
Articles

The Case for the Creation of an International Environmental Court: Non-State Actors and International Environmental Dispute Resolution

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ABSTRACT

This Article aims to investigate how environmental governance unfolds in the globalized world and how the increasing level of participation of non-state actors impacts the so-called “new governance”— a process involving many levels of international, domestic, regional, and local levels of decision-making, often without the participation of governments or formal international organizations. In one respect, the instruments of the new governance are inclusive; thus, in a field where multilateral efforts have reached a stalemate and the “treaty congestion” phenomenon has developed, they could represent a breath of fresh air by offering flexible, bottom-up solutions. At the same time, however, these instruments are often multifaceted and even chaotic; therefore, the coordination and overarching structures typical of traditional governance methods are much needed to confer cohesion to the system. With that backdrop, an architecture encompassing new institutions is proposed: this Article focuses on resolution of controversies by an International Environmental Court (IEC) that would incorporate the participation of non-state actors, both as plaintiffs and defendants. By analyzing the successes and failures of other international experiences, this study identifies the main characteristics around which such a court would be organized.

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I. INTRODUCTION

Contemporary changes to global governance have transcended the sphere of traditional governance instruments such as treaties and international organizations. Currently, global governance is experiencing remarkable innovation with different types of institutions—some with historic antecedents, some new—playing a fundamental role.¹

Sovereign states frequently fail to negotiate, implement, and guarantee effective environmental protection norms.² However the private sector and civil society have actively promoted and implemented other norms, which do not depend on traditional negotiation processes.³ The stalemate in climate negotiations in recent years has triggered the development of a myriad of initiatives unfolding outside the traditional diplomatic setting,⁴ such as regional and local arrangements articulated within the private sector or between the public and private spheres.⁵

Such rapidly developing and abundant changes are an invitation to reflect and debate on the institutional transformations⁶ in the domain of

1. See Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 685–86 n.81 (1993); see generally ELIZABETH R. DESOMBRE, *GLOBAL ENVIRONMENTAL INSTITUTIONS* (2006).

2. The lack of progress in recent climate change negotiations is a high-profile example of said failure.

3. See generally ABRAHAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 1–28 (1995); see also Gerald Fitzmaurice *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, in *LIVRE DU CENTENAIRE 1873-1973 – EVOLUTION ET PERSPECTIVES DU DROIT INTERNATIONAL* (1973).

4. “Although tragedies have undoubtedly occurred, it is also obvious that for thousands of years people have self-organized to manage common-pool resources and users often do devise long-term, sustainable institutions for governing those resources.” Elinor Ostrom et al., *Revisiting the Commons: Local Lessons, Global Challenges*, 284 *SCIENCE MAGAZINE* 278 (1999); see also Olivier Barrière, *Une Gouvernance Environnementale Dans Une Perspective Patrimoniale: Approche d’une Écologie Foncière*, in *CHRISTIAN EBERHARD CAHIERS, D’ANTHROPOLOGIE DU DROIT – DROIT, GOUVERNANCE ET DÉVELOPPEMENT DURABLE* 73–97 (2005).

5. See DANIEL C. ESTY & ANDREW S. WINSTON, *GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE* 3 (2006); Panagiotis Karamanos, *Corporate Incentives for Participation in Voluntary Environmental Agreements*, in *VOLUNTARY ENVIRONMENTAL AGREEMENTS* 50 (2012), available at <http://www.qscience.com/doi/abs/10.5339/gse-collection.cop18.18@cop18.2012.2012.issue-1>.

6. See Peter H. Sand, *Institution-Building to Assist Compliance with International Environmental Law: Perspectives*, 56 *HEIDELBERG J. INT’L LAW* 774, 775–76, 793 (1996), available at http://www.zaoerv.de/56_1996/56_1996_3_a_774_795.pdf.

global governance⁷ in order to identify and understand the challenges we face today, and ultimately devise alternatives to overcome them.⁸ These challenges are enormous. The sovereign state is indeed one of the most advanced governance mechanisms ever created, capable of ensuring a reasonable degree of security and prosperity to its nationals.⁹ Currently, however, government and governance are no longer synonyms. In a world of political,¹⁰ economic, legal,¹¹ geographic, and cultural interdependences,¹² no individual state, as competent as it may be, is able to effectively deal with transnational problems,¹³ such as those associated with international environmental protection.¹⁴

7. See generally LYNTON K. CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS* 8–20 (2d ed. 1990); see also John C. Dermbach, *Sustainable Development as a Framework for National Governance*, 49 *CASE W. RES. L. REV.* 1, 5–6, 17–24 (1998).

8. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 *AM. J. INT'L L.* 596, 597, 600–01 (1999).

9. “Mainstream environmental economics is a Hobbesian Project, built upon the foundation of a Leviathan that uses its monopoly on coercion to strictly enforce environmental regulations. This perspective is captured perfectly in Garrett Hardin’s famous solution to the tragedy of the commons: ‘mutual coercion, mutually agreed upon’. [. . .] This neoclassical approach is simplistic and obscures many of the mechanisms of governance. Nevertheless, it provides an excellent starting point for the study of governance.” Thomas P. Lyon, *Environmental Governance: an Economic Perspective*, in *GOVERNANCE FOR THE ENVIRONMENT – NEW PERSPECTIVES* 47 (Magali A. Delmas & Oran R. Young eds., 2009).

10. “Indeed, the exceptions to the Westphalian paradigm have been multiplying for the past 100 years, and the movement toward an international law of cooperation that Wolfgang Friedmann documented in 1964 in *The Changing Structure of International Law* has accelerated and intensified the exceptions to the Westphalian paradigm so much that it no longer satisfies the parsimony requirement of Occam’s Razor. This is the central crisis in international law.” JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* 18 (2013).

11. See generally MONDIALISATION ET GLOBALISATION DES CONCEPTS JURIDIQUES: L’EXEMPLE DU DROIT DE L’ENVIRONNEMENT (Jacqueline Morand-Deville & Jean-Claude Benichot eds., 2008).

12. ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977).

13. See THOMAS HALE & DAVID HELD, *HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS* 37 (2011).

14. This article does not delve into the concept of global administrative law. Global administrative law is generally based on the idea of understanding global governance as *administration*, which could then be organized and shaped by principles of an administrative law character. The dynamics of the new global environmental governance are, as we envision them, too fluid to fit into the strict sets of rules that are peculiar to administrative law. See generally SABINO CASSESE ET. AL., *GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK* (3d ed. 2012).

As a result of these challenges, one of the most notable characteristics of the new global environmental governance is the increasing participation of non-state actors. Recognition of the importance of non-state actors in international relations is a recent phenomenon. International law traditionally finds support in the relationship between states and in organizations that are essentially intergovernmental in nature.¹⁵ Indeed, institutions that are typical to a state-centric approach are widely recognized as the foundation of environmental governance.¹⁶

Nevertheless, contemporary societal changes establish that sustainable development is based not only on a strong state, but also on a strong society, thus legitimizing non-state actor initiatives in this domain.¹⁷ Global environmental governance has evolved to encompass the efforts to structure the relations among various sets of actors present in the environmental arena. Such efforts have materialized as different types of collaborative arrangements, among which are Type II Agreements.¹⁸ This model of partnership is especially relevant because (1) despite the fact that they represent a departure from the traditional model of governance, they were formally introduced by one of the instruments of traditional government, namely a treaty (the Johannesburg Declaration);¹⁹ (2) they are apt instruments to promote vertical or

15. Charles E. Rothwell, *International Organization and World Politics*, 3 INT'L ORG. 605, 617 (1949). See also Alexandre Kiss & Maguelonne Dejant-Pons, *Section 4: L'action des Organisations Internationales dans le Domaine de la Protection de l'Environnement*, in MANUEL SUR LES ORGANISATIONS INTERNATIONALES 794–830 (René-Jean Duouy ed., 1988) (discussing international environmental law).

16. Alan E. Boyle, *Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions*, 3 J. OF ENVTL. L. 229–30 (1991). Cf. Jessica Green, *Private Actors, Public Goods: Private Authority in Global Environmental Politics I* (Sept. 2010) (unpublished Ph.D dissertation, Princeton University) (discussing the role of private actors in international environmental politics).

17. See generally Karl-Werner Brand & Fritz Reusswig, *The Social Embeddedness of Global Environmental Governance*, in MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY AND THE LAW 79–105 (Gerd Winter ed., 2006). See also D. Parthasarathy, *Taking Participation Seriously: A Critique of "Good Governance,"* in CAHIERS D'ANTHROPOLOGIE DU DROIT – DROIT, GOUVERNANCE ET DÉVELOPPEMENT DURABLE 307–21 (Christian Eberhard ed., 2005).

18. See generally PARTNERSHIPS, GOVERNANCE AND SUSTAINABLE DEVELOPMENT: REFLECTIONS ON THEORY AND PRACTICE (Pieter Glasbergen et al. eds., 2007). See also ECO-EQUITY COALITION, *CRITICAL CONSIDERATIONS ABOUT TYPE 2 PARTNERSHIPS* (2002), available at <http://allafrica.com/download/resource/main/main/idatcs/00010022:353be8287ecde37427244774f63b7432.pdf>.

19. "We recognize that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels. As social partners, we will continue to work for stable partnerships with all major groups, respecting the independent, important roles of each of

horizontal collaboration between public and private entities or among private entities, globally, regionally, or locally, allowing the development of various combinations which are instrumental to attaining the goals of global environmental governance;²⁰ and (3) they are representative of an important paradigm shift: the recognition that international environmental protection is no longer exclusively dependent upon institutions based on the state, but instead that a combination between the latter and innovative governance tools reflect the dynamic, inclusive, and multifaceted nature of contemporary society.

One could argue that defining rules for partnerships is a contradiction in terms; an ultimate denial of the fluidity inherent to the instruments of the new global governance. This Article contends, however, that cohesion of regimes and effectiveness of the new governance rely heavily upon the establishment of guidelines. In other words, a *governance of governance*, or *meta-governance*,²¹ is in order. Meta-governance would provide both guidelines for the functioning of the new instruments and, on a wider level, a new institutional architecture to enhance the effectiveness of international environmental protection.²²

them.” World Summit on Sustainable Development, Aug. 26–Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*, ¶ 26, U.N. Doc. A/CONF.199/20, Annex (Sept. 4, 2002). See generally Jan Martin Witte, Charlotte Streck, & Thorsten Benner, *The Road from Johannesburg: What Future for Partnerships in Global Environmental Governance?*, available at <http://dspace.cigilibrary.org/jspui/bitstream/123456789/19660/1/The%20Road%20from%20Johannesburg%20What%20Future%20for%20Partnerships%20in%20Global%20Environmental%20Governance.pdf?1>.

20. See generally Christine M. Chinken, *The Challenge of Soft Law: Development and Change in International Law*, 4 INT’L & COMP. L.Q. 850, 850–66 (1989). See also Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT’L L. 420, 420–35 (1991); Jon Birger Skjaereth, Olav Schram Stokke, & Jørgen Wettestad, *Soft Law, Hard Law, and Effective Implementation of International Environmental Norms*, 6 GLOBAL ENVTL. POL. 104 (2006).

21. “Meta-governance is seen as the ‘governance of governance,’ or the ‘regulation of self-regulation.’ The purpose of meta-governance is to create some form of coordination, coherence and integration in the fragmented structures of network governance without completely undermining the autonomy, engagement and self-regulation in governance networks. In so doing the concept of meta-governance provides an analytical tool to analyse processes of network governance, which is relevant in the Randstad region where governance arrangements stumble over each other.” WIL ZONNEVELD ET AL., *META-GOVERNANCE AND DEVELOPING INTEGRATIVE TERRITORIAL STRATEGIES: THE CASE OF MIRT TERRITORIAL AGENDAS IN THE RANDSTAD* (2012), available at <http://www.regionalstudies.org/uploads/conferences/presentations/european-conference-2012/plenary-papers/zonneveld-waterhout-spaans.pdf> (citations omitted).

22. Oran R. Young & Marc A. Levy, *The Effectiveness of International Environmental Regimes*, in *THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL*

Also, this Article proposes an institution typical of the state-centric approach—a court—but seeks a reconciliation. Bearing in mind that the instruments of the new governance are inclusive but at the same time multifaceted and even chaotic,²³ this Article attempts to harmonize them with traditional governance instruments. The goal is to ensure that the flexibility of bottom-up solutions is not threatened and that at the same time the system gains cohesion, thus avoiding contradictions that may jeopardize its desired effectiveness.²⁴ This Article agrees with Anne-Marie Slaughter's assertion that public power cannot be substituted for private power, and that the relationship between state and non-state actors is not a win-lose situation: attributing more power to the latter category need not imply a loss of power for the former.²⁵

International dispute resolution is an important piece of the puzzle, and this Article seeks to contribute to the necessary reform in the institutional architecture of international protection of the environment by making the case for the creation of an international environmental court that would ensure access of private parties to environmental justice. Part I identifies international best practices whose features could be replicated in such a court, and Part II articulates the justification and the

REGIMES CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS, 1–32 (Oran. R. Young ed., 1994).

23. Thomas Hale, *Managing the Disaggregation of Development: How the Johannesburg "Type II" Partnerships Can Be Made Effective*, PRINCETON UNIVERSITY (2003), http://www.princeton.edu/~mauzeral/www402f_s03/JP.Thomas.Hale.pdf.

24. That is, solutions developed by the stakeholders themselves, as opposed to following regulations flowing top-down from an established centralized authority.

25. "The leading alternative to liberal internationalism is 'the new medievalism', a back-to-the-future model of the 21st century. Where liberal internationalists see a need for international rules and institutions to solve states' problems, the new medievalists proclaim the end of the nation-state. Less hyperbolically, in her article, 'Power Shift', in the January/February 1997 *Foreign Affairs*, Jessica T. Mathews describes a shift away from the state—up, down, and sideways—to supra-state, sub-state, and, above all, non-state actors. These new players have multiple allegiances and global reach. The new medievalists miss two central points. First, private power is still no substitute for state power. Consumer boycotts of transnational corporations destroying rain forests or exploiting child labor may have an impact on the margin, but most environmentalists or labor activists would prefer national legislation mandating control of foreign subsidiaries. Second, the power shift is not a zero-sum game. A gain in power by non-state actors does not necessarily translate into a loss of power for the state. On the contrary, many of these nongovernmental organizations (NGOs) network with their foreign counterparts to apply additional pressure on the traditional levers of domestic politics." Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFFAIRS, Sept./Oct. 1997, available at <http://www.princeton.edu/~slaughtr/Articles/RealNewWorldOrderFA.txt>. Retrieved on: May 18, 2014. This correctly negates the position according to which the globalized world is characterized by a need to "govern without a state," as posited by Mireille Delmas Marty, *Gouvernance et état de Droit*, in LA GOUVERNANCE DÉMOCRATIQUE: UN NOUVEAU PARADIGME POUR LE DÉVELOPPEMENT? 213–50 (2008).

characteristics of what would be an appropriate arena to resolve international environmental disputes effectively and coherently.

II. TOWARDS AN INTERNATIONAL ENVIRONMENTAL COURT: LEARNING FROM DIFFERENT EXPERIENCES

What makes an environmental matter global? James Gustave Speth and Peter M. Haas identify four circumstances: abuse of common resources, transboundary pollution, activities that affect large areas encompassing several states, and local but widely shared issues (because they happen simultaneously in various countries or because of general interest in addressing them).²⁶ An effective dispute resolution system must consider the nature of the very rights it aims to protect.²⁷ In the domain of international environmental protection, there are two more common types of situations. First, cross-border damages such as those involved in the high-profile bi-national disputes adjudicated by the International Court of Justice. Second, violations of *erga omnes* international environmental obligations from which a cause of action would arise even though there is no immediate material damage to a specific state or non-state actor, as is the case with the highly diffuse harm emanating from climate change.

This Article argues that the notable development of international environmental law in the last decades,²⁸ the importance of environmental protection on a global scale,²⁹ and the need for a new institutional architecture that enhances effectiveness of international environmental

26. JAMES GUSTAVE SPETH & PETER M. HAAS, GLOBAL ENVIRONMENTAL GOVERNANCE 15–16 (2006).

27. See generally Pavel Šturma, *A Propos des Problèmes Théoriques de la Responsabilité Internationale pour les Dommages à l'Environnement*, 23 *STUDIE Z MEZINÁRODNIHO PRÁVA* 69–70 (1990) (Fr.) (on file with the *Colorado Natural Resources, Energy & Environmental Law Review*).

28. See Jeffrey L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 *HARV. ENVTL. L. REV.* 268, 268–70 (1995); see also Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 *AM. J. INT'L L.* 259, 262–63 (1992) (suggesting new ways to make international law for the environment).

29. See Tatsuro Kunugi, *Challenges Posed by Globalization and Synergistic Responses: Multilateral Institutions in Transition*, in *ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS* 13, 32 (Alexandre Kiss et al. eds., 2003); see generally, José María Serna de La Garza, *Gobernanza, Privatización y “Nueva” Regulación*, in *GLOBALIZACIÓN Y GOBERNANZA: LAS TRANSFORMACIONES DEL ESTADO Y SUS IMPLICACIONES PARA EL DERECHO PÚBLICO* 73–74, (2010) (Mex.), available at <http://biblio.juridicas.unam.mx/libros/6/2818/6.pdf>.

protection justify the creation of an international court exclusively dedicated to environmental matters. Drawing from experiences that can be translated into a successful model makes it possible to outline the main characteristics of the proposed court, which would ideally foster participation, transparency and civil society initiatives. Similarly, the analysis of instances of dispute resolution dealing with environmental matters in order to verify the extent to which they are valid calls for the establishment of an international system of environmental dispute resolution in the context of the new global environmental governance.³⁰

A. *The International Court of Justice as an Environmental Tribunal*

Before analyzing the characteristics of other international experiences that could potentially translate into an international environmental court, it is necessary to understand the perceived inadequacy of the International Court of Justice (“ICJ”) as an international environmental court. The ICJ is the only international tribunal with universal jurisdiction over environmental issues. Despite its establishment in 1993 of a specific chamber to deal with environmental issues, only a dozen cases have been submitted to the ICJ since its creation in 1945.³¹

The scarce environmental jurisprudence of the ICJ includes the *Gabčíkovo-Nagymaros* case,³² the *Barcelona Traction* case (which addressed in dictum the notion of *erga omnes* obligations and to be later

30. Although private party access to international justice has been granted in matters related to human rights, for methodological reasons (*i.e.*, a dissimilarity of objects) this analysis is limited to mechanisms dealing with environmental matters.

31. See Jorge E. Vinuales, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment*, 32 *FORDHAM INT’L L.J.* 232, 232–33 (2008).

32. See, *e.g.*, *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 7, 78 (Sept. 25), available at <http://www.icj-cij.org/docket/files/92/7375.pdf> (“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”).

seen in more detail),³³ the *Corfu Channel* case,³⁴ which constitutes the first milestone of state liability for environmental damages at ICJ (following the reasoning of the *Trail Smelter* case,³⁵ arbitrated prior to its creation), the *Nuclear Tests I*³⁶ and *II*³⁷ cases, the *Nauru* case,³⁸ the *Aerial Herbicides* case,³⁹ the *San Juan River* case,⁴⁰ the *Fray Bentos* case (which rejected in 2010 the precautionary principle as invoked by Argentina),⁴¹ and the recently adjudicated *Whaling* case.⁴²

In one of its most relevant environmental law decisions—the 1997 *Gabčíkovo-Nagymaros* case⁴³—the Court, albeit in dictum, contributed to the establishment of the concept of sustainable development.⁴⁴ The Court found that states should consider environmental norms when planning new activities as well as when carrying on activities initiated in the past.⁴⁵ The notion of sustainable development, however, was not central to the decision; rather, it was an argument to reinforce the Court’s justification of its decision.⁴⁶ In a famous dissenting opinion, Judge Weeramantry enhanced the notion of sustainable development by acknowledging that sustainable development is a *principle* of international environmental law: “[t]he Court must hold the balance even between the environmental considerations and the developmental

33. *Barcelona Traction Light And Power Co., Ltd. (Belg. v. Spain)* 1970 I.C.J. 3, 32 (Feb. 5), available at <http://www.icj-cij.org/docket/files/50/5387.pdf>.

34. See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 36 (Apr. 9), available at <http://www.icj-cij.org/docket/files/1/1645.pdf>.

35. See Rep. of Int’l Arbitral Awards, 2006, U.N. Doc. V. III at 1923-1924, 1926, 1928, 1931 (reporting the *Trail Smelter Arbitration (U.S./Can.)*), http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf.

36. See *Nuclear Tests I (N. Z. v. Fr.)*, Summary of the Judgment, (Dec. 20, 1974), available at <http://www.icj-cij.org/docket/files/59/6161.pdf>.

37. See *Nuclear Tests II (Austl. v. Fr.)*, Summary of the Judgment, (Dec. 20, 1974), available at <http://www.icj-cij.org/docket/files/58/6095.pdf>.

38. See *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1993 I.C.J.80 (Sept. 13), available at <http://www.icj-cij.org/docket/files/80/6793.pdf>.

39. See *Aerial Herbicide Spraying (Ecuador v. Colom.)*, Unofficial Press Release, (Apr. 1, 2008), available at <http://www.icj-cij.org/docket/files/138/14470.pdf>.

40. See *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Unofficial Press Release, (July 13, 2009), available at <http://www.icj-cij.org/docket/files/133/15325.pdf>.

41. See *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Unofficial Press Release ¶¶ 1, 5, 6, 19 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15895.pdf>.

42. See *Whaling in the Antarctic (Austl. v. Japan: N. Z. Intervening)*, 2014 I.C.J. 148 (Mar. 31), available at <http://www.icj-cij.org/docket/files/148/18136.pdf>.

43. See *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, 1997 I.C.J. 7 (Sept. 25).

44. *Id.* at 7, 73, 78.

45. *Id.* at 7–8, 73, 78.

46. *Id.*

considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development.⁴⁷ In the majority vote, however, sustainable development remained a largely undefined concept, as the Court did not expand on the significance of the idea and lost a valuable opportunity to advance its environmental jurisprudence.⁴⁸

Even though the jurisprudence of the ICJ is relevant to the development of international environmental law, the example above illustrates that the Court, despite its universal jurisdiction, does not effectively play the role of an international environmental court. This may be due to several reasons: (1) lack of deep technical understanding of environmental questions (often treated only incidentally) and of a permanent legal and scientific body specialized in environmental matters; (2) the impossibility of access of private parties; (3) the absence of provisional measures; and (4) the huge delays in the adjudication process. If the proposed international environmental court is either a new tribunal or a reformation of the ICJ, these shortcomings must be addressed.

B. The World Trade Organization Dispute Resolution System: A Model to Be Adopted?

The WTO dispute resolution system is very active and relevant to the development of international law. It has been singled out as a model for international environmental dispute resolution.⁴⁹ It is not, however, a panacea apt to solve all law application problems regarding the environmental domain.

The WTO does not have a proper *compliance* system. Its dispute resolution mechanisms—embodied in the Dispute Settlement Body (“DSB”) whose rules are laid in the Dispute Settlement Understanding

47. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 88 (Sept. 25) (separate opinion of Judge Weeramantry), available at <http://www.icj-cij.org/docket/files/92/7383.pdf>.

48. PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 95–97 (2d ed. 2002); see generally GREENING INTERNATIONAL LAW (Philippe Sands ed., 1994).

49. “[T]he WTO possesses a strong dispute resolution system that is effective and seen by member states as an indication of policy options and opportunities. It is a reliable forum for trade disputes to be resolved. It has also grown in competence to deal with other issues, such as the environment, but this is just the beginning.” JAMES K. R. WATSON, THE WTO AND THE ENVIRONMENT: DEVELOPMENT OF COMPETENCE BEYOND TRADE 229 (2013).

(“DSU”)—consist primarily in an *enforcement* system.⁵⁰ The DSB acts only on disputes in which a member state claims to have been harmed.⁵¹ A mere allegation that a violation of the WTO treaty has taken place is therefore not encompassed in the authority of the DSB.⁵²

There are implications to this feature. First, all claims before the WTO are made by the harmed governments and not by private parties at least not without the assistance and representation of their respective governments or of WTO bodies.⁵³ Second, the member state must show interest in initiating the dispute.⁵⁴ Third—and perhaps most important—is that a case may be closed without a correction to the violation.⁵⁵ The DSU establishes in its Article 3.7 that the goal of the mechanism is to guarantee a positive solution to a controversy, adding that “[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred”⁵⁶—that is, a solution that is inconsistent with WTO rules is theoretically admissible.

The *Bananas* case is an example of a solution without compliance with WTO rules.⁵⁷ At the Doha Round, the WTO approved two waivers of rules for the European Union as a means of legitimating trade discrimination practices the EU had in place.⁵⁸ This feature, if transposed to the environmental domain, would be an obvious constraint to the body’s ability to properly adjudicate such matters.

There are other shortcomings in the WTO dispute resolution system that should be taken into consideration when analyzing its potential transposition to the environmental domain. The first is a lack of publicity: the decisions are rendered secretly, outside of public scrutiny. They are, however, promptly published once concluded.⁵⁹ Another

50. *Understanding on Rules and Procedures Governing the Settlement of Disputes: Annex 2 of the WTO Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3 (last visited Jan. 31, 2014).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Annex 2 of the WTO Agreement*, *supra* note 50.

56. *Id.*

57. See Joel Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT’L L. 4, (1999).

58. *European Communities: The ACP-EC Partnership Agreement, Decision of 14 November 2001*, WORLD TRADE ORGANIZATION (Nov. 14, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm.

59. See generally ROBERT WOLFE, LETTING THE SUN SHINE IN AT THE WTO: HOW TRANSPARENCY BRINGS THE TRADING SYSTEM TO LiSteve Charnovitz, *WTO Dispute Settlement as a Model for International Governance*, in ECONOMIC GLOBALIZATION AND

problem is that the DSB, although it does consult with experts, has shown little inclination to resort to specialists from other international organizations, thus missing the opportunity of bringing in valuable expertise.⁶⁰ The DSU lacks a provision such as that contained in Article 34 (3) of the Statute of the ICJ, which sets forth that if an instrument of another organization is in question said organization must be notified, and that the Court must take into consideration all information voluntarily presented by the organization.⁶¹

It should also be noted that DSB decisions often review their previous positions without explicitly overturning them, which creates some degree of confusion with regard to their interpretation. As Steve Charnovitz points out, “although the Appellate Body has been willing to correct some of its own mistakes in subsequent decision, it has not acknowledged that it is doing so.”⁶²

Moreover, there is no mechanism to ensure that if, by any reason, the DSB is not the appropriate venue to decide the matter, it should be transferred to a court linked to a specific regime, such as the International Tribunal for the Law of the Sea (“ITLOS”) or to a community or regional bloc, such as the European Union or the Mercado Común del Sur (“MERCOSUR”).

There are two other notable deficiencies in the WTO dispute resolution system that would cause even greater problems in the environmental domain: the absence of urgent measures, and the absence of private party access (except for the admission *amici curiae*, which, according to Michelle Rattón Sanchez Badin is controverted,⁶³ and by the pressure exerted by sectors of international trade over their governments, functioning as “quasi-actors”). Environmental regimes differ because they tend to favor prevention or cessation of the damage,

COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS, *supra* note 29, at 245, 251.FE (2013) (WTO Economic and Statistics, Working Paper No. ERSD-2013-03).

60. Steve Charnovitz, *WTO Dispute Settlement as a Model for International Governance*, in ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS, *supra* note 29, at 245, 251.

61. “Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.” Statute of the International Court of Justice, art. 34, para. 3.

62. Charnovitz, *WTO Dispute Settlement*, *supra* note 60, at 251.

63. Michelle Rattón Sanchez Badin, *Demandas por um novo arcabouço sociojurídico na Organização Mundial do Comércio e o caso do Brasil*, 226 (Jan. 2004) (unpublished Ph.D. dissertation, Law School of the University of São Paulo) (Braz.), available at <http://www.teses.usp.br/teses/disponiveis/2/2139/tde-02022012-095714/>.

resorting to recovery only remedially;⁶⁴ it is therefore desirable that an international environmental court has authority to determine provisional measures.

Private party access is ideally one of the main features of a system that is inclusive and harmonized with the new governance, as the latter is characterized by the growing participation of non-state actors. In the WTO, this possibility was discussed at the time the Havana Charter was negotiated.⁶⁵ Private party access was nevertheless considered a threat to the sovereignty of the states in conducting their trade policies, so the provision was excluded and did not make it back into the agenda.⁶⁶

As a result, private party access to the DSB can occur only when they receive a request for information or technical advice under Article 13 of the DSU.⁶⁷ This article was applied for the first time in the *Shrimp-Turtle* case,⁶⁸ in which NGOs voluntarily presented reports on the controversy.⁶⁹ The DSB received the report through *amicus curiae*. However, the report was criticized by members who understood that although such reports may be requested under Article 13, they could not be presented voluntarily.⁷⁰ Non-state actors' access to the DSB increased somewhat when the DSB admitted that member states are represented by non-governmental counsel.⁷¹ However, their participation is still contingent on acceptance by the represented state.

As previously discussed, the DSB favors enforcement over compliance. Even though the DSU foresees a consultation phase with good offices, mediation, and conciliation, these are scarcely used. Protection of the environment should actively promote preventive measures and facilitation of compliance, even if they coexist with

64. This derives logically from the fact that it is largely preferable to keep the environment harm-free than remediate injury once it occurs.

65. See generally Carmen Otero García-Castrillón, *Private Parties Under The Present WTO (Bilateralist) Competition Regime*, 35 J. WORLD TRADE 99 (2001).

66. *Id.* See also Annex 2 of the WTO Agreement, *supra* note 50.

67. García-Castrillón, *supra* note 65.

68. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 79, 99, WT/DS58/AB/R (Oct. 12, 1998).

69. The reports were authored by the Center of Marine Conservation (“CMC”), the Center for International Environmental Law (“CIEL”), and the World Wide Fund for Nature (“WWF”). Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 155, WT/DS58/R (May 15, 1998). See also *Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 68.

70. Appellate Body Report, *Concerning Amicus Curiae Briefs, Statement by Uruguay at the General Council*, at 3, WT/GC/38 (Nov. 22, 2000).

71. Ernesto Hernández-López, *Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes*, 35 J. WORLD TRADE 469, 470 (2001).

coercive measures. Coercive measures in the WTO have received criticism and proposals for reform, given the great asymmetry of economic and political power among the organization's members.⁷² In any event, the WTO's ability to impose sanctions has been praised for adding "teeth" to its dispute resolution system.⁷³ In the environmental domain (and others such as human rights and public health), however, this alternative needs to be considered cautiously. In the *Hormones* case, for instance, the WTO authorized the United States and Canada to retaliate against products of the European Union in response to a ban placed by the latter on the import of meat that contained artificial beef hormones, much to the frustration of consumers in the EU and farmers in North America.⁷⁴

Generally speaking, the WTO's mission is promoting the gradual liberalization of international trade by means of the negotiated reduction of trade barriers. International trade and the environment cannot be regarded as parallel. The environmental regime has environmental integrity as its ultimate goal—an objective that can and should be shared by all nations. The international trade regime, however, tends to see trade as a zero-sum game in which the winner is the country that exports the most and imports the least. Joost Pauwelyn warns that, "WTO rules, essentially aimed at liberalizing trade, have a potential impact on almost all other segments of society and law. For example, liberalizing trade may sometimes jeopardize respect for the environment or human rights."⁷⁵

The issue of sanctions in multilateral environmental treaties is complex. Although many instruments foresee trade measures, these are not trade sanctions in the sense that the WTO applies them. In the cases of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),⁷⁶ the Montreal Protocol on Substances that Deplete the Ozone Layer,⁷⁷ and the international treaties on fisheries, the

72. Michael Strange, *Discursivity of Global Governance: Vestiges of "Democracy" in the World Trade Organization*, 36 *ALTERNATIVES: GLOBAL, LOCAL, POL.* 240, 241 (2011).

73. Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 *AM. J. INT'L L.* 792, 792, 809 (2001).

74. Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 80, 84, WT/DS26/ARB (July 21, 1999).

75. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 *AM. J. INT'L L.* 535, 539 (2013).

76. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, available at <http://www.cites.org/eng/disc/text.php> [hereinafter CITES].

77. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 *I.L.M.* 1550 (entered into force Jan. 1, 1989).

object of the agreements is trade. In other words, trade measures are tools for the achievement of the treaty's goals rather than proper sanctions. One exception that will be discussed in further detail below is the North American Agreement on Environmental Cooperation ("NAAEC").⁷⁸

Evidence is scarce as to whether the WTO's sanctions promote compliance. What seems to be the true motivation to comply with DSB decisions is the integrity of the system, which allows sufficient time for members to gather domestic support to compliance—certainly something to be pursued while devising an environmental court.

Other regimes envy the WTO's ability to impose sanctions, and often attribute the WTO's power to that ability,⁷⁹ especially in comparison with the United Nations Environmental Programme ("UNEP") and other entities within the UN system. This has led to proposals that the WTO itself should function as an environmental court.⁸⁰

This is out of the question, as environmental matters often constrain the free deployment of goods and common resources, and therefore, free-trade itself, whose defense is the primordial goal of the WTO.⁸¹ The tension resulting from the asymmetry between the two goals is, in principle, irreconcilable by the WTO, precisely because of its institutional mission. In any event, the process of creating an international environmental court will necessarily have to deal with the issue of ensuring abundance by its decisions.

The DSB certainly has several upsides, namely compulsory jurisdiction, expedited decisions in comparison to most international and domestic courts, prompt and wide publicity of its decisions, ability to consult with specialists (often exercised, especially in matters involving the environment and public health), an active Appellate Body, one single dispute resolution system for all WTO agreements, and a sensitivity to interpreting WTO agreements in light of international law.⁸² In 2001,

78. N. Am. Comm'n for Env'tl. Cooperation, 32 I.L.M. 1482 (1993), available at <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567> (last visited Feb. 20, 2015).

79. Charnovitz, *Rethinking WTO Trade Sanctions*, *supra* note 73, at 17.

80. Charnovitz, *WTO Dispute Settlement*, *supra* note 60.

81. "The issue revolves around the scope and meaning of Article XX, the WTO rule that sets forth exceptions to WTO obligations, including those related to the protection of health or human, animal, or plant life. Article XX has been the focus of many of the controversies relating to the intersection—and potential clash—of trade and the environment." CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 46 (2001).

82. *Understanding the WTO: Settling Disputes, A Unique Contribution*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan. 29, 2014).

Ernst-Ulrich Petersmann noted that the DSB had adjudicated more environmental cases than any other environmental regime.⁸³ Even if that may no longer be true, the WTO still issues decisions with repercussions in the environmental and public health domains. In sum, the environmental regime can learn vastly from the WTO's dispute resolution system. The DSB creates confidence among members in the existence of a dynamic that promotes enforcement, while providing a neutral venue for disputes to be resolved outside a purely bilateral sphere. It would nevertheless be a mistake to transpose the WTO trade sanctions system to the environmental domain. Such sanctions could at best be of subsidiary application to pacific methods of dispute resolution and technical and financial incentives to compliance, especially to poorer countries.⁸⁴

C. The Experience of the North American Agreement on Environmental Cooperation

The Commission for Environmental Cooperation ("CEC") of the North American Free Trade Agreement ("NAFTA") is a trilateral international organization headquartered in Montreal whose goal is to ensure that its members—the United States, Canada, and Mexico—do not violate their own environmental regulations.

Article 5 (1) of the North American Agreement on Environmental Cooperation ("NAAEC") sets forth that "each Party shall effectively enforce its environmental laws and regulations through appropriate

83. ERNST-ULRICH PETERSMANN, INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND 22 (Nijhoff Law Specials, 1995).

84. Incentives to compliance also tackle the problem of free riding. See Nadra Hashim, *Free Riders, Side Payments, and International Environmental Agreements: Is Kyoto Failing Because Montreal Succeeded?*, 10 THE WHITEHEAD J. DIPL. & INT'L REL. 91, 98 (Winter/Spring 2009) ("Free riding, otherwise known as defection or total non-compliance, is generally considered the least favorable outcome of a treaty promoting mutual cooperation. Generally, small actors - those with less power or international clout - are able to act as free riders. They have a lower profile and their deviation is not thought to be an impediment to cooperation, at least not in a broad sense. Free riding is often more an affront than an impediment to the concept of multinational cooperation. However, the logic of cooperation suggests that parties who agree to participate in regulating a collective good are generally more committed to one another and to observing the rules of the agreement if they believe all parties are similarly compelled to preserve the collective good."); see also Günther Handl, *Compliance Control Mechanisms and International Environmental Obligations*, 5 TUL. J. INT'L & COMP. L. 29, 34 (1997) ("Typically, the NCP aims less at branding a state party as 'defaulting on its obligations,' and at imposing sanctions or providing remedies for past infractions, than at helping the incriminated party come into compliance and protecting the future integrity of the regime against would-be defectors.").

governmental action.”⁸⁵ It does not, therefore, create new obligations for the parties; rather it simply requests them to follow their own existing rules. Unusual or innocuous as it may seem, the rule has the merit of transforming the issue of enforcement of domestic environmental rules in a matter of international interest. The rationale of this rule is the fear expressed by the United States and Canada during negotiations that, although Mexico may have adequate environmental regulations, their implementation could be flawed.⁸⁶

The experience of the NAAEC is extremely relevant in light of its dual process of enforcement: one is a traditional intergovernmental mechanism that subjects the violator to sanctions;⁸⁷ the other is a procedure largely inclusive of multiple sets of actors, based on transparency and on civil society initiatives.⁸⁸ The first mechanism is based on the dispute resolution procedure established in Articles 22 to 36 of the Agreement, according to which if a member identifies “a persistent pattern of failure by that other Party to effectively enforce its environmental law . . .” it may request a consultation with the member held as noncompliant.⁸⁹ If the matter is still unresolved, it then goes to mediation and, after sixty days, to a technical arbitration panel composed of experts.⁹⁰ The technical arbitration panel has authority to determine whether there was a violation and to recommend solutions.⁹¹ If the party at fault does not abide by the recommendation, the panel may then impose pecuniary sanctions consisting in fines that, if unpaid, subject the party to retaliatory tariffs of equivalent amount.⁹² The second mechanism is a process of submission of claims by private parties, available to the citizens of the three countries.⁹³ The claim entails a process of independent review that culminates in a factual record of the country’s conduct in the matter.⁹⁴ Even though it is not coercive, the record aims to publicize the conduct, thus exerting pressure on the country to enhance its environmental performance. Per Article 14 of the NAAEC, any organization or individual in North America may submit a claim before

85. N. Am. Comm’n for Env’tl. Cooperation, *supra* note 78.

86. MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* 184, 186–88 (2000).

87. N. Am. Comm’n for Env’tl. Cooperation, *supra* note 78, at arts. 5–6.

88. *Id.* at arts. 8–36.

89. *Id.* at art. 22(1).

90. *Id.*

91. *Id.*

92. N. Am. Comm’n for Env’tl. Cooperation, *supra* note 78. Canada was able to negotiate an exception in order to be excluded by such penalties. *Id.* at Annex 36A.

93. Noemi Gal-Or, *Private Party Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT’L & COMP. L. REV. 1, 33 (1998).

94. N. Am. Comm’n for Env’tl. Cooperation, *supra* note 78, at art. 15.

the Convention Secretariat “asserting that a Party is failing to effectively enforce its environmental law”⁹⁵ The Secretariat then determines if claimant has first-hand knowledge and is being negatively affected by the violation and if the case is consistent with NAAEC goals, and, if so, the member has thirty days to respond.⁹⁶ If the matter is subject to judicial review in the country of origin, the claim is closed. If, however, the Secretariat determines that the matter should be analyzed in more detail, it is submitted to the Council of Ministers of the Environment of the three countries for drafting of the report mentioned above by a panel of experts that seeks information in multiple sources, including NGOs, in order to objectively evaluate the question.⁹⁷ The Council then decides, by a majority decision, whether the factual report shall be publicized.⁹⁸

This mechanism, essentially based on the recognition of the accountability of a member, is known as an information court (or “info-court”).⁹⁹ It follows several procedural rules typical of international courts, but substitutes coerciveness with transparency. As it would happen before a court, the party seeks a decision; the main difference, here, is that such decision does not compel the other party to comply.¹⁰⁰ The court relies instead on soft transparency-generated sanctions as a means to incentivize members to consider the question and provide the civil society with documental support to their demands.

One may think the dispute resolution mechanism is more robust, as the public submission procedure requires claimants to be able to show that the demand has merit. There are political implications to the majority vote required in order for a report to be publicized, especially since the members of the Commission are not independent, but rather appointed by NAAEC members. Additionally, the report merely enunciates the facts of the case, without making a finding as to whether a violation occurred or not.

In spite of all these hurdles, a comparison between the numbers of cases filed under each NAAEC mechanism shows ample preference for public submission. As of this writing, eighty-three cases¹⁰¹ have been

95. *Id.* at art. 14.

96. *Id.*

97. *Id.* at art. 15.

98. *Id.*

99. Thomas N. Hale & Anne-Marie Slaughter, *Transparency: Possibilities and Limitations*, 30 FLETCHER FORUM ON WORLD AFFAIRS 153, 157–59 (2006), available at <http://ui04e.moit.tufts.edu/forum/archives/pdfs/30-1pdfs/hale-slaughter.pdf>.

100. *Id.* at 158.

101. *Registry of Submissions*, COMMISSION FOR ENVIRONMENTAL COOPERATION, available at <http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250> (last visited Feb. 22, 2015).

initiated while, until February 2010, not a single case had been filed under the traditional intergovernmental mechanism.¹⁰² Even so, there is no consensus as to whether the “naming and shaming” process of publicizing a violation under the public submission mechanism is enough to compel a party to enhance its environmental practices.

Jonathan Dorn notes that, although publicity was not properly effective in determining the cessation of violations, it did compel legislatures and companies to adopt corrective measures before publication of the report.¹⁰³ Thus, publicity might not have resulted in enforcement, but it did promote compliance. Dorn also mentions procedural hurdles in public submission: the fact that petitions presented by NGOs suggest that a certain level of technical and administrative capacity is needed to bring forth a successful claim, and that cases involved in more intense activism tend to be more successful, although activism may be a consequence of the merit of the cause.¹⁰⁴

Thomas Hale’s conclusions, however, are encouraging as to the effectiveness of the public submission.¹⁰⁵ The author notes that two-thirds of the investigations conducted by the Commission have led to some type of change in the environmental regulation scenario. Armand de Mestral appropriately summarizes the importance of the Commission and its mechanisms: “[s]lowly, quietly, sometimes with little encouragement from the three governments, the CEC is becoming the advocate of the North American environment and potentially the acknowledged guardian thereof.”¹⁰⁶

D. Public Participation Under the 1998 Aarhus Convention

Another paradigmatic case is that of the United Nations Economic Commission for Europe (“UNECE”) Convention on Access to Information, Public Participation in Decision-making and Access to

102. See Thomas Hale, *Citizen Submission Process of the North American Commission for Environmental Cooperation*, in HANDBOOK OF TRANSNATIONAL GOVERNANCE – INSTITUTIONS AND INNOVATIONS 117, 120 (Thomas Hale & David Held eds., 2011).

103. Jonathon G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT’L ENVTL. L. REV. 129, 143 (2007).

104. *Id.* at 138–39.

105. Hale, *Citizen Submission Process*, *supra* note 102, at 121.

106. Armand de Mestral, *The NAFTA Commission on Environmental Cooperation – Voice for the North American Environment?*, in ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS, *supra* note 29, at 283, 297.

Justice in Environmental Matters¹⁰⁷—known as the Aarhus Convention—and ratified by the European Union and forty-seven European and Central Asian states.¹⁰⁸ It is a new modality of environmental agreement that seeks to interlink environmental rights and human rights.¹⁰⁹ It assumes that sustainable development can only be achieved with citizen involvement and highlights the importance of the interactions between the public and state actors in a democratic context.

The Convention establishes several forms of public participation and access to information, but the most relevant provision allows certain entities—associations, groups, and organizations recognized by one of the member states and whose goal is environmental protection—to present a request for internal reevaluation of an act or omission that they deem contrary to environmental law.¹¹⁰ Article 9 (2) grants the “public concerned”¹¹¹ “access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission.”¹¹²

107. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, *available at* <http://www.unece.org/env/pp/treatytext.html> [hereinafter Aarhus Convention].

108. As of January 16, 2015. Aarhus Convention: Status of Ratification, <http://www.unece.org/env/pp/ratification.html> (last visited Mar. 30, 2015).

109. On the relationship between environmental law and human rights, *see generally* DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS (2011).

110. Aarhus Convention, *supra* note 107, at art. 9, para. 2. (“Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above”).

111. As defined by Article 2 (5) of the Aarhus Convention, *supra* note 107: “‘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.”

112. Aarhus Convention, *supra* note 107.

Indeed, the Convention's Compliance Review Mechanism is a relevant example because it allows a member of the public to challenge a party's compliance directly to a committee of international legal experts with authority to examine the merits of the case (the Aarhus Convention Compliance Committee).¹¹³ The Committee, however, does not issue binding decisions, but rather makes recommendations to the full Meeting of the Parties.¹¹⁴

E. The International Tribunal for the Law of the Sea: Lessons for an Environmental Court

The International Tribunal for the Law of the Sea ("ITLOS") also has interesting features that could be mimicked in an international environmental court.¹¹⁵ Part XV of the United Nations Convention on the Law of the Sea ("the Convention") establishes an encompassing system for the resolution of disputes arising from interpretation of the Convention.¹¹⁶ This system urges member states to resort to the pacific means of dispute resolution enunciated in the UN Chart.¹¹⁷ If, however, they are unable to reach an agreement, they must submit the controversy to a dispute resolution system and abide by its decision.¹¹⁸

The Tribunal has established the following chambers: the Seabed Disputes Chamber, the Chamber of Summary Procedure, the Chamber for Fisheries Disputes, the Chamber for Marine Environment Disputes, and the Chamber for Maritime Delimitation Disputes.¹¹⁹ Upon request of Chile and the EU, it has also created a special chamber to deal with the

113. *Id.*

114. *Id.*

115. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf> [hereinafter U.N. Law of the Sea Convention].

116. MOM RAVIN, ITLOS AND DISPUTE SETTLEMENT MECHANISMS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (2005), available at http://www.un.org/Depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/mom_0506_cambodia_itlos.pdf.

117. Donald R. Rothwell, *Conflict Resolution and the Law of the Sea: Reconciling Interaction Between the LOS Convention and Environmental Instruments*, in ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS, *supra* note 29, at 255, 255–69.

118. U.N. Law of the Sea Convention, *supra* note 115, at art. 188.

119. *The Tribunal*, INT'L TRIBUNAL FOR THE LAW OF THE SEA, <https://www.itlos.org/en/the-tribunal/> (last visited Feb. 22, 2015).

conservation and the sustainable exploitation of swordfish stocks in the Southeastern Pacific Ocean.¹²⁰

Pursuant to article 15, paragraph 2 of the the Convention, the Tribunal shall form a chamber to deal with a particular dispute if the parties so request.¹²¹ The composition of such a chamber is determined by the Tribunal with the approval of the parties as provided for in Article 30 of the Rules of the Tribunal.¹²² Also, any party to a dispute over which the Seabed Disputes Chamber has jurisdiction may request the Seabed Disputes Chamber to form an ad hoc chamber.¹²³ Here resides a point of interest for the construction of an international environmental court; the possibility that it develops around thematic axes that may be added as needed to keep pace with the natural evolution of matters related to environmental protection.

Article 21 of the Statute establishes the Tribunal's jurisdiction over all disputes related to interpretation of the Convention. Parties can agree to submit any future controversy to the Tribunal, and "[t]he Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."¹²⁴ The ITLOS is, therefore, yet another example of an international court granting access to nonstate actors.

Finally, an important feature of the ITLOS is the ability to establish provisional measures deemed necessary to preserve the rights of the parties to the controversy or to prevent grave damage to the marine environment (Article 290, § 1°, of the United Nations Convention on the Law of the Sea,¹²⁵ and Article 25, § 1°, of the court Statutes).¹²⁶ The possibility of determining urgent measures is extremely important in the environmental domain, as avoiding the damage is always preferable to determining its reparation after a lengthy procedure.

120. *Id.*

121. U.N. Law of the Sea Convention, *supra* note 115, at art. 15.

122. International Tribunal for the Law of the Sea [ITLOS], *Rules of the Tribunal*, art. 30, para. 1 (Mar. 17, 2009), available at https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf [hereinafter ITLOS Rules of the Tribunal] ("Article 30 1. A request for the formation of a special chamber to deal with a particular dispute, as provided for in article 15, paragraph 2, of the Statute, shall be made within two months from the date of the institution of proceedings. Upon receipt of a request made by one party, the President of the Tribunal shall ascertain whether the other party assents").

123. *Id.*

124. Statute of the International Tribunal for the Law of the Sea art. 20, ¶ 2, Dec. 10, 1982, 1833 U.N.T.S. 561.

125. U.N. Law of the Sea Convention, *supra* note 115.

126. ITLOS Rules of the Tribunal, *supra* note 122.

III. INTERNATIONAL ENVIRONMENTAL DISPUTE RESOLUTION IN LIGHT OF THE NEW GOVERNANCE

The great development achieved by international environmental law in the past few decades—the relevance of international protection of the environment and the need for a new institutional arrangement—justifies the creation of an international court exclusively dedicated to the subject.¹²⁷ According to Sandrine Maljean-Dubois, “[t]he development of procedures for compliance responds to a real requirement to reinforce the operationalization of international agreements on protection of the environment.”¹²⁸

A. *International Environmental Protection, Erga Omnes Obligations, and Universal Jurisdiction*

How would an international environmental court justify universal and compulsory jurisdiction? The answer lies on two theoretical pillars of extraordinary practical relevance. First, environmental protection should be considered as a *common concern of humanity*.¹²⁹ The *intérêt général* referred to by Alexandre Kiss means fundamental values upon which the cohesion of society depends and that has on the law one of the main tools for their protection.¹³⁰ Second, it derives from its

127. See Alan E. Boyle & David Freestone, *Introduction to INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES* 1–2 (Alan E. Boyle & David Freestone eds., 1991).

128. Sandrine Maljean-Dubois, Symposium Paper, *Les Premiers pas des Mécanismes D’observance*, in Centre de Développement de la Recherche Internationale en Environnement, Apr. 2006 (Can.), available at http://www.cerium.ca/IMG/pdf/Conference_S_Maljean_Dubois.pdf (translation by author); see also Harold K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries*, in *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* 511–12 (1998).

129. See U.N. ENVIRONMENT PROGRAMME, *THE MEETING OF THE GROUP OF LEGAL EXPERTS TO EXAMINE THE CONCEPT OF THE COMMON CONCERN OF MANKIND* (David J. Attard ed., 1990); see also François Ost, *The Philosophical Foundation of Environmental Law: An Excursion Beyond Descartes* (Facultés Universitaires Saint-Louis, Oct. 2001), available at <http://www.dhdi.free.fr/recherches/environnement/articles/ostenvlaw.pdf>.

130. Alexandre Kiss, *Economic Globalization and the Common Concern of Humanity*, in *ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS*, *supra* note 29, at 6 (“The cohesion of every society and community is based upon and maintained by a value system, such as common religion, belief, or ethics that may demand respect for the human person, propriety, patriotism, respect for cultural heritage, or adherence to a social order. The protection of such fundamental values is generally recognized as a common concern of the community. One

characterization as a common concern of humanity that environmental protection norms may be considered as *jus cogens*,¹³¹ thus generating an erga omnes interest in compliance and enforcement. Maurizio Ragazzi notes that “[i]n international law, there are norms from which no derogation is permitted (*jus cogens*) and obligations binding on all states without exception, every state having an interest in their protection (*erga omnes*).”¹³²

The ICJ, in the aforementioned Barcelona Traction case, established that in the field of diplomatic protection an essential distinction should be drawn between the obligations of a state towards the international community as a whole and those arising vis-à-vis another state.¹³³ The Court clarified that the former are the concern of all states and that “[i]n view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes.”¹³⁴

Dinah Shelton emphasizes the interplay between the status of common concern of humanity and the ability to give rise to *erga omnes* obligations to whose enforcement any party may have an interest.¹³⁵ The

of the main tools for protecting the fundamental societal values is the law. As a consequence, legal regimes are formulated around the common concern (*intérêt général*), which the society recognizes as such.”). See also Dinah Shelton, *Common Concern of Humanity*, 2009 IUSTUM AEQUUM SALUTARE 33, 34, available at <http://ias.jak.ppk.hu/hir/ias/20091sz/05.pdf> (“What makes a concern a ‘common’ one? Alexandre Kiss suggested it was the importance of the values at stake. This idea is also implicit in the Martens Clause and in the ICJ’s recognition that erga omnes obligations arise ‘by their very nature’ ‘in view of the importance of the rights involved.’”).

131. See generally EDUARDO CORREIA BAPTISTA, *IUS COGENS EM DIREITO INTERNACIONAL* (1997) (Port.); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (Winter 1996); Jutta Brunnée, “Common Interest” – Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law, 49 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 791, 800–07 (1989); Alexander Orakhelashvili, *YJIL Symposium - Observations on a Fiduciary Theory of Jus Cogens*, OPINIO JURIS BLOG (Oct. 19, 2009, 1:01 PM), <http://opiniojuris.org/2009/10/19/yjil-symposium-observations-on-a-fiduciary-theory-of-jus-cogens>.

132. Maurizio Ragazzi, Abstract, *Norms of Jus Cogens and Obligations Erga Omnes: A Revival of the Natural Law Tradition in International Law?*, Paper presented at the 9th Annual Meeting – Society of Catholic Social Scientists, Ave Maria School of Law, Ann Arbor, Michigan (Oct. 26–27, 2001), available at <http://www.catholicsocialscientists.org/CSSR/Archival/2002/Abstract—Ragazzi.pdf>.

133. Barcelona Traction Light And Power Co., Ltd. (Belg. v. Spain) 1970 I.C.J. 3, 33–34 (Feb. 5), available at <http://www.icj-cij.org/docket/files/50/5387.pdf>.

134. *Id.* at 32.

135. Shelton, *supra* note 130, at 39 (“One avenue to explore is the link between common concern and *erga omnes* obligations. Both concepts relate to matters which touch the interests of people throughout the world. It may very well be that one of the

syllogism here is that international environmental protection is a common concern of humanity.¹³⁶ As such, it triggers *erga omnes* obligations that may be that may be universally pursued.

ICJ Judge Weeramantry, the dissenting opinion in *Gabčikovo-Nagymaros*,¹³⁷ asserts that international environmental protection gives rise to *erga omnes* obligations:

“[y]et this scarcely does justice to rights and obligations of an *erga omnes* character - least of all in cases involving environmental damage of a far-reaching and irreversible nature. I draw attention to this problem as it will present itself sooner or later in the field of environmental law, and because (though not essential to the decision actually reached) the facts of this case draw attention to it in a particularly pointed form.”¹³⁸

In the *Nuclear Weapons* advisory dissent, Judge Weeramantry reinforced this opinion by stating that the global environment “constitutes a huge, intricate, delicate interconnected web in which a touch there or a palpitation there sends tremors throughout the whole system. Obligations *erga omnes*, rules *jus cogens* and international crimes respond to this state of affairs by permitting environmental wrongs to be guarded against by all nations.”¹³⁹

Based on the above observations, several conclusions can be drawn as to the desirable characteristics of an international environmental court.

consequences of denoting a subject a common concern of humanity is that it gives rise to *erga omnes* obligations that may be pursued by any party.”).

136. UNITED NATIONS ENVIRONMENT PROGRAMME, *Opening Address by the Hon. Dr. Edward Fenech Adami, Prime Minister of Malta, in The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues*, Malta, Dec. 13–15, 1990 (David Attard ed. 1991).

137. International Court of Justice, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)* (Vice President Weeramantry, dissenting), *available at* <http://www.icj-cij.org/docket/files/92/7383.pdf>.

138. Standing can also be justified, with regard to States, by building on Articles 2 and 12 of International Law Commission’s 2001 Draft Articles of Responsibility of States for Internationally Wrongful Acts. “Article 2 - Elements of an internationally wrongful act of a State - There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State; Article 12 - Existence of a breach of an international obligation - There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.” Draft Articles of Responsibility of States for Internationally Wrongful Acts, International Law Commission Nov. 2001, *available at* <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf> (last visited May 28, 2014).

139. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66, 78 (July 8) (dissenting opinion of Judge Weeramantry) (citing LAKSHMAN GURUSWAMY ET AL., *INTERNATIONAL ENVIRONMENTAL LAW & WORLD ORDER* 264 (West 1994)), *available at* <http://www.icj-cij.org/docket/files/93/7417.pdf>.

This section will first analyze the issue of non-state actors' access to environmental justice. The second subpart suggests key features that are necessary to the success of an international environmental court.

B. Access of Non-state Actors to International Environmental Justice

Private party access to the dispute resolution system is an old problem in international justice that is reinforced by the growing importance of non-state actors in the international environmental arena.¹⁴⁰ The International Environmental Court ("IEC") would therefore need a clear mandate for incorporating non-state actors into the adjudication process.

As emphasized above, a fundamental feature of the new IEC would be the accessibility of non-state actors. The absence of such a provision has been largely criticized in other dispute resolution systems. Garrett Wilson notes that, in the context of the WTO, limiting access of private parties fosters lobbying activities.¹⁴¹ Indeed, inadequate rules for participation end up being an undesirable incentive for parties to seek access by means other than the official channels set forth in the rules.

Antonio Augusto Cançado Trindade, commenting on the Inter-American Court of Human Rights fourth Rules of Court which granted direct participation to individual petitioners in all stages of the procedure, asserts that "[v]iewed in historical perspective, this constitutes the most transcendental modification of the fourth Rules of Court, besides being a true turning-point in the evolution of the inter-American system of protection of human rights in particular, within the framework of international human rights law in general."¹⁴²

140. See *Interview by Danilo Mandic with Noam Chomsky, On Globalization, Iraq, and Middle East Studies*, (Mar. 11, 2005), available at <http://www.chomsky.info/interviews/20050311.htm>.

141. Garrett Wilson, *Private Parties and the WTO Dispute Settlement Procedure*, GARRETWILSON.COM (Oct. 5, 2004), <http://www.garretwilson.com/essays/economics/wtoprivateparties.html> (last visited Apr. 2, 2014) (accessed by requesting Google's latest cache of the website) ("Overall private access to the WTO is scarce and informal, and its effectiveness turns many times on the size of the player—exactly the type of discrepancies that law is theoretically supposed to ban from the game of justice. In a literal sense, WTO provisions for private participation are inadequate for allowing private parties with real needs to play a role in the rulemaking that directly affects their way of life.").

142. ANTÔNIO AUGUSTO CANÇADO TRINDADE, ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE 43 (Oxford Univ. Press, 2011). See also Marcelo Dias Varella, who discusses the barriers of access to environmental justice faced by NGOs (which extend to other categories of non-state actors) and states that "[t]he obstacles are of two

The general lack of access of private parties to international courts is intriguing,¹⁴³ especially the conundrum presented in cases where the non-state actor would want to file a claim against its own country, which would most certainly be unwilling to assist the private party. The creation of the IEC, whose object is by definition inclusive, is an excellent opportunity to overcome this serious shortcoming while setting a standard to be followed in other domains. Non-state actors' access to the IEC could happen at least under three different methods: (1) as *amici curiae*,¹⁴⁴ in which case the IEC would either request or accept voluntary submissions of information by the various stakeholders, taking them expressly into consideration (even if to reject them if impertinent) while deciding a case; (2) as parties seeking a report such as that foreseen in the NAAEC info-court, discussed *supra* Part II.C (although the NAAEC is intergovernmental this article does consider that such a mechanism could be successfully translated in the supranational context of the IEC); and (3) as parties seeking a binding decision. These methods could coexist from the beginning or be implemented progressively as the system matures and wins the trust of the international community. Implementation should not be unnecessarily delayed, however, so as not to discredit the effort.¹⁴⁵

natures: legal obstacles, as the need to show interest in acting in the environmental level and the acceptance of NGOs in courts and dispute resolution bodies of the international organizations, and non-legal obstacles, represented especially by access to environmental information. These barriers exist both in the United States and Europe and in developing countries." Marcelo Dias Varella, *Le Rôle des Organisations Non-gouvernementales dans le Développement du Droit International de l'Environnement*, 132 J. DU DROIT INT'L 41, 54 (2005) (Fr.), available at http://marcelodvarella.org/Teoria_do_Direito_Internacional_files/clunet%20ONG_2.pdf (translation by author).

143. When discussing the Olivos Protocol for the Resolution of Controversies within Mercosur, we argued that "[a]mong the critical issues on which the Protocol is silent, we believe that of access of private parties (individuals of other entities) negatively affects its effectiveness the most. Despite arguments to the contrary presented by the Uruguayan delegation, the Protocol did not innovate with regard to the unsatisfactory rules in this regard, thus private parties remain unable to file a claim directly. The need to for assistance by the private party's own country therefore remains." Alessandra Lehmen, *O Protocolo de Olivos para Solução de Controvérsias no Mercosul: Um Avanço Institucional?*, 9 Cadernos do Programa de Pós-Graduação em Direito - PPGDir/UFRGS 29, 35 (Sept. 2004) (Braz.) (translation by author).

144. On the participation of *amici curiae* in the WTO's DSB, Badin, *supra* note 63, notes that "[a] *amici curiae* open up the possibility not only that new non-state institutions act in the sphere of the dispute resolution mechanism, but also allows the introduction of new interpretations of the WTO agreements by said institutions" (translation by author).

145. See generally Michael J. Kelly, *Overcoming Obstacles to the Effective Implementation of International Environmental Agreements*, 9 GEO. INT'L ENVTL. L. REV. 447 (1997).

Furthermore, although the subject of granting non-state actors access to international dispute resolution as *plaintiffs* has been given some attention,¹⁴⁶ the concept of who could be a *defendant* in that arena is also a pressing issue in a globalized world.¹⁴⁷ The United Nations has correctly posited that “[g]lobalization has added a new dimension to these challenges. The rapid integration of markets, mobility of capital and significant increases in investment flows around the world have opened new challenges and opportunities for the pursuit of sustainable development.”¹⁴⁸

Indeed, in the globalized world non-state actors are ubiquitous and more likely than ever to harm the environment internationally in places where they cannot necessarily be reached by domestic justice. For instance, researchers at Yale Law School and the Yale School of Public Health released a 2013 report finding that the United Nations inadvertently caused a deadly cholera epidemic in Haiti by contaminating the Artibonite River, the largest in Haiti and one of the country’s main water sources.¹⁴⁹ Moral constraints aside, would this entail a legal obligation to redress the harm? Although the UN is an intergovernmental organization, this example illustrates the many situations in which it is desirable that non-state actors (corporations, NGOs) can be tried for acts that impact the environment internationally,

146. For instance, the Draft Statute of the International Environmental Agency and the International Court of the Environment presented at the UNCED Conference in Rio de Janeiro in June 1992, set forth that “[e]veryone, whether an individual or an association, has the right to take legal action to prevent activities that are harmful to the environment and to seek compensation for any environmental damage.” Draft Statute of the International Environmental Agency and the International Court of the Environment presented at the UNCED Conference in Rio de Janeiro, art. 4, June 1992, *available at* <http://www.icef-court.org/site/attachments/article/50/Draft%20Statute%20of%20the%20International%20Environmental%20Agency%20and%20the%20International%20Court%20of%20the%20Environment%20p.pdf>. The effort was led by Italian Supreme Court Justice Amedeo Postiglione and which lost traction in the following decades, although it was resubmitted in the Rio+20 conference in 2012; Peggy Ridgers Kalas, *International Environmental Dispute Resolution and The Need For Access By Non-State Entities*, 12 COLO. J. INT’L ENVTL. L. & POL’Y 191, 232–34 (2001).

147. “Globalization, as used herein, generally refers to the interconnections and consequent interdependence of peoples and governments throughout the world.” Kiss, *supra* note 130, at 3.

148. World Summit on Sustainable Development, Aug. 26 – Sept. 4, 2002, Johannesburg Plan of Implementation on Sustainable Development, ¶ 47, U.N. Doc. A/CONF.199.20, Annex (Sept. 4, 2002). *See generally* WOLFGANG REINICKE & FRANCIS DENG, *CRITICAL CHOICES: THE UNITED NATIONS, NETWORKS, AND THE FUTURE OF GLOBAL GOVERNANCE* (IRDC 2000).

149. *New Report Holds U.N. Responsible for Haitian Cholera Epidemic*, YALE LAW SCHOOL (Aug. 6, 2013), <http://www.law.yale.edu/news/17237.htm>.

something traditional diplomatic methods, existing international courts, and domestic courts have not been able, and maybe are not equipped, to address properly.

C. *Other Relevant Characteristics of an Effective International Environmental Tribunal*

It is important to point out that this Article speaks of dispute *resolution* intently. Hirozaku Miyano explains the distinction between the terms *settlement* and *resolution* when it comes to controversies: settlement means a win-lose compromise in which all parties let go of something, while resolution corresponds to a win-win, self-sustained, solution.¹⁵⁰

Environmental matters may be transversal or incidental to a question based on other grounds, for instance in international trade matters. Their status as a common concern of humanity and the *erga omnes* obligations derived from the universal goal of protecting the environment, however, justify that they are treated in a particularized way. This means that a court dedicated specifically to environmental issues is called for, even if it adopts a holistic approach.¹⁵¹ In that sense, the IEC cannot admit, as does the WTO, that the dispute resolution system creates a solution that is contrary to the environmental regime.

As envisioned by this article, the IEC would constitute the judiciary branch of a central environmental authority.¹⁵² This authority is not

150. Hirozaku Miyano, *The Place of the International Court of Justice in the Entire Process of Dispute "Resolution": A Critical Evaluation of Function of Adjudication in International Relations*, in *TOWARD COMPARATIVE LAW IN THE 21ST CENTURY*, 521–28 (1998).

151. “[T]he outcomes of ECR [environmental conflict resolution] are not binary decisions; they are complex, multifaceted agreements that address many issues.” Rosemary O’Leary, Tina Nabatchi, & Lisa Bingham, *Environmental Conflict Resolution*, in *ENVIRONMENTAL GOVERNANCE RECONSIDERED: CHALLENGES, CHOICES, AND OPPORTUNITIES* 341 (Robert F. Durant et al. eds., 2004).

152. This does not mean that the heritage of the United Nations Environmental Programme (“UNEP”) should be put aside. The program has developed meritorious efforts such as systematizing the existing environmental regimes (*see generally* Sophia Godel, *Das Umwelprogramm der Vereinten Naionen (UNEP) und seine Rolle um System der International Environmental Governance* (Frankfurt 2006); Maria Ivanova, *Moving Forward by Looking Back: Learning from UNEP’S History*, available at http://www.academia.edu/1876626/Moving_Forward_by_Looking_Back_Learning_from_UNEPs_History), but has been unable to establish itself as a true international reference in the environmental domain, either because of its conception as a program – as opposed to an organization – its exceedingly ample mandate, its remote headquarters, or its modest budget. The existing proposals for a creation of a WEO also have their shortcomings. The main deficiency is that of conceiving the organization in a state-

discussed in this article, but the contention is that a World Environmental Organization could either be organized within the UN system, as an entirely new entity or by upgrading the UNEP to the status of an organization—in which case in-depth reformation the ICJ's environmental chamber could be adequate—or independently such as the WTO.

The IEC would not be an ad hoc court but, rather, a permanent court with a high level of technical specialization. This permanent court would allow the parties to request the formation of ad hoc chambers, similarly to the ITLOS model, when appropriate. The court would be organized around technical chambers to be shared with the executive and legislative branches of the central authority so as to foster horizontally integrated and expedited procedures. Within the IEC, such experts would function similarly to special masters before the United States Supreme Court¹⁵³

centric light, considering it in a classic intergovernmental framework of Type I Agreements and thus failing to encompass the need to integrate non-state actors and Type II Agreements. A new governance structure that overlooks these phenomena seems to be doomed to failure. The WEO as we conceive it would have the following main features: (1) Could be a UN organization or independent such as, e.g., the World Trade Organization (WTO); (2) In the first case, would incorporate UNEP and the Commission on Sustainable Development (CSD); (3) Could be based in New York, using the current CSD infrastructure, and the current headquarters in Nairobi could be converted in a regional office for North-South gap issues; (4) Would have a revised mandate avoiding regulation of minutiae and fostering a bottom-up approach of local questions; (5) Would actively map and make available information on Type II Agreements, helping overcome accountability problems and paving the way for a global network of; (6) Would have a debureaucratized and horizontal structure, with virtual presence; (7) Would have an ample mandate from the UN General Assembly to its Secretariat and Executive Body; (8) Would be structured around Technical Chambers organized in thematic axes, with periodic intercameral meetings; (9) Would have a financial body with permanent interface with the World Bank, the Global Environmental Facility, and other sources of financing; and (10) As for its legislative functions, would prioritize the enforcement of existing norms over the negotiation of new programmatic treaties, while monitoring the new governance instruments and its possible antinomies with classic instruments, thus contributing to the cohesion of the system.

153. "The first time an environmental health scientist and mediator was asked by the courts to oversee cleanup of a hazardous waste site was not until 1993, when I was appointed in California. I found myself walking a tightrope among many conflicting roles, resulting in a hybrid style of dispute resolution I term 'mediation-negotiation.' We were able to resolve all case issues during my almost-four-year tenure without having to return to court. It was critical to balance the tensions between a negotiator's skill for assertiveness with a mediator's skill for empathy, and the tensions between impartial scientist and court advocate. The crux of such matters is the ability to play multiple, overlapping, and even conflicting roles, without betraying confidence or creating confusion among the various parties and the court, within the overall strategy of resolving the case." David B. Keller, *Court-Appointed Special Masters: Dispute-Resolvers?*, *MEDIATE*, <http://www.mediate.com/articles/kellerC.cfm> (last visited Feb. 17, 2015); see also Amedeo Postiglione, Int'l Court of the Env't Foundation, *La Governance Globale*

and could also aggregate much valued dispute resolution skills to the process.

Such chambers would be ideally organized, for coordination purposes, around regimes. Per the classic Krasner definition, regimes are “[e]xplicit or implicit principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area.”¹⁵⁴ A consultation procedure should also be established, and expertise inherent to each thematic axis or regime should always be deployed. The secretariat of a convention that is key to a specific regime such as climate change or biodiversity, for instance, is likely to bring in considerable knowledge.

Ideally, IEC members, technical chamber experts included, should be independent, so as to make sure they would not refrain from impartially deciding questions that are sensible to their respective

dell’Ambiente, compiled in International Conference on Global Environmental Governance (May 20–21, 2010) (on the role of environmental science).

154. Stephen D. Krasner, *Structural Causes and Consequences: Regimes as Intervening Variables*, in INT’L ORG., 185 (1982). Speth and Haas argue that “[a] treaty or a set of treaties and attendant arrangements are sometimes referred to as a *regime*, such as the climate regime, but the regime concept is also used more broadly . . . While most global environmental governance takes place through formal treaties and related institutions, these are not the only way to measure the level of coordination and cooperation taking place between states in the international system. A key concept in the area of international cooperation is that of ‘regimes’ . . . Regimes are an interesting and important limitation to the concept of anarchy in the international system. While there may no overarching global authority or government, the anarchical nature of the system is often mitigated by nations following and abiding by regularized and widely accepted series of regimes that allow for some level of continuity and stability in their relations. Regimes can also be thought of as social institutions created among nations. The analysis of regimes, known generally as regime theory, has primarily dealt with the creation of regimes and cooperation among nations at the international level. While the concept of regimes is thus broad, like global governance, the word is also commonly used to refer more narrowly to the work associates with specific international agreements.” SPETH & HAAS, *supra* note 26, at 83–84. The notion of regimes also serves didactic purposes. “The interest in regimes sprang from a dissatisfaction with dominant conceptions of international order, authority, and organization. The sharp contrast between the competitive, zero-sum ‘anarchy’ of interstate relations and the ‘authority’ of domestic politics seemed overdrawn in explaining cooperative behavior among the advanced industrial.” Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT’L ORG. 3, 491–517 (1987). It should not, however, be overestimated. Susan Strange notes that “it persists in the assumption that somewhere there exists that El Dorado of social science, a general theory capable of universal application to all times and places and all issues, which is waiting to be discovered by an inspired, intrepid treasure-hunter.” Susan Strange, *Cave! Hic Dragones: A Critique of Regimes Analysis*, 36 INT’L REGIMES 479, 493 (1982). See also Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 46 INT’L ORG. 1(1989).

countries of origin.¹⁵⁵ The system would reap clear benefits from the neutrality of members, as this would ideally shield it from the influence of power imbalances typical of diplomatic relations.

Another key feature of the IEC should be, similar to that of the ITLOS, the authority to determine urgent provisional measures. This is particularly important to ensure that the goal of avoiding environmental harms is given due priority over remediation or monetary awards.

The IEC should learn from the negative example of the lengthy ICJ procedures¹⁵⁶ and establish reasonable yet not unnecessarily dilated deadlines. In any event, a permanent and specialized court should contribute to expedite the procedures, as opposed to an ad hoc tribunal without a body of experts. As the court's proposed universal jurisdiction may lead to a profusion of illegitimate claims, a screening procedure is also in order to weed out submissions that, for instance, could be addressed by domestic courts (preventing parties from playing the system by venue shopping) or are facially inconsistent with the general goals of international environmental protection.

The peculiarities of environmental protection also make it advisable that the IEC has, and effectively deploys, pacific methods of dispute resolution: good offices, consultations, mediation, and conciliation. Even if those unfold in the sphere of traditional bilateral diplomacy, having an IEC mediator included in the process might presumably increase the success rate of the negotiations. It is desirable that the IEC fosters not only enforcement, but also—and primarily—compliance facilitation.¹⁵⁷ Daniel Bodansky, addressing the characteristics of compliance methods based on specific treaties, sets forth that they are political and pragmatic, forward-looking, managerial, non-adversarial, and consider compliance as part of a continuum.¹⁵⁸

155. A judge at an international court should have “diplomatic” authority. This attribute is not to be taken literally, in the sense of traditional State diplomacy, but rather in the sense of a conciliatory spirit; “it is often necessary to mix different competences: judiciary experience, evidently, but also – and that is new – a diplomatic competence.” JULIE ALLARD & ANTOINE GARAPON, *LES JUGES DANS LA MONDIALISATION - LA NOUVELLE RÉVOLUTION DU DROIT* 73 (2005) (Fr.) (translation by author).

156. *See supra* Part II.A.

157. Eliminating ambiguity, challenging though as it may be, is an important part of this task. *See* Anthony D’Amato, *Purposeful Ambiguity as International Legal Strategy: The Two China Problem*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 109–21 (Jerzy Makarczyk ed., 1996).

158. “They are political and pragmatic, not legalistic. . . They are forward, not backward-looking. . . Their goal is to manage environmental problems in order to achieve a reasonable level of compliance in the future, not to establish legal rights and duties or to rectify past breaches. . . They are non-adversarial rather than contentious in

International environmental law benefits from the wide array of non-confrontational procedures available.¹⁵⁹ Its goals are notably advanced by cooperation, compliance facilitation, and mechanisms aiming at correcting the political, economic, and technical imbalances that prevent nations from abiding by environmental protection rules.

The emphasis in pacific methods of dispute resolution does not mean, however, that they cannot coexist with coercive methods. That being said, a challenging topic presents itself: should—or could—the IEC impose sanctions to the party at fault? To what extent is it possible or adequate that the IEC imposes monetary fines such as those of the NAAEC, which are converted to retaliatory tariffs of the same amount if left unpaid? What is the risk of such a mechanism being distorted to justify the adoption of trade sanctions disguised as environmental measures?¹⁶⁰

It is not impossible to equip the IEC with “teeth”; this alternative, however, needs to be approached with caution for four reasons.¹⁶¹ First,

nature. In many cases thus far, the non-compliant state itself has initiated proceedings. . . They view compliance and non-compliance as a part of a continuum, not in all-or-nothing terms. On this continuum, the difference between a small and a big violation, or between bare compliance and overcompliance, may be more significant than the difference between compliance and breach.” DANIEL M. BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 248 (2010).

159. “[A] rich inventory of methods are available today for preventing or reducing environmental conflicts without resorting to the confrontational procedures that are typical of traditional adjudication and compulsory dispute settlement. In the area of international environmental law, preventive methods of dispute settlement may also have the advantage of more effectively securing compliance with environmental standards. By relying mainly on ‘procedural’ obligations requiring States to ensure transparency, mutual consultation, monitoring, environmental impact assessment and risk management, and to co-operate in ensuring preparedness and response action to environmental impacts, those alternative mechanisms are well suited to take into account the complexities of environmental disputes and the high degree of technical and financial inequalities among different actors on the international scene.” Francesco Franconi, *Dispute Avoidance in International Environmental Law*, in *ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS*, *supra* note 29, at 242–43.

160. Environmental matters may give rise to national measures to restrict the circulation of products that sometimes amount to discriminatory or disguised trade restrictions. See ALBERTO DO AMARAL JÚNIOR, *COMÉRCIO INTERNACIONAL E A PROTEÇÃO DO MEIO AMBIENTE* 149 (2011) (Braz.); see generally Vera Thorstensen, *A OMC – Organização Mundial do Comércio e as Negociações Sobre Comércio, Meio Ambiente e Padrões Sociais*, 41 *REV. BRAS. POLIT. INT’L* 29 (1998) (Braz.).

161. Boisson de Chazournes points out that “[w]hether it is possible to prevent countries from resorting to unilateral trade measures for environmental purposes is one thing, whether it is desirable is another: depending on the specific circumstances and the field of concern, unilateral measures may be better suited, i.e., more effective in achieving protection, if only because of the objectives pursued. Their legitimacy should, however, be harnessed by international law, whether through the application of

the need to avoid distortion of disguised trade barriers.¹⁶² Second, the extraordinary amount of political effort required to build the necessary consensus for implementation of the IEC,¹⁶³ and the prospect of monetary sanctions may hinder the process of gathering the support of some countries,¹⁶⁴ especially those that have faced significant defeats in the WTO. Third, in the environmental domain, coercive methods should be subsidiary to pacific methods rather than the main feature of the system. Fourth, with the possible exception of large corporations or transnational NGOs, the foreseeable difficulties in enforcing pecuniary sanctions, as non-state actors cannot be subject to trade retaliation measures.

Conversely, beyond the political consensus, creation of the IEC depends largely on financial resources. The IEC's fundraising ability depends on being positively perceived by the international community—that is, it must present itself as a robust entity capable of contributing to

substantive norms or through possible resort to checks and balances for assessing their legality.” Laurence Boisson de Chazournes, *The Use of Unilateral Trade Measures to Protect Environment*, in ECONOMIC GLOBALIZATION AND COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS, *supra* note 29, at 191.

162. Lawrence Kogan, *Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science*, NAT'L FOREIGN TRADE COUNCIL, May 2003, http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_looking_behind_e.pdf.

163. “International law lacks not only a central ‘legislator’ and an inherent hierarchy of its rules (other than *jus cogens*), but also a unified international ‘judiciary’ to which all pertinent disputes could be referred. The jurisdiction of an international court or tribunal cannot be presumed. It must be granted by the consent of states in explicit terms.” Pauwelyn, *supra* note 75, at 552.

164. Here a reflection on the fundamental question of why do nations obey international law is of the essence. Harold Hongju Koh posits that “[t]his remains among the most perplexing questions in international relations . . . If transnational actors do generally obey international law, why do they obey it, and why do they sometimes disobey it? The question is fundamental from both a theoretical and practical perspective. It challenges scholars of international law and international relations alike. It vexes all subfields in international affairs, from international security to political economy; from international business transactions to international trade; from European Union law to international organizations. It poses a critical ongoing challenge for United States foreign policy, for if we cannot predict when nation-states will carry out their international legal obligations respecting trade retaliation, environmental protection, human rights, global security, and supranational organizations, how can we count on ‘multilateralism’ to replace bipolar politics as the engine of the post-Cold War order? . . . Participation in transnational legal process creates a normative and constitutive dynamic. By interpreting global norms, and internalizing them into domestic law, that process leads to reconstruction of national interests, and eventually national identities. In a post-ontological age, characterized by the ‘new sovereignty,’ the richness of transnational legal process can provide the key to unlocking the ancient puzzle of why nations obey.” Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2599–2603, 2659 (1997) (reviewing CHAYES & CHAYES, *supra* note 3).

the development of the new global environmental governance. Bearing in mind the urgency of tackling the challenge of the development of an effective international regime of protection of the environment, this is a hypothesis worth considering.

IV. CONCLUSION

The dissipation of communication borders inherent to the globalized world exposed a series of problems with the traditional notion of governance centered on states and intergovernmental organizations. The need for cooperation can no longer be supported by relationships marked by reciprocity, and global efforts for the protection of common resources demand the recognition of, and abidance by, environmental *erga omnes* obligations.

It is also noticeable that traditional diplomatic relations—notably when it comes to international protection of the environment—suffer from a serious participation deficit. The interests of relevant actors have become increasingly multifaceted and sometimes incoherent. This, added to the extreme diversity among local scenarios and the marked inequality that characterizes power relations, has resulted in the inadequacy of traditional representation to include all the relevant stakeholders in the decision-making process. The increasing participation of non-state actors is, therefore, the main feature of what this Article chose to call the “new” global environmental governance.

The same occurred with the classic sources of international environmental law. The phenomenon of treaty congestion¹⁶⁵ and the

165. “The number and variety of environmental agreements has reached the point that some critics ask whether they may not severely strain the physical and organizational capacity of countries to handle them. There are signs of treaty congestion, in the form of separate negotiating forums, separate secretariats and funding mechanisms, overlapping provisions or inconsistencies between agreements and severe demands on local capacity to participate in negotiations, meetings of parties and associated activities. This affects the international community as a whole, since there will always be limited resources to address difficult issues and some countries may suffer particular inequities in their ability to participate effectively in new regimes . . . [w]ith such a large number of international agreements, there is great potential for overlapping provisions in agreements, inconsistencies in obligations, significant gaps in coverage, and duplication of goals and responsibilities . . . International environmental law has developed in a piecemeal, almost random, manner . . . Treaty congestion also contributes to significant inefficiencies in implementing international agreements. There are usually separate secretariats, monitoring processes, scientific councils, financing mechanisms, technical assistance programs and dispute resolution procedures . . . Finally, treaty congestion leads to overload at the national level in negotiating and implementing the agreements . . . Even industrialised [s]tates with well-developed regulatory mechanisms and bureaucracies show signs of being overwhelmed. As attention shifts to the need to comply with existing

recent stalemates in negotiations of environmental treaties, namely in the climate change domain, have resulted in a multilateralism crisis. These circumstances force a difficult but indispensable reflection on the effectiveness of international environmental law, and urge the international community to consider new alternatives to promote it.

At the same time, the growing protagonism of non-state actors is noticeable in the flourishing of voluntary initiatives involving various degrees of public and private participation at the global, regional, and local spheres, whose recognition culminated in the coining, at the Johannesburg Summit, of the expression Type II Partnerships.¹⁶⁶ Therefore, we are witnesses to a crucial paradigm shift: the adoption of contractual, voluntary forms of pursuing the goals of international protection of the environment.

If the instruments of the new governance are inclusive, they are also fragmentary and sometimes chaotic.¹⁶⁷ What can be done to ensure that the flexibility of bottom-up solutions is not threatened and the system gains cohesion and effectiveness? This Article proposes that the instruments of traditional governance and those of the new governance should coexist in a new institutional and regulatory architecture, in whose articulation the law plays a fundamental role.

This Article proposes that the new institutional design encompasses an *International Environmental Court (IEC)* to be developed around the characteristics and lessons learned from different models dealing with international dispute resolution in the environmental arena. By outlining the features below, this Article intends to provide a point of departure for further reflection, which will be of the essence as the many challenges regarding implementation of the court unfold. The key point lies with the recognition that any such institution cannot ignore the main feature of the new global environmental governance, and should, therefore, devise a means for inclusion of non-state actors.

agreements, the burden on the administrative capacity of [s]tates will become more acute.” Edith Brown Weiss, *New Directions in International Environmental Law*, in *INTERNATIONAL LAW AS A LANGUAGE FOR INTERNATIONAL RELATIONS: PROCEEDINGS OF THE UNITED NATIONS CONGRESS ON PUBLIC INTERNATIONAL LAW* (NEW YORK, MAR. 13–17, 1995), at 273–75, U.N. Sales No. T.96.V.4 (1996).

166. “[I]n the international arena, the notion of partnerships has become ‘salonfähig’ (socially acceptable), following the 1992 UNCED conference and, even more strongly, after the Johannesburg Summit in 2002.” Arthur P. J. Mol, *Bringing the Environmental State Back In: Partnerships in Perspective*, in *PARTNERSHIPS, GOVERNANCE AND SUSTAINABLE DEVELOPMENT*, *supra* note 18, at 215.

167. Harro Van Asselt, *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*, 44 N.Y.U. J. INT’L LAW & POL. 1205, 1207–12 (2012).

As this Article conceives it, the IEC would (1) constitute a judiciary branch of a central international environmental organization for the resolution of international environmental disputes; (2) recognize the growing importance of non-state actors—thus contributing to solve an old problem of international justice—by granting them access to the dispute resolution systems as *amici curiae*, as parties seeking a report in the fashion of the NAAEC info-court, or as parties seeking a binding decision; (3) be a permanent—as opposed to an *ad hoc*—court; (4) have highly specialized members distributed in technical chambers partially shared with those of the central international environmental organization; (5) have independent members, not subject to the interference of the governments of their countries of origin; (6) have authority to issue provisional measures; (7) have fast-tracked procedures; (8) consult with specialists, the Secretariats of treaties that may have to be analyzed in the claim, and generally, the actors bearing a legitimate interest in the outcome; and (9) encompass effective mechanisms of pacific dispute resolution.

Said pacific methods of dispute resolution should be prioritized because environmental matters are generally better resolved under the soft pressure of behavior obligations than the intense pressure of result obligations. Although in the environmental domain compliance is preferable to enforcement, pacific and coercive methods can coexist. The definition of said coercive methods, however, is a more challenging and somewhat unsettling task. Is it adequate, or even possible, that the IEC imposes pecuniary sanctions to, or authorizes retaliatory measures against, the recalcitrant party? Coercive measures should ideally be subsidiary to pacific methods of dispute resolution, not the basis for the success of the system. However, sanctions are an important resource in the context of the search for effectiveness not only of the court but of the new global environmental governance as a whole, so long as they are applied in a judicious and prudent manner. As ideas in this respect mature, coerciveness of the regime should constitute fertile grounds for future investigation.