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Compliance: implementation, enforcement, dispute settlement

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Introduction

Ensuring compliance by members of the international community with their international environmental obligations continues to be a matter of increasing concern. This is evident not only from the attention which the issue received during UNCED, as well as in the negotiation and implementation of recent environmental agreements, but also in the growing number of environmental disputes which have been brought to international judicial bodies. The relevance of environmental concerns to international peace and security was affirmed by the UN Security Council in January 1992 when its members declared

that 'non-military sources of instability in the . . . ecological fields have become threats to international peace and security'.[1] The response to those concerns has included the development of existing mechanisms for implementation, enforcement and dispute settlement (such as the 1993 decision of the ICJ to establish a Chamber for Environmental Matters), as well as new approaches such as the non-compliance mechanisms established under a number of environmental agreements, and the role given to the UN Compensation Commission over environmental claims,[2] and the specialised rules for arbitrating environmental disputes which were promulgated by the Permanent Court of Arbitration in 2001.

Of the reasons proffered for renewed efforts, at least three are especially relevant. First, it is apparent that states are taking on ever more international environmental commitments which are increasingly stringent and which must be complied with. Secondly, the growing demands on access to finite natural resources provides fertile conditions for conflicts over the use of natural resources. And, thirdly, as international environmental obligations increasingly intersect with economic interests, states which do not comply with their environmental obligations are perceived to gain economic advantage from non-compliance. Non-compliance is therefore seen to be important because it limits the effectiveness of legal commitments, undermines the international legal process, and can lead to conflict and instability in the international order. Plainly, non-compliance occurs for different reasons,[3] and it is widely recognised that the underlying causes require further attention so that existing and new international legal obligations are crafted to ensure their effective implementation. At UNCED, attention was focused on mechanisms to *prevent* disputes and to resolve them peacefully when they arise. Subsequent efforts have reflected a desire to address enforcement and dispute settlement in a non-contentious and non-adversarial manner.

Non-compliance can include a failure to give effect to substantive norms (e.g. to limit atmospheric emission of sulphur dioxide or greenhouse gases as required by treaty or to allow transboundary emissions of hazardous substances or gases in violation of any rules of customary law); or to fulfil procedural requirements (e.g. to carry out an environmental impact assessment or to consult with a neighbouring state on the construction of a new plant); or to fulfil an institutional obligation (e.g. to submit an annual report to an international organisation). Non-compliance raises three distinct but related issues relating to implementation, enforcement, and conflict resolution (traditionally referred to by international lawyers as 'dispute settlement'). These are:

[1] Note by the President of the Security Council, 31 January 1992, UN Doc. S23500, 2 (1992).
[2] Chapter 18, p. 890 below.
[3] Non-compliance may occur for a variety of reasons, including a lack of institutional, financial or human resources, and differing interpretations as to the meaning or requirements of a particular obligation. On the practice of the ECJ, see pp. 222–4 below.

1. What formal or informal steps must be taken to implement a state's international legal obligations?
2. What legal or natural person may enforce international environmental obligations of other states?
3. What techniques, procedures and institutions exist under international law to resolve conflicts or settle disputes over alleged non-compliance with international environmental obligations?

Over the years, a range of techniques have been adopted and used to improve compliance with environmental obligations, drawing upon other developments in international law. Today, techniques and practices specific to environmental matters are being developed. Despite the emergence of the concept of 'environmental security',[4] the legal issues relating to the environment concerning implementation, enforcement and conflict resolution are not dissimilar to those of one hundred years ago.[5] Since the *Fur Seals Arbitration* of 1893, numerous environmental disputes have been submitted to international dispute resolution arrangements, and the rate of submission appears to have increased significantly within the past decade. These disputes have addressed a broad range of issues, including: transboundary air pollution;[6] the diversion of the flow of international rivers;[7] conservation of fisheries resources;[8] protection of the marine environment;[9] import restrictions adopted to enforce domestic conservation standards;[10] the relationship between environmental laws and foreign investment protection treaties;[11] access to environmental information;[12] environmental impact assessment;[13] and responsibility for rehabilitation of

[4] See e.g. J. T. Matthews, 'Redefining Security', 68 *Foreign Affairs* 163 (1989); M. Renner, *National Security: The Economic and Environmental Dimensions* (Worldwatch Paper, 1989), 89; A. Timoshenko, 'Ecological Security: Global Change Paradigm', 1 *Colorado Journal of International Environmental Law and Policy* 127 (1990); S. Vinogradov, 'International Environmental Security: The Concept and its Implementation', in A. Carter and G. Danilenko (eds.), *Perestroika and International Law* (1990), 196; G. Handl, 'Environmental Security and Global Change: The Challenge to International Law', 1 *Yearbook of International Environmental Law* 3 (1990).

[5] See the *Fur Seals* Arbitration *(Great Britain* v. *United States)* (1893), chapter 11, pp. 561–6 below.

[6] *Trail Smelter* case, chapter 8, pp. 318–19 below.

[7] *Lac Lanoux Arbitration* (1957), chapter 10, pp. 463–4 below, *Gabcikovo-Nagymaros Project* case, chapter 10, pp. 469–77 below.

[8] *Fisheries Jurisdiction* case (1974), chapter 11, pp. 567–8 below; *Southern Bluefin Tuna* cases, chapter 11, pp. 580–1 below.

[9] *New Zealand* v. *France* (1995), chapter 8, pp. 319–21 below; *MOX* case, chapter 9, p. 436 below.

[10] *Yellow-Fin Tuna* decision (1991), chapter 19, pp. 955–61 below; *Shrimp/Turtle* case, chapter 19, pp. 961–73 below.

[11] *Metalclad* v. *Mexico*, chapter 21, pp. 1066–9 below.

[12] *MOX* case, chapter 9, p. 436 below.

[13] *Gabcikovo-Nagymaros* case, chapter 10, pp. 469–77 below; *MOX* case, chapter 9, p. 436 below.

mined lands.[14] Recent cases illustrate the availability of a growing range of fora for the resolution of disputes over environment and natural resources. In the context of the dispute over the Gabcikovo-Nagymaros barrages, Hungary and Slovakia had explored a range of enforcement and dispute settlement options including unilateral reference to the ICJ, arbitration, conciliation by the EC Commission, and the emergency procedures of the Conference on Security and Co-operation in Europe (CSCE) before they agreed to settle the dispute at the ICJ.[15] The dispute between Ireland and the United Kingdom concerning the MOX plant at Sellafield has been litigated at ITLOS and two separate arbitration tribunals (OSPAR and UNCLOS), and other fora (including the ECJ, the ECHR and the ICJ) were also available. Historically, the available mechanisms were under-utilised, leaving it unclear whether they would be able to deal with the growing range of environmental issues which may require resolution. In the past decade, however, there has been an increasing willingness on behalf of states to invoke these traditional procedures, which have demonstrated an ability to contribute to the resolution of contentious disputes and, in the process, to the development of the rules of international environmental law.

Implementation

States implement their international environmental obligations in three distinct phases. First, by adopting national implementing measures; secondly, by ensuring that national measures are complied with by those subject to their jurisdiction and control; and, thirdly, by fulfilling obligations to the relevant international organisations, such as reporting the measures taken to give effect to international obligations.[16]

[14] *Certain Phosphate Lands in Nauru* case, chapter 12, pp. 666–9 below.

[15] A mechanism for consultation and co-operation in emergency situations was adopted by the Berlin Meeting of the CSCE Council in June 1991. The mechanism comprises a process of exchange of information between the states involved, which if unsuccessful may lead to a special meeting of the Committee of Senior Officials, who may then refer the matter to a meeting at ministerial level. If the process does not resolve the situation the dispute may be referred to the Procedure for Peaceful Settlement of Disputes, involving the Conflict Prevention Centre: see Summary of Conclusion, 30 ILM 1348 (1991), Annexes 2 and 3.

[16] See generally D. Victor, K. Raustiala and E. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments* (1998); T. Zhenghua and R. Wolfrum, *Implementing International Environmental Law in Germany and China* (2001). See also G. Handl, 'Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio', 5 *Colorado Journal of International Environmental Law and Policy* 305 (1994); L. Boisson de Chazournes, 'La mise en oeuvre du droit international dans le domaine de l'environnement', 99 RGDIP 37 (1995); P. Sand, 'Institution Building to Assist Compliance with International Environmental Law: Perspectives', 56 ZaöRV 754 (1996).

National law

Once a state has formally accepted an international environmental obligation, usually following the entry into force of a treaty which it has ratified or the act of an international organisation by which it is bound, it will usually need to develop, adopt or modify relevant national legislation, or give effect to national policies, programmes or strategies by administrative or other measures. Some treaties expressly require parties to take measures to ensure the implementation of obligations,[17] or to take appropriate measures within their competence to ensure compliance with the convention and any measures in effect pursuant to it.[18] Numerous agreements require parties to designate a competent national authority or focal point for international liaison purposes to ensure domestic implementation.[19] The 1982 UNCLOS provides a typical example, its provisions being drawn from different precedents in the field of marine pollution. It includes provisions on implementation of pollution requirements from different sources, and provides specifically for the enforcement by states of their laws and regulations adopted in accordance with the Convention and the implementation of applicable international rules and standards.[20] It also requires states to ensure that recourse is available under their legal system for prompt and adequate compensation for damage caused by marine pollution by persons under their jurisdiction.[21]

Treaty obligations which have not been implemented domestically will usually be difficult to enforce in national courts. EC law provides a notable exception, since it can create rights and obligations enforceable before national courts without being implemented provided that they fulfil certain conditions, such as being clear and unconditional.[22] The failure by EC members to adopt measures implementing EC environmental law has been the subject of enforcement measures taken at the ECJ.[23] In dealing with these cases the ECJ has rejected different arguments by states seeking to justify domestic non-implementation.[24]

[17] 1969 Southeast Atlantic Convention, Art. X(1); 1972 London Convention, Art. VII(1); 1989 Basel Convention, Art. 4(4); 1991 Antarctic Environment Protocol, Art. 13.

[18] 1988 CRAMRA, Art. 7(1). The 1998 Chemicals Convention identifies possible measures to include the establishment of national registers and databases, the encouragement of initiatives by industry, and the promotion of voluntary agreements: Art. 15(1).

[19] 1989 Basel Convention, Art. 5; 2001 Biosafety Protocol, Art. 19.

[20] 1982 UNCLOS, Arts. 213, 214, 216 and 222. [21] Art. 235(2).

[22] EC Treaty, Art. 249 (formerly Article 189); chapter 15, pp. 736–9 below.

[23] See p. 222 below. R. Wagenbaur, 'The European Community's Policy on Implementation of Environmental Directives', 14 *Fordham International Law Journal* 455 (1990); L. Krämer, 'The Implementation of Community Environmental Directives Within Member States: Some Implications of Direct Effect Doctrine', 3 *Journal of Environmental Law* 39 (1991).

[24] See e.g. Case 91/79, *EC Commission* v. *Italy* [1980] ECR 1099, rejecting Italy's defences that the national legislation already contained provisions which to a large extent secured the realisation of the objects of the Directive, that the Directive was *ultra vires*, and that implementation was 'thwarted by the vicissitudes which were a feature of the brief existence

National compliance

Once an obligation has been domestically implemented, the party must ensure that it is complied with by those within its jurisdiction and control. Numerous treaties expressly require parties to ensure such compliance,[25] or to apply sanctions for failing to implement measures.[26] Others specifically provide for the application of criminal penalties or for the 'punishment' of violations.[27] Ensuring national compliance is a matter for the public authorities of each state, although there is much evidence to suggest that domestic compliance with environmental obligations is inadequate and that compliance with international obligations needs to be enhanced.[28] National judges meeting shortly before the World Summit on Sustainable Development adopted the Johannesburg 'Principles on the Role of Law and Sustainable Development', which affirmed their adherence to the 1992 Rio Declaration which laid down the basic principles of sustainable development, affirmed that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are 'crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law', and recognised that 'the rapid evolution of multilateral environmental agreements, national constitutions and statutes concerning the protection of the environment increasingly require the courts to interpret and apply new legal instruments in keeping with the principles of sustainable development'.[29]

Recognising that public authorities in many countries may not be able to ensure compliance, because of a lack of resources or commitment, and

of the seventh legislature of the Italian Parliament, and particularly its premature end': *ibid.*, at 1105.

[25] 1972 Oslo Convention, Art. 15(1); 1973 CITES, Art. VIII(1); 1974 Paris Convention, Art. 12; 1996 Protocol to the London Convention, Art. 10; 1995 Straddling Stocks Agreement, Art. 19.

[26] 1946 International Whaling Convention, Art. IX(1) and (3); 1969 Southeast Atlantic Convention, Art. X(1); 1972 Oslo Convention, Art. 15(3); 1972 London Convention, Art. VII(2); 1989 Basel Convention, Art. 4(4).

[27] 1974 Paris Convention, Art. 12(1); 1989 Basel Convention, Art. 9(5); 1991 Bamako Convention, Art. 9; 2001 Biosafety Protocol, Art. 25(1); ILC Draft Code of Crimes Against the Peace and Security of Mankind, Arts. 22(2)(d) and 26 (chapter 18, pp. 894–6 below; see also Resolution on the Role of Criminal Law in the Protection of Nature and the Environment, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/144/7, paras. 456–62 (1990).

[28] Agenda 21, Chapter 39, para. 39.3(d) and (e); EC Commission, Fifth Environmental Action Programme (1992); chapter 15, n. 107, p. 750 below.

[29] 20 August 2002, available at www.inece.org/wssd_principles.html. The Principles also express the judges' view that 'there is an urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who play a critical role at national level in the process of implementation, development and enforcement of environmental law, including multilateral environmental agreements (MEAs), especially through the judicial process'.

that individuals, groups and business can play a role in ensuring compliance, increasing numbers of states are encouraging private enforcement of national environmental obligations. These are sometimes referred to as 'citizen suits', allowing citizens (and businesses) to enforce national environmental obligations in the public interest. The importance of national remedies to challenge acts which damage the environment or violate environmental obligations has been recognised and is being addressed internationally. Principle 10 of the Rio Declaration states that '[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided'. The EC Commission has recognised that individuals and public interest 'groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped',[30] although the ECJ has not been willing to move away from its traditional and restrictive approach to recognising the rights of individuals and other non-state actors to challenge EC legislative and administrative acts.[31] The 1993 Lugano Convention was the first international agreement to elaborate rules governing access to national courts to allow enforcement of environmental obligations in the public interest: Article 18 requires standing to be granted to environmental organisations to allow them to bring certain enforcement proceedings before national courts.[32]

The 1998 Aarhus Convention goes a great deal further, giving concrete effect to the requirements of Principle 10 of the Rio Declaration on access to justice. Its Article 9(2) establishes an obligation on parties to ensure that members of the public which have a 'sufficient interest' or who claim an 'impairment of a right' shall have access 'to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission' which is subject to the Convention's Article 6. The Convention provides that 'sufficient interest' and 'impairment of a right' are to be determined in accordance with national law and 'consistently with the objective of giving the public concerned wide access to justice', and expressly provides that non-governmental organisations fulfilling certain conditions are deemed to have a 'sufficient interest' and rights capable

[30] EC Commission, Fifth Environmental Action Programme (1992), chapter 15, n. 107, p. 750 below.

[31] See Case C-321/95P, *Greenpeace* v. *EC Commission* 1998 ECR I-6151 (individuals and associations not 'individually concerned' by a Commission decision dispensing structural funds, and no account is to be taken of the 'nature and specific characteristics of the environmental interests' at stake). The Court of First Instance has indicated a desire to adopt a more flexible approach (see Case T-177/01, *Jego-Quere et Cie SA* v. *Commission* [2002] 2 CMLR 44, but the ECJ has rejected the approach (see Case C-50/00P, *Union de Pequenos Agricultores* v. *Council*, [2002] 3 CMLR 1). It may be that the requirements of the 1998 Aarhus Convention (see below) modify the approach taken by the ECJ, or that the matter might be addressed in the constitutional reforms which are underway in 2002–3.

[32] Chapter 18, pp. 933–7 below.

of being impaired.[33] The Convention also provides that members of the public should be able to challenge acts and omission by private persons and public authorities which contravene national provisions relating to the environment, and that all the procedures available should provide adequate and effective remedies (including injunctive relief) and be fair, equitable, timely and 'not prohibitively expensive'.[34]

The question of which state may or must ensure implementation is a difficult one where the environmental obligation relates to a shared natural resource or the global commons.[35] This can lead to conflicts between states over which has jurisdiction over a particular activity or violation.[36] Some treaties allocate enforcement obligations to particular states, and in respect of marine pollution the 1982 UNCLOS is notable for the detailed provisions on national enforcement responsibilities of flag states, port states or coastal states, depending on where a pollution incident occurred.[37] No equivalent treaty rules apply for other matters, such as atmospheric pollution. However, under the 1979 Moon Treaty, the state of registration retains jurisdiction and control over personnel and equipment and is responsible for ensuring that 'national activities are carried out in conformity with the provisions' of the treaty.[38] And under the 1988 CRAMRA each party would have been required to ensure that recourse was available in its national courts for adjudicating liability claims under Article 8 of the Convention (and consistently with Article 7), including the adjudication of claims against any operator it had sponsored.[39]

The UNCLOS rules are detailed and may provide a model for enforcement jurisdiction in other matters. Generally the flag state will be responsible for ensuring that vessels flying its flag or of its registry comply with applicable international pollution rules and standards, and with laws and regulations adopted in accordance with UNCLOS, and for the effective enforcement of such measures 'irrespective of where a violation occurs'.[40] Port states also have important enforcement functions. They may investigate and institute proceedings in respect of a vessel voluntarily within its port or at an offshore terminal for harmful discharges from that vessel outside the internal waters, territorial sea or exclusive economic zone (EEZ) in violation of international rules and

[33] Art. 9(2). Art. 2(5) establishes the conditions for non-governmental organisations, requiring merely that they promote environmental protection and meet 'any requirements under national law'.

[34] Art. 9 (3) and (4). By Art. 9(5) the parties are also to consider establishing appropriate assistance mechanisms to reduce barriers to access to justice.

[35] Chapter 6, p. 240 below (global commons), and p. 238 below (shared natural resources).

[36] On extra-territorial jurisdiction, see chapter 6, pp. 237–41 below.

[37] 1982 UNCLOS, Arts. 217–220.

[38] Arts. 12(1) and 14(1), see chapter 8 below. Similar provisions apply under the 1967 Outer Space Treaty, chapter 8, p. 383 below, Arts. VI and VIII.

[39] Art. 8(10); chapter 14, pp. 716–21 below.

[40] Art. 217(1). See also 1995 Straddling Stocks Agreement, Art. 19.

standards.[41] And they must take measures to prevent vessels from sailing where they have ascertained that the vessel is in violation of applicable international rules and standards relating to seaworthiness which may threaten the marine environment.[42] A coastal state may institute proceedings against vessels within its port for violations of its laws and regulations adopted in accordance with UNCLOS or applicable international rules and standards for environmental violations occurring in its territorial sea or EEZ.[43] Where there are grounds for believing that there is a 'substantial discharge causing or threatening significant pollution of the marine environment', the coastal state also has the right to investigate and institute proceedings against vessels navigating in its territorial sea, to obtain information from vessels navigating in its EEZ, and to undertake inspections of vessels in its EEZ. The coastal state may also institute proceedings – with sanctions including detention – against vessels in its territorial sea or EEZ if there is 'clear, objective evidence' that violation of applicable international rules and standards has occurred which results 'in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state, or to any resources of its territorial sea or exclusive economic zone.[44] UNCLOS does not prejudice the rights of states under international law to take and enforce measures to protect their coastlines or related interests from pollution or a threat of pollution. Such pollution may result from a maritime casualty, including collision or stranding, which may reasonably be expected to have major harmful consequences.[45]

With regard to the sea-bed and ocean floor and its subsoil, beyond the limits of national jurisdiction (known as the 'Area') and which constitutes the 'common heritage of mankind',[46] state parties must ensure that their activities, or the activities of their nationals or those effectively controlled by them or their nationals, are carried out in conformity with Part XI of UNCLOS. State parties will also be subject to rules adopted by the International Sea-bed Authority

[41] Art. 218(1). Proceedings in respect of violations taking place in the internal waters, the territorial sea or the EEZ of another state are, however, subject to certain limitations: see Art. 218(2).

[42] Art. 219. See in this regard the various understandings and agreements on port state controls, including: the 1982 Paris Memorandum of Understanding on Port State Control, as amended (http://www.parismou.org); the 1992 Latin American Agreement on Port State Control of Vessels (http://200.45.69.62/index_i.htm); and the 1994 Memorandum of Understanding on Port State Control in the Asia-Pacific Region (www.tokyo-mou.org/memoran.htm). See generally E. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998); D. Anderson, 'Port States and Environmental Protection', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development* (1999), 325; T. Keselj, 'Port State Jurisdiction in Respect of Pollution from Ships: the 1982 UNCLOS and the MOU', 30 *Ocean Development and International Law* 127 (1999).

[43] Art. 220(1). [44] Art. 220(1), (2), (3), (5) and (6). [45] Art. 221.

[46] Arts. 1(1) and 136. These provisions are not affected by the 1994 Agreement Implementing Part XI of UNCLOS.

concerning pollution and other hazards to the marine environment. and the protection and conservation of natural resources.[47]

The allocation of detailed enforcement powers to ensure compliance is not well developed in respect of many other environmental media involving shared resources. In the absence of specific treaty provisions, the applicable principles arise from general rules of international law concerning enforcement jurisdiction. Given the failure of many states, particularly developing states, to implement their international obligations by reason of lack of financial and other resources, an important development is the linkage now established between the extent to which developing countries meet their treaty obligations, and the provision to them of financial resources. The 1990 amendments to the 1987 Montreal Protocol established a mechanism to 'meet all agreed incremental costs' of developing country parties 'to enable their compliance with the control measures of the Protocol'.[48] The 1992 Climate Change Convention goes further by requiring developed country parties 'to meet the agreed full costs incurred by developing country parties in complying with their [reporting requirements and] agreed full incremental costs' needed by developing country parties for implementing their substantive obligations under the Convention.[49] Similar provisions exist in other agreements, including the 1992 Biodiversity Convention, the 1994 Desertification Convention and the 2001 POPs Convention.[50]

Reporting[51]

The third element of national compliance arises from the requirement that states must usually report national implementing measures. Most environmental agreements expressly require parties to report certain information to the international organisation designated by the agreement. The information to be reported typically includes: statistical information on production, imports and exports;[52] information on emissions or discharges;[53] information on the grant of permits or authorisations[54] including criteria;[55] information on implementation measures which have been adopted;[56] details of decisions taken by

[47] Arts. 139(1) and 145.
[48] Art. I(T) replacing Art. 10 of the 1987 Montreal Protocol, chapter 20, pp. 1031–2 below.
[49] Art. 4(3); chapter 20, pp. 1035–6 below. [50] Chapter 20, p. 1034 below.
[51] Chapter 20, p. 1034 below.
[52] 1987 Montreal Protocol, Art. 7, as amended; 2001 POPs Convention, Art. 15.
[53] 1997 Kyoto Protocol, Art. 7(1).
[54] 1946 International Whaling Convention, Art. VIII(1).
[55] 1972 London Convention, Art. VI(4); 1996 LDC Protocol, Art. 9(4).
[56] 1972 World Heritage Convention, Art. 29(1); 1989 Basel Convention, Art. 13(3)(c); 1992 Climate Change Convention, Art. 12(1); 2000 Biosafety Protocol, Art. 23; 2001 POPs Convention, Art. 15.

national authorities;[57] scientific information;[58] and information on breaches or violations by persons under the jurisdiction or control of the party.[59] Most EC Directives and Regulations also require the EC member states to provide regular information on measures taken to implement their obligations.[60]

These reports may be required annually or bi-annually, or according to some other timeframe.[61] They allow the international organisation and the other parties to assess the extent to which parties are implementing their obligations. It is clear, however, that many states fail to fulfil the basic reporting obligation, which suggests that more substantive obligations may also remain unimplemented. One report considered six environmental treaties requiring periodic reports, and found wide variations in compliance in the early 1990s.[62] Some treaties revealed a strong record: all six parties to the International Whaling Convention required to submit information on their 1989 whale harvests did so,[63] and sixteen of the seventeen parties to the 1988 NO_x Protocol submitted their 1990 report on their emissions in 1987 or another year.[64] By October 1990, fifty-two of the then sixty-five parties to the 1987 Montreal Protocol had responded to the requirement to report information on their consumption of controlled substances in 1986, of which twenty-nine (representing 85 per cent of world consumption) submitted complete data.[65] At the other end of the scale, however, only nineteen of the sixty-four parties to the 1972 London Convention reported on the number and types of dumping permits they issued in 1987,[66] and only thirteen of the fifty-seven parties to MARPOL 73/78 (representing only about 27 per cent of the world's gross shipping tonnage) submitted reports summarising violations and penalties they had imposed in 1989.[67] Finally, just twenty-five of the 104 parties to the 1973 CITES submitted reports summarising their 1989 import and export

[57] 1989 Basel Convention, Art. 13(2)(c) and (d).

[58] 1946 International Whaling Convention, Art. VIII(3). [59] *Ibid.*, Art. IX(4).

[60] Directive 88/609 (large combustion plants), Art. 16; Directive 92/43 (habitats), Art. 17.

[61] See also 1992 Climate Change Convention, requiring initial reports to be submitted within six months of entry into force by OECD countries, within three years of entry into force or upon the availability of financial resources by developing countries, and at their discretion by least-developed countries: Art. 12(5); chapter 8, p. 363 below.

[62] See United States General Accounting Office, 'International Environment: International Agreements Are Not Well Monitored', Report to Congressional Requesters, GAO/RCED-92-43 (1992).

[63] *Ibid.*, 26.

[64] *Ibid.*, 25. This high rate of reporting occurred even though the Protocol did not enter into force until February 1991.

[65] *Ibid.*, 24–5. Concern on lack of reporting led to the establishment in June 1990 of an Ad Hoc Group of Experts on the Reporting of Data: cited in GAO Report, n. 62 above. Reasons found by the Group for incomplete reporting include lack of financial and technical resources, inability to use customs records to track imports and exports because they do not distinguish between different substances, and confidentiality of information.

[66] *Ibid.*, 26. [67] *Ibid.*, 26–7.

certificates for listed endangered species.[68] These figures suggest the limited ability of many countries, particularly developing countries, to meet their reporting requirements. There is no evidence that the situation is improving, although steps are being taken to address the problem. Under the Biodiversity and Climate Change Conventions, financial resources are required to be made available to meet the incremental costs for developing countries of fulfilling their reporting requirements, and this has gone some way towards improving compliance.[69]

International enforcement

Once evidence is available that a state, or a party to a treaty, has failed to implement an international environmental obligation, the question arises as to which persons having international legal personality may enforce that obligation internationally. In this context, 'enforcement' is understood as the right to take measures to ensure the fulfilment of international legal obligations or to obtain a ruling by an appropriate international court, tribunal or other body, including an international organisation, that obligations are not being fulfilled. International enforcement may occur at the instigation of one or more states, or an international organisation, or by non-state actors. In practice, international enforcement usually involves a combination of the three, each acting in different capacities. The extent to which any of these actors may invoke enforcement measures depends on the nature and legal basis of the alleged violation, the subject matter involved, and the international legal obligations at issue. This aspect of enforcement is essentially about the standing required to bring international claims.

Enforcement by states

As the principal subjects of international law, states have the primary role in enforcing rules of international environmental law. To be in a position to enforce a rule of international environmental law, a state must have standing, and to have standing it must be able to show that it is, in the words of the International Law Commission (ILC), an 'injured state'. Article 42 of the ILC's 2001 Articles on State Responsibility provides:

> A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
> (a) that State individually; or
> (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

[68] *Ibid.*, 27–8. [69] Chapter 20, pp. 1034–6 below.

(i) Specially affects that State; or
(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.[70]

The rights concerning the first category include those arising from: a bilateral treaty; a multilateral treaty where particular performance is incumbent under the treaty as between one party and another; a unilateral commitment made by one state to another; or a rule of general international law which may give rise to individual obligations as between two states (for example, rules concerning riparian states and the non-navigational uses of international watercourses).[71] Rights arising under the second category are considered by the ILC to include a case of pollution of the high seas in breach of Article 194 of UNCLOS which may particularly impact on one or several states whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed and hence considered to be specially affected,[72] or a nuclear free zone treaty or any other treaty 'where each parties' performance is effectively conditioned upon and requires the performance of each of the others'.[73]

The ILC Articles also envisage that a state other than an 'injured state' is entitled to invoke the responsibility of another state if:

(a) The obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group; or
(b) The obligation breached is owed to the international community as whole.[74]

In cases involving environmental damage, at least three situations are to be distinguished. The first is where a state permits activities which cause damage to its own environment; the second is where a state permits activities which cause damage to the environment of another state; and the third is where a state permits or causes damage to the environment in an area beyond national jurisdiction.[75]

[70] ILC Articles on State Responsibility, Pt 2, Art. 5(1), *Report of the ILC to the United Nations General Assembly*, UN Doc. A/56/10 (2001). See also the commentary in J. Crawford, *The ILC's Articles on State Responsibility* (2002), 255–60.

[71] See Commentaries on the Articles, Report of the International Law Commission on the Work of its Fifty-Third Session, *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10* (A/56/10), chap.IV.E.1, Art. 42 (p. 297).

[72] *Ibid.*, at 299. [73] *Ibid.*

[74] Art. 48. The remedy which a non-injured state may make is limited to cessation of the internationally wrongful act, assurances and guarantees of non-repetition, and the performance of the obligation of reparation in the interest of the injured state or of the beneficiaries of the obligation breached: see Art. 49(2).

[75] For a most helpful discussion (and table), see C. Stone, *The Gnat is Older than Man: Global Environment and Human Agenda* (1993), 33 *et seq.*

Damage to a state's own environment

A number of international environmental agreements commit parties to protect environmental resources located exclusively within their territory, for example the conservation of non-migratory species[76] or habitats[77] or watercourses[78] located within their territories. In these circumstances, other parties to the agreement could claim to be an injured state such as to allow them – at least in theory – to bring an international claim. In practice, this has not happened: it is only where the interference with the environmental resource crosses a national boundary that one or more states have felt compelled to act. Exceptionally, in the EU context the EC Commission will institute proceedings for non-compliance with EC environmental rules even in the absence of transboundary consequences.[79]

Damage to the environment of another state

In situations involving damage to its environment, or consequential damage to its people or their property or other economic loss, a state will not find it difficult to claim that it is an 'injured state' and that it may bring an international claim. In the *Trail Smelter* case, the United States invoked its right not to be subjected to the consequences of transboundary air pollution from sulphur emissions in Canada and to bring a claim against Canada for having violated its rights. As a riparian state and a party to an international agreement with France, in the *Lac Lanoux Arbitration* Spain relied upon *prima facie* rights to challenge France over proposed works which it alleged would violate its right to use the waters of the River Carol under certain conditions.[80] Similar considerations apply in respect of the *Gabcikovo-Nagymaros* dispute submitted by Hungary and Slovakia to the ICJ for a determination of rights on the basis of a bilateral treaty between those two states and 'principles of general international law'.[81] Australia, in the *Nuclear Tests* case, argued that French nuclear tests deposited radioactive fallout on Australian territory which violated its sovereignty and impaired its independent right to determine the acts which should take place within its territory.[82] And Ireland, in the *MOX* case, claimed that it was injured by transboundary movements of radioactive substances introduced into the Irish Sea by the United Kingdom in violation of its international commitments.[83]

Damage to the environment in areas beyond national jurisdiction

Not all cases will be as straightforward as the *Trail Smelter* case, however. In the *Nuclear Tests* cases, brought by Australia and New Zealand against France calling on the latter to halt its atmospheric nuclear testing in the South Pacific

[76] Chapter 11, below. [77] Chapter 11 below.
[78] Chapter 10 below. [79] See pp. 193–5 below.
[80] Chapter 10, pp. 463–4 below. [81] Chapter 10, pp. 469–77 below.
[82] Chapter 8, pp. 319–21 below. [83] Chapter 9, p. 436 below.

region, the claim raised a more complicated legal question than the allegation of a violation of sovereignty by the deposit of radioactive fallout in its territory: did Australia and New Zealand have the right to bring a claim to the ICJ on the basis of a violation of an obligation owed *erga omnes* to all members of the international community to be free from nuclear tests generally or in violation of the freedom of the high seas?[84] Similar issues had been raised in the *Fur Seals* case.[85] Both cases raised the issue of whether a state had standing to bring an environmental claim to prevent damage to an area beyond national jurisdiction, even if it had not itself suffered any material damage. This raises the possibility of bringing an action on the basis of obligations which are owed *erga omnes*, either on the basis of a treaty or on the basis of customary law. As a general matter, where one party to a treaty or agreement believes that another party is in violation of its obligations under that treaty or agreement, it will have the right, under the treaty or agreement, to seek to enforce the obligations of the party alleged to be in violation, even if it has not suffered material damage.[86] In most cases involving a violation of a treaty obligation, however, the applicant state is likely to have been induced into bringing a claim because it has suffered some form of material damage and not because it wishes to bring a claim to protect the interests of the international community.[87] Such an example was Mexico's claim against the United States under the GATT over the US import ban on yellow-fin tuna caught by Mexican vessels on the high seas in violation of United States fisheries laws.[88]

For breaches of treaty obligations, the right of a state to enforce obligations will usually be settled by the terms of the treaty. Various human rights treaties permit any party to enforce the obligations of any other party by bringing a claim before the relevant treaty organs.[89] The EC Treaty allows a member state which considers that another member state has failed to fulfil an EC obligation, including an environmental obligation, to bring the matter before the ECJ.[90] Although this right has been relied upon on numerous occasions to threaten court proceedings, it appears to have resulted in a decision by the ECJ on just one occasion, when France successfully brought proceedings against the United Kingdom for unlawfully having enforced domestic legislation setting a minimum mesh size for prawn fisheries.[91] Under EC law, there is also no need to show that the claimant state has suffered damage: the mere violation of EC law is sufficient to allow standing. Thus a failure by a member state to carry out an environmental impact assessment as required under Directive

[84] See p. 188 below. [85] Chapter 11, pp. 561–6 below.
[86] *The Wimbledon* (1923) PCIJ Ser. A, No. 1.
[87] See for example the proceedings brought by Australia and New Zealand against Japan in the *Southern Bluefin Tuna* cases, chapter 11, pp. 580–1 below.
[88] Chapter 19, pp. 955–61 below. [89] ECHR, Art. 24, chapter 7, p. 299 below.
[90] EC Treaty, Art. 227 (formerly Article 170); see p. 223 below.
[91] Case 141/78, *France* v. *United Kingdom* [1979] ECR 2923.

85/337 would allow any other member state to bring an action to the ECJ in accordance with Article 227 (formerly Article 170) of the EC Treaty even if the environmental consequences might not be noticed beyond the country required to carry out the assessment. Under EC law, each member state has an actionable legal interest in the proper fulfilment by every other member state of its environmental obligations. Given that the environment is, in many instances, a shared natural resource in the protection of which each member of the international community has an interest, compelling policy arguments can be raised to apply the rationale underlying the EC approach to the international legal protection of the environment generally.

The 1995 Straddling Stocks Agreement has introduced innovative and far-reaching provisions in its Part VI (on compliance and enforcement). Article 19 requires flag states to ensure compliance with sub-regional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks.[92] Article 20 establishes arrangements for international co-operation in enforcement. These include the requirement that, where a vessel is alleged to have been engaged in unauthorised fishing in an area under the jurisdiction of a coastal state, the flag state must, at the request of the coastal state concerned, 'immediately and fully' investigate the matter.[93] Moreover, state parties which are members of a regional or sub-regional fisheries management organisation or participants in regional or sub-regional management arrangements may take action to deter vessels which have engaged in activities which undermine or violate the conservation measures established by the organisation or arrangement from fishing on the high seas until appropriate action is taken by the flag state.[94] Article 21 addresses sub-regional and regional co-operation in enforcement. It provides that a state party which is a member of a regional or sub-regional fisheries management organisation or a participant in a regional or sub-regional management arrangement may board and inspect fishing vessels flying the flag of another party to the 1995 Agreement (whether or not that party is a member of the organisation or a participant in the arrangement) in any high seas area covered by an organisation or arrangement, for the purpose of ensuring compliance with conservation and management measures.[95] Article 21 goes on to provide detailed rules on the enforcement obligations of the flag state and the rights of the state party to the 1995 Agreement, particularly with regard to 'serious violations', including the requirement that actions taken other than by flag states must be proportionate to the seriousness of the violation.[96]

[92] The flag state is required, *inter alia*, to enforce measures irrespective of where violations occur and ensure that where serious violations have been established the vessel involved does not engage in high seas fishing operations until all outstanding sanctions have been complied with.

[93] 1995 Straddling Stocks Agreement, Art. 20(7). [94] Art. 20(8). [95] Art. 21(1).

[96] Art. 21(16). 'Serious violations' are defined in Art. 21(11).

The situation in general international law is less well developed, although there is a move in the direction taken by the EC under some recent environmental treaties and in international practice. Thus, New Zealand's 1995 application to the ICJ challenging France's resumption of underground nuclear tests was premised on the view that it would be unlawful for France to conduct such tests before it had carried out an environmental impact assessment as required (it was argued) by international law.[97] A failure by a party to the 1987 Montreal Protocol to fulfil its obligations under that treaty entitles any other party to the Protocol to enforce the obligation by invoking the non-compliance or dispute settlement mechanisms under the Protocol, without having to show that it had suffered material damage as a result of the alleged failure.[98] The 1989 Basel Convention similarly provides that any party 'which has reason to believe that another party is acting or has acted in breach of its obligations' under the Convention may inform the Secretariat and the party against whom the allegations are made.[99] Most other environmental treaties are less explicit, establishing dispute settlement mechanisms which will settle the question of enforcement rights in accordance with the provisions available under that treaty or related instruments. Some treaties specifically preclude their application to the global commons. The 1991 Espoo Convention, for example, precludes parties from requesting an environmental impact assessment or other measures in respect of harm to the global commons.[100]

Whether a state has, in the absence of a specific treaty right such as those under the Montreal Protocol, a general legal interest in the protection of the environment in areas beyond its national jurisdiction such as to allow it to exercise rights of legal protection on behalf of the international community as a whole (sometimes referred to as *actio popularis*) is a question which remains difficult to answer in the absence of state practice. This may happen in a situation where the activities of a state were alleged to be causing environmental damage to the global commons, such as the high seas, the seabed beyond national jurisdiction, outer space or perhaps the Antarctic, or to living resources found in or passing through those areas. In such cases, the question is which states, if any, have the right to enforce such international legal obligations as may exist to avoid causing environmental damage to an area of the global commons?

The matter has been considered in passing by the ICJ on two occasions, and by some of the ICJ judges in a third case. In the *South West Africa (Preliminary Objections)* case, the ICJ stated that, 'although a right of this kind [*actio popularis*] may be known to certain municipal systems of law, it is not known to international law as it stands at present; nor is the Court able to regard it as

[97] *Request for an Examination of the Situation* (1995) ICJ Reports 288 at 291.
[98] See pp. 198–9 below.
[99] 1989 Basel Convention, Art. 19; the information is then to be submitted to the parties.
[100] Chapter 16, pp. 814–17 below.

imported by the "general principles of law" referred to in Article 38, paragraph 1(c), of its Statute'.[101] However, a majority of judges in the *Barcelona Traction* case implicitly recognised the possibility of what might be considered to be an *actio popularis* under international law where an obligation exists *erga omnes*. The ICJ held that:

> an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.[102]

In the *Nuclear Tests* cases, four judges in their joint Dissenting Opinion (Judges Ortyeama, Dillard, Jimenez de Arechega and Sir Humphrey Waldock) identified the conditions in which the *actio popularis* might be argued:

> If the materials adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the precise character and content of that rule and, in particular, whether it confers a right on every state individually to prosecute a claim to secure respect for the rule. In short, the question of 'legal interest' cannot be separated from the substantive legal issue of the existence and scope of the alleged rule of customary international law. Although we recognise that the existence of a so-called *actio popularis* is a matter of controversy, the observations of this Court in the *Barcelona Traction, Light and Power Company, Limited* Case suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.[103]

Despite the fact that the notion of *actio popularis* and rights and obligations *erga omnes* may be treated as distinct but related concepts, this Dissenting Opinion suggests that the two are closely linked. There has been little judicial consideration of what rights and obligations exist *erga omnes*, although the lists cited usually include obligations arising from the outlawing of acts of aggression and of genocide and relating to the protection of fundamental human rights.[104] Some support has been expressed by commentators for the view that obligations owed *erga omnes* might extend to environmental damage in areas beyond

[101] *South West Africa* case (1966) ICJ Reports 47.

[102] *Barcelona Traction Company* case (*Belgium* v. *Spain*) (1970) ICJ Reports 4 at 32.

[103] *Nuclear Test* case, (1974) ICJ Reports 253 at 369–70. Cf. Judge De Castro: 'The Applicant has no legal title authorizing it to act as spokesman for the international community and ask the Court to condemn France's conduct': *ibid.*, 390. See also Judge Gros (*Ibid.*, 290) and Judge Petren (*ibid.*, 224).

[104] See Oppenheim, vol. I, 5; and M. Ragazzi, *The Concept of International Obligation Erga Omnes* (1997).

national jurisdiction,[105] and support for this view might also be found in the ILC's previous classification of a 'massive pollution' of the atmosphere or of the seas as an international crime.[106] It has also been suggested that obligations *erga omnes* could be created by the actions of a limited number of states.[107]

There thus appears to be some support favouring the right of a state to bring an action in its capacity as a member of the international community to prevent significant damage from occurring to the environment in areas beyond its national jurisdiction. Although most discussions focus on damage occurring in the global commons, there may be equally compelling policy reasons for allowing the *actio popularis* concept to apply also in respect of damage occurring to the environment within another state's jurisdiction. To the extent, then, that a rational legal argument can be made in favour of the *actio popularis*, in respect of which international environmental obligations could it be relied upon? At this stage, it is most likely to be successfully invoked in a case involving very significant damage to the environment, perhaps even at the level of 'massive pollution' or harm. Likely candidates would probably include those environmental obligations that have been associated with the 'common concern' or 'common heritage' principles.[108] They might therefore include the protection of the global environment from significant harm (Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration) and rights established by treaty which relate to, *inter alia*, protection of the high seas, the climate system, the ozone layer, biodiversity (including fisheries), plant genetic resources and, to a lesser extent, wetlands and cultural property, as well as in respect of environmental matters which are associated with human rights obligations.

On a more cautious note, it should be remembered that not all international organisations or their non-compliance bodies are likely to favour the *actio popularis* concept. The GATT Dispute Settlement Panel in the *Yellow-Fin Tuna*

[105] See Brownlie, calling for a liberal approach to the standing issue in such circumstances: I. Brownlie, 'A Survey of International Customary Rules of Environmental Protection', in L. Teclaff and A. Utton (eds.), *International Environmental Law* (1975), 5; J. Charney, 'Third State Remedies for Environmental Damage to the World's Common Spaces', in F. Francioni and T. Scovazzi, *International Responsibility for Environmental Harm*, (1991) 149 at 157; K. Leigh, 'Liability for Damage to the Global Commons' (paper presented at an OECD Symposium on Liability for Nuclear Damage, Helsinki, September 1992), 25. On the suggestion that a coastal state is obliged to the world at large to prevent pollution of the territorial sea, see D. O'Connell, *The International Law of the Sea* (1984), vol. 2, 988–9.

[106] Draft Articles on State Responsibility, Art. 19, Pt I, *Yearbook of the International Law Commission* (1980-II), Pt 2, 30; see chapter 18, pp. 874–5 below. See also 1998 Statute of the International Criminal Court, Art. 8(b)(iv).

[107] See Oppenheim, vol. 1, 5, citing the *Reparations for Injuries* case (1949) ICJ Reports 185, and the *Namibia* case (1971) ICJ Reports 56.

[108] On 'common concern' and related concepts, see chapter 6, p. 287 below.

case specifically rejected the claim by the United States that it was entitled to take measures to protect dolphins on the high seas, although in that case the Panel applied GATT law and not public international law, and no evidence was presented by the United States that the dolphins were protected or endangered under international law.[109] The decision of the WTO Appellate Body in the *Shrimp/Turtle* case, recognising that the United States had a legitimate interest in migratory sea-turtles which were internationally endangered, marks a shift towards recognition of the *actiò popularis* concept, although in that case it is important to recall that the species of sea turtle in question (if not the turtles actually harmed) were known to be located from time to time in United States waters.[110] International law is in this respect still finding its centre of gravity, and states have not generally sought to assert a legal right to act on behalf of the whole international community in the protection of environmental issues on the basis of customary law or national law. Prior to the *Shrimp/Turtle* case, where they have sought to assert a legal right to act on behalf of the whole international community, as in the early *Fur Seals Arbitration* and the *Yellow-Fin Tuna* case, they have been rebuffed on the ground that they were seeking to apply *national* laws extra-territorially. In both of the latter cases, the result might have been different if the complainant states had relied upon, and could prove the existence of, a rule of customary international law, as Australia and New Zealand sought to do in 1973 in the *Nuclear Tests* cases.

In many respects, the discussion of *actio popularis* at the international level is similar to that which is taking place at the national level. In international affairs, the function of a state might be compared to that of an attorney general in national law. These national discussions suggest a further limitation on the likelihood of actions being brought by public authorities to enforce the environmental rights of the community as a whole. The views of one scholar on the clear limitations of an attorney general's ability to enforce rules to protect the environment on behalf of the community as a whole are equally applicable to international matters:

> Their statutory powers are limited and sometimes unclear. As political creatures, they must exercise the discretion they have with an eye towards advancing and reconciling a broad variety of important social goals, from preserving morality to increasing their jurisdiction's tax base. The present state of our environment, and the history of cautious application and development of environmental protection laws long on the books, testifies that the burdens of an attorney general's broad responsibility have apparently not left much manpower for the protection of nature.[111]

[109] Chapter 19, pp. 955–61 below. [110] Chapter 19, pp. 961–73 below.

[111] C. Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects', 45 *Southern California Law Review* 450 (1972).

The reluctance of states to enforce obligations towards the protection of the environment is, regrettably, supported by many examples. One leading example is the failure of any state to seek to enforce compliance by the former USSR with its international legal obligations arising out of the consequences of the accident at the Chernobyl nuclear power plant in 1986.[112] This and other examples suggest that it is unlikely that the same states would seek to enforce obligations owed to the global commons, the violation of which may only lead to indirect or nominal harm to the state. This suggests the need for an increased enforcement role for international organisations, or other members of the international community, particularly where the mere attempt to enforce obligations may establish a precedent which could subsequently apply to the enforcing state.

Enforcement by international organisations

Whilst international organisations play an important legislative role in the development of international environmental law, their enforcement function is limited. International organisations are international legal persons which may seek to protect their own rights and enforce the obligations that others have towards them.[113] Sovereign interests have, however, led states to be unwilling to transfer too much enforcement power to international organisations and their secretariats, although there are some indications that this reluctance is being overcome.

Early examples of limited enforcement roles granted to international organisations include: the right of the River Danube Mixed Commission to 'work out agreed measures' for the regulation of fishing in the Danube;[114] the right of certain international fisheries institutions to 'recommend' international enforcement measures or systems;[115] and the right of the International Commission for the Protection of the Rhine Against Pollution to regularly compare the draft national programmes of the parties to ensure that 'their aims and

[112] Chapter 18, pp. 887–9 below.

[113] See *Reparations for Injuries* case, (1949) ICJ Reports, 174, where in an advisory opinion the ICJ determined that the UN had an 'undeniable right' to 'demand that its Members fulfil the obligations entered into by them in the interest of the good working of the Organisation' and the capacity to claim adequate reparation for a breach of these obligations, and held that 'fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognised by them alone, together with the capacity to bring international claims'.

[114] 1958 Danube Fishing Convention, Art. 12(1).

[115] 1969 Southeast Atlantic Convention, Art. X(3); 1978 Northwest Atlantic Fisheries Convention, Art. XI(5); 1982 Convention for the Conservation of Salmon in the North Atlantic Ocean, Art. 4(2).

means coincide'.[116] Marginally more ambitious is the obligation of the CITES Secretariat, when it is satisfied that information it has received indicates that certain endangered species are being affected adversely by trade in specimens, to communicate that information to the relevant party or parties, which may then lead to the matter being reviewed by the next conference of the parties, which may make whatever recommendations it deems appropriate.[117]

Developments for the protection of the marine environment and the Antarctic environment foresee an enhanced enforcement role for international organisations. The approach of the 1992 Oil Fund Convention is particularly ambitious, since it establishes and endows the Fund with legal personality in the laws of each party and gives it rights and obligations, including being a party in legal and enforcement proceedings before the national courts of that party.[118] The 1982 UNCLOS also introduces innovative arrangements by endowing some of its institutions with a range of enforcement powers. Thus, the Council of the International Sea-Bed Authority can: 'supervise and co-ordinate the implementation' of Part XI of UNCLOS and 'invite the attention of the Assembly to cases of non-compliance'; institute proceedings on behalf of the Authority before the Sea-Bed Disputes Chamber in case of non-compliance; issue emergency orders 'to prevent serious harm to the marine environment arising out of activities in the Area'; and direct and supervise inspectors to ensure compliance.[119] A Legal and Technical Commission, one of the Council's organs, will be entitled to make recommendations to the Council on the institution of proceedings and the measures to be taken following any decision by the Sea-Bed Disputes Chamber.[120]

The Antarctic Mineral Resources Commission, which would have been established under the 1988 CRAMRA, could draw to the attention of all parties any activity which affected the implementation of CRAMRA or compliance by any party, as well as any activities by a non-party which affected implementation.[121] The Commission could also designate observers,[122] and 'ensure the effective application' of the provisions in the Convention concerning notification, reporting of mineral prospecting, and keeping under review the conduct of Antarctic mineral resource activities with a view to safeguarding the protection of the Antarctic environment in the interest of all mankind.[123]

[116] 1976 Rhine Chemical Convention, Art. 6(3).
[117] 1973 CITES, Art. XIII. [118] 1992 Oil Pollution Fund Convention, Art. 2(2).
[119] 1982 UNCLOS, Art. 162(2)(a), (u), (v), (w) and (z); the Authority is granted international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes: Art. 176.
[120] Art. 165(2)(i) and (j).
[121] Art. 7(7) and (8); chapter 14, pp. 716–21 below. [122] Art. 12(1)(b).
[123] Art. 21 (1)(f) and (x). The 1988 CRAMRA also provides for the establishment of regulatory committees, the functions of which relate, *inter alia*, to monitoring and inspection of exploration and development activities: Art. 31(1)(d) and (f).

The 1988 CRAMRA will not come into force since being 'replaced' by the 1991 Antarctic Environment Protocol, the main environmental institution for which there is a Committee for Environmental Protection.[124] The Committee's enforcement role under the 1991 Protocol is more limited than that envisaged for the Commission under CRAMRA: its Committee will provide advice and adopt recommendations on matters such as the effectiveness of measures taken, the application and implementation of environmental impact assessment procedures, and the state of the Antarctic environment.[125] The advice and recommendations are to be drawn upon fully by the Antarctic Treaty Consultative Meetings in adopting measures under the 1959 Antarctic Treaty for implementation of the Protocol.[126] The Committee is not, however, granted any formal enforcement powers.

The 1992 OSPAR Convention also goes some way towards establishing a limited role for the Commission it creates to ensure compliance. Under Article 23, entitled 'Compliance', the Commission has two functions. First, it must 'assess' compliance with the Convention by parties, and make any decisions and recommendations on the basis of the reports submitted by the parties.[127] Secondly, when appropriate, the Commission may:

> decide upon and call for steps to bring about full compliance with the Convention, and decisions adopted thereunder, and promote the implementation of recommendations, including measures to assist a contracting party to carry out its obligations.[128]

Although these provisions do not allow the Commission to take measures such as court proceedings in national courts, or arbitration proceedings, they go beyond the provisions of many other international environmental agreements. Other arrangements endow particular organisations with enforcement or quasi-enforcement functions. In relation to weapons agreements, the UN Security Council may 'take action in accordance with the [UN] Charter' if the consultation and co-operation procedure established under the relevant treaties does not remove doubts concerning fulfilment of obligations under certain nuclear weapons treaties.[129] More generally, many of the institutions established by environmental treaties are required, as their primary task, to keep under review the relevant treaty and to promote its effective implementation.[130] This general function could be interpreted, over time and under the right conditions, to allow institutions to play an enforcement role.

No discussion of international enforcement powers would be complete without mention of the EC Commission, which must, under Article 211 (formerly

[124] Art. 11; see chapter 14, pp. 721–6 below. [125] Art. 12(1)(a), (d) and (j).
[126] Art. 10(1) and (2). [127] Art. 23(a); see chapter 9, pp. 411–12 below. [128] Art. 23(b).
[129] 1971 Nuclear Weapons Treaty, Art. III(4); 1972 Biological and Toxic Weapons Convention, Art. VI.
[130] 1979 Berne Convention, Art. 14(1); 1992 Climate Change Convention, Art. 7(2).

Article 155) of the EC Treaty, ensure that the provisions of the EC Treaty and the measures taken by the institutions (i.e. secondary legislation) are applied. Article 226 (formerly Article 169) of the EC Treaty provides that:

> If the Commission considers that a member state has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations.

If the member state concerned does not comply with the opinion within the period laid down by the Commission, the Commission may bring the matter before the European Court of Justice (ECJ). It has done so on many occasions.

Before the Commission can bring a member state before the ECJ it must first present its case and evidence to the member state and request observations. The member state then has an opportunity to make observations, following which the Commission will deliver a 'reasoned opinion'. This allows a full airing of the differences between the Commission and the member state and often allows the matter to be resolved before the case is actually brought to the ECJ. In environmental matters, the Commission has frequently and controversially used its powers under Article 226 (formerly Article 169). In 1982, the Commission commenced sixteen infringement proceedings against member states under the former Article 169; by 1990, that number had risen to 217 infringement proceedings.[131] In 2001, the Commission brought seventy-one cases to the ECJ against member states under Articles 226 and 228, and delivered 197 reasoned opinions.[132] At any one time, the Commission is likely to have several dozen matters pending under Article 226, and has to date brought more than two hundred cases to the ECJ alleging violations of EC environmental laws.[133]

The Commission can also apply to the ECJ for interim measures under Article 243 (formerly Article 186) of the EC Treaty – a form of interlocutory relief well established in EC jurisprudence and quite often employed, for example, in competition and anti-trust cases. The Commission must show that it has a good arguable case, that the need for relief is urgent and that irreparable damage to the EC interest will be done if the order is not granted. The member state can defend itself by establishing that it will suffer irreparable harm if the order is made. The Commission does not have to give a cross-undertaking in damages in the event that it ultimately loses the case. In Case 57/89, *EC Commission* v. *Germany*, the ECJ considered the circumstances in which it would be prepared to prescribe necessary interim measures in environmental cases.[134] The case concerned the construction in Germany of a reservoir and related site, and the Commission sought a declaration that the construction violated Article 4(1) of

[131] See EC Commission, Eighth Report to the European Parliament on the Enforcement of Community Law (1991).

[132] EC Commission, Third Annual Survey on the Implementation and Enforcement of Community Environmental Law (2001), 6 (http://europa.eu.int/comm/environment/law/third_annual_survey_en.pdf).

[133] See p. 222 below. [134] [1989] ECR 2849.

the 1979 Wild Birds Directive, and the adoption of interim measures to suspend the work until the ECJ had given its decision on the main application. The ECJ held that for a measure of this type to be ordered the application must state the circumstances giving rise to the urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures.[135] The ECJ rejected the application on the grounds that the Commission had failed to prove urgency: the application had been submitted after the project was well under way and the interim measures had not been sought until a large part of the work had already been partially completed, and it could not be shown that 'it [was] precisely the next stage in the construction work which will cause serious harm to the protection of birds'.[136]

Enforcement by non-state actors[137]

According to traditional rules of public international law, non-state actors are not international legal persons except within the limited confines of international human rights law and its associated fields. It is still difficult to find many textbooks on international law which make any reference to the role of environmental and other non-state actors in the international environmental legal process, although it is widely recognised that they have become in many areas, and particularly in the field of international environmental law, *de facto* international actors who are, in limited circumstances, endowed with *de jure* rights. In practice, non-state actors play a central role in the development and application of international environmental law.[138] Environmental organisations have been involved in the international implementation and enforcement process although their primary role continues to be at the national level, through political means or by recourse to administrative or judicial procedures for enforcing national measures adopted by a state in implementing its international treaty and other obligations.[139]

Enforcement in the national courts

'Judicial Application of International Environmental Law', 7 RECIEL 1–67 (1998) (special issue); M. Anderson and P. Galizzi, *International Environmental Law in National Courts* (2001).

UNCED endorsed a stronger role for the non-governmental sector in enforcing national environmental laws and obligations before national courts and

[135] *Ibid.*, 2854. [136] *Ibid.*, 2855.

[137] D. Shelton, 'The Participation of NGOs in International Judicial Proceedings', 88 AJIL 611 (1994); P. Sands, 'International Law, the Practitioner and "Non-State Actors"', in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (2000), 103–24; P. Kalas, 'International Environmental Dispute Resolution and the Need for Access by Non-State Entities', 12 *Colorado Journal of International Environmental Law and Policy* 191 (2001).

[138] Chapter 3, p. 112 above. [139] See below.

tribunals, as reflected in Agenda 21 and the Rio Declaration,[140] and now applied in the 1998 Aarhus Convention.[141] This occurred in the context of earlier treaties and agreements which recognised and encouraged their role, particularly where individuals were the victims of pollution or environmental damage in a transboundary context. These earlier efforts sought either to establish principles governing equal access to national courts by victims of transfrontier pollution, or to establish the jurisdiction of courts in the event of transboundary incidents.[142] The 1974 OECD Council Recommendation on Principles Concerning Transfrontier Pollution prepared the ground for the adoption of more detailed principles to ensure the legal protection of persons who suffer transfrontier pollution damage.[143] The 1976 OECD Council Recommendation on Equal Right of Access in Relation to Transfrontier Pollution identified the constituent elements of a system of equal right of access.[144] According to the Recommendation, these were a set of rights recognised by a country in favour of persons who are affected or likely to be affected in their personal or proprietary interests by transfrontier pollution originating in that country. They include rights relating to access to information and participation in hearings and enquiries, and 'recourse to and standing in administrative and judicial procedures' to prevent pollution, have it abated, or obtain compensation for the damage caused.[145] These general rights were further elaborated the following year by a more detailed OECD Council Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution.[146]

The non-binding OECD instruments are supplemented by a range of treaty obligations which address equal access or the jurisdiction of courts over transboundary disputes. The 1974 Nordic Environmental Protection Convention allows any person who is affected or may be affected by a nuisance caused by 'environmentally harmful activities' in another contracting state to bring before the appropriate court or administrative authority of that state the question of the permissibility of such activities, including the questions of compensation and measures to prevent damage.[147] The 1974 Nordic Convention also provides for the appointment of a supervisory authority in each state 'to be entrusted with the task of safeguarding general environmental interests in so

[140] Agenda 21, Chapter 27, para. 27.13; Principle 10, Rio Declaration.
[141] See p. 176 above.
[142] A distinct aspect is the situation in which a transnational corporation headquartered or based in one state is challenged for the environmental or health consequences of its acts in another state, even where no transboundary pollution (in the classical sense) has occurred. For a review of three such cases (*Ok Tedi*, *Thor Chemicals* and *Connelly*), see J. Cameron and R. Ramsey, 'Transnational Environmental Disputes', 1 *Asia Pacific Journal of Environmental Law* 5 (1996).
[143] OECD Doc. C(74)224.
[144] OECD Doc. C(76)55 (Final) (1976).
[145] Annex, paras. 1 and 2.
[146] OECD Doc. C(77)28 (Final) (1977).
[147] Art. 3.

far as regards nuisances arising out of environmentally harmful activities in another contracting state', including the right to institute proceedings before or be heard by the courts or administrative authority of another contracting state.[148] The supervisory authority of the state in which damage occurs is also required to facilitate on-site inspections to determine such damage.[149]

An enforcement role for individuals is envisaged by several treaties establishing international rules on civil liability. In relation to the jurisdiction of national courts, these fall into two categories: those treaties requiring victims to bring proceedings before the courts of the state in which the transboundary pollution originated, and those allowing victims to choose either the court of the state in which the pollution originated or the courts of the state in which the damage was suffered. The nuclear liability conventions adopted in the 1960s fall into the former category.[150] They require victims of nuclear damage to make their claims before courts which may be several thousands of miles away from the area where the damage occurred, thus imposing an onerous burden. Moreover, they do not expressly allow for claims for environmental damage, although negotiations are currently underway to extend the definition of damage to include environmental damage.[151] The oil pollution conventions adopted a decade or so later also provide support for the enforcement role of individuals, and are more accessible to individuals since they allow victims to claim before the courts of any contracting state in which an incident has caused pollution damage.[152]

The second category of conventions ensuring a role for non-state enforcement establish private international law rules allocating jurisdiction to national courts over a range of civil and commercial matters, including disputes arising out of the law of tort. These generally allow victims a choice of courts. Although they were not prepared with environmental pollution and disputes in mind, they can apply to transboundary environmental disputes. The 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1968 Brussels Convention), to which EC member states alone may become parties, has a number of purposes, including the free circulation of judgments throughout the EC, and has established jurisdiction rules for civil and commercial matters.[153] Under Article 5(3) of the Convention (and now Regulation 44/2001), jurisdiction in matters 'relating to tort, delict

[148] Art. 4. [149] Art. 10.

[150] 1960 Paris Convention, Art. 13; 1963 Vienna Convention, Art. XI(1); see chapter 18, pp. 906–12 below.

[151] Chapter 18, pp. 906 and 908 below.

[152] 1969 CLC (as amended), Art. IX(1); 1992 Oil Pollution Fund Convention, as amended, Art. 7(1); chapter 18, pp. 913 and 915 below.

[153] Brussels, 27 September 1968, in force 1 February 1973;, OJ C189, 28 July 1990, 2, 77, Art. 1; 8 ILM 229 (1969). See now Council Regulation 44/2001 (EC) on jurisdiction and enforcement of judgments in civil and commercial matters, OJ L12, 16 January, 1.

or quasi-delict' is conferred on the courts of the place 'where the harmful event occurred'. In *Handelskwekerij GJ Bier* v. *Mines de Potasses d'Alsace*, the ECJ was asked to interpret 'where the harmful event occurred' in a case in which the defendant was alleged to have discharged over 10,000 tonnes of chloride every twenty-four hours into the Rhine River in France but the damage was suffered by horticultural businesses in the Netherlands.[154] The Dutch plaintiffs wished to bring proceedings in the Netherlands rather than in France. On an Article 177 preliminary reference request from the Appeal Court of The Hague, the ECJ held that Article 5(3) should be interpreted 'in such a way as to acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it'.[155] This allows victims of transboundary pollution in EC member states to choose the jurisdiction in which they wish to bring environmental cases which could be classified as tortious, delictual or quasi-delictual in nature. In 1988, the Brussels Convention was supplemented by the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, which applies similar rules to relations between EC and EFTA countries.[156]

International enforcement

At the international level, opportunities for non-state actors to play an enforcement role are limited. Under some regional human rights treaties, individual victims, including non-governmental organisations, may bring complaints directly to an international body. Thus, the European Convention on Human Rights allows any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the rights in the Convention by one of the parties to bring a case to the European Court of Human Rights.[157]

Similar provisions exist in the Optional Protocol to the 1966 International Covenant on Civil and Political Rights for communications by individuals to the Human Rights Committee, alleging breaches of the Covenant.[158] The International Covenant on Economic, Social and Cultural Rights, however, does

[154] Case 21/76, *Handelskwekerij G. J. Bier* v. *Mines de Potasse d'Alsace* [1976] ECR 1735.

[155] *Ibid.*

[156] 16 September 1988, in force 1 January 1992, 28 ILM 620 (1989); Art. 5(3) is in the same terms as Art. 5(3) of the Brussels Convention. On the relationship between the EC and EFTA states, see chapter 15, p. 747 below.

[157] Art. 34 of the ECHR (as amended by the Eleventh Protocol) (formerly 1950 ECHR, Art. 25(1)); all parties to the Convention have now accepted the right of individual petition. See also the 1969 American Convention on Human Rights, Arts. 44 and 45 and the 1981 African Charter on Human and Peoples' Rights, Art. 55. On the relationship between these human rights instruments and the protection of the environment, see chapter 7, pp. 293–305 below.

[158] *Ibid.*

not grant individuals and non-governmental organisations such rights.[159] The UN Commission on Human Rights[160] cannot receive individual complaints concerning human rights violations, although its subsidiary Sub-Commission on the Prevention of Discrimination and Protection of Minorities can receive complaints about a consistent pattern of gross and reliably attested violations of human rights, and then refer them to the Commission on Human Rights.[161]

Non-governmental organisations and individuals have played an active role in supporting the enforcement role of the EC Commission, usually by submitting complaints to that institution concerning the non-implementation by member states of their environmental obligations. In 1991, for example, more than four hundred complaints were received by the EC Commission concerning non-compliance with environmental obligations, leading to a number of formal investigations by the Commission.

It is in their capacity as watchdogs that environmental organisations play an important role in the development, application and enforcement of international environmental law. Environmental organisations have long been active in monitoring and seeking to enforce compliance by states of international environmental laws and standards. In this context, development, application and enforcement are so closely intertwined that it may be misleading to attempt to separate the tasks. In practice, environmental organisations seek to influence government positions at the national and international levels, to participate in international decision-making and law-making, and to enforce rules of international environmental law (at both the national and international levels).[162] Examples of the way in which these actors have sought to promote or give effect to international obligations include – at the international level – their role in bringing about requests from the WHO and the UN General Assembly for an advisory opinion on the legality of the use of nuclear weapons from the ICJ,[163] and informal assistance to states in the preparation (and even presentation) of a case.[164] At the national level, environmental organisations are increasingly active in bringing legal proceedings to enforce international environmental

[159] Chapter 7, p. 293 below. However, under ECOSOC Council Res. 1988/4, non-governmental organisations in consultative status with the ECOSOC may submit to the Committee on Economic and Social Rights written statements which might contribute to the full and universal realisation of the rights under the Covenant.

[160] Chapter 7, p. 295 below.

[161] *Ibid.*; established by the Commission on Human Rights under the authority of ECOSOC Res. 9(II) (1946).

[162] P. Sands, 'International Law, the Practitioner and "Non-State Actors"', in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (2000), 103–24.

[163] Chapter 6, p. 236 below.

[164] For example, the 1995 request to the ICJ by New Zealand to examine the resumption by France of nuclear testing ((1995) ICJ Reports 288) was brought by the government in part as a result of public and NGO pressure, including the preparation by at least one NGO of draft pleadings.

obligation.[165] In recent years, they have also gained a degree of access to some international proceedings from which they were previously excluded, in the sense that they may be able to file *amicus curiae* submissions.[166]

International conflict resolution (settlement of disputes)

Introduction

A range of international procedures and mechanisms are available to assist in the pacific settlement of environmental disputes. Article 33 of the UN Charter identifies the traditional mechanisms, including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the parties' own choice.[167]

These techniques can be divided into two broad categories: diplomatic means according to which the parties retain control over the dispute insofar as they may accept or reject a proposed settlement (negotiation, consultation, mediation, conciliation); and legal means which result in legally binding decisions for the parties to the dispute (arbitration and judicial settlement). Recourse to regional arrangements and international organisations as mediators and conciliators provides something of a middle way: the legal consequences of any decision taken by the institution will depend on the treaty establishing the institution. Many of the earliest environmental treaties did not provide for any dispute settlement mechanisms whether of a diplomatic or legal nature, or of a voluntary or mandatory character.[168] Initially, the trend was towards the use of informal and non-binding mechanisms, such as negotiation and consultation, supplemented by the use of more formal mechanisms, such as conciliation, arbitration and judicial settlement. More recently, there has been a move towards the development of new techniques to establish non-contentious mechanisms. Recent treaties provide parties with a range of options for settling disputes and encouraging implementation. The 1992 Climate Change Convention

[165] See e.g. *R.* v. *Secretary of State for Trade and Industry, ex parte Greenpeace* [2000] 2 CMLR 94 (ruling that the 1992 Habitats Directive applies beyond UK territorial seas to areas over which the UK exercises sovereign rights).

[166] *United States – Import of Certain Shrimp and Shrimp Products*, AB-1998-4, 12 October 1998, para. 110 (Appellate Body overturning a ruling by a WTO panel that 'accepting non-requested information from non-governmental sources is incompatible with the [WTO Dispute Settlement Understanding]', at para. 110; *Methanex* v. *United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001 (Tribunal ruling that by Art. 15(1) of the UNCITRAL rules it has power to accept written *amicus* submissions), at www.iisd.org/pdf/methanex_tribunal_first_amicus_decision.pdf.

[167] The 1958 High Seas Conservation Convention, Art. 9(1), specifically refers to Art. 33 of the UN Charter.

[168] 1940 Western Hemisphere Convention; 1946 International Whaling Convention.

envisages no fewer than three mechanisms to assist in dispute resolution or non-implementation: a Subsidiary Body for Implementation, to provide assistance in implementation; a multilateral consultative process to address questions regarding implementation in a non-confrontational way; and the settlement of remaining disputes in more traditional ways by negotiation, submission to arbitration or the ICJ, or international conciliation.[169]

Diplomatic means of dispute settlement

Negotiation and consultation

The technique of negotiation has been used to resolve a number of environmental disputes. In the *Fisheries Jurisdiction* case, the ICJ set forth the basic objectives underlying negotiation as an appropriate method for the resolution of a dispute. The ICJ held that the objective of negotiation should be:

> the delimitation of the rights and interests of the parties, the preferential rights of the coastal state on the one hand and the rights of the applicant on the other, to balance and regulate equitably questions such as those of catch-limitation, share allocations and 'related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions'.[170]

The ICJ also set out conditions establishing that future negotiations should be conducted:

> on the basis that each must in good faith pay reasonable regard to the legal rights of the other . . . thus bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation, and having regard to the interests of other states which have established fishing rights in the area. It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law.[171]

Environmental treaties refer, more or less as a matter of standard practice, to the need to ensure that parties resort to negotiation and other diplomatic channels to resolve their disputes before making use of other more formal

[169] 1992 Climate Change Convention, Arts. 10, 13 and 14. See also 1985 Vienna Convention, Art. 11; 1989 Basel Convention, Art. 20; 1992 Biodiversity Convention, Art. 27 and Annex II. See also the 1997 Kyoto Protocol, Arts. 15, 16 and 19; in addition, Art. 18 of the Kyoto Protocol provides for approval of procedures and mechanisms to address cases of non-compliance: see below.

[170] (1974) ICJ Reports 3 at 31.

[171] *Ibid.*, 33. The ICJ also invoked its earlier statement in the *North Sea Continental Shelf* cases, that 'it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles': *ibid.*, 47.

methods.[172] Since negotiations of this type invariably take place behind closed doors, it is difficult to identify specific examples involving the successful resolution of claims and disputes by negotiation. One case involved the settlement between Canada and the USSR concerning damage caused by the disintegration over Canada of Cosmos 954, a nuclear-powered satellite launched by the USSR. The negotiated settlement was agreed in the context of the USSR's consideration of the question of damage 'in strict accordance with the provisions' of the 1972 Space Liability Convention to which both countries were parties.[173]

Consultation between states is also encouraged by environmental treaties as a technique to avert and resolve disputes and potential disputes between states. In the *Lac Lanoux* case, the arbitral tribunal held that France had a duty to consult with Spain over certain projects likely to affect its interests, and that, in this context,

> the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.[174]

Specific examples of environmental treaties requiring consultation in certain situations include: development plans which may affect the natural resources of another state;[175] measures to prevent the pollution of coastlines from oil pollution incidents on the high seas;[176] the authorisation of ocean dumping in emergency situations;[177] pollution by certain substances from land-based sources;[178] the permissibility of environmentally harmful activities;[179] and generally problems in applying a treaty or the need for and nature of remedial measures for breaches of obligation.[180] The 1979 LRTAP Convention requires early consultations to be held between parties 'actually affected by or exposed to a significant risk of long-range transboundary air pollution' and the parties in which a significant contribution to such pollution originates.[181]

[172] 1973 CITES, Art. XVIII; MARPOL 73/78, Art. 10; 1972 Space Liability Convention, Art. IX; 1974 Baltic Convention, Art. 18(1); 1979 LRTAP Convention, Art. 13; 1985 Vienna Convention, Art. 11(1) and (2); 1992 Climate Change Convention, Art. 14; 1992 Biodiversity Convention, Art. 27(1).

[173] By a protocol dated 2 April 1981, the USSR agreed to pay, and Canada agreed to accept, C$3 million in final settlement: chapter 18, pp. 896–8 below.

[174] *Lac Lanoux Arbitration*, 24 ILR 101 at 128 (1957).

[175] 1968 African Nature Convention, Art. XIV(3).

[176] 1969 CLC, Art. III(a).

[177] 1972 London Convention, Art. V(2).

[178] 1974 Paris Convention, Art. 9(1).

[179] 1974 Nordic Environmental Protection Convention, Art. 11.

[180] 1976 Pacific Fur Seals Convention, Art. XII; 1976 ENMOD Convention, Art. V(1) and Annex, providing for the establishing of a Consultative Committee of Experts.

[181] 1979 LRTAP Convention, Art. 5.

Mediation, conciliation, fact-finding and international institutions

Where negotiations and consultations fail, a number of environmental treaties endorse mediation[182] and conciliation[183] (or the establishment of a committee of experts[184]) to resolve disputes, all of which involve the intervention of a third person. In the case of mediation, the third person is involved as an active participant in the interchange of proposals between the parties to a dispute, and may even offer informal proposals. There are few reported examples of mediation being relied upon to resolve environmental disputes. Of recent note, however, is the outcome of a mediation conducted under the auspices of the OAS, relating to a long-standing territorial dispute between Guatemala and Belize. In September 2002, the two facilitators appointed by the OAS put forward proposals, approved by the two states and Honduras, for a resolution of the dispute, including the establishment of an ecological park and a tri-state sub-regional fisheries commission.[185]

In the case of conciliation, the third person assumes a more formal role and often investigates the details underlying the dispute and makes formal proposals for the resolution of the dispute. Examples of conciliation include the role of the International Joint Commission established by Canada and the United States in the 1909 Boundary Waters Treaty,[186] which fulfils a combination of quasi-judicial, investigative recommendatory and co-ordinating functions. The now defunct European Commission on Human Rights also performed conciliation functions: once a petition had been referred to it, it was required to ascertain the facts, to place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention, and, where no such friendly settlement was reached, to draw up a report on the facts and state its opinion as to whether the facts found disclosed a breach of obligations under the

[182] 1968 African Nature Convention, Art. XVIII (referring disputes to the Commission of Mediation, Conciliation and Arbitration of the OAU); 1976 European Convention for the Protection of Animals Kept for Farming Purposes, Art. 10; 1982 UNCLOS, Art. 284 and Annex V, Section 1; 1985 Vienna Convention, Art. 11(2).

[183] 1963 Vienna Convention, Optional Protocol Concerning the Compulsory Settlement of Disputes, Art. III; 1974 Paris LBS Convention, Art. 21 (conciliation by a Commission); 1985 Vienna Convention, Art. 11(4) and (5) (providing for the establishment of a conciliation commission); 1992 Biodiversity Convention, Art. 27(4) and Annex II, Part 2; 1992 Climate Change Convention, Art. 14(5) to (7); 1998 Chemicals Convention, Art. 20; 2001 POPs Convention, Art. 18. See also the Permanent Court of Arbitration, Optional Rules for Conciliation of Diputes Relating to Natural Resources and the Environment, 16 April 2002 (http://pca-cpa.org/PDF/envconciliation.pdf).

[184] 1949 FAO Mediterranean Fisheries Agreement, Art. XIII; 1951 International Plant Protection Convention, Art. IX; 1952 North Pacific Fisheries Convention, Protocol, paras. 4 and 5 (special committee of scientists).

[185] Available at www.caricom.org/belize-guatemala.htm.

[186] 1909 Boundary Waters Treaty, especially Arts. VIII and IX.

Convention.[187] The Dispute Settlement Panels established under the GATT performed a similar function of conciliation.[188] Under Article XXIII(2) of the GATT, the Panels assisted the parties to a dispute to reach a solution and, failing that, made an objective assessment of the matter before them, including an objective assessment of the facts of the case and the applicability of and conformity with the GATT.[189] If requested by the contracting parties, the Panels made such other findings, including recommendations, as would assist them in making recommendations or in giving rulings.

The 1997 Watercourses Convention provides that where negotiation fails to lead to a successful outcome the parties may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them.[190] Where a dispute has not been settled within six months of a request for negotiations, any of the parties to the dispute may submit the dispute to impartial fact-finding in accordance with the Convention, unless the parties otherwise agree, and the fact-finding commission is to submit its report to the parties concerned setting forth its findings (with reasons) and such recommendations as it deems appropriate for an equitable resolution of the dispute, which the parties concerned must consider in good faith.[191] Under the 1985 Vienna Convention, the 1992 Biodiversity Convention and the 2001 Treaty on Plant Genetic Resources, conciliation will be used if the parties to the dispute have not accepted compulsory dispute settlement procedures by arbitration or the ICJ.[192]

The political organs of international institutions and regional agencies also play an important role in the settlement of disputes. Such organs may be granted an express mandate to consider disputes between two or more parties to the treaty.[193] Alternatively, they may attempt to resolve disputes between parties in the absence of a specific mandate to do so. Examples of the latter include the 1985 decision of the conference of the parties to CITES concerning the application of the Convention to endangered species acquired prior to the entry into force of the Convention,[194] and the 1991 decision of the Executive Committee of the 1971 Oil Pollution Fund Convention to exclude claims by Italy against the Fund for non-quantifiable damage to the marine environment.[195]

[187] 1950 ECHR, Arts. 28 and 31(1).

[188] See also dispute settlement under the NAFTA, chapter 19 below.

[189] See BISD 26S/210, Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted 28 November 1979. On panel decisions relating to environmental matters, see chapter 19, pp. 952–85 below.

[190] Art. 33(2). [191] Art. 33(3).

[192] 1985 Vienna Convention, Art. 11; 1992 Biodiversity Convention, Art. 27; 2001 Treaty on Plant Genetic Resources, Art. 22.

[193] See e.g. 1982 Jeddah Convention, Art. XXIV(2); 1988 Agreement on the Network of Aquaculture Centres in Asia and the Pacific, Art. 19(1).

[194] See chapter 10, p. 514 below. [195] See *The Haven Incident*, chapter 18, pp. 920–2 below.

Another example of this approach includes the 1974 Nordic Environmental Protection Convention, which provides for the establishment of a Commission upon the demand of any party to give an opinion on the permissibility of environmentally harmful activities which entail considerable nuisance in another party.[196] The 1985 South Pacific Nuclear Free Zone Treaty establishes a control system which includes a complaints procedure involving the possible convening of a Consultative Committee to consider complaints and evidence of breach of obligations, with certain inspection powers, and the right to report fully to members of the South Pacific Forum and to give its decision as to whether a breach of obligation has occurred.[197] Under the 1991 Espoo Convention, if the parties cannot agree on whether a proposed activity is likely to result in a 'significant adverse transboundary impact', any party involved in the disagreement may submit that question to an Inquiry Commission.[198] The Inquiry Commission, comprising three members, will advise and prepare an opinion based on 'accepted scientific principles' on the likelihood of significant adverse transboundary impact, and may take all appropriate measures to carry out its functions.[199] Finally, the procedure established under the Conference on Security and Co-operation in Europe provides an alternative means of achieving conciliation.[200]

Non-compliance procedures

E. Barratt-Brown, 'Building a Monitoring and Compliance Regime Under the Montreal Protocol', 16 *Yale Journal of International Law* 519 (1991); M. Koskenniemi, 'Breach of Treaty or Non-Compliance: Reflections on the Enforcement of the Montreal Protocol', 3 *Yearbook of International Environmental Law* 123 (1992); J. Werksman, 'Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime', 36 ZaöRV 750 (1996); J. Werksman, 'Compliance and the Kyoto Protocol', 9 *Yearbook of International Environmental Law* 48 (1998); O. Yoshida, 'Soft Enforcement of Treaties: The Montreal Non-Compliance Procedure and the Functions of the Internal International Institutions', 10 *Colorado Journal of International Environmental Law and Policy* 95 (1999); M. Fitzmaurice and C. Redgwell, 'Environmental Non-Compliance Procedures and International Law', 31 NYIL 35 (2000); P. Kalas and A. Herwig, 'Dispute Resolution under the Kyoto Protocol', 27 *Ecology Law Quarterly* 53 (2001)

One of the most significant developments in the field of international environmental law has been the emergence of non-compliance procedures under various multilateral environmental agreements, occupying a function between conciliation and traditional dispute settlement. Since the early 1990s, a significant number of treaties have established subsidiary bodies to deal with compliance and disputes over non-compliance. The first was the

[196] Arts. 11 and 12. [197] Art. 8 and Annex 4. [198] Art. 3(7).
[199] Appendix IV. [200] See n. 15 above.

non-compliance procedure established under the 1987 Montreal Protocol, including the Implementation Committee established by the second meeting of the parties to the Protocol.[201] Under the non-compliance procedure, any party which has reservations about another party's implementation of its obligations under the Protocol may submit its concerns in writing to the secretariat, with corroborating information.[202] The secretariat will then determine, with the assistance of the party alleged to be in violation, whether it is unable to comply with its obligations under the Protocol, and will transmit the original submission, its reply and other information to the Implementation Committee.[203] The Implementation Committee has a membership of ten parties (originally five) elected by the meeting of the parties on the basis of equitable geographical distribution for a two-year period. Its functions are to receive, consider and report on submissions made by any party regarding another party's implementation of its obligations under the Protocol, and any information or observations forwarded by the secretariat in connection with the preparation of reports based on information submitted by the parties pursuant to their obligations under the Protocol.[204] The Committee may, at the invitation of the party concerned, undertake information gathering in the territory of that party, and will also maintain an exchange of information with the Executive Committee of the Multilateral Fund related to the provisions of financial and technical co-operation to developing country parties.[205] The Committee is to try to secure 'an amicable resolution of the matter on the basis of respect for the provisions of the Protocol' and report to the meeting of the parties, which may decide upon and call for steps to bring about full compliance with the Protocol.[206] The fourth meeting of the parties also adopted an indicative list of measures that might be taken by a meeting of the parties in respect of non-compliance, which comprise:

- appropriate assistance;
- issuing cautions; and
- suspension (in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty) of specific rights and privileges under the Protocol.[207]

[201] See Decision II/5 (non-compliance), Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.2/3, 29 June 1990; see now Decision IV/5 and Annexes IV and V, adopting the non-compliance procedure; Report of the Fourth Meeting of the Parties, UNEP/OzL.Pro.4/15, 25 November 1992, 32 ILM 874 (1993); see chapter 8, pp. 356–7 below. The 1992 Climate Change Convention provides for the possible establishment of a 'multilateral consultative process, available to the parties on their request, for the resolution of questions regarding the implementation of the Convention': Art. 13.

[202] Annex IV, para. 1. [203] Paras. 2 to 4.

[204] Para. 7(a) and (b). Decision IV/5 and Annex IV; see n. 201 above.

[205] Para. 7(d) and (e). [206] Paras. 8 and 9.

[207] Fourth Meeting of the Parties to the 1987 Montreal Protocol, n. 201 above. Decision IV/5.

The Committee's report must not contain confidential information and is to be made available to any person upon request.[208] Significantly, resort to the non-compliance procedure does not prejudice the dispute settlement provisions available under Article 11 of the 1985 Vienna Convention, which include negotiation, good offices, mediation, arbitration, submission to the ICJ and the establishment of a conciliation commission.[209]

Following the developments under the Montreal Protocol, non-compliance procedures have been established (or are in the process of being established) under other multilateral environmental agreements, including the 1989 Basel Convention,[210] the 1991 VOC and 1994 Sulphur Protocols to the LRTAP Convention,[211] the 1996 Protocol to the London Convention,[212] the 1998 Chemicals Convention,[213] the 2000 Biosafety Protocol,[214] and the 2001 POPs Convention.[215] The two most significant arrangements, however, are reflected in the mechanisms established under the 1997 Kyoto Protocol and the 1998 Aarhus Convention.

Article 18 of the Kyoto Protocol calls on the conference of the parties serving as the meeting of the parties to the Kyoto Protocol to approve, at its first session, 'appropriate and effective procedures and mechanisms to address cases of non-compliance', with the caveat that any procedures and mechanisms entailing binding consequences 'shall be adopted by means of an amendment to [the] Protocol'. In 2001, at the seventh conference of the parties, the parties adopted a decision on the compliance regime for the Kyoto Protocol, which is among the most comprehensive and rigorous established thus far.[216] The compliance regime consists of a Compliance Committee made up of two branches: a Facilitative Branch and an Enforcement Branch. The Facilitative Branch aims to provide advice and assistance to parties to promote compliance; the Enforcement Branch has the power to apply consequences to parties not meeting their commitments. Both branches are to be composed of ten members, including one representative from each of the five official UN regions, one from the small island developing states, and two each from Annex I and non-Annex I parties. Decisions of the Facilitative Branch may be taken by a three-quarters majority, but decisions of the Enforcement Branch require, in addition, a double majority of both Annex I and non-Annex I parties. The Committee also meets in a plenary composed of members of both branches, and a Bureau supports its

[208] Paras. 15 and 16.

[209] M. Koskenniemi, 'Breach of a Treaty or Non-Compliance? Reflections on Enforcement of the Montreal Protocol', 3 *Yearbook of International Environmental Law* 123 (1992).

[210] See COP Decision V/16, Mechanism for promoting implementation and compliance of the Basel Convention, UNEP/CH.5/29, 10 December 1999.

[211] Decision 1997/2, LRTAP Convention Executive Body (http://www.unece.org/env/lrtap/conv/report/eb53_a3.htm). For examples of decisions of the Implementation Committee, see Executive Body decisions 2001/3 (Italy), 2001/2 (Finland), 2001/1 (Norway), 2000/1 (Slovenia).

[212] Art. 11. [213] Art. 17. [214] Art. 34. [215] Art. 17.

[216] Decision 24/CP.7, FCCC/CP/2001/13/Add.3, 10 November 2001.

work. Certain commitments fall under the remit of one or the other branch. The requirement, for example, of the flexibility mechanisms[217] to be 'supplemental' to domestic action is under the purview of the Facilitative Branch, as is the commitment of Annex I parties to strive to minimise adverse impacts on developing countries. The Facilitative Branch also provides 'early-warning' of cases where a party is in danger of not complying with its emission targets. In response to problems, the Facilitative Branch can make recommendations and also mobilise financial and technical resources to help parties comply. The Enforcement Branch, for its part, is responsible for determining whether an Annex I party is not complying with its emission targets or reporting requirements, or has lost its eligibility to participate in the mechanisms. It can also decide whether to adjust a party's inventory or correct the compilation and accounting database, in the event of a dispute between a party and the expert review team. The remedies it may decide on are to be aimed at the 'restoration of compliance to ensure environmental integrity'. In the case of compliance with emission targets, Annex I parties are granted 100 days after the expert review of their final annual emissions inventory has finished to remedy any shortfall in compliance. If, at the end of this period, a party's emissions are still greater than its assigned amount, it must make up the difference in the second commitment period, plus a penalty of 30 per cent. It will also be barred from 'selling' under emissions trading and, within three months, it must develop a compliance action plan detailing the action it will take to ensure that its target is met in the next commitment period. Any party not complying with reporting requirements must develop a similar plan, and parties that are found not to meet the criteria for participating in the mechanisms will have their eligibility withdrawn. In all cases, the Enforcement Branch will make a public declaration that the party is in non-compliance and will also make public the consequences to be applied. A potential compliance problem can be raised either by an expert review team, or by a party about its own compliance, or by a party raising concerns about another party. After a preliminary examination, the matter will be considered in the relevant branch of the Compliance Committee. The Compliance Committee will base its deliberations on reports from expert review teams, the subsidiary bodies, parties and other official sources.[218] Competent intergovernmental and non-governmental organisations may submit relevant factual and technical information to the relevant branch.

[217] Chapter 8, p. 372 below.

[218] The Marrakesh Accords set out more detailed additional procedures with specific timeframes for the Enforcement Branch, including the opportunity for a party facing the Compliance Committee to make formal written submissions and request a hearing where it can present its views and call on expert testimony. In the case of non-compliance with emission targets, the party can also lodge an appeal to the conference of the parties/meeting of the parties if that party believes it has been denied due process.

In October 2002, the parties to the Aarhus Convention established a Compliance Committee to review compliance by the parties with their obligations under the Convention.[219] The Committee consists of eight members, elected from candidates nominated by parties and signatories and – innovatively – non-governmental organisations. The functions of the Committee are to consider any submission, referral or communication made to it, to prepare a report on compliance with or implementation of the provisions of the Convention, and to monitor, assess and facilitate the implementation of and compliance with reporting requirements. In consultation with the party concerned, the Committee may provide advice and facilitate assistance to individual parties regarding the implementation of the Convention. Subject to agreement with the party concerned the Committee may also:

- make recommendations to the party concerned;
- request the party concerned to submit a strategy to the Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy; and
- in cases of communications from the public, make recommendations to the party concerned on specific measures to address the matter raised by the member of the public.

The meeting of the parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention, including declarations of non-compliance, issuing cautions, suspending special rights and privileges under the Convention, and taking such other non-confrontational, non-judicial and consultative measures as may be appropriate. The Committee may receive submissions from parties and referrals from the secretariat. Breaking new ground, the Committee may also receive communications from the public.[220] Communications from the public are to be addressed in writing to the Committee through the secretariat and supported by corroborating information. In language which will be familiar to human rights lawyers, the Committee is to consider any such communication unless it determines that the communication is anonymous, or an abuse of the right to make such communications, or manifestly unreasonable, or incompatible with the provisions of the decision establishing the Committee or with the Convention. Although there is no rule requiring exhaustion of local remedies, the Committee 'should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress'.[221] The Committee must bring any

[219] Decision I/7, 23 October 2002.

[220] Parties may notify the depositary that they will not accept consideration of such communications, but only up to a maximum period of four years: para. 18.

[221] Para. 21.

communications so submitted to the attention of the party alleged to be in non-compliance, and the party must within five months after any communication is brought to its attention by the Committee submit to the Committee a written statement clarifying the matter and describing any response that it may have made. The Committee may hold hearings.

Inspection procedures of multilateral development banks

I. Shihata, *The World Bank Inspection Panel* (1994); S. Schlemmer-Schulte, 'The World Bank's Experience with Its Inspection Panel', 58 ZaöRV 353 (1998); L. Boisson de Chazournes, 'Le Panel d'inspection de la Banque mondiale: à propos de la complexification de l'espace public international', RGDIP 145.(2001); G. Afredsson and R. Ring (eds.), *The World Bank Inspection Panel* (2001).

In September 1993, the World Bank became the first multilateral development bank to create an Inspection Panel to receive and review requests for inspection from a party which claimed to be affected by a World Bank project, including claims in respect of environmental harm.[222] This innovation was followed by similar arrangements established at the Inter-American Development Bank (an Independent Investigation Mechanism, established in 1994)[223] and the Asian Development Bank (1995).[224] These new mechanisms provide substantive and independent review of the activities of these banks and have enhanced access to international remedies for non-state actors.

The World Bank Inspection Panel became operational in late 1994. An affected party (or, in limited cases, its representatives) may request an inspection if it can

> demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank . . . provided in all cases that such failure has had, or threatens to have, a material adverse effect.[225]

The Panel, which consists of three members, may make a recommendation to the Executive Directors as to whether a matter complained of should be investigated, having been provided by evidence from the management of the Bank

[222] Resolution of the Executive Directors No. IBRD 93-10 and IDA 93-6, 22 September 1993. The resolutions have been subject to Clarifications, adopted on 17 October 1996 and 20 April 1999. See http://wbln0018.worldbank.org/ipn/ipnweb.nsf.

[223] See www.iadb.org/cont/poli/investig.htm.

[224] *ADB's Inspection Policy: A Guidebook* (1996); see also www.adb.org/Inspection/default.asp. Inspection is carried out by three persons from a roster of sixteen experts.

[225] *Ibid.*, para. 12. 'Operational policies and procedures' consist of the Bank's Operational Policies, Bank Procedures and Operational Directives, and similar documents issued before these series were started. They do not include Guidelines and Best Practices or similar documents or statements: *ibid.*

as to its compliance with the Bank's policies and procedures.[226] If the Executive Directors decide to investigate the matter, one or more members of the Panel (the Inspector(s)) will conduct an inspection and report to the Panel, which will then submit its report to the Executive Directors on whether the Bank has complied with its relevant policies and procedures.[227] This new review body represents an important development in international law, creating for the first time within a multilateral development bank an administrative procedure to permit review of the institution's compliance with its internal law at the instigation of third parties other than employees. The well-developed practice of administrative tribunals addressing employment and contractual matters for Bank staff is, in effect, extended into the fields of environmental and social review. By October 2002, the Panel had received twenty-seven requests, the largest number concerning compliance with the operational directive on environmental assessment (OD 4.01).[228] Requests have also addressed the environmental policy for dam and reservoir projects (OD 4.00), environmental aspects of Bank work (OMS 2.36), indigenous peoples (OD 4.20), water resource and management (OP 4.07), wildlands (OPN 11.02) and natural habitats (OP/BP 4.04).[229]

NAFTA Commission on Environmental Co-operation

Citizen access to an independent fact-finding mechanism is available under the NAFTA: the secretariat of NAFTA's Commission on Environmental Co-operation may receive and consider submissions from any non-governmental organisation or person asserting that a party is 'failing to effectively enforce its environmental law', and may request a response from the party concerned if it determines that the submission so merits.[230] The Secretariat may be instructed by the Council, by a two-thirds vote, to prepare a 'factual record' which may be made public by the Council.[231] Since 1996, the secretariat has received submissions in respect of thirty-six matters, of which twelve are currently active. The

[226] *Ibid.*, paras. 18 and 19.

[227] *Ibid.*, paras. 20 and 22. The 1999 Clarifications provide that if the Panel so recommends the Board will authorise an investigation without making a judgment on the merits of the claimant's request: para. 9.

[228] See e.g. Request No. 19 (Lake Victoria Environmental Management Project), in which the Panel found that Managament was not in full compliance with OD 4.01, where Managament had made no prior review of the environmental consequences of water disposal, and that environmental and other data necessary for subsequent assessments had not been obtained; and Request No. 22 (Chad–Cameroon Pipeline Projects), failing to comply with the requirement to carry out a regional environmental assessment.

[229] See Annual Report, 1 August 2001 to 30 June 2002.

[230] Agreement on Environment Co-operation, Art. 14; see chapter 19, pp. 1005–6 below. See generally www.cec.org/citizen/index.cfm?varlan=english; and Commission for Environmental Co-operation, *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the NAEEC* (2000).

[231] Art. 15. The procedure has been used by NGOs in all three of the NAFTA state parties to raise issues of non-compliance with environmental laws. Factual records have been

secretariat has published factual records in respect of three matters: *Cozumel* (24 October 1997);[232] *BC Hydro* (11 June 2000);[233] and *Metales y Derivados* (11 February 2002).[234]

Legal means of dispute settlement

Mediation and conciliation do not produce legally binding decisions. If the parties to a dispute seek such a result, they must opt for arbitration or recourse to an international court.[235]

Arbitration

International arbitration has been described as having 'for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for the law. Recourse to arbitration implies an engagement to submit in good faith to the award.'[236] In recent years, states negotiating environmental treaties have favoured the inclusion of specific provisions for the establishment of an arbitration tribunal, with the power to adopt binding and final decisions. Early examples providing for the establishment of a body to take binding decisions include the 'special commission' to be established at the request of any of the parties to disputes relating to high seas fishing and conservation,[237] and the detailed provisions on the establishment of an arbitration tribunal in the Annex to the 1969 Oil Pollution Intervention Convention.[238] Other environmental treaties include provisions, including annexes or protocols, for the submission of disputes to arbitration at the instigation of one party to a dispute[239] or both

produced in several cases but as yet no arbitral panel has been established to hear a complaint. Records of the submissions made, factual reports and responses of NAFTA parties are made available by the Commission for Environmental Co-operation on its website, www.cec.org/citizen/index.cfm?varlan=english.

232 *Cozumel*, SEM-96-001, 24 October 1997.

233 *BC Hydro*, SEM-97-001, 11 June 2000.

234 *Metales y Derivados*, SEM-98-007, 11 February 2002 (experts who have studied the site in question concur that the site must be remediated and that, given the volume of contaminated material and lead concentrations there present, it is urgent to forestall the dispersal of pollutants and limit access to the site so as to prevent adverse health effects on people living or working in its proximity).

235 For an assessment of the composition of a court or tribunal on substantive environmental outcomes (in the US Court of Appeals for the District of Columbia), see R. Revesz, 'Environmental Regulation, Ideology and the DC Circuit', 83 *Virginia Law Review* 1717 (1997); and R. Revesz, 'Congressional Influence on Judicial Behaviour? An Empirical Examination of Challenges to Agency Action in the DC Circuit', 76 NYULR 1100 (2001).

236 1907 Hague Convention on the Pacific Settlement of International Disputes, Art. 37.

237 1958 High Seas Conservation Convention, Arts. 9 to 12.

238 Art. VIII and Annex, Chapter II.

239 MARPOL 73/78, Art. 10 and Protocol 11; 1974 Paris Convention, Art. 21 and Annex B; 1976 Rhine Chemical Pollution Convention, Art. 15 and Annex B; 1976 Convention

parties.[240] Other treaties refer simply to the possibility of submitting disputes to arbitration without providing details on the establishment of such a body or its working arrangements.[241] Certain environmental treaties provide for the submission of disputes to arbitration by mutual consent of the relevant parties[242] or allow a party to declare, at the time of signature or ratification, that it is not bound by parts of the dispute settlement provisions, including submission to arbitration,[243] or provide for a party to declare, at the time of signature or ratification, or at any time thereafter, its acceptance of compulsory recourse to arbitration and/or the ICJ.[244]

The *Pacific Fur Seals Arbitration* (1893),[245] the *Trail Smelter* case (1935/41)[246] and the *Lac Lanoux* case (1957)[247] reflect the historical importance played by arbitration in the development of international environmental law, in interstate cases. More recently, there is growing evidence to support the view that states view arbitration as an attractive means of resolving international disputes. Within the past few years, the 1982 UNCLOS Annex VII arbitration procedure has been invoked on two occasions: in 1998 by Australia and New Zealand against Japan, in relation to a dispute concerning the conservation of southern bluefin tuna;[248] and in 2001 by Ireland against the United Kingdom, in the dispute concerning the authorisation of the MOX plant.[249] Additionally, France and the Netherlands have submitted a dispute to arbitration in relation to a dispute under the 1976 Rhine Chloride Convention and its 1991 Protocol, and Ireland initiated arbitration proceedings against the United Kingdom in relation to freedom of information under Article 9 of the 1992 OSPAR Convention.[250] Against that background, the Permanent Court of Arbitration (which has served as the registry in most of these disputes) has sponsored the adoption of arbitration rules specifically designed to address needs arising from the arbitration of disputes relating to the environment and natural

on the Protection of the Rhine Against Pollution by Chlorides, Art. 13 and Annex B; 1979 Berne Convention, Art. 18; 1988 CRAMRA, Arts. 55 to 59 and Annex; 1992 OSPAR Convention, Art. 32(2); 1994 Danube Convention, Art. 24; 1995 SADC Water Protocol, Art. 7; 1996 LDC Protocol, Art. 16; 1998 Rhine Convention, Art. 16; 2000 SADC Revised Water Protocol, Art. 7.

[240] 1976 Barcelona Convention, Art. 22 and Annex A; 1980 CCAMLR, Art. XXV and Annex; 1983 Cartagena Convention, Art. 23 and Annex; 1986 Noumea Convention, Art. 26 and Annex.

[241] 1974 Baltic Convention, Art. 18; 1985 Vienna Convention, Art. 11.

[242] 1973 CITES, Art. XVIII (to the Permanent Court of Arbitration at The Hague); 1989 Basel Convention, Art. 20 and Annex VI.

[243] 1986 Early Notification Convention, Art. 11; 1986 Assistance Convention, Art. 13.

[244] 1992 Biodiversity Convention, Art. 27 and Annex II, Part 1; 1992 Climate Change Convention, Art. 14; 1992 Watercourses Convention, Art. 22; 1992 Industrial Accident Convention, Art. 21.

[245] Chapter 11, pp. 561–6 below. [246] Chapter 8, pp. 318–19 below.

[247] Chapter 10, pp. 463–4 below. [248] Chapter 11, pp. 580–1 below.

[249] Chapter 9, p. 436 below. [250] Chapter 17, p. 857 below.

resources.[251] The growing role of arbitration is also reflected in the case law of arbitral tribunals in investor/state disputes involving allegations of interference with foreign investments occasioned by municipal concerns to protect the environment.[252]

International courts

The settlement of international disputes may also be referred to an international court, which is a permanent tribunal competent to deliver a legally binding decision. In the environmental field, a number of international courts have assumed particular importance, namely, the ICJ, the ITLOS, the WTO Appellate Body (and panels), the ECJ, and the courts created by regional human rights treaties. In addition, several non-governmental efforts aim to establish 'international courts' to address international environmental issues. While not creating binding arrangements, these provide a useful way to bring environmental issues to the attention of the public.[253] Notwithstanding certain calls for its creation, there is as yet no international environmental court, and none is likely to emerge in the foreseeable future.[254]

[251] Adopted 19 June 2001; available at www.pca-cpa.org/EDR/ENRrules.htm. The Rules are available for the use of all parties who have agreed to use them; states, intergovernmental organisations, non-governmental organisations and private entities. The Rules provide for the *optional* use of a panel of arbitrators with experience and expertise in environmental or conservation of natural resources law nominated by the member states and the Secretary General, respectively (Art. 8(3)), and a panel of environmental scientists nominated by the member states and the Secretary General, respectively, who can provide expert scientific assistance to the parties and the arbitral tribunal (Art. 27(5)). The Rules also make provision for the submission to the arbitral tribunal of a document agreed to by the parties, summarising and providing background to any scientific or technical issues which the parties may wish to raise in their memorials or at oral hearings (Art. 24(4)), and empower the arbitral tribunal to order any interim measures necessary to prevent serious harm to the environment, inless the parties agree otherwise (Art. 26). Recognising that time may be an important element in disputes concerning natural resources and the environment, the Rules provide for arbitration in a shorter period of time than under previous PCA Optional Rules or the UNCITRAL Rules. The PCA Rules have been recommended for use by the Facilitators in the Belize/Guatemala matter (see n. 142 above and the accompanying text).

[252] See chapter 21 (involving arbitration proceedings under ICSID, ICSID (Additional Facility) and UNCITRAL rules).

[253] The International Water Tribunal, based in the Netherlands; the International Court for the Protection of the Environment (established by the International Juridical Organisation for Environment and Development, Rome, in relation to the 1976 Barcelona Convention). See also A. Postiglione, 'A More Efficient International Law on the Environment and Setting Up an International Court for the Environment within the United Nations', 20 *Environmental Law* 321 (1990).

[254] See A. Postiglione, 'An International Court for the Environment?', 23 *Environmental Policy and Law* 73 (1993); A. Rest, 'An International Court for the Environment: The Role of the PCA', 4 *Asia Pacific Journal of Environmental Law* 107 (1999); P. Sands, 'International

International Court of Justice

S. Rosenne, *The Law and Practice of the* ICJ (1965); S. Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the ICJ* (1983); S. Rosenne, *The World Court: What It Is and How It Works* (1989); R. Jennings, 'The Role of the International Court of Justice in the Development of International Environment Protection Law', 1 RECIEL 240 (1992); R. Ranjeva, 'L'environnement, la cour internationale de justice et sa chambre speciale pour les questions d'environnement', AFDI 433 (1994); V. Coussirat-Coustere, 'La reprise des éssais nucléaires français devant la cour internationale de justice (observations sur l'ordonnance du 22 septembre 1995)', AFDI 355 (1995); M. Fitzmaurice, 'Environmental Law and the International Court of Justice', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996), 293; L. Boisson de Chazournes and P. Sands, *International Law, the International Court of Justice and Nuclear Weapons* (1999); P. Sands, 'International Courts and the Application of the Concept of "Sustainable Development"', 3 *Max Planck Yearbook of UN Law* (1999), 389; B. Kwiatkowska, 'The Contribution of the ICJ to the Development of the Law of the Sea and Environmental Law', 8 RECIEL 10 (1999).

The ICJ, sometimes referred to as the World Court or the Hague Court, is the UN's principal judicial organ. It was established as a successor (although not formally the legal successor) to the Permanent Court of International Justice (PCIJ) in 1945. Jurisdiction of the ICJ over a dispute depends on whether the Court has been invoked in a contentious case between two or more states, or asked to give an advisory opinion on a question of law at the request of states or certain international organisations.[255]

In July 1993, the ICJ established a seven-member Chamber for Environmental Matters. This decision followed previous consideration by the ICJ on the possible formation of such a chamber, and was taken in view of the developments in the field of environmental law which have taken place in the last few years and the need to be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction.[256]

Contentious cases The contentious jurisdiction of the ICJ can arise in at least two ways. First, under Article 36(1) of its Statute, the ICJ has jurisdiction by agreement between the parties to the dispute, either by a special agreement

Environmental Litigation and Its Future', 32 *University of Richmond Law Review* 1619 (1999); E. Hey, *Reflections on an International Environmental Court* (2000).

[255] In relation to contentious cases, 'only states may be parties in cases before the Court': UN Charter, Art. 34(1).

[256] ICJ, Communiqué 93/20, 19 July 1993. The Chamber was established under Art. 26(1) of the Statute of the ICJ; seven judges are elected by secret ballot to serve on the Chamber, which has not yet been utilised.

whereby two or more states agree to refer a particular dispute and defined matter to the ICJ, or by a compromissory clause in a multilateral or bilateral treaty. The treaty could be a general treaty for the peaceful settlement of disputes, a treaty dealing with the general relations between the states, or a treaty regulating a specific topic, such as environmental protection. Many environmental treaties provide for possible recourse to the ICJ to settle disputes. Occasionally, they recognise its compulsory jurisdiction,[257] but more usually the reference of a dispute to the ICJ requires the consent, in each case, of all parties to the dispute.[258] Recent practice in environmental treaties allows parties at the time of signature, ratification or accession, or at any time thereafter, to accept compulsory dispute settlement by recourse to arbitration or to the ICJ.[259] Few parties accept this option.

A second way in which contentious cases come before the ICJ is under Article 36(2) of its Statute (the 'Optional Clause'), under which parties to the Statute may declare that they recognise its compulsory jurisdiction, in relation to other states accepting the same obligation, in all legal disputes concerning the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature or extent of the reparation to be made for the breach of an international obligation.[260] Acceptance of the jurisdiction of the ICJ under Article 36(2) may be made unconditionally, or on condition of reciprocity, or for a limited period of time.[261] Additionally, the practice of the ICJ has been to accept reservations or conditions to declarations made under the Optional Clause, as happened in the *Fisheries Jurisdiction* case (*Spain* v. *Canada*).[262]

Unlike its predecessor, the PCIJ, the ICJ has now been presented with opportunities to address international environmental disputes – raising matters concerning environment and conservation – and has given judgments which establish – or imply – important general principles. Relevant cases before the

[257] 1963 Vienna Convention, Optional Protocol Concerning the Compulsory Settlement of Disputes, Art. 1 (not in force); 1980 Convention on the Physical Protection of Nuclear Materials, Art. 17(2).

[258] 1959 Antarctic Treaty, Art. XI(2); 1974 Baltic Convention, Art. 18(2).

[259] 1985 Vienna Convention, Art. 11(3); 1989 Basel Convention, Art. 20(3); 1992 Climate Change Convention, Art. 14(2); 1992 Biodiversity Convention, Art. 27(3); 1992 Industrial Accidents Convention, Art. 21; 1992 Watercourses Convention, Art. 22; 1998 Chemicals Convention, Art. 20(2); 2001 POPs Convention, Art. 18(2).

[260] Statute of the ICJ, Art. 36(2). As of 1 January 2002, sixty-five states have accepted the Optional Clause.

[261] Art. 36(3).

[262] (1998) ICJ Reports 432, giving effect to (and finding that the dispute was covered by) Canada's reservation (made in its Declaration of 10 May 1994 under Art. 36(2)) excluding from the jurisdiction of the Court 'disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area . . . and the enforcement of such measures'. On the dispute, see chapter 11, pp. 567–8 below.

PCIJ include the *Diversion of the Waters of the River Meuse*[263] and the *Territorial Jurisdiction of the International Commission of the River Oder*.[264] Early cases before the ICJ which have influenced the development of international environmental law include the *Corfu Channel* case, where 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';[265] the *Fisheries Jurisdiction* case, where the ICJ set forth basic principles governing consultations and other arrangements concerning the conservation of shared natural resources;[266] and the *Nuclear Tests* cases.[267] The ICJ has since had a number of cases before it which it considers as having important implications for international law 'on matters relating to the environment': the *Certain Phosphate Lands in Nauru* case, concerning the obligation, if any, of trustee states for, *inter alia*, the physical destruction of the island as a unit of self-determination accompanied by a failure to rehabilitate the land, as well as the nature and extent of obligations relating to permanent sovereignty over natural resources and entitlement to the costs of rehabilitation;[268] the *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* case, addressing, *inter alia*, the use of international watercourses and international environmental law in relation to an agreement for the construction of two barrages which would result in the diversion of the Danube river;[269] the *Request for an Examination of the Situation*, brought by New Zealand in relation to the resumption of underground nuclear tests by France;[270] and the *Fisheries Jurisdiction* case, where Spain challenged the enforcement of fisheries conservation measures taken by Canada in areas beyond its exclusive economic zone.[271]

Advisory opinions The UN Charter allows the General Assembly or the Security Council to request the ICJ to give an advisory opinion on any legal question,[272] and allows other organs of the UN and specialised agencies authorised by the General Assembly to request advisory opinions of the ICJ on legal questions arising within the scope of their activities.[273] Advisory opinions are not binding in law upon the requesting body, although in practice they are accepted and acted upon by that body. Although no legal question on an

[263] PCIJ Ser. A/B, No. 70.
[264] Chapter 10, p. 462 below.
[265] Chapter 6, p. 243, n. 39 below.
[266] Chapter 11, pp. 567–8 below.
[267] Chapter 8, pp. 319–21 below.
[268] Chapter 12, pp. 666–9 below; the case was settled in September 1993.
[269] Chapter 10, pp. 469–77 below.
[270] Chapter 9, pp. 578–80 below; chapter 15 below.
[271] Chapter 11, pp. 567–8 below.
[272] UN Charter, Art. 96(1).
[273] Art. 96(2). ECOSOC, the Trusteeship Council and fifteen of the specialised agencies have been authorised by the General Assembly, as have the IAEA, the Interim Committee of the General Assembly and the Committee for Applications for Review of the UN Administrative Tribunal. UNEP and the Commission on Sustainable Development have not been so authorised by the General Assembly.

environmental issue has been the subject of a request for an advisory opinion, this route could provide a useful and non-contentious way of obtaining independent international legal advice on environmental matters. In July 1996, the ICJ gave an advisory opinion on the legality of the use of nuclear weapons in the context of their effects on human health and the environment, arguably the most significant of the ICJ's pronouncements on international environmental law.[274]

Interim measures of protection If it considers that the circumstances so require, the ICJ has the power to indicate interim measures of protection to preserve the rights of the parties to a dispute.[275] The irreparability of serious environmental damage could make interim measures particularly important in cases concerning environmental protection. During the preliminary phase of the *Nuclear Tests* cases, the ICJ indicated interim measures of protection, asking the parties to ensure that no action should be taken which might aggravate or extend the dispute or prejudice the rights of another party, and calling on France to 'avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory'.[276] Interim measures of protection were also indicated in the *Fisheries Jurisdiction* cases,[277] but were refused by the ICJ in the *Passage Through the Great Belt* case.[278] They were also refused by the ICJ in ten cases brought by the Federal Republic of Yugoslavia to bring a halt to a bombing campaign. It was argued, *inter alia*, that attacks on oil refineries and chemical plants were having 'serious environmental effects on cities, towns and villages in the Federal Republic of Yugoslavia'.[279]

UNCLOS and ITLOS

A. O. Adede, *The System for Settlement of Disputes under the UNCLOS* (1987); S. Rosenne, 'Establishing the International Tribunal for the Law of the Sea', 89 AJIL 806 (1995); J. I. Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea', 90 AJIL 69 (1996); T. Treves, 'The Jurisdiction of the International Tribunal for the Law of the Sea', 37 *Indian Journal of International Law* 396 (1997); A. Boyle, 'Problems of Compulsory

[274] Chapter 7, p. 310 below.

[275] Statute of the ICJ, Art. 41. The ICJ has ruled that its provisional measures are legally binding: *Lagrand* case (*Germany* v. *United States*) (2001) ICJ Reports 000, 40 ILM 1069 (2001).

[276] Order for Interim Measures, (1973) ICJ Reports 99; (*New Zealand* v. *France*), Order for Interim Measures, (1973) ICJ Reports 135.

[277] *UK* v. *Iceland*, Order for Interim Measures, (1972) ICJ Reports 12; *Federal Republic of Germany* v. *Iceland*, (1972) ICJ Reports 30.

[278] *Finland* v. *Denmark*, (1991) ICJ Reports 9.

[279] E.g. *Case Concerning the Legality of the Use of Force (Yugoslavia* v. *United Kingdom)* (1999) ICJ Reports 826, para. 3.

Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks', 14 IJMCL 1 (1999); J. Noyes, 'The International Tribunal for the Law of the Sea', 32 *Cornell International Law Journal* 109 (1998); G. Eirikkson, *The International Tribunal for the Law of the Sea* (2000).

Part XV of the 1982 UNCLOS addresses compulsory dispute settlement, allowing states at the time of signature, ratification or accession or at any time thereafter to designate any of the following dispute settlement procedures: the International Tribunal for the Law of the Sea (established in accordance with Annex VI to UNCLOS); the ICJ; an arbitral tribunal (constituted in accordance with Annex VII to UNCLOS); and a special arbitral tribunal (constituted in accordance with Annex VIII to UNCLOS).[280] A state which does not designate one of these means is deemed to have designated arbitration in accordance with Annex VII, and where two or more states have designated different means the dispute will go to arbitration (unless the parties agree otherwise).[281]

The compulsory dispute settlement procedure is limited to certain disputes under the Convention. The exercise by a coastal state of its sovereign rights or jurisdiction under UNCLOS is only subject to the compulsory procedures when it is alleged that a coastal state has violated certain UNCLOS provisions, including internationally lawful uses of the exclusive economic zone (EEZ) or specified international rules and standards for the protection and preservation of the marine environment which are applicable to that state and which are established under UNCLOS or by a competent international organisation or diplomatic conference.[282] Fisheries disputes will be subject to the compulsory procedure, except for disputes over the sovereign right of a coastal state regarding the living resources of the EEZ (including the discretionary powers for determining allowable catch, harvesting capacity, the allocation of surpluses and the terms and conditions of its conservation and management laws and regulations).[283] Such disputes may be submitted to the conciliation procedure if it is alleged that the coastal state has manifestly failed to comply with its obligations to maintain the living resources in the EEZ.[284] Parties may also optionally declare that the compulsory procedures do not apply to disputes concerning boundary delimitations, military activities, and those in respect of which the Security Council is exercising its functions.[285]

Disputes relating to the exploration and exploitation of the international seabed and ocean floor (known as the 'Area') and its resources are subject to special, and rather complex, dispute settlement procedures, which will generally involve disputes going to a Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.[286] The Seabed Disputes Chamber will have jurisdiction over a wide range of disputes, including environmental disputes

[280] 1982 UNCLOS, Art. 287(1). [281] Art. 287(3) and (5). [282] Art. 297(1).
[283] Art. 297(3)(a). [284] Art. 297(3)(b)(i). [285] Art. 298.
[286] Arts. 186–191, and Annex VI, Arts. 35–40.

involving those engaged in activities in the Area (states parties, the Authority, state enterprises, legal or natural persons, and prospective contractors).[287]

The jurisdiction of ITLOS may also be invoked in certain circumstances where the parties to UNCLOS have not designated its use. Article 290(5) of the Convention provides that ITLOS may prescribe provisional measures pending the constitution of an arbitral tribunal to which a dispute is submitted. This provision has been invoked on two occasions: in 1998, Australia and New Zealand requested – and obtained – provisional measures from ITLOS in respect of fishing for southern bluefin tuna by Japanese vessels;[288] and in 2001 ITLOS prescribed a provisional measure requiring Ireland and the United Kingdom to co-operate pending the constitution of the Annex VI arbitral tribunal.[289] Additionally, ITLOS has jurisdiction pursuant to Article 292 of UNCLOS to order the 'prompt' release of vessels apprehended by a coastal state.

ITLOS has given judgment on the merits in four cases, all of which involved vessels alleged to have been engaged in illegal fishing activities. In addressing these cases, ITLOS has sought to avoid expressing views on the underlying merits of the case, although in the most recent case – involving the Volga (*Russia* v. *Australia*) – its judgment expressed understanding as to 'international concerns about illegal, unregulated and unreported fishing' and appreciation as to the objectives 'behind the measures taken by states, including the states parties to CCAMLR, to deal with the problem'.[290]

Dispute Settlement Body of the World Trade Organization

P. Pescatore, W. Davey and A. Lowenfeld, *Handbook of GATT Dispute Settlement* (1991); E. Petersmann, 'International Trade Law and International Environmental Law – Prevention, and Settlement of International Disputes in GATT', 27 *Journal of World Trade* 43 (1993); E. U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948', 31 CMLR 1157 (1994); A. Lowenfeld, 'Remedies Along with Rights: Institutional Reform in the New GATT', 88 AJIL 477 (1994); John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1997, 2nd edn); J. Cameron and K. Campbell (eds.), *Dispute Resolution in the World Trade Organization* (1998).

The 1994 WTO Agreement introduced as an Annex the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU). The DSU

[287] Art. 187. Certain disputes, at the request of the relevant parties, may be submitted to the International Tribunal for the Law of the Sea, to an *ad hoc* chamber of the Sea-Bed Disputes Chamber, or to commercial arbitration under UNCITRAL rules: *ibid.*, Art. 188.

[288] Chapter 11, p. 581 below. [289] Chapter 9, p. 436 below.

[290] Judgment of 22 December 2002, para. 68. See also the 'Camouco' case (*Panama* v. *France*), Judgment, 7 February 2000; the 'Monte Cafourco' case (*Seychelles* v. *France*), Judgment, 18 December 2000; the 'Grand Prince' case (*Belize* v. *France*), Judgment, 20 April 2001.

is intended to prevent and resolve disputes arising under the WTO Agreement and related instruments. It replaces the arrangements which had emerged in the context of the GATT, principally a system of panels with the power to make non-binding recommendations. Under the prior system, the adoption of panel recommendations could be blocked by any single contracting party. One of the principal innovations of the new WTO system is that panel decisions (as well as those of the Appellate Body) will be adopted and become legally binding unless these is a consensus to the contrary. The new WTO system therefore constitutes a system of compulsory third party adjudication with binding effects for its members. In this sense, it has potentially the most far-reaching and important jurisdiction of any of the global bodies. Its first eight years of operation suggest that it could significantly influence the development of international environmental law.

The DSU establishes a dispute settlement system consisting of three bodies – the Dispute Settlement Body (DSB), *ad hoc* panels and the Appellate Body – all based in Geneva. The DSB is a political body, comprising representatives of all WTO members. It administers the dispute settlement process. The WTO system establishes a detailed 'road map' for intergovernmental dispute settlement, characterised by its speed and relative procedural clarity. In the event of a dispute between members of the WTO over their respective trade-related obligations, one party may request the other to enter into consultations and notify the DSB of this request. If the consultations fail, each party may propose that other traditional dispute settlement procedures (good offices, conciliation or mediation) be employed, with the possible assistance of the WTO Director General. If this fails to settle the dispute, the DSB may be asked to establish an *ad hoc* panel. Once established, a panel will conduct hearings and issue a non-binding report on the merits of the case. The recommendations of a panel become binding only after they have been adopted by the DSB (adoption is automatic, unless there is a consensus against it in the DSB). Unlike the old GATT system, the panel report may be appealed on legal grounds to a permanent seven-member Appellate Body. The appeal is heard before a three-judge division of the Appellate Body, which may uphold, modify or reverse the legal findings of the panel. The report of the Appellate Body is then adopted by the DSB and given binding force, unless the DSB unanimously decides otherwise.

The WTO dispute settlement system is governed principally by Articles III and IV of the WTO Agreement and the DSU. Working Procedures have been adopted for panel and Appellate Body proceedings,[291] as have Rules of Conduct.[292] The substantive law to be applied by the panels and the

[291] Working Procedures for Appellate Review (as amended), WTO Doc. WT/AB/WP/3, 28 February 1997.

[292] Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. WT/DSB/RdC/1, 11 December 1996.

Appellate Body is to be found in the 1994 WTO Agreement,[293] and in the various multilateral and plurilateral side-agreements to the GATT (including the Multilateral Agreement on Trade in Services, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights).[294] In its first decision, the Appellate Body stated that these trade rules were 'not to be read in clinical isolation from public international law'.[295] It has subsequently referred to – and applied – principles and rules of international environmental law in the *Beef Hormones* case (precautionary principle), the *Shrimp/Turtle* case (including sustainable developments, fisheries conventions, the 1973 CITES, the 1992 Biodiversity Convention and the 1982 UNCLOS), and the *Asbestos* case.[296]

European Court of Justice[297]

N. Brown and F. Jacobs, *The Court of Justice of the European Communities* (1989); H. G. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities* (1992); K. P. E. Lasok, *The European Court of Justice – Practice and Procedure* (1994 2nd edn); D. Anderson, *References to the European Court* (1995); N. March Hunnings, *The European Courts* (1996).

The ECJ is the judicial institution of the EC and is required to ensure that in the interpretation and application of the EC Treaty 'the law is observed'.[298] Environmental cases reach the ECJ in a number of ways. The most frequent route is under Article 226 (formerly Article 169) of the EC Treaty,[299] and since 1980 the EC Commission has brought more than two hundred cases to the ECJ alleging the failure of a member state to comply with its environmental obligations, most of which have been successful. Its judgments have determined that member states may not plead circumstances existing in their internal legal system to justify a failure to comply with an environmental obligation;[300] that administrative practices which may be altered at the whim of the administration do

[293] General Agreement on Tariffs and Trade, Geneva, 30 October 1947, as revised on 15 April 1994, 33 ILM 28 (1994).

[294] DSU, Appendix 1.

[295] Case AB-1996-1, *US – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 April 1996, at 18, WTO Doc. WT/DS2/9.

[296] Chapter 19, pp. 965, 979 and 973 below.

[297] R. Macrory, 'The Enforcement of Community Environmental Laws: Some Critical Issues', 29 *Common Market Law Review* 347 (1992); P. Sands, 'European Community Environmental Law: Legislation, the European Court of Justice and Common Interest Groups', 53 MLR 685 (1990); P. Sands, 'The European Court of Justice: An Environmental Tribunal?', in H. Somsen (ed.) *Enforcing EC Environmental Law: The National Dimension* (1996), 23–35.

[298] EC Treaty, Art. 220 (formerly Art. 164). The ECJ also has competence in relation to the interpretation and application of the 1950 ECSC and 1957 Euratom Treaties.

[299] (1973) ICJ Reports 99; chapter 8, p. 320, n. 11 below.

[300] Cases 30–41/81, *EC Commission* v. *Italian Republic* [1981] ECR 3379; Case 134/86, *EC Commission* v. *Belgium* [1987] ECR 2415.

not constitute the proper fulfilment of an environmental obligation under a Directive;[301] that the legal obligations imposed on a member state by an environmental Directive are limited to those dangerous substances specifically listed in the Directive and not to other unlisted dangerous substances as well;[302] and that member states should achieve an 'environmental result' when implementing the Drinking Water Directive.[303] The ECJ has also addressed the legality of national environmental measures and trade obligations[304] and the failure to execute its judgment in an environmental case.[305] The ECJ also has the power to impose fines for non-compliance with its judgments, which it did for the first time (in an environmental case) in 2000.[306] Under Article 227 (formerly Article 170) of the EC Treaty, a member state which believes another member state has breached its obligations has a similar right to bring a matter before the ECJ.[307]

Under Article 230 (formerly Article 173) of the EC Treaty, the ECJ may review the legality of certain acts of the EC Council, Commission, Parliament and European Central Bank on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or any rule relating to its application, or misuse of powers. Actions may be brought by a member state or by a Community institution, other than the institution complained against, or by any legal or natural person provided that the act concerned is a decision addressed to that person or is of direct or individual concern to it.[308] Under this head, the ECJ has considered the legality of the treaty basis of EC environmental legislation,[309] and received applications from environmental groups alleging violations by the EC Commission of its legal obligations under the EC Treaty.[310] The ECJ also has jurisdiction under

[301] Cases 96, 97/81, *Commission of the European Communities* v. *Netherlands* [1982] ECR 1791 and 1819.

[302] Case 291/84, *Commission of the European Communities* v. *Netherlands* [1989] 1 CMLR 479 (concerning the failure to implement into national law Directive 80/68/EEC on the protection of groundwater against pollution by certain dangerous substances).

[303] Case C-56/90, *Commission* v. *United Kingdom* [1993] ECR I-4019.

[304] Case C-182/89, *Commission of the European Communities* v. *France* [1990] ECR I-4337, where the ECJ held that France had infringed Art. 10(1)(b) of Council Regulation 3626/82 (on the implementation of CITES) by granting import licences for skins of certain feline animals originating in Bolivia.

[305] Case C-75/91, *Commission* v. *Netherlands* [1992] ECR I-549 (wild birds).

[306] Chapter 18, p. 929 below. [307] See below.

[308] EC Treaty, Art. 230 (formerly Art. 173). On the restrictive approach to *locus standi* for non-privileged applicants, see below and the accompanying text.

[309] Case C-300/89, *EC Commission* v. *Council* [1991] ECR I-2867 (judgment of 11 June 1991), declaring void Council Directive 89/428/EEC of 21 June 1989 for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, on the ground that the Council adopted the Directive on the basis of the wrong treaty provision; but see more recently Case C-155/91, *EC Commission* v. *Council* [1993] ECR I-939; see chapter 15, p. 745 below.

[310] Chapter 16, p. 810 below.

Article 232 (formerly Article 175) under conditions similar to those governing Article 230, to challenge the failure of the Community institutions (in particular the Council or Commission) to act in pursuance of its environmental obligations under the EC Treaty. To date no environmental case appears to have been brought under this provision.

Finally, the ECJ has also considered environmental questions on the basis of its jurisdiction under Article 234 (formerly Article 177), the 'preliminary reference procedure'. Under this provision, the national courts of the EC member states may refer to the ECJ questions concerning the interpretation of the EC Treaty and the validity and interpretation of acts of the EC institutions, provided that a decision on the question is necessary to enable the national court to give a ruling on the question. Preliminary references from national courts to the ECJ are used when a dispute before the national courts raises a complex question of EC law or where the dispute turns on the EC law point and no appeal lies against the decision of the national court. The Article 234 procedure has been used on many occasions in relation to environmental matters, for example the disposal of waste from a nuclear power plant,[311] the compatibility with EC law of the ban by an Italian municipality on the sale and distribution of plastic bags and other non-biodegradable packaging material,[312] and the circumstances in which a member state may take account of economic, social and cultural requirements or regional and local characteristics when selecting and defining the boundaries of sites to be proposed to the Commission as eligible for identification as sites of Community importance, for the purposes of the 1992 Habitats Directive.[313]

Court of First Instance of the European Union In 1988, the EC Council, acting under an amendment to the EC Treaty introduced by the 1986 Single European Act, established the Court of First Instance (CFI) with limited jurisdiction (over staff and competition cases and cases arising under the 1957 ECSC Treaty) and a right of appeal on points of law to the ECJ.[314] In 1993, following the amendments to the EC Treaty made by the 1992 Treaty on European Union, the competence of the CFI was extended and it may now hear environmental cases brought under, *inter alia*, Articles 230 and 232 of the EC Treaty, although it cannot hear and determine preliminary references requested under Article 234 (formerly Article 177). Appellate review on points of law is to the ECJ.[315]

[311] Chapter 15, p. 739 below.

[312] Case C-380/87, *Enichem Base et al.* v. *Commune of Cinisello Balsamo* [1989] ECR 2491.

[313] Case C-371/98, *R.* v. *Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd* [2000] ECR I-9235.

[314] EC Treaty, Art. 225 (formerly Art. 168a), and Decision 88/591, OJ C251, 21 August 1988, 1.

[315] Decision 93/350/Euratom, ECSC, EEC, OJ L144, 18 June 1993, 21.

Human rights courts

The human rights courts established under regional human rights conventions[316] may also have jurisdiction over environmental matters, although so far only the European Court of Human Rights appears to have addressed such issues in a sustained manner.[317] From 1950 to 1998, the European Convention's machinery consisted of two organs, a Commission and a Court. Following the entry into force in November 1998 of the Eleventh Protocol to the Convention, the Commission was abolished and most of its functions transferred to the Court. As a result, claimants (whether state parties or individuals) now submit applications directly to the Court. The Court provides for traditional inter-state dispute resolution, as well as the rights of recourse by victims of violations. By Article 33, any state party may bring to the Court a case against any other state party which is alleged to have breached the provisions of the Convention or its Protocols. In fact, very few inter-state cases have been brought. Individuals, NGOs and groups of individuals, who claim to have been victims of a human rights violation[318] may also bring a case against the state party which has committed the alleged violation.[319] In the past few years, the Court has given far-reaching judgments in relation to Article 8 (privacy) and Article 1 of the First Protocol (property rights).

UNCED

Whereas the 1972 Stockholm Conference did not really address the compliance issue, the subject was clearly an important one for UNCED. UN General Assembly Resolution 44/228 determined that UNCED should 'assess the capacity of the United Nations system to assist in the prevention and settlement of disputes in the environmental sphere and to recommend measures in this field, while respecting existing bilateral and international agreements that provide for the

[316] The relevant courts are the European Court of Human Rights and the Inter-American Court of Human Rights. In the future, the African Court of Human and Peoples' Rights may also become important.

[317] Chapter 7, pp. 299–304 below.

[318] The European Human Rights Court and Commission have construed the term 'victim' narrowly. The Court has held that an individual cannot bring an *actio popularis* against a law *in abstracto*: *Klass* v. *Germany*, 2 EHRR 214 (1978). In addition, the Commission has declined on several occasions to regard organisations, bringing complaints on behalf of their members, specific persons or the general public, as 'victims' under the Convention. See e.g., *Church of X* v. *UK*, App. No. 3798/68, 12 *Yearbook of the European Convention on Human Rights* 306 (1969).

[319] ECHR, Art. 34. Under the old system, complaints presented to the Commission by individuals could be brought to the Court by the Commission, or an interested state party. Only individuals from states parties to the Ninth Protocol could forward the complaint to the Court after it had been dealt with by the Commission. 1950 ECHR, Art. 48; Protocol No. 9 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 6 November 1990, ETS 140 (1994).

settlement of such disputes'. This task was only partly fulfilled. Principles 10 and 26 of the Rio Declaration call on states to provide, at the national level, 'effective access to judicial and administrative proceedings, including redress and remedy', and internationally to 'resolve all their environmental disputes peacefully and by appropriate means and in accordance with the Charter of the United Nations'. Agenda 21 recognises the limitations of existing arrangements, including the inadequate implementation by parties of their obligations, the need to involve international institutions and environmental organisations in the implementation process, and the gaps in dispute settlement mechanisms. Chapter 39 of Agenda 21 ('International legal instruments and mechanisms') addresses some of the needs. The international community is called upon to ensure 'the full and prompt implementation of legally binding instruments',[320] and parties to international agreements are instructed to 'consider procedures and mechanisms to promote and review their effective, full and prompt implementation', including the establishment of 'efficient and practical reporting systems on the effective, full and prompt implementation of international legal instruments' and consideration of the ways in which international bodies might contribute towards the further development of such mechanisms.[321] The enhanced role of international institutions is endorsed. UNEP is called upon to promote the implementation of international environmental law; UNDP will play a lead role in support of the implementation of Agenda 21 and capacity-building at the country, regional, inter-regional and global levels; and the UN Commission on Sustainable Development is required to consider information regarding the implementation of environmental conventions made available by the relevant conferences of the parties.[322] On dispute settlement, the international community is called upon to consider broadening and strengthening the capacity of mechanisms in the UN system to identify, avoid and settle international disputes in the field of sustainable development, taking into account existing bilateral and multilateral agreements for the settlement of such disputes.[323] Specifically, this includes:

> mechanisms and procedures for the exchange of data and information, notification and consultation regarding situations that might lead to disputes with other states in the field of sustainable development and for effective peaceful means of dispute settlement in accordance with the Charter of the United Nations including, where appropriate, recourse to the International Court of Justice, and their inclusion in treaties relating to sustainable development.[324]

[320] Agenda 21, Chapter 39, para. 39.3(e). [321] *Ibid.*, para. 39.7.
[322] *Ibid.*, Chapter 38, paras. 38.13(f), 38.22(h), 38.24 and 38.25(a); see also UNGA Res. 47/191 (1992).
[323] Agenda 21, Chapter 39, para. 39.3(h). [324] *Ibid.*, para. 39.9.

Conclusions

As this chapter shows, the increased attention being given to compliance has generated new measures in the environmental field which supplement those measures available under general international law. The decision by the ICJ to establish an Chamber for Environmental Matters marked a further recognition that the effectiveness of the growing body of principles and rules required the availability of appropriate dispute settlement mechanisms. The limitations inherent in international arrangements for ensuring compliance with international environmental obligations should be apparent. Developments in international law alone will not be sufficient to overcome the political, economic and social reasons lying behind non-compliance. Nevertheless, the law, processes and institutions can make a difference, and recent developments suggest that changes in the importance attached by the international community to compliance reflect the changing structure of the traditional international legal order. Important developments within the past decade include the broadening and strengthening of non-compliance mechanisms under various multilateral environmental agreements, the Permanent Court of Arbitration's new rules on arbitration of environmental disputes, the 'environmental justice' provisions of the 1998 Aarhus Convention, and a significant body of environmental jurisprudence at the ICJ, ITLOS and the WTO Appellate Body.

Addressing compliance will require a comprehensive effort to develop rules and institutional arrangements at three levels: implementation, enforcement, and dispute settlement. First, with regard to implementation, the provision of technical, financial and other assistance to states, particularly developing states, points to the growing 'internationalisation' of the domestic implementation and legal process, and an awareness that international environmental law will not achieve its objectives if it does not also take account of the need, and techniques available, for improving domestic implementation of international environmental obligations.

Secondly, with regard to enforcement, states have been unwilling, for a variety of reasons, to bring international claims to enforce environmental rights and obligations. Within the past decade, however, it appears that this reluctance is being replaced by an increasing willingness by states to have resort to international adjudicatory mechanisms to enforce international environmental obligations, and important decisions have been handed down by the ICJ, ITLOS and the WTO Appellate Body. Nevertheless, the role of states can be reinforced by the supplementary role of international organisations and, to a lesser extent, non-state actors in the international enforcement process. Broadening the category of persons formally entitled to identify violations and to take measures to remedy them is a process which is underway and which should be further encouraged if states and other members of the international

community are to be subjected to the sorts of pressure that will lead them to improve compliance with their obligations.

Thirdly, as the disputes before various international courts have shown, the availability of a broad and growing range of mechanisms for dispute settlement, including the compulsory jurisdiction of certain regional and sectoral courts and other international bodies, suggests an important and growing role for independent international adjudication. Finally, Principle 10 of the Rio Declaration and the adoption of the 1998 Aarhus Convention reflect the recognition that ensuring effective access to national judicial and administrative proceedings, including redress and remedies, is appropriately a matter for regulation by the international community.