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## Introduction

International environmental law has evolved rapidly in recent decades and now constitutes a highly technical, sophisticated and distinctive sub-discipline of public international law that seeks to regulate a broad array of human activities affecting natural and built environments.<sup>1</sup> Yet notwithstanding the marked increase in the scope and content of this area of law the rate of environmental destruction has also grown. It is now estimated that over 60 per cent of all ecosystem services that support life on earth have been degraded or are being used unsustainably, including freshwater resources and natural systems for air and water purification.<sup>2</sup> This environmental deterioration is accelerating,<sup>3</sup> and is leading not only to the loss of biodiversity, but is also preventing effective action against poverty, hunger, and health crises in many parts of the globe.<sup>4</sup>

It is clear, therefore, that the main challenge for international environmental law in the twenty-first century is not the development of new rules but rather the effective implementation of the impressive body of law already in existence.<sup>5</sup> This is a challenge of effective governance, requiring the design and operation of institutions that can promote the full and faithful observance by states of their environmental commitments.<sup>6</sup> International adjudication, comprising both arbitration and judicial settlement by international courts and tribunals, is one type of institution gaining increasing prominence in contemporary international environmental law. However, there has been considerable ambivalence in state practice and in scholarly commentary concerning its

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<sup>1</sup> For a concise history see Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) ch 2; Philippe Sands, 'Introduction' in Philippe Sands (ed), *Greening International Law* (1994) xv and Ben Boer, Ross Ramsay and Donald R Rothwell, *International Environmental Law in the Asia Pacific* (1998) ch 1. See also Lynton Keith Caldwell, *International Environmental Policy: From the Twentieth to the Twenty-First Century* (3rd ed, 1996) chs 2-8.

<sup>2</sup> Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Synthesis* (2005) 1.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid 2.

<sup>5</sup> Martti Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1993) 3 *Yearbook of International Environmental Law* 123, 123; Donald R Rothwell, 'Reassessing International Environmental Dispute Resolution' (2001) 6 *Asia Pacific Journal of Environmental Law* 201, 214. But see also Douglas M Johnston and David L VanderZwaag, 'The Ocean and International Environmental Law: Swimming, Sinking, and Treading Water at the Millennium' (2000) 43 *Ocean and Coastal Management* 141, 147 (noting that the proliferation of multilateral environmental agreements means that it is 'increasingly difficult to establish priorities as a matter of national strategy' and that 'the mounting volume of such instruments...may result in the lowering of the political credibility of [environmental] diplomacy in the eyes of tough-minded decision-makers').

<sup>6</sup> See generally Joyeeta Gupta, 'Global Sustainable Development Governance: Institutional Challenges from a Theoretical Perspective' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 361.

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role. While some publicists have advocated much greater reliance upon international courts,<sup>7</sup> others have been highly sceptical of the benefits that adjudication can bring to problems of environmental management where cooperation rather than confrontation seems essential.<sup>8</sup> Against the background of these debates concerning optimal institutional structures, the objective of this work is to provide a systematic and comprehensive examination of the historical and contemporary role of international courts and tribunals in resolving environmental disputes, in promoting compliance with environmental commitments, and in developing rules and principles of environmental law.

### I THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

The genesis of international environmental law can be traced to general rules of public international law adapted and applied to address environmental problems,<sup>9</sup> and to early treaties and conventions dealing with select resource and wildlife issues.<sup>10</sup> However, most aspects of the discipline are of far more recent origin. From the 1960s onwards a range of regional and sectoral regimes were developed to address specific environmental issues, principally problems of riverine<sup>11</sup> and marine<sup>12</sup> pollution. Such developments were frequently in response to major pollution accidents<sup>13</sup> which raised the global profile of environmental concerns. As a consequence these initiatives were often piecemeal and ad hoc. It was only in 1972, following the United Nations Conference on the Human Environment ('Stockholm Conference'), that it became

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<sup>7</sup> See, eg, Amedeo Postiglione, *The Global Environmental Crisis: The Need for an International Court of the Environment* (1996); Alfred Rest, 'The Indispensability of an International Environmental Court' (1998) 7 *Review of European Community and International Environmental Law* 63.

<sup>8</sup> See, eg, Abram Chayes, Antonia Handler Chayes and Ronald B Mitchell, 'Managing Compliance: A Comparative Perspective' in Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998) 39.

<sup>9</sup> Such as the obligation upon states not knowingly to permit their territory to be used in such a way as to result in damage to the territory of other states: *Trail Smelter Case (Canada/United States of America)* (1938 and 1941) 3 RIAA 1911.

<sup>10</sup> See, eg, *1933 Convention Relative to the Preservation of Fauna and Flora in their Natural State*.

<sup>11</sup> See, eg, *1963 Agreement Concerning the International Commission for the Protection of the Rhine Against Pollution*.

<sup>12</sup> See, eg, *1969 Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances*.

<sup>13</sup> Such as the 1967 *Torrey Canyon* tanker disaster. The *Torrey Canyon* ran aground on the high seas in the English Channel, spilling over 100,000 tonnes of crude oil into the sea which damaged the English and French coastlines. In an effort to limit the spread of the oil, the wreck was bombed by the United Kingdom. See generally E D Brown, 'The Lessons of the Torrey-Canyon: International Law Aspects' (1968) 21 *Current Legal Problems* 113.

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possible to speak of the emergence of a truly distinctive, and increasingly coherent, ‘international environmental law’.<sup>14</sup>

The Stockholm Conference adopted the *Declaration of the United Nations Conference on the Human Environment*<sup>15</sup> (‘*Stockholm Declaration*’) which, although largely aspirational in character, was a landmark developmental step, articulating 26 fundamental principles to guide the consolidation and evolution of international environmental law.<sup>16</sup> The instrument dealt with several basic issues, such as the responsibility of states for transboundary environmental harm, upon which international consensus had already begun to emerge.<sup>17</sup> However, it also went further, emphasising the need for states to protect the environment for its own sake and for future generations,<sup>18</sup> and encouraged states to adopt an integrated and coordinated approach to environmental management.<sup>19</sup> The Stockholm Conference proved to be an important catalyst for international efforts to expand the reach of environmental law. This developmental process intensified and accelerated as a raft of new conventions were concluded,<sup>20</sup> soft-law instruments were endorsed,<sup>21</sup> and the World Commission on Environment and Development completed its work.<sup>22</sup> However, it became evident that despite the importance of these legal and policy initiatives a more comprehensive approach was required to advance global environmental protection. Awareness of this need led to the 1992 United Nations Conference on Environment and Development (‘UNCED’) in Rio.

Commemorating the 20th anniversary of the Stockholm Conference, UNCED ushered in the modern era of international environmental law. It led to the adoption of the *United Nations Declaration on Environment and Development*<sup>23</sup> (‘*Rio Declaration*’)

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<sup>14</sup> It must be noted that there has been much debate concerning whether international environmental law is in fact a distinctive body of law, or whether it is merely a convenient label for describing the collection of norms that have some relevance to environmental questions: Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (2nd ed, 2002) 2.

<sup>15</sup> UN Doc A/CONF.48/14/Rev.1 (1973).

<sup>16</sup> For comprehensive discussion of the negotiating history in respect of each of the principles see Louis B Sohn, ‘The Stockholm Declaration on the Human Environment’ (1973) 14 *Harvard International Law Journal* 423.

<sup>17</sup> *Stockholm Declaration*, above n 15, principle 21.

<sup>18</sup> *Ibid* principles 2 and 4.

<sup>19</sup> *Ibid* principles 24 and 25.

<sup>20</sup> See especially the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* and the 1979 *Convention on the Conservation of Migratory Species of Wild Animals*.

<sup>21</sup> See, especially, United Nations Environment Program, *Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States* (1978) 17 ILM 1097; *World Charter for Nature*, GA Res 37/7, UN Doc A/37/51 (1982); *Hague Declaration on the Environment*, (1989) 28 ILM 1308.

<sup>22</sup> World Commission on Environment and Development, *Our Common Future* (1987).

<sup>23</sup> UN Doc A/CONF.151/5/Rev.1 (1992).

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and landmark environmental conventions on biological diversity<sup>24</sup> and climate change.<sup>25</sup> The conference also endorsed *Agenda 21*<sup>26</sup> which set out an extensive program of action to address global environmental challenges in the 1990s and into the twenty-first century.<sup>27</sup> Since UNCED, international environmental law has developed further apace. This has been achieved principally through an assortment of multilateral environmental agreements which are characterised by an increasing sophistication, both in terms of the standards that are prescribed and the institutional structures established for monitoring implementation and promoting compliance.<sup>28</sup> However, some 13 years later, the soft and hard-law instruments concluded at UNCED continue to provide the main legal and policy direction for international environmental law.<sup>29</sup>

International environmental law can be seen to derive much of its logical consistency from a collection of fundamental or guiding principles, all of which share a relationship not dissimilar to that between the ‘maxims of equity’ known to common law legal systems. It is possible to identify at least seven such principles that have attracted broad acceptance:<sup>30</sup> (1) that states possess permanent sovereignty over their natural resources but also the responsibility to ensure that they do not cause transboundary damage, (2) the principle of preventive action, (3) the precautionary principle/approach, (4) the principle of co-operation, (5) the principle of sustainable development, (6) the polluter-pays principle, and (7) the principle of common but differentiated responsibility.

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<sup>24</sup> 1992 *Convention on Biological Diversity*.

<sup>25</sup> 1992 *United Nations Framework Convention on Climate Change*. This convention was in fact opened for signature prior to UNCED, but its terms were negotiated in the preparatory process for the Rio Conference.

<sup>26</sup> UN Doc A/CONF.151/26/Rev.1 (1992).

<sup>27</sup> See Marlene Jahnke, ‘UNCED: Rio Conference on Environment and Development’ (1992) 22 *Environmental Policy and Law* 204, 208.

<sup>28</sup> See, especially, the 1997 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.

<sup>29</sup> See, eg, 2005 *World Summit Outcome*, [48], UN Doc A/60/L.1 (2005) (‘We reaffirm our commitment to achieve the goal of sustainable development...[t]o this end, we commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles.’). Despite initially high expectations, the most recent global environmental conference, the World Summit on Sustainable Development, held in Johannesburg in 2002 to make the 10th anniversary of UNCED, failed to agree upon specific action to address global environmental challenges. Instead it marked a general commitment to work towards the achievement of the goals agreed at UNCED, and specifically emphasised the need for major reductions in poverty: see *Plan of Implementation of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (2002).

<sup>30</sup> Sands, *Principles of International Environmental Law*, above n 1, 231. See also the nine principles recited in IUCN – World Conservation Union, *Draft International Covenant on Environment and Development* (3rd ed, 2004): (1) respect for all life forms (art 2), (2) common concern for humanity (art 3), (3) interdependent values (art 4), (4) intergenerational equity (art 5), (5) prevention (art 6), (6) precaution (art 7), (7) right to development (art 8), (8) eradication of poverty (art 9), (9) common but differentiated responsibilities (art 10). Several of these principles represent ambitious attempts to advance the agenda of international environmental protection and sustainable development, and the extent to which they are subject to general acceptance is therefore more open to doubt than the principles included in Sands’ list.

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These principles are an important legacy of the soft-law origins of the discipline.<sup>31</sup> Determining appropriate limits to the exploitation of natural resources, or imposing limitations upon development activities to preserve sensitive ecosystems, inevitably involves highly contentious political choices. In this context the notion that states might agree to a non-binding or imprecise standard has obvious attractions as it permits agreement on goals of environmental protection without appearing to impose fetters on state autonomy.<sup>32</sup> An environmental principle therefore involves some degree of normativity, but does not necessarily bear all the hallmarks of a legal rule<sup>33</sup> (although a principle can acquire such status).<sup>34</sup> However, regardless of their legal character environmental principles provide international environmental law with an ethical outlook,<sup>35</sup> a conceptual structure and a distinctive vocabulary. Among other things they seek to explain why and how the natural environment should be valued, how the objectives of resource conservation and ecosystem protection should be pursued, and how environmental values should be balanced against other objectives pursued by the international community.

## II INTERNATIONAL ENVIRONMENTAL GOVERNANCE THROUGH COURTS AND TRIBUNALS

Parallel with these developments in the substantive content of international environmental law, there has been an acute awareness of the need for institutions that can promote compliance with environmental standards at domestic and international levels. While the question of enforcement has always vexed scholars of international

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<sup>31</sup> For a discussion of the emergence of the ‘polluter-pays’, ‘preventive’ and ‘precautionary’ concepts which sheds light on the origins, character, and impact of environmental principles more generally see Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Susan Leubusher trans, 2002). See also Geoffrey Palmer, ‘New Ways to Make International Environmental Law’ (1996) 86 *American Journal of International Law* 259; Ranee Khooshie Lal Panjabi, ‘From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law’ (1993) 21 *Denver Journal of International Law and Policy* 215.

<sup>32</sup> Patricia W Birnie, ‘International Environmental Law: Its Adequacy for Present and Future Needs’ in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment: Actors, Interests, and Institutions* (1991) 51, 54.

<sup>33</sup> For a general discussion of the distinction between ‘rules’ and ‘principles’ see Ronald Dworkin, *Taking Rights Seriously* (3rd ed, 1981) 26 (‘All that is meant, when we say that a particular principle is a principle of law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining one way or another.’).

<sup>34</sup> The clearest example of this is perhaps principle 21 of the *Stockholm Declaration*, above n 15 (and principle 2 of the *Rio Declaration*, above n 23) concerning the responsibility of states to ensure that activities within their jurisdiction and/or control do not lead to damage to other states or to areas beyond national jurisdiction. The status of this principle as a rule of customary international law was recognised by the ICJ in *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, [29] and the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Merits)* [1997] ICJ Rep 7, [53] (‘*Gabčíkovo-Nagymaros Case*’).

<sup>35</sup> See, eg, John M Macdonald, ‘Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management’ (1995) 26 *Ocean Development and International Law* 255.

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law and international relations,<sup>36</sup> environmental management appears to present a range of particular compliance challenges, especially given the need to manage complex and interconnected ecosystems that are indifferent to territorial and jurisdictional boundaries, and which require high levels of coordination and cooperation between a number of interested state and non-state actors.

International environmental governance may be described as the way in which rules of environmental law are developed, applied and enforced.<sup>37</sup> It is an ongoing process in which norms and structures are transformed over time to meet the changing needs of international society.<sup>38</sup> International courts and tribunals constitute one part of this overall governance picture. As with any international institution, international courts possess distinctive functional attributes. They are inherently less flexible than other international institutions. The adjudication process is essentially confrontational, adversarial and will often result in a dichotomous result. It also involves a limited number of parties, and can only deal with a narrow range of issues.<sup>39</sup>

However, it also has strengths in being able to resolve environmental disputes in a manner that is insulated from purely political processes. International courts involve a third party in the settlement process, international judges must adhere to high standards of independence and impartiality, they must adjudicate claims advanced on the basis of reasoned arguments,<sup>40</sup> and above all are required to render decisions according to accepted legal rules.<sup>41</sup> International adjudication is therefore an inherently rational procedure in which the court seised of the dispute may give effect not only to the wishes of the parties in an amicable settlement but, by upholding relevant legal principles, can

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<sup>36</sup> See Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1997-1998) 19 *Michigan Journal of International Law* 345.

<sup>37</sup> See generally Wayne Sandholtz and Alec Stone Sweet, 'Law, Politics and International Governance' in Christian Reus-Smit (ed), *The Politics of International Law* (2004) 238, 245. See also Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596, 597 (observing that international environmental governance is the process by which international institutions influence the behaviour of states) and Sands, *Principles of International Environmental Law*, above n 1, ch 3.

<sup>38</sup> Sandholtz and Stone Sweet, above n 37, 245. See also Oran R Young, *International Governance: Protecting the Environment in a Stateless Society* (1994) 15-16.

<sup>39</sup> See generally Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

<sup>40</sup> *Ibid* 369 ('Adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments.').

<sup>41</sup> José E Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 *Texas International Law Journal* 405, 407 (noting that 'international adjudication, like its domestic counterpart, is routinely seen as involving four basic elements: (1) independent judges apply (2) relatively precise and pre-existing legal norms after (3) adversary proceedings in order to achieve (4) dichotomous decisions in which one of the parties clearly wins.'). See also Philip Allott, 'The International Court and the Voice of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996) 17, 24 (observing that the distinctiveness of adjudication stems from the physical, symbolic and systematic isolation of courts from other international decision-making processes).

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also recognise the values embodied in those norms.<sup>42</sup> It is also a process productive of decisions which may influence the development of environmental norms. All of these attributes make courts unique among other international institutions for giving independent and authoritative recognition to concerns of a community character. Similar benefits have long been recognised in relation to domestic courts with jurisdiction over environmental matters.<sup>43</sup>

Despite these apparent benefits it must be observed that the governance function performed by adjudication varies considerably, depending upon its place within international regimes. In the most general sense the purpose that has been most pronounced has been that of dispute settlement. The obligation of states to resolve their disputes solely by peaceful means, such that international peace and security and justice are not threatened, has been the foundation stone of the modern era of international law.<sup>44</sup> In this context adjudication has often been regarded, along with other peaceful methods of resolving disputes, primarily as a means for preventing armed conflict or addressing its consequences.<sup>45</sup> However, since the late twentieth century there has been a dramatic ‘proliferation’ and diversification of international judicial bodies,<sup>46</sup> and international adjudication has accordingly been given new functions. Through this ‘judicialisation’<sup>47</sup> of some areas of international law the conception of adjudication has

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<sup>42</sup> On the place of environmental values in the exercise of the international judicial function see Philippe Sands, ‘“Unilateralism”, Values and International Law’ (2000) 11 *European Journal of International Law* 291, 300-301; A Neil Craik, ‘Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law’ (1998) 10 *Georgetown International Environmental Law Review* 551, 563.

<sup>43</sup> Gerry Bates, *Environmental Law in Australia* (5th ed, 2002) 16-17 (‘Despite the problems, the advantages of courts and tribunals for evaluating arguments and balancing conflicting interests should not be overlooked. They are politically unbiased and free of such influences; independent of the administration, whose job it is to translate policy into action; staffed by judges who are experienced in evaluating conflicting arguments and whose decisions are respected; and above all such forums should enable citizens to be heard and ensure that their views are taken into account in the ultimate decision-making processes.’).

<sup>44</sup> This customary obligation finds expression in the *UN Charter*, arts 2 and 33.

<sup>45</sup> The tradition of thinking about adjudication in this way can be traced to antiquity and has recurred ever since. See M N Tod, *International Arbitration Amongst the Greeks* (1913) 6; David D Caron, ‘War and International Adjudication: Reflections on the 1899 Peace Conference’ (2000) 94 *American Journal of International Law* 4.

<sup>46</sup> For an overview of these developments see Chester Brown, ‘The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze’ (2002) 3 *Melbourne Journal of International Law* 453. See also Cesare P R Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31 *New York University Journal of International Law and Politics* 709.

<sup>47</sup> ‘Judicialisation’ may be described as ‘the process through which a [triadic dispute resolution] mechanism appears, stabilizes and develops authority over the normative structure governing exchange in a given community. The judicialization of politics is the process by which triadic lawmaking progressively shapes the strategic behaviour of politics actors engaged in interactions with one another.’: Alec Stone Sweet, ‘Judicialization and the Construction of Governance’ (1999) 32 *Comparative Political Studies* 147, 164. Hence while the expression ‘proliferation’ is used to describe the quantitative increase in the number and type of international courts, the term ‘judicialisation’ captures the idea that there has been a qualitative expansion in the role of international courts in some areas of international relations and law.

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shifted from being a device exclusively designed for promoting inter-state peace, to being a means for responding to new challenges such as the protection of human rights, the imposition of individual international criminal responsibility and the resolution of complex commercial disputes.

International environmental law has not been insulated from these developments. There has been a substantial increase in international litigation on environmental questions in courts of general jurisdiction, in environmentally-focussed bodies and also in courts and tribunals having a specialisation in other issue-areas.<sup>48</sup> However, at the same time international environmental law has developed a complex bureaucracy in the form of treaty bodies and other institutions such as non-compliance procedures ('NCPs') designed to facilitate greater levels of cooperation and coordination among states in responding to environmental problems. These developments appear, on their face, to be pulling the institutional framework of international environmental law in two, quite different, directions. Whereas the reliance on courts and tribunals in some regimes signals a preference for a confrontational, enforcement-oriented, method for achieving greater levels of compliance, the use of NCPs and other treaty bodies indicates a more cooperative, and supervisory approach to governance. This raises questions as to whether these trends may be reconciled, and in what particular circumstances courts and tribunals are likely to be most effective in international environmental law.

### III THE ROLE AND RELEVANCE OF INTERNATIONAL COURTS IN CONTEMPORARY INTERNATIONAL ENVIRONMENTAL LAW

The three Chapters which make up Part I of the thesis address these questions. Chapter 2 surveys the landscape of adjudicative institutions operating in the environmental field. It is seen in that Chapter that there is a plurality of such bodies. A range of environmental instruments provide for the adjudication of environmental disputes, predominantly in ad hoc arbitral tribunals. However, permanent courts and tribunals, most notably the International Tribunal for the Law of the Sea ('ITLOS'), are also occupying an increasingly important role in some environmental regimes. There has also been an effort to improve the capacity of existing institutions to respond to environmental disputes, as is seen in the adoption of specialised environmental procedures by the Permanent Court of Arbitration<sup>49</sup> and the establishment of a permanent Chamber on Environmental Matters within the International Court of

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<sup>48</sup> Sands, *Principles of International Environmental Law*, above n 1, 65.

<sup>49</sup> *Optional Rules for the Arbitration of Disputes Relating to Natural Resources and/or the Environment* (2001) <<http://www.pca-cpa.org/ENGLISH/EDR/ENRules.htm>> at 1 July 2005.



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Justice<sup>50</sup> ('ICJ'). Although these are important developments, it is also seen that some of the most influential forums for environmental dispute settlement are judicial bodies that do not have an environmental specialisation, such as the dispute settlement system of the World Trade Organisation ('WTO'). Finally, Chapter 2 offers a critical appraisal of proposals for the establishment of an international court for the environment.

It is evident that the growing 'patchwork' of jurisdictions examined in Chapter 2 can be said to represent the judicialisation of international environmental law, at least in some areas. However, by comparison with some fields of public international law, particularly those applicable to international trade and foreign investment, international environmental law is not heavily reliant upon arbitration and judicial settlement. Indeed it is seen in Chapter 3 that the development of environmental governance structures has generally taken a different path. A key feature of the growing maturity of international environmental law is the emergence of a collection of treaty-based institutions through which the implementation of multilateral environmental agreements can be supervised.<sup>51</sup> Chapter 3 seeks to situate international courts and tribunals among these institutions for compliance control. The argument is made that by comparison with traditional forms of inter-state dispute settlement this supervisory or 'managerial' approach to compliance advanced through flexible institutions is likely to achieve better overall results in terms of compliance control.

However, the adoption of this institutional strategy is not universal, and some environmental agreements depend upon adjudicative institutions for resolving disputes and promoting compliance. In light of this diversity of practice Chapter 4 offers a reassessment of the role of adjudication in international environmental law. It is acknowledged at the outset that it is possible to identify several important shortcomings of adjudication, including its generally reactive nature and the limited number of participants who may be involved in the process. However, it also has several strengths, and these are identified and discussed. The variety of institutions examined in Chapter 2 underlines that adjudication often performs regime-specific tasks and that it is therefore impossible to generalise the adjudicative function. Hence while the ICJ cannot be said to be at the forefront of the interpretation and application of international environmental law, it can be argued that ITLOS, and the entire dispute settlement system fashioned by the *1982 United Nations Convention on the Law of the Sea* ('LOS Convention') is vital to enforcement and compliance with the regime of marine environmental protection established under that convention. The fact that the effectiveness of adjudication in

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<sup>50</sup> International Court of Justice, *Communiqué 93/20 on the Establishment of a Permanent Chamber for Environmental Matters* (19 July 1993).

<sup>51</sup> Alan E Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal of Environmental Law* 229.

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international environmental law is intimately tied to its institutional context suggests that the critique of the utility of courts and tribunals in the environmental context by many international relations scholars<sup>52</sup> is far too parsimonious. By reference to a recent, and alternative line of international relations scholarship,<sup>53</sup> the case is made that in certain regimes adjudication could be given a more prominent and productive role in resolving disputes and enforcing environmental rules.

### IV THE JUDICIAL DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

The development of international environmental law has principally occurred as a result of legislative processes.<sup>54</sup> Broad statements of environmental principles, together with increasingly technical environmental standards and regulations, have been articulated in a spectrum of bilateral and multilateral treaties, and in resolutions, declarations and other soft-law instruments. Nonetheless, as in public international law generally,<sup>55</sup> international courts and tribunals have had both an historic and contemporary influence upon the evolution of environmental rules.<sup>56</sup> Judicial exegesis in the course of resolving environmental disputes can greatly assist in the elaboration,

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<sup>52</sup> See especially Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 205 ('[a] century of experience with international adjudication leads to considerable scepticism about its suitability as an international dispute settlement method and, in particular, as a way of securing compliance with treaties.').

<sup>53</sup> See especially Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organization* 457.

<sup>54</sup> Alan E Boyle, 'Codification of International Environmental Law and the International Law Commission' in Alan E Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 61, 63; Catherine Redgwell, 'International Environmental Law' in Malcolm D Evans (ed), *International Law* (2003) 657, 664.

<sup>55</sup> Charney argues that the ICJ's decision *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, and more general interpretive practice, demonstrates that 'access to and use of evidence of state practice to establish international law are on the wane while deliberations of international forums and tribunals are increasingly examined to discover the content of contemporary international law.' Jonathan I Charney, 'The Implications of Expanding Dispute Settlement Systems: The 1982 Convention on the Law of the Sea' (1996) 90 *American Journal of International Law* 69, 74. Allott argues that international courts and tribunals have increasingly relied upon their own, and other courts', previous decisions as a type of judge-made customary law: Philip Allott, *The Health of Nations: Society and Law Beyond the State* (2002) 52.

<sup>56</sup> Precisely how this contribution to the content and structure of international environmental law should be characterised remains subject to ongoing debate. A strictly positivist, consent-based, conception of international law regards the judicial process as one involving no more than the application of rules established by states in their relations (see Grigorii I Tunkin, *Theory of International Law* (1974) 183). However, many commentators have argued that the distinction between the judicial 'application' and 'creation' of law is impossible to sustain: see E Hambro, 'The Reasons Behind the Decisions of the International Court of Justice' (1954) 7 *Current Legal Problems* 212, 214; Mohamed Shahabuddeen, *Precedent in the World Court* (1996) 67-96; Philippe Sands, 'Turtles and Torturers: The Transformation of International Law' (2000) 33 *New York University Journal of International Law and Politics* 527, 555. Advocates of a process-based conception of international law have argued that judicial law-making is inescapable as international law cannot be understood as a discrete body of rules to be mechanically applied: see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 2.

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clarification and development both of precise rules of conduct and more general principles of international environmental law. There are a growing number of international cases that have considered questions of law relevant to the protection of the environment. This body of jurisprudence continues to expand as new international courts and tribunals have begun to operate. There has also been a renewed interest in, and appreciation of, the very earliest cases that dealt with questions of natural resources and wildlife conservation.<sup>57</sup> Whereas Part I of the thesis considers the direct functional importance of courts and tribunals in international environmental governance, Part II assesses the less immediate, but no less important, contribution made by judicial bodies to the development of international environmental law.

This environmental jurisprudence has emerged in three main issue-areas: transboundary environmental harm, international water law, and the protection and preservation of the marine environment. The three Chapters in Part II examine each of these bodies of case law in turn, which together represent the core texts in the canon of international environmental jurisprudence. The discussion in Part II evaluates these decisions within the context in which they were decided, to ascertain whether they appropriately responded to the environmental problems with which they dealt, and whether in fact they might have gone further. An attempt is made to uncover and understand the philosophical underpinnings of these decisions; the conceptual premises concerning the environment and rationales for its protection expressly adopted in, or implicitly informing, the reasoning. Above all the purpose of Part II is to determine the extent to which this jurisprudence has had a positive influence upon the evolution of international environmental law.

In general terms it is suggested that the impact has been threefold. The most direct import of several of these decisions has been in articulating directly-applicable rules. A second impact of these decisions has been in illustrating potential environmental problems, and identifying (if not necessarily addressing) the range of legal issues that are implicated. The factual scenarios encountered in some cases therefore often provide a template against which the efficacy of future legislative developments can be measured. A third important, yet also indirect, influence of judicial decisions has been in highlighting gaps in the international legal framework as it applies to environmental matters, and thereby to act as a catalyst for further developments to address these deficiencies.

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<sup>57</sup> This can be seen in the publication by Cambridge University Press of the *International Environmental Law Reports*, a five-volume compilation of early decisions, decisions relating to trade and the environment, human rights and environment cases, decisions of national courts involving questions of international environmental law and decisions of the international court of justice.

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Chapter 5 explores the judicial contribution to the development of rules and principles of environmental law relating to transboundary harm. Norms relating to such damage are the *fons et origo* of international law relating to environmental matters, and the *Trail Smelter Case* is almost invariably cited as the first authoritative statement of the principle that states have a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states. The point is made, however, that this environmentally-significant dictum was fashioned out of more general doctrines of international law regarding sovereignty and territorial integrity. As a consequence, the principle stated in the *Trail Smelter Case*, and subsequently elaborated in the *Stockholm* and *Rio Declarations*, serves environmental purposes only indirectly. Many of the weaknesses of the *Trail Smelter Case* in this respect were made apparent in the *Nuclear Tests Cases*.<sup>58</sup> Although this litigation was never resolved on its merits, the pleadings and oral arguments made by the parties, separate and dissenting opinions, and practice outside the courtroom, all made a contribution to the development of the law in this area, and revealed many of the limitations inherent in approaching environmental problems through the lens of sovereignty and territorial integrity. Consideration is also given in Chapter 5 to the impact of this litigation upon treaty practice, and upon the work of the International Law Commission in devising general rules for the prevention of transboundary harm, and for imposing state responsibility and non-delictual liability if and when it does in fact occur.

In Chapter 6 the thesis turns to a second category of international environmental case, namely those decisions concerning riverine resources and ecosystems. These cases reveal clearly the development of environmental law from a complete focus upon state sovereignty issues to a recognition of the importance of ecological considerations. The contribution of the cases in this area has been vital because it has provided the conceptual underpinnings for a fundamental ‘greening’ of international water law. Challenging the notions of absolute and limited territorial sovereignty, it has replaced these unworkable and environmentally unsustainable doctrines with the ‘community of interest’ theory. This doctrine was recognised and endorsed by the ICJ in the *Gabčíkovo-Nagymaros Case*<sup>59</sup> in which the ICJ placed environmental concerns firmly within the law relating to international watercourses.

Chapter 7 deals with what is perhaps the most dynamic area of international environmental jurisprudence – that relating to the marine environment. Consideration is

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<sup>58</sup> *Nuclear Tests Cases (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, (*Merits*) [1974] ICJ Rep 253; *Nuclear Tests Cases (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, (*Merits*) [1974] ICJ Rep 457.

<sup>59</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7.

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first given to the *Bering Sea Fur Seals Case*.<sup>60</sup> Although the decision ultimately delivered was of limited compass, the arguments of the parties and individual arbitrators provide many insights into the potential of international law at an early stage of its development to address environmental problems. The long-term value of the case was mainly in highlighting the environmental shortcomings of a rigid adherence to the *mare liberum* doctrine, making clear the need for states to cooperate to achieve conservation objectives in relation to marine wildlife residing beyond, or traversing multiple, political boundaries. The tension between coastal and flag states in relation to the exploitation, management and conservation of marine wildlife has been a recurring problem, as was subsequently seen in the *Icelandic Fisheries Case*<sup>61</sup> in which the ICJ attempted to resolve such frictions by developing the controversial notion of ‘preferential fishing rights’. This case, and other decisions predating the *LOS Convention*, are now mainly of historical interest but they do serve to demonstrate how the legal framework was developed in response to the problems identified in the course of the litigation.

Undoubtedly the most important jurisprudence in the marine environmental context has emerged only after the entry into force of the *LOS Convention*. A number of cases involving environmental issues have now been decided under the compulsory dispute settlement procedures set out in Part XV of the *LOS Convention* and these have brought to life several of the Convention’s marine environmental provisions, and have revealed the importance of the Convention as a comprehensive regime for managing marine environmental challenges. The Chapter examines each of the environmentally-significant decisions of ITLOS and arbitral tribunals established under Annex VII of the *LOS Convention*. It is observed that despite some degree of timidity, there has been increasing recognition in these decisions of the important interplay between marine living resources issues and broader environmental questions regarding the integrity of marine ecosystems.

## V FUTURE CHALLENGES FOR INTERNATIONAL ENVIRONMENTAL LITIGATION

The third part of the thesis assesses several looming challenges facing international environmental litigation, and also offers some reflections on the future prospects for courts and tribunals in international environmental governance.

One particular source of pressure upon existing institutions that may lead to substantial changes in the way environmental disputes are settled in the future, is the demand by civil society for a great role in international adjudicatory procedures. The

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<sup>60</sup> *Bering Sea Fur Seals Case (Great Britain v United States)* (1898) 1 *Moore’s International Arbitrations* 755.

<sup>61</sup> *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction)* [1973] ICJ Rep 3 (*Merits*) [1974] ICJ Rep 3; *Fisheries Jurisdiction Case (Germany v Iceland) (Jurisdiction)* [1973] ICJ Rep 49 (*Merits*) [1974] ICJ Rep 175.

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tradition of public interest environmental law is developing rapidly in many states, and the substantial increase in the use of courts and tribunals for international environmental disputes has raised the prospect that the international community is witnessing the emergence of such public interest litigation on the international plane.<sup>62</sup> Chapter 8 considers the extent to which this has occurred, and some of the challenges that it poses. The discussion examines the various ways in which international environmental law has recognised the importance of public participation, and assesses the prospects that international judicial bodies might provide greater opportunities for civil society to initiate proceedings in the public interest. Whilst it seems unlikely that the participation will be further expanded unless attention is paid to underlying conceptual issues such as the rights that non-state actors are entitled to vindicate in international courts, it is nonetheless essential that the public function of environmental adjudication be enhanced. Suggesting a reconceptualisation of the notion of international public interest proceedings in the context of international environmental law, it is argued that participation falling short of full rights of standing can help ensure that community values and interests, including that of ecosystem protection, are appropriately recognised.

Chapter 9 considers the practical consequences flowing from the operation of the patchwork of jurisdictions deciding environmental disputes. Whereas for much of the history of international law states and other actors had few opportunities for litigating environmental or other grievances, the present situation is characterised by the many different judicial bodies that can be turned to. The interaction and interrelationship of these institutions has begun to generate practical problems for the administration of international justice, problems that have attracted some scholarly attention.<sup>63</sup> The aim of Chapter 9 is to examine these problems from the specific perspective of international environmental litigation. It is argued that the challenges of jurisdictional coordination, including forum shopping, simultaneous proceedings and successive proceedings, have not only increased the length, cost and complexity of environmental litigation but have also given rise to substantive problems such as the undermining of some compulsory systems of environmental dispute settlement. The argument is made that in devising strategies to address such problems the international community must have regard not only to obvious considerations, such as alleviating the inconvenience increasingly endured by parties to environmental disputes, but must also take note of the important

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<sup>62</sup> See generally Linda A Malone and Scott Pasternack, *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law* (2004).

<sup>63</sup> See especially Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) and Patrizia Vigni, 'The Overlapping of Dispute Settlement Regimes: An Emerging Issue of International Law' (2003) XI *The Italian Yearbook of International Law* 139.

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role of some dispute settlement bodies in promoting environmental protection. In other words it must entail a consideration of the substantive function that the court or tribunal was designed to discharge.

In Chapter 10 there is an examination of a further implication deriving from the multiplication in judicial forums examining environmental disputes. Much jurisprudence touching upon environmental matters is now emanating not from dedicated environmental courts and tribunals, but instead is being produced by issue-specific judicial and quasi-judicial bodies. This raises the prospect that such jurisprudence might have a negative influence on international environmental law by developing rules and principles of environmental law in a way that privileges the non-environmental agendas that these issue-specific regimes are designed to advance. This potential for the ‘fragmentation’ of international environmental law is tested through a close analysis of environment-related jurisprudence of human rights courts and complaints bodies and the dispute settlement system of the WTO. It is concluded that, at least to date, the evidence reveals no major or problematic departures from conventional understandings of environmental rules and principles.

## **Part I**

# **The Role and Relevance of International Courts in International Environmental Law**



## 2

# The ‘Patchwork’ of Jurisdictions in International Environmental Law

International courts and tribunals were rarely involved in the settlement of disputes concerning natural resources or environmental protection during the early development of international environmental law.<sup>1</sup> In contrast, environmental disputes are now frequently the subject of international judicial proceedings as a range of new adjudicative institutions have begun to operate.<sup>2</sup> The purpose of this Chapter is to survey these diverse and growing opportunities for international environmental litigation. It is suggested that the defining characteristic of contemporary environmental dispute settlement is the operation of an uncoordinated ‘patchwork’ of jurisdictions, each of which functions within its own institutional framework with distinctive rules as to personal and subject-matter competence. The first section of the Chapter defines what is meant by ‘international adjudication’, and identifies the various jurisdictional bases upon which courts and tribunals in the environmental context operate. In the second section the Chapter examines the main adjudicative forums engaged in environmental dispute settlement. The third and final section presents a critical assessment of proposals for an international environmental court.

### I ESTABLISHING JURISDICTION OVER ENVIRONMENTAL CASES

#### A *Defining ‘International Adjudication’*

The expression ‘international adjudication’ is used in this thesis to describe both ‘judicial settlement’ and ‘arbitration’ as those terms are employed in Article 33 of the *UN Charter*.<sup>3</sup> Each involves essentially the same function, namely the binding resolution of disputes according to international law. However, they differ substantially in terms of the degree of control maintained by litigants over the process. Judicial settlement is a function reserved for permanent institutions while arbitration entails, as the International Court of Justice (‘ICJ’) has observed, ‘the settlement of differences

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<sup>1</sup> Richard B Bilder, ‘The Settlement of Disputes in the Field of the International Law of the Environment’ (1975) 144 *Recueil des Cours* 139, 228. See also Chapters 5, 6 and 7.

<sup>2</sup> Ben Boer, Ross Ramsay and Donald R Rothwell, *International Environmental Law in the Asia Pacific* (1998) 1-2.

<sup>3</sup> Art 33 provides that the parties to a dispute which may endanger peace and security shall ‘seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.’

between States by judges of their own choice, and on the basis of respect for law.<sup>4</sup> In addition to traditional inter-state courts, any discussion of international adjudication in the environmental context must now also include international criminal courts and human rights bodies and tribunals.<sup>5</sup> The newly established International Criminal Court ('ICC') possesses jurisdiction over war crimes involving serious damage to the natural environment.<sup>6</sup> Additionally, several human rights courts and treaty bodies have begun to deal with a number of essentially environmental claims, albeit within the rubric of international human rights law.

### B *Dispute Resolution Clauses in Environmental Agreements*

Before considering the constitution and operation of these, and other, adjudicative bodies it is first necessary to understand the place of adjudication in environmental agreements.

International environmental law has expanded rapidly since the first resources agreements were concluded in the nineteenth century. The increase in 'hard' treaty law relating to the environment accelerated in the latter part of the twentieth century.<sup>7</sup> Whilst in 1989 the UNEP reported that there were 139 multilateral environmental agreements in existence<sup>8</sup> a recent review suggests that there are now over 700 multilateral and 1000 bilateral treaties.<sup>9</sup>

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<sup>4</sup> *Maritime Delimitations and Territorial Questions Between Qatar and Bahrain (Merits)* [2001] ICJ Rep 1, [113]. See also *1907 International Convention for the Pacific Settlement of International Disputes* ('*1907 Hague Convention*'), art 37.

<sup>5</sup> Brownlie has defined an international court as '[a]ny tribunal which has cognisance of legal questions not determinable by any national jurisdiction': Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 584. For a detailed definition of 'international court' and 'international tribunal', terms which may be used interchangeably, see Hermann Mosler, 'Judgments of International Courts and Tribunals' in Rudolph Bernhardt (ed), *Encyclopaedia of Public International Law*, vol III (1992) 31. See also I A Shearer, *Starke's International Law* (11th ed, 1994) 446.

<sup>6</sup> *1998 Rome Statute of the International Criminal Court* ('*Rome Statute*'), art 8(2)(b)(iv).

<sup>7</sup> R W Hahn and K R Richards, 'The Internationalization of Environmental Regulation' (1989) 30 *Harvard International Law Journal* 421, 423.

<sup>8</sup> United Nations Environment Program, *Register of International Treaties and Other Agreements in the Field of the Environment*, UN Doc UNEP/GC 15/Inf.2 (1989).

<sup>9</sup> Ronald B Mitchell, 'International Environmental Agreements: A Survey of Their Features, Formation, and Effects' (2003) 28 *Annual Review of Environment and Resources* 429, 430. Mitchell identifies 729 multilateral environmental agreements, however Mitchell includes protocols and amendments (which together make up 50 per cent of the total). Mitchell calculates that there are 1040 bilateral treaties, although it is admitted that due to difficulties in obtaining relevant data this figure is an underestimate. Protocols and amendments are estimated to make up 10 per cent of the total figure. Mitchell (at 432-433) defines an international environmental agreement as 'an intergovernmental document intended as legally binding with a primary stated purpose of preventing or managing human impacts on natural resources' or 'plant and animal species (including in agriculture); the atmosphere; oceans; rivers; lakes, terrestrial habitats; and other elements of the natural world that provide ecosystem services.' An updated database of environmental agreements can be found at Ronald B Mitchell, *International Environmental Agreements Database* <<http://iea.uregon.edu>> at 1 July 2005.

In parallel with the significant growth of environmental treaties there have also been increasing opportunities for the adjudication of environmental disputes. Environmental agreements, like most treaties, frequently include provision for the resolution of disputes concerning their interpretation or application. Many of these make reference to arbitration or judicial settlement,<sup>10</sup> as do several soft-law instruments.<sup>11</sup> In these texts, the most common form of dispute settlement clause comprises a restatement of the obligation to resolve disputes peacefully together with a recital of the catalogue of methods set out in Article 33 of the *UN Charter*.<sup>12</sup> Beyond this there is a now great diversity in state practice, with a broad range of dispute settlement provisions in operation. However, while many environmental agreements provide for consensual adjudication, only a select few provide for so-called 'compulsory'<sup>13</sup> adjudication through an obligatory 'compromissory clause.'<sup>14</sup> In this respect there has been only limited development since 1987 when the Expert Group on Environmental Law of the World Commission on Environment and Development proposed a graduated, but mandatory, system of dispute settlement for environmental disputes:

States shall settle environmental disputes by peaceful means. If mutual agreement on a solution or on other dispute settlement arrangements is not reached within 18 months, the dispute shall be submitted to conciliation and, if unresolved, thereafter to arbitration or judicial settlement at the request of any of the concerned States.<sup>15</sup>

The absence of general compulsory adjudication for environmental disputes reflects an oft-cited, and more general, defect in the system of international adjudication<sup>16</sup> – its general reliance upon the consent of the parties, on a case-by-case basis.<sup>17</sup>

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<sup>10</sup> Romano has identified at least 150 instruments containing dispute settlement provisions, 85 of which provide for international adjudication as a potential environmental dispute settlement mechanism: Cesare P R Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000) 91-92.

<sup>11</sup> See for example the *United Nations Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev.1 (1992) ('*Rio Declaration*') principle 26 which provides that 'States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations'. See also *Agenda 21*, UN Doc A/CONF.151/26/Rev.1 (1992) ch 39.10, which provides 'in the area of avoidance and settlement of disputes, States should further study and consider methods to broaden and make more effective the range of techniques available at present...'

<sup>12</sup> Birnie reached a similar conclusion in 1991: Patricia Birnie, 'International Environmental Law: Its Adequacy for Present and Future Needs' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment: Actors, Interests, and Institutions* (1991) 51, 69.

<sup>13</sup> Robert Jennings, 'The Judicial Enforcement of International Obligations' (1987) 47 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3, 3 ('so-called compulsory jurisdiction turns out to be only another form of consensual jurisdiction.')

<sup>14</sup> See generally Jonathan I Charney, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice' (1987) 81 *American Journal of International Law* 855.

<sup>15</sup> World Commission on Environment and Development, *Our Common Future* (1987) 395 ('*Brundtland Report*').

<sup>16</sup> See A Giustini, 'Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future' (1986) 9 *Fordham International Law Journal* 213.

|   | TYPE OF DISPUTE SETTLEMENT PROVISION  | EXAMPLES   |
|---|---|--|
| 1 | Instruments that include no provision for dispute settlement  | <i>1946 International Convention for the Regulation of Whaling</i>   |
| 2 | Instruments that provide that the parties agree to enter into consultations or negotiations whenever a dispute arises   | <i>1992 Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region</i>   |
| 3 | Instruments that provide that the parties agree to resolve disputes by a peaceful means of their own choice   | <i>1994 Convention for the Conservation and Management of Pollock Resources in the Central Bering Sea</i>  |
| 4 | Instruments that provide not only that the parties agree to resolve disputes by peaceful means, but also provide a list of available procedures, including arbitration and judicial settlement.   | <i>1993 Convention for the Conservation of Southern Bluefin Tuna</i>   |
| 5 | Instruments that provide for the settlement of a dispute by compulsory but non-legal procedures such as mediation or conciliation   | <i>1992 Convention on Biological Diversity</i>   |
| 6 | Instruments that provide for the settlement of a dispute by compulsory and binding adjudication (by arbitration or judicial settlement):<br><br>(a) By compulsory and binding adjudication where the parties have 'opted-in' to the procedure<br><br>(b) By compulsory and binding adjudication (arbitration or judicial settlement) unless the parties have 'opted-out' of the procedure<br><br>(c) By compulsory and binding adjudication (arbitration or judicial settlement), which is automatically applicable | <i>1985 Convention for the Protection of the Ozone Layer</i><br><br><i>1980 Convention on the Physical Protection of Nuclear Material</i><br><br><i>1982 United Nations Convention on the Law of the Sea</i> |

**Table 2.1 Types of dispute settlement provisions in multilateral environmental agreements**

<sup>17</sup> It is axiomatic that the adjudication of environmental or other disputes is only possible when states have expressly indicated their consent to the process either in advance, or in relation to a particular dispute: *Status of Eastern Carelia Case* [1923] PCIJ (ser B) No 5, 27; *Corfu Channel Case (United Kingdom v Albania) (Preliminary Objections)* [1948] ICJ Rep 1, 27; *Anglo-Iranian Oil Co (United Kingdom v Iran)* [1952] ICJ Rep 89, 102-103; *Ambatielos Case (Greece v United Kingdom)* [1953] ICJ Rep 10, 19; *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States)* [1954] ICJ Rep 19, 32. International law has neither evolved a general acceptance of binding settlement, nor consensus that a particular method of dispute resolution, such as adjudication, should have priority over others: Christine M Chinkin, 'The Peaceful Settlement of Disputes: New Grounds for Optimism?' in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (1993) 165, 177.

C *General Jurisdictional Provisions*

The preceding discussion has explained the extent to which states have sought through environmental agreements to provide for the adjudication of environmental disputes. There are additional ways in which adjudicative mechanisms may be activated in response to such disputes. States may by special agreement submit a dispute to arbitration or judicial settlement, as in the *Case Concerning the Gabčíkovo-Nagymaros Project*<sup>18</sup> in which Hungary and Slovakia submitted a dispute raising a range of environmental issues in the context of a shared watercourse to the ICJ.<sup>19</sup> Environmental disputes may also be litigated where the parties have accepted the jurisdiction of a court in advance in relation to a range of international disputes such as through a general arbitral or other dispute settlement agreement. Such mechanisms have been used in cases with significant environmental dimensions. In the *Nuclear Tests Cases*,<sup>20</sup> Australia and New Zealand relied first and foremost on the *1928 General Act for the Pacific Settlement of International Disputes* to which the applicants and France were parties.

(a) *The ICJ and the 'Optional Clause'*

One of the most important general mechanisms for establishing the jurisdiction of an international court or tribunal in advance of its exercise is Article 36(2) of the *Statute of the International Court of Justice* ('*Statute of the ICJ*'), the so-called 'optional clause'. As at 1 July 2005 a total of 64 states had deposited declarations under Article 36(2) recognising the compulsory jurisdiction of the ICJ.<sup>21</sup> Through this procedure legal disputes touching upon matters of environmental concern can be brought without the need for specific agreement, and it was via this basis that the *Case Concerning Certain Phosphate Lands in Nauru*,<sup>22</sup> which raised issues of responsibility for environmental degradation, was brought by Nauru against Australia.<sup>23</sup>

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<sup>18</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 ('*Gabčíkovo-Nagymaros Case*'). The text of the agreement appears at 10.

<sup>19</sup> See Chapter 6.

<sup>20</sup> *Nuclear Tests Cases (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, (*Merits*) [1974] ICJ Rep 253; *Nuclear Tests Cases (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, (*Merits*) [1974] ICJ Rep 457 ('*Nuclear Tests Cases*').

<sup>21</sup> This therefore represents only around a third of the 191 members of the United Nations.

<sup>22</sup> *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* [1992] ICJ Rep 240 ('*Nauru Case*').

<sup>23</sup> The dispute was ultimately settled: *1993 Settlement of the Case in the ICJ Concerning Certain Phosphate Lands in Nauru*. The *Fisheries Jurisdiction Case (Spain v Canada) (Jurisdiction and Admissibility)* [1998] ICJ Rep 431 ('*Estai Case*') was also commenced by Spain on this basis, however the Court found that it had no jurisdiction by operation of Canada's reservation to its acceptance of the Court's compulsory jurisdiction.

(i) *Environmental Exceptions to the 'Optional Clause'*

In accepting the jurisdiction of the Court in this way several states have indicated that they do not recognise the competence of the court with respect to certain disputes, including environmental matters.<sup>24</sup> Poland has sought to carve-out the broadest exclusion in relation to environmental issues. Its declaration states that the compulsory jurisdiction of the ICJ is not accepted with respect to 'disputes with regard to environmental protection'.<sup>25</sup> Other states accepting the jurisdiction of the ICJ in accordance with Article 36(2) have sought to limit the jurisdiction of the Court on narrower grounds, principally by excluding the Court's competence over disputes concerning marine pollution or living and non-living resources. For instance Malta's declaration excludes disputes in relation to 'the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Malta.'<sup>26</sup> New Zealand's declaration excludes 'disputes arising out of, or concerning, the jurisdiction or rights claimed or exercised by New Zealand in respect of the exploration, exploitation, conservation or management of the living resources in marine areas beyond and adjacent to the territorial sea of New Zealand but within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.'<sup>27</sup> Canada's reservation is similarly directed at marine living resources, but is narrowly targeted to

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<sup>24</sup> One of the best known reservations in this respect was included in Canada's declaration of 7 April 1970 in which Canada reserved jurisdiction with respect to the *Arctic Waters Pollution Prevention Act* (Can). This reservation was later withdrawn, but at the time was considered to undermine significantly the environmental jurisdiction of the ICJ: Peter H Sand, *Transnational Environmental Law: Lessons in Global Change* (1999) 45. In relation to reservations under the optional clause generally see Stanimir A Alexandrov, 'Accepting the Compulsory Jurisdiction of the International Court of Justice with Reservations: An Overview of Practice with a Focus on Recent Trends and Cases' (2001) 14 *Leiden Journal of International Law* 89.

<sup>25</sup> *Declaration of Poland Recognising as Compulsory the Jurisdiction of the ICJ* (1996) <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>> at 1 July 2005.

<sup>26</sup> *Declaration of Malta Recognising as Compulsory the Jurisdiction of the ICJ* (1996) <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>> at 1 July 2005.

<sup>27</sup> Resource issues comprise the main subject of reservations in optional clause declarations seeking to exclude environmental disputes. In its declaration Barbados has excluded, inter alia, 'disputes arising out of or concerning jurisdiction or rights claimed or exercised by Barbados in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Barbados.' The Philippines' declaration is also concerned with marine resources and provides that it has not accepted the jurisdiction of the ICJ 'in respect of the natural resources, including living organisms belonging to sedentary species, of the seabed and subsoil of the continental shelf of the Philippines, or its analogue in an archipelago, as described in Proclamation No. 370 dated 20 March 1968 of the President of the Republic of the Philippines.' Likewise, in its declaration, India sought to exclude, among other disputes, those concerning 'the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels.' All of these declarations are available at <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>> at 1 July 2005.

prevent challenges to its prohibition on fishing of straddling stocks in certain areas beyond the Canadian Exclusive Economic Zone.<sup>28</sup>

## II THE PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS

The expansion in the number and variety of dispute settlement procedures in international environmental law has occurred in parallel with the growth of international adjudicative bodies,<sup>29</sup> most of which were created in the twentieth century,<sup>30</sup> and an appreciable increase in judicial activity.<sup>31</sup> Many of these new courts and tribunals have been called upon to resolve environmental disputes, notwithstanding that few of these institutions have a recognised capacity in the environmental field.

### A *Ad Hoc Arbitration*

International adjudication in a strict sense, in terms of formalised dispute settlement by impartial judges according to international law, is a relatively recent institution. Permanent courts and tribunals emerged only at the beginning of the twentieth century and prior to that the adjudication of disputes was pursued through arbitration. This was predominantly on an ad hoc basis and was, to varying degrees, a quasi-diplomatic procedure.

Since the early twentieth century, which 'marked the beginning of the judicialization of interstate arbitration',<sup>32</sup> both judicial settlement and arbitration began to resemble one another closely in most important respects.<sup>33</sup> However, they have not been utilised in

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<sup>28</sup> *Declaration of Canada Recognising as Compulsory the Jurisdiction of the ICJ* (1994) <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>> at 1 July 2005. This reservation was unsuccessfully challenged by Spain in the *Estai Case* [1998] ICJ Rep 431.

<sup>29</sup> The authors of the *Manual on International Courts and Tribunals* arrive at a total of 28 international courts and tribunals, although they include the development banks' inspection panels and non-compliance procedures: Philippe Sands, Ruth Mackenzie and Yuval Shany, *Manual on International Courts and Tribunals* (1999). See also Chester Brown, 'The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze' (2002) 3 *Melbourne Journal of International Law* 453. In relation to the topic of 'proliferation' see in particular the special issue of *The New York University Journal of International Law and Politics* (vol 31(4), 1999).

<sup>30</sup> Shany offers five reasons for this growth, namely '(1) the increased density, volume and complexity of international norms...; (2) greater commitment to the rule of law in international relations, at the expense of power-oriented diplomacy; (3) the easing of international tensions...; (4) the positive experience with some international courts and tribunals...; and (5) the unsuitability of the ICJ and other pre-existing courts to address many types of disputes...': Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 3-4.

<sup>31</sup> Alter estimates that around 60 per cent of total international judicial activity (5598 out of 8895 cases) occurred in the last 12 years: Karen Alter, 'Do International Courts Enhance Compliance with International Law?' (2003) 25 *Review of Asian and Pacific Studies* 51, 52.

<sup>32</sup> Jonathan I Charney, 'International Law and Multiple International Tribunals' (1998) 271 *Recueil Des Cours* 115, 119.

<sup>33</sup> As early as 1935, and using the term 'adjudication' as a synonym for 'judicial settlement', it was noted by Hudson that 'as it is usually conducted, arbitration is quite as much within the limits of law as adjudication, and

equal measure in resolving environmental disputes. The preponderance of practice suggests that states prefer arbitration over judicial settlement in the resolution of environmental cases.<sup>34</sup> Moreover, where systems of compulsory adjudication have evolved in the environmental arena, they have often involved arbitration rather than judicial settlement.<sup>35</sup> In this respect relatively little has changed since 1983 when a review of dispute settlement clauses in multilateral environmental agreements found that the referral of disputes to permanent courts and tribunals was highly exceptional.<sup>36</sup> Furthermore, ad hoc arbitration, where the parties are responsible themselves for administering the process, is generally favoured over institutional arbitration, where the parties may rely upon registry facilities offered by bodies such as the Permanent Court of Arbitration ('PCA'). Various reasons have been advanced for the preference for arbitration in international environmental law, including that states have greater confidence in an adjudicative process that they have agreed upon, and in an arbitral panel they have themselves selected.<sup>37</sup>

(a) *Historical and Contemporary Importance of Arbitration*

While its importance is sometimes exaggerated, the *Trail Smelter Case*<sup>38</sup> between Canada and the United States assisted in the development of the law of state responsibility for transboundary environmental harm. Other seminal arbitral decisions

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the differences between the two processes are to be found chiefly in the constitutional instruments under which the tribunals act.' : Manley O Hudson, *By Pacific Means: The Implementation of Article Two of the Pact of Paris* (1935) 9.

<sup>34</sup> This is true both of early environmental instruments and more recent treaties. For early examples see the *1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES') and the *1979 Convention on the Conservation of Migratory Species of Wild Animals* ('Bonn Convention'). These two conventions include an identical dispute settlement clause (in arts XVIII and XIII respectively) which provides that, in the first instance, states should seek to resolve their dispute by negotiation, and if this is not successful, then the parties may 'by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague.' For an example of a more recent environmental treaty expressing a preference for arbitration see the *1991 Protocol on Environmental Protection to the Antarctic Treaty* ('Madrid Protocol'), arts 18 and 19 which provide for compulsory arbitration by default if the parties have not selected an alternative mechanism for dispute settlement.

<sup>35</sup> It has been estimated that by the mid 1990s there were around 20 multilateral environmental agreements that provided for compulsory arbitration: Philippe Sands and Ruth MacKenzie, 'Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements' in International Bureau of the Permanent Court of Arbitration (ed), *International Investments and Protection of the Environment* (2001) 305, 316-317.

<sup>36</sup> Alexandre Kiss, 'Le règlement des différends dans les conventions multilatérales relatives à la protection de l'environnement' in R J Dupuy (ed), *The Settlement of Disputes on the New Natural Resources* (1983) 119, 122-123.

<sup>37</sup> J G Merrills, *International Dispute Settlement* (3rd ed, 1998) 116.

<sup>38</sup> *Trail Smelter Case (Canada/United States of America)* (1938 and 1941) 3 RIAA 1911 ('*Trail Smelter Case*').



include the *Bering Sea Fur Seals Case*,<sup>39</sup> between Great Britain and the United States, concerning the latter's attempt to enforce conservancy measures in an area beyond its national jurisdiction, and the *Lake Lanoux Case*,<sup>40</sup> between France and Spain, in relation to a French proposal to interfere with the flow of the Carol River for the purposes of a hydroelectricity project.

Recent arbitrations of importance, in relation to essentially adjectival aspects of international environmental law, include the decisions of arbitral tribunals established under Annex VII of the *1982 United Nations Convention on the Law of the Sea* ('*LOS Convention*') in the *Southern Bluefin Tuna Dispute*<sup>41</sup> and the *MOX Plant Dispute*.<sup>42</sup> The *Southern Bluefin Tuna Dispute* stemmed from a disagreement between Australia and New Zealand on the one hand, and Japan on the other, as to the current state and future prospects for stocks of Southern Bluefin Tuna fished extensively by all three nations. The *MOX Plant Dispute* raises quite different environmental issues concerning the development by the United Kingdom of a nuclear re-reprocessing facility on the shores of the Irish Sea and has given rise to proceedings in the International Tribunal for the Law of the Sea ('ITLOS') and the PCA pursuant to the *LOS Convention*.<sup>43</sup> However, as with the *Southern Bluefin Tuna Dispute*, the *MOX Plant Dispute* involved not only the *LOS Convention* but several other environmental instruments incorporating dispute settlement provisions. Because of what proved to be a problematic interaction between the environmental agreements underlying both disputes, the merits of these cases have not been determined.<sup>44</sup>

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<sup>39</sup> *Bering Sea Fur Seals Case (Great Britain/United States of America)* (1893) 1 *Moore's International Arbitrations* 827.

<sup>40</sup> *Lake Lanoux Case (France/Spain)* (1957) 12 *RIAA* 285.

<sup>41</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 *ILM* 1624 ('*SBT Order*'); *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility)* (2000) 39 *ILM* 1359 ('*SBT Award*') (together the '*Southern Bluefin Tuna Dispute*').

<sup>42</sup> *MOX Plant Order* (2002) 41 *ILM* 405, *MOX Plant Award* <<http://www.pca-cpa.org>> at 1 July 2005 (together the '*MOX Plant Dispute*').

<sup>43</sup> Related proceedings were also commenced in the PCA under the *1992 Convention for the Protection of the Marine Environment of the North-East Atlantic* ('*OSPAR Convention*') although that litigation was concerned with a limited question as to the obligations of the United Kingdom under the *OSPAR* regime to provide Ireland with access to certain information in relation to the approvals process for the *MOX* plant at Sellafeld: *OSPAR Arbitration (Ireland v United Kingdom) (Final Award)* (2 July 2003), <<http://www.pca-cpa.org>> at 1 July 2005 ('*OSPAR Arbitration*'). See Ted L McDorman 'Access to Information under Article 9 of the *OSPAR Convention* (Ireland v United Kingdom)' (2004) 98 *American Journal of International Law* 330.

<sup>44</sup> In the *SBT Award* (2000) 39 *ILM* 1359 the Annex VII Arbitral Tribunal found that it did not have jurisdiction, while in the *MOX Plant Award (Order 3, of 24 June 2003) (Order 4, of 14 November 2003)* <<http://www.pca-cpa.org>> at 1 July 2005 the Annex VII Arbitral Tribunal constituted under the auspices of the PCA suspended proceedings pending the resolution of parallel proceedings under European Community law. On 30 October 2003 the European Commission commenced proceedings against Ireland in the ECJ claiming that by bringing the case to ITLOS and to an Annex VII Tribunal under the *LOS Convention*, Ireland had

B *Institutional Arbitration: the Permanent Court of Arbitration*

(a) *Origins of the Permanent Court of Arbitration*

The first major step in the establishment of permanent adjudicative mechanisms with capacity to deal with environmental disputes was taken with the conclusion of the *1899 International Convention for the Pacific Settlement of International Disputes* ('*1899 Hague Convention*') which established the PCA.<sup>45</sup>

Despite its title, the 'Permanent' Court of Arbitration was not the standing court with compulsory jurisdiction to resolve peacefully all international disputes that many of its proponents had hoped it would be. Rather it was, and remains today, a list of arbitrators several of whom may arbitrate a dispute at the request of the parties.<sup>46</sup> However, the PCA does possess a permanent secretariat (the International Bureau) which receives requests for the arbitration of disputes, facilitates the conduct of those arbitrations and promotes the court to potential litigants.<sup>47</sup>

The PCA emerged in response both to past conflicts and to the prospects of future disturbances to international peace and security.<sup>48</sup> As such this new and permanent system of arbitration established 'for the maintenance of the general peace'<sup>49</sup> was an essential precursor to the Permanent Court of International Justice ('PCIJ') and the ICJ. However, despite high expectations, the PCA has been greatly under-utilised, with only 47 cases submitted to the body, or conducted outside the PCA with the assistance of the International Bureau. The most important example of the latter is the Iran-US Claims Tribunal which rendered 680 awards between 1981 and 2001. The PCA was most active immediately after its establishment (17 cases were submitted prior to World War I) and was then infrequently used after 1919. Nonetheless since 1981 the PCA has enjoyed something of a revival, attracting 22 cases.<sup>50</sup>

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violated the exclusive jurisdiction of the ECJ (Case C-459/03). The procedural problems encountered in the *Southern Bluefin Tuna Dispute* and the *MOX Plant Dispute* are discussed in detail in Chapter 9.

<sup>45</sup> The PCA was subsequently reformed by the *1907 Hague Convention*.

<sup>46</sup> Merrills, above n 37, 90.

<sup>47</sup> See generally Sands, Mackenzie and Shany, above n 29, 23-38. Reference is also occasionally made to the Bureau to appoint arbitrators for ad hoc arbitral tribunals where the parties (or appointed arbitrators) are unable to agree. See for example the *1935 Convention for the Settlement of Difficulties Arising from the Operation of the Smelter at Trail between Great Britain and the United States*, art 2.

<sup>48</sup> David Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94 *American Journal of International Law* 4.

<sup>49</sup> *1899 Hague Convention*, preamble.

<sup>50</sup> All of these statistics are taken from Permanent Court of Arbitration, *103rd Annual Report (2003)*, annex 2 <<http://pca-cpa.org/ENGLISH/AR/annrep03.htm>> at 1 July 2005.

(b) *The Jurisdiction of the PCA over Environmental Disputes*

As the PCA was established in an effort to respond to international conflict it is perhaps unsurprising that very few disputes with environmental aspects have been brought before it. Indeed there are only four such cases. The *North Atlantic Coast Fisheries Case*<sup>51</sup> concerned the rights of Britain, pursuant to a treaty with the United States, to regulate fishing by United States vessels in Canadian waters. The underlying dispute between Ireland and the United Kingdom concerning the MOX plant at Sellafield gave rise to two arbitrations before PCA panels.<sup>52</sup> The fourth arbitration, in which an award has recently been delivered,<sup>53</sup> arose out of a dispute between France and Netherlands concerning the *1976 Convention on the Protection of the Rhine Against Pollution by Chlorides*.

(c) *The Optional Rules for the Arbitration of Environmental Disputes*

In view of this light caseload, the International Bureau has taken various steps to promote the court as a forum for environmental litigation. This has included the promulgation of *Optional Rules for the Arbitration of Disputes Relating to Natural Resources and/or the Environment*<sup>54</sup> ('*Environmental Rules*'). The *Environmental Rules*, adopted by consensus by the 94 member states of the PCA in 2001, are designed to respond to the special characteristics of international environmental litigation. They are optional in the sense that they can only be used on an ad hoc basis when disputes arise unless there is agreement in advance to incorporate reference to the rules in an arbitration clause in an environmental agreement.<sup>55</sup> Although they are yet to be used, the *Environmental Rules* offer highly flexible arbitral procedures that can be tailored to

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<sup>51</sup> *North Atlantic Coast Fisheries Case (Great Britain/United States of America)* (1910) 11 RIAA 167.

<sup>52</sup> *MOX Plant Award (Order 3, of 24 June 2003) (Order 4, of 14 November 2003)* <<http://www.pca-cpa.org>> at 1 July 2005, *OSPAR Arbitration* (2 July 2003), <<http://www.pca-cpa.org>> at 1 July 2005.

<sup>53</sup> *Arbitration in Application of the Convention of 3 December 1976 on the Protection of the Rhine Against Pollution by Chlorides and the Additional Protocol of 25 September 1991* (12 March 2004) Pt I <[http://www.pca\\_cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf](http://www.pca_cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf)> at 1 July 2005 and Pt II <[http://www.pca\\_cpa.org/ENGLISH/RPC/PBF/Sentence%20II.pdf](http://www.pca_cpa.org/ENGLISH/RPC/PBF/Sentence%20II.pdf)> at 1 July 2005.

<sup>54</sup> (2001) <<http://www.pca-cpa.org/ENGLISH/EDR/ENRules.htm>> at 1 July 2005. See D P Ratliff, 'The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment' (2001) 14 *Leiden Journal of International Law* 887; C Q Wu, 'A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration' (2002) 3 *Chicago Journal of International Law* 263. For background to the original proposal for the rules and their drafting history see Alfred Rest, 'An International Court for the Environment: The Role of the Permanent Court of Arbitration' (1999) 4 *Asia Pacific Journal of Environmental Law* 107, 117-118. The PCA has also adopted *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment* (2002) <<http://www.pca-cpa.org/PDF/envconciliation/pdf>> at 1 July 2005.

<sup>55</sup> The first and only example of the adoption of the rules in this way is the *2002 Draft Protocol on Civil Liability to the 1992 Convention on the Protection and Use of Transboundary Waters and International Lakes*.

meet the circumstances of a particular environmental case and are deserving of close scrutiny.

The *Environmental Rules* are applicable not only to inter-state environmental disputes, but also to disputes involving international organisations of states, non-governmental organisations and corporations.<sup>56</sup> They also allow for multiparty arbitration, in recognition of the frequent need to involve a variety of participants in environmental disputes. In addition, and acknowledging the difficulties involved in identifying a distinctive 'environmental' dispute, Article 1(1) provides that '[t]he characterisation of the dispute as relating to the environment or natural resources is not necessary for jurisdiction'.

Under the *Environmental Rules*, Arbitral Tribunals may be composed of one, three or five members and there are elaborate procedures designed to ensure that the appointment process proceeds smoothly and without delay.<sup>57</sup> These procedures may help avoid the difficulties in appointing qualified panellists, which is a recognised deficiency of ad hoc arbitration. Further emphasising the judicial character of the arbitral process, Articles 9 to 12 of the *Environmental Rules* make provision for the independence and impartiality of arbitrators and establish procedures for challenging prospective panellists.

Provisional measures have proved to be important in international environmental litigation and Article 26 of the *Environmental Rules* allows an arbitral tribunal to make, at the request of the parties, such interim orders 'it deems necessary to preserve the rights of any party or to prevent serious harm to the environment falling within the subject-matter of the dispute.'<sup>58</sup> Evidently this formulation, which limits the competence of the tribunal to issue orders in relation to the 'subject-matter of the dispute,' is designed to prevent a tribunal from making orders when confronted with a situation of threatened environmental damage unconnected with a dispute before the Court. However, this might be thought to impose a significant evidentiary burden on applicants, an onus which may be inappropriate at the interlocutory stage. Unless a tribunal is willing to adopt a broad characterisation of a dispute, claimants may be required to establish a causal link between the controversy under consideration and the environmental damage. Such a requirement appears at variance both with the nature of interim orders and with the precautionary approach to environmental management.<sup>59</sup>

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<sup>56</sup> *Environmental Rules*, above n 54, Introduction and art 1(1).

<sup>57</sup> *Ibid* arts 5, 6, 7, 8.

<sup>58</sup> *Ibid* art 26(1).

<sup>59</sup> The precautionary approach/principle is defined in principle 15 of the *Rio Declaration*, above n 11: '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.'

Article 26(2) also goes further than other provisional measures procedures in allowing the arbitral tribunal to require 'appropriate security'.<sup>60</sup>

Recognising that environmental disputes frequently involve complex scientific issues, Article 27 of the *Environmental Rules* allows an arbitral tribunal to appoint, on its own initiative, one or more experts to report in writing on specific issues as determined by the tribunal.<sup>61</sup> To assist the tribunal, an indicative list of experts with expertise in scientific and technical matters is provided by the Secretary-General of the PCA (and contained in Annex II to the *Environmental Rules*).<sup>62</sup> As the arbitral tribunal has significant control in appointing experts, both in relation to the issue-areas in which assistance is sought and the identity of the appointee(s), the procedure set out in Article 27 may be helpful where there is fundamental disagreement, as is often the case in environmental disputes, between the expert scientific evidence adduced by the parties.

The *Environmental Rules* appear to offer several advantages over traditional procedures for the adjudication of environmental disputes, particularly in providing for the prompt establishment of panels and the appointment of independent experts to assist the court on scientific and other matters where the adversarial system may impede the search for an objective appreciation of the issues involved. However, there are several problematic features of the *Environmental Rules*, not least being the provisional measures procedure discussed above. The presumption that any arbitral award will be confidential, unless all the parties otherwise agree,<sup>63</sup> is a significant impediment to the transparent resolution of international environmental disputes, reducing the accountability of the arbitrators and the parties. It is clearly contrary to the prevailing trend in environmental law, which has been to open decision-making processes to public scrutiny and participation.<sup>64</sup> Such transparency is essential for ensuring that the parties and the arbitrators respect not only the interests of the disputing states in achieving a settlement, but also the public at large in the protection of the environment.

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<sup>60</sup> There exists no such provision in relation to the ICJ or ITLOS, which has raised some concerns in relation to those jurisdictions as to the possibility for undue prejudice to a respondent's rights where a claimant, that successfully obtains provisional measures, subsequently fails at the merits stage. See Hugh Thirlway, 'The Indication of Provisional Measures by the International Court of Justice' in R Bernhardt (ed), *Interim Measures Indicated by International Courts* (1994), 1.

<sup>61</sup> *Environmental Rules*, above n 54, art 27(1).

<sup>62</sup> *Ibid* art 27(5).

<sup>63</sup> *Ibid* art 32(6).

<sup>64</sup> See, eg, *Rio Declaration*, above n 11, principle 10 ('Environmental issues are best handled with participation of all concerned citizens, at the relevant level.'). See also the *1998 Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters* ('*Århus Convention*').

Additionally, and unlike most international adjudicative procedures in which the parties ordinarily bear their own costs,<sup>65</sup> an arbitral tribunal operating under the *Environmental Rules* has the discretion to 'apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.'<sup>66</sup> Depending on how this discretion is exercised it could prove to be a major disincentive to environmental litigation in the public interest.

*(d) Arbitration and Judicial Settlement Compared*

There is little doubt that arbitration has usefully contributed to the peaceful resolution of a number of environmental disputes. Arbitral procedures have also been used to devise regimes for environmental protection and resource conservation.<sup>67</sup> One reason for the apparent success of arbitration in achieving these results is that states committing to arbitration ordinarily share a commitment to reaching a solution to their differences and, to that end, to respect the arbitral process and any award delivered as a result.<sup>68</sup> The record of cooperation and compliance is much more mixed when litigation is brought on the basis of a unilateral invocation of the compulsory jurisdiction of an international court or tribunal.<sup>69</sup>

It does not follow, however, that arbitration is always to be preferred. Beyond the commonality of basic function there are some important differences between judicial settlement by a permanent body and arbitration on an ad hoc or institutional basis. By comparison with permanent courts, which are relatively rigid institutions, arbitral procedures may be adapted by the parties to meet the exigencies of cases as they arise.<sup>70</sup> Among other things the parties will need to agree upon the composition of the arbitral tribunal, the rules of procedure, the law to be applied, and how any award will be executed. This inherent flexibility allows states to adjust arbitral rules to respond to the

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<sup>65</sup> See, eg, *Statute of the ICJ*, art 64; *ICJ Rules*, art 97.

<sup>66</sup> *Environmental Rules*, above n 54, art 40(1).

<sup>67</sup> See, eg, *Bering Sea Fur Seals Case* (1898) 1 *Moore's International Arbitrations* 755; *Trail Smelter Case* (1938 and 1941) 3 *RIAA* 1911.

<sup>68</sup> Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach*, above n 10, 324-328.

<sup>69</sup> See, eg, *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 3; *Fisheries Jurisdiction Case (Germany v Iceland) (Merits)* [1974] ICJ Rep 175. Iceland declined to recognise the Court's jurisdiction or play any part in the proceedings. In the *Nuclear Tests Cases (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, (*Merits*) [1974] ICJ Rep 253; *Nuclear Tests Cases (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, (*Merits*) [1974] ICJ Rep 457 France similarly refused to participate in the proceedings, and initially continued with its atmospheric nuclear testing program in defiance of provisional measures indicated by the Court.

<sup>70</sup> Christine Gray and Benedict Kingsbury, 'Inter-State Arbitration Since 1945: Overview and Evaluation' in Mark W Janis (ed), *International Courts for the Twenty-First Century* (1992) 55, 63.

unique requirements of environmental litigation,<sup>71</sup> However, it also allows states to design procedures that seek to promote an amicable settlement rather than allowing an arbitral body an opportunity to evaluate issues of public concern implicated in an environmental dispute. To avoid such an outcome, some environmental treaties seek to provide structure to the arbitration of disputes concerning their interpretation and application.<sup>72</sup>

Other obstacles to public-interest oriented decision-making in arbitration are apparent from the inherent plasticity of the arbitral process. From a practical perspective, the conduct of an arbitration often imposes considerable organisational and financial burdens upon disputing states.<sup>73</sup> Some developing states may not have the requisite financial or technical capacity to contribute to the administration of the arbitration,<sup>74</sup> and this may prove to be a serious disincentive to the invocation of arbitral proceedings, even in the face of environmentally deleterious activities.<sup>75</sup> A more serious deficiency reflects the origins of arbitration as an extension of diplomatic methods of dispute settlement.<sup>76</sup> Arbitration retains aspects of this private orientation,<sup>77</sup> and the high degree of control by the parties over the arbitral process carries implications for the conduct and outcome of environmental arbitrations and for the development of an environmentally-sensitive jurisprudence.<sup>78</sup> Although arbitrators must generally adhere to

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<sup>71</sup> Bilder, above n 1, 228.

<sup>72</sup> See for example the 1992 *Convention on Biological Diversity* ('Biodiversity Convention'), annex II; 1992 *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, art IV.

<sup>73</sup> Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach*, above n 10, 103. In relation to the costs involved in international adjudication see Cesare P R Romano, *The Cost of International Justice* (1997) Center on International Cooperation <<http://www.cic.nyu.edu/pubs/TheCost.html>> at 1 July 2005.

<sup>74</sup> Although not a case involving environmental questions, the *M/V Saiga Case (No 2) (St Vincent and the Grenadines v Guinea)* (1998) 37 ILM 1202 illustrates some of the difficulties that may be encountered in this respect. This dispute was originally to be resolved by arbitration under annex VII of the *LOS Convention*, however the parties subsequently agreed to transfer the case to ITLOS. Treves infers that this course of action was influenced by the costs and other burdens imposed upon the parties by ad hoc arbitration: Tullio Treves, 'Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice' (1999) 31 *New York University Journal of International Law and Politics* 809, 821.

<sup>75</sup> The initiation of proceedings in a permanent institution is generally less costly. It should also be noted that to fund litigation in the ICJ developing states may have access to a trust fund, established in 1989. See *Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General*, UN Doc A/47/444 (1992). In relation to the use by developing countries of international justice mechanisms see generally Cesare P R Romano, 'International Justice and Developing Countries: A Quantitative Analysis' (2002) 1 *The Law and Practice of International Courts and Tribunals* 367.

<sup>76</sup> Elihu Lauterpacht, *Aspects of the Administration of International Justice* (1991) 86.

<sup>77</sup> A Neil Craik, 'Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law' (1998) 10 *Georgetown International Environmental Law Review* 551, 562-565.

<sup>78</sup> Marcel T A Brus, *Third Party Dispute Settlement in an Interdependent World: Developing a Theoretical Framework* (1995) 191 (*ad hoc* procedures may be demanded by pragmatism, but should be avoided as they may be inadequate for the further development of a 'community of principle').

the same standards of independence and impartiality as judges of permanent courts and tribunals,<sup>79</sup> arbitral panels are significantly less insulated from the pressure of the parties to deliver a result acceptable to both parties. The propensity for arbitration to lead to a purely *inter partes* settlement may be further amplified if the parties do not accept the involvement of other interested parties, either as intervenors or as amici curiae, or if they agree that the proceedings and any award should remain confidential.<sup>80</sup>

In contrast permanent courts and tribunals may adopt a more independent stance. International courts have acquired substantial autonomy as international actors in their own right, operating increasingly independently from the formal expression of state consent.<sup>81</sup> This autonomy also permits the development of a more distinctive and independent approach to the settlement of environmental disputes. Courts and tribunals therefore have greater capacity to consider interests beyond those of the disputants, including those of ecosystem protection in the interests of future generations, and can contribute to the development of a consistent and principled environmental jurisprudence.<sup>82</sup>

### *C International Court of Justice*

#### *(a) Origins of the World Court*

The PCIJ and its successor the ICJ are the only two international courts to have been established with general subject-matter jurisdiction<sup>83</sup> and global reach. Both founded in the aftermath of internecine conflict, the progenitor of these institutions was the same popular belief that inspired and animated the 1899 and 1907 Hague Peace Conferences, which successively established and reformed the PCA, namely the conviction that the creation of a permanent mechanism for the pacific settlement of inter-state disputes was an essential step towards international peace and security. In securing peace these

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<sup>79</sup> See generally Dinah Shelton, 'Legal Norms to Promote the Independence and Accountability of International Tribunals' (2003) 2 *Law and Practice of International Courts and Tribunals* 27.

<sup>80</sup> The conduct of arbitral proceedings, or parts of proceedings, in closed session is not uncommon, even in relation to environmental disputes that raise issues beyond those of immediate concern to the parties. See, eg, *MOX Plant Award (Order 3, of 24 June 2003) (Order 4, of 14 November 2003)* <<http://www.pca-cpa.org>> at 1 July 2005 in which parts of the proceedings were closed to the public. See also *1907 Hague Convention*, art 78.

<sup>81</sup> Lauterpacht notes that while 'the system of international adjudication is totally dependent upon the consent of the parties', it is evident that 'some cracks in the edifice are developing, though, it would seem, less from any critical approach to the concept of consent than from the seeming disinclination of the [ICJ] to forego jurisdiction in certain cases in which there is at any rate an arguable case that consent has been given.': Lauterpacht, above n 76, 23.

<sup>82</sup> See also Laurence R Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 901, 938-939 (arguing that independent courts and tribunals are more likely than 'dependent' adjudicatory systems such as ad hoc arbitration to enhance the credibility of international commitments and hold states to their international obligations).

<sup>83</sup> *Statute of the PCIJ*, arts 34 and 36; *Statute of the ICJ*, arts 34 and 36.



institutions have played only a subsidiary and indirect function. Instead, in times of amity, they have performed an important role of clarifying, refining and developing international law, including in the environmental field.

*(b) Environmental Cases in the World Court*

The PCIJ was established in 1920 when the statute of the Court was adopted by the League of Nations.<sup>84</sup> Although the PCIJ was not a core institution in the League system that emerged out of the Paris Peace Conference, it proved to be an important body. Sixty six cases were submitted to the Court<sup>85</sup> and it handed down 59 judgments<sup>86</sup> during its brief existence in the inter-war period. From an environmental perspective the most significant decision of the PCIJ was the *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*.<sup>87</sup> Although the litigation did not raise environmental issues in any direct sense, the *River Oder Case* enunciated the 'community of interest' theory in relation to international rivers which has major environmental ramifications.<sup>88</sup> In large part the PCIJ model was retained in the ICJ that emerged out of the United Nations Conference on International Organisation in San Francisco in 1945. However, unlike the PCIJ in relation to the League of Nations, the ICJ was established as a principal organ<sup>89</sup> of the United Nations system. Reflecting this, the *Statute of the ICJ* was annexed to the *UN Charter*, of which it 'forms an integral part'.<sup>90</sup>

Environmental disputes have been far more prominent in the docket of the ICJ than they were in its predecessor. It has already been noted that environmental cases may be brought before the ICJ in several ways, and that the ICJ only has general and obligatory jurisdiction in contentious matters to the extent that jurisdiction has been conferred upon it by states in accordance with Article 36(2) of its Statute. In addition to its contentious jurisdiction, the ICJ also has competence to render advisory opinions 'on any legal question at the request of whatever body may be authorized by or in accordance' with the *UN Charter* to make a request.<sup>91</sup> The Court rendered an important advisory opinion with implications for the protection of the environment during wartime

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<sup>84</sup> Pursuant to the *1919 Covenant of the League of Nations*, art 14.

<sup>85</sup> 38 of these cases were contentious cases, the remaining 28 in the PCIJ's advisory jurisdiction.

<sup>86</sup> 32 of these were judgments in contentious cases, the remaining 27 advisory opinions.

<sup>87</sup> *Case Relating to the 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 ('*River Oder Case*').

<sup>88</sup> See Chapter 6.

<sup>89</sup> *UN Charter*, art 92.

<sup>90</sup> *Ibid.* In addition all members of the UN are *ipso facto* parties to the *Statute of the ICJ*: *UN Charter* art 93(1).

<sup>91</sup> *Statute of the ICJ*, art 65(1).

in the *Legality of the Threat or Use of Nuclear Weapons*<sup>92</sup> in which, among other things, it advised that treaty prohibitions on methods of warfare causing widespread, severe and permanent damage to the natural environment had entered into customary international law.

The ICJ's broad jurisdiction, and its position as the principal judicial organ of the United Nations, mean that it is particularly suited to considering major inter-state disputes concerning environmental issues in the exercise of its contentious and advisory jurisdictions. As Judge Weeramantry noted in his Dissenting Opinion in *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*,<sup>93</sup> 'the [ICJ], situated at the apex of international tribunals, necessarily enjoys a position of special trust and responsibility in relation to the principles of environmental law especially those relating to what is described in environmental law as the Global Commons.'<sup>94</sup> The Court is also a reasonably adaptable institution, capable of forming Chambers<sup>95</sup> and calling upon the assistance of technical or scientific assessors.<sup>96</sup> However, the ICJ suffers from some functional constraints including the rule that only states may be parties in contentious cases.<sup>97</sup> Consequently it has been unable to satisfy the demands of non-state actors, which remains 'the key remedial defect in international judicial process'<sup>98</sup> more generally. It would seem that for this and other reasons, in the absence of major structural reform the ICJ is unlikely ever to be at the frontline of enforcement in international environmental law.

(c) *The ICJ's Chamber for Environmental Matters*

As with the PCA, there has been an awareness of the limitations of the ICJ in the environmental field. In 1993 the Court sought to enhance its capabilities in dealing with environmental disputes by establishing a permanent seven-member Chamber for Environmental Matters ('Environmental Chamber').<sup>99</sup> After referring to the *Nauru Case* and the *Gabčíkovo-Nagymaros Case*, the *Communiqué* issued by the ICJ stated that:

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<sup>92</sup> *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 ('*Nuclear Weapons Advisory Opinion*').

<sup>93</sup> *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* [1995] ICJ Rep 288.

<sup>94</sup> *Ibid*, Dissenting Opinion of Judge Weeramantry, 345.

<sup>95</sup> *Statute of the ICJ*, art 26.

<sup>96</sup> *Ibid* art 50 and art 34(1). See Philip C Jessup, 'Do New Problems Need New Courts?' (1971) 65 *American Society of International Law Proceedings* 261, 262-263.

<sup>97</sup> *Statute of the ICJ*, art 34(1).

<sup>98</sup> David J Bederman, *The Spirit of International Law* (2002) 198.

<sup>99</sup> International Court of Justice, *Communiqué 93/20 on the Establishment of a Permanent Chamber for Environmental Matters* (19 July 1993). See Phoebe N Okowa, 'Environmental Dispute Settlement: Some

[I]n view of the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction, the Court has now deemed it appropriate to establish a seven-member Chamber for Environmental Matters.<sup>100</sup>

The Environmental Chamber was established under Article 26(1) of the *Statute of the ICJ*, which allows the Court to form one or more Chambers composed of three or more of the ICJ's 15 judges to deal with particular categories of case. In appointing judges to a Chamber the Court should 'have regard to any special knowledge, expertise or previous experience which any of the Members of the Court may have in relation to the category of case the chamber is being formed to deal with.'<sup>101</sup>

The Environmental Chamber is the first permanent Chamber to be formed by the ICJ (although the Court had previously established a number of ad hoc chambers under Article 26(2) of the *Statute of the ICJ*<sup>102</sup>) and in that respect amounts to a prominent recognition of the importance of environmental disputes.<sup>103</sup> The Chamber has not yet heard a case and will remain in abeyance until the parties to a dispute specifically request that the case be heard and determined by the Chamber.<sup>104</sup> Nonetheless Fitzmaurice has observed that the creation of the Environmental Chamber 'may well be regarded as the most important development in the ICJ concerning the environment, rendering it fully prepared to deal with all kinds of environmental matters which may come before it.'<sup>105</sup> The Chamber would appear to have value in two main senses. First, in its very existence as a tailored forum for resolving environmental disputes that is composed of judges with relevant experience in the fields of environment and natural resources, and second as an institution that could be influential in developing and

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Reflections on Recent Developments' in Malcolm D Evans (eds), *Remedies in International Law: The Institutional Dilemma* (1998) 157, 168-169. In relation to ICJ Chambers generally see Merrills, above n 37, 140-145; John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999) 127-129.

<sup>100</sup> International Court of Justice, *Communiqué 93/20 on the Establishment of a Permanent Chamber for Environmental Matters* (19 July 1993).

<sup>101</sup> *Rules of the ICJ*, art 16(2).

<sup>102</sup> See Stephen Schwebel, 'Ad Hoc Chambers of the International Court of Justice' (1987) 81 *American Journal of International Law* 831.

<sup>103</sup> Sands notes that the decision to establish the Chamber 'may...have been motivated by the desire to preempt the establishment of a specialized international environmental court': Philippe Sands, 'International Environmental Litigation and its Future' (1999) 32 *University of Richmond Law Review* 1619, 1626.

<sup>104</sup> *Statute of the ICJ*, art 26(3); *Rules of the ICJ*, art 91(1).

<sup>105</sup> Malgosia Fitzmaurice, 'Environmental Protection and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 293, 305. Fitzmaurice has also suggested that the Court's initiative 'evidences that environmental law has come of age.': Malgosia Fitzmaurice, 'International Protection of the Environment' (2001) 293 *Recueil des Cours* 9, 364.

clarifying international environmental law.<sup>106</sup> However, as the Chamber suffers from many of the same limitations as the ICJ in plenary, including restrictions on those who may have access to it, it has also been contended that it offers little improvement on the existing adversarial process in the Court *en banc*.<sup>107</sup> Moreover doubts have been expressed concerning the willingness of states to resort to the chamber given the difficulty of defining any dispute as purely environmental one and separate from more general questions of public international law.<sup>108</sup> These factors may partly explain why there have been no cases submitted to the Chamber to date.

D *ITLOS and Part XV of the LOS Convention*<sup>109</sup>

(a) *The Significance of the LOS Convention as an Environmental Agreement*

The entry into force of the *LOS Convention* was a major landmark in international environmental law. Noting that the Convention provides a global framework both for sustainable development of ocean resources and the protection of the marine environment, Birnie and Boyle consider the Convention to be 'a model for the evolution of international environmental law'.<sup>110</sup> Charney likewise described the Convention as containing 'the most comprehensive and progressive international environmental law of any modern international agreement.'<sup>111</sup>

The key provisions giving effect to the *LOS Convention's* stated aim of promoting 'the protection and preservation of the marine environment'<sup>112</sup> are found in Part XII.<sup>113</sup> They seek to limit pollution of the marine environment,<sup>114</sup> encourage co-operation on a global and regional basis to protect and preserve the marine environment,<sup>115</sup> promote the technical and scientific capacity of developing states for marine environmental

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<sup>106</sup> Merrills, above n 37, 306. See also Raymond Ranjeva, 'Jurisdiction International Arbitrage – L'environnement, Le Court International de la Justice et sa Chamber speciale pour les questions d'environnement' (1994) *XL Annuaire Francais de Droit International* 433.

<sup>107</sup> Okowa, above n 99, 169.

<sup>108</sup> Alan E Boyle, 'The *Gabčíkovo-Nagymaros* Case: New Law in Old Bottles' (1997) 8 *Yearbook of International Environmental Law* 13.

<sup>109</sup> Parts of the discussion under this heading are drawn, and modified, from Donald R Rothwell and Tim Stephens, 'Dispute Resolution and the Law of the Sea: Reconciling the Interaction Between the LOS Convention and Other Environmental Instruments' in Alex G Oude Elferink and Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 209.

<sup>110</sup> Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (2nd ed, 2002) 348.

<sup>111</sup> Jonathan I Charney, 'The Marine Environment and the 1982 United Nations Convention on the Law of the Sea' (1994) 28 *International Lawyer* 879, 882.

<sup>112</sup> *LOS Convention*, preamble, 3rd recital.

<sup>113</sup> *Ibid* art 192.

<sup>114</sup> *Ibid* arts 194, 195, 199, 204-206, 207-222 and 223-233.

<sup>115</sup> *Ibid* arts 197-201.

protection,<sup>116</sup> and require states to undertake monitoring and environmental assessment.<sup>117</sup> In addition, the conservation and management of 'marine living resources' is a major focus of the *LOS Convention* and several articles deal with the rights and responsibilities of coastal and flag States in this regard.<sup>118</sup>

*(b) An Overview of the Dispute Settlement Provisions of the LOS Convention*

In addition to these innovations in substantive environmental rules, the *LOS Convention* incorporates sophisticated dispute settlement provisions. The system of dispute resolution contained in Part XV of the Convention is highly distinctive in international environmental law by virtue of its comprehensive coverage and its compulsory character.<sup>119</sup> With limited exceptions, Part XV makes disputes concerning the interpretation and application of the Convention the subject of compulsory and binding third-party settlement. This was considered essential to hold the 'package deal' Convention together and to guarantee the authoritative and consistent interpretation of its provisions.<sup>120</sup> Part XV also carries a broader significance, with one commentator suggesting that it evidences a trend in international relations towards greater reliance on the rule of law rather than the dynamics of power politics.<sup>121</sup>

The three sections that make up Part XV seek both to utilize existing courts and to establish new institutions. Section 1 sets out jurisdictional prerequisites, Section 2 contains the core compulsory dispute settlement provisions and Section 3 provides for several exceptions to the Part XV system. The pivotal provision in Section 2 of Part XV is Article 287 ('the Montreux formula') which outlines the various compulsory dispute settlement procedures available.<sup>122</sup> At any time states are free to declare a preference for one or more of four procedures, namely ITLOS, the ICJ, an Annex VII Arbitral Tribunal, or an Annex VIII Special Arbitral Tribunal. Article 287 further provides that Annex VII arbitration is the default procedure where no declaration has been made by a party to a dispute<sup>123</sup> or where the parties have accepted different procedures.<sup>124</sup> There are

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<sup>116</sup> Ibid arts 202-203.

<sup>117</sup> Ibid arts 204-106.

<sup>118</sup> Ibid arts 61-73, 116-120.

<sup>119</sup> Tullio Treves, 'Dispute Settlement Clauses in the Law of the Sea Convention and their Impact on the Protection of the Marine Environment: Some Observations' (1999) 8 *Review of European Community and International Environmental Law* 6.

<sup>120</sup> Christine Chinkin, 'Dispute Resolution and the Law of the Sea: Regional Problems and Prospects' in James Crawford and Donald R Rothwell (eds) *The Law of the Sea in the Asian Pacific Region: Developments and Prospects* (1995) 237, 245.

<sup>121</sup> Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005) 24.

<sup>122</sup> See Robin R Churchill and A Vaughan Lowe, *The Law of the Sea* (3rd ed, 1999) 455-459.

<sup>123</sup> *LOS Convention*, art 287(3).

<sup>124</sup> Ibid art 287(5).

now 148 states parties to the *LOS Convention*, with 39 of these indicating a choice of procedure pursuant to Article 287. Of these 21 states have indicated a first preference for ITLOS in relation to all disputes.

| STATE PARTY                        | PREFERRED FORUM(S), IN ORDER OF PREFERENCE                                     |
|------------------------------------|--|
| <b>Argentina</b>                   | (a) ITLOS (b) Annex VIII Special Arbitration                                   |
| <b>Australia</b>                   | (a) ITLOS/ICJ*   |
| <b>Austria</b>                     | (a) ITLOS (b) Annex VIII Special Arbitration (c) ICJ                           |
| <b>Belarus</b>                     | (a) Annex VII Arbitration (b) Annex VIII Special Arbitration                   |
| <b>Belgium</b>                     | (a) ITLOS/ICJ  |
| <b>Canada</b>                      | (a) ITLOS/Annex VII Arbitration  |
| <b>Cape Verde</b>                  | (a) ITLOS (b) ICJ  |
| <b>Chile</b>                       | (a) ITLOS (b) Annex VIII Special Arbitration                                   |
| <b>Croatia</b>                     | (a) ITLOS (b) ICJ  |
| <b>Egypt</b>                       | (a) Annex VII Arbitration  |
| <b>Finland</b>                     | (a) ICJ/ITLOS  |
| <b>Germany</b>                     | (a) ITLOS (b) Annex VII Arbitration (c) ICJ                                    |
| <b>Greece</b>                      | (a) ITLOS  |
| <b>Honduras</b>                    | (a) ICJ  |
| <b>Hungary</b>                     | (a) ITLOS (b) ICJ (c) Annex VIII Special Arbitration                           |
| <b>Italy</b>                       | (a) ITLOS/ICJ  |
| <b>Lithuania</b>                   | (a) ITLOS (b) ICJ  |
| <b>Mexico</b>                      | (a) ITLOS/ICJ/Annex VIII Special Arbitration                                   |
| <b>Netherlands</b>                 | (a) ICJ  |
| <b>Nicaragua</b>                   | (a) ICJ  |
| <b>Norway</b>                      | (a) ICJ  |
| <b>Oman</b>                        | (a) ITLOS/ICJ  |
| <b>Portugal<sup>+</sup></b>        | (a) ITLOS (b) ICJ (c) Annex VII Arbitration (d) Annex VIII Special Arbitration |
| <b>Russian Federation</b>          | (a) Annex VII Arbitration/Annex VIII Special Arbitration                       |
| <b>Slovenia</b>                    | (a) Annex VII Arbitration  |
| <b>Spain</b>                       | (a) ITLOS/ICJ  |
| <b>Tanzania</b>                    | (a) ITLOS  |
| <b>Tunisia</b>                     | (a) ITLOS (b) Annex VII Arbitration  |
| <b>Ukraine</b>                     | (a) Annex VII Arbitration/Annex VIII Special Arbitration                       |
| <b>United Kingdom</b>              | (a) ICJ  |
| <b>United Republic of Tanzania</b> | (a) ITLOS  |
| <b>Uruguay</b>                     | (a) ITLOS  |

**Table 2.2 Summary of declarations under Article 287 of the *LOS Convention* (as at 9 December 2004) indicating preference(s) for method of dispute settlement. Source: <[http://www/un/org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure](http://www/un/org/Depts/los/settlement_of_disputes/choice_procedure)> at 1 July 2005**

\* This indicates that Australia has chosen both ITLOS and ICJ, without expressing a preference for one forum over the other.

<sup>+</sup> Portugal's declaration does not appear to express any order of preference for these procedures, notwithstanding that they are listed in this order.

Each of the four courts or tribunals referred to in Article 287 is given broad jurisdiction under Article 288 to address any dispute under the *LOS Convention*, and any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention submitted consistently with that agreement. The jurisdiction of the four bodies extends to most of the Convention's environmental provisions and accordingly there are significant opportunities for environmental issues to be the subject of compulsory dispute settlement.<sup>125</sup> Importantly, 'Special Arbitration' under Annex VIII is designed specifically to deal with a range of disputes concerning the protection and preservation of the marine environment including fisheries cases, and disputes relating to vessel sourced pollution and ocean dumping.<sup>126</sup>

However, there are some limitations to the jurisdiction of these bodies over cases that may involve some environmental issues. In the first place, states may declare that they do not accept the compulsory dispute settlement procedures for certain disputes including (a) maritime boundary delimitations or disputes involving historic bays or titles; (b) disputes over military activities; and (c) disputes in respect of which the United Nations Security Council is exercising its functions under the *UN Charter*.<sup>127</sup> Twenty four states have made declarations under Article 298 indicating that they do not accept one or more of the four procedures in relation to one or more of these three types of dispute.<sup>128</sup> Secondly, Article 297 sets out some non-optional limitations on the adjudication of disputes involving coastal marine scientific research and fisheries. However, before specifying these, Article 297(1)(c) seeks to make clear the broad application of compulsory procedures to environmental disputes:

[W]hen it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established through this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

The only major, non-optional, limitation on jurisdiction over environmental matters is set out in Article 297(3)(a) which provides that a coastal state is not obliged to submit disputes 'relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary capacity, the allocation of surpluses to other States and the terms and conditions established in its

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<sup>125</sup> H S Schiffman, 'UNCLOS and Marine Wildlife Disputes: Big Splash or Barely a Ripple?' (2001) 4 *Journal of International Wildlife Law and Policy* 257. For an overview of various environmental disputes that may arise under the *LOS Convention* see Thomas A Mensah, 'The International Tribunal for the Law of the Sea and the Protection and Preservation of the Marine Environment' (1999) 8 *Review of European Community and International Environmental Law* 1.

<sup>126</sup> *LOS Convention*, annex VIII, art 1.

<sup>127</sup> *Ibid* art 298.

<sup>128</sup> See <[http://www/un/org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure](http://www/un/org/Depts/los/settlement_of_disputes/choice_procedure)> at 1 July 2005.

conservation management laws and regulations.' These disputes may, however, be the subject of compulsory conciliation.<sup>129</sup>

In relation to disputes concerning the exploration and exploitation of the sea-bed and ocean floor and subsoil beyond the limits of national jurisdiction ('the Area')<sup>130</sup> there is a special regime which refers such disputes to a Sea-Bed Disputes Chamber of ITLOS, a special chamber of ITLOS, an ad hoc chamber of the Sea-Bed Disputes Chamber, or binding commercial arbitration.<sup>131</sup> Significantly, the parties to disputes before the Sea-Bed Disputes Chamber of ITLOS or binding commercial arbitration may include not only states parties to the *LOS Convention*, but also the Sea-Bed Authority,<sup>132</sup> the Enterprise,<sup>133</sup> state enterprises, natural or juridical persons and prospective contractors.

(c) *Provisional Measures Jurisdiction*

One of the most important features of Part XV, so far as international environmental law is concerned, is the machinery for issuing provisional measures.<sup>134</sup> Article 290 provides for the indication of interim orders either by an agreed court or tribunal or, failing agreement, by ITLOS 'to preserve the respective rights of the parties to the dispute *or to prevent serious harm to the marine environment*, pending the final decision.'<sup>135</sup> This provision has proven to be an important source of jurisdiction for ITLOS, which has now issued provisional measures on four occasions, with three of these applications raising environmental issues.<sup>136</sup>

The reference in Article 290 of the *LOS Convention* to the avoidance of 'serious harm to the marine environment' indicates that this mechanism was designed specifically to allow ITLOS to deal with potential environmental harm efficiently and effectively.<sup>137</sup> It may also be noted that since jurisdiction need only be established on a prima facie basis, and the court at an interlocutory stage must be cautious of definite factual findings that may prejudice a later determination on the merits, there is an

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<sup>129</sup> *LOS Convention*, art 297(3)(b).

<sup>130</sup> *Ibid* art 1(1).

<sup>131</sup> *Ibid* arts 186-191.

<sup>132</sup> *Ibid* arts 156-158.

<sup>133</sup> *Ibid* art 170.

<sup>134</sup> See generally Klein, above n 121, 59-87.

<sup>135</sup> Emphasis added.

<sup>136</sup> *SBT Order* (1999) 38 ILM 1624; *MOX Plant Order* (2002) 41 ILM 405; *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore) (Provisional Measures)* (8 October 2003) <<http://www.itlos.org>> at 1 July 2005.

<sup>137</sup> Tullio Treves, 'The Role of Dispute Settlement Mechanisms in the Protection of the Marine Environment in Cases Concerning Economic Activities in the Sea and Seabed' in International Bureau of the Permanent Court of Arbitration (ed), *International Investments and Protection of the Environment* (2001) 113.



obvious conceptual affinity between the precautionary principle in international environmental law and this particular judicial mechanism for providing interim relief.<sup>138</sup>

(d) *The Pre-eminence of ITLOS*

Although there is no formal hierarchy among the Article 287 courts and tribunals, Judge Tullio Treves has argued that ITLOS forms an integral part of the system for the peaceful resolution of disputes relating to the interpretation and application of the Convention.<sup>139</sup> It is evident that ITLOS has sought to stamp its authority on the Part XV dispute settlement system in several environmental cases,<sup>140</sup> and it can be argued more generally that ITLOS as a permanent institution with broad jurisdiction over marine environmental disputes is likely to play a central role in the ongoing judicial development of international environmental law.

Environmental issues have figured prominently in cases before ITLOS and Annex VII Arbitral Tribunals.<sup>141</sup> In its eight-year existence ITLOS has dealt with 12 distinct cases, delivered seven judgments and made close to 30 orders both of a substantive and procedural nature. Nine of these cases have raised significant issues of environmental concern. However, it must be noted that none of these environmental cases have yet led to a full hearing on the merits by ITLOS or another Article 287 institution. Three of the decisions have been in exercise of the Tribunal's provisional measures jurisdiction, while the remaining cases have involved cases of prompt release of vessels and crew. The two cases that were subject to Annex VII Arbitration (the *Southern Bluefin Tuna Dispute* and *MOX Plant Dispute*) have led to essentially procedural decisions deferring the settlement of the dispute to other forums. Notwithstanding this, the Tribunal has had an opportunity to consider, within its provisional measures and prompt release jurisdictions, a range of important environmental issues involving fisheries and marine pollution.

(e) *The ITLOS Chamber for Marine Environmental Disputes*

ITLOS has imitated the ICJ in establishing a Chamber for Marine Environmental Disputes under the Special Chambers mechanism of Annex VI to the *LOS*

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<sup>138</sup> As Judge Treves noted in his Separate Opinion in the *SBT Order* (1999) 38 ILM 1624 'a precautionary approach seems...inherent in the very notions of provisional measures.' (at [9]).

<sup>139</sup> Tullio Treves, *Le Controversie Internazionali: Nuovi Tendenze, Nuovi Tribunali* (1999) 102 ('esso è parte integrante del complesso sistema di regole sulla soluzione pacifica delle controversie relative all'interpretazione e all'applicazione della Convenzione previsto nella parte XV di essa').

<sup>140</sup> See in particular the discussion by ITLOS of jurisdictional issues in the *MOX Plant Order* (2002) 41 ILM 405. See also Vaughan Lowe, 'Advocating Judicial Activism: The ITLOS Opinions of Judge Ivan Shearer' (2005) 24 *Australian Year Book of International Law* 145, 152.

<sup>141</sup> ITLOS' environmental jurisprudence is considered in Chapter 7.

*Convention*.<sup>142</sup> Former ITLOS President, Thomas Mensah, has noted that in doing so 'the Tribunal has taken cognisance of the special role it is expected to play in the implementation of the Convention's provisions on the protection and preservation of the marine environment.'<sup>143</sup> Under the resolution adopting the initiative, ITLOS provided that the Chamber would be available to deal with disputes relating to the marine environmental provisions of the *LOS Convention*, disputes arising out of special conventions and agreements concerning the marine environment referred to in Article 237 of the *LOS Convention*, and disputes under any other relevant agreement which confers jurisdiction on the Tribunal.<sup>144</sup>

In sum, the system of environmental dispute settlement contained in Part XV is flexible and comprehensive. It provides for the compulsory settlement of most marine environmental disputes arising out of the *LOS Convention* while allowing states a choice of institution for resolving such cases. At the same time, by ensuring that ITLOS possesses residual jurisdiction to prescribe provisional measures it allows the Tribunal to intervene promptly to prevent environmental damage. In many respects it is therefore a model for dispute settlement mechanisms in multilateral environmental treaties more generally.<sup>145</sup>

## E *World Trade Organisation*

### (a) *The Environment/Trade Interface*

The vexed relationship between international economic law and international environmental law remains the subject of extensive public and scholarly debate. The central tension in the interaction between the two fields is the extent to which the imposition of trade restrictions on environmental grounds is compatible with general rules that seek to promote the liberalisation of international trade. As Jackson explains, this conflict between economy and ecology arises from two competing policy objectives: the protection of the environment on the one hand and the promotion of 'world economic welfare,' through free trade, on the other.<sup>146</sup> The interaction between trade liberalisation and environmental protection agendas has been played out in several international adjudicative bodies, most prominent among them being the World Trade Organisation's ('WTO') dispute settlement system.

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<sup>142</sup> International Tribunal for the Law of the Sea, *Resolution on the Chamber for Marine Environment Disputes* (2002) <<http://www.itlos.org>> at 1 July 2005.

<sup>143</sup> Mensah, above n 125, 4.

<sup>144</sup> International Tribunal for the Law of the Sea, above n 142.

<sup>145</sup> See J W Kindt, 'Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea' (1989) 22 *Vanderbilt Journal of Transnational Law* 1097.

<sup>146</sup> John H Jackson, *The Jurisprudence of GATT and the WTO* (2000) 414.

(b) *The WTO Dispute Settlement Understanding*

The WTO is the pre-eminent international trade organisation, and now has 148 members. Other important, but less globally significant, trade organisations include regional regimes such as the *1992 North American Free Trade Agreement* ('NAFTA'), and the European Community, together with a growing array of bilateral free trade arrangements.

The WTO was established in 1995<sup>147</sup> and is responsible for administering the trade rules found in the *1947 General Agreement on Tariffs and Trade*<sup>148</sup> ('GATT') and related instruments. One of the most important features of the WTO is its dispute settlement system, established by the *1994 Understanding on Rules and Procedures Governing the Settlement of Disputes*<sup>149</sup> ('DSU'). Three core institutions make up the WTO dispute settlement system: the Dispute Settlement Body ('DSB'), ad hoc Panels and the standing Appellate Body. Membership of the DSB, the WTO's political body, comprises representatives from all WTO members, and it is ultimately responsible for the administration of the dispute settlement system.

Disputes between WTO members are referred first to consultations<sup>150</sup> and, where no settlement is reached, a state may request adjudication by an ad hoc Panel.<sup>151</sup> The possibility of a review on legal grounds then lies to an Appellate Body, which is made up of seven permanent members, three of whom will be appointed to hear the case.<sup>152</sup> Although Panel and Appellate Body reports are themselves non-binding, they must be complied with once adopted by the DSB. As adoption is automatic, unless the DSB unanimously agrees to reject a report, the *DSU* therefore effectively establishes a compulsory system of adjudication for disputes. This is a major development from the *GATT* system in which panel recommendations only acquired binding force when there was consensus among *GATT* members in favour of their adoption.

The jurisdiction of the Panels and the Appellate Body is restricted to matters arising out of the 'covered agreements',<sup>153</sup> which are concerned with trade issues. Nonetheless there are several avenues for norms of international environmental law to be relevant to the deliberations of Panels and the Appellate Body. Principal among these is by way of interpreting WTO rules. Article 3.2 of the *DSU* provides that the *GATT* and other

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<sup>147</sup> *1994 Marrakesh Agreement Establishing the World Trade Organisation* ('Marrakesh Agreement').

<sup>148</sup> See now the *Marrakesh Agreement*, annex 1A (*General Agreement on Tariffs and Trade*) ('GATT 1994').

<sup>149</sup> *Marrakesh Agreement*, annex 2.

<sup>150</sup> *Ibid* art 4.

<sup>151</sup> *Ibid* art 6.

<sup>152</sup> *Ibid* art 17.

<sup>153</sup> *Ibid*, appendix 1.

covered agreements are to be construed 'in accordance with customary rules of interpretation of public international law', and in *United States – Standards for Reformulated and Conventional Gasoline*<sup>154</sup> the Appellate Body held that the '*General Agreement* is not to be read in clinical isolation from public international law.'<sup>155</sup>

On account of its sophisticated and frequently-used adjudicative system, the WTO is regarded as one of the most highly judicialised international regimes.<sup>156</sup> Because of its record of effectiveness it has also been suggested as a possible model for compliance systems in international environmental law.<sup>157</sup> Regardless of whether this eventuates it is evident that given the widespread reach of international trade law, and the compulsory jurisdiction of the WTO's dispute settlement system, WTO Panels and the Appellate Body are likely to have a major impact upon the evolution of international environmental law. Indeed in recent decisions there are promising signs that WTO Panels and the Appellate Body are recognising the relevance of international environmental law to global trade issues, and are becoming fluent in dealing with questions of environmental law and policy.<sup>158</sup>

(c) *NAFTA and Other Trade Regimes*

The settlement of disputes under other trade regimes also has the potential to influence the development of international environmental law. Among these is the *NAFTA*, which is modelled in general terms upon the *GATT*. In the ordinary course of events, the three *NAFTA* parties (Canada, Mexico and the United States) may pursue a settlement of their trade disputes under either *NAFTA* or in the WTO system.<sup>159</sup> However, disputes involving certain health or environmental concerns may be required by a *NAFTA* party to be brought exclusively under the *NAFTA* dispute settlement regime.<sup>160</sup>

Several controversial environmental disputes have arisen under Chapter 11 of the *NAFTA*, which sets out protections for investment in *NAFTA* countries and provides for the arbitration of disputes concerning matters such as expropriation by a host state.

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<sup>154</sup> *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (1996) (Report of the Appellate Body).

<sup>155</sup> *Ibid* 16.

<sup>156</sup> Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (2002) 72-78.

<sup>157</sup> Steve Charnovitz, 'WTO Dispute Settlement as a Model for International Governance' in Alexandre Kiss, Dinah Shelton and Kanami Ishibashi (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 245, 253.

<sup>158</sup> For a discussion of these cases see Chapter 10.

<sup>159</sup> *NAFTA*, art 2005.1.

<sup>160</sup> *Ibid* art 2005.3 and art 2005.4.

Three of the disputes have concerned waste disposal facilities in Mexico,<sup>161</sup> while the remainder relate to domestic environmental regulations.<sup>162</sup>

A quasi-judicial procedure also exists under the *1993 North American Agreement on Environmental Co-operation* ('NAAEC') which was negotiated as a side agreement to *NAFTA*. Under the *NAAEC*, natural and legal persons, and non-governmental organisations, may lodge a complaint with the Commission on Environmental Cooperation that one of the parties 'is failing to effectively enforce its environmental law.'<sup>163</sup> Although limited in scope, this procedure is an important development in international environmental law, representing a form of 'supranational' adjudication that exists within a broader, supervisory, regime.<sup>164</sup>

## F *Court of Justice of the European Communities*

### (a) *European Union Environmental Law*

Following the conclusion of the *1997 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, environmental considerations were placed at the forefront of European Community law, although even without an express treaty mandate environmental protection had already been recognised by the Court of Justice of the European Communities ('ECJ') as one of the Community's 'essential objectives.'<sup>165</sup> Article 6 of the *Treaty Establishing the European Community* ('*EC Treaty*') now requires the integration of environmental protection in all Community policies and activities 'with a view to promoting sustainable development.'<sup>166</sup>

The ECJ, the principal judicial organ of the European Communities, has been responsible for creating a strong 'community of law'<sup>167</sup> by taking an expansive view of its function to ensure 'that in the interpretation and application of this Treaty the law is

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<sup>161</sup> *Azinian v United Mexican States* (2000) 39 ILM 537, *Waste Management Inc v United Mexican States* (2000) <<http://www.naftaclaims.com>> at 1 July 2005, *Metalclad Corp v United Mexican States* (2001) 401 ILM 36.

<sup>162</sup> Although several cases have been commenced, only one has proceeded to arbitration on the merits: *S D Myers Inc v Canada* (2002) <<http://ita.law.uvic.ca/documents/SDMyersFinalAward.pdf>> at 1 July 2005.

<sup>163</sup> *NAAEC*, art 14. See generally Kal Raustiala, 'Citizen Review and Treaty Review in the NAAEC' in David L Markell and John H Knox (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 256.

<sup>164</sup> John H Knox 'A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission' (2001) 28 *Ecology Law Quarterly* 1, 12.

<sup>165</sup> *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées* (C-240/83) [1985] ECR 531.

<sup>166</sup> In relation to the environmental provisions of the draft Constitution for Europe see Peter Beyer et al, 'The Draft Constitution for Europe and the Environment' (2004) 13 *European Environmental Law Review* 218.

<sup>167</sup> Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273.

observed.<sup>168</sup> Since 1988 the ECJ has been assisted in its community-building efforts by the Court of First Instance ('CFI').

*(b) The Environmental Jurisdiction of the ECJ*

The ECJ has jurisdiction over cases brought by the Community against member states for breaches of Community law (the 'infringement procedure'),<sup>169</sup> claims brought against Community institutions,<sup>170</sup> and in relation to requests by domestic courts of member states for preliminary ruling on questions of Community law (the 'preliminary reference' procedure).<sup>171</sup> The CFI has coterminous jurisdiction, with the exception of preliminary rulings. Environmental cases have been brought before the ECJ under all three heads of jurisdiction. Importantly, natural and juridical persons may bring claims concerning environmental questions against Community institutions (the Council, Commission, Parliament and the European Central Bank).<sup>172</sup>

In several hundred cases the European Commission has commenced proceedings against member states for breaching environmental obligations under Community law.<sup>173</sup> In this way the Commission has been able to call upon the assistance of the judicial organ of the Community in order to ensure compliance with the environmental protection provisions of Community law.<sup>174</sup> The ECJ has also reviewed the legality of acts of Community institutions in relation to environmental matters. In addition, under its jurisdiction to issue preliminary rulings on the interpretation and application of Community law, the ECJ has issued decisions construing environmental provisions of EC law.<sup>175</sup>

The ECJ is perhaps the most effective among international courts and tribunals by virtue of its high degree of integration in the European legal system and the acceptance

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<sup>168</sup> *EC Treaty*, art 220.

<sup>169</sup> *Ibid* arts 226 and 227.

<sup>170</sup> *Ibid* art 230.

<sup>171</sup> *Ibid* art 234.

<sup>172</sup> *Ibid* arts 230 and 232

<sup>173</sup> See for example *Commission of the European Communities v French Republic* (C-182/89) [1990] ECR I-4337 (action against France in relation to import permits for skins of a species of wildcat listed under *CITES*). See generally Peter G G Davies, *European Union Environmental Law* (2004) 83-91.

<sup>174</sup> It should be noted that while international environmental agreements to which the Community is a party form an integral part of European Community law, the Commission has adopted a policy of not monitoring the implementation by member states of these agreements: Ellen Hey, 'The European Community's Courts and International Environmental Agreements' (1998) 7 *Review of European Community and International Environmental Law* 4, 7. Krämer has argued that the Commission does have the competence to take steps against member states to ensure implementation of international environmental agreements to which the Community is a party: Ludwig Krämer, 'The Implementation of Environmental Laws by the European Economic Communities' (1991) 34 *German Yearbook of International Law* 1, 44-46.

<sup>175</sup> *Establissemments Armand Mondiet SA v Armement Islais SARL* (C-405/92) [1993] ECR I-6133 (concerning effect of European Community ban on import of driftnet fishing nets on contractual obligations).

of its expanding role by member states. It has been a major driving force behind the development of European environmental law<sup>176</sup> and in many respects is a model for efficacious adjudication of environmental and other international disputes. As Sands has argued:

The ECJ has recognized the place which environmental protection has in the Community legal order. It has given (on occasion) environmental protection objectives an equal (or occasionally greater) weight over entrenched economic and trade objectives. And it has demonstrated a willingness to recognise and act upon some of the special characteristics of environmental issues.<sup>177</sup>

### G *Human Rights Courts and Tribunals*

Sometimes overlooked in international environmental law is the contribution made by regional human rights tribunals and international human rights bodies. Although most international environmental instruments avoid the use of rights-based language, and the notion of environmental rights is underdeveloped, environmental concerns have increasingly been pursued through international human rights law and institutions. By using the vocabulary of rights, both procedural and substantive, litigants have been able to bring essentially environmental claims before established human rights complaints procedures.<sup>178</sup>

Although there are legitimate concerns as to the appropriateness of transforming environmental demands into the inherently anthropocentric terminology of human rights,<sup>179</sup> safeguarding human rights and preserving ecosystems are often complementary objectives. Moreover in the absence of mechanisms that provide access for natural persons to claim satisfaction for environmental harm, human rights courts and other quasi-judicial bodies often present opportunities where none other exist for pursuing states for failing to protect the environment.<sup>180</sup> The growing body of human

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<sup>176</sup> Sands, 'International Environmental Litigation and its Future', above n 103, 1626; Alec Stone Sweet and Markus Gehring, 'Environmental Protection' in Alec Stone Sweet, *The Judicial Construction of Europe* (2004) 199.

<sup>177</sup> Philippe Sands, 'The International Court of Justice and the European Court of Justice' in Jacob Werksman (ed), *Greening International Institutions* (1996) 227.

<sup>178</sup> Dinah Shelton, 'The Environmental Jurisprudence of International Human Rights Tribunals' in Romina Picolotti and Jorge Daniel Taillant (eds), *Linking Human Rights and the Environment* (2003) 1, 1; Dinah Shelton, 'The Use of Human Rights Tribunals for Environmental Protection' (Paper presented at the 5th Annual Symposium of the International Centre for Environmental Compliance Assessment, Takamatsu, Japan, 13 December 2003).

<sup>179</sup> Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Alan E Boyle and Michael R Anderson, *Human Rights Approaches to Environmental Protection* (1996) 72. For a more general discussion of anthropocentric rationales for environmental protection see Alexander Gillespie, *International Environmental Law Policy and Ethics* (1997).

<sup>180</sup> Shelton, 'The Environmental Jurisprudence of International Human Rights Tribunals', above n 178, 2; Romina Picolotti and Sofia Bordenave, 'The Enforcement of Environmental Law from a Human Rights Perspective' (2003) 3 *Sustainable Development Law and Policy* 11, 11.

rights case law addressing environmental concerns also offers a potentially rich vein of jurisprudence for the development of international environmental law, although the distinctiveness of human rights discourse makes difficult the extrapolation of rules generally applicable in the environmental context.<sup>181</sup>

## H *International Criminal Court*

The great strength of the criminal law model of environmental regulation is that it applies directly to individuals, making them answerable for environmentally harmful activities. Individuals and corporations causing environmental damage have long been subject to criminal sanctions under domestic legal systems, and there have been efforts in some regional contexts to adopt international instruments that strengthen the protections provided under domestic criminal law.<sup>182</sup>

However, notwithstanding the benefits of the criminal law approach on both the domestic and international planes,<sup>183</sup> there have been only tentative steps towards the establishment of an international legal or institutional framework for the criminalisation of crimes against the environment. For the most part these have been limited to the criminalisation of certain acts committed during armed conflict.<sup>184</sup> The jurisdiction of the recently established ICC is no exception in this regard.

### (a) *The Jurisdiction of the ICC Over Environmental Cases*

The *Rome Statute* refers to environmental crimes only in the context of war crimes.<sup>185</sup> Recognising the need to expand international humanitarian law in order to respond to serious environmental harm, Article 8(2)(b)(iv) of the *Rome Statute* provides that a war crime will be committed where there are 'violations of the laws and customs applicable in international armed conflict' through the intentional launching of an attack with the knowledge that it will cause 'widespread, long-term and severe damage to the natural

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<sup>181</sup> For a discussion of these cases see Chapter 10.

<sup>182</sup> *1998 Convention for the Protection of the Environment through Criminal Law*.

<sup>183</sup> Brownlie notes that if relevant environmental crimes attracted universal jurisdiction it would be possible to regulate, in domestic legal systems, many problems involving extraterritorial environmental degradation: Ian Brownlie, 'A Survey of International Customary Rules of Environmental Protection' (1973) 13 *Natural Resources Journal* 179, 183.

<sup>184</sup> Note however art 2(1)(b) of the *Draft Comprehensive Convention on Terrorism* which provides that a general offence of terrorism will be committed where a person causes 'serious damage' to 'the environment', 'when the purpose of the conduct... is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.' The text of this draft instrument is included in the annexes to the *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996* UN Doc A/57/37 (2002). See generally Tim Stephens, 'International Criminal Law and the Response to International Terrorism' (2004) 27 *University of New South Wales Law Journal* 454, 462-466.

<sup>185</sup> See generally Peter Sharp, 'Prospects for Environmental Liability in the International Criminal Court' (1999) 18 *Virginia Environmental Law Journal* 217; Michael N Schmitt, 'Humanitarian Law and the Environment' (2002) 28 *Denver Journal of International Law and Policy* 265.



environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.’

This formulation is an important broadening of Article 20(g) of the International Law Commission’s *Draft Code of Crimes Against the Peace and Security of Mankind*<sup>186</sup> under which a war crime would have been committed where the damage to the natural environment ‘gravely prejudice[d] the health or survival of the population.’ The *Rome Statute* formula is essentially consistent with the ICJ’s *Nuclear Weapons Advisory Opinion* in which it was held that international environmental law indicated ‘important environmental factors that are properly to be taken into account in the context of implementation of the principles and rules of the law applicable in armed conflict.’<sup>187</sup>

*(b) The Complementary Character of the ICC’s Jurisdiction*

Although no prosecution has ever been mounted under international criminal law for environmental damage,<sup>188</sup> the existence of the ICC now makes it possible for international environmental crimes to be subject to adjudication by an international court. However, it must be noted that the ICC’s jurisdiction is limited in several significant respects. The ICC may exercise jurisdiction where either (a) the state on the territory of which the crime was committed or (b) the state whose national is accused of committing the crime, has accepted the jurisdiction of the ICC.<sup>189</sup> Moreover under the *Rome Statute* national courts remain the primary mechanisms for dealing with the crimes over which the ICC has jurisdiction, as the ICC is ‘complementary’ to national criminal jurisdictions.<sup>190</sup> A case can only be brought before the ICC if a state with jurisdiction is unwilling or unable genuinely to investigate or prosecute the case.<sup>191</sup>

III EXPANDING THE PATCHWORK:  
AN INTERNATIONAL COURT FOR THE ENVIRONMENT?

The deficiencies apparent in current arrangements for the adjudication of international environmental disputes, and the success of specialist environmental

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<sup>186</sup> *Report of the International Law Commission, 48th Session, UN Doc A/51/10 (1996).*

<sup>187</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 243.

<sup>188</sup> Note, however, the work of the United Nations Compensation Commission in relation to environmental damage caused by Iraq during its invasion of Kuwait in 1990. See <<http://www2.unog.ch/uncc/>> at 1 July 2005.

<sup>189</sup> *Rome Statute*, art 12.

<sup>190</sup> *Ibid* Preamble, [10].

<sup>191</sup> *Ibid* art 17.

tribunals at a domestic level,<sup>192</sup> have prompted consideration of the feasibility of a dedicated international court for the environment ('ICE').

(a) *Background*

Schemes for an ICE are reflective of an understandable impulse to enhance institutional control of the implementation and enforcement of international environmental law. Proposals for an international environmental organisation may be traced to the early twentieth century and there has been endless debate since that time concerning the need for an international environmental agency.<sup>193</sup> Plans for an ICE are of much more recent origin, and are most closely associated with Judge Amedeo Postiglione<sup>194</sup> of the Corte Suprema di Cassazione, and founder of the International Court for the Environment Foundation ('ICEF').<sup>195</sup>

The first substantial blueprint for an ICE was drawn-up in 1989, at a congress sponsored by ICEF and convened at the National Academy of Lincei in Rome. That congress recommended, among other things, that an international environmental court accessible to states, organs of the United Nations, and private citizens be established and have jurisdiction to consider disputes relating to breaches of a proposed covenant on the environment.<sup>196</sup> Subsequently in 1992 a *Draft Convention for the Establishment of an International Court for the Environment* was prepared by Judge Postiglione and presented to the United Nations Conference on Environment and Development ('UNCED').<sup>197</sup> However, the proposal was ultimately removed from the UNCED agenda,<sup>198</sup> and the notion of a dedicated environmental court was the subject of criticism

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<sup>192</sup> For a discussion of the Australian experience in relation to the operation of dedicated planning and environment courts see Paul Stein, 'A Specialist Environmental Court: An Australian Experience' in David Robinson and John Dunkley (eds), *Public Interest Perspectives in Environmental Law* (1995) 256. See also Paul Stein, 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law' (1996) 13 *Environmental Planning Law Journal* 179.

<sup>193</sup> Alexander Gillespie, *The Illusion of Progress: Unsustainable Development in International Law and Policy* (2001) 138. For a discussion of proposals for a Global Environmental Organisation ('GEO') to counterbalance the WTO see, among others, Fiona MacMillan, *WTO and the Environment* (2001) 272; Steve Charnovitz, 'A World Environment Organization' (2000) 27 *Columbia Journal of Environmental Law* 323. Although no dedicated international environmental organisation has yet been created, agencies such as UNEP and the Commission on Sustainable Development ('CSD') fulfill some of the functions that an environmental organisation having the full status as an organ of the United Nations would likely perform.

<sup>194</sup> See Amedeo Postiglione, *The Global Environmental Crisis: The Need for an International Court of the Environment* (1996).

<sup>195</sup> Since 1991 the Corte Suprema di Cassazione has provided support to ICEF via a dedicated secretariat established in Rome for this purpose.

<sup>196</sup> Amedeo Postiglione, 'A 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, 327.

<sup>197</sup> <<http://www.icef-court.org/icef/presentation/statute.htm>> at 1 July 2005.

<sup>198</sup> J L Dunoff, 'Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes' (1994) 15 *Michigan Journal of International Law* 1043, 1107.

by Sir Robert Jennings, then President of the ICJ, in an address to the Conference.<sup>199</sup> A revised draft treaty for an ICE was published in 1999.<sup>200</sup>

Subsequent to UNCED there has been no strong support among states for the ICE project, and no proposal for such a body was considered by the 2002 World Summit on Sustainable Development at Johannesburg. Undeterred by the lukewarm response, ICE proponents have suggested that, pending the establishment of an ICE, the PCA should be the main forum for the resolution of international environmental disputes.<sup>201</sup> ICE enthusiasts have also sought to establish a private forum for international environmental dispute settlement,<sup>202</sup> but this body has attracted little business.

(b) *The ICE Project*

There is some lack of clarity as to the objectives that an ICE would serve, however the chief assumption appears to be that the ICE would play an enforcement role, holding states and other actors to account for breaches of international environmental law. The ICE would be open to all non-state actors and would allow individuals to file complaints regarding alleged violations of their environmental rights.<sup>203</sup> Additionally, some advocates of an ICE contend that the court could have a criminal jurisdiction to prosecute individuals for grave crimes against the environment.<sup>204</sup>

In addition to having a role in enforcement, it is also suggested by some proponents that an ICE should be the primary forum for resolving international environmental disputes.<sup>205</sup> On the premise that environmental disputes possess a distinctive character it is contended that a dedicated environmental court with appropriately qualified judges and the capacity to evaluate complex matters of environmental law, policy and science,

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<sup>199</sup> Robert Jennings, 'Need for an Environmental Court?' (1992) 20 *Environmental Policy and Law* 312.

<sup>200</sup> For a summary of the statute see Peggy Rogers Kalas, 'International Environmental Dispute Resolution and the Need for Access by Non-State Entities' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 191, 235-241.

<sup>201</sup> Alfred Rest, 'The Indispensability of an International Environmental Court' (1998) 7 *Review of European Community and International Environmental Law* 63, 65-66; M Vespa, 'An Alternative to an International Environmental Court? The PCA's Optional Arbitration Rules for Natural Resources and/or the Environment' (2003) 2 *The Law and Practice of International Courts and Tribunals* 295.

<sup>202</sup> The International 'Court' of Environmental Arbitration and Conciliation, established in Mexico in 1994, is an NGO that seeks to assist in the resolution of environmental disputes submitted by states and natural or legal persons: <<http://iceac.sarenet.es/>> at 1 July 2005. See Eckard Rehbinder and Demetrio Loperena, 'Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation' (2001) 31 *Environmental Policy and Law* 282.

<sup>203</sup> Kenneth F McCallion and H Rajan Sharma, 'Environmental Justice Without Borders: The Need for an International Court of the Environment To Protect Fundamental Human Rights' (2000) 32 *George Washington Journal of International Law and Economics* 351.

<sup>204</sup> Kenneth F McCallion, 'International Environmental Justice: Rights and Remedies' (2002-2003) 26 *Hastings International and Comparative Law Review* 427, 436; Alfred Rest, 'Need for an International Court for the Environment?' (1994) 24 *Environmental Policy and Law* 173, 173-174.

<sup>205</sup> Rest, 'The Indispensability of an International Environmental Court', above n 201, 64.

would offer significant advantages over existing tribunals. With such specialised capabilities, and with expansive personal and subject-matter jurisdiction, ICE advocates anticipate that it would be in a unique position to contribute to the development of an ecologically sensitive jurisprudence. Rest suggests that this contribution could be made directly by the court resolving environmental disputes, and also through a procedure akin to the preliminary ruling mechanism by which national courts may turn to the ECJ for an authoritative interpretation upon issues of European Community law.<sup>206</sup>

The ICE could be established within,<sup>207</sup> or outside, the United Nations system. As regards its relationship to other dispute settlement procedures, some suggest that, much like the ICC in relation to criminal matters,<sup>208</sup> an ICE would have only residual or complementary jurisdiction in relation to environmental disputes. Others suggest that it should be at the forefront of enforcement, available even where domestic remedies have not been exhausted,<sup>209</sup> and situated at the apex of all courts operating in field of international environmental law.

*(c) A Critical Appraisal of the ICE Project*

There appears much to recommend an ICE to the extent that it raises public awareness of the centrality of environmental policy to many issues of governance,<sup>210</sup> and achieves even a limited number of the objectives that its proponents seek to realise.

However, existing proposals for an ICE are rendered problematic because they are overly ambitious. They imagine that an ICE would be central to guarantees of an environmental 'rule of law', and for developing international environmental law to meet changing needs.<sup>211</sup> It is also suggested that a permanent environmental court could be endowed with contentious, criminal and appellate jurisdiction, and entertain complaints brought directly by individuals and traditional inter-state environmental disputes. In some respects the ICE project therefore goes so far (advocating, for instance, a constant

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<sup>206</sup> Alfred Rest, 'Enhanced Implementation of the Biological Diversity Convention by Judicial Control' (1999) 29 *Environmental Policy and Law* 32, 37.

<sup>207</sup> Audra E Dehan, 'An International Environmental Court: Should There Be One?' (1992) 3 *Touro Journal of Transnational Law* 31, 54.

<sup>208</sup> *Rome Statute*, art 17.

<sup>209</sup> Rest, 'Enhanced Implementation of the Biological Diversity Convention by Judicial Control', above n 206.

<sup>210</sup> Justice Stein argues that this has been an important consequence of the establishment of specialist environmental courts in some Australian jurisdictions: Stein, above n 192, 263.

<sup>211</sup> Rest, 'Need for an International Court for the Environment?', above n 204, 173-184. See also McCallion and Sharma, above n 203, who make the bold claim (at 365) that '[o]nly an [International Environmental Court] can effectively address global issues and disputes relating to the degradation of the planet's environmental resources, such as depletion of the ozone layer, the greenhouse effect, the dumping of hazardous wastes at sea, nuclear power and chemical hazards, deforestation, desertification, irresponsible genetic manipulation, and ocean and atmospheric pollution.'

supervisory role<sup>212</sup>) that the proposed court bears little resemblance to a judicial institution at all. The ICE project is therefore somewhat quixotic. It seeks to transpose the successful domestic experience of environmental adjudication (through planning tribunals, criminal courts and other forums) to the international plane without accounting for the significant differences between these two systems of law or the character of international relations. Accordingly it represents, to borrow from Allott, a 'naïve constitutional extrapolation (institutions which are effective nationally can surely be effective internationally).'<sup>213</sup>

It is certainly the case that existing arrangements suffer from several weaknesses. However, it is by no means clear that some or all of these failings could be overcome in an ICE.<sup>214</sup> The jurisdictional limitations, and the restrictions on rights of participation, are arguably better addressed through progressive reform or adaptation of existing bodies that already command support from states,<sup>215</sup> rather than through the establishment of a fresh institution in relation to which states have not yet expressed confidence. An additional difficulty is that proposals for an ICE rest on the questionable assumption that environmental disputes possess a quality or character that allows them to be clearly delimited from other types of dispute, and that they are therefore best dealt with in a specialised body.<sup>216</sup> In reality, environmental disputes are almost always closely intertwined with other issues, and with other sub-disciplines of international law.<sup>217</sup> They are 'likely to be part of more complex disputes involving questions of trade, production, investment, rights of the individual, policy of international organizations and other matters that are inseparable from the general body of international law.'<sup>218</sup> Consequently, an international tribunal comprising only experts in international environmental law may attract little business.<sup>219</sup>

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<sup>212</sup> Rest, 'Enhanced Implementation of the Biological Diversity Convention by Judicial Control', above n 206, 37.

<sup>213</sup> Philip Allott, *The Health of Nations: Society and Law Beyond the State* (2002) 59.

<sup>214</sup> Sean D Murphy, 'Does the World Need a New International Environmental Court?' (2000) 32 *George Washington Journal of International Law and Economics* 333, 333; Okowa, above n 99, 170-171.

<sup>215</sup> Judge Jessup made several suggestions in this respect, including that the services and facilities of the ICJ could be lent to an ad hoc environmental tribunal in much the same way as the Internal Bureau of the PCA assists in the conduct of arbitrations outside of the PCA system: Jessup, above n 96, 266. But note that Boer argues that opening the ICJ to allow standing for non-state parties 'may well be insurmountable': Ben Boer, 'The Globalisation of Environmental Law: The Role of the United Nations' (1995) 20 *Melbourne University Law Journal* 101, 121.

<sup>216</sup> Okowa, above n 99, 158. On the definition of an 'international environmental dispute' see Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach*, above n 10, 4-33.

<sup>217</sup> Ellen Hey, *Reflections on an International Environmental Court* (2000) 4-9.

<sup>218</sup> Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society* (2004) 83-84.

<sup>219</sup> Philippe Sands, 'International Environmental Litigation and Its Future', above n 103, 1638 (given the almost inevitable intertwining of environmental and other issues 'an international tribunal composed solely of experts in international environmental law might not fare well in attracting cases... what is needed is a body of

The value of any proposed ICE must also be questioned on the grounds that it could add a further layer of institutional complexity to the patchwork of jurisdictions already operating in the environmental field, with all the implications this carries both for increased jurisdictional competition and conflict,<sup>220</sup> and for the possible 'fragmentation' of international law.<sup>221</sup> It therefore may be more practicable, and more consistent with the notion of integration, which emphasises the need to incorporate policies of sustainable development in all aspects of governance,<sup>222</sup> that the capacity of existing courts to deal with environmental disputes be improved wherever possible.

#### IV CONCLUSION

In 1987 the World Commission on Environment and Development recommended that binding dispute settlement was 'needed not only as a last resort to avoid prolonged disputes and possible serious environmental damage, but also to encourage and provide an incentive for all parties to reach agreement within a reasonable time.'<sup>223</sup> It has been seen in this Chapter that since the *Brundtland Report* there has been a significant expansion in the architecture of adjudication in international environmental law, driven both by the inclusion of adjudication as a dispute settlement option in environmental agreements and by the proliferation of international courts and tribunals.

Whereas once the only international judicial bodies competent to determine environmental disputes were arbitral panels established on an ad hoc basis, a variety of courts and tribunals now exist with jurisdiction extending to environmental controversies. These bodies include courts and tribunals with general competence, and also institutions with more focussed subject-matter jurisdiction. In relation to some courts, including the ICJ and the PCA, considerable efforts have also been expended in enhancing their capacity to resolve environmental cases. This is in recognition of the particular challenges faced in resolving complex environmental cases involving multiple parties and contentious scientific evidence.

However, despite these very substantial developments there has been relatively little progress towards the creation of comprehensive mechanisms with broad and

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judges with a mix of general and specialized expertise.'). Boyle has argued in the same vein in relation to the *Gabčíkovo-Nagyymaros Case* [1997] ICJ Rep 7 that given the interaction of international environmental law, the law of international watercourses, and the law of treaties in that case, a prudent legal advisor would have been compelled to recommend resort to the ICJ in plenary rather than to the specialist environmental chamber which may not be capable of dealing with these intersections in the law: Boyle, above n 108.

<sup>220</sup> Susan M Hinde, 'The International Environmental Court: Its Broad Jurisdiction as a Possible Flaw' (2003) 32 *Hofstra Law Review* 727. See also Chapter 9.

<sup>221</sup> Hey, *Reflections on an International Environmental Court*, above n 217, 4-9. See also Chapter 10.

<sup>222</sup> See especially *Rio Declaration*, above n 11, principle 4.

<sup>223</sup> World Commission on Environment and Development, above n 15, 378.

compulsory jurisdiction over environmental disputes. Although proponents of an international court for the environment seek to address this perceived problem with a dedicated tribunal possessing general jurisdiction, it was suggested that the merits of such proposals are open to question on several grounds.

### 3

## The Place of Adjudication in the Evolution of Institutions for Compliance Control

The growing collection of courts and tribunals operating in the environmental field do not exist in isolation but rather operate alongside a range of other institutions that have some role to play in resolving environmental disputes and enforcing environmental obligations. The objective of this Chapter is to assess the place of adjudication in this system. Drawing on international relations theory it seeks to understand the evolution of mechanisms of compliance control in international environmental law from an initial dependence upon intergovernmental dispute settlement systems to the more recent adoption of a ‘supervisory’<sup>1</sup> approach to compliance through mechanisms such as permanent treaty secretariats, regular meetings of treaty parties and non-compliance procedures (‘NCPs’).

### I KEY CONCEPTS AND PROCESSES

#### A ‘Implementation’, ‘Compliance’, ‘Enforcement’ and ‘Dispute Settlement’

Compliance with international environmental law is predicated upon the implementation by states of the environmental obligations to which they are bound. Implementation involves several dimensions, including the establishment by states of relevant domestic laws and procedures, the enforcement of those laws, and the fulfilment of obligations to relevant international institutions, such as reporting the steps taken domestically to comply with the regime.<sup>2</sup> When states discharge these obligations it is said that there has been compliance with the relevant norms of international environmental law.<sup>3</sup> However, any discussion of compliance must acknowledge that it is not synonymous with regime effectiveness.<sup>4</sup> When there are deficiencies of regime design, an environmental treaty may be fully implemented but not achieve demonstrable improvements in environmental outcomes while on the other hand substantial, but not complete, compliance with an ambitious environmental treaty may produce better than

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<sup>1</sup> Alan E Boyle, ‘Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions’ (1991) 3 *Journal of Environmental Law* 229, 229.

<sup>2</sup> Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) 174.

<sup>3</sup> Rüdiger Wolfrum, ‘Means of Ensuring Compliance with and Enforcement of International Environmental Law’ (1998) 272 *Recueil des Cours* 9, 29-30.

<sup>4</sup> Edith Brown Weiss, ‘Understanding Compliance with International Environmental Agreements: The Baker’s Dozen Myths’ (1999) 32 *University of Richmond Law Review* 1555, 1562; Antonia Handler Chayes, Abram Chayes and Ronald B Mitchell, ‘Active Compliance Management in Environmental Treaties’ in Winfried Lang (ed), *Sustainable Development and International Law* (1995) 75, 76.



expected results. Nonetheless, compliance with environmental regimes generally correlates with improved environmental protection, and hence the legitimate interest of the international community in promoting greater compliance levels.

When states fail to fulfil their environmental obligations attention shifts to strategies of enforcement. Enforcement refers to ‘a formal, legally circumscribed reaction to a breach of an obligation’<sup>5</sup> and may be horizontal (via inter-state dispute settlement, the traditional approach of public international law) or vertical (in which there is a reliance on institutions, such as domestic courts, possessing mandatory jurisdiction).<sup>6</sup> For reasons that reflect both the nature of environmental problems and the character of international relations, effective strategies for inducing compliance with international environmental law rely increasingly on systems for supervising and managing situations of potential non-compliance, rather than imposing sanctions *ex post facto*. Although a comprehensive examination of international relations theory is well beyond the scope of this thesis, an overview of the main theoretical approaches helps to explain why there has been this shift from confrontational to more cooperative mechanisms of compliance control.

## B *Lessons from International Relations Theory*

### (a) *Realist, Institutional and Constructivist Perspectives on Compliance*

The compliance question is viewed by international relations scholars through a variety of lenses, although there are three dominant types: realism, institutionalism, and constructivism.<sup>7</sup> For realist theorists international law has very little, or nil, effect on state behaviour, as realism posits that international relations are anarchic and that states are solely concerned with the pursuit of material power.<sup>8</sup> This is true of both the rules and institutions of international law, and particularly when security or other vital interests are threatened. Hence from a realist perspective, international regimes and supporting institutions, such as courts and tribunals,<sup>9</sup> are mostly incapable of producing any discernible improvement in compliance.

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<sup>5</sup> Martti Koskenniemi, ‘New Institutions and Procedures for Implementation Control and Reaction’ in Jacob Werksman, (ed), *Greening International Institutions* (1996) 236, 237.

<sup>6</sup> Johanna Rinceanu, ‘Enforcement Mechanisms in International Environmental Law: Quo Vadunt?’ (2001) 15 *Journal of Environmental Law and Litigation* 147, 150-156.

<sup>7</sup> Christian Reus-Smit, ‘The Politics of International Law’ in Christian Reus-Smit (ed), *The Politics of International Law* (2004) 14, 15. See generally also P Alford, ‘The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance’ (2000) *ASIL Proceedings* 160, 163.

<sup>8</sup> See the discussion in Jack Donnelly, *Realism and International Relations* (2000) 132.

<sup>9</sup> Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1951) 224 (‘[I]nternational adjudication is unable to impose effective restraints upon the struggle for power on the international scene.’).

By contrast institutionalist (or ‘regime’) theorists maintain the view that law and legal bodies (which they term ‘institutions’ or ‘regimes’) can shape international relations.<sup>10</sup> Most variants of institutionalist theory share with realism the view that states are the primary international actors, and that they act in an essentially rational manner in seeking to maximise their interests. However, whereas for realists international law is a chimera, or at most epiphenomenal of power relations,<sup>11</sup> institutionalists argue that states rationally pursuing their interests will agree to be bound by international legal commitments, compliance with which they take seriously.<sup>12</sup>

A sizeable body of institutionalist scholarship now exists which seeks to explain the reasons for the success or failure of environmental regimes.<sup>13</sup> An increasing focus in this literature is not only upon regime formation, or the rules of the regime itself, but also the institutional architecture for regime implementation. It suggests that while environmental agreements themselves may allow the parties to achieve objectives that they could not attain individually, appropriate bodies that complement those agreements may further assist the parties in realising their shared goals. In this respect institutionalist commentators generally argue that the bodies best able to promote compliance are not necessarily confrontational methods of dispute settlement, but are instead institutions that can further enhance the variables associated with regime effectiveness, namely transparency, accountability, and co-operation among regime participants. Because of the focus of environmental regimes in solving problems of international cooperation, such ‘managerialist’ scholars have generally been sceptical of the relevance of the traditional mechanisms of dispute settlement to treaty compliance. Chayes et al observe in this respect:

Despite their alleged virtues, the [International] Court [of Justice] and binding arbitration have played a minor role in treaty compliance to date, and seem unlikely to do more in the future. Besides being costly, contentious, cumbersome, and slow – the usual defects of litigation – they

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<sup>10</sup> ‘Institutions’ or ‘regimes’ are defined by regime theorists as ‘persistent and connected sets of rules and practices that prescribe behavioural roles, constrain activity, and shape expectations.’: Robert O Keohane, Peter M Haas and Marc A Levy, ‘The Effectiveness of International Environmental Institutions’ in Robert O Keohane, Peter M Haas and Marc A Levy (eds), *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993) 3, 4-5.

<sup>11</sup> Benedict Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ (1997-1998) 19 *Michigan Journal of International Law* 345, 350-351.

<sup>12</sup> Beth A Simmons, ‘Compliance with International Agreements’ in Charlotte Ku and Paul F Diehl (eds), *International Law: Classic and Contemporary Readings* (2003) 181, 186.

<sup>13</sup> See in particular Edward L Miles et al (eds), *Environmental Regime Effectiveness: Confronting Theory With Evidence* (2002); Oran R Young (ed), *The Effectiveness of International Environmental Regimes* (1999); Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998); David G Victor, Kal Raustiala and Eugene B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998); Peter M Haas, Robert O Keohane and Marc A Levy (eds), *Institutions for Earth: Sources of Effective International Environmental Protection* (1993).

have the additional unattractive features of raising the political visibility of the problem and failing to be subject to party control.<sup>14</sup>

However, a recent and exciting body of institutional scholarship addressing the increased ‘legalisation’ of some international regimes has adopted a more positive view regarding the potential for courts and tribunals to operate as mechanisms of compliance control.<sup>15</sup> This scholarship develops a nuanced approach to the place of formal legal institutions in regime compliance, suggesting that there are reasons why courts could achieve good compliance outcomes in some regimes but not in others. There are, for instance, reasons why the dispute settlement system of the World Trade Organisation (‘WTO’) has been effective in promoting compliance with international economic law while the International Court of Justice (‘ICJ’) has not been used to great effect in protecting the global environment. These explanations go beyond the mere fact that the WTO has compulsory jurisdiction, while the ICJ’s mandatory application to disputes is far more limited, and concern the extent to which courts are closely integrated within a detailed and rules-based regime.

Scholarship on ‘legalisation’ is closely linked to liberal international relations theory, a recent strand of institutionalist thought. The main distinguishing feature of liberal theory is that it looks beyond the behaviour of states, the traditional focus of scholars of international relations and international law, to the activities of sub-state actors. For liberal theorists the way states behave is, at least in part, a function of their domestic political structures and the interests of actors within those structures. This has two main implications for environmental compliance. In the first place, liberal theorists contend that liberal democratic states are more likely to support the development of legal institutions to facilitate co-operation on issues of common concern,<sup>16</sup> such as environmental matters,<sup>17</sup> an argument that invokes a linkage between democratic politics and improved environmental protection.<sup>18</sup> The second implication stems from

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<sup>14</sup> Abram Chayes, Antonia Handler Chayes and Ronald B Mitchell, ‘Managing Compliance: A Comparative Perspective’ in Edith Brown Weiss and Harold K Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998) 39, 54.

<sup>15</sup> Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, ‘Legalized Dispute Resolution: Interstate and Transnational’ (2000) 54 *International Organization* 457. By ‘legalisation’ is meant an increased reliance upon binding legal rules and formal legal institutions such as courts and tribunals.

<sup>16</sup> See Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 *European Journal of International Law* 503.

<sup>17</sup> However, the ‘exceptionalism’ of the United States in relation to environmental treaties calls into question the descriptive power of liberal theory. See generally Jutta Brunnée, ‘The United States and International Environmental Law: Living with an Elephant’ (2004) 15 *European Journal of International Law* 617. As regards this and other empirical problems with the liberal claim see José Alvarez, ‘Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory’ (2001) 12 *European Journal of International Law* 183.

<sup>18</sup> Some liberal theories have argued that international courts are more likely to be effective as between liberal democratic states rather than non-liberal regimes: D S Sullivan, ‘Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Peace’ (1993) 81 *Georgetown Law Journal* 2389. See also

the emphasis that liberal theory places upon *domestic* structures of governance, including municipal courts and tribunals, in achieving transnational outcomes. This focus on ‘transgovernmentalism’ suggests that in addressing compliance issues attention should be shifted from international institutions to the domestic institutions of multiple liberal polities that can manage environmental problems crossing national borders much as they might manage those occurring exclusively within state boundaries.

The third lens through which questions of compliance are often viewed is constructivism. Constructivists, as with regime theorists, accept that international law may influence state behaviour, but dispute the view that international actors perceive their bargaining positions objectively. For constructivists the very identity of actors and perceptions as to their interests are shaped by the behaviour of other actors, by the content of legal norms, and by the decisions of international institutions.<sup>19</sup> International environmental law is therefore law partly because it is understood as such, and is not simply the aggregation of expressions of consent flowing from a rational calculus of interests. Some institutionalist scholars have observed in the same vein that compliant behaviour flows often from an acceptance of rules as legitimate, fair, just and authoritative (the ‘logic of appropriateness rather than the logic of countermeasures.’)<sup>20</sup> This would also seem to explain why some institutions, including some international courts and tribunals which enjoy authority in the eyes of the international community, can render decisions that attract compliance notwithstanding the absence of any direct enforcement machinery.

*(b) Implications for Compliance and Enforcement in International Environmental Law*

International relations theory therefore invites international environmental lawyers to examine closely the complex factors involved in making environmental regimes effective. In particular, regime theory and constructivism offer valuable lessons for the construction of an effective institutional architecture for compliance and enforcement.

First and foremost it suggests the need to distinguish compliance per se from compliance achieved through the operation of an environmental regime.<sup>21</sup> Factors external to a regime often contribute to a greater or lesser degree of apparent treaty observance. By way of example, changes to the context in which an environmental treaty operates (such as increased economic cost of an environmentally damaging

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Andrew Moravcsik, ‘Explaining International Human Rights Regimes: Liberal Theory and Western Europe’ (1997) 1 *European Journal of International Relations* 157. But see *contra* Alvarez, above n 17.

<sup>19</sup> Reus-Smit, above n 7, 21-22.

<sup>20</sup> Oran R Young, *The Institutional Dimensions of Environmental Change: Fit, Interplay and Scale* (2002) 40.

<sup>21</sup> Ronald B Mitchell, ‘Compliance Theory: An Overview’ in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law* (1996) 3, 5.

activity) may lead incidentally to greater ‘compliance’ with the treaty. Non-compliance will also often be traced to exogenous factors, the chief among these being lack of financial, administrative or technical capacity.<sup>22</sup> This has implications for the development of enforcement mechanisms<sup>23</sup> because among other things it means that in many circumstances capacity-building, especially for developing nations, will be far more effective than sanctions.<sup>24</sup>

Second, regime theorists advocate the importance of a ‘compliance system’, forming an integral part of multilateral environmental agreements, for responding to potential and actual problems of compliance.<sup>25</sup> Mitchell argues that three sub-systems make up a robust compliance system.<sup>26</sup> These are a ‘primary rule system’, a ‘compliance information system’, and a ‘non-compliance response system’. The primary rule system refers to the rules of an environmental treaty itself and its reach in terms of its subject matter and the actors it seeks to regulate. The compliance information system refers to rules and processes relating to identifying instances of treaty compliance and infractions. It encompasses all of the information-gathering and monitoring functions of environmental regimes that produce knowledge about environmental threats not otherwise available,<sup>27</sup> and expose the behaviour of regime participants to external scrutiny. The third element, the non-compliance response system, is composed of the rules, processes and institutions that may be invoked in response to situations of non-compliance.

Such mechanisms and procedures need not operate only after a violation of an environmental treaty (although many do). They may adopt a proactive stance, relying on the compliance information system, and any inherent powers of inspection and inquiry, to monitor the compliance by states with their obligations. Some non-compliance response systems may actively manage the spectrum of state behaviour between full compliance and non-compliance, continually measuring the performance of member states against the provisions of a treaty, and its aims and objectives. Treaty bodies,

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<sup>22</sup> Ibid 12.

<sup>23</sup> Ibid 11-12.

<sup>24</sup> Alternatively, less onerous requirements may be imposed upon developing countries. This is the rationale behind the notion of ‘common but differentiated’ responsibilities. See, eg, the 1992 *United Nations Framework Convention on Climate Change* (*Climate Change Convention*), arts 3(1) and 4(1). See generally Christopher D Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98 *American Journal of International Law* 276; Philippe Cullet, *Differential Treatment in International Environmental Law* (2003).

<sup>25</sup> Mitchell, above n 21, 16.

<sup>26</sup> Ibid 17.

<sup>27</sup> List and Rittberger describe this as one of the major positive consequences of international environmental regimes: Martin List and Volker Rittberger, ‘Regime Theory and International Environmental Management’ in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment* (1991) 85, 107.

secretariats or mechanisms such as NCPs, can all provide ongoing supervision of compliance issues in this way.

## II A COMPARATIVE ASSESSMENT OF MECHANISMS OF COMPLIANCE CONTROL

Having regard to this international relations scholarship, how do existing mechanisms of compliance control perform in international environmental law and, more specifically, what is the place of adjudication in this overall scheme? Beginning with domestic courts, this section addresses these questions.

### A Domestic Courts

Principles 10 and 13 of the *United Nations Declaration on Environment and Development*<sup>28</sup> ('*Rio Declaration*') emphasise the importance of administrative and judicial agencies at a domestic level for giving effect to national and international environmental laws.<sup>29</sup> Domestic courts and tribunals have a threefold role in international environmental law: in applying international standards domestically, in resolving claims arising from transboundary environmental damage,<sup>30</sup> and in influencing the development of international environmental law.<sup>31</sup>

Where international environmental law has been implemented domestically, municipal courts and other governmental bodies are often at the frontline of efforts to enforce environmental standards.<sup>32</sup> They may also be used to deal with transboundary environmental damage through equal access and civil liability regimes.<sup>33</sup> Civil liability treaties concluded to date follow a broadly similar approach of providing for strict liability, a compulsory insurance system, restricted choice of forum for litigation and recognition and enforcement of judgments in the courts of all parties. One of the

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<sup>28</sup> UN Doc A/CONF.151/5/Rev.1 (1992). Principle 10 provides that '[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level...Effective access to judicial administrative proceedings, including redress and remedy, shall be provided.' Principle 13 provides that 'States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.'

<sup>29</sup> See also the IUCN – World Conservation Union, *Draft International Covenant on Environment and Development* (3rd ed, 2004) art 54(1) which provides that states 'shall ensure the availability of effective civil remedies that provide for cessation of harmful activities as well as for compensation to victims of environmental harm *irrespective of the nationality or the domicile of the victims*' (emphasis added).

<sup>30</sup> See the *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, principles 4 and 6, *Report of the International Law Commission, 56th Session*, UN Doc A/59/10 (2004); *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, art 15, *Report of the International Law Commission, 53rd Session*, UN Doc A/56/10 (2001) ('*Draft Articles on the Prevention of Transboundary Harm*').

<sup>31</sup> Daniel Bodansky and Jutta Brunnée, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7 *Review of European Community and International Environmental Law* 11, 13.

<sup>32</sup> Alfred Rest, 'Enhanced Implementation of the Biological Diversity Convention by Judicial Control' (1999) 29 *Environmental Policy and Law* 32, 36.

<sup>33</sup> See in particular the 1974 *Nordic Convention on the Protection of the Environment*.

principal benefits of such regimes is the directness of the claim by individuals harmed against those natural or legal persons responsible for the environmental damage.<sup>34</sup> With states being reluctant to take up the claims of their nationals, or to assume responsibility for environmental damage caused by their citizens,<sup>35</sup> civil liability regimes afford an opportunity for dealing with environmental harm by allowing the nationals of one state affected by environmental harm emanating from another state to sue the polluter directly in the courts of the latter.<sup>36</sup>

(a) *Domestic Courts and Liberal Theory of International Law*

The desirability of turning to domestic mechanisms for enforcing rules of international environmental law receives substantial theoretical support from liberal theories of international law. In developing her liberal conception of international law and relations Slaughter has argued that domestic courts can provide a valuable means of coercion absent in traditional inter-state dispute settlement:

[E]nforcement through the mechanism of a neutral tribunal backed by coercive force is an optimal way to ensure compliance with any agreement, whether between individuals or States. It is the mode of dispute resolution established where possible by societies the world over.<sup>37</sup>

Slaughter also contends that domestic courts throughout the world (and particularly those in liberal states) are increasingly engaged in a ‘transjudicial dialogue’ which may develop into a global ‘community of law’.<sup>38</sup> In the environmental context this may involve an evolving global consensus in relation to core concepts and principles of environmental law forged through the decision-making of domestic courts as they turn to the decisions of their foreign counterparts both for guidance and also as a way of asserting the legitimacy of their own legal reasoning.<sup>39</sup> This aspect of Slaughter’s theory suggests that the content of other legal systems and international law can have a much

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<sup>34</sup> Peter H Sand, *Transnational Environmental Law: Lessons in Global Change* (1999) 97; Stephen McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001) 435.

<sup>35</sup> Benedetto Conforti, ‘Do States Really Accept Responsibility for Environmental Damage’ in Francisco Francioni and Tullio Scovazzi (eds), *International Responsibility for Environmental Harm* (1991) 179, 179-180.

<sup>36</sup> Such systems therefore give concrete effect to the polluter-pays principle – by providing private rights of enforcement to affected individuals they force polluters to internalise the environmental costs of their activities. The principle was first articulated in an international instrument in the *Rio Declaration*, above n 28, principle 16.

<sup>37</sup> Slaughter, ‘International Law in a World of Liberal States’, above n 16, 532.

<sup>38</sup> Laurence R Helfer and Anne-Marie Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107 *Yale Law Journal* 273.

<sup>39</sup> The precautionary principle might be said to be an example of this. Originally a concept of German law (*‘Vörsorgeprinzip’*), it has been transplanted and transposed in many other legal systems through legislative enactment and judicial decisions. See Nicolas De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Susan Leubusher trans, 2002) 124-149.

more dynamic influence in domestic judicial decision-making than is commonly thought.<sup>40</sup>

Liberal theory further postulates that domestic courts may be assisted in their efforts to develop a consistent approach to the enforcement of environmental and other international standards through a dialogue with relevant international courts. Put simply, while the task of enforcement is performed most effectively at the local level, the work of domestic courts can be enhanced when they can turn to an international court for an authoritative interpretation of the treaty provisions in dispute.<sup>41</sup> Hence, notwithstanding the limited practical utility of international courts and tribunals as direct enforcement mechanisms, they can contribute more indirectly to compliance by providing consistent interpretation, consolidation, clarification and elaboration of the rules and principles of international environmental law.

It must be acknowledged that several aspects of Slaughter's theory are problematic,<sup>42</sup> including her arguments regarding the role of courts, both domestic and international. There are, for instance, empirical difficulties with Slaughter's claim that the courts of liberal-democratic states are able to form a strong 'community of law' as some domestic courts are often in fact resistant to the influence of their counterparts in other states. This is particularly the case in relation to constitutional disputes,<sup>43</sup> but such resistance may also be appropriate in relation to environmental disputes. Where a particular state has adopted a compromise between competing environmental and developmental agendas upon which there is general community agreement, it would seem inappropriate for this balance to be destabilised merely on the basis that a foreign decision supports a different approach. Slaughter's intrinsically procedural theory, which avoids considering problems of substantive value, does not satisfactorily account for the problem of the potentially overbearing influence of domestic courts of powerful, developed, states in relation to those operating in less developed jurisdictions.<sup>44</sup> While such influence may often be benign, in a 'free-market' of ideas it can in fact undermine

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<sup>40</sup> But see Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501, 518-526.

<sup>41</sup> Eckersley has made a similar point when arguing against excessive devolution of responsibility for environmental management to local polities: Robyn Eckersley, *Environmentalism and Political Theory: Toward an Ecocentric Approach* (1992) 174 ('bodies such as the International Court of Justice and the World Heritage Committee are salutary reminders of the ways in which institutions created by international treaties can serve to protect both human rights and threatened species and ecosystems from the "excesses" of local political elites' (emphasis added)).

<sup>42</sup> See generally Alvarez, above n 17.

<sup>43</sup> See the conclusions reached by Opeskin regarding the propensity of constitutional courts to cite their foreign counterparts: Brian Opeskin, 'Globalisation and Constitutional Law' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 171.

<sup>44</sup> Slaughter, 'International Law in a World of Liberal States', above n 16, 532.



one of the virtues that Slaughter extols in turning to domestic courts, namely their ability to serve the particular needs of the communities in which they operate.

Nonetheless this liberal approach does helpfully reinforce the general desirability of establishing enforcement mechanisms that can be accessed readily at the local level by those most directly affected by environmental damage. In so doing it amounts to the application of democratic governance theory<sup>45</sup> to the environmental context, affirming the necessity of strengthening domestic legal systems to promote the rule of law, openness and accountability in governmental decision-making, and civic participation in the development and enforcement of environmental law.<sup>46</sup> These characteristics of democratic government have been widely recognised in international environmental instruments,<sup>47</sup> and by judges themselves,<sup>48</sup> as preconditions for realising the objective of sustainable development.

### B *State Responsibility and the Law of Treaties*

Outside of the operation of international civil liability regimes, domestic courts have addressed international environmental disputes only to a very limited extent. There is, for example, little or no opportunity for the nationals of state A to challenge in the courts of state B the performance of B's government in implementing an environmental agreement such as the *1992 Convention on Biological Diversity* ('*Biodiversity Convention*'). It therefore remains necessary for mechanisms on the international plane to encourage states to comply with their environmental obligations. Among the most fundamental, but also most limited, of these is the law of state responsibility. On this basis affected states may seek to obtain redress where another state has violated its obligations to protect the environment. Such assertions as to breach of a treaty-based or customary norm may ultimately lead to the invocation of dispute settlement mechanisms, including arbitration or judicial settlement.

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<sup>45</sup> See especially Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

<sup>46</sup> Alan E Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 43, 60.

<sup>47</sup> See, eg, *Plan of Implementation of the World Summit on Sustainable Development*, [139(e)], UN Doc A/CONF.199/20 (2002).

<sup>48</sup> See Justice Paul L Stein, 'Judges Active in Promoting Environmental Law Capacity Building' (2003) 33 *Environmental Policy and Law* 56 in which Justice Stein provides an overview of the outcome of the World Summit on Sustainable Development Global Judges Symposium on the Role of Law and Sustainable Development. This pre-summit colloquium agreed upon the *Johannesburg Principles on the Role of Law and Sustainable Development* ('*Johannesburg Principles*') which affirmed the need for building judicial capacity through training and collaboration. See also Lord Justice Carnwath, 'Judicial Protection of the Environment: At Home and Abroad' (2004) 16 *Journal of Environmental Law* 315 (which includes the *Johannesburg Principles* in an appendix).

The deficiencies of this traditional, horizontal, approach to compliance in relation to environmental questions are manifold and well-documented. A key criticism advanced by regime theorists is that these coercive means of enforcement are not responsive to underlying reasons for non-compliance such as a lack of capacity.<sup>49</sup> In addition, and notwithstanding important recent developments, there remain question-marks over the potential for a state responsibility approach to deal effectively with environmental problems relating to the global commons.<sup>50</sup>

(a) *Basic Principles of State Responsibility*

The law of state responsibility appeared to present an effective system of enforcement during the early development of international environmental law, which was initially founded on the obligation to ensure that activities within one state did not cause injury to the territory or nationals of other states.<sup>51</sup> However, as the purview of international law on the environment has expanded, the notion of state liability for wrongful acts has become progressively less useful for dealing with the problem of compliance,<sup>52</sup> particularly in the context of common spaces.<sup>53</sup>

Article 1 of the International Law Commission's ('ILC') *Articles on Responsibility of States for Internationally Wrongful Acts*<sup>54</sup> ('*Articles on State Responsibility*') adumbrates the basic principle that an internationally wrongful act of a state entails the international responsibility of that state. In relation to environmental damage it is therefore essential first to identify the 'wrongful act', that is the breach of an international obligation attributable to a state. Discussion of state responsibility for

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<sup>49</sup> Chayes, Chayes and Mitchell, 'Active Compliance Management in Environmental Treaties', above n 4, 77-78.

<sup>50</sup> See generally Tullio Scovazzi, 'State Responsibility for Environmental Harm' (2001) 12 *Yearbook of International Environmental Law* 43.

<sup>51</sup> This principle is stated in the *Declaration of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1972) ('*Stockholm Declaration*') principle 21 and in the *Rio Declaration*, above n 28, principle 2. For a discussion of the judicial development of this principle see Chapter 5.

<sup>52</sup> Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (2nd ed, 2002) 181-200; Markus Ehrmann, 'Procedures of Compliance Control in International Environmental Treaties' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 377, 379-387; Malgosia Fitzmaurice, 'International Protection of the Environment' (2001) 293 *Recueil des Cours* 9, 220-232; Wolfrum, above n 3, 77-100; Martti Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1993) 3 *Yearbook of International Environmental Law* 123, 125-128.

<sup>53</sup> See generally Alan E Boyle, 'Remediating Harm to International Common Spaces and Resources: Compensation and Other Approaches' in Peter Wetterstein (ed), *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (1997) 83.

<sup>54</sup> *Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, 53rd Session*, UN Doc A/56/10 (2001), 43-59 (noted in GA Res 56/83, 12 December 2001, UN Doc A/RES/56/83 (2001)). Reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility* (2002).

environmental harm often revolves around examples such as the *Trail Smelter Case*<sup>55</sup> scenario in which industrial activities within Canada were causative of damage to the environment of the United States. However, the law of state responsibility is of much broader application, and responsibility will accrue whenever there is a breach of an obligation, regardless of its character.<sup>56</sup>

(b) *State Responsibility and the Actio Popularis*

The mere fact that a wrongful act has been identified does not mean that there is an automatic remedy, as not all states possess standing to invoke the responsibility of a delinquent state. Ordinarily only ‘injured states’ will be entitled to seek to enforce the law against a violator.

A state will be an ‘injured state’ if the obligation infringed was owed to that state individually.<sup>57</sup> There will also be an injury if the obligation breached was owed to a group of states, including the injured state, or to the international community as a whole and the breach ‘specially affects’ the injured state, or is of such a character as radically to change the position of all other states to which the obligation is owed with respect to the further performance of the treaty.<sup>58</sup> Direct and substantial damage to a state’s territory or citizens by transboundary pollution will readily give rise to injury in the relevant sense. In addition damage to common spaces involving infringement of the legal rights or interests of a state will also produce an injury and provide an injured state with standing.<sup>59</sup> An example in this regard given by the ILC is pollution on the high seas in breach of Article 194 of the *1982 United Nations Convention on the Law of the Sea* (*LOS Convention*). A state would be ‘specially affected’ in such circumstances if the pollution resulted in damage to its coastal areas, or the closure of its fisheries.<sup>60</sup>

Much more problematic would be damage to global commons areas not leading to any discernable impact upon the legal rights or interests of any state.<sup>61</sup> An obvious example in this regard is damage to the stratospheric ozone layer or anthropogenic climate change, both effects of the diffuse emission of pollutants into the atmosphere. In such cases it will frequently not be possible to identify a ‘specially affected’, and

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<sup>55</sup> *Trail Smelter Case (Canada/United States of America)* (1938 and 1941) 3 RIAA 1911.

<sup>56</sup> *Articles on State Responsibility*, above n 54, art 12.

<sup>57</sup> *Ibid* art 42(a).

<sup>58</sup> *Ibid* art 42(b).

<sup>59</sup> Kathy Leigh, ‘Liability for Damage to the Global Commons’ (1992) 14 *Australian Yearbook of International Law* 129, 148.

<sup>60</sup> This is an example given in the ILC’s Commentary to art 42(b)(i) of the *Articles on State Responsibility*, above n 54.

<sup>61</sup> Boyle, ‘Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches’, above n 53, 93.

therefore an 'injured', state. In recognition of this limitation, the *Articles on State Responsibility*, in an avowed instance of progressive development, provide for an additional basis for the invocation of responsibility. Under Article 48 a state that is not an injured state may nonetheless invoke the responsibility of another state if the obligation breached is owed to a group of states including that state and is established for the protection of a collective interest, or the obligation is owed to the international community as a whole.

To the extent that there are such obligations *erga omnes*,<sup>62</sup> there therefore exists the potential for an *actio popularis*.<sup>63</sup> In such circumstances the invoking state is acting not in its own capacity but rather as an agent on behalf of the group of states (where the obligation is *erga omnes partes*, such as under a multilateral environmental agreement) or the international community as a whole (where the obligation is truly *erga omnes*, such as under a customary obligation to protect the marine environment of the high seas).<sup>64</sup> However, the *actio popularis* concept has not been strongly supported, either in state practice or in judicial decisions,<sup>65</sup> and therefore remains *de lege ferenda*.<sup>66</sup>

Even should it assume broad recognition as a customary principle, in practice such essentially public interest claims would face a number of difficulties, including the problem of fashioning an appropriate remedy. Cessation will be appropriate where the damage is ongoing and any state incurring clean-up and restoration costs should be entitled to recover for such expenditures. However, an entitlement to receive

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<sup>62</sup> The ICJ in the *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, [33] recognised the existence of obligations which '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection'. The Court included among such obligations the prohibition on acts of aggression, genocide, slavery and racial discrimination. No mention was made by the Court of environmental obligations, which may be explained by the relatively inchoate nature of the discipline at the time of the Court's decision, coming as it did prior to the 1972 Conference on the Human Environment in Stockholm. On the concept of responsibility to the international community as a whole see James Crawford, *International Law as an Open System* (2002) 341-359.

<sup>63</sup> It has been suggested that the term '*actio pro societate*' may be more appropriate to describe such an action: Wolfrum, above n 3, 99 ('[I]n multilateral environmental treaties the State parties of the respective regimes have established a community with the intention to collectively achieve the objective of the said regime. Non-compliance with these commitments endangers the very existence of this community. A State party invoking non-compliance of another member of that community hence defends its own rights in the preservation of the said community and thus indirectly the community itself.').

<sup>64</sup> Julio Barboza, 'The ILC and Environmental Damage' in Peter Wetterstein (ed), *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (1997) 76.

<sup>65</sup> See François Voeffray, *L'actio popularis, ou la défense de l'intérêt collectif devant les juridictions internationales* (2004) 55-88.

<sup>66</sup> Catherine Redgwell, 'International Environmental Law' in Malcolm D Evans (ed), *International Law* (2003) 657, 666; Shabtai Rosenne, 'Some Reflections *Erga Omnes*' in Antony Anghie and Garry Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 509, 519 ('In current...practice...there is a sharp dichotomy between the enunciation of rules of law in *erga omnes* form, and the employment of procedural, and especially judicial, remedies for disputes...').

compensation will depend upon establishing a relevant loss and if remedial action is impossible or impracticable, and there is no impact upon the rights or interests of any state, then there will be no measurable and compensable loss to any state.<sup>67</sup> In the absence of a system of compensation, an *actio popularis* would therefore be largely without object in an enforcement and compliance sense, as it would result in no sanctioning of wrongful acts. For this reason it has been argued that environmental regimes should identify entities with standing to pursue claims and which would be entitled to receive compensation for 'pure environmental damage'.<sup>68</sup> Out of these proceeds such bodies could thereafter fund public interest litigation that states may not have an interest in commencing.<sup>69</sup>

(c) *Deficiencies in State Responsibility and Liability Approaches*

In addition to these doctrinal problems there are a number of functional deficiencies with state responsibility as a non-compliance response system. The first of these is the cumbersome and inherently reactive character of the process. Responsibility can only be invoked in the event of a breach of an obligation, by which time permanent environmental damage may already have been occasioned.<sup>70</sup> In being activated only on the commission of an internationally wrongful act, the law of state responsibility therefore imposes a high threshold as a mechanism of compliance control.

Some additional deficiencies may be noted. The law of state responsibility is largely indifferent to the causes of an internationally wrongful act,<sup>71</sup> as it treats equally a developed state deliberately violating an environmental agreement and a developing state in breach only because of capacity constraints.<sup>72</sup> In addition, invoking states will often face substantial evidentiary hurdles. Beyond establishing the nature and extent of

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<sup>67</sup> Boyle, 'Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches', above n 53, 98.

<sup>68</sup> Scovazzi, above n 50, 63.

<sup>69</sup> Leigh, above n 59, 156.

<sup>70</sup> Although, as Lefebvre has noted, an effective system of liability can perform some preventative function as an incentive *ex ante facto*, in addition to its corrective and reparative functions: René Lefebvre, *Transboundary Environmental Interference and the Origin of State Liability* (1996) 1. See also Leigh, above n 59, 148-149 ('The imposition of liability can provide an incentive to a person carrying out an activity to minimise the risks of causing damage').

<sup>71</sup> Unless there exists a circumstance precluding wrongfulness, such as necessity: *Articles on State Responsibility*, above n 56, art 25.

<sup>72</sup> *Ibid* art 31. This may be somewhat of a simplification, however, as the extent to which mitigating factors may be relevant will be a matter to be determined according to the relevant primary rules of conduct. In relation to the obligation to prevent and control transboundary harm to other states or common spaces, the standard of conduct required is generally accepted to be one of 'due diligence' such that developing states may legitimately identify limitations in their capacity to take preventative measures: Birnie and Boyle, above n 52, 112. See also Ian Brownlie, 'A Survey of International Customary Rules of Environmental Protection' (1973) 13 *Natural Resources Journal* 179, 188 (the notion that a tortfeasor may be entitled to a reduction of damages on account of poverty could be a general principle of international law).

the relevant damage it will be necessary to prove that the delinquent state failed to meet the applicable standard of care, and that this was causative of the relevant damage. In many situations involving damage to complex ecosystems, causation will simply not be able to be established sufficiently clearly.<sup>73</sup>

Finally, and perhaps most importantly, a state responsibility or liability approach will have little value unless supported by an institutional system capable of responding promptly and effectively to breaches.<sup>74</sup> Mere public assertion of a claim may highlight the violation by a state of its international obligations, and identify its secondary obligations to make reparation. However, unless subject to compulsory dispute settlement, there is no mechanism by which such claims could be subject to authoritative determination. Indeed, even with such a system the pursuit of a claim would remain voluntary and discretionary, and states have historically shown great reluctance to initiate proceedings even where the environmental damage is very severe.<sup>75</sup>

(d) *Breach of Treaty*

Many environmental agreements, or more general regimes that include in their coverage environmental matters, specify procedures through which parties may respond to breaches of the regime. NCPs established by several environmental agreements, and discussed below, are an example of this phenomenon, as is European Community law under which member states may bring complaints regarding the performance of environmental obligations before the Court of Justice of the European Communities

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<sup>73</sup> Brownlie has noted in this regard that '[t]he process of contamination is often... incremental and may involve complex causal mechanisms [and] the requirement of damage as a necessary condition of claim bears an uneasy relation to the scientific proof of a certain threshold of damage caused by an overall rise in radiation or other forms of pollution and problems of multiple causation then arise.' Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 284-285.

<sup>74</sup> Boyle, 'Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches', above n 53, 91.

<sup>75</sup> Birnie and Boyle, above n 52, 199. The decision of European governments not to invoke the responsibility of the former Soviet Union in relation to the Chernobyl disaster is the most frequently cited instance of such reluctance. There were a variety of reasons why affected states did not seek to pursue claims against the Soviet Union, including a desire not to impede the collapse of the communist system by imposing potentially crippling debts. See generally Philippe Sands, *Chernobyl: Law and Communication* (1988) 26-30. Examining the role of Indonesia in failing to prevent poor forestry and agricultural practices that gave rise to severe forest fires in the late 1990s, Tan has argued that Indonesia was responsible for the transboundary injury to neighbouring states: Alan Khee-Jin Tan, 'Forest Fires in Indonesia: State Responsibility and International Liability' (1999) 48 *International and Comparative Law Quarterly* 826. Nonetheless, Indonesia was not subject to any inter-state claim, and instead, in conformity with the non-interventionist 'ASEAN way', the members of ASEAN responded by concluding a specific agreement to deal with the growing phenomenon of transboundary haze: *2002 ASEAN Agreement on Transboundary Haze Pollution*. Similarly in relation to the Sandoz Spill in 1986, riparian states on the Rhine downstream of Switzerland waived their right to invoke the responsibility of Switzerland: Astrid Boos-Hersberger, 'Transboundary Water Pollution and State Responsibility: The Sandoz Spill' (1997) 4 *Annual Survey of International and Comparative Law* 103, 130.

(‘ECJ’).<sup>76</sup> However, where there is no such procedure, or where treaty-specific machinery proves ineffective, states may turn to several options presented under the law of treaties, as codified by the *1969 Vienna Convention on the Law of Treaties* (‘VCLT’), to enforce obligations applicable under environmental treaties.

Under the *VCLT* a party to a multilateral treaty that is specially affected by the material breach of the treaty may suspend the operation of the treaty between itself and the violating party.<sup>77</sup> In addition all parties to a environmental agreement may, by unanimous agreement, effectively exclude the defaulting state by suspending or terminating the operation of the treaty in whole or in part.<sup>78</sup> Both of these enforcement strategies rely on there having been a material breach of treaty; namely repudiation of the treaty, or violation of a provision of the treaty essential to the accomplishment of the object or purpose of the treaty.<sup>79</sup> The circumstances in which such termination is possible will therefore necessarily be limited. Nor will suspension or termination be an appropriate response in most cases where the widest participation, and the greatest degree of co-operation, is required to achieve an environmental objective. In any event states will face difficulties in seeking to terminate a treaty regime on environmental grounds. As an example, the ICJ’s decision in the *Case Concerning the Gabčíkovo-Nagymaros Project*<sup>80</sup> suggests that a treaty regulating a joint development will not easily be brought to an end, even when both parties have failed to comply with its provisions, and even where it is possible to point to significant developments in international environmental norms apposite to the environmentally damaging activity authorised under the relevant treaty.

### C *Traditional Inter-State Dispute Settlement Procedures*

A breach of an environmental agreement, or another internationally wrongful act entailing responsibility, will allow states to utilise available dispute settlement procedures to pursue a claim. These procedures comprise the classical mechanism of enforcement in public international law, and can be used whenever a ‘dispute’<sup>81</sup> arises. Article 33 of the *UN Charter* catalogues the main methods of settlement available, namely negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement,

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<sup>76</sup> See the discussion of the environmental jurisdiction of the ECJ in Chapter 2.

<sup>77</sup> *VCLT*, art 60(2)(b).

<sup>78</sup> *Ibid* art 60(2)(a).

<sup>79</sup> *Ibid* art 60(3).

<sup>80</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7.

<sup>81</sup> The ICJ has defined a dispute broadly, as ‘a disagreement on a point of law or fact, a conflict of legal views or interests between parties.’: *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, [22].

and 'resort to regional agencies or arrangements.'<sup>82</sup> While diplomatic procedures such as negotiation and mediation are considered techniques of 'alternative' dispute resolution in domestic legal settings, on the international plane they are the normal means of resolving differences.<sup>83</sup> Before turning to consider the operation of each of these methods in international environmental law it is essential to understand a fundamental distinction between the goals of dispute settlement on the one hand and compliance on the other.

(a) *Settling Disputes vs Eliciting Compliance*

Although it is often supposed that the existence and operation of dispute settlement mechanisms is essential for promoting compliance, in reality such procedures are infrequently invoked and, even when they are utilised, they often have only limited effectiveness.<sup>84</sup> This is primarily because the essential purpose of dispute settlement mechanisms (the peaceful resolution of controversies) is not an objective that is necessarily equated with improving compliance. The contemporary fascination, even 'obsession',<sup>85</sup> with dispute settlement procedures can therefore obscure a more helpful focus on issues of effectiveness and compliance. As agreement for the creation and use of procedures for dispute settlement is easier to achieve than agreement on substantive value, this 'proceduralisation' can create an 'illusion'<sup>86</sup> of a strong commitment to an environmental regime and the existence of an efficacious compliance system.

The failure by a state to adhere to the requirements of an environmental regime will not necessarily generate a dispute. This is not only because non-compliance will not often or always lead to breach of an environmental obligation, but also because states may not deem it in their interests to pursue a claim because of the political costs involved, even where their nationals are seriously affected.<sup>87</sup> Moreover, even where there is a clear dispute, such matters are rarely escalated to the intergovernmental level. It can also be questioned whether a more litigious, dispute driven, system of

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<sup>82</sup> See also the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN Doc A/RES/2625(XXV) (1970); *Manila Declaration on the Peaceful Settlement of International Disputes*, GA Res 37/10, UN Doc A/RES/37/10 (1982).

<sup>83</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 288; Christine Chinkin, 'Alternative Dispute Resolution under International Law' in Malcolm D Evans (ed), *Remedies in International Law: The Institutional Dilemma* (1998) 123, 124.

<sup>84</sup> Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths', above n 4, 1582.

<sup>85</sup> Martti Koskenniemi, 'International Law in a Post-Realist Era' (1997) 16 *Australian Yearbook of International Law* 1, 2.

<sup>86</sup> Chinkin, 'Alternative Dispute Resolution under International Law', above n 83, 139.

<sup>87</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 52; Keohane, Moravcsik and Slaughter, above n 15, 463.



environmental law enforcement would necessarily produce better results in protecting natural systems. It would seem generally preferable to avoid disputes if this impairs the co-operation needed to protect, conserve or restore shared local, regional and global environmental systems.

Most problematically, when controversies do arise these mechanisms may help facilitate an amicable solution to a fractious dispute without addressing directly the issue of environmental disturbance or threat that gave rise to those tensions. In other words inter-state dispute settlement systems tend to be process-oriented, in promoting peaceful relations regardless of the outcome, rather than goal-oriented, in seeking to achieve a substantive improvement in compliance. This means that there is a fundamental strain in the international system between, on the one hand, private ordering of public values through dispute settlement procedures, and, on the other hand, upholding the interests of the general international community in faithful adherence to environmental treaties.<sup>88</sup> In such a system there is a danger that the environment will be ‘sold out’<sup>89</sup> in negotiation between private litigants. Although this tension is most pronounced where there is ‘alternative’ dispute settlement through negotiation and mediation,<sup>90</sup> the strain is also visible in legal dispute settlement processes including international adjudication.

*(b) Consultation and Negotiation*

Discussion between states at a diplomatic level is normally the first and last resort in resolving international environmental disputes. Consultation and negotiation may occur directly between states, or may take place through the good offices of a third party, conferences of treaty parties, or international organisations. Given that international co-operation is required to address many environmental threats there is a general interest in encouraging such dialogue.

Consultation generally refers to the practice of discussions between states *prior* to an activity which may give rise to a dispute.<sup>91</sup> This was seen in the *Lake Lanoux Case*<sup>92</sup> where the Tribunal rejected the argument made by Spain that it had a right of veto over an upstream hydroelectric scheme proposed by France. Instead it was held that France

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<sup>88</sup> Chinkin, ‘Alternative Dispute Resolution under International Law’, above n 83, 127-128.

<sup>89</sup> Christopher D Stone, *Should Trees Have Standing? And Other Essays on Law, Morals, and the Environment* (1996) 25. Stone suggests that one way of avoiding this situation is to accord ecosystems and their components legal status so that they cannot be ignored by the parties or by a court. See also Thomas Gehring, ‘International Environmental Regimes: Dynamic Sectoral Legal Systems’ (1990) 1 *Yearbook of International Environmental Law* 35, 51.

<sup>90</sup> Chinkin, ‘Alternative Dispute Resolution under International Law’, above n 83, 130.

<sup>91</sup> J G Merrills, *International Dispute Settlement* (3rd ed, 1998) 3.

<sup>92</sup> *Lake Lanoux Case (France/Spain)* (1957) 12 RIAA 285. See Chapter 6.

was under a positive obligation to consult with Spain over watercourse projects that could impact upon Spain's interests. The Tribunal observed that

international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, *by preliminary negotiations*, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement.<sup>93</sup>

The importance of consultations has also been emphasised in other environmental cases including the *Icelandic Fisheries Case*<sup>94</sup> in which it was held that states with an interest in fisheries surrounding Iceland were under an obligation

to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them...<sup>95</sup>

Where consultations have not taken place, or are unsuccessful, and a dispute does arise, then the parties may seek to reach a negotiated settlement. As with consultation, negotiation may take a variety of forms, and be carried out in many different forums.

In almost all environmental instruments negotiation or consultation is presented as the initial method of dispute settlement.<sup>96</sup> While it is generally preferable to begin to resolve environmental disputes through such procedures, they are not normally required to be exhausted before other dispute settlement mechanisms can be invoked.<sup>97</sup> Moreover negotiations may be employed concurrently with other procedures invoked to resolve a dispute.

### (c) *Mediation*

Whereas the disputants themselves are generally the only participants in negotiatory or consultative dispute settlement, in the process of mediation a third party takes an active role in the settlement processes. Nonetheless, mediation remains firmly under the control of the parties, and does not lead to a binding determination by the mediator. A number of environmental treaties present mediation as an option for dispute

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<sup>93</sup> Ibid 371. Emphasis added.

<sup>94</sup> *Fisheries Jurisdiction Case (United Kingdom v Iceland)* [1974] ICJ Rep 3; *Fisheries Jurisdiction Case (Germany v Iceland)* [1974] ICJ Rep 175 ('*Icelandic Fisheries Case*').

<sup>95</sup> Ibid [72] (emphasis added). The ICJ stated that in relation to the dispute before it 'the most appropriate method for the solution of the dispute is clearly that of negotiation.' (at [73]).

<sup>96</sup> Cesare P R Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000) 48.

<sup>97</sup> *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* [1998] ICJ Rep 275, [56] ('Neither in the Charter nor otherwise in international law is any general rule to be found that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court'). See also *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624, [60]; *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)*, (2002) 41 ILM 405, [60]. See also John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999) 21-22

settlement.<sup>98</sup> Yet although mediation is also a common feature of informal dispute settlement within international environmental institutions mediation as a stand-alone procedure appears to have been rarely used to resolve environmental disputes. Moreover, as with any negotiatory methods of dispute settlement, mediation may lead to a settlement of a dispute which does not give adequate recognition to questions of community concern such as preserving environmental integrity.<sup>99</sup>

(d) *Conciliation*

Many environmental treaties refer to conciliation as a dispute settlement option.<sup>100</sup> Conciliation bears many similarities to mediation but with the third party taking a more active, formal and independent role. Much like mediation, it does not normally lead to a determination that is binding on the parties,<sup>101</sup> however some environmental instruments require that parties must consider the conciliation report ‘in good faith.’<sup>102</sup>

Conciliation may be made compulsory in situations where the parties have not agreed upon another dispute settlement procedure as in the *Desertification Convention* which requires disputes to be submitted to conciliation if the parties have not accepted arbitration or judicial settlement by the ICJ.<sup>103</sup> In most environmental instruments, however, conciliation is simply one option, among several, that the parties may select to resolve their differences.<sup>104</sup> It may be undertaken by a single conciliator, a panel of conciliators, or an international body such as a permanent commission established by an environmental agreement.<sup>105</sup> Bodies that principally operate as arbitral tribunals may also have the capacity to engage in environmental conciliation.<sup>106</sup>

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<sup>98</sup> 1985 *Vienna Convention for the Protection of the Ozone Layer* (‘*Convention for the Protection of the Ozone Layer*’), art 11(2); *Biodiversity Convention*, art 27(2); 1997 *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses* (‘*UN Watercourses Convention*’), art 33(2).

<sup>99</sup> Laura Horn, ‘The Role of the Mediator in International Environmental Law’ (1993) 4 *Australian Dispute Resolution Journal* 16, 30.

<sup>100</sup> See, eg, *Convention for the Protection of the Ozone Layer*, art 11(4); *Climate Change Convention*, art 14(5); 1992 *Convention for the Protection of the Marine Environment of the North-East Atlantic* (‘*OSPAR Convention*’), art 32(1); 1994 *Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (‘*Desertification Convention*’), art 28(6).

<sup>101</sup> See, eg, *LOS Convention*, annex V, art 7(2).

<sup>102</sup> See, eg, *Convention for the Protection of the Ozone Layer*, art 11(5).

<sup>103</sup> *Desertification Convention*, art 28(6). See also *LOS Convention*, art 297(3)(b) which establishes a compulsory conciliation procedure in relation to certain types of dispute that are not subject to mandatory adjudication under art 286.

<sup>104</sup> See, eg, 1982 *Convention on the Conservation of Antarctic Marine Living Resources*, art XXV.

<sup>105</sup> See, eg, the *OSPAR Convention*, art 32(1) which provides that in the first instance disputes should be settled by means of inquiry or conciliation ‘within the Commission’ established by art 10 and made up of representatives of each of the contracting parties.

<sup>106</sup> In addition to optional rules for the arbitration of environmental disputes see Permanent Court of Arbitration, *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment*

An advantage of conciliation over mediation in the environmental context is the greater independence of the conciliator, which may lead to a report that serves not only to provide guidance to the parties but which also highlights publicly the underlying environmental problem giving rise to the dispute. This may, in turn, prompt pressure from other states, international organisations and domestic constituencies to ensure that the relevant state addresses the environmental threat giving rise to a dispute. Notwithstanding its evident potential, conciliation does not appear to have been used in an environmental case.

(e) *Commissions of Inquiry/Fact Finding*

‘Inquiry’ and ‘fact-finding’ are interchangeable terms to describe a process of independent investigation of disputed facts and issues. It is more commonly a precursor to settlement by an alternative dispute settlement mechanism than a procedure for dispute resolution itself, and may involve a variety of activities including site visits, the examination of witnesses and the evaluation of written and oral submissions made by the parties themselves.

Several examples of inspection procedures are found in environmental agreements and other instruments. Under the NCP established by the *1987 Montreal Protocol on Substances that Deplete the Ozone Layer* (‘*Montreal Protocol*’),<sup>107</sup> the Implementing Committee may, with the consent of the party involved, undertake information-gathering in its territory. Another example is the system of inspection established by the *1991 Protocol on Environmental Protection to the Antarctic Treaty* (‘*Madrid Protocol*’) which provides in Article 14 for inspections of stations and other facilities by designated observers ‘in order to promote the protection of the Antarctic environment and dependent and associated ecosystems, and to ensure compliance with this Protocol.’<sup>108</sup>

Whereas these two instruments conceive of fact-finding as a system designed to improve compliance, rather than to resolve disputes, some environmental instruments treat inspection procedures as a method for solving differences. Under the *UN Watercourses Convention*, for instance, impartial fact-finding is compulsory unless the parties have agreed to another procedure or have declared acceptance of judicial

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(2002) <<http://www.pca-cpa.org/PDF/envconciliation.pdf>> at 1 July 2005. The PCA offers facilities for inquiry, mediation, conciliation and arbitration.

<sup>107</sup> Decision IV/5 of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UN Doc UNEP/Oz.L.Pro.4/15 (1992) (as revised in by Decision X/10 of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, *Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UN Doc UNEP/OzL.Pro.10/9 (1998)) (‘*Montreal Protocol NCP*’).

<sup>108</sup> See also the inspection mechanism under the *1959 Antarctic Treaty*, art VII.

settlement by the ICJ or arbitration by an arbitral tribunal.<sup>109</sup> Fact-finding Commissions are to be composed of members nominated by the parties, who in turn are responsible for selecting a chairperson. Such Commissions may adopt reports by majority vote, rather than consensus, in which findings and recommendations are made ‘for an equitable solution of the dispute.’<sup>110</sup> Where a dispute cannot be resolved through consultation or negotiation within a period of six months, the ILC’s *Draft Articles on Prevention on Transboundary Harm from Hazardous Activities*<sup>111</sup> similarly provide that a party to a dispute may invoke compulsory fact-finding procedures to be carried out by an impartial commission.

As with all procedures that involve the independent and impartial examination of evidence and the finding of facts, commissions of inquiry can help verify the true dimensions of an environmental threat and thereby contribute to attempts to avert, lessen or remedy damage to ecosystems. By identifying potential and actual impacts upon natural systems such investigation may lead delinquent states attempting to avoid international scrutiny back towards compliance. Inquiry can be of particular assistance where there are complex and disputed scientific considerations requiring independent verification. This is recognised in the procedure for special arbitration under Annex VIII of the *LOS Convention* which may only be utilised for certain disputes, including disputes concerning the protection and preservation of the marine environment.<sup>112</sup> Under Annex VIII, a special arbitral tribunal may be requested to carry out an inquiry and establish the facts giving rise to a dispute.<sup>113</sup> Unless the parties agree otherwise, any findings of fact made in this process are binding.<sup>114</sup>

*(f) Arbitration and Judicial Settlement*

International adjudication by arbitration or judicial settlement is distinguished from the other dispute settlement mechanisms described thus far by several important characteristics. The main point of difference is the result; namely that an arbitral award, or judgment of a court, is a decision according to law, which is binding upon the parties.

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<sup>109</sup> *UN Watercourses Convention*, art 33(3).

<sup>110</sup> *Ibid* art 33(8) (emphasis added).

<sup>111</sup> *Draft Articles on the Prevention of Transboundary Harm*, above n 30, art 19. The Commentary notes that ‘[t]his compulsory procedure is useful and necessary to help States resolve their disputes expeditiously on the basis of an objective identification and evaluation of the facts. Lack of proper appreciation of the correct and relevant facts is often at the root of differences or disputes among States.’

<sup>112</sup> Special Arbitration panels are to comprise both legal and scientific experts: *LOS Convention*, annex VIII, art 3.

<sup>113</sup> *Ibid* annex VIII, art 5(1).

<sup>114</sup> *Ibid* annex VIII art 5(2).

It is a quintessentially legal, as opposed to a political or diplomatic, method of dispute resolution.

It was seen in the previous Chapter that there exist a variety of different types of adjudicative procedures operating on the international plane. The extent to which each of these are effective as mechanisms for promoting compliance with international environmental law depends considerably upon the legal and institutional context in which they are situated. One way of understanding these variations is to conceptualise the various forms of adjudicative settlement, from ad hoc arbitration through to judicial settlement by a permanent body, as lying on a continuum between ‘inter-state’ dispute settlement and ‘transnational’ dispute settlement.<sup>115</sup>

Keohane, Moravcsik and Slaughter explain that where a particular court falls on the continuum between inter-state and transnational dispute resolution depends on three variables: *independence*, which refers to the extent to which a dispute resolution body can make impartial decisions independent of state interests; *access*, which describes the extent to which non-state actors have standing; and *embeddedness*, which refers to the extent to which decisions can be enforced without specific action by governments. While all international courts on this scale share one common feature – the task of interpreting and applying international law – they differ significantly according to these three criteria. Increased levels of independence, access and embeddedness all correlate with improved likelihood that the institution may be effectively and routinely used to promote compliance, and that its decisions will be given effect.

On this scale the Permanent Court of Arbitration (‘PCA’) comes close to the ideal type of inter-state dispute settlement because of its low independence, low to moderate access and low embeddedness. By contrast the ECJ ranks high on all three of these legal characteristics and therefore approaches the ideal type of transnational dispute resolution.<sup>116</sup> And while the PCA has had only a very limited role in international environmental dispute settlement (despite attempts to improve its capacity to deal with environmental matters), the ECJ has been used very effectively to bring European Union member states into compliance with European environmental standards. This analysis therefore appears to explain why adjudication has not been prominent among mechanisms for compliance control in international environmental law. Admittedly there have been some developments towards mandatory adjudication in the environmental field, presenting opportunities for unilateral invocation in an effort to enforce international environmental law.<sup>117</sup> However, these procedures are generally of a

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<sup>115</sup> Keohane, Moravcsik and Slaughter, above n 15.

<sup>116</sup> Ibid 469.

<sup>117</sup> See in particular the *LOS Convention*, pt XV.

purely 'inter-state' character, and can only be invoked, and their judgments enforced, by states themselves.

The absence of options for transnational dispute settlement in international environmental law is partly explained by the fact that this area of international law lacks the degree of 'legalisation' apparent in other fields, such as international trade law. However, it might also be said to be indicative of the fact that alternative strategies for environmental compliance control have been developed which have overtaken adjudication as a preferred mode of environmental governance.<sup>118</sup> It is to these that the discussion now turns.

#### D *International Supervisory and Regulatory Institutions*

Rather than continuing to rely on traditional enforcement mechanisms, in international environmental law and other issue-areas where there is a high degree of interdependence, there has been a 'paradigm shift'<sup>119</sup> with states now more inclined towards a managerial approach to compliance.<sup>120</sup> These institutional responses, developed in the context of particular environmental regimes, complement more wide-ranging international environmental organisations.<sup>121</sup>

##### (a) *Supervisory Approaches to Compliance*

A variety of rules, processes and bodies established by environmental treaties may operate alone or in combination to promote compliance with environmental treaties. At the most basic level exist procedural obligations, such as participating in co-operative research and scientific assessment,<sup>122</sup> the exchange of information,<sup>123</sup> reporting

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<sup>118</sup> But see John H Knox, 'A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission' (2001) 28 *Ecology Law Quarterly* 1 (arguing that it is possible to blend both transnational adjudication and the managerial model of compliance control) and Karen Alter, 'Do International Courts Enhance Compliance with International Law?' (2003) 25 *Review of Asian and Pacific Studies* 51, 52 (arguing that international courts can enhance both management and enforcement strategies for promoting compliance). See also Chapter 4.

<sup>119</sup> Thomas Kuhn, *The Structure of Scientific Revolutions* (1962).

<sup>120</sup> List and Rittberger, above n 27, 109; Antonia Chayes and Abram Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995). See also Günther Handl, 'Compliance Control Mechanisms and International Environmental Obligations' (1997) 5 *Tulane Journal of International and Comparative Law* 29.

<sup>121</sup> For example the Commission for Sustainable Development has the responsibility for ensuring the effective follow-up of the United Nations Conference on Environment and Development: *Institutional Arrangements to Follow up the United Nations Conference on Environment and Development*, GA Res 47/191 (1992), UN DOC A/RES/47/191 (1992). See generally Alexandre S Timoshenko, 'From Stockholm to Rio: The Institutionalisation of Sustainable Development' in Winfried Lang (ed), *Sustainable Development and International Law* (1995) 143; Ben Boer, Ross Ramsay and Donald R Rothwell, *International Environmental Law in the Asia Pacific* (1998) 23-46; Peter S Thacher, 'The Role of the United Nations' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment* (1991) 183.

<sup>122</sup> See, eg, *Convention for the Protection of the Ozone Layer*, art 3.

obligations,<sup>124</sup> and schemes for observers or inspection.<sup>125</sup> Such obligations may increase the transparency of environmental regimes and thereby enhance regime compliance.<sup>126</sup> Recognising that a major cause of non-compliance stems from a lack of capacity, recent environmental treaties also often require developed state parties to provide financial, technological and administrative assistance to developing states.<sup>127</sup>

These techniques for promoting compliance are most likely to be effective when they are managed by a supervisory institutional machinery.<sup>128</sup> For instance, when there is independent scrutiny of reported data states will be more likely to take seriously their reporting obligations. Hence the significance of permanent institutions, operating on a periodic or standing basis, such as regular meetings of treaty parties, treaty secretariats and compliance bodies administering NCPs. It is also here that important linkages may form between international regimes and civil society. Where the public has access to information regarding compliance with international environmental standards then there is the prospect that domestic constituencies may be mobilised to exert pressure on the state to ensure that it refrains from non-compliant behaviour, or desists from delinquent activities already underway.

In being conceptualised as institutions for environmental compliance regulation and management, supervisory institutions can be distinguished from dispute settlement mechanisms which have, as their primary objective, the resolution of international tensions. Nonetheless, although they therefore have something of an independent 'fiduciary' or 'guardianship' function, supervisory bodies may also play an important in responding to environmental disputes. Supervisory institutions provide 'a forum for interested states to participate in a process of negotiated equity' that is more useful than confrontational means of enforcement and are a 'model for resolving polycentric problems where no single state's acts are responsible and the interests of all are at stake.'<sup>129</sup>

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<sup>123</sup> Ibid art 4.

<sup>124</sup> See, eg, *1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES'), art 8.

<sup>125</sup> See, eg, *Madrid Protocol*, art 14 which provides for an inspection system 'in order to promote the protection of the Antarctic environment...and to ensure compliance with this Protocol.'

<sup>126</sup> Chayes, Chayes and Mitchell, above n 4, 81. See also Kamen Sachariew, 'Promoting Compliance with International Environmental Standards: Reflections on Monitoring and Reporting Mechanisms' (1991) 2 *Yearbook of International Environmental Law* 31.

<sup>127</sup> See, eg, *Climate Change Convention*, art 4(2).

<sup>128</sup> Patrick Széll, 'The Development of Multilateral Mechanisms for Monitoring Compliance' in Winfried Lang (ed), *Sustainable Development and International Law* (1995) 97, 98.

<sup>129</sup> Alan E Boyle, 'International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles' in Robin Churchill and David Freestone (eds), *International Law and Global Climate Change* (1991) 7, 18.



In sum, supervisory institutions established under the aegis of environmental treaties overcome many of the limitations of traditional dispute settlement mechanisms in eliciting compliance because they can perform multiple tasks flexibly and responsively. As Boyle explains

Reliance on institutional machinery in the form of intergovernmental commissions and meetings of treaty parties as a means of co-ordinating policy, developing the law, supervising its implementation, resolving conflicts of interest and putting community pressure on individual States, meets the [needs of international environmental law] much more flexibly and effectively than traditional bilateral forms of dispute settlement.<sup>130</sup>

Yet whilst these institutions offer significant promise, several shortcomings must be acknowledged. In the first place, these institutions often rely upon consensus-based decision-making which can be an obstacle to the adoption of strong conservation measures. In such a situation difficulties in reaching agreement outside an environmental regime on an environmental protection measure can simply be replicated within a regime itself, and the institution may become paralysed and ineffective. Participation in international supervisory institutions is also a key constraint upon their effectiveness in protecting the environment. Limited membership may simply lead to agreement to exploit a common resource beyond its sustainable limits, as has been the experience in many fisheries.<sup>131</sup> Expansion in membership and participation can overcome this problem, by introducing a constituency 'able to speak for the environmental interests of a wider community.'<sup>132</sup>

*(b) Non-Compliance Procedures*

Treaty secretariats, meetings and conferences of parties, and technical and scientific commissions operating under environmental regimes, all perform many similar supervisory functions. However NCPs, a recent and innovative form of supervisory institution, adopt an especially targeted approach to managing compliance with environmental regimes.<sup>133</sup> They illustrate how far international environmental law has developed from its early reliance upon dispute settlement procedures as a method of compliance control.

The first NCP was ushered into existence in 1992 under the *Montreal Protocol*.<sup>134</sup> Since then NCPs have been established under a number of other environmental

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<sup>130</sup> Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions', above n 1, 220.

<sup>131</sup> *Ibid* 243.

<sup>132</sup> *Ibid*.

<sup>133</sup> Malgosia A Fitzmaurice and Catherine Redgwell, 'Environmental Non-Compliance Procedures and International Law' (2000) 31 *Netherlands Yearbook of International Law* 35, 37.

<sup>134</sup> *Montreal Protocol NCP*, above n 107.

instruments,<sup>135</sup> including the *1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change* ('*Kyoto Protocol*')<sup>136</sup> and the *1998 Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters*.<sup>137</sup> These NCPs are modelled, in general terms, on the mechanism adopted under the *Montreal Protocol* and therefore this inaugural NCP merits detailed analysis.

(i) *Montreal Protocol NCP*

The objective of the *Montreal Protocol*, widely considered among the most successful of environmental regimes,<sup>138</sup> is to reduce and ultimately to eliminate global emissions of ozone-depleting substances<sup>139</sup> and to this end the protocol sets specific limitations in relation to the production, distribution and consumption of such substances. As required by Article 8 of the *Montreal Protocol*, negotiations on the modalities of a NCP began at the first meeting of the parties in 1989. The NCP was intended to be non-complex, non-confrontational, non-judicial, transparent and subject to the supreme authority of the Meeting of the Parties.<sup>140</sup> The procedure was finally adopted at the fourth meeting of the parties in 1992, and was modified in 1998.<sup>141</sup>

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<sup>135</sup> See, eg, Decision V/16 of the Fifth Meeting of the Conference of the Parties to the Basel Convention, *Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention*, UN Doc UNEP/CH.5/29 (1999); Decision 1997/2 of the Fifteenth Session of the Executive Body for the Convention on Long-Range Transboundary Air Pollution, *Report of the Fifteenth Session of the Executive Body for the Convention on Long-Range Transboundary Air Pollution*, UN Doc ECE/EB.AIR/53 (1998).

<sup>136</sup> Decision 24/CP.7 of the Conference of the Parties on its Seventh Session, *Report of the Conference of the Parties on its Seventh Session*, UN Doc FCCC/CP/2001/13/Add.3 (2002) ('*Kyoto Protocol NCP*'). See generally Massimiliano Montini, 'Improving Compliance with Multilateral Environmental Agreements through Positive Measures: The Case of the Kyoto Protocol on Climate Change' in Alexandre Kiss, Dinah Shelton and Kanami Ishibashi (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 157. For an analysis of compliance issues prior to the adoption, or during the negotiation, of the *Kyoto Protocol NCP* see Gregory Rose, 'A Compliance System for the Kyoto Protocol' (2001) 24 *UNSW Law Journal* 588; Peggy Rodgers Kalas and Alexia Herwig, 'Dispute Resolution Under the Kyoto Protocol' (2000) 27 *Ecology Law Quarterly* 53.

<sup>137</sup> Decision 1/7 of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN Doc ECE/MP.PP/2/Add.8 (2002).

<sup>138</sup> Edward A Parson, 'Protecting the Ozone Layer' in Peter M Haas, Robert O Keohane and Marc A Levy (eds), *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993) 27; Jørgen Wettestad, 'The Vienna Convention and the Montreal Protocol on Ozone-Layer Depletion' in Edward L Miles et al (eds), *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2002) 149.

<sup>139</sup> *Montreal Protocol*, preamble, 5th recital.

<sup>140</sup> *Report of the First Meeting of the Ad Hoc Working Group of Legal Experts on Non-Compliance with the Montreal Protocol*, UN Doc UNEP/OzL.Pro.LG 1/3 (1989).

<sup>141</sup> For a discussion of the negotiation history of the procedure see Ehrmann, above n 52, 391-395; Romano, above n 96, 69-72.

The *Montreal Protocol NCP*, which is set out in 16 short paragraphs, may be activated in three ways. In the first place, one party may address concerns relating to another party's implementation of the Protocol to the Secretariat.<sup>142</sup> Second, the Secretariat may itself initiate the procedure when it becomes aware of possible non-compliance.<sup>143</sup> Third, where a party concludes that despite its best endeavours it is unable to comply with its obligations, then it may itself invoke the procedure. The procedure is designed so that it can be invoked wherever there are concerns about actual or potential non-compliance, notwithstanding that there has been no injury to a state party. It can therefore be utilised in the common interest, a feature which is essential given the subject of the regime.<sup>144</sup>

Once invoked, the second step in the procedure is consideration of the potential non-compliance situation by the Implementation Committee; a permanent body composed of ten parties elected by the Meeting of the Parties for two years, based on equitable geographical distribution.<sup>145</sup> The Implementation Committee, which meets twice a year, has several functions. Chief among them is to consider the submissions, information and observations provided by the parties and the Secretariat in relation to non-compliance 'with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol.'<sup>146</sup> Arguably this mandate to seek an 'amicable solution' to a situation of non-compliance is a goal that is incompatible with the general system of the Protocol which is to protect collective rights.<sup>147</sup> It introduces a degree of bilateralism (to seek a settlement between the state or states alleging non-compliance and the allegedly non-compliant state) when the real concern should be whether in, objective terms, the defaulting state is in compliance.

However other features of the scheme tend to confirm that the main focus of the NCP is to remedy situations of non-compliance rather than merely resolve disputes. The Implementation Committee is required to report to the Meeting of the Parties, making any recommendations as to decisions which it considers appropriate, and the Parties must then decide upon, and call for steps to bring about, full compliance with the Protocol, including any measures to assist the non-compliant state.<sup>148</sup> A number of measures may be taken by the Meeting of the Parties in response to non-compliance

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<sup>142</sup> *Montreal Protocol NCP*, above n 107, [1].

<sup>143</sup> *Ibid* [2].

<sup>144</sup> Ehrmann, above n 52, 396.

<sup>145</sup> *Montreal Protocol NCP*, above n 107, [5].

<sup>146</sup> *Ibid* [8].

<sup>147</sup> Koskeniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol', above n 52, 149.

<sup>148</sup> *Ibid* [9].

including providing appropriate assistance, issuing cautions and, in extreme situations, suspending rights and privileges of the Protocol.

The *Montreal Protocol NCP* has been frequently activated since it was first utilised in 1995 following indications by the Russian Federation, Belarus, Bulgaria, the Ukraine and Poland that they were unable to meet the Protocol's requirements.<sup>149</sup> The Implementing Committee considered the procedure to have been activated by these non-compliant states themselves, thereby underling the non-adversarial nature of the NCP process.

(ii) *Kyoto Protocol NCP*

A compliance procedure has also been created for the *Kyoto Protocol* to complement the protocol's 'flexibility mechanisms' to ensure that there is an overall global reduction in greenhouse gas emissions.<sup>150</sup> Under the *Kyoto Protocol NCP*, which is more detailed and comprehensive than the *Montreal Protocol NCP*, compliance is monitored and acted upon by the Compliance Committee. The Committee functions through a Plenary session, a Bureau and two branches: the Facilitative Branch and the Enforcement Branch.<sup>151</sup>

The Facilitative Branch is responsible for 'providing advice and facilitation to Parties' in implementing the Protocol and for 'promoting compliance' having regard to the principle of common but differentiated responsibilities.<sup>152</sup> The Enforcement Branch is responsible for determining whether a party is complying with provisions of the *Kyoto Protocol*, including quantified limitation or reduction commitments,<sup>153</sup> and for applying the consequences set out in the NCP in cases of non-compliance.<sup>154</sup> In applying such measures, the Enforcement Branch is required to aim 'at the restoration of compliance to ensure environmental integrity, and shall provide for an incentive to comply.'<sup>155</sup> By comparison with the *Montreal Protocol NCP* this procedure is therefore more clearly directed at remedying defaulting behaviour rather than resolving disputes.

Situations of non-compliance, described somewhat obliquely in the *Kyoto Protocol NCP* as 'questions of implementation', may be raised by expert review teams, any party

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<sup>149</sup> *Report of the Eleventh Meeting of the Implementation Committee Under the Non-Compliance Procedure for the Montreal Protocol*, UN Doc UNEP/OzL.Pro/ImpCom/11/1 (1995).

<sup>150</sup> In relation to the Clean Development Mechanism and other flexibility mechanisms see Matthew Coghlan, 'Prospects and Pitfalls of the Kyoto Protocol to the United Nations Framework Convention on Climate Change' (2002) 3 *Melbourne Journal of International Law* 165.

<sup>151</sup> *Kyoto Protocol NCP*, above n 136, s II.

<sup>152</sup> *Ibid* s IV, [4].

<sup>153</sup> *Ibid* s V, [4], [5].

<sup>154</sup> *Ibid* s V, [5].

<sup>155</sup> *Ibid* s V, [6].

with respect to itself, or any party with respect to another party.<sup>156</sup> The Bureau is responsible for allocating questions of implementation to the appropriate branch, which will then undertake a preliminary examination of the situation in order to determine whether the matter should proceed.<sup>157</sup> If the matter does proceed, then the party concerned may designate persons to represent it during the consideration of the question of implementation by the relevant branch.<sup>158</sup> Deliberations by the relevant branch are to be based, *inter alia*, on reports of any expert review team, the party concerned, or the party that raised the question of implementation.<sup>159</sup> Importantly, competent inter-governmental and non-governmental organisations may submit relevant factual and technical information to the relevant branch,<sup>160</sup> and the branch itself may seek expert advice.<sup>161</sup>

Aspects of the procedure to be followed by the Enforcement Branch are quasi-judicial in nature. Decisions must include conclusions and reasons, the party concerned may request the holding of a hearing (which will ordinarily be public) by the Enforcement Branch at which it will have an opportunity to present its views,<sup>162</sup> and final decisions by the Enforcement Branch as to non-compliance are to be made available to the other parties and to the public.<sup>163</sup> Decisions by each branch within their respective competencies are also self-executing. Unlike the *Montreal Protocol NCP*, there is no need for adoption of the decisions by the Meeting of the Parties. However, there does exist a system of review, by which a party may appeal to the Conference of the Parties serving as the Meeting of the Parties against a decision of the enforcement branch if the party believes that it has been denied due process.<sup>164</sup>

The Enforcement Branch has at its disposal a host of possible measures that can be applied in the event of non-compliance. When the requirements for developing systems for estimating and reporting emission levels have not been met, the Enforcement Branch is to make a declaration of non-compliance and develop a plan in collaboration with the party concerned in order to bring the party back into compliance.<sup>165</sup> The Enforcement Branch may suspend the eligibility of a party to transfer emission reduction units in relation to sinks of greenhouse gases, to participate in the clean development

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<sup>156</sup> *Ibid* s VI, [1].

<sup>157</sup> *Ibid* s VII.

<sup>158</sup> *Ibid* s VIII [2].

<sup>159</sup> *Ibid* s VIII [3].

<sup>160</sup> *Ibid* s VIII [4].

<sup>161</sup> *Ibid* s VIII [5].

<sup>162</sup> *Ibid* s IX, [2].

<sup>163</sup> *Ibid* s IX, [10].

<sup>164</sup> *Ibid* s XI.

<sup>165</sup> *Ibid* s XV, [1], [2].

mechanism, or to engage in emissions trading when it determines that the party does not meet the eligibility requirements for these mechanisms.<sup>166</sup>

When the Enforcement Branch determines that a party has failed to meet its emission target, then it is required to declare that the party is not in compliance with its commitments. The defaulting party must then make up for any excess emissions during the second commitment period, and the new target will include a 30 per cent reduction by way of penalty for non-compliance. The Enforcement Branch must also suspend the eligibility of the party to participate in emissions trading, and develop a compliance action plan to ensure that the party meets its quantified emission limitation or reduction commitment in the subsequent commitment period.<sup>167</sup>

Finally it should be noted that, much like the *Montreal Protocol NCP*, the *Kyoto Protocol NCP* applies without prejudice to the dispute settlement procedures applicable to the Protocol (namely those of the *Climate Change Convention*).<sup>168</sup>

(iii) *The Innovations of NCPs*

The preceding review suggests many points of distinction between NCPs and traditional dispute settlement procedures for enforcing environmental obligations. The key difference is their capacity to act as preventive mechanisms, as they are empowered to deal with relatively minor compliance issues, and thereby assist states in discharging their obligations before a serious issue of non-compliance arises. They are also potentially more responsive to interests of a community character. NCPs may be invoked by any one of the parties to the relevant environmental instrument, and in some cases by bureaucratic bodies established under the instrument, such as permanent secretariats. Accordingly, unlike the law of state responsibility, NCPs can be utilised where the actor invoking the procedure is not injured or affected as a consequence of a wrongful act. Sand has noted that their ‘general approach (not requiring any injury or other condition of standing for the party submitting the complaint) resembles that of a ‘class action’ in the interest of all parties.’<sup>169</sup>

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<sup>166</sup> Ibid s XV, [4].

<sup>167</sup> Ibid s XV, [5].

<sup>168</sup> Ibid s XVI. Under art 14 of the *Climate Change Convention* disputes are first to be settled by the parties through negotiation or any other peaceful means of their own choice. Adjudication by the ICJ or an arbitral tribunal will apply where the parties to a dispute have both made declarations recognising the same procedure as compulsory ipso facto and without special agreement. Where no such declarations have been made and the parties to a dispute have not been able to resolve their dispute after twelve months then the dispute may be submitted, at the request of any party to the dispute, to conciliation.

<sup>169</sup> Sand, above n 34, 50.

A further point of departure from existing machinery is the non-confrontational and non-adversarial nature of NCPs.<sup>170</sup> There is no need to ‘manufacture’ a dispute in order to bring an environmental question under the supervision of a third-party procedure such as arbitration. Compliance issues are considered from the perspective of the interest of the treaty regime as a whole rather than in terms of bilateral disputes between two parties. This is also reflected in the range of measures that may be adopted in order to bring wayward states back into compliance. Reflecting the fact that most situations of non-compliance derive from insufficient capacity, the focus of NCPs is first upon assistance, such as in the collection and reporting of data, other technical assistance including the transfer of technology, and financial assistance. In very serious situations a non-compliant party may be suspended from a treaty regime, although termination is not normally among the range of enforcement tools as complete exclusion of a party is likely to be counterproductive in terms of achieving a regime’s objects and purposes.

(iv) *Interactions with Existing Enforcement Mechanisms: Breach or Non-Compliance?*

In contrast with traditional methods of enforcement that are activated on the breach of an environmental obligation, NCPs ascertain compliance and non-compliance according to much more flexible criteria. Under NCPs there is a blending of both negotiatory and adjudicative powers,<sup>171</sup> and they can provide positive encouragement to states to comply with an environmental regime rather than punitive sanctions. In this regard NCPs have been described as ‘a form of conciliation between a state and the international community in which a non-compliant state is, initially, not condemned, but given a helping hand.’<sup>172</sup> This has advantages given that environmentally deleterious activities often fall short of the breach of a treaty-based or customary environmental obligation.

However, these features have attracted some criticism, with some commentators concerned that this ‘softer’ form of enforcement may, over time, devalue the provisions of environmental regimes they are designed to uphold.<sup>173</sup> Such criticisms are not necessarily well-founded as there may be value in a precise environmental rule that is

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<sup>170</sup> Nonetheless they do seek to ensure that there is procedural fairness by allowing non-compliant states to participate in proceedings being conducted by the relevant compliance body and by preventing such states from having any input in the adoption by the body of its recommendations or decisions. See, eg, *Montreal Protocol NCP*, above n 107, [10], [11].

<sup>171</sup> Chinkin, above n 83, 129.

<sup>172</sup> Marcel Brus, *Third Party Settlement in an Interdependent World* (1995) 40.

<sup>173</sup> Koskenniemi, ‘Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol’, above n 52; Martti Koskenniemi, ‘Comment on the Paper by Antonia Handler Chayes, Abram Chayes and Ronald B Mitchell’ in Winfried Lang (ed), *Sustainable Development and International Law* (1995) 91, 94.

enforced somewhat flexibly. Because NCPs offer greater prospects of a cooperative rather than confrontational approach to compliance problems, states may be more willing to agree to more extensive and better defined environmental obligations. Not only can NCPs take a range of measures to ensure that states comply with such clear rules, but action outside an environmental regime is also more likely to be possible as clearly expressed rules permit non-governmental organisations and other actors to bring greater political pressure to bear on defaulting governments.

The interaction between NCPs and general international law relating to breach of treaty and state responsibility also raises several questions as to the distinction between principles of treaty law, state responsibility and formal dispute settlement procedures.<sup>174</sup> What is the relationship between the concepts of 'non-compliance' and 'breach'? Will a determination of the former lead inevitably to the latter, thereby permitting states not only to utilise the relevant NCP but also turn to the law of treaties and state responsibility to seek to expel a defaulting member and seek restitution? Would such a situation entail the parallel operation of formal dispute settlement procedures and the NCP system? There are several reasons why these questions are less problematic than they might initially appear.<sup>175</sup> In the first place, most non-compliance situations will fall far short of a technical breach of treaty and thereby other parties would not in any event be in a position to complain of such violations in parallel dispute settlement procedures. Second, even if non-compliance does involve a breach of a treaty obligation entailing state responsibility, it may be difficult to identify situations in which another state has suffered the requisite injury to be able to invoke the responsibility of the delinquent state. In this regard NCPs fulfil a need inadequately served by traditional procedures.

### III CONCLUSION

International environmental law initially developed as a collection of aspirational and soft-law instruments but these broad, frequently non-binding, texts have since been supplemented by a growing body of hard treaty law. It might therefore have been expected that compliance and enforcement in this area would follow a model of judicialisation in other areas of international law, such as international trade law, where there is a high degree of normative precision coupled with mandatory dispute settlement procedures readily initiated by members. However, the movement to law and legal institutions has to date been different in the international environmental field. There has

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<sup>174</sup> For a discussion of these issues in relation to the *Kyoto Protocol* see Malgosia Fitzmaurice, 'The Kyoto Protocol Compliance Regime and Treaty Law' (2004) 8 *Singapore Yearbook of International Law* 23.

<sup>175</sup> See Nout van Woudenberg, 'Compliance Mechanisms: A Useful Instrument' (2004) 34 *Environmental Policy and Law* 185, 185-186 (noting that the differences between NCPs and dispute settlement procedures 'are substantial and fundamental, and a procedure under [a] compliance mechanisms...does not prejudice any dispute settlement procedure.').



been an marked increase in the use of dispute settlement procedures, including courts and tribunals. But in terms of compliance, the tendency has been towards the establishments of hard and technical environmental standards that are combined with a ‘softer’ form of dispute settlement, namely NCPs and supervisory institutions. This development appears, at least in part, to constitute recognition of the limitations of traditional methods of inter-state dispute settlement.

This Chapter has endeavoured to situate international courts and tribunals among the institutions that have been established to address issues of compliance, enforcement, and dispute settlement in international environmental law. It was contended that the basic system of inter-state claims, made under the rubric of state responsibility and the law of treaties and leading to the invocation of dispute methods referred to in Article 33 of the *UN Charter*, provides only rudimentary tools for inducing compliance. Several reasons were advanced in this respect, including that dispute settlement bodies can be constrained by their central purpose or rationale, which is to resolve controversies peacefully rather than to uphold community values. By being responsive to the dynamics of the compliance problem, supervisory bodies established under multilateral regulatory agreements appear to present an vital part of institutional frameworks for ensuring that states meet their international environmental obligations. Such treaty-based institutions, including NCPs, secretariats, permanent commissions and other bodies, may perform multiple tasks across the life of an environmental regime, and through various stages from the identification of a potential non-compliance situation to the resolution of a dispute between the parties. Functions performed include the collection of information, reviewing reports from states on treaty implementation, assessing the performance of states of their obligations, deciding upon measures to be taken in response to non-compliance, and the negotiation and adoption of additional regulations applicable under the treaty regime. A major strength of such international regulatory institutions is that they may be more focussed on regime compliance and effectiveness, and less on technical questions of breach, responsibility or liability.

## 4

# Reassessing the Role of Adjudication in International Environmental Regimes

It was seen in the previous Chapter that international environmental law has not evolved a widespread dependence upon international adjudication as a mechanism of compliance control. Instead there has been a preference for a more ‘managerial’ approach to compliance pursued through flexible, supervisory, institutions. However, the adoption of this approach is not universal, and there are some environmental regimes that depend to a considerable degree upon judicial supervision and enforcement. This Chapter examines this diversity of practice, and seeks to understand in what circumstances adjudication may be used as a successful strategy of compliance control in international environmental law. In the first section the Chapter provides an overview of the functions of adjudication in environmental regimes. Building upon this analysis the second section considers the main arguments that have been raised for and against the value of adjudication in international environmental governance. It also examines new perspectives which contend that it is possible for courts and tribunals to assume a far more prominent role than they have to date.

### I AN OVERVIEW OF ADJUDICATIVE PROCEDURES IN ENVIRONMENTAL REGIMES

All international courts and tribunals may be said to perform three main functions – the resolution of disputes, the enforcement of legal commitments, and the development of rules and principles. However, these are not tasks that are discharged in equal measure across environmental regimes, and each function is more or less pronounced depending upon the specific institutional context, including the subject matter addressed by the regime in question. Separating existing adjudicative procedures into a number of functional categories helps to explain the nature and extent of these differences.

#### A *Adjudication as a Method of Dispute Settlement*

Most environmental instruments refer to arbitration or judicial settlement as simply one among a number of dispute settlement options, all of which may be used to achieve the same desired result, namely a peaceful resolution to any controversy between the parties concerning environmental issues. This type of approach is particularly evident in early environmental treaties and conventions. In the *1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora* (‘CITES’) and the *1979 Convention on the Conservation of Migratory Species of Wild Animals* (‘Bonn

*Convention*') the parties are encouraged to resolve their dispute by negotiation but, if this is not successful, they may by mutual agreement submit the dispute to arbitration. This attitude to adjudication is also retained in some more recently concluded agreements. The *1994 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification ('Desertification Convention')* is typical of several environmental instruments in providing that parties are to settle any dispute through negotiation or other peaceful means of their choosing, and may also submit, in advance, to the jurisdiction of an arbitral tribunal or the ICJ.<sup>1</sup>

The common feature of this early, and more recent, practice is that adjudication is not regarded as essential for ensuring compliance with the regime. In the earlier treaties adjudication was not included as an enforcement mechanism for the simple reason that states were not willing to have their implementation of environmental rules subjected to judicial scrutiny. In more recent treaties this continues to be a concern for governments, but adjudication appears to be omitted for the additional reason that other institutions have assumed enforcement and compliance functions. Hence the implementation of the *Desertification Convention* is to be promoted by innovative supervisory mechanisms not included in *CITES* or the *Bonn Convention*. In addition to obligations to collect and disseminate information, to build capacity, education and public awareness, and facilitate the transfer of technological and financial capacity, the *Desertification Convention* is complemented by treaty institutions including a Conference of the Parties, a permanent secretariat and a standing committee on science and technology. Moreover, and recognising the opportunities for further institutional development, the Conference of the Parties is required to consider and adopt procedures and institutional mechanisms for resolving questions that arise concerning the implementation of the Convention.<sup>2</sup>

However, in some environmental regimes adjudication has far more prominence by virtue of being included as a compulsory means of dispute settlement. The *1991 Protocol on Environmental Protection to the Antarctic Treaty ('Madrid Protocol')* is one of the few environmental instruments to provide for mandatory arbitration.<sup>3</sup> Nonetheless the process is structured so that the arbitral procedure is seen largely in dispute settlement, rather than enforcement, terms. Hence Article 18 calls for parties to settle disputes concerning the interpretation or application of the *Madrid Protocol* by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means. It is only where this is unsuccessful that the parties may turn to judicial

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<sup>1</sup> *Desertification Convention*, art 28.

<sup>2</sup> *Ibid* art 27.

<sup>3</sup> See generally Tullio Treves, 'Compulsory Settlement of Disputes: A New Element in the Antarctic System' in Francesco Francioni and Tullio Treves (eds), *International Law for Antarctica* (1996) 603.

settlement by the ICJ or to arbitration, the latter which applies by default if the parties have not indicated, in advance, a preference for the ICJ.<sup>4</sup> This focus upon adjudication in dispute settlement terms makes sense in the context of the *Madrid Protocol* because, as with the *Desertification Convention*, it includes additional mechanisms for ensuring that states observe their obligations. In the *Madrid Protocol*, which in this respect follows the basic formula for compliance control adopted in the *1959 Antarctic Treaty*, this includes a system of inspection established by Article 14, the purpose of which is to ‘promote the protection of the Antarctic environment and dependent and associated ecosystems, and to ensure compliance with [the] Protocol.’ Under this mechanism observers may undertake inspections of all stations, installations, equipment, ships and aircraft of Antarctic Treaty Consultative Parties, thereby promoting observance of the environmental protection provisions of the *Madrid Protocol* by the actual or threatened exposure of breaches.<sup>5</sup>

## B *Adjudication as a Method of Compliance Control*

### (a) *Inter-State Environmental Adjudication*

Another category of adjudicative procedure in the international environmental context is where it is generally compulsory and conceived not only as a method for settlement but also has a defined enforcement role. There are only a select few such examples in the environmental field and arguably the most important is the *United Nations Convention on the Law of the Sea* (*‘LOS Convention’*).<sup>6</sup> Charney has explained the enforcement role that this novel system was designed to play in the context of marine environmental protection:

The LOS Convention’s articles on dispute settlement are the strongest of any environmental treaty to date...The compulsory dispute settlement system is the best guarantee possible that states parties will fulfil their LOS Convention-based obligations with regard to the environment. Not only will states that are parties to those procedures be compelled to do so, but states parties will be encouraged to abide by their LOS Convention-based obligations since failure to perform those obligations exposes them to compulsory dispute settlement procedures.<sup>7</sup>

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<sup>4</sup> *Madrid Protocol*, art 19.

<sup>5</sup> See generally Donald R Rothwell, *The Polar Regions and the Development of International Law* (1996) 139ff. See also Catherine Redgwell, ‘Environmental Protection in Antarctica: The 1991 Protocol’ (1994) 43 *International and Comparative Law Quarterly* 599 and Sam Blay, ‘New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol’ (1992) 86 *American Journal of International Law* 377.

<sup>6</sup> Alan E Boyle, ‘Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction’ (1997) 46 *International and Comparative Law Quarterly* 37, 46 (noting that the the compulsory dispute settlement system of the *LOS Convention*, which applies to virtually all marine environmental disputes, ‘remains a novelty among even the most ambitious of environmental treaties, where compulsory conciliation is usually the most the parties are prepared to agree on.’).

<sup>7</sup> Jonathan I Charney, ‘The Marine Environment and the 1982 United Nations Convention on the Law of the Sea’ (1994) 28 *International Lawyer* 879, 894-895. For a sceptical analysis of the utility of adjudication in marine environmental governance see Ted L McDorman, ‘Global Ocean Governance and International

The template provided by the *LOS Convention* has subsequently been followed in several key fisheries agreements, including the *Straddling Stocks Agreement*<sup>8</sup> which relies, *mutatis mutandis*, upon the dispute settlement system set out in Part XV of the *LOS Convention*. These agreements are distinguishable from other environment-focussed regimes providing for compulsory arbitration or judicial settlement, such as the *Madrid Protocol*, in two main ways. First, because adjudication is given a pivotal role in supervising the implementation of the regime and exists alongside only a limited number of other treaty-based structures for compliance.<sup>9</sup> Although the *LOS Convention* did create institutions to manage some aspects of the law of the sea regime (most notably the Deep Seabed Authority and the Commission on the Limits of the Continental Shelf)<sup>10</sup> it did not establish a general supervisory institution such as a permanent secretariat or other standing bureaucracy. The second distinctive feature of the *LOS Convention* is that there are very few exceptions to the use of the adjudicative procedures, particularly in relation to marine environmental disputes. The general intent of the *LOS Convention* is to ensure that law of sea disputes are resolved in an authoritative and binding manner. The emphasis is therefore upon promoting a resolution of controversies that upholds the regime, rather than merely a settlement that is satisfactory to the parties and removes a source of international tension.

Unlike other environmental instruments providing for compulsory adjudication, the *LOS Convention* is also notable for its reliance upon a permanent judicial institution, ITLOS. In relation to most disputes under the *LOS Convention* the parties have four adjudicative bodies to select from, including Annex VII Arbitration, ‘special arbitration’ under Annex VIII, or judicial settlement by the ICJ or by ITLOS.<sup>11</sup> Whilst Annex VII Arbitration applies by default, ITLOS has residual jurisdiction in relation to matters

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Adjudicative Dispute Resolution’ (2000) 43 *Ocean and Coastal Management* 255, 257 (‘despite a multitude of processes for settlement of oceans disputes, states have been reluctant to make use of these processes with the result that third-party adjudication has contributed little to existing governing ocean structures.’).

<sup>8</sup> 1995 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (‘*Straddling Stocks Agreement*’), pt VIII. See also the 2000 *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, pt IX and the 2001 *Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean*, art 24.

<sup>9</sup> Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005) 146 (‘UNCLOS does not follow [a] cooperative, institutional approach but instead requires mandatory third-party review. Clearly, the regulatory and compliance regimes formulated in other areas of international environmental law were not perceived as workable, or perhaps inadequate, for the protection and preservation of the marine environment within the context of UNCLOS.’).

<sup>10</sup> See generally Donald R Rothwell, ‘Oceans Management and the Law of the Sea in the Twenty-First Century’ in Alex G Oude Elferink and Donald R Rothwell (eds), *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (2004) 329, 335-340 (discussing the Commission on the Limits of the Continental Shelf) and 341-344 (discussing the Seabed Authority).

<sup>11</sup> *LOS Convention*, art 287.

which can involve important marine environmental issues, namely prompt release cases<sup>12</sup> and applications for provisional measures pending the determination of a hearing of a dispute on the merits.<sup>13</sup> Both heads of jurisdiction have been frequently invoked.<sup>14</sup> Moreover, the provisional measures jurisdiction specifically recognises the importance of marine environmental protection,<sup>15</sup> and can be used to uphold, at least on an interim basis, the environmental obligations of the *LOS Convention*.

Although by virtue of its dispute settlement mechanisms the *LOS Convention* is unique amongst international environmental regimes, it should be noted that there are some cognate systems which are also directed towards preserving regime integrity and effectiveness rather than being concerned only with the purpose of dispute settlement. An important example is found in the *1992 Convention on Biological Diversity* ('*Biodiversity Convention*').<sup>16</sup> While arbitration or judicial settlement is optional under this instrument, these mechanisms are situated within a compulsory conciliation scheme designed to serve compliance and enforcement purposes. Under the *Biodiversity Convention* the parties to a dispute are first to seek a solution by negotiation.<sup>17</sup> If that fails then they may jointly seek to have their dispute mediated.<sup>18</sup> Should this also not produce a satisfactory resolution of the controversy, then the dispute may be submitted to arbitration or judicial settlement by the ICJ if the parties have accepted the jurisdiction of the same procedure in advance.<sup>19</sup> The final resort is to compulsory conciliation,<sup>20</sup> which cannot be avoided except by joint agreement. Although the conciliation report is not binding, the commission established for the purpose is required to render a proposal for resolving the dispute 'which the parties shall consider in good faith.'<sup>21</sup> Conciliation is envisaged therefore as a form of independent and impartial investigation of compliance with the agreement, and is not exclusively concerned with promoting an amicable settlement.

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<sup>12</sup> *Ibid* art 292.

<sup>13</sup> *Ibid* art 290.

<sup>14</sup> See Chapter 7.

<sup>15</sup> *LOS Convention*, art 290(1) (provisional measures may be issued 'to prevent serious harm to the marine environment.').

<sup>16</sup> *Biodiversity Convention*, art 27. Instruments that adopt similar or identical dispute settlement provisions include the *1992 United Nations Framework Convention on Climate Change*, art 14 and the *1985 Vienna Convention for the Protection of the Ozone Layer*, art 11.

<sup>17</sup> *Biodiversity Convention*, art 27(1).

<sup>18</sup> *Ibid* art 27(2).

<sup>19</sup> *Ibid* art 11(3).

<sup>20</sup> *Ibid* art 27(4).

<sup>21</sup> *Ibid* annex II, art 5.

(b) *'Supranational' Environmental Adjudication*

The *Biodiversity Convention* and the *LOS Convention* establish inter-state enforcement mechanisms and rely upon governments to utilise these compulsory conciliation and adjudication procedures in order to enforce the substantive environmental protection obligations. Given the reluctance of states to bring such claims,<sup>22</sup> the practical result has been the instigation of no conciliation proceedings under the *Biodiversity Convention* for alleged breaches,<sup>23</sup> and a relatively modest number of cases commenced under the *LOS Convention*. However, some other compulsory regimes operating in the environmental field are not limited in this way, and offer the potential for private actors to be involved in the enforcement process. Such 'supranational'<sup>24</sup> bodies substantially alter the dynamics of a dispute settlement system, as individuals and other private actors do not face the same disincentives as states in litigating grievances.

The most prominent example of such a procedure is the European legal system, which has acquired a substantial environmental focus over the course of its development, and in which a supranational judicial body has played a central enforcement role. Private actors have a range of options for gaining access to the Court of Justice of the European Communities ('ECJ') to ensure that European environmental law is faithfully implemented and enforced by member states. Natural and legal persons involved in domestic litigation may prompt the relevant municipal court to seek a preliminary ruling from the ECJ, and in those proceedings make submissions to the Court.<sup>25</sup> Civil society can also commence proceedings to contest the legality of actions of Community institutions under European Community law.<sup>26</sup> Finally, it should be noted that while individuals may not bring claims in the ECJ against member states in order to ensure compliance with European Community law, these proceedings may be

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<sup>22</sup> See David A Wirth, *Reexamining Decision-Making Processes in International Environmental Law* (1994) 79 *Iowa Law Review* 769, 779 (noting the political and strategic costs often involved in the bringing of third-party dispute settlement procedures).

<sup>23</sup> However, it has been suggested that in 1995 New Zealand considered invoking the procedure in response to French nuclear testing in the Pacific: Philippe Sands and Ruth MacKenzie, 'Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements' in International Bureau of the Permanent Court of Arbitration (ed), *International Investments and Protection of the Environment* (2001) 305, 314.

<sup>24</sup> In this context 'supranational' means that the international judicial process directly involves private actors as litigants. As Grievies has explained, 'supranational' in a more general sense means that 'states have transferred to an international institution certain limited decision-making powers normally exercised only by the governmental organs of a sovereign state, powers which include the capability of issuing, under certain specified conditions, binding norms to the states or to their inhabitants': Forest L Grievies, *Supranationalism and International Adjudication* (1969) 14

<sup>25</sup> *Consolidated Version of the Treaty Establishing the European Community* ('EC Treaty'), art 234.

<sup>26</sup> But only if the decision is addressed to that person, and is of 'direct and individual concern' to them: *EC Treaty*, art 230.

commenced by the European Commission, and the Commission has been actively involved in such enforcement efforts, often at the prompting of environmental groups.<sup>27</sup>

There are some indications that elements of this supranational approach to adjudication may be translated to environmentally-focussed regimes. In this respect, one of the more remarkable recent innovations in environmental dispute settlement is the citizen submissions procedure of the *1993 North American Agreement on Environmental Co-operation* ('*NAAEC*'),<sup>28</sup> which was agreed alongside the *1992 North American Free Trade Agreement*. The *NAAEC* was designed to allay concerns that trade liberalisation between Canada, Mexico and the United States would lead to a 'race to the bottom', with polluting industries taking advantage of jurisdictions where environmental standards were not enforced. The *NAAEC* addresses this problem through two primary obligations. First, each party is required to enforce its environmental laws 'effectively.'<sup>29</sup> Second, the parties are required to maintain their environmental laws at sufficiently high standards, and work to improve them further.<sup>30</sup>

The *NAAEC* establishes several institutions and procedures for ensuring that these obligations are discharged. In overall terms the *NAAEC* appears to adopt a managerial approach.<sup>31</sup> However, two of its institutions for compliance control adopt a more coercive strategy. One of these is the convoluted (and as yet unused) procedure for establishing an arbitral tribunal where one *NAAEC* party considers that another has systematically failed to enforce its environmental laws effectively.<sup>32</sup> However, the more important mechanism is the citizen submissions system. Under this procedure private parties may claim that any *NAAEC* party is failing effectively to enforce its environmental laws.<sup>33</sup> The *NAAEC* Secretariat may, in response, decide to author a Factual Record on the matter submitted.<sup>34</sup> In deciding whether to commence such an investigation the Secretariat must consider the extent to which an applicant has an interest in the complaint, whether addressing the submission would advance the goals of

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<sup>27</sup> See Richard C Visek, 'Implementation and Enforcement of EC Environmental Law' (1995) 7 *Georgetown International Environmental Law Review* 377, 406.

<sup>28</sup> See generally Kal Raustiala, 'Citizen Submissions and Treaty Review in the NAAEC' in David L Markell and John H Knox (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 257.

<sup>29</sup> *NAAEC* art 5(1).

<sup>30</sup> *Ibid* art 3.

<sup>31</sup> John H Knox, 'A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission' (2001) 28 *Ecology Law Quarterly* 1, 56.

<sup>32</sup> *Ibid* 59 (describing this procedure as 'a dead letter...because the parties will be extremely averse to invoking it against one another, for all the reasons that states are generally reluctant to invoke adjudication to resolve international environmental disputes.')

<sup>33</sup> *NAAEC*, art 14 (1).

<sup>34</sup> *Ibid* art 15.



the *NAAEC*, and whether available domestic remedies have been pursued.<sup>35</sup> If these preconditions are met, then the Secretariat may inform the *NAAEC* Council that a factual record should be prepared. If the Council considers that it should (which it may by a two-thirds vote) then the Secretariat will be asked to draw up the report on the alleged infringement.<sup>36</sup>

The *NAAEC* Secretariat has received a growing number of submissions since it commenced operation.<sup>37</sup> It falls short of a truly compulsory adjudicative procedure in that it cannot be automatically invoked, and does not lead to binding determinations. Nonetheless, it bears many of the hallmarks of successful supranational adjudication in other contexts, including that of the European legal system, in granting access to private individuals to make complaints regarding state compliance with environmental standards, in allowing these claims to be reviewed by independent experts, and in providing for the possibility of adverse reports based upon findings of fact and determinations of law.<sup>38</sup> Moreover in practice the Secretariat has adopted a quasi-judicial approach, issuing carefully reasoned reports based upon a close reading of *NAAEC* provisions.<sup>39</sup>

## II DEBATES CONCERNING THE VALUE OF ADJUDICATION IN THE ENVIRONMENTAL CONTEXT

Ever since environmental concerns began to be considered on the international plane, there has been considerable debate concerning the value of adjudication both in resolving environmental disputes, and in enforcing environmental obligations. This debate has often appeared one-sided, with international courts and tribunals argued to be inherently unsuited to deal with concerns that appear to be of a fundamentally different order from those traditionally the concern of bilateral dispute settlement processes.

### A *Limitations in Existing Arrangements*

International legal scholars have raised an array of arguments against the suitability of adjudication in the environmental context. These arguments come from two main perspectives. First, there is a body of criticism that has identified the limitations of

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<sup>35</sup> *Ibid* art 14(2).

<sup>36</sup> *Ibid* art 15.

<sup>37</sup> From its creation in 1995 to February 2003 the Secretariat received 36 submissions, and published three records. For a tabular summary see David L Markell, 'The CEC Citizen Submissions Process: On or Off Course?' in David L Markell and John H Knox (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 274, 289-293.

<sup>38</sup> Knox, above n 31, 121.

<sup>39</sup> *Ibid*.

existing mechanisms.<sup>40</sup> This critique has pointed to issues such as the lack of capacity of judicial institutions to deal with complex issues of environmental law and policy. On this basis it has been suggested that there is a need for an existing or new body to be developed with environmental expertise. Such criticism has also identified other functional defects in current arrangements, including that as environmental disputes often involve issues in which a large number of actors have an interest, there is a need for multi-party procedures which encompass not only a range of states, but also non-state actors. The limited scope of judicial remedies has also been frequently cited as a major defect. Boyle has commented in this regard that ‘the international law of remedies for breach of obligation has not yet caught up with the expansion of international legal commitments to the protection of the environment.’<sup>41</sup> Most problematically, there appears to be no widespread recognition that damages for ‘pure’ environmental harm (as opposed to environmental damage impacting upon human interests) should be recoverable.

Much of this criticism has force, although many arguments against adjudication are more properly directed at underlying problems. Hence, for instance, the incapacity of adjudicative structures to respond to issues of community concern often stem from deficiencies in the legal framework rather than the courts or tribunals themselves. It may be admitted that there exist limited mechanisms for recovering damages in respect of pollution in areas of the global commons causative of no damage to any specific state interests.<sup>42</sup> However, if the notion of an *actio popularis* were recognised as part of customary international law, such that any state could bring an action for damage to global commons spaces, then there would be no reason in principle why the ICJ or other courts could not be used for international environmental litigation in the community interest.

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<sup>40</sup> For a concise review of this scholarship see Phoebe N Okowa, ‘Environmental Dispute Settlement: Some Reflections on Recent Developments’ in Malcolm D Evans (ed), *Remedies in International Law: The Institutional Dilemma* (1998) 157. See also Richard B Bilder, ‘The Settlement of Disputes in the Field of the International Law of the Environment’ (1975) 144 *Recueil des Cours* 139; Christine Gray, *Judicial Remedies in International Law* (1987).

<sup>41</sup> Alan Boyle, ‘Reparation for Environmental Damage in International Law: Some Preliminary Problems’ in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (2002) 17, 25.

<sup>42</sup> The preconditions for a successful *actio popularis* in relation to such damage remain absent: François Voeffray, *L’actio popularis, ou la défense de l’intérêt collectif devant les juridictions internationales* (2004) 320-323. See also Kathy Leigh, ‘Liability for Damage to the Global Commons’ (1992) 14 *Australian Year Book of International Law* 129, 141-156.

**B More Fundamental Constraints**

A second perspective in this debate has examined some more fundamental limitations upon adjudication. The suggestion is that even if it were perfectly constituted adjudication would still struggle to deal with environmental questions.

(a) *The Nature of Environmental Problems*

An obvious constraint faced by courts is the range of parties that may be involved in the adjudicative process. Questions of international environmental management often involve issues that traverse multiple national boundaries, concern the protection of ecosystems in areas beyond national jurisdiction and sovereignty, or relate to aspects of the environment within national jurisdictions in which all of humanity has a collective interest. While there are strong arguments for expanding rights of standing to allow courts and tribunals to deal with these questions, there are apparent limits to any such reforms as courts must ultimately operate as mechanisms for the adjustment of rights between a limited number of litigants who have some interest in the proceedings. These features make adjudication an imperfect mechanism for achieving a definitive settlement in many situations involving disputes over common resources such as high seas fisheries,<sup>43</sup> or the atmosphere, or indeed any global problem requiring a consideration of complex issues of distributive justice.<sup>44</sup>

The intrinsic narrowness of adjudication in terms of participants is compounded by the restricted range of issues that can be satisfactorily addressed. Judicial settlement will rarely, if ever, resolve the entirety of an environmental controversy between two or more parties. Generally the most that can be expected is a resolution of a limited number of legal issues rather than what are often underlying political disagreements between the parties.<sup>45</sup> An apposite example in this connection is the *Southern Bluefin*

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<sup>43</sup> L D M Nelson, 'The Development of the Legal Regime of High Seas Fisheries' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 113, 132-133.

<sup>44</sup> Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 19, 29. These limitations are not as apparent in the exercise by some courts of their advisory jurisdiction. Boyle argues that in the *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 the ICJ demonstrated that it could deal effectively, and successfully, with public interest and multiparty litigation in advisory proceedings: Alan E Boyle, 'The *Gabcikovo-Nagymaros* Case: New Law in Old Bottles' (1997) 8 *Yearbook of International Environmental Law* 13, 20.

<sup>45</sup> Richard B Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique' (1982) 23 *Virginia Journal of International Law* 1, 4. This is not to suggest that a sharp distinction can be drawn between 'legal' and 'political' disputes, as any bright line distinction is impossible and open to objection insofar as it is relied on to support the doctrine of non-justiciability (see Rosalyn Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 *International and Comparative Law Quarterly* 58). Rather the argument being made is that judicial settlement remains highly formalised and necessarily

*Tuna Dispute*.<sup>46</sup> The precise legal questions before ITLOS, and a subsequent arbitral tribunal empanelled to hear the merits of the case, related to the legality of a Japanese experimental fishing program, and the applicability of Part XV of the *LOS Convention* to the case. However, this narrow legal dispute was symptomatic of a broader and more fundamental disagreement relating to an endangered straddling and high seas fishery which stemmed, in part, from differing cultural attitudes to fisheries conservation.<sup>47</sup> The underlying controversy also related to difficult and complex questions concerning the allocation of quotas to a range of interested states to exploit this valuable marine living resource. These cultural and political issues could not be comprehensively resolved by any judicial process.<sup>48</sup>

The *Southern Bluefin Tuna Dispute* was therefore typical of many environmental controversies in being intrinsically ‘polycentric’. Fuller has explained that such ‘polycentric’ disputes involve a complex ‘web’ of issues, and an attempt to resolve one aspect of a broad dispute raising a variety of intertwined issues may be unproductive.<sup>49</sup> He argues that efforts may be made to deal with such disputes through ‘managerial direction’ but formalised adjudication can only ever lead to one of three unhelpful results. First, there may be a complete failure to resolve the dispute because the questions posed are simply not reducible to a form that can be resolved by a court. A second consequence, if a court does attempt to resolve these questions, is that it may step well beyond its proper sphere. This may in turn lessen the legitimacy and authority of the court in the eyes of the international community. A third consequence is that the court may seek to reformulate the problem in narrow terms so as to be suitable for judicial determination, which involves a risk that the question ultimately decided bears little resemblance to the issues actually in dispute between the parties. There are examples of just such a process occurring in some environmental disputes, arguably

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focussed on specific legal questions. See also J G Merrills, ‘The Role and Limits of International Adjudication’ (1987) 24 *Coexistence* 169, 171-174.

<sup>46</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624 (‘*SBT Order*’); *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility)* (2000) 39 ILM 1359 (‘*SBT Award*’) (together the ‘*Southern Bluefin Tuna Dispute*’).

<sup>47</sup> See Tim Stephens, ‘The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case’ (2004) 19 *International Journal of Marine and Coastal Law* 173.

<sup>48</sup> Nonetheless, as Mansfield has noted, the process did lead to greater co-operation and an ultimate resolution of aspects of the dispute outside the courtroom: Bill Mansfield, ‘Compulsory Dispute Settlement after the Southern Bluefin Tuna Award’ in Alex G Oude Elferink and Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 255.

<sup>49</sup> Lon L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353, 401.

including the *Nuclear Tests Cases*<sup>50</sup> where the ICJ was able to avoid grappling with the environmental issues by recasting the dispute as one relating to the legal effect of statements by the French Government that it intended to cease atmospheric nuclear testing in the South Pacific.

Turning to adjudication as a mechanism of enforcement, it is evident that a general intrinsic weakness is in responding promptly to environmental problems. Environmental damage is often irreversible and there is an obvious need for principles and procedures that can ensure that environmental harm is avoided in the first instance, or at least activated rapidly in response to environmental problems as they arise. However, international courts and tribunals are inherently passive and reactive institutions, activated only when a litigant commences proceedings and capable of assuming jurisdiction only when there is a discrete *lis* or controversy.<sup>51</sup> The only exception to the otherwise reactive character of most international adjudicative procedures is the availability of provisional measures<sup>52</sup> in some jurisdictions which can allow action to be taken to prevent irreversible environmental harm until an environmental dispute is considered on its merits.<sup>53</sup> Interlocutory orders have been issued during international environmental litigation on several occasions, at regional<sup>54</sup> and global levels.<sup>55</sup> The provisional measures jurisdiction possessed by the courts and tribunals operating under Part XV of the *LOS Convention* has arguably been used to the greatest effect. The protective jurisdiction of ITLOS appears particularly suited to responding to environmental disputes, not only because interim orders may be granted swiftly, and

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<sup>50</sup> *Nuclear Tests Cases (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, (*Merits*) [1974] ICJ Rep 253; *Nuclear Tests Cases (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, (*Merits*) [1974] ICJ Rep 457 ('*Nuclear Tests Cases*').

<sup>51</sup> Merrills, above n 45, 170 (The function of international courts 'is not to head off disagreements before they become serious, nor to alleviate situations of amorphous tension, but to intervene only when called upon to resolve a particular crisis in the parties' relations.').

<sup>52</sup> The main function of provisional measures in international law is to preserve the integrity of a court or tribunal's final judgment, although the historical rationale for the institution was to prevent resort to self-help: L Collins, 'Provisional and Protective Measures in International Litigation' (1992) 234 *Recueil des Cours* 9, 23.

<sup>53</sup> See in particular *Statute of the ICJ*, art 41.

<sup>54</sup> Note for instance the power of the ECJ to grant interim relief in respect of proceedings brought by the Commission to enforce environmental directives. The ECJ will make interim orders under the *Consolidated Version of the Treaty Establishing the European Community*, [2002] OJ C 325, 33, art 243 ('*EC Treaty*') only where the situation is urgent, and delay would cause serious harm, and a *prima facie* case has been established: *Commission v Italy* (C-352/88R) [1989] ECR 267. See generally Peter G G Davies, *European Union Environmental Law* (2004) 86.

<sup>55</sup> See for instance the *Nuclear Tests Cases* [1973] ICJ Rep 99; [1973] ICJ Rep 135. The potential of the ICJ's provisional measures jurisdiction has recently been enhanced as a result of its conclusion that its interim orders are binding, and not merely recommendatory *LaGrand Case (Germany v United States of America) (Provisional Measures)* [1999] ICJ Rep 9. See Tim Stephens, 'The Right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for What Purpose? The *LaGrand Case*' (2002) 3 *Melbourne Journal of International Law* 143, 155-161.

where there is as yet no definite proof of environmental damage,<sup>56</sup> but also because this head of jurisdiction was expressly designed to pre-empt possible environmental harm.<sup>57</sup>

(b) *The Problem of 'Proceduralisation'*

An additional criticism has been made regarding the utility of adjudication, which derives from observations concerning the ambivalence of some environmental regimes as regards their preservationist and distributive objectives. Koskenniemi describes this process as one of 'proceduralisation',<sup>58</sup> in which environmental instruments defer difficult political choices for resolution by diplomatic or legal dispute settlement procedures.<sup>59</sup> As Koskenniemi has explained:

The strategy of environmental treaties is to treat the substance of the environmental conflict by referring its normative regulation elsewhere; into further cooperation between the parties, into unilateral measures or into cooperation within international organizations. The matter is *proceduralized* in order to make it amenable for diplomatic treatment.<sup>60</sup>

The reasons for this approach are obvious:

Agreement on substantive law requires more of a consensus about political value than agreeing upon procedure. Procedural solutions, combined with generally formulated calls for equitable balancing, do not prejudice a State's substantive policy or its views about the limits of its own freedom and action.<sup>61</sup>

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<sup>56</sup> Judge Treves drew attention to this in his Separate Opinion in the *SBT Order* (1999) 38 ILM 1624, Separate Opinion of Judge Tullio Treves, [9] (noting that 'a precautionary approach seems to me inherent in the very notions of provisional measures.').

<sup>57</sup> Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Law of the Sea* (2005) 46-47 ('[R]eference to the protection of the marine environment presumably has in mind the protection of the marine environment in the context of the dispute of which the court or tribunal is seised, and is distinct from the protection of the rights of the parties. That was appropriate in an instrument dealing with the whole of the law of the sea and which devotes...Part XII...to the protection of the marine environment as an integral part of the new law of the sea.'). See also the *Madrid Protocol*, schedule, art 6, which provides that an arbitral tribunal established to deal with a dispute may 'prescribe any provisional measures which it considers appropriate under the circumstances to prevent serious harm to the Antarctic environment or dependent or associated ecosystems.'

<sup>58</sup> Martti Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 60 *Nordic Journal of International Law* 73. An important distinction must be drawn between the strategy of 'proceduralisation', by which unresolved substantive questions are reserved for determination by dispute settlement bodies, and the use of procedural obligations in multilateral agreements requiring states, inter alia, to identify and assess environmental risks, or notify of possible environmental impacts. In relation to such obligations see Phoebe N Okowa, 'Procedural Obligations in International Environmental Agreements' (1996) 67 *British Yearbook of International Law* 275.

<sup>59</sup> See Peter H Sand, *Transnational Environmental Law: Lessons in Global Change* (1999) 334.

<sup>60</sup> Koskenniemi, 'Peaceful Settlement of Environmental Disputes', above n 58, 78.

<sup>61</sup> Ibid 74. Koskenniemi has argued elsewhere (Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989)) that an attraction to procedural over substantive solutions is a characteristic of international law generally. The recourse to the judicial function is a resort to 'proceduralisation' in order to manage the conflict between the 'subjective' and 'objective' in international law. According to Koskenniemi (at 32) '[p]roceduralisation – as the jurists' unending interest in the topic of 'peaceful settlement of disputes' shows – is a useful means to avoid arguing about binding obligation in a way that might seem to overrule one sovereign will with another or with contentious political value. It is a practical

This tendency to proceduralise may lead to the impression that international environmental law has acquired more content and institutional sophistication than in reality it does.<sup>62</sup> It can also obscure fundamental conflict, deferring at the stage of regime-formation difficult choices that are then confronted when dispute settlement procedures are invoked.<sup>63</sup> However, the main consequence is to provide a judicial forum seised of a dispute with uncertain guidance as to how to resolve controversies arising out of the environmental regime.<sup>64</sup> If an environmental treaty incorporates no strong consensus on substantive questions, when a dispute arises over such an unresolved issue a court or tribunal must look elsewhere in order to find a solution. This will generally involve a pragmatic attempt to facilitate an amicable resolution – an approach that appears entirely understandable given that the alternative may be to reach what may be viewed as an arbitrary decision not grounded in the law.

This facilitative approach has attracted some support in the literature. Writing in relation to the *Southern Bluefin Tuna Dispute*, Johnston has argued that the willingness of ITLOS in the *SBT Order* to assist the parties in reaching an amicable settlement ‘should be applauded’ and that the ‘*facilitative* function of modern international adjudication should in no way be relegated to a lower position than the more traditional *resolutive* and *declaratory* functions.’<sup>65</sup> Other commentators have similarly suggested that were courts generally to seek to moderate agreed outcomes, they would be more effective in resolving environmental disputes.<sup>66</sup> However, in the environmental context there is a fundamental difficulty with a positive appraisal of the notion of adjudication as facilitation, for two main reasons. The first objection is that although facilitating a joint settlement can help broker a temporary compromise, it may not necessarily serve to resolve the underlying political disagreement over such issues as the allocation of scarce environmental resources. Second, although removing discord, a facilitative solution may appear to indicate that the environmental regime is functioning

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strategy developed to circumvent a problem created by theory.’ However proceduralisation cannot resolve the tension between the subjective and objective aspects of international law, and hence proceduralisation has the effect of deferring, rather than resolving, inherent contradictions in the law.

<sup>62</sup> Christine Chinkin, ‘Alternative Dispute Resolution under International Law’ in Malcolm D Evans (ed), *Remedies in International Law: The Institutional Dilemma* (1998) 123, 139. See also Christine Chinkin, ‘The Peaceful Settlement of Disputes: New Grounds for Optimism?’ in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (1993) 165, 178.

<sup>63</sup> Martti Koskenniemi, ‘The Future of Statehood’ (1991) 32 *Harvard International Law Journal* 397, 403.

<sup>64</sup> Philippe Sands, ‘International Environmental Litigation and Its Future’ (1999) 32 *University of Richmond Law Review* 1619, 1637 (‘Called upon to interpret vague norms, an international court faces a situation of real difficulty when asked to apply the law to the particular facts of a case.’).

<sup>65</sup> Douglas M Johnston, ‘Fishery Diplomacy and Science and the Judicial Function’ (1999) 10 *Yearbook of International Environmental Law* 33, 38.

<sup>66</sup> Francis N Botchway, ‘The International Adjudicatory Process and Trans-Boundary Resource Disputes’ [2001] *Australian International Law Journal* 143, 151.

successfully, while in reality there is no net improvement in environmental outcomes. Encouraging the parties to a dispute to reach a compromise may well produce more harmonious international relations but it will not necessarily lead to better levels of environmental protection.

The tendency towards a facilitative approach, even as regards factual findings, can be discerned in several recent environmental cases. The decision of the ICJ in the *Case Concerning the Gabčíkovo-Nagymaros Project*<sup>67</sup> can be seen as one in which the Court studiously avoided the determination of any breach of principles of international environmental law, and instead sought to encourage the parties to work together to reach consensus on a regime to protect the environment of the Danube while simultaneously continuing work on the jointly undertaken dams project.<sup>68</sup> The ICJ also made no definitive factual findings regarding the extent of environmental damage threatened by the Danube dam project, preferring also to leave these matters to the parties to resolve between themselves.

The decisions of ITLOS in relation to marine environmental matters also signal a tendency to facilitate an amicable settlement, rather than to reach definitive conclusions regarding compliance with environmental obligations. It can be argued that this is a consequence of the ‘proceduralisation’ strategy adopted in the negotiation of the *LOS Convention*. Lowe has noted in this respect that ‘the states parties were prepared to sign off the Convention text without dotting every i and crossing every t because the details in critical areas would be worked out either by state practice or, if all else failed, by recourse to adjudication’.<sup>69</sup> ITLOS has without question contributed significantly to the evolution of the *LOS Convention*, however the Tribunal has been reticent in identifying clear situations of breach, and has instead been inclined to encourage the parties to reach a settlement.<sup>70</sup> It has also displayed some caution in engaging with the relevant principles of international environmental law, again for reasons that appear connected to its desire to promote a friendly settlement. For instance, in all three of its provisional measures orders in environmental cases, ITLOS has been careful to avoid taking a

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<sup>67</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7.

<sup>68</sup> Attila Tanzi and Cesare Pittea, ‘Emerging Trends in the Role of Non-State Actors in International Water Disputes’ in International Bureau of the Permanent Court of Arbitration (ed), *Resolution of International Water Disputes* (2003) 259, 262.

<sup>69</sup> Vaughan Lowe, ‘Advocating Judicial Activism: The ITLOS Opinions of Judge Ivan Shearer’ (2005) 24 *Australian Year Book of International Law* 145, 150.

<sup>70</sup> This tendency provoked Judge ad hoc Shearer to remark in the *SBT Order* (1999) 38 ILM 1624 that rather than merely encouraging the parties to co-operate, the Tribunal should have found that Japan was prima facie in breach of its international obligations. He stated (at [14]) that ‘the Tribunal, in its prescription of provisional measures in this case, has behaved less as a court of law and more as an agency of diplomacy. While diplomacy, and a disposition to assist the parties in resolving their dispute amicably, have their proper place in the judicial settlement of international disputes, the Tribunal should not shrink from the consequences of proven facts.’



position in the debate concerning the legal status of the concept of 'precaution'. Rather than identifying precaution as a customary 'principle' of law, or indeed merely a guiding 'approach', the Tribunal has favoured the more neutral notion of 'prudence and caution'.<sup>71</sup>

### C *The Managerialist Critique*

In addition to these debates concerning the function of adjudication emanating from international legal literature, much scholarship from an international relations perspective has been highly sceptical of the utility of adjudication in environmental regimes. Initially associated with the work of Abram and Antonia Handler Chayes,<sup>72</sup> but subsequently with several other commentators,<sup>73</sup> this perspective does not seek to argue that current arrangements are deficient, and demand improvement or perfecting. Instead, it is contended, adjudication is fundamentally unsuited to the task of environmental governance.

Members of this 'managerial' school of thought have argued that 'adjudication has played a minor role in treaty compliance' because it is 'costly, contentious, cumbersome, and slow' and also has the tendency of 'raising the political visibility of the problem and failing to be subject to party control'.<sup>74</sup> States have shown no great enthusiasm for adjudicative procedures in international environmental law, and instead they have preferred a regulatory approach to resolving disputes and promoting compliance. Such an approach, it is suggested, builds institutions that complement regimes that are designed to bring states into compliance. By contrast, adjudication is a confrontational and adversarial approach to enforcement which cannot deal appropriately with many situations of non-compliance where a cooperative rather than punitive approach is needed.

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<sup>71</sup> *SBT Order* (1999) 38 ILM 1624, [77]; *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* (2002) 41 ILM 405, [84]; *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore) (Provisional Measures)* (8 October 2003), <<http://www.itlos.org>> at 1 July 2005, [99]. See Jacqueline Peel, 'Precaution – A Matter of Principle, Approach or Process?' (2004) 5 *Melbourne Journal of International Law* 483, 493-495.

<sup>72</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 205 ('[a] century of experience with international adjudication leads to considerable scepticism about its suitability as an international dispute settlement method and, in particular, as a way of securing compliance with treaties.').

<sup>73</sup> For a concise summary of the literature see George W Downs, Jyle W Danish and Peter N Barsboom, 'The Transformational Model of International Regime Design: Triumph of Hope or Experience?' (2000) 38 *Columbia Journal of Transnational Law* 465, 482-488. See also Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 *University of Richmond Law Review* 1555.

<sup>74</sup> Abram Chayes, Antonia Handler Chayes and Ronald B Mitchell, 'Managing Compliance: A Comparative Perspective' in Edith Brown Weiss and Harold K Jacobsen (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998) 39, 54.

D *New Perspectives on the Value of Adjudication*

Although this remains the prevailing attitude of international relations scholarship to adjudication in the environmental context, in recent years an alternative understanding of the potential role of adjudication has been developed. The argument is not that adjudication per se is unsuitable, but rather that to be effective it needs to draw upon the apparent success of adjudication in some regional and issue-specific contexts. This commentary proceeds from the premise that international courts can discharge many of the functions successfully performed by judicial bodies in domestic legal systems. It is argued that there are several reasons why adjudication can be useful in resolving international environmental disputes and in promoting compliance.<sup>75</sup> A system of adjudication can harness litigants who can monitor violations and take legal action in response.<sup>76</sup> The very threat of judicial proceedings can cast a shadow over the political relations of states, encouraging a resolution of disputes in conformity with a regime.<sup>77</sup> When an adjudicatory procedure is invoked, it involves an impartial and independent examination of the performance of actors measured against defined legal commitments. It results in binding decisions that are ordinarily complied with not because of any threat of punitive sanctions (which are almost always absent) but rather because decisions may carry the persuasive weight of authority and legitimacy,<sup>78</sup> thereby allowing other international actors, and domestic constituencies,<sup>79</sup> to impose pressure on a principled basis. Perhaps most importantly it can assist in clarifying legal principles,

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<sup>75</sup> Knox, above n 31, 4-5. See also more generally Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, 532 ('Enforcement through the mechanism of a neutral tribunal backed by coercive force is an optimal way to ensure compliance with any agreement, whether between individuals or States. It is the mode of dispute resolution established where possible by societies the world over. A system of horizontal counter-measures, by contrast, inevitably entails each party being judge in its own cause, with the attendant illegitimacy of the resulting determination.'). See also Yuval Shany, , *The Competing Jurisdictions of International Courts and Tribunals* (2003) 5 ('in areas of law where compulsory adjudicative jurisdiction has emerged, legal obligations can be enforced on states by other parties (i.e. state or non-state actors) through the unilateral activation of existing judicial bodies, in a manner not dissimilar to that utilized in domestic legal settings.').

<sup>76</sup> Karen Alter, 'Do International Courts Enhance Compliance with International Law?' (2003) 25 *Review of Asian and Pacific Studies* 51, 57.

<sup>77</sup> *Ibid* 58.

<sup>78</sup> Thomas M Franck, *The Power of Legitimacy Among Nations* (1990) 24 and 316-7 (Legitimacy, that is the general belief that rules are articulated and applied according to 'accepted principles of right process' is essential for ensuring compliance. While unable to enforce its decisions directly, through principled reasoning an international court can 'pull states to compliance with its opinions [because of] the general perception of the legitimacy and fairness of its opinion-forming process.'). See also Thomas M Franck, 'Fairness and the General Assembly Advisory Opinion' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 511, 512.

<sup>79</sup> Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organization* 457, 467.

thus ensuring that actors know precisely what is expected of them by an environmental regime.<sup>80</sup>

However, the success of a court or tribunal in performing these functions will depend upon the nature of the environmental regime, how the adjudicative procedure is situated within it, and also the formal rules concerning jurisdiction. In a landmark article examining the judicial institutions of the European legal system, Helfer and Slaughter sought to isolate those features of that regional legal order that have explained its success.<sup>81</sup> Their central thesis was that the ECJ and the European Court of Human Rights have been effective in eliciting compliance with European law by because their decisions are able to penetrate the boundary of the state, to be directly enforceable in domestic courts.<sup>82</sup> To this end Helfer and Slaughter compiled a list of factors that appeared to correlate with effective supranational adjudication, and which could be used as a template for judicial bodies in other contexts. These included: (i) factors within the control of states (such as the organisation of the court); (ii) factors within the control of the supranational court (such as its style of decision-making); and (iii) factors which are outside the control of states or judges (such as whether the states that establish the court possess liberal democratic institutions).<sup>83</sup> Some scholars in the environmental field have begun to deploy these factors in an effort to understand dispute settlement procedures in specific environmental regimes.<sup>84</sup> This analysis has tended to suggest that there is no reason why adjudication could not be made more prominent and effective in environmental contexts. For instance Knox has argued that supranational adjudication can, among other things, be used to perform a monitoring function considered essential by managerialist theorists by giving non-state actors the ability to bring complaints in response to failures to implement an environmental regime.<sup>85</sup>

Building upon this work Keohane et al have conceptualised the various forms of adjudicative settlement, from ad hoc arbitration through to judicial settlement by a permanent body, as lying on a continuum between ‘inter-state’ dispute settlement and ‘transnational’ or ‘supranational’ dispute settlement.<sup>86</sup> They explain that where a

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<sup>80</sup> Knox, above n 31, 5.

<sup>81</sup> Laurence R Helfer and Anne-Marie Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107 *Yale Law Journal* 273.

<sup>82</sup> Ibid 290 (‘effectiveness’ ought to be defined ‘in terms of [a tribunal’s] ability to compel compliance with its judgments by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf.’).

<sup>83</sup> Helfer and Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’, above n 81, 336.

<sup>84</sup> See in particular John E Noyes, ‘The International Tribunal for the Law of the Sea’ (1999) 32 *Cornell International Law Journal* 109; Knox, above n 31, 76-120 (applying the Helfer-Slaughter checklist to the NAAEC).

<sup>85</sup> Knox, above n 31, 36.

<sup>86</sup> Keohane, Moravcsik and Slaughter, above n 79.

particular court falls on this scale depends on three variables: *independence*, which refers to the extent to which a dispute resolution body can make impartial decisions independent of state interests; *access*, which describes the extent to which non-state actors have standing; and *embeddedness*, which refers to the extent to which decisions can be enforced without specific action by governments. While all international courts share one common feature – the task of interpreting and applying international law – they differ substantially according to these three criteria. Keohane et al argue that increased levels of independence, access and embeddedness all correlate with an improved likelihood that the institution may be effectively and routinely used to promote compliance. They suggest on this basis that their theory explains why the Permanent Court of Arbitration (‘PCA’), a purely inter-state court, has been poorly used while other institutions, including human rights complaints bodies which incorporate some aspects of supranational adjudication, have been turned to more frequently.

In inter-state dispute resolution, the task entrusted to a third party is no more than the resolution of disputes between governments. States are the parties to the dispute, control access to the settlement mechanism and are also responsible for the implementation of any decision. States therefore ‘act as gatekeepers both to the international legal process and from that process back to the domestic level.’<sup>87</sup> The contrasting ideal type in the dialectic is transnational dispute resolution in which states play a minor gate-keeping role. While states are initially responsible for the creation of such mechanisms, access to such courts and tribunals is more open to individuals and groups, and states are unable to (in the pure ideal type), or constrained from (in practice), controlling access and the enforcement of the decisions.<sup>88</sup>

How do dispute settlement procedures operating in international environmental law measure against the three parameters of independence, access and embeddedness? In terms of independence, real question marks hang over many judicial and quasi-judicial procedures operating in international environmental law. It has already been observed that there has been a marked preference for arbitration over other forms of adjudication. While arbitration shares many of the same features of judicial settlement, one major distinction is the independence of arbitral panels. Arbitration is more closely controlled by the parties, and for this reason is not necessarily able to deal appropriately with concerns of a public order.<sup>89</sup> Being more ‘dependent’, arbitral panels are susceptible to

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<sup>87</sup> Ibid. See also Robert Y Jennings, ‘The Judicial Enforcement of International Obligations’ (1987) 47 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3, 4 (noting that in relation to intergovernmental adjudication there is no infrastructure in general international law for the decisions of international courts to be effectively implemented at the domestic level).

<sup>88</sup> Keohane, Moravcsik and Slaughter, above n 79, 458.

<sup>89</sup> Laurence R Helfer and Anne-Marie Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’ (2005) 93 *California Law Review* 901, 938 (‘Independent tribunals are also more

pressure to reach a conclusion acceptable to the parties, not a result which is optimal from the perspective of environmental protection.<sup>90</sup>

Turning to the issue of access, adjudication in environmental law is generally limited to states. With the exception of the PCA's *Optional Rules for the Arbitration of Disputes Concerning the Environment and/or Natural Resources*,<sup>91</sup> which have never been used, environmental arbitration is a process reserved exclusively for governments. The main permanent courts engaged in environmental dispute settlement are also generally open only to states. Although the ICJ has decided several cases involving environmental issues in the exercise of its contentious jurisdiction, in none of these could private actors be involved in the process as litigants given the statutory restriction on non-state participation.<sup>92</sup> The ICJ's advisory jurisdiction is somewhat more open in permitting authorised organs and agencies of the United Nations to seek opinions, but it is far from providing open access to civil society to contest the compliance of governments with environmental norms. Standing before ITLOS is also limited to states for almost all marine environmental disputes.<sup>93</sup>

Hence outside of the European context it is the *NAAEC* which remains the solitary example of a judicial or quasi-judicial body with an exclusive environmental focus granting access to non-state actors to complain of breaches of environmental obligations. It might be objected that the non-compliance procedure of the *1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*<sup>94</sup> falls into a similar category as it is the first, and thus far only, example where civil society may invoke a compliance review mechanism. Although it remains too early to assess how this mechanism will operate, the experience with other non-compliance procedures is that they have concentrated not on technical questions of legal breach, which is a key task of adjudication, but have

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likely to help states resolve cooperation problems arising from treaties that regulate public goods or the global commons.').

<sup>90</sup> Ibid 939

<sup>91</sup> (2001) <<http://www.pca-cpa.org/ENGLISH/EDR/ENRules.htm>> at 1 July 2005.

<sup>92</sup> *Statute of the ICJ*, art 34(1) ('Only states may be parties in cases before the Court.').

<sup>93</sup> The only possible exception is in relation to environmental disputes involving the deep seabed regime. In such circumstances the Seabed Disputes Chamber may adjudicate disputes which involve a limited number of private entities. See *LOS Convention*, annex VI (*Statute of ITLOS*) art 37.

<sup>94</sup> Decision 1/7 of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN Doc ECE/MP.PP/2/Add.8 (2002) ('*Århus Convention NCP*').

instead been oriented towards assessing compliance and facilitating cooperation between all states parties in an environmental regime.<sup>95</sup>

Finally, in relation to the ‘embeddedness’ of adjudicative procedures in international environmental law, with the exception of the European legal order in all environmental regimes states retain primary responsibility for enforcing arbitral awards and judgments. That is to say such judicial determinations must be implemented by executive government, as the process has not been delegated to other governmental organs, such as courts and tribunals. This state control over the implementation process means that some environmental decisions have simply not been given effect. To adapt Henkin’s famous aphorism, while it may be true that most states obey the decisions of most courts most of the time,<sup>96</sup> there have been some notable examples of delinquency in the environmental field. In the *Icelandic Fisheries Case*,<sup>97</sup> in which the ICJ rendered an environmentally-significant decision concerning the rights of coastal states over adjacent fisheries, Iceland refused to play any part in the proceedings. Similarly in the *Nuclear Tests Case*, in which the ICJ issued interim orders requiring France to ‘avoid nuclear tests causing the deposit of radioactive fall-out’ on Australian or New Zealand territory,<sup>98</sup> France refused to recognise the Court’s jurisdiction, and initially continued with its testing program in defiance of the Court’s orders.<sup>99</sup>

Attention to the issues of ‘independence’, ‘access’ and ‘embeddedness’ may lead to the design and creation of adjudicative procedures in environmental regimes with much greater effectiveness than existing institutions. However, it must also be emphasised that there are significant differences between environmental regimes in terms of their objects and purposes, and that while in some regimes adjudication could be very usefully deployed to promote compliance, in others it could only have a far more limited function. Some environmental instruments, particularly those originating in the early stages of the discipline’s development, were of a general or hortatory character. They emphasised the importance of environmental protection, but often in general and non-binding language, and did not contain detailed prescriptions to regulate state

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<sup>95</sup> Cesare Pitea, ‘NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: From Tolerance to Recognition?’ in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 205, 206 (noting that non-compliance procedures ‘established under MEAs are meant to differ significantly from [judicial or quasi-judicial bodies] since they are designed mainly to prevent and avoid, rather than resolve, disputes and to do so in a non-judicial, non-confrontational and cooperative manner.’).

<sup>96</sup> L. Henkin, *How Nations Behave* (1961) 47 (‘almost all nations observe almost all principles of international law almost all of the time.’)

<sup>97</sup> *Fisheries Jurisdiction Case (United Kingdom v Iceland)* [1974] ICJ Rep 3; *Fisheries Jurisdiction Case (Germany v Iceland)* [1974] ICJ Rep 175 (‘*Icelandic Fisheries Case*’).

<sup>98</sup> *Nuclear Tests Cases* [1973] ICJ Rep 99, 106; [1973] ICJ Rep 135, 142.

<sup>99</sup> Constanze Shulte, *Compliance with Decisions of the International Court of Justice* (2004) 308-310.

behaviour.<sup>100</sup> Moreover, they often went no further than requiring environmental standards already met by the willing signatories. Downs, Danish and Barsoom have described such environmental agreements as ‘shallow’, and contended that in such settings enforcement is unnecessary to promote compliance.<sup>101</sup> Other more detailed and demanding environmental agreements benefit from correspondingly more exacting procedures for enforcement, including courts and tribunals. For instance the *1992 Convention for the Protection of the Marine Environment of the North-East Atlantic* (‘*OSPAR Convention*’), which seeks to prevent and eliminate pollution in a specific maritime region, combines detailed obligations with a compliance machinery that includes compulsory arbitration.<sup>102</sup>

Other relevant factors will include the subject-matter of the regime, and the objectives which it seeks to advance. It might be observed here that merely because an environmental regime addresses problems of a common or community character, such as damage to the stratospheric ozone layer, or the warming of the global atmosphere, it does not follow that adjudicative systems have no potential usefulness. While it may be the case that it is difficult to establish damage to a particular state sufficient either in legal or political terms to justify litigation against another state for breaching its obligations to control those pollutants giving rise to these problems, it is possible, if appropriate attention is paid to the issue of access, to change the dynamics of such an adjudicative system to facilitate and encourage litigation in the public interest. Adjudication also appears particularly suited to dealing with narrow issues of compliance within such regimes. To use the example of the *OSPAR Convention* once again, compulsory arbitration allows members of the regime to challenge the performance of others in adhering to the provisions of the Convention relating to the release of environmental information.<sup>103</sup>

However in other environmental regimes, which do not seek to restrain government activities, or to prevent governments from authorising environmentally damaging development, adjudication might not be as helpful. Hence, for instance, the *1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of*

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<sup>100</sup> See for instance the *1971 Convention on Wetlands of International Importance, Especially as Waterfowl* (‘*Ramsar Convention*’). The *Ramsar Convention* includes no provision on dispute settlement.

<sup>101</sup> Downs, Danish and Barsoom, above n 73. See also Helfer and Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’, above n 89, 938.

<sup>102</sup> *OSPAR Convention* art 32.

<sup>103</sup> *Ibid* art 9(1) (‘The Contracting parties shall ensure that their competent authorities are required to make available [information on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention] to any natural or legal person, in response to any reasonable request, without that person’s having to prove an interest...’). See *OSPAR Arbitration (Ireland v United Kingdom) (Final Award)* (2 July 2003), <<http://www.pca-cpa.org>> at 1 July 2005 (‘*OSPAR Arbitration*’).

*Transboundary Watercourses and International Lakes* is designed to build the capacity of states to protect human health by improving water management. It seems unlikely that in such capacity-building efforts that international adjudication could perform any important role.<sup>104</sup>

### III CONCLUSION

If proposals for an international environmental court are unrealistic in overlooking the inherent limitations of adjudication, an exclusively 'managerial' approach appears too dismissive of the constructive contribution that courts and tribunals can bring to environmental governance. There can be no doubt that adjudication has not been extensively used in the environmental field but this should not be taken to prove that it has no utility. By paying attention to the character of an environmental agreement, and the structure of international courts and tribunals operating within it, it appears possible to explain the limited utility of courts to date in alternative terms. This more nuanced analysis also supports the conjecture that adjudicative structures might be utilised more extensively and effectively in ensuring that international environmental law is more widely and faithfully observed.

Given the tide of developments in international environmental law, which have generally been towards 'bureaucratisation' rather than 'judicialisation', it is perhaps unrealistic to expect a rapid and wholesale embracing of supranational forms of adjudication. However, it would appear that complaints procedures in the environmental context modelled on those existing in the arena of international human rights protection could provide a valuable forum for allowing individuals to contest governmental acts or omissions that are contrary to environmental standards. The *NAAEC* provides just such a mechanism, and its success or otherwise will provide many lessons as to the feasibility of its use in other regimes. The strength of such judicial and quasi-judicial institutions is that they offer a neutral forum for litigating grievances and are less likely to be constrained or frustrated by the political manoeuvrings of states. As a consequence they may have greater capacity to pay appropriate regard to environmental considerations.

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<sup>104</sup> Alter, above n 76, 66 ('compliance with agreements aimed at addressing poverty, improving education, providing rural health etc. are unlikely to be enhanced by creating an international court to enforce the agreement.').



## **Part II**

# **The Judicial Development of International Environmental Law**

## 5

# The Adjudication of Disputes Relating to Transboundary Environmental Damage

Rapid and extensive industrialisation in many states in the nineteenth century generated serious atmospheric, terrestrial, riverine and marine pollution highly damaging to human health and the natural environment. By the early twentieth century these pollution problems were beginning to take on transboundary dimensions, damaging the environment in other states, and in areas beyond national jurisdiction.<sup>1</sup> Growing awareness of this led to early developments in international environmental law as it was atmospheric pollution originating in Canada, and damaging to crops and other commercial interests in the United States, that led to the seminal *Trail Smelter Case*,<sup>2</sup> in which it was concluded that no state has the right to use, or permit the use, of its territory in such a way as to cause serious injury by pollution in the territory of another state. There is no more elemental stipulation of customary international law relating to environmental matters than this duty to prevent transboundary harm.<sup>3</sup>

This Chapter examines the contribution of international adjudication to the evolution of legal principles relating to transboundary environmental damage. It is seen that this area of international environmental law originated and developed not out of concerns for the environment per se, but rather from a more general and protean notion that international law should protect states from unwarranted interference. Although the law in this field has undergone substantial evolution, especially through the work of the International Law Commission ('ILC'), it remains tied to several of its problematic conceptual origins.

### I THE JURISPRUDENCE

#### A *The Early Origins*

The notion that states should not permit the use of their territory to damage the environment of others did not spring out of environmental concerns, but instead was a logical application of the concept of sovereignty.<sup>4</sup> However expressed, whether through

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<sup>1</sup> For a concise discussion of the emergence of transboundary air pollution problems see Phoebe N Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (2000) 6-23.

<sup>2</sup> *Trail Smelter Case (Canada/United States of America)* (1938 and 1941) 3 RIAA 1911 ('*Trail Smelter Case*').

<sup>3</sup> *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, [26] ('*Nuclear Weapons Advisory Opinion*').

<sup>4</sup> The term 'sovereignty' as used in international legal discourse is traditionally traced to the writings of Bodin who, in 1583, defined the concept as 'the absolute and perpetual power of a commonwealth': Jean Bodin, *On*

the notion of relative as opposed to absolute sovereignty,<sup>5</sup> the principle *sic utere tuo ut alienum non laedas*,<sup>6</sup> the principle of good neighbourliness,<sup>7</sup> the doctrine of abuse of rights<sup>8</sup> or the notion of equitable use, the idea is essentially one of balancing the sovereign rights and interests of states engaged in polluting activities on the one hand against the interests of states affected by such pollution on the other.<sup>9</sup> Stone has observed that it also implies that within its sovereign territory a state can do largely as it wishes: '[e]ach nation...has the right to pull up its forests, bulldoze habitats, wipe out species, fish, farm, and mine – and not have to answer to any “outside” authority for any repercussions on its *own* environment.'<sup>10</sup>

The term 'sovereignty' in this context therefore captures the twofold idea that states possess the right to utilise their territories as they wish, but at the same time that this use must respect the territorial sovereignty of other states. This conception was articulated clearly by Judge Huber in the *Island of Palmas Case*:<sup>11</sup>

Territorial sovereignty...involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.<sup>12</sup>

This decision, and the much later *Corfu Channel Case*<sup>13</sup> in which the ICJ affirmed 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States',<sup>14</sup> are frequently said to have articulated rules having

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*Sovereignty* (1583, reprinted 1992) 46. See generally Stéphane Beaulac, 'The Social Power of Bodin's "Sovereignty" and International Law' (2003) 4 *Melbourne Journal of International Law* 1.

<sup>5</sup> The doctrine of 'absolute sovereignty' is often referred to as the 'Harmon Doctrine', in reference to the opinion of United States Attorney-General Judson Harmon concerning the supposed rights of the United States to divert water from the Rio Grande notwithstanding damage to Mexican interests. For a detailed discussion of the opinion see Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme* (2002) 9-24.

<sup>6</sup> 'Use your own property so as not to harm that of another'. This principle is of ancient origin. See *Nuclear Tests Case (Australia v France) (Merits)* [1974] ICJ Rep 253, Dissenting Opinion of Judge de Castro, 388-389 (referring to principles of Roman law and contemporary civil law prohibiting *immissio* (of water, smoke or objects) into neighbouring property).

<sup>7</sup> The idea of international 'good neighbourliness' is found in several instruments, including the *UN Charter* in relation to the duties of administering authorities. Art 74 provides that '[m]embers...agree that their policy in respect of [non-self-governing territories], no less than in respect of their metropolitan areas, must be based on the general principle of *good neighbourliness*...' (emphasis added).

<sup>8</sup> Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 *McGill Law Journal* 389.

<sup>9</sup> René Lefebvre, *Transboundary Environmental Interference and the Origin of State Liability* (1996) 20.

<sup>10</sup> Christopher D Stone, 'Defending the Global Commons' in Philippe Sands (ed), *Greening International Law* (1994) 34, 35(emphasis added).

<sup>11</sup> *Island of Palmas Case (Netherlands/US)* (1928) 2 RIAA 829 ('*Island of Palmas Case*').

<sup>12</sup> *Ibid* 838.

<sup>13</sup> *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4 ('*Corfu Channel Case*').

<sup>14</sup> *Ibid* 22.

environmental significance.<sup>15</sup> However, Lammers notes that although these decisions ‘enjoined States not to allow their territory to be used for acts contrary to the *rights* of other States’, they ‘did not indicate what substantive rights or duties States possessed in respect of transfrontier water pollution or other forms of transfrontier nuisance.’<sup>16</sup>

### B *The Trail Smelter Case*

The *Trail Smelter Case* involved an opportunity to elaborate and adapt the basic rights identified by Judge Huber in the *Island of Palmas Case* to the environmental context. The case therefore epitomises the method by which international law relating to environmental matters came in to being – through the extension of general principles rather than the articulation of specific environmental rules.<sup>17</sup>

#### (a) *The Trail Smelter Case in Context*

The *Trail Smelter Case* has attracted extensive scholarly attention. It has frequently been cited by parties before international courts and tribunals, by these bodies themselves in their awards and judgments,<sup>18</sup> and by states in relation to transboundary pollution disputes not leading to litigation.<sup>19</sup> However, the contribution of the case to international environmental law is often overstated.<sup>20</sup> Indeed frequent reference to the decision tends to convey the false impression that transboundary pollution cases are

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<sup>15</sup> See, eg. Judge Weeramantry in his Dissenting Opinion in *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 Case (New Zealand v France)* [1995] ICJ Rep 288 (‘1995 Nuclear Tests Case’) who observed that ‘[t]he *Corfu Channel* case laid down the environmentally important principle that, if a nation knows that harmful effects may occur to other nations from facts within its knowledge and fails to disclose them, it will be liable to the nation that suffers damage.’ (at 362).

<sup>16</sup> Johan G Lammers, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law* (1984) 528 (original emphasis).

<sup>17</sup> Lynton K Caldwell, ‘Concepts in Development of International Environmental Policies’ (1973) 13 *Natural Resources Journal* 190, 190.

<sup>18</sup> See in particular *Nuclear Tests Case (Australia v France) (Merits)* [1974] ICJ Rep 253, Dissenting Opinion of Judge de Castro, 388-389; *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Dissenting Opinion of Judge Weeramantry, 346 and 362 and Dissenting Opinion of Judge Palmer, 408; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 (‘*Gabčíkovo-Nagymaros Case*’) Separate Opinion of Judge Weeramantry, 111-112.

<sup>19</sup> See, eg. in relation to the Cherry Point Oil Spill, the statement of the Canadian External Affairs Secretary, (1973) 11 *Canadian Yearbook of International Law* 333, 334.

<sup>20</sup> Günther Handl, ‘Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited’ (1975) 3 *Canadian Yearbook of International Law* 156, 167-168; Ian Brownlie, ‘A Survey of International Customary Rules of Environmental Protection’ in L A Teclaff and A E Utton (eds), *International Environmental Law* (1974) 1, 2 (the decision ‘is actually a rather modest contribution to the jurisprudence – as it was bound to be in view of the restricted terms of reference...’).

regularly and effectively resolved by means of inter-state dispute settlement, when the reality is otherwise.<sup>21</sup>

The tendency to exaggerate the significance of the *Trail Smelter Case* reinforces the symbolic power of some international judicial decisions in the environmental field. While not always achieving by themselves a major development in the law, they may nonetheless have considerable influence by articulating the kernel of an idea that is modified and amplified in future decisions and in state practice. Yet this lasting legacy may also include the retention of early and problematic conceptions of the environment that are not conducive to an effective contemporary legal framework for environmental protection. The *Trail Smelter Case* is such a decision. Its disposition of the dispute between the United States and Canada did not address a range of environmental issues that would today be considered pivotal in resolving such a dispute. This does not render the decision irrelevant or of no lasting value, but rather suggests that an appreciation of its place in the canon of international environmental jurisprudence must acknowledge the social, political and economic context in which the litigation took place.<sup>22</sup>

(b) *Background to the Dispute*

The dispute in the case arose out of the operation of a zinc and lead smelter in British Columbia near the town of Trail on the Columbia River, seven miles from the United States border. By the early twentieth century the natural resources of the Columbia River Valley had been heavily exploited. Intensive forestry and agricultural activities caused significant deforestation, and had stripped large parts of the landscape of biodiversity. Mining and smelting operations also contributed to the environmental decline. Following a series of claims in domestic courts, smelting operations ceased on the United States side of the boundary. In contrast the smelter established at Trail in 1896, initially under American auspices but later acquired by a Canadian company, thrived. Under its Canadian owners, the Consolidated Mining and Smelting Company Ltd ('Consolidated Mining'), the plant became one of the largest and best equipped lead and zinc smelters in Canada, and was a key driver in the economic growth of the region.<sup>23</sup>

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<sup>21</sup> Sand notes that it is a 'myth' that transboundary pollution disputes have often (or even occasionally) been resolved along these lines: Peter H Sand, *Transnational Environmental Law: Lessons in Global Change* (1999) 43.

<sup>22</sup> Karin Mickelson, 'Rereading *Trail Smelter*' (1993) 31 *Canadian Yearbook of International Law* 219, 229; John D Wirth, *Smelter Smoke in North America: The Politics of Transborder Pollution* (2000) 80 ('the main issues of the case have been otherwise ignored or obscured by the conventional wisdom about [the case's] significance.')

<sup>23</sup> D H Dinwoodie, 'The Politics of International Pollution Control: The *Trail Smelter Case*' (1971-1972) 27 *International Journal* 219, 219. The *Trail Smelter* is now owned and operated by Teck Cominco Metals Ltd, the corporate successor to Consolidated Mining. The smelting complex at Trail is one of the world's largest zinc

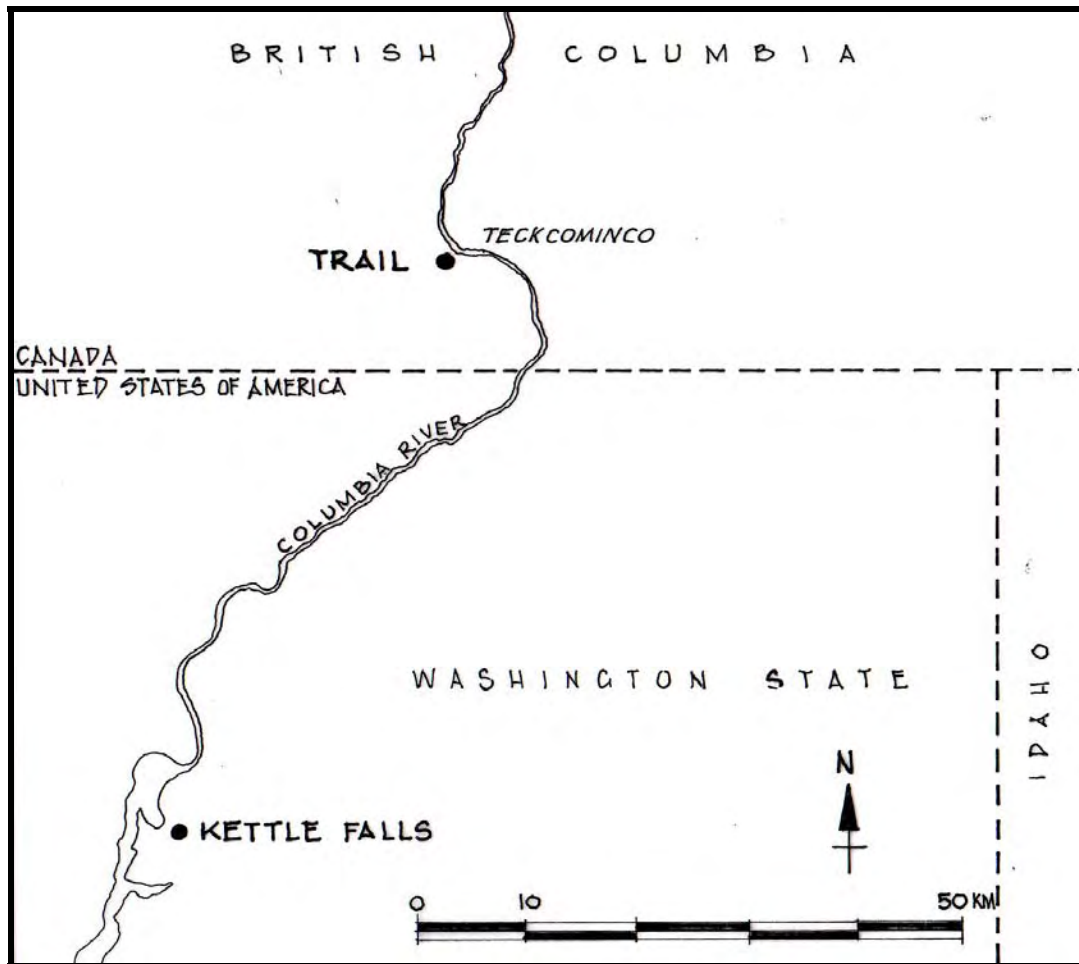


Figure 5.1 The Columbia River and the Smelter at Trail

The operations of the Trail smelter greatly affected the surrounding natural environment. Atmospheric emissions included lead dust and other metallic compounds, and substantial quantities of sulphur (rising from around 160 tons per day in 1916 to 300-350 tons per day in 1930 before falling to around 22 tons per day in early 1937).<sup>24</sup> Forming sulphur dioxide and sulphuric acid in the atmosphere, two compounds highly toxic to plant tissues, the sulphur emissions caused substantial and widespread damage to local vegetation. As a consequence Canadian farmers raised a series of complaints regarding the smelter and these were mostly resolved by Consolidated Mining by means of compensatory payments or the purchase of smoke easements. The emissions also began to affect United States users south of the boundary.

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and lead smelting and refining complexes, producing approximately 290,000 tonnes of zinc and 120,000 tonnes of lead per annum. See <<http://www.teckcominco.com>> at 1 July 2005.

<sup>24</sup> *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1917. Despite its increased capacity, the Trail Smelter now emits between 3 and 10 tons of sulphur dioxide per day: Golder Associates Ltd, *Analysis of the Effects of Smelter Emissions on Vegetation within the Trail Regional Area* (2004) 3, <<http://www.teckcominco.com/articles/tr-ecorisk/techreports/2004/2004-05-veganalysis.pdf>> at 1 July 2005.

In 1925, in an effort to improve the dispersal of sulphur emissions, Consolidated Mining increased the height of the smelter stacks.<sup>25</sup> The new arrangements improved the conditions in Canada, but further concentrated emissions drifting south. As a result the town of Northport in Stevens County, Washington, and surrounding farms, were subjected to heavy clouds of sulphur dioxide, often lasting for several days. United States farmers and other users, who did not share in the economic benefits that the smelter brought to British Columbia, vigorously pursued claims against the company.<sup>26</sup> While some of these were resolved, Consolidated Mining denied most as exorbitant.<sup>27</sup> An increasingly well-organised group of Stevens County residents ultimately encouraged affected farmers to refuse the settlement of individual claims, and petitioned the United States government to pursue their grievances directly with Canada.

Ultimately the *Trail Smelter Case* appears to have arisen because the United States residents affected by the transboundary pollution did not possess admissible claims in the courts of British Columbia. Following *British South Africa Company v Companhia de Moçambique*,<sup>28</sup> those courts could not assume jurisdiction in cases involving trespass to foreign land. Hence it was only because of this domestic legal limitation that an otherwise unremarkable occurrence of pollution by a private company affecting individuals in another jurisdiction was elevated to an international dispute.<sup>29</sup>

(c) *The Report of the International Joint Commission*

The United States and Canada agreed in August 1928 that the matter should be referred to the International Joint Commission ('IJC')<sup>30</sup> established under the *1909 Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary Between the United States and Canada* ('*Boundary Waters Treaty*').<sup>31</sup> In 1931 the IJC

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<sup>25</sup> Dinwoodie, above n 23, 220.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1917.

<sup>28</sup> [1893] AC 602. On the '*Moçambique* rule' see generally Pete E Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) 136-146.

<sup>29</sup> John E Read, 'The Trail Smelter Dispute' (1963) 1 *Canadian Yearbook of International Law* 213, 213-214; John H Knox, 'The Flawed Trail Smelter Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law' in Rebecca Bratspies and Russell Miller (eds), *Transboundary Harms in International Law: Lessons from the Trail Smelter Arbitration* (forthcoming) ('*Trail Smelter* was the kind of case that many scholars agree might usefully be addressed through privately enforced private rights: it involved only one polluter, a limited number of individuals alleging harm, and relatively clear causation').

<sup>30</sup> *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1918.

<sup>31</sup> *Boundary Waters Treaty*, art VII. The IJC continues to operate today (see <<http://www.ijc.org>> at 1 July 2005). It is an independent organisation with the mandate of preventing and resolving disputes relating to the use and quality of boundary waters between Canada and the United States, and to advise both governments on related questions (*Boundary Waters Treaty*, preamble, 1st recital). The IJC is conferred investigative powers by the *Boundary Waters Treaty*, art IX which provides that reports by the IJC 'shall not be regarded as decisions

issued a unanimous report,<sup>32</sup> recommending an award of US\$350,000 for injury to private interests up to 1 January 1932, by which stage the Commission considered that the damage was likely to be eliminated by the installation of 'sulphuric acid units' to capture and convert emissions.<sup>33</sup> In relation to any damage suffered after 1 January 1932, the IJC recommended that if appropriate compensation was not forthcoming, that the two governments should jointly determine an amount payable by Consolidated Mining.

(d) *Ad Hoc Arbitration*

Although satisfactory to Canada,<sup>34</sup> the IJC's recommendations were not acceptable to the United States, as they provided inadequate past, and uncertain future, indemnification for damage.<sup>35</sup> Hence after further negotiations the two governments concluded a special agreement submitting their dispute to arbitration.<sup>36</sup>

Several features of the *Trail Smelter Arbitral Agreement* are noteworthy. Under Article I, Canada effectively accepted liability in relation to past damage caused by the smelter's operations. That provision required the Canadian government to pay US\$350,000 by way of compensation for all damage sustained in the United States prior to 1932. In determining the United States' claims in relation to damage after that date, Article IV required the tribunal to apply 'the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice.' This reference to United States, rather than Canadian law, was supported by Canada, partly because decisions of its courts regarding industrial nuisance were considerably less favourable to industry.<sup>37</sup> Any assessment of the precedential value of

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of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award.'

<sup>32</sup> *Report of the International Joint Commission in the Trail Smelter Reference* (1931) <<http://www.ijc.org>> at 1 July 2005. Although the compromise report attracted the support of all six commissioners, the proceedings were fractious, and the commission split along national lines. In addition, the scientific evidence presented by each government was in almost complete opposition, with the United States Department of Agriculture finding widespread injury caused by sulphur dioxide fumigations, while a team of Canadian National Council scientists concluded that the main reasons for agricultural failure in the area were unrelated to the smelter: see Dinwoodie, above n 23, 225-226.

<sup>33</sup> *Report of the International Joint Commission in the Trail Smelter Reference*, above n 32, 1.

<sup>34</sup> Read, above n 29, 214.

<sup>35</sup> Dinwoodie, above n 23, 228.

<sup>36</sup> *1935 Convention for the Settlement of Difficulties Arising from the Operation of the Smelter at Trail between Great Britain and the United States* ('*Trail Smelter Arbitral Agreement*').

<sup>37</sup> Read, above n 29, 227.



the decision must acknowledge this proper law clause which clearly allowed the Tribunal to look beyond applicable principles of public international law.<sup>38</sup>

Article IV also provided that the tribunal ‘shall give consideration to the desire of the high contracting parties to reach a solution *just* to all parties concerned.’<sup>39</sup> As a result the Tribunal, though deciding an essentially intergovernmental dispute, was nonetheless empowered to take into consideration the interests of the private parties involved, including the residents of the Columbia River Valley and Consolidated Mining. It is therefore an early model of international adjudication involving private actors, albeit indirectly.

The key provision of the *Trail Smelter Arbitral Agreement* was Article III, in which the parties agreed upon the four questions to be resolved by the Tribunal:

- (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?
- (2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage to the State of Washington in the future and, if so, to what extent?
- (3) In the light of the answer to the preceding Question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?
- (4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

In responding to these questions, the Tribunal delivered its award in two phases. In its initial decision in 1938 the Tribunal decided the first question for the period from 1932 to 1937 and prescribed a temporary regime for controlling emissions in response to the remaining three questions.

(i) *The Interim Decision*

On the first issue, namely the indemnity to be paid for any damage sustained in the State of Washington after 1 January 1932, the Tribunal rejected most of the United States’ claims in the seven categories to which they related.<sup>40</sup>

In assessing the United States’ allegations of damage, the Tribunal undertook an extensive review of the topography and climatic conditions in the Columbia River Valley south of Trail. With respect to cleared land used for crops, there was evidence of

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<sup>38</sup> Günther Handl, ‘Territorial Sovereignty and the Problem of Transnational Pollution’ (1975) 69 *American Journal of International Law* 50, 60.

<sup>39</sup> Emphasis added.

<sup>40</sup> The United States claimed damages of US\$2,100,011.17 divided into seven categories, in respect of (a) cleared land and improvements, (b) uncleared land and improvements, (c) live stock, (d) property in the town of Northport, (e) wrong done to the United States in violation of sovereignty, measured by cost of investigation, (f) interest on US\$350,000 accepted in satisfaction of damage to 1 January 1932, but not paid on that date, and (g) business enterprises: *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1940.

damage by sulphur fumigation from 1932 to 1936, and the Tribunal ordered that there be recompense for the reduced value of this land.<sup>41</sup> As for land used as pasture and for forestry industries, the Tribunal found that although there was little evidence of damage to pasture, the sulphur dioxide fumes had damaged harvestable trees. This damage varied from year to year, and from species to species, and the Tribunal's assessment was complicated by the heavy deforestation that had already occurred as a result of logging, forest fires, and by smelters that had operated in Northport.<sup>42</sup> Further confirming the focus of the parties and the tribunals upon commercial rather than ecological interests, the Tribunal rejected compensation for damage to timber found in inaccessible areas.

For the compensable losses the Tribunal awarded a total of US\$78,000 for the period from 1932 until 1937. All other categories of claimed losses were rejected, including damages for discharges of smelter wastes into the Columbia River. This was arguably the only category of loss sought by the United States that related to pure environmental harm.<sup>43</sup> The Tribunal found that even if such injury came within the term 'damage' as used in Article III of the *Trail Smelter Arbitral Agreement*, the United States had presented no evidence to support its claim.

Finally, in respect of the United States claim for 'damages in respect of the wrong done the United States in violation of sovereignty', the Tribunal concluded that it was unnecessary to decide whether such a violation had occurred. This was because the damages claimed related only to expenditure for *investigation* of the 'problems caused by the Trail Smelter' and these could not, according to Tribunal, constitute 'damage caused by the Trail Smelter' as those words were used in Article III of the *Trail Smelter Arbitral Agreement*.<sup>44</sup>

The Tribunal refrained from deciding questions two, three or four, on the grounds that there was insufficient information. However pending the final award, temporary arrangements were made to undertake further assessments of the impact of the smelter fumes, and to limit sulphur emissions during specified periods.

(ii) *The Final Award*

Whereas the interim award was mostly concerned to ascertain the quantum of damages payable by Canada for damage from 1932 onwards, in the final award the Tribunal had to consider Canada's ongoing obligations to prevent emissions being

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<sup>41</sup> Ibid 1925.

<sup>42</sup> Ibid 1928.

<sup>43</sup> Philippe Sands, 'International Environmental Litigation and Its Future' (1999) 32 *University of Richmond Law Review* 1619, 1622.

<sup>44</sup> *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1932.

carried into the United States. The Tribunal was also asked to devise a regime that could ensure no further damage occurred.

However, some remaining issues in relation to past injury were first addressed. The Tribunal concluded that the evidence did not sustain the United States' claim in relation to damage from 1937 onwards. The United States also sought to re-contest the issue of compensation for the costs of its investigation of the circumstances giving rise to the claim. After lengthy consideration, the Tribunal also rejected this petition. In relation to expenditures incurred up to the first award, the Tribunal concluded that its disposition of the issue in the interim decision constituted a *res judicata*.<sup>45</sup> Costs incurred for scientific and other investigations subsequent to that award were also disallowed.

The Tribunal's reasoning here principally revolved around its interpretation of Article III of the *Trail Smelter Arbitral Agreement*. It was concluded that the expenses were directed to the presentation of the case, and were not traceable to 'damage' caused by the Trail Smelter in the State of Washington. Interestingly the Tribunal drew a distinction between 'expenditure incurred in mending the damageable consequences of an injury and monies spent in ascertaining the existence, the cause and the extent of the latter.'<sup>46</sup> This dictum implies that damages for repair and remediation, had they been claimed, may well have been recovered and therefore suggests that the litigation might have encompassed additional environmental concerns had the United States developed more wide-ranging submissions.

The Tribunal then turned to question two, the core question to be resolved in its final award ('whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and to what extent.') As a preliminary matter the Tribunal observed that whether the question was determined on the basis of domestic or international law the same principles were applicable because both systems of law adopted the same approach.<sup>47</sup>

The Tribunal acknowledged the frequent statement by publicists of a general duty to respect other states and their territory.<sup>48</sup> However the difficulty here was resolving 'what, *pro subjecta materiae*, is deemed to constitute an injurious act.'<sup>49</sup> On this point the Tribunal noted that although there was no previous decision of an international tribunal concerning air pollution, there were decisions of the United States Supreme Court on cognate questions of pollution across federal boundaries.<sup>50</sup> Having regard to

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<sup>45</sup> *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1948-1958.

<sup>46</sup> *Ibid* 1959.

<sup>47</sup> *Ibid* 1963.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* 1963-1964.

this jurisprudence, and to scientific and technical developments in the control of air pollutants, the Tribunal reached its landmark conclusion that:

[U]nder the principles of international law, as well as of the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>51</sup>

Applying the principle to the facts before it, the Tribunal concluded that Canada was responsible in international law for the operation of the Trail Smelter, and was under a duty to ensure that its future operation was in conformity with its obligations as stated by the Tribunal.<sup>52</sup> In this respect the Tribunal was evidently concerned not with past conduct (as Canada had accepted responsibility for past damage<sup>53</sup>), but rather with Canada's obligations in relation to the ongoing operation of the Trail smelter.

As a result of its conclusion on question two, the Tribunal was required to respond to question three, by which the parties requested that the Tribunal develop a regime for the future conduct of smelting operations at Trail. Drawing upon what the Tribunal acknowledged was 'probably the most thorough study ever made of any area subject to atmospheric pollution by industrial smoke',<sup>54</sup> and expressly seeking to adopt an equitable approach that did not unduly hinder the smelter's operation, the Tribunal devised a comprehensive regime to be adopted and maintained at the Trail smelter. The objective of the regime was self-evidently not to protect the natural environment in the immediate vicinity of the smelter, but rather to reduce diurnal fumigations to the point where agriculture was not affected.<sup>55</sup>

Finally, the Tribunal considered question four, namely whether compensation should be paid on account of its decisions on questions two and three. The Tribunal was of the view that the prescribed regime would probably remove the cause of the dispute.<sup>56</sup> However, it also indicated that Canada would be liable to indemnify the United States for any substantial damage taking place in the future 'whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the regime.'<sup>57</sup>

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<sup>51</sup> Ibid 1965.

<sup>52</sup> Ibid 1965-1966.

<sup>53</sup> Lammers, *Pollution of International Watercourses*, above n 16, 520 ('[Nowhere] in the Tribunal's Interim Award do we find any indication that in the absence of the explicit obligation assumed by Canada under the Convention the Tribunal would have held Canada responsible for such damage on account of a breach of a substantive obligation of general international law in respect of transfrontier air pollution.')

<sup>54</sup> *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1973.

<sup>55</sup> Ibid 1974.

<sup>56</sup> Ibid 1980.

<sup>57</sup> Ibid.

(e) *The Legacy of the Trail Smelter Case*

The *Trail Smelter Case* is best remembered for the statement that states must not permit their territory to be used in such a way as to cause damage to the territory of other states by atmospheric pollution. The influence of the case was assured because even though it considered only airborne pollutants as required by the *Trail Smelter Arbitral Agreement*<sup>58</sup> it had adapted a general principle regarding sovereignty and territorial integrity that could extend to other forms of transboundary damage. The Tribunal's statement ultimately found expression in Principle 21 of the *Declaration of the United Nations Conference on the Human Environment*<sup>59</sup> which was substantially repeated in Principle 2 of the *United Nations Declaration on Environment and Development*.<sup>60</sup> The longevity of the dictum is also a consequence of the flexible standard articulated by the Tribunal. In recognising the potential for technological improvements in relation to emissions capture,<sup>61</sup> it is implicit in the Tribunal's reasoning that the duty to prevent transboundary harm is not a strict or absolute one, but rather only applies to harm that is foreseeable and preventable.<sup>62</sup>

Moreover, the Tribunal found that states would only be required to prevent transboundary harm of 'serious consequence' and that any injury be 'established by clear and convincing evidence.' The imposition of a more demanding threshold of damage would clearly have been desirable from an environmental viewpoint.<sup>63</sup> However, given the strong desire by the parties to continue to promote economic growth in the region, and the scope of the United States cases on which the Tribunal relied,<sup>64</sup> it is perhaps unrealistic to have expected the adoption of a different approach. The Tribunal was aware of these dynamics, noting that 'while the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian interests might be claimed

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<sup>58</sup> And on this basis the Tribunal did not consider the United States' claims that the Columbia River had been damaged by the discharge of slag containing sulfates, chlorides, arsenic, zinc and lead. The Tribunal found that such alleged harm did not constitute 'damage' for the purposes of art III of the *Trail Smelter Arbitral Agreement*. The river pollution was in many senses as serious as the atmospheric, resulting in the decline of fishstocks and birdlife dependent upon the river system: Wirth, above n 22, 101.

<sup>59</sup> UN Doc A/CONF.48/14/Rev.1 (1973) ('*Stockholm Declaration*').

<sup>60</sup> UN Doc A/CONF.151/5/Rev.1 (1992) ('*Rio Declaration*').

<sup>61</sup> 'Great progress in the control of fumes has been made by science in the last few years and this progress should be taken into account.': *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1965.

<sup>62</sup> But see *contra* L F E Goldie, 'Liability for Damage and the Progressive Development of International Law' (1965) 14 *International and Comparative Law Quarterly* 1189, 1226-1231.

<sup>63</sup> Alfred P Rubin, 'Pollution by Analogy: the Trail Smelter Arbitration' (1971) 50 *Oregon Law Review* 259, 272-274.

<sup>64</sup> These did not permit recovery for bare trespass: Alan Boyle, 'Reparation for Environmental Damage in International Law: Some Preliminary Problems' in Michael Bowman and Alan Boyle (eds), *Environmental Damages in International and Comparative Law* (2002) 17, 19.

to be injured by an American corporation.<sup>65</sup> Subsequent state practice has confirmed that a threshold should be maintained.<sup>66</sup> However, it has gradually been lowered as is seen in the recent efforts of the ILC to codify and develop the basic primary rules of international law relating to transboundary harm. The ILC's *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*<sup>67</sup> ('*Draft Articles on Prevention*') and *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*<sup>68</sup> ('*Draft Principles on Liability*') apply in respect of any 'significant' damage, that is harm which is more than 'detectable', but not necessarily 'serious' or 'substantial'.

Other aspects of the *Trail Smelter Case* have been decisively abandoned, including the requirement that a complaining state provide 'clear and convincing evidence' of harm. Such an approach runs against the precautionary trend in environmental management at national and international levels. Indeed had this antiquated evidentiary hurdle remained, it would effectively render nugatory a general duty to prevent transboundary harm as many longer-term or complex causes of environmental harm would escape regulation. This was one of the reasons why the *Trail Smelter Case* was not helpful for the applicants in the *Nuclear Tests Cases*<sup>69</sup> as Australia and New Zealand needed to establish that the obligation to prevent transboundary harm extended to cover a scenario where there was ostensibly little environmental effect following atmospheric tests many thousands of kilometres away from their territory, but nonetheless the potential for radionuclides to cause long-term damage by, among other things, subtle genetic damage.

Also separating the Tribunal's approach from contemporary environmental law and policy is the exclusion of injury to the environment itself from the range of compensable interests.<sup>70</sup> Given the extensive scientific investigation of the Columbia

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<sup>65</sup> *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911, 1938-1939.

<sup>66</sup> Lammers notes that 'Subsequent state practice has tended only to confirm that 'the obligation to prevent or abate transboundary environmental interference does not involve a duty to prevent or abate every transboundary harm, however small.' Johan G Lammers, 'The Present State of Research Carried out by the English-Speaking Section of the Centre for Studies and Research' in Académie de Droit International de la Haye, *La Pollution Transfrontière* (1985) 90, 94.

<sup>67</sup> *Report of the International Law Commission, 53rd Session*, 366, UN Doc A/56/10 (2001). See Bruno Simma, 'The Work of the International Law Commission at Its Fifty-Third Session' (2002) 71 *Nordic Journal of International Law* 123, 137-147.

<sup>68</sup> *Report of the International Law Commission, 56th Session*, 153-156, UN Doc A/59/10 (2004).

<sup>69</sup> *Nuclear Tests Case (Australia v France) (Interim Measures)* [1973] ICJ Rep 99; *Nuclear Tests Case (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135; *Nuclear Tests Case (Australia v France) (Merits)* [1974] ICJ Rep 253; *Nuclear Tests Case (New Zealand v France) (Merits)* [1974] ICJ Rep 457 ('*Nuclear Tests Cases*').

<sup>70</sup> Boyle, 'Reparation for Environmental Damage in International Law: Some Preliminary Problems', above n 64, 18-19 (while material injury of some kind is necessary, this may extend to the intrinsic worth of natural ecosystems, including biological diversity and areas of wilderness or aesthetic significance).

River Valley undertaken for the litigation, it is remarkable that no attention was paid by the litigants, or the Tribunal itself, to the impact of the smelter either upon native wildlife<sup>71</sup> or indigenous flora (except as regards harvestable areas of forest). Nor was the question of human health raised, even though evidence of these matters had been presented to the IJC.<sup>72</sup> These exclusions have provoked strong criticism<sup>73</sup> however the Tribunal's omission to consider them must be viewed in its proper context. The limited environmental consciousness of the time, and the primary concern of the parties with addressing economic losses in the United States, largely explain the Tribunal's narrow focus. Other aspects of the decision must also be regarded as being largely confined to the particular context of the litigation. This is especially so when an attempt is made to rely upon the *Trail Smelter Case* as a precedent for the resolution of disputes over transboundary environmental harm through the application of flexible or equitable criteria. The ILC's *Draft Articles on Prevention* adopt such an approach, however a close reading of the *Trail Smelter Case* itself suggests that the decision does not support the notion of an equitable balancing. While such considerations certainly played a role in the Tribunal's disposition of the case, this is because it was specifically mandated by the *Trail Smelter Arbitral Agreement* to reach a just and equitable solution in devising a regime for the future operation of the plant.<sup>74</sup>

Accordingly, the decision does not provide authority for the general proposition that states may agree to an equitable sharing of the environmental costs of transboundary harm.<sup>75</sup> Admittedly the statement of principle articulated by the Tribunal (that states

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<sup>71</sup> The area surrounding the Trail Smelter is rich in faunal diversity. Species of mammals found in the area include the Black Bear, Columbian Ground Squirrel, Coyote, Deer Mouse, Dusky Shrew, River Otter, Red Squirrel, Southern Red-Backed Vole, White-Tailed Deer and Townsend's Big Eared Bat. The recently commenced Trail Ecological Risk Assessment, required under British Columbia's *Environment Management Act 1996* (BC) RSBC c 118 in relation to contaminated sites, has identified the Dusky Shrew and River Otter as mammalian species potentially at risk due to smelter emissions: Teck Cominco Metals Ltd, *Living Summary: Trail Ecological Risk Assessment* (2004) <<http://www.teckcominco.com/articles/tr-ecorisk/eranews/2004-09-living.pdf>> at 1 July 2005.

<sup>72</sup> Stevens County residents developed severe respiratory problems after the height of the smelter stacks was increased in 1925 and 1927: Wirth, above n 22 99.

<sup>73</sup> See in particular Rubin, above n 63, 273.

<sup>74</sup> The Tribunal observed that 'the phraseology of the questions submitted to the Tribunal clearly evinces a desire and an intention that, to some extent, in making its answers to the questions, the Tribunal should endeavour to adjust the conflicting interests by some "just solution" which would allow the continuance of the Trail Smelter...': *Trail Smelter Case* (1938 and 1941) 3 RIAA 1911,1939.

<sup>75</sup> *Contra* McCaffrey who suggests that the 'tribunal endeavoured to achieve a 'just solution' to the controversy by striking a balance between the industrial and agricultural interests involved' and that 'the solution arrived at by the tribunal may thus be said to reflect an equitable allocation of the capacity of the airshed to accommodate pollution from the smelter.': Stephen C McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001) 207). See also Robert Q Quentin-Baxter, 'Second Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law' [1981] 2 *Yearbook of the International Law Commission* 103 ('It is a feature of the modern world...that the resolution of disputes between States may turn as much upon the adjustment of competing interests as upon the ascertainment and application of prohibitory rules.')

must not permit ‘serious’ damage to be caused to other states) itself enshrines a degree of ‘balance’ by tolerating a certain level of transboundary emissions, and therefore not unduly interfering in activities that are productive of economic and other benefits. However, the case does not suggest that in determining conformity with this standard that reference may be had to equitable considerations.

Turning, finally, to the implications of the decision for institutional structures to address transboundary harm, the legacy of the *Trail Smelter Case* must similarly be subject to critical and contextual appraisal. Several benefits flowed to the parties from the litigation: the dispute brought to a conclusion a lengthy and difficult chapter in relations between Canada and the United States, and resulted in the establishment of a comprehensive regime for ongoing monitoring and control of the Trail Smelter.<sup>76</sup> Yet it was clearly less than desirable for such a case to have been resolved in this way then, or indeed now.<sup>77</sup> The litigation was in large part a consequence of deficiencies in the domestic law of Canada and the United States. It was therefore the only solution in the circumstances, and an imperfect one to a case involving damage to private interests by the operations of a private company. The process addressed the dispute indirectly, and took 14 years to complete, by which time the original complainants had either moved, or were deceased. Perhaps it should not therefore be surprising that the case remains the only international arbitration on the merits in a dispute over transboundary pollution.<sup>78</sup>

### *C The Nuclear Tests Litigation*

The *Trail Smelter Case* had left unresolved many issues relating to the obligations of states to prevent the occasioning of transboundary harm. The litigation had obviously not involved damage to a common space (a phenomenon which does not readily fit within the conceptual constraints of the principle that states must respect the territorial integrity of other states<sup>79</sup>). Nor had the Tribunal directly considered the standard of care expected of states in discharging their obligation to prevent the emission of hazardous pollutants having extraterritorial effects. In addition, although emphasising that states would only be liable in cases of transboundary damage of ‘serious consequence’, the Tribunal did not specify precisely how this threshold of damage could be determined,

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<sup>76</sup> However it resolved these issues in only one region, while the problem of transboundary air pollution was then, and remains today, a much wider one on the North American continent: John E Carroll, ‘The Acid Rain Issue in Canadian-American Relations: A Commentary’ in John E Carroll (ed), *International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems* (1988) 141.

<sup>77</sup> Knox, above n 29 (arguing that ‘the *Trail Smelter* procedure has proved to be remarkably unattractive to governments as a method of resolving international environmental disputes.’).

<sup>78</sup> Lynton Keith Caldwell, *International Environmental Policy: From the Twentieth to the Twenty-First Century* (3rd ed, 1996) 151.

<sup>79</sup> Kathy Leigh, ‘Liability for Damage to the Global Commons’ (1993) 14 *Australian Year Book of International Law* 129, 141.



and whether different considerations should apply to materials with longer-lasting or more hazardous effects than the sulphur dioxide emitted from the smelter at Trail.

Several of these issues were of central importance in the *Nuclear Tests Cases* brought by Australia and New Zealand in response to atmospheric nuclear tests conducted by France in the South Pacific from 1966 onwards. Closely following the conclusion of the 1972 United Nations Conference on the Human Environment at Stockholm, the litigation presented an opportunity for the ICJ to consider the applicability of rapidly developing principles of international environmental law to a major environmental hazard – the testing of nuclear weapons. However, as a result of a complex interplay of political and jurisdictional issues the Court never pronounced upon the merits of the dispute.<sup>80</sup> Nonetheless, in combination, the submissions of the parties, aspects of the Court's interim orders and the judgment on jurisdiction, and the separate and dissenting opinions, provide much valuable discussion and practice in relation to this area of international environmental law.<sup>81</sup>

*(a) Background to the Dispute*

In 1963 the French Government announced that it intended to relocate its nuclear tests centre from Algeria to French Polynesia. The main firing site was to be Mururoa Atoll, and nearby Fangataufa Island, two remote and uninhabited atolls. France subsequently conducted its first atmospheric test in the Pacific in 1966, and exploded an average of four devices per annum until 1973 when Australia and New Zealand simultaneously instituted proceedings against France in the ICJ.

The French testing program was not unique; nuclear weapons tests had been conducted in the Pacific region since the 1950s, including on Australian soil.<sup>82</sup> However, from 1963 onwards, and reflecting widespread public concern at the potentially serious, but uncertain, human and environmental impacts of these tests, Australia and New Zealand, together with other South Pacific nations, expressed strong opposition to French nuclear testing in the Pacific. France entertained only limited

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<sup>80</sup> Instead the litigation is best known for the important contribution made by the Court to explaining the international legal effects of unilateral acts. In this respect Franck has observed that 'cases need not have monumental outcomes to make monumental law': Thomas M Franck, 'Word Made Law: The Decision of the ICJ in the Nuclear Tests Cases' (1975) 69 *American Journal of International Law* 612, 612.

<sup>81</sup> Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) 320.

<sup>82</sup> See generally Ben Boer, Ross Ramsay and Donald R Rothwell, *International Environmental Law in the Asia Pacific* (1998) 64-68. In relation to United States nuclear tests on the Marshall Islands see *In the Matter of the People of Enewetak* (2000) 39 ILM 1214.

consultations with these affected states, and maintained that its testing program was entirely consistent with international law and had minimal environmental impact.<sup>83</sup>

Australia and New Zealand's opposition to the tests was part of a broader regional and global movement against the development, testing and proliferation of nuclear arms. The conclusion of the *1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water* ('*Nuclear Test Ban Treaty*'), had ended atmospheric testing for all nuclear nations except France and China.<sup>84</sup> Moreover in a series of resolutions the United Nations General Assembly urged all States to become parties to the treaty, emphasised the harmful environmental effects of nuclear tests, and condemned nuclear testing.<sup>85</sup> The testing and deployment of nuclear weapons had also been a key concern of the Stockholm Conference and Principle 26 of the *Stockholm Declaration* called for the 'elimination and complete destruction of such weapons.' These legal and political developments were accompanied by increased scientific examination of the impact of radioactive materials upon human health and marine and terrestrial ecosystems.<sup>86</sup>

Anticipating a new round of tests in 1973 Australia and New Zealand instituted proceedings in the ICJ, invoking the *1928 General Act for the Pacific Settlement of Disputes* to which the applicants and France were parties. The applicants also requested that the court indicate provisional measures requiring France to refrain from any testing giving rise to radioactive fall-out pending the judgment of the Court on the merits.

(b) *Australia and New Zealand's Applications*

Australia and New Zealand sought the same ultimate objective, namely an end to French nuclear testing in the Pacific causing the deposit of nuclear materials on Australian and New Zealand territory and on the high seas. Both states also shared broadly the same concerns regarding environmental damage and impacts upon the health of present and future generations caused by tropospheric and stratospheric fallout

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<sup>83</sup> République Française, Ministère des Affaires étrangères, *Livre Blanc sur les expériences nucléaires* (1973) ('*Livre Blanc*') 8-9.

<sup>84</sup> The 3rd recital of the preamble to the *Nuclear Test Ban Treaty* expresses the parties' desire 'to put an end to the contamination of man's environment by radioactive substances'. It prohibits nuclear tests in the atmosphere, in outer space, under water, or in any other environment 'if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted' (art 1(1)).

<sup>85</sup> See in particular GA Res 1762 A (XVII), UN Doc A/RES/1762A(XVII) (1962) (which condemned all nuclear tests) and GA Res 2934 (XXVII), UN Doc A/RES/2934(XXVII) (1972) (which referred specifically to nuclear tests in the Pacific).

<sup>86</sup> Particularly as a result of the work of the UN Scientific Committee on the Effects of Atomic Radiation ('UNSCEAR') established by GA Res 913 (X) UN Doc A/RES913(X) (1955).

following atmospheric tests.<sup>87</sup> Nonetheless, the two applications differed in several important respects. In particular, while the Australian position emphasised the illegality of *atmospheric* tests, New Zealand objected more generally to radioactive pollution as a result of nuclear testing.<sup>88</sup>

Australia contended that the conduct of the tests violated its rights individually, and in common with other states, to be free from atmospheric nuclear tests. Australia also argued that the interference with ships and aircraft on the high seas (by the tests themselves and the enforcement of exclusion zones), and high seas pollution through radioactive fall-out, constituted infringements of the high seas freedoms. In these submissions Australia was therefore seeking to assert an *actio popularis*, invoking the responsibility of France notwithstanding that Australia's interests were not more seriously affected than many other states. Anticipating difficulties in sustaining this argument following the *South West Africa Case*,<sup>89</sup> Australia also made two inventive claims regarding transboundary pollution. In the first place it was said that the deposit of *any* radioactive material within Australian territory violated Australian territorial sovereignty. Second, it was argued that the testing interfered with Australian 'decisional sovereignty' by '[impairing] Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources.'<sup>90</sup>

Rather than relying upon the *Trail Smelter Case*, Australia therefore sought to downplay any requirement to identify actual damage. Establishing serious injury to the satisfaction of a court was a difficult task given the complex chain of causation between the emission of nuclides and eventual effects upon human health and the biosphere. Instead, in relying upon the fact of interference alone regardless of its scale, Australia impelled the doctrine of sovereignty underpinning the *Trail Smelter Case* much further than it had previously been advanced. Australia's assertion essentially amounted to a claim of international 'trespass', in which a wrongful act was committed merely by the

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<sup>87</sup> *Nuclear Tests Cases (Australia v France)*, Australian Application [1973] 1 ICJ Pleadings 3, 8-11; *Nuclear Tests Case (New Zealand v France)* [1973] 1 ICJ Pleadings 3, 5-7.

<sup>88</sup> J S Kós, 'Interim Relief in the International Court: New Zealand and the Nuclear Tests Cases' (1984) 14 *Victoria University of Wellington Law Review* 357, 370-375; Malgosia Fitzmaurice, 'Environmental Protection and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996) 293, 297-299.

<sup>89</sup> *South West Africa Case (Second Phase) (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ Rep 6, 47 ('although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present.'). See François Voeffray, *L'actio popularis, ou la défense de l'intérêt collectif devant les juridictions internationales* (2004) 65-73.

<sup>90</sup> *Nuclear Tests Cases (Australia v France)*, Australian Application [1973] 1 ICJ Pleadings 3, 14.

deposit of radioactive particles, notwithstanding any evidence of environmental or other harm caused as a result.<sup>91</sup>

New Zealand's Application addressed a broader range of infringed interests, and did not refer specifically to the atmospheric nature of the tests. As with the Australian Application, New Zealand contended that the nuclear tests giving rise to fall-out constituted a violation of the rights of all members of the international community. New Zealand also asserted France's interference with the freedom of the high seas, and similarly complained that the testing violated its rights to prevent the entry of radioactive material into its territory, including New Zealand air space and territorial waters. In addition to referring to nuclear tests generally, rather than only atmospheric testing, the New Zealand application is also distinguished from the Australian pleadings by its strong emphasis upon an infringement of 'the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment'.<sup>92</sup>

A striking feature of several submissions made by Australia and New Zealand is the detailed discussion of the effects of the nuclear testing not only upon human health, but also marine and terrestrial ecosystems. The reference in Australia's Application to the potential for the radioactive fall-out to settle on the sea, and be absorbed into the water and 'the life-chains which comprise the marine environment' constitutes one of the first references in international litigation to the concept of an 'ecosystem'.<sup>93</sup> More generally the overall tenor of the submissions, imbued as they are with references to the natural environment, suggests a major departure from the proceedings in the *Trail Smelter Case* in which the claim related exclusively to commercially exploitable elements of the ecosystems in the Columbia River Valley. They also hint at an application of a precautionary approach, by adverting to possible, but not clearly proven, effects upon human health and ecosystems.<sup>94</sup>

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<sup>91</sup> Handl, above n 37, 53; Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 285. In relation to the development of common law trespass which is actionable per se, without proof of material damage, see John G Fleming, *The Law of Torts* (9th ed, 1998) 3-5, 21-40.

<sup>92</sup> *Nuclear Tests Cases (Australia v France)*, New Zealand Application [1973] 2 ICJ Pleadings 3, 8.

<sup>93</sup> *Nuclear Tests Cases (Australia v France)*, Australian Application [1973] 1 ICJ Pleadings 3, 11. The term 'ecosystem' may be defined as 'a community of organisms interacting with one another and with the environment in which they live' (*Macquarie Dictionary* (3rd ed, 2001) 600) and was originally devised in 1935 by British botanist Sir Arthur Tansley (A G Tansley, 'The Use and Abuse of Vegetational Concepts and Terms' (1935) 16 *Ecology* 284, 299). A convenient definition in an international environmental text is now found in the 1992 *Convention on Biological Diversity* ('*Biodiversity Convention*'), art 2 ('[A] dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.').

<sup>94</sup> Nathalie L J T Horbach and Pieter H F Bekker, 'State Responsibility for Injurious Transboundary Activity in Retrospect' (2003) 50 *Netherlands International Law Review* 327, 344.

(c) *Interim Orders*

Australia and New Zealand were successful in their request for provisional measures (by eight votes to six), however the ICJ engaged in no substantive analysis of the factual or legal claims.<sup>95</sup> The Court was satisfied on a prima facie basis as to jurisdiction and admissibility and observed that the information before it ‘does not exclude the possibility that damage to [Australia and New Zealand] might be shown to be caused by the deposit on [Australian and New Zealand] territory of radio-active fall-out resulting from such tests and to be irreparable.’<sup>96</sup> The basis of the Court’s orders was to preserve the claimed rights of Australia and New Zealand to prevent the deposit of nuclear materials in their territory,<sup>97</sup> and the Court expressly indicated that the circumstances of the case did not require the indication of interim measures in respect of other claimed rights.<sup>98</sup> This aspect of the Court’s order was questioned by several dissenting judges, three of whom appeared to suggest that the Court’s order had gone too far and had effectively recognised the customary status of Principle 21 of the *Stockholm Declaration*.<sup>99</sup>

The ICJ’s provisional measures jurisdiction appeared particularly suited to responding to threatened environmental damage, especially as the Court affirmed that its powers could be mobilised on a finding of jurisdiction on a prima facie, rather than clearly manifest, basis. However, France undertook a planned test shortly after the order in open defiance of the Court, a result which illustrates the political difficulties that can arise in using judicial procedures to protect the environment, particularly where the target state has consistently objected to the jurisdiction of the court, and refused to participate in the proceedings. Nonetheless the interim measures were helpful for

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<sup>95</sup> Although France did not appear before the Court, it indicated several objections to the Court’s jurisdiction in a letter to the Registry. For a discussion see Jerome B Elkind, ‘French Nuclear Testing and Article 41 – Another Blow to the Authority of the Court?’ (1974) 8 *Vanderbilt Journal of Transnational Law* 39, 43-44.

<sup>96</sup> *Nuclear Tests Case (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, [29]; *Nuclear Tests Case (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, [30]. See generally Kathie D Frankel, ‘The Nuclear Tests Cases’ (1974) 7 *New York University Journal of International Law and Politics* 163.

<sup>97</sup> *Nuclear Tests Case (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, [30]; *Nuclear Tests Case (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, [31].

<sup>98</sup> *Nuclear Tests Case (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, [31]; *Nuclear Tests Case (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, [32].

<sup>99</sup> *Nuclear Tests Case (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, Dissenting Opinion of Judge Ignacio-Pinto (at 131), Dissenting Opinion of Judge Gros (at 288) and the Dissenting Opinion of Judge Petrén (at 303-306). But note the Joint Dissenting Opinion of Judges Onyeama, Dilard, Jiminez de Arechega and Waldock (at 367-8). In addition Judge de Castro (at 389) referred to the general ‘right to demand prohibition of the emission by neighbouring properties of noxious fumes.’ See also Philippe Sands, ‘Pleadings and the Pursuit of International Law: Nuclear Tests II (New Zealand v France)’ in Antony Anghie and Garry Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Weeramantry* (1998) 601, 614.

Australia and New Zealand as they gained considerable sympathy and publicity for their actions.<sup>100</sup>

(d) *The 1974 Judgment*

Before delivering its judgment in the next phase of the proceedings the Court was presented with a development in relations between the parties that would allow it to avoid considering the issues on their merits. The French Government had made a general announcement in June 1974 that ‘in view of the stage reached in carrying out the French nuclear defence program France will be in a position to pass on to the stage of underground explosions as soon as the series planned for this summer is completed.’<sup>101</sup>

Relying on the doctrine of unilateral acts the Court concluded that this announcement amounted to an assumption of a legal obligation to cease all atmospheric tests in the South Pacific.<sup>102</sup> This was despite the fact that the statement was made to the world at large, and not to Australia and New Zealand specifically, and France did not express any intention to be bound by its announcement. Nonetheless the Court concluded that the dispute had become moot: ‘the Court having found that the Respondent has assumed an obligation as to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required.’<sup>103</sup>

This conclusion depended on a strained interpretation of the Australian and New Zealand claims, particularly those of New Zealand which complained against French nuclear testing generally, and not only atmospheric tests. Noting that it was for the Court to determine the substance of the applications,<sup>104</sup> the Court found that true objective of the Australian and New Zealand applications was to bring an end to atmospheric nuclear testing.<sup>105</sup> While it was certainly the case that neither Australia nor New Zealand had sought compensation for any injury they had suffered, they had both requested a declaration that the testing was illegal per se. It should also be noted that

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<sup>100</sup> Constanze Shulte, *Compliance with Decisions of the International Court of Justice* (2004) 309.

<sup>101</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, [34]; *Nuclear Tests Case (New Zealand v France)* (Merits) [1974] ICJ Rep 457, [35]. In violation of the Court’s provisional measures order, France conducted tests in July and August 1973, and from June to September in 1974, causing some degree of radioactive fall-out on Australian and New Zealand territory.

<sup>102</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, [52]; *Nuclear Tests Case (New Zealand v France)* (Merits) [1974] ICJ Rep 457, [55]

<sup>103</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, [56]; *Nuclear Tests Case (New Zealand v France)* (Merits) [1974] ICJ Rep 457, [59]

<sup>104</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, [30]; *Nuclear Tests Case (New Zealand v France)* (Merits) [1974] ICJ Rep 457, [31]

<sup>105</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, [30]; *Nuclear Tests Case (New Zealand v France)* (Merits) [1974] ICJ Rep 457, [31]

neither applicant was provided with an opportunity to make submissions on the question of the unilateral act, or the Court's re-interpretation of the core claims being made in each application.<sup>106</sup>

By adopting the conclusion it did on the effect of the French declaration the Court was relieved of the need to assess Australia's and New Zealand's factual and legal claims regarding the effects of nuclear testing upon the environment of the South Pacific region. The Court merely adverted, in a single paragraph, to the dispute between the parties over the effects of radioactive materials dispersed in the conduct of the tests.<sup>107</sup> Significantly, however, several dissenting opinions engaged in a substantive discussion of the issues of international environmental law and policy raised by the dispute (although this discussion was admittedly limited, and several judges ignored altogether an appraisal of the environmental impacts of nuclear testing).<sup>108</sup>

(i) *The Dissenting Opinions*

The Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock engaged in a general review of Australia's and New Zealand's contentions in order to demonstrate that both states had asserted legal interests which the Court could evaluate. In his Dissenting Opinion Judge de Castro dealt with these issues in much greater detail. Unlike the Joint Dissenting judges, he categorically dismissed the arguments of Australia and New Zealand that they were entitled to bring an *actio popularis* in respect of certain alleged obligations that France was said to owe *erga omnes*. For Judge de Castro, the Applicants did not possess a relevant and material legal interest. As regards the claims concerning interference with the freedom of the high seas, the applicants had 'no legal title authorising [them] to act as [spokespersons] for the international community.'<sup>109</sup>

As to Australia's and New Zealand's claims regarding infringement of their sovereignty by radioactive fallout, Judge de Castro suggested that these issues should be evaluated on their merits. He was the only judge to refer to the *Trail Smelter Case*, and undertook a general discussion of the principle stated in the case, noting that it was well-known in civil law systems derived from Roman law. He concluded that:

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<sup>106</sup> Lyndel V Prott, 'Avoiding a Decision on the Merits in the International Court of Justice' (1976) 7 *Sydney Law Review* 433, 451.

<sup>107</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, [18]; *Nuclear Tests Case (New Zealand v France)* (Merits) [1974] ICJ Rep 457, [18]

<sup>108</sup> It is somewhat surprising that Judge Petré, who had been President of the arbitral tribunal in the *Lake Lanoux* case, was not one of the judges to consider the applicability of developing principles of international environmental law to this case.

<sup>109</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, Dissenting Opinion of Judge de Castro, 390.

If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes, the consequence must be drawn by an obvious analogy, that the Applicant is entitled to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory.

The question whether the deposit of radio-active substances on the Applicant's territory as a result of the French nuclear tests is harmful to the Applicant should only be settled in the course of proceedings on the merits in which the Court would consider whether intrusion or trespass into the territory of another is unlawful in itself or only if it gives rise to damage; in the latter hypothesis, it would still have to consider the nature of the alleged damage, its existence and its relative importance, in order to pronounce on the claim for prohibition of the French nuclear tests.<sup>110</sup>

Judge ad hoc Barwick's Dissenting Opinion also analysed closely the nature of each applicant's asserted interests, but as with the other dissenting judges he refrained from evaluating their merits. Judge Barwick noted that the dispute turned on whether 'actual and demonstrable damage is the 'gist' of the right to territorial integrity or is the intrusion of radio-active nuclides into the environment *per se* a breach of that right'<sup>111</sup>, and this was a genuine and admissible legal question to be decided.

In summary, therefore, the substance of the applicants' claims were not assessed in any detail by any member of the court, including the dissenting judges. Nonetheless these opinions, together with the pleadings and oral argument, clearly identified the core issues in dispute between the parties, and served to expose the difficulty of applying the *Trail Smelter Case* to situations involving nuclear pollution.

(e) *1995 Nuclear Tests Case*

France ceased atmospheric nuclear testing in 1974, but continued with its nuclear program, carrying out over 100 underground tests in the South Pacific until 1992, when a moratorium was announced prior to the United Nations Conference on Environment and Development in Rio.<sup>112</sup> Just three years later, in June 1995, it was declared that this suspension would be lifted, and that a final series of eight underground tests would be conducted to obtain data for future computer-based simulations.

The French decision to resume its tests came at a time of renewed international efforts to end nuclear testing, efforts which had gained considerable momentum after the Chernobyl disaster in 1986.<sup>113</sup> Within the Pacific region, the South Pacific Forum

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<sup>110</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, Dissenting Opinion of Judge de Castro, 389-390.

<sup>111</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253, Dissenting Opinion of Judge ad hoc Barwick, 433.

<sup>112</sup> See Donald K Anton et al, 'Memorandum on the Legality of the Planned Resumption of Nuclear Testing by France' (1995) 12 *Environmental Planning Law Journal* 300.

<sup>113</sup> Alan E Boyle, 'Nuclear Energy and International Law: An Environmental Perspective' (1989) 60 *British Yearbook of International Law* 257, 259-260.



states reaffirmed their opposition to nuclear testing with the conclusion of the *1985 South Pacific Nuclear Free Zone Treaty* which prohibited the manufacture or acquisition,<sup>114</sup> stationing<sup>115</sup> and testing<sup>116</sup> of nuclear weapons, and the dumping of any radioactive materials.<sup>117</sup> The politics of South Pacific nuclear testing became even more highly charged following the bombing of the *Rainbow Warrior* by two agents of the French secret service while the Greenpeace vessel was docked in Auckland.<sup>118</sup>

It was against this background that New Zealand sought to reactivate the proceedings commenced in 1973 by invoking paragraph 63 of the Court's 1974 judgment.<sup>119</sup> The Court had indicated in that passage that its decision was based on France's undertaking to refrain from further tests, but that 'if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute.'<sup>120</sup> New Zealand asked the Court to adjudge and declare that the new tests would violate the rights of New Zealand and other states under international law, and alternatively that it was unlawful for France to undertake the tests without first conducting an environmental impact assessment.<sup>121</sup> On the basis that the New Zealand application to revive its 1973 case had a better chance of success than any attempt by Australia to reopen the Court's original decision, Australia decided against making a similar application and instead sought to intervene in the proceedings commenced by New Zealand.<sup>122</sup>

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<sup>114</sup> *1985 South Pacific Nuclear Free Zone Treaty*, art 3.

<sup>115</sup> *Ibid* art 5.

<sup>116</sup> *Ibid* art 6.

<sup>117</sup> *Ibid* art 7.

<sup>118</sup> The dispute between New Zealand and France over the actions of the French agents, and their arrest by New Zealand authorities, was referred to the United Nations Secretary General for a ruling: *Ruling on the Rainbow Warrior Affair between France and New Zealand* (1987) 26 ILM 1346. After France breached the Secretary-General's ruling by releasing both agents from imprisonment in French Polynesia, the parties agreed to submit the dispute to ad hoc arbitration: *Rainbow Warrior Arbitration (New Zealand/France)* (1990) 82 ILR 499. The Arbitral Tribunal concluded that satisfaction was an appropriate remedy for the moral injury occasioned by France.

<sup>119</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288. See generally Matthew Craven, 'New Zealand's Request for a Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case' (1996) 45 *International and Comparative Law Quarterly* 725. New Zealand was not able to commence fresh proceedings in the ICJ as France withdrew its acceptance of the Court's compulsory jurisdiction following the original litigation.

<sup>120</sup> *Nuclear Tests Case (New Zealand v France)* (Merits) [1974] ICJ Rep 457, [63].

<sup>121</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, [6].

<sup>122</sup> Statement by the Hon Gareth Evans QC, Minister for Foreign Affairs, 8 August 1995, reprinted in (1996) 17 *Australian Year Book of International Law* 684. Minister Evans noted that there was a key difference in the way Australia and New Zealand had framed their 1973 applications: 'Australia's 1973 case was entirely concerned with atmospheric testing, whereas New Zealand's was more broadly drafted, relating to contamination from nuclear testing generally.'

New Zealand argued that the basis of the Court's initial judgment had indeed been affected as underground nuclear testing would result in the same or similar environmental impacts as France's atmospheric tests. It asked the Court to recognise 'those rights that would be adversely affected by entry into the marine environment of radioactive material as a result of the further tests to be carried out at Mururoa or Fangataufa...and of its entitlement to the protection and benefit of a properly conducted Environmental Impact Assessment.'<sup>123</sup> It was argued in particular that the French tests posed the risk of weakening the structure of Mururoa and Fangataufa atolls to such an extent that massive discharges of accumulated nuclear materials were possible if either atoll were to split or disintegrate.<sup>124</sup> New Zealand therefore sought to engage France in a debate about the environmental implications of its tests which France had up to that point refused to entertain.<sup>125</sup> New Zealand also specifically argued that the principle stated in the *Trail Smelter Case* now constituted an established proposition of customary international law.<sup>126</sup>

However, in yet another controversial judgment, the Court found it unnecessary to consider New Zealand's substantive claims, or the request by Australia and other states to intervene in the proceedings.<sup>127</sup> On this occasion the Court concluded that because France was now engaged in *underground* nuclear testing the basis of the original judgment was unaffected.<sup>128</sup> According to the Court, the 1974 judgment dealt exclusively with atmospheric nuclear tests, and consequently it was not now possible to take into consideration questions relating to alternative forms of testing.<sup>129</sup> This was an exceptionally narrow reading of the Court's original judgment,<sup>130</sup> and a highly problematic one given the nature of New Zealand's original application. While it was certainly the case that New Zealand was in 1974 most concerned about open-air testing of nuclear devices, this reflected the fact that such tests were the only type used by

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<sup>123</sup> Ibid.

<sup>124</sup> Ibid [21]-[55]; Catherine Giraud, 'French Nuclear Testing in the Pacific and the 1995 International Court of Justice Decision' (1996) 1 *Asia Pacific Journal of Environmental Law* 125, 129-130.

<sup>125</sup> Don MacKay, 'Nuclear Testing: New Zealand and France in the International Court of Justice' (1995-1996) 19 *Fordham International Law Journal* 1857, 1881.

<sup>126</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Request by New Zealand, [98].

<sup>127</sup> In its application for permission to intervene Australia argued that because the obligations invoked by New Zealand were of an *erga omnes* character all states had a right to make arguments before the Court. Because of its narrow jurisdictional conclusion the Court did not have an opportunity to consider this application. Nonetheless as a matter of logic it would seem that the Court should have granted permission to intervene if the matter had gone to the merits stage, as otherwise it would render the notion of *erga omnes* obligations of little value: Phoebe N Okowa, 'Environmental Dispute Settlement: Some Reflections on Recent Developments' in Malcolm D Evans (eds), *Remedies in International Law: The Institutional Dilemma* (1998) 157, 165.

<sup>128</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Request by New Zealand, [62].

<sup>129</sup> Ibid [63].

<sup>130</sup> Malgosia A Fitzmaurice, 'International Protection of the Environment' (2001) 293 *Recueil des Cours* 9, 376.

France at the time in the Pacific. In any event New Zealand's application had referred generally to the environmental dangers inherent in all nuclear tests.

The Court's judgment therefore did not consider the developments in international law since the 1974 decision, including emerging rules relating to environmental impact assessment and the precautionary principle. Nonetheless it did at least recognise the existence of this growing body of law, by reminding the parties that its order was 'without prejudice to the[ir] obligations...to respect and protect the natural environment.'<sup>131</sup> The precise meaning of this statement is unclear, but it does suggest that France was not at liberty to pursue underground testing in defiance of international environmental law. Indeed, although contesting their application to this case, France accepted that it was bound by environmental duties, and did not contest New Zealand's argument that Principle 21 of the *Stockholm Declaration* and Principle 2 of the *Rio Declaration* were reflective of a 'well established proposition of customary international law.'<sup>132</sup>

(i) *The Dissenting Opinions*

The Court's judgment offered little new as regards international environmental law. By contrast the three dissenting opinions of Judges Weeramantry, Koroma and Judge ad hoc Palmer engaged with some of the environmental issues raised by the case in some considerable depth.

Judge Weeramantry analysed a range of existing and developing principles of international environmental law, including the precautionary principle, the requirement to undertake environmental impact assessment, and the illegality of introducing nuclear materials into the marine environment. Judge Weeramantry also referred to the *Trail Smelter Case* and Principle 21 of the *Stockholm Declaration*, observing that 'no nation is entitled by its own activities to cause damage to the environment of any other nation.'<sup>133</sup> According to Judge Weeramantry, Principle 21 represented 'a deeply entrenched principle, grounded in common sense, case law, international conventions and customary international law.'<sup>134</sup>

Judge Koroma and Judge ad Hoc Palmer also considered the environmental arguments made by New Zealand in order to evaluate whether the Court's 1974 judgment should be examined. For Judge Koroma, international environmental law had developed to such a stage that '[u]nder contemporary international law, there is

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<sup>131</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288 [64].

<sup>132</sup> *Ibid* [98]. See Sands, 'Pleadings and the Pursuit of International Law: Nuclear Tests II (New Zealand v France)', above n 99, 606.

<sup>133</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Dissenting Opinion of Judge Weeramantry, 347.

<sup>134</sup> *Ibid*.

probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances.<sup>135</sup>

Judge ad hoc Palmer's dissenting opinion offered a detailed excursus of developments in international environmental law since 1974. He referred to the *Trail Smelter Case* and the obligation, adverted to in the *Lake Lanoux Case*,<sup>136</sup> requiring states to give notice when engaging in actions that may impair the environment of another state. However, Judge Palmer's attention was mainly focussed upon specific principles relating to hazardous radioactive materials, the emerging international law on environmental impact assessment and the precautionary principle.

*(f) The Legacy of the Nuclear Tests Litigation*

The nuclear tests litigation provided an opportunity for the ICJ to consider the importance of newly developed principles of international environmental law. As Judge Weeramantry observed in 1995, the Court had for too long been silent upon these issues.<sup>137</sup> International environmental law had developed rapidly in the years leading up to the Court's 1974 judgment, and by the time of New Zealand's 1995 request had acquired great sophistication and complexity.

However, in this litigation fundamental questions of international environmental law and policy were inseparable from a dispute that was highly political in character, and carried widespread implications for the nuclear and other defence activities of many nations. On this basis some commentators have argued that the case was an unsuitable vehicle for developing international environmental law,<sup>138</sup> and that the Court was correct in taking the opportunities that presented themselves to avoid pronouncing upon issues of environmental law. The contrary, and better view, is that the principal judicial organ of the United Nations was under a duty to consider a dispute which involved a number of legal questions.<sup>139</sup>

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<sup>135</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Dissenting Opinion of Judge Koroma, 378.

<sup>136</sup> *Lake Lanoux Case (France/Spain)* (1957) 12 RIAA 285.

<sup>137</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Dissenting Opinion of Judge Weeramantry, 362.

<sup>138</sup> Edward McWhinney, 'International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case' (1975) 3 *Syracuse Journal of International Law and Commerce* 9, 36. Similar doubts have been expressed by Koskenniemi in relation to the *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226: Martti Koskenniemi, 'The Silence of Law/The Voice of Justice' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 488, 489 ('the Court's *non liquet*...raises questions about the need for and limits of judicial activism in international affairs').

<sup>139</sup> Protts, above n 106, 444.

Notwithstanding the result, Australia, New Zealand and other South Pacific nations gained considerable public support for their campaign.<sup>140</sup> Additionally the nuclear tests litigation had very substantial implications for the development of international environmental law. The litigation was an essential catalyst for increasing awareness of the effects of nuclear testing, and encouraged a reconsideration of several foundational principles of international environmental law. The factual scenario confronted in the cases, and the arguments advanced by the parties, simultaneously highlighted not only how far international environmental law had progressed, but also how much additional development was required. This included the need for the principle stated in the *Trail Smelter Case* to be refashioned to encompass situations where the extent and cause of transboundary damage was unclear, and where the damage involved the impairment of global commons areas including the marine environment and the atmosphere. The *1995 Nuclear Tests Case*, and particularly the dissenting opinions, also helped bring into focus the range of supplementary considerations and procedural obligations that must be considered in order to make the basic obligation stated in the *Trail Smelter Case* operate effectively.

#### D *Transboundary Harm and International Watercourses*

Thus far the discussion has been concerned with landmark litigation that has directly involved questions of transboundary harm. However, these questions have also arisen incidentally in other cases, particularly in the context of shared watercourses, and this jurisprudence is deserving of brief mention.

##### (a) *The Lake Lanoux Case*

In the context of international rivers, the *Lake Lanoux Case* appeared to confirm the existence of the principle stated in the *Trail Smelter Case* but offered no significant analysis of its application. The dispute in the *Lake Lanoux Case* concerned a French scheme to generate electricity by diverting waters from Lake Lanoux, a large alpine lake in the French Pyrenées, to the Ariège River, which would have resulted in reduced flows into the Carol River which flowed into Spain. Following Spanish protests France agreed to return from another source the exact quantity of water extracted. The case therefore did not turn on any allegation as to downstream, transboundary, damage.<sup>141</sup> In *obiter dicta* the Tribunal nonetheless clearly accepted that ‘there is a principle which

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<sup>140</sup> MacKay, above n 125, 1886-1887. This ultimately contributed to France, along with the United States and the United Kingdom, signing a protocol to the *1985 South Pacific Nuclear Free Zone Treaty* requiring them to desist from further nuclear tests in the region: *1986 Protocol I to the South Pacific Nuclear Free Zone Treaty*. However, unlike France and the United Kingdom, the United States has not ratified the Protocol.

<sup>141</sup> This reflected the way in which the case was argued, as it was possible that the arrangement could have had environmental effects. See Chapter 6.

prohibits the upstream State from altering the waters of a river in such a fashion as seriously to prejudice the downstream State.<sup>142</sup>

(b) *The Gabčíkovo-Nagymaros Case*

Questions of transboundary damage featured more prominently in the *Gabčíkovo-Nagymaros Case*.<sup>143</sup> In that case concerning a joint project between Slovakia and Hungary to construct extensive dam and other works on a stretch of the Danube, several arguments were made by Hungary regarding the potential impact of the project upon the downstream environment, and on supplies of drinking water in Hungary. As the Court ultimately concluded that all environmental matters could be addressed by ongoing co-operation between the parties within the terms of a bilateral agreement between the parties, the ICJ did not proffer any view as to any breach by Slovakia of an obligation to prevent transboundary harm. However the Court did accept that the principle stated in the *Trail Smelter Case* had acquired customary status by repeating its dictum in the *Nuclear Weapons Advisory Opinion* that ‘the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment.’<sup>144</sup>

## II THE IMPACT OF THESE DECISIONS

A number of preliminary points have already been made regarding the legacy of these cases for international environmental law. The aim of the discussion under this heading is to present an overview of the current legal framework relating to transboundary damage in order to assess to what extent these decisions continue to exert an influence.

### A *Principle 21 of the Stockholm Declaration*

The most visible impact of the *Trail Smelter Case* upon international law is to be found in Principle 21 of the *Stockholm Declaration*. However, in Principle 21 the duty to prevent damage to other states acquired a clearly environmental dimension not evident in the *Trail Smelter Case*:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or

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<sup>142</sup> *Lake Lanoux Case* (1957) 12 RIAA 285, 308. See Chapter 6.

<sup>143</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7. See Chapter 6.

<sup>144</sup> *Ibid* [53].

control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>145</sup>

This *erga omnes* obligation has been described as the ‘cornerstone of international environmental law’,<sup>146</sup> and was substantially repeated in Principle 2 of the *Rio Declaration*.<sup>147</sup> The policy of the principle is ‘to balance the right of a state to control matters within its territory with its responsibility to ensure that what is done within that territory does not cause damage outside.’<sup>148</sup> Accordingly it does not express an absolute environmental objective. The first part of the principle expressly permits development within a state’s jurisdiction, and the obligation to protect the environment in the second part applies only to the environment of other states, and areas beyond national jurisdiction. As Bosselman has observed:

[Principle 21 and its antecedents] do not aim for the protection of the environment per se, but for the protection of the territorial integrity of neighbouring states. Any limiting effects to the territorial sovereignty of the polluting state are solely due to the territorial sovereignty of the ‘receiving’ state.<sup>149</sup>

Principle 21 was recognised as a fundamental principle of customary international law in the environmental field in the *Nuclear Weapons Advisory Opinion*<sup>150</sup> (a conclusion that was reaffirmed in the *Gabčíkovo-Nagymaros Case*<sup>151</sup>):

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<sup>145</sup> This principle emerged after considerable debate, and several proposals, and ultimately resembled the formulation suggested by the Australian delegation to the Conference: see UN Doc A/CONF.48/PC/WG.I(II)/CRP.9 (1972) 2.

<sup>146</sup> Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) 236.

<sup>147</sup> *Rio Declaration*, above n 60 (‘States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.’) On the significance of the inclusion of the words ‘and developmental policies’ in principle 2 of the *Rio Declaration* and the *Rio Declaration’s* general emphasis on the importance of development see David A Wirth, ‘The Rio Declaration on Environment and Development: Two Steps Forward and One Back or Vice Versa?’ (1995) 29 *Georgia Law Review* 599; Marc Pallemarts, ‘International Environmental Law from Stockholm to Rio: Back to the Future’ (1992) 1 *Review of European Community and International Environmental Law* 254, 256

<sup>148</sup> Louis B Sohn, ‘The Stockholm Declaration on the Human Environment’ (1973) 14 *Harvard International Law Journal* 423.

<sup>149</sup> Klaus Bosselmann, ‘Environmental Governance: A New Approach to Territorial Sovereignty’ in Robert J Goldstein (ed), *Environmental Ethics and Law* (2004) 293, 301.

<sup>150</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, [29] Although this recognition by the Court has been widely cited, and frequently praised, it ultimately represents only a modest development from the *Trail Smelter Case* and the expression of the preventive principle in principle 21 of the *Stockholm Declaration* and principle 2 of the *Rio Declaration*. The issue for the court was not merely to what extent the environmental interests of other states should be considered by states in deploying nuclear weapons, but rather whether the use of nuclear weapons would violate the interests of *all* states in the protection and preservation of the natural environment. Given the catastrophic effects that nuclear weapons of even the lowest potency have upon the global environment, the case therefore raised issues not amenable to reduction to the simple sovereign interests vs sovereign interests approach of principle 21 of the *Stockholm Declaration*. Moreover, the Court did not examine in detail environmental treaties and norms relating to the protection of the environment, because it was concluded that these could not have been intended to deprive a state of the exercise of the right of self-defence.

The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents a living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>152</sup>

However, although widely referred to, or incorporated, in environmental instruments, Principle 21 provides little practical guidance to states in their activities, and requires further elucidation and elaboration.<sup>153</sup> Relevant issues in this regard include the type and degree of environmental harm to be prevented, what procedural obligations (such as notification and co-operation) are necessary to ensure that harm does not occur, whether the obligation of prevention is one of strict liability or due diligence, and finally the relevant remedies applicable in the event of any breach.<sup>154</sup>

Several of these were addressed in the *Rio Declaration*. Principle 18 of that instrument refers to the requirement that states notify others of emergencies likely to affect their environment, and Principle 19 states that prior notification should be provided, and consultation undertaken, before activities that might have serious effects on the environment of other states or common spaces are permitted. These principles now reflect customary international law and augment the basic preventive principle.<sup>155</sup> More controversial from a customary perspective, but no less important to the practical functioning of the prevention principle, is the status of Principle 17 of the *Rio Declaration* in relation to environmental impact assessment and the articulation of the precautionary approach in Principle 15.

### B *Treaty Transformation of the Principle in the Trail Smelter Case*

The transformation of the principle into environmental treaties has taken differing forms reflecting the particular objects and purposes of the relevant instrument, and the

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<sup>151</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [53].

<sup>152</sup> *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 241-242. On the difference between the language adopted by the Court and principle 21 of the *Stockholm Declaration* see Edith Brown Weiss, 'Opening the Door to the Environment and to Future Generations' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 338, 340 (observing that the Court's use of the word 'respect' imposes a broader obligation than the requirement of principle 21 merely to prevent 'damage').

<sup>153</sup> One commentator has in fact argued that principle 21 belongs to a 'mythology' of international environmental law, with the principle having acquired great symbolism, when in reality it is a modest, and vague, legal standard: John H Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96 *American Journal of International Law* 291, 293-295. See also Daniel Bodansky, 'Customary (and Not so Customary) International Environmental Law' (1995) 3 *Indiana Journal of Global Legal Studies* 105.

<sup>154</sup> Sands, *Principles of International Environmental Law*, above 146, 241.

<sup>155</sup> Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (2nd ed, 2002) 126.



limitations of Principle 21 as a tool of environmental management. In those treaties that specifically aim to prevent, mitigate and monitor adverse transboundary effects, Principle 21 can be given direct application.<sup>156</sup> However, in other treaty formulations of the principle, the underlying implication that the rule exists to protect the environmental integrity of potentially affected states is subordinated to a more general obligation to protect the environment per se.<sup>157</sup> This is particularly evident in treaties addressing damage to common spaces. This is seen clearly in provisions of the *1982 United Nations Convention on the Law of the Sea* relating to the protection of the marine environment of the high seas.<sup>158</sup> A similar approach animates other regimes. For instance, both the *1985 Vienna Convention for the Protection of the Ozone Layer*<sup>159</sup> and the *1992 United Nations Framework Convention on Climate Change*<sup>160</sup> recognise Principle 21 of the *Stockholm Declaration* in their respective preambles but go on to provide for regimes which of necessity require a global approach.<sup>161</sup> An intriguing exception to this general trend is the *Biodiversity Convention* which in Article 3, under the title ‘Principle’, repeats Principle 21 verbatim. This is a very curious inclusion given that the objective of the Convention, as expressed in Article 1, is to conserve biodiversity generally, and not merely to prevent transboundary environmental harm causing the loss of faunal or floral diversity.

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<sup>156</sup> See, eg, the *1991 Convention on Environmental Impact Assessment in a Transboundary Context*, art 2(1) (‘The Parties shall, individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.’); *1992 UNECE Convention on the Transboundary Effects of Industrial Accidents*, preamble, 8th recital and art 3.

<sup>157</sup> See, eg, the *1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, arts 2(1) and 2(2)(b).

<sup>158</sup> *1982 United Nations Convention on the Law of the Sea*, art 193 (‘States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.’).

<sup>159</sup> *1985 Vienna Convention for the Protection of the Ozone Layer*, preamble, 2nd recital.

<sup>160</sup> *1992 United Nations Framework Convention on Climate Change*, preamble, 8th recital.

<sup>161</sup> See also the *1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Materials* (‘*1972 London Convention*’), preamble, 3rd recital (but see also art 1) and the *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* which will replace the *1972 London Convention* and contains no reference to principle 21. Instead art 2 provides simply that states ‘shall individually and collectively protect and preserve the marine environment from all sources of pollution.’ Other environmental treaties that neither refer to, nor incorporate, the principle include several instruments that seek to protect the global commons: *1978 Protocol Relating to the International Convention for the Prevention of Pollution from Ships 1973*; *1976 Convention for the Protection of the Mediterranean Sea Against Pollution*; *1992 Convention for the Protection of the Marine Environment of the North-East Atlantic*; *1991 Protocol on Environmental Protection to the Antarctic Treaty*. In acknowledgment of its limited application to environmental problems having global dimensions, principle 21 is also not referred to in the *1987 Montreal Protocol on Substances that Deplete the Ozone Layer* or the *1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change*.

C *The Work of the International Law Commission on  
'Responsibility', 'Prevention' and 'Liability'*

Beyond the treaty law regulating specific dimensions of transboundary harm the international community has recognised the need for general principles of a residual character. The ILC has taken on the task of formulating these rules, building upon the decision in the *Trail Smelter Case* and Principle 21 of the *Stockholm Declaration*. The examination by the ILC of the questions of responsibility and liability illustrate how far international law has come from its origins in the *Trail Smelter Case*, and how the litigation in the *Nuclear Tests Cases* has influenced legal developments. The ILC's work also shows how some problematic aspects of the *Trail Smelter Case* have been retained in contemporary practice.

It must immediately be observed that the ILC's *Articles on Responsibility of States for Internationally Wrongful Acts*<sup>162</sup> have general application and apply to violations of Principle 21 of the *Stockholm Declaration* as a customary rule as much as they apply to any breach of an international legal obligation. Rather than dealing with the nature and extent of the obligation to prevent transboundary harm in the *Articles on State Responsibility*, which provide *secondary* rules only applicable in the event of the violation of *primary* obligations, the ILC has sought in additional work to promote the conclusion of a general instrument governing transboundary environmental harm.

In 2001 the final text of the ILC's *Draft Articles on Prevention* were adopted and submitted to the United Nations General Assembly with the recommendation that they form the basis of a convention<sup>163</sup> and subsequently, in 2004, the ILC adopted on first reading the *Draft Principles on Liability*.<sup>164</sup> Both of these documents emerged out of a long and contentious program of work initiated in 1978 to examine the topic of 'international liability for injurious consequences arising out of acts not prohibited by international law.' Progress within the Commission on the topic was slow for many years as a result of ongoing debate surrounding the question of liability. In order to separate its work on this question from the more general topic of state responsibility, the Commission had initially adhered to a problematic distinction between 'lawful' and 'wrongful' activities resulting in transboundary harm. This approach was widely

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<sup>162</sup> *Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, 53rd Session, 43-59, UN Doc A/56/10 (2001) (noted by the General Assembly in GA Res 56/83, UN Doc A/RES/56/83 (2001)) ('Articles on State Responsibility')*. Reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility* (2002).

<sup>163</sup> *Report of the International Law Commission, 53rd Session, 366, UN Doc A/56/10 (2001)*.

<sup>164</sup> *Report of the International Law Commission, 56th Session, 153-156, UN Doc A/59/10 (2004)*. The ILC explains that the term 'draft principles' was to be preferred in this context over that of 'draft articles' because the instrument is 'inevitably general and residual in character' designed to be adapted when applied to particular situations involving the risk of hazardous activities causing significant transboundary harm (at 160).

criticised.<sup>165</sup> Most activities causing transboundary harm, such as the industrial air pollution in the *Trail Smelter Case*, are not themselves prohibited, and it is only the failure to prevent industrial activities from causing significant damage to the environment of other states which constitutes a wrongful act. As Boyle explains, the Commission had based its work on the erroneous assumption ‘that there could be responsibility for harmful activities only if these were prohibited, whereas liability could only arise in respect of non-prohibited or “lawful” activities.’<sup>166</sup>

In 1996 the Commission abandoned its earlier approach and placed the topic on a more realistic and conceptually defensible footing.<sup>167</sup> The topic was essentially divided into two core questions (which, from 1997, formed the basis of two entirely separate programs of work).<sup>168</sup> First, what is the nature and scope of the obligation to prevent transboundary environmental damage? In other words, what are the primary rules relating to the prevention of transboundary damage the breach of which allows secondary rules of state responsibility to be invoked. A secondary question, and one distinct from that of responsibility, is what should occur if transboundary environmental harm is not caused by an internationally wrongful act? If states discharge their prevention obligations but transboundary harm nevertheless eventuates, who should bear the costs of the damaging consequences, the originating state or the innocent victim?

(a) *ILC Draft Articles on Prevention*

The *Draft Articles on Prevention* deal with the first of these two questions. They articulate a regime of primary rules applicable to the prevention and control of activities not prohibited by international law but which nonetheless involve a risk of causing significant transboundary harm.<sup>169</sup> The articles rely considerably upon the *Trail Smelter*

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<sup>165</sup> See in particular Alan E Boyle, ‘State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?’ (1990) 39 *International and Comparative Law Quarterly* 1, 12-14; Ian Brownlie, *State Responsibility (Pt I)* (1983) 50; Michael Akehurst, ‘International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law’ (1985) 16 *Netherlands Yearbook of International Law* 3. For an overview of the ILC’s work on the topic, and the criticism which it attracted for some time, see Malgosia A Fitzmaurice, ‘International Protection of the Environment’, above n 130, 233-244.

<sup>166</sup> Alan Boyle, ‘Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited’ in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 61, 73.

<sup>167</sup> *Ibid* 76.

<sup>168</sup> *Report of the International Law Commission, 48th Session*, UN Doc A/51/10 (1996).

<sup>169</sup> *Draft Articles on Prevention*, above n 163, art 1. See also IUCN – World Conservation Union, *Draft International Covenant on Environment and Development* (3rd ed, 2004) art 50 (‘A State Party is liable for significant harm to the environment of other States or of areas beyond the limits of national jurisdiction, as well as for injury or loss to persons resulting therefrom, caused by acts or omissions attributable to them or to activities under their jurisdiction or control.’).

Case and Principle 21 of the *Stockholm Declaration*, and encompass all activities involving any risk of transboundary harm.<sup>170</sup> They apply both to hazardous activities of the type encountered in the *Trail Smelter Case* and also ultra-hazardous activities of the kind involved in the *Nuclear Tests Cases* and *1995 Nuclear Tests Case*.

In the ILC's text, 'harm' connotes damage to persons, property or the environment, and the *Draft Articles on Prevention* are therefore concerned with physical damage of any type, not only environmental injury. Hence rather than seeking to codify and develop Principle 21 of the *Stockholm Declaration* and adopt an overtly environmental focus, the *Draft Articles on Prevention* return the focus of international law on this topic to its early origins in the *Trail Smelter Case* which was concerned with violations of territorial sovereignty, regardless of their character.

The *Draft Articles on Prevention* are only enlivened when the calculus of probability of occurrence and the potential extent of harm is 'significant'. The Commission considered this threshold essential because the reality of the 'ecological unity of the planet which does not correspond to political boundaries' means that it is inevitable that activities within states will have some impact upon others. The ILC has therefore maintained much the same approach as that adopted in the *Trail Smelter Case*, and similarly leaves unregulated many environmentally damaging activities. However, it may be noted that the requirement of 'significant' damage is much lower than the threshold of 'serious' damage preferred in the *Trail Smelter Case*.

Where the *Draft Articles on Prevention* advance the law considerably is in dealing with the procedural duties largely ignored in the *Trail Smelter Case* and in the *Nuclear Tests Cases*. Article 3 of the *Draft Articles on Prevention* provides that states 'shall take all appropriate measures to prevent significant transboundary harm or at any rate to minimise the risk thereof.' The text then elaborates upon this obligation through an ensemble of supporting duties. States must co-operate in good faith and, if necessary, seek the assistance of competent international organisations.<sup>171</sup> This effectively codifies the Tribunal's statement in the *Lake Lanoux Case* that states must undertake negotiations and consultations in respect of potentially damaging transboundary activities.<sup>172</sup> And in order to maintain control over potentially harmful activities, systems of prior authorisation must be established,<sup>173</sup> and these must be based upon comprehensive environmental impact assessment.<sup>174</sup> Such assessments should include

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<sup>170</sup> *Report of the International Law Commission, 53rd Session, 382, UN Doc A/56/10 (2001)*

<sup>171</sup> *Draft Articles on Prevention*, above n 163, art 4.

<sup>172</sup> Boyle, 'Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited', above n 166, 80.

<sup>173</sup> *Draft Articles on Prevention*, above n 163, art 6.

<sup>174</sup> *Ibid* art 7.

consideration of the potential impacts upon the environment of other states, independently of any impairment of human health or damage to property.<sup>175</sup> In essence these provisions incorporate the key procedural duties New Zealand alleged were incumbent on France to discharge in the *1995 Nuclear Tests Case*.

The obligation to take preventative measures is one of due diligence, not an absolute guarantee against the occurrence of harm. According to the Commission's commentary, 'due diligence is manifested in reasonable efforts by a State to inform itself of factual or legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them.'<sup>176</sup> This reflects state practice generally, in which there has been great reluctance to accept a stricter standard.<sup>177</sup> As was noted above, the Tribunal in the *Trail Smelter Case* implicitly accepted that a due diligence standard was to apply having regard to the capacity of Canada, via improvements in emissions control technology, to limit transboundary damage.

In so far as the foregoing issues are concerned, the Commission's approach is firmly founded on state practice and judicial decisions. In contrast, a highly controversial aspect of the *Draft Articles on Prevention* is the combined operation of Articles 9 and 10 relating to consultations between states to achieve an 'equitable' balancing of interests. Article 9(1) sets out the generally accepted obligation, expressed in the *Lake Lanoux Case*, that originating and potentially affected states should enter into consultations in order to reach agreement upon acceptable measures to prevent or minimise significant transboundary harm.<sup>178</sup> Far more controversial is the stipulation in Article 9(2) that the consultations should be directed at achieving a solution 'based on an equitable balance of interests' in light of the criteria contained in Article 10. The ILC appears here to have misinterpreted the legacy of the *Trail Smelter Case*.

The difficulty with the ILC's approach is that the Tribunal did not in fact engage in any such equitable balancing because general international law demanded it, but rather because the *Trail Smelter Arbitral Agreement* provided in Article IV that the Tribunal 'shall give consideration to the desire of the high contracting parties to reach a solution *just* to all parties concerned.'<sup>179</sup> In any event, and putting aside questions as to the

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<sup>175</sup> *Report of the International Law Commission, 53rd Session, 405, UN Doc A/56/10 (2001).*

<sup>176</sup> *Ibid* 393.

<sup>177</sup> Patricia Birnie, 'The Role of International Law in Solving Certain Environmental Conflicts' in John E Carroll (ed), *International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems* (1988) 95, 111.

<sup>178</sup> It was held in the *Lake Lanoux Case* that 'the upstream State has... a right of initiative... If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the downstream State': *Lake Lanoux Case* (1957) 12 RIAA 285, 316.

<sup>179</sup> Emphasis added.

juridical origins of the ILC's approach, it is manifestly problematic because it permits states to reach an agreement that pays little, or no, regard to environmental considerations when reaching an 'equitable' agreement.<sup>180</sup> In one sense, therefore, the incorporation of considerations of equity by the ILC tends to confirm that the law in this area continues to be influenced by its conceptual origins in the notion of a 'balancing' of sovereign interests and is only concerned, in a derivative sense, with absolute standards for the protection and preservation of the environment.

*(b) ILC Draft Principles on Liability*

The second question, namely the extent of liability in the event of complete discharge of a state's obligations of prevention, has only recently been addressed by the ILC. Whereas the *Draft Articles on Prevention* mostly codify customary international law, the Commission's *Draft Principles on Liability* are more in the nature of progressive development.

In this topic the ILC has sought to address a major lacuna in pre-existing law relating to transboundary harm: a system of liability for damage that does not result from the breach of an international obligation.<sup>181</sup> The *Draft Principles on Liability* are of a framework character, and encourage states to develop specific liability regimes on a global, regional or bilateral basis<sup>182</sup> to implement the polluter-pays principle.<sup>183</sup> They were adopted in 2004 on first reading, and are designed to stand alongside the *Draft Articles on Prevention*. They likewise apply to activities not prohibited by international law involving a risk of causing significant transboundary harm through their physical consequences. As with the *Draft Articles on Prevention*, the *Draft Principles on Liability* do not apply to damage to the global commons, with the Commission expressing the view that this question requires separate treatment.<sup>184</sup>

The primary aim of the *Draft Principles on Liability* is to ensure prompt and adequate compensation for individuals and states suffering transboundary damage, including environmental degradation.<sup>185</sup> They therefore deal with questions not addressed in the *Trail Smelter Case* or subsequent international litigation. They rest on the premise that even if states comply with their international legal obligations to

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<sup>180</sup> Birnie and Boyle, above n 155, 107.

<sup>181</sup> Alan Boyle, 'Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited', above n 166, 73.

<sup>182</sup> *Draft Principles on Liability*, above n 164, principle 7.

<sup>183</sup> See *Rio Declaration*, above n 60, principle 16 ('National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution...').

<sup>184</sup> *Report of the International Law Commission, 56th Session*, 158, UN Doc A/59/10 (2004).

<sup>185</sup> *Draft Principles on Liability*, above n 164, principle 3.

prevent transboundary harm, such damage may nonetheless occur accidentally or otherwise in circumstances beyond the control of the originating state, and in such cases those who suffer loss or harm as a result should be compensated.

Consistent with existing bilateral, regional and sectoral liability regimes the *Draft Principles on Liability* seek to make the *operators* of hazardous or risk-bearing activities liable for adverse transboundary effects. This is to be achieved by states establishing procedures allowing victims to obtain effective remedies, including compensation. To this end, the principles require that administrative and judicial mechanisms of the originating state treat nationals and non-nationals alike.<sup>186</sup>

### III CONCLUSION

Each of the cases examined in this Chapter assisted, to varying degrees, in successfully resolving contentious disputes involving transboundary damage.<sup>187</sup> Yet, in terms of addressing the underlying pollution problem, or other environmental issue giving rise to these controversies, the achievements of the litigation has been more limited. The *Trail Smelter Case* resulted in the establishment of a detailed regime to reduce the damaging effects of sulphur dioxide emitted from the smelter at Trail but did not, and could not, resolve the broader problem of aerial pollution and acid rain in North America. The litigation in relation to French nuclear testing in the South Pacific contributed to the ultimate disbanding of France's atmospheric and underground nuclear testing program, but it was never accepted by France that this testing violated rules of international law regarding environmental protection. In the *Lake Lanoux Case* and *Gabčíkovo-Nagymaros Case* the proposed projects, the credentials of which were impugned by Spain and Hungary respectively, were ultimately given judicial approval, although in modified form.

The normative contribution of the cases has been more important and enduring, although only in supplying general principles which have been given practical effect through more detailed treaty regimes.<sup>188</sup> The *Trail Smelter Case* involved the first application of the principle of respect for the territorial integrity of other states to a situation involving environmental damage. The decision signalled the abandonment of the notion of absolute sovereignty and therefore set the stage for a new era of

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<sup>186</sup> Ibid principles 4 and 6.

<sup>187</sup> For an assessment of the success or otherwise of this litigation in achieving a lasting settlement of all of these disputes see Cesare P R Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000) 219-232 (in relation to the *Lake Lanoux Case*), 246-260 (in relation to the *Gabčíkovo-Nagymaros Case*) 261-278 (in relation to the *Trail Smelter Case*) and 279-306 (in relation to the *Nuclear Tests Cases*).

<sup>188</sup> For a discussion of the key regimes see Okowa, *State Responsibility for Transboundary Air Pollution in International Law*, above n 1, 24-59.

international law which was concerned with balancing the environmental interests of states.<sup>189</sup> The *Trail Smelter Case* also exposed the many questions that must be addressed in devising any comprehensive international legal regime for regulating transboundary environmental harm, including the standard of care to be expected of originating states, the level of harm necessary to give rise to state responsibility, and the range of commercial and environmental interests that may be protected.

In the *Nuclear Tests Cases*, some 35 years later, an attempt was made by Australia and New Zealand to take the concept of sovereignty lying at the heart of the principle articulated in the *Trail Smelter Case* to its logical conclusion, by arguing that any interference with another state's environment, however slight, may give rise to state responsibility. It was also sought to adapt these basic principles to a dispute involving damage to the environment of commons areas. By studiously avoiding a decision on the merits in 1974, and again in 1995, the ICJ did not consider this question, or issues concerning the extent to which the prevention principle operates in conjunction with a range of other environmental rules, including those relating to environmental impact assessment or the precautionary principle. New Zealand addressed these issues in detail in its submissions in the *1995 Nuclear Tests Case*, and several judges supported the cogency of New Zealand's arguments in Dissenting Opinions. In addition, in the *Nuclear Weapons Advisory Opinion* the ICJ finally recognised that the principle enunciated in the *Trail Smelter Case* had acquired customary status.

The cases discussed in this Chapter therefore reveal the early origins of international environmental law and the character of its development by analogy from more general concepts of sovereignty and territorial integrity. Although it has undergone significant evolution, general international environmental law in the context of transboundary harm remains heavily influenced by these foundations which are inherently statist and, as a consequence, anthropocentric. Indeed to label the principles that these cases have developed as rules of 'international environmental law' is perhaps to ascribe to them too great a significance. They have a much more general genesis, and retain a general application, as confirmed in the ILC's recent *Draft Articles on Prevention*, and *Draft Principles on Liability* which are applicable to all types of injury, not merely ecological damage. These instruments do not have a strong environmental focus; they expressly resile from regulating transboundary damage to the global commons, and are concerned, as was the *Trail Smelter Case*, in reconciling two competing *sovereign* rights: the right of states to pursue development with the right of other states to be free from significant transboundary harm.

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<sup>189</sup> Kuokkanen, above n 5, 93.



## 6

# The Adjudication of Disputes Relating to Freshwater Resources and Ecosystems

Freshwater systems are an indispensable component of all terrestrial ecosystems, and the overuse and pollution of water basins throughout the world has caused severe environmental damage and resulted in worsening crises of water scarcity.<sup>1</sup> As the world's population increases the per capita share of finite supplies of freshwater diminishes such that, by 2025, approximately 35 per cent of the world's population will experience water stress or chronic water scarcity.<sup>2</sup> To avert this prediction a key United Nations Millennium Development Goal is to halve by 2015 the proportion of the world's population who do not have access to safe drinking water.<sup>3</sup>

Increasing pressure on shared international watercourses<sup>4</sup> has generated international tensions, and raised the spectre of armed conflict over water resources.<sup>5</sup> In this context, international environmental law has a role to play in implementing measures to address water scarcity and environmental degradation, and in promoting the peaceful settlement of disputes.<sup>6</sup> This Chapter considers the contribution of arbitral awards and judicial decisions to the development of international environmental law relating to shared freshwater systems. It is seen that although these decisions have traditionally been concerned with the equitable utilisation of freshwater resources, in the *Case Concerning the Gabčíkovo-Nagymaros Project*<sup>7</sup> the ICJ took an important step towards an ecologically-oriented jurisprudence.

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<sup>1</sup> *Agenda 21*, ch 8, [18.1]-[18.4], UN Doc A/CONF.151/26/Rev.1 (1992).

<sup>2</sup> As compared to six per cent in 1990: Commission on Sustainable Development, *Freshwater Resources: Report of the Secretary-General*, UN Doc E/CN.17/1994/4 (1994); Stephen C McCaffrey, 'Water, Water Everywhere, But Too Few Drops to Drink: The Coming Freshwater Crisis and International Environmental Law' (2000) 28 *Denver Journal of International Law and Policy* 325, 330.

<sup>3</sup> UN GA Res 55/2, [19], UN Doc A/RES/55/2 (2000). See also 2005 *World Summit Outcome*, [56(h)], UN Doc A/60/L.1 (2005).

<sup>4</sup> See 1997 *United Nations Convention on the Law of Non-Navigational Uses of International Watercourses* ('*UN Watercourses Convention*'), art 2 which defines an international watercourse as 'a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.'

<sup>5</sup> See J Starr, 'Water Wars' (1991) 82 *Foreign Policy* 17; H L F Saeijs and M V van Berkel, 'The Global Water Crisis: The Major Issue of the 21st Century' in Edward H P Brans et al (eds), *The Scarcity of Water: Emerging Legal and Policy Responses* (1997) 3.

<sup>6</sup> Stephen C McCaffrey, 'Water Scarcity: Institutional and Legal Responses' in Edward H P Brans et al (eds), *The Scarcity of Water: Emerging Legal and Policy Responses* (1997) 52.

<sup>7</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Merits)* [1997] ICJ Rep 7 ('*Gabčíkovo-Nagymaros Case*').

I THE JURISPRUDENCE

Relatively few disputes concerning international watercourses have to date proceeded to adjudication,<sup>8</sup> with riparian states generally preferring diplomatic methods of settlement, often through joint river commissions.<sup>9</sup> Indeed there has been significant debate as to the utility of adjudication in dealing with water disputes. Some early commentators, concerned with the absence of clear principles, argued that ‘water disputes are generally agreed to constitute a classic example of disputes which cannot be satisfactorily resolved by judicial decision.’<sup>10</sup> Others have taken the view that adjudication can assist in developing a more secure legal basis for resolving disputes over water rights.<sup>11</sup>

There are now several important regional instruments that establish compulsory adjudicative procedures,<sup>12</sup> and the two leading multilateral instruments also provide for adjudication as a dispute settlement option.<sup>13</sup> Moreover, the cases that have been decided have had a significant impact upon the evolution of international water law and cognate rules and principles of international environmental law. International case law examining environmental issues in the context of international watercourses can be divided into two main categories. In the first category are those disputes concerning access to water resources of an international river or another body of freshwater. Such disputes most commonly arise when a downstream state asserts that an upstream user has diverted excessive volumes of water, such as through the construction of a dam as part of a power generation or irrigation project. Such projects often have profound, but poorly recognised, environmental impacts on rivers, and dependent tributaries and floodplains.<sup>14</sup>

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<sup>8</sup> Stephen C McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001), 177. See generally B R Chauhan, *Settlement of International Water Law Disputes in International Drainage Basins* (1981).

<sup>9</sup> L Cafišich, ‘Judicial Means for Settling Water Disputes’ in International Bureau of the Permanent Court of Arbitration (ed), *Permanent Court of Arbitration Peace Palace Papers: Resolution of International Water Disputes* (2003) 235, 240.

<sup>10</sup> F J Berber, *Rivers in International Law* (1959) 263. But see W W Van Alstyne, ‘The Justiciability of International River Disputes: A Study in the Case Method’ [1964] *Duke Law Journal* 307.

<sup>11</sup> J G Laylin and R L Biancho, ‘The Role of Adjudication in International River Disputes’ (1959) 53 *American Journal of International Law* 30, 49.

<sup>12</sup> See, eg, *1996 Convention on Cooperation for the Protection and Sustainable Use of the Danube*, art 24 (provides for compulsory settlement by the ICJ unless the parties agree otherwise); *1998 Convention on the Protection of the Rhine*, art 16.

<sup>13</sup> *UN Watercourses Convention*, art 33; *1992 Convention on the Protection and Use of Transboundary Waters and International Lakes* (‘1992 Watercourses Convention’), art 22.

<sup>14</sup> The World Dam Commission has reported that large dams have several, mostly negative, impacts on riverine and dependent ecosystems including (a) damage to terrestrial ecosystems and biodiversity; (b) damage to aquatic ecosystems and biodiversity as a result of altered upstream and downstream flows; and (c) damage to floodplain ecosystems as a result of changes to natural flood cycles. Large dams often cause the fragmentation

Several disputes between riparians concerning the appropriation of water by upstream states have been the subject of international adjudication, beginning as early as 1872.<sup>15</sup> Only rarely, however, have environmental concerns been explicitly at the centre of these disputes. Indeed the protection of the riparian environment, as distinct from preserving the interests of riparian states, has not traditionally been regarded as a concern of the law of international watercourses.<sup>16</sup> Instead, environmental issues have been subsumed within disputes over matters such as sufficiency of downstream water flows for agricultural uses or possible physical damage to the territory of one riparian state as a result of hydrological works carried out by another riparian.<sup>17</sup>

The second main group of disputes concern the pollution of watercourses. Although several such cases have been considered in domestic courts,<sup>18</sup> only one has so far been the subject of international adjudication, and it involved environmental issues only tangentially.<sup>19</sup>

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of river basin ecosystems, and it is estimated that 60 per cent of the world's large river basins are now highly or moderately fragmented: World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (2000) ch 3.

<sup>15</sup> *Helmand River Cases (Afghanistan/Persia)* (1872) 5 *Moore's International Arbitrations* 4706.

<sup>16</sup> Malgosia A Fitzmaurice, 'International Protection of the Environment' (2001) 293 *Recueil des Cours* 9, 445. Boyle has noted that one reason for this is that the membership of international watercourse commissions is normally confined to riparian states which have a primary interest in allocating water flows and not in addressing ecological problems: Alan E Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal of Environmental Law* 229, 243.

<sup>17</sup> That dam construction could lead to transboundary environmental damage was seen following Canada's construction of the Gut Dam in 1903 on the St Lawrence River, which contributed to flooding in United States territory on the shores of Lake Ontario and the St Lawrence River. Although the United States and Canada agreed to submit the dispute to ad hoc arbitration (*1965 Canada – United States Agreement Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam*) the matter was later discontinued when the United States accepted Canada's offer of a lump-sum settlement (*1968 Agreement on the Settlement of Claims Relating to the Gut Dam*).

<sup>18</sup> Note in particular the involvement by the United States Supreme Court in resolving disputes between states of the union concerning the pollution of interstate watercourses. See *Missouri v Illinois and the Sanitary District of Chicago*, 180 US 208 (1901); 200 US 496 (1905) (in which Missouri sought an injunction to restrain Illinois from discharging sewage into the Despaines River) and *New York v New Jersey* 256, US 296 (1920) (in which New York sought an injunction to restrain New Jersey from discharging sewage into New York Bay).

<sup>19</sup> *The Arbitration in Application of the Convention of 3 December 1976 on the Protection of the Rhine Against Pollution by Chlorides and the Additional Protocol of 25 September 1991* (12 March 2004) Pt I <[http://www.pca\\_cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf](http://www.pca_cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf)> at 1 July 2005 and Pt II <[http://www.pca\\_cpa.org/ENGLISH/RPC/PBF/Sentence%20II.pdf](http://www.pca_cpa.org/ENGLISH/RPC/PBF/Sentence%20II.pdf)> at 1 July 2005 related primarily to a technical issue concerning the financing by France of measures undertaken in conjunction with the Netherlands and the other states parties to control the discharge of chlorides into the Rhine. As such the decision did not consider in detail substantive questions of international environmental law or policy as they relate to transboundary rivers. However, the Tribunal did note (at [103]) that the 'polluter-pays' principle was not part of general international law, and therefore was not relevant to an interpretation of the *1976 Convention on the Protection of the Rhine Against Pollution by Chlorides*.

A *The Lake Lanoux Case*

The *Lake Lanoux Case*<sup>20</sup> falls within the first category of decision, and has been cited frequently to support several environmentally significant rules, most notably the obligation upon states to cooperate in good faith when managing shared water resources.

(a) *Background to the Dispute*

The dispute concerned a French scheme to generate electricity by diverting waters from Lake Lanoux, a large alpine lake in the French Pyrenées, to the Ariège River. As originally planned the scheme would have led to the permanent removal of a large quantity of water from the Carol River, a tributary of Lake Lanoux, that flowed into Spain where it supported a range of agricultural interests. After Spain opposed the original project, and rejected an offer of monetary compensation, France proposed an alternative arrangement which would return to the Carol, via an underground tunnel, the same quantity of water removed from the its headwaters. However, Spain also rejected this scheme, essentially because France would thereby assume control over continued flows of the Carol.

The parties agreed to submit the dispute to arbitration,<sup>21</sup> and the question posed for the Tribunal was a narrow one: whether the French Government could commence the modified project without Spain's consent consistent with the provisions of the *1866 France-Spain Treaty of Delimitation* ('*1866 Treaty of Bayonne*')<sup>22</sup> and the *1866 Additional Act to the Delimitation Treaties Concluded on 2 December 1856, 14 April 1862 and 26 May 1866* ('*Additional Act*'). The Tribunal divided this question into two sub-questions: whether the proposed scheme would itself infringe Spain's rights or, if not, whether Spain's consent was required before work on the project could commence.<sup>23</sup>

Spain had not argued that the French works would pollute the waters of the Carol, or that the water to be returned would differ in chemical composition or temperature.<sup>24</sup> Instead the Spanish argument was simply that the French proposal would lead to the '*de facto* preponderance of one Party in place of the equality of the two parties as provided [in the *1866 Treaty of Bayonne* and the *Additional Act*]<sup>25</sup> by making the restoration of

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<sup>20</sup> *Lake Lanoux Case (France/Spain)* (1957) 12 RIAA 285; 24 ILR 101 ('*Lake Lanoux Case*').

<sup>21</sup> *1956 Arbitral Compromis on the Interpretation of the Treaty of Bayonne of 26 May 1866 and Additional Act of the Same Date Concerning the Utilisation of the Waters of Lake Lanoux* ('*Compromis*').

<sup>22</sup> The *1866 Treaty of Bayonne* was one of three treaties settling the border between France and Spain.

<sup>23</sup> *Lake Lanoux Case* (1957) 12 RIAA 285, 301.

<sup>24</sup> *Ibid* 303.

<sup>25</sup> *Ibid*.

the Carol's waters dependent on French Government action. The Tribunal considered that Spain was here making a twofold submission which related:

on the one hand, to the prohibition, in the absence of the consent of the other Party, of compensation between two basins, despite the equivalence of what is diverted and what is restored, and, on the other hand, the prohibition, without the consent of the other Party, of all acts which may create by a *de facto* inequality the physical possibility of a violation of rights.<sup>26</sup>

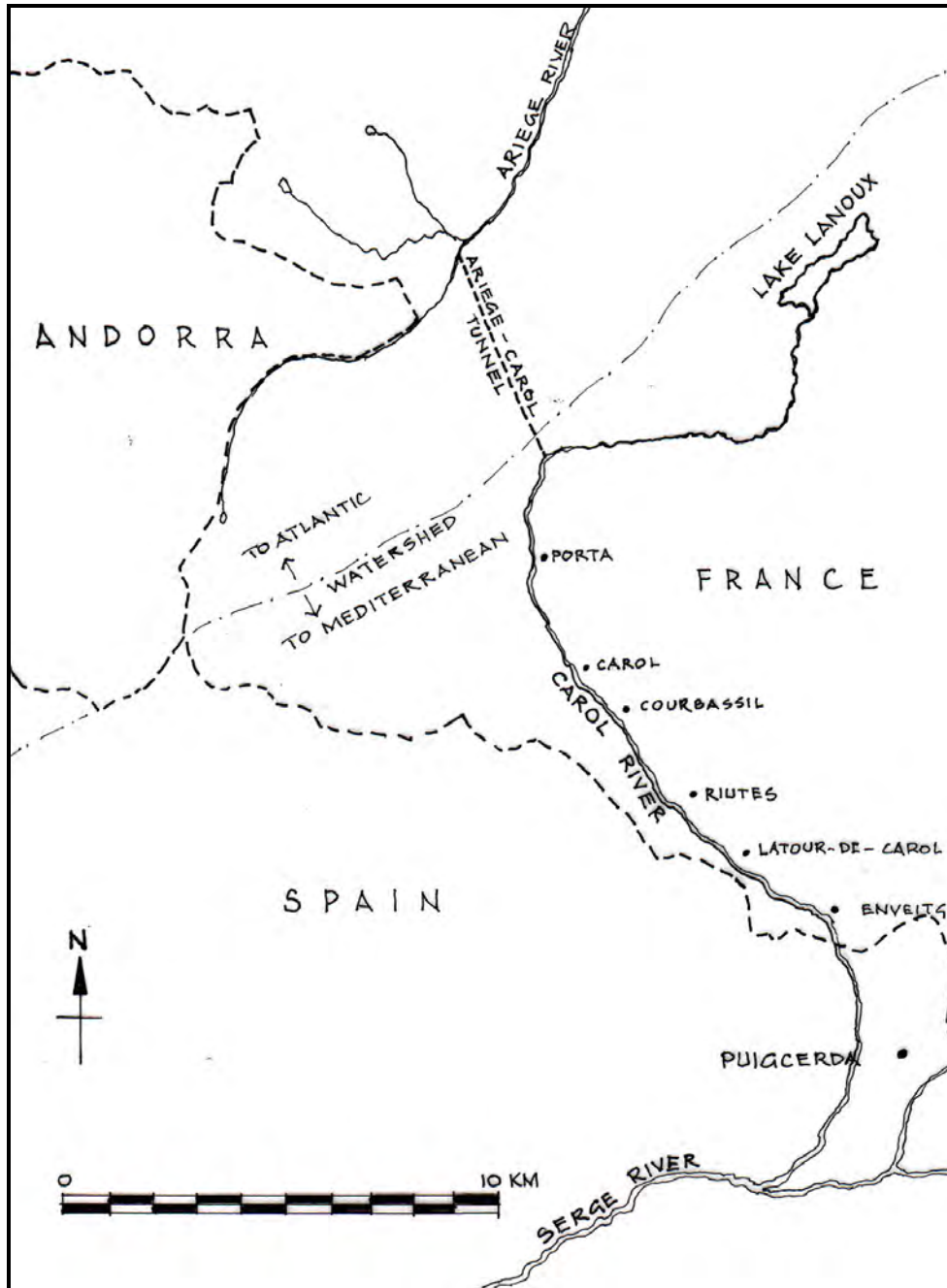


Figure 6.1 Lake Lanoux, the Carol and Ariège Rivers

<sup>26</sup> Ibid 304.

(b) *The Tribunal's Award*

The essence of Spain's first argument was that the hydrographic basins of the Ariège and Carol River systems should remain in their natural state. The Tribunal's response to this contention was unequivocal – nature must bend to the law:

[T]he unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities. The water which by nature constitutes a fungible item may be the object of a restitution which does not change its qualities in regard to human needs. A diversion with restitution, such as that envisaged by the French project, does not change a state of affairs organised for the working of the requirements of social life.<sup>27</sup>

It is clear therefore that the Tribunal conceived of water resources as constituting in law an interchangeable commodity, existing solely for the satisfaction of human needs. The key issue was therefore ensuring the return of an equivalent amount of water to the watercourse, not how that return was effected and certainly not whether an upstream project would result in the permanent alteration of the watercourse environment. In this conceptual framework there was little or no room for a consideration of the ecological impacts that the French scheme might have upon either the Carol or the Ariège, even had they been raised by Spain.

In relation to the control that France would assume over future flows into the Carol, the Tribunal rejected Spain's argument that this was illegal. France had given an assurance that it would not impair Spain's rights, and bad faith was not to be presumed.<sup>28</sup>

[T]he growing ascendancy of man over the forces and the secrets of nature has put into his hands instruments which he can use to violate his pledges just as much as for the common good of all; the risk of an evil use has so far not led to subjecting the possession of these means of action to the authorisation of the States which may possibly be threatened.<sup>29</sup>

Having disposed of the first main issue, the Tribunal then considered the second, namely whether France could carry out the project without Spain's consent. The Tribunal concluded that there was no right of veto, but instead 'international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement.'<sup>30</sup> It was acknowledged by the Tribunal that even if there did exist a principle which prevented upstream states from altering the waters of a river so as to 'prejudice the downstream

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid 305.

<sup>29</sup> Ibid 305-306

<sup>30</sup> Ibid 306.

State' such a rule was not relevant here because the French scheme 'will not alter the waters of the Carol.'<sup>31</sup>

The final issue addressed by the Tribunal was French adherence to a series of obligations contained in the *1866 Treaty of Bayonne* and the *Additional Act* concerning prior notice and the establishment of 'machinery for dealing with compensation claims and safeguards for all interests involved on either side.'<sup>32</sup> There was no doubt as to French compliance with its notice obligations. As to the second set of obligations, those concerning adequate consideration of downstream interests, the Tribunal noted that a strict interpretation of the relevant provision, Article 11 of the *Additional Act*, would lead to the inclusion of only those interests which relate to riparian rights. Interestingly, the Tribunal instead preferred what it called 'a more liberal interpretation',<sup>33</sup> such that '*account must be taken of all interests, of whatsoever nature, which are liable to be affected by the works undertaken, even if they do not correspond to a right.*'<sup>34</sup> However, while extolling the need to consider all interests of 'whatsoever nature', the Tribunal did not include 'nature' itself among these. Nonetheless it is perhaps conceivable that had Spain invoked such environmental concerns France would have been required to pay due regard to their satisfaction.

(c) *The Legacy of the Lake Lanoux Case*

One commentator has noted that the *Lake Lanoux Case* illustrated the constructive role of adjudication in resolving a 'venomous dispute',<sup>35</sup> and in enunciating foundational principles of international environmental law.<sup>36</sup> However, the litigation was clearly not directly concerned with issues of an environmental character. Even though the subject-matter of the case related to the substantial alteration of natural flows in the headwaters of a shared watercourse, there is a striking absence of any recognition of environmental issues in the pleadings or the decision. The Tribunal simply assumed that returning the same quantity of water would lead to Spain being placed in exactly the same situation as it was before construction of the French scheme. It was, of course, not obvious that the ecology of the Carol or the Ariège would have remained unaltered, although this question was never before the Tribunal as it was not raised by Spain. Nonetheless, and despite these limitations, the decision does illustrate that litigation argued on the basis

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<sup>31</sup> Ibid 308.

<sup>32</sup> Ibid 314-315.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid (emphasis added).

<sup>35</sup> Cesare P R Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000) 219.

<sup>36</sup> Ibid.

of the rights of states qua states can serve important environmental objectives. A downstream state successful in arguing that an upstream user should not interfere with a shared basin serves not only to protect its agricultural or other industries dependent on an international river, but it can also effectively serve to protect the equilibrium of ecosystems that would otherwise be disturbed.

As the Tribunal ventured beyond the precise terms of its remit and considered general principles of international law, the *Lake Lanoux Case* made an important contribution to the development of international water law. The Tribunal clearly recognised the right of upper riparians to develop an international watercourse without having to seek the prior agreement of any lower riparian. However, the Tribunal also articulated two environmentally important limitations. In the first place it was emphasised that states should cooperate wherever possible to reach a shared solution, that the upper riparian should engage in negotiations to this end when proposing works, and above all should seek in good faith to accommodate *all* interests concerned. Although the Tribunal did not refer to environmental considerations as among these interests, the emphasis placed upon cooperation can be seen to be the foundation of modern international law relating to the utilisation of shared watercourses.<sup>37</sup> Second, while inapplicable in the case before it, the Tribunal also noted that ‘there is a principle which prohibits the upstream State from altering the waters of a river in such a fashion as seriously to prejudice the downstream State.’<sup>38</sup> Whilst expressed narrowly, this principle is essentially the same as the *Trail Smelter Case*<sup>39</sup> dictum, namely that states should not permit their territory to be used in such a way as to affect the territorial integrity of neighbouring states.

### B *The River Oder Case*

Although the case was not concerned with environmental matters, nor indeed with issues relating to the non-navigational uses of international watercourses more generally, the decision of the Permanent Court of International Justice (‘PCIJ’) in the *Case Relating to the Territorial Jurisdiction of the International Commission of the*

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<sup>37</sup> Alan E Boyle, ‘Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited’ in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 61, 80; Alan E Boyle, ‘The Principle of Co-Operation: The Environment’ in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Honour of Michael Akehurst* (1994) 120, 122.

<sup>38</sup> *Lake Lanoux Case* (1957) 12 RIAA 285, 308. See also the *San Juan River Case (Costa Rica/Nicaragua)* (1888) 2 *Moore’s International Arbitrations* 1964, 1964-1965 in which President Cleveland, as arbitrator of the dispute, held that ‘Costa Rica cannot prevent the Republic of Nicaragua from executing...within her own territory...works of improvement, provided such works...do not result in the occupation or flooding or damage of Costa Rica territory...’.

<sup>39</sup> *Trail Smelter Case (Canada/United States)* (1938 and 1941) 3 RIAA 1911



*River Oder*<sup>40</sup> is frequently cited in the environmental context. This is chiefly because the PCIJ provided a simple and elegant statement of the ‘community of interests’ theory, which asserts that a natural resource shared by two or more states is common property and must be subject to equitable use by all interested states.<sup>41</sup> In this respect the case is discussed here as an important precursor to the ICJ’s judgment in the *Gabčíkovo-Nagymaros Case* in which this early decision was expressly affirmed, and its reasoning extended.

(a) *Background to the Dispute*

The dispute in the *River Oder Case* concerned the competence of the International Commission of the Oder (‘Oder Commission’), a body established by Part XII of the *1919 Treaty of Peace Between the Allied and Associated Powers and Germany* (‘*Treaty of Versailles*’), to manage the use of the river.<sup>42</sup> Article 331 of the *Treaty of Versailles* provided that sections of the Elbe, the Vltava, the Niemen and the Danube ‘and all navigable parts of these river systems which naturally provide more than one State with access to the sea’ were ‘declared international.’ Under Article 343, the Oder Commission was given the task of defining the sections of the Oder and its tributaries to which this international regime applied.

The Oder Commission became deadlocked when seeking to carry out this function. The Polish representative insisted that the Warthe and Netze tributaries beyond the Polish frontier were excluded from the Oder Commission’s jurisdiction.<sup>43</sup> However, the other members of the commission (Czechoslovakia, Denmark, France, Germany, Great Britain and Sweden) took the opposite position, and sought the greatest possible access to the entire river system.<sup>44</sup> By special agreement the parties submitted a two-part question to the PCIJ, namely whether the jurisdiction of the Commission extended to the Polish sections of the Warthe and Netze and, if so, what principle was to guide the Commission in determining the upstream limits of its jurisdiction.<sup>45</sup>

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<sup>40</sup> *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (Czechoslovakia, Denmark, France, Germany, Great Britain, Sweden/Poland)* [1929] PCIJ (ser A) No 23 (‘*River Oder Case*’).

<sup>41</sup> The *River Oder Case* stands in contrast to the other decision of the PCIJ touching upon water law issues, the *Diversion of Water from the River Meuse (Netherlands v Belgium)* [1937] PCIJ (ser A/B) No 70. That case, which similarly did not raise environmental questions, is of far more limited significance because the PCIJ insisted that the dispute was to be determined solely by reference to bilateral arrangements between the Netherlands and Belgium concerning the diversion of water from the Meuse.

<sup>42</sup> The Oder (or ‘Odra’) River begins in what is now the Czech Republic, passes through western Poland, later forming the border between Poland and Germany and ultimately emptying into the Baltic Sea.

<sup>43</sup> *River Oder Case* [1929] PCIJ (ser A) No 23, 14. These tributaries rose in Poland and passed across the border into Germany before converging and joining the Oder.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* 6.

(b) *The PCIJ's Decision*

Although the issue at the centre of the dispute was primarily one concerning navigation rights, the PCIJ enunciated a general principle that has been influential in the broader context of non-navigational watercourse issues. In aid of its interpretation of Article 331 of the *Treaty of Versailles*, the Court considered that it must 'go back to the principles governing international fluvial law in general',<sup>46</sup> and in a critical passage set out the 'community of interest' concept:

[W]hen consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of right of passage in favour of upstream States, but in that of a community of interest of riparian States. *This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others...*<sup>47</sup>

The Tribunal held that the common right of navigation extended throughout the navigable course of the river irrespective of political boundaries,<sup>48</sup> and concluded that the *Treaty of Versailles* adopted the position of 'complete internationalization.'<sup>49</sup> Accordingly, the Commission possessed jurisdiction over the navigable portions of the Warthe and the Netze in Polish territory.

C *The Gabčíkovo-Nagymaros Case*

The community of interest theory also arose in the *Gabčíkovo-Nagymaros Case*, in which an environmental controversy concerning the development of the Danube was 'embedded'<sup>50</sup> in a broader dispute involving the law of treaties, state responsibility and the succession of states. Indeed, in many ways the dispute can be understood as one involving a clash between traditional principles of public international law on the one hand and evolving principles of international environmental law on the other.<sup>51</sup>

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<sup>46</sup> Ibid 26.

<sup>47</sup> Ibid 27 (emphasis added).

<sup>48</sup> Ibid 27-28.

<sup>49</sup> Ibid.

<sup>50</sup> Stephen Schwebel, 'The Judgment of the International Court of Justice in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*' in International Bureau of the Permanent Court of Arbitration (ed), *Permanent Court of Arbitration Peace Palace Papers: Resolution of International Water Disputes* (2003) 247, 258.

<sup>51</sup> Rosalyn Higgins, 'Natural Resources in the Case Law of the International Court' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 87, 105.

(a) *Background to the Dispute*

The case concerned a joint project between Hungary and Czechoslovakia to construct a series of locks and dams along a shared stretch of the Danube. The details of the joint project, which was designed to produce hydroelectricity, improve navigation, and to improve flood protection, were set out in a bilateral agreement, the *1977 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks* ('1977 Treaty'). Article 1(1) of that instrument provided for the construction of two systems of locks, one at Gabčíkovo (in what was then Czechoslovakia) and another at Nagymaros (in Hungary), and these together were to form 'a single and indivisible' operational system. The treaty also included several provisions addressing the environmental impacts of the project under which the parties undertook to ensure that the quality of water in the Danube would not be impaired.<sup>52</sup> Hungary and Slovakia also committed to 'compliance with the obligations [imposed by general international law] for the protection of nature arising in connection with the construction and operation of the System of Locks.'<sup>53</sup> More detailed measures to protect the ecology of the Danube were to be incorporated in a 'Joint Contractual Plan'.

Under the terms of the joint project, the works in Hungary involved the construction of a dam and reservoir at Dunakiliti together with a series of locks at Nagymaros. By early 1989 the project in the Gabčíkovo sector was well-advanced, with the Dunakiliti dam 90 per cent complete and the Gabčíkovo dam 85 per cent finished.<sup>54</sup> However in the Nagymaros sector only minor preparatory works had been completed, and in May 1989, following strong domestic opposition on environmental grounds, Hungary decided to suspend further work. It was argued that there was inadequate knowledge of the environmental risks both in terms of ecological and water quality impacts.<sup>55</sup> Subsequently, in October 1989, Hungary abandoned the project at Nagymaros altogether,<sup>56</sup> while retaining the partially completed Dunakiliti complex.<sup>57</sup> Although the Czechoslovak President at one stage described the entire dam scheme as a 'totalitarian, gigomaniac monument which is against nature', the Czechoslovak Government insisted that the project should be completed<sup>58</sup> and to this end began investigating the possibility of an alternative solution. In November 1991 it began construction of 'Variant C' which

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<sup>52</sup> *1977 Treaty*, art 15.

<sup>53</sup> *Ibid* art 19.

<sup>54</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [31].

<sup>55</sup> *Ibid* [34].

<sup>56</sup> *Ibid* [37].

<sup>57</sup> *Ibid* [38].

<sup>58</sup> *Ibid*.

involved the unilateral diversion of the Danube and the construction of a dam at Cunovo, all inside what is now Slovakia.<sup>59</sup>

(b) *The Three Questions for the Court*

In May 1992 the Hungarian government formally notified Czechoslovakia that the 1977 Treaty was terminated.<sup>60</sup> Shortly after Czechoslovakia was dissolved and Slovakia attained independence, Hungary and Slovakia agreed to submit the dispute to the ICJ.<sup>61</sup> This decision came after considerable efforts were expended by the European Commission to promote a negotiated settlement.<sup>62</sup> The Court was requested to decide three main questions, namely whether Hungary was entitled to suspend and abandon the works, whether Slovakia was entitled to proceed with Variant C, and the legal effects of Hungary's purported termination of the treaty.<sup>63</sup> In relation to all three questions, which will now be considered in turn, Hungary expressly based its arguments on a range of environmental concerns.<sup>64</sup>

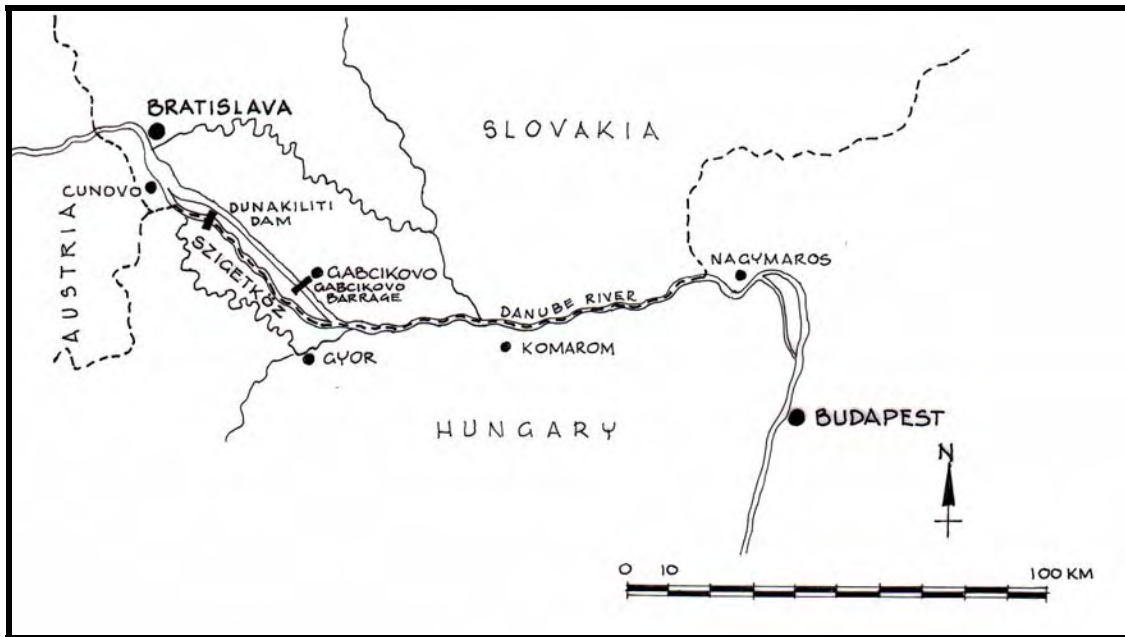


Figure 6.2 The Original Gabčíkovo-Nagymaros Project<sup>65</sup>

<sup>59</sup> Ibid [23].

<sup>60</sup> Ibid [23].

<sup>61</sup> 1993 *Special Agreement between the Republic of Hungary and the Slovak Republic for Submission to the International Court of Justice of the Differences between them concerning the Gabčíkovo -Nagymaros Project* ('Special Agreement').

<sup>62</sup> Paul R Williams, *International Law and the Resolution of Central and East Asian Transboundary Environmental Disputes* (2000) 68-73.

<sup>63</sup> *Special Agreement*, art 2(1).

<sup>64</sup> For a comprehensive appraisal of Hungary's environmental concerns see Williams, above n 62, 55-57.

<sup>65</sup> This map is adapted from 'Sketch-Map No 2: The Original Project' in *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, 21.

(i) *The Suspension and Abandonment of Works at Nagymaros and Gabčíkovo*

In order to justify its conduct in suspending and abandoning the works, Hungary relied on a ‘state of ecological necessity.’<sup>66</sup> In this respect several environmental dangers were identified. First, the scale of the Dunakiliti reservoir and the use of the Gabčíkovo dynamo in peak mode twice a day would reduce flows along the Danube river bed to a ‘trickle’, thereby ‘condem[ning] to extinction’<sup>67</sup> the fauna and flora of the river and the Szigetköz alluvial plains. Second, in relation to the Nagymaros locks, Hungary argued that if it were required to continue with the project vast quantities of silt would accumulate in the river, thereby lowering water quality and threatening aquatic habitats. For its part Slovakia argued that international law did not permit a ‘state of ecological necessity’ to be invoked either to suspend treaty obligations, or as a defence for an otherwise internationally wrongful act.<sup>68</sup> Slovakia also contested the factual basis for Hungary’s claim, arguing that it was overly pessimistic and that while environmental problems were significant, they could be addressed.<sup>69</sup>

The Court assessed Hungary’s ecological necessity argument on the basis of what was then Article 33 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*,<sup>70</sup> which the parties and the Court accepted as reflecting customary international law. The Court noted that the environment could constitute an ‘essential interest’ for the purposes of the necessity defence, and pointed out that in the *Legality of the Threat or Use of Nuclear Weapons*<sup>71</sup> it had stressed the ‘great significance that it

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<sup>66</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [40]. Necessity has been raised in several situations involving environmental damage. In the Russian Fur Seals Controversy of 1892 the Russian Government issued a decree prohibited sealing in an area of the high seas in the Bering Sea and explained that this action was taken because of ‘absolute necessity’ in light of the imminent opening of the hunting season. In the *Torrey Canyon* incident of March 1967, the British Government in bombing the Liberian oil tanker that had run aground off the coast of Cornwall beyond the British territorial sea justified its actions on the basis of necessity. In the *Fisheries Jurisdiction Case (Spain v Canada) (Jurisdiction and Admissibility)* [1998] ICJ Rep 431, discussed in Chapter 7, necessity was an issue as Canada claimed that it was entitled to exercise legislative and enforcement jurisdiction over a Spanish fishing vessel on the high seas in order to prevent the extinction of Greenland halibut. See James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002) 180-182.

<sup>67</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [40].

<sup>68</sup> *Ibid* [44].

<sup>69</sup> *Ibid*.

<sup>70</sup> Art 33 was finally adopted, with some amendments, as art 25 of the *Articles on Responsibility of States for Internationally Wrongful Acts*, art 2, *Report of the International Law Commission, 53rd Session, UN Doc A/56/10, 43-59* (2001) (noted in GA Res 56/83, UN Doc A/RES/56/83 (2001)) (‘*Articles on State Responsibility*’). After a review of state practice, the Commentary to art 25 observes that necessity ‘has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.’

<sup>71</sup> *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 (‘*Nuclear Weapons Advisory Opinion*’).

attaches to respect for the environment.<sup>72</sup> However, the Court concluded that the perils invoked by Hungary ‘were not sufficiently established in 1989’, were not imminent and, in any event, Hungary could implement mitigation measures rather than abandoning the works.<sup>73</sup>

Several aspects of the Court’s reasoning here are open to criticism. Although the Court stated that it was not necessary to reach a view as to which party’s scientific evidence was better founded,<sup>74</sup> the Court did in fact engage in a relatively detailed assessment of the gravity and imminence of the ecological risks asserted by Hungary. Moreover, in evaluating this evidence the court effectively required Hungary to establish the alleged risks to a very high degree of scientific certainty, an approach which effectively precluded the operation of the precautionary principle.<sup>75</sup> While this may well have been justified given the exceptional character of the necessity defence, the Court made no attempt to explain the relationship between the law of state responsibility and developing rules of international environmental law.

(ii) *The Legality of ‘Variant C’*

Slovakia’s unilateral commencement of Variant C involved the construction of a dam and reservoir inside Slovakian territory at Cunovo, and the diversion of 80 to 90 per cent of the waters of the Danube to a bypass canal for hydroelectric power generation at Gabčíkovo. The environmental concerns in relation to Variant C were, as the Court noted, essentially the same as those for the original project as it involved an almost complete diversion of water from the Danube.

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<sup>72</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [53].

<sup>73</sup> *Ibid* [57].

<sup>74</sup> *Ibid* [54].

<sup>75</sup> Afshin A-Khavari and Donald R Rothwell, ‘The ICJ and the Danube Dam Case: A Missed Opportunity for International Environmental Law?’ (1998) 22 *Melbourne University Law Review* 507, 514. See also Stephen Stec and Gabriel E Eckstein, ‘Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ’s Decision in the *Case Concerning the Gabčíkovo-Nagymaros Project*’ (1997) 8 *Yearbook of International Environmental Law* 41, 49; Daniel Dobos, ‘The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle’ (2002) 13 *Fordham Environmental Law Journal* 375.

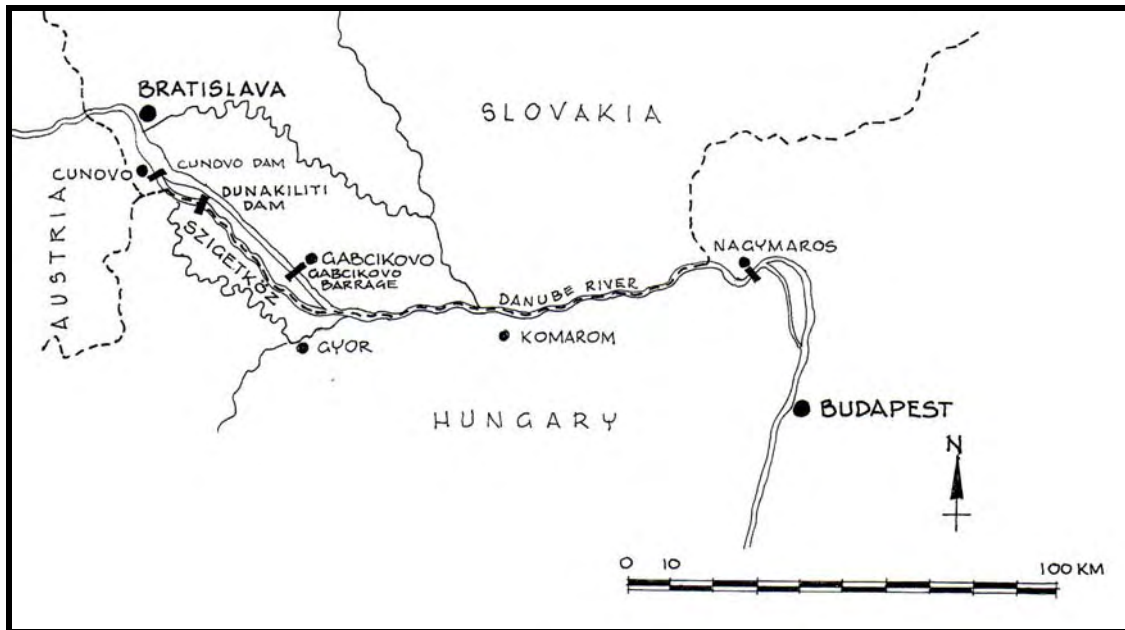


Figure 6.3 ‘Variant C’ to the Gabčíkovo-Nagymaros Project<sup>76</sup>

Slovakia justified the legality of Variant C on two main grounds. First, it was said that Hungary’s abandonment of the Dunakiliti works meant that Slovakia was entitled to proceed with a solution that ‘closely approximated’ the original project. Second, Slovakia argued that even if *prima facie* unlawful, Variant C could nonetheless be justified as a legitimate countermeasure. In relation to the first argument, the Court did not determine whether there was a principle of ‘approximate application’ but found that even if such a principle did exist it would only allow an alternative scheme within the limits of the treaty. Variant C was not within those limits because it was a unilateral measure whereas the 1977 Treaty provided for joint ownership and management of the project as a co-ordinated single unit.<sup>77</sup>

It was in the context of Slovakia’s secondary, countermeasures, argument that the Court sought to draw most extensively upon general principles of international water law. The Court noted that Hungary’s refusal to participate in the project ‘cannot mean that Hungary forfeited its basic right to *an equitable and reasonable sharing of the resources of an international watercourse*.’<sup>78</sup> In support of this principle the Court cited the dictum in the *River Oder Case* that the ‘community of interest in a navigable river becomes the basis of a common legal right.’<sup>79</sup> The Court also referred to the UN

<sup>76</sup> This map is adapted from ‘Sketch-Map No 3: “Variant C”’ in *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, 26.

<sup>77</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [78].

<sup>78</sup> *Ibid* (emphasis added).

<sup>79</sup> *River Oder Case* [1929] PCIJ (ser A) No 23, 27.

*Watercourses Convention* as evidencing acceptance of the community of interest theory, despite the fact that the Convention had not yet entered into force.<sup>80</sup>

The ICJ's strong approval of the 'community of interest' theory is highly significant from an environmental perspective. At a conceptual level the theory has obvious affinities with the general notion, derived from Roman law,<sup>81</sup> that natural systems which cross or are beyond borders (i.e. international rivers, the atmosphere and the oceans) are common property open to exploitation by all members of the relevant community.<sup>82</sup> They are simultaneously the property of all (*res communis*) and the property of none (*res nullius*). There are also important intersections between the notion of a 'community of interest' and the 'ecosystem approach' to environmental management adopted in recent environmental agreements.<sup>83</sup> The theory emphasises the need to view an international watercourse as a whole, having regard to the entire 'community' of interested states dependent upon it. It also implies that these states have a shared interest not only in the exploitation of those freshwater resources, but also in their rational use and in the protection of riverine and dependent ecosystems.

These aspects of the theory were not expressly considered by the ICJ. The Court simply concluded that Slovakia had deprived Hungary 'of its right to an equitable and reasonable share of the natural resources of the Danube – with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz.'<sup>84</sup> The absence of any elaboration on this cursory reference to ecological issues appeared on its face to constitute a major opportunity missed, as the relationship between environmental concerns and rules relating to equitable use of watercourses has been a source of ongoing uncertainty in international water law. Boyle has nonetheless argued that, if the judgment is viewed as a whole, the Court did appear to have set the notion of equitable utilisation in the broader context of 'environmentally *sustainable* utilisation'

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<sup>80</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [147].

<sup>81</sup> See, eg. Justinian, *Institutiones* (Peter Birks and Grant McLeod trans, 1987) II.1.1 ('The things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore.').

<sup>82</sup> Some commentators have even suggested that the 'community of interest' theory could be developed further in line with conceptions of 'common heritage': McCaffrey, *The Law of International Watercourses: Non-Navigational Uses*, above n 8, 172-173 ('The international community has devised a system for sharing the resources of the sea with developing and geographically disadvantaged states. It would seem equally important that it begin the elaboration of a system for the sharing of the world's freshwater resources equitably among all states, especially those that are *hydrologically* disadvantaged.' (emphasis in original)).

<sup>83</sup> See, eg. *Convention on Biological Diversity*, art 8. The ecosystem approach has been particularly prominent in the Antarctic context: see the *Protocol on Environmental Protection to the Antarctic Treaty* and the *Convention on the Conservation of Antarctic Marine Living Resources*, art I(3).

<sup>84</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [85].



and therefore the judgment represents ‘the most radical re-writing of the law relating to international watercourses since the *River Oder* case.’<sup>85</sup>

(iii) *Hungary’s Purported Termination of the Treaty*

Hungary proffered five arguments to justify its purported termination of the *1977 Treaty*, four of which raised environmental concerns. The first of these, that a state of ecological necessity existed which allowed Hungary to terminate the Treaty, was promptly rejected on the grounds that necessity might exonerate a state of responsibility, but could not justify termination. Second, Hungary sought to rely on the principle of impossibility of performance,<sup>86</sup> arguing that an essential object of the treaty (a joint investment arrangement *consistent* with norms of environmental protection) had disappeared. The Court dismissed this argument, holding that ‘[t]he 1977 Treaty – and in particular its Articles 15, 19 and 20 – actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives.’<sup>87</sup> Third, Hungary submitted that there had been a fundamental change of circumstances including ‘the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law.’<sup>88</sup> Applying Article 62 of the *VCLT*, the Court stated that developments in environmental knowledge and international environmental law were not ‘completely unforeseen’ and in any event ‘the formulation of Articles 15, 19 and 20, which were designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.’<sup>89</sup>

The fourth and final environment-related treaty law argument made by Hungary was the most ambitious. Hungary contented that it could terminate the *1977 Treaty* on the basis that ‘new requirements of international law for the protection of the environment precluded performance of the Treaty.’ The Court again rejected this submission, holding that there was no conflict between the Treaty and emerging principles of international environmental law. This was because such new norms could be incorporated through Articles 15, 19 and 20 which were not ‘specific obligations of performance’ but instead required the parties to take environmental considerations, including developing

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<sup>85</sup> Alan E Boyle, ‘The *Gabcikovo-Nagymaros Case*: New Law in Old Bottles’ (1997) 8 *Yearbook of International Environmental Law* 17.

<sup>86</sup> As reflected in art 61 of the *1969 Vienna Convention on the Law of Treaties* (*VCLT*).

<sup>87</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [103].

<sup>88</sup> *Ibid* [104].

<sup>89</sup> *Ibid* [104].

principles, into account on an ongoing basis. The *1977 Treaty*, it was concluded, ‘is not static, and is open to adapt to emerging norms of international law.’<sup>90</sup>

The Court emphasised the importance of discharging this joint responsibility because, as it had held in its Advisory Opinion in the *Nuclear Weapons Advisory Opinion*, ‘the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.’<sup>91</sup> The repetition of this statement in two places in the judgment in the *Gabčíkovo-Nagymaros Case* underlines the Court’s recognition of the significance of recent developments in international environmental law (albeit from an overtly anthropocentric perspective, in acknowledging the instrumental rather than intrinsic value of the environment).

However, the Court did not identify the relevant principles of international environmental law which could assist the parties in adapting the *1977 Treaty* to meet new legal developments and this growing awareness of environmental vulnerability. It was suggested instead that the parties should continue to work together, and possibly seek the assistance of a third party, in responding to the environmental challenges that the project posed.<sup>92</sup> More fundamentally, the Court did not adopt a consistent explanation as to why the parties were required to take into account evolving norms of international environmental law.<sup>93</sup> While in this part of the judgment the Court suggested that such norms were incorporated by reference in the *1977 Treaty*, later in its reasons the Court appears to conclude that new principles of international environmental law have a general applicability to existing treaty regimes.<sup>94</sup> Arguably this latter approach is correct, and environmental norms crystallising in customary international law after the conclusion of a treaty should be applied in the interpretation and application of the treaty unless it specifically excludes their operation.<sup>95</sup>

(c) *The Future Conduct of the Parties*

When it came to prescribing the future conduct of the parties, the Court held that the parties should negotiate an agreement for the operation of the joint project consistent with the *1977 Treaty*, and with developing principles of international environmental law. The Court also took note of several facts on the ground, including that the Gabčíkovo power plant had operated for seven years fed by a smaller reservoir than

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<sup>90</sup> Ibid [111].

<sup>91</sup> Ibid [112] (citing *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, [29]).

<sup>92</sup> Ibid.

<sup>93</sup> Boyle, ‘The *Gabčíkovo-Nagymaros Case*: New Law in Old Bottles’, above n 85, 15.

<sup>94</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [140].

<sup>95</sup> Boyle, ‘The *Gabčíkovo-Nagymaros Case*: New Law in Old Bottles’, above n 85, 15-16.

originally planned. Environmental concerns were ‘of necessity a key issue’<sup>96</sup> and must be accommodated within the framework of the *1977 Treaty*. In a lengthy and important passage the Court explained how this should occur, by reference to the principle of sustainable development:

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the Gabčíkovo 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.<sup>97</sup>

In what is arguably the most environmentally-significant passage of any ICJ judgment to date, the Court made implicit reference to the precautionary principle (‘vigilance and precaution’), identified the way in which environmental law had developed in tandem with growing scientific awareness of environmental risks, expressly referred to the concept of sustainable development, and sought to apply the principle to the dispute at hand.

(i) *Judge Weeramantry’s Separate Opinion*

Judge Weeramantry in his separate opinion explored the principle of sustainable development in far greater detail, although he stopped short of recognising it as a binding norm, or concluding that the original project and Variant C were ‘unsustainable’. For Judge Weeramantry, sustainable development was ‘more than a mere concept’ and was ‘a principle with normative value which is crucial to the determination of this case.’<sup>98</sup> Drawing on a diversity of practice from many legal traditions, Judge Weeramantry concluded that sustainable development ‘is one of the most ancient of ideas in the human heritage.’<sup>99</sup> For Judge Weeramantry it reconciled

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<sup>96</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [140].

<sup>97</sup> *Ibid.*

<sup>98</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, Separate Opinion of Vice-President Weeramantry, 88.

<sup>99</sup> *Ibid* 110.

what he considered to be two human rights: the right to environment and the right to development.

(ii) *Applying the Concept of Sustainable Development*

Although the Court (and indeed Judge Weeramantry) stopped short of recognising sustainable development as a rule of law, the Court's use of the concept nonetheless has much to recommend it. Lowe has argued in this respect that the Court was correct in refraining from accepting the rule as one of custom, given that this multidimensional notion does possess a fundamentally norm creating character.<sup>100</sup> At best, Lowe contends, sustainable development 'is a convenient, if imprecise, label for a general policy which may be adopted by states unilaterally, bilaterally, or multilaterally.'<sup>101</sup> But even though it was not recognised as a positive rule of conduct, the concept of sustainable development was important for the Court's decision. There are two senses in which the influence of the notion of sustainable development was felt. First, the principle was deployed both by the Court and by Judge Weeramantry to reconcile two competing primary norms – the right of development and the obligation to protect the environment. In this sense sustainable development can be understood as a 'meta-principle, acting upon other legal rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.'<sup>102</sup>

The second, related way, in which the Court implicitly supported the importance of sustainable development was through its emphasis upon the procedural aspects of the concept.<sup>103</sup> Boyle has argued that the case 'was not about the public interest in sustainable development. It was about the public interest in cooperation and in the processes that serve the interests of sustainable development.'<sup>104</sup> The Court required the parties to reconsider the environmental consequences of the project and undertake monitoring and protective measures consistent with contemporary international

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<sup>100</sup> Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 19, 30 (referring to the ICJ's use of the term 'fundamentally norm-creating character' in the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3 to describe those rules of treaty law susceptible to crystallisation as customary rules).

<sup>101</sup> *Ibid* 30-31.

<sup>102</sup> *Ibid* 31.

<sup>103</sup> Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (2nd ed, 2002) 96. In relation to procedural obligations in international environmental law generally see Phoebe N Okowa, 'Procedural Obligations in International Environmental Agreements' (1996) 72 *British Yearbook of International Law* 276.

<sup>104</sup> Boyle, 'The *Gabcikovo-Nagymaros Case*: New Law in Old Bottles', above n 85, at 20.

environmental law.<sup>105</sup> Such an approach allowed the Court to further the objective of sustainable development while at the same time ‘relieving [it] of the impossible task of deciding what is and what is not sustainable.’<sup>106</sup> It is nonetheless to be regretted that the Court did not specify in more detail the procedural obligations that were relevant here, including that of environmental impact assessment and continuous environmental monitoring.<sup>107</sup>

(d) *The Future of the Project*

The *Gabčíkovo-Nagymaros Case* did not lead to a comprehensive resolution of the dispute between Hungary and Slovakia, although it did encourage the parties to continue joint environmental monitoring of the river,<sup>108</sup> and established a legal framework for ongoing negotiations. These negotiations have proven difficult and have been punctuated by long periods of abeyance. Shortly after the judgment was delivered, Slovakia sought an additional judgment of the Court on the grounds that Hungary had not implemented the 1997 judgment. However this request was not pressed, and as the parties continue to work together to monitor and mitigate environmental problems stemming from the project it is doubtful whether further involvement by the ICJ would helpfully resolve the case.<sup>109</sup>

In broad terms there appear to be two continuing points of disagreement remaining between the parties, the first being the upstream diversion of water for hydropower generation and second Slovakia’s insistence that a downstream dam be constructed by Hungary so as to improve navigation and facilitate peak mode operation of the Gabčíkovo dynamo.<sup>110</sup> These raise sensitive questions of policy and of science, and the parties have continued to negotiate a resolution to the dispute within the terms of the Court’s judgment and the *1977 Treaty*. European Union institutions, including the Parliament, will no doubt become more closely involved in resolving the dispute now

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<sup>105</sup> Birnie and Boyle, above n 103, 96.

<sup>106</sup> Ibid.

<sup>107</sup> These issues were canvassed by Judge Weeramantry in his Separate Opinion. Judge Weeramantry argued that a continuing obligation to carry out environmental impact assessment was imported into the *1977 Treaty* by arts 15 and 19. He held that the obligation was a principle of international environmental law, namely a specific application of the more general principle of caution which must be read into treaties which have a significant impact upon the environment: *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, Separate Opinion of Vice-President Weeramantry, 112.

<sup>108</sup> For a detailed analysis of the joint environmental monitoring of the stretch of the Danube affected by the Gabčíkovo-Nagymaros Project, before and after the *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, see Libor Jansky, Masahiro Murakami and Nevelina I Pachova, *The Danube: Environmental Monitoring of an International River* (2004).

<sup>109</sup> Constanze Schulte, *Compliance With Decisions of the International Court of Justice* (2004) 249.

<sup>110</sup> BBC Monitoring Europe, ‘Report by Hungarian Kosuth Radio’, 13 April 2004, available at <<http://www.westlaw.com>> at 1 July 2005.

that both Hungary and Slovakia are members of the enlarged Community. In addition, some of the environmental concerns that have been raised consistently by Hungary, from before the abandonment of works in 1989 until today, may now be addressed in the context of the implementation of the European Union's Water Framework Directive, which applies to existing and new dams.<sup>111</sup>

(e) *The Legacy of the Gabčíkovo-Nagymaros Case*

Although it did not produce a resolution of the dispute, the judgment of the ICJ in the *Gabčíkovo-Nagymaros Case* has considerable implications for international environmental law.<sup>112</sup> The Court affirmed the community of interest theory which, as has been seen, can be adapted to serve environmental objectives. Most important, however, was the Court's pronouncements on the impact of developing environmental norms upon an existing treaty regime. The judgment asserts the legitimacy of environmental concerns influencing the operation of a treaty concluded in the late 1970s, which did not have a strong focus on environmental protection. The Court effectively held that the parties could and should update this treaty framework in order to bring the joint dam project into conformity with contemporary international environmental standards.<sup>113</sup>

In addition, although the Court did not enter into an analysis of the principle of sustainable development, the *Gabčíkovo-Nagymaros Case* does suggest that the ICJ is willing to look beyond the narrow ambit of the dispute and examine general principles and norms that may assist the court in the resolution of a case. However, it would have been preferable for the Court to have explained in express terms the relevance of sustainable development to its reasons, and why other equally important concepts, such as that of environmental impact assessment, and the principles of prevention and precaution, were not considered and given effect.

## II THE IMPACT OF THESE DECISIONS

The decisions examined in this Chapter have played an important role in the development of international water law, principally by focussing attention on underlying theoretical considerations. Four theories have influenced the evolution of

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<sup>111</sup> Directive of the European Parliament and of the Council Establishing a Framework for Community Action in the Field of Water Policy, 2000/60/EC [2000] OJ L 327.

<sup>112</sup> But see *contra* Johan G Lammers, 'The Gabčíkovo-Nagymaros Case Seen in Particular from the Perspective of the Law of International Watercourses and the Protection of the Environment' (1998) 11 *Leiden Journal of International Law* 287, 318 (arguing that the Court's judgment brought few innovations on these topics).

<sup>113</sup> Sands observes that this conclusion is 'potentially of great significance, possibly even radical significance': Philippe Sands, 'International Environmental Litigation and its Future' (1999) 32 *University of Richmond Law Review* 1619, 1632.

this area of international law, namely those of ‘absolute territorial sovereignty’, ‘absolute territorial integrity’, ‘limited territorial sovereignty’, and ‘community of interest’.<sup>114</sup> The absolute territorial sovereignty theory is associated with the Harmon doctrine,<sup>115</sup> and asserts that upstream riparians have complete freedom of use of a watercourse. It has enjoyed no support in judicial decisions. Similarly rejected has been the doctrine of absolute territorial integrity which holds that downstream riparians have a right to use the watercourse free from any interference by upstream riparians.

The approaches that have found more favour have been the ‘limited territorial sovereignty’ and ‘community of interest’ doctrines. The *Lake Lanoux Case* essentially approved the limited territorial sovereignty approach in concluding that France’s rights to exploit the headwaters of the River Carol were limited by an obligation to have regard to the downstream interests of Spain. In many respects this approach can be said to be ‘the prevailing theory of international watercourse rights and obligations’<sup>116</sup> as it forms the conceptual basis for the principle of equitable utilisation.<sup>117</sup> The ‘community of interest’ theory adopted first in the navigational context by the PCIJ in the *River Oder Case* was affirmed and expanded in the *Gabčíkovo-Nagymaros Case*. It looks beyond issues of sovereignty and instead asserts that all riparian states have equal and common legal rights in the shared watercourse. It is also the only theory through which environmental considerations may be given appropriate recognition.

Beyond this contribution to the development of the conceptual bases of international water law, the influence of judicial decisions upon the emergence of environmental rules in the context of shared watercourses has been far more modest. The *Lake Lanoux Case* did emphasise the importance of consultation and cooperation among riparians, and developed a framework which could encompass environmental considerations. The decision also recognised the no-harm principle that had been articulated in more general terms in the *Trail Smelter Case*. The *Gabčíkovo-Nagymaros Case* had a more overtly environmental focus, reflecting the arguments made to this end by Hungary. The Court affirmed the community of interest theory, and emphasised the necessity for the parties

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<sup>114</sup> Malgosia Fitzmaurice, ‘Water Management in the 21st Century’ in Antony Anghie and Gary Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 425, 427.

<sup>115</sup> The absolute territorial sovereignty approach has affinities with the position taken by some states with respect to transboundary pollution. Note for instance the arguments by Australia in the *Nuclear Tests Case (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, (*Merits*) [1974] ICJ Rep 253 that the deposit of any radionuclides on Australian territory as a result of French nuclear testing in the South Pacific would constitute a violation of Australian territorial sovereignty.

<sup>116</sup> McCaffrey, *The Law of International Watercourses: Non-Navigational Uses*, above n 8, 137.

<sup>117</sup> For a convenient encapsulation of the equitable utilisation principle see the *UN Watercourses Convention*, art 5. See also the *Helsinki Rules on the Use of the Waters of International Rivers*, art IV in International Law Association, *Report of the 52nd Conference* (1966) 484 (‘Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters in an international drainage basin.’).

to have regard to environmental considerations when carrying out their joint project, however the Court did not explain how developing rules of international environmental law intersected and interacted with traditional rules of international water law which have generally been focussed on questions of resource allocation rather than environmental protection.

One is left with the conclusion, therefore, that the contribution of the case law has been momentous in terms of international water law, but somewhat limited in relation to international environmental law. The integration of environmental concerns into this area of law has been achieved primarily by legislative efforts, the most notable being the International Law Commission's *Articles on the Law of the Non-Navigational Uses of International Watercourses*<sup>118</sup> which were subsequently codified in the *UN Watercourses Convention*. Although this Convention is yet to enter into force, it draws upon extensive state practice relating to riverine ecosystem protection<sup>119</sup> and was referred to by the ICJ in the *Gabčíkovo-Nagyymaros Case*. It now establishes the international legal benchmark not only for the equitable utilisation of international watercourses, but also for maintaining the equilibrium of freshwater ecosystems, and marks a decisive move in international water law away from an almost exclusive focus upon issues of resource exploitation and transboundary harm.<sup>120</sup>

The key environmental protection provisions of the *UN Watercourses Convention* are found in Part IV. Article 20, which is modelled on Article 192 of the *1982 United Nations Convention on the Law of the Sea*,<sup>121</sup> provides that watercourse states must 'individually and, where appropriate, jointly protect and preserve the ecosystems of international watercourses'. Recognising that pollution constitutes one of the most serious threats to freshwater ecosystems, Article 21 sets out a series of obligations upon watercourse states to prevent and mitigate 'any detrimental alteration in the composition or quality of an international watercourse which results directly or indirectly from human conduct.'<sup>122</sup> Under Article 22, watercourse states are also obliged to take all measures necessary to prevent the introduction of alien species that might have a detrimental effect upon watercourse ecosystems. In its commentary the ILC explained that the obligation to protect freshwater environments:

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<sup>118</sup> *Report of the International Law Commission, 46th Session*, 195 ff, UN Doc A/49/10 (1994).

<sup>119</sup> For a review of this practice see McCaffrey, *The Law of International Watercourses: Non-Navigational Uses*, above n 8, 388-393 (McCaffrey concludes (at 392) that 'there is now at least an emerging obligation to protect international watercourse systems and their ecosystems against degradation' ).

<sup>120</sup> See for instance the emphasis upon issues of transboundary harm rather than ecosystem protection in *1992 Watercourses Convention*, art 2(1) ('The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact.').

<sup>121</sup> Art 192 provides that 'States have the obligation to protect and preserve the marine environment.'

<sup>122</sup> *UN Watercourses Convention*, art 21(1).



In essence...requires that watercourse States shield the ecosystems of international watercourses from harm or damage. It thus includes the duty to protect those ecosystems from a significant threat of harm. The obligation to 'preserve' the ecosystems of international watercourses, while similar to that of protection, applies in particular to freshwater ecosystems that are in a pristine or unspoiled condition...Together, protection and preservation of aquatic ecosystems help to ensure their continued viability as life support systems, thus providing an essential basis for sustainable development.<sup>123</sup>

Environmental disputes concerning shared watercourses must now be viewed through the prism of this instrument. The principles relating to environmental protection included in the Convention mark a paradigm shift away from the mere equitable balancing of riparian interests<sup>124</sup> toward a recognition of the independent importance of environmental interests. Hence Article 20 of the *UN Watercourses Convention* is an absolute obligation, requiring a state to protect and preserve the ecosystems of international watercourses even if there is no threat of transboundary harm.<sup>125</sup>

### III CONCLUSION

This Chapter has examined the judicial development of international environmental law as it relates to freshwater resources and ecosystems, and offered some critical reflections concerning the place of environmental concepts and concerns within these decisions. It has been seen that, for the most part, environmental issues have not featured prominently in this case law. This is not to suggest that this jurisprudence has been of no relevance to environmental law. Quite to the contrary, in articulating the community of interest theory the PCIJ in the *River Oder Case* expressed the kernel of a concept that would come to have profound implications for the sustainable and equitable management of freshwater resources. In addition the Tribunal in the *Lake Lanoux Case* enunciated the no-harm principle and emphasised the importance of cooperation in relation to the exploitation of a shared natural resource. By stressing the breadth of considerations that an upstream state may be called upon to address in negotiations with downstream users, the decision also opened the door for environmental concerns to be given a place in the resolution of watercourse disputes.

The *Gabčíkovo-Nagymaros Case* is widely regarded as the most significant international decision to date on environmental matters, and marks a fundamental shift in perceptions from the *Lake Lanoux Case*. Whereas earlier cases might be said to be 'disputes about concessions and control of natural resources', the *Gabčíkovo-Nagymaros Case* signalled a new focus on 'sustainability and the limits of resource

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<sup>123</sup> *Report of the International Law Commission, 46th Session, 282, UN Doc A/49/10 (1994).*

<sup>124</sup> See for example the *Helsinki Rules on the Use of the Waters of International Rivers*, above n 117, ch 3.

<sup>125</sup> McCaffrey, *The Law of International Watercourses: Non-Navigational Uses*, above n 8, 394.

use.<sup>126</sup> Admittedly the ICJ avoided many of the opportunities with which it was presented to develop the law, and thereby ‘sent a clear message of its conservatism.’<sup>127</sup> Nonetheless, the Court recognised the importance of the principle of sustainable development and sought to fashion an approach to the dispute that would give the concept life and meaning. This was achieved not through a black-and-white judgment<sup>128</sup> as to the ‘sustainability’ of the original project, or of Slovakia’s Variant C, but instead was a result of the Court’s conclusion that the parties must implement the terms of the *1977 Treaty* having regard to developments in international environmental law. Ultimately the most important legacy of the *Gabčíkovo-Nagymaros Case* may be this emphasis upon the procedural dimensions of the principle of sustainable development. The concept of sustainability assisted the court in facilitating the resolution of the dispute in a way that was consistent with international environmental law, without testing the bounds of justiciability by applying environmental rules which did not have clear and uncontroversial content.

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<sup>126</sup> Rosalyn Higgins, above n 51, 111.

<sup>127</sup> Stephen Stec and Gabriel E Eckstein, above n 75, 42-43. See also Adriana Koe, ‘Damming the Danube: The International Court of Justice and the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)’ (1998) 20 *The Sydney Law Review* 612, 628-629.

<sup>128</sup> Peter H F Bekker, ‘*Gabčíkovo-Nagymaros Project*’ (1998) 92 *American Journal of International Law* 273, 277 (that the case is ‘a good example of how the ICJ gives and takes with a view to achieving a result that is acceptable to both litigants and that, consequently, stands the best chance of being complied with.’)

## The Adjudication of Disputes Relating to Marine Resources and Ecosystems

Disputes concerning the marine environment, which supports the vast majority of the planet's biological diversity,<sup>1</sup> have been the subject of ongoing international judicial attention since the *Bering Sea Fur Seals Case*<sup>2</sup> was decided in the late nineteenth century. This litigation has intensified as the marine environment has faced increasing pressures.<sup>3</sup> Among the most serious threats include global climate change,<sup>4</sup> pollution from terrestrial, marine and atmospheric sources and the unsustainable exploitation of marine living organisms.<sup>5</sup> Disputes relating to several of these threats have found their way before international courts and tribunals, including the International Tribunal for the Law of the Sea ('ITLOS') which has come to play a prominent role in global efforts to protect ocean ecosystems.<sup>6</sup>

This Chapter examines this dynamic area of international environmental jurisprudence, from the earliest fisheries cases through to recent litigation under the compulsory procedures established by the *1982 United Nations Convention on the Law of the Sea* ('LOS Convention').<sup>7</sup> The first section of the Chapter examines the plentiful case law relating to the exploitation and conservation of ocean resources.<sup>8</sup> This section

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<sup>1</sup> For example 33 of the 34 major categories of animals (*phyla*) are found in the oceans compared to the only 15 found on land: Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, *A Sea of Troubles: Report No 70* (2001) 12. The marine environment is also an essential source of resources, including food for the planet's growing population, with fish now accounting for more than 15 per cent of the total world supply of animal protein: Food and Agriculture Organisation of the United Nations, *The State of the World Fisheries and Aquaculture* (2002) 3.

<sup>2</sup> *Bering Sea Fur Seals Case (Great Britain v United States)* (1898) 1 *Moore's International Arbitrations* 755 ('*Bering Sea Fur Seals Case*').

<sup>3</sup> See generally Independent World Commission on the Oceans, *The Ocean Our Future* (1998) 97-118.

<sup>4</sup> It is estimated that 27 per cent of the world's coral reefs have been lost due to direct human impacts and the effects of climate change events in 1997-1998, and it is predicted that a further 32 per cent of coral reefs may be functionally destroyed within the next 30 years principally as a result of global warming: *Report of the Secretary-General on Oceans and Seas*, [7], UN Doc E/CN.17/2001/PC/16 (2001).

<sup>5</sup> United Nations Environment Programme, *Global Environment Outlook 3* (2002) 180.

<sup>6</sup> Tullio Treves, 'Dispute-Settlement Clauses in the Law of the Sea Convention and their Impact on the Protection of the Marine Environment: Some Observations' (1999) 8 *Review of European Community and International Environmental Law* 6.

<sup>7</sup> As was recognised in *Agenda 21*, UN Doc A/CONF.151/26/Rev.1 (1992), the *LOS Convention* represents the most important effort to date to provide a global legal framework for the protection of marine ecosystems, constituting the 'basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources' (ch 17.1).

<sup>8</sup> Adopting terminology used in treaty-based and customary law more generally, such cases are conventionally described in the literature as those relating to 'marine living resources' (see for example Shigeru Oda, *International Control of Sea Resources* (2nd ed, 1988) xx-xxvi). Where possible, the use of this terminology is

is in turn divided into two sub-sections, the first dealing with disputes relating to the limits of the jurisdiction of littoral states over fisheries and other marine wildlife in adjacent waters, and the second discussing cases concerning the exploitation of straddling and high seas fisheries. The second section of the Chapter discusses the more limited collection of cases dealing with issues of marine pollution. Together these two sections trace the development of marine environmental law from an early and exclusive focus upon marine resources to contemporary decisions that recognise the importance of international legal measures to protect the integrity of marine and coastal ecosystems.

## I DISPUTES CONCERNING MARINE WILDLIFE AND ECOSYSTEMS

Whereas once marine fish stocks were regarded as an inexhaustible resource to be exploited free from regulation,<sup>9</sup> it is now clear that appropriate international legal measures and institutions are essential to address the crisis in global fisheries.<sup>10</sup> In 2002 the Food and Agriculture Organisation of the United Nations reported that 75 per cent of ocean fisheries were fished up to, or beyond, their sustainable limit.<sup>11</sup>

Disputes over marine wildlife have typically emerged out of the competing interests of flag states in the freedom of fishing on the oceans on the one hand, and the interests of coastal states in their adjacent fisheries on the other. The law of the sea has developed in response to this conflict, and the *LOS Convention* is the most comprehensive result to date of this process.<sup>12</sup> It establishes an entirely new maritime

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resisted in this thesis as it unhelpfully concentrates on the commercial value of marine wildlife as a harvestable commodity to the exclusion of a more complete conception that acknowledges the intrinsic value of marine wildlife as an aspect of biological diversity and as an essential component of marine ecosystems. From a relatively early stage in the development of international environmental law, several commentators have preferred the 'wildlife' over the 'resources' perspective. See in particular Simon Lyster, *International Wildlife Law* (1985); Lynton K Caldwell, 'Concepts in Development of International Environmental Policies' (1973) 13 *Natural Resources Journal* 190, 194 (the concept of "natural resources"...is primarily an economic concept categorizing the various elements of the natural world according to their usefulness to man.').

<sup>9</sup> Believing that fisheries were practically inexhaustible, Grotius argued that there could be no limits on nations seeking to exploit them – hence the oceans and its fruits, as *res communis*, could be used by all without restriction: Hugo Grotius, *The Freedom of the Seas: or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (1609) (Ralph van Deman Magoffin trans, 1916) 57. For a discussion of changing perceptions of oceans resources from Grotius to the Third United Nations Conference on the Law of the Sea see Lawrence Juda, *International Law and Ocean Use Management: The Evolution of Ocean Governance* (1996).

<sup>10</sup> *Report of the Secretary-General on Oceans and Seas*, [14], UN Doc E/CN.17/1999/4 (1999).

<sup>11</sup> Food and Agriculture Organisation, above n 1, 22. This figure is comprised of fisheries that are fully exploited, over-exploited or depleted. Forty seven per cent of the main stocks or species groups are fully exploited. A further 18 per cent of stocks or species groups are overexploited. Ten per cent of stocks have become significantly depleted or are recovering from depletion. Accordingly, only 25 per cent of major marine fish stocks or species groups are underexploited or moderately exploited.

<sup>12</sup> Ellen Hey, 'The Fisheries Provisions of the LOS Convention' in Ellen Hey (ed), *Developments in International Fisheries Law* (1999) 13. See also Shigeru Oda, 'Fisheries under the United Nations Convention on the Law of the Sea' (1983) 77 *American Journal of International Law* 739.

zone, the 200nm Exclusive Economic Zone ('EEZ'),<sup>13</sup> in which coastal states have primary responsibility for the management of fisheries,<sup>14</sup> and it also provides a framework for promoting the sustainable utilisation of high seas fisheries.<sup>15</sup> Importantly the *LOS Convention* extends the compulsory jurisdiction of its dispute settlement procedures over high seas fishing, and in so doing circumscribes the right of flag states to insist that their vessels be free from any restrictions on unsustainable fishing practices.<sup>16</sup>

The compromise between coastal and distant-water fishing states found in the *LOS Convention*, and adjusted by the *Straddling Stocks Agreement*,<sup>17</sup> was only struck following several major disputes between states, some of which have been subject to adjudication. These cases have served as litmus tests of the efficacy of existing rules and institutions governing fisheries, and by highlighting serious omissions and inefficiencies in the legal framework they have provided the impetus for international legal reform. Although these cases have arisen under a variety of distinct regimes, almost all disputes have revolved around two common issues, namely the limits of coastal state jurisdiction to protect and conserve adjacent fisheries and the necessary features of effective regimes for high seas fisheries conservation.<sup>18</sup> Accordingly these

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<sup>13</sup> *LOS Convention*, art 56.

<sup>14</sup> As 90 per cent of harvestable fish stocks are found within this area, coastal states possess the primary responsibility for ensuring the sustainable utilisation of the majority of the world's fisheries: Robin R Churchill and A Vaughan Lowe, *The Law of the Sea* (3rd ed, 1999) 162.

<sup>15</sup> *LOS Convention*, arts 116-120. See Francisco Orrego Vicuña, 'The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use' in Olav Schram Stokke (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001) 23. In relation to high seas fisheries see now the 1993 *FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* and the Food and Agriculture Organisation of the United Nations, *Code of Conduct for Responsible Fisheries* (1995).

<sup>16</sup> Bernard Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 *American Journal of International Law* 277, 288.

<sup>17</sup> 1995 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* ('*Straddling Stocks Agreement*').

<sup>18</sup> Marine wildlife issues have also arisen less directly in the context of maritime boundary cases. In the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246 the United States submitted that ecological considerations were relevant in defining a single maritime boundary dividing the continental shelf and exclusive fishing zone of Canada and the United States in the Gulf of Maine. When it came to fixing a boundary, the ICJ noted that 'essentially ecological' or other natural criteria could not be determinative in identifying a single maritime boundary line for both the exclusive fishing zone and the continental shelf. On subsequent developments in marine environmental management in the region see A Chircop, D VanderZwaag and P Mushkat, 'The Gulf of Maine Agreement and Action Plan: A Novel but Nascent Approach to Transboundary Marine Environmental Protection' (1995) 19 *Marine Policy* 317. In the *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38 the ICJ was also presented with an opportunity to incorporate ecological considerations in delimiting the boundaries of the opposing continental shelves and EFZs claimed by Denmark (from Greenland) and Norway (from Jan Mayen). However, notwithstanding that the near extinction of a particular species of fish (capelin, *Mallotus villosus*) was one of the reasons for the emergence of the dispute, the ICJ made no mention of environmental considerations in its

disputes generally involve both a complex balancing of the rights and interests of coastal and distant water fishing states and a consideration of the broader interests of the international community in the sustainable exploitation of marine wildlife and the protection of marine ecosystems.

A *The Limits of Coastal State Jurisdiction Over Adjacent Fisheries*

(a) *The Bering Sea Fur Seals Case*

Although the decision ultimately handed down in the *Bering Sea Fur Seals Case* provided a very imperfect template for the sustainable management of marine resources, the arguments of the parties, and the arbitrators, provide many insights into the environmental awareness of the international community in the late nineteenth century.

The dispute giving rise to the case arose in 1886 following the arrest by the United States of Canadian sealing schooners engaged in pelagic sealing for Alaskan Fur Seals (*Callorhinus alascanus*) near the Pribilof Islands, part of United States territory.<sup>19</sup> United States authorities had seized the vessels on the high seas pursuant to domestic legislation prohibiting the taking of wildlife from Alaskan territory ‘or the waters thereof’,<sup>20</sup> and it was claimed that the sealing threatened the existence of seal colonies that frequented the Pribilof Islands for five months each year.<sup>21</sup> Pelagic sealing had a particularly negative effect on the overall Fur Seals population as it involved killing a disproportionate number of female seals (up to 90 per cent of catches).<sup>22</sup>

The legal arguments presented by both parties were relatively straightforward. Justifying its actions the United States asserted that it possessed jurisdiction over the seas where the British vessels were arrested under a treaty of cession concluded with Russia.<sup>23</sup> It also claimed that the killing of Fur Seals at sea was an offence ‘*contra bonos mores*’ and a violation of the property rights of the United States in the seal herds.<sup>24</sup> For its part, Britain insisted that the vessels enjoyed complete freedom on the high seas and had therefore been improperly seized. The British government also argued that any

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judgment. In his Separate Opinion, Judge Weeramantry argued that among the relevant equitable considerations in the process of delimitation was ‘the sacrosanct nature of earth’s resources, harmony of human activity with the environment, respect for the rights of future generations, and the custody of earth’s resources with the standard of due diligence expected of a trustee.’ (at 276-277).

<sup>19</sup> For a detailed history of sealing in the North Pacific up to 1942, see Jozo Tomasevich, *International Agreements on Conservation of Marine Resources* (1943, reprinted 1971) 65-122.

<sup>20</sup> *Bering Sea Fur Seals Case* (1898) 1 *Moore’s International Arbitrations* 755, 763.

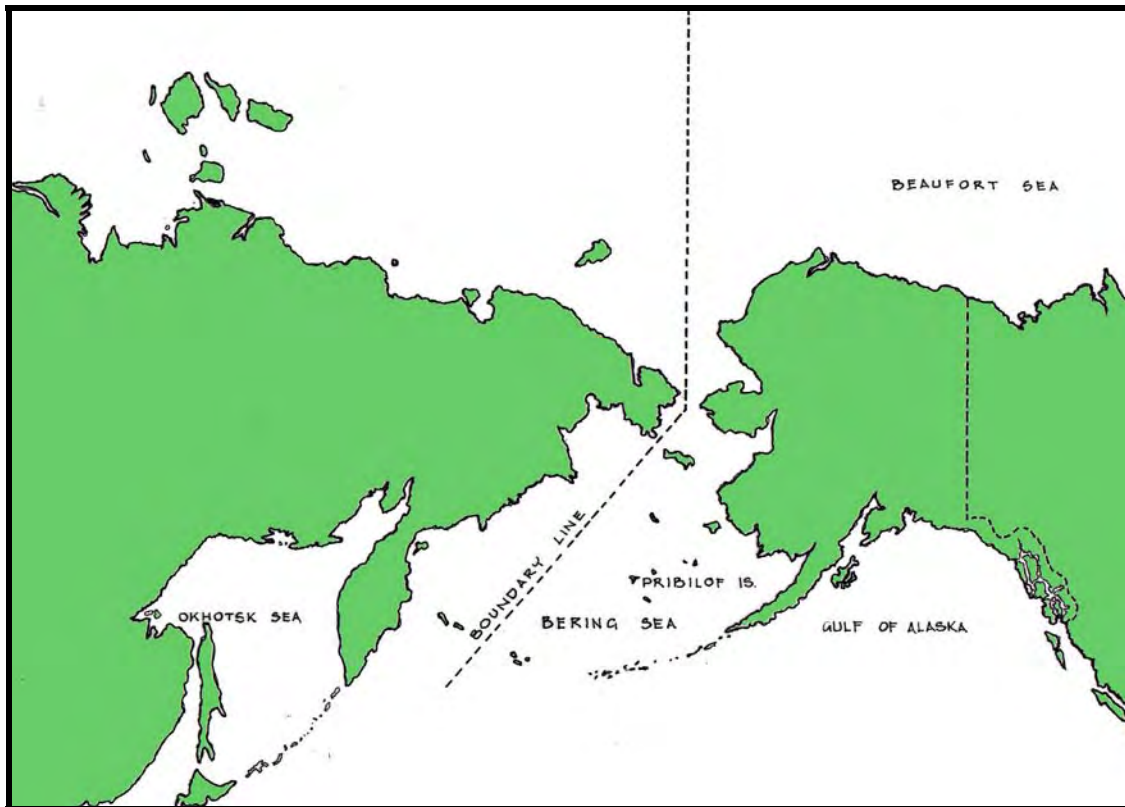
<sup>21</sup> William Williams, ‘Reminiscences of the Bering Sea Arbitration’ (1943) 37 *American Journal of International Law* 562, 569.

<sup>22</sup> *Ibid.*

<sup>23</sup> *1867 Russia-United States Convention Ceding Alaska*.

<sup>24</sup> *Bering Sea Fur Seals Case* (1898) 1 *Moore’s International Arbitrations* 755, 793-794.

questions regarding the management of the species should be referred to a commission of experts.<sup>25</sup>



**Figure 7.1 The Bering Sea and Pribilof Island**

Following unsuccessful attempts to resolve the dispute by diplomatic means,<sup>26</sup> the parties agreed to submit the dispute to arbitration.<sup>27</sup> The Tribunal which was formed was presented with five questions,<sup>28</sup> the first four of which concerned United States jurisdiction over the seas where the British vessels were arrested. The fifth question was whether, assuming there was no such jurisdiction, the United States possessed rights of protection or property in the Fur Seals on the high seas. Additionally the Tribunal was asked, should it conclude that the United States did not have jurisdiction or a right of protection or property in the seals, to determine what ‘concurrent regulations outside the jurisdictional limits of the respective Governments are necessary for the proper protection and preservation of the Fur Seals.’<sup>29</sup> By this procedure the Tribunal was

<sup>25</sup> Ibid.

<sup>26</sup> For an overview of these attempts see Cesare P R Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000) 137-138.

<sup>27</sup> 1892 *Great Britain-United States Treaty Submitting to Arbitration the Questions Relating to Seal Fisheries in the Bering Sea*.

<sup>28</sup> Ibid art VI.

<sup>29</sup> Ibid art VII.

effectively requested to legislate a joint regulatory regime for sustainable sealing in the Bering Sea.<sup>30</sup>

In its submissions the United States relied heavily on the evidence that Alaskan Fur Seals were begotten, born and reared on Alaskan territory and always returned to the Pribilof Islands, and that the herd was on the verge of extinction due to the inappropriate and wasteful method of sealing employed by British sealers. The United States made a threefold legal argument: first that it had property in the Fur Seals, second, that irrespective of its property rights it had an interest in harvesting the seal herd which it was entitled to protect, and third that it was the trustee for 'preserving and cherishing this valuable interest.'<sup>31</sup>

The United States' arguments in relation to the third submission are remarkable for their conceptualisation of the environment. Although fundamentally anthropocentric in outlook, being reliant on the notion of human custodianship of nature and natural resources, these arguments sought to place an asserted obligation to protect marine wildlife on conceptual footings that acknowledged the importance of marine wildlife as elements of a 'natural trust' held for the benefit of future generations. This was an early and important expression of the idea of inter-generational rights – the idea that as 'members of the present generation, we hold the earth in trust for future generations'<sup>32</sup> – which forms an integral part of the broader notion of sustainable development. Counsel for the United States described the earth and its natural resources as a 'gift in common' to mankind, that may only be the subject of usufructuary possession and not absolute beneficial ownership, and which must be protected for the interests of 'succeeding tenants.'<sup>33</sup>

By contrast, the British submissions sought primarily to rely on the freedom of the high seas and suggested that the United States' arguments could not be accepted because they were without precedent in international law. Hence, although the case arose out of a dispute regarding sealing, from the British perspective this environmental dispute was a vehicle for resolving a question of legal principle regarding high seas freedoms which carried implications for its activities throughout the world's oceans.

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<sup>30</sup> Romano, above n 26, 143.

<sup>31</sup> *Bering Sea Fur Seals Case* (1898) 1 *Moore's International Arbitrations* 755, 812-814.

<sup>32</sup> Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *American Journal of International Law* 198, 199. See also Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989). Under principle 1 of the *Stockholm Declaration* UN Doc A/CONF.48/14/Rev.1 (1973) humankind is said to bear 'a solemn responsibility to protect and improve the environment for present and future generations.'

<sup>33</sup> Written argument by Mr Carter, Counsel for the United States. Reproduced in *Bering Sea Fur Seals Case* (1898) 1 *Moore's International Arbitrations* 755, 833-834.



The Tribunal delivered a brief award, characteristic of many arbitral decisions of the period, and did not engage in an evaluation of the parties' arguments. It simply issued the epigrammatic statement that the United States 'has not any right of protection or property in the Fur Seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three mile-limit.'<sup>34</sup> Having therefore found against the United States on all substantive points, the Tribunal turned to devise recommendations for a regulatory scheme for the protection and preservation of the Fur Seals herd. These regulations, to apply to the United States and to Britain on the high seas only, were set out in nine detailed articles, and provide a basic model for conservation measures adopted by regional fisheries management organisations to this day.<sup>35</sup>

The regulations incorporated several important features. They provided for a closed area for sealing around the Pribilof Islands, a closed season in an adjacent area of high seas, limitations on the type of vessels to be used, a vessel licensing scheme, a requirement that catch records be kept by masters, limitations on the gear to be used, and exceptions from the regulations for indigenous peoples. Not only did the Tribunal recommend that these regulations be agreed to by the United States and Britain but also declared that they should be implemented in their respective national legal systems.<sup>36</sup>

(i) *The Conceptual Constraints of the Award*

Although the Tribunal resolved the dispute by rigid adherence to the *mare liberum* doctrine, individual statements by members of the Tribunal acknowledged that the dispute raised issues relating to environmentally sustainable oceans management. The President of the Tribunal, Baron de Courcel, observed that the award of the Tribunal was 'a first attempt at a sharing of the products of the ocean, which has hitherto been undivided.'<sup>37</sup> The President also alluded to the tragedy of the commons, noting the overexploitation of the 'fruits' of the seas by 'men, who, like the hero Alexander...feel confined in a world too narrow.'<sup>38</sup>

The arbitrators appointed by the United States thought that the Tribunal had taken an inflexible approach not justified under the terms of the arbitration treaty which afforded the Tribunal considerable latitude in resolving the dispute according to equitable

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<sup>34</sup> Ibid 949.

<sup>35</sup> Patricia Birnie and Alan Boyle, *International Law and the Environment* (2nd ed, 2002) 650.

<sup>36</sup> *Bering Sea Fur Seals Case* (1898) 1 *Moore's International Arbitrations* 755. Both states enacted domestic legislation in 1894.

<sup>37</sup> Ibid 945.

<sup>38</sup> Ibid.

considerations.<sup>39</sup> Justice Harlan observed that the twin claims that the United States possessed property in the seals and could assert a right of protection of the seals on the high seas must be rejected if precedent were required, as there was no such precedent.<sup>40</sup> However, he argued, the question as to whether public international law supported the United States' claim had to be examined by respect to 'the law of nature; that is, by the principles of justice, sound reason, morality, and equity, as recognized and approved by civilized peoples.'<sup>41</sup> A particularly interesting feature of Justice Harlan's dissenting decision concerned the question of property in the Alaskan Fur Seals herd, in relation to which the United States was able to draw upon principles of Roman law concerning rights over animals evincing an *animus revertendi* ('intention to return home').<sup>42</sup> Justice Harlan suggested that wild animals could not ordinarily become property unless 'by care, watchfulness, self-denial, and industry, [he] induces or causes them to abide, for stated periods in each year, upon his premises, so that he, and he only, is in a position to deal with the race as a whole, taking its increase regularly for commercial purposes without impairing the stock.'<sup>43</sup>

To a considerable extent the Tribunal overlooked the essence of these arguments which were based on a special and historic claim on behalf of humankind generally, rather than a specific jurisdictional claim over areas of the high seas. The United States was effectively asserting an entitlement to be the primary guardians or stewards of a particular species and this can be seen as an important and indirect reference, if not to the ecosystem approach, to the related notion that a species should be regulated across the whole of its geographical occurrence.

There are obvious practical difficulties with the approach to environmental management advocated by the United States in comparison with a scheme that draws clear jurisdictional boundaries. Nonetheless, the notion that a state possessing a substantial connection with migratory marine wildlife should be entitled to protect the species in adjacent high seas if threatened with extinction is preferable to an approach that asserts absolute high seas freedoms. At the very least a cogent argument could be

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid 914.

<sup>41</sup> Ibid.

<sup>42</sup> See for instance Justinian, *Institutiones* (Peter Birks and Grant McLeod trans, 1987) II.1.12-15 ('Wild animals, birds and fish...become the property of the taker as soon as they are caught. However wild animals may be to some extent domesticated so that they go back and forth from the wilderness. Such animals remain in the ownership of the person to whose property they habitually return for 'so long as they keep their homing instinct.'). See also Henry Sumner Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge 1887* (1888), 95.

<sup>43</sup> *Bering Sea Fur Seals Case* (1898) 1 *Moore's International Arbitrations* 755, 914.

made that the United States' was legitimately protesting against the abuse of rights of other states in the exploitation of a shared resource.<sup>44</sup>

Given the inchoate state of the law of the sea, and the broad ambit of the arbitral agreement conferring jurisdiction upon the Tribunal, it appears to have been open to the Tribunal in 1893 to have accepted the United States' submissions.<sup>45</sup> Indeed it should be noted that in the *Icelandic Fisheries Case*,<sup>46</sup> which will shortly be discussed, the ICJ suggested a not dissimilar concept of 'preferential rights', under which coastal states are said to have a special, but not exclusive, entitlement to adopt conservation measures in relation to adjacent fisheries on the high seas when it can demonstrate a longstanding interest in the fisheries in question. However, rather than accepting the invitation of the United States, the Tribunal chose to avoid a consideration of the fundamental issue – whether, and in what circumstances, it is appropriate for a state to act unilaterally in order to protect an interest of the international community as a whole.<sup>47</sup>

The deficiencies with the Tribunal's *mare liberum* approach, and with the bilateral regulations which it developed, were made apparent not long after the case was decided. The Tribunal's regulations permitted enforcement by United States and Britain in relation to each other's vessels, however both Japan and Russia, whose sealers were also heavily engaged in pelagic sealing in the Bering Sea, did not agree to similar regulations and Canadian vessels began to fly Japanese and Russian flags of convenience. Eventually, in the face of imminent extinction of the Alaskan Fur Seals, all four states agreed to a treaty in 1911 suspending pelagic sealing in the North Pacific Ocean.<sup>48</sup>

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<sup>44</sup> See Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 *McGill Law Journal* 389, 428 (arguing that the principle of abuse of rights offers a way of protecting common spaces in the absence of more precise treaty-based or customary rules).

<sup>45</sup> But see *contra* Douglas M Johnston, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries* (1985) 111 (arguing that the Tribunal was confronted with a difficulty commonly faced by international courts dealing with environmental problems, namely the lack of prior coherent and authoritative decisions).

<sup>46</sup> *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction)* [1973] ICJ Rep 3 (*Merits*) [1974] ICJ Rep 3; *Fisheries Jurisdiction Case (Germany v Iceland) (Jurisdiction)* [1973] ICJ Rep 49 (*Merits*) [1974] ICJ Rep 175 (*Icelandic Fisheries Case*). Unless otherwise indicated all references are to the United Kingdom case.

<sup>47</sup> On the role of unilateral measures in the environmental context see generally Daniel Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11 *European Journal of International Law* 339.

<sup>48</sup> *1911 Convention Respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean*. For a discussion of this and subsequent developments in relation to the management of Northern Fur Seals see Simon Lyster, above n 8, 40-48.

(b) *The North Atlantic Coast Fisheries Case*

The *North Atlantic Coast Fisheries Case*<sup>49</sup> is an important counterpoint to the *Bering Sea Fur Seals Case*. Whereas the latter award made clear that the United States could not seek to protect Alaskan Fur Seals in areas *beyond* its jurisdiction through the exercise of enforcement jurisdiction over foreign vessels, the *North Atlantic Coast Fisheries Case* was concerned with the rights and duties of coastal states over marine wildlife that fell clearly within their jurisdictional reach.

The case concerned a dispute between Britain and the United States over the interpretation and application of provisions of the *1783 Definitive Treaty of Peace* and the *1815 Convention to Regulate the Commerce Between the Territories of the United States and Great Britain* under which United States residents continued to enjoy fishing privileges along the North Atlantic Coast, including parts of the coast of Newfoundland. The dispute was provoked by restrictive fisheries legislation introduced by Newfoundland and the subsequent seizure of American fishing vessels. By special agreement concluded in 1909 the parties agreed to submit the dispute to the Permanent Court of Arbitration ('PCA').<sup>50</sup>

The first and primary question for the PCA was whether Britain could, in the absence of United States consent, impose reasonable regulations upon fishing operations conducted by United States residents.<sup>51</sup> The PCA, in its first case involving environmental questions, held that requiring such consent would make the fishery 'unregulatable'<sup>52</sup> and that Britain was the local sovereign and was 'not only entitled, *but obliged*, to provide for the protection and preservation of the fisheries.'<sup>53</sup> Therefore, although emerging out of a specific regime for the exploitation of a fishery by two neighbouring states pursuant to longstanding agreement, the PCA's decision does helpfully emphasise the primary responsibility of a coastal state to protect and conserve the marine environment within its jurisdiction.<sup>54</sup> However, it must also be recognised that the decision was not framed in environmental terms, and the chief concern was to ensure the rational exploitation of fisheries to protect human industry.

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<sup>49</sup> *North Atlantic Coast Fisheries Case (Great Britain/United States of America)* (1910) 11 RIAA 167 ('*North Atlantic Coast Fisheries Case*').

<sup>50</sup> *1909 Special Agreement for the Submission of Questions Relating to Fisheries on the North Atlantic Coast*.

<sup>51</sup> *Ibid* art I.

<sup>52</sup> *North Atlantic Coast Fisheries Case* (1910) 11 RIAA 167, 186.

<sup>53</sup> *Ibid* 187 (emphasis added).

<sup>54</sup> See now *LOS Convention*, art 61.

(c) *The Icelandic Fisheries Case*

This case arose out of the so-called ‘cod war’ between Iceland and several other North Atlantic fishing states that was precipitated by Iceland’s progressive extension of an exclusive fisheries jurisdiction zone (‘EFZ’). With increased interest by distant-water fishing fleets in fully exploited fisheries on the Icelandic continental shelf, Iceland extended its claims to an EFZ so as to conserve demersal fisheries and thereby ensure the survival and expansion of its fishing industry.<sup>55</sup> However Iceland’s extension of its fisheries jurisdiction and its arrest of foreign fishing vessels attracted the strong opposition of a number of states with an interest in the fisheries.

Pursuant to a 1948 law that permitted the establishment of conservation zones within Iceland’s continental shelf,<sup>56</sup> Iceland extended its EFZ in progressive stages: from three to four nautical miles (in 1952) to 12 nm (in 1958) and eventually to 50 nm (in 1971). Both the United Kingdom and Germany objected to these claims, and in 1972 both commenced proceedings against Iceland in the ICJ pursuant to respective exchanges of notes agreed with Iceland in 1961.<sup>57</sup> Iceland, however, refused to take any part in any stage of either proceeding.

As with the *Bering Sea Fur Seals Case*, this case raised the difficult question as to the permissibility of unilateral assumption of prescriptive and enforcement jurisdiction by a coastal state over adjacent high seas areas in order to protect its economic and environmental interests. Three main issues were posed for the Court: whether Iceland’s claim to a 50 nm EFZ was consistent with international law, whether Iceland’s claim to the EFZ could be asserted against the United Kingdom, and whether Iceland could unilaterally impose conservation measures in high seas areas adjacent to its coast.

The ICJ issued interim orders in 1972 calling upon the parties to refrain from actions which would aggravate the dispute, requiring Iceland to suspend enforcement of its new

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<sup>55</sup> Robin R Churchill, ‘The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States’ Fishing Rights’ (1975) 24 *International and Comparative Law Quarterly* 82, 84. At the time Iceland’s economy was more dependent on fishing than any other nation in the world, with its fishing industry generating 20 per cent of its gross national product: Richard B Bilder, ‘The Anglo-Icelandic Fisheries Dispute’ (1973) 37 *Wisconsin Law Review* 37, 43.

<sup>56</sup> *Law Concerning the Scientific Conservation of the Continental Shelf Fisheries* (1948), art 1. Reproduced in the *Icelandic Fisheries Case (Jurisdiction)* [1973] ICJ Rep 3, 10.

<sup>57</sup> The relevant provisions of these two instruments are reproduced in the *Icelandic Fisheries Case (Jurisdiction)* [1973] ICJ Rep 3; [1973] ICJ Rep 45. Under these notes Germany and the United Kingdom withdrew their objection to Iceland’s 12 nm fishing zone and, in return, Iceland permitted German and British vessels to fish between six and 12 miles off its coast within specified areas to be phased out over a period of three years. In addition, and providing the jurisdictional basis for the subsequent case in the ICJ it was provided that ‘[t]he Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959 [which declared that “Iceland has an unequivocal right to the entire continental shelf”], regarding the extension of the fisheries jurisdiction around Iceland, but shall give to the [German and United Kingdom] Government[s] six months’ notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice.’

regulations and stipulating that Germany and the United Kingdom limit their annual catches in the area claimed by Iceland.<sup>58</sup> The ICJ subsequently handed down its judgment on the merits in 1974, at an important stage both for the development of the law of the sea and international environmental law more generally.<sup>59</sup> In what is widely regarded as a highly unsatisfactory decision,<sup>60</sup> the Court avoided answering directly the central question posed for decision – the legality of Iceland’s 50 nm claim. Instead the Court found that the claim was not opposable to the applicants. In relation to the question of Iceland’s conservation measures the Court developed the problematic doctrine of ‘preferential rights.’ However, the Court did find that coastal states could assert a claim to a 12 nm EFZ consistent with customary international law and this conclusion, coupled with the court’s preferential fisheries doctrine, which is inherently incompatible with the notion of exclusivity, suggests an implicit rejection of Ireland’s 50 nm EFZ.<sup>61</sup>

The reasoning of the Court in relation to the customary status of a 12 nm EFZ revealed little awareness of, or concern for, the environment of the North Atlantic or the more general problem of unsustainable exploitation of high seas fisheries. The Court described the EFZ claimed by Iceland and other states as ‘a *tertium genus* between the territorial sea and the high seas.’<sup>62</sup> However beyond this the Court did not evaluate the purpose of such a zone, or the respective rights and duties of coastal states and flag states within this third type of ocean space. Significantly the Court did not identify the implications of the EFZ for the exploitation and conservation of marine wildlife.

Separate and dissenting opinions did address some of these issues. The Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Singh and Ruda recognised that a coastal state’s claim to an EFZ could help prevent the serious depletion of fisheries resources, as coastal states generally have the greatest interest in ensuring that their adjacent fisheries are not overexploited. These judges acknowledged the reality of the tragedy of the commons, observing that unrestricted access to coastal waters ‘inevitably results in physical and economic waste, since there is no incentive for restraint in the interest of future returns: anything left in adjacent waters for tomorrow may be taken by others today.’<sup>63</sup> In his Separate Opinion Judge Dillard also explored the concept of the EFZ in detail, and was the only judge to discuss some of the scientific

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<sup>58</sup> *Icelandic Fisheries Case (Interim Measures)* [1972] ICJ Rep 12, 17; [1972] ICJ Rep 30, 35.

<sup>59</sup> The judgment was handed down midway through the first session of the Third United Nations Conference on the Law of the Sea and three years after the *Stockholm Declaration*, above n 32, recognised in principle 4 the need ‘to safeguard and wisely manage the heritage of wildlife and its habitat.’

<sup>60</sup> Churchill, above n 55.

<sup>61</sup> *Ibid* 90.

<sup>62</sup> *Icelandic Fisheries Case (Merits)* [1974] ICJ Rep 3, 24.

<sup>63</sup> *Ibid* 48-49.

realities of fisheries conservation. Fish, Judge Dillard wryly observed, ‘are no respecters of national jurisdictions.’<sup>64</sup> Accordingly, while not disavowing the notion of the EFZ, Judge Dillard suggested that a flexible approach should be taken depending on the fishery concerned.<sup>65</sup>

By contrast to the Court’s brief treatment of the concept of the EFZ, the majority judgment considered the notion of ‘preferential fishing rights’ in depth. The Court explained that such rights of a coastal state arise only ‘when the intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch-limitation and sharing of those resources’ so as ‘to preserve *the interests of their rational and economic exploitation.*’<sup>66</sup> However, these preferential rights are by definition not exclusive, and hence the coastal state and other states with an interest in the fisheries must seek an accommodation of their competing claims through negotiation and cooperation.<sup>67</sup>

(i) *Judicial Activism and the Doctrine of ‘Preferential Fishing Rights’*

There are several questionable features of the doctrine of preferential fishing rights as expounded by the Court. Not only was the issue not raised by the parties (indeed Iceland had never claimed such rights),<sup>68</sup> but there is little evidence to support the Court’s conclusion that it constituted a part of customary law.<sup>69</sup> According to Churchill, the concept was a ‘sheer invention’,<sup>70</sup> and a clear example of ‘judicial creativity.’<sup>71</sup>

Although this reveals the willingness, and indeed the capacity, of the ICJ to develop the law in a situation of perceived need, it also confirms the importance for judicial innovation to be based on a sound appreciation of relevant issues of environmental and economic policy. At a conceptual level the doctrine of preferential rights appears to disregard environmental considerations, and is instead concerned with reconciling the competing economic interests of coastal and distant-water fishing states. Hence when the Court speaks of the requirement for the preferential fishing rights of coastal states to be limited having regard to ‘*the needs of conservation,*’<sup>72</sup> the term ‘conservation’ is

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<sup>64</sup> Ibid 61.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid 27 (emphasis added).

<sup>67</sup> Ibid 27-28.

<sup>68</sup> Churchill, above n 55, 93.

<sup>69</sup> Ibid 93-96. Churchill and Lowe note that the rule is imprecise and that no state before or since the ICJ’s judgment has sought to claim such preferential fishing rights: Churchill and Lowe, above n 14, 285. However, it must be noted that the development of the EEZ rendered the preferential fishing rights doctrine otiose.

<sup>70</sup> Churchill, above n 55, 104.

<sup>71</sup> Ibid.

<sup>72</sup> *Icelandic Fisheries Case (Merits)* [1974] ICJ Rep 3, 31 (emphasis added).

understood only in terms of ensuring maximum sustainable yield, not as an objective to preserve the ecosystem of which the fishery forms part.<sup>73</sup>

Furthermore, the Court failed to foresee the harmful consequences of its preferential rights doctrine for some fisheries yet to be fully exploited. It effectively established a perverse incentive to coastal states to overexploit fisheries so that they may point to an historic dependence in any future negotiations with distant water fishing nations.<sup>74</sup> This is unfortunate as the notion of preferential fishing rights might have been developed by the Court in such a way as to recognise the special interest of coastal states in managing and conserving adjacent fisheries on the high seas and thereby resolve the substantive question posed, but not satisfactorily answered, in the *Bering Sea Fur Seals Case*.<sup>75</sup>

By contrast, one of the more helpful aspects of the decision is the Court's discussion of the need for negotiation and cooperation in order to promote the equitable and rational exploitation of high seas fisheries. In an important passage the Court remarked that:

It is one of the advances in maritime international law resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States *and the needs of conservation for the benefit of all*. Consequently, both Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them.<sup>76</sup>

The Court therefore emphasised the necessity for states to have regard to the interests of others and to seek on a continuous basis to manage and conserve fisheries in a cooperative and equitable manner.<sup>77</sup> Although tentative, and reliant on an economic conception of conservation, the Court's statement is therefore an important presage of future developments in international environmental law relating to the marine environment.<sup>78</sup> The *LOS Convention* repeatedly emphasises the need for states to

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<sup>73</sup> For a general analysis of the influence of economic rationales for ecosystem protection and resource conservation in environmental law see Alexander Gillespie, *International Environmental Law Policy and Ethics* (1997) 28-61.

<sup>74</sup> Churchill, above n 55, 103.

<sup>75</sup> Indeed Iceland's representatives had argued publicly that coastal fisheries should be considered part of the natural resources of the coastal state: see Juda, above n 9, 178.

<sup>76</sup> *Icelandic Fisheries Case (Merits)* [1974] ICJ Rep 3, 32 (emphasis added).

<sup>77</sup> Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (1989) 34-35.

<sup>78</sup> Indeed this passage has even been interpreted as an early articulation of aspects of the precautionary approach in oceans governance: *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624, Separate Opinion of Judge Laing, [20].



cooperate to the greatest extent possible to adopt policies of management and conservation of marine living resources based on the best available scientific data.<sup>79</sup>

This part of the judgment can also be seen to illustrate the practical limitations of utilising an essentially bilateral and adjudicative process to resolve a dispute involving multiple states and concerning complex questions of resource allocation and management. The Court appears to have recognised these constraints. When it came to the actual disposition of the case, the ICJ observed that the most appropriate method for resolving the dispute was negotiation, and that as the parties were in possession of the relevant scientific information and expertise it was not desirable for the Court to set out a precise scheme.<sup>80</sup> Nonetheless it was expected that the Court's articulation of guiding principles would encourage the parties towards a satisfactory resolution of the 'cod wars'.

This expectation proved to be misplaced.<sup>81</sup> From the outset Iceland refused to take any part in any aspect of the proceedings, and the Court's judgment provided uncertain guidance to the parties on the applicable law. Legal developments outside the courtroom soon made redundant the Court's statements regarding the 12 nm EFZ and the doctrine of preferential rights. In 1976 the United Kingdom claimed a 200 nm EFZ, and in 1977 this became the European Community limit.<sup>82</sup> Subsequently the *LOS Convention* established the 200 nm EEZ regime which accorded coastal states jurisdiction and sovereign rights over marine wildlife within this area.

Nonetheless, although now of historical interest only, the judgment provides several insights into the ICJ's understanding and appreciation of environmental issues at an important period in the emergence of international environmental law. It also suggests that the ICJ does have the capacity to develop environmentally significant rules and principles in circumstances of perceived need. However, the judgment did not meet the legitimate expectation that the Court would consider the weaknesses in the then applicable international legal regime relating to fisheries and identify possible options for improvement.

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<sup>79</sup> See, eg, *LOS Convention*, art 118 ('States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States...shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned.').

<sup>80</sup> *Icelandic Fisheries Case (Merits)* [1974] ICJ Rep 3, 32.

<sup>81</sup> Romano, above n 26, 152.

<sup>82</sup> *Fisheries Limits Act 1976* (UK).

(d) *The Estai Case*

The persistent question as to the limits of coastal state competence to manage adjacent high seas fisheries arose once again in the *Fisheries Jurisdiction Case*,<sup>83</sup> which concerned the so-called ‘turbot war.’<sup>84</sup> The dispute arose against the background of severe overfishing in the Northwest Atlantic, and a European Union quota for the catch of turbot (*Reinhardtius hippoglossoides*)<sup>85</sup> which was over five times above the catch levels recommended by the Northwest Atlantic Fisheries Organization (‘NAFO’).<sup>86</sup> Canada seized a Spanish fishing vessel, the *Estai*, on the high seas pursuant to the *Coastal Fisheries Protection Act* 1994 (Can) which enabled Canadian authorities to take urgent action necessary to protect endangered straddling stocks on the Grand Banks. As Iceland had done 20 years earlier in the context of the *Icelandic Fisheries Case*, Canada invoked the doctrine of necessity to defend its actions, asserting that an essential interest of Canada was threatened by a grave and imminent peril.<sup>87</sup>

The arrest prompted Spain to commence proceedings against Canada in the ICJ. Although the Court did not consider the dispute on the merits, in an important decision on jurisdiction and admissibility<sup>88</sup> it was held that Canada’s optional clause declaration<sup>89</sup> excluded the Court’s jurisdiction.<sup>90</sup> Clearly this case posed profound questions

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<sup>83</sup> *Fisheries Jurisdiction Case (Spain v Canada) (Jurisdiction and Admissibility)* [1998] ICJ Rep 431 (‘*Estai Case*’).

<sup>84</sup> Christopher C Joyner, ‘On the Borderline? Canadian Activism in the Grand Banks’ in Olav Schram Stokke (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001) 207. See also A Anna Zumwalt, ‘Straddling Stocks Spawn Fish War on the High Seas’ (1997) 3 *University of California at David Journal of International Law and Policy* 535, Andrew Schaefer, ‘Canada-Spain Fishing Dispute (The Turbot War)’ (1996-1997) 8 *Georgetown International Environmental Law Review* 437.

<sup>85</sup> A species of deepwater flatfish also known as ‘Greenland halibut’ and ‘Greenland turbot’.

<sup>86</sup> Established by the *1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*.

<sup>87</sup> Glen Plant, ‘The EC/Canadian Fisheries Dispute in the Northwest Atlantic’ (1995) 44 *International and Comparative Law Quarterly* 927, 936. See also the Commentary to art 25 of the International Law Commission’s *Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission 53rd Session*, UN Doc A/56/10 (2001) (noted in GA Res 56/83, UN Doc A/RES/56/83 (2001)). Reprinted in James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002).

<sup>88</sup> See Louise De La Fayette, ‘The Fisheries Jurisdiction Case (Spain v Canada), Judgment on Jurisdiction of 4 December 1998’ (1999) 48 *International and Comparative Law Quarterly* 664; Malgosia Fitzmaurice, ‘The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice’ (1999) 20 *Australian Year Book of International Law* 127, 148-150.

<sup>89</sup> In its art 36(2) declaration, made 10 May 1994, Canada accepted the jurisdiction of the Court with respect to all disputes excluding ‘disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures.’: *Declaration of Canada Recognising as Compulsory the Jurisdiction of the ICJ* (1994) <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>> at 1 July 2005.

<sup>90</sup> *Estai Case* [1998] ICJ Rep 431, [87]. Significantly, had both Canada and Spain been parties to the *LOS Convention* at the time of the arrest of the *Estai*, Spain could have pursued the case under the compulsory procedures established by pt XV of the *LOS Convention*.

concerning the adequacy of international fisheries law to protect highly endangered fish stocks, and had it proceeded to the merits stage the ICJ would have had an opportunity to evaluate the legality of Canada's attempts to protect a threatened fishery in the light of significant developments in international environmental law since the *Icelandic Fisheries Case*.<sup>91</sup>

Although aborted at an early stage, the *Estai Case* nonetheless had a significant impact on the development of the law of the sea relating to the conservation of straddling fisheries. Disputes over straddling stocks had been described as the 'greatest threat'<sup>92</sup> to the law of the sea since the conclusion of the *LOS Convention* and Canada's arrest of the *Estai* while the United Nations Straddling Stocks Conference was underway highlighted the deficiencies in the rudimentary regime for conserving high seas fisheries contained in the *LOS Convention*. As a result it was a catalyst for the conclusion of the *Straddling Stocks Agreement* which substantially addressed Canada's concerns.<sup>93</sup>

#### B *Disputes under the LOS Convention: Part XV Jurisprudence*<sup>94</sup>

The dispute settlement system established by Part XV of the *LOS Convention* represents one of the most significant developments in the 'patchwork' of adjudicative institutions for the settlement of international environmental disputes. Under Part XV a variety of disputes over marine environmental issues may be subject to judicial settlement by ITLOS, by the ICJ or by arbitral panels established pursuant to Annexes VII or VIII of the *LOS Convention*.

Since the entry into force of the *LOS Convention*, both ITLOS and Annex VII Arbitral tribunals have considered several significant disputes involving questions as to the exploitation and conservation of marine wildlife. The following discussion examines the decisions of ITLOS relating to the prompt release of foreign vessels arrested by coastal states on suspicion of Illegal, Unregulated and Unreported ('IUU') fishing,

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<sup>91</sup> Romano, above n 26, 194. Although it seems probable that the Court would have found in favour of Spain: Robin Churchill, 'Fisheries Jurisdiction Case (Spain v Canada)' (1999) 12 *Leiden Journal of International Law* 597, 609.

<sup>92</sup> Bernard H Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 *American Journal of International Law* 277, 304.

<sup>93</sup> Christopher C Joyner and Alejandro Alvarez von Gustedt, 'The Turbot War of 1995: Lessons for the Law of the Sea' (1996) 11 *International Journal of Marine and Coastal Law* 425, 451. For discussion of recent Canadian practice see Rosemary Rayfuse, 'Canada and Regional Fisheries Organizations: Implementing the UN Fish Stocks Agreement' (2003) 34 *Ocean Development and International Law* 209. Canada became a party to the *Straddling Stocks Agreement* on 3 August 1999.

<sup>94</sup> The discussion under this heading partly draws upon Donald R Rothwell and Tim Stephens, 'Dispute Resolution and the Law of the Sea: Reconciling the Interaction Between the LOS Convention and Other Environmental Instruments' in Alex G Oude Elferink and Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 209.

before turning to consider the decisions of ITLOS and an Annex VII Arbitral Tribunal in the *Southern Bluefin Tuna Dispute*.

| <b>CASES IN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA</b>  |
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| Case No 1: <i>M/V Saiga Case (Saint Vincent and the Grenadines v Guinea)</i><br>( <i>Prompt Release</i> ) (1997) 110 ILR 736   |
| Case No 2: <i>M/V Saiga (No 2) Case (Saint Vincent and the Grenadines v Guinea)</i><br>( <i>Provisional Measures</i> ) (1998) 117 ILR 111<br>( <i>Admissibility and Merits</i> ) (1999) 120 ILR 143  |
| Cases No 3 and 4: * <i>Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)</i><br>( <i>Provisional Measures</i> ) (1999) 117 ILR 148, (1999) 38 ILM 1624 (' <i>SBT Order</i> ')   |
| Case No 5: * <i>Camouco Case (Panama v France)</i><br>( <i>Prompt Release</i> ) (2000) 125 ILR 151, (2000) 39 ILM 666  |
| Case No 6: * <i>Monte Confurco Case (Seychelles v France)</i><br>( <i>Prompt Release</i> ) (2000) 125 ILR 203  |
| Case No 7: * <i>Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)</i> (' <i>Swordfish Stocks Case</i> ')<br>Proceedings suspended (15 March 2001 and 16 December 2003) < <a href="http://www.itlos.org">http://www.itlos.org</a> > at 1 July 2005                    |
| Case No 8: <i>Grand Prince Case (Belize v France)</i><br>( <i>Prompt Release</i> ) (2001) 125 ILR 251  |
| Case No 9: <i>Chaisiri Reefer 2 Case (Panama v Yemen)</i><br>( <i>Prompt Release</i> ) Proceedings discontinued 13 July 2001 < <a href="http://www.itlos.org">http://www.itlos.org</a> > at 1 July 2005  |
| Case No 10: * <i>MOX Plant Case (Ireland v United Kingdom)</i><br>( <i>Provisional Measures</i> ) (2002) 41 ILM 405 (' <i>MOX Plant Order</i> ')   |
| Case No 11: * <i>Volga Case (Russian Federation v Australia)</i><br>( <i>Prompt Release</i> ) (2003) 42 ILM 159  |
| Case No 12: * <i>Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor</i><br>( <i>Malaysia v Singapore</i> )<br>( <i>Provisional Measures</i> ) (2003) < <a href="http://www.itlos.org">http://www.itlos.org</a> > at 1 July 2005  |
| Case No 13: * <i>Juno Trader Case (St Vincent and the Grenadines v Bissau)</i><br>( <i>Prompt Release</i> ) (2004) < <a href="http://www.itlos.org">http://www.itlos.org</a> > at 1 July 2005  |
| <b>ARBITRATIONS UNDER THE LOS CONVENTION, ANNEX VII</b>  |
| * <i>Southern Bluefin Tuna Case (Australia &amp; New Zealand v Japan)</i><br>( <i>Jurisdiction and Admissibility</i> ) (2000) 119 ILR 508, (2000) 39 ILM 1359 (' <i>SBT Award</i> ')   |
| * <i>MOX Plant Case (Ireland v United Kingdom)</i><br>( <i>Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures</i> )<br>( <i>Order 3, of 24 June 2003</i> ) ( <i>Order 4, of 14 November 2003</i> ) < <a href="http://www.pca-cpa.org">http://www.pca-cpa.org</a> > at 1 July 2005<br>( ' <i>MOX Plant Award</i> ' ) |
| * <i>Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor</i><br>( <i>Malaysia v Singapore</i> ) Case settled (2005)<br>< <a href="http://app.www.mfa.gov.au/internet/press/view_press.asp?post_id=1307">http://app.www.mfa.gov.au/internet/press/view_press.asp?post_id=1307</a> > at 1 July 2005                                     |
| <i>Arbitration Between Guyana and Suriname Concerning Maritime Delimitation</i><br>< <a href="http://www.pca-cpa.org">http://www.pca-cpa.org</a> > at 1 July 2005  |
| <i>Arbitration Between Barbados and the Republic of Trinidad and Tobago Concerning Maritime Delimitation</i><br>< <a href="http://www.pca-cpa.org">http://www.pca-cpa.org</a> > at 1 July 2005   |

**Table 7.1. Cases brought before the International Tribunal for the Law of the Sea and/or Arbitral Tribunals established under Annex VII of the LOS Convention (an asterisk indicates that the case involved environmental issues)**

(a) *ITLOS Prompt Release Decisions*

While the *LOS Convention* conferred significant jurisdictional capacity upon coastal states to protect the marine environment within their EEZs, there was an appreciation by the Convention's drafters of the potential for enforcement processes to be abused when coastal states arrested flag state fishing vessels for breaches of fishing regulations.

Article 73 of the *LOS Convention* seeks to reconcile these competing interests. Article 73(1) provides that coastal states may, in the exercise of their sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ, take such enforcement action against vessels as is necessary to ensure conformity with its fishing regulations. However, the flag state quid pro quo to this right is the requirement in Article 73(2) that arrested vessels and their crews be 'promptly released upon the posting of reasonable bond or other security.' In addition, Article 292 establishes a procedure by which coastal states may seek the resolution of any dispute concerning such arrests by either an agreed tribunal or, in all other situations, by ITLOS. Article 292 therefore confers compulsory jurisdiction on ITLOS in relation to prompt release cases.<sup>95</sup>

Prompt release cases have dominated the Tribunal's docket.<sup>96</sup> Seven such applications have been made to the Tribunal, although two of these were not heard on their merits.<sup>97</sup> What is significant from the perspective of international environmental law is that three of the remaining five cases (the *Camouco Case*,<sup>98</sup> *Monte Confurco Case*<sup>99</sup> and the *Volga Case*<sup>100</sup>) raised significant issues relating to the conservation and management of 'marine living resources'. In addition, an underlying question in all three cases was the interaction between the *LOS Convention* and another environmental

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<sup>95</sup> R Lagoni, H Heinrich-Noll, and H Vogel, 'The International Tribunal for the Law of the Sea: Establishment and 'Prompt Release' Procedures' (1996) 11 *International Journal of Marine and Coastal Law* 137.

<sup>96</sup> See Table 7.1. For an overview of the Tribunal's prompt release jurisprudence see Yoshifumi Tanaka, 'Prompt Release in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOS Jurisprudence' (2004) 51 *Netherlands International Law Review* 237; Andrew Serdy and Michael Bliss, 'Prompt Release of Fishing Vessels: State Practice in the Light of the Cases Before the International Tribunal for the Law of the Sea' in Alex G Oude Elferink and Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 273.

<sup>97</sup> In the *Grand Prince Case (Belize v France) (Prompt Release)* (2001) 125 ILR 251, ITLOS found that it did not have jurisdiction to consider the application while in the *Chaisiri Reefer 2 Case (Panama v Yemen) (Prompt Release)* <<http://www.itlos.org>> at 1 July 2005, the dispute was settled prior to hearing.

<sup>98</sup> *Camouco Case (Panama v France) (Prompt Release)* (2000) 125 ILR 151, (2000) 39 ILM 666 ('*Camouco Case*').

<sup>99</sup> *Monte Confurco Case (Seychelles v France) (Prompt Release)* (2000) 125 ILR 203 ('*Monte Confurco Case*').

<sup>100</sup> *Volga Case (Russian Federation v Australia) (Prompt Release)* (2003) 42 ILM 159 ('*Volga Case*').

instrument; the *1980 Convention on the Conservation of Antarctic Marine Living Resources* ('CCAMLR').<sup>101</sup>

The *Camouco Case*, *Monte Confurco Case*, *Grand Prince Case* and *Volga Case* all arose out of arrests by coastal states of foreign fishing vessels engaged in IUU fishing for Patagonian toothfish (*Dissostichus eleginoides*)<sup>102</sup> in the EEZs around sub-Antarctic islands, within the area covered by CCAMLR.<sup>103</sup> The *Camouco*, *Monte Confurco* and *Grand Prince* were seized by French authorities for violating fishing regulations in force in the EEZs around the French islands of Crozet and Kerguelen respectively. Similar issues arose in the *Volga* case in which Australia arrested a Russian-flagged vessel for illegal fishing in the Australian EEZ adjacent to Heard and McDonald Islands.<sup>104</sup>

In the *Camouco*, *Monte Confurco* and *Volga* cases, the Tribunal was required to consider whether the bond set by the arresting state for the release of the vessels was a 'reasonable bond or other security' for the purposes of Articles 73 and 292 of the *LOS Convention*. In undertaking this task the Tribunal has held that it must have regard to a supposed 'balance' which was struck in the *LOS Convention* between coastal and flag state interests.<sup>105</sup> Striking an appropriate balance has proved to be problematic and the Tribunal has in all three cases left unresolved the tension in the *LOS Convention* between the responsibility of coastal states for conserving marine living resources and the interests of flag states in having their vessels promptly released following arrest.<sup>106</sup>

While Article 61 of the *LOS Convention* requires coastal states to 'ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation', that obligation must be appreciated in light of Article 73. The latter provision seeks to

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<sup>101</sup> For an overview of the CCAMLR regime see Steinar Anderson, 'The Convention for the Conservation of Antarctic Marine Living Resources: Improving Procedures but Lacking Results' in Edward L Miles et al (eds), *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2002) 405.

<sup>102</sup> Also known as 'Chilean Sea Bass' and 'Antarctic Sea Bass'. See generally Richard Herr, 'The International Regulation of Patagonian Toothfish: CCAMLR and High Seas Fisheries Management' in Olav Schram Stokke (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001) 303.

<sup>103</sup> See generally Dean Bialek 'Sink or Swim: Measures Under International Law for the Conservation of the Patagonian Toothfish in the Southern Ocean' (2003) 34 *Ocean Development and International Law* 105.

<sup>104</sup> Australia has arrested a number of vessels on suspicion of having undertaken IUU fishing in Australia's EEZ near Heard and McDonald Islands. One such arrest (that of the *Viarsa I*) involved the longest hot pursuit in maritime history. On the pursuit and arrest of the *Volga* and the *Viarsa I* see Tim Stephens, 'Enforcing Australian Fisheries Laws: Testing the Limits of Hot Pursuit in Domestic and International Law' (2004) 15 *Public Law Review* 12. On hot pursuit in the Southern Ocean more generally see Erik Jaap Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: the Pursuits of the *Viarsa I* and the *South Tomi*' (2004) 19 *International Journal of Marine and Coastal Law* 19.

<sup>105</sup> *Monte Confurco Case* (2000) 125 ILR 203, [71]-[72].

<sup>106</sup> Donald R Rothwell and Tim Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests' (2004) 53 *International and Comparative Law Quarterly* 171, 186.

reconcile the interests of coastal states in ensuring compliance with its laws adopted ‘in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone’<sup>107</sup> with the interests of flag states in having their ‘[a]rrested vessels and their crews...promptly released upon the posting of reasonable bond or other security.’<sup>108</sup> Although Article 61 appears highly relevant to a determination of the reasonableness of a bond,<sup>109</sup> the Tribunal has not ventured into environmental issues in any substantial way in its prompt release jurisprudence.<sup>110</sup> The reticence of the Court as a whole is clearly confirmed in the *Volga Case*, the most recent prompt release decision to raise major issues relating to marine environmental protection.<sup>111</sup>

In its judgment in the *Volga Case* the Tribunal recalled its brief statement, in the *Camouco Case*, of some factors relevant to assessing the reasonableness of a bond including: the gravity of alleged offences, possible penalties under the domestic law of the detaining state, the value of the vessel detained and the cargo seized and the amount and form of bond imposed by the detaining state.<sup>112</sup> The Tribunal also noted that in the *Monte Confurco Case* it had held that Articles 292 and 73 seek to ‘balance’ the interests of flag states in having their vessels and crews released promptly with the interests of coastal states detaining such vessels in securing the appearance of the Master in its court and the payment of fines.<sup>113</sup>

When it came to perform this process in the *Volga Case*, the Tribunal took a somewhat restrictive, textual approach. It held that no direct weight was to be placed on

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<sup>107</sup> *LOS Convention*, art 73(1).

<sup>108</sup> *Ibid* art 73(2).

<sup>109</sup> *Camouco Case* (2000) 125 ILR 151, Dissenting Opinion of Judge Anderson.

<sup>110</sup> Although several judges in separate opinions have made reference to the environmental impact of IUU fishing. See in particular the separate opinions of Judge Anderson in the *Camouco Case* (2000) 125 ILR 151, and *Monte Confurco Case* (2000) 125 ILR 203, and the dissenting opinion of Judge Wolfrum in the *Camouco Case* (2000) 125 ILR 151 (noting that *CCAMLR* represents ‘one of the most important structural principles of the [LOS] Convention namely that conservation and management of marine living resources is a task in which all States involved shall cooperate’).

<sup>111</sup> See generally Robin Churchill and Vaughan Lowe, ‘The International Tribunal for the Law of the Sea: Survey for 2002’ (2003) 18 *International Journal of Marine and Coastal Law* 447; Tim Stephens and Donald R Rothwell, ‘The ‘Volga’ Case (Russian Federation v Australia)’ (2004) 35 *Journal of Maritime Law and Commerce* 283; Chester Brown, ‘“Reasonableness” in the Law of the Sea: The Prompt Release of the *Volga*’ (2003) 16 *Leiden Journal of International Law* 621; Philippe Gautier, ‘The International Tribunal for the Law of the Sea: Activities in 2002’ (2003) 2 *Chinese Journal of International Law* 341. In the *Juno Trader Case (St Vincent and the Grenadines v Bissau) (Prompt Release)* (2004) <<http://www.itlos.org>> at 1 July 2005 environmental concerns were raised but were not discussed in any depth in the majority order or in separate declarations and opinions. Guinea-Bissau submitted that IUU fishing had resulted in ‘a serious depletion of its fisheries resources’. The Tribunal simply noted this concern, and did not explain to what extent it was relevant to determining the amount of the bond or other financial security.

<sup>112</sup> *Volga Case* (2003) 42 ILM 159, [63]; *Camouco Case* (2000) 125 ILR 151, [67].

<sup>113</sup> *Volga Case* (2003) 42 ILM 159, [65]; *Monte Confurco Case* (2000) 125 ILR 203, [72].

the serious problem of IUU fishing in the ‘*CCAMLR* area’.<sup>114</sup> Australia had argued that international concern over IUU fishing for toothfish was highly relevant to the assessment of the bond<sup>115</sup> and pointed out that IUU fishing threatened the viability of toothfish and by-catch species such as Albatross that are snared on the long-lines set by IUU vessels.<sup>116</sup> While ITLOS stated that it ‘understands the international concerns about [IUU] fishing and appreciates the objectives behind the measures taken by States, including the States Parties to *CCAMLR*’<sup>117</sup> it noted that the task set for the Tribunal under Article 292 was to decide whether the bond set by Australia was reasonable and that it was only by reference to the possible penalties for the alleged offences that ITLOS could determine their gravity.<sup>118</sup>

In his dissenting judgment, Judge Anderson noted that the Tribunal’s appreciation of international concern over IUU fishing in the *CCAMLR* area was a significant and positive development in its jurisprudence.<sup>119</sup> However, he also argued that coastal state duties to conserve the marine living resources of its EEZ under Article 61, and the complementary obligations imposed by *CCAMLR* to protect and preserve the Antarctic environment, were relevant factors for determining the reasonableness of a bond. Judge ad hoc Shearer went further in his dissenting opinion, holding that the question of reasonableness in the *Volga Case* could not be assessed in isolation from the ‘grave allegations of illegal fishing in a context of the protection of endangered fish stocks in a remote and inhospitable part of the seas.’<sup>120</sup>

Clearly the Tribunal has taken a narrow view of its task in prompt release cases, an approach that might be considered appropriate given the summary nature of its jurisdiction in this context. On the other hand the *LOS Convention* bestows upon coastal states significant responsibility for conserving marine living resources and protecting the marine environment within the EEZ, and arguably this should have been given greater recognition in the balancing process undertaken by ITLOS. Additionally it can also be questioned whether the notion of ‘balancing’ coastal and flag state interests is

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<sup>114</sup> *CCAMLR* applies ‘to the Antarctic marine living resources of the area south of 60° South latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem.’ (art I(1)). For a discussion of *CCAMLR*’s area of application see Donald R Rothwell, *The Polar Regions and the Development of International Law* (1996) 124-128.

<sup>115</sup> *Volga Case* (2003) 42 ILM 159, Australian Statement in Response, [22], [26], [42] and [54], available at <<http://www.itlos.org>> 1 July 2005.

<sup>116</sup> *Ibid* [45].

<sup>117</sup> *Volga Case* (2003) 42 ILM 159, [68].

<sup>118</sup> *Ibid* [69].

<sup>119</sup> *Volga Case* (2003) 42 ILM 159, Dissenting Opinion of Judge Anderson, [2].

<sup>120</sup> *Volga Case* (2003) 42 ILM 159, Dissenting Opinion of Judge ad hoc Shearer, 194.



appropriate in prompt release cases. Not only is the concept of a ‘balance’ not expressly referred to in Article 292, there can be no coastal state – flag state balance in cases such as the *Volga Case* where the real competing interests involved were those of the well-funded IUU fishers on the one hand and the coastal state on the other.<sup>121</sup> A better approach to the question of reasonableness may lie not in such an artificial evaluation preferred by the Tribunal, but instead in the concept of ‘proportionality’.<sup>122</sup> Determining the reasonableness of a bond by reference to whether it is appropriate and adapted to the environmental interest to be protected appears to offer a preferable framework for analysis not least because it could allow the integration of environmental concepts, including the precautionary principle, in the reasoning process.<sup>123</sup>

(b) *The Southern Bluefin Tuna Dispute*

Whereas in its prompt release jurisprudence ITLOS has not sought to engage with fisheries management issues in any significant depth, ITLOS did consider these questions in the first phase of the *Southern Bluefin Tuna Dispute*.<sup>124</sup>

(i) *Background to the Dispute*

The *Southern Bluefin Tuna Dispute* arose out of a breakdown in cooperation among the founding members of the 1993 *Convention for the Conservation of Southern Bluefin Tuna* (‘CCSBT’) which was concluded to ‘ensure, through appropriate management, the conservation and optimum utilisation of Southern Bluefin Tuna.’<sup>125</sup> Among other things, the CCSBT established the Commission for the Conservation of Southern Bluefin Tuna (‘C-CCSBT’) to manage catches by member states by setting, by consensus, the total allowable catch (‘TAC’) for Southern Bluefin Tuna (‘SBT’) and individual national allocations.

The issue at the heart of the disagreement between Australia and New Zealand on the one hand, and Japan on the other, was the current state, and future prospects for recovery, of stocks of SBT (*Thunnus maccoyii*). SBT is a highly migratory species<sup>126</sup> of

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<sup>121</sup> *Volga Case* (2003) 42 ILM 159, Dissenting Opinion of Judge ad hoc Shearer, [19].

<sup>122</sup> Brown, “‘Reasonableness’ in the Law of the Sea: The Prompt Release of the *Volga*”, above n 111, 630.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624 (‘*SBT Order*’); *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility)* (2000) 39 ILM 1359 (‘*SBT Award*’) (together the ‘*Southern Bluefin Tuna Dispute*’). The discussion in this section is partly drawn from Tim Stephens, ‘A Paper Umbrella Which Dissolves in the Rain? Implications of the *Southern Bluefin Tuna Case* for the Compulsory Resolution of Disputes Concerning the Marine Environment Under the 1982 LOS Convention’ (2001) 6 *Asia Pacific Journal of Environmental Law* 297.

<sup>125</sup> *Ibid* art 3.

<sup>126</sup> SBT are included on the list of highly migratory species in annex I of the *LOS Convention*.

pelagic fish that spawn in the waters south of Indonesia and traverse the high seas, EEZs and territorial seas of various states, including Australia and New Zealand.<sup>127</sup> They are long-living, late breeding and are mostly fished on the high seas.<sup>128</sup> Mature and juvenile SBT have a high market value, particularly on the Japanese *sashimi* market, and have been fished heavily since the 1950s with the catch peaking at 81,605 tonnes in 1961.<sup>129</sup> The global catch in 2002 was approximately 16,096 tonnes.<sup>130</sup>

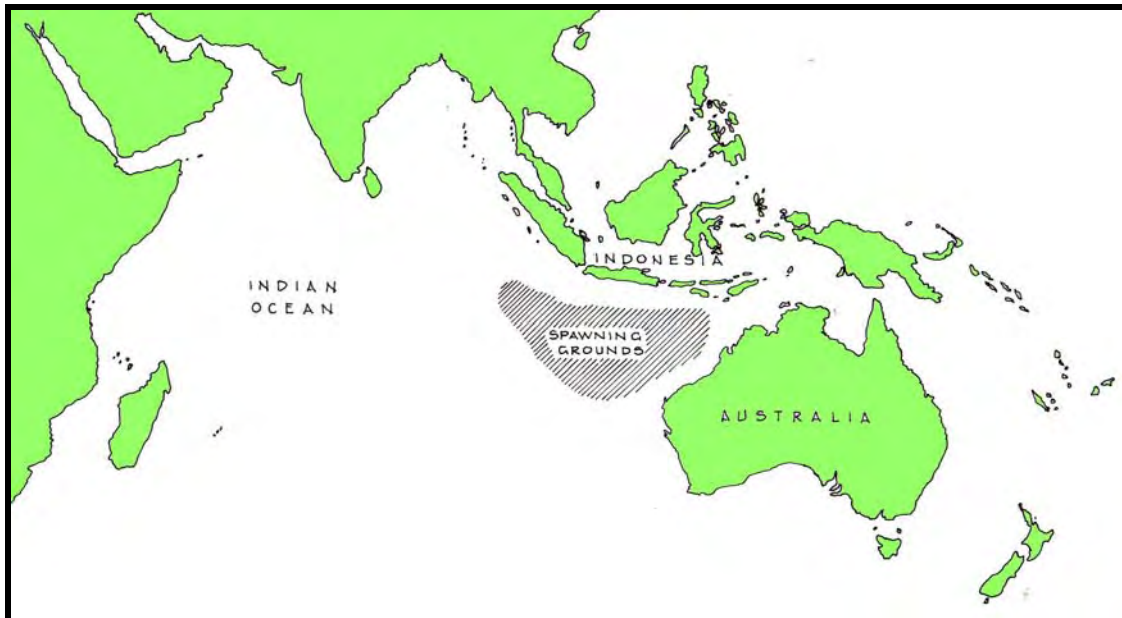


Figure 7.2 Southern Bluefin Tuna Spawning Grounds<sup>131</sup>

By virtue of its high market value, and their late breeding cycle, SBT is a species highly vulnerable to over-fishing. By the early 1980s parental SBT stock had declined to less than 30 per cent of their 1960 levels<sup>132</sup> and since 1996 SBT has been listed as Critically Endangered on the IUCN – World Conservation Union’s *Red List of Threatened Species*.<sup>133</sup> In order to manage the exploitation of SBT, and to protect the fishery, Australia, New Zealand and Japan informally agreed in 1989 to a TAC of

<sup>127</sup> *SBT Award* (2000) 39 ILM 1359, [21].

<sup>128</sup> Anthony Bergin and Marcus Haward, ‘Southern Bluefin Tuna Fishery: Recent Developments in International Management’ (1994) 18 *Marine Policy* 263, 271.

<sup>129</sup> Of which Japan’s catch was 77,927 tonnes and Australia’s 3,678 tonnes: *Ibid*, 266 (Table 1).

<sup>130</sup> Commission for the Conservation of Southern Bluefin Tuna, *Report of the Extended Scientific Committee for the Eighth Meeting of the Scientific Committee* (2003) Attach D, available at <<http://www.ccsbt.org>> at 1 July 2005.

<sup>131</sup> Diagram based on Figure 1 (‘Distribution of Bluefin Tuna Catch off the Australian Coast’) included in David Campbell, ‘Change in Fleet Capacity and Ownership of Harvesting Rights in the Australian Bluefin Tuna Fishery’, <[http://www/fao/org/DOCREP/\\_005/Y249E/y2498e0d.htm](http://www/fao/org/DOCREP/_005/Y249E/y2498e0d.htm)> at 1 July 2005

<sup>132</sup> *SBT Award* (2000) 39 ILM 1359, [22].

<sup>133</sup> IUCN – World Conservation Union, *Red List of Threatened Species* <<http://www.iucnredlist.org/search/details.php?species=21858>> at 1 July 2005.

11,750 tonnes.<sup>134</sup> In 1994, at the first meeting of the C-CCSBT, it was agreed that the TAC should be maintained at the 1989 level.<sup>135</sup> The same TAC was set at the annual meeting of the Commission each subsequent year up to 1997. After that time there was no agreement on TAC until the meeting of the Commission in October 2003.<sup>136</sup> In the absence of consensus on catch limits, the parties in practice maintained their national catches at the 1994 levels.<sup>137</sup>

From 1994 onwards Japan sought an increased TAC maintaining that, although they were at historically low levels, SBT stocks had begun to recover. Australia and New Zealand consistently opposed such proposals, taking the view that the species remained under threat. Beginning in 1995 Japan began to urge the C-CCSBT to approve a joint Experimental Fishing Programme ('EFP') to assess the recovery of the stock. As with Japan's request for additional TAC, this was opposed by Australia and New Zealand, which maintained that the proposed EFP could endanger the species.<sup>138</sup> Unable to secure the Commission's support for an EFP, Japan began its own pilot program in June 1998 followed by the commencement of a much more substantial EFP a year later.<sup>139</sup>

Although the essence of the disagreement between the parties was a fundamental divergence of views as to the status of the SBT stock, Japan's unilateral EFP proved to be the catalyst for, and the subject of, the litigation. Australia and New Zealand objected to Japan's EFP and consultations under the rubric of the *CCSBT* in Canberra and Tokyo in late 1998 aimed at resolving the dispute failed. Australia informed Japan that the dispute concerned not only the *CCSBT* but also the parties' rights and obligations under the *LOS Convention*.<sup>140</sup> Japan expressed its willingness to submit the dispute to mediation, however the offer was refused on the grounds that Japan had not undertaken to suspend the EFP pending the results of the mediation.<sup>141</sup> Japan also suggested arbitration pursuant to Article 16(2) of the *CCSBT* but again declined to halt its EFP.<sup>142</sup> Accordingly Australia and New Zealand rejected the offer to have the matter referred to

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<sup>134</sup> *SBT Award* (2000) 39 ILM 1359, [22]

<sup>135</sup> 6,065 tons to Japan, 5,265 tons to Australia and 420 tons to New Zealand: *Ibid* [24].

<sup>136</sup> *Ibid*. The Commission must meet at least annually (*CCSBT*, art 6(3)). Agreement was finally reached on a provisional global catch at C-CCSBT8 in October 2001.

<sup>137</sup> *SBT Award* (2000) 39 ILM 1359, [24].

<sup>138</sup> *SBT Order* (1999) 38 ILM 1624, [74].

<sup>139</sup> *SBT Award* (2000) 39 ILM 1359, [25]. The estimated catch from the pilot programme was 1,464 tonnes. See also Julia Baldrock, 'Determining the Fate of Southern Bluefin Tuna – International Tribunal for the Law of the Sea (1999) *New Zealand v Japan; Australia v Japan*' (2000) 17 *Environmental and Planning Law Journal* 157.

<sup>140</sup> *SBT Award* (2000) 39 ILM 1359, [27]. Australia, New Zealand and Japan became parties to the *LOS Convention* on 16 November 1994, 18 August 1996 and 20 July 1996 respectively.

<sup>141</sup> *SBT Award* (2000) 39 ILM 1359, [28].

<sup>142</sup> *Ibid*.

third party settlement under the *CCSBT* and instead announced their intention to pursue settlement of the dispute under Part XV of the *LOS Convention*.

On 15 July 1999, Australia and New Zealand requested the establishment of an Arbitral Tribunal under Annex VII of the *LOS Convention* to hear the merits of the dispute.<sup>143</sup> Both Australia and New Zealand maintained that Japan, by unilaterally designing and undertaking an experimental fishing program, had breached several provisions of the *LOS Convention* relating to the conservation and management of highly migratory species within the EEZ and high seas fisheries. It was argued inter alia that Japan violated the duty established by Article 118 of the *LOS Convention*, which requires states ‘to co-operate with each other in the conservation and management of living resources in the areas of the high seas’ and the requirement in Article 117 that in relation to their nationals all states take conservation measures ‘as may be necessary for the conservation of the living resources of the high seas.’<sup>144</sup>

(ii) *The SBT Order*

Pending the establishment of the Annex VII Tribunal, Australia and New Zealand sought provisional measures in ITLOS to halt Japan’s unilateral EFP. In August 1999, the 22 judges of ITLOS unanimously found that the Annex VII Tribunal to be established would prima facie have jurisdiction over the dispute.<sup>145</sup> ITLOS went on to order, by 18 votes to four, that catches be maintained at 11,750 tonnes and by 20 votes to two ordered that none of the parties engage in an EFP.<sup>146</sup>

As many commentators have noted, this was an important decision for international environmental law, principally because ITLOS applied a precautionary approach even though it did not refer expressly to the concept in its decision.<sup>147</sup> Although brief, the *SBT Order* contains significant conclusions on several issues of marine environmental law and is therefore deserving of close analysis.

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<sup>143</sup> As none of the parties had made a declaration selecting a procedure, annex VII arbitration applied by default (*LOS Convention*, art 287).

<sup>144</sup> The applicants also alleged that Japan’s EFP breached art 64(1) of the *LOS Convention* which provides that ‘[t]he coastal State and other States whose nationals fish in the region for...highly migratory species...shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region...’ Articles 116 to 119 are found in s 2 of pt VII of the *LOS Convention* and relate to the conservation and management of marine wildlife on the high seas.

<sup>145</sup> *SBT Order* (1999) 38 ILM 1624, [62].

<sup>146</sup> *Ibid* [90(c), (d)].

<sup>147</sup> See Adrianna Fabra, ‘The LOSC and the Implementation of the Precautionary Principle’ (1999) 10 *Yearbook of International Environmental Law* 15; David Freestone, ‘Caution or Precaution: “A Rose By Any Other Name...?”’ (1999) 10 *Yearbook of International Environmental Law* 15; Simon Marr, ‘The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources’ (2000) 11 *European Journal of International Law* 815.

ITLOS began the substantive part of its reasons by noting that although Japan maintained that the dispute was scientific rather than legal, the differences between the parties did involve points of law.<sup>148</sup> The Tribunal observed that under the *LOS Convention*, states have the duty to cooperate directly or through appropriate international organisations in order to conserve and promote the objective of optimum utilisation of highly migratory species. Emphasising the primacy of the *LOS Convention* as an overarching framework agreement for the protection of the marine environment, the Tribunal considered that breaches of the Convention could be invoked notwithstanding that they related to conduct also regulated by a regional fisheries agreement such as the *CCSBT*.<sup>149</sup> ITLOS found that the arbitral tribunal to be established would prima facie have jurisdiction over the dispute, rejecting Japan's arguments that the non-binding dispute settlement mechanisms of the *CCSBT* applied in lieu of the compulsory procedures under Part XV of the *LOS Convention*.<sup>150</sup>

Satisfied as to its jurisdiction, ITLOS turned to the question of provisional measures and noted that under Article 290 of the *LOS Convention* provisional measures may be prescribed to preserve the respective rights of the parties or to prevent serious harm to the marine environment, where the urgency of the situation so requires. Identifying an important linkage between the provisions of the *LOS Convention* relating to the conservation and management of marine wildlife, and the more general obligations under the Convention to protect and preserve the marine environment, ITLOS expressly stated that 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.'<sup>151</sup>

Article 290 was enlivened, ITLOS went on to suggest, as it was clear that the stock of SBT were seriously depleted and that conservation measures were necessary in order to prevent the disappearance of the species. On this basis not only did the Tribunal encourage the parties to 'act with *prudence and caution* in order to ensure that effective conservation measures are taken'<sup>152</sup> but it went on to apply a precautionary approach in prescribing detailed provisional measures. The precautionary principle or approach was therefore relevant in the *SBT Order* in two senses: first as a specific rule or norm regulating the conduct of the parties, and second as an organising principle to guide the Tribunal's assessment of Australia and New Zealand's request for interim orders.

Therefore, even though ITLOS did not expressly refer to or endorse the precautionary 'principle', its decision revealed a classic 'precautionary 'approach'.

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<sup>148</sup> *SBT Order* (1999) 38 ILM 1624, [42]-[43].

<sup>149</sup> *Ibid* [51].

<sup>150</sup> *Ibid* [52]-[62].

<sup>151</sup> *Ibid* [70].

<sup>152</sup> *Ibid* [77] (emphasis added).

Indeed it is notable as the first international judicial decision to use the notion to structure its analysis,<sup>153</sup> albeit in qualified terms.<sup>154</sup> ITLOS noted that there was scientific uncertainty regarding the measures necessary to conserve stocks of SBT, but that the Tribunal was not in a position to assess this evidence conclusively and that the urgency of the situation demanded measures to preserve the rights of the parties and to avoid further deterioration of SBT stock.<sup>155</sup> Freestone has suggested that in so doing ITLOS appears to have given effect to the obligation to apply the precautionary approach to straddling and highly migratory species under Article 6 of the *Straddling Stocks Agreement*, notwithstanding that the instrument was not then in force,<sup>156</sup> and despite the controversy that surrounds its applicability to fisheries management.<sup>157</sup>

This treatment of the precautionary principle tends to suggest that ITLOS is more aware of, and more favourably disposed to, environmental considerations and environmental principles than other international courts.<sup>158</sup> Several judges in separate opinions also considered both the environmental dimensions of the dispute and the precautionary principle in significant detail,<sup>159</sup> although they stopped short of recognising the notion as a rule of custom.<sup>160</sup> Judge Laing expressed a clear preference for the term precautionary ‘approach’ rather than ‘principle’ if the latter is understood as a precise norm of conduct.<sup>161</sup> Judge Treves’ Separate Opinion is a good example of the potential for general principles of international environmental law to influence judicial decision-making. He argued that it was unnecessary for the precautionary approach to be considered a principle of customary international law in order to have an application in the case, as ‘the precautionary approach seems...inherent in the very notion of provisional measures.’<sup>162</sup>

Judge ad hoc Shearer delivered the most comprehensive Separate Opinion. Judge Shearer was critical of the *SBT Order* for not being expressed in stronger terms,

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<sup>153</sup> Freestone, above n 147, 29.

<sup>154</sup> It is noteworthy that the majority opinion did not venture an opinion as to whether the precautionary concept was to be regarded as a legal ‘principle’ or as a policy ‘approach’: Jacqueline Peel, ‘Precaution – A Matter of Principle, Approach or Process?’ (2004) 5 *Melbourne Journal of International Law* 483, 494.

<sup>155</sup> *SBT Order* (1999) 38 ILM 1624, [80].

<sup>156</sup> Freestone, above n 147, 31. See also *SBT Order* (1999) 38 ILM 1624, Separate Opinion of Judge Treves and Separate Opinion of Judge ad hoc Shearer.

<sup>157</sup> For an outline of this controversy see Grant J Hewison, ‘The Precautionary Approach to Fisheries Management: An Environmental Perspective’ (1996) 11 *International Journal of Marine and Coastal Law* 301.

<sup>158</sup> Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Susan Leubusher trans, 2002) 108.

<sup>159</sup> *SBT Order* (1999) 38 ILM 1624, Separate Opinion of Judge Laing, [12]-[21].

<sup>160</sup> *Ibid* [16].

<sup>161</sup> *Ibid* [20].

<sup>162</sup> *SBT Order* (1999) 38 ILM 1624, Separate Opinion of Judge Treves, [9].

particularly for failing to find Japan *prima facie* in breach of its obligations under the *LOS Convention*, and for not concluding that the jurisdiction of the Annex VII Tribunal was clearly manifest.<sup>163</sup> In his view, the Tribunal ‘has behaved less as a court of law and more as an agency of diplomacy’<sup>164</sup> and that while ‘a disposition to assist the parties in resolving their disputes amicably’ is an appropriate function of judicial settlement, the Tribunal ‘should not shrink from the consequences of proven facts.’<sup>165</sup>

(iii) *The SBT Award*

The *SBT Order* is one of the most important judicial decisions in international environmental law, demonstrating a sensitivity both to the gravity of the problem of overfishing and the interplay between ‘living resources’ issues and marine environmental questions more generally. As Judge Wolfrum has noted in statements made *ex curia*, ‘the effect fisheries have on species and marine ecosystems due to ecological inter-dependency is considerable; stock depletion affects *inter alia* coral reefs, mangroves, estuaries as well as mammal species and turtles.’<sup>166</sup> Most notably the *SBT Order* recognises the importance and applicability of the precautionary principle/approach both to the conduct of states and to the process of judicial decision-making more generally.<sup>167</sup> In stark contrast the *SBT Award* is a largely procedural decision, which evinces apparent ambivalence to the seriousness of the environmental issues underlying the dispute.

In August 2000 the Annex VII Tribunal, the first arbitral tribunal to be established under Annex VII of the *LOS Convention*, handed down the *SBT Award* in which it reached the opposite conclusion to ITLOS on jurisdiction and therefore declined to consider the merits of the case. It found, by four votes to one, that it did not have jurisdiction and unanimously discharged the provisional measures prescribed by ITLOS. The controversial conclusion in the *SBT Award* was that by operation of Article 281 of the *LOS Convention* the non-compulsory dispute resolution provisions of the *CCSBT* contained in Article 16 excluded the operation of the obligatory dispute settlement procedures established by Part XV of the *LOS Convention*.<sup>168</sup> What is

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<sup>163</sup> For criticism of this view see Vaughan Lowe, ‘Advocating Judicial Activism: The ITLOS Opinions of Judge Ivan Shearer’ (2005) 24 *Australian Year Book of International Law* 145, 149-153.

<sup>164</sup> *SBT Order* (1999) 38 ILM 1624, Separate Opinion of Judge ad hoc Shearer, 1649.

<sup>165</sup> *Ibid.*

<sup>166</sup> Rüdiger Wolfrum, ‘The Role of the International Tribunal for the Law of the Sea’ in M H Nordquist and J N Moore (eds), *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (2000) 369, 371.

<sup>167</sup> Judge Wolfrum has described the precautionary principle as ‘a matter of inherent logic’ in such cases: *Ibid* 380.

<sup>168</sup> This aspect of the decision is considered in detail in Chapter 9 in the context of an evaluation of the threat to international environmental law posed by multiple dispute settlement regimes. It is suggested there that the *SBT*

noteworthy in the context of the discussion in this Chapter is that the Annex VII Tribunal did not acknowledge the relevance of the Part XV machinery for protecting the marine environment, and therefore did not consider the implications of its narrow approach to jurisdiction to international marine environmental management. The practical effect of the *SBT Award* is to allow high seas fishing to continue while precluding direct enforcement of the duty of all states to conserve and manage living resources.

(iv) *Subsequent Developments in the SBT Fishery*

While it may be doubted whether any decision on the merits could have definitively resolved this complex dispute, it would certainly have helped bring international attention to the plight of a chronically endangered fishery. The Australian Government's Threatened Species Scientific Committee ('TSSC') has recently advised that SBT have been severely overfished, notwithstanding the management regime established by the *CCSBT*.<sup>169</sup> It estimates that parental biomass of the fishery is between three per cent and 14% of that in 1960, and on these grounds is eligible for listing as an endangered species under the Australian *Environment Protection and Biodiversity Conservation Act 1999* (Cth).<sup>170</sup> The effect of such a listing would be to require a substantial reduction (and perhaps even complete cessation) in the Australian take of SBT which currently stands at 5,265 tonnes per annum, and which is approximately a third of the total global catch of SBT each year. However, the TSSC recognises in its report that there is a need for international cooperation to address the overfishing of SBT, particularly in its single known spawning ground in the Indian Ocean between Java and northern Western Australia. The Committee therefore concluded that while scientifically justified

'listing of the SBT under the [*Environment Protection and Biodiversity Conservation Act 1999* (Cth)] may be detrimental to the survival of the species, as it may weaken Australia's ability to influence the global conservation of the species, and by implication, its conservation in Australian waters.'<sup>171</sup>

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*Award* (2000) 39 ILM 1359 adopted an erroneous interpretation of both the *LOS Convention* and the *CCSBT* and has significantly undermined the operation of pt XV of the *LOS Convention*.

<sup>169</sup> Commonwealth of Australia, Threatened Species Scientific Committee, *Advice to the Minister for the Environment and Heritage on Amendments to the List of Threatened Species under the Environment Protection and Biodiversity Conservation Act 1999* (2005) 10 <<http://www.hsi.org.au>> at 16 September 2005.

<sup>170</sup> SBT have already been listed as threatened or endangered in two Australian states (under the *Flora and Fauna Guarantee Act 1988* (Vic) and the *Fisheries Management Act 1994* (NSW)). Although widely known to be an endangered species, SBT have been declared an ecologically sustainable Wildlife Trade Operation by the Australian Minister for the Environment and Heritage under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Humane Society International has recently commenced proceedings in the Australian Administrative Appeals Tribunal to overturn this decision. The case has yet to be heard.

<sup>171</sup> Commonwealth of Australia, Threatened Species Scientific Committee, above n 169, 10.



(c) *The Swordfish Stocks Case*

The *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*<sup>172</sup> raised the same types of issues concerning the rights of coastal states to manage adjacent marine resources that had been confronted in the *Bering Sea Fur Seals Case*, the *Icelandic Fisheries Case* and the *Estai Case*. On this occasion the litigation was brought under the *LOS Convention*, which substantially improved the existing legal framework applicable to straddling, migratory and high seas fisheries.

In order to conserve stocks of swordfish (*Xiphias gladius*) found in the high seas adjacent to the Chilean coast from collapse, Chile imposed a port ban on the landing of swordfish caught in these waters by Spanish vessels. This measure provoked litigation under two distinct dispute settlement systems. In September 2000 the European Community ('EC') requested consultations with Chile under Article 4 of the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes*<sup>173</sup> and subsequently, in November 2000, requested the establishment of a WTO panel. Effectively by way of counter-claim, in September 2000 Chile commenced proceedings against the EC under Part XV of the *LOS Convention*, contending that the EC had not discharged its duty to cooperate with Chile under Articles 64 and 117 to 119 of the *LOS Convention* in order to conserve stocks of swordfish. In addition to challenging the jurisdiction of the Special Chamber of ITLOS that was formed at the request of the parties, the EC argued that Chile's domestic conservation measures violated the freedom of the high seas as enshrined in Article 87 of the *LOS Convention*.

These legal proceedings therefore raised a familiar dispute between a coastal state and flag state over attempts to protect adjacent fisheries, although unlike the *Icelandic Fisheries Case* and the *Estai Case* the impugned conduct by Chile clearly took place within Chilean territorial jurisdiction. Given the limited range of enforcement options available to coastal states in relation to unsustainable fishing activities on the high seas that adversely impact upon their adjacent fisheries, Chile and other coastal states would likely have welcomed clarification of its legal rights by the ITLOS Special Chamber.<sup>174</sup>

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<sup>172</sup> *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) (Proceedings suspended)* (15 March 2001 and 16 December 2003) <<http://www.itlos.org>> at 1 July 2005 ('*Swordfish Stocks Case*'). See generally Andrew Serdy, 'See You in Port: Australia and New Zealand as Third Parties in the Dispute Between Chile and the European Community Over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas' (2002) 3 *Melbourne Journal of International Law* 79; John Shamsey, 'ITLOS vs Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute' (2002) 12 *Transnational Law and Contemporary Problems* 513; Marcos A Orellana, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 *Nordic Journal of International Law* 55.

<sup>173</sup> 1994 *Marrakesh Agreement Establishing the World Trade Organisation*, annex 2.

<sup>174</sup> Serdy, above n 172, 108.

This is now unlikely, as the parties have effectively resolved the dispute, and proceedings under both the *LOS Convention* and the WTO have been suspended, indefinitely.<sup>175</sup>

## II DISPUTES CONCERNING THE POLLUTION OR ALTERATION OF THE MARINE ENVIRONMENT

The discussion now turns to the second main category of marine environmental dispute that has been the subject of adjudication in international courts and tribunals – cases relating to marine pollution.

The international legal regime for the protection of the marine environment from pollution is highly developed, with the *LOS Convention*,<sup>176</sup> and a coterie of complementary global and regional agreements, providing an expansive framework for the control of marine pollution.<sup>177</sup> Although the comprehensiveness and clarity of this area of marine environmental law may partly explain why relatively few disputes have arisen, there have been several important cases including the recent *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor*<sup>178</sup> which related to coastal engineering works impacting upon estuarine and marine ecosystems. The possibility for future litigation on pollution and other issues concerning the alteration of the marine environment remains high, particularly having regard to the capacity of coastal states to prescribe and enforce pollution standards applicable to foreign vessels within coastal state maritime zones.<sup>179</sup>

### A *French Nuclear Testing in the Pacific*

The conduct by France of atmospheric and underground nuclear tests in the Pacific has generated several disputes leading to litigation in the ICJ, and in other forums, and these cases have raised important issues concerning the principles of international environmental law applicable to transboundary pollution.<sup>180</sup>

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<sup>175</sup> For a discussion of the terms of the settlement see Shamsey, above n 172, 538.

<sup>176</sup> See pt XII of the *LOS Convention*, in particular arts 194, 195, 198, 199 and 202-222.

<sup>177</sup> Nonetheless there remain some weaknesses in the regulatory scheme, the most significant of which is the relatively few and ineffective international controls of land-based sources of marine pollution (which accounts for over 80 per cent of pollutants entering the oceans): Thomas A Mensah, 'The International Legal Regime for the Protection and Preservation of the Marine Environment from Land-Based Sources of Pollution' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 297.

<sup>178</sup> *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore) (Provisional Measures)* (8 October 2003) <<http://www.itlos.org>> at 1 July 2005 ('*Straits of Johor Case*').

<sup>179</sup> *LOS Convention*, art 220.

<sup>180</sup> See the discussion in Chapter 5.

These cases also raised marine pollution issues. Australia and New Zealand both contended in the *Nuclear Tests Cases*<sup>181</sup> that French atmospheric nuclear testing generating radioactive fall-out constituted an infringement of high seas freedoms by, inter alia, interfering with the freedom of navigation and overflight and interfering with the freedom to explore and exploit the resources of the sea and the seabed.<sup>182</sup> To this end Australia and New Zealand sought interim orders in relation not only to potential pollution on each respective metropolitan land mass, but also ocean space. However, the Court did not consider the issue of marine pollution and ordered France to refrain from nuclear tests causing the deposit of radioactive fallout on Australian or New Zealand territory.<sup>183</sup> The arguments relating to marine pollution were also not considered on the merits, with the Court finding that the dispute had become moot following France's public undertaking to cease atmospheric testing.<sup>184</sup>

In its 1995 request for an examination of the situation in accordance with paragraph 63 of the Court's 1974 judgment,<sup>185</sup> New Zealand sought recognition 'of those rights that would be adversely affected by entry into the *marine environment* of radioactive material' as a consequence of the underground tests to be carried out at Mururoa or Fangataufa Atolls and 'of its entitlement to the protection and benefit of a properly conducted Environmental Impact Assessment.'<sup>186</sup> New Zealand also sought provisional measures requiring France to undertake an environmental impact assessment in relation to its underground tests and required France to refrain from the tests unless the assessment revealed that the tests would not give rise to radioactive contamination of the marine environment.

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<sup>181</sup> *Nuclear Tests Case (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, 103; *Nuclear Tests Case (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, 139-140;

<sup>182</sup> The Australian submissions did not revolve around environmental considerations but instead focussed on what was said to be French infringement of Australian territorial sovereignty and its rights to enjoy the freedom of the high seas and exploit its resources. In oral submissions on behalf of Australia, environmental issues were stressed more forcefully. The New Zealand government included a whole chapter in its request for interim measures which addressed the environmental consequences of the tests. For a summary of the submissions of the applicant states see Malgosia Fitzmaurice, 'Environmental Protection and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996) 293, 297-299.

<sup>183</sup> *Nuclear Tests Case (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, 106; *Nuclear Tests Case (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, 142;

<sup>184</sup> *Nuclear Tests Case (Australia v France) (Merits)* [1974] ICJ Rep 253, 270-271; *Nuclear Tests Case (New Zealand v France) (Merits)* [1974] ICJ Rep 457, 474-476.

<sup>185</sup> *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 (New Zealand v France)* [1995] ICJ Rep 288 ('1995 Nuclear Tests Case'). Paragraph 63 stated that '[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute.'

<sup>186</sup> *Ibid* [6] (emphasis added).

However, in a narrow reading of its original judgment,<sup>187</sup> the Court again found it unnecessary to consider New Zealand's argument concerning marine environmental impacts, on this occasion because, as France was now engaged in underground nuclear testing, the basis of the original judgment, which related to atmospheric testing, was unaffected.<sup>188</sup> The Court therefore did not consider developments in the law of the sea since its 1974 decision, including the emergent principles of environmental impact assessment and precaution. Nonetheless, it did recognise the existence of this growing body of law, by reminding the parties that its order was 'without prejudice to the obligations of [New Zealand and France] to respect and protect the natural environment.'<sup>189</sup>

The three dissenting judges addressed a host of issues not canvassed in the majority decision, including questions relating to the marine environment. They considered that developments in international environmental law did affect the basis of the 1974 judgment, thus justifying the Court's consideration of the permissibility of France's underground tests.<sup>190</sup> Judge Weeramantry analysed these issues in depth,<sup>191</sup> and devoted considerable attention to the concepts of inter-generational equity, the precautionary principle and environmental impact assessment (which he described as ancillary to the principle of precaution).<sup>192</sup> Importantly, Judge Weeramantry held that New Zealand had made out a prima facie case that France's underground tests would violate international law by introducing radioactive waste into the marine environment.<sup>193</sup> The illegality of polluting the environment through the discharge of radioactive waste was described by Judge Weeramantry as a principle 'too well established to need discussion.'<sup>194</sup> The other dissentients, Judge ad hoc Palmer and Judge Koroma, stopped short of endorsing Judge Weeramantry's view regarding the customary status of the precautionary principle and environmental impact assessment, but did concur that international law prohibited nuclear testing where the practice led to the introduction of nuclear material into the marine environment.<sup>195</sup>

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<sup>187</sup> Malgosia A Fitzmaurice, 'International Protection of the Environment' (2001) 293 *Recueil des Cours* 9, 376.

<sup>188</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, [63].

<sup>189</sup> *Ibid* [64].

<sup>190</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Dissenting Opinions of Judge Weeramantry, 339-341; Judge Palmer, 412; Judge Koroma, 379.

<sup>191</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Dissenting Opinion of Judge Weeramantry, 317.

<sup>192</sup> *Ibid* 341-345.

<sup>193</sup> *Ibid* 345-346.

<sup>194</sup> *Ibid* 345.

<sup>195</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288, Dissenting Opinions of Judge Koroma, 379; Judge Palmer, 413.

B The MOX Plant Dispute

This ongoing dispute between Ireland and the United Kingdom relates to the establishment of a mixed oxide fuel ('MOX') plant at the Sellafield nuclear processing facility located on the Irish Sea in north-west England.<sup>196</sup> As no nuclear facilities in the United Kingdom currently use the mixed uranium and plutonium fuel to generate electricity, MOX fuel is intended for export, via the Irish Sea. Ireland is particularly concerned that the operation of the plant will lead to radioactive discharges into the Irish Sea both from the operation of the plant and from increased shipments of nuclear material.

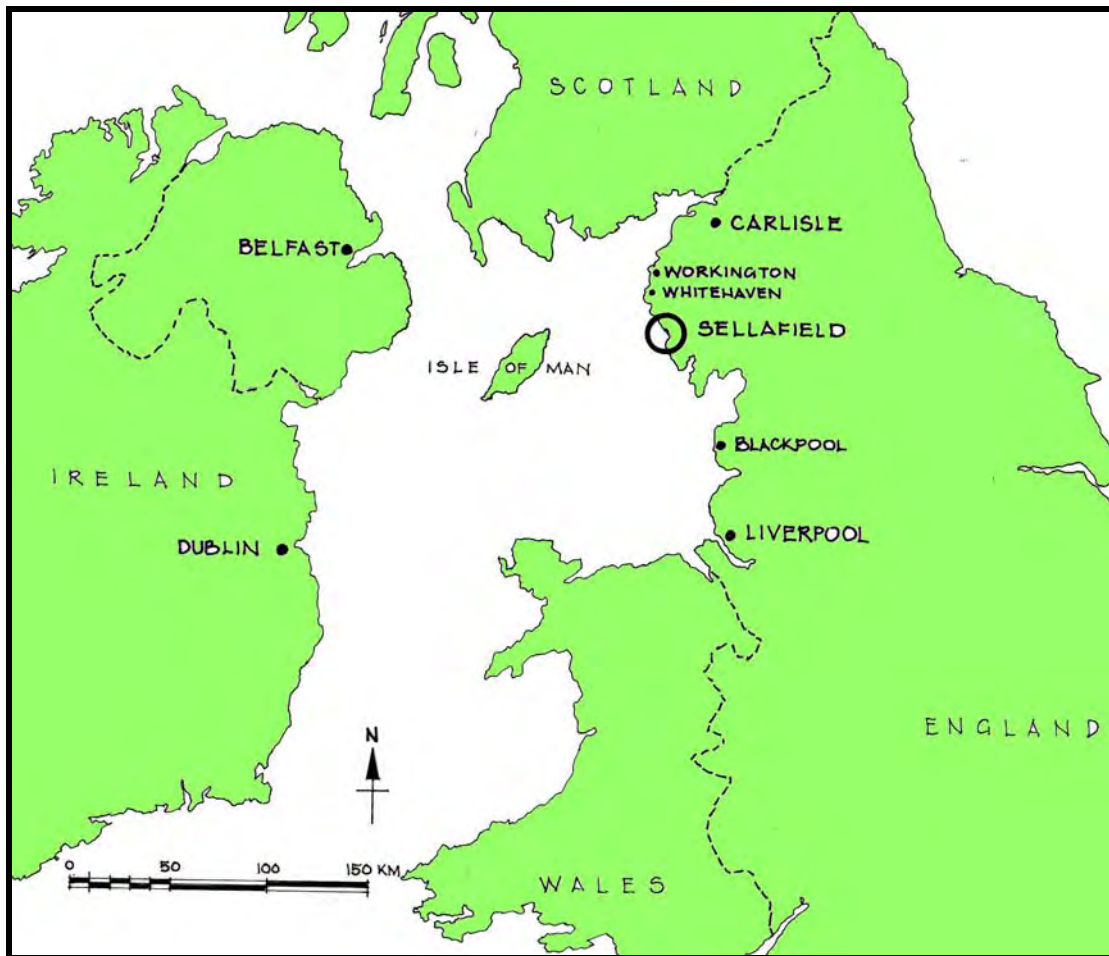


Figure 7.3 Sellafield Nuclear Processing Facility in North West England

Following public consultation and feasibility studies, the operation of the MOX plant was authorised by the United Kingdom in October 2001 with a view to commissioning of the plant in December 2001. Throughout this process Ireland strongly objected to the plant on health and environmental grounds, and ultimately commenced proceedings

<sup>196</sup> For a comprehensive overview of the factual background to the dispute see Maki Tanaka, 'Lessons From the Protracted Mox Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea' (2004) 25 *Michigan Journal of International Law* 337.

against the United Kingdom under both the *LOS Convention* (the *MOX Plant Dispute*<sup>197</sup>) and the *1992 Convention for the Protection of the Marine Environment of the North-East Atlantic* ('*OSPAR Convention*') (the *OSPAR Arbitration*<sup>198</sup>). Subsequently, the European Commission commenced proceedings against Ireland in the Court of Justice of the European Communities ('ECJ')<sup>199</sup> claiming that by bringing the case to ITLOS and to an Annex VII Tribunal under the *LOS Convention*, Ireland had violated the exclusive jurisdiction of the ECJ enshrined in Article 292 of the *EC Treaty*<sup>200</sup> and Article 193 of the *1957 Treaty Establishing the European Atomic Energy Authority*.

(a) *The MOX Plant Order*<sup>201</sup>

In November 2001 Ireland sought provisional measures in ITLOS suspending the authorisation of the plant pending the constitution of an Annex VII Tribunal to determine its claims that the United Kingdom had breached several obligations under the *LOS Convention* in relation to the plant. Ireland asserted in its notification and statement of claim that the United Kingdom had breached its obligations under the *LOS Convention*<sup>202</sup> (1) by failing to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea from accidental or intended releases of radioactive material or releases as a result of terrorist attack;<sup>203</sup> (2) by failing to cooperate with Ireland in the protection of the marine environment of the Irish Sea by, inter alia, refusing to share information with Ireland;<sup>204</sup> and (3) by failing to carry

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<sup>197</sup> *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* (2002) 41 ILM 405 ('*MOX Plant Order*'); *MOX Plant Case (Ireland v United Kingdom) (Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures) (Order 3, of 24 June 2003) (Order 4, of 14 November 2003)* <<http://www.pca-cpa.org>> at 1 July 2005 ('*MOX Plant Award*') (together the '*MOX Plant Dispute*').

<sup>198</sup> *OSPAR Arbitration (Ireland v United Kingdom) (Final Award)* (2 July 2003) <<http://www.pca-cpa.org>> at 1 July 2005 ('*OSPAR Arbitration*'). See Ted L McDorman 'Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)' (2004) 98 *American Journal of International Law* 330; Malgosia Fitzmaurice, 'Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (*Ireland v United Kingdom*)' (2003) 18 *International Journal of Marine and Coastal Law* 541.

<sup>199</sup> Case C-459/03. The case has not yet been heard.

<sup>200</sup> *2002 Consolidated Version of the Treaty Establishing the European Community*.

<sup>201</sup> See generally Barbara Kwiatkowska 'The *Ireland v United Kingdom (MOX Plant)* Case: Applying the Doctrine of Treaty Parallelism' (2003) 18 *International Journal of Marine and Coastal Law* 1; Malcolm Forster, 'The *Mox Plant* Case – Provisional Measures in the International Tribunal for the Law of the Sea' (2003) 16 *Leiden Journal of International Law* 611; Chester Brown, 'Provisional Measures Before the ITLOS: The *MOX Plant* Case' (2002) 17 *International Journal of Marine and Coastal Law* 267; Victoria Hallum 'International Tribunal for the Law of the Sea: The *MOX Nuclear Plant* Case' (2002) 11 *Review of European Community and International Environmental Law* 372-375; Ted L McDorman, 'International Tribunal for the Law of the Sea' (2001) 12 *Yearbook of International Environmental Law* 589.

<sup>202</sup> *MOX Plant Order* (2002) 41 ILM 405, [26].

<sup>203</sup> Ireland relied on *LOS Convention*, arts 192, 193, 194, 207, 211 and 213.

<sup>204</sup> *Ibid* arts 123 and 197.

out a proper environmental impact assessment in relation to the marine environmental impacts of the MOX plant.<sup>205</sup>

The United Kingdom raised several objections to the jurisdiction of ITLOS and the Annex VII Tribunal to be established. These objections were made on the grounds that several other dispute settlement regimes were applicable, and therefore that the prerequisites for jurisdiction under Part XV of the *LOS Convention* were not met. Although the Tribunal was ultimately satisfied as to its jurisdiction, the Tribunal declined to make the orders requested by Ireland, concluding that there was insufficient urgency to justify their prescription.<sup>206</sup>

Ireland had in essence sought two provisional measures: the suspension of the commissioning of the MOX plant and the prohibition of any transportation of radioactive materials associated with the MOX plant through Irish coastal zones. Rather than acceding to this request, ITLOS arrived at its own formulation of interim relief requiring Ireland and the United Kingdom to cooperate and to enter into consultations in order to (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant, (b) monitor risks or effects of the operation of the MOX plant for the Irish Sea, and (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.<sup>207</sup> These orders were clearly designed to facilitate a solution to the dispute by encouraging the parties to co-operate to the greatest extent possible. In this respect the operative orders appear to have been informed by the statement, found in the body of the decision, that ‘the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [*LOS Convention*] and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under Article 290 of the Convention.’<sup>208</sup>

The Tribunal did not explain in detail the reasons for concluding that the situation was not sufficiently urgent to justify the imposition of the provisional measures requested by Ireland. However, ITLOS appears to have been influenced in particular by assurances given to the Tribunal by the United Kingdom that there would be no additional marine transports of radioactive material to or from Sellafield as a result of

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<sup>205</sup> Ibid art 206.

<sup>206</sup> *MOX Plant Order* (2002) 41 ILM 405, [81].

<sup>207</sup> Ibid, [89].

<sup>208</sup> Ibid, [82]. In his Separate Opinion Judge Wolfrum described the obligation to co-operate as ‘a *Grundnorm* of Part XII of the Convention as of the customary international law for the protection of the environment.’ (at [16]).

the commissioning of the MOX plant,<sup>209</sup> and that there would be no imports to, or from, Sellafield in relation to the operation of the MOX plant until October 2002.<sup>210</sup>

Significantly, and by contrast with the *SBT Order*, ITLOS did not implicitly apply the precautionary principle in the *MOX Plant Order*. Apparently in support of its provisional measures orders, the Tribunal stated that ‘prudence and caution’ required Ireland and the United Kingdom to cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them.<sup>211</sup> However, in finding that there was no urgency<sup>212</sup> and, accordingly, rejecting Ireland’s requested measures, the Tribunal appears to have rejected Ireland’s argument that the precautionary principle was applicable to the dispute. Ireland had contended that the principle placed the burden on the United Kingdom to establish that no harm would arise from the operation of the MOX plant and that the precautionary principle ‘might usefully inform the assessment by the Tribunal of the urgency of the measures it is required to take in respect of the operation of the MOX plant.’<sup>213</sup>

Given the existence of scientific uncertainty as to the marine environmental impacts of the MOX plant, together with the highly dangerous nature of the radioactive materials involved, it is surprising that the Tribunal made no reference to the precautionary approach or principle.<sup>214</sup> Such characteristics of the dispute suggest that it is a ‘textbook example’<sup>215</sup> of a situation that would ordinarily demand the invocation of the precautionary approach. Ultimately, however, it appears to have been determinative that there was no evidence of any likelihood of an increase in radioactivity in the Irish Sea during the few months before the Annex VII Tribunal would become seised of the merits of the dispute and could indicate provisional measures on its own terms.<sup>216</sup> Nonetheless, the *MOX Plant Order* suggests that ITLOS may have retreated to some

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<sup>209</sup> *MOX Plant Order* (2002) 41 ILM 405, [78]

<sup>210</sup> *Ibid* [79].

<sup>211</sup> *Ibid* [84].

<sup>212</sup> Given the Tribunal’s assessment that the situation was not in fact urgent there are doubts whether the Tribunal had jurisdiction to order interim measures at all: Brown, ‘Provisional Measures Before the ITLOS: The MOX Plant Case’, above n 201.

<sup>213</sup> *MOX Plant Order* (2002) 41 ILM 405, [71].

<sup>214</sup> See David VanderZwaag, ‘The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides’ (2002) 33 *Ocean Development and International Law* 165, 177-178 (noting that the central argument made by Ireland was essentially that the precautionary principle imposed a burden on the United Kingdom to show that no harm would eventuate from discharges from the plant, or other consequences of its operation).

<sup>215</sup> McDorman, ‘International Tribunal for the Law of the Sea’, above n 201, 596.

<sup>216</sup> *MOX Plant Order* (2002) 41 ILM 405, Separate Opinion of Judge Tullio Treves, [8]



extent from its previous favourable stance towards the precautionary principle in the *SBT Order*.<sup>217</sup>

(b) *The MOX Plant Award*

In June 2003 the Annex VII Tribunal established to determine the merits of the dispute decided to suspend proceedings in the case pending the finalisation of pending litigation in the ECJ.<sup>218</sup> Nonetheless, the Annex VII Tribunal maintained that it was satisfied as to its prima facie jurisdiction and on this basis considered Ireland's fresh request for revised provisional measures. Ireland's proposed orders were far more extensive than its initial request to ITLOS. Ireland sought interim orders (a) restraining any discharge from the MOX plant into the Irish Sea, (b) requiring the United Kingdom to co-operate fully with Ireland by providing information concerning the operation of the plant and any movements of materials, and (c) requiring the parties not to engage in any action which might prejudice any environmental impact assessment required of the United Kingdom under Article 206 of the *LOS Convention*.<sup>219</sup>

After a much more detailed assessment of the competing claims of the parties than that undertaken by ITLOS, the Annex VII Tribunal refused Ireland's request and fashioned orders in its own terms. Importantly the Tribunal provided an analysis of the terms of Article 290(1) which permit the prescription of provisional measures 'to prevent *serious harm* to the marine environment.'<sup>220</sup> The importance of the criterion of seriousness was strongly emphasised by the Tribunal, and it was concluded that Ireland had not satisfactorily established that any potential harm which would meet this threshold could be caused to the marine environment pending the determination of the

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<sup>217</sup> Note also the Separate Opinion of Judge Wolfrum in which he was strongly critical of the invocation of the precautionary approach. He noted that it was still a matter for contention whether the 'precautionary principle/approach has become part of customary international law.' (*MOX Plant Order* (2002) 41 ILM 405, 428). He also suggested that if it was followed in the context of provisional measures then not only would there be a danger of ITLOS anticipating the judgment on the merits, but also it would make the granting of provisional measures automatic. This is a curious argument, and one which appears to misunderstand the operation of the precautionary principle which, as expressed in principle 15 of the *Rio Declaration*, UN Doc A/CONF.151/5/Rev.1 (1992), does not mandate positive action but instead seeks to ensure that lack of scientific certainty is not used as a justification for a potentially environmentally harmful activity.

<sup>218</sup> *MOX Plant Award (Order 3, of 24 June 2003)* <<http://www.pca-cpa.org>> at 1 July 2005. The suspension was originally until 1 December 2003, however in Order No 4 (14 November 2003) the Annex VII Tribunal decided to suspend proceedings until the ECJ has given judgment or the Annex VII Tribunal otherwise determines. See the discussion of this aspect of the decision in Chapter 9. See also Volker Röben, 'The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sellafield: How Much Jurisdictional Subsidiarity' (2004) 73 *Nordic Journal of International Law* 223; Robin Churchill and Joanne Scott, 'The MOX Plant Litigation: The First Half-life' (2004) 53 *International and Comparative Law Quarterly* 643.

<sup>219</sup> *LOS Convention*, art 206 requires states having reasonable grounds for believing that planned activities under their jurisdiction or control may cause damage to the marine environment to undertake an assessment of the potential impacts of those activities and make public the results of such assessments.

<sup>220</sup> Emphasis added.

case on the merits.<sup>221</sup> On one view it might appear that the Tribunal has thereby reversed the conventional wisdom, expressed by Judge Tullio Treves in the *SBT Order*, that provisional measures under Article 290 of the *LOS Convention* have a natural affinity with the precautionary approach.<sup>222</sup> However, rather than altering radically the operation of Article 290, the *MOX Plant Award* simply suggests that the requirement of seriousness cannot be ignored. Although the burden is upon the applicant for interim orders to establish the seriousness of the potential harm, once that threshold is met there remains room for the precautionary approach to inform the reasoning of the court's analysis as to the risk of the harm eventuating.

In addition to rejecting Ireland's environmental arguments, the Tribunal also concluded that provisional measures in the terms sought by Ireland were not necessary to protect its rights under the *LOS Convention* pending an award on the merits. Environmental issues intruded in this context also, with Ireland asserting that the rights which would be damaged included irreversible injury to the Irish Sea caused by liquid discharges from the Sellafield plant. However the Tribunal was not satisfied that there was any indication of the possibility of additional discharges, and therefore there was no urgent and serious risk of irreparable harm to Ireland's claimed rights.<sup>223</sup>

In concluding, the Tribunal re-affirmed the original ITLOS provisional measures and sought to take a pro-active role in supervising the parties in complying with these orders and with its recommendation that the parties engage in meaningful co-operation and consultation at a suitable inter-governmental level.<sup>224</sup> To this end the Tribunal required that the parties submit to the Tribunal reports on their compliance with the provisional measures. This 'hands-on' approach to a dispute is unusual, but clearly desirable from the perspective of the expeditious resolution of a case which has been characterised by a lack of co-operation and consultation. Such supervision also ensures that ongoing judicial attention is focussed on any environmental damage between the date of the order and any eventual decision on the merits.

(c) *The OSPAR Arbitration*

In parallel with the litigation under the *LOS Convention*, Ireland commenced proceedings against the United Kingdom in June 2001 under Article 32 of the *OSPAR Convention*, seeking access to the full contents of two reports commissioned by the United Kingdom to examine the economic justifications for the MOX plant.<sup>225</sup> In this

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<sup>221</sup> *MOX Plant Award (Order 3, of 24 June 2003)* <<http://www.pca-cpa.org>> at 1 July 2005, [55].

<sup>222</sup> *SBT Order* (1999) 38 ILM 1624, Separate Opinion of Judge Treves, [9].

<sup>223</sup> *MOX Plant Award (Order 3, of 24 June 2003)* <<http://www.pca-cpa.org>> at 1 July 2005, [61]-[62].

<sup>224</sup> *Ibid* [67].

<sup>225</sup> *OSPAR Arbitration* (2 July 2003) <<http://www.pca-cpa.org>> at 1 July 2005.

case, in which the PCA acted as registry, Ireland asserted that the disclosure would place it in a better position to consider the impacts which the MOX plant may have on the environment, and to assess the extent of the United Kingdom's compliance with the *OSPAR Convention* and the *LOS Convention*.<sup>226</sup> The United Kingdom refused to release this information, contending inter alia that it was not information within the meaning of Article 9 of the *OSPAR Convention*.<sup>227</sup> The essence of the dispute was that while Ireland was seeking all information as to the environmental impacts of the operation of the plant, the United Kingdom insisted that the only information it was required to release related specifically to the discharging of radioactive materials into the Irish Sea.

In its July 2002 award, a majority of the arbitral panel (with Gavan Griffith QC dissenting<sup>228</sup>) concluded that the information requested by Ireland did not come within Article 9(2). It was held that Article 9 was not a general freedom of information provision,<sup>229</sup> and that none of the categories of information requested by Ireland could be characterised as material concerning the state of the maritime area within the meaning of Article 9(2).<sup>230</sup> Indeed the Tribunal went further, observing that even if Article 9(2) covered the same information as 'environmental information' within the meaning of Article 2(3) of the *1998 Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters* ('*Aarhus Convention*') it was far from clear whether Ireland's request could be accepted.<sup>231</sup>

McDorman has suggested that criticism of the decision for not taking into account environmental considerations, including international legal developments since the 1980s, is unfounded as the Tribunal was bound to adhere to the precise terms of the *OSPAR Convention*.<sup>232</sup> He argues that in 'international environmental litigation, hard law and international legal obligations matter more than environmental aspirations and atmospherics.'<sup>233</sup> However, McDorman's defence of the majority appears misplaced, as

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<sup>226</sup> Ibid [41].

<sup>227</sup> *OSPAR Convention*, art 9(1) provides that '[t]he Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2', while art 9(2) provides that '[t]he information referred to in paragraph 1...is any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it.'

<sup>228</sup> Gavan Griffith QC was the only member of the tribunal to refer to the precautionary principle, finding that its application shifted the burden of proof to the United Kingdom: *OSPAR Arbitration* (2 July 2003), Dissenting Opinion of Gavan Griffith QC, <<http://www.pca-cpa.org>> at 1 July 2005, [90].

<sup>229</sup> *OSPAR Arbitration* (2 July 2003) <<http://www.pca-cpa.org>> at 1 July 2005, [170].

<sup>230</sup> Ibid [179].

<sup>231</sup> *OSPAR Arbitration* (2 July 2003) <<http://www.pca-cpa.org>> at 1 July 2005, [178], [181].

<sup>232</sup> McDorman, 'Access to Information under Article 9 of the *OSPAR Convention* (Ireland v United Kingdom)', above n 198.

<sup>233</sup> Ibid 338.

the choice for the Tribunal was not between the polar opposites of ‘hard law’ and ‘environmental aspirations’, but rather reaching a conclusion as to the United Kingdom’s legal obligations under the *OSPAR Convention* which gave appropriate recognition to the environmental context of the dispute. Indeed Sands has argued in this regard that the PCA’s ‘textual and ‘acontextual’ approach’ confirms that environmental considerations have ‘not yet fully permeated the reasoning processes of some classical international lawyers.’<sup>234</sup>

### *C The Straits of Johor Case*

This case, which has recently been settled,<sup>235</sup> concerned land reclamation work being carried out by Singapore in and adjacent to the Straits of Johor, a narrow strait separating the island of Singapore from the Malay Peninsula. In July 2003 Malaysia instituted arbitral proceedings against Singapore, requesting that an Annex VII Tribunal be established to: (a) delimit a maritime boundary between the territorial waters of the two states in the Straits of Johor, (b) declare that Singapore had breached its obligations under the *LOS Convention* by commencing land reclamation without adequate notification and consultation, and (c) decide that as a consequence of these breaches that Singapore should cease land reclamation activities until it had undertaken an adequate environmental impact assessment.<sup>236</sup>

Pending the constitution and decision of the Annex VII Tribunal, Malaysia sought provisional measures in ITLOS. Specifically Malaysia asked ITLOS to order: (a) that Singapore suspend all current land reclamation activities in the vicinity of the maritime boundary; (b) that Malaysia be provided with full information on the current and projected works; (c) that Malaysia be afforded an opportunity to comment on the works and their potential impacts, and (d) that Singapore agree to negotiate with Malaysia on unresolved issues.<sup>237</sup>

ITLOS considered that the Annex VII Tribunal to be established would *prima facie* have jurisdiction, rejecting among other arguments Singapore’s claim that neither ITLOS nor the Annex VII Tribunal were competent to hear the dispute until negotiations between the parties had been exhausted.<sup>238</sup> Malaysia’s essential claim was

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<sup>234</sup> Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003), 857-858.

<sup>235</sup> *2005 Settlement Agreement in the Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (‘*Straits of Johor Settlement Agreement*’).

<sup>236</sup> *Straits of Johor Case* (8 October 2003) <<http://www.itlos.org>> at 1 July 2005, [22].

<sup>237</sup> *Ibid* [24].

<sup>238</sup> *Ibid* [48].

that provisional measures were necessary to protect and preserve the marine environment in the straits, and to ensure continued maritime access to its coastline.<sup>239</sup>

The precautionary principle emerged in the arguments of the parties, with the Tribunal observing that Malaysia had contended that the concept of precaution must direct the application and implementation of obligations under the *LOS Convention*.<sup>240</sup> However, the Tribunal did not consider these submissions directly, instead focussing on the need for co-operation between the parties to resolve the dispute and to avoid potential marine environmental damage. The Tribunal observed that it could not be excluded that Singapore's land reclamation works may have adverse effects on the marine environment.<sup>241</sup> Repeating what has now become a well-worn phrase in its jurisprudence, ITLOS further held that given these possible implications '*prudence and caution* require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them.'<sup>242</sup> But while suggesting that the parties themselves must adhere to the precautionary approach, the Tribunal itself declined to make the orders requested by Malaysia, and instead sought to establish a regime that would draw upon the expertise of a group of independent experts.

ITLOS unanimously ordered the parties to co-operate and, for this purpose, enter into consultations to establish an independent group of experts to conduct a study into the effects of Singapore's land reclamation activities.<sup>243</sup> Significantly, although stopping short of ordering the cessation of the land-reclamation, the Tribunal also directed Singapore not to conduct its land reclamation in a way that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, having regard to the reports of the group of independent experts to be established.<sup>244</sup> The Tribunal also ordered that the parties submit a report on compliance with its orders.<sup>245</sup>

The *Straits of Johor Case* indicates ITLOS' continued awareness of environmental considerations. Environmental questions occupied a central position in the arguments of the parties and in the reasoning of the Tribunal, and the need for environmental protection and the importance of co-operation to achieve this goal was also recognised

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<sup>239</sup> Ibid [61].

<sup>240</sup> Ibid [74].

<sup>241</sup> Ibid [96].

<sup>242</sup> Ibid [99] (emphasis added).

<sup>243</sup> Ibid [106]. The report of the group of independent experts proved critical to the ultimate resolution of the dispute, and the parties in the *Straits of Johor Settlement Agreement* committed to carrying out the various mitigating measures recommended by the group of independent experts.

<sup>244</sup> *Straits of Johor Case* (8 October 2003) <<http://www.itlos.org>> at 1 July 2005, [106]

<sup>245</sup> Ibid.

in several Declarations and Separate Opinions.<sup>246</sup> As explained by Judge Anderson in his Declaration, the Tribunal's orders were 'intended to be constructive guidance to the parties, designed to preserve the marine environment.'<sup>247</sup> In aid of this objective, the Tribunal in its provisional measures attempted both to encourage the resolution of the dispute and also to ensure that the environment was protected by reference to independent, expert, advice. Similar orders were made by ITLOS in the *SBT Order* and *MOX Plant Order*, but in the *Straits of Johor Case*, ITLOS showed greater willingness to become involved in the detailed modalities of environmental dispute resolution through a high degree of curial supervision of the settlement process. This appears to have been successful in inducing the parties to establish co-operative, science-based, arrangements to assess the extent of the environmental risks involved, and to devise jointly-agreed solutions.

### III CONCLUSION

The discussion in this Chapter began with an examination of two cases, the *Bering Sea Fur Seals Case*, and the ICJ's decision in the *Icelandic Fisheries Case*, which clearly revealed the deficiencies in the international legal framework for the protection of the marine environment. As was seen, both decisions relied on problematic understandings and assumptions about the marine environment, and stated a broad right to exploit marine wildlife subject only to a limited obligation of rational use. Although the *Bering Fur Seals Case* is often viewed positively as having contributed to the evolution of international environmental law in several key respects, the case can also be seen as having failed to adapt the law at a critical juncture when existing principles were inchoate and amenable to development to recognise the needs of nature conservation. Paradoxically, the *Icelandic Fisheries Case* is a clear example of judicial creativity, but one which was not grounded in a satisfactory appreciation of the science and policy factors at play in fisheries management. Ultimately, both decisions share a conceptualisation of the marine environment as a domain of exploitation rather than one of protection. In both decisions 'conservation' was understood in terms of conserving resources to promote the continued health of an industry, rather than to ensure the survival of the exploited species itself and the ecosystems of which it formed an integral part.

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<sup>246</sup> *Straits of Johor Case* (8 October 2003) <<http://www.itlos.org>> at 1 July 2005, Declaration of President Nelson, [7]; Declaration of Judge Anderson [1], [5]; Joint Declaration of Judges ad hoc Hussain and Oxman, [1].

<sup>247</sup> *Straits of Johor Case* (8 October 2003) <<http://www.itlos.org>> at 1 July 2005, Declaration of Judge Anderson, [5].

Hence these decisions assisted in the development of marine environmental law principally by revealing the extent of the weaknesses in the legal framework. These problems were ultimately addressed in the *LOS Convention* which sought to establish the basis for the sustainable and cooperative management of coastal and other fisheries. However, it did not comprehensively address the issue of coastal state responsibility for straddling and migratory fisheries, and in the *Estai Case* and the *Swordfish Stocks Case* the questions over coastal state management of adjacent fisheries arose once again. Neither of these cases proceeded to judgment, but the controversy underlying the *Estai Case* may be credited with encouraging states to conclude the *Straddling Stocks Agreement* to provide a more effectual management regime for fisheries lying beyond the limits of coastal state EEZ jurisdiction.

The jurisprudence emerging out of the dispute settlement system of the *LOS Convention* has been considerably more promising from an environmental perspective than earlier case law generated by other adjudicative bodies, including the ICJ. This is despite the fact that ITLOS operates at the interface between the ‘traditional logic’ of the law of the sea and the more ‘progressive ethic’ of international environmental law.<sup>248</sup> Most importantly, and consistent with its broad mandate over marine environmental cases, ITLOS has issued provisional measures on three occasions to protect marine environmental interests. And in all these cases there has been at least implicit reliance upon the precautionary principle.

It must nonetheless be asked whether ITLOS and Annex VII Tribunals have been overly timid in applying the innovative provisions of the *LOS Convention*, principally found in Part XII, regarding marine resource and ecosystem protection. It cannot be doubted that the jurisprudence emerging out of the Part XV dispute settlement system evinces greater cognisance of environmental questions than any of the earlier cases. However, there has also been some resistance, particularly in the prompt release cases, in recognising the full potential of the *LOS Convention* as an environmental instrument. The compulsory dispute settlement system of the *LOS Convention* is arguably the most important environment-focussed adjudicative arrangement currently in existence, and it remains to be seen whether ITLOS judges and ad hoc arbitrators appointed to Annex VII Arbitral Tribunals will seek to realise its full potential in this respect.

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<sup>248</sup> Douglas M Johnston, ‘Fishery Diplomacy and Science and the Judicial Function’ (1999) 10 *Yearbook of International Environmental Law* 33, 35.

## **Part III**

# **Future Challenges for International Environmental Litigation**



## 8

# Public Interest Proceedings in International Environmental Law

One of the consequences of the increased use of adjudicative procedures to resolve environmental disputes is that it has raised expectations in international civil society<sup>1</sup> that states may now be more effectively compelled to observe their environmental commitments. Much as public interest environmental litigation has been a feature of some domestic jurisdictions for decades,<sup>2</sup> it is contended by some commentators that international adjudicative forums might now be used by environmental non-governmental organisations ('NGOs') and other private actors to 'defend the environment'.<sup>3</sup>

The three sections of this Chapter consider whether it is indeed possible and appropriate to speak of 'public interest environmental litigation' on the international plane.<sup>4</sup> The first section surveys the changes in international environmental law through which private actors have come to assume important roles in the formation and operation of environmental regimes. In the second section the Chapter considers rationales for civil society access to adjudicatory bodies resolving environmental

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<sup>1</sup> The term 'international civil society' is used here to refer to the range of private actors, principally environmental non-governmental organisations, who are involved either directly or indirectly in advocating environmental causes in international fora. See Tullio Treves, 'Introduction' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 1, 2 (civil society groups have in common the fact 'that they are not states [and] try, inter alia, to influence the decisions and activities of states, acting not only through the channels accepted (or even set up) by states, but also outside of them.'). See also Pierre-Marie Dupuy, 'Le concept de société civile internationale, identification et genèse' in H Gherari and S Szurek (eds), *L'émergence de la société civile internationale vers la privatisation du droit international?* (2003) 5.

<sup>2</sup> See the landmark work of Joseph L Sax, *Defending the Environment: A Handbook for Citizen Action* (1970), ch 4 ('A Role for the Courts'). Preston identifies 11 benefits yielded by domestic public interest environmental litigation: (1) it can help to realise a truly democratic process, (2) it can enforce legality in governance, maintain institutional integrity and ensure executive accountability, (3) it can assist in the progressive and principled development of environmental law and policy, (4) it can improve the quality of executive decision-making, (5) it can explicate and give force to environmental values, (6) it promotes environmental values by putting a price on them, (7) it can ensure rational discourse on environmental issues and disputes, (8) it can encourage society to debate public values, national identity and sense of place, (9) it can have positive social effects, (10) it can foster environmentalism and environmental consciousness in society, (11) it can promote achievements in other areas of endeavour: Brian Preston, 'The Role of Public Interest Environmental Litigation' (Paper presented at the Environmental Defenders' Office National Conference on Public Interest Environmental Law in Australia, Sydney, 13 May 2005).

<sup>3</sup> See especially Linda A Malone and Scott Pasternack, *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law* (2004).

<sup>4</sup> In the municipal context the term 'public interest environmental litigation' may be defined as judicial proceedings commenced by an individual or community organisation against individuals, corporations or governments which seeks to protect the environment for the benefit of the community rather than merely to vindicate private rights or interests.

disputes and surveys current arrangements. It is contended in the third section that the character of public participation in most judicial and quasi-judicial bodies deciding environmental disputes is necessarily limited. Nonetheless, through several procedures, including the reception by some courts of amicus curiae briefs, it is increasingly possible for environmental adjudication to be responsive to public interest considerations.

## I PUBLIC PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL LAW

Before considering the opportunities for public interest environmental litigation in international courts and tribunals it is essential to understand the various imperatives that have been behind the notion of public participation in international environmental law.

### A *Public Participation in Domestic Environmental Governance*

The concept of ‘public participation’ in international environmental law has been most closely associated with the idea that individuals should be afforded meaningful roles in developing and implementing environmental standards at the domestic level. Hence Principle 10 of the *United Nations Declaration on Environment and Development*<sup>5</sup> (*Rio Declaration*) proclaimed that ‘[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level.’ It also stated that ‘[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided’.<sup>6</sup> *Agenda 21*<sup>7</sup> also stressed the importance of public participation for sustainable development. To this end the preamble to Chapter 23 stated that:

One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work.

These two key documents produced by the United Nations Conference on Environment and Development therefore draw a link between effective participation, good environmental management and sustainable development. In emphasising participation, transparency and accountability they seek to promote key aspects of democratic

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<sup>5</sup> UN Doc A/CONF.151/5/Rev.1 (1992).

<sup>6</sup> See also IUCN – World Conservation Union, *Draft International Covenant on Environment and Development* (3rd ed, 2004) art 12 (4) (‘The Parties shall ensure that all concerned persons have the right to participate effectively during decision-making processes at the local, national and international levels regarding activities, measures, plans, programmes and policies that may have a significant effect on the environment.’).

<sup>7</sup> UN Doc A/CONF.151/26/Rev.1 (1992).

governance in the environmental context. In some more recent environmental declarations this linkage between democracy and environmental protection has been made even more explicit.<sup>8</sup>

Although these are non-binding instruments, the concept of domestic public participation they espouse has been given concrete effect in some environmental treaties and conventions. This has been most obvious in those treaties that establish schemes for civil liability, which allow individuals of member states to commence proceedings, in the courts of any of those states, against other individuals or companies that have engaged in polluting or other environmentally damaging activities.<sup>9</sup> However, the most important recent development as regards participatory rights is undoubtedly the *1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* ('*Århus Convention*'). Described by the United Nations Secretary General, Kofi Annan, as 'the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations',<sup>10</sup> the *Århus Convention* comprises three main 'pillars' which give legal force to the language of Principle 10 of the *Rio Declaration*. The first of these is the provision by governments of access to environmental information.<sup>11</sup> Affording such access allows citizens of member states to enjoy the second and third rights, namely public participation in environmental decision-making,<sup>12</sup> and access to justice in environmental matters.<sup>13</sup>

The *Århus Convention* is also noteworthy because it highlights the value of civil society engagement in the *international* implementation of its domestic procedural guarantees. Environmental NGOs were deeply involved in the negotiation of the *Århus Convention*, with the attitude being taken by governments that it was essential in concluding a convention on public participation that groups representative of the public interest be closely involved in the development of the instrument.<sup>14</sup> They have also been recognised as important actors within the text of the convention itself. NGOs have a

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<sup>8</sup> See, eg., *Plan of Implementation of the World Summit on Sustainable Development*, [138], UN Doc A/CONF.199/20 (2002) ('Good governance is essential for sustainable development. Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication, and employment creation.')

<sup>9</sup> See, eg, the *1974 Nordic Convention on the Protection of the Environment*.

<sup>10</sup> Quoted in Jeremy Wates, 'NGOs and the Århus Convention' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 167, 167.

<sup>11</sup> *Århus Convention*, arts 4 and 5.

<sup>12</sup> *Ibid* arts 6 (public participation in decisions on specific activities), 7 (public participation concerning environmental plans and policies) and art 8 (public participation during the legislative and administrative process).

<sup>13</sup> *Ibid* art 9.

<sup>14</sup> Wates, above n 10, 177-179.

formalised role at meetings of the parties.<sup>15</sup> Additionally the non-compliance procedure ('NCP') established pursuant to Article 15, which required the development of a compliance review mechanism that would 'allow for appropriate public involvement', constitutes the first NCP which may be triggered by civil society groups.<sup>16</sup>

Notwithstanding these developments, the most important legacy of the *Åarhus Convention*, from the perspective of public participation in international environmental institutions, is Article 3(7) which requires the parties 'to promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment.' Although expressed in somewhat hortatory terms, it provides a basis for arguments that international environmental organisations should be further opened to civil society involvement. It also supplies a clearer conceptual basis for explicating the role of individuals and other non-state actors in international environmental law.<sup>17</sup>

### B *Public Participation in International Environmental Governance*

Even before the *Åarhus Convention* sought to transpose the notion of public participation from the domestic plane to international environmental institutions, many environmental agreements had begun to recognise civil society groups as legitimate observers and participants in international forums.

The *1987 Montreal Protocol on Substances that Deplete the Ozone Layer* had stated that '[a]ny body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to the protection of the ozone layer' could be represented and participate at a meeting of the parties unless over one third of the parties objected.<sup>18</sup> This formula has been replicated in many other global and regional environmental agreements including the *1992 United Nations Framework Convention*

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<sup>15</sup> *Åarhus Convention*, art 10(5); *Rules of Procedure of the Meetings of the Parties of the Åarhus Convention* UN Doc ECE/MP.PP/2/Add.9 (2002).

<sup>16</sup> Decision 1/7 of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN Doc ECE/MP.PP/2/Add.8 (2002).

<sup>17</sup> This aspect of international environmental law has tended to involve considerable uncertainty. See Malgosia A Fitzmaurice, 'International Environmental Law as a Special Field' in L A N M Barnhoorn and K C Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (1995) 181, 222 ('[A]n important special characteristic of the environment is the extent to which, by comparison with all other fields covered by international law with the exception of human rights itself, the individual has become an important player. The importance of the individual, however, is not reflected in any coherent overall doctrine, or even line of development in international environmental law, but, rather, is represented in a number of largely unconnected lines of development, some covering essentially the rights of individuals, some their obligations, and some bringing both of these together.').

<sup>18</sup> *1987 Montreal Protocol on Substances that Deplete the Ozone Layer*, art 11(5).

on Climate Change,<sup>19</sup> the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change<sup>20</sup> and the 1992 Convention on Biological Diversity.<sup>21</sup> Even in earlier regimes, most of which do not expressly provide for civil society participation,<sup>22</sup> NGOs have over time been granted observer status and have taken an active role in the operation of treaty bodies. For instance, whilst the *International Convention for the Regulation of Whaling* makes no reference to participation by any actor other than the parties themselves,<sup>23</sup> from 1977 onwards NGOs were admitted as observers, and have participated extensively over the life of this regime.<sup>24</sup>

The almost universal experience had been that NGOs have taken advantage of even the most restricted opportunities for access to environmental institutions, and have brought a range of benefits for the operation of environmental regimes. Raustiala has identified several such advantages, including the provision of policy and technical guidance to states and the monitoring of the performance by parties of the environmental obligations.<sup>25</sup> At the same time, however, extensive civil society participation has put pressure on the effective functioning of some environmental regimes, and resulted in states negotiating positions not only within the formal confines of treaty institutions, but also in more informal sessional and inter-sessional settings.

## II PUBLIC PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL LITIGATION

There have therefore been two normative and institutional developments which have raised the prospect of more permissive rules for civil society access to international judicial bodies resolving environmental disputes. The first has been the emergence of legal and ethical commitments to enhancing the role of the individual and other non-state actors in domestic environmental governance. This is to include participation in the three arms of government; in the promulgation, administration, and enforcement of environmental standards. That the *Rio Declaration* and some other environmental instruments refer specifically to the right of individuals to an effective judicial or administrative remedy has been particularly important, as it raises the question as to why such entitlements should not also extend to international courts and tribunals.

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<sup>19</sup> 1992 United Nations Framework Convention on Climate Change, art 7(6).

<sup>20</sup> 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, art 13(8).

<sup>21</sup> 1992 Convention on Biological Diversity, art 23(5).

<sup>22</sup> One striking exception is the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'), art 11. CITES is also unusual in providing that observers who are admitted have a 'right' to participate. Much softer language has been included in more recent agreements.

<sup>23</sup> Although see art 4 (providing that the Commission may collaborate with 'public or private organisations' to gather information and conduct studies in relation to whales and whaling).

<sup>24</sup> Kal Raustiala, 'The "Participatory Revolution" in International Environmental Law' (1997) 21 *Harvard Environmental Law Review* 537, 545.

<sup>25</sup> *Ibid* 558-565.

The second development of significance has been the tremendous increase in the involvement by NGOs in the negotiation and operation of environmental regimes. Inevitably this high degree of involvement in political and diplomatic processes has prompted the argument that it should extend across all institutions engaged in international environmental governance, including courts and tribunals. This contention has acquired even greater salience as new forms of compliance control have been developed, such as NCPs, which appear to meld aspects of supervisory and adjudicatory procedures.

A *The Increased Role of Civil Society in International Adjudication*

Traditionally, and reflecting the statist character of international law, only states have had standing to pursue claims before international courts and tribunals. Non-state actors, including natural persons, corporations and NGOs have, for the most part, been excluded from international adjudication both as claimants and as respondents. Similarly, international organisations of states have generally not been permitted to initiate, or intervene in, arbitral or judicial proceedings. A major implication of this exclusion is that the opportunities for public interest litigation on the international plane have been impeded.

Chinkin and Sadurska observed in 1991 that ‘dispute resolution processes, in their goals, participants, procedures, and outcomes, remain geared towards excluding individuals and downgrading their claims as against those of the relevant states.’<sup>26</sup> There are many indications that this situation is now changing, and that previously impenetrable institutions are becoming more amenable to public participation. Romano has observed in this respect that the ‘international judicial process has changed from a device concocted by states to serve their own interests into a tool available to all entities...to obtain justice and further the rule of law.’<sup>27</sup> This conclusion may be a little premature, particularly as environmental dispute settlement procedures have not experienced the same transformation as seen in other areas of international dispute settlement. But it nonetheless correctly emphasises the general trend. There now exist a number of judicial and quasi-judicial bodies in which non-state actors have standing to raise complaints, a development which reflects the growing importance of non-state actors in international society.

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<sup>26</sup> Christine Chinkin and Romana Sadurska, ‘The Anatomy of International Dispute Resolution’ (1991) 7 *Ohio State Journal on Dispute Resolution* 39, 78.

<sup>27</sup> Cesare P R Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31 *New York University Journal of International Law and Politics* 709, 739. See also Francisco Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society* (2004) 31 (there is ‘a new trend in dispute settlement under international law, one where access of individuals and corporations to international claims and remedies is gradually being recognised as a right inherent in their possession of international personality.’).

*B Rationales for Public Participation in International Environmental Litigation*

The notion that civil society should have access to environmental justice has three dimensions.<sup>28</sup> The first is that non-state actors should be able to hold governments to account for breaches of environmental commitments. The second is that non-state actors should be able to instigate proceedings against other non-state actors for environmental harm.<sup>29</sup> The third is that international organisations should be capable of being held to account by civil society groups in international environmental litigation.

These three objectives can be pursued in different ways at domestic and international levels. At the domestic level, Principle 10 of the *Rio Declaration*, and subsequent instruments, have recognised the importance of access to justice to enforce domestic and international environmental standards. However, in much the same way as human rights law has recognised the value of access to justice in international complaints bodies, it can be argued that some degree of public participation should be permitted in international environmental dispute settlement, particularly as regards the activities of governments and international organisations.

One of the strongest reasons for permitting such participation is simply one of fairness.<sup>30</sup> Environmental damage by private actors or governments, and decisions by governments regarding environmental management, have an impact upon individuals and civil society and it is therefore in the interests of fairness that they be given a voice. More generally it may be observed that the judgments of international courts and tribunals may often affect private parties, and the community, no less significantly than third party states traditionally accorded rights of intervention.<sup>31</sup>

A second rationale is that public participation allows a broader range of interests to be considered in environmental litigation, including the intrinsic value of ecosystem protection. In political terms, more permissive standing rules expands ‘the range of those who can set the agenda.’<sup>32</sup> This second reason essentially reflects the arguments

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<sup>28</sup> Ellen Hey, *Reflections on an International Environmental Court* (2000) 14-16.

<sup>29</sup> See generally Peggy Rodgers Kalas, ‘International Environmental Dispute Settlement and the Need for Access by Non-State Entities’ (2001) 12 *Colorado Journal of International Environmental Law and Policy* 191 (arguing for international adjudicative mechanisms to hold transnational corporations responsible for violations of domestic and international environmental law).

<sup>30</sup> John H Knox, ‘A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission’ (2001) 28 *Ecology Law Quarterly* 1.

<sup>31</sup> David A Wirth, ‘Reexamining Decision-Making Processes in International Environmental Law’ (1994) 79 *Iowa Law Review* 769, 790. See also Christine Chinkin, ‘Alternative Dispute Resolution under International Law’ in Malcolm D Evans (ed), *Remedies in International Law: The Institutional Dilemma* (1998) 123, 139 (‘traditional legal and procedural exclusion of non-State actors from international dispute resolution processes disregards the reality that international decision-making impacts upon peoples’ lives.’).

<sup>32</sup> Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, ‘Legalized Dispute Resolution: Interstate and Transnational’ (2000) 54 *International Organization* 457, 462.

that have been made for decades in some domestic jurisdictions regarding the desirability of 'open-standing rules' or 'citizen suits' which allow individuals and community groups to advance the cause of environmental protection directly without their efforts being hampered or mediated by governments.

Third, it may be argued that allowing private actors to participate in international environmental adjudication can enhance the legitimacy of the decision-making of international courts and tribunals. An emerging challenge for international environmental law is the actual and perceived authority of processes of decision-making.<sup>33</sup> Increased public participation in international environmental dispute settlement can address the ostensible or real 'democratic deficit'<sup>34</sup> in some environmental regimes, even if it does not result in such regimes becoming truly representative. A corollary of enhanced legitimacy is that judicial decisions on environmental matters are likely to acquire greater authority, and have more influence upon governments and other actors.

Beyond these philosophical and political considerations, there are some practical reasons for expanding access. Chief among these is the prospect that greater involvement by civil society has for improving the quality of judicial decisions by bringing new information and new perspectives to the resolution of environmental disputes. It has also be argued by some international relations scholars that there is a strong correlation between public participation and the effectiveness of the adjudicative system.<sup>35</sup> Drawing upon the experience of supranational adjudication in Europe, in which the Court of Justice of the European Communities has become the fulcrum in the successful functioning of the European legal order, it has been contended that allowing individuals greater access to international judicial procedures can fundamentally change the political dynamics of adjudicatory procedures. Whereas in traditional inter-state adjudication governments are responsible for invoking proceedings, and implementing judgments, in supranational adjudicatory systems individuals may commence litigation directly against governments, and have any judgment enforced by domestic courts. Keohane, Moravcsik and Slaughter explain that:

By linking direct access for domestic actors to domestic legal enforcement, transnational dispute resolution opens up an additional source of political pressure for compliance, namely favourable judgments in domestic courts. This creates a new set of political imperatives. It gives

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<sup>33</sup> Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596.

<sup>34</sup> Philippe Sands, 'Turtles and Torturers: The Transformation of International Law' (2000) 33 *New York University Journal of International Law and Politics* 527, 540 ('If participatory democracy is relevant to the national levels of governance then it is equally applicable at the international level, particularly since so many important decisions are now being taken outside national jurisdictions.').

<sup>35</sup> Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273; Keohane, Moravcsik and Slaughter, above n 32.



international tribunals additional means to pressure or influence domestic government institutions in ways that enhance the likelihood of compliance with their judgments. It pits a recalcitrant government not simply against other governments but against legally legitimate domestic opposition; an executive determined to violate international law must override his or her own legal system.<sup>36</sup>

*C Existing Opportunities for Public Interest Proceedings in International Environmental Law*

Despite these apparent advantages, non-state actors have generally been excluded from international environmental litigation, a situation that appears anomalous when compared with other areas of international dispute resolution.<sup>37</sup>

*(a) Courts of General Jurisdiction*

In relation to courts and tribunals with general subject-matter jurisdiction, there are remote prospects for the initiation by civil society of legal proceedings in response to breaches of international environmental obligations.

*(i) The International Court of Justice*

Before the ICJ, only states may be parties to contentious cases.<sup>38</sup> Nonetheless, in some circumstances non-state actors may have some impact upon ICJ proceedings. Under Article 34(2) of the *Statute of the ICJ*, the Court may request of public international organisations information relevant to cases before it, and may receive relevant information provided by such international organisations on their own initiative. The Court and the Registrar have made it clear, however, that Article 34(2) encompasses only international organisations of states, and not NGOs.<sup>39</sup> In addition, the ICJ has authority, under Article 50, to seek expert advice from any individual, body, bureau, commission or other organisation. This procedure would appear to allow the Court to seek information from any body including an environmental organisation such as the IUCN – World Conservation Union. However, to date the Court has not sought to do so.

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<sup>36</sup> Keohane, Moravcsik and Slaughter, above n 32, 477.

<sup>37</sup> Elihu Lauterpacht, *Aspects of the Administration of International Justice* (1991) 60-75.

<sup>38</sup> *Statute of the ICJ*, art 34(1).

<sup>39</sup> Christine Chinkin and Ruth Mackenzie, 'Intergovernmental Organizations as "Friends of the Court"' in Laurence Boisson de Chazournes, Cesare P R Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (2002) 135, 140-141. The Court declined to accept an NGO submission in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7. See Alan E Boyle, 'The Gabčíkovo-Nagymaros Case: New Law in Old Bottles' (1997) 8 *Yearbook of International Environmental Law* 13, 20. Similarly in the *Asylum Case (Columbia/Peru)* [1950] ICJ Rep 266 a submission by the International League for the Rights of Man was rejected on the grounds that the organisation was not a public international organisation within the meaning of the *Statute of the ICJ*, art 34.

In the exercise of its advisory jurisdiction, which may only be initiated by a competent agency of the United Nations, the ICJ is more open to participation by non-state actors.<sup>40</sup> This is appropriate given that, as Rosenne has observed, '[t]he advisory competence of the International Court supplies a true *erga omnes* procedure.'<sup>41</sup> In advisory proceedings the body invoking the procedure is afforded an opportunity to present oral statements in support of its position. States entitled to appear before the Court may also present written and oral arguments.<sup>42</sup> Additionally, international organisations considered likely to be able to furnish information on the question before the ICJ may be permitted to make written and oral submissions.<sup>43</sup> It would appear that the Court may receive submissions from NGOs, which could therefore act, at least in a limited sense, as *amici curiae*.<sup>44</sup> However, the involvement by civil society in relation to advisory proceedings has not universally been welcomed. In his Separate Opinion in the *Legality of the Use or Threat of Nuclear Weapons*,<sup>45</sup> Judge Guillaume was critical of the role of NGOs (principally the World Court Project, in conjunction with the International Association of Lawyers Against Nuclear Arms) in applying pressure on the World Health Organisation and General Assembly to seek an advisory opinion from the Court:

I am sure that the pressure brought to bear in this way did not influence the Court's deliberations, but I wondered whether, in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible.<sup>46</sup>

In 1993 the ICJ established a dedicated chamber of the Court to deal with environmental controversies.<sup>47</sup> However, the view has been expressed that unless the

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<sup>40</sup> *Statute of the ICJ*, art 65(1).

<sup>41</sup> Shabtai Rosenne, 'Some Reflections *Erga Omnes*' in Antony Anghie and Garry Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 509, 522.

<sup>42</sup> *Ibid* art 66(2).

<sup>43</sup> *Ibid* art 66(2).

<sup>44</sup> In *Practice Direction XII* (adopted 30 July 2004) <[http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasic\\_practice\\_directions\\_20040730\\_I-XII.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasic_practice_directions_20040730_I-XII.htm)> at 1 July 2005, the ICJ has clarified the procedure for the submission of amicus briefs and other material. It provides:

'1. Where 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.

2. Such statements and/or documents 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.

3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All 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.'

<sup>45</sup> *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226.

<sup>46</sup> *Ibid* 287.

<sup>47</sup> International Court of Justice, *Communiqué 93/20 on the Establishment of a Permanent Chamber for Environmental Matters* (19 July 1993).

Court is opened to wider participation, it is unlikely ever to play an important role in environmental dispute-settlement. Writing in 1971, Judge Jessup noted that a serious drawback to the functionality of the ICJ as an environmental tribunal was the provision in Article 34 of the *Statute of the ICJ* that only states may be parties to contentious cases:

It would be folly to provide for the settlement of disputes under environmental treaties without opening the tribunal or administrative body to those entities which will be as much concerned with enforcement of the new standards as will governments of states.<sup>48</sup>

(ii) *The Permanent Court of Arbitration*

On its face, the Permanent Court of Arbitration ('PCA') appears substantially more accessible than the ICJ. Under the *Optional Rules for the Arbitration of Disputes Relating to Natural Resources and/or the Environment*<sup>49</sup> ('*Environmental Rules*'), disputes may involve parties other than states, including international organisations, NGOs and corporations.<sup>50</sup> However, these innovative arrangements have not been used,<sup>51</sup> a fact which suggests that, in practical terms, only states are likely to be regular parties to arbitrations under the auspices of the PCA. Nonetheless, the *Environmental Rules* remain a useful template for the possible organisation of environmental dispute resolution involving a wide range of participants, including civil society groups.

(iii) *The International Tribunal for the Law of the Sea*

Although the subject-matter jurisdiction of the International Tribunal for the Law of the Sea ('ITLOS') is not as broad as that of the ICJ or the PCA, its global reach justifies a consideration of its rules relating to standing alongside these two bodies.

Before ITLOS it is principally in relation to deep seabed disputes that non-state parties enjoy standing to commence proceedings. In such proceedings, not only states but also the Seabed Authority, the Enterprise, and natural or juridical persons parties to a contract relating to the Area, may appear before Seabed Disputes Chamber of

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<sup>48</sup> Philip C Jessup, 'Do New Problems Need New Courts' (1971) 65 *American Society of International Law Proceedings* 261, 265.

<sup>49</sup> <<http://www.pca-cpa.org/ENGLISH/EDR/ENRules.htm>> at 1 July 2005. The PCA has also adopted similar rules for environmental conciliation: *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment* (2002) <<http://www.pca-cpa.org/PDF/envconciliation/pdf>> at 1 July 2005.

<sup>50</sup> *Ibid* Introduction and art 1(1).

<sup>51</sup> This was the experience even in relation to the *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore) (Provisional Measures)* (2003) <<http://www.itlos.org>> at 1 July 2005. However, as this was arbitration under annex VII of the 1982 *United Nations Convention on the Law of the Sea* ('*LOS Convention*'), the parties may have felt constrained in departing too significantly from the arbitral procedures established under that instrument, notwithstanding that they were free to select a procedure of their own choice (see art 281).

ITLOS.<sup>52</sup> However although it is possible that in relation to environmental disputes concerning the deep seabed that non-state actors could be involved in the process, it is unlikely that they will be participating in the role of public interest litigants.

In relation to environmental disputes arising under the 1982 *United Nations Convention on the Law of the Sea* ('*LOS Convention*') more generally, natural persons and other non-states entities may not invoke the compulsory dispute settlement provisions. However, it should be noted that if they meet highly restrictive criteria, international organisations may be parties to the *LOS Convention*.<sup>53</sup> Accordingly they may then participate in contentious cases under Part XV, including as applicants or respondents in disputes heard by ITLOS, Annex VII, or Annex VIII arbitral panels.<sup>54</sup> Additionally, ITLOS is open to entities other than states parties in any cases submitted pursuant to an agreement conferring jurisdiction on ITLOS which is accepted by all parties to a dispute.<sup>55</sup>

To date no environmental or other NGO has sought to participate in ITLOS proceedings as an *amicus curiae*.<sup>56</sup> However, it would appear possible for ITLOS to call upon NGO submissions in exercising the powers granted to it under the *ITLOS Rules of Court* to seek and receive expert opinion.<sup>57</sup>

(b) *Regional Courts of Economic Integration and Free Trade Regimes*

In contrast to courts with general jurisdiction *ratione materiae* and *ratione loci*, courts and other dispute settlement bodies at the centre of regional integration or free trade regimes tend to be far more open to participation by non-state actors.

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<sup>52</sup> *LOS Convention*, annex VI, art 20(2).

<sup>53</sup> *Ibid* art 305(1)(f) and annex IX ('Participation by International Organizations'). The European Community is the only international organisation to meet the strict requirements of this provision.

<sup>54</sup> There has been only one such case, which was settled prior to a determination on the merits: *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) (Proceedings suspended)* (15 March 2001 and 16 December 2003) <<http://www.itlos.org>> at 1 July 2005.

<sup>55</sup> *LOS Convention*, annex VI, art 20(2).

<sup>56</sup> However, the positions of intergovernmental environmental organisations have sometimes been made known to the Tribunal by parties to cases. See in particular the reference made by Australia to the practice of the Commission for the Conservation of Antarctic Marine Living Resources in the *Volga Case (Russian Federation v Australia) (Prompt Release)* (2003) 42 ILM 159.

<sup>57</sup> *ITLOS Rules of Court*, art 82. See also art 84 under which intergovernmental organisations may furnish information to ITLOS at the request of the Tribunal or upon its own initiative. See generally Philippe Gautier, 'NGOs and Law of the Sea Disputes' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 233.

(i) *Central American Court of Justice*

The most accessible institution in this respect is the Central American Court of Justice, the principal judicial organ of the Central American Integration System ('SICA'), in which any interested party, including natural and legal persons, may commence proceedings against a state party that has enacted laws inconsistent with SICA law.<sup>58</sup> Similarly, where they are directly affected, non-state entities may bring proceedings against SICA organs on the grounds that they have failed to fulfil a requirement of SICA law.<sup>59</sup>

(ii) *Court of Justice of the European Communities*

Access to the ECJ is somewhat more limited, but still expansive. Natural and legal persons involved in domestic court proceedings in which a preliminary ruling is requested of the ECJ may make submissions to the ECJ.<sup>60</sup> In addition, individuals may initiate proceedings to contest the legality of actions of Community institutions under European Community law, but only if the decision is addressed to that person, and is of 'direct and individual concern' to them.<sup>61</sup> The latter condition has been interpreted narrowly by the ECJ, such that purely public interest proceedings are inadmissible.<sup>62</sup> The impugned decision must affect complainants 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'<sup>63</sup>

Individuals may not bring claims in the ECJ against member states in order to ensure compliance with European Community law – such proceedings may only be

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<sup>58</sup> 1992 *Agreement on the Statute of the Central American Court of Justice*, art 22(c).

<sup>59</sup> *Ibid* art 22(g).

<sup>60</sup> 2002 *Consolidated Version of the Treaty Establishing the European Community* ('EC Treaty'), art 234; 1957 *Protocol on the Statute of the Court of Justice of the European Economic Community*; *Statute of the ECJ*, art 20.

<sup>61</sup> *EC Treaty*, art 230.

<sup>62</sup> Ludwig Krämer, 'Public Interest Litigation in Environmental Matters Before European Courts' (1996) 8 *Journal of Environmental Law* 1, 11-12.

<sup>63</sup> *Plaumann & Co v Commission* (C-25/62) [1963] ECR 95, 107. This test is of remarkable longevity, and was applied in *Stichting Greenpeace Council (Greenpeace International) v Commission* (C-321/95) [1998] ECR I-1651 to deny standing to an environmental NGO which challenged a decision by the Commission to provide financial support to Spain for the construction of power stations. See Jacqueline Peel, 'Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 47, 50; Diana L Torrens, 'Locus Standi for Environmental Associations under EC Law – Greenpeace – A Missed Opportunity for the ECJ' (1999) 8 *Review of European Community and International Environmental Law* 336, 343 (arguing that '[s]ituations do arise in which it is the Commission which needs to be monitored and...environmental associations...have a positive role to play in the enhanced enforcement of environmental rules.)

commenced by other member states, or by the Commission. However, the Commission has been highly active in this respect, and has been encouraged by NGOs and other non-state actors to take action against members for breaches of Community environmental laws.<sup>64</sup> In terms of amicus curiae participation, no right to submit amicus briefs is expressly recognised in relation to the ECJ. However, arguably the public interest function of the system is adequately served through the unique role given to Advocates-General before the Court.<sup>65</sup> Finally it must be noted that civil society possesses an indirect method of enforcing European Community environmental law via the preliminary reference procedure under Article 234. Under this procedure national courts may submit a request for a preliminary ruling to the ECJ on an issue concerning the interpretation or validity of a provision of European Community environmental law.<sup>66</sup>

(iii) *North American Free Trade Agreement and North American Agreement on Environmental Cooperation*

The 1992 *North American Free Trade Agreement* ('NAFTA') does not itself provide an avenue for public interest environmental litigation, although it does allow individuals significant opportunity to commence proceedings which involve environmental issues, and has also elaborated highly developed procedures permitting environmental groups to submit amicus briefs.

Under Chapter 11 of *NAFTA*, private investors are entitled to institute arbitral proceedings where there has been an interference with a foreign investment contrary to *NAFTA* rules. There have now been several cases on this basis, with private investors seeking determinations that environmental laws of member states are inconsistent with *NAFTA*. This has been a source of significant contention given that the process may lead to the effective overriding of domestic environmental standards.<sup>67</sup> However, these concerns are tempered to some extent by the recent decision of the *NAFTA* Free Trade Commission,<sup>68</sup> and the arbitral tribunal in *Methanex Corp v United States*,<sup>69</sup> to accept amicus submissions from environmental NGOs.

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<sup>64</sup> Peel, above n 63, 50. Although for a discussion of the problems faced by the Commission in enforcing member state compliance see R Williams, 'The European Commission and the Enforcement of Environmental Law: An Invidious Position' (1995) 14 *Yearbook of European Law* 351.

<sup>65</sup> Jessica Maria Almqvist, 'The Accessibility of European Integration Courts from an NGO Perspective' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 271, 276.

<sup>66</sup> See generally Han Somsen, 'The Private Enforcement of Member State Compliance with EC Environmental Law: an Unfulfilled Promise?' (2000) 1 *Yearbook of European Environmental Law* 311.

<sup>67</sup> See generally Joseph Freedman, 'Implications of the NAFTA Investment Chapter for Environmental Regulation' in Alexandre Kiss, Dinah Shelton and Kanami Ishibashi (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 89.

<sup>68</sup> 'Statement of the Free Trade Commission on Non-Disputing Party Participation' (2004) 16 *World Trade and Arbitration Materials* 167.

The *Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation* ('*NAFTA NDP Statement*') represents the most serious effort to date by an international organisation to set out detailed procedures governing the acceptance of amicus curiae briefs, including those submitted by green NGOs which raise public interest concerns regarding environmental issues. The *NAFTA NDP Statement* acknowledges that no provision of the *NAFTA* limits a tribunal's discretion to accept written submissions from a person or entity that is not a disputing party. Under the procedure, non-disputing parties are required to seek leave from the tribunal to file a submission. In determining whether to grant leave to file such a submission, the tribunal must consider, among other things, to extent to which the submission would assist the tribunal in determining a factual or legal issue in dispute, whether the non-disputing party has a significant interest in the arbitration, and also whether there is public interest in the subject-matter of the arbitration.

Additionally, *NAFTA* is accompanied by the *1993 North American Agreement on Environmental Cooperation* ('*NAAEC*') under which *NAFTA* parties undertake to enforce their environmental laws. The *NAAEC* 'provides unprecedented opportunities for participation by civil society at the international level.'<sup>70</sup> Part five of *NAAEC* establishes a public complaints procedure under which any citizen of the three *NAFTA* parties, Canada, Mexico and the United States, may make a submission to the *NAAEC* alleging that a party to *NAFTA* is failing to implement its environmental laws.<sup>71</sup> The *NAAEC* Secretariat may, in response, decide to author a Factual Record on the matter submitted.<sup>72</sup> The *NAAEC* also incorporates a procedure for binding arbitration where there is a 'persistent pattern of failure by [a] Party to enforce its environmental law,'<sup>73</sup> although this mechanism has not yet been utilised. However, it is the citizen submission procedure which has attracted the most detailed scrutiny, as the first and only example outside of the European context where individuals may bring claims regarding environmental matters directly to a quasi-judicial supranational body.

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<sup>69</sup> *Methanex Corp v United States*, Decision on Petitions from Third Persons to Intervene as 'Amicus Curiae', (2001) <<http://www.state.gov/documents/organization/6039.pdf>> at 1 July 2005; 'Tribunal Announcement on Procedures for Amicus Submissions', (2004), <<http://www.worldbank.org/icsid/methanex.htm>> at 1 July 2005. See Howard Mann, 'Opening the Doors, At Least a Little: Comment on the Amicus Decision in Methanex v United States' (2002) 10 *Review of European Community and International Environmental Law* 241.

<sup>70</sup> John H Knox and David L Markell, 'The Innovative North American Commission for Environmental Cooperation' in David L Markell and John H Knox (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 1, 2.

<sup>71</sup> Kal Raustiala, 'Citizen Submissions and Treaty Review in the NAAEC' in David L Markell and John H Knox (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 257.

<sup>72</sup> *NAAEC*, art 15

<sup>73</sup> *Ibid* arts 22-36.

(iv) *World Trade Organisation*

The WTO dispute settlement system is designed to resolve inter-state disputes regarding compliance with WTO rules and non-state entities have no rights of standing.<sup>74</sup> But while not admitted as parties in the face of growing demands for greater accessibility and accountability civil society has been given an increased voice in WTO proceedings. This has come principally as a result of the decision of the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*<sup>75</sup> (*‘Shrimp-Turtle I’*).

Although the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*<sup>76</sup> (*‘DSU’*) does not provide for the submission of amicus curiae briefs, the Appellate Body held in *Shrimp-Turtle I* that under Articles 12 and 13 of the *DSU* a WTO Panel ‘has the discretionary authority either to accept and consider or to reject information submitted to it, whether requested by a panel or not.’<sup>77</sup> The Appellate Body also upheld the Panel’s earlier finding that it could consider NGO submissions when they were incorporated with those of a party to the proceedings.<sup>78</sup> Amicus briefs by environmental NGOs may therefore find their way before WTO dispute settlement bodies via two routes: (1) directly when submitted by the NGO, or (2) as part of a brief submitted by a disputing party.<sup>79</sup>

Although some degree of public participation in WTO dispute settlement proceedings via amicus briefs is now possible, the involvement of non-state actors remains a contentious and somewhat unresolved issue.<sup>80</sup> In response to concerns of

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<sup>74</sup> Initially it was thought that the dispute settlement process was entirely closed so that not even the private representatives of governments could take part. However, a Panel decision to this effect was reversed by the Appellate Body: *European Communities – Regime for the Importation, Sale and Distribution of Bananas* WTO Doc WT/DS27/R (1997) (Report of the Appellate Body). For an overview of early practice in the WTO in relation to NGO participation see Steve Charnovitz, ‘Participation of Nongovernmental Organizations in the World Trade Organization’ (1996) 17 *University of Pennsylvania Journal of International Economic Law* 331.

<sup>75</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/R (1998) (Report of the Panel), WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body) (*‘Shrimp-Turtle I Appellate Body Report’*).

<sup>76</sup> *1994 Marrakesh Agreement Establishing the World Trade Organisation*, annex 2.

<sup>77</sup> *Shrimp-Turtle I Appellate Body Report* WTO Doc WT/DS58/AB/R (1998) 38. See generally Georg C Umbrecht, ‘An ‘Amicus Curiae Brief’ on Amicus Curiae Briefs at the WTO’ (2001) *Journal of International Economic Law* 773.

<sup>78</sup> *Shrimp-Turtle I Appellate Body Report* WTO Doc WT/DS58/AB/R (1998) 39.

<sup>79</sup> For a discussion of the decision and its implications for dispute settlement under the WTO see Peel, above n 63, 64-70.

<sup>80</sup> John H Knox, ‘The Judicial Resolution of Conflicts Between Trade and the Environment’ (2004) 28 *Harvard Environmental Law Review* 1, 46.



WTO members (principally developing states<sup>81</sup>), in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*<sup>82</sup> the Appellate Body adopted, under Article 16(1) of its working procedures, guidelines for the submission of amicus briefs.<sup>83</sup> Notwithstanding the significant issues of public interest in this dispute, the *Appellate Body* ultimately rejected all 17 applications to submit amicus briefs on the grounds that they did not comply with the guidelines it had articulated.<sup>84</sup> It has been speculated that one reason for this outright rejection (with few reasons) was partly motivated by an awareness of the controversy surrounding the reception of amicus briefs.<sup>85</sup> In addition, in *United States – Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5*,<sup>86</sup> (*‘Shrimp Turtle II’*) the Appellate Body refused, without giving reasons, to consider the only amicus brief it received.<sup>87</sup>

As matters currently stand the admission of amicus briefs in the WTO depends upon procedures of an essentially improvised character, and there is a need to formalise these in a way which deals with the fundamental question as to the appropriate qualifications for admitting civil society groups. Amici curiae can serve a number of important functions in WTO dispute settlement, including by providing legal analysis, factual analysis and evidence, and in placing the trade dispute into broader social, political and environmental focus.<sup>88</sup> If the interface between trade and environment agendas is to be satisfactorily resolved, it seems essential that this contribution is formally recognised, and structured and detailed procedures for amicus curiae participation developed.

(c) *Human Rights Bodies*

Human rights courts and complaints procedures are among the most accessible international judicial and quasi-judicial mechanisms currently in existence. Once local

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<sup>81</sup> See generally Maki Tanaka, ‘Bridging the Gap Between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO Under the Rio Principles’ (2003) 30 *Ecology Law Quarterly* 113.

<sup>82</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body).

<sup>83</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appellate Body*, 2000 WTO Doc AB-2000-11 (2000); *Additional Procedure Adopted under Rule 16(1) of the Working Procedures for Appellate Review*, WTO Doc WT/DS135/9.

<sup>84</sup> Mary Footer and Salman Zia-Zarifi, ‘European Communities – Measures Affecting Asbestos and Asbestos-Containing Products: The World Trade Organisation on Trial for its Handling of Occupational Health and Safety Issues’ (2002) 3 *Melbourne Journal of International Law* 120, 131-133.

<sup>85</sup> Lise Johnson and Elisabeth Tuerk, ‘CIEL’s Experience in WTO Dispute Settlement: Challenges and Complexities from a Practical Point of View’ in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 243, 246.

<sup>86</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5*, WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body).

<sup>87</sup> *Ibid* [78].

<sup>88</sup> Johnson and Tuerk, above n 85, 249.

remedies have been exhausted,<sup>89</sup> and a claim raising environmental concerns is capable of being framed in terms of human rights, then individuals may turn to human rights bodies to seek a remedy for environmental damage.<sup>90</sup> The most important global institution in this respect is the Human Rights Committee.<sup>91</sup>

However, it is the European Court of Human Rights ('ECtHR') that has been the most active in the environmental field, delivering several judgments regarding human rights complaints having an environmental dimension.<sup>92</sup> Under the amended *1950 Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>93</sup> individuals, NGOs and groups may bring a case in the ECtHR against a state party alleged to have committed a human rights violation.<sup>94</sup> They must, however, establish that they have been a 'victim', a term which the court has construed narrowly, and to the exclusion of public interest proceedings.<sup>95</sup>

(i) *Development Bank Inspection Panels*

Several development banks have established an inspection panel process under which individuals may, in relation to a particular project funding by these banks, seek review of the compliance by the bank with its operational policies and procedures. Accordingly, complaints regarding compliance with international environmental standards are therefore only possible to the extent that these have been incorporated in the relevant bank's internal policies and lending guidelines.

In the World Bank, affected persons from the borrowing state may make a request for inspection to an Inspection Panel composed of three members.<sup>96</sup> Individual complainants may not seek review on their own behalf, but only via a 'community of persons', such as a citizens' organisation or other group.<sup>97</sup> Additionally, the rights or interests of the complaining party must have been seriously affected in some way as a

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<sup>89</sup> See Dinah Shelton, *Remedies in International Human Rights Law* (1999) chs 5 and 6.

<sup>90</sup> Malone and Pasternack, above n 3, 9; Caroline Dommen, 'Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms' (1998) 11 *Georgetown International Environmental Law Review* 1.

<sup>91</sup> Established under the *1966 Optional Protocol to the International Covenant on Civil and Political Rights*, art 2.

<sup>92</sup> For a review of this jurisprudence see Chapter 10.

<sup>93</sup> See the *1994 Protocol No 11 to the European Convention on Human Rights*.

<sup>94</sup> *European Convention on Human Rights*, art 34.

<sup>95</sup> *Klass v Germany* (1978) 2 EHRR 214.

<sup>96</sup> *International Bank for Reconstruction and Development Resolution 93-10 and International Development Association Resolution 93-6*, 22 September 1993, (1993) 34 ILM 520 ('*IBRD and IDA Inspection Panel Resolutions*'). See also *Operating Procedures, Inspection Panel for the International Bank for Reconstruction and Development and the International Development Association*, 19 August 1994, (1995) 34 ILM 510.

<sup>97</sup> *IBRD and IDA Inspection Panel Resolutions*, above n 96, [12].

result of an act or omission of the Bank as a consequence of a failure to follow its own operational policies and procedures.

### III RECONCEPTUALISING PUBLIC INTEREST ENVIRONMENTAL LITIGATION

The prolific expansion in the opportunities available to civil society groups to participate in international environmental governance has been described by Raustiala as a ‘participatory revolution’.<sup>98</sup> However, it has been seen that this revolution has not been extended to anywhere near the same extent in adjudicatory institutions operating in the environmental field. Where judicial decision-making processes have allowed for public participation it has seldom involved the innovations apparent in some domestic legal systems where concerned citizens are extended rights of standing to commence proceedings in the public interest.<sup>99</sup>

#### A *Some Conceptual Issues Concerning Public Participation*

Before such developments are possible it would seem essential that attention be paid to several more fundamental conceptual issues. The question of access for non-state entities cannot be isolated from underlying questions regarding the protection that international environmental law affords non-state actors. It may be desirable to allow individuals standing before international courts in environmental cases, yet such access will only be meaningful if the complainants can identify legal rights and interests that they are entitled to vindicate.

The development of environmental rights is one response to this conundrum. Such rights may be attached to the human enjoyment of the natural environment (such as, for instance, ‘a right to live in a healthy environment’<sup>100</sup>). However, it is also possible for environmental rights to be understood in an ecocentric rather than anthropocentric sense. Stone has argued in this respect that effective guardianship of the natural environment depends not only on extending the class of persons who can challenge adverse environmental impacts, but also upon a conception of the environment as an

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<sup>98</sup> Raustiala, ‘The “Participatory Revolution” in International Environmental Law’, above n 24.

<sup>99</sup> See, eg, the NSW Land and Environment Court in which any person may bring proceedings to enforce the provisions of the *Environmental Planning and Assessment Act 1979* (NSW) (*EPA Act*) even where they have no special interest in the proceedings: *EPA Act*, s 123. See generally Paul Stein, ‘A Specialist Environmental Court: An Australian Experience’ in David Robinson and John Dunkley (eds), *Public Interest Perspectives in Environmental Law* (1995) 256, 271.

<sup>100</sup> 1988 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, art 11. See generally Robin Churchill, ‘Environmental Rights in Existing Human Rights Treaties’ in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 89.

independent rights-bearer.<sup>101</sup> In developing this argument, Stone points to the progressive expansion of rights through the occidental legal tradition, from originally excluding certain persons (such as slaves and women) to embracing all humankind. He argues that there is no reason in principle why, at least for some purposes, this expansion should not also encompass natural objects, thereby allowing, through the mechanism of a legal guardian having standing, a more effective legal framework for their recognition and protection.

Another response to the problem of identifying an individual legal interest is to consider whether the relevant environmental treaty or customary norm applies not only as between states, but also directly to the nationals of contracting parties. The ICJ has recognised that it is possible for international treaty obligations ostensibly applicable only between states to be owed directly to individuals.<sup>102</sup> Although it is conceivable that some environmental instruments may also be understood as conferring legal rights directly upon individuals, little attention has been given to the possible utilisation of such interests as the basis of a claim by individuals or other non-state actors before international forums. This may partly reflect the controversy that surrounds the whole topic of individual human rights in international environmental law.<sup>103</sup>

A third response, more compatible with international environmental law as presently configured, is to allow non-state actors the capacity to initiate proceedings in the public interest; thereby enforcing an existing rule of international environmental law against a delinquent state. Elihu Lauterpacht has observed in this respect that:

[T]he international community should certainly contemplate the day when the enforcement of obligations under, say, conventions for the prevention of aerial pollution, or the protection of the ozone layer, will take the form of proceedings initiated before the ICJ at the instance of the United Nations Environment Programme or some other agency...<sup>104</sup>

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<sup>101</sup> Christopher D Stone, *Should Trees Have Standing? And Other Essays on Law, Morals and the Environment* (1996) 32-33. However, recognising individual animals or plants as possessing rights and interests is not conducive to systematic environmental protection, which requires a whole of species, or whole of ecosystem approach: Mark Sagoff, *The Economy of the Earth* (1988) 156-157.

<sup>102</sup> *LaGrand Case (Germany v United States of America) (Provisional Measures)* [1999] ICJ Rep 9, [78]. See Tim Stephens, 'The Right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for What Purpose? The *LaGrand Case*' (2002) 3 *Melbourne Journal of International Law* 143, 151-153.

<sup>103</sup> See generally Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Alan E Boyle and Michael R Anderson, *Human Rights Approaches to Environmental Protection* (1996) 72.

<sup>104</sup> Lauterpacht, above n 37, 63-64. There is merit in formally creating a guardian, having international legal status, for the interests of the environment or for future generations. For a discussion of the proposal by Malta to the Preparatory Committee of the United Nations Conference on Environment and Development to institute an official guardian for generations as yet unborn see Stone, above n 101, 65-80. See also Christopher D Stone, 'Defending the Global Commons' in Philippe Sands (ed), *Greening International Law* (1994) 34, 41 ('International treaties should endow [a non-governmental] guardian with standing to initiate legal and

As states have been unwilling guardians of community interests in environmental protection, particularly in relation to common spaces and resources, such a procedure may allow environmental commitments to be more effectively enforced by international organisations.<sup>105</sup>

The question that inevitably then arises is which actors should be admitted to act in such a guardianship role? A dedicated international environmental organisation would appear the most suitable candidate. Additionally NGOs might also be empowered to initiate proceedings in the public interest;<sup>106</sup> as they are arguably more appropriate representatives of global environmental interests than states.<sup>107</sup> As is observed in *Agenda 21*, NGOs ‘play a vital role in the shaping and implementation of participatory democracy.’<sup>108</sup> They are often willing, and have the capacity, to consider and respond to environmental problems crossing borders or beyond national jurisdiction; they may focus upon, and become specialists in, particular environmental issue-areas; and they can also bring a perspective not hamstrung by state interests.

(a) *Reconceptualising ‘Public Interest International Environmental Litigation’*

The possibility of such public enforcement of international environmental law seems some way off, however, given that even the right of states to initiate an *actio popularis*, or to intervene as a third party representing the public interest,<sup>109</sup> is not widely accepted. Nor has the extent of *erga omnes* obligations in the environmental context been settled.<sup>110</sup> The principles by which states may enforce rules for the protection of the

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diplomatic action on the ocean ecosystem’s behalf in appropriate cases; to sue at least in those cases where, if the ocean were a sovereign State, the law would afford it some prospect of relief.’)

<sup>105</sup> The entitlement of international organisations to bring claims in certain circumstances has been recognised by the ICJ. The ICJ in the *Reparation for Injuries Suffered in the Service of the United Nations Case* [1948] ICJ Rep 174 (concerning potential claim against Israel for failing to prevent the murder of a United Nations official, Count Bernadotte) confirmed that the United Nations was ‘a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.’

<sup>106</sup> Philippe Sands, ‘The Environment, Community and International Law’ (1989) 30 *Harvard International Law Journal* 393, 394.

<sup>107</sup> Peel, above n 63, 70-72; Raustiala, ‘The “Participatory Revolution” in International Environmental Law’, above n 24, 558-571.

<sup>108</sup> UN Doc A/CONF.151/26/Rev.1 (1992), ch 27.

<sup>109</sup> See Christine Chinkin, *Third Parties in International Law* (1993) 282, 284 (the ‘notion of intervention by a third party on behalf of the entire world community would cut across the bilateralism of international adjudication, and constitute major intrusion upon state autonomy.’).

<sup>110</sup> In *obiter dicta* in the *Barcelona Traction* case the ICJ confirmed the existence of *erga omnes* obligations designed to protect humanitarian interests, but made no reference, in its admittedly non-exhaustive list, to possible *erga omnes* obligations serving environmental objectives: *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, [34] (‘Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination’).

environment on behalf of the international community as a whole are therefore incomplete and imperfect,<sup>111</sup> and at present, international adjudication is structured around an essentially bilateral system that involves the vindication of the private legal rights of states rather than community values.<sup>112</sup>

Nonetheless it may be observed that, even without such developments, expanding opportunities for public participation within existing strictures can help to ensure that the public function of international environmental adjudication is appropriately discharged. The judicial settlement of international environmental disputes may be said to have two essential aspects. First, there is a *private* function of *inter partes* dispute settlement – courts are charged with the task of resolving disputes brought before them according to international law. However there is also a second, intrinsically *public*, function as the resolution of environmental disputes necessarily involves questions of broader community interest.<sup>113</sup> The private function of international adjudication has traditionally received the greatest emphasis in public international law, reflecting the overriding concern in the era of the *UN Charter* that international law promote peaceful international relations. However, from an environmental perspective this emphasis can be problematic, by privileging the interests of comity over those of the environment. Essentially it may result in the private ordering of public values.

The public purpose of adjudication in domestic environmental law has been well-recognised for some time. As Fiss has explained, courts should operate ‘not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts.’<sup>114</sup> These observations are equally applicable to the role of international courts in explaining and giving effect to the fundamental values found in international environmental law. Indeed this public interest function of international environmental litigation is beginning to be given recognition in some judicial procedures. For instance under the *LOS Convention* ITLOS has competence to issue provisional measures not only to protect the rights of the parties, but also to prevent damage to the environment.<sup>115</sup> A similar provision has been included in the *Straddling Stocks Agreement*.<sup>116</sup> Noyes has argued that, given these provisions,

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<sup>111</sup> Sands, above n 106, 397. See Boyle, above n 39, 19-20.

<sup>112</sup> Phoebe N Okowa, ‘Environmental Dispute Settlement: Some Reflections on Recent Developments’ in Malcolm D Evans (eds), *Remedies in International Law: The Institutional Dilemma* (1998) 157, 158.

<sup>113</sup> Ibid (‘most environmental disputes, even in the form of the most straightforward case of transboundary pollution, always affect the interests of other States, say in a clean environment, and a bilateral resolution of such a dispute will invariably marginalise the wider community concerns’).

<sup>114</sup> O Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Journal* 1073, 1085.

<sup>115</sup> *LOS Convention*, art 290(1).

<sup>116</sup> *1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (‘*Straddling Stocks Agreement*’), art 31(2).

‘ITLOS should bear in mind that the goal of standard-setting in such a case is to help implement important community rights or interests.’<sup>117</sup>

Unless and until the types of innovations evident in the *NAAEC* citizen-submission process are generalised across other regimes, and international law develops legal rules and principles that recognise the possibility of public interest environmental litigation, increased participation may have to take forms other than full *ius standii*. One possible approach would be to expand the rights of non-state actors to participate as *amici curiae*. It has been seen in this Chapter that such developments have been significant in several regimes, and these procedures have begun to be used by environmental NGOs. Although they do not afford non-state actors an entitlement to commence litigation in the public interest, it can allow broader interests to be acknowledged and considered in the course of inter-state litigation involving environmental questions. The participation of *amici curiae* brings with it many other benefits. It can help enhance the quality of the legal argument, it can assist the court in gaining an appreciation of the scientific and policy issues involved, thereby improving the factual conclusions and the eventual legal disposition of the case. This can in turn reduce judicial error, and improve public confidence in adjudicative systems.<sup>118</sup> Moreover, where those *amicus curiae* comprise environmental NGOs, they may provide an important counterbalance to the arguments of states, which may be acting in some respects as proxies for corporate interests.<sup>119</sup>

Nonetheless, several cautionary notes must be sounded in relation to any expansion of rights to appear before international courts as *amicus curiae* in environmental cases.<sup>120</sup> Courts may find themselves inundated with requests, and unable readily to decide upon those bodies most appropriately admitted to participate in the proceedings. If, for instance, an environmental group is admitted as an *amicus*, would it not also be appropriate that a representative industry body offering a countervailing view also be permitted to make submissions?<sup>121</sup> If an environmental NGO is to be allowed to make submissions in a WTO dispute having ramifications for Southern states, should not the latter be entitled to be heard also? In answer to these questions some commentators have

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<sup>117</sup> John E Noyes, ‘The International Tribunal for the Law of the Sea’ (1999) 32 *Cornell International Law Journal* 109, 162.

<sup>118</sup> Dinah Shelton, ‘The Participation of Non-Governmental Organizations in International Judicial Proceedings’ (1994) 88 *American Journal of International Law* 611, 616.

<sup>119</sup> Jeffrey L Dunoff, ‘The Misguided Debate over NGO Participation at the WTO’ (1998) *Journal of International Economics and Law* 433, 434.

<sup>120</sup> See generally D B Hollis, ‘Private Actors in Public International Law: *Amicus Curiae* and the Case for the Retention of State Sovereignty’ (2002) 25 *Boston College International and Comparative Law Review* 235 (arguing that the outer limits of expanding private actor participation are to be found in maintaining the legitimacy of dispute settlement systems in the eyes of states who remain the primary international actors).

<sup>121</sup> In effect this already occurs in the WTO system, given the close involvement by industry groups with the conduct of litigation by governments: Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, ‘Legalized Dispute Resolution: Interstate and Transnational’ (2000) 54 *International Organization* 457, 463.

suggested that expanding *amicus curiae* procedures would only result in the creation of opportunities for 'well-monied special interest groups',<sup>122</sup> not for input by the general public. There is a need, therefore, for the articulation of guidelines both as to the circumstances in which amici are to be heard, and the procedures that will apply to their participation in international judicial proceedings. Such clarification also seems essential for the additional reason that allowing unfettered access by NGOs may make states even more reluctant to utilise international adjudicative mechanisms to resolve their environmental disputes.<sup>123</sup> However, international adjudicative bodies are only in the early stages of this process, and it remains to be seen how successful they will be in mediating the demands of states and of a plurality of civil society and corporate interest groups.

#### IV CONCLUSION

In national and international legal systems governments face a host of constraints that prevent them from commencing environmental litigation in the public interest. In recognition of this fact there have been significant pressure brought to bear by environmental NGOs and other civil society groups to gain access to adjudicative procedures at all levels so that they may be used to ventilate complaints regarding, among other things, governmental failure to implement environmental standards. This pressure has begun to yield results in the practice of international environmental law, although such developments have been very modest in comparison with gains made in other areas of international environmental diplomacy as civil society have become active and valued participants in negotiating environmental regimes and contributing to their ongoing operation.

As is to be expected at this admittedly early stage of development, no uniform approach has been adopted by international courts and tribunals to participation by civil society. Not only is there considerable diversity of practice in terms of jurisdiction *ratione personae*, but there is also great variability in terms of other lesser forms of participation, such as the reception of *amicus curiae* submissions. This means that the extent to which a particular international judicial or quasi-judicial body may be used to defend the environment in the public interest will vary considerably. However, it is possible to make the general point that public interest environmental litigation in international forums at present bears little similarity to such litigation in municipal

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<sup>122</sup> Phillip M Nicols, 'Extension of Standing in the World Trade Organization Disputes to Nongovernmental Parties' (1996) 17 *University of Pennsylvania Journal of International Economics and Law* 295, 327.

<sup>123</sup> Brownlie makes similar observations in relation to more relaxed rights of intervention for third states: Ian Brownlie, 'Arbitration and Judicial Settlement: Comments on a Paper by Judge Lachs' in Alfred H A Soons (ed), *International Arbitration: Past and Prospects* (1990) 60.



courts and tribunals, and can be deployed to protect the environment in the public interest only in an indirect sense.

Given the important differences which exist between the international courts and tribunals deciding disputes with environmental dimensions, it seems unlikely that the diversity of practice might be replaced by a set of uniform rules relating to jurisdiction, intervention, and the participation of amici curiae.<sup>124</sup> Although the goal of public participation has been strongly recognised in environmental law, a standardised approach to this objective by international adjudicatory bodies would require much greater agreement than currently exists on fundamental questions such as the interests that non-state actors are entitled to vindicate in international environmental litigation. Nonetheless, it has been contended in this Chapter that all international courts and tribunals engaged in environmental decision-making are discharging an intrinsically public function. Accordingly some degree of public participation, consonant with the community character of the questions being decided, is not only desirable as a matter of principle, but can also assist in a practical sense in ensuring that the court or tribunal reaches the most appropriately informed decision having regard to relevant issues of environmental law, policy and science.

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<sup>124</sup> Ruth Mackenzie, 'The *Amicus Curiae* in International Courts: Towards Common Procedural Approaches?' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 296, 311.

## **Forum Shopping and Other Problems of Jurisdictional Coordination**

The heterogenous collection of adjudicative procedures currently engaged in resolving environmental disputes has been described in this thesis as a jurisdictional ‘patchwork’ because of the absence of any systematic organisation. The patchwork is characterised by substantial ‘gaps’, as proponents of an international court for the environment have been quick to point out.<sup>1</sup> However, there are also ‘overlaps’, and these give rise to several practical challenges of jurisdictional competition and coordination including forum shopping, simultaneous litigation in multiple forums, and successive proceedings. This Chapter examines the ways in which these practical difficulties are compromising the effective operation of international courts and tribunals in the environmental field. It is seen that these ostensibly procedural or technical problems can produce substantive effects in preventing environmental cases from being resolved promptly and in a manner that effectively addresses the environmental problems of which the litigation is a symptom. The first section of the Chapter identifies the types of jurisdictional competition that can arise between dispute settlement mechanisms operating in international environmental law. By reference to recent cases, the second section considers the ways in which such overlaps or conflicts have led, or may lead, to practical problems. In the third section the Chapter undertakes an assessment of the efficacy of existing jurisdiction-regulating norms in alleviating such difficulties.

### I GAPS AND OVERLAPS IN THE JURISDICTIONAL PATCHWORK

#### *A The Potential for Jurisdictional Competition*

Through the establishment of new institutions, the expansion in the jurisdiction and expertise of existing bodies, and the more frequent use of specialised courts and tribunals, there is now a significant likelihood of jurisdictional competition in relation to a variety of environmental disputes. International environmental agreements have increasingly been drafted to include judicial settlement or arbitration among the available dispute settlement mechanisms.<sup>2</sup> In most cases adjudication is presented as one

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<sup>1</sup> See Chapter 2.

<sup>2</sup> Cesare P R Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000) 91-92.

option among several for the resolution of disputes, following the template provided by Article 33 of the *UN Charter*. However, several instruments go further and allow states at the time of ratification, or at any time thereafter, to accept as compulsory the submission of disputes to arbitration.<sup>3</sup> There are also a growing number of environmental treaties under which arbitration or adjudication is made compulsory.<sup>4</sup>

The competition between dispute settlement provisions of environmental regimes is part of a broader phenomenon of interaction between environmental instruments as a result of environmental ‘treaty congestion’.<sup>5</sup> Bilateral and multilateral environmental agreements have largely been developed in isolation from one another, in the sense that only limited consideration has been given to how they interact and interrelate. As a result there is a considerable degree of overlap in various areas of international environmental law.<sup>6</sup> Some of this replication is benign, with two or more instruments applying similar standards to the same issues (although doubling up of this type may be inefficient if it diverts scarce financial, administrative and technical resources).<sup>7</sup> However, other overlaps can generate difficulties if they involve differing normative standards and prescriptions.<sup>8</sup> Without an effective means of resolving conflict, and promoting uniformity, there can be uncertainty both in the interpretation and implementation of environmental standards.<sup>9</sup>

In parallel with these developments in environmental regimes there have been efforts to enhance the environmental capacity and expertise of existing judicial bodies through initiatives such as the establishment of an environmental chamber of the International

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<sup>3</sup> See, eg, 1985 *Vienna Convention for the Protection of the Ozone Layer*, art 11(3); 1992 *United Nations Framework Convention on Climate Change*, art 14; 1992 *Convention on Biological Diversity*, art 27; 1992 *UNECE Convention on the Transboundary Effects of Industrial Accidents*, art 21; 1994 *Protocol to the 1979 Convention on Long Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions*, art 9.

<sup>4</sup> See, eg, *Convention on the Physical Protection of Nuclear Material*, art 17(2); *Convention for the Protection of the Marine Environment of the North-East Atlantic* (‘*OSPAR Convention*’), art 32; 1973 *International Convention for the Prevention of Pollution from Ships* (as amended and given effect by the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*), art 10; 1991 *Protocol on Environmental Protection to the Antarctic Treaty* (‘*Madrid Protocol*’), arts 18-20; 1982 *United Nations Convention on the Law of the Sea* (‘*LOS Convention*’), pt XV; 1995 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (‘*Straddling Stocks Agreement*’), pt VIII; 2000 *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, art 31. See also *Convention on the Regulation of Antarctic Mineral Resource Activities*, arts 55-59.

<sup>5</sup> Bethany Lukitsch Hicks, ‘Treaty Congestion in International Environmental Law: The Need for Greater International Coordination’ (1999) 32 *University of Richmond Law Review* 1643.

<sup>6</sup> See Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (2003).

<sup>7</sup> *Ibid* 3.

<sup>8</sup> For a discussion of the specific problems that arise in the Antarctic context from overlapping regimes see Donald R Rothwell, ‘A Maritime Analysis of the Conflicting International Law Regimes in the Antarctic and the Southern Ocean’ (1994) 15 *Australian Year Book of International Law* 155

<sup>9</sup> Wolfrum and Matz, above n 6, 3.

Court of Justice<sup>10</sup> ('ICJ') and the elaboration of special arbitral procedures for environmental dispute settlement by the Permanent Court of Arbitration<sup>11</sup> ('PCA'). In addition the proliferation of international courts and tribunals has resulted in the establishment of a variety of specialised adjudicative bodies, and several of these have been involved in deciding disputes involving questions of environmental law and policy.

An important consequence of these trends has been growing levels of competition between dispute settlement mechanisms engaged in resolving environmental cases. Before examining the implications of this phenomenon it is necessary to clarify the three types of jurisdictional intersection that may arise.<sup>12</sup>

### B *Types of Jurisdictional Competition*

One type of competition may arise between two or more dispute settlement systems with similarly broad subject-matter jurisdiction. In such circumstances the jurisdictional overlap is total, in the sense that both bodies possess concurrent and identical subject-matter jurisdiction. One example of this is found in the relationship between the ICJ and the PCA, both of which may be assigned general jurisdiction over environmental and other disputes. This has not yet occurred, although such competition is possible having regard to the efforts of both institutions to increase their capacity to deal with environmental controversies.

A second type of jurisdictional competition may emerge in circumstances where two dispute settlement systems possess jurisdiction that only partly overlaps. This includes situations where one dispute settlement mechanism has general subject-matter jurisdiction, whilst a second procedure operates in relation to a narrower category of disputes falling within this general field. Whether there is any competition in such circumstances will depend considerably upon the characterisation of a dispute. Dispute settlement procedures typically provide that they only apply to cases concerning the interpretation and application of the instrument by which they are established.<sup>13</sup> Hence a

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<sup>10</sup> International Court of Justice, *Communiqué 93/20 on the Establishment of a Permanent Chamber for Environmental Matters* (19 July 1993).

<sup>11</sup> Permanent Court of Arbitration, *Optional Rules for the Arbitration of Disputes Relating to Natural Resources and/or the Environment* (2001) <<http://www.pca-cpa.org/ENGLISH/EDR/ENRules.htm>> at 1 July 2005.

<sup>12</sup> The discussion that follows draws inspiration from the categorisation suggested by Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Year Book of International Law* 191, 192-193) and, to a lesser extent, by Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 29-74 and Patrizia Vigni, 'The Overlapping of Dispute Settlement Regimes: An Emerging Issue of International Law' (2003) XI *The Italian Yearbook of International Law* 139.

<sup>13</sup> This formulation is near universal, and reflects the accepted treaty practice of seeking to confine the application of treaty provisions, including their dispute settlement procedures, to the subject-matter of the treaty concerned. See the model dispute settlement clauses suggested by Philippe Sands and Ruth Mackenzie,

dispute relating solely to one treaty will only enliven the dispute settlement mechanisms of that instrument, and there will be no competition with other dispute settlement systems. Increasingly, however, the interaction between environmental and other agreements renders such compartmentalisation of disputes difficult.

This problem of isolating the gist of a dispute implicating multiple environmental instruments has been encountered in two prominent environmental cases: the *Southern Bluefin Tuna Dispute*<sup>14</sup> which raised questions concerning the conservation of a threatened fishery, and the *MOX Plant Dispute*<sup>15</sup> which related to the commissioning of a nuclear processing plant in the United Kingdom. In the *Southern Bluefin Tuna Dispute* the jurisdictional competition involved the mandatory and binding dispute settlement provisions of the *LOS Convention* on the one hand, and the optional and non-binding procedures of the *1993 Convention for the Conservation of Southern Bluefin Tuna* ('*CCSBT*')<sup>16</sup> on the other. The ongoing *MOX Plant Dispute* raises even more acute difficulties of jurisdictional competition, as the dispute settlement systems of the *LOS Convention*, the *OSPAR Convention* and the *EC Treaty*<sup>17</sup> have all been activated to deal with aspects of the controversy.

There is a third category of jurisdictional competition which may occur when a common set of facts gives rise to litigation under two dispute settlement systems, each with specialised subject-matter jurisdiction. The paradigmatic example of such competition is the concurrent operation of some trade and environment regimes. For instance states may seek, or may be required, to impose trade restrictive measures in order to achieve the objectives of an environmental regime, yet this may prompt complaints from other governments under the dispute settlement system of the World Trade Organisation ('WTO'). There is no true overlap in these cases as the specialisation of the two regimes means that they have competence to deal only with

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'Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements' in International Bureau of the Permanent Court of Arbitration (ed), *International Investments and Protection of the Environment* (2001) 305, 337-344. Only general arbitration agreements, or procedures such as the optional clause system under art 36(2) of the *Statute of the ICJ*, purport to apply to all disputes.

<sup>14</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624 ('*SBT Order*'); *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility)* (2000) 39 ILM 1359 ('*SBT Award*') (together the '*Southern Bluefin Tuna Dispute*').

<sup>15</sup> *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* (2002) 41 ILM 405 ('*MOX Plant Order*'); *MOX Plant Case (Ireland v United Kingdom) (Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures) (Order 3, of 24 June 2003) (Order 4 of 14 November 2003)* <<http://www.pca-cpa.org>> at 1 July 2005 ('*MOX Plant Award*') (together the '*MOX Plant Dispute*').

<sup>16</sup> See *CCSBT*, art 16.

<sup>17</sup> *2002 Consolidated Version of the Treaty Establishing the European Community*.

juridically separate issues. Use of the geometric metaphor of ‘parallelism’<sup>18</sup> to describe such competition is therefore appropriate. However, this does not mean that this type of competition is free from practical difficulties, as will now be seen.

## II PRACTICAL DIFFICULTIES STEMMING FROM JURISDICTIONAL COMPETITION

There arises the potential for three main problematic scenarios to arise from jurisdictional competition, namely ‘forum shopping’, simultaneous proceedings in multiple forums, and successive proceedings in different tribunals. This section considers each of these in turn.

### A *Forum Shopping*

The phenomenon of forum shopping is familiar in domestic and transnational litigation and is encountered when litigants ‘shop’ for the court or tribunal offering the greatest procedural and substantive advantages.<sup>19</sup> The practice ordinarily carries pejorative connotations in these contexts,<sup>20</sup> although there is ongoing debate as to whether it is always undesirable.<sup>21</sup> It is sometimes said that forum shopping undermines the rule of law by denying a defendant forewarning of the substantive law to apply to its conduct or the court that will evaluate its compliance with the law.<sup>22</sup> Moreover, in selecting the most expedient forum, and not the tribunal with the closest connection to the dispute, a plaintiff may initiate litigation that is costly and inconvenient both for the defendant and for the forum. In response to these perceived problems various strategies have been developed in private international law to limit the opportunities to engage in forum shopping, such as the *forum non conveniens* doctrine, and the use of anti-suit injunctions.<sup>23</sup>

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<sup>18</sup> The term is used here in a different sense from that suggested in the *SBT Award* (2000) 39 ILM 1359, 52 in which the Annex VII Tribunal observed in relation to the *LOS Convention* and the *CCSBT* that ‘[t]here is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.’ In the *SBT Dispute* the two instruments in question effectively overlapped rather than operated in ‘parallel’ in that the *CCSBT* was a specific agreement designed to implement the marine living resource conservation provisions of the *LOS Convention*.

<sup>19</sup> See generally Andrew S Bell, ‘The Why and Wherefore of Transnational Forum Shopping’ (1995) 69 *Australian Law Journal* 124.

<sup>20</sup> Shany, *The Competing Jurisdictions of International Courts and Tribunals*, above n 12, 131-138.

<sup>21</sup> Friedrich K Juenger, ‘What’s Wrong with Forum Shopping?’ (1994) 16 *The Sydney Law Review* 5; Brian Opeskin, ‘The Price of Forum Shopping: A Reply to Juenger’ (1994) 16 *The Sydney Law Review* 14.

<sup>22</sup> Shany, *The Competing Jurisdictions of International Courts and Tribunals*, above n 12, 131.

<sup>23</sup> The doctrine of *forum non conveniens*, which allows a court to refuse to hear a case where the forum court is either ‘clearly inappropriate’ or an alternative jurisdiction is ‘more appropriate’ has sometimes been an impediment to transnational environmental litigation: Philippa Webb, ‘The Inconvenience of Liability: The Doctrine of *Forum Non Conveniens* in International Environmental Litigation’ (2001) 6 *Asia Pacific Journal of Environmental Law* 377. But see Peter Prince, ‘Bhopal, Bougainville and Ok Tedi: Why Australia’s *Forum non Conveniens* Approach is Better’ (1998) 47 *International and Comparative Law Quarterly* 573.

Forum shopping is now a feature in some fields of public international law, including human rights,<sup>24</sup> the law of the sea,<sup>25</sup> and international environmental law. Concerns arisen from forum shopping in dispute settlement bodies represents part of a broader anxiety regarding the interaction between international organisations that have overlapping competence and areas of interest.<sup>26</sup> In international law the practice presents several challenges, some of which reflect the negative experiences encountered in domestic legal systems. One of these is the increasing unpredictability of international environmental litigation. Where there a range of forums exist, states may find themselves brought before dispute settlement procedures they had not expected would be invoked. This is effectively what Japan asserted had occurred in the *Southern Bluefin Tuna Dispute*, and Japan was ultimately successful in arguing that the dispute should be resolved under the rubric of the *CCSBT's* dispute settlement procedures rather than those of the *LOS Convention*. From the perspective of the applicants, Australia and New Zealand, the case generated a different type of unpredictability, as the *CCSBT* dispute settlement procedures were referred to, rather unexpectedly, to justify the non-applicability of the far more effective and robust settlement mechanisms of the *LOS Convention*.

Forum shopping in international environmental law raises a further concern, namely that proceedings may be commenced in tribunals not equipped with the necessary expertise or specialised procedures for determining disputes involving complex questions of environmental law and policy. Some features of an adjudicative body may render it more or less appropriate than others for resolving environmental controversies. For instance, it has been argued that permanent bodies are generally to be preferred over ad hoc arbitral panels for several functional and substantive reasons.<sup>27</sup> One key reason is that standing courts and tribunals are better suited for dealing with international environmental disputes involving issues in which the international community as a whole has an interest. In addressing these essentially public disputes, permanent courts

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<sup>24</sup> Laurence R Helfer, 'Forum Shopping for Human Rights' (1999) 148 *University of Pennsylvania Law Review* 285. Helfer identifies three types of forum shopping in the human rights context: (1) choice of tribunal forum shopping, (2) simultaneous complaint forum shopping, and (3) successive complaint forum shopping.

<sup>25</sup> Donald R Rothwell, 'Oceans Management and the Law of the Sea in the Twenty-First Century' in Alex G Oude Elferink and Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 329, 352 (pointing to the variety of dispute settlement options available for law of the sea disputes, and the attendant problem of forum shopping, and noting that '[u]nless there is some development...of a doctrine of international *forum non conveniens*, the capacity of international law of the sea institutions to effectively resolve disputes may be seriously undermined with the result that the institutional architecture created in Part XV [of the *LOS Convention*] may become seriously compromised to the detriment of the whole Convention.').

<sup>26</sup> One example of this is the competition between various international organisations addressing the issue of cetacean conservation: Alexander Gillespie, 'Forum Shopping in International Environmental Law: The IWC, CITES and the Management of Cetaceans' (2002) 33 *Ocean Development and International Law* 17.

<sup>27</sup> See Chapter 2.

can therefore perform an important community function as opposed to the merely private task of adjusting rights and obligations *inter partes*.<sup>28</sup>

Inappropriate forum selection could effectively undermine the operation and regulatory purpose of environmental regimes if procedures outside that regime are utilised in preference to those established specifically to deal with such disputes.<sup>29</sup> In this regard some commentators have argued that the dispute settlement system of the WTO is completely unsuited for determining environmental disputes.<sup>30</sup> Some members of the WTO have been alive to these criticisms, and aware of the WTO's limitations in this respect. For this reason the WTO Committee on Trade and Environment ('CTE'), established with the WTO in 1994, was given the mandate of exploring 'the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements.'<sup>31</sup> In 1996 the CTE recommended, among other things, that WTO parties involved in a dispute principally arising out of a multilateral environmental agreement should consider trying to resolve it through that agreement's dispute settlement mechanisms.<sup>32</sup> Skeen explains that this recommendation was partly borne out of concerns relating to forum shopping, as the '[t]he Committee feared that the exclusive jurisdiction and binding nature of the WTO dispute settlement

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<sup>28</sup> A Neil Craik, 'Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law' (1998) 10 *Georgetown International Environmental Law Review* 551, 562.

<sup>29</sup> Such a problem can arise even as between the dispute settlement systems of the one regime. In relation to the *Southern Bluefin Tuna Dispute*, for instance, Oxman has argued that the fundamentally divergent conclusions regarding jurisdiction reached by ITLOS and the subsequent Annex VII Tribunal may be because judges of ITLOS regarded themselves as part of the system created by the *LOS Convention*, while the majority of the Annex VII Tribunal saw themselves as 'outsiders looking in.': Bernard H Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 *American Journal of International Law* 277, 288.

<sup>30</sup> Layla Hughes, 'Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision' (1998) 10 *Georgetown International Environmental Law Review* 915; Richard J McLaughlin, 'Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or WTO?' (1997) 9 *Georgetown International Environmental Law Review* 29. Lakshman Guruswamy, 'Environment and Trade: Competing Paradigms in International Law' in Antony Anghie and Garry Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 574, 575 (arguing that '[i]t is unfair and unjust to allow a court created by the DSB of GATT/WTO which recognizes only trade law, to adjudicate conflicts between the trade laws that the tribunal is established to advance, and environmental laws based on different and contradictory goals...Those pursuing IEL objectives should have the opportunity to prosecute their cases in a forum which, if not sympathetic to them, will at least hold the balance between trade and environmental objectives.'). But see Andrea Bianchi, 'The Impact of International Trade Law on Environmental Law and Process' in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (2001) 105, 130 ('Although...other fora could become occasionally available to adjudicate environmentally-related disputes, the WTO-DSU provides the most efficient and reliable forum to address this type of dispute.').

<sup>31</sup> *Trade and Environment* (14 April 1994) (1994) 33 ILM 1267 (GATT Ministerial Decision).

<sup>32</sup> *Report of the WTO Committee on Trade and Environment*, [178], WTO Doc WT/CTE/1 (1996).



system might attract environmentally related suits that were not the province of the WTO dispute settlement panel.<sup>33</sup>

While forum shopping may therefore have several undesirable consequences for international environmental litigation, it must also be acknowledged that benefits may flow from some degree of litigant autonomy. It may, for instance, act as an incentive for existing courts and tribunals to improve their capacity to deal with environmental questions. Jurisdictional competition may therefore encourage courts to provide the best 'service',<sup>34</sup> and attract greater use. The attempts by the ICJ, the PCA, and even ITLOS,<sup>35</sup> to adopt environment-specific procedures may perhaps be viewed from this perspective.

It may also be contended that some degree of forum shopping is an inevitable price for an expansion in the range of jurisdictions applicable to environmental disputes. In relation to the *LOS Convention*, for example, the creation of multiple procedures was a prerequisite for agreement on a compulsory dispute settlement regime, and on the Convention as a whole.<sup>36</sup> Rather than relying exclusively on a single body such as the ICJ, Part XV of the *LOS Convention* presents states with a 'cafeteria'<sup>37</sup> or 'smorgasbord'<sup>38</sup> of options for resolving marine environmental disputes which comprises the ICJ, ITLOS and two arbitral tribunals. In this way the *LOS Convention* 'sought to balance flexibility with the goal of compulsory settlement.'<sup>39</sup> This type of adaptable system may actually encourage the increased use of judicial bodies in environmental cases, and to the extent that these bodies give effect to rules and principles of international environmental law then this may be regarded as a beneficial outcome that generally outweighs any potential problems stemming from forum shopping.

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<sup>33</sup> Richard Skeen, 'Will the WTO Turn Green? The Implications of Injecting Environmental Issues Into the Multilateral Trading System' (2004) 17 *Georgetown International Environmental Law Review* 161, 173. See also Joost Pauwelyn, *Conflict of Norms in Public International Law* (2003) 452-453 (arguing that in certain circumstances involving both WTO rules and other regimes, it is possible for a WTO Panel to decide that it does not have jurisdiction, or if it does have jurisdiction that it would be inappropriate for the proceedings to continue).

<sup>34</sup> Jonathan I Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea' (1996) 90 *American Journal of International Law* 69, 71; Shany, *The Competing Jurisdictions of International Courts and Tribunals*, above n 12, 122-123.

<sup>35</sup> International Tribunal for the Law of the Sea, *Resolution on the Chamber for Marine Environment Disputes* (2002) <<http://www.itlos.org>> at 1 July 2005.

<sup>36</sup> Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005) 54.

<sup>37</sup> Alan E Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 *International and Comparative Law Quarterly* 37, 40.

<sup>38</sup> Charney, above n 34, 71.

<sup>39</sup> Shirley V Scott, 'The Contribution of the LOS Convention's Organisations to its Harmonious Implementation' in Alex G Oude Elferink and Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 313, 321.

**B *Simultaneous Proceedings***

A second potential challenge posed by jurisdictional competition is the possibility of litispence, that is proceedings being pursued simultaneously in two or more courts. These types of situations may arise not only from multiple suits commenced by an applicant state, but could also occur where a respondent seeks to utilise a different forum to pursue what is effectively a counterclaim.<sup>40</sup> The availability of multiple dispute settlement procedures that can address aspects of the same dispute can therefore encourage ‘claim splitting’, with all the implications this carries for complicating dispute settlement and increasing its costs.<sup>41</sup>

A situation in which an identical dispute is litigated in two tribunals is highly unlikely to be permitted to continue. Some environmental instruments expressly seek to prevent such a situation. By way of example, under the *1993 North American Agreement on Environmental Cooperation* (‘*NAAEC*’), which exists alongside the *1992 North American Free Trade Agreement* (‘*NAFTA*’), the Secretariat of the Commission on Environmental Cooperation may not consider a complaint that a *NAFTA* party is not complying with its environmental obligations<sup>42</sup> if this question is already before investment arbitration under Chapter 11 of the *NAFTA*.<sup>43</sup> In the absence of treaty-based regulation of litispence, it may be possible to turn to rules of a more general character. Hence the *lis alibi pendens*<sup>44</sup> doctrine may be invoked before the second body seised of the case in order to decline the exercise of jurisdiction.<sup>45</sup> The *res judicata*

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<sup>40</sup> In domestic law a counterclaim may be defined as a ‘claim or a cross-claim capable of supporting an independent action but which is pleaded in the existing action for the sake of convenience.’: *Butterworths Australian Legal Dictionary* (1997) 292.

<sup>41</sup> Yuval Shany, ‘The First *MOX Plant* Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures’ (2004) 17 *Leiden Journal of International Law* 815, 825.

<sup>42</sup> In relation to the citizen submission process see Kal Raustiala, ‘Citizen Submissions and Treaty Review in the *NAAEC*’ in David L Markell and John H Knox (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 257; David L Markell, ‘The Commission for Environmental Cooperation’s Citizen Submission Process’ (2000) 12 *Georgetown International Environmental Law Review* 545.

<sup>43</sup> *NAAEC*, art 14(3)(a). Just such a situation was encountered in 1999 when a Canadian company lodged a complaint with the *NAAEC* Secretariat alleging that the United States had failed to enforce environmental regulations in the state of California. See Methanex Submission, SEM-99-001, 18 October 1999, available at <<http://www.cec.org/citizen/>> at 1 July 2005.

<sup>44</sup> ‘A suit pending elsewhere’.

<sup>45</sup> See Lowe, above n 12, 202. See also *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Jurisdiction)* [1925] PCIJ (ser A) No 6, 20 in which the PCIJ noted that ‘[i]t is a much disputed question...whether the doctrine of *litispence*, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations’. However, the Court went on to conclude that it was not necessary to consider the doctrine as it only applied where there were ‘two identical actions’.

principle may also be relied upon by a responding party if the first tribunal has already proceeded to judgment.<sup>46</sup>

In practice, however, situations of parallel environmental proceedings have not been amenable to resolution in such a straightforward fashion, as is seen in the environmentally important, but as yet unresolved, *MOX Plant Dispute*.

(a) *The MOX Plant Dispute*

The ongoing dispute between Ireland and the United Kingdom in the *MOX Plant Dispute* relates to the establishment of a mixed oxide ('MOX') nuclear fuel plant at the Sellafield nuclear processing facility located on the Irish Sea, in north-west England.<sup>47</sup> Ireland has made a number of claims concerning the non-performance by the United Kingdom of its environmental obligations under the *LOS Convention*, the *EC Treaty*, and the *OSPAR Convention*. The dispute has now led to litigation under four separate regimes,<sup>48</sup> in four different tribunals,<sup>49</sup> and offers a paradigmatic example of difficulties encountered in contemporary international environmental law as a result of jurisdictional competition.

The litigation first began in June 2001, when Ireland requested the establishment of an arbitral tribunal under Article 32 of the *OSPAR Convention* to determine a dispute with the United Kingdom concerning the release of information relating to the commissioning of the MOX plant.<sup>50</sup> Subsequently, in October 2001, Ireland began proceedings against the United Kingdom under Part XV of the *LOS Convention*, alleging violations of the marine environmental protection provisions of that instrument. Ireland also indicated an intention to commence a case in the Court of Justice of the European Communities ('ECJ') in relation to alleged breaches of the *EC Treaty* and the *Euratom Treaty*.<sup>51</sup> However, before it was able to do so the European Commission itself initiated action against Ireland in the ECJ,<sup>52</sup> on the grounds that by bringing the case

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<sup>46</sup> The *res judicata* ('thing decided') doctrine may be regarded as a general principle of law. See Iain Scobbie, 'Res Judicata, Precedent and the International Court: A Preliminary Sketch' (1999) 20 *Australian Yearbook of International Law* 299, 299.

<sup>47</sup> See Chapter 7.

<sup>48</sup> *OSPAR Convention*; *LOS Convention*; *EC Treaty*; and the 1957 *Treaty Establishing the European Atomic Energy Authority* ('*Euratom Treaty*').

<sup>49</sup> ITLOS, an Annex VII Tribunal (convened pursuant to the *LOS Convention* under PCA auspices), an *OSPAR* Arbitral Tribunal (also under PCA auspices), and the ECJ.

<sup>50</sup> *OSPAR Arbitration (Ireland v United Kingdom) (Final Award)* (2 July 2003), <<http://www.pca-cpa.org>> at 1 July 2005. See generally Shany, 'The First *MOX Plant* Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures', above n 41; Malgosia Fitzmaurice, 'Dispute Concerning Access to Information Under Article 9 of the *OSPAR Convention (Ireland v United Kingdom)*' (2003) 18 *International Journal of Marine and Coastal Law* 541.

<sup>51</sup> *MOX Plant Order* (2002) 41 ILM 405, [42].

<sup>52</sup> Case C-459/03. As at 1 July 2005 the case is yet to be heard.

under Part XV of the *LOS Convention*, Ireland had violated the exclusive jurisdiction of the ECJ.<sup>53</sup> These proceedings effectively brought to a halt the proceedings under the *LOS Convention*. While Ireland was successful in obtaining an order of provisional measures in ITLOS (the *MOX Plant Order*), the Annex VII Arbitral Tribunal empanelled to determine the merits of the case has suspended proceedings pending a resolution of the case in the ECJ (the *MOX Plant Award*).<sup>54</sup>

In the *MOX Plant Award*, the Annex VII Tribunal refrained from attempting any definitive resolution of the jurisdictional issues that linger in the *MOX Plant Dispute*. Instead, the Tribunal adopted a compromise approach of affirming its prima facie jurisdiction, which was necessary to support its order of provisional measures, while at the same time suspending the hearing of the merits of the case until its competence can be clearly determined. From a technical perspective this approach appears entirely appropriate in the context of a complex dispute involving several competing regimes.<sup>55</sup> However, the upshot of this cautious and deferential approach is that an important environmental dispute continues to languish unresolved. The Tribunal revealed some awareness of this situation in seeking to fashion interim orders, based on those prescribed by ITLOS in the *MOX Plant Order*, that would ensure that the interests of the parties were preserved, and the dispute was not further inflamed. However, given the seriousness of the environmental questions raised before ITLOS and the Annex VII Tribunal it would seem highly undesirable that the substantive issues concerning nuclear pollution of the Irish Sea should remain unanswered. The fact that they have been tends to suggest that the operation of substantive provisions seeking to protect the environment can be weakened if the institutions designed to supervise their implementation are paralysed by jurisdictional competition.

(b) *The Swordfish Stocks Case*

A somewhat different example of concurrent proceedings was witnessed in the *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*,<sup>56</sup> a dispute between Chile and the European Community that raised not only environmental issues relevant to the *LOS Convention*, but also trade

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<sup>53</sup> See *EC Treaty*, art 292, which provides that ‘Member States undertake not to submit a dispute concerning the interpretation or application of [the *EC Treaty*] to any method of settlement other than those provided for therein.’ Art 193 of the *Euratom Treaty*, is in similar terms.

<sup>54</sup> *MOX Plant Award (Order 3, of 24 June 2003) (Order 4, of 14 November 2003)* <<http://www.pca-cpa.org>> at 1 July 2005.

<sup>55</sup> But see Klein who argues that the decision might be criticised for being ‘overly cautious and premature’: Klein, above n 36, 51.

<sup>56</sup> *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) (Proceedings Suspended)* (15 March 2001 and 16 December 2003) <<http://www.itlos.org>> at 1 July 2005 (‘*Swordfish Stocks Case*’). See Chapter 7.

issues under the WTO. Issues of international economic law were implicated because Chile sought to protect an overexploited straddling fishery by a trade measure, in the form of port bans imposed upon Spanish fishing vessels targeting swordfish near the Chilean Exclusive Economic Zone.<sup>57</sup>

In August 2000, in response to these bans, the European Community initiated consultations in the WTO<sup>58</sup> and subsequently, in November 2000, requested the establishment of a Panel<sup>59</sup> to resolve the dispute. For its part Chile responded by commencing what were effectively counterclaim proceedings under Part XV of the *LOS Convention*.<sup>60</sup> Chile claimed that the European Community had violated several provisions of the *LOS Convention* relating to the conservation of high seas fisheries,<sup>61</sup> and also argued that the dispute was in essence an environmental one and therefore that the dispute settlement procedures of the *LOS Convention* should prevail over those of the WTO. The dispute was eventually resolved by negotiation before a hearing took place either in ITLOS or in a WTO Panel, although the *Swordfish Stocks Case* technically remains on foot as the only case currently in the ITLOS docket. It would seem that one important factor encouraging the parties to settle was the prospects that Chile might lose in any proceedings in the WTO, while the European Community might similarly be the subject of an adverse result in ITLOS.<sup>62</sup>

Serdy has suggested that the trade/environment dichotomy invoked by Chile was a false one,<sup>63</sup> and argued that it would be ‘perverse’<sup>64</sup> to conclude that simply because one forum could hear claims under one treaty that this must preclude another forum from hearing claims in the same dispute under a second treaty. Lowe has similarly contended

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<sup>57</sup> See John Shamsey, ‘ITLOS vs Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute’ (2002) 12 *Transnational Law and Contemporary Problems* 513. This dispute raised similar questions to those addressed in *United States – Restrictions on Imports of Tuna*, GATT Doc DS21/R (1991) (*Tuna-Dolphin I*); *United States – Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994) (*Tuna-Dolphin II*); *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/R (1998) (Report of the Panel), WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body) (*Shrimp-Turtle I*); and *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (*Shrimp-Turtle II*), WTO Doc WT/DS58/RW (2001) (Report of the Panel), WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body) (*Shrimp-Turtle II*). For a discussion of these cases see Chapter 10.

<sup>58</sup> *Chile – Measures Affecting the Transit and Importation of Swordfish*, WTO Doc WT/DS193/1 (2000) (Request for Consultations by the European Communities).

<sup>59</sup> *Chile – Measures Affecting the Transit and Importation of Swordfish*, WTO Doc WT/DS193/2 (2000) (Request for the Establishment of a Panel by the European Communities).

<sup>60</sup> *Swordfish Stocks Case (15 March 2001 and 16 December 2003)* <<http://www.itlos.org>> at 1 July 2005

<sup>61</sup> In particular *LOS Convention*, arts 116 and 119.

<sup>62</sup> Shamsey, above n 57, 538.

<sup>63</sup> Andrew Serdy, ‘See You in Port: Australia and New Zealand as Third Parties in the Dispute Between Chile and The European Community Over Chile’s Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas’ (2002) 3 *Melbourne Journal of International Law* 79, 90.

<sup>64</sup> *Ibid.*

that in circumstances such as these there is no real concurrent or conflicting jurisdiction, and therefore that the dispute could be determined by the two institutions in parallel.<sup>65</sup> Although this analysis may well be correct,<sup>66</sup> the parallel determination of disputes under these distinctive treaty regimes is nonetheless problematic. Had the proceedings continued it would have been for ITLOS to consider the law of the sea questions, while a WTO Panel, and perhaps ultimately the WTO Appellate Body, would have been required to determine whether Chile's trade measure was WTO-consistent. Neither ITLOS nor the WTO dispute settlement system had general competence to consider all of the legal questions involved. However, this does not mean that in deciding the specific segments of this dispute that there would not have been a considerable intersection between the two processes.<sup>67</sup>

There was the real possibility that these two dispute settlement systems might have reached divergent conclusions of fact, a clearly undesirable result that may well have hindered rather than helped in resolving the dispute. Boyle has also noted that either ITLOS or a WTO Panel might 'incidentally determine questions arising under other treaties where it is necessary to do so in order to determine the dispute that is properly before it.'<sup>68</sup> It was also possible for the *LOS Convention* to have been invoked before a WTO Panel or the Appellate Body to justify what would otherwise be a violation of WTO rules. In such circumstances the WTO would have been called upon to interpret the provisions of the *LOS Convention* relating to coastal state responsibilities for fisheries conservation, a task that might lead to conclusions differing from those of ITLOS when confronted with the same question in the parallel proceeding.<sup>69</sup> Moreover, if the two cases produced different overall outcomes, there was also the potential for the parties to be bound by conflicting orders, a consequence which would surely have undermined confidence in the administration of justice by international judicial organs, and may well have forestalled effective conservation measures to protect a threatened fishery.

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<sup>65</sup> Lowe, above n 12, 203. See also Vigni, above n 12, 155 ('Formally speaking, such disputes cannot be considered "the same" even though they may concern the same set of facts.').

<sup>66</sup> But see Pauwelyn, above n 33, 450 (noting that it can also be argued that the underlying basis of the dispute did not relate to trade at all, but rather the sustainable use of high seas fisheries resource.)

<sup>67</sup> For a discussion of possible interactions between ITLOS and the WTO's dispute settlement system see John E Noyes, 'The International Tribunal for the Law of the Sea' (1999) 32 *Cornell International Law Journal* 109, 179-180.

<sup>68</sup> Alan Boyle, 'The World Trade Organization and the Marine Environment' in Myron H Nordquist, John Norton Moore and Said Mahmoudi (eds), *The Stockholm Declaration and the Law of the Marine Environment* (2003) 109, 116.

<sup>69</sup> Marcos A Orellana, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 *Nordic Journal of International Law* 55, 65 ('The parallel proceedings at the WTO and before the ITLOS Chamber carry the risk of rendering contradictory and incompatible judgments, as both adjudicative bodies retain jurisdiction to rule upon the issue of port access to fishing vessels.').

Cases such as the *Swordfish Stocks Case* also invoke the spectre of parallel proceedings being utilised for purely tactical reasons in order to affect the outcome of environmental litigation. To vary somewhat the scenario presented in this case, it is possible that in a dispute involving both trade and marine environmental issues that a respondent to an application brought under Part XV of the *LOS Convention* might attempt to use parallel WTO dispute settlement procedures in order to force a negotiated rather than adjudicated outcome. If successful this could have the consequence that serious breaches of obligations to protect and preserve the marine environment are not brought before an independent forum, and therefore made subject to public scrutiny. In this type of situation it may be possible to apply the doctrine of abuse of right (*'abus de droit'*) to prevent an abuse of the legal process.<sup>70</sup> However, in so doing it would seem essential that the second set of proceedings be shown to be colourable – possessing no substance and no real connection with the dispute – and this may be an exceptionally difficult hurdle to surmount.

### C *Successive Proceedings*

The third, and less serious, problem flowing from jurisdictional competition in contemporary international environmental law is the risk of successive proceedings addressing the same or similar dispute. Serial litigation, in which claimant or respondent states seek to contest the same or similar legal claims is inimical to the orderly administration of international justice. In addition to excessive costs and delay in the resolution of a dispute, there is also the possibility that such decisions could differ. As there is no rule of *stare decisis* in international law, such jurisprudential divergence can only be avoided to the extent that the *res judicata* doctrine is applicable. However the latter doctrine, as with the *lis alibi pendens* rule applicable in relation to parallel proceedings, is only enlivened when the situation involves an *identical* dispute. As ITLOS explained in the *MOX Plant Order*, it is often difficult to characterise a dispute raised before multiple forums as involving a single *lis* or controversy. Indeed the Tribunal found that disputes arising out of several instruments possessing provisions that were in similar, or even identical terms, retained a separate existence.

There has not yet been an instance in international environmental law of successive proceedings seeking to ventilate essentially the same, or a similar, complaint. Ireland's

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<sup>70</sup> Shany argues that the doctrine of abuse of rights now forms part of customary international law: Shany, *The Competing Jurisdictions of International Courts and Tribunals*, above n 12, 255-260. Lowe refers more specifically to the doctrine of 'abuse of process': Lowe, above n 12, 204. Support for the theory that courts may decline jurisdiction where an applicant has commenced malicious proceedings, or has made an application having a tenuous or artificial connection with the facts of the dispute, can be found in general principles of law and in treaty practice, including *LOS Convention*, art 294(1) which relevantly provides that '[i]f the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case.'

claims in the *MOX Plant Dispute* under the *OSPAR Convention* and the *LOS Convention* were different, with the former relating mainly to issues concerning access to environmental information, while the latter concerned substantive questions of marine environmental protection. The *Southern Bluefin Tuna Dispute* involved sequential stages of the one proceeding, pursued under a single dispute settlement system, namely Part XV of the *LOS Convention*. Nonetheless, the dispute did involve distinct forums in the sense that the *SBT Order* was rendered by ITLOS, while the subsequent decision on jurisdiction and admissibility in the *SBT Award* was handed down by an ad hoc arbitral tribunal formed pursuant to Annex VII of the *LOS Convention*. The major differences between the *SBT Order* and the *SBT Award* on the issue of jurisdiction can therefore be cited as some illustration of the potential problems that can arise from successive proceedings.<sup>71</sup>

### III JURISDICTIONAL CO-ORDINATION IN INTERNATIONAL ENVIRONMENTAL LAW

The previous section examined some of the practical problems that have been faced in international environmental law as multiple dispute settlement bodies operate side-by-side. These problems of co-ordination could only be completely resolved by the wholesale rationalisation of the jurisdiction of these bodies. This appears a remote prospect. Not only is the establishment of a system or hierarchy of international courts a practical and political impossibility, but it would run counter to the desire of the international community for diverse forums with distinctive features tailored to meet particular needs.<sup>72</sup> It would also be contrary to the trend of international environmental law to develop sectoral and regional regimes in response to environmental problems.<sup>73</sup>

In the absence of systematic co-ordination it is inevitable that interactions among the patchwork of jurisdictions will continue. The purpose of this section is to consider the strategies currently available for addressing this interaction, and to assess how they have operated in practice. In broad terms there are two basic approaches, reflecting the sources of the applicable rules. The first comprises treaty provisions, found in the

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<sup>71</sup> Donald L Morgan, 'Implications of the Proliferation of International Legal Fora: The Example of the *Southern Bluefin Tuna Cases*' (2002) 43 *Harvard International Law Journal* 541, 541 (the case is evidence of the many problems associated with the growth of international courts including 'fragmentation of international law, forum-shopping by litigants, rivalry among judiciaries with overlapping, and conflicting applications and interpretations of customary international law.').

<sup>72</sup> Jonathan I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1998-1999) 31 *New York University Journal of International Law and Politics* 697, 698.

<sup>73</sup> For a discussion of this trend see Ben Boer, Ross Ramsay and Donald R Rothwell, *International Environmental Law in the Asia Pacific* (1998) 18-20; Martin List and Volker Rittberger, 'Regime Theory and International Environmental Management' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment* (1991) 85, 109 (because of the political obstacles of co-ordination and consensus in negotiating global environmental agreements, states often prefer regional rather than global approaches for managing environmental issues).



constitutive instruments of international dispute settlement bodies, which seek to regulate how those bodies interact with other institutions. In addition to such treaty-based jurisdiction regulating rules there are also general norms, being either rules of custom or ‘general principles of law recognised by civilised nations’,<sup>74</sup> which may be called upon to deal with situations of jurisdictional competition when treaty based rules are non-existent or unclear.

Alone, and in combination, both sets of rules are fairly rudimentary. Rosenne notes that even the most elemental procedures, such as the capacity to transfer cases from one jurisdiction to another, are generally absent.<sup>75</sup> One consequence of their nascent and developing character is that there is some degree of flexibility in their application. This means that precisely how they are deployed depends considerably upon the objective which is sought to be achieved.<sup>76</sup> For instance, in a situation of litispendence a desire to reduce any inconvenience to the litigants might suggest a rather different approach from a broader objective which seeks to ensure that an environmental dispute is resolved by the tribunal best equipped to deal with it. It might also differ from an objective to maintain the effectiveness of an environmental regime by ensuring, wherever possible, that an overlap between consensual and compulsory mechanisms of dispute settlement are resolved in favour of the latter.<sup>77</sup> The key challenge, therefore, in devising and applying appropriate jurisdiction regulating rules in the context of environmental litigation is paying appropriate regard to the role of adjudication not only in resolving disputes amicably, but also in determining cases in a manner which best promotes the substantive objectives of the applicable rules of international environmental law.

#### *A Applying Jurisdiction Regulating Rules in International Environmental Law*

Environmental regimes seek to regulate jurisdictional competition in several ways, mirroring the practice in international dispute settlement more generally. However, as yet no environmental dispute settlement procedure has adopted the approach of some regional or issue-specific tribunals, such as the ECJ and the WTO, which possess exclusive jurisdiction over disputes concerning the interpretation or application of their respective constituent instruments.<sup>78</sup> Such provisions are designed to be protective of

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<sup>74</sup> *Statute of the ICJ*, art 38(1)(c).

<sup>75</sup> Shabtai Rosenne, *The Perplexities of Modern International Law* (2004) 65.

<sup>76</sup> Vigni, above n 12, 146 (emphasising that neither general principles nor rules of treaty law provide a definitive resolution of problems of jurisdictional overlap, and arguing that there is a need for ‘contextual and teleological interpretation’ of those norms in order ‘to determine which regime must deal with a particular matter or dispute.’).

<sup>77</sup> *Ibid* 147.

<sup>78</sup> *EC Treaty*, art 292; *1994 Marrakesh Agreement Establishing the World Trade Organisation* annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) (‘DSU’), art 23.

self-contained regimes, and are motivated by a concern that external dispute settlers may not share the same commitment to the goals of the regime.<sup>79</sup>

The closest such example with some connection to environmental disputes is actually found in a trade regime. Under the *NAFTA* the parties may rely upon only a limited number of multilateral environmental agreements to justify trade measures designed to protect human health and/or the environment that would otherwise be in conflict with the *NAFTA*.<sup>80</sup> In order to prevent parties from commencing trade cases involving such environmental exceptions outside the *NAFTA* dispute settlement system, when a responding party seeks to rely on the specified environmental agreements a complainant may *only* resort to the *NAFTA* for resolution of that dispute.<sup>81</sup>

Dedicated environmental regimes instead adopt a mostly deferential approach, allowing virtually any alternative procedure to be used to settle disputes concerning the regime. A typical provision in this respect is found in the *Madrid Protocol*, which is unusual in international environmental law in providing for compulsory adjudication of disputes, either by the ICJ or an ad hoc arbitral tribunal.<sup>82</sup> However, it does not prevent the parties from seeking to utilise other mechanisms, including diplomatic means of settlement. To this end Article 18 provides that the parties to a dispute ‘concerning the interpretation or application of this Protocol’ shall ‘consult among themselves as soon as possible with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means to which the parties to the dispute agree.’ This flexibility built into the *Madrid Protocol* provides the parties with the widest range of options for resolving disputes, but also ensures that where no agreement between them is forthcoming that arbitration or judicial settlement applies by default.

The type of jurisdiction-regulating rule expressed in the *Madrid Protocol* is beginning to be considered in international litigation. It might be thought that the operation of such norms would be relatively clear-cut. However, this has not been the experience to date. Difficulties have been encountered in determining what constitutes an agreement to utilise an alternative means of peaceful settlement, and ascertaining whether it should override the procedure that has been invoked in the absence of express words to this effect. This was the quandary faced in both the *Southern Bluefin Tuna*

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<sup>79</sup> Shany, *The Competing Jurisdictions of International Courts and Tribunals*, above n 12, 182.

<sup>80</sup> *NAFTA*, art 104.

<sup>81</sup> *Ibid* art 2005(3).

<sup>82</sup> *Madrid Protocol*, art 19. Parties to the *Madrid Protocol* may declare that they accept the jurisdiction of the ICJ or of an Arbitral Tribunal constituted in conformity with the Schedule to the protocol (art 19(1)). A party which has not made a declaration is deemed to have accepted the competence of the Arbitral Tribunal (art 19(3)), and in a case of differing preferences the dispute may be submitted only to the Arbitral Tribunal, unless the parties otherwise agree (art 19(5)).

*Dispute* and the *MOX Plant Dispute*, in which ITLOS and Annex VII Arbitral Tribunals were asked to interpret provisions of the *LOS Convention* that are similar to Article 18 of the *Madrid Protocol*, but go somewhat further in allowing the use of alternative dispute settlement mechanisms only insofar as it does not detract from the Convention's own binding system. How these provisions have operated in practice provide a range of insights into the extent to which jurisdictional competition is problematic in the environmental context, and how it might be addressed.

(a) *The Jurisdiction-Regulating Norms of the LOS Convention*

Jurisdiction-regulating norms are an essential feature of Part XV of the *LOS Convention*, which establishes a compulsory system for the adjudication of disputes relating to the interpretation or application of the Convention. The drafters were aware of the potential interaction between Part XV and other mechanisms for resolving law of the sea disputes, and hence included several jurisdictional prerequisites in Section 1 of Part XV. These provide additional flexibility to the system, permitting states to agree upon alternative disputes settlement procedures. Article 280 emphasises that nothing in the *LOS Convention* prevents states from resolving disputes concerning the interpretation or application of the Convention through peaceful means of their choosing. Article 281(1) goes on to provide that the compulsory dispute settlement mechanisms contained in Section 2 of Part XV will only operate where the parties to a dispute have not reached a settlement by their agreed means and that agreement does not exclude any further procedure. In addition, and recognising that parties to a dispute concerning the *LOS Convention* may also be parties to other agreements providing for the binding settlement of such disputes, Article 282 provides that those procedures will apply in lieu of Part XV:

If the states parties that are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in [Part XV], unless the parties to the dispute otherwise agree.

Hence while the parties retain the freedom to select another form of dispute settlement, they are not permitted to avoid the general obligation to submit Convention-related disputes, such as those concerning the marine environment, to a binding settlement mechanism.<sup>83</sup>

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<sup>83</sup> Vigni, above n 12, 154.

(b) *The Southern Bluefin Tuna Dispute*

It was the effect of Article 281 of the *LOS Convention* that emerged as the central jurisdictional issue in the *Southern Bluefin Tuna Dispute*.<sup>84</sup>

(i) *The SBT Order*

In July 1999 Australia and New Zealand requested the establishment of an arbitral tribunal under Annex VII of the *LOS Convention* to hear the merits of the dispute which related to a Japanese experimental fishing program ('EFP') for an endangered fishery, Southern Bluefin Tuna.<sup>85</sup> Pending the establishment of the Tribunal, Australia and New Zealand successfully sought provisional measures in ITLOS to halt Japan's unilateral EFP. In August 1999 ITLOS unanimously found that the Annex VII Tribunal to be established would prima facie have jurisdiction over the dispute between the parties.<sup>86</sup> ITLOS went on to order that the parties maintain their catches of Southern Bluefin Tuna at previously agreed levels, and that none of the litigants engage in a EFP.<sup>87</sup>

In what was akin to a claim that Australia and New Zealand were shopping for a forum that offered them particular advantages, Japan argued before ITLOS that the dispute between the parties concerned only the *CCSBT*, and not the *LOS Convention*, and therefore that the non-binding dispute settlement provisions of the *CCSBT* should prevail. However, ITLOS concluded that the fact that the *CCSBT* applied did not exclude the right of Australia and New Zealand to invoke the provisions of the *LOS Convention* relating to the conservation and management of Southern Bluefin Tuna,<sup>88</sup> nor did it preclude recourse to the procedures in Part XV.<sup>89</sup> ITLOS also accepted that there was in existence a dispute between the parties concerning the interpretation and application of the *LOS Convention*.<sup>90</sup> Accordingly ITLOS found that the Annex VII Tribunal to be established would prima facie have jurisdiction over the dispute.<sup>91</sup>

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<sup>84</sup> See also the discussion in Chapter 7.

<sup>85</sup> As neither Australia, New Zealand, or Japan had made a declaration under the *LOS Convention*, art 287 electing a procedure, annex VII arbitration applied by default. The parties requested the World Bank's International Centre for Settlement of Investment Disputes to administer the arbitration.

<sup>86</sup> *SBT Order* (1999) 38 ILM 1624, [62].

<sup>87</sup> *Ibid* [90(c)] and [90,(d)].

<sup>88</sup> *Ibid*, [51].

<sup>89</sup> *Ibid*.

<sup>90</sup> *Ibid* [44]-[48].

<sup>91</sup> *Ibid* [62]. Judge ad hoc Shearer argued in the *SBT Order* that ITLOS should have held that the jurisdiction of the Annex VII Tribunal was clearly manifest. Lowe acknowledges the beneficent intentions behind such an approach ('it is understandable that the ITLOS, and its individual judges, should seek to exercise some benevolent oversight of the UNCLOS dispute settlement system. If they do not, who else will?'), but argues that the majority correctly refrained from stepping beyond the terms of their remit and pronouncing upon a jurisdictional issue that is properly the province of the tribunal constituted to determine the merits of the

(ii) *The SBT Award*

In August 2000 the Annex VII Arbitral Tribunal handed down its award on jurisdiction and admissibility in which it reached a conclusion that was diametrically opposed to that of ITLOS. It found that it was not in fact competent to hear the dispute, and unanimously discharged the provisional measures prescribed by ITLOS. The main conclusion in the *SBT Award* was that, by operation of Article 281 of the *LOS Convention*, the non-compulsory dispute resolution provisions of the *CCSBT* contained in Article 16<sup>92</sup> excluded the operation of the compulsory procedures contained in Part XV of the *LOS Convention*. As a consequence of this controversial conclusion, the decision has given rise to voluminous, and mostly critical, commentary.<sup>93</sup>

The Tribunal rejected Japan's submission that the *CCSBT* was a *lex specialis* which displaced the relevant conservation and management provisions of the *LOS Convention*. It found that an implementing convention such as the *CCSBT* does not necessarily vacate the obligations imposed by the *LOS Convention*, or other framework

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proceeding: Vaughan Lowe, 'Advocating Judicial Activism: The ITLOS Opinions of Judge Ivan Shearer' (2005) 24 *Australian Year Book of International Law* 145, 152

<sup>92</sup> Art 16 provides:

'1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.'

<sup>93</sup> For critical analysis of the decision see D A Colson and P Hoyle, 'Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the *Southern Bluefin Tuna* Tribunal Get it Right?' (2003) 34 *Ocean Development and International Law* 59; Jacqueline Peel, 'A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes Under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration' (2002) 3 *Melbourne Journal of International Law* 53; Cesare Romano, 'The *Southern Bluefin Tuna* Dispute: Hints of a World to Come...Like it or Not' (2001) 32 *Ocean Development and International Law* 313; Tim Stephens, 'A Paper Umbrella Which Dissolves in the Rain? Implications of the *Southern Bluefin Tuna* Case for the Compulsory Resolution of Disputes Concerning the Marine Environment' (2001) 6 *Asia Pacific Journal of Environmental Law* 297; Leah Sturtz, '*Southern Bluefin Tuna* Case: Australia and New Zealand v. Japan' (2001) 28 *Ecology Law Quarterly* 455; Deborah Horowitz, 'The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the *Southern Bluefin Tuna* Case' (2001) 25 *Melbourne University Law Review* 810. For a far more sympathetic appraisal of the decision see Barbara Kwiatkowska, 'The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A Colson and Dr Peggy Hoyle' (2003) 34 *Ocean Development and International Law* 369; Barbara Kwiatkowska, 'The Australia and New Zealand Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal' (2001) 16 *International Journal of Marine and Coastal Law* 239 and Barbara Kwiatkowska, 'Southern Bluefin Tuna' (2001) 95 *American Journal of International Law* 162.

convention.<sup>94</sup> The Tribunal concluded that while the dispute was centred on the *CCSBT*, it also arose under the *LOS Convention*.<sup>95</sup>

[T]here is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.<sup>96</sup>

However, the Tribunal was not content simply to find that a ‘parallelism’ existed; instead it went further, finding that in this case there was in fact ‘a *single dispute* arising under both Conventions.’<sup>97</sup> This was an essential step in its reasoning which ultimately led it to conclude that Part XV was inapplicable, because it allowed the Tribunal to conclude that the *CCSBT* constituted an agreement for the settlement of a dispute concerning the *LOS Convention*.

The Tribunal noted that the first requirement of Article 281 had been met because there had been serious and prolonged negotiations under the *CCSBT* which had produced no settlement.<sup>98</sup> In relation to the second requirement of Article 281, the Tribunal held that Article 16 of the *CCSBT* ‘exclude[d] any further procedure’ and therefore rendered Part XV inoperative.<sup>99</sup> The reasoning on this second aspect of Article 281 had two main aspects.<sup>100</sup> First, the Tribunal found that the *CCSBT* intended to exclude the compulsory dispute settlement mechanisms contained in Part XV. This was despite the fact that Article 16 of the *CCSBT* does not expressly purport to exclude Part XV. Second, the Tribunal interpreted Article 281 broadly to support its conclusion that Part XV procedures were displaced by an agreement that disclosed no clear intention to apply in its place. This conclusion also appears problematic, as the Tribunal’s expansive reading of Article 281 would seem to catch all dispute resolution provisions in parallel instruments rather than being limited to specific agreements to seek a settlement of *LOS Convention* disputes outside the framework of Part XV.

Various factors were said by the Tribunal to support these contentious conclusions. First, the express obligation in Article 16 of the *CCSBT* to continue to seek resolution by the means listed in that Article stressed the consensual nature of the reference of any dispute to judicial settlement and indicated that the intent of Article 16 was to remove proceedings from the reach of compulsory procedures.<sup>101</sup> Second, the Tribunal found that Article 16 of the *CCSBT*, like Article XI of the *1959 Antarctic Treaty* on which it

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<sup>94</sup> *SBT Award* (2000) 39 ILM 1359, [52].

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid* [54] (emphasis added).

<sup>98</sup> *Ibid* [55].

<sup>99</sup> *Ibid* [59].

<sup>100</sup> Colson and Hoyle, above n 93, 67.

<sup>101</sup> *SBT Award* (2000) 39 ILM 1359, [57].

was modelled, was obviously intended to exclude compulsory jurisdiction.<sup>102</sup> Third it was considered that, in light of the express exceptions from the Part XV regime, the *LOS Convention* ‘falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions.’<sup>103</sup> Finally it was said that many other agreements entered into after the *LOS Convention* exclude compulsory jurisdiction to varying degrees.

The reasoning of the *SBT Award* was challenged on a number of grounds by the lone dissident, Sir Kenneth Keith. Sir Kenneth considered that clear wording was needed to exclude the obligations of states to submit to binding procedures under the *LOS Convention* and that Article 16 of the *CCSBT* did not supply the necessary words.<sup>104</sup> Colson and Hoyle have similarly mounted a compelling critique of this aspect of the *SBT Award*, observing that ‘the more compelling interpretation [of Article 281]...is that [Part XV] would only be precluded if there were a *specific agreement* to do so in relation to a *specific process* being used to address a *specific dispute*.’<sup>105</sup>

If it is followed, the *SBT Award* may have significant implications for the settlement of disputes that arise simultaneously under the *LOS Convention* and a specific implementing instrument, such as the *CCSBT*. It suggests that the dispute settlement system of the *LOS Convention* is highly vulnerable to displacement, and therefore that its effectiveness as a regime may be substantially weakened. The reasoning of the Tribunal would also appear to be applicable to other situations of jurisdictional competition in which one instrument incorporates a jurisdiction-regulating provision in similar terms to Article 281 of the *LOS Convention*. In such situations a mere agreement to negotiate, such as Article 16 of the *CCSBT*, which adds little to the requirement under Articles 2 and 33 of the *UN Charter* that states settle their disputes peacefully, may take precedence over compulsory procedures.

As far as high seas fisheries disputes are concerned, in the ultimate paragraph of its reasons the Annex VII Tribunal referred to a comprehensive solution to what the Tribunal euphemistically described as the ‘procedural problems’ raised by the *Southern Bluefin Tuna Dispute*.<sup>106</sup> The Tribunal specifically discussed the *Straddling Stocks Agreement*<sup>107</sup> which, it was noted, was not only more detailed and expansive than the

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<sup>102</sup> *SBT Award* (2000) 39 ILM 1359, [58].

<sup>103</sup> *Ibid* [62].

<sup>104</sup> *SBT Award* (2000) 39 ILM 1359, Separate Opinion of Judge Sir Kenneth Keith, [19].

<sup>105</sup> Colson and Hoyle, above n 93, 69.

<sup>106</sup> *SBT Award* (2000) 39 ILM 1359, [71].

<sup>107</sup> See Tullio Treves, ‘The Settlement of Disputes According to the Straddling Stocks Agreement of 1995’ in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), 253, 269 (noting that unlike the ‘usual approach of conventions for the protection of the environment, which stresses more the prevention and management of disputes than their

relevant provisions of the *LOS Convention* or *CCSBT*, but contains provisions that apply Part XV of the *LOS Convention mutatis mutandis* to any dispute between the states parties concerning the Agreement or a subregional, regional or global fisheries agreement.<sup>108</sup>

Oxman has noted that the *SBT Award* confirmed that jurisdiction regulating norms are not necessarily capable of straightforward application, and that there may be a need to turn to presumptions to resolve the interactions between competing procedures.<sup>109</sup> He asks whether, when there is competition between non-compulsory and compulsory procedures, is there a presumption that restrictions on state autonomy are not to be presumed and therefore that express consent will be required to maintain the mandatory system? Or instead is there a presumption in favour of what Oxman calls a 'regime-building conception' which only permits states to derogate from compulsory procedures where they have expressly sought to do so? The Tribunal in the *SBT Award* appeared to adopt the former framework of analysis, the effect of which was to prevent a dispute concerning a threatened fishery from being considered in a forum that could offer authoritative guidance on the marine environmental provisions of the *LOS Convention*. While there is no doubt that the litigation in the *Southern Bluefin Tuna Dispute* assisted the parties in resolving their dispute,<sup>110</sup> it must seriously be questioned whether it also had the effect of leaving the parties with no precise legal guidance as to their marine environmental protection obligations.

(c) *The MOX Plant Dispute*

The *MOX Plant Dispute* also involved a consideration of the jurisdiction-regulating norms of the *LOS Convention*, this time Article 282, a companion provision to Article 281. Unlike the *Southern Bluefin Tuna Dispute*, the *MOX Plant Dispute* has not produced a determination that has weakened the *LOS Convention's* dispute settlement regime. Nonetheless, the practical result of the litigation has been to prevent the environmental dispute from being determined.

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solution by binding decisions' the *Straddling Stocks Agreement* relies heavily on compulsory dispute settlement as a compliance mechanism.)

<sup>108</sup> *SBT Award* (2000) 39 ILM 1359, [71].

<sup>109</sup> Oxman, above n 29, 277.

<sup>110</sup> See Bill Mansfield, 'Letter to the Editor: The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiakowska's Article' (2001) 16 *International Journal of Marine and Coastal Law* 361; Bill Mansfield, 'Compulsory Dispute Settlement after the *Southern Bluefin Tuna Award*' in Alex Oude-Elferink and Donald R Rothwell (eds), *Oceans Management in the Twenty First Century: Institutional Frameworks and Responses under the Law of the Sea Convention* (2004) 255.



(i) *The MOX Plant Order*

In the provisional measures phase ITLOS had an opportunity to consider some of the issues arising out of the interaction between the *LOS Convention* and other legal regimes applicable to the dispute. The United Kingdom had objected to the jurisdiction of ITLOS to order provisional measures on several grounds, including that Article 282 of the *LOS Convention* prevented proceedings from continuing because the parties had agreed to alternative binding procedures.<sup>111</sup> In this regard the United Kingdom pointed to the *OSPAR Convention*, the *EC Treaty* and the *Euratom Treaty* and the compulsory dispute settlement procedures of those three agreements.<sup>112</sup>

For its part Ireland responded that the gist of the dispute with the United Kingdom concerned the interpretation and application of various provisions of the *LOS Convention* relating to marine environmental protection,<sup>113</sup> and *not* any other instrument.<sup>114</sup> Moreover, it was contended that tribunals operating under the competing regimes would not have jurisdiction that extended to all the matters in dispute before ITLOS.<sup>115</sup> In characterising the case, Ireland suggested that the rights and duties under the range of instruments applicable to the dispute were cumulative, and therefore it could rely on any, or all of them, as it chose.<sup>116</sup>

ITLOS rejected the United Kingdom's objections based on Article 282, for two closely related reasons. First, it held that the general, regional or bilateral agreements to which Article 282 refers will only apply in place of the *LOS Convention* dispute settlement system if they provide for the settlement of disputes concerning the interpretation or application of the *LOS Convention* itself.<sup>117</sup> The settlement mechanisms under the *OSPAR Convention*, the *EC Treaty* and the *Euratom Treaty* were said by ITLOS to concern 'the interpretation or application of those agreements, and not with disputes arising under the [*LOS Convention*].'<sup>118</sup> Secondly, the Tribunal sought to distinguish disputes arising under the *LOS Convention* from those arising under the *OSPAR Convention*, *EC Treaty* and *Euratom Treaty*. The Tribunal held that:

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<sup>111</sup> *MOX Plant Order* (2002) 41 ILM 405 [38].

<sup>112</sup> *Ibid* [43].

<sup>113</sup> *Ibid* [36].

<sup>114</sup> *Ibid* [45].

<sup>115</sup> *Ibid* [46].

<sup>116</sup> *Ibid* [47].

<sup>117</sup> *Ibid* [48]. Note also the Separate Opinion of Judge Wolfrum in which he observed that taking into account the purpose of Part XV, which is to give primary jurisdiction to art 287 courts and tribunals unless the parties to a dispute have agreed otherwise, 'an intention to entrust the settlement of disputes concerning the interpretation and application of the [*LOS Convention*] to other institutions must be expressed explicitly in [those other] agreements.'

<sup>118</sup> *MOX Plant Order* (2002) 41 ILM 405 [49].

[E]ven if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention.<sup>119</sup>

In support of this conclusion ITLOS observed even where treaty provisions are identical they may be construed differently having regard to the objects and purposes of the treaty regimes of which they form part.<sup>120</sup> Judge Wolfrum further explained this line of reasoning in his Separate Opinion:

It is well known in international law and practice that more than one treaty may bear upon a particular dispute. The development of a plurality of international norms covering the same topic or right is a reality. There is frequently a parallelism of treaties, both in substantive content and in their provisions for settlement of disputes thereunder. However, a dispute under one agreement, such as the OSPAR Convention does not become a dispute under the [*LOS Convention*] by the mere fact that both instruments cover the [same] issue. If the OSPAR Convention, the Euratom Treaty or the EC Treaty were to set out rights and obligations similar or even identical to those of the [*LOS Convention*], these still arise from rules having a separate existence from the ones of the [*LOS Convention*].<sup>121</sup>

Both the ITLOS order and Judge Wolfrum's Separate Opinion usefully explain how a dispute implicating multiple instruments which seems on its face to be an indivisible case can in fact be separated into individual components. However, somewhat regrettably, there was no further engagement with the question that was subsequently faced in the *MOX Plant Award*, namely how the interaction between the *LOS Convention* and the 'self-contained regime'<sup>122</sup> established by the *EC Treaty* was to be resolved. Specifically, which institution is to be the ultimate arbiter as to whether a dispute concerns only the *LOS Convention*, or in fact several instruments including the *EC Treaty*?

Having dismissed the United Kingdom's arguments regarding Article 282, the Tribunal concluded that it did have jurisdiction, stating that since the dispute 'concerns the interpretation or application of the Convention and no other agreement, only the

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<sup>119</sup> Ibid [50].

<sup>120</sup> Ibid [51].

<sup>121</sup> Ibid, Separate Opinion of Judge Wolfrum, 2.

<sup>122</sup> Bruno Simma, 'Self-Contained Regimes' (1985) 16 *Netherlands Yearbook of International Law* 111, 123-129 (arguing that the *EC Treaty* constitutes a self-contained regime and that consequences of violations of the treaty must first be pursued within the regime itself before looking for procedures beyond the regime).

dispute settlement procedures under the Convention are relevant to that dispute.<sup>123</sup> Judge Treves noted that had the United Kingdom's jurisdictional arguments been accepted, this law of the sea dispute would have had to be considered in separate parts by different courts and tribunals and been taken away from the only mechanism competent to consider it in its entirety.<sup>124</sup> The majority's approach is evidently a strong affirmation of the centrality of Part XV of the *LOS Convention* for the resolution of marine environmental disputes.

(ii) *The MOX Plant Award*

The Annex VII Arbitral Tribunal's Order of 24 June 2003 in which it suspended proceedings did not greatly clarify the scope of Article 282, although the decision did implicitly affirm aspects of the *MOX Plant Order*. The Tribunal concurred with the finding as to prima facie jurisdiction on the grounds that the dispute clearly concerned the interpretation and application of the Convention.<sup>125</sup> However, the Tribunal noted that although this was sufficient to support an order of interim measures, it had to be definitely satisfied as to its jurisdiction in order to pronounce on the merits.<sup>126</sup>

The United Kingdom once again argued that the jurisdiction of the *LOS Convention's* dispute settlement system was ousted by the *OSPAR Convention* and the *EC Treaty*. The Tribunal was not swayed by the argument relating to the *OSPAR Convention*. It agreed with ITLOS that while the *OSPAR Convention* was relevant to some of the questions in issue, this fact did not alter 'the character of the dispute as one essentially involving the interpretation and application of the [*LOS Convention*].'<sup>127</sup> Additionally the Tribunal was not convinced that the *OSPAR Convention* substantially 'covers the field' of the dispute so as to activate Article 282 of the *LOS Convention*.

However, the interaction between the *LOS Convention* and the *EC Treaty* raised far more difficult questions. Not only had Ireland and the United Kingdom transferred

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<sup>123</sup> *MOX Plant Order* (2002) 41 ILM 405, [52]. In his Separate Opinion, Judge Nelson expressed doubts as to the breadth of the reasoning adopted by the majority, suggesting that it may render arts 281 and 282 ineffective. Judge Anderson also questioned this aspect of the Tribunal's order, but did not explain the basis of his doubts as to the correctness of paragraph 52. Judge Jesus similarly doubted the Tribunal's interpretation of art 282, and accepted the reasoning in the *SBT Award* (2000) 39 ILM 1359 that had the dispute in this case been amenable to characterisation as a single dispute arising under multiple instruments then Part XV would be inapplicable. But see *contra* Judge Wolfrum, who maintained that the interpretation of art 282 offered by ITLOS did not leave the provision devoid of substance.

<sup>124</sup> *MOX Plant Order* (2002) 41 ILM 405, Separate Opinion of Judge Treves, [6].

<sup>125</sup> *MOX Plant Award (Order 3, of 24 June 2003)* <<http://www.pca-cpa.org>> at 1 July 2005, [14].

<sup>126</sup> *Ibid* [15].

<sup>127</sup> *Ibid* [18].

competence over law of the sea matters to the European Community,<sup>128</sup> but the ECJ possessed exclusive jurisdiction over matters of European Community law.<sup>129</sup> In June 2003, at the time of the initial Annex VII Tribunal order, there was a real possibility that the European Commission would institute proceedings against Ireland, and indeed such proceedings were subsequently commenced in October 2003. In that case the ECJ could well be asked whether the relevant provisions of the *LOS Convention* on which Ireland relied were matters in relation to which competence had been transferred to the European Community, and whether the exclusive jurisdiction of the ECJ extended to the interpretation and application of the *LOS Convention*.<sup>130</sup>

Neither Ireland nor the United Kingdom argued that the interpretation and application of the *LOS Convention* fell entirely within the exclusive jurisdiction of the ECJ, however the Tribunal observed that the ECJ may well reach such a conclusion and, if it did, then Part XV would be inapplicable by operation of Article 282 of the *LOS Convention*.<sup>131</sup> It was of course a matter for the Annex VII Tribunal to determine the limits of its own jurisdiction,<sup>132</sup> and the Tribunal observed that it could seek to identify those provisions of the *LOS Convention* not falling within the exclusive jurisdiction and competence of the European Community. However, the Tribunal stated that this would be inappropriate, not only because there was some lack of clarity as to which provisions of the *LOS Convention* were affected, but also because under

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<sup>128</sup> By operation of *LOS Convention*, annex IX, an international organisation may become a party to the Convention. Under annex IX, art 5(1) the instrument of formal confirmation or accession ‘shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organisation by its members States which are Parties to this Convention.’ Under art 5(2), a member State of an international organisation shall, when ratifying or acceding, ‘make a declaration specifying the matters governed by this Convention in respect of which it has transferred competence to the organisation.’ Both Ireland (upon ratification on 21 June 1996) and the United Kingdom (upon accession on 25 July 1997) made declarations observing that competence in relation to certain matters had been transferred to the European Community. In its declaration upon formal confirmation (1 April 1998) the European Community stated that it had exclusive competence over various marine environmental matters, including fisheries issues and also marine pollution to the extent that ‘such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community.’ For the full texts of these, and all other declarations, see <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm)> at 1 July 2005.

<sup>129</sup> *MOX Plant Award (Order 3, of 24 June 2003)* <<http://www.pca-cpa.org>> at 1 July 2005, [20]. The ECJ has held that international agreements to which the EC is a party (either alone or side-by-side with member states) are an integral part of the Community’s legal system (*Haegeman v Belgium* [1974] ECR 499, [4]-[6]). The ECJ has the task of ensuring that EC law is observed (*EC Treaty*, art 164). See generally Ellen Hey, ‘The European Community’s Courts and International Environmental Agreements’ (1998) 7 *Review of European Community and International Environmental Law* 4.

<sup>130</sup> *MOX Plant Award (Order 3, of 24 June 2003)* <<http://www.pca-cpa.org>> at 1 July 2005, [21].

<sup>131</sup> *Ibid* [22].

<sup>132</sup> It is generally accepted that international courts possess jurisdiction to decide the limits of their own jurisdiction (the so-called ‘*la compétence de la compétence*’ or ‘*Kompetenz-Kompetenz*’) as a necessary incident of the judicial function. See generally I Shihata, *The Power of the International Court to Determine Its Own Jurisdiction: Competence de la Competence* (1965).

European Community law this was a matter ultimately to be decided by the ECJ.<sup>133</sup> It was also of relevance that had both the Tribunal and the ECJ proceeded to a determination on jurisdiction, each decision would be equally binding upon the parties.<sup>134</sup> For these reasons, ‘and bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States’,<sup>135</sup> the Tribunal suspended hearings on the merits pending a resolution of Community law issues. In November 2003 the Tribunal further suspended the proceedings indefinitely.<sup>136</sup> Presumably they will only now be reactivated following a decision by the ECJ.

#### IV CONCLUSION

The varied dispute settlement procedures now operating in the environmental field, including the many international courts and tribunals, present a suite of options for resolving disputes and promoting compliance with environmental rules and standards. As has been seen in this Chapter, the interaction between these mechanisms is fraught with practical difficulties. International environmental litigation has become, as a consequence, more complex, lengthy and costly, with some proceedings paralysed by procedural manoeuvring. This has attendant implications for the continued efficacy of international courts and tribunals in dealing with environmental threats, as disputes involving such matters should be resolved promptly if the underlying environmental problem is to be addressed. There are also potentially more serious problems, which relate to determining an appropriate priority between competing dispute settlement procedures in dealing with environmental questions, and to the undermining of substantive environmental norms by preventing dispute settlement bodies from operating to ensure that these rules are effectively implemented.

Just as it is unlikely that this interaction, conflict and competition between dispute settlement procedures will lead to anomy in international environmental law and diplomacy, neither is it realistic to expect complete eunomy through a systematic legal and institutional framework for dealing with all international environmental disputes. Arguably the most that might reasonably be expected is a greater degree of coordination in the operation of potentially competing jurisdictions. This Chapter has argued that there do exist a range of strategies for promoting this objective, but that they must be applied in a manner which appreciates the function of dispute settlement bodies in international environmental regimes, which often exist not merely to promote the

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<sup>133</sup> *MOX Plant Award (Order 3, of 24 June 2003)* <<http://www.pca-cpa.org>> at 1 July 2005, [26].

<sup>134</sup> *Ibid* [27].

<sup>135</sup> *Ibid* [28].

<sup>136</sup> *MOX Plant Award (Order 4, of 14 November 2003)* <<http://www.pca-cpa.org>> at 1 July 2005.

amicable resolution of fractious disputes, but also seek to ensure that the environment is effectively and appropriately protected.

## Multiple Jurisdictions and the Problem of ‘Fragmentation’

It has been seen in this thesis that a hallmark of contemporary international litigation is that it takes place in an array of adjudicative institutions including permanent courts, ad hoc arbitral tribunals, regional courts, and bodies with highly specialised subject-matter jurisdiction. The preceding Chapter examined the resulting practical difficulties for environmental litigation and suggested the need for greater jurisdictional co-ordination. This Chapter assesses a related challenge facing international environmental governance – the potential for this mosaic of adjudicative bodies to develop divergent approaches on questions of international environmental law and policy.

Although there has been a lively debate concerning the possible ‘fragmentation’ of international law as courts and tribunals grow in number,<sup>1</sup> there has been no systematic consideration of the specific implications of the phenomenon for the integrity of international environmental law as a distinctive discipline. Such analysis is now desirable having regard to the sizeable expansion in the body of international environmental case law.<sup>2</sup> Specifically by reference to the development of an environmental jurisprudence in human rights courts and complaints bodies, and in the dispute settlement system of the World Trade Organisation (‘WTO’), this Chapter asks whether there is cause for alarm or whether diversification in the opportunities for dispute settlement has instead led to a broader recognition and appreciation of rules and principles of international environmental law.

### I THE ‘FRAGMENTATION’ OF INTERNATIONAL LAW

International law has always comprised both general and specific rules. However, an important feature of the contemporary legal order is the existence of specialised and

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<sup>1</sup> The issue has also now also attracted the attention of the International Law Commission. For an overview of the limited work undertaken thus far see Gerhard Hafner, ‘Pros and Cons Ensuing from Fragmentation of International Law’ (2004) 25 *Michigan Journal of International Law* 849; Michael J Matheson and Sara Bickler, ‘The Fifty-Fifth Session of the International Law Commission’ (2004) 98 *American Journal of International Law* 317, 322; Pemmarajau Sreenivasa Rao, ‘Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?’ (2004) 25 *Michigan Journal of International Law* 929, 935-937.

<sup>2</sup> With considerable prescience, Sands observed in 1999 that ‘a few years from now the body of case law will probably require us to address how to maintain coherence among the various fora at which international environmental issues are litigated.’: Philippe Sands, ‘International Environmental Litigation and Its Future’ (1999) 32 *University of Richmond Law Review* 1619, 1641.

technical regimes, rules and procedures.<sup>3</sup> While some commentators have argued that separating international law into quasi-autonomous branches in this way unhelpfully compartmentalises international law, others have observed that decentralisation can advance community objectives inadequately served by general rules.<sup>4</sup>

### A *International Courts and Fragmentation*

The debate concerning the nature and desirability of this phenomenon took on fresh life with the proliferation of new international courts and tribunals in the late twentieth century. This judicialisation of some areas of international law posed questions as to whether issue-specific tribunals would further compartmentalise international law. In particular it raised the possibility that such bodies might co-opt and adapt general norms for the narrow purposes of specialised regimes, and thereby undermine their universal applicability. This seemed more than merely an abstract concern, as the legitimacy and authority of rules of public international law depends substantially upon their consistency and universality. Moreover, there appeared no way of addressing the problem other than by suppressing the emergence of new institutions as the international legal system possesses no formal mechanisms for maintaining consistency, such as a doctrine of precedent, or a hierarchy among jurisdictions.<sup>5</sup>

Current and former members of the ICJ have been among the most prominent participants in this debate, both as harbingers of supposed calamity,<sup>6</sup> and as more optimistic commentators<sup>7</sup> upon the expansion in the international adjudicative system. The critique of proliferation gained momentum after it was taken up by successive Presidents of the ICJ, who warned that it could lead to practical problems such as forum

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<sup>3</sup> Joost Pauwelyn, *Conflict of Norms in Public International Law* (2003) 9.

<sup>4</sup> Karel C Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends' in L A N M Barnhoorn and K C Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (1995) 3, 28 ('[T]he relative autonomy of special fields...[has] promoted and guaranteed the growing effectiveness of their own particular set of primary rules, without putting in jeopardy the unity of coherence of the international legal order').

<sup>5</sup> See the *Statute of the ICJ*, art 59 which provides that '[t]he decision of the Court has no binding force except as between parties and in respect of that particular case.' See also Mohamed Shahabuddeen, *Precedent in the World Court* (1996) 67. To address the potential problem of divergent conclusions on questions of general international law it has been suggested that the ICJ could be given competence to determine such issues on reference from specialised procedures: *Report of the Secretary-General on the Work of the Organisation* (1993) [66] UN Doc A/48/1 (1993).

<sup>6</sup> See Robert Jennings, 'The Role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 58; Robert Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *International and Comparative Law Quarterly* 1; Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848; Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 *International and Comparative Law Quarterly* 863.

<sup>7</sup> See Rosalyn Higgins, 'Respecting the Sovereignty of States and Running a Tight Courtroom' (2001) 50 *International and Comparative Law Quarterly* 121, 122 ('this is an inevitable consequence of the busy and complex world in which we live and is not a cause of regret.').



shopping and overlapping jurisdiction and also generate jurisprudential inconsistency.<sup>8</sup> Particular concern was expressed for the future of the ICJ as the pre-eminent international judicial forum, as it was thought that its caseload might diminish and its decisions would become less influential.

Other publicists have regarded the growth of international courts and tribunals as a largely benign, and indeed beneficial, consequence of the expansion of international law into a wider range of activities. Such optimistic views range from bold claims that it is indicative of 'the construction of coherent international order based on justice'<sup>9</sup> to the more sedate proposition that international law is acquiring greater maturity,<sup>10</sup> and is developing into a 'legal system' in the Hartian sense.<sup>11</sup> It has also been suggested that any technical problems that might arise in terms of conflicting jurisprudence could be overcome at an informal level, with international courts and tribunals being aware of, and referring to, relevant and persuasive decisions of other bodies. The notion here is of a diversity of institutions existing within some semblance of an overarching legal order.<sup>12</sup>

While not pointing to irresolvable conflict, the evidence thus far does suggest the need to be alive to possible discordance between different courts and tribunals. In 1998, in an extensive survey examining seven areas of international law addressed by more than one tribunal, Charney advanced the argument that a multiplicity of forums

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<sup>8</sup> Judge Stephen M Schwebel, 'Address to the Plenary Session of the General Assembly of the United Nations' (Speech delivered to the General Assembly of the United Nations, New York, 26 October 1999) [19] <[http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54\\_19991026.htm](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54_19991026.htm)> at 1 July 2005; Judge Gilbert Guillaume, 'Address to the General Assembly of the United Nations' (Speech delivered to the General Assembly of the United Nations, 26 October 2000) <[http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/SpeechPresident\\_Guillaume\\_GA55\\_20001026.htm](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/SpeechPresident_Guillaume_GA55_20001026.htm)> at 1 July 2005; Judge Gilbert Guillaume, 'Address to the Sixth Committee of the General Assembly of the United Nations' (speech delivered to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000) <[http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/SpeechPresident\\_Guillaume\\_SixthCommittee\\_20001027.htm](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/SpeechPresident_Guillaume_SixthCommittee_20001027.htm)> at 1 July 2005.

<sup>9</sup> Cesare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709, 751.

<sup>10</sup> Rao, above n 1, 960.

<sup>11</sup> H L A Hart, *The Concept of Law* (2nd ed, 1994). Hart argued that while courts were not necessary to assure the binding and obligatory character of legal rules, they were an indispensable part of a fully-fledged legal system (see 213-237), which is characterised by a combination of norms regulating conduct (primary rules) together with additional norms that allow primary rules to be identified, modified and promulgated (secondary rules – the rule of recognition, rules of change and rules of adjudication). The absence of such a union in public international law led Hart to conclude that international law was indeed law, but did not constitute a 'legal system'.

<sup>12</sup> William W Burke-White, 'International Legal Pluralism' (2004) 25 *Michigan Journal of International Law* 963, 977 ('A pluralist legal system accepts a range of different and equally legitimate normative choices by...international institutions and tribunals, but it does so within the context of a universal system').

generally benefited international law.<sup>13</sup> There have, however, been several examples of conflicting pronouncements most notably in the fields of international humanitarian law<sup>14</sup> and human rights.<sup>15</sup> Moreover the *Southern Bluefin Tuna Dispute*,<sup>16</sup> in which the International Tribunal for the Law of the Sea ('ITLOS') and a subsequent Arbitral Tribunal reached opposing conclusions on a question of jurisdiction, provided an indication as to the potential for 'fragmentation' in the context of international environmental law.

### B *The Effects of Politics*

Such divergences cannot be seen merely as technical mistakes requiring technical solutions. The establishment of new courts and tribunals, and their efforts to develop a distinctive jurisprudence, are ultimately the result of underlying political factors.<sup>17</sup> International environmental and other regimes are created by states to address particular issues not adequately regulated by general international law, and therefore reflect distinctive political agendas. It is therefore to be expected that in performing their mandate specialised courts and tribunals may adhere to interpretations of rules of international law to suit the needs of the regime.<sup>18</sup> Koskenniemi and Leino describe this

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<sup>13</sup> Jonathan I Charney, 'Is International Law Threatened by Multiple International Tribunals' (1998) 271 *Recueil Des Cours* 101. The seven areas were treaty law, sources of international law, state responsibility, compensation standards, exhaustion of domestic remedies, nationality and maritime boundaries. See also Jonathan I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 *New York University Journal of International Law and Politics* 697.

<sup>14</sup> In *Prosecutor v Tadić (Appeals Chamber Judgment)* Case No IT-94-1-A (15 July 1999) the International Criminal Tribunal for the Former Yugoslavia adopted a different approach on a question of attribution from the ICJ in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14.

<sup>15</sup> *Case of Belilos v Switzerland* (1988) 10 EHRR 466 and *Case of Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99 illustrate the distinctive approach that the European Court of Human Rights has taken when considering the effect of reservations to the *1950 Convention for the Protection of Human Rights and Fundamental Freedoms*. It differs substantially from the ICJ's pronouncement in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 26. For a concise overview of these divergent approaches to the effect of reservations see Roslyn Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent' (2004) 5 *Melbourne Journal of International Law* 155.

<sup>16</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* 38 ILM 1624 (1999) ('*SBT Order*'); *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility)* 39 ILM 1359 (2000) (together the '*Southern Bluefin Tuna Dispute*').

<sup>17</sup> Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 561 ('[T]he fact is that proliferating tribunals, overlapping jurisdictions and "fragmenting" normative orders...arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic.'). See also M C W Pinto, 'Judicial Settlement of International Disputes: One Forum or Many' in Antony Anghie and Garry Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 465, 467.

<sup>18</sup> Guillaume, 'Address to the General Assembly of the United Nations', above n 8, ('specialised courts...are inclined to favour their own disciplines.'). See also Patrizia Vigni, 'The Overlapping of Dispute Settlement Regimes: An Emerging Issue of International Law' (2003) XI *Italian Yearbook of International Law* 139, 143 (noting in the context of trade and environment regimes that 'the organs established by each international

process as a 'hegemonic struggle' in which each court or tribunal seeks to have its own particular perspective regarded as the preferable general approach.<sup>19</sup>

This curial competition might be thought to be pronounced and more problematic in the environmental field for the simple reason that most international environmental litigation takes place not in dedicated environmental tribunals or bodies with general jurisdiction (such as the ICJ), but rather in institutions with specialisation in other issue-areas. Before assessing whether the operation of such bodies has in fact had the effect of 'fragmenting' international environmental law, by promoting interpretations of environmental rules that deviate from standard understandings, it is necessary first to understand why the concern that it might is a critical one.

## II THE DISTINCTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW

In a little over 30 years international environmental law has developed from protean origins into an identifiable and important branch of public international law.<sup>20</sup> In light of these developments there has been extensive debate concerning whether it is appropriate to refer to 'international environmental law' as a sub-discipline of international law, or whether it is no more than the sum of those rules of public and private international law relevant to environmental issues.<sup>21</sup> While it is beyond question that many rules of international law have some application in the environmental field, or have been developed over time having regard to environmental concerns,<sup>22</sup> it is also possible to discern the evolution of a distinct corpus of international environmental law.<sup>23</sup> There are two particular features of the discipline that mark it out as distinctive.

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instrument still prefer to sacrifice the protection of the interests safeguarded by the other international conventions rather than to disregard the provisions established by their own treaty.').

<sup>19</sup> Koskenniemi and Leino, above n 17, 562.

<sup>20</sup> See Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) ch 2 and Lynton Keith Caldwell, *International Environmental Policy: From the Twentieth to the Twenty-First Century* (3rd ed, 1996) chs 2-8.

<sup>21</sup> Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (2nd ed, 2002) 2

<sup>22</sup> See, eg, *Articles on Responsibility of States for Internationally Wrongful Acts*, art 48, *Report of the International Law Commission, 53rd Session*, 43-59, UN Doc A/56/10 (2001) (noted in GA Res 56/83, UN Doc A/RES/56/83 (2001)) which deals with the invocation of responsibility in response to violations of *erga omnes* obligations of an environmental or other character.

<sup>23</sup> Alexandre Kiss and Dinah Shelton, *International Environmental Law* (2000) 1. Brownlie has argued that any movement towards 'overspecialisation' should be resisted: Ian Brownlie, 'State Responsibility and International Pollution: A Practical Perspective', in Daniel Barstow Magraw (ed), *International Law and Pollution* (1991) 120, 122. Nonetheless, Professor Brownlie has acknowledged that in the environmental context 'general international law does not provide the focussed problem-solving which results from carefully prepared standard-setting treaties linked with domestic and international support systems and funding': Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 281. See also Malgosia A Fitzmaurice, 'International Environmental Law as a Special Field' in L A N M Barnhoorn and K C Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (1995) 181, 183 (while not accepting that international environmental law is a distinct field, nonetheless noting that 'the attempt to provide a necessary legal

The first is the strong influence of general principles upon the implementation and development of international environmental law. In addition to providing a conceptual structure to international environmental law, in expressing environmental policy perspectives and goals these principles also provide focal points for ongoing dialogue and debate in the international community over how best to achieve them. As environmental principles are relatively open-textured and flexible they are amenable to adaptation and transformation through this process. Nowhere is this more evident than in debates concerning the meaning and importance of the 'precautionary principle.'<sup>24</sup> Various arguments have been made as to whether it should be understood as a 'principle' or merely as an 'approach' and, more concretely, whether it only prevents scientific uncertainty from being used as a justification for environmentally damaging activities, or instead mandates the taking of positive steps to protect the environment whenever there is a chance that ecosystems are threatened.<sup>25</sup>

Much has been written concerning the customary status of environmental principles. In its Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons*,<sup>26</sup> the ICJ recognised what had been an incontrovertible proposition for some time – that Principle 21 of the *Declaration of the United Nations Conference on the Human Environment*<sup>27</sup> ('*Stockholm Declaration*') (and Principle 2 of the *Rio Declaration*) had crystallised as a rule of customary law.<sup>28</sup> Analysis of the binding status of other environmental principles, particularly those of sustainable development<sup>29</sup> and

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framework to meet the problems of the environment...are stretching and possibly straining the limits of classical international law.').

<sup>24</sup> See the *Declaration of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/5/Rev.1 (1992) ('*Rio Declaration*') principle 15, which provides that '[i]n 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.'

<sup>25</sup> Jacqueline Peel, 'Precaution – A Matter of Principle, Approach or Process?' (2004) 5 *Melbourne Journal of International Law* 483, 485. See also David VanderZwaag, 'The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides' (2002) 33 *Ocean Development and International Law* 165 (observing that the precautionary principle has a high degree of 'slipperiness', and has faced opposition in several areas of marine environmental protection, but nonetheless has the potential to synergize with other normative developments, including developments in human rights law).

<sup>26</sup> *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226.

<sup>27</sup> UN DOC A/CONF.48/14/Rev.1 (1973), (1972) 11 ILM 1416.

<sup>28</sup> Ibid [29] ('The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'). Recited and approved in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Merits)* [1997] ICJ Rep 7, [53] ('*Gabčíkovo-Nagymaros Case*').

<sup>29</sup> Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm-Creation Changing?' in Michael Byers (ed), *The Role of Law in International Politics* (2000) 19; Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 207.

precaution,<sup>30</sup> continues. The latter has been repeatedly referred to and relied upon by the Court of Justice of the European Communities.<sup>31</sup> However, other international courts have not cited or endorsed the precautionary principle with the same enthusiasm. In the *Gabčíkovo-Nagymaros Case* the ICJ made only passing reference to the importance of 'vigilance and prevention' in the field of environmental protection.<sup>32</sup> Similarly ITLOS has avoided express reference to the precautionary principle or approach but has instead articulated the notion of 'prudence and caution'<sup>33</sup> and so charted a diplomatic course through a politically-charged debate.<sup>34</sup> The WTO Appellate Body in *European Communities – Measures Concerning Meat and Meat Products (Hormones)*<sup>35</sup> also declined to state any view as to the status of the precautionary principle, preferring instead to resolve the issues of risk management by reference to WTO rules.

It must be recognised that, regardless of their status as rules of international law, environmental principles have had a major influence upon the development of environmental law and policy at both national and international levels.<sup>36</sup> They have been incorporated in international agreements<sup>37</sup> and national legislation,<sup>38</sup> and have been

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<sup>30</sup> Owen McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 *Journal of Environmental Law* 221; Rosie Cooney, *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management* (2004).

<sup>31</sup> See for instance the decision of the Court of Justice of the European Communities in *United Kingdom of Great Britain and North Ireland v Commission of the European Communities* (C-180/96) [1998] ECR I-2265.

<sup>32</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [140]. Although the majority did not refer to the principle, in the *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* [1995] ICJ Rep 288, two dissenting judges referred to the precautionary principle as one which 'may now be a principle of customary law relating to the environment' (Judge Palmer, at 412) or at least is 'gaining increasing support as part of the international law of the environment' (Judge Weeramantry, at 342).

<sup>33</sup> *SBT Order*, 38 ILM 1624 (1999) [77]; *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)*, 41 ILM 405 (2002), [84]; *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore) (Provisional Measures)* (2003), <<http://www.itlos.org>> at 1 July 2005, [99].

<sup>34</sup> Peel, above n 25, 493-495.

<sup>35</sup> *European Communities – Measures Concerning Meat and Meat Products (Hormones)* WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body) ('*Beef Hormones Appellate Body Report*').

<sup>36</sup> Philippe Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in Winfried Lang (ed), *Sustainable Development and International Law* (1995) 53, 66.

<sup>37</sup> See, eg, the *Consolidated Version of the Treaty Establishing the European Community*, [2002] OJ C 325, 33 art 174(2) which provides that EC policy regarding the environment must be based upon 'the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.'

<sup>38</sup> See, eg, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) which sets out 'principles of ecologically sustainable development' in s 3A: '(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations; (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations; (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; (e) improved valuation, pricing

considered and applied by national courts and tribunals.<sup>39</sup> They have also informed international judicial decision-making even where there has been no confirmation as to their precise legal status. The principle of sustainable development was not expressly accepted in the *Gabčíkovo-Nagymaros Case* to constitute a legal rule,<sup>40</sup> but it nonetheless provided the court with an essential frame of reference to balance the competing environmental and developmental considerations at issue between the parties.<sup>41</sup> Pointing to its ambiguity and multidimensional character, Lowe notes that sustainable development does not possess a sufficient normative character to be regarded as a rule of customary international law. However, he argues that it does have a considerable degree of influence by virtue of its character as an 'interstitial' principle.<sup>42</sup> It is evident therefore that environmental principles may come to exert an important, and even decisive, influence upon international environmental adjudication.

A second distinguishing feature of contemporary international environmental law is its technical and regulatory character. There are now over a thousand treaties and conventions incorporating provisions concerned with some aspect of environmental protection.<sup>43</sup> While earlier environmental conventions often do no more than espouse

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and incentive mechanisms should be promoted.' See also s 391(2) which defines the precautionary principle as 'that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.' These principles must be considered when a variety of powers are exercised under the Act. For an example of the use of environmental principles to inform proposals for domestic environmental legislation see Ian Hannam and Ben Boer, *Drafting Legislation for Sustainable Soils: A Guide* (2004) 24-28 (referring inter alia to the precautionary, prevention and polluter-pays principles).

<sup>39</sup> See for instance the English case of *R v Secretary of State for Environment, Food and Rural Affairs* [2001] New Property Cases 176 (noting at [84] that 'it may in some fields of regulation be relevant to take into account the precautionary principle and...its limitations'), the Canadian decision of *114957 Canada Ltée (Spraytech, Société D'Arrosage) and Services des Espaces Verte Ltée v Town of Hudson* [2001] 2 SCR 241 (noting, in a case concerning a challenge to restrictions on the use of pesticides, that there may be sufficient state practice to support the conclusion that the precautionary principle is a rule of customary international law) and the Indian decision of *Vellore Citizens Welfare Forum v Union of India* AIR 1996 Supreme Court 2715 (applying the sustainable development, precautionary, and polluter-pays principles to a case involving industrial pollution).

<sup>40</sup> *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7, [140] ('[The] need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.')

<sup>41</sup> Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments', above n 29, 19; Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm-Creation Changing?' in Michael Byers (ed), *The Role of Law in International Politics* (2000) 207.

<sup>42</sup> Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm-Creation Changing?', above n 41, 217. ('If the tribunal chooses to adopt the concept, the very *idea* of sustainable development is enough to point the tribunal towards a coherent approach to a decision in cases where development and environment conflict. There is absolutely no need for the concept to have been embodied in State practice coupled with the associated *opinio juris*...All that is needed to enable the norms to perform this role is that they be clearly and coherently articulated.')

<sup>43</sup> Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 *University of Richmond Law Review* 1555, 1555.

broad principles,<sup>44</sup> the discernible trend in recent practice has been towards highly detailed and technical regimes. The efforts of the international community to address stratospheric ozone depletion caused by the release of chlorofluorocarbons and other substances exemplifies this important shift. The *1985 Vienna Convention for the Protection of the Ozone Layer* ('*Convention for the Protection of the Ozone Layer*') provides no more than a general framework, encouraging states to take 'appropriate measures' to address ozone depletion. However, it was the basis for the conclusion of the *1987 Montreal Protocol on Substances that Deplete the Ozone Layer* ('*Montreal Protocol*') which specifies precise rules concerning reductions in the consumption, production and trade of ozone-depleting substances, and couples this with a non-compliance procedure for continual supervision of the performance of regime participants. Since its adoption the *Montreal Protocol* has been finessed at several meetings of the parties, and the regime has thereby acquired even greater reach and complexity.

Increasingly, therefore, international environmental agreements not only articulate specific 'ecostandards'<sup>45</sup> but they also establish a regulatory system comprising sophisticated procedures and institutions for monitoring implementation. Such mechanisms rely heavily upon the technical expertise of governments, of treaty institutions such as scientific committees, and of broader 'epistemic communities'<sup>46</sup> of experts who often play a key role in raising awareness of environmental problems.<sup>47</sup> This advent of a specialised and technical international environmental law, implemented and monitored by an emerging environmental technocracy,<sup>48</sup> has implications for its relationship with other areas of international law because it potentially constrains the capacity of actors external to environmental regimes to interpret and apply environmental rules accurately and effectively.

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<sup>44</sup> See, eg, *1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat* ('*Ramsar Convention*') comprising 12 articles which require parties to select wetlands of importance to be listed on the Ramsar list, and to take those measures necessary to promote the conservation of such wetlands.

<sup>45</sup> Paolo Contini and Peter H Sand, 'Methods to Expedite Environment Protection: International Ecostandards' (1972) 66 *American Journal of International Law* 37, 56 (displaying considerable prescience, Contini and Sand contended that '[i]nternational environmental protection...may and should indeed be a highly technical matter once it has cleared some of its present political-emotional hurdles...').

<sup>46</sup> Such communities may be defined as networks 'of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.': Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1, 3.

<sup>47</sup> On the role of epistemic communities in relation to the *Convention for the Protection of the Ozone Layer* and *Montreal Protocol* see Peter M Haas, 'Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone' (1992) 46 *International Organization* 187.

<sup>48</sup> On the emergence of a 'global technocracy' in relation to a range of issues see Anne-Marie Slaughter, *A New World Order* (2004) 219-221.

III THE APPLICATION OF INTERNATIONAL ENVIRONMENTAL LAW IN  
SPECIALISED COURTS AND TRIBUNALS

Although international environmental law has developed into a distinctive normative system, the legal and political institutions operating within environmental regimes are not the only bodies to discharge the task of interpreting and applying this area of law. As international environmental law encounters other fields, environmental issues have begun to be considered in the institutions of non-environmental regimes, and this has been particularly evident in the context of the human rights and trade dispute settlement systems. The purpose of this section is to consider whether these encounters have led to interpretations of rules and principles of international environmental law that have privileged the particular perspectives of those other normative orders.

A *Human Rights and the Environment:  
The Environmental Jurisprudence of Human Rights Bodies*

(a) *Human Rights and Environmental Protection*

The relationship between international environmental norms and human rights continues to generate tension and uncertainty. Although there have been repeated calls for greater integration of these two fields of law,<sup>49</sup> a right to a clean, healthy and safe environment has not been included in human rights instruments.<sup>50</sup> Nor have such substantive environmental rights been codified in international environmental agreements.<sup>51</sup>

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<sup>49</sup> See in particular the UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc E/CN.4/SUB.2/1994/9 (1994).

<sup>50</sup> Robin R Churchill, 'Environmental Rights in Existing Human Rights Treaties' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 89. There are only a handful of exceptions: *1981 African Charter on Human and Peoples' Rights*, art 24 ('All peoples shall have the right to a general satisfactory environment favourable to their development'); *1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, art 11 ('(1) Everyone shall have the right to live in a healthy environment and to have access to basic public services, (2) The state parties shall promote the protection, preservation and improvement of the environment'); *1989 Convention on the Rights of the Child*, art 29(e) (requiring education for '[t]he development of respect for the natural environment.').

<sup>51</sup> Note for instance the omission of human rights language in the *1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*. But see the *1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* ('*Åarhus Convention*'). Although the *Åarhus Convention* only establishes certain procedural rights such as the right to environmental information, art 1 declares that the objective these rights are to serve is ultimately substantive: '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.' (emphasis added). See also the *Hague Declaration on the Environment* (1989) 28 ILM 1308, preamble ('The right to live is the right from which all other rights stem...Today, the very conditions of life on our planet are threatened by the severe attacks to which the earth's atmosphere is subjected.') and IUCN – World Conservation Union, *Draft International Covenant on Environment and Development* (3rd ed, 2004) at 12(1) ('The Parties undertake to



Both of these potential developments have been resisted on the grounds that human rights approaches to environmental protection are essentially anthropocentric, and cannot accommodate the notion that animals and nature possess intrinsic value.<sup>52</sup> Reflecting the present reluctance of the international community to adopt a human rights approach to environmental protection, the *Rio Declaration* conspicuously avoided any reference to a human right to a healthy environment.<sup>53</sup> This was in contrast to the *Stockholm Declaration* which had declared in Principle 1 that 'Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being.'

(b) *The Jurisprudence*

Human rights and environmental regimes have therefore existed somewhat in isolation from one another. However, there have been increasing points of interaction, particularly in the operation of human rights complaints procedures operating within and outside the United Nations system.

Notwithstanding the lack of any express environmental rights in human rights texts, global and regional human rights bodies including the Human Rights Committee, the European Court of Human Rights ('ECtHR'), the European Commission on Human Rights ('EComHR') and the Inter-American Commission on Human Rights ('IACoMHR') are confronting a growing number of environmental cases. This is mainly because they offer the only international procedures for individuals to challenge governmental action or inaction in relation to environmental matters.<sup>54</sup> As a result, these bodies have begun to develop an important body of environment-related human rights jurisprudence. The human rights that have been invoked include both procedural rights (such as rights to information, participation and legal redress) and substantial guarantees (such as rights to life, health and enjoyment of property). It is convenient to consider each of these two categories of case in turn.

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achieve progressively the full realisation of the right of everyone to an environment and a level of development adequate for their health, well-being and dignity.)

<sup>52</sup> Catherine Redgwell, 'Life, The Universe And Everything: A Critique of Anthropocentric Rights' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 72, 72.

<sup>53</sup> See generally Dinah Shelton, 'What Happened in Rio to Human Rights' (1992) *Yearbook of International Environmental Law* 75. Nonetheless 'human beings' rather than 'the environment' are the first words of principle 21 of the *Rio Declaration*: Ileana M Porras, 'The Rio Declaration: A New Basis for International Cooperation' in Philippe Sands (ed), *Greening International Law* (1994) 20, 24.

<sup>54</sup> Dinah Shelton, 'The Environmental Jurisprudence of International Human Rights Tribunals' in Romina Picolotti and Jorge Daniel Taillant (eds), *Linking Human Rights and the Environment* (2003) 1, 2. See also Caroline Dommen, 'Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms' (1998) 11 *Georgetown International Environmental Law Review* 1.

(i) *Procedural Human Rights*

Attempts to advance the cause of environmental protection through substantive human rights, such as a right to an 'adequate', 'decent' or 'healthy' environment, have met strong resistance for philosophical reasons. In contrast, few such difficulties have emerged in the context of rights of a procedural character as it appears to be common ground that enhanced respect for human rights and improved protection of the environment are objectives that can be promoted by ensuring that individuals are able to participate in governance by exercising fundamental civil and political rights.<sup>55</sup>

Both environmental agreements and human rights texts include reference to three specific procedural guarantees: a right to obtain information, to participate in decision-making and to an effective remedy for breaches of the law. Principle 10 of the *Rio Declaration* declared that 'environmental issues are best handled with the participation of all concerned citizens', that each individual 'shall have appropriate access to information concerning the environment', and that there be 'effective access to judicial and administrative proceedings, including redress and remedy.' The most expansive statement of these three procedural rights is now found in the *Åarhus Convention*. This Convention, the first to guarantee such rights in a legally binding environmental instrument, requires not only that states implement these rights at a national level,<sup>56</sup> but also that they promote their application in international environmental decision-making processes.<sup>57</sup> Expressed in more general terms, such civil and political rights also form an important part of human rights instruments, and their operation in relation to environmental matters has been considered in a growing collection of cases.

The right to environmental information has generally been construed fairly narrowly by human rights bodies. In *Guerra and Others v Italy*<sup>58</sup> the ECtHR considered the effect of Article 10 of the *1950 Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR') which guarantees 'the freedom to receive information'. The applicants asserted that the Italian government had violated the provision by failing to provide the public with information concerning the risks of operation of a chemical facility near the town of Manfredonia in southern Italy. Concluding that there was no breach in this instance, the Court held that Article 10 did not impose a positive obligation to collect and disseminate information, but instead only prohibited governments from interfering with the freedom to receive information that

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<sup>55</sup> Alan E Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 44, 59.

<sup>56</sup> *Åarhus Convention*, art 3(1).

<sup>57</sup> *Ibid* art 3(7).

<sup>58</sup> *Guerra and Others v Italy* (1998) 26 EHRR 357 ('*Guerra*').

others are willing to impart.<sup>59</sup> Just such a prohibited interference was found to have taken place in *Bladet Tromsø and Stensaas v Norway*<sup>60</sup> after Norwegian defamation law prevented the publication of a newspaper report claiming that the government was aware of inhumane seal hunting practices.

Human rights and environmental texts refer to the same basic need to ensure that individuals have an opportunity to engage in meaningful participation in government.<sup>61</sup> The IACoMHR has recognised that participatory rights contained in the *1969 American Convention on Human Rights* ('ACHR') extend to include involvement in decision-making on environmental matters. In its report on the human rights situation of indigenous peoples living in the interior of Ecuador affected by development activities, the IACoMHR observed that Article 23 of the ACHR, which provides that all persons enjoy a right 'to take part in the conduct of public affairs', implicated a right 'to participate, individually and jointly, in the formulation of decisions which directly concern their environment.'<sup>62</sup> The Commission concluded that '[t]he quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.'<sup>63</sup> Ecuador was encouraged to take additional steps to ensure that these rights could be enjoyed.

A civil right that has often engaged the attention of human rights bodies in cases involving environmental issues is the guarantee of effective administrative or judicial remedies. The *ICCPR* requires states to ensure that persons whose rights are violated have access to an effective remedy, to be determined by competent judicial, administrative or legislative authorities.<sup>64</sup> Article 6 of the *ECHR* is narrower – it provides only that in the determination of civil rights or criminal charges individuals are entitled to a fair and public hearing. However, it has been frequently relied upon by applicants asserting a failure to provide an adequate judicial hearing of disputes concerning matters such as the granting of permits to carry out activities affecting the environment.<sup>65</sup>

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<sup>59</sup> *Guerra* (1998) 26 EHRR 357, [53], following *Leander v Sweden* (1987) 9 EHRR 433, [74].

<sup>60</sup> *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125.

<sup>61</sup> Human rights instruments referring to a right to participate in government include the *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/810 (1948) art 21 and the *1966 International Covenant on Civil and Political Rights* ('*ICCPR*'), art 25. In the environmental context see the *Rio Declaration*, above n 24, principle 10 and the *Århus Convention*, arts 6, 7 and 8.

<sup>62</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, 93, OEA/Ser.L/V/II.96 Doc 10 rev 1 (1997).

<sup>63</sup> *Ibid* 92.

<sup>64</sup> *ICCPR*, art 2(3).

<sup>65</sup> Shelton, above n 54, 9.

It has been made clear that Article 6 can only have an application where an interest of the applicants has, or may be, directly affected. In *Balmer-Schafroth and Others v Switzerland*<sup>66</sup> the applicants who lived near a nuclear power station complained that they had been denied a hearing in relation to the Government's renewal of an operating permit for the plant. The ECtHR accepted that there was a genuine and serious dispute between the applicants and the Swiss government over a right recognised under domestic law, that of 'physical integrity'. However, the complaint was ultimately rejected by the Court on the grounds that the applicants had failed 'to establish a direct link between the operating conditions of the power station...and their right to protection of their physical integrity.'<sup>67</sup> According to the majority, the applicants had not shown that the operation of the power plant exposed them to danger that was serious, specific and, above all, imminent.<sup>68</sup> And in the absence of such a finding 'neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive.'<sup>69</sup> In a dissenting opinion seven judges criticised this conclusion on the grounds that it ran counter to rules and principles of international environmental law, including the precautionary principle, but it was not explained how these principles mandated a different result in this instance.<sup>70</sup>

(ii) *Substantive Human Rights*

Complainants to human rights bodies have made a range of innovative arguments in an effort to pursue remedies for environmental damage by reference to established rights including the right to life, the right to health, the right to respect for private life and home, and the right to peaceful enjoyment of possessions.

Although the right to life has been invoked in a number of petitions, most of these have been found to be inadmissible on the grounds that the applicants had not pointed to a real and imminent threat to life.<sup>71</sup> There are some exceptions. In *Yanomami v Brazil*<sup>72</sup>

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<sup>66</sup> *Balmer-Schafroth and Others v Switzerland* (1998) 25 EHRR 598.

<sup>67</sup> *Ibid* [40].

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*, Dissenting Opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek.

<sup>71</sup> See, eg, *Nöel Narvii Tauria and Eighteen Others v France* (1995) 83-B Eur Comm HR 112. The applicants in this case were residents of French Polynesia who claimed that the decision of the French government to resume nuclear testing in the South Pacific in 1995 posed a real, substantial and immediate risk to life. The EComHR rejected the application, noting that it was only in highly exceptional circumstances that an applicant could claim to be a victim of a violation of the Convention on the basis of a possible future violation, and that in such circumstances reasonable and convincing evidence must be presented. Similar reasons were given for the rejection of a parallel petition in the Human Rights Committee in *Bordes, Tauria and Temeharo v France*, UN Doc CCPR/C/57/D/645/1995 (1995). Nonetheless, although not satisfied that the authors were victims of a rights violation, the Committee reiterated the view it expressed in *General Comment No 14* (UN Doc

the IACoMHR found that Brazil had violated the rights to life and health of a group of indigenous people, the Yanomami. These violations resulted from a variety of factors, including the construction of a highway through Yanomami territory, the failure to establish a promised Yanomami Park, the authorisation of resource exploitation, and allowing the penetration of Yanomami lands by outsiders carrying contagious diseases.

Another stark violation of the right to life as a result of environmental mismanagement was considered by the ECtHR in *Öneryildiz v Turkey*.<sup>73</sup> Nine members of the applicant's family had perished when their home, located in a slum quarter of Istanbul, was buried by a landslide of refuse from a nearby rubbish tip as the result of a massive methane gas explosion. Civil and criminal proceedings were instigated against several individuals in local government who had failed to take preventive measures in the face of warnings from an expert consultant that precisely such an explosion would occur. However, no criminal sanctions were ultimately imposed by the Turkish courts, and in civil proceedings the applicant was awarded only a small sum in damages.

In the ECtHR it was held that there had been a breach of the right to life. The Court developed its reasons by reference to European and international environmental law relating to civil and criminal liability including the *1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*. It concluded that Article 2(1) of the *ECHR* 'enjoins the State not only to refrain from the intentional and unlawful taking of life, but also guarantees the right to life in general terms and, in certain well-defined circumstances, imposes an obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.'<sup>74</sup> The Court noted that it was clear that a violation of the right to life 'can be envisaged in relation to environmental issues.'<sup>75</sup>

In the European human rights system the substantive right that has proven to offer the most promising avenue for environment-focussed human rights litigation is Article 8(1) of the *ECHR*, which provides that '[e]veryone has the right to respect for his private and family life, his home and his correspondence.' This guarantee is subject to several important qualifications in Article 8(2), which permits interference with the exercise of this right if in the interests, among other things, of 'the economic well-being of the country'. The right has often been relied upon in tandem with Article 1 of the

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E/C.12/2000/4 (2000)) that 'the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confronts mankind today.' (at [5.9]).

<sup>72</sup> *Yanomami v Brazil*, Case 7615 (Brazil) OAE/Ser.L/VII.66 Doc.10 rev.1 (1985).

<sup>73</sup> *Öneryildiz v Turkey* (48939/99) [2002] ECHR 491 (18 June 2002) <<http://www.worldlii.org/eu/cases/ECHR/2002/491.html>> at 1 July 2005.

<sup>74</sup> *Ibid* [62].

<sup>75</sup> *Ibid* [64].

1963 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms which states that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions.'

Cases brought in reliance on these two provisions are in many respects akin to common law actions for private nuisance. Much as common law nuisance involves striking a balance between conflicting private property interests,<sup>76</sup> these human rights cases have often attempted to balance the interests of individuals in the quiet enjoyment of their property against broader community interests such as economic development. In finding for complainants affected by noise and other forms of pollution they have nonetheless promoted a degree of incidental environmental protection.

Most cases involving Article 8 of the *ECHR* have related to noise pollution. In *Powell and Rayner v United Kingdom*<sup>77</sup> the ECtHR concluded that although the applicants' properties were adversely affected by aircraft noise emanating from Heathrow Airport, there was no violation of Article 8. The Court observed that 'regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole'<sup>78</sup> and that the United Kingdom 'enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.'<sup>79</sup> Highly relevant here was the economic importance of Heathrow airport to the United Kingdom economy.<sup>80</sup>

*Lopez-Ostra v Spain*<sup>81</sup> is arguably the most important decision of the ECtHR relating to environmental harm violating the right to private life and the home, and involved a major pollution incident. In this case the applicant had brought a petition before the Court after suffering serious health effects from fumes emitted from a tannery waste treatment plant located just 12 metres from her home. The start-up of the plant had emitted noxious fumes causing health problems for a number of local residents, and as a result the town council evacuated those affected, including the applicant, and rehoused

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<sup>76</sup> Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (2003) 111-112. See generally John G Fleming, *The Law of Torts* (9th ed, 1998) 457-492.

<sup>77</sup> *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355.

<sup>78</sup> *Ibid* [41].

<sup>79</sup> *Ibid* [41].

<sup>80</sup> See also *Hatton and Others v United Kingdom* (36022/97) [2003] ECHR 338 (8 July 2003) <<http://www.worldlii.org/eu/cases/ECHR/2003/338.html>> at 1 July 2005 where a similar decision was reached. In this case the Grand Chamber of the ECtHR overturned an earlier Chamber decision that had found a violation of art 8 as a result of a substantial increase in night-time aircraft movements at London's Heathrow airport. The original Chamber had observed that 'in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others.': *Hatton and Others v United Kingdom* (36022/97) [2001] ECHR 561 (2 October 2001) [97] <<http://www.worldlii.org/eu/cases/ECHR/2001/561.htm>> at 1 July 2005.

<sup>81</sup> *Lopez-Ostra v Spain* (1995) 20 EHRR 277.

them free of charge in the town centre. The authorities also ordered a partial closure of the plant, but permitted certain waste treatment activities to continue.

The applicant's claim in the ECtHR related to the failure of the municipality to respond adequately to the pollution emanating from the plant. The Court observed that:

[S]evere environmental pollution may affect individual's 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.

[In determining whether there has been compliance with Article 8] regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation.<sup>82</sup>

Having regard to the limited efforts by the authorities to mitigate the pollution problem, and despite the margin of appreciation open to them, the Court found that Spain had not succeeded in striking a fair balance between the interest of the town's economic well-being and the applicant's effective enjoyment of her right to respect for her home and family life.<sup>83</sup>

A similar conclusion was arrived at by the Court in *Guerra* in which the ECtHR reiterated that environmental pollution may violate Article 8 by affecting the well-being of individuals and preventing them from enjoying their homes. The ECtHR observed that Article 8 does not merely prohibit member states arbitrarily interfering with a person's private or family life, it also imposes a *positive* obligation that is inherent in effective respect for private or family life.<sup>84</sup> In this case involving pollution from a chemical factory, the Court found a violation of Article 8 on the basis that local authorities took inadequate steps to protect the applicants' right to respect for their private and family life, and awarded compensation. However, the compensation that the applicants sought for biological damage was refused, a result that confirms that existing human rights do not (and perhaps never can) offer direct protection of environmental interests.

(c) *Evaluation*

This brief overview of the developing environmental jurisprudence of human rights bodies suggests no collision or conflict with more mainstream environmental case law, or any challenge to conventional understandings of rules and principles of international environmental law. Indeed in none of these cases has there been a detailed consideration and application of environmental norms. Where there has been a discussion of international environmental law it has been in broad and mostly uncontroversial terms.

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<sup>82</sup> Ibid [51].

<sup>83</sup> Ibid [58].

<sup>84</sup> *Guerra* (1998) 26 EHRR 357, [58].

The cases do however indicate that there exist several points of interaction and intersection between human rights and environmental law, which will continue to be debated.

In addressing environmental questions through the specific terminology of international human rights law it would therefore seem that the case law of human rights bodies has to date poses no threat to the integrity of international environmental law. Quite to the contrary, given the synergies between procedural rights in both the human rights and environmental contexts, determinations on issues such as access to information, participation in decision-making, and redress for injury, form an important body of precedent for understanding the meaning and scope of similar rights recognised in environmental law. These decisions will be of invaluable assistance in understanding and applying the detailed provisions of the *Århus Convention* as states begin to implement its provisions at national and international levels.<sup>85</sup>

#### *B Trade and Environment: The Environmental Jurisprudence of the WTO*

Such synergies have not been evident in the decisions of international trade bodies that touch upon environmental questions. Instead the consideration of the interaction between international trade and environmental regimes has tended to be characterised by references to problems of underlying tension and conflict.

##### *(a) Trade Law and Environmental Protection*

By virtue of its breadth and its institutional sophistication, international trade law has far-reaching implications for environmental governance at the domestic and international levels. The increase in global trade, a key dimension of economic globalisation, has inevitably meant that some domestic and international measures to protect human health or the natural environment have ramifications for international trade, and come within the purview of international economic law.

The most fundamental issue arising from this interaction is whether trade and environmental policies are mutually supportive,<sup>86</sup> or whether the liberalisation of trade is inimical to environmental conservation and protection.<sup>87</sup> The evidence in this respect is mixed. Trade liberalisation can have obvious negative environmental effects by, among

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<sup>85</sup> Other recent environmental texts provide similar rights of participation and access to information. See for example the *2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, art 23(2) ('The Parties shall...consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public, while respecting confidential information...').

<sup>86</sup> Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2003) 444-447.

<sup>87</sup> Herman E Daly, 'From Adjustment to Sustainable Development: The Obstacle of Free Trade' (1992) 15 *Loyola of Los Angeles International and Comparative Law Review* 33, 41-42.



other things, creating incentives for industry to move production to states with poor environmental standards (the so-called 'race to the bottom'). However, it can also have positive consequences by providing poorer nations with the material capacity to protect the environment,<sup>88</sup> and by mandating the removal of subsidies to certain uneconomic and ecologically unsustainable agricultural and fisheries industries.<sup>89</sup>

This debate concerning the compatibility of the trade and environment agendas has been particularly prominent in international law. Notwithstanding the attempt to integrate the agendas through the principle of sustainable development,<sup>90</sup> a range of questions continue to be raised concerning the extent to which there is conflict or congruence between trade law and environmental law. These issues have been elevated to particular prominence in the operation of dispute settlement bodies established by trade regimes including the *1992 North American Free Trade Agreement* and the WTO. As Notaro observes, 'the judiciary has been charged with the task of finding a way out of the trade and environment impasse, in part due to the contentious character of the disputes at issue and in part due to the absence of practicable alternatives.'<sup>91</sup> However, a recurring criticism has been that in seeking to address this 'impasse' the dispute settlement bodies of trade regimes have exhibited a strong bias towards trade liberalisation at the expense of sound environmental management.<sup>92</sup>

(b) *The Environmental Jurisprudence of the WTO*

The WTO was established in 1995, providing an institutional superstructure for the international trade rules that had developed out of the *1947 General Agreement on Tariffs and Trade*<sup>93</sup> ('GATT') agreed at the end of World War II.<sup>94</sup> Integral to the WTO

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<sup>88</sup> John H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (2000) 414-415.

<sup>89</sup> Håkan Nordström and Scott Vaughan, *Trade and Environment* (1999) 26.

<sup>90</sup> See *1994 Marrakesh Agreement Establishing the World Trade Organisation* ('Marrakesh Agreement'), preamble, 1st recital ('relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living...while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.');

*Rio Declaration*, above n 24, principle 3 ('The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'). The Brundtland Commission defined the concept of sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs': World Commission on Environment and Development, *Our Common Future* (1987) 87.

<sup>91</sup> Nicola Notaro, *Judicial Approaches to Trade and Environment: The EC and the WTO* (2003) 31. See also John H Knox, 'The Judicial Resolution of Conflicts Between Trade and the Environment' (2004) 28 *Harvard Environmental Law Review* 1, 70-74.

<sup>92</sup> J L Dunoff, 'Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes' (1994) 15 *Michigan Journal of International Law* 1043.

<sup>93</sup> See now the *Marrakesh Agreement*, annex 1A (*General Agreement on Tariffs and Trade*) ('GATT 1994').

<sup>94</sup> See generally Gavin Goh and Trudy Witbreuk, 'An Introduction to the WTO Dispute Settlement System' (2001) 30 *Western Australian Law Review* 51, 52). Unlike the *GATT*, which was originally intended as a temporary mechanism, the WTO possesses international legal personality and administers the WTO rules

is a compulsory and binding system of dispute settlement established by the *Understanding on Rules and Procedures Governing the Settlement of Disputes in the World Trade Organisation*<sup>95</sup> ('DSU'). Under this procedure WTO members may initiate consultations and, should they fail, request the establishment of a Panel.<sup>96</sup> Appeals against Panel reports may thereafter be brought before a standing Appellate Body.<sup>97</sup> Unlike the previous ad hoc *GATT* panel system, the decisions of WTO Panels and the Appellate Body are adopted automatically and are therefore binding unless the WTO Dispute Settlement Body decides against adoption by consensus.<sup>98</sup>

Since it commenced operation on 1 January 1995, over 330 complaints have been notified to the WTO, with over 100 Panel and Appellate Body reports adopted.<sup>99</sup> By any measure this dispute settlement system has been amongst the most active and has been vital to the development and consolidation of the WTO regime.<sup>100</sup> The system has also encountered environmental issues, with a number of disputes involving essentially environmental questions being brought before *GATT* panels and the WTO.<sup>101</sup>

While the WTO dispute system may only be used to resolve disputes relating to WTO rules,<sup>102</sup> it is not a closed or self-contained regime. WTO Panels and the Appellate Body are required by Article 3(2) of the *DSU* to interpret the covered agreements by reference to 'customary rules of interpretation of public international law.' In *United States – Standards for Reformulated and Conventional Gasoline*<sup>103</sup> ('*Gasoline*') the Appellate Body stated that this meant that WTO agreements could not be read 'in

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found in the updated *GATT 1994* and the other Multilateral Trade Agreements annexed to the *Marrakesh Agreement*.

<sup>95</sup> *Marrakesh Agreement*, annex 2. See the discussion in Chapter 2.

<sup>96</sup> *Ibid* art 4(7) and 5(4).

<sup>97</sup> *Ibid* art 17.

<sup>98</sup> *Ibid* arts 16(4) and 17(14).

<sup>99</sup> *Update of WTO Dispute Settlement Cases*, WTO Doc WT/DS/OV/24 (2005). By comparison only 196 cases had been commenced under *GATT* dispute settlement procedures throughout its 45 years of existence.

<sup>100</sup> Deborah Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39.

<sup>101</sup> In several disputes consultations have been requested, but no Panel has yet been established. These include *Croatia – Measures Affecting Imports of Live Animals and Meat Products* WT/DS297 (import restrictions imposed by Croatia to prevent the spread of bovine spongiform encephalopathy ('mad cow disease')) and *Australia – Certain Measures Affecting the Importation of Fresh Pineapple* WT/DS271 (quarantine restrictions on the importation of fresh pineapple). In several additional disputes Panels have been established, but no report has yet been circulated. These include *Australia – Quarantine Regime for Imports* WT/DS287 (a broad challenge by the European Communities to Australia's quarantine restrictions) and *Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables* WT/DS270 (complaint by the Philippines in relation to Australia's quarantine restrictions on the import of fresh fruit and vegetables).

<sup>102</sup> *DSU*, arts 1(1) and 3(2).

<sup>103</sup> *United States – Standards for Reformulated and Conventional Gasoline* WTO Doc WT/DS2/AB/R (1996) (Report of the Appellate Body).

clinical isolation from public international law.<sup>104</sup> Accordingly rules of international environmental law may be relevant for interpretive purposes. But this is not their only potential influence. To the extent that they are binding, have developed after the conclusion of the WTO agreement in question, and WTO Members have not sought to exclude their application, then environmental rules may be relied upon in the WTO dispute settlement system in much the same way as they would be in an international jurisdiction with general subject-matter competence.

(c) *Cases Concerning the GATT Environmental Exemptions*

*GATT* and WTO cases involving environmental issues fall into two main categories. The first, and largest, of these comprises disputes concerning *GATT* environmental exemptions.

The key organising principles of the WTO system are the most-favoured nation principle,<sup>105</sup> and the national treatment principle.<sup>106</sup> Together they limit the circumstances in which states may impose trade restrictive measures. However, they are subject to Article XX of the *GATT* which sets out certain limited exceptions for health and environmental measures:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

.....

(b) necessary to protect human, animal or plant life or health;

.....

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.<sup>107</sup>

(i) *The Tuna-Dolphin Cases*

*United States – Restrictions on Imports of Tuna*<sup>108</sup> (*Tuna-Dolphin I*) and *United States – Restrictions on Imports of Tuna*<sup>109</sup> (*Tuna-Dolphin II*) were important early cases that considered the scope of these exemptions.

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<sup>104</sup> Ibid 16.

<sup>105</sup> *GATT 1994*, art I requires equality of treatment for like products, and therefore members of the WTO may not discriminate between like products of other members.

<sup>106</sup> Ibid art III stipulates that domestic and imported products should be treated equally in terms of the application of internal regulations and policies.

<sup>107</sup> Given the relatively recent emergence of environmental concerns in international law it is unsurprising that the only reference of the *GATT* is to 'natural resources' rather than the environment more broadly: Mark Harris, 'Beyond Doha: Clarifying the Role of the WTO in Determining Trade-Environment Disputes' (2003) 21 *Law in Context* 307, 309.

<sup>108</sup> *United States – Restrictions on Imports of Tuna*, GATT Doc DS21/R (1991).

The cases were brought under the *GATT* panel system in response to restrictions imposed by the United States on imports of certain yellowfin tuna harvested in a manner that resulted in excessive by-catch of dolphin in the Eastern Tropical Pacific Ocean. Under the *Marine Mammal Protection Act 1972* (US) ('*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 I* and *Tuna-Dolphin II*, *GATT* Panels rejected the arguments of the United States that the import bans were justified under Article XX(b) of the *GATT* as measures necessary to protect animal life. The decisions attracted strong criticism on the grounds that they privileged trade considerations over legitimate efforts to achieve the protection of marine wildlife.<sup>110</sup> The Panels had adopted a narrow interpretation of Article XX and had decisively rejected the legality of using domestic measures for an extraterritorial purpose, namely to affect the environmental policies of other states. However, when considering the impact of these decisions upon international environmental law it must be noted that in neither case did the United States seek to make arguments beyond the terms of the *GATT* itself. Beyond suggesting that trade measures pursuant to a multilateral agreement to protect cetaceans would be *GATT*-consistent, the Panels also made no reference to environmental instruments potentially having a bearing on the cases.<sup>111</sup>

(ii) *The Shrimp-Turtle Cases*

The environmental case law of the WTO was inaugurated in *Gasoline* but again it was not deemed necessary to address issues of international environmental law when rejecting the WTO-consistency of United States gasoline standards designed to improve air quality. A markedly different approach was taken in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*Shrimp-Turtle I*'),<sup>112</sup> a decision

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<sup>109</sup> *United States – Restrictions on Imports of Tuna*, GATT Doc DS29/R (1994).

<sup>110</sup> Daniel C Esty, *Greening the GATT: Trade, Environment and the Future* (1994) 114-130.

<sup>111</sup> None of the other environmental cases decided under the *GATT* system addressed such questions either. See *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc L/6268 (1988) (export restrictions as part of system of fishery resource management not justified under art XX(g)), *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc L DS10/R (prohibition on importation of cigarettes purportedly for reasons of public health not justified under art XX(b)), *United States – Taxes on Automobiles*, GATT Doc DS31/R (1994) (regulation regarding minimum fuel economy of imported cars not justified under art XX(g)).

<sup>112</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/R (1998) (Report of the Panel), WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body) ('*Shrimp-Turtle I*

which has been widely regarded as evidencing the greening of *GATT*/WTO jurisprudence.<sup>113</sup>

The issue in *Shrimp-Turtle I* was similar to that confronted in the *Tuna-Dolphin* cases. In conformity with the *Endangered Species Act* 1973 (US), the United States government imposed a prohibition on the import of shrimp harvested using methods that involved high rates of mortality for species of sea turtle protected by *1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora*<sup>114</sup> ('*CITES*'). The ban applied to all imports of shrimp unless from certified nations and certification was only forthcoming for nations harvesting shrimp in sea turtle habitats where it was established that Turtle Excluder Devices or other preventative measures were used.

The United States trade measure was challenged by India, Malaysia, Pakistan and Thailand on the basis that it was inconsistent with Articles I, XI and XIII of the *GATT* and not justified as a permissible measure to protect animal life under Article XX. The complainants were ultimately successful, with a Panel finding that the import ban was inconsistent with WTO rules and that Article XX did not apply.<sup>115</sup> On appeal, the Appellate Body also upheld the earlier result. However it effectively reversed the rationale, thereby opening the door for unilateral environmental measures in certain circumstances. Indeed there is much that is significant about the Appellate Body report for national and transnational environmental management.<sup>116</sup> Not only did the Appellate Body find that amicus curiae submissions from environmental groups could be considered in the WTO dispute settlement process, it also developed a more flexible interpretation of Article XX environmental exemptions having regard to developments in international environmental law.

The Appellate Body adopted a two-stage test for determining whether the measures adopted by the United States were justified under Article XX. In the first place it asked whether the measure fitted specifically within Article XX(g) by relating to the

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*Appellate Body Report*'). See A H Qureshi, 'Extraterritorial Shrimps, NGOs and the WTO Appellate Body' (1999) 48 *International and Comparative Law Quarterly* 199.

<sup>113</sup> Sam Blay, 'The WTO and the Greening of World Trade: A Look at WTO Jurisprudence' (2004) 21 *Environmental Planning Law Journal* 27, 32; Gillian Triggs, 'World Trade Organisation: Dispute Settlement and the Environment' (2002) 7 *Asia Pacific Journal of Environmental Law* 43, 59-61.

<sup>114</sup> All seven known species of sea turtle, the longest-living of all vertebrates, are threatened with extinction, mainly due to modern fishing practices, and are listed in appendix 1 of *CITES*.

<sup>115</sup> For a discussion of the panel report see Rohan Hardcastle, 'Environmental Trade Measures Under Siege: The WTO US Shrimp Case' (1998) 3 *Asia Pacific Journal of Environmental Law* 157.

<sup>116</sup> Notaro, above n 91, 197-200; Philippe Sands, 'International Courts and the Application of the Concept of "Sustainable Development"' in John Hatcher and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century* (2003) 147, 151-155; Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491, 499-516

'conservation of exhaustible natural resources'. If so, the second stage involved determining whether the measure met the requirements of the Article XX *chapeau* in not being applied in a manner that would constitute unjustifiable discrimination or a disguised restriction on international trade.<sup>117</sup> In applying both stages of this test the Appellate Body referred to international environmental law.

However, before doing so, a threshold question for the Appellate Body was whether sea turtles could be considered 'exhaustible natural resources' within the meaning of Article XX(g) of the *GATT*. Having regard to the need to interpret the *GATT* 'in light of contemporary concerns of the community of nations about the protection and conservation of the environment'<sup>118</sup> the Appellate Body held that sea turtles were indeed 'exhaustible natural resources' just as much as any non-living 'resource'.<sup>119</sup> The Appellate Body reached this conclusion by reference to the concept of sustainable development included in the first recital of the Preamble to the *Marrakesh Agreement*.<sup>120</sup> Also considered relevant to a contemporary interpretation of the term 'natural resources' were references to 'living natural resources' in the *United Nations Convention on the Law of the Sea* ('*LOS Convention*') the *1992 Convention on Biological Diversity* ('*Biodiversity Convention*'), *Agenda 21*,<sup>121</sup> and the *1979 Convention on the Conservation of Migratory Species of Wild Animals*. For the Appellate Body all of these instruments confirmed that 'it was too late in the day to suppose that Article XX(g) of the *GATT* may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.'<sup>122</sup> The Appellate Body also referred to the fact that as all sea turtles were listed as endangered under *CITES*, they must therefore be considered 'exhaustible' under Article XX(g) of the *GATT*.<sup>123</sup>

After determining this initial issue it was then evident that the United States' trade measure was one 'relating to' the conservation of sea turtles,<sup>124</sup> and the Appellate Body turned to consider whether the 'provisionally justified' import ban was consistent with the requirements of the *chapeau* to Article XX. The Appellate Body found against the United States on this point, concluding that the measure was 'a means of arbitrary or unjustifiable discrimination' within the meaning of the *chapeau*. In reaching this

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<sup>117</sup> *Shrimp-Turtle I Appellate Body Report*, WTO Doc WT/DS58/AB/R (1998) [118]-[119].

<sup>118</sup> *Ibid* [129].

<sup>119</sup> *Ibid* [134].

<sup>120</sup> *Ibid* [130].

<sup>121</sup> UN Doc A/CONF.151/26/Rev.1 (1992).

<sup>122</sup> *Shrimp-Turtle I Appellate Body Report*, WTO Doc WT/DS58/AB/R (1998) [131].

<sup>123</sup> *Ibid* [132].

<sup>124</sup> *Ibid* [142].

conclusion the principle of sustainable development was cited yet again, in order to give 'colour, texture and shading' to an interpretation of Article XX. Precisely how the concept had relevance here was not explained, but there was nothing controversial about the Appellate Body's interpretation of the principle, which it achieved by reference to the *Rio Declaration* and *Agenda 21*.

According to the Appellate Body it was not acceptable for the United States to have adopted measures that prohibited imports from some countries where shrimp were caught using the same turtle-friendly methods employed in the United States simply because those countries had not been certified.<sup>125</sup> Moreover, the United States had failed to engage members exporting shrimp to the United States 'in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition.'<sup>126</sup>

The Appellate Body observed that 'the protection and conservation of highly migratory species of sea turtles...demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations'<sup>127</sup> and to this end referred to the *Rio Declaration, Agenda 21* and the *Biodiversity Convention* all of which declare that unilateral actions to protect the environment should generally be avoided and that multilateral environmental measures should, as far as possible, be preferred.<sup>128</sup> The Appellate Body therefore strongly emphasised the need for states to attempt a cooperative, multilateral, solution to environmental problems, an emphasis that is consistent with the notion of co-operation which underpins many aspects of international environmental law.<sup>129</sup>

In this case the United States had led negotiations on a regional agreement for the protection and conservation of sea turtles, a fact which demonstrated that an alternative course of action was reasonably open to the United States to secure the legitimate objective of sea turtle conservation.<sup>130</sup> However, while the United States had negotiated seriously with some Members, it had not done the same with others, and according to the Appellate Body the effect was therefore plainly discriminatory and unjustifiable.

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<sup>125</sup> Ibid [165].

<sup>126</sup> Ibid [166].

<sup>127</sup> Ibid [168].

<sup>128</sup> *Rio Declaration*, above n 24, principle 12; *Agenda 21*, above n 121, [2.22(i)]; *Biodiversity Convention*, art 5.

<sup>129</sup> Robyn Briese, 'Precaution and Cooperation in the World Trade Organization: An Environmental Perspective' (2002) 22 *Australian Yearbook of International Law* 113, 156.

<sup>130</sup> *Shrimp-Turtle I Appellate Body Report*, WTO Doc WT/DS58/AB/R (1998) [171].

The follow-up case of *United States-Import Prohibition of Certain Shrimp and Shrimp Products* ('*Shrimp-Turtle II*')<sup>131</sup> was brought by Malaysia, one of the original complainants in *Shrimp-Turtle I*, under Article 21.5 of the *DSU*.<sup>132</sup> Malaysia argued that the United States had not implemented the Appellate Body report in *Shrimp-Turtle I*, however a Panel and the Appellate Body disagreed. The main significance of this case is the Panel's and Appellate Body's ultimate findings that temporary measures imposed by the United States were permissible pending international agreement on sea turtle conservation. To justify this conclusion the Appellate Body referred to Principle 12 of the *Rio Declaration* which states that environmental measures should only be based upon consensus and co-operation as far as this is possible. The United States was therefore permitted to apply a unilateral measure so long as it continued to negotiate an internationally-agreed action plan to improve the protection of endangered sea turtles.

The Appellate Body's use of international environmental law in *Shrimp-Turtle I* and *Shrimp-Turtle II* has not gone without criticism. Triggs is critical of the 'judicial creativity' of the Appellate Body and notes that '[f]or the developing nations of Asia...the outcomes of the Shrimp case may prove to be the harbinger of new interpretations of WTO rules that could be to their economic disadvantage.'<sup>133</sup> However, a close examination of the Appellate Body's reasons suggests that it turned to international environmental law only to the extent that it was necessary to make sense of the *GATT* in light of the concern of many states, including the complainants, that a threatened species of marine wildlife receive appropriate and effective international legal protection.

No Article XX case before or after the *Shrimp-Turtle* cases has engaged in the same detailed consideration as to the relevance of international environmental law to the interpretation and application of the *GATT*.<sup>134</sup> Nor has any other case involved reliance

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<sup>131</sup> *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), *Shrimp-Turtle II Appellate Body Report*, WTO Doc WT/DS58/AB/RW (2001).

<sup>132</sup> *DSU*, art 21.5 provides that '[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such disputes shall be decided through recourse to these dispute settlement procedures...'.<sup>2</sup>

<sup>133</sup> Triggs, above n 113, 60-61.

<sup>134</sup> The most recent art XX decision is *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc WT/DS135/R (2000) (Report of the Panel), WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body) in which a Panel and the Appellate Body found that French prohibitions on the import of asbestos were allowable under art XX(g) as they addressed a legitimate human health risk. Neither the Panel nor the Appellate Body referred to international environmental law in reaching this decision. But see Marie-Claire Cordonier Segger and Markus W Gehring, 'The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute' (2003) 15 *Journal of Environmental Law* 289 (arguing that the Appellate Body's decision was 'inspired by' precaution and sustainable development.). See also Mary Footer and Saman Zia-Zarifi, 'European Communities – Measures Affecting Asbestos and Asbestos-Containing Products: The World Trade Organization on Trial for its Handling of Occupational Health and Safety Issues' (2002) 3 *Melbourne Journal of International Law* 120.



by a respondent state upon a multilateral environmental agreement. The only dispute in which the prospects of such reliance has so far emerged was *Chile – Measures Affecting the Transit and Importation of Swordfish*<sup>135</sup> in which Chile justified closing its ports to Spanish vessels on the basis of the *LOS Convention* which it was said required it to take measures to protect a straddling fishery under threat of collapse. The dispute, which also involved the commencement of parallel proceedings under the *LOS Convention* dispute settlement system,<sup>136</sup> was ultimately settled.<sup>137</sup>

(d) *Cases Concerning Sanitary and Phytosanitary Measures*

The second main category of trade/environment disputes in the WTO are those under the rubric of the *Sanitary and Phytosanitary Agreement*<sup>138</sup> ('*SPS Agreement*') which regulates the extent to which states may impose quarantine restrictions and other measures to safeguard animal and plant health.<sup>139</sup>

The *SPS Agreement* is perhaps the WTO agreement most closely situated at the intersection between trade and environment, and in respect of sanitary and phytosanitary ('*SPS*') measures it elucidates upon the general environmental exemption contained in Article XX(b) of the *GATT*.<sup>140</sup> Member states are permitted to take their own decisions concerning *SPS* measures.<sup>141</sup> However, if these have the effect of limiting imports they are only permissible if they are supported by scientific investigation<sup>142</sup> and a rigorous risk assessment. Under no circumstances may they be disguised attempts at protectionism or discrimination.

Disputes over the interpretation and application of these provisions are a burgeoning area of environment-related litigation in the WTO<sup>143</sup> and there is the potential for a host

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<sup>135</sup> *Chile – Measures Affecting the Transit and Importation of Swordfish* WTO Doc WT/DS193/2 (2000) (Request for Consultations).

<sup>136</sup> *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) Proceedings suspended* (15 March 2001 and 16 December 2003) <<http://www.itlos.org>> at 1 July 2005.

<sup>137</sup> For a discussion of the arguments that might have been made on the basis of the *LOS Convention* before a WTO Panel and the Appellate Body see Andrew Serdy, 'See You in Port: Australia and New Zealand as Third Parties in the Dispute Between Chile and the European Community Over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas' (2002) 3 *Melbourne Journal of International Law* 79.

<sup>138</sup> *Marrakesh Agreement*, annex 1A ('*Sanitary and Phytosanitary Agreement*').

<sup>139</sup> See Steve Charnovitz, 'The Supervision of Health and Biosafety Regulation by World Trade Rules' (1999-2000) 13 *Tulane Environmental Law Journal* 271. Sanitary measures are those designed to protect the health of animals, including human beings, while phytosanitary measures are those that aim to protect the health of plants (from the Greek *phyton* meaning 'plant').

<sup>140</sup> Andreas F Lowenfeld, *International Economic Law* (2002) 324.

<sup>141</sup> *SPS Agreement*, art 2(1).

<sup>142</sup> *Ibid* art 2(2).

<sup>143</sup> Four Appellate Body reports have now been adopted by the Dispute Settlement Body: *Japan – Measures Affecting the Importation of Apples* WTO Doc WT/DS245/AB/R (2003) (Report of the Appellate Body), *Japan*

of issues of international environmental law to be implicated in their resolution. Most obvious is the specific question as to whether the precautionary principle may be relied upon to justify quarantine and other health-related trade measures, or whether the *SPS Agreement* establishes a sui generis system for the evaluation of scientific uncertainty and risk.

The only SPS case thus far to deal expressly with the precautionary principle is *European Communities – Measures Affecting Livestock and Meat (Hormones)*<sup>144</sup> which related to import bans imposed by the European Community on hormone-fed livestock and meat in 1997.<sup>145</sup> European regulators had concerns that certain hormones administered to livestock could have a carcinogenic effect upon consumers. After consultations with the United States and Canada failed, Panels were established to determine the disputes in which the complainants contended that the European Community measures were inconsistent both with the *GATT* and with the *SPS Agreement*.

To defend its actions, the European Community relied specifically on the precautionary principle, arguing that it was a binding rule of customary international law. For their part the United States and Canada argued that it was only an emerging principle that might eventually crystallise into a general principle of law recognised by civilised nations. Each of the Panels found that to the extent that the principle could be considered as part of customary international law, and be used to interpret Articles 5.1 and 5.2, the principle could not override the express wording of these articles, because the precautionary principle had been incorporated and given a specific meaning in Article 5.7.<sup>146</sup> For these and other reasons the Panels ultimately held that that European Community had acted inconsistently with the *SPS Agreement*.

The Appellate Body reached the same conclusion, but for somewhat different reasons. On the issue of the precautionary principle the Appellate Body avoided answering the question as to its status. It considered that regardless of its status 'under

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– *Measures Affecting Agricultural Products* WTO Doc WT/DS76/AB/R (1999) (Report of the Appellate Body), *European Communities – Measures Concerning Meat and Meat Products (Hormones)* WTO Doc WT/DS26/R/USA (1997) (Complaint by the United States – Report of the Panel), WTO Doc WT/DS48/4/CAN (1997) (Complaint by Canada – Report of the Panel) WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (1998) (Report of the Appellate Body), and *Australia – Measures Affecting the Importation of Salmon* WTO Doc WT/DS18/AB/R (1998) (Report of the Appellate Body).

<sup>144</sup> *European Communities – Measures Concerning Meat and Meat Products (Hormones)* WTO Doc WT/DS26/R/USA (1997) (Complaint by the United States – Report of the Panel), WTO Doc WT/DS48/4/CAN (1997) (Complaint by Canada – Report of the Panel) WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (1998) (Report of the Appellate Body) ('*Beef Hormones Case*').

<sup>145</sup> EC Directive 96/22/EC (which repealed and replaced similar directives going back to 1981, including 91/602/EEC).

<sup>146</sup> *Beef Hormones Case* WTO Doc WT/DS26/R/USA (1997) (Complaint by the United States – Report of the Panel) [8.157].

international environmental law'<sup>147</sup> the principle did not need to be applied because the relevant rules which had to govern the assessment of risk were set out in the *SPS Agreement*. Articles 5.1 and 5.2 specify the need for a risk assessment, and for that assessment to be based upon scientific evidence. In addition, because the import bans had been in place for over a decade, the European Community had not sought to rely on Article 5.7, which allows provisional measures to be implemented pending a more complete assessment of the risk. The Appellate Body explained that:

It is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important but abstract question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.<sup>148</sup>

Nevertheless, the Appellate Body noted 'some aspects of the relationship of the precautionary principle to the *SPS Agreement*', observing that:

A panel charged with determining...whether 'sufficient scientific evidence exists to warrant the maintenance by a member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.<sup>149</sup>

In sum, therefore, the Appellate Body considered that the *SPS Agreement itself* permitted the taking of precautionary measures, where prudence and precaution demanded them.<sup>150</sup> In other words both the Panels and the Appellate Body were of the view that a precautionary approach finds some form of expression in the *SPS Agreement* itself.

The Appellate Body's non-committal treatment of the precautionary principle is hardly controversial from the perspective of international environmental law. However, it does raise some questions regarding whether the correct approach was taken in terms of addressing the European Community's arguments. In this respect Pauwelyn has argued that the Appellate Body reached the correct conclusion, but for the wrong reasons.<sup>151</sup> In his view 'there was *no need* for the SPS agreement to refer explicitly to the precautionary principle for this principle to be a possible defence in WTO dispute settlement.'<sup>152</sup> This is because the principle could have been applied if it was concluded that it was a rule of customary international law that arose later in time and which was

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<sup>147</sup> *Beef Hormones Case* WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (1998) (Report of the Appellate Body) [125].

<sup>148</sup> *Ibid* [123].

<sup>149</sup> *Ibid* [124].

<sup>150</sup> Peel, above n 25, 493.

<sup>151</sup> Pauwelyn, *Conflict of Norms in Public International Law*, above n 3, 482.

<sup>152</sup> *Ibid*.

in conflict with an earlier rule set out by the *SPS Agreement*. Pauwelyn therefore considers that the Appellate Body's decision was far too categorical and ignored critical questions as to the meaning of the precautionary principle and its normative value.<sup>153</sup> Nonetheless he notes that this defect in the reasoning was not problematic in this case, as in his view it is questionable whether the precautionary principle meets the requirements of a customary norm of international law.

(e) *Evaluation*

(i) *The Evidence to Date*

Although trade liberalisation and environmental regimes reflect substantially different objectives, that are pursued through distinctive institutions, the foregoing review of relevant WTO jurisprudence has identified no evidence to suggest that the WTO has adopted parochial interpretations of international environmental law in conflict with prevailing understandings. Instead it appears that WTO Panels and the Appellate Body have sought to integrate accepted environmental rules and concepts within the WTO regime. This conclusion that the WTO has demonstrated 'integrative' rather than 'disintegrative' tendencies is in line with an earlier assessment of the place of treaty law and other basic principles of public international law within WTO jurisprudence.<sup>154</sup>

In the *Shrimp-Turtle* cases the Appellate Body referred to a range of international environmental instruments to justify its decision on several questions relating to the interpretation of the *GATT*. In no respect did the Appellate Body appear to prefer 'trade-friendly' interpretations of environmental rules. Instead by faithfully reciting the principle of sustainable development, and drawing upon environmental instruments, the Appellate Body was anxious to address the criticism that the WTO was indifferent or hostile to environmental concerns.<sup>155</sup> Indeed, as Sands has argued, the Appellate Body looked beyond the narrow questions of trade law and sought to give effect to international values embodied in the environmental instruments, both soft and hard, to which it referred.<sup>156</sup> He suggests that the case 'points to an enhanced role for a self-confident judiciary, filling in the gaps which states in their legislative capacity have been unwilling – or unable – to fill.'<sup>157</sup>

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<sup>153</sup> Ibid.

<sup>154</sup> Charney, 'Is International Law Threatened by Multiple International Tribunals', above n 13, 153.

<sup>155</sup> Lowenfeld, above n 140, 322.

<sup>156</sup> Philippe Sands, "'Unilateralism', Values and International Law' (2000) 11 *European Journal of International Law* 291, 300-301.

<sup>157</sup> Ibid 301.

The *Beef Hormones Case* is essentially neutral as regards its influence upon international environmental law as the Appellate Body found it unnecessary to enter into an evaluation of the precautionary principle. Nonetheless the decision is controversial in the sense that the Appellate Body adopted a curious approach to relating this asserted rule of customary international law to WTO rules. If the Appellate Body's reasoning is followed it will reinforce the view of some commentators that the WTO regime is closed except in so far as other rules of international law are relevant for the limited purpose of interpreting the *GATT* and other covered agreements.<sup>158</sup> However, as has been seen, environmental law may be given a more general application. Admittedly WTO Panels and the Appellate Body can only determine disputes relating to WTO rules, but in so doing they may be called upon to apply *all* relevant rules of international law, including those set out in environmental agreements, which are binding on the disputing parties.<sup>159</sup>

(ii) *Future Directions*

Although the evidence to date suggests no reason to be alarmed about the possible fragmentation of international environmental law at the hands of WTO dispute settlement procedures, it must be acknowledged that there have only been a handful of cases and there remain possibilities for divergences to develop in the future. There appear to be three main areas where, in future WTO disputes, issues of international environmental law are likely to arise.

The first of these is when international environmental law has relevance for interpretive purposes. It was seen in the *Shrimp-Turtle* cases that the concept of 'exhaustible natural resources' was given meaning by reference to developments in international environmental law – the *GATT* was effectively updated to reflect contemporary environmental law. The Appellate Body has therefore made it clear that the combined operation of Article 3(2) of the *DSU* and Article 31(3) of the *1969 Vienna Convention on the Law of Treaties* means that environmental rules may be used to assist in the interpretation of WTO agreements. As environmental law develops this means that WTO law will similarly be evolutionary and not static.<sup>160</sup>

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<sup>158</sup> See for instance Koskenniemi and Leino, above n 17, 572 ('In case of conflict between, say, an...environmental treaty and a WTO agreement, WTO bodies are constitutionally prevented from concluding that the WTO standard has to be set aside'). See also Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 10 *Yale Human Rights and Development Law Journal* 3, 12; Lakshman D Guruswamy, 'Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?' (1998) 7 *Minnesota Journal of Global Trade* 287, 311.

<sup>159</sup> Joost Pauwelyn, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' (2004) 15 *European Journal of International Law* 575, 588-589.

<sup>160</sup> Alan Boyle, 'The World Trade Organization and the Marine Environment' in M H Nordquist, J N Moore and S Mahmoudi (eds), *The Stockholm Declaration and Law of the Marine Environment* (2003) 109, 110.

The second area where the application of international environmental law may arise is where states seek to rely upon multilateral environmental agreements to justify trade restrictive measures. Approximately 40 multilateral environmental agreements include trade-related provisions,<sup>161</sup> however no WTO case has yet arisen where a state has relied upon these or another environmental instrument. In the *Shrimp-Turtle* cases the United States invoked several multilateral environmental agreements to justify its import restrictions, however it was not contended that the United States was positively mandated by international environmental law to implement its unilateral trade measures. Nonetheless, by emphasising the importance of co-operation through multilateral environmental agreements to resolve environmental challenges the Appellate Body's report suggests that this area of potential conflict between trade and environment may be more imagined than real. In any event, where states have committed themselves to a multilateral environmental regime with trade consequences it appears politically unlikely that trade restrictions imposed in conformity with the environmental instrument will be the subject of WTO challenge.<sup>162</sup>

The third, and arguably most anticipated, area where international environmental law is likely to be considered is in the interpretation and application of the *SPS Agreement*. There is every likelihood that the precautionary principle will be raised once again in the resolution of a dispute over the WTO consistency of SPS measures and given the politically contentious character of the precautionary principle, WTO Panels and the Appellate Body may once more seek to avoid determining its status. However, at some point it will be necessary to grapple with the importance of the principle, and this will concentrate the attention of the disputants and the WTO system not only upon technical questions as to the extent to which state practice and *opinio juris* support the notion of precaution as a rule of custom but also, and perhaps more fundamentally, upon the meaning and purpose of the precautionary approach in managing environmental risks.

#### IV CONCLUSION

This Chapter has examined the expanding body of environmental jurisprudence emanating from some of the most active international adjudicative institutions. This review has not sought to argue that these bodies have rendered decisions that have always appropriately recognised environmental considerations. Rather it has been suggested that there is no indication that these institutions have preferred inadequate or

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<sup>161</sup> Richard Skeen, 'Will the WTO Turn Green? The Implications of Injecting Environmental Issues Into the Multilateral Trading System' (2004) 17 *Georgetown International Environmental Law Review* 161, 192.

<sup>162</sup> Lowenfeld, above n 140, 313-314. Although it would be more problematic if a WTO member were to rely upon a multilateral environmental agreement to which another disputant were not a party. This situation has not, as yet, materialised partly because the membership of multilateral environmental agreements tends to be more widespread than the WTO itself.

'skewed' interpretations of environmental rules and principles in order to uphold the policy objectives of the issue-specific regimes that they operate within. The reasons for this conclusion in relation to human rights bodies were seen to be twofold. In the first place, in relation to substantive human rights, there is so little commonality between international environmental law and existing human rights that there are few opportunities for environmental rules to intrude upon their application, except in the most general and uncontroversial terms. Second, in relation to procedural rights, the other extreme is encountered in that there is an almost complete overlap between the human rights and environmental agendas to improve access to information, enhance public participation, and to provide effective remedies for rights infringements. It was suggested on this basis that the human rights jurisprudence is in fact likely to be of considerable value as procedural environmental rights receive greater recognition in international environmental law.

The resolution of disputes in the WTO system involves substantially greater opportunities for environmental norms to be considered in a selective and parochial manner. This is because such norms can be used to assist in the interpretation of provisions of the *GATT* and other trade agreements, and also because they may be relied upon to justify what would otherwise constitute violations of WTO rules. However, despite dire predictions that it might be a forum for normative development that would lead to divergent interpretations of environmental rules, the WTO has to date shown a willingness to consider international environmental law faithfully and on its own terms. Admittedly it may be too early to draw definitive conclusions in this respect as there have only been a handful of cases, of narrow compass. The WTO dispute settlement system has not been fully tested in this respect as no case has yet arisen where a state has sought to rely upon environmental rules in derogation of WTO commitments. If and when that situation arises it will pose most acutely the potential problem of 'fragmentation' as WTO dispute settlement bodies will no doubt be called upon by a disputing party to prefer interpretations of environmental regimes that have the least trade restrictive effects.

## The Future of International Environmental Litigation

### I THE FLOURISHING OF ENVIRONMENTAL LITIGATION

In concluding this study it must be asked what the future holds in store for international environmental dispute settlement. It certainly could not have been imagined at the Conference on the Human Environment or the United Nations Conference on Environment and Development, the two key ‘constitutional moments’ for international environmental law, that within decades international litigation on environmental matters would become a relatively routine occurrence in international relations. By 1972 only a handful of environmentally significant cases had been decided, the most important being the arbitral awards in the *Bering Sea Fur Seals Case*,<sup>1</sup> the *Trail Smelter Case*<sup>2</sup> and the *Lake Lanoux Case*.<sup>3</sup> No environmental case had yet been determined by the International Court of Justice (‘ICJ’), although proceedings in the *Icelandic Fisheries Case*<sup>4</sup> were commenced by the United Kingdom just prior to the Stockholm Conference.<sup>5</sup>

There were some important additions in the years leading up to the 1992 Rio Conference, beginning with the *Nuclear Tests Cases*,<sup>6</sup> which marked a new era in international environmental litigation in which ecological threats were identified clearly and directly, and claims began to be asserted on the basis of a growing collection of applicable rules and standards. Similarly, in the *Case Concerning Certain Phosphate Lands in Nauru*,<sup>7</sup> which was commenced in 1989, the factual basis of Nauru’s claim related to massive environmental degradation suffered while under the administration of

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<sup>1</sup> *Bering Sea Fur Seals Case (Great Britain/United States of America)* (1893) 1 *Moore’s International Arbitrations* 827 (‘*Bering Sea Fur Seals Case*’).

<sup>2</sup> *Trail Smelter Case (Canada/United States of America)* (1938 and 1941) 3 *RIAA* 1911 (‘*Trail Smelter Case*’).

<sup>3</sup> *Lake Lanoux Case (France/Spain)* (1957) 12 *RIAA* 285 (‘*Lake Lanoux Case*’).

<sup>4</sup> *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction)* [1973] ICJ Rep 3, (*Merits*) [1974] ICJ Rep 3; *Fisheries Jurisdiction Case (Germany v Iceland) (Jurisdiction)* [1973] ICJ Rep 49, (*Merits*) [1974] ICJ Rep 175 (‘*Icelandic Fisheries Case*’).

<sup>5</sup> The United Kingdom formally instituted proceedings against Iceland on 14 April 1972, while the Federal Republic of Germany followed on 5 June 1972, the day the Stockholm Conference opened.

<sup>6</sup> *Nuclear Tests Cases (Australia v France) (Interim Measures)* [1973] ICJ Rep 99, (*Merits*) [1974] ICJ Rep 253; *Nuclear Tests Cases (New Zealand v France) (Interim Measures)* [1973] ICJ Rep 135, (*Merits*) [1974] ICJ Rep 457 (‘*Nuclear Tests Cases*’).

<sup>7</sup> *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* [1992] ICJ Rep 240 (‘*Nauru Case*’).



Australia, New Zealand and the United Kingdom under the United Nations trusteeship system.<sup>8</sup> Since the Rio Conference there has been a tremendous intensification and diversification in the practice of environmental dispute settlement. States have shown an ever greater willingness to establish and utilise dispute settlement procedures, including judicial and quasi-judicial bodies. There has also been an expansion in the range of actors participating in these institutions, as international organisations, non-governmental organisations and individuals begin to gain access either as litigants in their own right, or as *amici curiae*.

Arriving at a definitive total of cases commenced or concluded in these bodies is difficult, given that any precise categorisation of an 'environmental case' is contentious.<sup>9</sup> However, taking an expansive definition such that all those disputes involving at least one issue of environmental protection or management are included, the extent of the litigation is indeed impressive. By 2005 nine disputes directly or indirectly involving environmental questions had led to litigation in the ICJ,<sup>10</sup> panels established under the auspices of the Permanent Court of Arbitration ('PCA') had considered four environmental cases,<sup>11</sup> and the International Tribunal for the Law of the Sea ('ITLOS') had been activated in some eight disputes raising environmental issues.<sup>12</sup>

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<sup>8</sup> The case was subsequently settled in 1993. See the *1993 Settlement of the Case in the ICJ Concerning Certain Phosphate Lands in Nauru*.

<sup>9</sup> See Richard B Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment' (1975) 144 *Recueil des Cours* 139, 153 (defining such disputes as 'any disagreement or conflict of views or interests between States relating to the alteration, through human intervention, of natural environmental systems.').

<sup>10</sup> *Fisheries Jurisdiction Case* [1974] ICJ Rep 3; [1974] ICJ Rep 175; *Nuclear Tests Cases* [1974] ICJ Rep 253; [1974] ICJ Rep 457; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246; *Nauru Case* [1992] ICJ Rep 240; *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38; *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* [1995] ICJ Rep 288 ('1995 Nuclear Tests Case'); *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 ('*Gabčíkovo-Nagymaros Case*'); *Fisheries Jurisdiction Case (Spain v Canada) (Jurisdiction and Admissibility)* [1998] ICJ Rep 431 ('*Estai Case*').

<sup>11</sup> *North Atlantic Coast Fisheries Case (Great Britain/United States of America)* (1910) 11 RIAA 167; *MOX Plant Award (Order 3, of 24 June 2003) (Order 4, of 14 November 2003)* <<http://www.pca-cpa.org>> at 1 July 2005 ('*MOX Plant Award*'); *OSPAR Arbitration (Ireland v United Kingdom) (Final Award 2 July 2003)*, <<http://www.pca-cpa.org>> at 1 July 2005 ('*OSPAR Arbitration*'); *Arbitration in Application of the Convention of 3 December 1976 on the Protection of the Rhine Against Pollution by Chlorides and the Additional Protocol of 25 September 1991* (12 March 2004) Pt I <[http://www.pca\\_cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf](http://www.pca_cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf)> at 1 July 2005 and Pt II <[http://www.pca\\_cpa.org/ENGLISH/RPC/PBF/Sentence%20II.pdf](http://www.pca_cpa.org/ENGLISH/RPC/PBF/Sentence%20II.pdf)> at 1 July 2005.

<sup>12</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 117 ILR 148, (1999) 38 ILM 1624 ('*SBT Order*'); *Camouco Case (Panama v France) (Prompt Release)* (2000) 125 ILR 151, (2000) 39 ILM 666 ('*Camouco Case*'); *Monte Confurco Case (Seychelles v France) (Prompt Release)* (2000) 125 ILR 203 ('*Monte Confurco Case*'); *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) (Proceedings suspended 15 March 2001 and 16 December 2003)*

The activity of other judicial bodies has also been substantial, including the dispute settlement system of the World Trade Organisation ('WTO') which is increasingly engaging with disputes possessing important environmental dimensions.<sup>13</sup> Other specialised judicial and quasi-judicial procedures, including human rights tribunals and complaints bodies have also heard essentially environmental complaints.<sup>14</sup> Finally it should be noted that any aggregate of environmental cases is increased by an order of magnitude if all such decisions of the Court of Justice of the European Communities ('ECJ') are included.<sup>15</sup>

This flourishing of international environmental litigation appears remarkable when one reflects upon the genesis of international environmental law. As the discipline largely emerged from soft-law instruments, incorporating informal and non-binding principles, it appeared that it was effectively non-adjudicable, and therefore essentially unenforceable.<sup>16</sup> However, in recent decades several areas of international environmental law have acquired precise and technical legal content, readily permitting

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<<http://www.itlos.org>> at 1 July 2005; *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* (2002) 41 ILM 405 ('MOX Plant Order'); *Volga Case (Russian Federation v Australia) (Prompt Release)* (2003) 42 ILM 159 ('Volga Case'); *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore) (Provisional Measures)* (2003) <<http://www.itlos.org>> at 1 July 2005 ('Straits of Johor Case'); *Juno Trader Case (St Vincent and the Grenadines v Bissau) (Prompt Release)* (2004) <<http://www.itlos.org>> at 1 July 2005.

<sup>13</sup> See *United States – Standards for Reformulated and Conventional Gasoline* WTO Doc WT/DS2/AB/R (1996) (Report of the Appellate Body); *European Communities – Measures Concerning Meat and Meat Products (Hormones)* WTO Doc WT/DS26/R/USA (1997) (Complaint by the United States – Report of the Panel), WTO Doc WT/DS48/4/CAN (1997) (Complaint by Canada – Report of the Panel) WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (1998) (Report of the Appellate Body); *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/R (1998) (Report of the Panel), WTO Doc WT/DS58/AB/R (1998) (Report of the Appellate Body) ('*Shrimp-Turtle I*'); *United States-Import Prohibition of Certain Shrimp and Shrimp Products ('Shrimp-Turtle II')*, WTO Doc WT/DS58/RW (2001) (Report of the Panel), WTO Doc WT/DS58/AB/RW (2001) (Report of the Appellate Body); *Chile – Measures Affecting the Transit and Importation of Swordfish* WTO Doc WT/DS193/2 (2000) (Request for Consultations); *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc WT/DS135/R (2000) (Report of the Panel), WTO Doc WT/DS135/AB/R (2001) (Report of the Appellate Body). Of course these disputes represent only a fraction of the 330 complaints notified to the WTO from 1995 to 2005.

<sup>14</sup> Especially the European Court of Human Rights. See in particular the decisions in *Balmer-Schafroth and Others v Switzerland* (1998) 25 EHRR 598; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125; *Guerra and Others v Italy* (1998) 26 EHRR 357, *Lopez-Ostra v Spain* (1995) 20 EHRR 277; *Öneryildiz v Turkey* (48939/99) [2002] ECHR 491 (18 June 2002) <<http://www.worldlii.org/eu/cases/ECHR/2002/491.html>> at 1 July 2005, *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355; *Hatton and Others v United Kingdom* (36022/97) [2003] ECHR 338 (8 July 2003) <<http://www.worldlii.org/eu/cases/ECHR/2003/338.html>> at 1 July 2005.

<sup>15</sup> However, some of this sizeable body of case law is clearly more important for European environmental law than others. The European Commission includes a total of 49 cases in its list of the leading cases and judgments of the ECJ on environmental matters see <[http://europa.eu.int/comm/environment/law/cases\\_judgments.htm](http://europa.eu.int/comm/environment/law/cases_judgments.htm)> at 1 July 2005.

<sup>16</sup> Douglas M Johnston and David L VanderZwaag, 'The Ocean and International Environmental Law: Swimming, Sinking, and Treading Water at the Millennium' (2000) 43 *Ocean and Coastal Management* 141, 145 (noting the 'preponderance of soft, informal, non-binding, ostensibly non-adjudicable (or even unenforceable) commitments generated by IEL diplomacy.')

the deployment of legal methods of dispute settlement in addition to negotiatory procedures. Moreover, it has become clear that even soft-law principles of somewhat amorphous content, and even more uncertain normative status, can be given concrete effect by international courts. For, example, the ICJ gave practical meaning and import to the principle of sustainable development in the *Gabčíkovo-Nagymaros Case* without recognising the principle as a binding rule of law. In a somewhat similar fashion ITLOS has attempted to implement the precautionary principle in several of its provisional measures orders while side-stepping difficult questions as to the content of the principle, and whether it has entered the pantheon of customary norms relating to environmental protection.<sup>17</sup>

## II THE JUDICIAL DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

### A *Initial Origins and Development*

The origins and early development of international environmental law in the core areas of wildlife protection and responsibility for transboundary environmental harm owe much to several judicial decisions. The *Bering Sea Fur Seal Case* did not conclude that states were under a general obligation to protect faunal species under the threat of extinction, but it did set out a detailed and practical management regime to prevent this fate befalling the Alaskan fur seal, and this ultimately led to improved regional cooperation to protect the species. The regulations adopted by the Tribunal also provided a model for managing other marine wildlife, particularly fisheries. Some 40 years later the *Trail Smelter Case* articulated what is widely regarded as a keystone of international law in the field of environmental protection by concluding that states have a duty to ensure that activities within their control do not cause damage in the territory of other states.

Admittedly these were somewhat embryonic developments, and provided no more than the most general normative guidance. International environmental law only began to emerge as a fully-fledged and coherent field of law much later in the 20th century when the seriousness of global environmental threats could no longer be ignored, and when popular environmental movements began to exert political influence in a number of developed states. These and other developments resulted in states agreeing to two types of international legal measures to address various environmental challenges such as habitat protection and marine pollution. The first of these comprised a raft of soft-law instruments. Although states have a long history of agreeing upon essentially diplomatic and non-binding resolutions, declarations, guidelines, codes, standards and the like,

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<sup>17</sup> *SBT Order* (1999) 117 ILR 148, (1999) 38 ILM 1624; *MOX Plant Order* (2002) 41 ILM 405; *Straits of Johor Case* <<http://www.itlos.org>> at 1 July 2005.

such instruments were especially important for the consolidation of international environmental law. They allowed agreement upon important goals that would otherwise not have been forthcoming, and also provided a principled framework within which states could settle their ongoing disputes over contentious environmental issues such as the equitable and sustainable use of shared resources.<sup>18</sup> The second way in which an emerging international consensus on the need to address environmental problems found legal manifestation was in regulatory agreements. Building upon the general principles found in soft-law texts, these hard-law treaties and conventions seek to advance the objective of ecologically sustainable development by requiring states to regulate, with varying degrees of specificity, environmentally-damaging activities taking place with their territory, or otherwise within their jurisdiction and control.

In the context of these important and extensive legislative developments, the judicial contribution to international environmental law has mostly been to provide general direction, rather than to articulate precise rules. International environmental litigation has also illustrated, in a practical way, many situations where legal principles concerning environmental protection have been lacking and are in need of development. However, in both respects the judicial influence has been felt only within very limited topic-areas rather than across the whole spectrum of issues of relevance to global environmental governance. Most decisions of international courts directly and substantially considering environmental questions having fallen within three categories: (1) transboundary harm, (2) the sustainable utilisation of freshwater resources, or (3) the protection of the marine environment.<sup>19</sup>

The body of jurisprudence in the first category is very compact.<sup>20</sup> The *Trail Smelter Case* remains the only example of an intergovernmental dispute in which claims concerning transboundary environmental damage have been successfully litigated to conclusion. Instead states have normally resolved such problems directly through negotiation, or through regional regulatory regimes. Moreover, although seminal, the significance of the principle stated in the *Trail Smelter Case* regarding state responsibility for transboundary damage should not be exaggerated as it constitutes no more than a translation of general concepts concerning state sovereignty and territorial integrity into a form that could be applied to a situation of transboundary pollution. Some of the limitations of the *Trail Smelter Case* dictum emerged with clarity in the *Nuclear Tests Cases*. France's impugned atmospheric nuclear tests involved complex

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<sup>18</sup> Patricia W Birnie, 'Legal Techniques of Settling Disputes, The "Soft" Settlement Approach' in William E Butler (ed), *Perestroika and International Law* (1990) 177.

<sup>19</sup> Inevitably there has been some overlap in these cases. Note for instance the issues of transboundary damage raised by Hungary in the *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7. See Chapters 5 and 6.

<sup>20</sup> See Chapter 5.

environmental threats not only to the applicants, Australia and New Zealand, and many other South Pacific states, but also to marine ecosystems beyond national jurisdiction. While Australia and New Zealand could point to sovereignty concerns as regards the impact of this testing upon their own territories and populations, they also made a host of innovative arguments regarding a general duty to protect the environment, submissions that could not have been advanced within the narrow conceptual rubric offered by the *Trail Smelter Case*. These submissions were well ahead of their time and hence the main contribution of the litigation was in pinpointing several deficiencies in international environmental law, notwithstanding the milestones that had already been reached at the Stockholm Conference. By the time New Zealand unsuccessfully sought to re-open the litigation in 1995,<sup>21</sup> in response to a new round of nuclear tests, it was evident that many of these gaps in the legal framework had been filled, but several issues still required further clarification, including the extent to which there existed environmental obligations of an *erga omnes* character, the breach of which any state may invoke in international judicial proceedings.

The second field where judicial decisions have been prominent in international environmental law has been in the context of shared freshwater systems.<sup>22</sup> For almost all of its history international water law has had a very strong resource focus. Its traditional concern has been to promote the rational and equitable utilisation of international rivers and other freshwater basins, and only indirectly to address the ecological problems that are implicated in any fragmentation of hydrographic systems occasioned by dams and other projects. However, since the *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*,<sup>23</sup> successive decisions have helped to provide this area of law with a conceptual structure in which environmental considerations have progressively been given a more prominent place. The absolute notion that upstream states have complete autonomy in exploiting river systems was rejected in the *Lake Lanoux Case* in favour of an approach that affirmed the limited sovereignty of upstream users. The latter are thereby required to have due regard to downstream states, and to enter into meaningful consultation to ascertain and respond to their interests. A further important step was taken in the *Gabčíkovo-Nagymaros Case* where the concept of limited sovereignty was displaced by the community of interest theory enunciated in the *River Oder Case*, yet this time being applied in a non-navigational context. The idea of a perfect equality of users, forming a community of

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<sup>21</sup> *1995 Nuclear Tests Case* [1995] ICJ Rep 288.

<sup>22</sup> See Chapter 6.

<sup>23</sup> *Case Relating to the 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 ('*River Oder Case*').

states equally interested in the sustainable utilisation of freshwater resources, is a major advance on earlier legal conceptions of international river management. However, it remains to be seen how far the concept can be taken, and whether it can ever be used as a basis for asserting that all stretches of an international river or other freshwater basin constitute a 'commons space' or 'common heritage', the ecological integrity of which is a shared concern of all riparian states.<sup>24</sup>

The third main body of international environmental case law concerns the protection of the marine environment and the sustainable exploitation of marine wildlife.<sup>25</sup> The vast majority of marine environmental cases have concerned marine living resources.<sup>26</sup> Commencing with the *Bering Sea Fur Seals Case*, adjudicators have sought to grapple with fundamental issues of resource management and ecosystem protection in the complex marine environment where the ecological artificiality of political boundaries is readily apparent. One of the notable features of this area of law was its early malleability, and the accompanying potential for judicial decisions to have a major influence upon its development. Arguably it was open to the Tribunal in the *Bering Sea Fur Seals Case* to accept the submissions of the United States regarding asserted patrimonial rights to conserve a threatened species of marine wildlife. The connections with the Alaskan fur seals, which were begotten, born, and reared on United States territory, were equally as strong as Iceland's historic interest in adjacent cod and other high seas fisheries. Yet while the United States' arguments were summarily rejected in favour of the *mare liberum* doctrine, in the *Icelandic Fisheries Case* the ICJ developed the 'preferential fishing rights' doctrine which accorded priority to Iceland in the management and exploitation of high seas fisheries on the Icelandic continental shelf. Admittedly the ICJ did not incorporate environmental considerations within the preferential rights concept, but the case nonetheless demonstrated the potential for the law to be transformed by judicial exegesis in order to reflect conservationist and preservationist objectives.

With the conclusion of the *1982 United Nations Convention on the Law of the Sea* ('*LOS Convention*') these and other contentious questions regarding coastal resource management were largely addressed by arrogating to coastal states extensive rights to

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<sup>24</sup> See Stephen McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001) 172-173 (arguing that the community of interest theory could possibly be developed further in line with the notion of 'common heritage' of humankind).

<sup>25</sup> See Chapter 7.

<sup>26</sup> Only a few cases have raised issues such as marine pollution, or other human alteration of the marine environment, and none of these has yet led to a decision on the merits. See the *MOX Plant Order* (2002) 41 ILM 405 and *MOX Plant Award* <<http://www.pca-cpa.org>> at 1 July 2005 and the *Straits of Johor Case* <<http://www.itlos.org>> at 1 July 2005.

manage the marine wildlife found in their Exclusive Economic Zones ('EEZ').<sup>27</sup> An important effect of this innovation has been to move the area of contestation over marine living resources seawards, to the margins of the EEZ and to the high seas. Hence in the *Estai Case* the disputants were concerned to resolve ongoing uncertainties as to the capacity of coastal states to manage straddling and highly migratory fisheries consistent with the *LOS Convention*. This dispute between Canada and Spain over the arrest of a Spanish-flagged fishing vessel was never decided on its merits, but it was an important catalyst for agreement on the *Straddling Stocks Agreement*<sup>28</sup> which is designed to bring greater clarity to the law of the sea as regards the exploitation and conservation of fisheries that move between high seas and EEZ areas. Finally, in the *SBT Order*, which also involved a highly migratory fishery, the dispute was argued by the applicants as one involving the duty of Japan to respect the provisions of the *LOS Convention* relating to marine resource conservation on the high seas. This led to the prescription of important provisional measures by ITLOS, in which the Tribunal recognised that 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.'<sup>29</sup>

### B *New Fields for Judicial Development*

Cases concerning transboundary environmental damage, the sustainable use of freshwater resources, and the protection of riverine ecosystems, are limited in number and in scope largely because states have increasingly addressed such environmental disputes through means other than international litigation. Through regulatory regimes and international institutions including joint river commissions, it has been possible to develop a range of necessary environmental standards and to resolve disputes concerning their implementation. There is accordingly little reason to expect that the jurisprudence on these issues will expand to any substantial extent in the 21st century, and the existing case law will become progressively less germane as it is further separated in time from contemporary practice.

By contrast there is considerable judicial activity in the field of marine environmental protection, now thanks largely to the operation of the dispute settlement system of the *LOS Convention*. The important environmental protection provisions of the *LOS Convention* were negotiated several decades ago and will doubtless require ongoing interpretation and clarification if they are to remain relevant to contemporary

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<sup>27</sup> See *LOS Convention*, art 56.

<sup>28</sup> *1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*.

<sup>29</sup> *SBT Order* (1999) 117 ILR 148, (1999) 38 ILM 1624, [70].

conditions. The residual compulsory jurisdiction of ITLOS to issue provisional measures orders,<sup>30</sup> together with its competence in prompt release cases,<sup>31</sup> has assured this recently established tribunal an important function in this regard. As it develops a body of practice and precedent it may also attract greater interest from states as their judicial body of choice for dealing with all law of the sea disputes.<sup>32</sup> The role of ad hoc arbitral tribunals operating under the auspices of the *LOS Convention* seems less certain, as there have been several ‘false starts’ in environmental cases brought before such bodies.<sup>33</sup> Notwithstanding these teething problems a sizeable body of jurisprudence may well emerge given that arbitration remains the default procedure for the resolution of most disputes under the *LOS Convention*.

In what other contexts is judicial involvement in the development of international environmental law likely? Many environmental agreements permit states to consent in advance to the adjudication of their disputes, however few states have in fact taken up these opportunities. Unless states agree on a case-by-case basis to submit their disputes to such procedures, it is likely that compulsory procedures in environmental regimes will provide the greatest opportunity for litigation. Most of these are concerned, however, with marine environmental issues,<sup>34</sup> and only one has been used to date, namely the arbitral procedure established by the *1992 Convention for the Protection of the Marine Environment of the North-East Atlantic*.<sup>35</sup> There are only a few examples of such procedures beyond the maritime context, the most notable being the *1991 Protocol on Environmental Protection to the Antarctic Treaty*.<sup>36</sup> However, in all probability this procedure will remain unused while states seek to deal with questions of regime compliance and the settlement of disputes through the alternative mechanisms operating under the Protocol.

There are other important fields for judicial involvement in the development of international environmental law. One of the most promising is in the context of trade

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<sup>30</sup> *LOS Convention*, art 290.

<sup>31</sup> *Ibid* art 292.

<sup>32</sup> At present only 21 states (from a total of 148 states parties to the *LOS Convention*) have nominated ITLOS, under art 287, as their first preference for resolving disputes arising from the Convention. See Chapter 2, Table 2.2.

<sup>33</sup> See the *MOX Plant Award* <<http://www.pca-cpa.org>> at 1 July 2005 and the *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility)* 39 ILM 1359 (2000).

<sup>34</sup> See for instance the *Straddling Stocks Agreement*, the *2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* and the *2001 Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean*, all of which incorporate by reference the dispute settlement system of the *LOS Convention*. See also the *1973 International Convention for the Prevention of Pollution from Ships* (as amended and given effect by the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*) art 10.

<sup>35</sup> *OSPAR Arbitration* <<http://www.pca-cpa.org>> at 1 July 2005.

<sup>36</sup> *1991 Protocol on Environmental Protection to the Antarctic Treaty*, arts 18-20.



regimes. As the volume of international trade increases the international community has sought to establish bilateral, regional and global legal frameworks to facilitate the free movement of goods and services, and to promote foreign investment. The globalisation of trade has many environmental impacts, yet international trade law generally limits the extent to which states may implement environmental policies that affect trade flows. The dispute settlement systems forming part of trade regimes at regional and global levels have been used ever more frequently to deal with controversies arising from this intersection between the agendas of trade liberalisation and environmental protection. Important regional examples in this respect include the *1992 North American Free Trade Agreement*, and the much more established regime for European economic integration. Globally, the WTO dispute settlement system will continue to be a site for vigorous contests concerning the interaction between WTO trade rules and environmental norms and principles.

Another encouraging avenue for judicial contribution to international environmental law is the operation of human rights tribunals and complaints procedures. Much controversy continues to surround the notion of substantive environmental rights, and no such rights are currently recognised in the leading human rights texts. However, essentially environmental claims will continue to be raised within human rights bodies for the simple reason that they provide a means of redress to individuals otherwise excluded from international processes of review. As this practice develops it would seem inevitable that there will be some cross-pollination in jurisprudence, with human rights courts, commissions and complaints procedures calling upon environmental rules and principles when interpreting and giving effect to several human rights, including the right to life.

In the coming decades international environmental litigation therefore appears likely to be played out more routinely in a variegated system in which courts and tribunals with a non-environmental focus are particularly prominent. This necessitates some consideration being given to the practical and normative impacts of this development. The practical challenges are real and immediate ones, as illustrated in the *Southern Bluefin Tuna Dispute* and the *MOX Plant Dispute* in which important environmental cases were effectively stymied because of problematic interactions between the *LOS Convention* dispute settlement system and other regimes.<sup>37</sup> The consequences for the normative structure of international environmental law are more subtle, and likely only to be evident in the longer term.<sup>38</sup> On the one hand there appears to be a valuable opportunity for environmental concerns to be integrated or ‘mainstreamed’ within the

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<sup>37</sup> See Chapter 9.

<sup>38</sup> See Chapter 10.

decisions of specialised tribunals, and therefore within those specific areas of law. Yet at the same time there is the potential for these bodies to develop problematic approaches to rules and principles of international environmental law that might challenge conventional understandings as to their content. For instance, the WTO Appellate Body could conceivably pronounce upon the meaning of the principles of precaution or sustainable development in a way that may be seen to strip them of their environmental content. However, it has been contended in this work that the available evidence does not suggest that any such process has to date occurred.

### *C Assessing the Judicial Contribution*

The review of international environmental jurisprudence undertaken in this study suggests that international courts and tribunals have made a somewhat variable contribution to the development of international environmental law. While in some areas the ‘greening’ of international law may partly be attributed to the influence of judicial decisions, in others the case law may actually have impeded the recognition of environmental objectives. Sands has observed that there are three key questions that should be asked when assessing the extent to which environmental considerations have been appropriately integrated in judicial decisions.<sup>39</sup> The first of these is whether courts have recognised the importance of environmental objectives among other goals being pursued in the international legal system. Second, it may be asked whether they have been willing to give precedence to environmental over non-environmental (principally developmental) values. A third question is whether judicial bodies have evinced an awareness and appreciation of the unique policy and science considerations involved in environmental disputes.

There have undoubtedly been some promising signals in the case law in respect of all three of these issues. This study has traced the discernible shift from complete judicial ignorance of, and indifference to, environmental issues, to an increased awareness of problems of resource management and ecosystem protection, and greater fluency in the understanding and use of concepts of environmental science, policy and law. It should also be emphasised that a fair assessment of environmental cases to date must pay

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<sup>39</sup> Philippe Sands, ‘The International Court of Justice and the European Court of Justice’ in Jacob Werksman (ed), *Greening International Institutions* (1996) 219; Philippe Sands, ‘International Environmental Litigation and Its Future’ (1999) 32 *University of Richmond Law Review* 1619, 1625. Sands considered these issues in relation to the ICJ and the ECJ, however they appear equally applicable to other international courts and tribunals. Sands concluded that while the ICJ has refrained from engaging fully with issues of environmental law and policy in its decisions, the ECJ has been at the forefront of European governance on environmental matters. See also Malgosia Fitzmaurice, ‘Equipping the ICJ to Deal with Environmental Law’ in Connie Peck and Roy S Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1997) 398, 402 (noting that the ICJ ‘cannot, so far, be said to have grasped the nettle’ in terms of contributing to the development of international environmental law).

appropriate regard to the context in which they were decided, including the degree to which environmental rules and principles were fully formed and expressed at the time of the litigation, whether and to what extent environmental issues were raised by the parties, and also several wider issues including the general level of environmental awareness within the international community.<sup>40</sup> Yet notwithstanding the progress that has been made, and after appropriate allowance is made for contextual considerations, it is difficult to escape the conclusion that the judicial treatment of environmental disputes has often been unsatisfactory. The notion that a decision represents a ‘missed opportunity’ is a cliché repeated in countless case notes, but it bears repeating that the paths presented for developing a jurisprudence that addresses issues of ecological sustainability have often not been taken, or have been avoided.

What accounts for these missed opportunities, and the limited conceptual and ethical framework often adopted by courts in considering environmental issues? The main answer appears to be that courts and tribunals have generally sought to do no more than is necessary to resolve those disputes placed before them. Whether this is considered an appropriate approach evokes age-old jurisprudential debates concerning the proper function of the judiciary in the process of legal development.<sup>41</sup> From one perspective it might be suggested that courts ought to take a programmatic, or ‘activist’ stance, to address problems and issues that have not been adequately dealt with through legislative developments. At the opposite end of the spectrum a ‘formalist’ approach may be preferred, on the basis that courts should do no more than is required to bring disputes to a close, and to this end must apply the law strictly as it is found, even if it is possible to adopt an interpretation or application of the law that more effectively advances environmental objectives.

There are many reasons why charting a course between these two approaches is challenging for courts in the resolution of international environmental disputes. One of these stems from the way in which some dispute settlement bodies relate to environmental agreements. Judicial and other procedures for the dispute settlement are sometimes established without appropriate attention being given to the resolution of underlying normative issues. Indeed fundamental disagreements relating to appropriate levels of conservation of natural resources and other environmental issues may be deliberately deferred when concluding environmental agreements in the hope that they may be resolved by subsequent state practice, including through the use of dispute

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<sup>40</sup> Without an appreciation of these and other background considerations it is tempting to be overly critical of much of the case law, particularly earlier decisions. Conversely, without understanding the precise economic, social and other considerations in which a case was decided it is possible to rely excessively or inappropriately upon decisions that now have limited usefulness in contemporary law and practice.

<sup>41</sup> Sands, ‘International Environmental Litigation and Its Future’, above n 39, 1637.

settlement procedures. However, in the absence of an unambiguous normative framework, courts or other bodies seised of disputes under these agreements tend to encourage the parties to resolve their dispute as between themselves, rather than seeking to elucidate and develop legal rules that may be applied to the dispute in order to reach a definitive conclusion.

An additional reason for judicial reticence is that international courts are creatures of consent, operating in a demanding political setting. Should they seek to adopt too innovative or creative an approach there is every possibility that their standing may be diminished, with attendant implications for the authority of their decisions, and the health of their dockets. Brownlie has argued along these lines that to prevent states from becoming wary of accepting jurisdiction in relation to environmental and other matters, international courts must not be ‘seduced by academic fashion’<sup>42</sup> to develop the law, and must instead remain focussed upon the actual practice of states. The pressure upon courts to be alive to the political context in which they operate is pronounced in most arbitral settings. However, it is also a factor in the operation of judicial bodies such as the ICJ which assume jurisdiction only occasionally, and then normally on the basis of special agreement.

Those judicial bodies best able to forge a distinctive approach to environmental issues are those institutions at the greatest distance from pressures of this character. Arguably this is one of the main reasons why the ECJ has been able to develop an innovative approach to environmental questions, while the ICJ has been far more circumspect. ITLOS has also taken a somewhat cautious approach to environmental questions since it began operating in 1996. This may be viewed partly as a response by the Tribunal to the strident criticism that its creation attracted.<sup>43</sup> However, the practice in ITLOS also indicates how important gains can be made incrementally over the course of a series of decisions. Just such a process is evident in successive cases brought in ITLOS to secure the prompt release of vessels arrested in the Southern Ocean while apparently engaged in Illegal, Unregulated and Unreported (‘IUU’) fishing for Patagonian toothfish.<sup>44</sup> While in its earlier decisions the Tribunal did not expressly recognise the seriousness of this environmental problem, in the recent *Volga Case* it stated that it understood ‘the international concerns about [IUU] fishing’ and

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<sup>42</sup> Ian Brownlie, ‘Some Questions Concerning the Applicable Law in International Tribunals’ in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 761, 764.

<sup>43</sup> See especially Shigeru Oda, ‘Dispute Settlement Prospects in the Law of the Sea’ (1995) 44 *International and Comparative Law Quarterly* 863, 866-867.

<sup>44</sup> See the *Camouco Case* (2000) 125 ILR 151; *Monte Confurco Case* (2000) 125 ILR 203; *Grand Prince Case (Belize v France) (Prompt Release)* (2001) 125 ILR 251; *Volga Case* (2003) 42 ILM 159.

‘appreciates’ the measures taken by states to address the problem.<sup>45</sup> This was no doubt important in leading the Tribunal to set the very substantial bond that it did for the release of the *Volga*.

### III INTERNATIONAL COURTS AND INTERNATIONAL ENVIRONMENTAL GOVERNANCE

#### A *The General Adjudicative Machinery of Public International Law*

In addition to considering the relevance of judicial decisions to the development of international environmental law, this study has also explored the functional importance of international courts and tribunals for settling environmental disputes and promoting compliance with international environmental law. It has been seen that much commentary upon the practice of environmental dispute settlement has focussed upon the problems encountered when using the basic architecture of international law for dealing with environmental controversies. It now seems self-evident that the general institutions of public international law are not adequately responsive to the particular demands of international environmental governance. There are relatively few customary norms of international law with strong environmental content. There are also doubts as to the extent to which the responsibility of states may be invoked effectively in response to breaches of these norms, or in respect of other internationally wrongful acts resulting in environmental damage. This is not least because of the requirement to establish a requisite legal interest or injury, a hurdle which may be insurmountable in a number of cases, including those relating to damage to the global commons. Moreover, these basic primary and secondary rules are not supported by dedicated environmental institutions of a universal character that can supervise their implementation. The *UN Charter* makes no reference to environmental matters, and establishes no specialised environmental organ. Additionally the ICJ, the principal judicial organ of the United Nations, has been granted compulsory jurisdiction by only 64 states, six of which have included reservations in relation to environmental matters.<sup>46</sup>

It can also be argued that when such general mechanisms are relied upon they may produce unsatisfactory results. Notwithstanding the remarkable proliferation in multilateral environmental agreements, states have shown little propensity for utilising the ICJ to bring other governments to account for environmentally-damaging activities, and in no environmental case where the Court’s contentious jurisdiction has been invoked unilaterally has the Court produced a satisfactory decision, or an acceptable

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<sup>45</sup> *Volga Case* (2003) 42 ILM 159, [68].

<sup>46</sup> See Chapter 2. This is despite repeated calls for greater acceptance of the Court’s compulsory jurisdiction in order to promote the rule of law at the international level. See, eg, *2005 World Summit Outcome*, [134(f)], UN Doc A/60/L.1 (2005).

solution to an environmental dispute.<sup>47</sup> Paradigmatic examples of the problems that may be encountered in this respect are found in the *Icelandic Fisheries Case* and the *Nuclear Tests Cases* in which the respondents refused to accept the jurisdiction of the court, and did not participate in the proceedings.

Pointing to these disappointing results in the ICJ, Romano has argued that ad hoc arbitration, another 'classical' adjudicative institution of international law, has been far more effective as a tool of environmental dispute settlement.<sup>48</sup> However, effectiveness in this context is in the eye of the beholder as it depends on the purpose that dispute settlement mechanisms are thought to serve. There can be no doubt that ad hoc arbitral panels have helped to resolve a number of fractious environmental controversies. The *Bering Sea Fur Seals Case*, *Trail Smelter Case* and *Lake Lanoux Case* all brought about the conclusion to difficult and long-standing environmental disputes. In each of these cases the arbitral tribunals were able to reach a determination acceptable to the parties precisely because the disputants had delegated ample authority to these bodies to address most, if not all, of the highly contentious political issues implicated in each dispute. Therefore, when measured solely against the objective of peaceful dispute settlement these environmental arbitrations appear highly successful. This is no small achievement and the importance of furthering this goal is likely to become even more pronounced as resource scarcity, and other threats to global environmental security, generate increased political tensions. Indeed in recognition of such challenges Principle 26 of the *United Nations Declaration on Environment and Development* called upon all states 'to resolve all their environmental disputes peacefully, by appropriate means and in accordance with the Charter of the United Nations.'<sup>49</sup> However, as has been emphasised throughout this work, when considering the effectiveness of any process for resolving environmental disputes it is also important to look at other considerations of a community character, beyond the legitimate interest in ensuring that environmental disputes are resolved in a peaceful manner in accordance with the *UN Charter*. These include the extent to which the adjudicative or other procedure can uphold the relevant rules of international environmental law, and can promote tangible outcomes such as sustainable resource management and ecosystem protection.

There have been substantial efforts to address some of the deficiencies manifest in general international law as it applies to environmental issues. In the *Articles on*

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<sup>47</sup> Arguably the most important decision of the ICJ on environmental matters was the *Gabčíkovo-Nagymaros Case* [1997] ICJ Rep 7 and this dispute was submitted by special agreement.

<sup>48</sup> Cesare P R Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000) 324-331.

<sup>49</sup> Un Doc A/CONF.151/5/Rev.1 (1992).

*Responsibility of States for Internationally Wrongful Acts*<sup>50</sup> the ILC fulfilled its mandate to contribute to the progressive development of international law by providing for the possibility of an *actio popularis* in relation to environmental obligations of an *erga omnes* character<sup>51</sup>. The ICJ has also established a permanent Chamber for Environmental Matters,<sup>52</sup> while the PCA has adopted impressive rules for arbitration and conciliation of environmental disputes.<sup>53</sup> However, none of this machinery has been used, a fate that is likely also to confront any general international court for the environment, should such an institution be established.<sup>54</sup> Notwithstanding the good intentions behind such a body, in the form that it is most commonly proposed it would be no more than a general institution established in the hope that states may in time come to support it. That appears a remote prospect, and states are likely to stay away from its doors, for the same reasons they have generally avoided turning to the ICJ.

### B *The Distinctive Approach of International Environmental Law to Challenges of Governance*

It is not to institutions of a general character that international environmental law is increasingly looking to perform the indispensable governance tasks of dispute settlement and enforcement. Rather these objectives have been more profitably pursued through dedicated environmental regimes, together with ‘supervisory’<sup>55</sup> institutions specifically designed to uphold their provisions. Such treaty-based bodies build upon procedural obligations that have been used in international agreements for many years. Inspection procedures, reporting obligations and other measures designed to identify situations of non-compliance or breach, are thereby united with treaty bureaucracies including scientific committees, environment committees, and regular meetings of the parties in plenary.

One of the most important institutional innovations in this respect was the emergence of non-compliance procedures (‘NCPs’), the first of which was established in 1992 under the *1987 Montreal Protocol on Substances that Deplete the Ozone Layer*. This

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<sup>50</sup> *Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, 53rd Session, 43-59, UN Doc A/56/10 (2001) (noted in GA Res 56/83, UN Doc A/RES/56/83 (2001)).*

<sup>51</sup> *Ibid* art 48.

<sup>52</sup> International Court of Justice, *Communiqué 93/20 on the Establishment of a Permanent Chamber for Environmental Matters* (19 July 1993).

<sup>53</sup> *Optional Rules for the Arbitration of Disputes Relating to Natural Resources and/or the Environment* (2001) <<http://www.pca-cpa.org/ENGLISH/EDR/ENRules.htm>> at 1 July 2005; *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment* (2002) <<http://www.pca-cpa.org/PDF/envconciliation/pdf>> at 1 July 2005.

<sup>54</sup> See the discussion in Chapter 2.

<sup>55</sup> See Alan E Boyle, ‘Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions’ (1991) 3 *Journal of Environmental Law* 229.

was followed by the establishment of three further NCPs for global environmental regimes,<sup>56</sup> and four such procedures for regional environmental agreements.<sup>57</sup> NCPs share similar characteristics with some judicial or quasi-judicial procedures, however they also differ in several important respects. Both allow states to raise complaints concerning another state's performance of its environmental obligations, and thereby may raise the political profile of a particular environmental problem. This may in turn lead to greater compliance with the relevant regime. However, whereas adjudication is an essentially confrontational and adversarial process, ultimately concerned to ascertain whether there have been breaches of legal obligations, NCPs are a softer form of dispute settlement more focussed upon promoting the achievement of the overall objectives of the regime, and to this end can involve the provision of practical assistance to defaulting states to ensure that they meet their regime commitments.

In most major and regional environmental regimes the preference is clearly for these new forms of compliance control. Many global regimes for dealing with the most serious and pressing problems of international environmental management, such as stratospheric ozone depletion<sup>58</sup> and global warming,<sup>59</sup> have shunned adjudication in preference for NCPs and other techniques of compliance management. The effect of this has been to isolate large fields of international environmental law from any routine use of judicial procedures for resolving disputes concerning their implementation. Comprehensive amendment of these regimes to provide participants with an additional, adjudicative, framework for eliciting compliance is highly unlikely. Nor indeed is the general trend in favour of non-adjudicative mechanisms of compliance control likely to

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<sup>56</sup> Decision V/16 of the Fifth Meeting of the Conference of the Parties to the Basel Convention, *Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention*, UN Doc UNEP/CH.5/29 (1999); Decision 24/CP.7 of the Conference of the Parties on its Seventh Session, *Report of the Conference of the Parties on its Seventh Session*, UN Doc FCCC/CP/2001/13/Add.3 (2002); Decision BS-1/7 of the First Meeting of the Parties of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *Report of the First Meeting of the Conference of the Parties of the Convention Serving as the Meeting of the Parties to the Protocol*, UN Doc UNEP/CBD/BS/COP-MOP/1/15 (2004).

<sup>57</sup> Decision 1997/2 of the Fifteenth Session of the Executive Body for the Convention on Long-Range Transboundary Air Pollution, *Report of the Fifteenth Session of the Executive Body for the Convention on Long-Range Transboundary Air Pollution*, UN Doc ECE/EB.AIR/53 (1998); Decision II/4 of the Second Meeting of the Parties of the Convention on Environmental Impact Assessment in a Transboundary Context, *Report of the Second Meeting of the Parties*, UN Doc ECE/MP/EIA/4 (2001); Decision 1/7 of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN Doc ECE/MP.PP/2/Add.8 (2002) ('*Åarhus Convention NCP*'); Decision VII/4 of the Seventh Meeting of the Parties of the Convention on the Protection of the Alps (2002), available at <<http://www.convenzionedellealpi.org>> (in Italian only).

<sup>58</sup> See the 1985 *Vienna Convention on the Protection of the Ozone Layer* and the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*.

<sup>59</sup> See the 1992 *United Nations Framework Convention on Climate Change* and the 1997 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.



be reversed as new multilateral environmental agreements are concluded. Quite to the contrary, NCPs are currently under consideration in respect of several environmental regimes including the *1994 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*,<sup>60</sup> and the *1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*.<sup>61</sup>

At the same time it must also be emphasised that state preference for these alternative mechanisms is not universal and does not in itself disprove the utility of adjudication. Courts and tribunals can perform important enforcement and dispute settlement functions within environmental regimes, as is evident in the operation of the *LOS Convention's* dispute settlement system. Unlike NCPs, judicial bodies are also more authoritative sites for independent decision-making, and therefore are potentially more useful for assisting in the principled development of the law. However, their utility ultimately depends upon a complex of factors relating among other things to the environmental problem addressed by the environmental regime in question, and the extent to which the court or tribunal is incorporated into the regime as part of its operational structure.

Beyond the *LOS Convention*, few institutions meet such criteria. However, there is some developing practice which may suggest a resurgence in interest for judicial or quasi-judicial procedures operating in environmental regimes. The citizen submissions procedure of the *1993 North American Agreement on Environmental Cooperation* ('*NAAEC*') was cited as an imaginative and exciting example in this respect, which draws upon the successful use of supranational adjudication in other contexts and transposes it to an environmental regime. One of the major innovations of the *NAAEC* is that the regime melds both supervisory and adjudicatory functions. Among other things this suggests a possible reconciliation between the more confrontational approach to compliance issues preferred in some regimes such as the *LOS Convention* and the cooperative and supervisory strategy adopted in most other major environmental agreements. Another important feature of the *NAAEC* citizen submission procedure is its openness to private actor participation. Such demands for greater civil society involvement in international environmental litigation are also being made of existing judicial bodies. Notwithstanding the dramatic opening of many areas of international environmental diplomacy to public participation, many international courts and tribunals remain bastions of statism, in which individuals and other non-state actors have limited opportunities to have their voices heard. Yet this situation is also under

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<sup>60</sup> For background material prepared by the Secretariat see UN Doc ICCD/COP(6)/7 (2003).

<sup>61</sup> For a recent draft see UN Doc UNEP/FAO/PIC/INC.10/20 (2003).

challenge, and the way in which existing bodies respond to persistent demands for greater public accountability and transparency promises to be one of the most important areas for future developments in the way in which international courts and tribunals address international environmental disputes.

#### IV CONCLUSION

Quick to defend the discipline against the charge that it is not in fact 'law', international lawyers have been transfixed by questions of enforcement and compliance and have increasingly drawn upon international relations scholarship to explain the ways in which international legal regimes may be made more effective. This work has entered into these debates in the specific context of environmental regimes, and by looking at the actual and potential function of international courts and tribunals it has sought to explain the circumstances in which international environmental litigation may make a positive contribution to the successful implementation of international environmental law. Perhaps the most important lesson from this analysis is that there can be no general and universal approach to regulating environmental challenges. Individual environmental regimes must be tailored in response to the particular nature of the environmental problem that is being regulated. And as norms and processes must vary according to the topic being addressed, so must those institutional structures that are designed to promote compliance. For these reasons international adjudication cannot be advocated as an institutional panacea, however nor can its potential contribution in the effective functioning of international environmental law be dismissed.

## Bibliography

### ARTICLES/BOOKS/REPORTS

- Abbott, Kenneth W et al, 'The Concept of Legalization' (2000) 54 *International Organization* 401.
- Adede, Andronico O, 'Management of Environmental Disputes: Avoidance Versus Settlement' in Laing, Winfried (ed), *Sustainable Development and International Law* (1995) 115.
- Akehurst, Michael, 'International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law' (1985) 16 *Netherlands Yearbook of International Law* 3.
- Alexandrov, Stanimir A, 'Accepting the Compulsory Jurisdiction of the International Court of Justice with Reservations: An Overview of Practice with a Focus on Recent Trends and Cases' (2001) 14 *Leiden Journal of International Law* 89.
- Allott, Philip, 'The International Court and the Voice of Justice' in Lowe, Vaughan and Fitzmaurice, Malgosia (eds), *Fifty Years of the International Court of Justice* (1996) 17.
- Allott Philip, *The Health of Nations: Society and Law Beyond the State* (2002).
- Almqvist, Jessica Maria, 'The Accessibility of European Integration Courts from an NGO Perspective' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 271.
- Al-Qahtani, Mutlaq, 'The Role of the International Court of Justice in the Enforcement of its Judicial Decisions' (2002) 15 *Leiden Journal of International Law* 781.
- Alvarez, José E, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 *Texas International Law Journal* 405.
- Alvarez, José E, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *European Journal of International Law* 183.
- A-Khavari, Afshin and Rothwell, Donald R, 'The ICJ and the Danube Dam Case: A Missed Opportunity for International Environmental Law?' (1998) 22 *Melbourne University Law Review* 507.
- Alter, Karen, 'Do International Courts Enhance Compliance with International Law?' (2003) 25 *Review of Asian and Pacific Studies* 51.
- Anderson, Michael R, 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle, Alan E and Anderson, Michael R (eds), *Human Rights Approaches to Environmental Protection* (1996) 8.
- Anderson, Steinar, 'The Convention for the Conservation of Antarctic Marine Living Resources: Improving Procedures but Lacking Results' in Miles, Edward L et al (eds), *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2002) 405.
- Anton, Donald K et al, 'Memorandum on the Legality of the Planned Resumption of Nuclear Testing by France' (1995) 12 *Environmental Planning and Law Journal* 300.

## Bibliography

- Baldrock, Julia, 'Determining the Fate of Southern Bluefin Tuna – International Tribunal for the Law of the Sea (1999) New Zealand v Japan; Australia v Japan' (2000) 17 *Environmental and Planning Law Journal* 157.
- Barboza, J, 'The ILC and Environmental Damage' in Wetterstein, Peter (ed), *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (1997) 76.
- Barnhoorn, L A N M and Wellens, Karel C (eds), *Diversity in Secondary Rules and the Unity of International Law* (1995).
- Barker, Michael, 'Standing to Sue in Public Interest Environmental Litigation: From ACF v Commonwealth to Tasmanian Conservation Trust v Minister for Resources' (1996) 13 *Environmental Planning Law Journal* 186.
- Bates, Gerry, *Environmental Law in Australia* (5th ed, 2002).
- Bederman, David J, *International Law in Antiquity* (2001).
- Bederman, David J, *The Spirit of International Law* (2002).
- Bekker, Peter H F, 'Gabcikovo-Nagymaros Project' (1998) 92 *American Journal of International Law* 273.
- Bell, Andrew S, 'The Why and Wherefore of Transnational Forum Shopping' (1995) 69 *Australian Law Journal* 124.
- Berber, F J, *Rivers in International Law* (1959).
- Bergin, A and Haward, M, 'Southern Bluefin Tuna Fishery: Recent Developments in International Management' (1994) 18 *Marine Policy* 263.
- Beyer, Peter et al, 'The Draft Constitution for Europe and the Environment' (2004) 13 *European Environmental Law Review* 218.
- Bialek, Dean 'Sink or Swim: Measures Under International Law for the Conservation of the Patagonian Toothfish in the Southern Ocean' (2003) 34 *Ocean Development and International Law* 105.
- Bianchi, Andrea 'The Impact of International Trade Law on Environmental Law and Process' in Francioni, Francesco (ed), *Environment, Human Rights and International Trade* (2001) 105.
- Bilder, Richard B, 'Some Limitations of Adjudication as an International Dispute Settlement Technique' (1982) 23 *Virginia Journal of International Law* 1.
- Bilder, Richard B, 'The Settlement of Disputes in the Field of the International Law of the Environment' (1975) 144 *Recueil des Cours* 139.
- Bilder, Richard B, 'The Anglo-Icelandic Fisheries Dispute' (1973) 37 *Wisconsin Law Review* 37.
- Birnie, Patricia W, 'The Role of International Law in Solving Certain Environmental Conflicts' in Carroll, John E (ed), *International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems* (1988) 95.
- Birnie, Patricia W, 'International Environmental Law: Its Adequacy for Present and Future Needs' in Hurrell, Andrew and Kingsbury, Benedict (eds), *The International Politics of the Environment: Actors, Interests, and Institutions* (1991) 51.

## Bibliography

- Birnie, Patricia W and Boyle, Alan E, *International Law and the Environment* (2nd ed, 2002).
- Blay, Sam, 'The WTO and the Greening of World Trade: A Look at WTO Jurisprudence' (2004) 21 *Environmental Planning Law Journal* 27.
- Blay, Sam, 'New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol' (1992) 86 *American Journal of International Law* 377.
- Bodansky, Daniel, 'Customary (and Not so Customary) International Environmental Law' (1995) 3 *Indiana Journal of Global Legal Studies* 105.
- Bodansky, Daniel and Brunnée, Jutta, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7 *Review of European Community and International Environmental Law* 11.
- Bodansky, Daniel, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596.
- Bodansky, Daniel, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11 *European Journal of International Law* 339.
- Bodin, Jean, *On Sovereignty* (1583, reprinted 1992).
- Boer, Ben, Ramsay, Ross and Rothwell, Donald R, *International Environmental Law in the Asia Pacific* (1998).
- Boer, Ben, 'The Globalisation of Environmental Law: The Role of the United Nations' (1995) 20 *Melbourne Journal of International Law* 101.
- Boos-Hersberger, Astrid, 'Transboundary Water Pollution and State Responsibility: The Sandoz Spill' (1997) 4 *Annual Survey of International and Comparative Law* 103.
- Bosselmann, Klaus, 'Environmental Governance: A New Approach to Territorial Sovereignty' in Goldstein, Robert J (ed), *Environmental Ethics and Law* (2004) 293.
- Botchway, Francis N, 'The International Adjudicatory Process and Trans-Boundary Resource Disputes' [2001] *Australian International Law Journal* 143.
- Boyle, Alan E, 'Nuclear Energy and International Law: An Environmental Perspective' (1989) 60 *British Yearbook of International Law* 257.
- Boyle, Alan E, 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39 *International and Comparative Law Quarterly* 1.
- Boyle, Alan E, 'International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles' in Churchill, Robin R and Freestone, David (eds), *International Law and Global Climate Change* (1991) 7.
- Boyle, Alan E, 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal of Environmental Law* 229.
- Boyle, Alan E, 'The Principle of Co-Operation: The Environment' in Lowe, Vaughan and Warbrick, Colin (eds), *The United Nations and the Principles of International Law: Essays in Honour of Michael Akehurst* (1994) 120.

## Bibliography

- Boyle, Alan E, 'The Role of International Human Rights Law in the Protection of the Environment' in Boyle, Alan E and Anderson, Michael R (eds), *Human Rights Approaches to Environmental Protection* (1996) 43.
- Boyle, Alan E, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 *International and Comparative Law Quarterly* 37.
- Boyle, Alan E, 'The *Gabcikovo-Nagymaros* Case: New Law in Old Bottles' (1997) 8 *Yearbook of International Environmental Law* 13.
- Boyle, Alan E, 'Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches' in Wetterstein, Peter (ed), *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (1997) 83.
- Boyle, Alan E, 'Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited' in Boyle, Alan E and Freestone, David (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 61.
- Boyle, Alan E, 'Reparation for Environmental Damage in International Law: Some Preliminary Problems' in Bowman, Michael R and Boyle, Alan E (eds), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (2002) 17.
- Boyle, Alan E, 'The World Trade Organization and the Marine Environment' in Nordquist, Myron H, Moore, Norton, John and Mahmoudi, Said (eds), *The Stockholm Declaration and the Law of the Marine Environment* (2003) 109.
- Briese, Robyn, 'Precaution and Cooperation in the World Trade Organization: An Environmental Perspective' (2002) 22 *Australian Yearbook of International Law* 113.
- Brown, Chester, "'Reasonableness' in the Law of the Sea: The Prompt Release of the *Volga*' (2003) 16 *Leiden Journal of International Law* 621.
- Brown, Chester 'Provisional Measures Before the ITLOS: The MOX Plant Case' (2002) 17 *International Journal of Marine and Coastal Law* 267.
- Brown, Chester, 'The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze' (2002) 3 *Melbourne Journal of International Law* 453.
- Brown, E D, 'The Lessons of the Torrey-Canyon: International Law Aspects' (1968) 21 *Current Legal Problems* 113.
- Brownlie, Ian, *Principles of Public International Law* (5th ed, 1998).
- Brownlie, Ian, 'Some Questions Concerning the Applicable Law in International Tribunals' in Makarczyk, Jerzy, *Theory of International Law at the Threshold of the 21<sup>st</sup> Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 761.
- Brownlie, Ian, 'State Responsibility and International Pollution: A Practical Perspective', in Daniel Barstow Magraw (ed), *International Law and Pollution* (1991) 120.
- Brownlie, Ian, 'Arbitration and Judicial Settlement: Comments on a Paper by Judge Lachs' in Soons, Alfred H A (ed), *International Arbitration: Past and Prospects* (1990) 60.

## Bibliography

- Brownlie, Ian, *State Responsibility (Pt I)* (1983).
- Brownlie, Ian, 'A Survey of International Customary Rules of Environmental Protection' in Teclaff, L A and Utton, A E (eds), *International Environmental Law* (1974) 1.
- Brownlie, Ian, 'A Survey of International Customary Rules of Environmental Protection' (1973) 13 *Natural Resources Journal* 179.
- Brown Weiss, Edith, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 *University of Richmond Law Review* 1555.
- Brown Weiss, Edith, 'Opening the Door to the Environment and to Future Generations' in Boisson de Chazournes, Laurence and Sands, Philippe (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 338.
- Brown Weiss, Edith and Jacobson, Harold K (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998).
- Brown Weiss, Edith, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *American Journal of International Law* 198.
- Brown Weiss, Edith, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989) .
- Brunnée, Jutta, 'The United States and International Environmental Law: Living with an Elephant' (2004) 15 *European Journal of International Law* 617.
- Brus, Marcel T A, *Third Party Dispute Settlement in an Interdependent World: Developing a Theoretical Framework* (1995) 191.
- Buergenthal, T, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 *Leiden Journal of International Law* 267.
- Burke, William T, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (1994).
- Burke-White, William W, 'International Legal Pluralism' (2004) 25 *Michigan Journal of International Law* 963.
- Byers, Michael, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 *McGill Law Journal* 389.
- Caflich, L, 'Judicial Means for Settling Water Disputes' in International Bureau of the Permanent Court of Arbitration (ed), *Permanent Court of Arbitration Peace Palace Papers: Resolution of International Water Disputes* (2003) 235.
- Caldwell, Lynton K, *International Environmental Policy: From the Twentieth to the Twenty-First Century* (3rd ed, 1996).
- Caldwell, Lynton K, 'Concepts in Development of International Environmental Policies' (1973) 13 *Natural Resources Journal* 190.
- Cameron, James, 'Compliance, Citizens and NGOs' in Cameron, James, Werksman, Jacob and Roderick, Peter (eds), *Improving Compliance with International Environmental Law* (1996) 29.
- Cameron, James and Mackenzie, Ruth, 'Access to Environmental Justice and Procedural Rights in International Institutions' in Boyle, Alan E and Anderson,

## Bibliography

- Michael R (eds), *Human Rights Approaches to Environmental Protection* (1996) 129.
- Carnwath, Lord Justice, 'Judicial Protection of the Environment: At Home and Abroad' (2004) 16 *Journal of Environmental Law* 315.
- Caron, David D, 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94 *American Journal of International Law* 4.
- Carroll, John E, 'The Acid Rain Issue in Canadian-American Relations: A Commentary' in Carroll, John E (ed), *International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems* (1988) 141.
- Cass, Deborah, 'The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39.
- Charlesworth, Hilary and Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis* (2000).
- Charney, Jonathan I, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 *New York University Journal of International Law and Politics* 697.
- Charney, Jonathan I, 'International Law and Multiple International Tribunals' (1998) 271 *Recueil Des Cours* 115.
- Charney, Jonathan I, 'The Implications of Expanding Dispute Settlement Systems: The 1982 Convention on the Law of the Sea' (1996) 90 *American Journal of International Law* 69.
- Charney, Jonathan I, 'The Marine Environment and the 1982 United Nations Convention on the Law of the Sea' (1994) 28 *International Lawyer* 879.
- Charney, Jonathan I, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice' (1987) 81 *American Journal of International Law* 855.
- Charnovitz, Steve, 'WTO Dispute Settlement as a Model for International Governance' in Kiss, Alexandre, Shelton, Dinah and Ishibashi, Kanami (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 245.
- Charnovitz, Steve, 'A World Environment Organization' (2000) 27 *Columbia Journal of Environmental Law* 323
- Charnovitz, Steve, 'The Supervision of Health and Biosafety Regulation by World Trade Rules' (1999-2000) 13 *Tulane Environmental Law Journal* 271.
- Chauhan, B R, *Settlement of International Water Law Disputes in International Drainage Basins* (1981).
- Chayes, Antonia H and Chayes, Abram, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).
- Chayes, Antonia H, Chayes, Abram and Mitchell, Ronald B, 'Active Compliance Management in Environmental Treaties' in Lang, Winfried (ed), *Sustainable Development and International Law* (1995) 75.



## Bibliography

- Chayes, Abram, Chayes, Antonia H and Mitchell, Ronald B, 'Managing Compliance: A Comparative Perspective' in Brown Weiss, Edith and Jacobson, Harold K (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998) 39.
- Chinkin, Christine M and Mackenzie, Ruth, 'Intergovernmental Organizations as "Friends of the Court"' in Boisson de Chazournes, Laurence, Romano, Cesare P R and Mackenzie, Ruth (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (2002) 135.
- Chinkin, Christine M, 'Alternative Dispute Resolution under International Law' in Evans, Malcolm D (ed), *Remedies in International Law: The Institutional Dilemma* (1998) 123.
- Chinkin, Christine M, 'Dispute Resolution and the Law of the Sea: Regional Problems and Prospects' in Crawford, James and Rothwell, Donald R (eds) *The Law of the Sea in the Asian Pacific Region: Developments and Prospects* (1995) 237.
- Chinkin, Christine M, *Third Parties in International Law* (1993).
- Chinkin, Christine M, 'The Peaceful Settlement of Disputes: New Grounds for Optimism?' in Macdonald Ronald St John (ed), *Essays in Honour of Wang Tieya* (1993) 165.
- Chinkin, Christine M and Sadurska, Romana, 'The Anatomy of International Dispute Resolution' (1991) 7 *Ohio State Journal on Dispute Resolution* 39.
- Chircop, A, VanderZwaag, D, and Mushkat, P, 'The Gulf of Maine Agreement and Action Plan: A Novel but Nascent Approach to Transboundary Marine Environmental Protection' (1995) 19 *Marine Policy* 317.
- Churchill, Robin, and Scott, Joanne, 'The MOX Plant Litigation: The First Half-life' (2004) 53 *International and Comparative Law Quarterly* 643.
- Churchill, Robin R and Lowe, A Vaughan, 'The International Tribunal for the Law of the Sea: Survey for 2000' (2003) 18 *International Journal of Marine and Coastal Law* 447.
- Churchill, Robin R, 'Fisheries Jurisdiction Case (Spain v Canada)' (1999) 12 *Leiden Journal of International Law* 597.
- Churchill, Robin R and Lowe, A Vaughan, *The Law of the Sea* (3rd ed, 1999).
- Churchill, Robin R, 'Environmental Rights in Existing Human Rights Treaties' in Boyle, Alan E and Anderson, Michael R (eds), *Human Rights Approaches to Environmental Protection* (1996) 89.
- Churchill, Robin R, 'The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fishing Rights' (1975) 24 *International and Comparative Law Journal* 82.
- Coghlan, Matthew, 'Prospects and Pitfalls of the Kyoto Protocol to the United Nations Framework Convention on Climate Change' (2002) 3 *Melbourne Journal of International Law* 165.
- Collier, J and Lowe, A Vaughan, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999).

## Bibliography

- Collins, L, 'Provisional and Protective Measures in International Litigation' (1992) 234 *Recueil des Cours* 9.
- Colson, D A and Hoyle, P, 'Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get it Right?' (2003) 34 *Ocean Development and International Law* 59.
- Conforti, Benedetto, 'Do States Really Accept Responsibility for Environmental Damage' in Francioni, Francesco and Scovazzi, Tullio (eds), *International Responsibility for Environmental Harm* (1991) 179.
- Contini, Paolo and Sand, Peter H, 'Methods to Expedite Environment Protection: International Ecostandards' (1972) 66 *American Journal of International Law* 37.
- Cooney, Rosie, *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management* (2004).
- Coyle, Sean and Morrow, Karen, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (2003).
- Craik, A Neil, 'Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law' (1998) 10 *Georgetown International Environmental Law Review* 551.
- Craven, Matthew, 'New Zealand's Request for a Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case' (1996) 45 *International and Comparative Law Quarterly* 725.
- Crawford, James, *The International Law Commission's Articles on State Responsibility* (2002).
- Daly, Herman E, 'From Adjustment to Sustainable Development: The Obstacle of Free Trade' (1992) 15 *Loyola of Los Angeles International and Comparative Law Review* 33.
- Davidson, James, 'Resolution of Transboundary Pollution Disputes: The Great Lakes Experience' (1998) 3 *Asia Pacific Journal of Environmental Law* 233.
- Davies, Peter G G, *European Union Environmental Law* (2004).
- Dehan, Audra E, 'An International Environmental Court: Should There Be One?' (1992) 3 *Touro Journal of Transnational Law* 31.
- de Castro, Paulo Canelas 'The Judgment in the *Case Concerning the Gabčíkovo-Nagymaros Project*: Positive Signs for the Evolution of International Water Law' (1997) 8 *Yearbook of International Environmental Law* 21.
- De La Fayette, Louise, 'The Fisheries Jurisdiction Case (Spain v Canada), Judgment on Jurisdiction of 4 December 1998' (1999) 48 *International and Comparative Law Quarterly* 664.
- de Sadeleer, Nicolas, *Environmental Principles: From Political Slogans to Legal Rules* (Susan Leubusher trans, 2002).
- Dinwoodie, D H, 'The Politics of International Pollution Control: The Trail Smelter Case' (1971-1972) 27 *International Journal* 219

## Bibliography

- Dobos, Daniel, 'The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle' (2002) 13 *Fordham Environmental Law Journal* 375.
- Dommen, Caroline, 'Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms' (1998) 11 *Georgetown International Environmental Law Review* 1.
- Donnelly, Jack, *Realism and International Relations* (2000).
- Downs, George W, Danish, Jyle W and Barsoom, Peter N, 'The Transformational Model of International Regime Design: Triumph of Hope or Experience?' (2000) 38 *Columbia Journal of Transnational Law* 465.
- Dugard, John, 'The Nuclear Tests Cases and the South West Africa Cases: Some Realism About the International Judicial Decision' (1975-1976) 16 *Virginia Journal of International Law* 463.
- Dupuy, Pierre-Marie, 'Le concept de société civile internationale, identification et genèse' in Gherari, H, and Szurek, S, (eds), *L'émergence de la société civile internationale vers la privatisation du droit international?* (2003) 5.
- Dunoff, Jeffrey L, 'The Misguided Debate over NGO Participation at the WTO' (1998) *Journal of International Economics and Law* 433.
- Dunoff, Jeffrey L, 'Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes' (1994) 15 *Michigan Journal of International Law* 1043.
- Dworkin, Ronald, *Taking Rights Seriously* (3rd ed, 1981).
- Eaton, Joshua P, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, the Human Right to a Healthy Environment' (1997) 18 *Boston University International Law Journal* 261.
- Eckersley, Robyn, *Environmentalism and Political Theory: Toward an Ecocentric Approach* (1992).
- Ehrmann, Markus, 'Procedures of Compliance Control in International Environmental Treaties' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 377.
- Eiriksson, Gudmundur, *The International Tribunal for the Law of the Sea* (2000).
- Elkind, Jerome B, 'French Nuclear Testing and Article 41 – Another Blow to the Authority of the Court?' (1974) 8 *Vanderbilt Journal of Transnational Law* 39.
- Elliott, Lorraine, 'ASEAN and Environmental Cooperation: Norms, Interests and Identity' (2003) 16 *The Pacific Review* 29.
- Esty, Daniel C, *Greening the GATT: Trade, Environment and the Future* (1994).
- Fabra, Adriana, 'The LOSC and the Implementation of the Precautionary Principle' (1999) 10 *Yearbook of International Environmental Law* 15.
- Fitzmaurice Malgosia A, 'The Kyoto Protocol Compliance Regime and Treaty Law' (2004) 8 *Singapore Yearbook of International Law* 23.
- Fitzmaurice, Malgosia A, 'Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (*Ireland v United Kingdom*)' (2003) 18 *International Journal of Marine and Coastal Law* 541.

## Bibliography

- Fitzmaurice, Malgosia A, 'International Protection of the Environment' (2001) 293 *Recueil des Cours* 9.
- Fitzmaurice, Malgosia A and Redgwell, Catherine, 'Environmental Non-Compliance Procedures and International Law' (2000) 31 *Netherlands Yearbook of International Law* 35.
- Fitzmaurice Malgosia A, 'The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice' (1999) 20 *Australian Year Book of International Law* 127.
- Fitzmaurice, Malgosia A, 'Equipping the ICJ to Deal with Environmental Law' in Peck, Connie and Lee, Roy S (eds), *Increasing the Effectiveness of the International Court of Justice* (1997) 398
- Fitzmaurice, Malgosia A, 'Environmental Protection and the International Court of Justice' in Lowe, A Vaughan and Fitzmaurice, Malgosia (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 293.
- Fitzmaurice, Malgosia A, 'International Environmental Law as a Special Field' in Barnhoorn, L A N M, and Wellens, K C (eds), *Diversity in Secondary Rules and the Unity of International Law* (1995) 181.
- Fleming, John G, *The Law of Torts* (9th ed, 1998).
- Footer, Mary and Zia-Zarifi, Salman, 'European Communities – Measures Affecting Asbestos and Asbestos-Containing Products: The World Trade Organisation on Trial for its Handling of Occupational Health and Safety Issues' (2002) 3 *Melbourne Journal of International Law* 120.
- Forster, Malcolm, 'The *Mox Plant* Case – Provisional Measures in the International Tribunal for the Law of the Sea' (2003) 16 *Leiden Journal of International Law* 611.
- Francioni, Francesco, 'Dispute Avoidance in International Environmental Law' in Kiss, Alexandre, Shelton, Dinah and Ishibashi, Kanami (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 229.
- Franck, Thomas M, 'Fairness and the General Assembly Advisory Opinion' in Boisson de Chazournes, Laurence and Sands, Philippe (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 511
- Franck, Thomas M, *Fairness in International Law and Institutions* (1995).
- Franck, Thomas M, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.
- Franck, Thomas M, *The Power of Legitimacy Among Nations* (1990).
- Franck, Thomas M, 'Word Made Law: The Decision of the ICJ in the Nuclear Tests Cases' (1975) 69 *American Journal of International Law* 612.
- Frankel, Kathie D, 'The Nuclear Tests Cases' (1974) 7 *New York University Journal of International Law and Politics* 163.
- Freedman, Joseph, 'Implications of the NAFTA Investment Chapter for Environmental Regulation' in Kiss, Alexandre, Shelton, Dinah and Ishibashi, Kanami (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 89.

## Bibliography

- Freestone, David, 'Caution or Precaution: 'A Rose By Any Other Name...?'' (1999) 10 *Yearbook of International Environmental Law* 15.
- Freestone, David, 'The Precautionary Principle' in Churchill, Robin R and Freestone David, (eds), *International Law and Global Climate Change* (1991) 21.
- Fuller, Lon L, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353
- Gautier, Philippe, 'NGOs and Law of the Sea Disputes' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 233.
- Gautier, Philippe, 'The International Tribunal for the Law of the Sea: Activities in 2002' (2003) 2 *Chinese Journal of International Law* 341.
- Gehring, Thomas, 'International Environmental Regimes: Dynamic Sectoral Legal Systems' (1990) 1 *Yearbook of International Environmental Law* 35.
- Gillespie, Alexander 'Forum Shopping in International Environmental Law: The IWC, CITES and the Management of Cetaceans' (2002) 33 *Ocean Development and International Law* 17.
- Gillespie, Alexander, *The Illusion of Progress: Unsustainable Development in International Law and Policy* (2001).
- Gillespie, Alexander, *International Environmental Law Policy and Ethics* (1997).
- Giraud, Catherine, 'French Nuclear Testing in the Pacific and the 1995 International Court of Justice Decision' (1996) 1 *Asia Pacific Journal of Environmental Law* 125.
- Giustini, A, 'Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future' (1986) 9 *Fordham International Law Journal* 213.
- Goh, Gavin and Witbreuk, Trudy, 'An Introduction to the WTO Dispute Settlement System' (2001) 30 *Western Australian Law Review* 51.
- Goldie, L F E, 'Liability for Damage and the Progressive Development of International Law' (1965) 14 *International and Comparative Law Quarterly* 1189.
- Golder Associates Ltd, *Analysis of the Effects of Smelter Emissions on Vegetation within the Trail Regional Area* (2004) <<http://www.teckcominco.com/articles/tr-eorisk/techreports/2004/2004-05-veganalysis.pdf>> at 1 July 2005.
- Gray, Christine and Kingsbury, Benedict, 'Inter-State Arbitration since 1945: Overview and Evaluation' in Janis, M W (ed), *International Courts for the Twenty-First Century*, (1992) 55.
- Gray, Christine, *Judicial Remedies in International Law* (1987).
- Grewe, E, *The Epochs of International Law* (Michael Byers trans, 2000).
- Grievies, Forest L, *Supranationalism and International Adjudication* (1969).
- Gross, Leo (ed), *The Future of the International Court of Justice*, Vol I (1976).
- Grotius, Hugo, *The Freedom of the Seas: or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (1609) (Ralph van Deman Magoffin trans, 1916).
- Guillaume, Judge Gilbert, 'Address to the General Assembly of the United Nations' (Speech delivered to the General Assembly of the United Nations, 26 October 2000) <<http://www.icj->

## Bibliography

- cij.org/icjwww/ipresscom/SPEECHES/SpeechPresident\_Guillaume\_GA55\_20001026.htm> at 1 July 2005;
- Guillaume, Judge Gilbert, 'Address to the Sixth Committee of the General Assembly of the United Nations' (speech delivered to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000) <[http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/SpeechPresident\\_Guillaume\\_SixthCommittee\\_20001027.htm](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/SpeechPresident_Guillaume_SixthCommittee_20001027.htm)> at 1 July 2005.
- Guillaume, Gilbert, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848.
- Gupta, Joyeeta, 'Global Sustainable Development Governance: Institutional Challenges from a Theoretical Perspective' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 361.
- Guruswamy, Lakshman D, 'Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?' (1998) 7 *Minnesota Journal of Global Trade* 287.
- Guruswamy, Lakshman D, 'Environment and Trade: Competing Paradigms in International Law' in Anghie, Antony and Sturgess, Garry (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 574.
- Haas, Peter M, Keohane, Robert O and Levy, Marc A (eds), *Institutions for Earth: Sources of Effective International Environmental Protection* (1993).
- Haas, Peter M, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1.
- Haas, Peter M, 'Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone' (1992) 46 *International Organization* 187.
- Hafner, Gerhard, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849
- Hafner, Gerhard, 'Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?' in Caflisch, L (ed), *The Settlement of Disputes Between States: Universal and European Perspectives* (1998) 25.
- Hahn, R W and Richards, K R, 'The Internationalization of Environmental Regulation' (1989) 30 *Harvard International Law Journal* 421.
- Hallum, Victoria, 'International Tribunal for the Law of the Sea: The MOX Nuclear Plant Case' (2002) 11 *Review of European Community and International Environmental Law* 372.
- Hambro, E, 'The Reasons Behind the Decisions of the International Court of Justice' (1954) 7 *Current Legal Problems* 212
- Handl, Günther, 'Compliance Control Mechanisms and International Environmental Obligations' (1997) 5 *Tulane Journal of International and Comparative Law* 29.
- Handl, Günther, 'Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited' (1975) 3 *Canadian Yearbook of International Law* 156.
- Handl, Günther, 'Territorial Sovereignty and the Problem of Transnational Pollution' (1975) 69 *American Journal of International Law* 50.

## Bibliography

- Hannam, Ian and Boer, Ben, *Drafting Legislation for Sustainable Soils: A Guide* (2004).
- Hardcastle, Rohan, 'Environmental Trade Measures Under Siege: The WTO US Shrimp Case' (1998) 3 *Asia Pacific Journal of Environmental Law* 157.
- Harris, Mark, 'Beyond Doha: Clarifying the Role of the WTO in Determining Trade-Environment Disputes' (2003) 21 *Law in Context* 307.
- Hart, H L A, *The Concept of Law* (2nd ed, 1994).
- Helfer, Laurence R and Slaughter Anne-Marie, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 901.
- Helfer, Laurence R and Slaughter Anne-Marie, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273.
- Helfer, Laurence R, 'Forum Shopping for Human Rights' (1999) 148 *University of Pennsylvania Law Review* 285.
- Hewison, Grant J, 'The Precautionary Approach to Fisheries Management: An Environmental Perspective' (1996) 11 *International Journal of Marine and Coastal Law* 301.
- Hey, Ellen, *Reflections on an International Environmental Court* (2000).
- Hey, Ellen, 'The Fisheries Provisions of the LOS Convention' in Hey, Ellen (ed), *Developments in International Fisheries Law* (1999) 13.
- Hey, Ellen, 'The European Community's Courts and International Environmental Agreements' (1998) 7 *Review of European Community and International Environmental Law* 4.
- Hey, Ellen, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (1989).
- Henkin, L, *How Nations Behave* (1961).
- Herr, Richard, 'The International Regulation of Patagonian Toothfish: CCAMLR and High Seas Fisheries Management' in Stokke, Olav Schram (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001) 303.
- Hicks, Bethany Lukitsch, 'Treaty Congestion in International Environmental Law: The Need for Greater International Coordination' (1999) 32 *University of Richmond Law Review* 1643.
- Higgins, Rosalyn, 'Respecting the Sovereignty of States and Running a Tight Courtroom' (2001) 50 *International and Comparative Law Quarterly* 121.
- Higgins, Rosalyn, 'Natural Resources in the Case Law of the International Court' in Boyle, Alan E and Freestone, David (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 87.
- Higgins, Rosalyn, *Problems and Process: International Law and How We Use It* (1994)
- Higgins, Rosalyn, 'Policy Considerations and the International Judicial Process' (1968) 17 *International and Comparative Law Quarterly* 58.

## Bibliography

- Highes, Layla, 'Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision' (1998) 10 *Georgetown International Environmental Law Review* 915.
- Hinde, Susan M, 'The International Environmental Court: Its Broad Jurisdiction as a Possible Flaw' (2003) 32 *Hofstra Law Review* 727.
- Hollis, D B, 'Private Actors in Public International Law: *Amicus Curiae* and the Case for the Retention of State Sovereignty' (2002) 25 *Boston College International and Comparative Law Review* 235.
- Horbach, Nathalie L J T and Bekker, Pieter H F, 'State Responsibility for Injurious Transboundary Activity in Retrospect' (2003) 50 *Netherlands International Law Review* 327.
- Horn, Laura, 'Emerging Trends in Sustainable Development: The International Initiatives' [2002] *Australian International Law Journal* 24.
- Horn, Laura, 'The Role of the Mediator in International Environmental Law' (1993) 4 *Australian Dispute Resolution Journal* 16.
- Horowitz, Deborah, 'The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the *Southern Bluefin Tuna Case*' (2001) 25 *Melbourne University Law Review* 810.
- Howse, Robert, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law* 491
- Hudson, Manley O, *By Pacific Means: The Implementation of Article Two of the Pact of Paris* (1935).
- International Bureau of the Permanent Court of Arbitration (ed), *International Investments and Protection of the Environment* (2001).
- International Law Association, 'Searching for the Contours of International Law in the Field of Sustainable Development' in Ku, C and Diehl, P F (eds), *International Law: Classic and Contemporary Readings* (2003) 397.
- International Law Association, *Report of the 52nd Conference* (1966).
- Independent World Commission on the Oceans, *The Ocean Our Future* (1998).
- Jackson, J H, *The Jurisprudence of GATT and the WTO* (2000).
- Jahnke, Marlene, 'UNCED: Rio Conference on Environment and Development' (1992) 22 *Environmental Policy and Law* 204.
- Jennings, Robert, 'The Role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 58
- Jennings, Robert, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *International and Comparative Law Quarterly* 1
- Jennings, Robert, 'Need for an Environmental Court?' (1992) 20 *Environmental Policy and Law* 312.
- Jennings, Robert, 'The Judicial Enforcement of International Obligations' (1987) 47 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3.



## Bibliography

- Jessup, Philip C, 'Do New Problems Need New Courts?' (1971) 65 *American Society of International Law Proceedings* 261.
- Johnson, Lise and Tuerk, Elisabeth, 'CIEL's Experience in WTO Dispute Settlement: Challenges and Complexities from a Practical Point of View' in Treves, Tullio, et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 243.
- Johnston, Douglas, M, and VanderZwaag, David, L, 'The Ocean and International Environmental Law: Swimming, Sinking, and Treading Water at the Millennium' (2000) 43 *Ocean and Coastal Management* 141.
- Johnston, Douglas M, 'Fishery Diplomacy and Science and the Judicial Function' (1999) 10 *Yearbook of International Environmental Law* 33.
- Johnston, Douglas M, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries* (1985).
- Joyner, Christopher C, 'On the Borderline? Canadian Activism in the Grand Banks' in Stokke, Olav Schram (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001) 207.
- Joyner, Christopher C and von Gustedt, Alejandro A, 'The Turbot War of 1995: Lessons for the Law of the Sea' (1996) 11 *International Journal of Marine and Coastal Law* 425.
- Juda, Lawrence, *International Law and Ocean Use Management: The Evolution of Ocean Governance* (1996).
- Juenger, Friedrich K, 'What's Wrong with Forum Shopping?' (1994) 16 *Sydney Law Review* 5.
- Justinian, *Institutiones* (trans Peter Birks and Grant McLeod, 1987).
- Kalas, Peggy R and Herwig, Alexia, 'Dispute Resolution Under the Kyoto Protocol' (2000) 27 *Ecology Law Quarterly* 53.
- Kalas, Peggy R, 'International Environmental Dispute Resolution and the Need for Access by Non-State Entities' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 191.
- Keohane, Robert O, Haas, Peter M and Levy, Marc A, 'The Effectiveness of International Environmental Institutions' in Keohane, Robert O, Haas, Peter M and Levy, Marc A (eds), *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993) 3.
- Keohane, Robert O, Moravcsik, Andrew and Slaughter, Anne-Marie, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organization* 457.
- Kindt, J W, 'Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea' (1989) 22 *Vanderbilt Journal of Transnational Law* 1097.
- Kiss, Alexandre, 'Environmental Information and Public Participation in Decision-Making' in Kiss, Alexandre, Shelton, Dinah and Ishibashi, Kanami (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 193

## Bibliography

- Kiss, Alexandre and Shelton, Dinah, *International Environmental Law* (2000).
- Kiss, Alexandre, 'Le règlement des différends dans les conventions multilatérales relatives à la protection de l'environnement' in Dupuy, R J (ed), *The Settlement of Disputes on the New Natural Resources* (1983) 119.
- Klein, Natalie, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005).
- Knop, Karen, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501.
- Knox, John H, 'A new approach to compliance with international environmental law: the submissions procedure of the NAFTA Environmental Commission.' (2001) 28 *Ecology Law Quarterly* 1.
- Knox, John H, 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96 *American Journal of International Law* 291.
- Knox, John H, and Markell, David L, 'The Innovative North American Commission for Environmental Cooperation' in Markell, David L and Knox, John H (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 1.
- Knox, John H, 'The Judicial Resolution of Conflicts Between Trade and the Environment' (2004) 28 *Harvard Environmental Law Review* 1.
- Knox, John H, 'The Flawed Trail Smelter Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law' in Bratspies, Rebecca and Miller, Russell (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (forthcoming 2005).
- Kós, J S, 'Interim Relief in the International Court: New Zealand and the Nuclear Tests Cases' (1984) 14 *Victoria University of Wellington Law Review* 357.
- Koskenniemi, Martti and Päivi, Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.
- Koskenniemi, Martti, 'The Silence of Law/The Voice of Justice' in Boisson de Chazournes, Laurence and Sands, Philippe (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 488.
- Koskenniemi, Martti, 'International Law in a Post-Realist Era' (1997) 16 *Australian Yearbook of International Law* 1.
- Koskenniemi, Martti, 'New Institutions and Procedures for Implementation Control and Reaction' in Werksman, Jacob, (ed), *Greening International Institutions* (1996) 236.
- Koskenniemi, Martti, 'Comment on the Paper by Antonia Handler Chayes, Abram Chayes and Ronald B Mitchell' in Lang, Winfried (ed), *Sustainable Development and International Law* (1995) 9.
- Koskenniemi, Martti, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 *Yearbook of International Environmental Law* 123.
- Koskenniemi, Martti, 'The Future of Statehood' (1991) 32 *Harvard International Law Journal* 397.
- Koskenniemi, Martti, 'Peaceful Settlement of Environmental Disputes' (1991) 60 *Nordic Journal of International Law* 73.

## Bibliography

- Koskenniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument* (1989).
- Krämer, Ludwig, 'Public Interest Litigation in Environmental Matters Before European Courts' (1996) 8 *Journal of Environmental Law* 1.
- Krämer, Ludwig, 'The Implementation of Environmental Laws by the European Economic Communities' (1991) 34 *German Yearbook of International Law* 1
- Kuhn, Thomas, *The Structure of Scientific Revolutions* (1962).
- Kuokkanen, Tuomas, *International Law and the Environment: Variations on a Theme* (2002).
- Kwiatkowska, Barbara, 'The *Ireland v United Kingdom (MOX Plant)* Case: Applying the Doctrine of Treaty Parallelism' (2003) 18 *International Journal of Marine and Coastal Law* 1
- Kwiatkowska, Barbara, 'The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A Colson and Dr Peggy Hoyle' (2003) 34 *Ocean Development and International Law* 369
- Kwiatkowska, Barbara, 'The Australia and New Zealand Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal' (2001) 16 *International Journal of Marine and Coastal Law* 239
- Kwiatkowska, Barbara, 'Southern Bluefin Tuna' (2001) 95 *American Journal of International Law* 162
- Kwiatkowska, Barbara, 'The Southern Bluefin Tuna (New Zealand v. Japan; Australian v Japan) Cases' (2000) 15 *International Journal of Marine and Coastal Law* 1
- Kwiatkowska, Barbara, 'New Zealand v France Nuclear Tests Cases: The 'Little' Big Order of the International Court of Justice' [1995] *Finnish Yearbook of International Law* 1
- Lagoni, R, Heinrich-Noll, H, and Vogel, H, 'The International Tribunal for the Law of the Sea: Establishment and 'Prompt Release' Procedures' (1996) 11 *International Journal of Marine and Coastal Law* 137.
- Lammers, Johan G, 'The Gabcikovo-Nagymaros Case Seen in Particular from the Perspective of the Law of International Watercourses and the Protection of the Environment' (1998) 11 *Leiden Journal of International Law* 287.
- Lammers, Johan G, 'The Present State of Research Carried out by the English-Speaking Section of the Centre for Studies and Research' in Académie de Droit International de la Haye, *La Pollution Transfrontière* (1985) 90.
- Lammers, Johan G, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law* (1984).
- Lauterpacht, Elihu, *Aspects of the Administration of International Justice* (1991)
- Laylin, J G and Biancho, R L, 'The Role of Adjudication in International River Disputes' (1959) 53 *American Journal of International Law* 30
- Lefeber, René, *Transboundary Environmental Interference and the Origin of State Liability* (1996).

## Bibliography

- Leigh, Kathy, 'Liability for Damage to the Global Commons' (1992) 14 *Australian Yearbook of International Law* 129.
- List, Martin and Rittberger Volker, 'Regime Theory and International Environmental Management' in Hurrell, Andrew and Kingsbury, Benedict (eds), *The International Politics of the Environment* (1991) 85.
- Lowe, A Vaughan, 'Advocating Judicial Activism: The ITLOS Opinions of Judge Ivan Shearer' (2005) 24 *Australian Year Book of International Law* 145.
- Lowe, A Vaughan, 'The Politics of Law-Making: Are the Method and Character of Norm-Creation Changing?' in Byers, Michael (ed), *The Role of Law in International Politics* (2000) 19.
- Lowe, A Vaughan, 'Sustainable Development and Unsustainable Arguments' in Boyle, Alan E and Freestone, David (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 19.
- Lowe, A Vaughan, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Year Book of International Law* 191.
- Lowenfeld, Andreas F, *International Economic Law* (2002).
- Lyster, Simon, *International Wildlife Law* (1985).
- Macdonald, John M, 'Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management' (1995) 26 *Ocean Development and International Law* 255.
- MacKay, Don, 'Nuclear Testing: New Zealand the France in the International Court of Justice' (1995-1996) 19 *Fordham International Law Journal* 1857.
- Mackenzie, Ruth, 'The *Amicus Curiae* in International Courts: Towards Common Procedural Approaches?' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 296.
- MacMillan, Fiona, *WTO and the Environment* (2001).
- Maine, Henry S, *International Law: A Series of Lectures Delivered Before the University of Cambridge 1887* (1888).
- Malone, Linda A and Pasternack, Scott, *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law* (2004).
- Mann, Howard, 'Opening the Doors, At Least a Little: Comment on the Amicus Decision in *Methanex v United States*' (2002) 10 *Review of European Community and International Environmental Law* 241.
- Mansfield, Bill, 'Compulsory Dispute Settlement after the Southern Bluefin Tuna Award' in Oude Elferink, Alex G and Rothwell, Donald R (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 255.
- Mansfield, Bill, 'Letter to the Editor: The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiakowska's Article' (2001) 16 *International Journal of Marine and Coastal Law* 361.
- Markell, David L, 'The CEC Citizen Submissions Process: On or Off Course?' in Markell, David L, and Knox, John H, (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 274.

## Bibliography

- Markell, David L, 'The Commission for Environmental Cooperation's Citizen Submission Process' (2000) 12 *Georgetown International Environmental Law Review* 545.
- Marr, Simon, 'The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources' (2000) 11 *European Journal of International Law* 815.
- Matheson, Michael J and Bickler, Sara, 'The Fifty-Fifth Session of the International Law Commission' (2004) 98 *American Journal of International Law* 317.
- Matsushita, Mitsuo, Schoenbaum, Thomas J and Mavroidis, Petros C, *The World Trade Organization: Law, Practice and Policy* (2003).
- McCaffrey, Stephen C, *The Law of International Watercourses: Non-Navigational Uses* (2001), 435
- McCaffrey, Stephen C, 'Water, Water Everywhere, But Too Few Drops to Drink: The Coming Freshwater Crisis and International Environmental Law' (2000) 28 *Denver Journal of International Law and Policy* 325.
- McCaffrey, Stephen C, 'Water Scarcity: Institutional and Legal Responses' in Brans, Edward H P et al, (eds), *The Scarcity of Water: Emerging Legal and Policy Responses* (1997) 52.
- McCallion, Kenneth F and Sharma, H Rajan, 'Environmental Justice Without Borders: The Need for an International Court of the Environment To Protect Fundamental Human Rights' (2000) 32 *George Washington Journal of International Law and Economics* 351.
- McCallion, Kenneth F, 'International Environmental Justice: Rights and Remedies' (2002-2003) 26 *Hastings International and Comparative Law Review* 427.
- McConnell, M L and Gold, E, 'The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?' (1991) 23 *Case Western Reserve Journal of International Law* 83.
- McDorman, Ted L, 'Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)' (2004) 98 *American Journal of International Law* 330.
- McDorman, Ted L, 'International Tribunal for the Law of the Sea' (2001) 12 *Yearbook of International Environmental Law* 589.
- McDorman, Ted L 'Global Ocean Governance and International Adjudicative Dispute Resolution' (2000) 43 *Ocean and Coastal Management* 255.
- McDorman, Ted L, 'Fisheries Conservation and Management and International Trade Law' in Hey, Ellen, (ed), *Developments in International Fisheries Law* (1999) 501.
- McIntyre, Owen and Mosedale, Thomas, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 *Journal of Environmental Law* 221.
- McLaughlin, Richard J, 'Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or WTO?' (1997) 9 *Georgetown International Environmental Law Review* 29.

## Bibliography

- McWhinney, Edward, 'International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case' (1975) 3 *Syracuse Journal of International Law and Commerce* 9.
- Mensah, Chris, 'The United Nations Commission on Sustainable Development' in Werksman Jacob (ed), *Greening International Institutions* (1996) 21.
- Mensah, Thomas A, 'The International Legal Regime for the Protection and Preservation of the Marine Environment from Land-Based Sources of Pollution' in Boyle, Alan E and Freestone, David (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 297.
- Mensah, Thomas A, 'The International Tribunal for the Law of the Sea and the Protection and Preservation of the Marine Environment' (1999) 8 *Review of European Community and International Environmental Law* 1.
- Merrills J G, 'The Role and Limits of International Adjudication' (1987) 24 *Coexistence* 169.
- Merrills, J G, *International Dispute Settlement* (3rd ed, 1998).
- Mickelson, Karin, 'Rereading *Trail Smelter*' (1993) 31 *Canadian Yearbook of International Law* 219.
- Miles, Edward L et al (eds), *Environmental Regime Effectiveness: Confronting Theory With Evidence* (2002).
- Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Synthesis* (2005).
- Miller, Nathan, 'An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals' (2002) 15 *Leiden Journal of International Law* 483.
- Mills, Alex and Stephens, Tim, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *Leiden Journal of International Law* 1.
- Mitchell, Ronald B, 'International Environmental Agreements: A Survey of Their Features, Formation, and Effects' (2003) 28 *Annual Review of Environment and Resources* 429
- Mitchell, Ronald B, 'Compliance Theory: An Overview' in Cameron, James, Werksman, Jacob and Roderick, Peter (eds), *Improving Compliance with International Environmental Law* (1996) 3.
- Molenaar, Erik J, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: the Pursuits of the *Viarsa I* and the *South Tomi*' (2004) 19 *International Journal of Marine and Coastal Law* 19.
- Montini, Massimiliano, 'Improving Compliance with Multilateral Environmental Agreements through Positive Measures: The Case of the Kyoto Protocol on Climate Change' in Kiss, Alexandre, Shelton, Dinah and Ishibashi, Kanami (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 157.
- Morgan, Donald L, 'Implications of the Proliferation of International Legal Fora: The Example of the *Southern Bluefin Tuna Cases*' (2002) 43 *Harvard International Law Journal* 541.

## Bibliography

- Mosler, Hermann, 'Judgments of International Courts and Tribunals' in Bernhardt, Rudolph (ed), *Encyclopaedia of Public International Law*, Vol III (1992) 31.
- Murphy, Sean D, 'Does the World Need a New International Environmental Court?' (2000) 32 *George Washington Journal of International Law and Economics* 333.
- Nelson, L D M, 'The Development of the Legal Regime of High Seas Fisheries' in Boyle, Alan E and Freestone David (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 113.
- Nicols, Phillip M, 'Extension of Standing in the World Trade Organization Disputes to Nongovernmental Parties' (1996) 17 *University of Pennsylvania Journal of International Economics and Law* 295
- Notaro, Nicola, *Judicial Approaches to Trade and Environment: The EC and the WTO* (2003).
- Noyes, John E, 'The International Tribunal for the Law of the Sea' (1998) 32 *Cornell International Law Journal* 109.
- Nygh, P E and Davies, M, *Conflict of Laws in Australia* (7th ed, 2002)
- Oda, Shigeru, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 *International and Comparative Law Quarterly* 863.
- Oda, Shigeru, 'The ICJ Viewed From the Bench' (1993) 244 *Recueil des Cours* 139.
- Oda, Shigeru, *International Control of Sea Resources* (2nd ed, 1988).
- Oda, Shigeru, 'Fisheries under the United Nations Convention on the Law of the Sea' (1983) 77 *American Journal of International Law* 739.
- Okowa, Phoebe N, 'Environmental Dispute Settlement: Some Reflections on Recent Developments' in Evans, Malcolm D (ed), *Remedies in International Law: The Institutional Dilemma* (1998) 157.
- Okowa, Phoebe N, 'Procedural Obligations in International Environmental Agreements' (1996) 67 *British Yearbook of International Law* 275.
- Opeskin, Brian, 'The Price of Forum Shopping: A Reply to Juenger' (1994) 16 *Sydney Law Review* 14.
- Orellana, Marcos A, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 *Nordic Journal of International Law* 55.
- Oxman, Bernard H, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 *American Journal of International Law* 277.
- Pallemaerts, Marc, 'International Environmental Law from Stockholm to Rio: Back to the Future' (1992) 1 *Review of European Community and International Environmental Law* 254.
- Palmer, Geoffrey, 'New Ways to Make International Environmental Law' (1996) 86 *American Journal of International Law* 259.
- Panjabi, Raneer Khooshie Lal, 'From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law' (1993) 21 *Denver Journal of International Law and Policy* 215.

## Bibliography

- Parson, Edward A, 'Protecting the Ozone Layer' in Haas, Peter M, Keohane, Robert O and Levy, Marc A (eds), *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993) 27.
- Pauwelyn, Joost, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' (2004) 15 *European Journal of International Law* 575.
- Pauwelyn, Joost, *Conflict of Norms in Public International Law* (2003).
- Peel, Jacqueline, 'Precaution – A Matter of Principle, Approach or Process?' (2004) 5 *Melbourne Journal of International Law* 483.
- Peel, Jacqueline, 'A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes Under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration' (2002) 3 *Melbourne Journal of International Law* 53
- Peel, Jacqueline, 'Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 47.
- Perez, Oren, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (2004).
- Picolotti, Romina and Bordenave, Sofia, 'The Enforcement of Environmental Law from a Human Rights Perspective' (2003) 3 *Sustainable Development Law and Policy* 11.
- Pinto, M C W, 'Judicial Settlement of International Disputes: One Forum or Many' in Anghie, Antony and Sturgess, Garry (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 465.
- Pitea, Cesare, 'NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: From Tolerance to Recognition?' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 205.
- Plant, Glen, 'The EC/Canadian Fisheries Dispute in the Northwest Atlantic' (1995) 44 *International and Comparative Law Quarterly* 927.
- Porras, Illeana, M, 'The Rio Declaration: A New Basis for International Cooperation' in Philippe Sands (ed), *Greening International Law* (1994) 20.
- Postiglione, Amedeo, *The Global Environmental Crisis: The Need for an International Court of the Environment* (1996).
- Postiglione, Amedeo, 'A 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.
- Preston, Brian J, 'Role of Public Interest Environmental Litigation' (Paper presented at the Environmental Defender's Office National Conference on Public Interest Environmental Law in Australia, Sydney, 13 May 2005).
- Prince, Peter, 'Bhopal, Bougainville and Ok Tedi: Why Australia's *Forum non Conveniens* Approach is Better' (1998) 47 *International and Comparative Law Quarterly* 573.
- Prott, Lyndel V, 'Avoiding a Decision on the Merits in the International Court of Justice' (1976) 7 *Sydney Law Review* 433.



## Bibliography

- Quentin-Baxter, Robert Q, 'Second Report on International Liability for Injuries Consequences Arising Out of Acts Not Prohibited by International Law' [1981] 2 *Yearbook of the International Law Commission* 103.
- Qureshi, A H, 'Extraterritorial Shrimps, NGOs and the WTO Appellate Body' (1999) 48 *International and Comparative Law Quarterly* 199.
- Ralston, John, *The Law and Procedure of International Tribunals* (1926).
- Ranjeva, Raymond, 'Jurisdiction International Arbitrage – L'environnement, Le Court International de la Justice et sa Chamber speciale pour les questions d'environnement' (1994) *XL Annuaire Francais de Droit International* 433.
- Rao, Pemmarajau S, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?' (2004) 25 *Michigan Journal of International Law* 929.
- Ratliff, D P, 'The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or The Environment' (2001) 14 *Leiden Journal of International Law* 887.
- Raustiala, Kal, 'The 'Participatory Revolution' in International Environmental Law' (1997) 21 *Harvard Environmental Law Review* 537.
- Raustiala, Kal, 'Citizen Review and Treaty Review in the NAAEC' in Markell, David L and Knox, John H (eds), *Greening NAFTA: The North American Commission for Environmental Cooperation* (2003) 257.
- Rayfuse, Rosemary, 'Canada and Regional Fisheries Organizations: Implementing the UN Fish Stocks Agreement' (2003) 34 *Ocean Development and International Law* 209.
- Rayfuse, Rosemary, 'International Environmental Law' in Blay, Sam, Piotrowicz, Ryszard and Tsamenyi, B Martin (eds), *Public International Law: An Australian Perspective* (1997) 355.
- Read, John E, 'The Trail Smelter Dispute' (1963) 1 *Canadian Yearbook of International Law* 213.
- Redgwell, Catherine, 'International Environmental Law' in Malcolm D Evans (ed), *International Law* (2003) 657.
- Redgwell Catherine, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Boyle, Alan E and Anderson, Michael R (eds), *Human Rights Approaches to Environmental Protection* (1996) 72.
- Redgwell, Catherine, 'Environmental Protection in Antarctica: The 1991 Protocol' (1994) 43 *International and Comparative Law Quarterly* 599.
- Rehbinder, Eckard and Loperena, Demetrio, 'Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation' (2001) 31 *Environmental Policy and Law* 282.
- Rest, Alfred, 'Enhanced Implementation of the Biological Diversity Convention by Judicial Control' (1999) 29 *Environmental Policy and Law* 32
- Rest, Alfred, 'An International Court for the Environment: The Role of the Permanent Court of Arbitration' (1999) 4 *Asia Pacific Journal of Environmental Law* 107

## Bibliography

- Rest, Alfred, 'The Indispensability of an International Environmental Court' (1998) 7 *Review of European Community and International Environmental Law* 63
- Rest, Alfred, 'Need for an International Court for the Environment?' (1994) 24 *Environmental Policy and Law* 173.
- Reus-Smit, Christian, 'The Politics of International Law' in Reus-Smit, Christian (ed), *The Politics of International Law* (2004) 14.
- Rinceanu, Johanna, 'Enforcement Mechanisms in International Environmental Law: Quo Vadunt?' (2001) 15 *Journal of Environmental Law and Litigation* 147.
- Röben, Volker, 'The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sellafield: How Much Jurisdictional Subsidiarity' (2004) 73 *Nordic Journal of International Law* 223.
- Romano Cesare P R, 'International Justice and Developing Countries: A Quantitative Analysis' (2002) 1 *The Law and Practice of International Courts and Tribunals* 367.
- Romano, Cesare P R, 'The Southern Bluefin Tuna Dispute: Hints of a World to Come... Like it or Not' (2001) 32 *Ocean Development and International Law* 313.
- Romano, Cesare P R, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000).
- Romano, Cesare P R, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709.
- Romano, Cesare P R, *The Cost of International Justice* (1997) Center on International Cooperation <<http://www.cic.nyu.edu/pubs/TheCost.html>> at 1 July 2005.
- Rose, Gregory, 'A Compliance System for the Kyoto Protocol' (2001) 24 *University of New South Wales Law Journal* 588.
- Rosenne, Shabtai, *Provisional Measures in International Law: The International Court of Justice and the International Law of the Sea* (2005).
- Rosenne, Shabtai, *The Perplexities of Modern International Law* (2004).
- Rosenne, Shabtai, 'Some Reflections *Erga Omnes*' in Anghie, Antony and Sturgess, Garry (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 509.
- Rosenne, Shabtai and L B Sohn (ed), *United Nations Convention on the Law of the Sea: A Commentary*, vol V (1989).
- Rothwell, Donald R, *The Polar Regions and the Development of International Law* (1996).
- Rothwell, Donald R, 'Oceans Management and the Law of the Sea in the Twenty-First Century' in Elferink, Alex G and Rothwell, Donald R (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 329.
- Rothwell, Donald R and Stephens, Tim, 'Dispute Resolution and the Law of the Sea: Reconciling the Interaction Between the LOS Convention and Other Environmental Instruments' in Oude Elferink, Alex G and Rothwell, Donald R (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 209.

## Bibliography

- Rothwell, Donald R and Stephens, Tim, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests' (2004) 53 *International and Comparative Law Quarterly* 171.
- Rothwell, Donald R, 'Reassessing International Environmental Dispute Resolution' (2001) 6 *Asia Pacific Journal of Environmental Law* 201.
- Rothwell, Donald R, 'A Maritime Analysis of the Conflicting International Law Regimes in Antarctic and the Southern Ocean' (1994) 15 *Australian Year Book of International Law* 155.
- Rubin, Alfred P, 'Pollution by Analogy: the Trail Smelter Arbitration' (1971) 50 *Oregon Law Review* 259.
- Sachariew, K, 'Promoting Compliance with International Environmental Standards: Reflections on Monitoring and Reporting Mechanisms' (1991) 2 *Yearbook of International Environmental Law* 31.
- Saeijs, H L F and van Berkel, M V, 'The Global Water Crisis: The Major Issue of the 21st Century' in Brans Edward H P et al (eds), *The Scarcity of Water: Emerging Legal and Policy Responses* (1997) 3.
- Sagoff, Mark, *The Economy of the Earth* (1988).
- Sand, Peter H, *Transnational Environmental Law: Lessons in Global Change* (1999).
- Sandholtz, Wayne and Stone Sweet, Alec 'Law, Politics and International Governance' in Reus-Smit, Christian (ed), *The Politics of International Law* (2004) 238.
- Sands, Philippe, 'International Courts and the Application of the Concept of "Sustainable Development"' in Hatchard, John and Perry-Kessaris, Amanda (eds), *Law and Development: Facing Complexity in the 21st Century* (2003) 147.
- Sands, Philippe, *Principles of International Environmental Law* (2nd ed, 2003).
- Sands, Philippe and Mackenzie, Ruth, 'Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements' in International Bureau of the Permanent Court of Arbitration (ed), *International Investments and Protection of the Environment* (2001) 305.
- Sands, Philippe, 'Turtles and Torturers: The Transformation of International Law' (2000) 33 *New York University Journal of International Law and Politics* 527.
- Sands, Philippe, Mackenzie, Ruth and Shany, Yuval, *Manual on International Courts and Tribunals* (1999).
- Sands, Philippe, 'International Environmental Litigation and its Future' (1999) 32 *University of Richmond Law Review* 1619.
- Sands, Philippe, 'Pleadings and the Pursuit of International Law: Nuclear Tests II (*New Zealand v France*)' in Anghie, Antony and Sturgess, Garry (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998) 601.
- Sands, Philippe, 'International Environmental Litigation: What Future?' (1998) 7 *Review of European Community and International Environmental Law* 1.
- Sands, Philippe, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 10 *Yale Human Rights and Development Law Journal* 3.

## Bibliography

- Sands, Philippe, 'The International Court of Justice and the European Court of Justice' in Werksman, Jacob (ed), *Greening International Institutions* (1996).
- Sands, Philippe, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in Lang, Winfried (ed), *Sustainable Development and International Law* (1995) 53.
- Sands, Philippe (ed), *Greening International Law* (1994).
- Sands, Philippe, 'The Environment, Community and International Law' (1989) 30 *Harvard International Law Journal* 393.
- Sands, Philippe, *Chernobyl: Law and Communication* (1988).
- Sax, Joseph L, *Defending the Environment: A Handbook for Citizen Action* (1970).
- Schachter, Oscar, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54 *American Journal of International Law* 1.
- Schaefer, Andrew, 'Canada-Spain Fishing Dispute (The Turbot War)' (1996-1997) 8 *Georgetown International Environmental Law Review* 437.
- Schiffman, H S 'UNCLOS and Marine Wildlife Disputes: Big Splash or Barely a Ripple?' (2001) 4 *Journal of International Wildlife Law and Policy* 257.
- Schmitt, Michael N, 'Humanitarian Law and the Environment' (2002) 28 *Denver Journal of International Law and Policy* 265.
- Schwebel, Stephen M, 'The Judgment of the International Court of Justice in the *Case Concerning the Gabčíkovo-Nagymoros Project (Hungary/Slovakia)*' in International Bureau of the Permanent Court of Arbitration (ed), *Resolution of International Water Disputes* (2003) 247.
- Schwebel, Stephen M, 'Address to the Plenary Session of the General Assembly of the United Nations' (Speech delivered to the General Assembly of the United Nations, New York, 26 October 1999) <[http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54\\_19991026.htm](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54_19991026.htm)> at 1 July 2005.
- Schwebel, Stephen M, 'Ad Hoc Chambers of the International Court of Justice' (1987) 81 *American Journal of International Law* 831.
- Scobbie, Iain, 'Res Judicata, Precedent and the International Court: A Preliminary Sketch' (1999) 20 *Australian Year Book of International Law* 299.
- Scovazzi, Tullio, 'State Responsibility for Environmental Harm' (2001) 12 *Yearbook of International Environmental Law* 43.
- Scott, Shirley V, 'The Contribution of the LOS Convention's Organisations to its Harmonious Implementation' in Oude Elferink, Alex G and Rothwell, Donald R (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 313.
- Segger, Marie-Claire Cordonier and Gehring, Markus W, 'The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute' (2003) 15 *Journal of Environmental Law* 289.
- Serdy, Andrew and Bliss, Michael, 'Prompt Release of Fishing Vessels: State Practice in the Light of the Cases Before the International Tribunal for the Law of the Sea' in

## Bibliography

- Oude Elferink, Alex G and Rothwell, Donald R (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 273.
- Serdy, Andrew, 'See You in Port: Australia and New Zealand as Third Parties in the Dispute Between Chile and the European Community Over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas' (2002) 3 *Melbourne Journal of International Law* 79.
- Shahabuddeen, Mohamed, *Precedent in the World Court* (1996).
- Shamsey, John, 'ITLOS vs Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute' (2002) 12 *Transnational Law and Contemporary Problems* 513.
- Shany, Yuval, 'The First *MOX Plant* Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures' (2004) 17 *Leiden Journal of International Law* 815
- Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals* (2003).
- Shapiro, M and Stone Sweet, Alec, *On Law, Politics and Judicialization* (2002).
- Shaw, Malcolm, *International Law* (5th ed, 2003).
- Sharp, Peter, 'Prospects for Environmental Liability in the International Criminal Court' (1999) 18 *Virginia Environmental Law Journal* 217.
- Shearer, Ivan, 'Oceans Management Challenges for the Law of the Sea in the First Decade of the 21st Century' in Oude Elferink, Alex G and Rothwell, Donald R (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) 1.
- Shearer, I A, *Starke's International Law* (11th ed, 1994).
- Shelton, Dinah, 'The Environmental Jurisprudence of International Human Rights Tribunals' in Piccolotti, Romina and Taillant, Jorge Daniel (eds), *Linking Human Rights and the Environment* (2003) 1.
- Shelton, Dinah, 'Legal Norms to Promote the Independence and Accountability of International Tribunals' (2003) 2 *Law and Practice of International Courts and Tribunals* 27.
- Shelton, Dinah, 'The Use of Human Rights Tribunals for Environmental Protection' (Paper presented at the 5th Annual Symposium of the International Centre for Environmental Compliance Assessment, Takamatsu, 12-14 December 2003, Japan)
- Shelton, Dinah, *Remedies in International Human Rights Law* (1999)
- Shelton Dinah, 'The Participation of Non-Governmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 611.
- Shelton, Dinah, 'What Happened in Rio to Human Rights' (1992) *Yearbook of International Environmental Law* 75.
- Shihata, I, *The Power of the International Court to Determine Its Own Jurisdiction: Competence de la Competence* (1965).
- Shulte, Constanze, *Compliance with Decisions of the International Court of Justice* (2004).

## Bibliography

- Simma, Bruno, 'The Work of the International Law Commission at Its Fifty-Third Session' (2002) 71 *Nordic Journal of International Law* 123.
- Simma, Bruno, 'Counter-Measures and Dispute Settlement: A Plea for a Different Balance' (1994) 5 *European Journal of International Law* 102.
- Simma, Bruno, 'Self-Contained Regimes' (1985) 16 *Netherlands Yearbook of International Law* 111.
- Simmons, Beth A, 'Compliance with International Agreements' in Ku, Charlotte and Diehl, Paul F (eds), *International Law: Classic and Contemporary Readings* (2003) 181.
- Skeen, Richard, 'Will the WTO Turn Green? The Implications of Injecting Environmental Issues Into the Multilateral Trading System' (2004) 17 *Georgetown International Environmental Law Review* 161.
- Slaughter, Anne-Marie, *A New World Order* (2004).
- Slaughter, Anne-Marie, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.
- Slaughter Burley, Anne-Marie, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205
- Sohn, Louis B, 'The Stockholm Declaration on the Human Environment' (1973) 14 *Harvard International Law Journal* 423.
- Starr, J, 'Water Wars' (1991) 82 *Foreign Policy* 17.
- Stec, Stephen and Eckstein, Gabriel E, 'Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the *Case Concerning the Gabčíkovo-Nagymaros Project*' (1997) 8 *Yearbook of International Environmental Law* 41.
- Stein, Paul L, 'A Specialist Environmental Court: An Australian Experience' in Robinson, David and Dunkley, John (eds), *Public Interest Perspectives in Environmental Law* (1995) 256.
- Stein, Paul L, 'Judges Active in Promoting Environmental Law Capacity Building' (2003) 33 *Environmental Policy and Law* 56
- Stein, Paul L, 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law' (1996) 13 *Environmental Planning Law Journal* 179.
- Stephen, Ninian, 'Environmental Dispute Resolution' (1992) 28 *Australian Zoologist* 10.
- Stephens, Tim, 'Enforcing Australian Fisheries Laws: Testing the Limits of Hot Pursuit in Domestic and International Law' (2004) 15 *Public Law Review* 12.
- Stephens, Tim, 'International Criminal Law and the Response to International Terrorism' (2004) 27 *University of New South Wales Law Journal* 454.
- Stephens, Tim, 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 *International Journal of Marine and Coastal Law* 173.
- Stephens, Tim and Rothwell, Donald R, 'The 'Volga' Case (Russian Federation v Australia)' (2004) 35 *Journal of Maritime Law and Commerce* 283.

## Bibliography

- Stephens, Tim, 'The Right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for What Purpose? The *LaGrand Case*' (2002) 3 *Melbourne Journal of International Law* 143.
- Stephens, Tim, 'A Paper Umbrella Which Dissolves in the Rain? Implications of the *Southern Bluefin Tuna Case* for the Compulsory Resolution of Disputes Concerning the Marine Environment Under the 1982 LOS Convention' (2001) 6 *Asia Pacific Journal of Environmental Law* 297.
- Stone, Christopher D, *Should Trees Have Standing? And Other Essays on Law, Morals, and the Environment* (1996).
- Stone, Christopher D, 'Defending the Global Commons' in Philippe Sands (ed), *Greening International Law* (1994) 34.
- Stone, Julius, 'Non Liquef and the Function of Law in the International Community' (1959) 35 *British Yearbook of International Law* 124.
- Stone Sweet, Alec, 'Judicialization and the Construction of Governance' (1999) 32 *Comparative Political Studies* 147.
- Sturtz, Leah, '*Southern Bluefin Tuna Case*: Australia and New Zealand v Japan' (2001) 28 *Ecology Law Quarterly* 455.
- Sureda, Andrés Rigo, 'Process Integrity and Institutional Independence in International Organizations: The Inspection Panel and the Sanctions Committee of the World Bank' in Boisson de Chazournes, Laurence, Romano, Cesare P R and Mackenzie, Ruth (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (2002) 165.
- Széll, Patrick, 'The Development of Multilateral Mechanisms for Monitoring Compliance' in Lang, Winfried (ed), *Sustainable Development and International Law* (1995) 97.
- Tan, Alan Khee-Jin, 'Forest Fires or Indonesia: State Responsibility and International Liability' (1999) 48 *International and Comparative Law Quarterly* 826.
- Tanaka, Maki, 'Bridging the Gap Between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO Under the Rio Principles' (2003) 30 *Ecology Law Quarterly* 113.
- Tanaka, Yoshifumi, 'Prompt Release in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOS Jurisprudence' (2004) 51 *Netherlands International Law Review* 237.
- Tansley, Arthur G, 'The Use and Abuse of Vegetational Concepts and Terms' (1935) 16 *Ecology* 284.
- Tanzi, Attila and Pitea, Cesare, 'Emerging Trends in the Role of Non-State Actors in International Water Disputes' in International Bureau of the Permanent Court of Arbitration (ed), *Resolution of International Water Disputes* (2003) 259.
- Teck Cominco Metals Ltd, *Living Summary: Trail Ecological Risk Assessment* (2004) <<http://www.teckcominco.com/articles/tr-ecorisk/eranews/2004-09-living.pdf>> at 1 July 2005.
- Thacher, Peter S, 'The Role of the United Nations' in Hurrell, Andrew and Kingsbury, Benedict (eds), *The International Politics of the Environment* (1991) 183.

## Bibliography

- Thirlway, H, 'The Indication of Provisional Measures by the International Court of Justice' in Bernhardt, R, (ed), *Interim Measures Indicated by International Courts* (1994) 1.
- Timoshenko, Alexandre S, 'From Stockholm to Rio: The Institutionalisation of Sustainable Development' in Lang, Winfried (ed), *Sustainable Development and International Law* (1995) 143.
- Tomasevich, Jozo, *International Agreements on Conservation of Marine Resources* (1943, reprinted 1971).
- Tod, M N, *International Arbitration Amongst the Greeks* (1913).
- Torrens, Diana L, 'Locus Standi for Environmental Associations under EC Law – Greenpeace – A Missed Opportunity for the ECJ' (1999) 8 *Review of European Community and International Environmental Law* 336,
- Treves, Tullio, 'Introduction' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 1.
- Treves, Tullio, 'The Role of Dispute Settlement Mechanisms in the Protection of the Marine Environment in Cases Concerning Economic Activities in the Sea and Seabed' in International Bureau of the Permanent Court of Arbitration (ed), *International Investments and Protection of the Environment* (2001) 113
- Treves, Tullio, 'Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice' (1999) 31 *New York University Journal of International Law and Politics* 809.
- Treves, Tullio, 'Dispute Settlement Clauses in the Law of the Sea Convention and their Impact on the Protection of the Marine Environment: Some Observations' (1999) 8 *Review of European Community and International Environmental Law* 6.
- Treves, Tullio, *Le Controversie Internazionali: Nuovi Tendenze, Nuovi Tribunali* (1999).
- Treves, Tullio, 'The Settlement of Disputes According to the Straddling Stocks Agreement of 1995' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 253.
- Treves, Tullio, 'Compulsory Settlement of Disputes: A New Element in the Antarctic System' in Francesco Francioni and Tullio Treves (eds), *International Law for Antarctica* (1996) 603.
- Triggs, Gillian, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507.
- Triggs, Gillian, 'World Trade Organisation: Dispute Resolution and the Environment' (2002) 7 *Asia Pacific Journal of Environmental Law* 43.
- Tunkin, Grigorii I, *Theory of International Law* (1974).
- Umbrecht, Georg C, 'An 'Amicus Curiae Brief' on Amicus Curiae Briefs at the WTO' (2001) *Journal of International Economic Law* 773.
- Unger, R, 'Brandishing the Precautionary Principle Through the Alien Torts Claim Act' (2001) 9 *New York University Environmental Law Journal* 638.
- United Nations Environment Program, *Global Environment Outlook 3* (2002).



## Bibliography

- United Nations Food and Agriculture Organisation, *The State of the World Fisheries and Aquaculture* (2002).
- Van Alstyne, W W, 'The Justiciability of International River Disputes: A Study in the Case Method' [1964] *Duke Law Journal* 307.
- van der Mei, Anne Pieter, 'The New African Court on Human and Peoples' Rights: Toward an Effective Human Rights Protection Mechanism for Africa?' (2005) 18 *Leiden Journal of International Law* 113.
- VanderZwaag, David, 'The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides' (2002) 33 *Ocean Development and International Law* 165.
- van Woudenberg, Nout, 'Compliance Mechanisms: A Useful Instrument' (2004) 34 *Environmental Policy and Law* 185.
- Vespa, M, 'An Alternative to an International Environmental Court? The PCA's Optional Arbitration Rules for Natural Resources and/or the Environment' (2003) 2 *The Law and Practice of International Courts and Tribunals* 295.
- Victor, David G, 'Enforcing International Law: Implications for an Effective Global Warming Regime' (1999) 10 *Duke Environmental Law and Policy Forum* 147.
- Victor, David G, Raustiala, Kal and Skolnikoff, Eugene B (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998).
- Vicuña, Francisco Orrego, *International Dispute Settlement in an Evolving Global Society* (2004)
- Vicuña, Francisco Orrego, 'The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use' in Stokke, Olav Schram (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001) 23.
- Vicuña, Francisco Orrego, *The Changing International Law of High Seas Fisheries* (1999).
- Vigni, Patrizia, 'The Overlapping of Dispute Settlement Regimes: An Emerging Issue of International Law' (2001) XI *The Italian Yearbook of International Law* 139.
- Visek, Richard C, 'Implementation and Enforcement of EC Environmental Law' (1995) 7 *Georgetown International Environmental Law Review* 377.
- Voeffray, François, *L'actio popularis, ou la défense de l'intérêt collectif devant les juridictions internationales* (2004).
- Wates, Jeremy, 'NGOs and the Aarhus Convention' in Tullio Treves et al (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 167.
- Webb, Philippa, 'The Inconvenience of Liability: The Doctrine of *Forum Non Conveniens* in International Environmental Litigation' (2001) 6 *Asia Pacific Journal of Environmental Law* 377.
- Wellens, Karel C, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends' in Barnhoorn, L A N M and Wellens, K C (eds), *Diversity in Secondary Rules and the Unity of International Law* (1995) 3.

## Bibliography

- Werksman, Jacob, 'Designing a Compliance System for the UN Framework Convention on Climate Change' in Cameron, James, Werksman, Jacob and Roderick, Peter (eds), *Improving Compliance with International Environmental Law* (1996) 86.
- Werksman, Jacob, *Greening International Institutions* (1996)
- Wettestad, Jørgen, 'The Vienna Convention and the Montreal Protocol on Ozone-Layer Depletion' in Edward L Miles et al, *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2002).
- Williams, P, 'International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabčíkovo and Nagymaros Dams' (1994) 19 *Columbia Journal of Environmental Law* 1.
- Williams, William, 'Reminiscences of the Bering Sea Arbitration' (1943) 37 *American Journal of International Law* 562.
- Wirth, David A, 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back or Vice Versa?' (1995) 29 *Georgia Law Review* 599.
- Wirth, David A, 'Reexamining Decision Making Processes in International Environmental Law' (1994) 79 *Iowa Law Review* 769.
- Wirth, John D, *Smelter Smoke in North America: The Politics of Transborder Pollution* (2000) 80.
- Wolfrum, Rüdiger and Matz, Nele, *Conflicts in International Environmental Law* (2003).
- Wolfrum, Rüdiger, 'The Role of the International Tribunal for the Law of the Sea' in Nordquist, Myron H and Moore, John N (eds), *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (2000) 369.
- Wolfrum, Rüdiger, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law' (1998) 272 *Recueil des Cours* 9.
- World Commission on Environment and Development, *Our Common Future* (1987).
- World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (2000).
- Wu, C Q, 'A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration' (2002) 3 *Chicago Journal of International Law* 263.
- Yankov, Alexander, 'The Law of the Sea Convention and Agenda 21: Marine Environmental Implications' in Boyle, Alan E and Freestone, David (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 27.
- Young, Oran R, *The Institutional Dimensions of Environmental Change: Fit, Interplay, and Scale* (2002).
- Young, Oran R (ed), *The Effectiveness of International Environmental Regimes* (1999).
- Young, Oran R, *International Governance: Protecting the Environment in a Stateless Society* (1994).
- Zumwalt, A Anna, 'Straddling Stocks Spawn Fish War on the High Seas' (1997) 3 *University of California at David Journal of International Law and Policy* 535

**OTHER SOURCES**

***United Nations Documents***

Decision 1/7 of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN Doc ECE/MP.PP/2/Add.8 (2002).

Decision 1997/2 of the Fifteenth Session of the Executive Body for the Convention on Long-Range Transboundary Air Pollution, *Report of the Fifteenth Session of the Executive Body for the Convention on Long-Range Transboundary Air Pollution*, UN Doc ECE/EB.AIR/53 (1998).

Decision 24/CP.7 of the Conference of the Parties on its Seventh Session, *Report of the Conference of the Parties on its Seventh Session*, UN Doc FCCC/CP/2001/13/Add.3 (2002).

Decision IV/5 of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UN Doc UNEP/Oz.L.Pro.4/15 (1992) (as revised in by Decision X/10 of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, *Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UN Doc UNEP/OzL.Pro.10/9 (1998)).

Decision V/16 of the Fifth Meeting of the Conference of the Parties to the Basel Convention, *Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention*, UN Doc UNEP/CH.5/29 (1999).

*Plan of Implementation of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (2002).

*Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General*, UN Doc A/47/444 (1992).

United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment*, Final Report of the Special Rapporteur, UN Doc E/CN.4/SUB.2/1994/9 (1994).

United Nations Environment Program, *Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States* (1978) 17 ILM 1097.

United Nations Environment Program, *Register of International Treaties and Other Agreements in the Field of the Environment*, UN Doc UNEP/GC 15/Inf.2 (1989).

*2005 World Summit Outcome*, UN Doc A/60/L.1 (2005).

***Other***

*Additional Procedure Adopted under Rule 16(1) of the Working Procedures for Appellate Review*, WTO Doc WT/DS135/9 (2000).

## Bibliography

- Commission for the Conservation of Southern Bluefin Tuna, *Report of the Extended Scientific Committee for the Eighth Meeting of the Scientific Committee*, 1-4 September 2003, Christchurch, <<http://www.ccsbt.org>> at 1 July 2005.
- Decision VII/4 of the Seventh Meeting of the Parties of the Convention on the Protection of the Alps (2002), available at <<http://www.convenzionedellealpi.org>> (in Italian only).
- Draft Convention for the Establishment of an International Court for the Environment* <<http://www.icef-court.org/icef/presentation/statute.htm>> at 1 July 2005.
- EU Directive 2000/60/EC establishing a framework for Community action in the field of water policy, O K No L 327, 21 December 2000, <[www.europa.eu.int/comm/environment/water/water-framework/index\\_en.html](http://www.europa.eu.int/comm/environment/water/water-framework/index_en.html) > at 1 July 2005.
- International Bank for Reconstruction and Development Resolution 93-10 and International Development Association Resolution 93-6* (1993), (1993) 34 ILM 520 ('*IBRD and IDA Inspection Panel Resolutions*').
- International Bank for Reconstruction and Development Resolution 93-10 and International Development Association Resolution 93-6, 22 September 1993*, (1993) 34 ILM 520 ('*IBRD and IDA Inspection Panel Resolutions*'). See also *Operating Procedures, Inspection Panel for the International Bank for Reconstruction and Development and the International Development Association*, 19 August 1994, (1995) 34 ILM 510.
- International Court of Justice, *Communiqué 93/20 on the Establishment of a Permanent Chamber for Environmental Matters* (19 July 1993).
- International Tribunal for the Law of the Sea, *Resolution on the Chamber for Marine Environment Disputes* (2002) <<http://www.itlos.org>> at 1 July 2005.
- IUCN – World Conservation Union, *Draft International Covenant on Environment and Development* (3rd ed, 2004).
- IUCN – World Conservation Union, *Red List of Threatened Species* <<http://www.iucnredlist.org/search/details.php?species=21858>> at 1 July 2005.
- Mitchell, Ronald B, *International Environmental Agreements Database* <<http://iea.uregon.edu>> at 1 July 2005.
- Permanent Court of Arbitration, *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment* (2002) <<http://www.pca-cpa.org/PDF/envconciliation/pdf>> at 1 July 2005.
- Permanent Court of Arbitration, *Optional Rules for the Arbitration of Disputes Relating to Natural Resources and/or the Environment* (2001) <<http://www.pca-cpa.org/ENGLISH/EDR/ENRules.htm>> at 1 July 2005.
- Practice Direction XII* (adopted 30 July 2004) <[http://www.icj-cij.org/icjwww/ibasicdocuments/ibasic\\_text/ibasic\\_practice\\_directions\\_20040730\\_I-XII.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasic_text/ibasic_practice_directions_20040730_I-XII.htm)> at 1 July 2005
- Report of the Secretary-General on the Work of the Organisation* (1993), UN Doc A/48/1 (1993).

*Bibliography*

*Report of the WTO Committee on Trade and Environment*, WTO Doc WT/CTE/1 (1996).

Statement of the Canadian External Affairs Secretary in relation to the *Cherry Point Oil Spill*, (1973) 11 *Canadian Yearbook of International Law* 333.

'Statement of the Free Trade Commission on Non-Disputing Party Participation' (2004) 16 *World Trade and Arbitration Materials* 167.

*Trade and Environment* (14 April 1994) (1994) 33 ILM 1267 (GATT Ministerial Decision).

*Update of WTO Dispute Settlement Cases*, WTO Doc WT/DS/OV/24 (2005).