

**Dispute Avoidance
and
Dispute Settlement
in International
Environmental Law**

**Compilation
of Documents**

**Editor
Alexandre Timoshenko**

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United Nations Environment Programme

Nairobi, 2001

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FOREWORD

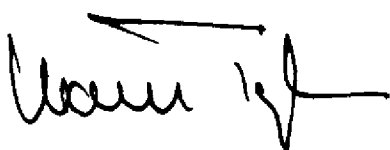
The Charter of the United Nations obliges the Member States to resolve disputes by peaceful means that are listed in its Article 33. These principles have also been incorporated into the various bilateral, regional and global environmental conventions and agreements.

Experience, however, reveals that the dispute settlement provisions of these conventions have been of limited use.

It must be realized that the importance of these provisions will only increase in the future. This requirement gains urgency in view of the growing scarcity of renewable resources – such as cropland, forest, freshwater and fisheries. And this scarcity could precipitate civil or international conflicts.

Clearly, the global community must improve its ability to identify emerging environmental problems and assess alternative responses. Here, formulating effective global, regional and national instruments of dispute avoidance and settlement will have a critical role to play.

The present expert study reviews tools and machinery available for environmental dispute avoidance and settlement while aiming at promoting the development of new rules and institutions in the area. I am sure that this publication will not only address the practical needs of the United Nations system in environmental dispute avoidance and settlement, but will also contribute to the progressive development of international environmental law.

A handwritten signature in black ink, appearing to read 'Klaus Töpfer', with a horizontal line above it.

Dr. Klaus Töpfer
UN Under-Secretary General
Executive Director
United Nations Environment Programme

NOTE BY THE EDITOR

The theme of avoidance and settlement of international environmental disputes has for a long time been attracting the attention of legal scholars worldwide. Also most international environmental agreements include provisions on settlement of disputes concerning the interpretation or application of such agreements. These provisions are formulated in a similar manner and are based on a common principle of peaceful settlement of international disputes. The parties to the dispute are encouraged to seek solution by negotiation and, if negotiation fails to bring a solution, they are obligated to recur to conciliation or arbitration procedure, or submit the dispute to the International Court of Justice. In practice these provisions have been rarely, if ever, used and are considered mostly as means to deter non-compliance.

By its very nature the resource use and environmental protection engage conflicting interests and have a strong potential for disputes. Hence, there is an increasing demand for efficient mechanisms of dispute settlement as well as for advanced systems of dispute avoidance.

The United Nations Environment Programme, being the lead UN agency in the field of environment and pursuing its long-standing mandate to promote the progressive development of international environmental law, has been continuously keeping in focus the need for creating an effective system of legal means and mechanisms to avoid environmental disputes and, where such avoidance is not possible, to bring such disputes to peaceful settlement. This focus have been duly reflected in the last two UNEP long-term programmes for the development and periodic review of environmental law: the Programme for the 1990s, adopted by the UNEP Governing Council in 1993, and the Programme for the first decade of the 21st century, adopted in February 2001. Both Programmes singled out the theme of avoidance and settlement of environmental disputes as a distinct programme area with defined objective, strategy and activities.

The approach suggested by the Programmes emphasizes the overarching importance of avoidance of environmental dispute and for this purpose encourages States to regularly exchange environmental data and information, assess transboundary environmental impacts of planned activities, and give early notification and engage in consultations whenever activities with potentially adverse effect are undertaken. The States are also called to actively use monitoring, fact-finding and reporting and especially innovative approaches to dispute avoidance like the use of third-party neutrals to facilitate open and complete information exchange.

With respect to settlement of environmental disputes the Programmes call for review of dispute settlement provisions in multilateral environmental agreements and in other fields of international law in order to identify the most effective dispute settlement mechanisms. They also suggest to undertake studies of the actual and potential facilitative role of international bodies and agencies, and to promote such and other innovative approaches and mechanisms for settling environmental disputes.

As a concrete step towards improving the means and mechanisms of avoidance and settlement of environmental disputes the United Nations Environment Programme in collaboration with the Vienna University (Austria), the Jawaharlal Nehru University (India), the Queen Mary and Westfield College at the University of London (UK), the Moi University (Kenya) and the University of British Columbia (Canada) organized a geographically balanced international group of recognized experts in the field that held its meetings during 1998-1999. The Group prepared a Study on Dispute Avoidance and Dispute Settlement in International Environmental Law and came up with a range of Conclusions. UNEP expresses its appreciation to all collaborating institutions, in particular the Vienna University, for preparation of the background documentation and provision of substantive and logistical support to the meetings of the Group of international experts. A high appreciation is also expressed to the international experts – members of the Group – whose wealth of knowledge and practical experience led to the development of the Study and the Conclusions.

The present publication brings to the attention of Governments, academic community, practitioners and the general public a collective international expertship on the theme of avoidance and settlement of environmental disputes. Besides the documents resulting from the deliberations of the Group of experts the publication contains supporting documentation and other relevant information.

Section I of the publication contains the expert Study on Dispute Avoidance and Dispute Settlement in International Environmental Law. The Study commences with the review of the meaning and rationale of dispute avoidance and dispute settlement and of the relationship between these two institutions. It analyses the emerging principles and approaches in the area of environmental dispute avoidance and

settlement and the factors adversely affecting dispute avoidance. The principal focus of the Study is on the detailed analysis of the mechanisms of dispute avoidance and dispute settlement.

The dispute avoidance mechanisms examined by the Study include monitoring and collection of data, reporting mechanisms, consultation, inspection, fact-finding and inquiry, compliance procedures. The mechanisms integrated in international environmental law are viewed in light of dispute avoidance mechanisms in other areas of international law, such as those related to human rights and arms control and disarmament, international labour law, law of the sea and international economic and trade law. The Study also considers various tools of addressing international environmental disputes on the domestic level and by use of international organizations.

The dispute settlement regimes are analyzed on the basis of traditional mechanisms available in international law as well as from the perspective of recent trends to develop innovative tools, specific for environmental disputes. These processes are viewed in the context of the work on international liability undertaken by the International Law Commission. Also the related developments in telecommunication and information technology have been taken into account.

Section II of the publication contains the Conclusions drawn by the experts on the basis of the Study. In the Conclusions the experts assess the interplay between environmental dispute avoidance and settlement in light of their mutual supportiveness and in the overall context of sustainable development. The national legislative and institutional capacity-building and the public awareness and education are recognized as important supportive factors. Significant facilitative role of international organizations and institutions as well as that of civil society is underlined.

Section III consists of various supportive and illustrative materials and documents that include international charters, declarations and programmes of action, relevant resolutions of the UN General Assembly and decisions of the UNEP Governing Council, drafts and guidelines developed by other international institutions. The Section also includes lists of selected international documents, agreements, court cases, bibliography and related web links.

Overall the publication is a comprehensive and structured collection of expert deliberations and supporting documentation on the state of environmental dispute avoidance and settlement in international law and on the ways to improve the relevant legal systems, means and mechanisms. The publication addresses the wide range of readers that includes legislators, government and international officials, negotiators of environmental treaties, academic scholars and law practitioners.

ACKNOWLEDGEMENTS

A profound gratefulness is expressed to Dr. Klaus Töpfer, UN Under-Secretary-General and Executive Director of the United Nations Environment Programme for his continued support to the project which resulted into this publication.

Especially appreciated is the encouragement by Bakary Kante, Director of the Division of Environmental Policy Development and Law, rendered by him all through the process of preparation of the publication.

Heartfelt thanks go to all LEOI/DPDL colleagues and interns, especially Nils Meyer-Ohlendorf, Andree Kirchner and Inga Heuser for dedication and substantive contributions.

The International Group of Experts held its meetings in New Delhi, Vienna and London. We are grateful to the Jawaharlal Nehru University, University of Vienna and Queen Mary and Westfield College University of London for their hospitality and assistance with meeting facilities.

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DISPUTE AVOIDANCE AND DISPUTE SETTLEMENT IN INTERNATIONAL ENVIRONMENTAL LAW

INTRODUCTORY ARTICLE BY THE RAPPORTEUR

This "Study on Dispute Avoidance and Dispute Settlement in International Environmental Law" has been elaborated during a period of approximately two years by a geographically balanced Group of Experts. The Group based its work on inputs provided by international lawyers from the Jawaharlal Nehru University, New Delhi, India, the Moi University, Nairobi, Kenya, the Queen Mary and Westfield College at the University of London, United Kingdom, the University of British Columbia, Vancouver, Canada and the University of Vienna, Austria. The Group of Experts met three times at respectively the University of Vienna, the Jawaharlal Nehru University in New Delhi and the Queen Mary and Westfield College in London.

The issues of dispute avoidance and dispute settlement in the context of international environmental law have been extensively addressed in the UNEP long-term Programme for the Development and Periodic Review of Environmental Law for the 1990s (Montevideo Programme II). While taking into account emerging principles and approaches of international environmental law special emphasis is being placed on questions concerning implementation of and compliance with international environmental obligations contained in international environmental agreements.

The objective of this Study is to scrutinize and analyse the means and mechanisms found in international environmental law to deal with matters of dispute avoidance and dispute settlement. Further, the Study reviews other areas of international law in order to gain from experiences accumulated in these fields. Although dispute settlement mechanisms have been developed over the past decades in all branches of international law, an increased emphasis on dispute avoidance mechanisms has manifested in recent years. While stressing the importance and complementarity of both dispute avoidance and dispute settlement, the Group felt the need to concentrate to a certain extent its work on dispute avoidance mechanisms. Dispute avoidance and dispute settlement have been found to be mutually supportive in enhancing and promoting implementation of and compliance with international environmental commitments. Both sets of mechanisms pursue the overarching goal of achieving peaceful and cooperative relations in the field of international environmental protection.

The accrued significance of implementation of and compliance with international and national environmental law originates in the complexity of the issues involved, e.g. climate change, biological diversity, or ozone layer depletion, but is also conditioned by the specific structure of international environmental obligations. While compliance with the classical "bilateralistic" rules of international law benefits from the effects of reciprocity, most - if not all - obligations found in international environmental law are characterised by the absence of such a reciprocal relationship between States. Thus, an obligation to reduce chlorofluorocarbon (CFC) emissions in order to preserve the ozone layer cannot be said to be owed only *vis-à-vis* a specific State only, but rather towards the international community as a whole. While a breach of a "bilateralistic" rule may in principle be responded to by reciprocal non-compliance by the affected State, and thus in itself promotes compliance, the system of reciprocity can not reasonably be applied to international environmental commitments; in reality such an approach would amplify environmental risks; or to express it in the simplest way: deterioration of the environment due to non-compliance with international environmental obligations by one State can not be redressed by reciprocal non-application of such obligations by other States.

The experience has shown that implementation of and compliance with international environmental obligations are central issues of environmental protection. As classical dispute settlement is characterised by an *ex post* scrutiny, it comes into play only when a dispute has arisen. At that time, it might be already too late to prevent irreversible environmental damage. Consequently, the idea that prevention is better than cure should become a guiding principle for the international community's efforts in the environmental field.

Finally, the increased scientific knowledge about environmental matters, which goes hand in hand with growing public awareness has demonstrated that protection of the environment is not only in the interest of individual States, but rather in the interest of the international community as a whole. For instance, depletion of the ozone layer does not only affect a particular country, but may affect the entire international community. Therefore, compliance with certain rules of international environmental law is not an issue of concern for one specific country alone. It follows that States while addressing environmental challenges should act in a spirit of "global partnership" as has been emphasised in the Rio Declaration on Environment and Development in 1992.

There is an evident need to elaborate and employ systems that even in the absence of reciprocity and given the facts mentioned above are apt to ensure implementation of and compliance with international environmental law. These systems comprise mechanisms ranging from monitoring and reporting, as well as certain tools classically understood to belong to the realm of dispute settlement (like fact-finding and inquiry) to such new and innovative approaches like compliance mechanisms under *e.g.* the Montreal Protocol on Substances that Deplete the Ozone Layer or the Long-Range Transboundary Air Pollution Convention and its subsequent Protocols. The latter examples, in particular, take into consideration that States may need assistance and advice in their efforts to comply with their commitments - a notion which is practically unknown to dispute settlement procedures.

The experience gained in the area of dispute settlement shows that the relevant mechanisms have to be adapted to each individual treaty. Similarly, the dispute avoidance mechanisms, in order to be effective and efficient, have to be tailor-made to the specific regime in which they are incorporated. Different issues, such as the protection of the ozone layer, biological diversity or non-navigational uses of international watercourses, as well as the various degrees of stringency of obligations under respective treaties require different tools. Moreover, States are reluctant to accept dispute avoidance mechanisms on a general basis and tend to confine the application of such mechanisms to specific situations. Such tailor-made systems should aim at procedural simplicity and high efficiency. Eventual synergy of various systems should also be taken into account as a "proliferation of dispute avoidance mechanisms" might bear the risk of jeopardising the aims such mechanisms are intended to promote. In particular, reporting obligations should be as far as possible based on common patterns in order to facilitate the preparation of national reports.

The Study scrutinised and analysed dispute avoidance and dispute settlement mechanisms in various fields of international law, with particular focus on international environmental law. While developing the Study, the Expert Group has agreed on a set of Conclusions, which map out possible future approaches in the area of dispute avoidance and dispute settlement. It is hoped that the Study will provide useful information for those interested and engaged in the elaboration of dispute avoidance and dispute settlement mechanisms in the environmental area and that the Conclusions will serve as guidelines for further work in this field.

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SECTION I

**STUDY ON DISPUTE AVOIDANCE AND
DISPUTE SETTLEMENT IN INTERNATIONAL
ENVIRONMENTAL LAW**

I. INTRODUCTION

Dispute settlement has long been a focus of inter-State relations, and it remains an important tool for dealing with international environmental problems. Recently, the international community has paid increasing attention to the need to develop and use means of dispute avoidance, and to the closely related question of improving implementation of, and compliance with, international obligations.¹

This Study focuses on multilateral agreements. Examples of cooperative approaches, including, *inter alia*, dispute avoidance and dispute settlement, can be found in numerous bilateral treaties. By and large, this Study does not focus on such instruments because they are specific to particular bilateral situations.

A. Meaning and Rationale of Dispute Avoidance

The general rule in respect of reparation for a breach of international law requires the State found to be in breach to provide restitution or, if this is not possible, to compensate for the losses.² What then happens where restitution is impossible, because the environmental harm underlying a dispute has already led to irreversible damage? Once a species has been extinguished, how can it be reestablished, *i.e.* brought into existence again? Compensation would not help in such a case. It follows from the special character of environmental harm that reparation available under general international law often does not lead to satisfactory results. Therefore, in the field of environmental protection, it is always better to avoid harm to human health or the environment and disputes that frequently arise therefrom.

The issue of coping with potential friction at the earliest possible time is not limited to the protection of the environment. In the Agenda for Peace the Secretary-General of the United Nations emphasized the importance of "preventive diplomacy", which he defined as

*"action to prevent disputes from arising between Parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur"*³

In order to conduct preventive diplomacy, measures to build confidence, as well as fact-finding to ensure the gathering of timely and accurate knowledge of the relevant facts, are necessary.⁴ Thus, dispute avoidance needs to be seen in a very broad sense. All means and mechanisms which could help to avoid disputes at the inter-State level should be considered in this manner, including traditional means of dispute settlement that could also be used for the purpose of dispute avoidance.

It has become one of the major tasks of international environmental agreements to address the environmental problem by tackling potential disputes at the earliest possible time and thereby prevent harm to human health and the environment. Mechanisms have been elaborated which aim to ensure that States implement the rules agreed upon and that they comply with them. If States properly implement and comply with their international commitments, the scope for possible conflicts is minimized. Thus, measures whose purpose is to enforce the implementation of and compliance with international obligations, can be regarded as effective means of dispute avoidance, since they are capable of reaching the roots of potential disputes *a priori*, *i.e.* before a dispute has arisen, and

¹ Cf. Ch. 39.2 of Agenda 21 - Programme of Action for Sustainable Development, in United Nations, Earth Summit, reprinted in: Agenda 21 - The United Nations Programme of Action from Rio; Dispute Settlement in Environmental Conventions and Other Legal Instruments, OCDE/GD(95)138; Programme for the Development and Periodic Review of Environmental Law, UNEP/GC.17/32, hereinafter: Montevideo-Programme; cf. also the works of the CSD; cf. Article 61 of the IUCN/ICEL Draft International Covenant on Environment and Development; cf. further R. Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment', 144 *RdC* 1975-I, 139 *et seq.*; P.H. Sand, 'Coping with Transnational Environmental Disputes', in: *Österreichische Außenpolitische Dokumentation, Sondernummer "UN-Green Helmets"*; A.O. Adede, 'Avoidance, Prevention and Settlement of International Environmental Disputes', in Sun Lin, Lai Kurukulasuriya (eds.): *UNEP's New Way Forward: Environmental Law and Sustainable Development*, 52 *et seq.*; G. Loibl, Comment on the Paper by Andronicó Adede, in W. Lang, *Sustainable Development*, 125 *et seq.*; *id.* Dispute Prevention and Possible Legal Instruments in the Field of the Environment, in: *Österreichische Außenpolitische Dokumentation, Sondernummer "UN-Green Helmets"*; Z.O. Gresham - J.M. Schurz, Dispute Avoidance and Dispute Resolution in International Environmental Agreements: An Introduction, 9 *Environment and Trade* (edited by UNEP).

² *Case Concerning the Factory at Chorzów* (Claim for Indemnity; Merits), PCIJ-Ser. A, No. 17 (1928), 47; the relevant passage reads as follows: "The essential principle [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear".

³ B. Boutros-Ghali, *An Agenda for Peace*, UN-Doc. A/47/277-S/24111, para. 20.

⁴ *Ibid.*, paras. 23 *et seq.*

in a non-confrontational, non-judicial and amicable manner.

It should be noted that the terms "implementation" and "compliance" are sometimes used interchangeably. For the purposes of this Study implementation is regarded as the incorporation of international norms into domestic legal systems; compliance means the actual performance of these norms.⁵

The examination of existing dispute avoidance mechanisms makes clear that different types of situations and disputes which might lead to disputes exist and that these situations and disputes are to a large extent determined by the nature of the resources in question. In order to be able to cope with these situations and prevent them from escalating into disputes, different dispute avoidance mechanisms may be necessary; for instance, the resolution of a bilateral, regional or global issue may require the application of tools at the appropriate geographical or political level. The mechanisms, which might be necessary to find a successful solution, may differ, depending on the nature of the resource involved, e.g. a watercourse shared between two States or the ozone-layer.⁶ As a consequence, the nature of the dispute and the number of States likely to be involved has to be taken into account when establishing mechanisms to deal with these problems.

Dispute avoidance mechanisms have been elaborated in various international legal instruments concerning environmental issues.⁷

B. Settlement of Disputes

In the aftermath of the Second World War the United Nations elaborated a system for the peaceful resolution of international disputes, which was incorporated in the UN Charter. According to Article 2 para. 3 of the UN Charter all member States "shall settle their international disputes by peaceful means in such a

manner that international peace and security, and justice are not endangered." Article 33 of the UN Charter reads as follows:

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

Most environmental regimes incorporate the same mechanisms, among which the parties may choose. States have been reluctant to use judicial or quasi-judicial mechanisms in solving environmental disputes and, in particular, have tended to use negotiation and consultation. In this regard it should be noted that none of the major environmental catastrophes of recent years, such as the Amoco Cadiz or Chernobyl incidents has led to international judicial proceedings.⁸ Consequently, only very few cases brought before the International Court of Justice have involved questions of environmental nature. Examples of such cases were the Gabcikovo-Nagymaros Case⁹, the Case concerning certain Phosphate Lands in Nauru¹⁰, the Gulf of Maine Case¹¹ and the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons¹². Among the reasons why States seem to be reluctant to employ judicial or quasi-judicial methods of dispute settlement to environmental cases are to be understood to be the following:

1. Dispute settlement procedures are bilateral in character; environmental regimes in which they are included, however, are often multilateral. Thus, compliance procedures, which are multilateral in character, are more relevant, and therefore more appropriate, as they serve a multilateral purpose.
2. Dispute settlement procedures are expensive, time-consuming and confrontational; these

⁵ Note that during the UNCED-process the terms "implementation" and "compliance" have been used with a slightly different meaning. Ch. 39 para. 8 of Agenda 21 understands "effective, full and prompt implementation" as a larger concept, covering both, implementation and compliance as referred to in this study.

⁶ Cf. G. Loibl, *op.cit. supra* fn. 1

⁷ Cf. Vienna Convention for the Protection of the Ozone Layer (26 *ILM* 1987, 1523 *et seq.*), Montreal Protocol on Substances that Deplete the Ozone Layer (26 *ILM* 1987, 1541 *et seq.*), the Convention on Biological Diversity (31 *ILM* 1992, 818 *et seq.*), United Nations Framework Convention on Climate Change (31 *ILM* 1992, 848, *et seq.*), Kyoto Protocol to the Convention on Climate Change (37 *ILM* 1998, 22 *et seq.*), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (28 *ILM* 1989, 657 *et seq.*) or United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (33 *ILM* 1994, 1328 *et seq.*).

⁸ Cf. P.W. Birnie, A.E. Boyle, *International Law and the environment* (Oxford 1992), 137.

⁹ *Case concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of September 25, 1997, *ICJ-Rep.* 1997.

¹⁰ *Case concerning certain Phosphate Lands in Nauru* (Nauru v. Australia), Preliminary Objections, Judgment of June 26, 1992, *ICJ-Rep.* 1992, 240 *et seq.* Before the Court was able to render its judgment on the merits Nauru and Australia reached a friendly settlement of their dispute; with an order dated September 13, 1993, *ICJ-Rep.* 1993, 322s, the Court placed on record the discontinuance of the proceedings. Cf. K. Oellers-Frahm, *Phosphate Lands in Nauru Case* (Nauru v. Australia), III *EPIL* 1997 (R. Bernhardt, ed.), 1025 *et seq.*

¹¹ *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. USA), Judgment of October 12, 1984, *ICJ-Rep.* 1984, 245 *et seq.*

¹² *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of July 8, 1996, *ICJ-Rep.* 1996 (225 *et seq.*).

factors particularly handicap developing countries.

3. Dispute settlement, being accusatorial in character, may bring a State to be punished, but does not ensure results that would safeguard the environment or improve it. Consequently, mechanisms that seek to facilitate compliance and avoid "pointing of the finger of blame" at a State are more appropriate for achieving environmental protection and improvement.
4. Only very few regimes contain compulsory third-party dispute settlement; third-party dispute settlement depends on "mutual agreement". As long as these mechanisms are not compulsory, third-party dispute settlement is unlikely to occur.
5. There may be uncertainty regarding the legal norms that apply to a particular case which may impede bringing a case to a judicial or quasi-judicial body.¹³
6. States may fear that if they bring a claim for transboundary harm, other States may be more likely to bring similar claims against it (the so-called "boomerang effect").
7. Harm is mostly caused by the actions of non-State actors; in many cases it could best be challenged by affected individuals and entities taking action before national courts.

Against this background States continue to establish mechanisms for the resolution of international environmental disputes. Where avoidance and prevention of disputes is not possible or failed, the mechanisms of peaceful settlement of disputes are essential.

C. Relationship Between Dispute Avoidance and Dispute Settlement

In developing dispute avoidance and dispute settlement regimes, it should be taken into account that the mechanisms contained therein are mutually supportive in serving the aim of enhancing and promoting implementation of and compliance with international environmental commitments. However, dispute avoidance and dispute settlement mechanisms serve different needs. In theory the difference between dispute avoidance and dispute settlement might seem to be made rather easily; in practice their interrelations

are not to be overlooked. It has often been stated that the mere existence of dispute settlement mechanisms has a preventive effect since decision-makers generally envisage the possibility that the injured State may have recourse to such mechanisms.¹⁴ Moreover, certain mechanisms, which have been traditionally used to settle disputes between States, may also be employed for the avoidance of disputes.

Effective avoidance and settlement of environmental disputes begin with the design of regimes that foster environmentally appropriate conduct. Dispute avoidance regimes are preferable from an environmental standpoint to models that merely respond to harm. Similarly, regimes that aim at preventing degradation and harm from occurring in the first place are also crucial steps in the avoidance of disputes.

The most elaborate dispute avoidance "mechanisms" will not by themselves prevent disputes from arising if the root causes of the dispute are not addressed. Regimes aiming at the prevention of environmental degradation identify and develop areas of common environmental interest. A strong cooperative relationship and successful experience with different dispute avoidance techniques provide a setting for meaningful dispute settlement mechanisms, *i.e.* mechanisms that States actually are willing to use and whose outcome would be honored.

Avoidance and settlement mechanisms cannot be considered in isolation; nor can they simply be incorporated into other agreements without adaptation. Experience gained in the context of one instrument may well serve as a useful basis for the elaboration of mechanisms in another instrument in order to fit the latter's needs. However, adaptation of the instrument or development of new instruments will be required, particularly in the case of dispute avoidance mechanisms.

D. Factors Adversely Affecting Dispute Avoidance

Despite the fact that many recent international environmental regimes make compliance and dispute avoidance mechanisms a major component, these mechanisms have not had as much impact as they might have had. One reason for this may lie in the lack of capacity of developing countries and countries with economies in transition to comply with their international commitments. Mechanisms requiring

¹³ On this cf. OECD, *Dispute Settlement in Environmental Conventions and other Legal Instruments* (Paris 1995), OECD-Doc. OCDE/GD(95)138.

¹⁴ G. Hafner, *Should one fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?*, in L. Caflisch (ed.), *The Settlement of Disputes between States: Universal and European Perspectives* (1998), 25, 37; G. Loibl, *op.cit. supra* fn. 1, 125 et seq.

fact-finding, reporting or monitoring, for example, assume certain levels of skill, capability (technical and financial), and resources which are often not at hand for developing countries and countries with economies in transition. Thus, it is important to build appropriate capacities, including the development and strengthening of institutions in developing countries and countries with economies in transition, in order to enhance understanding in these countries of international environmental regimes and ability of these countries to comply with their international obligations. This could be aided by the transfer of

technology and financial and technical resources to the developing countries and countries with economies in transition as referred to in the Rio Declaration¹⁵ and Agenda 21.

The effectiveness of dispute avoidance mechanisms would also be increased to the extent these mechanisms and related information requirement are designed so as to minimize their administrative burden while achieving the desired environmental results.

¹⁵ The Rio Declaration on Environment and Development, 31 *ILM* 1992, 876 et seq.

II. EMERGING PRINCIPLES AND APPROACHES

The Rio Declaration laid down, and in some cases reinforced, basic principles to guide the international community in its efforts to achieve sustainable development, which requires the integration of economic, environmental and social policies; other emerging principles and approaches are referred to in Agenda 21. A number of international instruments have been elaborated furthering these principles and approaches such as equity, common but differentiated responsibilities of States, good neighborliness, environmental impact assessment, global partnership,

international cooperation and the precautionary approach. These principles and approaches should be taken into account when designing dispute avoidance and settlement mechanisms. Examples in other areas of international law where comprehensive dispute avoidance and dispute settlement systems have been established (e.g. the law of the sea, human rights law, disarmament or international trade law) warrant careful consideration when elaborating such systems in the environmental context.

III. DISPUTE AVOIDANCE MECHANISMS

The following chapter provides an overview of mechanisms that have been established at the international and domestic levels to help to avoid disputes between States. It is not intended to be exhaustive.

A. Dispute Avoidance Mechanisms in International Environmental Law

At the international level dispute avoidance mechanisms include 1) monitoring (collection of data), 2) reporting mechanisms, 3) consultations, 4) inspection, 5) fact-finding, and 6) compliance procedures. Furthermore, international obligations to increase public awareness, education and information play a particularly important role in achieving 'dispute avoidance'.¹⁶

1. Monitoring - Collection of Data

Monitoring systems aim at the collection of relevant data in respect to the environment generally or specific environmental media, e.g. the atmosphere or water. They primarily serve to identify problems, assess the effects of particular activities or measures or to evaluate the success of international agreements and, thereby, help to avoid disputes. In some instances, data-collection systems are the foundation for evaluation of the implementation of and compliance with international commitments and can be a basis for the further development of international environmental law.¹⁷

By and large two types of monitoring systems may be distinguished:

1) The Parties to such a system collect the relevant data

unilaterally and provide this data to the other Parties or to an international coordination organ; or

2) The Parties establish an international institution for the collection of data.

Examples of the second category are relatively scarce; most of the monitoring systems that have been created follow the first pattern.

a. Earthwatch - Global Environment Monitoring System

Following the 1972 Stockholm Conference on the Human Environment, a global system for the collection of environmental data was established within the framework of the United Nations Environment Programme.¹⁸ This Global Environment Monitoring System (GEMS) is based on national activities, which are coordinated at the international level. More than 140 monitoring stations all over the world are involved in the program. International organizations like WMO, FAO and WHO and some 130 States participate in it. The main tasks of GEMS are the collection of data on renewable resources, climate, the ozone-layer, air quality, oceans, the world biogeochemical carbon cycle and health, and the determination of the impact of pollution thereon.¹⁹

b. Montreal Protocol on Substances that Deplete the Ozone Layer

Under Article 7 of the Montreal Protocol²⁰ States are obliged to provide the following data:

1) within three months of becoming a Party: statistical data on its production, imports and exports of each of

¹⁶ Cf. Section C of the Montevideo Programme for the Development and Periodic Review of Environmental Law for the 1990s the heading of which reads as follows: "Environmental awareness, education, information and public participation", UNEP/GC. 17/32; cf. also C. Biggs, *The Montevideo Environmental Law Programme*, 87 *AJIL* 1993, 328 *et seq.*

¹⁷ Other monitoring systems as those covered below have been elaborated e.g. in the 1991 'Agreement on Air Quality' (30 *ILM* 1991, 676 *et seq.*) between USA and Canada and in Article 10 of the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution (15 *ILM* 1976, 285 *et seq.*).

¹⁸ Cf. UNEP, *GEMS - Global Environment Monitoring System* (1990).

¹⁹ Cf. A. Kiss, - D. Shelton, *International Environmental Law* (1991), 60, 151, 228; T.M. Franck, *Fairness in the International Legal and Institutional System*, 240 *RdC* 1993 II, 9, 354; E. Brown-Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 *Georgetown LJ* 1993, 1, 3; note that a computerized information system (INFOTERRA) has been developed which allows access by officials to sources on information on numerous environmental issues.

²⁰ 26 *ILM* 1987, 1541 *et seq.*

the controlled substances (CFCs and halons) for the year 1986, or the best possible estimates of this data, if actual data is not available;²¹ and

2) annual reports on its annual production, imports and exports of the controlled substances to Parties and non-Parties of the Protocol.

c. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Article VIII para. 7 subpara. a of CITES²² requires its Parties to transmit statistics annually on “the number and type of permits and certificates granted; the States with which such trade occurred; the numbers or quantities and types of specimens, names of species as included in Annex I, II and III and, where applicable, the size and the sex of the specimens in question.” The Secretariat of this Convention is required to study these reports (Article XII para. 1 d).

d. Convention on Long-Range Transboundary Air Pollution and the two Sulphur Protocols

Article 9 of the LRTAP Convention took the already existing EMEP, *i.e.* the “Co-operative program for the monitoring and evaluation of the long-range transmission of air pollutants in Europe”, into the framework of the Convention. Under this system States collect relevant data unilaterally, *i.e.* at national level, and communicate it to EMEP for further analysis. EMEP presents its calculations and analysis to the Executive Body of the LRTAP Convention.

Under Article 4 of the Helsinki Protocol (First Sulphur Protocol)²³ the Contracting Parties are obliged to transmit annual reports on their sulphur emissions to the Executive Body. The Executive Body elaborated “Guidelines for reporting by Parties to the Helsinki Protocol” which provide for possible consequences in case of a delay in reporting; para. 2 of the guidelines

stipulates that:

“Parties which by the required date have not submitted data on their overall national sulphur emissions [...] shall either accept the emission estimates adopted by EMEP [...] or shall provide corrections of such estimates.”

The Second Sulphur Protocol²⁴ follows a similar pattern. Under Article 5 the Parties are required to provide information on a periodic basis on the “levels of national annual sulphur emissions, in accordance with guidelines adopted by the Executive Body”. Its Article 7 establishes an Implementation Committee, whose purpose is to review periodically “compliance by the Parties with the reporting requirements of the Protocol”.²⁵

2. Reporting Mechanisms

Under reporting mechanisms, States communicate - usually at yearly intervals - information on their implementation efforts to a central body, *e.g.* the Conference of the Parties.

Reporting systems pursue a variety of goals:

- i) to assess the implementation of and compliance with international commitments,
- ii) to remind the Parties regularly of their international obligations and, hence, to “ensure that it stays at the forefront of its Parties’ attention”,²⁶
- iii) to display the difficulties States face in endeavouring to implement and comply with their obligations,
- iv) to increase the awareness of decision makers and - to some extent - of the public with regard to environmental problems and the need for their resolution, and
- v) to highlight whether already existing regulations are adequate to fulfill the

²¹ Article 7 para. 1. The year of 1986 forms the most crucial period for the implementation of the Montreal Protocol. The consumption of Chlorofluorocarbons (CFCs) from the 7th month after the entry into force of the Protocol shall not exceed the level of 1986; between 1993 and 1994 the consumption may only comprise of 80% of the 1986-level and between mid-1998 and mid-1999 the level of consumption shall be 50% of the 1986-level; the consumption of halons shall after three years after the entry into force of the protocol be frozen on the 1986-level; to this cf. Article 2 of the Montreal Protocol. Thus, compliance with these rules can only be achieved and verified, when comparing the data presented to the data or estimates on the year of 1986.

²² Convention on International Trade in Endangered Species (1973), 993 *UNTS* 243 *et seq.*

²³ Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 percent (1985), 27 *ILM* 1988, 707 *et seq.*

²⁴ Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (1994), 33 *ILM* 1994, 1540 *et seq.*

²⁵ Decision 1997/2 concerning the Implementation Committee, its Structure and Functions and Procedures for Review of Compliance, para. 3 (d), in Annex III to the Report of the Fifteenth Session of the Executive Body, available at URL: http://www.unece.org/env/conv/report/eb53_a3.htm.

²⁶ S. Lyster, *International Wildlife Law* (1985); cf. also A. Boyle, Saving the World? Implementation and Enforcement of International Environmental Law through International Institutions, 3 *Journal of Environmental Law* 1991, 229 *et seq.*, 232.

objectives set forth by the agreement in question.

Two types of reporting systems can be distinguished: 1) systems that merely require States to communicate the information requested and 2) systems where the information provided is used as the basis for further discussion within the international body on the efficiency of the measures undertaken by the States to implement a certain legal instrument.

a) Reporting Systems on a Voluntary Basis in the Framework of UNCED and the Commission for Sustainable Development

Under Resolution 44/228, the UN General Assembly convened the United Nations Conference on Environment and Development and initiated a voluntary reporting system. The General Assembly invited all States "to prepare national reports, as appropriate, to be submitted to the Preparatory Committee [...]".²⁷ This invitation was aimed at displaying the activities States had already undertaken in the environmental field and to elucidate yet unresolved problems of environmental protection.

In 1993 the ECOSOC, following GA Res. 47/191, created the Commission on Sustainable Development (CSD)²⁸ which is to "consider information provided by Governments, for example, in the form of periodic communications or national reports regarding the activities they undertake to implement Agenda 21 [...]".²⁹ This reporting system, although not obligatory, aims to further the implementation of a 'soft law' instrument.

b) Reporting Systems Embodied in International Conventions (Obligatory Mechanisms)

Such mechanisms exist in many multilateral agreements e.g. in the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Article 13), the 1992 United Nations Framework Convention on Climate Change (Article 12) and the Kyoto Protocol (Articles 7 and 8), the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (Article VIII), the 1992 Convention on Biological Diversity (Article 26), the 1994 United Nations Convention to Combat Desertification in Countries

Experiencing Serious Drought and/or Desertification, Particularly in Africa (Article 26).³⁰

i) Basel Convention

Under Article 13 para. 3 of the Basel Convention, the Parties shall, consistent with their national laws and regulations,

"transmit, through the Secretariat, to the Conference of the Parties established under Article 15, before the end of each calendar year, a report on the previous calendar year containing the following information:

[...]

c) Information on the measures adopted by them in implementation of this Convention".

ii) United Nations Framework Convention on Climate Change and the Kyoto Protocol

Article 12 para. 1 b of the United Nations Framework Convention on Climate Change requires all Parties to communicate to the Conference of the Parties a general description of steps they have undertaken or envisaged to implement the Convention.

Article 12 para. 2 a takes into account that the largest share of the emission of greenhouse gases originates in developed countries³¹ and requires more detailed reports to be submitted by developed countries and certain countries with economies in transition.³² They are required to communicate, *inter alia*, a detailed description of the policies and steps undertaken for the implementation of the provisions contained in Article 4 paras. 2 a and 2 b. Developing countries do not have to transmit reports other than the above-mentioned general description of steps they have undertaken or envisage to implement the Convention.

A Subsidiary Body for Implementation (SBI) was established under Article 10 of the UNFCCC that may consider the reports received in order to assist the Conference of the Parties (Article 10 para. 2 (a)), which itself has a duty to assess the overall effects of the measures taken by Parties pursuant to the Convention (Article 7 para. 2).

Under the UNFCCC an in-depth review process has been established to ensure that the Conference of the

²⁷ GA-Res. 44/228, II para. 11.

²⁸ ECOSOC Dec. 1993/207.

²⁹ GA-Res. 47/191, para 3 b.

³⁰ See also 1994 IAEA Convention on Nuclear Safety, 33 *ILM* 1994, 1514 *et seq.* Articles 5, 20 and 22 para.1.

³¹ Cf. Preamble para. 3, which reads as follows: "Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs".

³² Cf. Annex 1 UNFCCC.

Parties receives accurate, consistent and relevant information from the Parties.³³ The review process, which is subject to the consent of the Party concerned, is conducted by multilateral teams. It often results in greater clarity and transparency and in filling information gaps.

In December 1997, the Conference of the Parties to the UNFCCC adopted the so-called Kyoto Protocol, which provides for a comprehensive reporting mechanism. Under the Kyoto Protocol each Party listed in Annex I of the UNFCCC has to elaborate an annual inventory of its anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol. In those inventories “the necessary information for the purposes of ensuring compliance with Article 3” of the Kyoto Protocol shall be incorporated; furthermore, each Annex I State has to incorporate into its national communications required by Article 12 UNFCCC the supplementary information necessary to demonstrate compliance with its commitments under the Kyoto Protocol.³⁴

This information will be reviewed by expert teams or as part of the annual compilation and accounting of emissions inventories. According to Article 8 para. 3 of the Kyoto Protocol, the review process will provide a thorough and comprehensive technical assessment of all aspects of implementation by the Parties of the Kyoto Protocol. The expert review teams are required to prepare a report to the Conference of the Parties assessing the implementation of the commitments and identifying any potential problems in, and factors influencing, the fulfillment of commitments. The Secretariat must circulate the review teams’ reports to all Parties to the Convention.

Finally, the Conference of the Parties serving as the meeting of the Parties (COP/MOP) considers the information submitted by Parties pursuant to Article 7 and the reports of the expert review teams thereon. The COP/MOP also considers questions of implementation listed by the Secretariat as well as questions raised by Parties.

iii) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

According to Article VIII para. 7 of CITES, the Parties are obliged to transmit two types of reports: firstly, an annual report containing specified statistics³⁵ and secondly, “a biannual report on legislative, regulatory and administrative measures taken to enforce the provisions of the present Convention.”³⁶

The reports of the first kind are aimed at ensuring the adequacy of the Convention, *i.e.* the ability of the measures and methods embodied in this instrument to cope with the problem of endangered species,³⁷ whereas the reports of the second kind are concerned with the effectiveness of the Convention, *i.e.* the implementation of and compliance with CITES by the Parties.³⁸ Consideration of the reports by the Conference of the Parties is possible, but not obligatory.³⁹

iv) Convention on Biological Diversity

Under Article 26 of the Convention on Biological Diversity the Contracting Parties are obliged to present reports to the Conference of the Parties, on measures undertaken for the implementation of the Convention and their effectiveness in meeting its objectives. The Conference of the Parties is entitled to consider the information and reports received under Article 26.⁴⁰

v) Vienna Convention for the Protection of the Ozone Layer and Montreal Protocol on Substances that Deplete the Ozone Layer

Under Article 5 of the Vienna Convention for the Protection of the Ozone Layer, Parties are under the obligation to transmit to the Conference of the Parties information on

“the measures adopted by them in implementation of this Convention and of protocols to which they are Parties [...]”

³³ UNFCCC/CP/1995/Add.1.

³⁴ Article 7 of the Kyoto Protocol (37 *ILM* 1998, 22 *et seq.*; also available at URI: <http://www.unfccc.de>)

³⁵ Article VIII para. 7 b in conjunction with Article VIII para. 6 b; Parties are obliged to prepare and transmit annual reports containing a summary of the information specified in para. 6 b, *i.e.* “the number and type of permits and certificates granted; the States with which such trade occurred; the number or quantities and types of specimens, names of species as included in Appendices I, II and III and, where applicable, the size and sex of the specimens in question.”

³⁶ Article VIII para. 7 b of CITES.

³⁷ See Chapter III.A.1 on Monitoring - Collection of Data.

³⁸ Cf. also the Montevideo Programme for the Development and Periodic Review of Environmental Law (UNEP/CC. 17/32) which distinguishes between ‘Implementation of international legal instruments in the field of the environment, in order to achieve their objectives’ (section B) and ‘Adequacy of existing international instruments’ (section C).

³⁹ Article XI para. 3 CITES: “At meetings, whether regular or extraordinary, the Parties shall review the implementation of the present Convention and may: [...] d) receive and consider any reports presented by the Secretariat or by any Party”.

⁴⁰ Article 23 para. 4 (a) Convention on Biological Diversity.

Article 6 para. 4 a) empowers the Conference of the Parties to consider information submitted in accordance with Article 5 of the Convention.⁴¹

vi) United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa

Under Article 26 of the UNCCD⁴² each Party is required to communicate to the Conference of the Parties for consideration at its ordinary sessions reports on the measures taken for the implementation of the Convention.⁴³ Article 26 UNCCD provides for different reporting standards for affected country Parties and developed country Parties.⁴⁴

3. Consultation

In situations that are capable of leading to environmental disputes, consultations between the parties concerned are likely to be a helpful means of coping with a “situation” before it can possibly develop into a dispute. Consultation has so far been incorporated into a number of international environmental agreements and is also embodied in Principle 19 of the Rio Declaration.⁴⁵

Article 14 para. 1 subpara. c of the Convention on Biological Diversity expresses the Contracting Parties’ obligation to promote on the basis of reciprocity “notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral regional or multilateral agreements”. The Convention on Biological Diversity, thus, establishes an obligation to promote such procedures rather than obliging Contracting Parties to actually conducting them.

Obligations to carry out consultations can be found particularly in the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses⁴⁶ which refers to consultations in a whole variety of provisions dealing, *inter alia*, with planned measures, water management, installations or cases where significant transboundary harm has occurred.⁴⁷

Provision for consultation is made in Article 10 of the ECE-Convention on the Protection and Use of Transboundary Watercourses and International Lakes⁴⁸. Such consultation shall be held at the request of a Riparian Party and shall be carried out on the basis of reciprocity, good faith and good-neighborliness. Consultation under Article 10 shall aim at cooperation regarding the issues covered by the Convention.

Article 4 of the Convention on Cooperation for the Protection and Sustainable Use of the Danube River⁴⁹ lists consultations as one of the forms of cooperation under the Convention.⁵⁰

4. Inspection

International inspection systems serve the function of verifying reporting mechanisms such as national reports. They can be carried out by an international body⁵¹ or conducted by a national body acting under international supervision. The advantage of the first of these two approaches is evident: the accuracy of national reports is reviewed by an objective observer. An example of the second approach is provided by e.g. the 1946 Whaling Convention.⁵² Inspections under that Convention, which are limited to areas beyond national jurisdiction, are carried out by nationals of the Contracting State who are supervised by an international body.

A type of inspection system distinct from the two systems mentioned above is contained in Article VII

⁴¹ The compliance procedure pursuant to Article 8 of the Montreal Protocol is discussed in detail in a later chapter.

⁴² 33 *ILM* 1994, 1328 *et seq.*

⁴³ Article 26 para. 1 UNCCD.

⁴⁴ Cf. for affected country Parties Article 26 paras. 2, 3 and 4 and for developed country Parties Article 26 para. 4.

⁴⁵ As to consultation in the framework of the WTO/GATT Dispute Settlement Understanding see chapter IV.A.1.a and as to NAAEC see chapter IV.A.1.f.i of this Study.

⁴⁶ 36 *ILM* 1997, 700.

⁴⁷ United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, Article 6 para. 2 (concerning equitable and reasonable utilization), Article 7 (concerning significant harm that has already occurred), Article 17 (concerning planned measures), Article 18 (concerning planned measures where no notification has occurred), Article 19 (concerning certain exceptions for urgent implementation of planned measures), Article 24 (concerning water management), Article 26 (concerning installations) and Article 30 (special provisions for so-called indirect procedures).

⁴⁸ 31 *ILM* 1992, 1312 *et seq.*

⁴⁹ Reprinted in W. Burhenne (ed.), *International Environmental Law - Multilateral Treaties*, Doc. 994:49.

⁵⁰ Note that Article 2 of the Danube Protection Convention places the Parties under a general obligation to cooperate and Article 11 contains further specifications concerning consultations.

⁵¹ For an example outside the field of environmental protection see Article 3 of the Non-Proliferation Treaty.

⁵² International Convention for the Regulation of Whaling (1946), 161 *UNTS* 72 *et seq.*

of the 1959 Antarctic Treaty. Each Party to that agreement can send observers to Antarctica. They are entitled to free access to all parts of the Treaty area and may inspect all stations, other installations, ships, aircrafts etc. located in Antarctica. Furthermore, each Party has the right to conduct overflights of the Treaty area. This mechanism can consequently be regarded as a system of mutual inspection. Furthermore, Article XXIV of the 1982 Convention on the Conservation of Antarctic Marine Living Resources⁵³ provides for an inspection system “to promote the objective and ensure observance of the provisions of this Convention”.⁵⁴ Similar systems are found in the 1967 Outer Space Treaty,⁵⁵ and the 1979 Moon Agreement.⁵⁶

Article 220 para. 2 of UNCLOS is another example of this kind of inspection system.⁵⁷ Article 220 para. 2 of UNCLOS provides:

“Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State [...] may undertake physical inspection of the vessel [...].”

Furthermore, Article 21 of the Straddling Stocks Convention provides for inspection.⁵⁸

5. Fact-Finding - Inquiry

In Res. 46/59 the General Assembly of the U.N. defined fact-finding as

⁵³ 19 *ILM* 1980, 837 *et seq.*

⁵⁴ Article XXIV para. 1.

⁵⁵ Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 610 *UNTS* 1967, 205 *et seq.*

⁵⁶ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 18 *ILM* 1979, 1434 *et seq.*

⁵⁷ It should be noted that UNCLOS - in addition to Article 220 para. 2 - provides for other inspection rights such as the inspection rights on the high seas (search and visit) and the so-called port-State inspection provided for in Article 218. See also other provisions in Article 220 where the coastal State has certain well-defined rights of investigation and inspection, depending on the degree of the suspected pollution and compliance with national or international standards.

⁵⁸ Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 34 *ILM* 1995, 1542 *et seq.* 1995.

⁵⁹ Cf. also CA-Res. 2329(XII) which called upon the Secretary-General to prepare a register of experts in legal and other fields, whose services might be used for fact-finding. The task of these fact finding bodies may - to a great extent - be regarded as seeking the prevention of a dispute (cf. the U.N. ‘Handbook on the Peaceful Settlement of Disputes between States’, U.N.-Doc. A/46/33, para. 79).

⁶⁰ This can be illustrated by reference to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (32 *ILM* 1993, 800 *et seq.*; cf. also 88 *AJIL* 1994, 323, 331), where such rules have been elaborated in detail.

⁶¹ Cf. Article XIII CITES.

⁶² Cf. Article 3 para. 7 and Appendix IV of the Convention on Environmental Impact Assessment in a Transboundary Context, 30 *ILM* 1991, 802 *et seq.*

⁶³ Cf. Articles 4 and 5 and Annex II of the Convention on the Transboundary Effects of Industrial Accidents, 31 *ILM* 1992, 1330 *et seq.*

⁶⁴ Cf. Chapter III.B.5.d.

“[...] any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to international peace and security.”

By using the term ‘situation’ the General Assembly made it clear that fact-finding, although often seen as a ‘classical’ tool for the settlement of disputes, is also relevant to dispute avoidance.⁵⁹ The purpose of an inquiry is to produce an impartial finding of fact especially when reliance on the information provided by States is felt not to be sufficient. These findings can then be relied on as the basis for the adoption of measures to avert possible disputes. Ordinarily an international commission is empowered to conduct a fact-finding mission within the territory of a certain State, provided that the State agrees thereto. To be acceptable to States, fact-finding missions are governed by a set of procedural rules, which aim at averting misuse of information gathered and protecting sensitive national interests.⁶⁰ In contrast to inspection, which is normally conducted on a regular basis, inquiries take place only, when they are deemed to be necessary.

In the field of international environmental law, inquiry is provided international agreements, such as e.g. CITES,⁶¹ the ECE-Convention on Environmental Impact Assessment in a Transboundary Context,⁶² the ECE-Convention on the Transboundary Effects of Industrial Accidents,⁶³ and the North American Agreement on Environmental Cooperation.⁶⁴

6. Compliance Procedures

A number of compliance procedures have been developed under multilateral environmental agreements. They are characterized by their cooperative, non-confrontational and non-judicial nature⁶⁵ and in their aim of seeking amicable solutions to problems arising in connection with the application and implementation of environmental agreements. In literature they have often been seen as having a status in between dispute avoidance and dispute settlement procedures.⁶⁶ It may be said that the very purpose of compliance procedures is to encourage or enable States to avoid resorting to formal dispute settlement procedures,⁶⁷ indeed to avoid the emergence of disputes in the first place. In fact, many compliance procedures combine elements of three distinct processes: processes designed to clarify norms and standards employed by a treaty, processes designed to further the evolution of these norms and standards, and processes designed to resolve problems among Parties.

The longest standing and most developed compliance procedure is the one that has been elaborated under Article 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer. A comparable compliance mechanism has recently started to operate under the LRTAP Convention and subsequent protocols thereto.

a) Montreal Protocol on Substances that Deplete the Ozone Layer

The States negotiating the Montreal Protocol were not able to reach agreement on how such a compliance procedure should be designed in time to include it in the Protocol as adopted. They therefore inserted an enabling clause in (Article 8).

The First Meeting of the Parties managed only to set up a working group to draft proposals for a procedure. It was only at the fourth Meeting of the Parties that there was final agreement to a procedure which, because it was the first in the field, has tended to be viewed as a milestone in the development of rules ensuring compliance with international environmental commitments.

The Parties established a standing Implementation Committee, which consists of ten Parties elected by the Meeting of the Parties.⁶⁸ A comprehensive system of rules was elaborated which identifies three ways of triggering the procedure:

- i) Parties which have reservations in respect to another Party's compliance with the Protocol can address them to the Secretariat which then transmits copies of the submissions to the Party whose compliance with the Protocol is in question. A reply is to be transmitted within three months or 'such longer period as the circumstances of any particular case may require'. The submission, the reply and any information provided by the Parties is then transmitted to the Implementation Committee which shall consider the matter as soon as practicable.⁶⁹
- ii) Should the Secretariat, during the course of preparing its reports, become aware of possible non-compliance by a Party, it may request the Party concerned to furnish necessary information. Should the Party not provide the necessary information or should the matter not be resolved by administrative action or through diplomatic contacts, the Secretariat shall include this matter in its report to the Meeting of the Parties and inform the Implementation Committee.⁷⁰
- iii) Should a Party, despite having made its best, *bona fide* efforts conclude that it is not able to comply fully with its obligations under the Protocol, it may address a written submission to the Secretariat, which then transmits the submission to the Implementation Committee.⁷¹

The Implementation Committee deals with matters of alleged or admitted non-fulfillment of the commitments undertaken by Parties under the Montreal Protocol. It aims at an amicable solution including "measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objective."⁷² The compliance procedure was specifically designed to emphasize cooperation, and to assist Parties in their efforts to

⁶⁵ Cf. UNEP/OzL.Pro.7/12, para. 39 (Report of the President of the Implementation Committee).

⁶⁶ Cf. J. Rummel-Bulska, Implementation Control: Non-compliance Procedure and Dispute Settlement: From Montreal to Basel, in 'The Ozone Treaties and their Influence on the Building of International Environmental Regimes', W. Lang (ed.), *Österreichische außenpolitische Dokumentation. Special issue*, who States (with reference to the Working Group of Legal Experts on Non-compliance): "that the non-compliance and dispute settlement procedures [...] were 'two distinct and separate procedures which could well exist in parallel[...]' and that '...the Parties should have the right to exercise either option in any given situation'".

⁶⁷ P.W. Birnie, A. Boyle, *op.cit. supra* in, 13, 177.

⁶⁸ See Annex IV ('Non-Compliance Procedure') of the 'Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that deplete the Ozone Layer', UNEP/OzL.Pro.4/15, para. 5; reprinted in 3 *YIEL* (1992), 819s. The Tenth Meeting of the Parties held in Cairo in November 1998 adopted a decision modifying and clarifying in a number of minor respects the terms of the "non-compliance" procedure.

⁶⁹ Paras. 1 and 2 of Annex IV, *ibid.*

⁷⁰ Para. 3 of Annex IV, *ibid.*

⁷¹ Para. 4 of Annex IV, *ibid.*

comply, rather than to punish their failure to do so. So far the Implementation Committee has considered several instances of non-compliance with the Montreal Protocol involving, *inter alia*, Belarus, Bulgaria, the Czech Republic, Latvia, Lithuania, Poland, the Russian Federation and the Ukraine.⁷³

As regards the relationship between compliance procedures and dispute settlement mechanisms it was concluded that a clear delimitation between these mechanisms is not feasible. In some cases, matters, which could be dealt with within the compliance procedure, could also be raised before judicial bodies.⁷⁴ However, it has to be borne in mind that the two procedures differ in their nature. The compliance procedure is

- non-confrontational and is based on cooperation between the Party in question and the Implementation Committee with a view to facilitating the former's compliance with its commitments under the agreement,
- non-judicial and based on the interest of all Parties to the agreement in ensuring implementation of, and compliance with, the commitments undertaken, and
- to provide assistance to Parties which face difficulties in carryinout their commitments.

Under the compliance procedure the Implementation Committee has no power to make recommendations or issue instructions directly to the Party under scrutiny. It may merely make recommendations to the Meeting of the Parties which, in turn, can adopt decisions. In practice such decisions will be taken by consensus. Among the measures, which may be taken by the Meeting of the Parties, are those enumerated in the so-called "Indicative List".⁷⁵ They range from "appropriate assistance", both technical and financial, to "cautions" and suspensions of rights and privileges under the Protocol.

A number of factors have contributed to the success

of the compliance procedure under the Montreal Protocol: first, the fact that the Committee cannot itself adopt decisions with respect to Parties before it, has allowed it to act as an effective mediator. Secondly, the fact that the Committee members are State Parties rather than independent experts, has built confidence in the procedure as run by representatives of equals well-versed in the technical requirements of the Montreal Protocol as well as of diplomacy.⁷⁶ Thirdly, the absence of observers has promoted greater openness in both the submissions and the Committee's deliberations.

By contrast, dispute settlement procedures are not designed primarily to assist a Party being in breach of an international obligation to return to compliance.

b) Long-Range Transboundary Air Pollution Convention and subsequent Protocols

At their meeting in 1993, the European Ministers of the Environment defined the essential character of compliance procedures as follows:

- "- aim to avoid complexity
- non-confrontational
- transparent
- leave the competence for the taking of decisions to be determined by the Contracting Parties
- leave the Contracting Parties to each convention to consider what technical and financial decisions may be required, within the context of the specific agreement
- include a transparent and revealing reporting system and procedures, as agreed to by the Parties".⁷⁷

In the 1994 second Sulphur Protocol the Parties agreed to establish an Implementation Committee which serves to "review the implementation of the present Protocol and compliance by the Parties with their

⁷² Para. 9 of Annex IV, *ibid.*

⁷³ Cf. the Reports of the 7th to 9th Meetings of the Parties, Doc. UNEP/OzL.Pro.7/12, UNEP/OzL.Pro.8/12 and UNEP/OzL.Pro.9/12, available at URL: <http://www.unep.ch/ozone/reports.htm>.

⁷⁴ Cf. also chapter I.2 of this Study.

⁷⁵ See Annex V of the 'Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that deplete the Ozone Layer, UNEP/OzL.Pro.4/15, reprinted in 3 *YIEL* (1992), 821.

⁷⁶ In this regard mention should also be made of a trend towards greater involvement of non-State actors; this trend can be exemplified by the Scientific Committee for Antarctic Research (SCAR) which is deeply involved in the State activities according to the Antarctic Treaty System.

⁷⁷ Cf. para. 23.1 of the Lucerne ECF Declaration Concerning Environment 1993.

⁷⁸ Cf. Article 7 of the Oslo Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (33 *ILM* 1994, 1540 et seq.).

obligations”.⁷⁸ In 1997, however, the Executive Body to the Long-Range Transboundary Air Pollution Convention⁷⁹ adopted a new compliance regime applicable to all Protocols to the Convention.⁸⁰ A standing Implementation Committee consisting of eight Parties to the Convention was established, which shall, *inter alia*, “[r]eview periodically compliance by the Parties with the reporting requirements of the protocols” and consider any submission or referral concerning compliance “with a view to securing a constructive solution”.⁸¹ The compliance procedure can be triggered either

- by submissions by Parties that have reservations about another Party’s compliance,⁸²
- by submissions by a Party that concludes that, despite its best endeavors, it is or will be unable to comply fully with its obligations under a protocol,⁸³ or
- by referrals by the Secretariat, where it becomes aware of possible non-compliance by a Party and has requested the Party to furnish necessary information about the matter and if there is no response or the matter is not resolved within three months or such longer period as the circumstances of the matter may require.⁸⁴

As in the case of compliance procedure under the Montreal Protocol, the Implementation Committee has no power to make recommendations or issue instructions directly to a Party under scrutiny. It may merely make such “recommendations as it considers appropriate, taking into account the circumstances of the matter” to the Executive Body.⁸⁵ It is then up to the Parties to the Protocol concerned, meeting within the Executive Body, to “decide upon measures of a non-discriminatory nature to bring about full compliance with the protocol in question, including measures to assist a Party’s compliance.”⁸⁶

c) UNFCCC and Kyoto Protocol

i) Multilateral Consultative Process under Article 13 UNFCCC

Article 13 of the UNFCCC required the Conference of the Parties, at its first session, to consider the establishment of a so-called multilateral consultative process (MCP), available to Parties on their request, for the resolution of questions regarding the implementation of the Climate Change Convention. During its first session the Conference of the Parties by means of decision 20/CP.1 set up an open ended working group⁸⁷ to address this multilateral consultative process. In decisions 4/CP.2 and 14/CP.3 the working group was invited to proceed with its work with a view to complete it before the fourth Conference of the Parties. The working group reached the conclusion that the MCP should function through a standing Committee answering directly to the Conference of the Parties. The MCP should operate in a facilitative, cooperative and non-confrontational, transparent, timely manner and be non-judicial. It is to be separate from, and without prejudice to, the Convention’s provisions on dispute settlement. The purpose of the process is to provide advice on assistance to help Parties to overcome difficulties they encounter in implementing the Convention.⁸⁸ The fourth Conference of the Parties, which took place in Buenos Aires in November 1998 approved the text of the MCP as elaborated by the working group with the exception of two interrelated issues, which it is aimed to resolve at COP-5.⁸⁹

ii) Relevant Provisions of the Kyoto Protocol

The Kyoto Protocol contains two provisions concerning the issue of compliance: Article 16 envisages the application to the Protocol of a multilateral consultative

⁷⁸ As to the Executive Body cf. Article 10 of the Long-Range Transboundary Air Pollution Convention. The Executive Body shall, *inter alia*, review the implementation of the Convention, establish working groups to consider matters related to implementation, etc.

⁸⁰ Operative para. 1 of the Decision 1997/2 concerning the Implementation Committee, its Structure and Functions and Procedures for Review of Compliance, in Annex III to the Report of the Fifteenth Session of the Executive Body, available at URL: http://www.unep.org/env/conv/report/eb53_a3.htm.

⁸¹ Para. 3 (a) and (b) of the Annex to Decision 1997/2.

⁸² Para. 4 (a) of the Annex to Decision 1997/2.

⁸³ Para. 4 (b) of the Annex to Decision 1997/2.

⁸⁴ Para. 5 of the Annex to Decision 1997/2.

⁸⁵ Para. 9 of the Annex to Decision 1997/2.

⁸⁶ Para. 11 of the Annex to Decision 1997/2.

⁸⁷ The Ad hoc Group on Article 13 (AG 13).

⁸⁸ In this regard cf., *i.a.*, the Report of the Ad Hoc Group on Article 13 on the Work of its Fifth Session, Bonn 28 – 30 July 1997, Annex II, Doc. FCCC/AG13/1997/4 and also the Report of the Ad Hoc Group on Article 13 on its Sixth Session, Bonn, 5 – 11 June 1998, Doc. FCCC/AG13/1998/2 (available at URL: <http://www.unfccc.de>).

⁸⁹ See Decision 10/CP.4, Multilateral Consultative Process (available at URL: <http://www.unfccc.de>).

process along the lines of the one referred to in Article 13 of the UNFCCC. Article 18 provides for the elaboration of “appropriate and effective procedures and mechanisms to determine and address cases of non-compliance with the Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance.” It is to be noted that any such “appropriate ... procedures and mechanisms” entailing binding consequences must be adopted by means of amendment to the Kyoto Protocol.

d) Basel Convention

The establishment of a compliance procedure is also under consideration within the framework of the Basel Convention. In June 1998, the Convention’s Consultative Sub-Group of Legal and Technical Experts submitted the report on its third session to the Conference of the Parties⁹⁰ in which it identified “principles for a regime of monitoring of implementation and compliance”.⁹¹ The Sub-Group stated that such a regime should be preventive and forward looking, timely, simple, flexible, consultative (*i.e.* non-confrontational, non-judicial, non-binding and cooperative), cost-effective and transparent. Its main functions should be: 1) facilitating and assessing Parties’ compliance with their obligations, 2) facilitating and assessing implementation of the Basel Convention, and 3) facilitating and assessing reporting under Article 13 of the Basel Convention.

The Sub-Group reached the conclusion that such a regime should be established through a decision of the Conference of the Parties rather than through an amendment of the Basel Convention. In contrast to the other agreements discussed in this section the Basel Convention does not expressly envisage the establishment of a compliance procedure or a multilateral consultative process.

7. Other Mechanisms

The importance of cooperative practice within treaty regimes has already been noted. However, such cooperative practice does not follow automatically from the fact of adopting a treaty, nor can it be ensured through the mere adoption of dispute avoidance ‘mechanisms’ or ‘techniques’. The growth and consolidation of cooperative practice requires that areas of shared or common interest are understood by all Parties, that the concerns of individual Parties are

understood by all and that all Parties have confidence in the basic fairness of the regime. In this, the Study echoes Area D of the Montevideo Programme II where a strategy for dispute avoidance is said to require the promotion of “informed decisions, mutual understanding and confidence-building”.

In recent treaty practice the above approach found expression in the “framework convention” model and has been employed by many environmental protection regimes. This model allows for gradual regime-building and the initial framework articulates only basic points of common concern, provides for information gathering and promotes interaction and, ultimately, mutual trust among the Parties. The examples of the Vienna Convention for the Protection of the Ozone Layer, of the Framework Convention on Climate Change and of the Convention on Biological Diversity illustrate that such an approach is particularly important in the context of cooperation between developed and developing countries.

Thus, gathering and evaluation of information, leading to informed decision making, is a first crucial step to identifying areas of common, or at least overlapping, concern. It is important that regimes provide for fora and sustainable methods, which can generate mutually acceptable findings and information to facilitate agreement on the extent of a given problem and the countermeasures required. A variety of options, ranging from the reporting mechanisms to the compliance procedures discussed above, contribute to “international” information gathering and evaluation. However, the importance of another useful technique should not be overlooked: the use of working groups composed of science or policy experts, as opposed to government representatives, for discussing issues and information in a less politicized setting. It is generally thought that such ‘communities of shared knowledge’ make important contributions to the articulation of common concerns and have considerable substantive influence on the development of both policy and law.⁹² Thought might also be given to increased involvement of non-governmental organizations (NGOs) in such processes.⁹³ While the participation of NGOs in decision making or enforcement processes remains problematic,⁹⁴ the expertise of NGOs, which are often transnational expert communities themselves, can make important contributions at the information gathering or evaluation stage.

Most of the more recent multilateral environmental agreements make provision for the information

⁹⁰ Report of the Consultative Sub-Group of Legal and Technical Experts on the Work of its third Session, June 24, 1998, Doc. UNEP/CHW/LSG/3/5.

⁹¹ See Annex I of the Report.

⁹² See T. Gehring, *International Environmental Regimes: Dynamic Sectoral Legal Systems*, 1 *YIEL* (1990), 35, 36.

⁹³ See A. Chayes & A.H. Chayes, *The New Sovereignty: Compliance With International Regulatory Regimes* (1995) at 250-270.

⁹⁴ But see *infra*, Section III.B.5.d on NAFTA.

gathering and evaluation channels described above. Indeed, when dealing with environmental concerns that are characterized by scientific and cost uncertainty, ongoing assessment of the problem in question and the identification of available countermeasures have been recognized as an indispensable precursor to normative development. For example, in light of the many uncertainties with respect to ozone depletion, the Parties to the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol established mechanisms for the evaluation of scientific information and control measures.⁹⁵ Panels of experts considered findings on the extent of ozone depletion and its potential adverse effects. Before the Protocol entered into force an intergovernmental working group, established in the Final Act of the 1987 Conference of Plenipotentiaries,⁹⁶ oversaw the expert panels' work plans and schedules.⁹⁷ Similar expert panels have been used since the Protocol's entry into force and have played an important role in each of its subsequent revisions.

More formalized examples of this type of mechanism include the Joint Group of Experts on Scientific Aspects of Marine Pollution (GESAMP) and the Intergovernmental Panel on Climate Change (IPCC). GESAMP, without being tied to any particular treaty, has made a significant contribution over two decades to the development of marine environmental protection law.⁹⁸ IPCC was an important catalyst in the adoption of the Framework Convention on Climate Change.⁹⁹ The Climate Convention itself established a permanent multidisciplinary body, called the Subsidiary Body for Scientific and Technological Advice (SBSTA), designed exclusively to provide and assess information; yet, the IPCC remains a major source of outside research and analysis for the Convention's COP and SBSTA.¹⁰⁰

B. Dispute Avoidance Mechanisms in other Areas of International Law¹⁰¹

1. Human Rights

Major international human rights agreements contain provisions, which aim at the avoidance of inter-State disputes. They provide for State reports, peer review of those reports, fact-finding missions and complaint mechanisms (e.g. individual petitions).

A major characteristic of human rights law is that the regulations do not aim mainly at inter-State behavior. Rather States commit themselves to grant certain minimum standards to individuals under their jurisdiction. Thus, reciprocity, which in other areas of international law has been seen as a decisive factor in ensuring compliance with internationally agreed rules, does not apply in this field.¹⁰² As a consequence mechanisms for ensuring implementation of and compliance with the agreed rules is of eminent importance for human rights. Conventions regulating human rights, thus, employ a variety of systems to ensure compliance. Reporting systems, for example, are contained in, *inter alia*, the UN Covenant on Cultural, Economic and Social Rights (CCPR)¹⁰³ (Articles 16 *et seq.*), the UN Covenant on Civil and Political Rights¹⁰⁴ (Article 40), the American Convention on Human Rights¹⁰⁵ (Article 42), the African Charter on Human and Peoples' Rights¹⁰⁶ (Article 62), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰⁷ (Article 19) and the Convention on the Rights of the Child¹⁰⁸ (Article 44). Moreover, under the system of human rights protection in the Americas

⁹⁵ Prior to the entry into force of the Vienna Convention and the adoption of the Montreal Protocol, scientific information was assessed by the Coordinating Committee on the Ozone Layer (CCOL), originally established by UNEP.

⁹⁶ See Final Act of the 1987 Montreal Conference of Plenipotentiaries on the Protocol on Chlorofluorocarbons to the Vienna Convention on the Protection of the Ozone Layer, (1987) 26 *ILM* 1549.

⁹⁷ See Working Group on Harmonization of Data on Production, Imports and Exports of Substances That Deplete the Ozone Layer, UNEP/OzL.WG.Data.2/3/Rev.2, para. 25.

⁹⁸ See P. Sands, *Principles of International Environmental Law* (1995) at 86, 293.

⁹⁹ See IPCC, *Climate Change: The IPCC Scientific Assessment* (1992); and the 1992 Supplement.

¹⁰⁰ See Article 9 (1) of the UNFCCC. Note that the other convention adopted at Rio, the Convention on Biological Diversity, established a similar subsidiary body (Article 25).

¹⁰¹ The structure of this Study is based on a distinction between environmental and other agreements. In some cases this distinction might seem to be somewhat artificial as some agreements referred to in this chapter of the Study have, environmental implications. Moreover, a number of agreements referred to in the Study, transgress this border-line, such as the Convention on International Trade in Endangered Species which, for good reasons, might be argued to belong to both, international environmental law and international trade law. The assignment of agreements to either part, however, has been effected according to respective agreement's main focus.

¹⁰² This lack of reciprocity is also a characteristic shared by most areas of international environmental law.

¹⁰³ 993 *UNTS* 3.

¹⁰⁴ 999 *UNTS* 171.

¹⁰⁵ *OAS Treaty Series* No. 36.

¹⁰⁶ 21 *ILM* (1982), 58.

¹⁰⁷ UNGA-Res. 39/46 (Annex) of December 10, 1984; UN-Doc. A/39/51.

¹⁰⁸ 28 *ILM* (1989), 1457.

the Inter-American Commission on Human Rights is, according to Article 18 para. g of its Statute, entitled to carry out on-site inspections, with the consent or at the invitation of the State in question.¹⁰⁹

Two features distinguish the compliance safeguards found in the field of human rights instruments from those employed for purposes of environmental protection: first, the possibility of individual petitions and second, the possibility of human rights courts to indicate provisional measures.

As to the first, the possibility of individual petitions is included, *inter alia*, in Articles 1 *et seq.* of the Optional Protocol to the International Covenant on Civil and Political Rights¹¹⁰, Article 44 of the American Convention and Articles 34 *et seq.* of the European Convention on Human Rights as amended by Protocol No. 11.¹¹¹ Unlike the cases of the American and the European Convention where the individuals' complaints may be dealt with by an international court, petitions under the Optional Protocol to the CCPR are dealt with by the Human Rights Committee which has no power to render judgments, but expresses its "views".

As regards the power to indicate provisional measures, there is a fundamental difference between the system under the American Convention and the European Convention. According to Article 63 para. 2 of the American Convention, the Inter-American Court of Human Rights "shall adopt" provisional measures in cases of extreme gravity and urgency and when they are necessary to avoid irreparable damage to persons. The provisional measures thus adopted are binding upon the Parties concerned.¹¹² Under the European system the possibility to indicate provisional measures is not contained in the Convention itself, but is provided for in Rule 36 of the Rules of the Court. According to Rule 36 the President of the Court may "indicate to any Party ... any interim measure which it is advisable for them to adopt"; this wording, however, does not allow to conclude that interim measures

under the European Convention have binding force. Moreover, in the case *Cruz Varras et al. v. Sweden* the European Court on Human Rights stated that interim measures are non-binding.¹¹³

To summarize, human rights regimes lay down comprehensive mechanisms at the international level to which individuals have access. Thereby, a substantial number of potential inter-State disputes are resolved while being kept on the level of the relationship between individuals and States; these mechanisms thus enable the resolution of differences before they become inter-State disputes.

2. Arms Control and Disarmament

In the area of arms control and disarmament, the issues of implementation and compliance have a high priority. Provisions which deal with these issues can be found, *inter alia*, in the 1968 Non-Proliferation Treaty¹¹⁴, the 1972 Biological Weapons Convention¹¹⁵, the 1993 Chemical Weapons Convention¹¹⁶, and the 1996 Comprehensive Test Ban Treaty¹¹⁷.

Under the Chemical Weapons Convention, for example, the initial report of a Party is to be corroborated by on-site inspection and monitoring for all chemical weapons. After having submitted the report a State has to give the Technical Secretariat prompt access to all its chemical facilities so that the report can be verified.

The arms control and disarmament sector may well offer a good precedent for environmental dispute avoidance. In an age of nuclear weaponry, all the nuclear weapons States recognize that the detonation of a nuclear weapon would create such devastation and lead to such a calamitous outcome (Mutual Assured Destruction) that any subsequent attempt to resolve differences or to determine liability or responsibility for damages would be meaningless. This awareness led negotiators to devise first the principles

¹⁰⁹ Statute of the Inter-American Commission on Human Rights, reprinted in T. Buergenthal, D. Shelton (eds.), *Protecting Human Rights in the Americas - Cases and Materials* (4th ed., 1995), 649 *et seq.*; on the on-site inspections cf., *i.a.*, E.C. Vargas, *Visits on the Spot - The Experience of the Inter-American Commission on Human Rights*, in B.G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights* (1982), 137 *et seq.*

¹¹⁰ 999 UNTS 171, 302.

¹¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5); the Protocol No. 11 entered into force on November 1, 1998.

¹¹² Cf. U. Kriebaum, *Prevention of Human Rights Violations*, 2 *Austrian Review of International and European Law* 1997, 155, 176.

¹¹³ Case of *Cruz Varras et al. v. Sweden*, Judgment of March 20, 1991, Publication of the European Court of Human Rights, Series A, Vol. 201, paras. 100-102; this statement of the Court has been criticized mostly on the basis that if interim measures are to be regarded as non-binding, it would, in those instances where interim measures were required, render meaningless the individual petition as such. Cf. in this regard K. Oellers-Frahm, *Zur Verbindlichkeit einstweiliger Anordnungen der Europäischen Konvention für Menschenrechte*, 18 *EuGRZ* (1991), 197-199; G. Cohen-Jonathan, *De l'effet juridique des "mesures provisoires" dans certaines circonstances et de l'efficacité du droit de recours individuel: à propos de l'arrêt de la Cour de Strasbourg Cruz Varras du 20 mars 1991*, 3 *Revue Universelle des Droits de l'homme* (1991), 205-209.

¹¹⁴ Treaty on the Non-Proliferation of Nuclear Weapons (NPT), 7 *ILM* 1968, 809 *et seq.*

¹¹⁵ TIAS 8062.

¹¹⁶ 32 *ILM* 800 *et seq.*

¹¹⁷ Comprehensive Test Ban Treaty (CTBT), 35 *ILM* 1996, 1439 *et seq.*

of balance and equivalence and later on the principles of confidence building measures and verification.

The level of sophistication of agreements has risen proportionately with the growth in awareness of the utter destructiveness of any nuclear exchange. In the circumstances, traditional sensitivities with respect to classical concepts of sovereignty (even in the sensitive sector of national security), and the traditional inflexibility of States when negotiating limitations proved less of an obstacle than had been the case previously.

As the growth of scientific knowledge increases awareness of the long-term, and sometimes irremediable, harm that can result from environmental damage, an opportunity is presented for the introduction into the environmental sector of similar techniques as a means of enhancing the acceptance of the precautionary principle. The environmental equivalent of arms verification offers an interesting example for dispute and, even more importantly, damage avoidance.

3. International Labour Law

The International Labour Organization, which is the oldest of the global community's specialized agencies (dating back to the Treaty of Versailles 1919), has for a long time functioned with considerable success in the dispute resolution field (which includes both aspects of dispute avoidance and dispute settlement), largely as a result of its innovative structure and equally innovative practices. The distinctive feature of its structure is the nature of State representation in the International Labour Conference (the supreme deliberative body of the ILO). Here, each State is entitled to be represented by four delegates, two of whom are representatives of government, and one each representing employers' and workers' groups. The tradition of side-by-side involvement of government and non-governmental representatives in the policy making and dispute resolution processes has fostered a climate of mutual confidence and co-operation at both the national and the international levels.

In terms of process, the ILO has long employed techniques that encourage dispute avoidance on the basis of transparency and accountability. In a fashion similar to the provisions of some environmental treaties, Article 22 of the ILO Constitution places an obligation upon member States to make an annual report to the International Labour Office "on the measures it has taken to give effect to the provisions of Conventions to which it is a Party." In addition, Article 19, para. 5(e) obliges State members to report to the Director General of ILO with respect to unratified

ILO Conventions. Whilst Article 19, para. 6(d) obliges member States to report to the Director General "showing the extent to which effect has been given or is proposed to be given to the provisions of ... Recommendation[s]."

Most relevant as a precedent for UNEP is the ILO machinery for supervising the observance of obligations under or relating to Conventions and Recommendations. On the basis of a resolution, adopted by the Eighth Session of the International Labour Conference in 1926, a Committee of Experts on the Application of Conventions and Recommendations, and a Conference Committee on the Application of Standards, were given responsibility for regular supervision. Members of the Committees are appointed by the Director-General for renewable terms of three years. Appointments are made in a personal capacity from among impartial persons of technical competence and independent standing. These persons are drawn from all parts of the world to reflect first-hand experience of different legal, economic and social systems. The Committee's fundamental principles are independence, impartiality and objectivity.

4. Law of the Sea

References with respect to the obligations of Parties to protect and preserve the marine environment are to be found in a number of sections of the United Nations Convention on the Law of the Sea. They are intended to prevent environmental degradation and therefore to reduce the scope for disputes with respect thereto. The entirety of Part XII of the Convention relates to the preservation of the marine environment. Its articles address obligations, principles for global and regional cooperation, technical assistance, monitoring and environmental assessment, rules, safeguards, enforcement etc. Moreover, specific provisions occur elsewhere in the Convention; Articles 117 to 120, for example, address living resources of the high seas. Article 145 deals with protection of the marine environment within the "Area", i.e. the seabed beyond the limits of national jurisdiction. These provisions make UNCLOS one of the most extensive international agreements to date to address environmental issues. It may be that this specificity can be interpreted as a deterrent to practices which cause environmental damage, and so may be a valuable example.¹¹⁸

¹¹⁸ For inspection rights under UNCLOS see *supra* Chapter III.A.3.

5. International Economic Law

a) WTO/GATT

In Annex 3 to the Marrakech Agreement establishing the World Trade Organization, the Parties created a Trade Policy Review Mechanism¹¹⁹ (TPRM) the purpose of which is to “contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies of the Members.”¹²⁰ To carry out this review, the Trade Policy Review Body (TPRB), which may discuss the reports submitted by Members, was established. The TPRB bases its work not only on the reports of Members¹²¹, but also on “a report to be drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the Member or Members concerned.”¹²² All Members are subject to periodic review; the frequency of reviews depends on their share of world trade: the first four trading entities shall be subject to review every two years. The next sixteen shall be reviewed every four years. The review for other Members shall be carried out every six years. Exceptions may be made for least developed country Members.¹²³

This review mechanism is “not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures”.¹²⁴ Thus, the mechanism does not aim at ensuring compliance with or implementation of specific obligations by enforcing them; nevertheless, its purpose is to improve adherence by Members to the rules, disciplines and commitments contained in multilateral or plurilateral trade agreements. In this regard, the review mechanism may be considered to be a mechanism to further the aim of dispute avoidance.

¹¹⁹ GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts* (1994), 434.

¹²⁰ *Ibid.*, para. A (i).

¹²¹ Provisions for the reporting system is made in para. D of Annex 3.

¹²² *Ibid.* para. C (v) (b).

¹²³ *Ibid.* para. C (ii).

¹²⁴ *Ibid.* para. A (i)

¹²⁵ 33 *ILM* 1993, 1067.

¹²⁶ Article 155 first paragraph (new Article 211) of the Treaty establishing the European Community, reprinted in 1 *European Union - Selected Instruments taken from the Treaties* (1995), 91 *et seq.* (hereinafter: ECT); the Commission, thus, serves to ensure compliance with primary and secondary EC law. Note that the competencies of the Commission are not only regulated in the ECT, but also in the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community; for reasons of presentation and space, the present overview is restricted to the ECT. The numbering of Articles of the ECT has been changed by the Amsterdam Treaty, which is not yet in force; in this Study ECT articles are referred to according to the pre-Amsterdam numbering; the new numbering is cited in brackets.

¹²⁷ R.H. Folsom, *European Law in a Nutshell* (2nd ed., 1995), 62. It should be noted that the Commission itself is subject to a certain control by other EC organs, Member States and even individuals. The following mechanisms have, *inter alia*, been established: motion for censure against the Commission as a body under Article 144 ECT (new Article 201); compulsory retirement of individual members of the Commission or deprivation of a right to a pension or other benefits under Article 157 last paragraph ECT (new Article 213); review of legality of acts adopted by the Commission by the European Court of Justice under Article 173 ECT (new Article 230); action before the European Court of Justice for failure to act under Article 175 ECT (new Article 232); etc.

b) Common Market for Eastern and Southern Africa

On November 15, 1993 representatives from 15 East and South African States signed the Treaty of Kampala Establishing the Common Market for Eastern and South Africa¹²⁵ which in its Article 173 provides for “Implementation and Monitoring Arrangements”. Under this provision, Member States agree that the implementation of the Treaty shall be prioritized on the basis of comprehensive and measurable programs with clear implementation targets and effective evaluation mechanisms. The Secretariat is responsible for following up and monitoring the implementation by the Member States. The “comprehensive and measurable implementation program with clear targets” is to be elaborated by the Secretary-General within twelve months from the entry into force of the Treaty.

The timetable of implementation is divided into stages of two years and is required to show a set of actions to be initiated and carried through concurrently. The transition from one stage to the next is conditional upon a finding that the objectives laid down in the timetable have been substantially attained.

c) European Community

A complex system of checks and balances has been established within the framework of the European Community to ensure compliance with obligations under European law, which can only be outlined briefly in this Study. It can be difficult to categorize a particular mechanism as belonging solely to dispute avoidance or solely to dispute settlement. The Member States of the European Community have entrusted one of the Community's organs, the Commission, with the task of ensuring “that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied”.¹²⁶ The Commission is, thus, sometimes described as being the independent “guardian of the treaties”¹²⁷ or as “guardian of EC law”.

Under Article 169 of the ECT (new Article 226), the Commission may, after giving the State concerned the opportunity to submit its observations, bring cases of alleged non-compliance by a Member State with EC law to the European Court of Justice. Accordingly, the matter may either be resolved by the Court or in a pre-trial procedure between the Commission on the one hand and the Member State concerned on the other. Moreover, under certain EC regulations the Commission is assigned competence to ensure adherence to EC law not only by Member States, but also by individuals.¹²⁸

Secondary Community law also comprises directives, which are binding as to the result to be achieved, upon each Member State to which they are addressed, but leave to the national authorities of the Member States the choice of form and methods. Unlike regulations, which are directly applicable in all Member States, directives require national implementation action. Besides the Commission's assignments as outlined above, no other means to safeguard implementation of EC law has been established within the ECT. Most directives require Member States to communicate to the Commission the texts of the provisions of national law, which they adopt to give effect to the directive.¹²⁹

The ECT also provides for so-called preliminary rulings by the European Court of Justice (ECJ). Under Article 177 ECT (new Article 234) the Court has the function of providing the domestic courts or tribunals of Member States with interpretations of particular provisions of EC law that arise before them with the aim of ensuring uniform interpretation of EC law throughout the whole community.¹³⁰ Any national court or tribunal against whose decision an appeal or other judicial remedy is available may, if it considers that such a decision is necessary to enable it to give judgment in a case before it, request the European Court of Justice to give a preliminary ruling. However, national courts and tribunals of last instance must request such rulings.¹³¹

d) NAFTA

i) Dispute Avoidance under NAFTA and NAAEC - Background

The North American Agreement on Environmental Cooperation (NAAEC)¹³² was concluded by the Parties to the North American Free Trade Agreement (NAFTA)¹³³ to complement NAFTA with respect to environmental protection. While NAFTA is a "trade agreement with some environmental provisions", NAAEC is "an environmental agreement with some trade implications."¹³⁴ Thus, the avoidance of trade barriers or distortions is among the objectives of NAAEC.¹³⁵ However, the primary objective of the agreement is to promote environmental protection, sustainable development and environmental cooperation among Canada, Mexico and the United States.¹³⁶ It seeks to achieve this objective principally by establishing institutions to facilitate effective cooperative solutions to trilateral and even bilateral environmental problems, not just on specified topics but as a general matter. As a regional approach to the trade - environment interface, the NAFTA-NAAEC package differs significantly from the approach of the European Union. For example, no *supranational* law-making is envisaged. Rather, the Parties commit themselves to ensuring that their own laws and regulations "provide for high levels of environmental protection",¹³⁷ and that their laws and regulations are "effectively enforced".¹³⁸

The connections between the two agreements are reflected, *inter alia*, in the liaison function assigned to NAAEC institutions within NAFTA's dispute avoidance and settlement processes. Thus, the Council of the Commission for Environmental Cooperation (CEC) established by NAAEC serves as a link to the Free Trade Commission (FTC) established under NAFTA. For example, the CEC Council is to act as a point of inquiry

¹²⁸ Council-Regulation 17/62 (OJ L3, 21.02.62, p. 204 *et seq.*), for example, establishes an authorization procedure concerning dominant market positions to be carried out by the Commission.

¹²⁹ Cf. e.g. Article 12 para. 2 of the Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, 05.07.1985, p.40 *et seq.*). Note that the references to domestic legislation contained in the national communications are published in the European Union's legal database CELEX.

¹³⁰ Cf. N. Moussis, *Handbook of European Union* (3rd ed., 1996), 37.

¹³¹ Some Member States provide in their domestic legal systems for a subjective right of individuals not to be deprived of one's lawful judge (cf. e.g. Article 83 para. 2 of the Austrian Constitution); in these countries an infringement of Article 177 ECT might be regarded as a breach of this right (cf. Judgment B2300/95 dated 11.12.1995 of the Austrian Constitutional Court, reprinted in G. Loibl, M. Reiterer, *Austrian Judicial Decisions Involving Questions of Public International Law*, in 1 *Austrian Review of International and European Law* 1996, 145, 173 *et seq.*)

¹³² North American Agreement on Environmental Cooperation, Sept. 8, 1993, U.S.-Can.-Mex., 32 *ILM* 1480.

¹³³ North American Free Trade Agreement, Dec. 8, 1992, U.S. Can. - Mex., 32 *ILM* 289.

¹³⁴ J.O. Saunders, "NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and the Environment" (1994) 5/2 *Colorado Journal of International Environmental Law and Policy* 273 at 284.

¹³⁵ Because of the close links between NAFTA and NAAEC, the latter is discussed within this section of the Study, notwithstanding the fact that NAAEC's primary goal is environmental protection.

¹³⁶ NAAEC's objectives are outlined in Article 1.

¹³⁷ Article 3 NAAEC.

¹³⁸ Article 5 NAAEC.

and a recipient of comments from “civil society” concerning NAFTA’s environmental goals and objectives,¹³⁹ assist the FTC in consultations under NAFTA Article 1114 (the so-called „pollution haven” provision)¹⁴⁰ and contribute to the “prevention or resolution of environment-related trade disputes by seeking to avoid disputes between the Parties, making recommendations to the FTC in this regard, and identifying experts able to provide technical information or advice.”¹⁴¹ The strong cooperative component of NAAEC, while primarily aimed at promoting and facilitating cooperation among these countries to solve environmental problems, simultaneously serves an important dispute avoidance function: if an environmental problem is resolved, it will not be a source of dispute.

The CEC itself, thus, may fairly be characterized as, at least in part, a dispute avoidance device. The CEC Council is the Commission’s decision making body and comprises cabinet-level or equivalent representatives of the Parties.¹⁴² An innovative addition to the CEC’s institutional structure is the Joint Public Advisory Committee (JPAC), comprising 15 members (five from each country) drawn, *inter alia*, from NGO and expert communities and authorized to advise the Council “on any matter within the scope of the Agreement.”¹⁴³

ii) Citizen Submissions on Enforcement Matters - Articles 14 and 15 NAAEC

Perhaps most relevant to the focus of this Study is the mandate of the CEC Secretariat, a relatively independent body also established by NAAEC.¹⁴⁴ It includes responsibility for a unique process of “Submissions on Enforcement Matters”. This process allows residents including NGOs of any of the Parties

to turn to the Secretariat with an allegation, referred to as a “submission”, about a Party’s “failure to effectively enforce its environmental laws.”¹⁴⁵ In keeping with NAAEC’s approach, the focus of this process is not on transnational environmental (or trade) law. Rather, the submissions must relate to failures in the enforcement of domestic law. Thus, while the process may at first glance seem to belong solely in the realm of dispute settlement, it is more appropriately categorized as a process with the ultimate effect of avoiding inter-State disputes about domestic enforcement failures.¹⁴⁶ The citizen submission process may help to avoid recourse to the State-to-State dispute resolution processes established under both NAFTA and NAAEC.¹⁴⁷

The process begins with a screening stage in which the Secretariat determines whether the submission meets certain basic admissibility criteria.¹⁴⁸ If it does, the Secretariat determines, according to criteria outlined in NAAEC, whether the submission merits a response from the State Party concerned.¹⁴⁹ In that event, the State Party is invited to advise the Secretariat whether the matter is the subject of a pending proceeding, or was previously the subject of a proceeding, or whether private remedies are available to the submitter, as well as any other information it wishes to provide.¹⁵⁰ The Secretariat can then decide to recommend the preparation of a “factual record” on the matter, in which case it must obtain the Council’s permission by two-thirds vote.¹⁵¹ During the preparation of the factual record, the State Party concerned can furnish information, as can NGOs or individuals, the JPAC or independent experts.¹⁵² The final record can be published, again pursuant to a two-thirds vote by the Council.¹⁵³ Of the 18 submissions made since 1995, only one has as so far led to the publication of a factual record.¹⁵⁴

¹³⁹ Pursuant to Article 10(6)(a) NAAEC, inquiries and comments may come from NGOs and persons.

¹⁴⁰ See Article 10 (6)(b) NAAEC. The consultations pertain to cases “where a Party considers that another Party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, acquire, expand or retain an investment of an investor”.

¹⁴¹ Article 10 (6)(c) NAAEC.

¹⁴² Article 9 NAAEC.

¹⁴³ Article 16 (4) NAAEC.

¹⁴⁴ In addition to day-to-day operational responsibilities, the Secretariat prepares the CEC’s annual reports, and may, on its own initiative, report on any matter within the scope of the CEC’s annual program. Articles 12, 13 NAAEC. The CEC’s headquarters are in Montreal, Canada.

¹⁴⁵ Articles 14, 15 NAAEC.

¹⁴⁶ see *infra*, at IV. B.a.

¹⁴⁷ See *infra*, at IV.B.2.

¹⁴⁸ Article 14 (1) NAAEC.

¹⁴⁹ Article 14 (2) NAAEC.

¹⁵⁰ Article 14 (3) NAAEC.

¹⁵¹ Articles 15 (1) & (2) NAAEC.

¹⁵² Article 15 (4) NAAEC.

¹⁵³ Article 15 (7) NAAEC.

¹⁵⁴ A factual record was published in the case of *Comite para la Proteccion de los Recursos Naturales, A.C. et al.* (SEM-96-001). The preparation of a factual record has been ordered by the CEC Council in the case of *B.C. Aboriginal Fisheries Commission et al.* (SEM-97-001). Several 1997 and 1998 submissions have been rejected, either for failure to meet basic admissibility criteria or because no government response was considered necessary. Four 1997 submissions are still pending at various stages of the process. Detailed information about the status and outcome of the submissions can be found in the submission registry accessible at URL: <http://www.cec.org/>.

The submission procedure is noteworthy in several respects. First, while submissions focus on domestic rather than international environmental law, NGOs and citizens are given access to a transnational institution. Second, the process is structured so as to strike a balance between the public's interests in access and transparency and government concern to retain some measure of control over the process. The former interests are met by generous formal and substantive admissibility criteria and by easy access to information about both process requirements and the status of any submissions. The latter concerns are addressed by keeping ultimate control over the process in the hands of a political body, the Council. Further, a successful submission does not produce a binding decision, but simply a factual record. Thus, any "enforcement" effect of the process is not legal in nature, but driven by the power of public opinion or by intergovernmental actions by the NAFTA countries.

e) Other examples

Other relevant examples for such mechanisms may also be found in instruments concerning the African Common Market, the South Asia Association for Regional Co-operation (SAARC), the Association of South East Asian Nations (ASEAN), the Mercado Común del Sur (MERCOSUR), Caribbean Community (CARICOM), or the Organization for Economic Cooperation and Development (OECD). The scope of the present Study, however, does not allow for a detailed discussion of mechanisms contained in these instruments.

C. Addressing International Environmental Disputes from the Perspective of Legal Mechanisms on the Domestic Level

1. Access of Affected Non-Residents to Domestic Administrative Authorities and Courts

An environmental dispute between States may be prevented, if a resident of State A, who is likely to be affected by a project to be carried out in State B, has access to State B's courts and administrative authorities that are competent to decide on the project. This concept does not follow an international, but a transnational approach, since the controversy already might be resolved not at the State-to-State level, but at the level between private individuals¹⁵⁵ or between a private individual on the one side and a State on the other. Thus, this approach might furnish a "lowest-level solution".¹⁵⁶ Where such access exists, it may lead to the depolitization of the situation so that it never reaches the inter-State level and is solved at the State-foreigner level.¹⁵⁷

Principle 10 of the Rio Declaration States that "[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided." Principle 10 does not necessarily exclude non-residents from the right of access to such proceedings, but seen in the light of the first two sentences of Principle 10 it could be argued that such a right is not granted to non-residents.¹⁵⁸ Chapter 8.18 of Agenda 21 contains a similar provision, but it too could be read as not contemplating a right of foreigners to access to the above mentioned proceedings.

The 1982 "Conclusions of the Study of Legal Aspects concerning the environment related to Offshore Mining and Drilling within the Limits of National Jurisdiction" elaborated under UNEP's auspices state that "States should endeavor, in accordance with their legal systems and, where appropriate, on a basis agreed with other States, to grant equal access to and treatment in administrative proceedings to persons in other States who may be affected by pollution or other adverse effects resulting from proposed or existing operations."¹⁵⁹

¹⁵⁵ E.g. by means of international private law.

¹⁵⁶ Cf. P.H. Sand, *Coping with Transnational Environmental Disputes*, in: *UN Green Helmets - A Model System for the Settlement and Prevention of Environmental Disputes*, *Osterreichische außenpolitische Dokumentation* (1992), 31; R. Bilder, *The Settlement of Disputes in the Field of the International Law of the Environment*, 144 *RdC* 1975 III, 139 *et seq.*

¹⁵⁷ Within the EC there exist well established provisions of this type: See Article 5 para. 3 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (Official Journal L 299, 32 *et seq.*, 31. 12. 1972) and the European Court of Justice's judgement in *Handelswerkerij G. S. Bier BV v. Mines de potasse d'Alsace SA* (Judgement dated 30 November 1976, FCR 1976, 1735 *et seq.*).

¹⁵⁸ The relevant part of Principle 10 reads as follows: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment [...]". It is clear that this provision does not specify the question of access to authorities; however, reference to the "concerned citizens" and the "national level" perhaps allows one to assume that Principle 10 was not intended to strengthen the position of aliens.

¹⁵⁹ UNEP, *Environmental Law and Principles, Offshore Mining and Drilling, Conclusions of the Study of Legal Aspects concerning the environment related to Offshore Mining and Drilling within the Limits of National Jurisdiction* (Decision 10/14 part VI of the Governing Council of UNEP of 31 May 1982), para. 19 (2).

¹⁶⁰ Reprinted in *Our Common Future - The World Commission on Environment and Development*, Annexe I, para. 6, p. 349; cf. also para. 20 of this draft which reads as follows: "States shall grant equal access, due process and equal treatment in administrative and judicial proceedings to all persons who are or may be affected by transboundary interferences with their use of a natural resource or the environment".

The legal expert group of the World Commission on Environment and Development (WCED) proposed a principle of 'Prior Notification, Access and Due Process' which provides that States shall inform "all persons likely to be significantly affected by a planned activity and to grant them equal access and due process in administrative and judicial proceedings."¹⁶⁰ Proposing that 'all persons' should have this right implies that a non-resident is also - in principle - entitled to this right.

A similar conclusion is implied by Article 52 of the IUCN Draft 'International Covenant on Environment and Development' which provides that "Parties shall ensure the availability of effective civil remedies [...] irrespective of the nationality or the domicile of the victims."¹⁶¹

Access of affected non-residents to domestic administrative authorities and courts is provided for only in a very small number of international instruments of binding character. The 1974 Nordic Convention¹⁶², for example, stipulates in its Article 3 that "[a]ny person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting Party shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or Administrative Authority." This also applies to the question of compensation for damage caused by environmentally harmful activities.¹⁶³

In June 1998 the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was opened for signature in Aarhus.¹⁶⁴ Under the Convention the public¹⁶⁵ shall "have access to information, have the possibility to participate in decision making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective center of its activities."¹⁶⁶ As regards decisions on whether to permit

specific activities which are either listed in Annex I to the Aarhus Convention or may have a significant effect on the environment, Article 6 of the Convention contains comprehensive regulations concerning, *inter alia*, information of the public concerned¹⁶⁷ and a so-called public participation procedure. Moreover, Article 9 para. 2 of the Aarhus Convention requires the Parties to ensure within the framework of its national legislation that members of the public concerned that have a sufficient interest or maintain impairment of a right "have access to a review process before a court of law and/or another independent and impartial body established by law to challenge the legality of any decision, act or omission subject to the procedure mentioned above".

For the time being the Aarhus Convention contains the most elaborate rules on the question dealt with in this section of the present Study. However, desirable though such a right is, it can yet not be concluded that - apart from the Nordic Convention and the Aarhus Convention, the latter of which is not yet in force - such a right already exists under general international law or in the domestic laws of all States.

2. Criminal and Administrative Law Sanctions on the Domestic Level as a Means of Dispute Avoidance

In a number of international agreements dealing with environmental issues State Parties have agreed to establish criminal or administrative sanctions for individuals or companies which violate the internationally agreed rules. Article 4 of the International Convention for the Prevention of Pollution from Ships and Article VII (1) of CITES are examples of obligations on State Parties to establish sanctions at the domestic level for the violation of these conventions. The UN Commission on Crime Prevention and Criminal Justice has addressed this issue and recommended that three categories of activities should be made subject to sanctions in all States if related to an international agreement (e.g. the Basel Convention): "(a) offences with transboundary

¹⁶⁰ International Covenant on Environment and Development, prepared by the Commission on Environmental Law of the IUCN in cooperation with the International Council of Environmental Law. This draft was launched at the UN Congress on Public International Law in New York in March 1995.

¹⁶² Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden, 13 *ILM* 1973, 591 *et seq.*

¹⁶³ See also Article 3 para. 8 of the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (30 *ILM* 1991, 800 *et seq.*).

¹⁶⁴ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN-Doc. ECL/CEP/43, available at URL: <http://www.unece.org/env/europe/ppconven.htm>.

¹⁶⁵ "The public" is defined in Article 2 para. 4 of the Aarhus Convention as "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups".

¹⁶⁶ Article 3 para. 9 of the Aarhus Convention.

¹⁶⁷ According to Article 2 para. 5 of the Aarhus Convention "The Public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

effects (or possible effects) on the world, such as greenhouse effects; (b) offences affecting countries other than the one in which they were committed; and (c) conduct that should be considered an offence in every country.”¹⁶⁸

At the regional level, a Convention on the Protection of the Environment through Criminal Law has been adopted in the framework of the Council of Europe in November 1998.¹⁶⁹ The Convention requires Member States to establish as criminal offences, *inter alia*, the discharge, emission or introduction of substances or ionising radiation into air, soil or water which causes death or serious injury to any person, or creates a serious danger thereof; the discharge, emission or introduction of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting deterioration, etc.¹⁷⁰ The Convention also provides for the establishment of corporate liability.¹⁷¹

Criminal and administrative sanctions on the domestic level are a helpful means of promoting compliance by individuals since they create an environment which “outlaws” certain activities. Thus, they too could be a useful means of avoiding inter-State disputes.

D. International Organizations and Dispute Avoidance

1. Role of International Organizations

International organizations are quite often named as facilitators for the avoidance or settlement of disputes between States concerning environmental issues. The most frequently mentioned examples are the positive involvement of FAO, UNEP and World Bank in water management projects, which had a dispute avoidance effect.

Technical advice and financial support given by international organizations in the development of the utilization and management of environmental resources could be a useful means of avoiding and settling of disputes. Therefore, the activities of institutions like FAO, UNEP and World Bank are important ways of ensuring sustainable development and, thereby, supplementing other efforts concerning dispute avoidance and dispute settlement. In the

following paragraphs, the role of international organizations in the field of dispute avoidance is outlined in the context of the Indus Water Dispute and the Zambezi River Action Plan. These two instances of course do not exhaustively show the whole range of activities undertaken by international organizations, but demonstrate well the importance of their activities.

a) Dispute Avoidance in the case of the Indus Waters

Clearly, dispute avoidance strategies can, and do, use some procedures traditionally associated with dispute settlement. Good offices and mediation, for example, can be offered and used both before and after the occurrence of a dispute. One is familiar with cases of good offices and mediations that succeeded in resolving a dispute. However, less well known are the instances where good offices and mediation played a role before an incipient dispute flared up into a real one. The Indus Water Treaty¹⁷² and its antecedent negotiations provide an excellent example of the latter type of case. It is also important for another reason.

Disputes can be impossible to resolve where there are conflicting views as to the facts among the Parties about them. Fact finding as a first step to dispute settlement had acquired wide acceptance as long as the League of Nations’ days. As disputes have become more complex and grow beyond the territorial and jurisdictional realms, working out acceptable technical details has become a viable pre-dispute settlement procedure that could lead to a depoliticized solution to a problem. Water sharing between nations lends itself well to such a dispute avoidance strategy.

Another factor that often befuddles the finding of a solution to an emerging dispute is the cost factor. The Parties may collect and agree on the data and successfully work out a technical solution to a problem, but find the solution too costly or inequitable in terms of burden sharing and apportionment of benefits. International organisations, and especially financial institutions, could play a significant role in promoting solutions to such disputes by helping to meet the costs of implementation. This is roughly what happened in the dispute between India and Pakistan over the sharing of the waters of the Indus River.

¹⁶⁸ Report of the Meeting of the ad hoc Expert Group on more effective forms of international cooperation against transnational crime, including environmental crime, held in Vienna from 7 to 10 December 1993 (E/CN.15/1994/4/Add.2,10).

¹⁶⁹ ETS 172, available at URL: <http://www.coe.fr/eng/legaltext/172e.htm>.

¹⁷⁰ See Articles 2, 3 and 4 of the Convention.

¹⁷¹ Article 9 of the Convention.

¹⁷² The Indus Water Treaty 1960, 419 *UNTS* 125 *et seq.* (1962); as to the Indus Water Dispute cf. *l.a.* D. Rauschnig, *Indus Water Dispute*, II *EPIL* 962 *et seq.* (1995); A.A. Michel, *The Indus River: A Study on the Effects of Partition* (1967); J.S. Baihs, *Indo-Pakistan Water Dispute*, in J.S. Baihs (ed.) *India's International Dispute* (1962), 29 *et seq.*; F.J. Berber, *The Indus Water Dispute*, VI *Indian Yearbook of International Affairs* 46 *et seq.* (1957); Y.-C. Accariez, *Le regime juridique de l'Indus*, in R. Zacklin, L. Callisch (eds.), *The Legal Regime of International Rivers* (1981), 53 *et seq.*; S. Mehta Jacat, *The Indus Water Treaty: a Case Study in the Resolution of an International River Basin Conflict*, 12 *Natural Resources Forum* (Feb. 1988), 69-77; R.R. Baxter, *The Indus Basin*, in A.H. Garretson, R.D. Layton, C.J. Olmsted (eds.), *The Law of International Drainage Basins* (1967), 443 *et seq.*

Punjab (which means literally five waters) was partitioned in 1947 between India and Pakistan. The five tributaries of the Indus River fell into the two jurisdictions rather inequitably. Pakistan inherited the larger part of the irrigated Indus basin, while India got the less irrigated land that could be developed only by a more extensive use of the river waters; in terms of land area, it was 21 million acres to 5 million acres; and in terms of population, 25 million people in Pakistan got 25 million acres of irrigated lands, while 35 million people in India inherited only 5 million acres. The inequity gets greater if one takes into consideration the catchment areas of the two countries. The canal system (consisting of 23 canals) made the problem more complicated.

The Punjab Boundary Commission, chaired by Sir Cyril Radcliffe, therefore suggested joint management by the two States of what it called "a valuable common service". The idea was unacceptable to the Parties, and a series of ad-hoc arrangements were continued beyond the partition of the sub-continent. The problem was that partition had left the head waters of the Chenab, Jhelum, Ravi and Sutlej and the whole of the Beas within India, while the greater part of the upper and lower courses of the Jhelum, Chenab, Ravi and Sutlej lay within Pakistan. As the upper riparian India could resort to more intensive utilisation of the waters, but doing so would have entailed diminution of water supply to Pakistan. Pakistan could have tapped alternative sources, but this would obviously have required enormous investment. The question thus became intractable.

The World Bank perceived the possibility of a technological and engineering solution to the problem. It offered the following package:

1. the water of three eastern Rivers (Ravi, Beas and Sutlej) should be for the use of India;
2. the water of the three western Rivers (Indus, Jhelum and Chenab) should be for the use of Pakistan;
3. there should be a transition period, during which Pakistan would construct a system of link canals to transfer water from the Western Rivers to replace the irrigation uses in Pakistan hitherto met from the Eastern Rivers; and
4. India should pay the cost of constructing these replacement link canals.

The scheme was quite simple; three rivers each to the two Parties, to be used and developed independently. The land - water inequities inherited by the two States were resolved by developing an intricate network of canal irrigation on both sides of the divide. Most of the cost of construction was borne by the Indus Basin Development Fund established by the World Bank with loans and contributions of the United States, the United Kingdom, Germany, Canada, Australia, and New Zealand. A permanent Indus Commission was set up to study, exchange information and inspect the operation of the Treaty and to settle technical disputes. An arbitration procedure was envisaged for non-technical disputes.

Although there was initially some criticism on both sides, the Treaty within time has assumed some kind of celebrity status in the history, practice and law relating to the sharing of international river waters. The principle of equitable apportionment, developed by the International Law Association (the Helsinki Rules) can be traced back to the Indus water sharing agreement between India and Pakistan.

b) The Zambezi River Action Plan

Another example of the important role assumed by international organizations in the field of dispute avoidance to be mentioned in this Study relates to the establishment of the Action Plan for the Environmentally Sound Management of the Common Zambezi River System adopted in Harare in May 1987 - the so-called ZACPLAN.¹⁷³

Prior to adoption of the Action Plan, UNEP - in accordance with the 1977 Mar del Plata Plan on Water Development and Administration¹⁷⁴, the recommendations of the Montevideo Programme and UNEP Governing Council Decision 11/7 - launched a comprehensive programme on the environmentally sound management of inland-waters (EMINWA) to assist governments in the integration of environmental concerns into the management of water resources. In 1985 - in the light of the EMINWA programme - a Working Group of Experts was established which included experts from practically all countries involved and representatives from the South African Development Co-ordination Conference, FAO, UNEP, World Bank and other UN bodies. The Agreement on the Action Plan developed and launched with the assistance of UNEP¹⁷⁵ has been described as "the most ambitious approach to environmental protection of a river basin in the developing world"¹⁷⁶. It constitutes

¹⁷³ Cf. UNEP, Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System - Final Act (1987); P. Birnie, A.E. Boyle, *op.cit. supra* fn. 13, 248; I. Rummel-Bulska, 54 YAAA 75 (1984).

¹⁷⁴ UN-Doc. E/Conf.70/29.

¹⁷⁵ Cf. ZACPLAN, para. 4.

¹⁷⁶ P. Birnie, A.E. Boyle, *op.cit. supra* fn. 13, 248 (1994).

a forward-looking program designed to bring about a sustainably sound and equitable solution to the question of utilization of the Zambezi River.

One of the main objectives of the Action Plan has been stated in its paragraph 13, which reads as follows:

“In view of the present utilisation of the river system it is possible and highly desirable to deal with the water resources and environmental management problems of the river in a co-ordinated manner to avoid possible future conflicts.”

Thus ZACPLAN, which also established an Intergovernmental Monitoring and Coordinating Committee to oversee implementation and evaluate results, clearly serves to minimize the sources of potential conflicts and disputes, in fact to avoid them, through enhanced co-ordination and co-operation among the States concerned.

2. Potential of International Organizations

The roles that can be played by international organizations and institutions are many. Two main functions of international organizations may be distinguished: On the one hand, they may - as can be seen from the examples described above - act as mediators or offer their good offices to assist the States involved in a situation in finding an acceptable solution

- even before a dispute in the strict sense has occurred. On the other hand, international organizations may provide technical, financial and other assistance for certain instances and help to promote research, education and public awareness in the field of environmental protection. The work undertaken in this field by FAO, UNEP, the World Bank Group and other international bodies are relevant examples. Moreover, international organizations may provide fora for the further development of international environmental law aiming at sustainable development, encompassing both its material and procedural aspects.

In this regard mention should also be made of the Global Environmental Facility (GEF)¹⁷⁷ which was established in 1991 as a joint operation of UNEP, UNDP and World Bank. In general GEF functions to provide financial resources for incremental costs, *i.e.* additional costs of activities to address environmental concerns, in the focal areas of climate change, ozone layer depletion, international waters and bio-diversity. Also eligible for funding are the agreed incremental costs of activities concerning land degradation, *i.e.* primarily desertification and deforestation, as they relate to the focal areas.¹⁷⁸ It thereby facilitates compliance with commitments undertaken by States that are Parties to treaties dealing with those aspects of the protection of the environment.

Although much has already been done by international organizations, by no means everything has yet been accomplished.

¹⁷⁷ Instrument for the Establishment of the Restructured Global Environmental Facility, Report of the GEF Participants Meeting, Geneva 1994, reprinted in 33 *ILM* (1994), 1273.

¹⁷⁸ See Annual Report on the World Bank in 5 *YIEL* (1994), 576.

IV. DISPUTE SETTLEMENT MECHANISMS¹⁷⁹

A. Traditional Dispute Settlement Mechanisms in International Environmental Law

Nearly all multilateral environmental agreements contain provisions on the settlement of disputes. They follow the pattern found in international law: negotiation, good offices, enquiry, mediation, conciliation, arbitration and judicial settlement. Also the Parties may resort to regional agencies or arrangements or other peaceful means of their own choice.¹⁸⁰

Negotiation: In practice, the majority of international disputes is solved by way of negotiation. Negotiations do not involve third States or an international organ, but rest solely among the concerned Parties. Ordinarily negotiation leads to a minimum of publicity. Its success depends to a large extent on how acceptable the demands of the other Party are, but also on tact and the existence of a *bona fide* attitude to reach a solution of the dispute.¹⁸¹

Good Offices: The Parties to a dispute may seek the good offices of a third Party or a third Party may offer its good offices. The third Party will then try to persuade the disputing States to enter into negotiations. The function of the third Party ends at the moment the negotiations start.

Enquiry: Enquiries aim at the impartial finding of disputed facts (fact-finding). Normally the Parties appoint an impartial body or person that then carries out the enquiry. This procedure is extremely helpful, when a dispute turns solely - or at least to a large extent - on factual questions.

Mediation: A mediator, whether an official of a third State or a private person, takes part in the negotiations of the disputing Parties and suggests possible solutions to the dispute. Much will depend on the confidence the Parties have in the mediator and on his ability to find acceptable solutions.

Conciliation: Conciliation can be regarded as a combination of fact-finding and mediation. The conciliator first investigates the relevant facts and then proposes a solution, which the Parties are free to adopt or reject.

Arbitration: The Parties to a dispute can decide that their controversy should be settled by an arbitrator or an arbitral tribunal. Frequently each Party appoints one arbitrator and the two arbitrators then choose a third arbitrator who acts as president of the tribunal. The award rendered by the arbitral tribunal typically is binding on the Parties.

Judicial Settlement: The Parties may refer their dispute to the International Court of Justice as the principal judicial organ of the U.N.¹⁸² The Court's judgment is binding upon the Parties and - in case of non-performance - may be enforced by a recommendation or a decision delivered by the Security Council.¹⁸³

Resort to regional agencies or arrangements: Many regional agencies and arrangements provide mechanisms for the peaceful settlement of disputes. The inclusion of resort to regional agencies or arrangements among the means of dispute settlement under Article 33 of the Charter was to give the member States of the United Nations the option of applying any of the enumerated peaceful means in a regional setting or forum.¹⁸⁴

¹⁷⁹ The following section is intended to give a rather brief overview over existing mechanisms for the peaceful resolution of disputes, it is however far from being exhaustive.

¹⁸⁰ Cf. Article 33 para. 1 of the Charter of the United Nations; cf. also the Manila Declaration on the Peaceful Settlement of Disputes, Annex to U.N.-G.A.-Res. 37/10; cf. further United Nations, Handbook on the Peaceful Settlement of Disputes between States (1992).

¹⁸¹ Cf. B.S. Murty, Settlement of Disputes, in Max Sørensen (ed.), *Manual of Public International Law* (1968), 679.

¹⁸² It has to be noted that no judge or arbitrator has jurisdiction over the Parties to a dispute without their having agreed to confer jurisdiction on him.

¹⁸³ Article 94 para. 2 of the Charter of the United Nations.

¹⁸⁴ United Nations, Handbook on the Peaceful Settlement of Disputes between States (1992), 83, para. 237.

The dispute settlement procedures contained in international environmental agreements by and large follow the patterns described above.

Article 27 of the Convention on Biological Diversity for example requires the Parties to seek a solution to a dispute by negotiation. If the Parties are unable to reach an agreement by negotiation they may jointly seek the good offices of or mediation by a third Party.¹⁸⁵ The Parties may - at any time - accept arbitration or the jurisdiction of the ICJ as compulsory (Article 27 para. 3). Annex II Part 1 to the Convention on Biological Diversity lays down the arbitration procedure to be followed: generally speaking each of the Parties to a dispute appoints one arbitrator who then, by common agreement, designates the president of the tribunal (Article 2 of Annex II/1). If during a period of two months the president has not been designated, the Secretary General of the UN, at the request of a Party, is to designate the president; the same happens, if one of the Parties does not appoint an arbitrator (Article 3 of Annex II/1). The tribunal's award is binding upon the Parties and - unless the Parties to the dispute otherwise agree - not subject to appeal.

If the Parties to a dispute have not accepted arbitration or the jurisdiction of the ICJ as compulsory, the dispute will be subject to conciliation pursuant to Annex II Part 2. Thus, a conciliation commission shall be created upon request of one Party. This commission is comprised of 5 members, two appointed by each Party and a president chosen jointly by those four members. Unless the Parties to the dispute otherwise agree, the commission adopts its own rules of procedure. The commission renders a "proposal for resolution of the dispute, which the Parties shall consider in good faith." (Article 5 of Annex II/2).

Provisions on dispute settlement procedures have also been incorporated in e.g. Article VIII of CITES, Article 20 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Article 28 of the U.N. Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Article 14 of the U.N. Framework Convention on Climate Change and Article 12 of the Convention on the Conservation of Migratory Species of Wild Animals. None of these have been used so far in practice.

As a general matter, in considering the use or design of particular dispute settlement techniques, it is important to bear in mind that international environmental disputes often involve disagreement or uncertainty over scientific facts. Resolving such questions can thus greatly assist in resolving disputes, just as it can in avoiding them as illustrated by the experience under the Canada-U.S. 1909 Boundary Waters Treaty.¹⁸⁶ It is thus essential for the successful resolution of international environmental disputes that dispute settlement mechanisms make provision for access to the necessary scientific information and expertise and the mandate to take it into account.

Countries involved in international environmental disputes will almost always need to cooperate in the future in confronting both the problem that has provoked the dispute and also other environmental threats. Dispute settlement mechanisms should thus be used in a manner that is conducive to future constructive cooperation between the disputing countries.

B. Other Areas of International Law

1. International Economic Law

a) WTO/GATT

Within the WTO, the GATT dispute settlement system has been strengthened substantially by the 1994 Dispute Settlement Understanding (DSU)¹⁸⁷. According to the DSU a number of mechanisms are at the disposal of the WTO member States (consultation, good offices, arbitration and mediation and the panel procedure). But the main mechanism for dispute settlement remains the "panel procedure" which is closely linked to consultation. Based on the past experience of certain shortcomings of the GATT "panel procedures", the DSU has formalized and picked up the panel procedure by laying down more detailed rules.

¹⁸⁵ In other words: The Parties to a dispute are - according to Article 27 of the Convention on Biological Diversity - obliged to negotiate, whereas recourse to good offices and mediation is only optional (the Parties "may jointly seek" good offices or mediation).

¹⁸⁶ Cf. supra III.A.5.

¹⁸⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakech Agreement Establishing the World Trade Organization, reprinted in GATT (ed.), *The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts*, 404 et seq.

The flexibility of the WTO/GATT dispute settlement system is seen as one of its major achievements and the basis for its success in the field of trade law. It leaves a number of choices to the Parties involved in a dispute. A Party found in violation of the WTO/GATT legal order by a panel has three options how to deal with the panel's findings:

- it may come into compliance with the ruling by withdrawing the offending measure or rectifying the relevant omission.
- it may maintain the offending measure or determine not to rectify the omission but, instead, provide compensatory benefits to restore the balance of negotiated concessions that were disturbed by the non-complying law or measure.
- it may choose to make no changes in its law or measures and decline to pay compensation, and, instead, run the risk of retaliation against its exports authorized by the WTO for the purpose of restoring the balance of negotiated concessions.¹⁸⁸

The Final Act of Marrakech, affirming the results of the Uruguay Round of the GATT, included for the first time specific and binding provisions for dispute settlement in the field of international commerce. The dispute settlement system is seen as a central element in providing security and predictability to the international trading system. Dispute Settlement Understanding emphasizes that prompt settlement is essential to the effective functioning of the WTO. It sets out in considerable detail the procedures and timetables to be followed. Original elements in the WTO process include the virtually automatic establishment of Panels to examine complaints and make findings, the speed of the process (including tight time limits with respect to hearings and reports), the provision for appeal, and the mandatory nature of the process. The overall period from complaint to exhaustion of appeal and implementation of rulings is measured in weeks as compared to the years that are the norm for so much international litigation. Costs

are reduced accordingly. Panelists are qualified and serve in their personal capacities, thus contributing to confidence in the system.

It should also be mentioned that some disputes decided within the framework of WTO and other trade and investment agreements entail challenges to environmental regulations, and thus have important implications for environmental protection. Concerns have been raised about whether trade dispute settlement mechanisms are appropriate to deal with such disputes, e.g. with respect to transparency and the inclusion of scientific expertise and an environmental protection perspective. A related concern has been raised with respect to trade-related disputes arising in the context of multilateral environmental agreements; indeed, the issue has explicitly arisen in recent negotiations of multilateral environmental agreements, *i.e.* under what regime should such disputes be settled. Similarly, one of the items on the work program of the WTO Committee on Trade and Environment (CTE) is that of the relationship between dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements (Item 5).¹⁸⁹

b) CARICOM

CARICOM, the Caribbean Community, was established by the Treaty of Chaguaramas of July 4, 1973.¹⁹⁰ The Treaty contains an Annex which established the Caribbean Common Market. Both the Treaty and the Annex (which - according to Article 32 of the Treaty - forms an integral part of the Treaty) contain provisions on dispute settlement. According to Article 19 of the Treaty any dispute concerning the interpretation or application of the Treaty shall, unless otherwise provided in the Annex, be determined by the Conference; the Conference is a political organ comprised of the heads of governments of the CARICOM member States.¹⁹¹ The dispute settlement mechanisms thus foreseen for matters not falling under the provisions of the Annex can be seen as a means of political dispute settlement, not a judicial or quasi-judicial one.

¹⁸⁸ J.H. Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 *AJIL* (1996), 416 *et seq.*

¹⁸⁹ See Duncan Brack, *Multilateral Environmental Agreements and the Multilateral Trading System*, paper presented to the Royal Institute of International Affairs Conference on "Trade, Investment and the Environment", London, England, October 29-30, 1998.

¹⁹⁰ Available at URL: <http://www.sice.oas>.

¹⁹¹ Cf. Articles 6 *et seq.* of the Treaty of Chaguaramas.

Where a CARICOM Member State considers that any benefit conferred upon it by the Annex is being or may be frustrated and if no settlement is reached between the States concerned, it may refer the matter to the Common Market Council.¹⁹² The Council shall promptly make arrangements for examining the matter; such an arrangement may include referral of the matter to an ad-hoc tribunal for which provision is made in Article 12 of the Annex. Upon request by each Member State, *i.e.* not only the Parties to the dispute, the Council shall refer the matter to the Tribunal. The mechanism thus allows two different ways of settlement: one by the Tribunal, the other by the Common Market Council itself. Both, the Council and the Tribunal may make “recommendations” to the Member State concerned. If a Member State to which a recommendation is made “does not or is unable to comply with such recommendation the Council may, by majority vote, authorize any Member State to suspend to the Member State which has not complied with the recommendation the application of such obligations under this Annex as the Council considers appropriate.”¹⁹³ Moreover, any Member State may at any time while the matter is under consideration request the Council to authorize “interim measures to safeguard its position”.¹⁹⁴ The Council may, if it is found by a simple majority vote that the circumstances are sufficiently serious to justify interim action, authorize a Member State to suspend obligations under the Annex as specified by the Council.

The dispute settlement procedure set out in the Annex to the Treaty of Chaguaramas thus contains some remarkable features: 1) as soon as a matter has been brought before the Council by a Member State concerned, any Member State may request that it is referred to the Tribunal; thus, the quasi-judicial settlement process is not necessarily initiated by a State concerned, but by any Member State of CARICOM; and 2) under Article 11 para. 5 of the Annex a political organ - the Common Market Council - may adopt interim measures which consist in authorizing the suspension of certain obligations under the Annex.

c) Common Market for Eastern and Southern Africa

The Treaty Establishing the Common Market for Eastern and Southern Africa establishes a Court of Justice¹⁹⁵ which “shall ensure the adherence to law in the interpretation and application of this Treaty”.

The jurisdiction of the Court comprises the following matters:

1. individual petition - subject to the exhaustion of local remedies, any person who is resident in a member State may refer for determination by the Court the legality of any act, regulation, directive or decision of the Council of the common market or a member State on the grounds that that act, etc. “is unlawful or an infringement of the provisions of this Treaty”;¹⁹⁶
2. disputes between the Common Market and its employees;¹⁹⁷
3. any matter a) arising from an arbitration clause in a contract which confers such jurisdiction to which the Common Market or any of its institutions is a Party and b) arising from a dispute between the member States regarding the Treaty if the dispute is submitted to it under a special agreement between the member States concerned;¹⁹⁸
4. preliminary rulings upon request of any court or tribunal of a member State.¹⁹⁹

The judgment of the Court is “final and conclusive and not open to appeal.”²⁰⁰ The Court may make interim orders or issue any directions “which it considers necessary or desirable”. Such orders and directions shall have the same effect *ad interim* as decisions of the Court.²⁰¹ Finally, the Court is competent to render advisory opinions upon request of the Authority, the Council or any member State.²⁰²

¹⁹² Article 11 para. 1 of the Annex; the Common Market Council is the principal organ of the common market in which each Member State of the CARICOM shall be represented (*cf.* Articles 5 *et seq.* of the Annex).

¹⁹³ Article 11 para. 4 of the Annex.

¹⁹⁴ In case the matter is dealt with by the Tribunal the Council shall refer the request for interim measures “to the Tribunal for its recommendation.” (Article 11 para. 5 2nd sentence).

¹⁹⁵ Treaty establishing the Common Market for Eastern and Southern Africa, 33 *ILM* 1994, 1067, Articles 7 and 19 *et seq.*

¹⁹⁶ Article 26.

¹⁹⁷ Article 27.

¹⁹⁸ Article 28.

¹⁹⁹ Article 30.

²⁰⁰ Article 31 para. 1.

²⁰¹ Article 35.

²⁰² Article 32.

d) European Community

One of the functions of the ECJ is to adjudicate on disputes between member States. This function takes two different forms: under Art. 170 ECT (new Article 227) the ECJ has jurisdiction to hear actions brought by one Member State against another alleging failure to fulfil an obligation under the ECT; according to Article 182 ECT (new Article 239) the Court of Justice shall have jurisdiction "in any dispute between the Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the Parties". It is notable, however, that in over 40 years of existence of the EC, the ECJ has not been called on to deliver any judgements under these provisions.²⁰³

e) MERCOSUR

The Treaty of Asunción by which the *Mercado Comun del Sur* (MERCOSUR) was established entered into force on January 1, 1995.²⁰⁴ The initial dispute settlement procedure of MERCOSUR was contained in Annex III to the Treaty of Asunción. By means of the Protocol of Brasilia²⁰⁵ the Parties created a "permanent" dispute settlement mechanism as envisaged in para. 3 of Annex III.²⁰⁶ Under this procedure the Parties to the dispute first seek to find a solution through direct negotiations;²⁰⁷ if the dispute cannot be resolved within 15 days through negotiations, either Party to the dispute may submit the matter for consideration by the *Grupo Mercado Comun*. This body may within 30 days formulate recommendations to the Parties to the dispute.²⁰⁸ If a solution cannot be achieved through

negotiations or reference to the *Grupo Mercado Comun* each of the Parties to the dispute may refer the matter to an arbitral tribunal.²⁰⁹ The Parties of MERCOSUR accept the jurisdiction of the arbitral tribunal *ipso facto* and without a special agreement being required as compulsory.²¹⁰ The Tribunal in general renders its decision within 60 days. This period may be prolonged by 30 days.²¹¹ No appeal is possible from the Tribunal's decision, which is binding upon the Parties.²¹² If a Party to the dispute does not comply with the award of the Tribunal, the other Party to the dispute may adopt temporary compensatory measures such as the suspension of concessions.²¹³

The dispute settlement mechanism under the Protocol of Brasilia also provides for the possibility of individual petition in certain circumstances.²¹⁴

f) NAFTA

i) Dispute Settlement for State Parties under NAFTA Chapter 20 and NAAEC Part Five

For the most part, dispute resolution processes under both NAFTA and NAAEC²¹⁵ follow a conventional stepped approach.²¹⁶ Dispute resolution under NAFTA, outlined in chapter 20 of the agreement, involves measures ranging from consultations²¹⁷ to good offices, conciliation and mediation provided by the Free Trade Commission (FTC),²¹⁸ and binding arbitration.²¹⁹ Where a dispute concerns both GATT and NAFTA,

²⁰³ Furthermore, it should be borne in mind, that if a Member State fails to take measures required by a judgement of the ECJ, the Commission may bring the case before the Court and in doing so it shall specify the amount of lump sum or penalty payment which it considers appropriate in the circumstances. Should the Court find that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

²⁰⁴ Texts of Treaty of Asunción and the Protocol of Ouro Preto reprinted in 30 *ILM* (1991), 1040 and 34 *ILM* (1995), 1244 respectively.

²⁰⁵ Available at URL: http://www.sice.oas.org/trade/mrcsr/protbr_s.stm.

²⁰⁶ As to the dispute settlement mechanism in the framework of MERCOSUR cf. F.J. Rey Caro, *La Solución de Controversias en el MERCOSUR*, in *Ilustre Colegio de Abogados de Madrid - Programa Iberoamericano (ed.)*, *Temas de Legislación, Gestión y Derecho Ambiental* (Madrid, 1997), 19 *et seq.*

²⁰⁷ Article 2 of the Protocol of Brasilia.

²⁰⁸ Cf. Article 4 *et seq.* of the Protocol of Brasilia.

²⁰⁹ Article 7 of the Protocol of Brasilia.

²¹⁰ Article 9 of the Protocol of Brasilia.

²¹¹ Article 20 para. 1 of the Protocol of Brasilia.

²¹² Article 21 of the Protocol of Brasilia.

²¹³ Article 23 of the Protocol of Brasilia.

²¹⁴ Cf. Article 25 *et seq.* of the Protocol of Brasilia.

²¹⁵ See *supra*, Section III.B.5.b

²¹⁶ Overview in B. Appleton, *Navigating NAFTA* (Toronto, 1994), pp. 145-155; 178-180; 195-199.

²¹⁷ Article 2006 NAFTA.

²¹⁸ Article 2007 NAFTA.

²¹⁹ Articles 2008-2022 NAFTA.

the complaining Party may select resolution under either agreement.²²⁰ The aforementioned FTC is responsible for the resolution of disputes regarding the interpretation or application of NAFTA.²²¹ Dispute resolution under chapter 20 is available only to State Parties, including interested Third State Parties.²²²

In this respect as well as with regard to the structure of the process, the dispute resolution process under NAAEC Part Five, coordinated by the CEC Council, is virtually identical to the one just described.²²³ Of course, given the objectives of NAAEC (see *supra*, at III. B. 5. b.), the process is not intended to resolve “environment-related trade disputes”, but rather disputes as to “whether there has been a persistent pattern of failure by ... [a] Party to effectively enforce its environmental law.”²²⁴ A finding of such a “persistent failure” can result in the adoption of a “mutually satisfactory action plan”,²²⁵ the imposition of a “monetary enforcement assessment”,²²⁶ or even the suspension of NAFTA benefits.²²⁷

ii) Private Party Access under NAFTA Chapters 11, 17 and 19

While NAFTA chapter 20 fully retains a State-to-State dispute resolution focus, other chapters of NAFTA provide for different forms of direct access by private Parties to domestic and inter-State settlement procedures. No equivalents to such binding settlement processes with private Party access exist under NAAEC, though the citizen submission process²²⁸ contains some elements of a dispute settlement nature.

In chapter 11 on “Investment, Services and Related Matters”, private investors from a NAFTA State are provided with access to binding dispute resolution regarding the disciplines for the treatment of foreign

investors set out in that chapter.²²⁹ Where private investors believe that another NAFTA Party has violated these minimum standards, they may bring a claim for damages to arbitration.²³⁰

Chapter 17 establishes minimum standards to protect intellectual property rights against unauthorized use and sets out various sanctions for the enforcement of these standards against other NAFTA Parties.²³¹ In particular, Parties are required to provide various domestic procedures and remedies for these purposes, both to their own nationals and to nationals of other NAFTA Parties.²³² A failure to comply with these obligations would enable other Parties to resort to dispute settlement under chapter 20. Thus, while chapter 17 seeks to ensure the availability of domestic remedies for private Parties, dispute settlement under NAFTA with respect to any failures in this regard remains a State-to-State affair.

The panel review process outlined in chapter 19 is concerned with disputes relating to the imposition of antidumping or countervailing duties.²³³ A Party may request that a bi-national panel reviews the determination of such duties by an importing Party to establish whether the determination was in accordance with the laws of that Party.²³⁴ Any Party shall, “on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic judicial review”, request panel review.²³⁵ Each Party must then ensure that those private persons have “the right to appear and be represented by counsel before the panel”.²³⁶

²²⁰ Article 2005 NAFTA.

²²¹ Article 2001 (2)(c) NAFTA.

²²² See Article 2008 (1) and Article 2021 which even prevents Parties from providing a domestic right of action against any other Party on the ground that a measure of that Party is inconsistent with NAFTA. And see Article 2013 NAFTA.

²²³ Articles 22-36 NAAEC; one significant difference, however, is that a final panel report under NAAEC Part Five must be published (Article 32 (3) NAAEC), whereas the final report under NAFTA Chapter 20 is to be published “unless the [Free Trade] Commission decides otherwise” (Art. 2017 (4) NAFTA).

²²⁴ Article 22 (1) NAAEC.

²²⁵ Article 33 NAAEC.

²²⁶ Article 34 (4)(b) NAAEC.

²²⁷ Article 36 NAAEC.

²²⁸ See *supra* under III. B. 5. b.

²²⁹ Articles 1101-1139 NAFTA.

²³⁰ Article 1116 NAFTA.

²³¹ Articles 1701-1721 NAFTA.

²³² Articles 1714-1718 NAFTA.

²³³ Articles 1901-1911 NAFTA.

²³⁴ Article 1904 (2) NAFTA.

²³⁵ Article 1904 (5) NAFTA.

²³⁶ Article 1904 (7) NAFTA.

g) SADC

On August 17, 1992, member countries of the Southern African Development Coordination Conference signed the Treaty of the Southern African Development Community (SADC)²³⁷ which, *inter alia*, serves to achieve development and economic growth, to alleviate poverty, enhance the standard and quality of life. The Treaty provides for the establishment of a Tribunal²³⁸ to ensure adherence to and proper interpretation of the SADC-Treaty and subsidiary instruments and to adjudicate upon disputes referred to it. The decisions of the Tribunal are final and binding.²³⁹ Article 32 of the SADC-Treaty provides that any dispute arising from the interpretation or application of the Treaty, "which cannot be settled amicably, shall be referred to the Tribunal."

The Tribunal is also competent to render advisory opinions upon request of either of two organs of the Community, the Summit and the Council.

h) Investment Law

At the regional level, NAFTA contains dispute settlement procedures with respect to investment, described *supra* at III.B.1.f. There also exist over 1000 bilateral investment treaties in force, which provide for various forms of dispute settlement. An effort to negotiate a Multilateral Agreement on Investment (MAI) under the auspices of the OECD appears to have foundered in fall 1998. Among the difficulties MAI encountered were issues relating to the relationship between investment liberalization and environmental protection, including specifically issues relating to dispute settlement in that context. It is envisaged that the Free Trade Area of the Americas currently being negotiated will include a chapter on investment that will also deal with these issues.

In the area of international investment law, the International Center for the Settlement of Investment Disputes (ICSID) is an example of an international mechanism dealing with disputes between individuals and States. In its short life it has become a successful

means to resolve conflicts which otherwise might give rise to frictions at the inter-State level.

In this context mention should also be made of the regulations under the Energy Charter Treaty which establish mandatory third Party settlement procedures by way of arbitration, concerning both disputes between States and disputes between investors and States.²⁴⁰

2. Law of the Sea

The United Nations Convention on the Law of the Sea provides in its Part XV for the creation of an institution devoted to the settlement of disputes by peaceful means consistent with Article 2 of the U.N. Charter. The organ so created is the International Tribunal for the Law of the Sea, a court with special competence in the form of the particular qualities and experience of the judges. Article 2 of the Statute of the Tribunal provides that members shall be elected "from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea". Provision is also made for there to be representation of the principal legal systems of the world and equitable geographic distribution. As with the WTO, the detailed nature of structures and processes for dispute resolution (including special Annexes to the Law of the Sea Convention relating to Arbitration and Special Arbitration) provide the essential environment within which States are more likely to place confidence and to engage routinely. In the absence of such provisions and such detail, the task of dispute settlement is much more problematic.²⁴¹

UNCLOS contains a highly sophisticated and detailed system for dispute settlement. But, since no agreement on the principle that only one tribunal or court should decide on disputes was reached, the Parties have the choice of procedure (Article 287 UNCLOS): recourse to the International Tribunal for the Law of the Sea which comprises a special Sea-Bed Dispute Chamber, the International Court of Justice or an arbitral tribunal that may be made competent to settle a dispute.

²³⁷ 32 ILM 1993, 116.

²³⁸ Article 16 of the SADC-Treaty.

²³⁹ Article 16 para. 5 of the SADC-Treaty.

²⁴⁰ Articles 26s of the Energy Charter Treaty; cf. G. Loibl, *The Energy Charter Treaty: Implementation and Compliance Issues*, in T. Waelde (ed.), *The Energy Charter Treaty - An East-West Gateway for Investment and Trade* (1997), 365 et seq.

²⁴¹ On December 4, 1997 the International Tribunal on the Law of the Sea rendered its first judgment in the case "The M/V 'SAIGA'" (St. Vincent and the Grenadines v. Guinea); cf. F. Lauterpacht, *The first Decision of the International Tribunal for the Law of the Sea: The M/V SAIGA*, in: G. Hafner, G. Loibl, A. Rest, L. Sucharipa, K. Zemanek, *Liber Amicorum Prof. Ignaz Seidl-Hohenveldern*, 395-418.

Under Annex VIII disputes concerning the parts of UNCLOS relating to “(1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research and (4) navigation, including pollution from vessels and by dumping”, may be submitted to a special arbitration procedure.

C. Recent Developments in International Law to Establish Specific Settlement Mechanisms for Environmental Disputes:

1. ICJ - Environmental Chamber

In 1993, the International Court of Justice - following the proposals of the Court's late President Nagendra Singh - established a permanent “Environmental Chamber” in accordance with Article 26 para. 1 of its Statute.²⁴² Proceedings before the environmental chamber, which is composed of seven judges, are instituted by the application of the Parties. Until now no case has been brought before this chamber, although the Court as a whole has dealt with a number of matters in recent years, which raised legal questions concerning the environment.²⁴³

2. PCA - Special Procedures to Deal with Environmental Disputes

Proposals were made concerning a possible role of the Permanent Court of Arbitration in The Hague in the environmental field. Thought was given to the possibility of creating a special procedure to deal with environmental disputes. This procedure would not be limited to inter-State disputes but could also include disputes concerning individuals. This raised a number of questions: would it be useful to establish an international institution which is entrusted to hear cases brought by individuals against States (including their own State) or which would even be able to deal with disputes between individuals resident in different States? Such a procedure would have to draw on the experience gained in the area of human rights and investment law.

3. Other Proposals

During the fifth session of the United Nations Commission on Crime Prevention and Criminal Justice (1996), the Costa Rican delegation brought forward the idea of establishing an International Court of Justice on the Environment to become a permanent body of the United Nations for arbitration, prevention, international control, punishment (of individuals) and consultation with States.²⁴⁴ The Commission adopted a resolution requesting the Secretary-General of the UN to seek the views of member States in order to “determine the feasibility of establishing appropriate machinery for applying criminal law for the protection of the environment”. So far, only a very limited number of States, including Austria, Cyprus and Finland, have provided the Secretary General with their views. While Cyprus favored the above-mentioned establishment of “appropriate machinery”, Austria and Finland expressed critical attitudes.²⁴⁵

4. United Nations Compensation Commission: Use of Computerized Data Management Techniques

Environmental disputes sometimes involve large numbers of persons injured by a single disaster, such as at Bhopal, or even by a single long-term source of pollution that causes gradual environmental harm. Particularly with respect to disaster-caused injuries, there is an obvious need to provide redress expeditiously. The obvious temporal roadblock is the need to process the large number of claims, each with its own unique set of facts as to causation and damage, in a fair manner.

A technique used by the United Nations Compensation Commission, established to decide claims arising out of the 1991-92 Gulf War, provides a possible methodology for overcoming this obstacle. The class of eligible claimants were defined so that there was a relatively precise set of small claims, *i.e.* claims of less than \$100,000, with respect to which speed was especially important, that were to be decided before the other classes of claims. The determination of eligibility for these claimants - which numbered more than 1,000,000 - was thus relatively straightforward. The large number of such claims, however, precluded claim-by-claim determination of the amount of awards.

²⁴² Cf. R. Jennings, *The Role of the International Court of Justice in the Development of International Environment Protection Law*, 1 *RECIEL* 1992, 240 *et seq.*, 243; cf. further M. Fitzmaurice, *Environmental Protection and the International Court of Justice*, in V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice - Essays in honour of Sir Robert Jennings* (1996), 293, 305 *et seq.*

²⁴³ Cf. in this regard e.g. the *Gabcikovo-Nagymaros Case* or the Court's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. See *supra* I. 2.

²⁴⁴ Cf. Report of the Commission on its Fifth Session, E/CN.15/1996/I.1/Add.1, para. 11.33; G. Loibl, M. Reiterer, *International Criminal Law and the Environment*, in: 26 *Environmental Law and Policy* 1996, 192s; G. Loibl, M.A. Reiterer, *Criminal Law and the Protection of the Environment*, 27 *Environmental Policy and Law* 1997, 400s.

²⁴⁵ Report of the Secretary General, *International Cooperation in Combating Transnational Crime - The Role of Criminal Law in the Protection of the Environment*, UN-Doc. E/CN.15/1997/10, paras. 54 to 56.

To deal with this dilemma, a computer model was created to set the amount of awards by predicting what one would expect a claimant to have lost on the basis of variables corresponding to characteristics of the claimant and claim, e.g. age, income and nationality of the claimant, and whether the claim was for loss of personal property or some other type of injury. The model thus was not an analytic tool in the sense of evaluating the particulars of an individual claim, but rather predicted an award in a manner that abstracted itself from the particulars of the claim, i.e. it did not look at the specific evidence of the alleged injury or amount claimed. This approach inevitably generated some awards that were far out-of-line with the amount of damage for which evidence was submitted, and the Commission eventually devised a system for revisiting such anomalous results.

One can thus conclude that this approach worked in the sense that the Commission achieved what can be described as “quick, rough justice”. It is also evident that the design of the model must be carefully coordinated with the underlying factual reality in order to ensure, for example, that appropriate variables are considered, and with an eye to what type of legal result is desired, e.g. should the model predict damage or should it analyze claims in some other way. Finally, if a predictive model is used, there should be the opportunity for claimants with anomalous claims, i.e. claims whose proven damages differ substantively from the amount predicted by the model, to choose to have their claims evaluated on the basis of the particular evidence submitted.

D. Current Discussions within the International Law Commission (ILC) on International Liability²⁴⁶

In the course of its discussion of the item “International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law” the International Law Commission has completed the first reading of draft articles on “Prevention of Transboundary Damage from Hazardous Activities” and submitted them to the General Assembly in 1998²⁴⁷. These draft articles “deal with the phase prior to the situation where significant harm or damage has actually occurred”.²⁴⁸ As such, their primary objective is to prevent the outbreak of disputes arising from the likelihood of transboundary damage.

²⁴⁶ The following text is based on a draft prepared by a member of the International Law Commission.

²⁴⁷ Report of the International Law Commission on the work of its 50th session, U.N. Doc. A/53/10, 11 et seq.

²⁴⁸ *Ibid.*, 22.

²⁴⁹ *Ibid.*, 33.

²⁵⁰ *Ibid.*, 37.

²⁵¹ *Ibid.*, 34.

²⁵² *Ibid.*, 37.

²⁵³ *Ibid.*, 37.

The draft articles apply to “activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences” (Article 1). Consequently, they relate only to activities likely to cause harm above the threshold of a significant effect but below that of activities necessarily causing harm. This risk is defined as “a low probability of causing disastrous harm” or “a high probability of causing other significant harm” (Article 2. a). “Harm” is defined as harm caused to persons, property or the environment in the transboundary context (Article 2. b).

The basic obligation reflects the well-established principle “sic utere tuo ut alienum non laedas”²⁴⁹ and materializes in two duties: one on the prevention of significant harm and the other on the minimization of the risk of such harm (Article 3). The juxtaposition of these two duties is explained by the Commission in way that, first, States have “to attempt to design policies and to implement them with the aim of preventing significant transboundary harm”, but if that is not possible, they are bound to minimize the still existing risk of such harm.²⁵⁰ These duties are not considered as prejudicing other obligations imposed upon the States concerned (Article 6).

The basic obligations are subject to the due diligence principle²⁵¹ and also entail the precautionary principle insofar as States have to take such measures as “are appropriate by way of abundant caution, even if full scientific certainty does not exist.”²⁵² According to that basic principle, it is expected that the operator will bear the costs of prevention to the extent that he is responsible for the operation²⁵³.

In the implementation of these duties the States concerned should cooperate, seek the advice of international organizations and take the necessary legislative, administrative and other measures (Article 4).

The preventive duty envisaged in these draft articles is to be accomplished by an appropriate authorization procedure to be applied to all activities addressed by the draft articles and involving an environment impact assessment (Articles 7 and 8).

The scope and amount of preventive measures to be taken are not absolute, but largely depend on consultations among the States concerned, which should achieve a solution “based on an equitable balance of interests” (Article 11 para. 2). As to these measures the draft articles stress therefore the procedural aspect, which precedes the substantive one, which is merely defined as an equitable solution. The various factors this balance of interests has to take into account are the degree of the risk and the availability of means, social, economic and technical benefits to be derived from the activities as compared to the harm involved, the contribution of the affected States to the measures, the existence of alternative activities and the standards of prevention (Article 12). These procedures can also be requested by the State likely to be affected by the relevant activities (Article 13).

The procedures have to involve the domestic public (Article 9) as well as, on the basis of non-discrimination, that of other States concerned by appropriate means (Article 16) ; however, States are not bound to disclose information on national security and industrial secrets (Article 15).

The draft articles do not provide for a compulsory procedure for the settlement of dispute except *pactum de negotiando*, supplemented by the right to resort to a fact-finding commission the report of which shall be considered in good faith (Article 17).

The draft articles do not cover the whole range of dangerous activities (only those which entail a certain risk and which are of a transboundary character) and do not address damage caused to the environment in general. Likewise, they abstain from addressing the issue of responsibility or liability.

V. Developments in Telecommunication and Information Technology

Recent developments in telecommunications and information technology can facilitate dispute avoidance and dispute settlement. Data is now being collected by remote sensing from satellites. Collecting and compiling information from various sources is easier than through more conventional means because it is easier to transfer and process data through, for

example, use of the Internet. Similarly, communicating with other governments and international organizations has become easier because of the Internet. For example, sending reports to central secretariats, reporting the existence of a transboundary problem and filing memorials with tribunals can be done nearly instantaneously.

The same technology allows rapid and inexpensive dissemination of information to the public, or at least to those parts of the public with access to the Internet. Reports submitted under an agreement or decisions of a dispute settlement tribunal thus can be widely distributed very quickly.

Current technology also allows holding “virtual meetings” via conference calls, with or without a video element. These meetings reduce the time and expense of travel, and thus can facilitate both dispute avoidance and dispute settlement. Current technology, such as the Internet, also facilitates the transfer of environmentally sound technology, the use of which may reduce environmental threats and thus the likelihood of environmental disputes.

The use of advanced technologies raises certain questions, however. Software incompatibilities occur, with the result that communication sometimes does not proceed evenly. The increased speed made possible by advanced technology is not invariably helpful, because the passage of time sometimes allows passions to cool and solutions to occur to people. Another potential cost of the use of telecommunications is reduced face-to-face contact: personal interactions have frequently proven indispensable to resolving sensitive or complicated situations.

There is also a high start-up cost for many technologies. Developing countries, in particular, may not have the hardware or technical knowledge to utilize advanced technology. In such situations, the use of advanced technology would effectively lock such countries out of the dispute avoidance or dispute settlement process, though hopefully only temporarily, and all efforts to alleviate the technological gap should be encouraged.

SECTION II

CONCLUSIONS OF THE INTERNATIONAL GROUP OF EXPERTS

Conclusions by the International Group of Experts on Dispute Avoidance and Dispute Settlement in International Environmental Law of the United Nations Environmental Programme (UNEP)*

1. The UNEP Programme for the Development and Periodic Review of Environmental Law for the 1990s (Montevideo Programme II), which has among its objectives "to develop further the mechanisms to facilitate the avoidance and settlement of environmental disputes", has endorsed a strategy of developing "methods, procedures and mechanisms that promote, *inter alia*, informed decisions, mutual understanding and confidence-building, with a view to avoiding environmental disputes and, where such avoidance is not possible, to their peaceful settlement."

2. Dispute settlement has long been a focus of inter-State relations, and it remains an important tool for dealing with international environmental problems. Recently, the international community has paid increasing attention to the need to develop and use means of dispute avoidance, and to the closely related question of improving implementation of, and compliance with, international obligations.¹ These concepts, while being relevant to many fields of human activity, play a particularly important role in international environmental law because the behaviour leading to environmental disputes may cause grave harm, sometimes irreversible, to the environment and human health and because reparation, even if available, often cannot adequately compensate for environmental harm, such as long-term soil degradation, deforestation, and loss of biological diversity. In order to meet these concerns, recently negotiated regimes relating to international environmental issues have relied to a greater extent on dispute avoidance methods and approaches, using them in an innovative and multifaceted manner.

3. Sustainable development, which requires the integration of economic, environmental and social policies, provides an overall framework for avoidance and settlement of disputes in the field of environmental protection. Certain principles and approaches that are

emerging in the process of achieving sustainable development, such as the precautionary approach, prevention of environmental harm, common but differentiated responsibilities of States, global partnership and equity, are of particular relevance to the development of effective means of environmental dispute avoidance and settlement.

4. In developing dispute avoidance and dispute settlement regimes, it should be taken into account that the mechanisms contained therein are mutually supportive in serving the aim of enhancing and promoting implementation of and compliance with international environmental commitments. Dispute avoidance mechanisms which prevail during the pre-dispute phase, and dispute settlement mechanisms both serve the overarching aims of achieving peaceful and cooperative relations in the environmental field and avoiding environmental harm. Seen from this perspective, dispute avoidance has many advantages vis-a-vis dispute settlement, just as prevention of environmental harm is preferable to cure.

5. Where avoidance or prevention of disputes is not possible or has failed, the mechanisms of peaceful settlement of disputes are essential. Article 33 of the United Nations Charter enumerates the following means of dispute settlement: "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements, or other peaceful means of [the disputing parties'] own choice." Most environmental agreements incorporate such means, among which the parties may choose.

6. Various mechanisms developed in environmental agreements for the wider purpose of implementation and compliance are of particular importance for dispute avoidance and can contribute significantly to maintaining a cooperative spirit between countries.

* The UNEP International Group of Experts worked during 1998 and 1999 and produced the Study on Dispute Avoidance and Dispute Settlement in International Environmental Law and the resulting Conclusions.

¹ The terms "implementation" and "compliance" are sometimes used interchangeably. For the purposes of these Conclusions implementation is regarded as the incorporation of international norms into domestic legal systems, compliance means the actual performance of these norms.

They include the collection of data, reporting, fact-finding, inquiry, inspection, compliance procedures, consultation, capacity building activities, incentives, and gathering and sharing of information through, *inter alia*, transboundary environmental impact assessment and early notification.

7. In situations that are capable of leading to an environmental dispute, consultation between the parties concerned is likely to be helpful. This method of dispute avoidance deserves further elaboration and wider application.

8. A particularly promising recent innovation, also closely connected with dispute avoidance, is the development of compliance procedures, such as the procedure to address cases of non-compliance under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Typically, such mechanisms are multilateral, easily triggered, non-adversarial and facilitative and tailored to the specific circumstances of the particular regime. Multilateral compliance mechanisms have the following characteristics that warrant their increased use in addressing environmental problems:

(a) Compliance procedures are designed to be forward-looking, facilitative, non-confrontational and emphasize cooperation; whereas dispute settlement tends rather to be retrospective, time-consuming and confrontational.

(b) Environmental issues, in order to be dealt with satisfactorily, often require multilateral responses. Compliance procedures, which by their nature are multilateral, are better equipped to provide such a response than mechanisms of dispute settlement, which are bilateral in character.

(c) Compliance procedures aim primarily at enabling States to achieve compliance, rather than determining violations of international obligations. Thus, they are more effective for bringing about environmental improvement.

(d) In general, dispute settlement procedures depend on consent of the disputing parties. If such consent is not obtained, dispute settlement will not occur. Compliance procedures, being non-adversarial, are more easily triggered as their application typically does not require consent by the parties concerned.

9. In elaborating dispute avoidance and dispute settlement mechanisms with respect to a particular environmental problem, a comprehensive approach should be applied which would also allow environmental problems to be addressed as early as possible. A comprehensive approach includes the formulation of norms which promote compliance and implementation and the creation of mechanisms

designed to fit the specific situation on the basis of taking into account the nature of the environmental problem, the structure of the legal obligation, the actual capacities of the concerned countries, and other relevant circumstances. If public education, information, awareness and transparency are strengthened, there will be a better understanding of environmental problems and of the need for their early solution. This in turn will contribute to environmental dispute avoidance. Likewise, if scientific questions are identified and resolved using the best methods available, including enhanced scientific research on environmental issues, there will be less likelihood of environmental disputes arising.

10. It is important to build appropriate capacities in developing countries, including the development and strengthening of institutions, in order to enhance understanding of international environmental regimes and ability to comply with international obligations. This could be supported by transfer of technology and financial and technical resources as referred to in the Rio Declaration and Agenda 21. Similar actions may be appropriate with respect to countries with economies in transition.

11. Experience gained in addressing other international issues, e.g. in the fields of the law of the sea, human rights, disarmament and international trade law, should also be regularly monitored with a view to profiting from the best achievements in related contexts when elaborating and operating dispute avoidance and dispute settlement mechanisms in international environmental law.

12. Intergovernmental bodies, such as UNEP, can, and should, play an important role in facilitating and assisting in the avoidance and settlement of international environmental disputes by way of providing, as appropriate, scientific and technical expertise, fact-finding services, administrative, logistic and other support. Furthermore, intergovernmental organizations may exercise a facilitative role also by the improvement of channels of communication, through serving as a forum for discussions and consultations, and by convening international conferences and meetings. Activities within the framework of regional organizations and arrangements can be important in dispute avoidance and dispute settlement. Such activities should be enhanced since some environmental problems are best dealt with at the regional level.

13. Recent environmental agreements have established a range of institutions, including governing bodies and secretariats, which by reason of their functions can

contribute to the settlement of disputes which may arise under such agreements. Further, certain agreements accord to such bodies specific functions which promote the avoidance of environmental disputes.

14. International and regional financial institutions can, and should, play an important role in environmental dispute avoidance and dispute settlement. This role may be fulfilled through, *inter alia*: providing incentives to countries to resolve environmental problems, such as giving in appropriate cases financial or technical assistance; approving only projects that are environmentally sound and that, at the very least, do not create international tensions, but help relieve already existing tensions or serve to prevent the creation of new ones; and taking into account compliance by countries with their environmental obligations in approving projects.

15. Rapid developments in telecommunication and information technology have the potential to facilitate dispute avoidance and dispute settlement. They allow speedy and inexpensive "virtual meetings" and facilitate the spreading of environmentally sound technology and the collection, compilation, communication and dissemination of information. However, such technologies should be used with prudence, with particular attention to the capacity of all concerned States to use them. New data management techniques, such as those used by the United Nations Compensation Commission, can play a facilitative role in situations where many persons are injured by a single environmental incident; but the design of such techniques must be carefully coordinated with the relevant facts and the underlying legal questions.

16. Affected persons should have the opportunity to protect their interests in environmental issues in an effective manner, including access to administrative and judicial proceedings in the country where the potentially harmful activity is to take place or has occurred. Such access should be without discrimination on the basis of residence or nationality of persons who may be affected by adverse environmental consequences resulting from proposed or existing activities. As a means of dispute avoidance, therefore, it is important that legal systems grant to affected persons equal access to, and treatment in, administrative and judicial proceedings.

17. The role of civil society - such as individuals, environmental NGOs, the business community and trade unions - in helping to avoid disputes has been beneficial and should be enhanced in appropriate ways. Civil society can, for instance: provide technical assistance; alert governments and intergovernmental organizations to environmental problems; elaborate and implement voluntary codes of conduct in the private sector; provide relevant information and assist in information exchange and distribution; and enhance public awareness and acceptance of environmental regimes and thus promote compliance with those regimes. Civil society can also make a valuable input during the dispute settlement process. Moreover, public access to information and the decision-making process is essential.

SECTION III

ANNEXES

Annex 1

United Nations

The Charter of the United Nations, 26 June 1945
(excerpt)

PREAMBLE TO THE CHARTER OF THE UNITED NATIONS WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

[...]

CHAPTER VI PACIFIC SETTLEMENT OF DISPUTES

Article 33

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

Article 34

The Security Council may investigate any dispute, or any situation, which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
2. The Security Council should take into consideration any procedures for the settlement of the dispute, which have already been adopted by the parties.
3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement, as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

[...]

Annex 2

United Nations General Assembly

The Rio Declaration, 12 August 1992

UNITED
NATIONS



General Assembly

Distr.
General

A/CONF.151/26 (Vol. I)
12 August 1992

THE RIO DECLARATION

REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT*

(Rio de Janeiro, 3-14 June 1992)

Annex I

RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

The United Nations Conference on Environment and Development,

Having met at Rio de Janeiro from 3 to 14 June 1992,

Reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it,

With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,

Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,

Recognizing the integral and interdependent nature of the Earth, our home,
Proclaims that:

Principle 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Principle 5

All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

Principle 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

Principle 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Principle 8

To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

Principle 9

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

Principle 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 11

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Principle 12

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Principle 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Principle 14

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

Principle 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Principle 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Principle 17

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Principle 18

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

Principle 19

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

Principle 20

Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.

Principle 21

The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.

Principle 22

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Principle 23

The environment and natural resources of people under oppression, domination and occupation shall be protected.

Principle 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

Principle 25

Peace, development and environmental protection are interdependent and indivisible.

Principle 26

States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

Principle 27

States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

Annex 3

United Nations General Assembly

REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT - AGENDA 21

(Rio de Janeiro, 3-14 June 1992)

UNITED
NATIONS



General Assembly

Distr.
General

A/CONF.151/26 (Vol. III)
14 August 1992

A-21: INT. LEGAL INSTRUMENTS

REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT

Chapter 39

INTERNATIONAL LEGAL INSTRUMENTS AND MECHANISMS

Basis for action

39.1. The recognition that the following vital aspects of the universal, multilateral and bilateral treaty-making process should be taken into account:

(a) The further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns;

(b) The need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of developing countries;

(c) At the global level, the essential importance of the participation in and the contribution of all countries, including the developing countries, to treaty making in the field of international law on sustainable development. Many of the existing international legal instruments and agreements in the field of environment have been developed without adequate participation and contribution of developing countries, and thus may require review in order to reflect the concerns and interests of developing countries and to ensure a balanced governance of such instruments and agreements;

(d) Developing countries should also be provided with technical assistance in their attempts to enhance their national legislative capabilities in the field of environmental law;

(e) Future projects for the progressive development and codification of international law on sustainable development should take into account the ongoing work of the International Law Commission;

(f) Any negotiations for the progressive development and codification of international law concerning sustainable development should, in general, be conducted on a universal basis, taking into account special circumstances in the various regions.

Objectives

39.2. The overall objective of the review and development of international environmental law should be to evaluate and to promote the efficacy of that law and to promote the integration of environment and development policies through effective international agreements or instruments taking into account both universal principles and the particular and differentiated needs and concerns of all countries.

39.3. Specific objectives are:

(a) To identify and address difficulties which prevent some States in particular developing countries, from participating in or duly implementing international agreements or instruments and, where appropriate, to review and revise them with the purposes of integrating environmental and developmental concerns and laying down a sound basis for the implementation of these agreements or instruments;

(b) To set priorities for future law-making on sustainable development at the global, regional or subregional level, with a view to enhancing the efficacy of international law in this field through, in particular, the integration of environmental and developmental concerns;

(c) To promote and support the effective participation of all countries concerned, in particular developing countries, in the negotiation, implementation, review and governance of international agreements or instruments, including appropriate provision of technical and financial assistance and other available mechanisms for this purpose, as well as the use of differential obligations where appropriate;

(d) To promote, through the gradual development of universally and multilaterally negotiated agreements or instruments, international standards for the protection of the environment that take into account the different situations and capabilities of countries. States recognize that environmental policies should deal with the root causes of environmental degradation, thus preventing environmental measures from resulting in unnecessary restrictions to trade. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing international environmental problems should, as far as possible, be based on an international consensus. Domestic measures targeted to achieve certain environmental objectives may need trade measures to render them effective. Should trade policy measures be found necessary for the enforcement of environmental policies, certain principles and rules should apply. These could include, inter alia, the principle of non-discrimination; the principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives; an obligation to ensure transparency in the use of trade measures related to the environment and to provide adequate notification of national regulations; and the need to give consideration to the special conditions and development requirements of developing countries as they move towards internationally agreed environmental objectives;

(e) To ensure the effective, full and prompt implementation of legally binding instruments and to facilitate timely review and adjustment of agreements or instruments by the parties concerned, taking into account the special needs and concerns of all countries, in particular developing countries;

(f) To improve the effectiveness of institutions, mechanisms and procedures for the administration of agreements and instruments;

(g) To identify and prevent actual or potential conflicts, particularly between environmental and social/economic agreements or instruments, with a view to ensuring that such agreements or instruments are consistent. Where conflicts arise they should be appropriately resolved;

(h) To study and consider the broadening and strengthening of the capacity of mechanisms, inter alia, in the United Nations system, to facilitate, where appropriate and agreed to by the parties concerned, the

identification, avoidance and settlement of international disputes in the field of sustainable development, duly taking into account existing bilateral and multilateral agreements for the settlement of such disputes.

Activities

39.4. Activities and means of implementation should be considered in the light of the above basis for action and objectives, without prejudice to the right of every State to put forward suggestions in this regard in the General Assembly. These suggestions could be reproduced in a separate compilation on sustainable development.

A. Review, assessment and fields of action in international law for sustainable development

39.5. While ensuring the effective participation of all countries concerned, Parties should at periodic intervals review and assess both the past performance and effectiveness of existing international agreements or instruments as well as the priorities for future law making on sustainable development. This may include an examination of the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of sustainable development, as provided by General Assembly resolution 44/228. In certain cases, attention should be given to the possibility of taking into account varying circumstances through differential obligations or gradual application. As an option for carrying out this task, earlier UNEP practice may be followed whereby legal experts designated by Governments could meet at suitable intervals, to be decided later, with a broader environmental and developmental perspective.

39.6. Measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law. The General Assembly and its Sixth Committee are the appropriate forums to deal with this subject. The specific competence and role of the International Committee of the Red Cross should be taken into account.

39.7. In view of the vital necessity of ensuring safe and environmentally sound nuclear power, and in order to strengthen international cooperation in this field, efforts should be made to conclude the ongoing negotiations for a nuclear safety convention in the framework of the International Atomic Energy Agency.

B. Implementation mechanisms

39.8. The parties to international agreements should consider procedures and mechanisms to promote and review their effective, full and prompt implementation. To that effect, States could, inter alia:

- (a) Establish efficient and practical reporting systems on the effective, full and prompt implementation of international legal instruments;
- (b) Consider appropriate ways in which relevant international bodies, such as UNEP, might contribute towards the further development of such mechanisms.

C. Effective participation in international law making

39.9. In all these activities and others that may be pursued in the future, based on the above basis for action and objectives, the effective participation of all countries, in particular developing countries, should be ensured through appropriate provision of technical assistance and/or financial assistance. Developing countries should be given "headstart" support not only in their national efforts to implement international agreements or instruments, but also to participate effectively in the negotiation of new or revised agreements or instruments and in the actual international operation of such agreements or instruments. Support should include assistance in building up expertise in international law particularly in relation to sustainable development, and in assuring access to the necessary reference information and scientific/technical expertise.

D. Disputes in the field of sustainable development

39.10. In the area of avoidance and settlement of disputes, States should further study and consider methods to broaden and make more effective the range of techniques available at present, taking into account, among others, relevant experience under existing international agreements, instruments or institutions and, where appropriate, their implementing mechanisms such as modalities for dispute avoidance and settlement. This may include 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.

END OF CHAPTER 39

Annex 4

United Nations General Assembly Resolution 37/10, 15 November 1982

UNITED
NATIONS



General Assembly

Distr.
General

A/RES/37/10
15 November 1982

Peaceful settlement of disputes between States

The General Assembly,

Having examined the item entitled "Peaceful settlement of disputes between States",

Recalling its resolutions 34/102 of 14 December 1979, 35/160 of 15 December 1980 and 36/110 of 10 December 1981,

Reaffirming the need to exert utmost efforts in order to settle any conflicts and disputes between States exclusively by peaceful means and to avoid any military action and hostilities, which can only make more difficult the solution of those conflicts and disputes,

Considering that the question of the peaceful settlement of disputes should represent one of the central concerns for States and for the United Nations and that the efforts to strengthen the process of the peaceful settlement of disputes should be continued,

Convinced that the adoption of the Manila Declaration on the Peaceful Settlement of International Disputes should enhance the observance of the principle of peaceful settlement of disputes in the relations between States and contribute to the elimination of the danger of recourse to force or to the threat of force, to the relaxation of international tensions, to the promotion of a policy of co-operation and peace and of respect for the independence and sovereignty of all States, to the enhancing of the role of the United Nations in preventing conflicts and settling them peacefully and, consequently, to the strengthening of international peace and security,

Considering the need to ensure a wide dissemination of the text of the Declaration,

1. Approves the Manila Declaration on the Peaceful Settlement of International Disputes, the text of which is annexed to the present resolution;
2. Expresses its appreciation to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization for its important contribution to the elaboration of the text of the Declaration;

3. Requests the Secretary-General to inform the Governments of the States Members of the United Nations or members of specialized agencies, the Security Council and the International Court of Justice of the adoption of the Declaration;
4. Urges that all efforts be made so that the Declaration becomes generally known and fully observed and implemented.

ANNEX

Manila Declaration on the Peaceful Settlement of International Disputes

The General Assembly,

Reaffirming the principle of the Charter of the United Nations that all States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,

Conscious that the Charter of the United Nations embodies the means and an essential framework for the peaceful settlement of international disputes, the continuance of which is likely to endanger the maintenance of international peace and security,

Recognizing the important role of the United Nations and the need to enhance its effectiveness in the peaceful settlement of international disputes and the maintenance of international peace and security, in accordance with the principles of justice and international law, in conformity with the Charter of the United Nations,

Reaffirming the principle of the Charter of the United Nations that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Reiterating that no State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State,

Reaffirming the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Bearing in mind the importance of maintaining and strengthening international peace and security and the development of friendly relations among States, irrespective of their political, economic and social systems or levels of economic development,

Reaffirming the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and in other relevant resolutions of the General Assembly,

Stressing the need for all States to desist from any forcible action which deprives peoples, particularly peoples under colonial and racist regimes or other forms of alien domination, of their inalienable right to self-determination, freedom and independence, as referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Mindful of existing international instruments as well as respective principles and rules concerning the peaceful settlement of international disputes, including the exhaustion of local remedies whenever applicable,

Determined to promote international co-operation in the political field and to encourage the progressive development of international law and its codification, particularly in relation to the peaceful settlement of international disputes,

Solemnly declares that:

1

1. All States shall act in good faith and in conformity with the purposes and principles enshrined in the Charter of the United Nations with a view to avoiding disputes among themselves likely to affect friendly relations among States, thus contributing to the maintenance of international peace and security. They shall live together in peace with one another as good neighbours and strive for the adoption of meaningful measures for strengthening international peace and security.

2. Every State shall settle its international disputes exclusively by peaceful means in such a manner that international peace and security, and justice, are not endangered.

3. International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with the sovereign equality of States.

4. States parties to a dispute shall continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States, as well as other generally recognized principles and rules of contemporary international law.

5. States shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies or other peaceful means of their own choice, including good offices. In seeking such a settlement, the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute.

6. States parties to regional arrangements or agencies shall make every effort to achieve pacific settlement of their local disputes through such regional arrangements or agencies before referring them to the Security Council. This does not preclude States from bringing any dispute to the attention of the Security Council or of the General Assembly in accordance with the Charter of the United Nations.

7. In the event of failure of the parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful solution and shall consult forthwith on mutually agreed means to settle the dispute peacefully. Should the parties fail to settle by any of the above means a dispute the continuance of which is likely to endanger the maintenance of international peace and security, they shall refer it to the Security Council in accordance with the Charter of the United Nations and without prejudice to the functions and powers of the Council set forth in the relevant provisions of Chapter VI of the Charter.

8. States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations.

9. States should consider concluding agreements for the peaceful settlement of disputes among them. They should also include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof.

10. States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties. States should be equally prepared to seek the settlement of their disputes by the other means mentioned in the present Declaration.

11. States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes.

12. In order to facilitate the exercise by the peoples concerned of the right to self-determination as referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the parties to a dispute may have the possibility, if they agree to do so and as appropriate, to have recourse to the relevant procedures mentioned in the present Declaration, for the peaceful settlement of the dispute.

13. Neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the States parties to the dispute.

II

1. Member States should make full use of the provisions of the Charter of the United Nations, including the procedures and means provided for therein, particularly Chapter VI, concerning the peaceful settlement of disputes.

2. Member States shall fulfil in good faith the obligations assumed by them in accordance with the Charter of the United Nations. They should, in accordance with the Charter, as appropriate, duly take into account the recommendations of the Security Council relating to the peaceful settlement of disputes. They should also, in accordance with the Charter, as appropriate, duly take into account the recommendations adopted by the

General Assembly, subject to Articles 11 and 12 of the Charter, in the field of peaceful settlement of disputes.

3. Member States reaffirm the important role conferred on the General Assembly by the Charter of the United Nations in the field of peaceful settlement of disputes and stress the need for it to discharge effectively its responsibilities. Accordingly, they should:

(a) Bear in mind that the General Assembly may discuss any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations and, subject to Article 12 of the Charter, recommend measures for its peaceful adjustment;

(b) Consider making use, when they deem it appropriate, of the possibility of bringing to the attention of the General Assembly any dispute or any situation which might lead to international friction or give rise to a dispute;

(c) Consider utilizing, for the peaceful settlement of their disputes, the subsidiary organs established by the General Assembly in the performance of its functions under the Charter;

(d) Consider, when they are parties to a dispute brought to the attention of the General Assembly, making use of consultations within the framework of the Assembly, with a view to facilitating an early settlement of their dispute.

4. Member States should strengthen the primary role of the Security Council so that it may fully and effectively discharge its responsibilities, in accordance with the Charter of the United Nations, in the area of the settlement of disputes or of any situation the continuance of which is likely to endanger the maintenance of international peace and security. To this end they should:

(a) Be fully aware of their obligation to refer to the Security Council such a dispute to which they are parties if they fail to settle it by the means indicated in Article 33 of the Charter;

(b) Make greater use of the possibility of bringing to the attention of the Security Council any dispute or any situation which might lead to international friction or give rise to a dispute;

(c) Encourage the Security Council to make wider use of the opportunities provided for by the Charter in order to review disputes or situations the continuance of which is likely to endanger the maintenance of international peace and security;

(d) Consider making greater use of the fact-finding capacity of the Security Council in accordance with the Charter;

(e) Encourage the Security Council to make wider use, as a means to promote peaceful settlement of disputes, of the subsidiary organs established by it in the performance of its functions under the Charter;

(f) Bear in mind that the Security Council may, at any stage of a dispute of the nature referred to in Article 33 of the Charter or of a situation of like nature, recommend appropriate procedures or methods of adjustment;

(g) Encourage the Security Council to act without delay, in accordance with its functions and powers, particularly in cases where international disputes develop into armed conflicts.

5. States should be fully aware of the role of the International Court of Justice, which is the principal judicial organ of the United Nations. Their attention is drawn to the facilities offered by the International Court of Justice for the settlement of legal disputes, especially since the revision of the Rules of the Court. States may entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future. States should bear in mind:

(a) That legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court;

(b) That it is desirable that they:

(i) Consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;

(ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognize as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;

(iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice. The organs of the United Nations and the specialized agencies should study the advisability of making use of the possibility of requesting advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities, provided that they are duly authorized to do so. Recourse to judicial settlement

of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.

6. The Secretary-General should make full use of the provisions of the Charter of the United Nations concerning the responsibilities entrusted to him. The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. He shall perform such other functions as are entrusted to him by the Security Council or by the General Assembly. Reports in this connection shall be made whenever requested to the Security Council or the General Assembly.

Urges all States to observe and promote in good faith the provisions of the present Declaration in the peaceful settlement of their international disputes;

Declares that nothing in the present Declaration shall be construed as prejudicing in any manner the relevant provisions of the Charter or the rights and duties of States, or the scope of the functions and powers of the United Nations organs under the Charter, in particular those relating to the peaceful settlement of disputes;

Declares that nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration;

Stresses the need, in accordance with the Charter, to continue efforts to strengthen the process of the peaceful settlement of disputes through progressive development and codification of international law, as appropriate, and through enhancing the effectiveness of the United Nations in this field.

Annex 5

United Nations General Assembly

Resolution 50/50, 29 January 1996

UNITED
NATIONS



General Assembly

D0istr.
General

A/RES/50/50
29 January 1996

Fiftieth session
Agenda item 145

United Nations Model Rules for the Conciliation of Disputes between States

The General Assembly,

Considering that conciliation is among the methods for the settlement of disputes between States enumerated by the Charter of the United Nations in Article 33, paragraph 1, that it has been provided for in numerous treaties, bilateral as well as multilateral, for the settlement of such disputes, and that it has proved its usefulness in practice,

Convinced that the establishment of model rules for the conciliation of disputes between States which incorporate the results of the most recent scholarly work and of experience in the field of international conciliation, as well as a number of innovations which can with advantage be made in the traditional practice in that area, can contribute to the development of harmonious relations between States,

1. Commends the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization for having completed the final text of the United Nations Model Rules for the Conciliation of Disputes between States;
2. Draws to the attention of States the possibility of applying the Model Rules, the text of which is annexed hereto, whenever a dispute has arisen between States which it has not been possible to solve through direct negotiations;
3. Requests the Secretary-General, to the extent possible and in accordance with the relevant provisions of the Model Rules, to lend his assistance to the States resorting to conciliation on the basis of those Rules;
4. Also requests the Secretary-General to make the necessary arrangements to distribute to Governments the text of the present resolution, including the annex.

87th plenary meeting
11 December 1995
ANNEX
United Nations Model Rules for the Conciliation of Disputes between States

CHAPTER I
APPLICATION OF THE RULES

Article 1

1. These rules apply to the conciliation of disputes between States where those States have expressly agreed in writing to their application.
2. The States, which agree to apply these rules, may at any time, through mutual agreement, exclude or amend any of their provisions.

CHAPTER II

INITIATION OF THE CONCILIATION PROCEEDINGS

Article 2

1. The conciliation proceedings shall begin as soon as the States concerned (henceforth: the parties) have agreed in writing to the application of the present rules, with or without amendments, as well as on a definition of the subject of the dispute, the number and emoluments of members of the conciliation commission, its seat and the maximum duration of the proceedings, as provided in article 24. If necessary, the agreement shall contain provisions concerning the language or languages in which the proceedings are to be conducted and the linguistic services required.
2. If the States cannot reach agreement on the definition of the subject of the dispute, they may by mutual agreement request the assistance of the Secretary-General of the United Nations to resolve the difficulty. They may also by mutual agreement request his assistance to resolve any other difficulty that they may encounter in reaching an agreement on the modalities of the conciliation proceedings.

CHAPTER III
NUMBER AND APPOINTMENT OF CONCILIATORS

Article 3

There may be three conciliators or five conciliators. In either case the conciliators shall form a commission.

Article 4

If the parties have agreed that three conciliators shall be appointed, each one of them shall appoint a conciliator, who may not be of its own nationality. The parties shall appoint by mutual agreement the third conciliator, who may not be of the nationality of any of the parties or of the other conciliators. The third conciliator shall act as president of the commission. If he is not appointed within two months of the appointment of the conciliators appointed individually by the parties, the third conciliator shall be appointed by the Government of a third State chosen by agreement between the parties or, if such agreement is not obtained within two months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment shall be made by the Vice-President or the next member of the Court in order of seniority who is not a national of the parties. The third conciliator shall not reside habitually in the territory of the parties or be or have been in their service.

Article 5

1. If the parties have agreed that five conciliators should be appointed, each one of them shall appoint a conciliator who may be of its own nationality. The other three conciliators, one of whom shall be chosen with a view to his acting as president, shall be appointed by agreement between the parties from among nationals of third States and shall be of different nationalities. None of them shall reside habitually in the territory of the parties or be or have been in their service. None of them shall have the same nationality as that of the other two conciliators.
2. If the appointment of the conciliators whom the parties are to appoint jointly has not been effected within

three months, they shall be appointed by the Government of a third State chosen by agreement between the parties or, if such an agreement is not reached within three months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment shall be made by the Vice-President or the next judge in order of seniority who is not a national of the parties. The Government or member of the International Court of Justice making the appointment shall also decide which of the three conciliators shall act as president.

3.If, at the end of the three-month period referred to in the preceding paragraph, the parties have been able to appoint only one or two conciliators, the two conciliators or the conciliator still required shall be appointed in the manner described in the preceding paragraph. If the parties have not agreed that the conciliator or one of the two conciliators whom they have appointed shall act as president, the Government or member of the International Court of Justice appointing the two conciliators or the conciliator still required shall also decide which of the three conciliators shall act as president.

4.If, at the end of the three-month period referred to in paragraph 2 of this article, the parties have appointed three conciliators but have not been able to agree which of them shall act as president, the president shall be chosen in the manner described in that paragraph.

Article 6

Vacancies, which may occur in the commission as a result of death, resignation or any other cause, shall be filled as soon as possible by the method established for appointing the members to be replaced.

CHAPTER IV FUNDAMENTAL PRINCIPLES

Article 7

The commission, acting independently and impartially, shall endeavour to assist the parties in reaching an amicable settlement of the dispute. If no settlement is reached during the consideration of the dispute, the commission may draw up and submit appropriate recommendations to the parties for consideration.

CHAPTER V PROCEDURES AND POWERS OF THE COMMISSION

Article 8

The commission shall adopt its own procedure.

Article 9

1.Before the commission begins its work, the parties shall designate their agents and shall communicate the names of such agents to the president of the commission. The president shall determine, in agreement with the parties, the date of the commission's first meeting, to which the members of the commission and the agents shall be invited.

2.The agents of the parties may be assisted before the commission by counsel and experts appointed by the parties.

3.Before the first meeting of the commission, its members may meet informally with the agents of the parties, if necessary, accompanied by the appointed counsel and experts to deal with administrative and procedural matters.

Article 10

1.At its first meeting, the commission shall appoint a secretary.

2.The secretary of the commission shall not have the nationality of any of the parties, shall not reside habitually in their territory and shall not be or have been in the service of any of them. He may be a United Nations official if the parties agree with the Secretary-General on the conditions under which the official will exercise these functions.

Article 11

1. As soon as the information provided by the parties so permits, the commission, having regard, in particular, to the time-limit laid down in article 24, shall decide in consultation with the parties whether the parties should be invited to submit written pleadings and, if so, in what order and within what time-limits, as well as the dates when, if necessary, the agents and counsel will be heard. The decisions taken by the commission in this regard

may be amended at any later stage of the proceedings.

2. Subject to the provisions of article 20, paragraph 1, the commission shall not allow the agent or counsel of one party to attend a meeting without having also given the other party the opportunity to be represented at the same meeting.

Article 12

The parties, acting in good faith, shall facilitate the commission's work and, in particular, shall provide it to the greatest possible extent with whatever documents, information and explanations may be relevant.

Article 13

1. The commission may ask the parties for whatever relevant information or documents, as well as explanations, it deems necessary or useful. It may also make comments on the arguments advanced as well as the statements or proposals made by the parties.

2. The commission may accede to any request by a party that persons whose testimony it considers necessary or useful be heard, or that experts be consulted.

Article 14

In cases where the parties disagree on issues of fact, the commission may use all means at its disposal, such as the joint expert advisers mentioned in article 15, or consultation with experts, to ascertain the facts.

Article 15

The commission may propose to the parties that they jointly appoint expert advisers to assist it in the consideration of technical aspects of the dispute. If the proposal is accepted, its implementation shall be conditional upon the expert advisers being appointed by the parties by mutual agreement and accepted by the commission and upon the parties fixing their emoluments.

Article 16

Each party may at any time, at its own initiative or at the initiative of the commission, make proposals for the settlement of the dispute. Any proposal made in accordance with this article shall be communicated immediately to the other party by the president, who may, in so doing, transmit any comment the commission may wish to make thereon.

Article 17

At any stage of the proceedings, the commission may, at its own initiative or at the initiative of one of the parties, draw the attention of the parties to any measures, which in its opinion might be advisable or facilitate a settlement.

Article 18

The commission shall endeavour to take its decisions unanimously but, if unanimity proves impossible, it may take them by a majority of votes of its members. Abstentions are not allowed. Except in matters of procedure, the presence of all members shall be required in order for a decision to be valid.

Article 19

The commission may, at any time, ask the Secretary-General of the United Nations for advice or assistance with regard to the administrative or procedural aspects of its work.

CHAPTER VI

CONCLUSION OF THE CONCILIATION PROCEEDINGS

Article 20

1. On concluding its consideration of the dispute, the commission may, if full settlement has not been reached, draw up and submit appropriate recommendations to the parties for consideration. To that end, it may hold an exchange of views with the agents of the parties, who may be heard jointly or separately.

2. The recommendations adopted by the commission shall be set forth in a report communicated by the president of the commission to the agents of the parties, with a request that the agents inform the commission, within a given period, whether the parties accept them. The president may include in the report the reasons, which, in the commission's view, might prompt the parties to accept the recommendations, submitted. The commission shall refrain from presenting in its report any final conclusions with regard to facts or from ruling formally on issues of law, unless the parties have jointly asked it to do so.

3. If the parties accept the recommendations submitted by the commission, a procès-verbal shall be drawn up setting forth the conditions of acceptance. The procès-verbal shall be signed by the president and the secretary.

A copy thereof signed by the secretary shall be provided to each party. This shall conclude the proceedings.

4. Should the commission decide not to submit recommendations to the parties, its decision to that effect shall be recorded in a procès-verbal signed by the president and the secretary. A copy thereof signed by the secretary shall be provided to each party. This shall conclude the proceedings.

Article 21

1. The recommendations of the commission will be submitted to the parties for consideration in order to facilitate an amicable settlement of the dispute. The parties undertake to study them in good faith, carefully and objectively.

2. If one of the parties does not accept the recommendations and the other party does, it shall inform the latter, in writing, of the reasons why it could not accept them.

Article 22

1. If the recommendations are not accepted by both parties but the latter wish efforts to continue in order to reach agreement on different terms, the proceedings shall be resumed. Article 24 shall apply to the resumed proceedings, with the relevant time-limit, which the parties may, by mutual agreement, shorten or extend, running from the commission's first meeting after resumption of the proceedings.

2. If the recommendations are not accepted by both parties and the latter do not wish further efforts to be made to reach agreement on different terms, a procès-verbal signed by the president and the secretary of the commission shall be drawn up, omitting the proposed terms and indicating that the parties were unable to accept them and do not wish further efforts to be made to reach agreement on different terms. The proceedings shall be concluded when each party has received a copy of the procès-verbal signed by the secretary.

Article 23

Upon conclusion of the proceedings, the president of the commission shall, with the prior agreement of the parties, deliver the documents in the possession of the secretariat of the commission either to the Secretary-General of the United Nations or to another person or entity agreed upon by the parties. Without prejudice to the possible application of article 26, paragraph 2, the confidentiality of the documents shall be preserved.

Article 24

The commission shall conclude its work within the period agreed upon by the parties. Any extension of this period shall be agreed upon by the parties.

CHAPTER VII

CONFIDENTIALITY OF THE COMMISSION'S WORK AND DOCUMENTS

Article 25

1. The commission's meetings shall be closed. The parties and the members and expert advisers of the commission, the agents and counsel of the parties, and the secretary and the secretariat staff, shall maintain strictly the confidentiality of any documents or statements, or any communication concerning the progress of the proceedings unless their disclosure has been approved by both parties in advance.

2. Each party shall receive, through the secretary, certified copies of any minutes of the meetings at which it was represented.

3. Each party shall receive, through the secretary, certified copies of any documentary evidence received and of experts' reports, records of investigations and statements by witnesses.

Article 26

1. Except with regard to certified copies referred to in article 25, paragraph 3, the obligation to respect the confidentiality of the proceedings and of the deliberations shall remain in effect for the parties and for members of the commission, expert advisers and secretariat staff after the proceedings are concluded and shall extend to recommendations and proposals which have not been accepted.

2. Notwithstanding the foregoing, the parties may, upon conclusion of the proceedings and by mutual agreement, make available to the public all or some of the documents that in accordance with the preceding paragraph are to remain confidential, or authorize the publication of all or some of those documents.

CHAPTER VIII

OBLIGATION NOT TO ACT IN A MANNER WHICH MIGHT HAVE AN ADVERSE EFFECT ON THE CONCILIATION

Article 27

The parties shall refrain during the conciliation proceedings from any measure which might aggravate or widen the dispute. They shall, in particular, refrain from any measures, which might have an adverse effect on the

recommendations, submitted by the commission, so long as those recommendations have not been explicitly rejected by either of the parties.

CHAPTER IX
PRESERVATION OF THE LEGAL POSITION OF THE PARTIES

Article 28

1. Except as the parties may otherwise agree, neither party shall be entitled in any other proceedings, whether in a court of law or before arbitrators or before any other body, entity or person, to invoke any views expressed or statements, admissions or proposals made by the other party in the conciliation proceedings, but not accepted, or the report of the commission, the recommendations submitted by the commission or any proposal made by the commission, unless agreed to by both parties.

2. Acceptance by a party of recommendations submitted by the commission in no way implies any admission by it of the considerations of law or of fact which may have inspired the recommendations.

CHAPTER X
COSTS

Article 29

The costs of the conciliation proceedings and the emoluments of expert advisers appointed in accordance with article 15 shall be borne by the parties in equal shares.

Annex 6

United Nations Environment Programme Governing Council

Decision 17/25, 21 May 1993

(excerpt)

UNITED NATIONS
ENVIRONMENT PROGRAMME



Governing Council

UNEP/GC 17/25
21 May 1993

Programme for the Development and Periodic Review of Environmental Law

The Governing Council,

Recalling its decision 10/21 of 31 May 1982, in which the Council adopted the Montevideo Programme for the Development and Periodic Review of Environmental Law, which provided the basis for the activities of the United Nations Environment Programme in the field of environmental law for the last decade,

Also recalling its decision 16/25 of 31 May 1991, in which it noted the progress made in the implementation of decision 10/21,

Taking note of paragraph 38.22 (h) of Agenda 213 which calls for further development of international environmental law,

Taking note also of chapter 39 of Agenda 21,

Taking note also of the Meeting of Senior Government Officials Expert in Environmental Law for the Review of the Montevideo Programme, held in Rio de Janeiro from 30 October to 2 November 1991, and in Nairobi from 7 to 11 September 1992,

Having considered the Executive Director's report on the Programme for the Development and Periodic Review of Environmental Law,

1. Takes note of the report of the Executive Director on the Programme for the Development and Periodic Review of Environmental Law;
2. Notes with appreciation the work of the United Nations Environment Programme in implementing the Montevideo Programme since its adoption by the Governing Council;

3. Adopts the Programme for the Development and Periodic Review of Environmental Law, as contained in the annex to the present decision, as the broad strategy for the activities of the United Nations Environment Programme in the field of environmental law for the 1990s;
4. Requests the Executive Director to implement the Programme, within available resources, inter alia, through preparing and disseminating analytical reports, organizing intergovernmental meetings, and contributing to capacity-building in the field of environmental law;
5. Encourages the Executive Director to implement the Programme, where appropriate, in close cooperation with relevant international organizations;
6. Underlines the role of the United Nations Environment Programme in the continued progressive development of international environmental law as a means for achieving wider adherence to and more efficient implementation of international environmental conventions, and for future negotiating processes for legal instruments in the field of sustainable development, in accordance with paragraph 39.1 (a) of Agenda 21;
7. Requests the Executive Director to continue to promote the coherent coordination of the functioning of environmental conventions, including their secretariats, with a view to improving the effectiveness of the implementation of the conventions;
8. Decides to review the implementation of the Programme not later than at its regular session in 1997.

10th meeting
21 May 1993

PROGRAMME FOR THE DEVELOPMENT AND PERIODIC REVIEW OF ENVIRONMENTAL LAW

The following programme areas, together with the respective objectives, strategies and activities, are proposed as a non-exhaustive list of elements for the Programme:

[...]

D. Dispute avoidance and settlement

Objective:

To develop further the mechanisms to facilitate the avoidance and settlement of environmental disputes.

Strategy:

Develop methods, procedures and mechanisms that promote, inter alia, informed decisions, mutual understanding and confidence-building, with a view to avoiding environmental disputes and, where such avoidance is not possible, to their peaceful settlement.

Activities:

- (a) Study and consider methods to broaden and make more effective the current mechanisms, such as the following, for possible inclusion in international legal instruments, where appropriate:
 - (i) Regular exchange of data and information;
 - (ii) Assessment of possible environmental impacts of planned measures on other States or areas beyond the limits of national jurisdiction;
 - (iii) Prior notification and consultation concerning planned measures that may have adverse impacts on other States or in areas beyond the limits of national jurisdiction;
 - (iv) Monitoring, fact-finding and reporting with regard to matters relating to obligations under the relevant instrument, even when no difference or dispute has yet arisen between the parties;
 - (v) Procedures to verify compliance through a non-judicial body established by the States Parties;
 - (vi) Compulsory or non-compulsory conciliation, whereby the Parties are committed to or voluntarily resort to conciliation by one or more experts whose report and recommendations are not, however, binding upon the Parties; and

- (vii) Compulsory settlement of disputes, where appropriate, by one of the following means:
 - a. Binding arbitration, in accordance with procedures established under the instrument;
 - b. Judicial settlement, by submission of the dispute to the International Court of Justice or other relevant international tribunal;
- (b) Consider the role that could be and has been played by the relevant international bodies, such as UNEP, in the anticipation, avoidance and resolution of disputes relating to the environment.

Annex 7

United Nations Environment Programme Governing Council

Decision 18/9, 26 May 1995

UNITED NATIONS
ENVIRONMENT PROGRAMME



Governing Council

UNEP/GC 18/9
26 May 1995

Further development of international environmental law aiming at sustainable development

The Governing Council,

Recalling General Assembly resolution 47/190 of 22 December 1992 endorsing Agenda 21 and the other documents as adopted by the United Nations Conference on Environment and Development, and, in particular the principal environmental challenges identified therein,

Desiring to achieve the implementation of tasks set out in those documents,

Recalling chapter 38 of Agenda 21 on international institutional arrangements, which reaffirms the enhanced and strengthened role of the Governing Council of the United Nations Environment Programme in providing policy guidance and coordination in the field of the environment, taking into account the development perspective, and urges the United Nations Environment Programme to concentrate, inter alia, on the implementation and further development of international environmental law,

Recognizing that chapter 38 of Agenda 21 further urges the United Nations Environment Programme to concentrate on coordinating functions arising from an increasing number of international legal agreements, inter alia, the functioning of the convention secretariats, and the provision of technical, legal and institutional advice to Governments, at their request, for developing and implementing national environmental legislation and institutions, providing training and disseminating legal information,

Recalling its decision 17/25 of 21 May 1993, by which it adopted the Programme for the Development and Periodic Review of Environmental Law for the 1990s, and decided to review the implementation of the programme not later than at its nineteenth session,

Recalling also the decision adopted by the Commission on Sustainable Development on 27 May 1994 urging the United Nations Environment Programme to study further the concept, requirements and implications of sustainable development and international law,

Welcoming the progress achieved in the implementation and development of international environmental instruments and the conclusion of environmental programmes of action,

Concerned that, despite the encouraging signs, three years after the adoption of Agenda 21 only limited progress has been made in the realization of its goals and objectives and that existing and proposed legal and institutional instruments and arrangements have so far been ineffective in halting the deterioration of the global environment,

Noting the need for enhanced policy guidance with regard to the direction and coordination of United Nations system activities in the field of environment in the context of sustainable development,

Believing that in order to achieve sustainable development it is imperative to address on a priority basis the principal environmental challenges, as contained in Agenda 21, including with reference to relevant social, economic and environmental aspects, which should be considered in the context of the development of international environmental law,

Noting with appreciation the efforts being made by the United Nations Environment Programme as well as other institutions, both within and outside the United Nations system, to further the implementation and development of international environmental law aiming at sustainable development,

Believing further that innovative approaches are required in the field of the progressive development and codification of international environmental law in order to achieve sustainable development,

1. Requests the Executive Director to monitor the implementation of international legal instruments in the field of environment, to elaborate and recommend, where necessary, means to enhance their effectiveness and to provide support, as agreed, to the convention secretariats;

2. Requests the Executive Director to update, within available resources, a compilation of international environmental instruments, with a view to facilitating harmonization of international environmental law;

3. Requests the Executive Director, in implementing the mandate for a database on national and international environment law, to use the existing IUCN data bank as the core archival system and, with view to avoiding duplication of efforts, provide the support necessary to enable it to serve the needs of the United Nations Environment Programme, in particular to assist Governments of developing countries in this field;

4. Requests the Executive Director to develop, in preparing the periodic review of environmental law in accordance with Council decision 17/25, a position paper for international environmental law aiming at sustainable development, containing, inter alia, compliance/implementation mechanisms, dispute avoidance/settlement procedures and new concepts and principles, with reference to existing international legal instruments as well as guidelines developed by institutions both within and outside the United Nations system;

5. Requests the Executive Director, within available resources, to prepare a study on the need for and feasibility of new international environmental instruments aiming at sustainable development, addressing, on a priority basis, the principal environmental challenges, including as they relate to the broader issues of sustainable development as set forth in Agenda 21, and, in fulfilling this task, to draw upon relevant work and activities of other United Nations agencies and international organizations;

6. Requests the Executive Director to keep the Committee of Permanent Representatives informed of the progress of the United Nations Environment Programme on the subject and to submit a report thereon to the Governing Council at its nineteenth session.

10th meeting
26 May 1995

Annex 8

United Nations Environment Programme Governing Council

Decision 20/3, 3 February 1999

UNITED NATIONS
ENVIRONMENT PROGRAMME



Governing Council

Distr.
General

UNEP/GC 20/3
3 February 1999

Programme for the development and periodic review of environmental law beyond the year 2000

The Governing Council,

Having considered the report of the Executive Director on the programme for the development and periodic review of environmental law beyond the year 2000,

1. Takes note with appreciation of the progress made in the further implementation of the Programme for the Development and Periodic Review of Environmental Law for the 1990s, including the recently concluded study on dispute avoidance and dispute settlement in international environmental law;
2. Requests the Executive Director to undertake a process for the preparation of a new programme for the development and periodic review of environmental law, in consultation with Governments and relevant organizations, and, as part of that process, to convene in the year 2000 a meeting of senior government officials expert in environmental law ;
3. Authorizes the Executive Director to continue to use the current Programme for the Development and Periodic Review of Environmental Law as strategic guidance for the work of the United Nations Environment Programme in the field of environmental law until a new programme is adopted by the Council and, in that connection, authorizes him to assist, upon request, Governments and organizations in developing international environmental agreements;
4. Requests the Executive Director to continue to assist, upon request, developing countries and countries with economies in transition in strengthening national environmental legislation and institutions;
5. Also requests the Executive Director to report on the outcome of the implementation of the present decision to the Council at its twenty-first session.

6th meeting
3 February 1999

Annex 9

International Union for the Conservation of nature (IUCN)

Draft International Covenant on Environment and Development, March 1995 (excerpt)

DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT

FOREWORD

The Charter of the United Nations governs relations between States. The Universal Declaration of Human Rights pertains to relations between the State and the individual. The time has come to devise a covenant regulating relations between humankind and nature.

UN Secretary-General's 1990 Report

1992 was a historical watershed, with the convening of the world's largest ever international conference, the UN Conference on Environment and Development (UNCED), attended by representatives of 178 States, including many heads of State and government. UNCED's action plan, Agenda 21, identifies concrete steps to integrate environment and development. UNCED further endorsed roles of environmental law in guiding all nations toward this integration.

The law is an essential component for setting and implementing global, regional, and national policy on environment and development. UNCED emphasized the need to integrate "environment and development issues at national, sub-regional, regional and international levels," including: (a) elaborating the "balance between environmental and developmental concerns;" (b) clarifying the relationships between the various existing treaties; and (c) ensuring national participation in both developing and implementing these legal measures, with particular focus on developing countries.

IUCN's Commission on Environmental Law (CEL), in cooperation with the International Council of Environmental Law (ICEL) and with the assistance of UNEP's Environmental Law and Institutions Programme Activity Centre (ELI/PAC), has responded to UNCED's recommendations by elaborating a *Draft International Covenant on Environment and Development*.

[...]

ARTICLE 61
COMPLIANCE AND DISPUTE AVOIDANCE

In the framework of environmental treaties to which they are party or by other means, Parties shall maintain or promote the establishment of procedures and institutional mechanisms to assist and encourage States to comply fully with their obligations and to avoid environmental disputes. Such procedures and mechanisms should improve and strengthen reporting requirements, and be simple, transparent, and non-confrontational.

ARTICLE 62
SETTLEMENT OF DISPUTES

1. Parties shall settle disputes concerning the interpretation or application of this Covenant by peaceful means, such as by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or by any other peaceful means of their own choice.
2. If parties to a dispute do not reach agreement on a solution or on a dispute settlement arrangement within one year following the notification by one party to another that a dispute exists, the dispute shall, at the request of one of the parties, be submitted to either an arbitral tribunal, including the Permanent Court of Arbitration, or to judicial settlement, including by the International Court of Justice and the International Tribunal for the Law of the Sea as appropriate.

[...]

Annex 10

Organisation for Economic Co-operation and development (Oecd)

Dispute Settlement in Environmental Conventions and Other Legal Instruments

OCDE/CG(95) 138, 13 December 1995

DISPUTE SETTLEMENT IN ENVIRONMENTAL CONVENTIONS AND OTHER LEGAL INSTRUMENTS

INTRODUCTION

1. International law imposes a general prohibition on the threat or use of force by one State against another in violation of the Charter of the United Nations. The Charter sets a corresponding obligation to resolve disputes by any of the peaceful means listed in Article 33:

"The parties to any dispute, [...] shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

2. These different techniques for dispute resolution have been incorporated into many environmental conventions at the bilateral, regional and global level. These provisions focus on the settlement of disputes concerning the interpretation or application of the conventions with the ultimate aim of ensuring the implementation of the conventions and the achievement of the environmental objectives. Provisions for dispute settlement in environmental conventions range from non-binding consensus-building mechanisms to judicial settlement, with some agreements including the entire range of approaches.

3. In general, however, there has been little use made of the dispute settlement provisions in environmental agreements. At the United Nations Conference on Environment and Development (UNCED) in June 1992, proposals were made to broaden and make more effective the range of techniques available for the avoidance and settlement of environmental disputes. Agenda 21, the UNCED action programme, states:

"In the area of avoidance and settlement of disputes, States should further study and consider methods to broaden and make more effective the range of techniques available at present, taking into account, among others, relevant experience under existing international agreements, instruments or institutions and, where appropriate, their implementing mechanisms such as modalities for dispute avoidance and settlement."

4. This paper discusses both the approaches to dispute settlement contained in current environmental conventions and the strengths and weaknesses of these approaches. Further information on the conventions and other instruments discussed in this paper is given in *Annex 1*.

APPROACHES TO DISPUTE SETTLEMENT IN ENVIRONMENTAL CONVENTIONS AND OTHER LEGAL INSTRUMENTS

A. Dispute Avoidance

5. Most environmental conventions have emphasised dispute avoidance rather than dispute settlement, although all multilateral environmental agreements (MEAs) contain traditional dispute settlement provisions. These

conventions all have provisions for exchange of information among countries and technical and scientific cooperation. They also incorporate provisions for helping to ensure compliance with the agreement in order to prevent disputes. Specific procedures for dispute avoidance have focused on: 1) monitoring, 2) reporting, and 3) inspection.

Monitoring

6. General monitoring of the implementation of environmental agreements is usually accomplished through meetings of the parties or the establishment of formal commissions on which parties are represented. In addition, institutional support is generally given to environmental conventions by a permanent Secretariat. Most environmental conventions hold at least annual meetings of the parties and more frequent meetings of sub-committees to assess particular aspects of the implementation of the agreement. For example, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter "the Basel Convention") provides for the parties "to keep under continuous review and evaluation...the effective implementation" of the Convention. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter the "Montreal Protocol") provides for regular meetings of the parties and for a complete assessment of the control measures on the basis of available scientific, environmental, technical and economic information at least every four years.

The 1992 United Nations Framework Convention on Climate Change (hereinafter the "Climate Change Convention") provides for parties to "keep under review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt." It should be further noted that within the Organisation for Economic co-operation and Development (OECD) several decisions and recommendations in the environmental area contain a monitoring mechanism. For example, the Decision/Recommendation on the co-operative investigation and risk reduction of existing chemicals adopted by the Council on 31.1.1991 [C (90) 163/FINAL] "instructs the Management Committee of the Special Programme on the control of chemicals to review by the end of 1994 the actions taken by Member countries in pursuance of the Decision/Recommendation".

Reporting

7. More formal reporting requirements have been incorporated into many environmental conventions as part of overseeing the implementation of the agreements and promoting compliance with the terms of the agreements. The extent of the reporting obligations varies, but they typically cover at a minimum the measures taken by the parties towards implementing their obligations. Some environmental conventions have adopted systems of mandatory reporting and auditing by an independent experts committee followed by public review of compliance.

8. The Basel Convention requires an annual report on all aspects of transboundary trade and disposal of hazardous substances. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) provides for the parties to maintain records of trade in listed species and to report on the number and type of permits granted. Parties to the Montreal Protocol are obligated to provide annual data concerning production, imports and exports to parties and non-parties of controlled substances.

Under the Climate Change Convention, parties must report on national inventories of greenhouse gas emissions and steps taken to implement the Convention; developed parties have even more stringent requirements to give details of their implementation programmes and "specific estimates of the effects that the policies= and measures ... will have." Here again certain OECD Decisions and Recommendations in the environmental field provide for detailed reporting.

Inspection

9. Inspection procedures have been included in certain environmental conventions to help promote compliance with the terms of the respective agreements. Most examples of inspection provisions are found in environmental conventions for the conservation of marine living resources, where non-compliance can rapidly lead to endangerment and extinction of the species being supervised. In general, observers and inspectors have been nominated by parties willing to participate in an oversight programme, infractions are reported back to a central body and penalties are left to be implemented by the country whose vessel is in violation of the agreement.

10. For example, under the International Convention for the Regulation of Whaling, the International Whaling Commission has the power to appoint observers who are carried aboard whaling vessels and report back to the Commission. A similar approach was adopted for the International Inspection Scheme under the Convention on the Conservation of Antarctic Marine Living Resources. A stronger enforcement model was included in the 1992 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, which authorises all parties to board, inspect and seize fishing vessels found operating in violation of the Convention. The non-compliance procedures under the Montreal Protocol include a provision for the Implementation Committee to visit, "upon invitation", countries whose performance is in question.

B. Non-Compliance Procedures

11. Under the Montreal Protocol a formal non-compliance procedure was adopted which draws elements from a variety of dispute settlement procedures. An Implementation Committee consisting of ten parties is responsible for the treatment of parties found to be in non-compliance with the provisions of the Protocol, including those relating to trade. A procedure has been adopted whereby parties may report on alleged instances of non-compliance by other parties, the challenged parties may respond, and the Implementation Committee prepares a full report to the parties who may call for steps to bring about compliance. An indicative list of steps, which might be taken, includes advice and assistance, issuing cautions and suspension of specific rights and privileges under the Protocol. However, the emphasis has been on advice and conciliation, finding amicable solutions to compliance problems and assisting parties in achieving compliance. Non-compliance procedures can make a useful, straightforward, non-confrontational and transparent contribution to compliance with international environmental law, and were therefore promoted by paragraph 23.1 of the 1993 Luzern Declaration made by Ministers in the UN/ECE region. A non-compliance procedure has been adopted under the 1994 Sulphur Protocol to the Long-Range Transboundary Air Pollution Convention by the Executive Body for the Convention. Work is also on going in the context of the United Nations Framework Convention on Climate Change for the creation of a multilateral consultative process for the resolution of questions regarding implementation.

C. Consultation and Negotiation

12. In the case of infractions or strong disagreements on the implementation of an environmental convention, most agreements have provisions recommending consultation and negotiation. Consultations imply a process of exchange of views with the objective of working out a solution or a compromise regarding a disagreement. These provisions fall short of any type of mediation or involvement of third parties. The UN Convention on the Law of the Sea, for example, provides for an "Obligation to Exchange Views:" *"When a dispute arises between States concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."*

13. The 1985 Vienna Convention for the Protection of the Ozone Layer [hereinafter "The Vienna Convention"] (to which the Montreal Protocol relates) stipulates that: *"The parties will seek to shape consensus on the issue in conflict, and their decisions and interpretations will try to reinforce the stability of the specific legal regime as a whole."* The Basel Convention states: *"In case of a dispute between Parties as to the interpretation or application of, or compliance with, this Convention or any protocol thereto, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice."*

14. Similarly, the Biodiversity Convention provides: *"In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation."* The Climate Change Convention contains almost identical language: *"In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice."*

D. Mediation

15. Mediation of disputes is the next step in dispute resolution and may be generally described as facilitated negotiation. It implies the involvement of a third party in the dispute resolution process who is charged with helping to maintain a constructive environment for discussions and assisting the disputing parties in reaching agreement. The mediator usually has no power to investigate a case or to impose an outcome on the disputing parties. A mediator's knowledge of the facts depends on the information provided by the parties to the dispute, his own expertise, and other information that is available to the public. In most conventions, the mediator can

be another party to the agreement, the Secretariat of the environmental convention or a specific body or committee of the convention. Many environmental conventions provide for mediation when dispute avoidance mechanisms have failed.

16. The Vienna Convention stipulates: *"If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party."* The Biodiversity Convention recommends as the step after negotiation: *"If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party."*

The Berne Convention on the Conservation of European Wildlife and Natural Habitats provides for the standing committee to serve as mediator: the Standing Committee *"[...] shall use its best endeavours to facilitate a friendly settlement of any difficulty to which the execution of this Convention may give rise"*.

17. A resolution of the Conference of the Parties to CITES recommends mediation by the Secretariat or the Standing Committee, specifically that:

"If major problems with the implementation of the Convention in particular parts are brought to the attention of the Secretariat, the Secretariat work together with the Party concerned to try to solve the problem and offer advice or technical assistance as required; that, if it does not appear that a solution can be readily achieved, the Secretariat bring the matter to the attention of the Standing Committee which may pursue the matter in direct contact with the party concerned with a view of helping to find a solution."

E. Conciliation

18. Some environmental conventions provide for the establishment of conciliation commissions to consider disputes. These in essence give more formal powers to the mediator. This procedure relies on the appointment of a group to evaluate key factual issues in order to improve the chances for settlement. The main task of the conciliation commission is to establish the facts of the dispute case, which often involves complex scientific and technical issues. In addition, this group may be empowered to indicate possible solutions, which include findings on matters of law. However, there is no settlement decision at the end and the parties are not obliged to accept the proposed solutions. Rather, a compromise is sought through recommendations made by the conciliation commission.

19. For example, the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties provides that Parties *"shall, if settlement by negotiation between the Parties involved [...] has not been possible, and if the Parties do not otherwise agree, be submitted upon request of any of the Parties concerned to conciliation [...]."* The UN Convention on the Law of the Sea establishes that a party to a dispute *"may invite the other party or parties to submit the dispute to conciliation"* and provides for detailed rules of procedure. The conciliation commission *"shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement."* Within 12 months of its constitution, the conciliation commission shall draw up a report to be deposited with the Secretary-General of the United Nations, which, however, is not binding upon the parties.

20. The Vienna Convention and the Biodiversity Convention both provide for a dispute to be submitted to conciliation if there is no agreement through negotiation or mediation. The Vienna Convention fixes the rules of procedure as: *"A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a final and recommendatory award, which the parties shall consider in good faith."*

21. The Biodiversity Convention states that a request for conciliation of one of the parties to a dispute is sufficient for the creation of a conciliation commission. The members of the commission shall be appointed by the parties or, in the case of default, by the Secretary-General of the United Nations after a two-month period. The conciliation commission shall take its decisions by majority vote of its members and is empowered to determine its own procedure, unless the parties to the dispute otherwise agree.

22. Similarly, the 1993 North American Agreement on Environmental Cooperation (known as the environmental "side-agreement" to the North American Free Trade Agreement (NAFTA)) recommends conciliation procedures as one of its dispute settlement approaches. Parties should first consult with other parties whether there has been a persistent pattern of failure to enforce effectively its environmental law and attempt to arrive at a mutually satisfactory resolution of the matter. If this fails, a party may request a special session of the Council, which should assist the consulting parties to reach a mutually satisfactory resolution of the dispute:

“The Council may call on such technical advisers or create such working groups or expert groups as it deems necessary, have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or make recommendations.”

F. Arbitration

23. Arbitration is a dispute resolution procedure designed by the parties to the dispute to serve the particular needs of the dispute rather than submit it to a standing tribunal. Generally speaking, each party retains the power to designate one of the arbitrators. The third arbitrator, who normally is the chairman of the arbitral tribunal, is usually chosen jointly by the parties or by the two other arbitrators or, should they fail to do so, by a neutral third party (e.g. the Basel Convention and the Biodiversity Convention give such a power to the Secretary-General of the UN). In all other respects arbitration typically contains the essential elements of traditional adjudication, where proofs and arguments are submitted to a neutral third party which, in most instances, has the power to issue a binding decision. In this regard, it should be noted that while an arbitral decision may also be non-binding on the parties if the convention or the parties have so provided, such an option is rare in international practice. In fact, most conventions specifically mention that the arbitral award shall be final and binding on the parties.

24. Most of the major environmental conventions have references to possible arbitration of disputes. For example, CITES states:

“If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision.”

Three environmental treaties dealing with wildlife conservation, pollution of the Rhine, land-based sources of marine pollution allow parties to refer disputes concerning their interpretation or application to arbitration: the Berne Convention on the Conservation of European Wildlife and Natural Habitats, the Convention on the Protection of the Rhine Against Chemicals, and the Paris Convention for Prevention of Marine Pollution from Land-Based Sources. The 1991 Protocol on Environmental Protection to the Antarctic Treaty provides for disputes concerning the interpretation or application of certain articles of the Protocol to be referred to the Arbitral Tribunal unless they have made a declaration as to an alternative dispute settlement procedure

25. Annexes to the more recent environmental conventions provide for the rules of the arbitration procedure, for example, Annex II of the Biodiversity Convention, Annex VI of the Basel Convention, Annexes VI and VII of the Convention on the Law of the Sea, and an appendix to the 1991 Protocol on Environmental Protection to the Antarctic Treaty.

26. These arbitration rules often provide for the involvement of expert witnesses. The Biodiversity Convention stipulates that the parties to the dispute shall “enable it [the arbitral tribunal], when necessary, to call witnesses or experts and receive their evidence”. The Basel Convention establishes that the “tribunal may take all appropriate measures in order to establish the facts.” The UN Convention on the Law of the Sea provides for a procedure of Special Arbitration for any dispute relating to fisheries, the protection and preservation of the environment or marine scientific research or navigation, which focuses on the involvement of experts. It also establishes a list of experts on those subjects who can themselves serve as arbitrators.

27. The North American Agreement on Environmental Cooperation (NAAEC) has provisions for binding arbitration for the three parties to the agreement. In essence, the consultation and dispute resolution mechanism of the NAAEC consists of three stages. The first stage consists of consultations between the parties. If consultations are unsuccessful, the matter may be referred to a special session of the Council. And finally, if the matter is still unresolved, an “arbitral panel” can be convened at the request of any party and by a two-thirds vote of the Council. The third party, which has a substantial interest in the dispute, can join as a complaining party. The Council shall maintain a list of up to 45 qualified individuals who can serve as panellists. The Panel comprises five members, whose Chair is selected by mutual agreement of the parties to the dispute; each party then selects two panellists who are citizens of the other disputing party. The Panel submits an Initial Report of its findings, followed by a Final Report which seeks to establish a “mutually satisfactory action plan” to be agreed by the Parties involved, if the party complained against is found to have persistently failed to effectively enforce its environmental law. In case of non-agreement by the Parties, the Panel can be reconvened and determine whether any action plan proposed by the Party complained against is sufficient to remedy the pattern of non-enforcement. If so, the Panel will approve the plan, and if not, it will establish a plan consistent with the law of the Party complained against. In case of failure by the Party to comply with the action plan agreed, the Panel may impose a monetary fine and, if this is not paid, can suspend benefits received under the NAFTA (no greater than the amount of the fine).

G. Judicial Settlement

28. Judicial settlement involves recourse to a tribunal and binding decisions on the parties to the dispute. Here, jurisdiction, rules of procedure and composition of members are determined in advance by the statute of the tribunal or court, which does not normally allow for modifications. Judicial settlement generally has less flexibility than arbitration, parties not having as much control over applicable rules and settlement procedure, particularly when they have accepted in advance the compulsory jurisdiction of the tribunal and the scope of the case.

29. When they refer to judicial settlement of disputes, most environmental conventions provide for referral to the International Court of Justice. These include the Vienna Convention (and the Montreal Protocol), the Basel Convention, the Climate Change Convention and the Biodiversity Convention. For example, the Basel Convention provides that: *“If the Parties concerned cannot settle their dispute through the means mentioned in the preceding paragraph, the dispute, if the parties to the dispute agree, shall be submitted to the International Court of Justice or to arbitration under the conditions set out in Annex VI on Arbitration.”*

30. In the major international environmental conventions, countries can declare their general willingness to enter into and be bound by judicial settlement and/or arbitration in cases of disputes. Thus, parties are often given the possibility to *“recognize as compulsory ipso facto and without special agreement”* the submission of the dispute to the International Court of Justice by the means of a general written declaration. However, the other party must agree on the submission of the dispute to the same forum by having made the same declaration or by ad hoc agreement.

31. Thus the Basel Convention provides that:

“When ratifying, accepting, approving, formally confirming or acceding to this Convention, or at any time thereafter, a State or political and/or economic integration organization may declare that it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation: (a) submission of the dispute to the International Court of Justice; and/or (b) arbitration in accordance with the procedures set out in Annex VI.”

32. Similarly, the Climate Change Convention states that parties *“may declare in a written instrument submitted to the Depositary”* that it recognises as *“compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation”* submission of the dispute to the international Court of Justice. The Biodiversity Convention states that parties *“may declare in writing”* that they accept submission to the International Court of Justice as compulsory. Under the Vienna Convention (and the Montreal Protocol), any party may declare that it accepts as compulsory submission to the International Court of Justice of its disputes with other parties concerning the Convention.

DISCUSSION OF DISPUTE SETTLEMENT IN ENVIRONMENTAL CONVENTIONS AND OTHER LEGAL INSTRUMENTS

33. As outlined above, most of the major international environmental agreements have provisions for dispute settlement, including consultation, negotiation, mediation, conciliation, arbitration and judicial settlement procedures. To date, there are very few cases in which these provisions have been invoked or used.

34. In general, governments have tended to avoid dispute settlement approaches to dealing with disputes relating to transboundary and global environmental problems. Four main reasons might be identified for this reluctance having to do with: 1) compliance considerations, 2) legal considerations, 3) institutional considerations and 4) political considerations.

A. Compliance Considerations

35. Dispute settlement within environmental conventions has not been commonplace partly because compliance with obligations under these agreements is difficult to monitor and enforce. In addition, many environmental conventions are based on cooperative endeavours to attain general goals and do not specify duties or obligations in detail. For example, they may be *“framework agreements”* where more specific goals and obligations are to be elaborated at a later point (e.g. the Climate Change Convention). Other conventions impose *“best endeavour”* obligations on countries and do not have numerical targets or binding legal obligations. Where agreements do have specific obligations or prohibitions, it has often been problematic to monitor compliance by individual countries.

36. The method most frequently used to monitor compliance by parties with their commitments under environmental conventions is periodic reporting. In some cases, this is followed by an assessment of the information submitted and/or by a public review. In theory, the creation and dissemination of information can help deter violations by providing a base of political mobilisation against the offending nation. Parties may be called upon to explain and to justify apparent departures from international norms. Creation and dissemination of information may also help generate pressure for compliance with the environmental convention at the national level.

37. In practice, the reporting requirements of environmental conventions are not fully complied with. For example, only about 60 per cent of the parties to the London Dumping Convention comply with the reporting obligations imposed by the treaty. Less than 40 per cent of the developed nations and 20 per cent of the developing nations, which are parties to CITES, have submitted annual reports in recent years. Reporting has also been lax with regard to obligations under the Montreal Protocol, particularly by the less developed parties. As a result, there are serious doubts about the value of reporting alone as a means of promoting compliance with environmental obligations.

38. Countries have diverse reasons for not complying with the obligations they accept in signing an environmental convention, including reporting requirements. Non-compliance may be due to a lack of financial and technical resources, lack of necessary administrative infrastructure, or lack of appropriate internal legislation. This is why non-confrontational dispute avoidance mechanisms have been emphasised along with incentive-based strategies, such as assistance to countries to help them comply with the terms of the convention.

39. Attempts are now being made to improve and manage compliance with environmental conventions. The conventions themselves are specifying more clear-cut targets and actions to be undertaken by parties, as in the case of the 1994 Sulphur Protocol to the Agreement on Long-Range Transboundary Air Pollution which mandates certain emissions reductions. Some agreements, particularly in the living resources area, are incorporating internal observation and inspection mechanisms. The non-compliance regime adopted under the Montreal Protocol, which can be initiated by any party to the agreement, is a step towards improving implementation and respect of treaty obligations and is being considered as a model for other conventions. The North American Agreement on Environmental Cooperation has an extensive dispute resolution procedure, which ensures that the environmental compliance of the parties can be investigated and addressed.

40. Due to the nature of environmental problems, the emphasis in environmental conventions is on dispute avoidance and dispute settlement of a non-confrontational and conciliatory nature. But as the obligations of parties under environmental conventions become more stringent, there may be demand for stronger compliance and enforcement mechanisms. Once countries commit themselves to observing strict environmental standards, especially in areas where commitments have significant economic implications, they are likely to request compliance procedures, which protect their economic position. They may be more willing to enter into dispute settlement to ensure that their competitors are equally bound by the obligations of the environmental convention. The perceived seriousness of some environmental threats, such as those to endangered species, may also support the evolution of stronger environmental compliance and dispute settlement procedures.

B. Legal Considerations

41. An important constraint on environmental dispute settlement has been the immature state of international environmental law. The lack of well-defined legal standards is believed to have acted as an impediment to the acceptance by countries of the adjudication of international environmental issues. In general, countries are unable to predict with any degree of certainty the substantive law that would be applied in the case of judicial settlement on environmental matters. Uncertainty regarding legal norms may have prevented cases from being submitted to the International Court of Justice or to arbitration. The lack of judicial settlement, in turn, seems to have impeded the further elaboration of international environmental law.

42. There are certain environmental principles and concepts which are widely seen as providing a basis for the development of international environmental law, although they are not yet recognized as international environmental law principles, most notably the Polluter Pays Principle, the Precautionary Principle and concepts related to Sustainable Development. The main principle of customary international environmental law governing the international environmental responsibilities of countries was recognized in the 1972 Stockholm Declaration and restated in Principle 2 of the 1992 Rio Declaration:

"States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."

43. However, the scope of this responsibility is ill defined and the practical implications have not been well established. With respect to the need to prevent environmental harm to areas beyond national jurisdiction one should try to reconcile the general obligations related to the management and conservation of "*shared resources*" (in the transboundary and global sense) with the principle of "*permanent sovereignty*," according to which each nation has the right to legitimately exploit its own natural resources. In essence, if various environmental principles have established an obligation to protect the environment and to prevent transboundary and global damages to it, the legal implications of alleged violations of such obligations have not been delineated.

44. The majority of environmental disputes between neighbouring states or between states sharing a territorially defined natural resource have been settled through direct negotiations among the countries concerned. They have generally reached negotiated settlements regarding border regions or transboundary pollution problems or worked out a combined approach. For example, Canada and the United States have resolved several transboundary environmental problems through the use of non-binding bilateral commissions.

45. A few transboundary environmental disputes have been settled through arbitration. The most famous is the 1941 Trail Smelter Arbitration Between Canada and the United States, where fumes from a Canadian smelter were damaging US citizens and property. The two countries agreed to arbitration, which found that "*No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another.*" Two other examples of intergovernmental dispute adjudications that could be compared to the Trail Smelter case are the 1957 Lake Lanoux arbitration between France and Spain and the 1968 Gut Dam arbitration between Canada and the United States.

46. Some transboundary environmental disputes have also been subject to judicial settlement in domestic courts. Here, private citizens or entities sue other citizens or entities under the jurisdiction of the courts in one country and receive judgements on civil liability and claims owed. There are also instances of insurance arrangements and out-of-court settlements in cases of transboundary pollution. Sometimes these remedies are pursued simultaneously with diplomatic negotiations between countries. International claims commissions may distribute funds donated by the government involved to the foreign plaintiffs, which allows governments to settle claims without acknowledging legal responsibility. However, the number of national court proceedings or insurance rulings involving liability claims for reparation of transboundary environmental injuries remains limited.

47. The 1992 Rio Declaration called on countries to further develop international law regarding liability and compensation for the adverse effects of environmental damage beyond national jurisdictions. But environmental liability standards have not been easy to establish, even at the transboundary level. There remain significant legal issues such as establishing what constitutes a "*significant level*" of environmental damage; identifying the polluter and/or the source of environmental injury; deciding whether environmental damage concerns only physical consequences or also related economic and social effects; establishing whether environmental damage has to include a loss of property; and agreeing on the responsibility of governments when private entities are concerned.

48. The question of liability and also that of legal "*standing*" are more problematic in the case of harm to shared or global commons resources. First, there is the legal issue of whether any nation or individual has standing to complain of harm to shared or global commons resources. There are difficulties in establishing what exactly constitutes damage to "*common concerns*" and to whom compensation would be paid. Most global environmental issues are also distributional matters relating to who should bear the costs for environmental protection, for which there are no established legal principles. It is conceivable that courts could be given jurisdiction to adjudicate breaches of environmental obligations as provided for in environmental conventions, if these obligations were clearly delineated. At present, most environmental conventions do not expressly address or regulate the question of liability arising from a breach of duty. Some conventions do provide that the parties will cooperate to establish rules and procedures on liability and damages (e.g. the Basel Convention, the Antarctic Treaty). There is the question, however, as to whether greater clarity on legal penalties for violations would discourage countries from joining environmental conventions. Indeed, countries remain very protective of their sovereign rights.

C. Institutional Considerations

49. It has been argued that the lack of a central institution or tribunal to consider international environmental disputes has also slowed environmental dispute settlement. There have been proposals for a new International Court for the Environment, which would be part of the United Nations system and deal exclusively with environmental issues. There have also been repeated calls to make greater use of the International Court of Justice (ICJ) to resolve international environmental disputes. However, countries have generally been reluctant

to accept a central institution that would consider environmental disputes and the UNCED did not endorse the several proposals made at the 1992 conference to strengthen the ICJ's role in the settlement of disputes relating to the environment.

50. The International Court of Justice is the primary judicial forum for resolving international legal disputes and is the principal judicial organ of the United Nations. All members of the United Nations are parties to the ICJ statute and the ICJ is competent to decide environmental disputes. In July 1993, the ICJ formed a special seven-member Chamber for Environmental Matters to be more fully prepared to deal with environmental cases falling within its jurisdiction. Under its statute, the ICJ may form standing chambers on particular issues such as environment or may form a specialised chamber to deal with a particular case, such as in the delimitation of maritime boundaries. To date, however, the Chamber for Environmental Matters has not been used.

51. Nations have infrequently used the ICJ for international legal disputes. In the period between 1946 and 1985, the ICJ rendered some 46 judgements, 50 orders and 18 advisory opinions, an average of two or three decisions per year. In the last few years, the size of the Court's docket has increased although in absolute numbers the caseload is still small. In general, countries are tending to prefer more informal arbitration mechanisms where they can nominate the arbitrators and have more control over proceedings. Although decisions of the ICJ are legally binding on the parties once they have been submitted to adjudication, the Court has no enforcement powers. On several occasions, nations have refused to comply with ICJ decisions. Although the UN Security Council can decide upon measures to be taken to give effect to ICJ judgements, it has yet to decide upon any enforcement measures in situations where nations refuse to comply.

52. Intergovernmental dispute settlement processes tend to be slow and can be extremely expensive. For example, both the Trail Smelter case and the Gut Dam case took 15 years from the first claims to the final arbitral award. Countries may be deterred by these time lapses from submitting disputes to arbitration or judicial settlement when it is a case of a perceived severe and/or urgent environmental threat.

D. Political Considerations

53. Environmental dispute settlement at the international level reflects one of the main weaknesses of international law in general. Absent their consent, countries are not obliged to submit a dispute with another country to judicial settlement. Thus, although the major environmental conventions contain provisions for arbitration and dispute settlement, these provisions cannot be invoked unilaterally at the request of any one country. As in all international law, third-party adjudication is dependent on the common agreement of the parties to a dispute. And governments have tended to avoid recourse to judicial settlement, favouring informal channels, negotiation and compromise over litigation.

54. In environmental as well as in other matters, countries have generally been reluctant to limit their national sovereignty by submitting a dispute to the compulsory jurisdiction of a court or tribunal. National officials are hesitant to permit third parties to make final, binding determinations of their nation's interests in an international dispute. They generally do not want to cede decision-making power in the environmental area as in other policy areas. They may forego bringing suits when they are pollution victims as on other occasions they may be the source of an environmental problem. They will avoid entering into arbitration where they may be liable for large environmental damages. Most countries tend to prefer negotiation and face-saving compromises over the risk of legal defeat, which could also have domestic political repercussions.

55. Compulsory dispute settlement on environmental matters would require yielding some national sovereignty in an area where economic gains are not substantial and environmental benefits are not always agreed upon. It would require a broader acceptance by countries of the need for international cooperation in regulating the use and conservation of shared resources. A first step would imply increased environmental regulation at the international level through strengthened environmental conventions. Related institutional and procedural mechanisms could be developed to ensure implementation and compliance with the conventions. Stronger enforcement will inevitably lead to disputes and may lead to more use of arbitration or judicial settlement mechanisms.

FINAL REMARKS

56. Most environmental conventions contain provisions for dispute avoidance, consultation, negotiation, mediation, conciliation, arbitration and judicial settlement. To date, however, the emphasis has been on dispute avoidance through monitoring and reporting.

57. Strengthening dispute settlement with regard to the environment, and thereby helping to ward off trade and environment disputes, has been problematic. In most areas of international law, with the exception of trade, countries have had an historical reluctance to relinquish sovereignty by agreeing, in advance, to binding dispute resolution procedures. In the environmental realm, international environmental law is still immature for effectively preventing and settling environmental disputes, particularly those concerning use and protection of global commons resources. There is no institution with a clear mandate to interpret international environmental law. And there are difficulties relating to the relatively undefined nature of obligations under many environmental conventions and problems in determining when countries are in compliance or not.

58. Dispute avoidance should continue to be the focus of environmental conventions but, as stated at UNCED, progress could be made in strengthening the techniques available for dealing with environmental disputes, which do arise. Interim steps might include specifying and strengthening national commitments in environmental conventions and improving internal mechanisms for overseeing compliance. In the case of disagreements, more resort could be made to the informal, non-compulsory procedures provided for in many environmental conventions such as those for mediation and conciliation. While certain cases involving government responsibility and private liability for transboundary pollution could continue to be addressed by domestic tribunals, States should be encouraged to make greater recourse to arbitral tribunals and the International Court of Justice, in particular its recently established Environmental Chamber.

ANNEX 1

REFERENCES: ENVIRONMENTAL DECLARATIONS AND CONVENTIONS

General:

1973 *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*, UN Document A/CONF.48/14/Rev.1.

1992 *Rio Declaration on Environment and Development*, UN Document A/CONF.151/5/Rev.1

1992 *Report of the United Nations Conference on Environment and Development (Agenda 21)* (1992), Annex II, UN Document A/CONF.151.26.

1993 *North American Agreement on Environmental Cooperation*, concluded between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, September 13, 1993.

Protection of the Marine Environment:

1969 *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*
1972 *London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 11 I.L.M. 1294.

1973 *International Convention for the Prevention of Pollution from Ships*, 12 I.L.M. 1319.

1982 *United Nations Convention on the Law of the Sea*, UN Document A/CONF.62/122.

Protection of the Atmospheric Environment:

1985 *Helsinki Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions*, 27 I.L.M. 707.

1985 *Vienna Convention for the Protection of the Ozone Layer*, 26 I.L.M. 1529.

1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*, 26 I.L.M. 1550.

1992 *United Nations Framework Convention on Climate Change*, UN Document No. A/AC.237/18(Part II)/Add.1.

Protection of Fauna and Flora:

1972 *UNESCO Convention for the Protection of the World Cultural and Natural Heritage*, UN Document ST/LEG/SER.C/10.

1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, 12 I.L.M. 1088.

1946 *International Convention for the Regulation of Whaling*

1980 *Convention on the Conservation of Antarctic Marine Living Resources*

1991 *Protocol on Environmental Protection to the Antarctic Treaty*, XI ATSCM/2.

1992 *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*

1992 *Convention on Biological Diversity*, 31 I.L.M. 818

Protection from Hazardous Substances:

1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, UN Document UNEP/w6.190/4, UNEP/16.80/3.

1989 *London Guidelines for the Exchange of Information on Chemicals in International Trade*, UNEP Governing Council Decision 15/30.

1991 *Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa*, 30 I.L.M. 775.

Annex 11

List of Selected Documents of the United Nations and other international organisations

- I. United Nations General Assembly Resolutions
- UN GA Res. 53/100 'United Nations Decade of International Law' (20 January 1999).
 - UN GA Res. 52/153 'United Nations Decade of International Law' (26 January 1998).
 - UN GA Res. 51/157 'United Nations Decade of International Law' (30 January 1997) and Annex.
 - UN GA Res. 50/50 'United Nations Model Rules for the Conciliation of Disputes between States' (29 January 1996).
 - UN GA Res. 47/191 'Institutional arrangements to follow up the United Nations Conference on Environment and Development' (22 December 1992).
 - UN GA Res. 46/59 'Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security' (9 December 1991).
 - UN GA Res. 45/40 'Programme for the Activities to be Commenced during the First Term (1990-1992) of the United Nations Decade of International Law' (28 November 1990).
 - UN GA Res. 44/228 'United Nations Conference on Environment and Development' (22 December 1989).
 - UN GA Res. 44/31 'Peaceful settlement of disputes between States' (4 December 1989).
 - UN GA Res. 43/163 'Peaceful settlement of disputes between States' (9 December 1988).
 - UN GA Res. 42/150 'Peaceful settlement of disputes between States' (7 December 1987).
 - UN GA Res. 41/74 'Peaceful settlement of disputes between States' (3 December 1986).
 - UN GA Res. 40/68 'Peaceful settlement of disputes between States' (11 December 1985).
 - UN GA Res. 39/79 'Peaceful settlement of disputes between States' (13 December 1984).
 - UN GA Res. 38/131 'Peaceful settlement of disputes between States' (19 December 1983).
 - UN GA Res. 37/10 Annex 'Manila Declaration on the Peaceful Settlement of Disputes' (15 November 1982).
 - UN GA Res. 37/10 'Peaceful settlement of disputes between States' (15 November 1982).
 - UN GA Res. 36/110 'Peaceful settlement of disputes between States' (10 December 1981).
 - UN GA Res. 2625(XXV).
 - UN GA Res. 2329(XXII), 18 December 1967.
- II. United Nations
- UN Doc. A/CN.4/501 'Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)' (5 May 1999).
 - UN Doc. ECE/CEP/55 'Future of the "Environment for Europe" Process' (25 June 1998).

- ECOSOC Doc. E/CN.15/1997/10 'International Cooperation in Combating International Crime - The Role of Criminal Law in the Protection of the Environment' (17 February 1997).
- ECOSOC Doc. E/CN.15/1996/8 'Technical Cooperation and Strengthening of the United Nations Crime Prevention and Criminal Justice Programme' (1 April 1996), no. 42 *et seqq.* 'The role of criminal law in the protection of the environment'.
- ECOSOC Doc. 1993/207 'Establishment of the Commission on Sustainable Development' (12 February 1993).
- UN Doc. A/47/277-S/2411 'An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping' (17 June 1992), para.20.
- UN Doc. A/CONF.151/L.3/Add.39 'Adoption of Agreements on Environment and Development' (11 June 1992).
- UN Doc. A/46/33 'Handbook on the Peaceful Settlement of Disputes between States' (1992).
- UN Doc. A/CONF.151/26 (Vol. I) 'Report of the United Nations Conference on Environment and Development - The Rio Declaration' (12 August 1992).
- UN Doc. A/CONF.151/26 (Vol. III) 'Report of the United Nations Conference on Environment and Development - Agenda 21' (14 August 1992).

III. United Nations Environment Programme

- UNEP Doc. GC.20/INF/16 'Study on Dispute Avoidance and Dispute Settlement in International Environmental Law and Conclusions' (19 January 1999).
- UNEP Doc. GC.18/9 'Further Development of International Environmental Law Aiming at Sustainable Development' (26 May 1995).
- UNEP Doc. GC 17/25 'Programme for the Development and Periodic Review of Environmental Law' (21 May 1993).

IV. Other Organisations

- IUCN/ICEL Draft International Covenant on Environment and Development (Bonn/Lahore) March 1995 (Art. 61-63).
- OECD Doc. GD(95)138, 'Dispute Settlement in Environmental Conventions and other Legal Instruments' (1995).

Annex 12

List of Selected International Agreements and Conventions related to Dispute Avoidance and Dispute Settlement

I. International Environmental Law

1. Canada-US Boundary Waters Treaty (Washington), 11 January 1909, (Sec. 2).
2. Agreement for the Establishment of a General Fisheries Council for the Mediterranean (Rome), 24 September 1949, (Art. XIII).
3. International Plant Protection Convention (Rome), 6 December 1951, (Art. IX).
4. International Convention for the Prevention of Pollution of the Sea by Oil (London), 12 May 1954, (Art. XIII).
5. Plant Protection Agreement for the South East Asia and Pacific Region (Rome), 27 February 1956, (Art. VII).
6. Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva), 29 April 1958, (Art. 9-12), 52 A.J.I.L.L., p. 851.
7. The Antarctic Treaty (Washington), 1 December 1959, (Art. XI), 54 A.J.I.L.L., p. 477.
8. Convention on Third Party Liability in the Field of Nuclear Energy (Paris), 29 July 1960, (Art. 17).
9. Protocol Concerning the Constitution of an International Commission for the Protection of the Mosel Against Pollution (Paris), 20 December 1961, (Art. 11).
10. Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy (Brussels), 31 January 1963, (Art. 17).
11. Act Regarding Navigation and Economic Co-operation between the States of the Niger River (Niamey), 26 October 1963, (Art. 7).
12. Agreement for the Establishment of a Commission for Controlling the Desert Locust in the Eastern Region of its Distribution Area in South-West Asia (Rome), 3 December 1963, (Art. XVII).
13. Agreement for the Establishment of a Commission for Controlling the Desert Locust in the Near East (Rome), 2 July 1965, (Art. XVI).
14. Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), 27 January 1967, 610 UNTS (1967), pp. 205 *et seqq.*
15. African Convention on the Conservation of Nature and Natural Resources (Algiers), 15 September 1968, (Art. XVIII).
16. European Convention for the Protection of Animals During International Transport (Paris), 13 December 1968, (Art. 47).
17. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels), 29 November 1969, (Art. VIII and Art. 1 *et seqq.* of the Annex).
18. Agreement for the Establishment of a Commission for Controlling the Desert Locust in Northwest Africa (Rome), 11 November 1970, (Art. XVI).
19. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), (Washington), 3 March 1973, (Art. XIII and XVIII), 993 UNTS, pp. 243 *et seqq.*

20. International Convention for the Prevention of Pollution from Ships (London), 2 November 1973, (Art. 10 and Protocol II).
21. Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki), 22 March 1974, (Art. 18).
22. Convention for the Prevention of Marine Pollution from Land-based Sources (Paris), 4 June 1974, (Art. 9, 21 and Annex B).
23. Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona), 16 February 1976, (Art. 22 and Annex A), 15 I.L.M. 1976, pp. 285 *et seqq.* and its Athens Protocol, 1980 (Art. 12).
24. Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (Santiago), 16 June 1976, (Convention of San Salvador) (Art. 4).
25. Convention on the Protection of the Rhine Against Chemical Pollution (Bonn), 3 December 1976, (Art. 15).
26. Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait), 24 April 1978, (Art. XXV).
27. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979, 18 I.L.M. (1979), pp. 1434 *et seqq.*
28. Convention on the Conservation of Migratory Species of Wild Animals (Bonn), 23 June 1979, (Art. XII).
29. Convention on the Conservation of European Wildlife and Natural Habitats (Bern), 19 September 1979, (Art. 18).
30. Convention on Long-range Transboundary Air Pollution (Geneva), 13 November 1979, (Art. 5, 13) and its Protocol on the Reduction of Sulphur Emissions or their Fluxes by at least 30 percent, 1985 (Art. 4) and its Protocol on Further Reduction of Sulphur Emissions, 1994 (Art. 5 and 7), 33 I.L.M. (1994), pp. 1540 *et seqq.*
31. Convention on the Conservation of Antarctic Marine Living Resources (Canberra), 20 May 1980, (Art. XXV).
32. Memorandum of Intent concerning Transboundary Air Pollution between the United States and Canada, 1980 (Art. 3).
33. Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan), 23 March 1981, (Art. 24).
34. United Nations Convention on the Law of the Sea (Montego Bay), 10 December 1982, (Art. 279 *et seqq.*, Annex IX, Art. 7).
35. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias), 24 March 1983, (Art. 23).
36. Vienna Convention for the protection of the Ozone Layer (Vienna), 22 March 1985, (Art. 11), 26 I.L.M. 1987, pp. 1523 *et seqq.* and its Protocol of Cartagena de Indias, 1986 (Art. 116) and its Montreal Protocol (Montreal), 16 September 1987, (Art. 11), 26 I.L.M. 1987, pp. 1541 *et seqq.*
37. Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi), 21 June 1985, (Art. 24).
38. Convention on Early Notification of a Nuclear Accident (Vienna), 26 September 1986, (Art. 11).
39. Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna), 26 September 1986, (Art. 13).
40. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea), 24 November 1986, (Art. 26).
41. Convention on the Regulation of Antarctic Mineral Resources (Wellington), 2 June 1988, (Art. 55 *et seqq.*).
42. Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel), 22 March 1989, 28 I.L.M. (1989), pp. 657 *et seqq.*
43. Agreement on the Conservation of Seals in the Wadden Sea (Bonn), 16 October 1990, (Art. XIII).

44. Agreement Between the Government of Canada and the Government of the United States of America on Air Quality, 1991 (Art. XIII), 30 I.L.M. (1991), pp. 676 *et seqq.*
45. Convention on Environmental Impact Assessment in a Transboundary Context (Espoo), 25 February 1991 (Art. 3 and Appendix IV), 30 I.L.M. (1992), pp. 1330 *et seqq.*
46. Convention on Biological Diversity (Rio de Janeiro), 5 June 1992 (Art. 27), 31 I.L.M. (1992), pp. 818 *et seqq.*
47. United Nations Framework Convention on Climate Change (UNFCCC) (New York), 9 May 1992 (Art. 13 and 14), 31 I.L.M. (1992), pp. 848 *et seqq.* and the Kyoto Protocol to the Convention on Climate Change, 1997 (Art. 19), 37 I.L.M. (1998), pp. 22 *et seqq.*
48. Convention on the Transboundary Effects of Industrial Accidents (Helsinki), 17 March 1992 (Art. 4, 5 and Annex II), 31 I.L.M. (1992), pp. 1330 *et seqq.*
49. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Paris), 12 January 1992, (Art. XIV), 32 I.L.M. (1993), pp. 800 *et seqq.*
50. United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), 1994 (Art. 28), 33 I.L.M. (1994), pp. 1328 *et seqq.*
51. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus), 25 June 1998, (Art. 16), UN Doc. ECE/CEP/43.
52. Convention on the Protection of the Environment through Criminal Law (Strasbourg), 4 November 1998, (Art. 19), ETS No. 172.

II. General

1. Arbitration Agreement concerning Claims to Delagoa Bay, 1872.
2. Convention for the Pacific Settlement of International Disputes (The Hague) 29 July 1899.
3. Convention for the Pacific Settlement of International Disputes (The Hague) 18 October 1907.
4. Revised General Act for the Pacific Settlement of International Disputes (New York) 28 April 1949, 71 UNTS, pp. 101 *et seqq.*
5. Treaty Establishing the European Community (Rome), 27 March 1957 (Art. 235 *et seqq.* and 292), Official Journal of the European Communities C340 (1967), pp. 173-308.
6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York), 10 June 1958, 330 UNTS, pp. 3 *et seqq.*
7. European Convention on International Commercial Arbitration (Geneva), 21 April 1961, 484 UNTS, pp. 349 *et seqq.*
8. Treaty Establishing the Caribbean Community and Common Market (CARICOM) (Chaguaramas), 4 July 1973, (Art. 19) and its Annex 'The Caribbean Common Market' (ch. II no. 11).
9. UNCITRAL Arbitration Rules, 15 December 1976.
10. Convention on Conciliation and Arbitration within the CSCE (now OSCE), 15 December 1992.
11. Treaty Establishing the Common Market for Eastern and Southern Africa, (Art. 7 and 19 *et seqq.*), 33 I.L.M. (1994), pp. 1067 *et seqq.*
12. Agreement Establishing the World Trade Organization (Marrakesh), 15 April 1994, (Art. III sec. 3) and its Annex 2 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU).
13. Permanent Court of Arbitration Optional Rules for Fact-Finding Commissions of Inquiry.

III. Charters and Statutes

1. Charter of the United Nations (San Francisco), 26 June 1945, 859/860 UNTS.
2. Statute of the International Court of Justice (The Hague), 59 Stat. 1031, TS No. 993.
3. Rules of Procedure of the Administrative Council of the Permanent Court of Arbitration (The Hague), 19 September 1900.

Annex 13

Table of Cases

1. Chorzow Factory Case, [1927] P.C.I.J. Series A, No. 17, p. 47.
2. Trail Smelter Case (U.S. vs. Canada), [1938/41] 3 R.I.A.A., pp. 1905 *et seqq.*
3. Corfu Channel Case (UK vs. Albania), [1946] ICJ-Rep. 1949, pp. 4 *et seqq.*
4. Lake Lanoux Arbitration (France vs. Spain), [1957] 24 I.L.R. p. 101 *et seqq.*
5. North Sea Continental Shelf Cases, [1969] ICJ-Rep. 1969, pp. 3 *et seqq.*
6. Nuclear Test Cases, [1974] ICJ-Rep. 1974, pp. 253 *et seqq.* and pp. 457 *et seqq.*
7. Fisheries Jurisdiction Cases (United Kingdom vs. Iceland), [1973/74] ICJ-Rep. 1974, pp. 3 *et seqq.*
8. Cosmos 954 Case (Canada vs. USSR), [1978].
9. Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada vs. USA), [1984], ICJ-Rep. 1984, pp. 245 *et seqq.*
10. Case concerning certain Phosphate Lands in Nauru (Nauru vs. Australia), [1992] ICJ-Rep. 1992, pp. 240 *et seqq.*
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Annex 15

Table of Web-Links regarding Dispute Avoidance and dispute settlement

1. Common Market for Eastern and Southern Africa (COMESA)	http://www.comeas.in/
2. Commission on the Limits of the Continental Shelf (CLCS)	http://www.un.org/Depts/los/tempclcs/CLCS.htm
3. Food and Agricultural Organization (FAO) - Fisheries Division	http://www.fao.org/waicent/fishery.htm
4. Intergovernmental Oceanographic Commission of UNESCO (IOC)	http://www.unesco.org/ioc/unclos.htm
5. International Centre for Settlement of Investment Disputes (ICSID)	http://www.worldbank.org/icsid/
6. International Council for Commercial Arbitration (ICCA)	http://www.mi.camcom.it/eng/arbitration.chamber/
7. International Council of Environmental Law (ICEL)	http://www.law.pace.edu/env/icelsite/icelhome.html
8. International Court of Justice (ICJ)	http://www.icj-cij.org
9. International Labour Organization (ILO)	http://www.ilo.org
10. International Law Association (ILA)	http://www.ila-hq.org
11. International Law Commission (ILC)	http://www.un.org/law/ilc/index.htm
12. International Maritime Organization (IMO)	http://www.imo.org
13. International Seabed Authority (ISA)	http://www.isa.org.jm
14. International Tribunal for the Law of the Sea (ITLOS) - Seabed Disputes Chamber	http://www.un.org/Depts/los/los_disp.htm#ITLOS
15. International Union for the Conservation of Nature (IUCN)	http://www.iucn.org/
16. Organization of African States - Trade Unit	http://www.sice.oas.org/disputee.stm
17. Organization for Security and Co-operation in Europe (OSCE) - Court on Conciliation and Arbitration	http://www.osceprag.cz/inst/court/ccamain.htm
18. Permanent Court of Arbitration (PCA)	http://www.pca-cpa.org
19. United Nations Commission on International Trade Law (UNCITRAL)	http://www.uncitral.org/en-index.htm
20. United Nations Compensation Commission (UNCC)	http://www.unog.ch/uncc/start.htm
21. United Nations Convention on the Law of the Sea (UNCLOS)	http://www.un.org/Depts/los/los_disp.htm#SD
22. United Nations Environment Programme (UNEP)	http://www.unep.org
23. World Bank - Global Environment Facility (GEF)	http://www.worldbank.org/html/ins-panel/
24. World Trade Organization (WTO)	http://www.wto.org/wto/dispute/dispute.htm http://www.wto.org/wto/environ/dispute.htm



United Nations Environmental Programme
Nairobi, 2001