Environmental Disputes in International Courts and Tribunals

Overcoming the Obstacles Through Judicial Adaptation

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Abstract

International law regulating the protection of the environment has grown exponentially over the years, with the adoption of many conventions covering the protection of specific environmental issues at the global, regional and bilateral levels. The variety of rules and types of protection is vast, and the question then is how to resolve potential conflicts.

Within the field of interstate dispute settlement, the mechanisms that exist to solve international environment conflicts present a critical pressure point. Instead of a smooth process of adjudication, conducive to timely judgments that benefit all parties, a disjointed system offering more stumbling blocks than solutions seems to exist. There is this idea that the interstate judicial settlement is old-fashioned, and therefore inadequate to respond to the new legal developments in international environmental law. This pessimistic view on the existing mechanisms and the development of parallel theories on how to achieve greater compliance with environmental rules have consequently led to the creation of alternative types of conflict resolution mechanisms, labelled as non-compliance procedures.

Indeed, it is true to say that the roles of international courts and tribunals in environmental disputes have been challenged by certain specific features of environmental disputes, bringing into question their usefulness and effectiveness. However, we should not be too hasty in dismissing the role of courts and tribunals in this context. This thesis seeks to investigate whether there is a place on the international stage for international courts and tribunals when it comes to solving environmental disputes. In doing so, the analysis focuses on the design of interstate adjudication and arbitration. Some judicial mechanisms which are often not considered could be adequately used in the context of international environmental law. By concentrating on the various relevant legal tools available to international judicial bodies, this thesis argues that international courts and tribunals can be used favourably in an environmental context.

This thesis adopts three main perspectives from which the role of international courts and tribunals is assessed. First, the analysis concentrates on how the judicial procedures

can be triggered (or the question "how to get in"). Then it looks at the mechanisms and procedural problems attached to the judicial bodies (or "once you are in"). Finally, the research focuses on the location of judicial bodies within the broader dispute settlement regime relevant for the application of international environmental law (or "in/out relationships"). With these three elements, it is then possible to evaluate the role international courts and tribunals play, their limitations and their advantages.

Lay summary

In the international arena, a centralised system of adjudication does not exist. Rather, many different types of international courts and tribunals have been created over the decades. There are global and regional courts, some being only able to judge on interstate disputes, either with general or limited mandates, as well as tribunals where individuals can claim their rights.

However, the application of international environmental law – as it focuses largely on the creation of specific obligations towards states themselves – is more likely to be questioned by the other bearers of the same obligations, the other states. Therefore, the specific courts and tribunals analysed in this thesis are those able to hear interstate disputes over environmental conflicts.

These environmental conflicts raise certain specific challenges for international courts and tribunals: they are the object of this research. The challenges are largely procedural in nature and they relate to how the judicial procedures can be triggered (or the question "how to get in"), the role of courts in assessing scientific evidence and the remedies that may be prescribed at the end of the case (or questions relating to "what happens once you are in"). The thesis tackles each individual procedural hurdle and investigates the extent to which international courts and tribunals have shown some ability to adapt or could adapt better in the future. The thesis also discusses the relationship between judicial bodies and other dispute settlement mechanisms relevant for the application of international environmental law, with a view to suggesting when it might be appropriate to take an interstate dispute about environmental protection to an international court or tribunal.

Declaration

In accordance with Regulation 25 of the Assessment Regulations for Research Degrees at the University of Edinburgh, I certify that this thesis I have presented for examination for the Ph.D degree of the University of Edinburgh is solely my own work. It has not been submitted for any other degree or professional qualification.

Justine Bendel

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The Edinburgh University Chamber Orchestra was a family to me. It helped me stay sane, and I am especially grateful to its conductor Will Conway taught much more than music interpretation; he showed me how to transmit a passion.

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ASEAN	Association of Southeast Asian Nations
CBD	Convention on Biological Diversity
CCSBT	Convention for the Conservation of the Southern Bluefin Tuna
CITES	Convention on International Trade in Endangered Species
COP	Conference of Parties
CUP	Cambridge University Press
EEZ	Exclusive Economic Zone
ECJ	European Court of Justice
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
ICSID	International Centre for Investment Disputes
ILC	International Law Commission
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
LRTAP	Long-Range Transboundary Air Pollution Convention
MEA	Multilateral Environmental Agreement
MOP	Meeting of Parties
NGO	Non-Governmental Organisation
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RECIEL	Review of European Community and International Environmental Law
UN	United Nations
UNCC	United Nations Compensation Commission
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNFCCC	United Nations Framework Convention on Climate Change
WTO DSB	World Trade Organisation Dispute Settlement Body
WTO DSU	World Trade Organisation Dispute Settlement Understanding

This PhD is dedicated to my dad, François. Despite his absence – and because of his absence, he has been the main drive for me to keep going at all times. He taught me the love of books and the power of thoughts. This PhD has been my way of keeping connected to him.

> "In every legal system law and procedure constantly react upon each other. Changes in the substantive law call for new procedures and remedies; new procedures and remedies make possible changes in the substantive law. So it is in international law; if we wish so to develop the law as to respond to the challenges of our times our procedures and remedies must be sufficiently varied and flexible for the purpose."[1]

1. The problem of environmental dispute settlement

Environmental discourse has motivated the development of international environmental law through various means, through for instance the adoption of the Stockholm Declaration[2] during the UN Conference on the Human Environment in 1972 and the creation of the UN Environmental Programme (UNEP)[3] in the aftermath of the conference, followed twenty years later by the adoption of the Rio Declaration.[4] Both texts are the result of political summits where representative of states showed their will to commit to certain environmental goals. Then, the international community has gone further than just admitting the protection of the environment is a goal to achieve and established environmental protection as a legal and administrative field in its own right. International agreements multiplied, with no formal hierarchy and few links to one another, with the adoption of many conventions covering the protection of specific environmental issues, such as climate change with the UNFCCC,[5] environmental impact assessments with the Espoo Convention,[6] the conservation of biodiversity with the CBD,[7] the protection of the marine environment with the UNCLOS[8] and of certain species such as the Whaling Convention[9] and many more. These evolutions show the changes

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[1] Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 184.

[2] Declaration of the United Nations Conference on the Human Environment, concluded on the 16th June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

[3] Resolution adopted by the United Nations General Assembly, 15 December 1972, 27th session, A/RES/27/2997.

[4] Rio Declaration on Environment and Development, concluded on the 13th June 1992, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

[5] United Framework Convention on Climate Change (1992).

[6] Convention on Environmental Impact Assessment in a Transboundary Context (1991).

[7] Convention on Biological Diversity (1992).

[8] United Nations Convention on the Law of the Sea (1992).

[9] International Convention for the Regulation of Whaling (1946).

in the perception of international environmental law towards a global and all-encompassing legal framework. States find in law an appropriate way to fight for environmental protection. The variety of rules and possible types of protection is vast, culminating in myriad potential disputes. This begs the central question, therefore: how may these be resolved?

The foundations of this thesis rely on the assumption that procedural matters are interrelated with substantive matters: they have to respond to each other. Therefore, this thesis seeks to explore the relationship between the relatively new corpus of international environmental rules and the established international courts and tribunals.

Within the field of interstate dispute settlement, the mechanisms that exist to solve international conflicts over the environment present a critical pressure point. Instead of a smooth process of adjudication, conducive to timely judgments that benefit all parties, there seems to exist a disjointed system offering more stumbling blocks than solutions. Often the interstate judicial settlement is stigmatised as old-fashioned, and therefore inadequate to respond to the new legal developments in international environmental law.[10] This pessimistic view of existing mechanisms and the development of parallel theories analysing how to achieve greater compliance with environmental rules have consequently led to the creation of alternative types of conflict resolution mechanisms, labelled as non-compliance procedures.[11] Such developments raise the question of the relationship between judicial settlement and these alternative mechanisms.

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[10] The term "adequacy" is preferred to the term "efficiency" as it emphasises the need for judicial bodies to correspond to the specificities of international environmental protection. This discourse does not help answer the questions asked in this project as the meaning of effective judicial bodies does not automatically correlate with the efficiency of the legal framework. Neither may it also be assumed to correlate with the procedural mechanisms constituting international courts and tribunals.

[11] See chapter 5 of this thesis for further discussion.

2. Background to the thesis and research questions

2.1 The alleged inadequacy of international courts and tribunals in environmental disputes

In general, the UN Charter obliges states to settle their disputes "in such a manner that international peace and security, and justice, are not endangered".[12] Whenever a dispute arises, it has to be settled through a range of mechanisms, enumerated in article 33 UN Charter – adjudication being one of them.[13] It is indeed important to bear in mind that international litigation is a part of a broader dispute settlement process. Furthermore, article 33 shows that legal mechanisms are optional, and are not meant to be used in the first place. Nevertheless, there is a tension nowadays between a certain legalisation of dispute settlement procedures and the emergence of many non-binding mechanisms. Judicial dispute settlement has been used increasingly over the years, voluntarily or through membership to certain treaties and institutions (spanning from the World Trade Organisation Dispute Settlement Understanding (WTO DSU), the International Tribunal for the Law of the Sea (ITLOS), to the obligation to accept a binding settlement of disputes in order to join a community such as the European Union (EU)). Meanwhile, an increasing number of non-binding mechanisms have been created through the adoption of many multilateral environmental agreements (MEAs). In this context, it has been admitted there is "ambivalence in state practice and in scholarly commentary concerning the role of international environmental litigation".[14]

Two phenomena occurring over the last decades have triggered the need for this research. On the one hand, the judicialisation of international law[15] forces international tribunals to enhance their procedures as they grow in importance.[16] On the other hand,

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[12] Article 2(3) UN Charter.

[13] Possible resolution can be found in negotiation, inquiry, conciliation or the use of non-compliance procedures for instance.

[14] Tim Stephens, *International Courts and Environmental Protection* (CUP 2009) 2.

[15] See Gleider I Hernández, 'The Judicialization of International Law: Reflections on the Empirical Turn' (2014) 25 The European Journal of International Law 919. He reviews three main contributions to the scholarship on the judicialisation of international law.

[16] This aspect will be dealt with in chapters 3, 4 and 5.

multiple forms of dispute settlement have grown in importance,[17] potentially destabilising judicial institutions, but also requiring some reinforcement and adaptation from those judicial institutions.[18] In other words, an augmentation of competent courts and tribunals (i.e. the International Court of Justice (ICJ), ITLOS, WTO, International Centre for the Settlement of Investment Disputes (ICSID), European Court of Human Rights (ECHR), European Court of Justice (ECJ), Inter-American Human Rights Court (IACHR)) has been noted and yet, it is often concluded that, despite playing some role in environmental conflicts, the advantages of non-contentious procedures over litigation are preferred. The reasons for this choice are based on several elements, of which the most prominent ones are the vagueness of environmental rules due to the high degree of compromise in the building-process of MEAs, the highly scientific issues raised by environmental issues and the multifaceted feature of environmental claims.[19]

It is true that environmental protection has needs that are not easily reconcilable with the traditional conception of judicial settlement in international law. Some concepts on which environmental protection is based go beyond what traditional international law can do. The concerns raised about the inadequacy of judicial procedures are mainly related to the nature of international courts and tribunals. Some of their features seem to be in opposition with the developments in international environmental law.[20]

In particular, judicial dispute settlement has been criticised for being inherently bilateral and adversarial, rendering the integration of third parties difficult and as a result obstructing a polycentric approach to solving environmental problems.[21] International environmental law does not only contain reciprocal obligations – the most suited for

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[17] See for an overview Malgosia Fitzmaurice and Catherine Redgwell, 'Environmental Non-Compliance Procedures and International Law' (2000) 31 Netherlands Yearbook of International Law 35.

[18] This aspect will be dealt with in chapter 6.

[19] Philippe Sands, 'International Environmental Litigation and Its Future' (1999) 32 University of Richmond Law Review 1619, 1637–1639.

[20] Tim Stephens, 'International Environmental Disputes: To Sue or Not to Sue?' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014) 291; Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 247.

[21] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Third Edition, OUP 2009) 211–213.

international litigation[22] – but puts a strong emphasis on collaboration between the different states, and creates integral obligations. It is often the view that greater environmental protection is achieved through better collaborative actions, therefore opposing the concept of adjudication.

Another concern has been raised about the high dependence on scientific knowledge of environmental issues, which judicial tribunals can find hard to address.[23] The complexity of the factual settings of environmental disputes and the technical character of such disputes create a barrier from a procedural point of view, but also from a financial point of view. International litigation can become even more costly.

It is also often argued that the different remedies provided in judicial decisions do not correspond to the preventive nature of environmental protection, which aims primarily at avoiding irreparable harm to the environment.[24] In this context, the length of the procedure becomes an issue for effectively reacting to an environmental harm. Additionally, the legal standards applied by the courts and tribunals (e.g. the law on state responsibility among others) have also been considered as unhelpful in an environmental context.[25]

Moreover, the nature of certain international obligations can also affect the impact of international litigation negatively. Some rules of international environmental law are unsettled as to their binding nature or as to their global applicability which can create further problems for international courts.[26]

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[22] Gerard Hafner, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them' in United Nations (ed), *International Law as a Language for International Relations. Proceedings of the United Nations Congress on Public International Law* (Kluwer Law International 1995) 563.

[23] Philippe Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' in Tafsir Malik Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 315.

[24] Richard Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment' (1975) 1 Hague Academy of International Law, Recueil des Cours 140, 154–155.

[25] Stephens, *International Courts and Environmental Protection* (n 14) 68–69; Birnie, Boyle and Redgwell (n 21) 236–237.

[26] Birnie, Boyle and Redgwell (n 21) 211.

Although the ill-suited nature of international courts and tribunals has been broadly claimed, states have submitted in the past few years a significant number of cases involving environmental protection to various interstate tribunals, namely the ICJ, the ITLOS, or arbitration, such as the *Whaling* case,[27] the *Pulp Mills* case,[28] the *Southern Bluefin Tuna* cases,[29] the *Land Reclamation* case,[30] the *Indus Waters Kishenganga* arbitration,[31] the *Certain Activities in the Boarder Area* case,[32] the *Mauritius/UK* case,[33] and the *South China Sea* arbitration,[34] among others. This increase in number of cases shows that states themselves are disposed to bring a case to an international tribunal. The fact that states accept the character of such entities as judicial organs, and accept that judicial bodies have inherent powers and are neither subordinate nor subsidiary to any other body is critical for the success of the international judiciary. Sands and Treves also explore the implications of this by emphasising the increasing role of courts and tribunals in the application of international environmental law.[35]

Besides, interstate adjudicatory bodies have created frameworks intended to include environmental claims as part of their competences, such as the International Court of Justice and the creation of the Chamber for Environmental Matters in 1993 (subsequently closed in 2006 because it had never been used), or the Permanent Court

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[27] *Whaling in the Antarctic (Australia v Japan)* (Merits) [31 March 2014] ICJ Rep 2014.

[28] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [20 April 2010] ICJ Rep 2010.

[29] *Southern Bluefin Tuna cases (New Zealand v Japan/Australia v Japan)* Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999. The arbitration was held at ICSID (see www.worldbank.org/icsid).

[30] *Case concerning Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003. The dispute was settled on the merits under the PCA on the 26 April 2005 (see www.pca-cpa.org/showpage.asp?pag_id=1154).

[31] *Indus Waters Kishenganga Arbitration (Pakistan v India)* Final Award (20 December 2013) <http://www.pca-cpa.org/showpageb106.html?pag_id=1392>. Under the Permanent Court of Arbitration.

[32] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Merits) [16 December 2015] ICJ Rep 2015.

[33] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* PCA Case No 2011-3 (Final Award) [18 March 2015] <http://www.pcacases.com/web/view/11>.

[34] *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* PCA Case N° 2013-19 (Merits) [12 July 2016].

[35] Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (n 23) 317–319. Tullio Treves, 'Disputes in International Environmental Law: Judicial Settlement and Alternative Methods' in Yann Kerbrat and Sandrine Maljean-Dubois (eds), *The Transformation of International Environmental Law* (A Pedone & Hart 2011) 286–293.

of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment adopted in 2001 (also never used). These attempts demonstrate the tribunals' willingness to hear environmental cases and their intention to give them a special forum. The lack of engagement with those particular developments shows that the problem is not about the definition of what environmental disputes are (see below). States are willing to use the same fora for disputes concerning the environment, emphasising the need for this research.

2.2 Can we still talk about inadequacy today? If yes, how to resolve it?

The wider research question at the heart of this thesis is therefore whether international courts and tribunals have a meaningful and justifiable role to play in the context of environmental law. Can the above arguments against the submission of environmental disputes to adjudication be refuted, and to what extent? The central argument and main original contribution of my thesis is that, despite many limitations and disadvantages of judicial settlement as exemplified above, the mechanisms provided by judicial institutions can be used in order to adequately answer violations of international environmental law, if the tools and procedures available are used at their full potential. Indeed, international courts and tribunals have the potential to solve environmental disputes adequately despite the fact that their roles have been challenged. The inherently dynamic nature of procedures within international courts and tribunals is at the core of the arguments developed in this thesis. Indeed, the gist of the thesis relies on the assertion that international courts and tribunals have tools at their disposal that – if used appropriately and creatively – can be adapted to the needs of environmental disputes. This assertion is substantiated in every chapter by tackling certain critical procedural aspects, which altogether form the meat of the argument. In other words, the structure of international courts and tribunals is flexible enough to allow developments needed for the appropriate handling of environmental disputes, and there is evidence shown later on that certain of those developments have already been put into practice in some cases.

3. Scope of the thesis

3.1 Environmental disputes

What makes a dispute environmental? Some scholars have taken the risk to give a definition of environmental disputes: for instance, in 1975, Bilder defined them as "any disagreement or conflict of views or interests between States relating to the alteration, through human intervention, of natural environmental systems" and enumerated nine factors determining in which category a dispute would fall.[36] These factors will further imply the choice of the adequate resolution mechanism. Cooper, in 1986, gave another definition of this kind, enlarging the categories to transnational disputes.[37] But as Romano stressed, the notion of environmental dispute has a changing nature. A rigorous definition would not be useful in a broader context.[38] Sands avoided defining the exact content of an environmental conflict by saying that it is useless to define it since parties will unlikely agree on characterising a dispute as environmental. For lack of anything better, Sands here preferred to talk about "disputes which have an environmental or natural resources component or which relate to that".[39]

It is important to note that there is no binding decision from an international court or tribunal which relates only to environmental law. All judicial decisions contain some environmental aspects as well as other aspects. That is why we need objective criteria to determine how to recognise an environmental dispute from other disputes.

The question of defining environmental disputes is intrinsically linked to the question of what international environmental law is. Because its sources are disparate, and can also contain elements of different areas of international law, disputes follow the same pattern. The matter is complicated further by the fact that in certain cases, states may have a political incentive to avoid classifying a dispute as environmental, as in the case

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[36] Bilder (n 24) 153–156.

[37] Catherine Cooper, 'The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms' (1986) 24 The Canadian Yearbook of International Law 247, 243.

[38] Cesare Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International 2000) 6.

[39] Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (n 23) 319.

of Slovakia in *the Gabcikovo-Nagymaros* dispute. Since parties disagree on the nature of the dispute, any provisional definition may be useless or inapplicable.

The definition of a dispute as environmental does not carry many consequences *per se*. Indeed, when parties to a dispute bring a claim to an international court or tribunal, they do not name the conflict beforehand. It might partly explain as well why the Special Chamber for Environmental Matters in the ICJ had never been used.

But there have been problems about the impact of international environmental rules on other areas of law, such as trade law or human rights law. In this case, whether the obligation breached determines the nature of the conflict or the determination of the factual situation is the key element in deciding the environmental nature of a dispute. It will have consequences on the scope of the dispute. For example, the WTO Panel in *Canada – Certain Measures affecting the Renewable Energy Generation Sector* did not qualify the dispute as related to the environment, rather as a "investment and trade dispute", yet the subject matter of the dispute – the domestic content requirements that certain generators of electricity utilizing solar photovoltaic and wind power technology – is obviously linked to the protection of the environment.[40] In this case, the parties' claims did not include any environmental aspects and legitimised the tribunal to reject arguments on the basis of environmental protection. Sands confirms this view by saying that "at the root of international environmental conflict lies the actual or perceived failure of a State to fulfil its international environmental obligations under customary law [..] or international treaty obligations".[41]

The status of such disputes arising under specific treaties that are not environmental remains ambiguous, and it is not necessary for the purpose of this thesis to resolve this uncertainty. The scope of this thesis indeed is limited to international courts and tribunals that can apply international rules directly related to the protection of the

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[40] *Canada - Certain Measures Affecting the Renewable Energy Generation Sector* Reports of the Panels, WT/DS412/R; WT/DS426/R, p. 31, par. 7.7.

[41] Philippe Sands, 'Enforcing Environmental Security' in Philippe Sands (ed), *Greening International Law* (Earthscan Publications Limited 1993) 52–53.

environment, excluding other rules that have a tangential relationship to the environment.

3.2 Interstate courts and tribunals

As said above, the research is focused primarily on interstate judicial bodies which directly apply international environmental legal rules. Indeed, a body of international rules relating to the environment has grown and can now be described as a field of international law. It includes all multilateral and bilateral agreements concluded until now concerned with any environmental aspect. It includes all multilateral environmental agreements, and any bilateral agreement establishing some environmental obligation to a state.

The application of such environmental rules requires certain procedural adaptations in order for international courts and tribunals to render a better judicial interpretation. The idea is to understand if and how the judicial institutions established on prevailing understandings of the traditional limits of international law can adapt to the specific changes required by environmental protection. The scope is therefore determined by the application by the courts and tribunals of the environmental rules themselves. Other courts like human rights courts, investment tribunals or the World Trade Organisation dispute settlement system have to deal with environmental law issues. While they are focusing on the integration of environmental regulations into their framework, this thesis is interested in the reaction of the institutions of interstate litigation which have to deal directly with international environmental law. In order to achieve this, other interstate tribunals will be analysed as a comparative tool.

The international legal system has witnessed a proliferation of international courts and tribunals,[42] but there are not many whose remit includes hearing cases based on international environmental rules. However, the existence of different international courts and tribunals still offers states different fora to bring their disputes to. There are courts of general jurisdiction or more restricted jurisdiction. Some can apply any

[42] See Cesare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 New York University Journal of International Law and Politics 709; Shane Spelliscy, 'The Proliferation of International Tribunals: A Chink in the Armor' (2001) 40 Columbia Journal of Transnational Law 143. Both articles are concerned with the implications of such proliferation.

international rules[43] or some can only apply a certain area of law (such as the ITLOS[44]). Indeed, the extent of the competences of the courts can vary according to some limits, namely to the "subject-matter (jurisdiction *ratione materiae*), person appearing (jurisdiction *ratione personae*), geographical scope (jurisdiction *ratione loci*), time (jurisdiction *ratione temporis*)."[45] In particular, the limitations of standing especially concerning the participants in a judicial procedure are of high importance in environmental matters. This question will be analysed in the second chapter, as it raises issues with substantial environmental rules in regard with standing. Despite this proliferation of international courts and tribunals, the fact is that the courts that are competent to hear cases based on international environmental law are fewer, precisely because of the limitations on the jurisdiction *ratione materiae*. Courts such as the WTO DSU, the ICC or the human rights courts cannot hear cases directly based on environmental rules because their jurisdiction is limited to specific areas (trade, criminal or human rights law). The remit of this thesis will consequently be limited to the courts that can apply directly international environmental law: the ICJ, the ITLOS and arbitration.

This thesis includes both permanent courts and arbitration, because it is the existence of certain powers and characteristics exercised through their contentious jurisdiction that makes an institution judicial, including arbitration. In order to decide whether the court or tribunal has jurisdiction, it must exercise the "Kompetenz-Kompetenz" either provided by a treaty or through its inherent powers.[46] The sources of their inherent powers can be explained differently, but all courts agree they are given some inherent powers.[47] The use of this Kompetenz-Kompetenz by the international courts and

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[43] Article 36 (1) ICJ Statute.

[44] Article 21 ITLOS Statute.

[45] Cesare Romano, 'International Organizations and the International Judicial Process: An Overview' in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, Inc 2002) 3.

[46] *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)* [1928] PCIJ, Series B, No 16 par. 200; *Nottebohm case* (Preliminary Objections) [1953] ICJ Rep 1953 p 111, par. 119–120.

[47] Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 British Yearbook of International Law 195, 223. The author explains that there are four different possible sources

tribunals themselves is a determinative element in establishing the judicial character of a certain court. Accordingly, both permanent courts and arbitration have judicial powers that are scrutinised in this research. Moreover, a large number of multilateral environmental agreements specially mention arbitration as a means to settle disputes, sometimes in conjunction with other fora such as the ICJ, sometimes as a compulsory means to settle them.[48]

4. Structure of the thesis

The broad argument developed in this thesis takes different forms. It is shaped in order to emphasise at each procedural step where the pitfalls are and how they can be tackled. The thesis is centred on the idea that international courts and tribunals have a role to play in the protection of the environment, and it seeks to define the contours of their role. Indeed, within the given scope of international adjudication, there are ways of interpretation, mechanisms and procedures that can be developed. These often prove helpful for enhancing environmental protection through traditional adjudication. Indeed, by analysing the most contentious procedural aspects of international litigation, this thesis will be able to assess the suitability of such litigation for environmental disputes. It will conclude that the procedural changes necessary to a more understanding judicial system can be done within the existing legal boundaries of current international courts and tribunals.

But before tackling each individual procedural pitfall, the thesis defines what roles international courts and tribunals can play in environmental disputes. Therefore, the first chapter considers the different functions of international courts and tribunals and how the specificities of environmental disputes affect those functions.

Once the roles of international litigation have been established, the thesis focuses on three main procedural steps at stake in environmental disputes. In the second chapter, the analysis concentrates on how the judicial procedures can be triggered (or the question 'how to get in'). In chapters three and four, it looks at the mechanisms and

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of inherent powers: 'the concept of "general principles of law"; the doctrine of implied powers; the identity of international courts as judicial bodies; and a functional justification'.

[48] See for example, article 32 of the OSPAR Convention.

procedural problems attached to the judicial bodies (or 'once you are in'). Finally, the fifth chapter focuses on the location of judicial bodies within the broader dispute settlement regime relevant for the application of international environmental law (or 'in/out relationships'). With these three broad elements, it is then possible to evaluate the role international courts and tribunals play, and to establish their limitations and advantages.

In particular, the second chapter concerns the rules on standing to access international adjudicatory bodies and how they can be interpreted in different ways: is there potential for broader applications, including the defence of public interests? Public interest litigation will be contextualised within the field of international environmental law. This body of rules will be defined as a multi-layered set of rules, layers that will be correlated with the structure of international litigation. On this basis, the implementation of international environmental law in judicial procedures will be analysed. Jurisprudence particularly shows that both other non-state actors and states can participate and contribute to the defence of public interests in interstate disputes. Given the centrality of global commons to international environmental law, this chapter deserves special emphasis. It focuses on the potential compatibility of the international judicial system as a traditionally state-centric system with developments in international environmental law, and offers an original interpretation of the ways to overcome the discrepancy with disputes over areas and resources beyond national jurisdiction and global environmental problems.

The third chapter scrutinises how facts are established in an environmental dispute. This task is of paramount importance for the good functioning and relevance of international dispute settlement. Complex environmental cases based on contradictory and controversial scientific evidence require more developed judicial procedures, but are the international courts and tribunals equipped for those? The uncertainty around the accuracy of scientific facts will be reviewed, examining the types of evidence that can be brought before international courts and the way these courts judge on the evidence.

Moreover, even though international courts and tribunals were not designed as a preventive mechanism at first – rather as a reactive system of dispute resolution, the fourth chapter of the thesis will demonstrate how provisional measures as a preventive

judicial mechanism can adjust this assumption. In the context of the current law on remedies as stated in the ILC Articles on State Responsibility, provisional measures of protection can fill an important gap.

Lastly, because of the existence of non-compliance procedures and judicial dispute settlement within most multilateral environmental treaties, the question of what kinds of relationships exist between the two procedures is highly significant. While there has not been a case where both procedures were triggered at the same time, conceptually, it is important to develop a model of how the relationship should be and what consequences are attached to each model. This will also reinforce both the role of international dispute settlement in environmental conflicts and the overall enforcement of international environmental obligations.

The analysis will be concluded by emphasising that the existing resources available to international courts and tribunals can be used and interpreted in a manner adequate and coherent with environmental disputes. The thesis indeed shows how certain developments necessary for environmental disputes have already been used in certain instances. Although the future use of international courts and tribunals cannot be predicted, this thesis argues that the procedural rules as they stand can be interpreted and used in a favourable way for judging environmental disputes in a coherent manner. Indeed, the opening of judicial litigation to non-state actors and the recognition of certain public interests in the current jurisprudence shows that international courts and tribunals are capable to evolve in this direction. The use of science in international litigation can also be adapted to the needs of environmental disputes. Similarly, the use of provisional measures in a compatible way with environmental disputes can be noticed, and therefore pushed further in the future, without the need of formal reform. Finally, the potential collaboration between non-compliance mechanisms and international courts and tribunals also enhances the judicial protection and adequacy of international courts and tribunals.

5. Methodology

The choice of methodology stems from the type of questions this research is asking. Indeed, because of the research is focused on *what* are the issues potentially preventing international courts and tribunals in applying environmental law and *how* international

courts and tribunals can use their judicial tools in order to accommodate specific demands of international environmental law, the methodology therefore can only be doctrinal. My theoretical approach does not aim at analysing the law as it should be through a particular lens – it rather analyses how the law is interpreted in a certain context. This research is based on a pragmatic approach. The focus is on the development of the law. Therefore, the objective of the thesis is to examine the development of the law and practice in a particular context. Such objective will be achieved by also focusing on good practices, even if they are a minority. Such good practices will be identified and promoted as practices that should be followed in the future.

1. THE FUNCTIONS OF INTERNATIONAL LITIGATION

This chapter seeks to explain the different functions of international adjudication when confronted with cases related to international environmental law. The fact that international courts and tribunals can serve different purposes exemplifies the pluralistic nature of adjudication. It is not limited to one task; rather it has to juggle multiple facets of its role. Indeed, international courts and tribunals have not only settled particular environmental disputes, but also developed a body of decisions that have helped to shape international environmental law.[49] This chapter will explore how they have done this.

As written in Article 38 of the ICJ Statute, the function of the Court is "to decide in accordance with international law such disputes as are submitted to it". This sentence summarises the essence of the judicial power and introduces the two main roles international courts and tribunals fulfil. They are meant to settle disputes in a particular manner: based on international law. Other functions lurk around international courts and tribunals: can they create new law? Can they use their authority to solve cases in the public interest? Can they enforce certain international rules? The exact extent of powers given to international judicial bodies is not as clear as often portrayed. Many different factors play a significant role in shaping the way international courts and tribunals will be used by litigants and the way courts themselves choose how to exercise their powers.[50]

Within this context, what can international litigation do? This chapter argues that international judicial bodies' roles can vary depending on different factors: the context in which they were given jurisdiction; the nature of the judicial institution itself; the domestic politics affecting the choice to use international litigation; the nature of the legal obligations to be implemented; the fact that international adjudication is part of the international legal system as a whole – and due to its particular position it will have to

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[49] Vaughan Lowe, 'The Function of Litigation in International Society' (2012) 61 International and Comparative Law Quarterly 209, 212–213.

[50] See in general: John Merrills, 'The Place of International Litigation in International Law' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014).

answer to broader public interests. These different factors will be analysed in light of the different functions performed by international courts and tribunals.

The existence of such varied factors affecting the judicial process and its aims is the reason why adjudication needs to be flexible.[51] There is no single appropriate answer for all environmental disputes and it is the judicial capacity of international courts and tribunals that allows them to bring different solutions according to different needs of each environmental dispute.

This chapter will review the different functions judicial bodies can perform, and highlight the specific challenges or factors that influence them in carrying out these functions in environmental cases. It firstly offers an account of what it means for international courts to give an authoritative determination of the legal disputes, focusing on both the identification of customary international law and the process of treaty interpretation by tribunals. It then investigates whether that leads towards a judicial law-making function. The chapter also analyses the dispute settlement function and its limits, as well as how public interests can be integrated in international litigation. Finally, it looks at the impact of domestic and international politics on the overall role of international courts and tribunals in an environmental context.

1.1 The legal context of international environmental disputes

International environmental law is a relatively young legal field, encompassing many different political and legal issues, which do not develop evenly. In addition, conventions are ratified at every level; globally, regionally and bilaterally. As a consequence, the content of similar obligations can vary between legal instruments. Some areas of protection are more developed for some states than for others.

At the global level, international environmental law tends to have a more diluted content due to the high degree of compromise required for the negotiation of multilateral environmental agreements. Indeed, it is important to bear in mind the consensual nature of most of the treaties related to the protection of the environment, such as the

[51] Robert Stein, 'The Settlement of Environmental Disputes: Towards a System of Flexible Dispute Settlement' (1985) 12 Syracuse Journal of International Law and Commerce 283, 284.

UNFCCC. It follows that multilateral treaties often contain ambiguities and uncertainties. Besides, treaties are not the only source of international environmental law. More and more *soft law* instruments are being used to develop further environmental principles, through various actors. *Soft law* can be found in a variety of instruments and is often the product of actions by international organisations and NGOs, as well as states. It encompasses weak treaty provisions, declarations following international conferences, recommendations taken by treaty bodies, and codes of conducts or standards, the common denominator between these varied instruments being that they are non-binding.[52] All these actions taken together might or might not create customary rules, a task often left for international courts to decide (see below 1.2.i).

Rules on environmental protection are also mixing with other fields of international law, such as investment law, trade law or human rights law. All these elements have an impact on how international courts can solve a dispute and also require a particular law-making function. In particular, this means that international courts and tribunals will be faced with legal questions about the relationships between these bodies of rules, such as the challenges of interpretation of specific non-environmental rules in the light of further environmental legal developments.[53] International courts and tribunals can offer nuance, affirm principles, and confirm trends that affect the whole field; they assure a dynamic response to change.

The nature of the environmental obligations under judicial scrutiny will also affect the success of the settlement of the dispute. Vague rules make it more difficult for international courts and tribunals to end a dispute (see below section 1.3.iii).

Consequently, the nature of international environmental rules will have different impacts on how international courts and tribunals perform their functions. These specificities

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[52] Catherine Redgwell, 'International Environmental Law' in Malcolm Evans (ed), *International Law* (Third Edition, OUP 2010) 693–696.

[53] For example, see Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 The European Journal of International Law 613.

will affect both how international courts and tribunals determine the law authoritatively, settle the dispute, and integrate public interests into the judicial procedure.

1.2 The authoritative determination of the law

The authoritative determination of the law is part and parcel of the dispute settlement function of any judicial body, but it is a distinct step towards the resolution of the dispute, which entails the performance of specific functions. Indeed, there is a difference between a court interpreting legal rules and applying them to a concrete case, although they often are exercised together: by applying rules to a certain case, an international tribunal has to first give an interpretation of those rules.[54] Although a judicial decision is created through the exercise of both functions, this section will only focus on the particular aspect of the determination of the law.

By defining the applicable law the different constitutive treaties imply that international courts and tribunals have the capacity to judge according to the law. A judicial institution must have the power to declare what the law is to be called "judicial". It assumes that the judges know the law and that they can determine it.[55] As an autonomous body, although tied to the subject matter defined by the parties to the dispute, a judicial court or tribunal is not bound by the parties' arguments and can assess the state of the law itself.[56] Indeed, the ICJ reinforced a pre-existing principle in the *Arrest Warrant* case whereby:

> "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions [...]. While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning".[57]

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[54] Stephan Wittich, 'The Judicial Functions of the International Court of Justice' in Isabelle Buffard and others (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Brill/Nijhoff 2008) 991–992.

[55] Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'A Propos Du Caractère Juridictionnel de La Procédure de Non-Respect Du Protocole de Kyoto' in Sandrine Maljean-Dubois (ed), *Changements climatiques: les enjeux du contrôle international* (Centre d'études et de recherches internationales et communautaires, Université Pau-Cézanne 2007) 85–86.

[56] Dinah Shelton, 'Form, Function, and the Powers of International Courts' (2009) 9 Chicago Journal of International Law 537, 543.

[57] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits) [2002] ICJ Rep 2002, p 3, par. 43.

International courts and tribunals will therefore base their reasoning on international law, which means that they will use the different sources of international law to formulate their decisions as displayed in Article 38(1) of the ICJ Statute, including treaty rules, customary rules and general principles. Regarding international environmental law, they can be summarised as followed: statements issued by international conferences such as the Rio Declaration concluded in 1992; different governmental policy statements; many non-binding instruments containing recommended standards, such as the guidelines and procedures adopted by the COP/MOP of different multilateral environmental treaties; global, regional or bilateral treaties; international customs. Moreover, international law as understood in Article 38(1) of the ICJ Statute includes international judicial decisions, even as a subsidiary means.[58] Judicial decisions indeed are part of the body of international environmental law, as they represent authoritative interpretation of the law, and will be used as such throughout the body of existing international environmental rules. Through the settlement of specific cases, the various judicial bodies have clarified and developed both treaty obligations and customary obligations related to environmental protection.[59] This is an important feature of international courts and tribunals that must be emphasised, representing one of the strengths of international courts and tribunals instead of a weakness.

Judicial bodies have always had to fill existing gaps in the law, and this broader function is to be understood in this context in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out a new direction.[60] The following two sections will focus primarily on the role of international courts in identifying customary international rules and then their roles in relation to treaty disputes.

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[58] See Thomas A Mensah, 'Using Judicial Bodies for the Implementation and Enforcement of International Environmental Law' in Isabelle Buffard and others (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Brill/Nijhoff 2008) 798–799; Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Third Edition, CUP 2012) 15–18.

[59] See Stephens, *International Courts and Environmental Protection* (n 14) for a detailed analysis of the legal developments by the international judiciary.

[60] Mohamed Shahabuddeen, *Precedent in the World Court* (CUP 2007) 75.

i. Identification of customary international law

The exact content and process of creation of international custom occupies the centre of the international legal scholarship,[61] yet still remains to be agreed on unanimously. The judges illustrated this in the *Iron Rhine* arbitration through the assertion that "there is considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law."[62]

This section highlights the important role of international courts in the identification of customary rules in relation to international environmental law, a process that requires the courts and tribunals to adapt to the "new" models of customary law-making. Indeed, international environmental law consists of different types of rules, and this must be reflected in the judicial practice.

Generally, previous cases have shown the willingness of the ICJ to recognise some work of the ILC as representing customary rules;[63] UNGA resolutions and declarations have also been identified as playing a role in the identification of custom,[64] as well as multilateral treaties, especially when they are reached by consensus.[65]

In particular, the ICJ recognised in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion that Principle 21 of the Stockholm Declaration, reproduced in Principle 2 of the Rio Declaration were of customary nature, as "part of the corpus of international law relating to the environment".[66] This was further confirmed in the *Iron Rhine* arbitration where the tribunal stated that the duty to prevent

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[61] Seminal works include Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007); Hugh Thirlway, *The Sources of International Law* (OUP 2014); Jan Klabbers, *International Law* (CUP 2013); Martii Koskenniemi, *Sources of International Law* (Ashgate 2000).

[62] *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (Merits) [2005] Reports of International Arbitral Awards, Vol XXVII pp35-125, par. 58.

[63] See *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [25 September 1997] ICJ Rep 1997 p 7, par. 50-51.

[64] Birnie, Boyle and Redgwell (n 21) 31–33.

[65] ibid 23–25 The Tunisia/Libya Continental Shelf case, ICJ Rep (1982), par. 27 especially mentions the role of treaties.

[66] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, par. 29.

significant harm to the environment "has now become a principle of general international law".[67] By doing so, the tribunal clearly develops the concept under scrutiny and confirms its legal status. Moreover, the achievement of the recognition of an international court of a concept as legal is a reflection of the conduct of many different actors.

Another example of the judicial identification of a customary environmental rule is found in the now famous *Pulp Mills* case, stating that

> "the obligation to protect and preserve, under Article 41 *(a)* of the Statute [of the River Uruguay], has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[68]

What is most interesting in this case is that in the analysis of the existence of such an obligation to make an environmental impact assessment, the Court mentioned different texts, namely the ESPOO Convention, the UNEP Goals and Principles of Environmental Impact Assessment and the ILC 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities.[69] Although the ESPOO Convention and the ILC draft articles were excluded from the court's reasoning, the principle 5 of the UNEP Goals and Principles was used by the court as a tool to identify a customary rule on environmental impact assessment. The non-binding nature of the document did not prevent the court from using it directly.[70] This is a great example of the court acknowledging and integrating *soft law* instruments as part of the formation of customary law.

In the *Certain Activities* case, the ICJ reinforced its findings in the *Pulp Mills* case and added that the obligation to exercise due diligence to avoid causing significant

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[67] *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (n 62), par. 59.

[68] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28), par. 204.

[69] ibid, par. 203.

[70] ibid, par. 205.

transboundary harm is generally applicable to all activities undertaken by States, and not only to industrial activities:

> Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.[71]

Another area where international courts and tribunals have offered some positive insights is related to sustainable development. Several decisions have mentioned the role of sustainable development in international law, although not as a customary rule. But the fact such an extended web of cases using the concept of sustainable development exists is a great contribution to its evolution. Important decisions include the *Gabcikovo-Nagymaros* case, the *Pulp Mills* case, the *Iron Rhine* arbitration,[72] and the Seabed Disputes Chamber's 2011 Advisory Opinion.[73]

By using *soft law* instruments in their decisions, judicial bodies give them normative force. They can identify what is legal in a *soft law* instrument. Indeed, in international environmental law in particular, there is a "diffusion of participation in the development of interstitial norms",[74] as the development of the concept of sustainable development shows. All sorts of actors, from scientists to political organs have framed the concept little by little.[75] The work of these actors is paid back when an international court recognises a concept as part of international law.

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[71] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (n 32), par. 104.

[72] Birnie, Boyle and Redgwell (n 21) 125–127.

[73] Duncan French, 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber's 2011 Advisory Opinion' (2011) 26 The International Journal of Marine and Coastal Law 525, 534–537.

[74] Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2001) 220.

[75] ibid.

ii. Treaty interpretation and application

International courts and tribunals are particularly relevant in the interpretation and application of international environmental agreements. Although it rarely constitutes a compulsory method of resolving disputes that arise in the context of those agreements, judicial dispute settlement is mentioned as one of the main ways to do so. Importantly, *ad hoc* arbitration is often a preferred judicial forum within multilateral environmental agreements,[76] the alternative being that states can choose between the ICJ and arbitration.[77] Cases arising under the UNCLOS will be heard either by an *ad hoc*/special arbitral tribunal or by the ITLOS, or by the ICJ.[78]

Moreover, many – if not all – recent cases involving aspects of international environmental law have been based on specific treaties. For instance, the *Pulp Mills* case was brought to the court under the bilateral Statute of the River Uruguay; the *Kishenganga* Arbitration was brought under the Indus Waters Treaty between India and Pakistan; the *Whaling* case under the multilateral ICRW. The UNCLOS has also been a source of many environmental disputes (such as the *Land Reclamation* case,[79] the *Chagos Marine Protected Area* arbitration,[80] the *MOX Plant* case,[81] and the *South China Sea* arbitration[82]).

Specific, treaty-related dispute settlement clauses exist for the sole purpose of solving disputes arising under the particular treaties. They aim to make the treaty function well through interpretation, application, and execution. In doing so they take into account

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[76] Article XVIII(2) of CITES; article 32(1) and (2) of the OSPAR Convention.

[77] Article 14(2) of the UNFCCC; article 11(3) of the Vienna Convention for the Protection of the Ozone Layer.

[78] Article 287 of the UNCLOS. See Treves (n 35) 294–298, for a display of the different jurisdiction clauses that exist in relation with international environmental obligations.

[79] *Case concerning Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore)* (n 30).

[80] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (n 33).

[81] *The MOX Plant Case (Ireland v United Kingdom)* (Order N° 3) 24 June 2003, Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea; *The MOX Plant Case (Ireland v United Kingdom) No 10* ITLOS (Provisional Measures, Order of 3 December 2001).

[82] *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (n 34).

the purposes of the treaty in question, giving a limited jurisdiction to the specific judicial bodies mentioned.

In the context of the interpretation and application of treaty rules, judicial decisions have a special role: they give coherence to the treaty system. Courts also have a role to play in the preservation of the integrity of the treaty.[83] The judicial machinery is used as an external independent reviewer deciding upon internal questions raised within the application of the treaty. In this case scenario, having an identified body to review the interpretation and application of the treaty guarantees its integrity against diverse and opposite views.[84] A good example is given by the UN Convention on the Law of the Sea. This treaty is special because it was negotiated as a "package deal", as an integral whole. It makes the protection of the convention's integrity even more important than in any treaty. Therefore, they introduced tools to preserve its integrity. First, the possibility of making reservations to the convention is prohibited (Article 309 UNCLOS). Second, a compulsory dispute settlement clause is introduced (Article 286 UNCLOS).[85] Such a compulsory mechanism has been established with the aim of offering a collective authoritative body to interpret the Convention and therefore stabilise it. This compulsory jurisdiction affects the general role that the international tribunal will take. By conferring such jurisdiction, the treaty confers the judiciary the task of looking after it by offering one unique forum for a homogenous application of the treaty.[86]

Moreover, especially since the multiplication of treaties concerning the environment, international courts and tribunals are a cornerstone for a more harmonious international environmental legal framework.[87] International litigation can have an impact on the fragmentation of international law, especially in the context of international environmental law. Because of the variety of its sources and the importance of non-

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[83] Alan Boyle, 'Settlement of Disputes Relating to the Law of the Sea and the Environment' in Kalliopi Koufa (ed), *International Justice*, vol XXVI (Sakkoulas Publications 1997) 304–305.

[84] ibid 303–305.

[85] ibid 320.

[86] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005) 21 and 25.

[87] Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 447.

binding developments, international courts are an important forum where all these sources can come together. Indeed, global, regional and bilateral environmental treaties are often interpreted with the help of non-binding instruments. This is why the ILC Report on Fragmentation emphasised the role of a systemic integration as a tool for harmonisation.[88] In this context, courts have resorted to extraneous rules in interpreting treaties.[89] For example, in the *Pulp Mills* case, the identification of a new customary rule developed after the conclusion of the River Uruguay Treaty made it possible to update the meaning of the treaty to the current legal developments (see section above 1.2.i).

Such coherence given by judicial decision through holistic and updated interpretations of the existing international environmental legal framework is reinforced by the acceptance by an individual tribunal of the other tribunals' jurisprudence. The fact that many judicial institutions flourished rapidly and have been quite active (some more than others) not only proves their influence on the development of legal concepts but also that there is a level of interaction between them. For example, the Seabed Disputes Chamber of the ITLOS referred to the ICJ *Pulp Mills* case several times as the law at the time.[90] The tribunal in the *Iron Rhine* arbitration also quoted the ICJ *Gabcikovo-Nagymaros* case in relation to the concept of sustainable development.[91] The fact that they are different jurisdictions did not prevent them from acknowledging the relevant developments made by other tribunals. These interactions not only stem from Article 38 (1)(d) of the ICJ Statute and the understanding that judicial decisions have an impact on the formation of international law, but also show the willingness of each court not to

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[88] Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) A/CN.4/L.682 206–243.

[89] See Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 International and Comparative Law Quarterly 281.

[90] For example, the ITLOS says about paragraph 204 of the Pulp Mills case that: 'Although aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations', *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* Advisory Opinion, Seabed Disputes Chamber of the ITLOS (No. 17) 1 February 2011, par. 148.

[91] *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (n 62), par. 59.

fragment the legal system. They prove the existence of cross-fertilisation among international tribunals.[92]

In sum, coherence within a treaty system and systemic coherence between all the relevant rules related to a specific problem are two sides of one coin: articles 31-33 of the VCLT aim at achieving both.[93] The role of the courts in deciding environmental cases is affected precisely by how they understand what treaty interpretation means. For example, the fact that "old" treaties have to be interpreted in light of current state of the law and include the later developments (evolutionary approach) is a vague principle that can be applied in many ways.[94] Indeed, it can be about the applicability of a certain treaty to modern use – in order to create coherence within the treaty system – or about the need for a renewed meaning of a treaty rule in light of new developments in other part of international law, in order to create systemic coherence.

The jurisdiction *ratione materiae* of the particular tribunal also affects how it will understand and shape its mandate in interpreting and applying the law to the dispute: "Specific treaty-based tribunals will validly pursue a judicial policy that stresses the general objectives of the constituent treaty and the regime created by it".[95] In this respect, the ICJ's general jurisdiction means the court does not have to conform to a specific institutional setting. Its interpretation is not bound to a single treaty, such as the ITLOS.

The process itself of interpreting treaties, broadly regulated by articles 31 to 33 of the VCLT, has occupied scholars over the years.[96] In particular, how international courts

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[92] James Harrison, 'Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental Law' (2013) 25 Journal of Environmental Law 501, 513.

[93] Eirik Bjorge, 'The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation?' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015) 529.

[94] See Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 'Introduction'.

[95] Wittich (n 54) 987.

[96] See for example, Charles de Visscher, *Problèmes D'interprétation Judiciaire et Droit International Public* (A Pedone 1963); Jan Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 Nordic Journal of International Law 405; Shabtai Rosenne, 'Conceptualism as a Guide to Treaty Interpretation', *International Law at the Time of its Codification, Essays in Honour of Roberto Ago*, vol I (Giuffrè 1987).

and tribunals will perform their interpretative function has been described as paradoxical: the paradox lies in the fact that there is

> "*more demand* for treaty interpretation, given ambiguity and rigidity of treaties, yet *less supply* of treaty interpretation, given the reluctance of states and (more often than not) tribunals to deal judicially with highly contested questions between sovereign states (sensitivity of treaties)."[97]

The need for judicial bodies to clarify and interpret treaties clashes with the will of states to be in control of their own obligations. And the role of international courts and tribunals takes place within this context. They are themselves aware of this tension and need to balance between how innovative they are and how the states will receive their decisions.

The performance of an international tribunal in relation to a treaty dispute will also depend on the nature of the rules invoked in the judicial procedure and how precise or vague they are. For example, the UNFCCC is almost impossible to breach since it is an umbrella Convention and its rules are meant to be broad and vague. The fact that the rules themselves are not precise affects how international courts and tribunals function.

Overall, by interpreting international law, especially environmental treaties, bilateral or multilateral, the statements made by courts have a broad impact on the international community. As Lowe said, "litigation is there to strengthen the international legal system as such. It reasserts and strengthens the rules and principles applied by the tribunal".[98]

iii. Between development of the law and law-making

How far can international tribunals go in developing and filling the gaps? Where is the line beyond which a tribunal oversteps its judicial function?

There is a "golden rule" when it comes to judicial law-making. The principle according to which international courts and tribunals cannot legislate is well established in the jurisprudence. The ICJ affirmed in the *Legality of the Threat or Use of Nuclear*

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[97] Pauwelyn and Elsig (n 87) 448.

[98] Lowe, 'The Function of Litigation in International Society' (n 49) 214.

Weapons Advisory Opinion that "it is clear that the Court cannot legislate".[99] In addition, the ICJ said in the *Interpretation of the Peace Treaties* Advisory Opinion that "it is the duty of the Court to interpret the Treaties, not to revise them".[100] It also said in the *Armed Activities* case that "the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that."[101] This is the reason why the ICJ has rejected some arguments put forward by the parties over the years, as it did in the *South West Africa* case: "the whole necessity argument appears, in the final analysis, to be based on considerations of an extra-legal character, the product of a process of after-knowledge".[102] This shows understanding from the Court that it will not expand its role to that of a lawmaker. The authoritative determination of the law is a broader function than the settlement of a dispute, but the judicial power is clearly distinct from the legislative power. This latter power is left for the states and any other institutions states confer the powers to do so, but not judicial institutions.

Nonetheless, international courts and tribunals have a role to play in the development of international law. It is undeniable to acknowledge the role of litigation in making international law, especially in the field of international environmental law. Indeed, the judge may have no choice but to make law. Gaps in the law are inevitable. Judicial law-making is therefore a reality. However, a distinction can be drawn between general law-making in the legislative sense and creating a rule applicable to the parties to a particular dispute.[103] A court's law-making powers must stem from the case in hand; they are shaped by the specific circumstances under dispute and by the parties' requests. They cannot be conceived *a priori*.[104] By doing that, we can see that while courts do tweak the

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[99] *Legality of the Threat or Use of Nuclear Weapons* (n 66), par. 18.

[100] *Interpretation of Peace Treaties between Bulgaria, Hungary and Romania* (Advisory Opinion, Second Phase) [1950] ICJ Rep 1950, p 221, p. 229.

[101] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 2005, p 168, par. 26.

[102] *South West Africa, Second Phase* (Merits) [1966] ICJ Rep 1966, p 6, par. 89.

[103] Tom Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2004) 45 Virginia Journal of International Law 631, 635.

[104] Sir Robert Jennings, 'The Judicial Function and the Rule of Law in International Relations', *International Law at the Time of its Codification, Essays in Honour of Roberto Ago*, vol III (Giuffrè 1987) 141–145.

rules, they do not make new law. In this context, advisory opinions, although non-binding, can be very relevant.[105] The Seabed Disputes Chamber of the ITLOS for instance explained why the advisory jurisdiction exists:

> "[i]n order to exercise its functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber. In the exercise of that jurisdiction, the Chamber is part of the system in which the Authority's organs operate, but its task within that system is to act as an independent and impartial body."[106]

When the Court pronounces an advisory opinion, it effectively "makes law for all member (and non-member states)".[107] In the field of international environmental law, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea was asked to precisely clarify "the legal responsibilities and obligations of State Parties to the Convention with respect to the sponsorship of activities in the Area". By completing this task, the Chamber developed key concepts and gave an understanding which goes beyond the mere question requested by the Council of the International Seabed Authority (ISA). French highlights the importance of the decision outside the scope of the delimited request therefore defining and giving some teeth to some key concepts, all regrouped under the concept of sustainable development.[108] This opinion is a good example of the proactive role of an international court in developing environmental concepts. For instance, the Chamber notes that:

> "Judicial bodies may not perform functions that are not in keeping with their judicial character. Nonetheless, without encroaching on the policy choices a sponsoring State may make, the Chamber deems it appropriate to indicate some general considerations that a sponsoring State may find useful in its choice of

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[105] Rüdiger Wolfrum, 'Panel II: Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?*, vol 239 (Springer 2013) 43–44.

[106] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 90), par. 26.

[107] Boyle and Chinkin (n 61) 296.

[108] French, 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber's 2011 Advisory Opinion' (n 73) 565–657.

measures under articles 139, paragraph 2, 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention".[109]

However, controversies exist in relation to the limits of this law-making power attributed to international courts and tribunals. Distinctions between "authoritative determinations of legal questions" and "judicial activism" have arisen where judicial activism was considered as a step too far, going beyond the judicial function of international adjudication.[110] In the same decision, the Seabed Disputes Chamber specifically gives policy advice to the ISA in relation to the creation of a trust fund, which could fill the gap in liability previously identified.[111] The legal incentive for the Seabed Dispute Chamber to do so is article 235 (3) UNCLOS, which affirms that "[...] States shall cooperate in ... the development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds". The Chamber also highlights that article 304 UNCLOS expressly foresees the development of "further rules regarding responsibility and liability under international law".[112] Whether or not these suggestions made by the tribunal extend beyond the realm of its judicial powers is a contentious issue.

Given the scope of the questions asked to the Chamber and the purpose of the advisory jurisdiction, it can be argued this statement does not exceed the judicial powers of the Chamber, yet occupies a position at the very edge of its judicial powers. It was indeed requested to define "the extent of liability of a State Party for any failure to comply with the provisions of the Convention by an entity whom it has sponsored".[113] In answering this question, the tribunal can only recognise a gap in the existing legal framework, which it does not try to fill itself. It merely mentions the possibilities offered by the convention

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[109] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 90), par. 227.

[110] See Hugh Thirlway, 'Judicial Activism and the International Court of Justice' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum: Judge Shigeru Oda*, vol 1 (Kluwer Law International 2002) for a complete analysis.

[111] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 90), par. 205.

[112] ibid, par. 211.

[113] ibid, par. 1, question 2.

itself. Moreover, these policy suggestions are a reflection of the existing legal rules, not a new addition to the law.

The *Bering Sea Fur Seal* arbitration is a special case where the parties to the dispute specifically asked the tribunal to "determine what concurrent Regulations, outside the jurisdictional limits of the respective Governments, are necessary, and over what waters such Regulations should extend".[114] The arbitrators adopted a series of articles that should apply to the waters in question in the future. This process is exceptional, but was expressly asked and agreed on by the parties since the beginning of the judicial procedure.[115] It demonstrates how the will of the parties can affect the role of international courts and tribunals.

However, some dangers in relation to judicial activism must be underlined. The question of the democratic foundation of law-making in a broad sense by the judiciary is relevant in this debate. Scholars distinguish between "surrogate law-making" and "independent law-making", where the former seems inappropriate and the latter seems to comply the most with democratic principles. The difference between the two lies in the fact that courts and tribunals should not be influenced by or dependent on powerful states using them in their own interest.[116] Indeed, it is only by making sure that international courts and tribunals keep their independence from states' interests that their law-making capacities are guaranteed.

Another counter-argument to the view that judicial law-making should exist is about the transfer of powers. Some scholars criticise the courts' judicial activism and say that law-making through traditional sources of law has been transferred to decision-making by courts.[117] International courts and tribunals might be used as instruments for achieving other aims. Furthermore, a judicial answer might not be the best option in hand. There

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[114] Article VII of the Treaty between Great Britain and the United States of America relating to the Behring's Sea, Signed at Washington, February 29 and April 18, 1892, Ratifications exchanged at London, May 7, 1892.

[115] For a detailed explanation of the impact of the decision, see Sands and Peel (n 58) 399–400.

[116] Eyal Benvenisti and George W Downs, 'Prospects for the Increased Independence of International Tribunals' (2011) 12 German Law Journal 1057, 1059.

[117] Ole W Pedersen, 'An International Environmental Court and International Legalism' (2012) 24 Journal of Environmental Law 547.

can be many flaws to the system. [118] Judges can overcome their power and render a decision legally unjustified.[119] It can happen either when they are considered as lacking deference to the lawmakers or when their conducts are not considered as following what the judiciary should do.[120]

As an example of this tension, in the *Nuclear Tests II* case, the limits of the judicial powers of the Court were questioned. New Zealand asked to re-open the 1974 case against France's nuclear testing. France, however, had withdrawn its consent to compulsory jurisdiction of the ICJ. Although it was decided to dismiss the case, few judges dissented and argued the Court should have taken a more proactive approach. In particular, Judge Palmer summarised the tension as follows:

> "In this case the Court had an opportunity to make a contribution to one of the most critical environmental issues of our time. It has rejected the opportunity for technical legal reasons which could in my opinion have been decided the other way, fully consonant with proper legal reasoning. It is true that much of the jurisdiction of this Court rests upon the consent of States. It is true that France has withdrawn the consent that allowed the 1974 case to be heard. That is not an adequate reason to refrain from re-opening the case, a possibility that the Judgment in 1974 expressly contemplated. The case is one the Court had the power to decide then; it has the power to decide it now. But the Court refuses to decide it."[121]

Moreover, he sustained on the basis of Lauterpacht and Fitzmaurice's theories that the courts are here to promote and generally develop international law, because on the one hand the questions asked are of a greater interest of the international community and global environment (based on a sociological approach) and on the other hand the role of international courts is to "advance human purposes".[122]

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[118] See Sterling Harwood, *Judicial Activism. A Restrained Defense* (Austin & Winfield 1996).

[119] Robert Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power' in Thomas Cottier, Pedros C Mavroidis and Patrick Blatter (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press 2003) 35.

[120] Fuad Zarbiyev, 'Judicial Activism in International Law—A Conceptual Framework for Analysis' (2012) 3 Journal of International Dispute Settlement 247, 250.

[121] Dissenting Opinion of Judge ad hoc Geoffrey Palmer, *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France)* (Provisional Measures) [1995] ICJ Rep 1995 p 288, par. 117.

[122] Dissenting Opinion of Judge ad hoc Geoffrey Palmer, ibid, par. 103.

After understanding what international courts and tribunals can do, it is important to know why they can do it. What makes international courts entitled to fill the gaps left by the legislative process? On the one hand, article 38 of the ICJ Statute says that judicial decisions are only "subsidiary means for the determination of rules of law", which means that as such, judicial decisions are not part of the formal sources of law. On the other hand, the decisions made by international courts and tribunals are persuasive, especially when the jurisprudence is constant. From the court's perspective, it is clear that judges want to reach a broader impact on the international community as a result of the fact that they can write general and abstract statements (*obiter dicta*).[123] Lauterpacht acknowledges this function, saying: "it is proper to search not only for the law behind the cases decided by the Court, but also for the wider legal principle behind the legal rules authoritatively laid down by it".[124] It is also true from the actors' perspective. They expect courts to deliver their judgements according to the past decisions. They "develop their expectations along generalisations based on elements of the decision".[125]

Several scholars have analysed why international courts and tribunals have the potential to make law. Von Bogdandy and Venzke note that:

> "Robert Brandom [...], has shown that every decision concerning the use or, which is the same, interpretation of a concept contributes to the making of its content. The discretionary as well as creative element in the application of the law makes the law. He refines this position by suggesting that this moment of volition is tamed by the fact that judges are tied to past practices by the prospective reception of their claims. Pragmatism does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future (footnotes omitted)."[126]

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[123] 'The term [ratio decidendi] may be taken generally to mean "any rule of law expressedly or impliedly treated by the judge as a necessary step in reaching his conclusion"; theoretically, anything is obiter.' See Shahabuddeen (n 60) 152–164.

[124] Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 62.

[125] Armin von Bogdandy and Ingo Venzke, 'Panel IV: International Courts as Lawmakers' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?*, vol 239 (Springer 2013) 170.

[126] ibid 168.

This triggers the question of a systemic precedential effect influencing all states subjects to a tribunal's jurisdiction. What weight is given to precedents? The WTO for instance is quite clear on the question in its decision on *Japan - Taxes on Alcoholic Beverages:*

> "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[30]
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> [30]It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible."[127]

As de Brabandere summed up, "[n]o precedential value is attached to judicial and arbitral decisions in international law and the case law of the ICJ and ITLOS has unambiguously confirmed the absence of any form of *stare decisis* in international law."[128]

But the system is made so that judgments contribute to building a body of international jurisprudence and to norm-developing. Lauterpacht said that "judicial law-making is a permanent feature of administration of justice in every society."[129] In sum, international courts and tribunals have contributed to the clarification of certain environmental obligations, customary or treaty-based. Although their role is very limited in the development of new environmental practices, judicial decisions have consolidated, updated and integrated certain environmental rules.

iv. Factors affecting the legal development function

There are different views on the relationship between judges on the one hand and the existing legislation on the other. The notion that judicial bodies will give substance to existing rules on investment protection was a key reason for the creation of the ICSID.

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[127] *Japan – Taxes on Alcoholic Beverages* (AB-1996-2), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996), p. 14.

[128] Eric de Brabandere, 'The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea' (2016) 15 The Law and Practice of International Courts and Tribunals 24, 55.

[129] Lauterpacht (n 124) 155.

Indeed, the idea of "procedure before substance" was a driving force in the conception of the ICSID. It was argued that "the substance, i.e. the law of investment protection, would follow in the practice of adjudication".[130] The consequence is that the whole regime of investment law will be infused by this approach. International tribunals might then experience more freedom to use their judicial powers to expand on the law.

This shows that different jurisdictions might have different incentives to act in certain ways. A distinction can be made between permanent institutions and *ad hoc* tribunals. In the latter case, the tension is less visible since there is no possibility of a future similar case arising under their jurisdiction – the tribunal dissolves automatically. Moreover, because the state parties choose the arbitrators themselves, they are not as legitimated as judges on permanent courts, who are elected collegially. There is nonetheless a caveat inasmuch the arbitrators themselves can influence the outcome of the arbitration. In permanent courts, although the balance between the best outcome for the parties and the best outcome for the broader international community is harder to find, they are expected to protect other interests beyond the ones at stake in the case.[131]

Currently there is a move towards the legalisation of international institutions, including international courts and tribunals, but not limited to judicialisation. It also includes the work of the other actors on the international scene at every step from the creation of new rules to their implementation. In particular, the process through which norms are created impacts the way in which international courts and tribunals come to a decision. Indeed, the precision of the rule in question, and the degree of obligation contained in it, are factors that have to be taken into account in assessing the roles of international courts and tribunals in an environmental context.[132]

For example, the *Southern Bluefin Tuna* case shows the correlation between the substantive law and the role of the tribunal. As the subject matter – the management of tuna stocks – is proceduralised without a substantial agreement among the parties, it leaves the tribunal in an awkward position. Should the tribunal leave it to the parties to

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[130] von Bogdandy and Venzke (n 125) 164.

[131] Gleider I Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 5.

[132] Goldstein, Kahler, Keohane and Slaughter, *Introduction: Legalization and World Politics*, 390.

decide on the substantive obligations, taking up the role of a conciliator and advising the parties to negotiate further? The ITLOS, in its provisional measures award, follows this path in requiring the states to negotiate further.[133] It can, however, be argued that since the parties to the CCSBT could not agree on substantive management of stocks, they delegated the work to the Commission – the political branch of the CCSBT's proceduralisation process – as well as to the ITLOS (the legal branch of the CCSBT's proceduralisation process). This delegation can then allow the ITLOS to have a more proactive role, acknowledging that agreement on some substantive issues was not possible, but agreeing on a judicial resolution of the potential conflicts.

However, the vagueness of the rules and their potential lack of content has been seen as a problem for international litigation. Sands clearly states that the compromised character of many international environmental agreements poses a problem for international courts as they do not want to overstep their judicial competences and be blamed for illegitimately legislating.[134] The *Gabcikovo-Nagymaros* case exemplifies perfectly this dilemma as the bilateral treaty's provisions at the source of the dispute were not clear. Consequently, the Court avoided clarifying the meaning of the treaty and instead decided that the parties should renegotiate instead.[135]

Another example can be taken from the *Icelandic Fisheries* case, where the Court's conclusion was not providing the parties with a solution. Indeed, the parties wanted the Court to interpret a customary international rule, which was not clear enough and not widely accepted. Judicial settlement is sometimes the wrong forum to address an issue where rules are too imprecise.[136] Indeed, the dispute finally ended when states started to

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[133] Tim Stephens, 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 International Journal of Marine and Coastal Law 177, 189.

[134] Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (n 23) 314–315.

[135] The Court 'finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty'. *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (n 63), par. 155(2)(B).

[136] Boyle, 'Settlement of Disputes Relating to the Law of the Sea and the Environment' (n 83) 314–315.

draft the EEZ principle as a legal principle, which was the appropriate solution in this case.

Moreover, it has been argued, as a corollary of the view that legal standards can be relatively indeterminate, the personality of the judges matters in the decision-making process.[137] The impact of both the political context and the particular judges on the panel are not negligible and must be acknowledged. Whether the vagueness of the rule invoked will have a positive or negative impact on the court is not consistent.

1.3 The dispute settlement function

The role of an international tribunal as a dispute settler is uncontested, yet the exact meaning of the "settlement of a dispute" has been subject to controversies. Although the notion is vague and open on purpose, leaving the decision on how to perform the task open to the tribunal in each case, it is constrained within the boundaries of the constitutive texts and dependant on other factors. What is certain is that an international tribunal will pronounce a legally-binding decision that the parties undertake to respect, with the purpose of solving the conflict brought by the parties. It acts as an impartial third party decision-maker. The dispute is therefore individualised and based on rules consented by the states.

In general, this function is seen as retrospective because the tribunal decides on "who was right and who was wrong in doing whatever was done".[138] It is also described as private, since the tribunal is interested mainly in settling the dispute between the parties, without considering other external elements.[139]

i. Contours of the notion of dispute settlement

It is clear that every international tribunal has a specific mandate to settle a dispute, but this mandate is not formulated in the same terms. Each court or tribunal does not

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[137] Martii Koskenniemi, 'The Silence of Law/the Voice of Justice' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International law, the International Court of Justice and nuclear weapons* (CUP 1999) 507; Thomas Franck, *Fairness in International Law and Institutions* (OUP 1998) 320.

[138] Lowe, 'The Function of Litigation in International Society' (n 49) 212.

[139] ibid 213.

exercise the powers given by their constitutive treaty in the same fashion.[140] The understanding of what they mean as dispute settlers varies according to how the constitutive treaties framed their mandate. For instance, for the ICJ or the ITLOS, the function of settling a particular dispute, as emphasised by Article 36(3) of the UN Charter for the ICJ, or by Annex VI of the LOS Convention for the ITLOS, it seems that the emphasis is on the power to end legal disputes arising between states. In the case of the WTO as well, the article 3(4) of the DSU confirms that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements". This article illustrates the importance of the framework within which the DSU operates, indicating an approach to dispute settlement that takes into account more contextual information. A substantial difference exists: before stating that the DSB should aim at settling the dispute between the parties, it first emphasises its role of "providing security and predictability to the multilateral trading system"[141].

By contrast, the settlement of the dispute is not always the first function of an international tribunal. Article 19 of the ECHR, for example, states that "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights". Its preponderant function is therefore more oriented towards the general compliance of states regarding human rights through individuals' complaints against their state. It is therefore impossible to understand the notion of "dispute settlement" in the same way for the ICJ and the ECtHR.[142]

However, two elements are necessary to all jurisdictions in order for a dispute to be justiciable in front of an international court or tribunal. First a dispute must exist. Indeed, the use of international adjudication is subject to the precondition of the existence of a

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[140] See Cesare Romano, 'The United States and International Courts: Getting the Cost-Benefit Analysis Right' in Cesare Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (CUP 2009) 424.

[141] Article 3 (2) DSU.

[142] Wittich (n 54) 988. In this article, the author shows how the meaning of the judicial function of international courts and tribunals should be distinguished according to the specific jurisdiction. Each jurisdiction's judicial function differs and cannot be grouped under one single banner.

dispute. The *Interpretation of Peace Treaties* case affirmed that "[w]hether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence."[143] Article 53 of the ICJ Statute confirms this position, as it allows the court to proceed even if one party does not participate in the proceedings. The Court further confirmed in the same *Interpretation of Peace Treaties* case that "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations" is an international dispute.[144] Moreover, the fact that the existence of a dispute is determined objectively means that even in the absence of a dispute due to the fact that the two parties agree on the breach of the obligation or when one does not respond, it does not prevent a court to exercise its jurisdiction.[145] The explanation of the Court's assertion in the *South West Africa* cases that "[i]t must be shown that the claim of one party is positively opposed to the other"[146] was further given in the *Headquarters* advisory opinion whereby even in the case

> "where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute [...]".[147]

The objective determination of the existence of a dispute means that it is to be judged by the tribunal itself, on the basis of the submissions made by the parties to the dispute, but also on other documents, such as public statements, diplomatic exchanges and any other relevant evidence.[148]

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[143] *Interpretation of Peace Treaties between Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 1950 p 65, 74.

[144] ibid, 74.

[145] Sir Robert Jennings, 'Reflections on the Term "Dispute"' in Ronald St John MacDonald (ed), *Essays in honour of Wang Tieya* (Martinus Nijhoff 1993) 404.

[146] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 1962, p 319, 328.

[147] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 1988 p 12, par. 38.

[148] See for example, *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Rep 1998 p 432, par. 30-31; *Southern Bluefin Tuna Case between Australia and Japan and between New*

Second, the dispute must also be legal, as opposed to political.[149] However, the ICJ has never rejected a case for being a part of a broader political context. For example, the Court stated in the *Diplomatic and Consular Staff in Tehran* case that "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned".[150] It did not prevent the court from having jurisdiction over the dispute.

The dispute settlement function of an international court also entails the settlement of the facts at the basis of the legal dispute. In order to proceed with the settlement of a dispute legally, an international court has to settle the facts first. Indeed, the *Mavrommatis* case defined a dispute as being "a disagreement on a point of law *or fact*, a conflict of legal views or of interests between two persons" (emphasis added).[151] The *Serbian Loans* case developed this statement by affirming that

> "it would be scarcely accurate to say that only questions of international law may form the subject of a decision of the Court. It should be recalled in this respect that paragraph 2 of Article 36 of the Statute provides that States may recognise as compulsory the jurisdiction of the Court in legal disputes concerning "the existence of any fact which, if established, would constitute a breach of an international obligation". [...] Clearly, amongst others, disputes concerning pure matters of fact are contemplated, for the States concerned may agree that the fact to be established would constitute a breach of an international obligation; it is unnecessary to add that the facts the existence of which the Court has to establish may be of any kind."[152]

This dimension of the dispute settlement function has become particularly prominent in environmental disputes and will be examined further in the thesis. Indeed, getting the

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Zealand and Japan (Award on Jurisdiction and Admissibility) [2000] Reports Of International Arbitral Awards, Vol XXIII p 1-57, 4 August 2000, par. 48.

[149] See Christoph Schreuer, 'What Is a Legal Dispute?' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Brill/Nijhoff 2008) 965–970 for a complete analysis.

[150] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Merits) [1980] ICJ Rep1890 p 3, par. 37.

[151] *Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Objection to the Jurisdiction of the Court) [1924] PCIJ Rep Series A No 2, 11.

[152] *Case Concerning the Payment of Various Serbian Loans Issued in France (France v Kingdom of the Serbs, Croats and Slovenes)* (Merits) [1929] PCIJ Series A 20/21, 19.

facts right is an important part of disputes brought before international courts and tribunals. The establishment of facts can become controversial, especially when they involve scientific expertise, and because the question of whether there is a breach of an international rule directly results from the ascertainment of the facts, factual disagreements become crucial to the settlement of the dispute. In the *Southern Bluefin Tuna* case, for example, Japan argued the matters in contention were purely scientific and therefore could not be admissible before the tribunal.[153] This argument was vehemently rejected by Australia and New Zealand, who made the connection between the legal obligations and the role of scientific facts to prove the breach of those obligations.[154] Unfortunately, the tribunal did not engage with this question as it dismissed its jurisdiction on other grounds, only mentioning that the "analysis of provisions of UNCLOS that bring the dispute within the substantive reach of UNCLOS suggests that the dispute is not one that is confined to matters of scientific judgment only."[155]

Overall, in contentious cases, international courts and tribunals will always be considered ultimately as dispute settlers because of the effect of their decisions. Indeed, once they decided on a case, it cannot be judged again according to the *res judicata* principle. The arbitral tribunal in the *Trail Smelter Arbitration* said that

> "[t]he sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law. If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged if it is to be effective to that end".[156]

Hence, decisions of a court or a tribunal apply the law to a concrete case conclusively. In other words, as an independent body, a judicial court or tribunal pronounces final judgments within the scope of its powers previously agreed on by the states. The existence of this principle confirms the function of international courts and tribunals as

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[153] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan* (n 148), par. 40(a).
[154] ibid, par. 41(c).
[155] ibid, par. 65.
[156] *Trail Smelter Arbitration (United States, Canada)* [1941], Reports of International Arbitral Awards, Vol. III pp. 1905-1982, at p. 1950-51.

dispute settlers, but also can create situations where new facts arise yet the tribunal cannot re-open the case.[157]

ii. Enforcement, compliance and remedies

It is important to highlight that international law does not automatically imply the use of adjudication at all. Normally dispute resolution occurs without it,[158] and the enforcement of international environmental law encompasses all means of effective implementation of the rules, including litigation.[159] It is indeed achieved through different mechanisms, one of them being judicial dispute resolution.[160] Moreover, states, international organisations and non-state actors have a role to play in the enforcement process of the law.[161] This is particularly applicable to international environmental law, which requires a comprehensive approach from all parties. The role of domestic courts should also not be neglected. This observation is supported by the liberal theory which argues that international law is more effectively enforced when it is embedded in domestic legal systems.[162]

But international courts and tribunals are themselves empowered to enforce international rules. Indeed, states can ask an international judicial body to determine the other state's compliance with international rules.[163] Generally, the point of enforcement means the non-complying state complies again if the obligation is ongoing or repairs the situation. It is about rectifying the wrong. Moreover, it is clear that "even when the law

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[157] Caroline E Foster, *Science and the Precautionary Principle in International Courts and Tribunals* (CUP 2011) Part IV. This book criticises the res judicata rule as it prevents the tribunal from re-adjusting disputes if new facts or new knowledge arise. This point is important in the application of international environmental law particularly, because of its heavy reliance on evolving scientific facts.

[158] John G Merrills, *International Dispute Settlement* (3rd Edition, CUP 1998) 291.

[159] Laurence Boisson de Chazournes, 'La Mise En Oeuvre Du Droit International Dans Le Domaine de La Protection de L'environnement: Enjeux et Défis' (1995) 99 Revue Générale de Droit International Public 37, 38.

[160] Namely state responsibility and treaty compliance. Birnie, Boyle and Redgwell (n 21) 214–249.

[161] Sands and Peel (n 58).

[162] Goldstein, Kahler, Keohane and Slaughter, *Introduction: Legalization and World Politics*, 393.

[163] Karen J Alter, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 351.

is certain states may not adhere to it. In such circumstances, litigation becomes primarily an enforcement mechanism, to bring a wayward state into compliance".[164]

However, such enforcement power is not often used to its full potential. For example, the *South China Sea* award illustrates us that the tribunal did not want to go further than to declare the breach of certain international obligations. As part of its dispute settlement function, it did not consider that it should take measures affecting the future conduct of the parties, despite a clear submission by the Philippines asking that

> "China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention."[165]

In response, the tribunal said:

> "The root of the disputes presented by the Philippines in this arbitration lies not in any intention on the part of China or the Philippines to infringe on the legal rights of the other, but rather – as has been apparent throughout these proceedings – in fundamentally different understandings of their respective rights under the Convention in the waters of the South China Sea. In such circumstances, the purpose of dispute resolution proceedings is to clarify the Parties' respective rights and obligations and thereby to facilitate their future relations in accordance with the general obligations of good faith that both governments unequivocally recognise."[166]

By affirming that the purpose of the tribunal is to give a clarification of the existing law, it clearly bypasses what the Philippines were asking, i.e. precise "prospective" measures to limit unilateral actions of China, as these actions have brought "chaos and insecurity".[167] The fact the tribunal did not engage at all with this particular request by the Philippines can be explained by the fact China did not participate in the proceedings and therefore gave no counter-arguments. However, it is not the only time a tribunal has chosen to only clarify the law, without pursuing further measures. The Court in the *Pulp*

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[164] Stephens, 'International Environmental Disputes: To Sue or Not to Sue?' (n 20) 295.

[165] *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (n 34), par. 112.

[166] ibid, par. 1198.

[167] ibid, par. 1185-1187.

Mills case also rejected a request by Argentina because there were no special signs from Uruguay's behaviour that it would breach the law again.[168]

If anything, the mere fact that a dispute settlement mechanism exists forces States to comply with the existing rules. Knowing that a State violating an international rule is subject to review before a judicial body will compel it to follow the rules. It is also called the "deterrence role" of an international court or tribunal.[169] Indeed, international courts and tribunals also act as facilitators of diplomatic relations between parties. The mere fact that a dispute resolution machinery exists constitutes an incentive for States to avoid a dispute in the first place or negotiate a solution. It is like the sword of Damocles hanging over the parties to a dispute. By further developing their role in settling disputes, international courts and tribunals become more effective at preventing disputes.

Increasingly, judicial decisions are expected to make tangible change. This is best exemplified by the proliferation of non-compliance mechanisms. Enforcement and compliance are correlated, and because the concrete implementation of the rules has become a key question in international environmental law, when international courts are triggered, there are pre-existing expectations they will help to stop the alleged ongoing harm.

As a result of this pressure to have an impact, provisional measures can become a major tool for judicial bodies when it comes to enforcing environmental obligations. Judges will not decide on the wrongdoing of a state but instead use the principle of precaution to prevent any potential future harm. By promoting compliance, judicial decisions can effectively end certain behaviours that may later be found illegal on the merits (see chapter 4). Consequently, the importance of non-compliance procedures created within multilateral environmental agreements will be analysed further in this thesis. The interactions between these non-compliance procedures and international courts and tribunals must be analysed as they can enhance the enforcement system of international environmental law (see chapter 5).

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[168] For example, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28), par. 277-278.

[169] Treves (n 35) 285–304; Bilder (n 24) 226.

But how can international courts and tribunals ensure the enforcement of claims put forward by the parties? International courts and tribunals have at their disposal certain remedies (Article 31 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts). Any state responsible for a violation of international law has the "obligation to make full reparation".[170] This obligation can be fulfilled by diplomatic means, but may also be decided by an international court.

According to the law on state responsibility, the determination of a breach of an international obligation triggers the obligation of reparation. Therefore, when an international court decides on an environmental case, it can be asked by the parties to award certain remedies.[171] A tribunal can also reject to award remedies asked by the parties, as shown above in the *South China Sea* arbitration and the *Pulp Mills* case.

The existence of remedies is not manifest in constitutive texts of many international courts and tribunals. The ICJ Statute mentions them explicitly only under the optional clause jurisdiction;[172] the UNCLOS generally states that states are responsible for their wrongful acts without prejudice to general rules.[173] Only the WTO DSU gives account for a more developed framework.[174] Despite the lack of formal recognition, the fact judicial institutions are able to decide on remedies is accepted as inherent powers of judicial bodies.[175] The ICJ confirmed its remedial powers as being inherent in the *LaGrand* case, affirming that when jurisdiction is established over a certain dispute, it entails the power to decide on remedies.[176]

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[170] Article 31 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

[171] Marina Spinedi, 'Les Conséquences Juridiques D'un Fait Internationalement Illicite Causant Un Dommage à l'Environnement' in Francesco Francioni and Tullio Scovazzi (eds), *International Responsibility for Environmental Harm* (Graham&Trotman 1991) 84–85.

[172] Article 36(2)(d) ICJ Statute.

[173] Article 304 UNCLOS.

[174] Articles 17, 19, 21 and 22 WTO DSU.

[175] Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 The American Journal of International Law 833, 835.

[176] *LaGrand (Germany v United States of America)* (Provisional Measures) [1999] ICJ Rep 9, par. 48.

However, it is not entirely clear if remedies are intended to be punitive, restorative or to act as a deterrent. Depending on the answer, the nature of remedies awarded will vary.[177] Reparation as developed by the ILC is not meant as a punitive tool, rather as a corrective measure, choosing a remedial justice approach.[178] But is international adjudication tied to this approach? Generally, the scope of the powers to award remedies of an international court is unclear, and needs to be assessed in relation to its judicial function.[179] Remedies have been conceived differently in other areas of international law. The purpose of remedies according to the law on state responsibility, for example, can vary substantially from the purpose of remedies in international environmental law. Indeed, reparation for breach of international law as understood to restore the *status quo ante*, as often declared by the different judicial bodies and reaffirmed by the ILC Articles on State responsibility differs from the idea that remedies exist to promote compliance with environmental rules. With the continued evolution of international environmental law, the concept of remedies has shifted from reparation to compliance. These developments based on divergent approaches to remedies have put international courts and tribunals in an uncomfortable position.

Discussion of the rationale behind remedies reaches to the core of argument about the judicial function. At what point do certain conceptions of remedies depart from the judicial function of a court? Is there a limit to the scope of remedial powers beyond which a tribunal acts outside its judicial functions? While this section will not focus on the theoretical answers to these questions,[180] it seeks to explore the function of judicial discretion in awarding remedies. International courts and tribunals have awarded a wide variety of remedies, yet it is difficult to find a structured pattern in their decision-making. Despite the agreed ability of international courts and tribunals to award remedies, the extent of their remedial powers has been questioned.[181] How can international courts

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[177] Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (n 175) 837.

[178] ibid 844–845.

[179] Malcolm Shaw, 'International Courts, Responsibility, and Remedies' in Malgosia Fitzmaurice and Danesh Sarooshi (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart Publishing 2004) 19–23.

[180] See in particular Dinah Shelton, *Remedies in International Human Rights Law* (OUP 2006), Chapter 1, 'Concepts and Theories of Remedies'.

[181] Chester Brown, *A Common Law of International Adjudication* (OUP 2009) 209.

and tribunals use their remedial powers in an environmental context and what is their rationale when awarding certain remedies? The answer to this question depends on the broader role of international adjudication, which is often defined vaguely by the specific courts and tribunals. From the inconsistent judicial practice, it may be surmised this role has varied across different cases. Therefore, the affirmation that a judicial procedure endorses a winner-takes-all approach is too restrictive.[182] Indeed, the tools available offer a range of solutions that international courts and tribunals have used not only to determine a winner and a loser, but also to encompass the particularities of the cases under consideration. In other words, international courts and tribunals have used remedies to pursue their role beyond determining the outcome of disputes in which parties are seen as two antagonist poles. This argument is supported by the fact that the concept of reparation itself is a flexible one, depending on substantive rules and secondary rules of international law. The issue is not simply a procedural one.[183] Moreover, international tribunals will have to juggle between the circumstances of the case at hand, the parties' wishes, and the legal necessities, which allow them to use their discretionary powers innovatively in awarding remedies (see chapter 4.1).

Another issue related to the litigation as a tool for enforcement concerns the way in which states comply with judicial decisions.[184] In particular, it has a critical impact on the aftermath of an international court's judgment, i.e. whether the parties to the dispute comply with the judgment. Although it has never been used, the only existing formal tool to secure the enforcement of ICJ orders is through the application of article 94 (2) UN Charter, an article that enables the Security Council to compel or encourage compliance. For the other international courts, such option is not available. Overall, however, the record of non-compliance of judicial orders is not high, demonstrating the willingness of state parties to the judicial procedure to follow the judgment.

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[182] The winner-takes-all feature of judicial procedures is especially mentioned in relation to international arbitration. See Carrie Menkel-Meadow, 'Complex Dispute Resolution: Volume III: Introduction and Coda: International Dispute Resolution' [2012] Georgetown Business, Economics and Regulatory Law Research Paper No. 13-023, xiv.

[183] Birnie, Boyle and Redgwell (n 21) 225.

[184] For a full overview, see Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004).

iii. Limits to the settlement of the dispute

The straight-forward understanding of what constitutes a settlement is the end of the dispute.[185] The resolution of a dispute assumes that it is solved and the conflict between the parties disappeared. However, in international litigation it is not rare to see cases that fail to be resolved in this manner.

Before engaging in international litigation, states make a cost-benefit analysis that means they conduct a wide-ranging assessment of their aims in that particular case (see section 1.5). They may not have the intention to settle the dispute *per se*, but instead seek to use litigation for other reasons, such as developing an aspect of the law that may have consequences for their interests in the future. States may use litigation to fulfil a wide range of functions, including for the purpose of exerting influence on their own domestic politics. The outcomes of international litigation are multiple, and not limited to the settlement of the dispute.[186]

In this context, there are many cases where an ICJ decision has not directly led to the end of the conflict, but instead facilitated negotiations or actions that have resulted in the resolution of the dispute. Indeed, the judicial decision acts as a catalyst, helping the parties to end the conflict through further negotiations. Cases such as the *Southern Bluefin Tuna* case or the *Nuclear Tests* case are good examples of such a scenario. In the first case, Australia, New Zealand and Japan managed to further negotiations and agree on specific quotas for Bluefin tuna catches, despite the award on the lack of jurisdiction of the tribunal and therefore the abrupt end of the litigation. The judicial part of the overall conflict had a role to play, although not a final one. The second case was part of a broader political conflict between France and Australia/New Zealand, and played a role as such in the overall conflict, without directly putting an end to it.[187] Indeed, international courts and tribunals can still – within their competence – provide material and legal justifications that contribute to ending a conflict and therefore act as dispute

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[185] The Oxford dictionary defines a settlement as "an official agreement intended to resolve a dispute or conflict".

[186] Shirley V Scott, 'Litigation versus Dispute Resolution through Political Processes' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014) 40.

[187] For a full analysis, see Stephens, *International Courts and Environmental Protection* (n 14) 137–150.

settlers.[188] The *Pulp Mills* case is a notable example of this, where judicial intervention allowed the parties to return to the negotiating table.[189]

Other environmental cases were resolved through judicial proceedings, like the *Trail Smelter* arbitral award. In this case, the tribunal created a new regime that both parties followed and also awarded compensation to those who suffered some damage. This judicial process was considered as a success.[190]

On the other hand, some cases were not resolved through adjudication. Nor did the judicial decisions lead to further negotiations. The infamous example is given by the *Gabcikovo/Nagymaros* case[191], which is formally still pending. Although this case has led to further diplomatic negotiations between Hungary and Slovakia, no final agreement on the matter has been reached. The *Bering Sea Fur Seals* arbitration is a further example where the judicial decision did not manage to stop the gradual extinction of the fur seals, but was merely a milestone in the broader political issue.[192] In these cases, although the legal content of the case has contributed to the development of certain environmental concepts, the dispute itself was not resolved.

iv. Advisory opinions and dispute settlement

In general, the ability to give advisory opinions is well within the judicial remit of the ICJ[193], and exists in other jurisdictions.[194] Even though the competence of each Court is different, the core idea is similar. However, differences exist between advisory and contentious jurisdictions. In contentious cases, for example, the existence of a dispute is

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[188] Stephens, 'International Environmental Disputes: To Sue or Not to Sue?' (n 20) 290–291.

[189] Dapo Akande, 'ICJ Decision Helps to End Environmental Dispute Between Argentina and Uruguay' <http://www.ejiltalk.org/icj-decision-helps-to-end-environmntal-dispute-between-argentina-and-uruguay/>.

[190] Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (n 38) 272.

[191] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (n 63).

[192] Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (n 38) 144–147.

[193] *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 1963, p 15 par. 30.

[194] For the International Tribunal of the Law of the Sea, *see* Article 191 UNCLOS & Article 138 Rules of the ITLOS; for the European Court of Human Rights, *see* Article 47.1 and 47.2 European Convention; for the Inter American Court of Human Rights, *see* Article 64.1 of the American Convention; for the European Court of Justice, *see* Article 218 (11) TFEU.

an essential criterion without which the tribunal must decline jurisdiction. This criterion supposes some link with concrete behaviours must exist.[195] States cannot use the contentious jurisdiction to ask abstract questions to an international court.[196] However, the advisory jurisdiction is precisely for abstract questions about the law. In other words, advisory opinions cannot settle a dispute as such: jurisprudence makes it clear that courts cannot solve particular disputes through their advisory jurisdiction. It would be more accurate to talk about legal controversies instead of disputes. A dispute may be defined as a conflicting claim raised by one party against another on a point of law, whereas an advisory opinion can be requested for less than that.

This has a consequence on the fact that consent from interested states is not relevant. Indeed, one major difference from contentious cases is the lack of consent from concerned parties. The States whose interests may be affected by the Advisory Opinion do not need to give their consent in order for the Court to proceed.[197] This position is justified because of the nature of an advisory opinion. Indeed, it distinguishes itself from a contentious case in the fact that it is not binding[198] upon Member States. The ICJ has been consistent on this point.

An advisory opinion can be requested and granted even though the parties with interests at stake are against it. In the case of the *Status of Eastern Carelia* Advisory Opinion, the Court said that this case was not a question of law but a question of facts, therefore consent of both parties was required.

> "The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties."[199]

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[195] Schreuer (n 149) 970–972.

[196] *Nuclear Tests (Australia v France)* (Merits) [1974] ICJ Rep 1974, p 253, par. 55-59.

[197] See for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 2004, p 136, par. 47.

[198] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 2010, p 403, par. 33.

[199] *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ, Series B, No 5, p. 28-29.

Indeed, consent is not a requirement for advisory proceedings, but if a request for an advisory opinion circumvents the obligation to consent to settle disputes in contentious proceedings, the court cannot proceed with the case.[200] The Court considered in the *Construction of a Wall* Advisory Opinion that since the request for an opinion was within the exercise of the functions of the General Assembly and since the conflict was "located in a much broader frame of reference than a bilateral dispute" it was justified for the Court to give an opinion.[201] Indeed, the questions were drafted in such a manner that the court could not settle a particular dispute. Therefore, the lack of consent by Israel did not prevent the Court from giving an opinion in this case.

In other words, even though advisory opinions can be given for any legal question, it does not mean that a dispute between two or more parties already exists. It is explicit in the wording of Article 102 (3) of the Rules of the ICJ which states that if a dispute is pending between two or more parties, Article 31 of the ICJ Statute shall apply. The same applies to the Seabed Disputes Chamber. The consequences of having an advisory opinion at the same time as a pending dispute can blur the distinction between the purpose of an advisory opinion as opposed to a contentious case. However, it does not prevent the court from accepting its advisory jurisdiction, as long as the object of the request is not on the particular case. Even in cases where bilateral issues exist, it does not automatically mean the advisory jurisdiction is moot, precisely because the requests are so different.

Moreover, the advisory jurisdiction of a court also exists in order to assist a specific organ or an international organisation to perform its functions. For example, the ICJ's jurisdiction is to assist UN bodies carrying out their tasks, rather than a form of jurisdictional recourse.[202] The court said that "the General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs".[203] It is

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[200] *Western Sahara* (Advisory Opinion) [1975] ICJ Reports 1975, p 12, par. 32-33.

[201] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 197), par. 50.

[202] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 198).

[203] *Legality of the Threat or Use of Nuclear Weapons* (n 66).

therefore clear the ICJ does not take into account the reasons why a body requested an Advisory Opinion. The mechanism exists in order to counterbalance the powers of each branch of the United Nations. It reiterates this by saying that "the Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion".[204]

Overall, the question as to whether advisory opinions can substitute contentious cases must be answered negatively. Looking at cases where the Court gives direct advice to one party about its wrongful behaviour, as in the *Western Sahara* case and the *Construction of a Wall* case, it is clear the opinions were not taken into account by the wrongdoers. The conflicts were not solved by the ICJ in any of these cases. Tensions between Morocco and Algeria did not end; Israel did not change its behaviour. In this context, it is difficult to argue that the Court can effectively solve a dispute through an advisory opinion, although it would be unfair not to give any credit to the Court. The court itself said that "[a] distinction should ... be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, "as such ... has no binding force".[205] Moreover, the Court affirmed that "[i]t is not clear ... what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard".[206] While an advisory opinion has no binding force on states themselves, whether they have a *de facto* binding effect on the requesting international organisation or organ is debated.[207] That is, the fact that judicial decisions are binding – in opposition to advisory opinions – shows why advisory opinions cannot be considered as having a function of dispute settlement as such.

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[204] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 197).

[205] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 1999 p 62, par. 25.

[206] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 197), par. 53.

[207] Wolfrum, 'Panel II: Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?' (n 105) 114.

Despite this, advisory opinions can have a role to play in relation to the establishment of certain debated facts. Although they do not settle disputes *per se,* this does not prevent them from offering a suitable forum for hearing opposing arguments over relevant facts, resulting in useful decisions. The procedure under the advisory jurisdiction allows for facts to be debated, heard and decided on.[208] In particular, article 107(2) of the ICJ Rules of the Court expressly mentions that advisory opinions shall contain a statement of the facts, implying that the court has to establish them.

1.4 The public interests function

The fact that international courts and tribunals have a role to play in relation to the defence of public interests must be emphasised, although it has not yet been developed extensively in practice. It is a different role that international courts and tribunals would endorse by accepting claims made in the public interest. Wittich called it the function of "ensuring the observance of the law".[209] This function is tied to the idea that the international judiciary is part of the broader international legal regime and has a role to play within that regime as such. The protection of public interests indeed does not fall within the function of dispute settlement *per se* because its aim is broader than a dispute between two parties.

In particular, as section 1.3.iii above showed, the settlement of a dispute happens in a certain context, and cannot be isolated from either the affected people, the political decisions on specific public policies or the international community at large. Bilateral disputes, for example, can entail different aspects of public interest[210]: a trade measure can imply questions of endangered species (such as in the *US – Shrimp* case); a decision to build a pulp mill can affect the biodiversity of the region (see the *Pulp Mills* case).

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[208] Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 Journal of Environmental Law 19, 29–30.

[209] Wittich (n 54) 996–997.

[210] Lowe shows how bilateral investment disputes have contained many public interests, such as the Tecmed and Methanex cases. Vaughan Lowe, 'Private Disputes and the Public Interest in International Law' in Duncan French, Matthew Saul and Nigel D White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing 2010) 7–10.

Bilateral disputes concerning multilateral agreements automatically involve at least the interests of the other parties to the agreements, which may have an important role to play in acknowledging the settlement of the particular dispute.

Moreover, international courts and tribunals also have to approach their role differently when global problems are brought before them. International environmental law especially rests upon various public interests. Indeed, the existence of such common interests to the whole community cannot be ignored. A whole strand of multilateral environmental agreements stems from the need to recognise certain common concerns of humankind (see the Preamble of the UNFCCC or the CBD). The existence of such public interests goes together with the existence of any society: "in every society there are some common interests and some public weal [...]. There is therefore always a part of the legal order which gives expression to these types of interests common to the members of the society".[211]

However, the question of public interest litigation continues to be controversial nowadays, and is not fully accepted by either the international community or the international courts themselves (see chapter 2.2 below). Nonetheless, there is a role beyond the role of settling a dispute attributed to international courts and tribunals so far. In other words, international adjudication has both a public and a private function, and as an institution carries out the public authority.[212] Generally, an institution having a public authority has been defined as having a "legal capacity to influence others in the exercise of [its] freedom, i.e. to shape [its] legal or factual situation"[213], even without the lack of coercive enforcement of its decisions.[214] In that sense, international courts and tribunals ought to recognise their public nature, as well as their private nature. It is the reason why a tension exists in each decision between the purpose of settling the dispute

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[211] Robert Kolb, 'The Jurisprudence of the Permanent Court of International Justice Between Utilitas Publica and Utilitas Singulorum' (2015) 14 The Law and Practice of International Courts and Tribunals 16, 16.

[212] ibid 34.

[213] Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2009) 11–12.

[214] von Bogdandy and Venzke (n 125) 172–173.

concretely (i.e. finding common ground between the parties), asserting the real meaning of the law, and integrating public interests.

Because of the special position of international courts and tribunals within the international legal system, and their denomination as belonging to the judiciary,[215] international courts and tribunals must respect certain principles, as the publicity of the procedure and its transparency.[216] But there are more to be added, including accessibility to the courts and affordability. They are all considered as public values, in contrast to private values, and must be maintained within the proceedings before any court or tribunal.

Now that it has been clarified that international litigation cannot be completely separated from the issue of public interests, this chapter turns to the analysis of how those public interests can be represented. The question of who should be entitled to represent such public interests is crucial, and the next chapter will offer detailed analysis of how the jurisdiction can be broadened to encompass a bigger range of environmental disputes that can be submitted to international courts and tribunals. One important element in the representation of public interests is the role of different actors during judicial proceedings, knowing that a major drawback of international litigation is the lack of openness in the rules of standing in contentious cases.

It is interesting to note that the different procedural rules attached to the question of standing for requesting advisory opinions affect the role international adjudication can play particularly in the integration of public interests. In general, it seems that because of the nature of the advisory jurisdiction, an international court or tribunal could respond to environmental conflicts such as conflicts concerning climate change or any global conflict taking place within a multilateral treaty. Indeed, since a bilateral conflict is not necessary, an international organisation could ask for clarifications over general

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[215] This following article summarises what is entailed in the notion of the 'judicial function'. Chittharanjan F Amerasinghe, 'Reflections on the Judicial Function in International Law' in Tafsir Malik Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007).

[216] Neil Craik, 'Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law' (1997) 10 Georgetown International Environmental Law Review 551, 578.

implementation issues and therefore push the law into a more comprehensive shape. Since advisory opinions have different trigger mechanisms and are generally requested by non-state actors such as international organisations, their role in the pursuit of public interests is greater. The procedure leading to the ITLOS Advisory Opinion on the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, for example, shows how inclusive it can be: along with the documents submitted by the SRFC, written statements were received from twenty-two states parties to the UNCLOS and six inter-governmental organisations. One non-governmental organisation – the WWF – submitted an *amicus curiae*, despite being later rejected, was available on their website. Although not a party to the UNCLOS, the United States of America even submitted a written statement, demonstrating that even a state can make use of this mechanism.[217]

This function can be really important for environmental cases. Both because the procedure is open to other actors than states, and because the effects of the decisions are different from contentious cases. International courts, in particular, are asked to provide a decision with legal implications for the future:

> "The purpose of an advisory opinion, if there is to be one, is surely to benefit the international community as a whole, by looking forward. What is to be done, rather than what has been done (although I recognise there is a connection between the two elements)."[218]

In this context, an advisory opinion on the effects of certain rules concerning climate change could have beneficial effects and solidify the existing global commitments to prevent climate change, both factually and legally.[219]

1.5 The political factors affecting the initiation of judicial proceedings

It is important to acknowledge that international environmental litigation is part of a broader political process, at both the international and domestic levels. There are two

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[217] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion), Case No. 21 [2015], par. 6-36.

[218] Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (n 208) 30.

[219] ibid 32–33.

questions in this context: why are states bringing disputes to international courts and tribunals, and what do they want out of international litigation? Some scholars have framed the decision made by governments to sue as part of a cost-benefits analysis, the elements mentioned above (at 1.3.iii) being part of this broad cost-benefit analysis.[220]

An important feature of international litigation is consent: the states participating in the judicial proceedings need to consent to the proceedings in some way. The whole international judicial system is based on the consent of states. One party files a case against another, with the consent of both. But this consent can be given in different ways and at different times. For the ICJ, consent must be specifically given either through a special agreement between the parties, through the *forum prorogatum* jurisdiction, through a compromissory clause or through an optional clause.[221] ITLOS is also dependent on state consent, which can be given through declaration and competent only when both states have made such declaration,[222] and under UNCLOS, arbitration has compulsory jurisdiction (Annex VII). Arbitration is also often proposed in MEAs, although not often compulsorily. When states sign an optional clause under Article 36 (2) ICJ Statute or ratify the UNCLOS (unless they opt-out of particular disputes according to article 298 (1) UNCLOS), they allow other states to file a case against them regardless of their consent at the time of the existence of the dispute. Knowing if the state against which a state wants to file a dispute has already consented to the jurisdiction of the court is an important element in the decision whether or not to go to international litigation.

Moreover, states have a choice mainly between these three different fora and the jurisdiction clause applicable for the potential future dispute is a key factor in deciding where – or whether – to file a case. When one tribunal has compulsory jurisdiction especially, it gives an advantage to the complaining state as it does not need the specific consent of the respondent state. This strategy has been used by New Zealand and Australia in the *Southern Bluefin Tuna* case. Japan claimed they wanted to take

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[220] See Scott (n 186) She systematises the decision of a state to go to international litigation into ten specific questions. The decision to sue will then depend on the specific answer to each of them.

[221] Article 36 ICJ Statute.

[222] Article 287 UNCLOS.

advantage of the compulsory jurisdiction under UNCLOS and tried to reframe the dispute under the CCSBT, which did not contain a compulsory dispute settlement clause.[223]

Regardless of the jurisdiction clauses, the choice of tribunal is important because, as Aust affirmed, "[d]ifferent courts may come to different decisions". [...] It is a mistake to think that every international court has to decide a legal question the same way".[224] States will review the past jurisprudence and make a guess about the risk they are taking with each tribunal, bearing in mind their ultimate goal.

In this regard, the decision to go to which court also depends on the characterisation of the dispute by the parties, and therefore on their internal politics as much as interstate diplomatic exchanges. This element is crucial for two reasons: because the way the parties frame the dispute will also frame the way the tribunal will decide on the law, and because different tribunals have different jurisdictions *ratione materiae*. Firstly, the tribunal is bound by the states' declarations, which is one of the most limiting factor to its jurisdiction.[225] The declarations will affect the decision-making process because they determine the extent of the powers of the tribunal in that particular case. It must be said that international courts can nevertheless use the relevant juridical concepts they need regardless of whether the parties invoked them or not (*jura novit curia*).[226] Secondly, the dispute can be framed in different terms and therefore exclude certain jurisdictions. This was the case in the *Swordfish* dispute which saw Chile oppose the European Union. Proceedings both before the ITLOS and the WTO DSU were initiated, the first about

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[223] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan* (n 148), par. 38.

[224] Anthony Aust, 'Peaceful Settlement of Disputes: A Proliferation Problem?' in Tafsir Malik Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 140.

[225] Hernández (n 131) 47–50.

[226] See above 1.2.

a dispute over the conservation and protection of swordfish, the second about a dispute over the consistency of Chilean fisheries policy with the GATT.[227]

The impact of domestic politics on governments' decisions whether or not to initiate judicial proceedings cannot be underestimated. Importantly, it raises the question as to whether cases take place exclusively between states. Stephens shows evidence that grass-roots environmental and civil society movements, pre-election promises and general public pressure have been at the source of various environmental disputes, such as in the *Nuclear Tests* case, the *Gabcikovo/Nagymaros* case, the *Pulp Mills* case or the *Whaling* case.[228] These internal pressures play a major role in international litigation and cannot be left out of the international judicial process, as they are often its trigger.[229]

1.6 Conclusion

Although the general purpose of a judicial procedure is to settle a dispute between two consenting parties, this chapter has illustrated that there is more to the judicial function than that, especially in relation to legal developments it can bring. By having more than one string to their bow, international courts and tribunals may struggle in defining what they aim at in a single decision, especially when it comes to the application of environmental rules. On the one hand, the court faced with a certain case has to solve this particular conflict in the most adequate way possible for the parties involved. On the other hand, the court has to take into account its position in the international legal system, which may have an impact of what the settlement of this dispute means in the international legal system. The roles of international courts and tribunals are polarised and they have to balance those roles out in each decision. Knowing that the decisions create a certain jurisprudence which the court or tribunal will be asked to respond to in the future, the role of international litigation, especially advisory opinions, becomes greater.

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[227] Marcos Orellana, 'The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea' <https://www.asil.org/insights/volume/6/issue/1/eu-and-chile-suspend-swordfish-case-proceedings-wto-and-international>.

[228] Stephens, 'International Environmental Disputes: To Sue or Not to Sue?' (n 20) 287.

[229] Scott (n 186) 36–37.

In relation with environmental disputes, international litigation's role in determining the law is in large part successful. International courts and tribunals have helped to precise certain environmental obligations, such as the environmental impact assessment rule (see the *Pulp Mills* case). Assessing exactly whether they have used their powers enough in developing and interpreting the law is a question of degree and comparison between the advancement of the legal framework and judicial decisions which falls outside the scope of this thesis.

In terms of their dispute settlement function, this chapter has shown that international courts and tribunals have not consistently been able to end environmental disputes. Moreover, their role as rule-enforcers has been fragmentary. Although judicial bodies might be considered at first sight as effective dispute settlers, environmental disputes have demonstrated that such conclusion is inaccurate. Moreover, the narrow conception of international courts and tribunals as immediate dispute-settlers does not hold against the communitarian element attached to many rules in the field of international environmental law, and consequently the concept of standing in international law might need an update.

This push towards a communitarian perspective of international litigation can be explained by the fact that international courts and tribunals have a public interest function. They exist in a broader legal structure that imparts international courts and tribunals with the defence of public interests.

The roles of international courts and tribunals as displayed in this chapter show the strengths and weaknesses of judicial bodies as a whole in the context of environmental disputes. States are aware of these roles and may instrumentalise judicial institutions. However, a systemic component, which should not be forgotten, which is the independence of the judicial body. In order for an international court or tribunal to be considered an authoritative institutional force by its subjects, developing and enforcing the law, it has to be independent. If the court or tribunal is regarded as susceptible to

the influence of a few powerful actors, it will harm the legitimacy critical to fulfilling its role.[230]

With a view to enable international courts and tribunals to best perform those functions, this thesis will then focus on specific issues arising during judicial proceedings of environmental disputes. Indeed, this thesis does not aim at weighing how international courts and tribunals fulfil these roles; it rather focuses on individual obstacles particularly prominent in environmental cases. This chapter shows that the functions attributed to international courts and tribunals may not be optimal, but this thesis is based on the idea that the development of particular procedural tools will improve the quality of judicial proceedings, therefore impacting on the overall work of international courts and tribunals.

[230] Benvenisti and Downs (n 116) 1058.

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2. QUESTIONS OF STANDING IN INTERNATIONAL ENVIRONMENTAL DISPUTES

This chapter focuses on the requirements attached to the entry into international litigation. Who can bring a claim, and will any international tribunal accept it? The analysis of this chapter is focused on the potential transformation of interstate dispute settlement from being exclusively bilateral towards a procedure allowing public interests to be defended. The tension created by the expansion of some concepts to address common environmental concerns is apparent in the institution of adjudication. This section of the thesis discusses how to deal with such tension. This chapter illustrates the first part of the argument of this thesis and aims at refuting the hasty assertion that international courts and tribunals have too narrow rules on standing to respond to environmental disputes.

First, it is important to underline the difference between jurisdiction and standing. An international tribunal can have jurisdiction over a dispute but legal standing of the particular state triggering the procedure can be refused. Standing is a question of admissibility, separate from the one of jurisdiction.Generally, it is often noted that international adjudication has not been designed to protect common areas or resources, neither to be adapted to obligations owed to the international community as a whole. Rather, international litigation is generally understood as confrontational, bilateral, and having a winner-takes-all approach; characteristics considered to prevent a fitted use of international courts and tribunals.[231] Any evolution in international environmental law towards a more holistic protection of the environment will have to find a way around this restrictive premise. As Judge Weeramantry said rightly in his Separate Opinion concerning the *Gabcikovo/Nagymaros* case, "*inter partes* adversarial procedures, eminently fair and reasonable in a purely *inter partes* issue, may need reconsideration in the future, if ever a case should arise of the imminence of serious or catastrophic environmental danger, especially to parties other than the immediate litigants".[232]

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[231] Nele Matz, 'Financial and Other Incentives for Complying with MEA Obligations' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Brill 2006) 305; Nout Van Woudenberg, 'Compliance Mechanisms: A Useful Instrument' (2004) 34 Environmental Policy and Law 185.

[232] Separate Opinion of Judge Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (n 63), p. 118/115.

Therefore, the chapter will consider the notion of public interest in international law, its stakeholders and its legal implications for international adjudication in order to clarify the developments made by the judicial institutions.

In order to answer these questions, it is necessary to understand international environmental law as a sum of different types of rules creating different relationships between states. Depending on the type of obligation, states' responsibilities will vary and therefore affect the potential judicial enforcement. Indeed, public interest litigation relies heavily on the developments of the law on state responsibility, as it provides for protection against breaches of *erga omnes* obligations.

Generally, it is useful to categorise environmental obligations as bilateral, interdependent or integral, because this categorisation shows how each type of obligation impacts on the way in which states can trigger a judicial procedure. It classifies the objects of protection developed in the field of international environmental law according to different rules on standing and highlights the specific legal interests states would be able to defend in international litigation.

2.1 International environmental law as a multi-layered regime

Different types of obligations exist, with a varying degree of interference into state sovereignty. In order to understand what environmental protection entails at the international level and how adjudication can enforce it, we need to classify the objects of the existing legal rights, because these legal rights have procedural implications in judicial proceedings (indirect standing before international courts).[233]

A critical point of analysis is whether specific rules related to the environment broaden the scope of action of a state in instituting judicial action before an international court or tribunal. Four types of obligations are identified, depending on the degree of sovereign states' rights over areas or resources. These are: the obligations of one state when there are potential transboundary effects, the protection of resources shared among several

[233] Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 37–39.

states, the obligations deriving from the protection of areas and resources beyond national jurisdiction, and fourthly, of global environmental problems.

First, I will introduce the framework used for the separation of environmental obligations in those four categories. They will indeed all be connected with the work done by Pauwelyn on the classification of international obligations. Such classification is reproduced here:

Typology of international obligations[234]

Bilateral obligations	Collective obligations
❖ All bilateral treaties ❖ Multilateral treaties that are 'bundles of bilateral relationships' (e.g., the Vienna Convention on Diplomatic Relations) ❖ Certain rules of general international law and certain unilateral commitments	I. Obligations *erga omnes partes* ❖ Sub-set 1: 'interdependent' or 'all or nothing' obligations (e.g. disarmament or nuclear free zone treaties) ❖ Sub-set 2: 'integral' obligations or sacrosanct/ intransgressible obligations (e.g. human rights or humanitarian obligations and certain obligations relating to global warming or biodiversity)
	II. Obligations *erga omnes* ❖ Coincides with obligations of *jus cogens* ❖ All obligations *erga omnes* are also 'integral' obligations

These concepts will be explained and used in the context of international environmental law as follows. This framework is used because of its connection with the law on state responsibility, especially in the context of obligations *erga omnes*. Such obligations are

[234] Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 The European Journal of International Law 907, 923.

at the basis of the debate on public interests litigation and will shape the discussion in this chapter on how international litigation can address such challenges.

i. Transboundary impacts

Environmental rules regulating transboundary impacts from the territory of one state onto the territory of another are part of the bilateralist grounding of international law. The concept of protection according to spatial territories is clearly linked to the idea of states as "organisational units of civil society".[235] Even though we are moving towards a more comprehensive conception of the international society, it cannot be forgotten that many environmental legal obligations are perceived within this bilateralist realm. For instance, articles 3 and 5 of the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context encompass the concept of "good neighbourliness". They specially create an obligation binding on states in the event of "significant adverse transboundary impact". This general obligation bearing on states not to carry activities that might have transboundary effects has now been codified[236] and confirmed by several judicial decisions.[237] Indeed, this type of obligations fit very well with the traditional understanding of international law. States can tolerate an infringement to their sovereignty in this case, knowing that these obligations entail full reciprocity (*do ut des*). They accept mutual constrain of their behaviour. It does not matter whether the obligation is part of a multilateral treaty, as long as it can be individualised between two states, or "bilateralised". This type of multilateral conventions creates a network of bilateral relations that can be considered individually. Indeed, a distinction can be made between bilateral and collective obligations within multilateral treaties. In this context, bilateral obligations can be described as "multilateral

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[235] Günther Handl, 'Transboundary Impacts' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 548.

[236] Principle 21 of the Stockholm Declaration on the Human Environment; Principle 2 of the Rio Declaration on Environment and Development.

[237] *Trail Smelter Case (United States v Canada)* Awards (16 April 1938 and 11 March 1941), Vol. III p. 1905-1982, UN Reports of International Arbitral Awards, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28).

treaty obligations that can be reduced to a compilation or "bundle" of bilateral relations, each of them detachable one from the other".[238]

Therefore, these obligations are straight forward to enforce judicially. All kinds of dispute settlement procedures are apt to respond adequately. There are two opposite parties in conflict, even though more than one state can be individually affected by the same violation. It is confirmed by the high number of cases dealt by different bodies (for example, the *Trail Smelter* arbitration or the *Pulp Mills* case). Cases were brought in arbitral tribunals or permanent courts, depending on the specificities of the cases, but overall the aim was the same. Affected states have personal interests in resolving the conflict. The law on state responsibility reaffirms these interests by giving the possibility of an injured state to invoke the responsibility of another state and claim reparation for the injury. Article 31 of the ILC Draft Articles on State Responsibility defines an injury as including "any damage, whether material or moral, caused by the internationally wrongful act of a state", no matter if the obligation is part of a purely bilateral or multilateral treaty. The *Trail Smelter* arbitration further underlined that the damage should not be "too indirect and remote".[239]

These obligations related to specific interests of particular states can also be called reciprocal obligations, where there is a purely bilateral relationship.[240] In this case, the judicial institutions will not *prima facie* refuse a request to settle a dispute, because the recipient of the obligation is clearly and narrowly announced. The breach is directly related to a specific state. Therefore, a victim-state of transboundary injuries will not struggle to use judicial fora, at least not because of the type of the obligation it invokes.[241]

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[238] Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (n 234) 908.

[239] *Trail Smelter Arbitration, USA v. Canada* (16 April 1938 and 11 March 1941, Vol. III pp. 1905-1982) 1931.

[240] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 52–59.

[241] Tullio Treves, 'The Settlement of Disputes and Non-Compliance Procedures' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 513.

This is reflected in the fact that the majority of cases brought before international courts and tribunals belong to this category of obligations.

ii. Shared resources

The concept of shared resources stands for resources that are overlapping the territories of two or more states, such as some rivers, lakes, forests or wild animals. It entails a cooperative element between the states that are sharing the resources, although it does not automatically mean all obligations concerning shared resources are removed from a bilateral scheme.

The main consequence stemming from the recognition of a shared resource is a common management of the resources among the concerned states. In terms of legal obligations, the PCIJ said explicitly that states have created a "common legal right" by regulating the navigation of the shared river in the *River Oder* case:

> "[The] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others".[242]

In this case, the river is crossing three states, namely Germany, Poland and Czech Republic, and the problem is to know whether the right to passage on a navigable river extends to all tributaries and sub-tributaries, i.e. whether these portions of river deriving from the Oder river are internationalised or not. In that context, the Court acknowledges the existence of a "common legal right [...] based on the existence of a navigable waterway separating or traversing several States", which extends to the "whole navigable course of the river and does not stop short at the last frontier".[243] The fact that several states share the same resource – in this case a river – creates an international obligation which effects reach all these states sharing the resource. It goes beyond the bilateral relationship explained before. The Treaty of Versailles internationalises the watercourse, and thereby the watercourse becomes a shared resource.

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[242] *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (Judgment) [1929] PCIJ Series A, No 23, p. 27.
[243] ibid, p. 27 and 28.

This same element can be found in the *Gabcikovo-Nagymaros* case. This case is about the construction of a system of locks on the Danube between Hungary and Slovakia. The project has been described as a "single and indivisible operational system of works", and is a "joint investment,[244] which was agreed through a joint contractual plan.[245] In article 19 of the 1977 Treaty, the parties also agreed on "ensur[ing] compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks". This obligation can be described as creating a common regime in which whenever one state does not comply, the other state has a right to demand compliance, regardless of the impacts on its own territory. Despite the fact the 1977 Treaty created a bilateral agreement of a synallagmatic type, the obligation contained in Article 19 of the 1977 Treaty has the characteristics of the interdependent type of obligations. Indeed, "obligations for the protection of nature must be respected in connection with the construction and operation of the System of Locks", which means each party must respect these obligations in any circumstance during the accomplishment of the project. The parties therefore created a common regime where reciprocity is no longer a condition to the respect of the obligation. Although the ICJ did not examine what type of responsibility would result from the breach of the particular treaty obligation, it was not prevented from hearing the case because of the type of obligation at stake.

Other examples of shared resources can be found in the handling of fish stocks, where several countries have to coordinate and establish common fisheries rules,[246] or in creating joint sovereignty over certain territories, as in the Nicaragua-Honduras-El Salvador joint sovereignty over the Gulf of Fonseca.[247] Both of these examples were brought to an international tribunal when a conflict arose, showing that judicial enforcement is not excluded in cases about shared resources.

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[244] Article 1 (1) of the 1977 Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks.

[245] Article 4 (1) of the same treaty.

[246] See the Convention for the Conservation of Southern Bluefin Tuna (1994).

[247] Established by a Judgement of the Central American Court of Justice rendered March 9th 1917.

The difference between these cases and the cases on transboundary harm is that the states in question have agreed on restricting their behaviour on their own territory. In these cases, as opposed to those on transboundary harm, for the states to be violating their obligations there is no need to prove transboundary harm. They have agreed on restricting their behaviour. In the context of the *Gabcikovo-Nagymaros* case, the state parties agreed to pursue a joint project of a dam construction, and in the *River Oder* case, they agreed to guarantee the most efficient regulation of the river.

These obligations require limitations on the way states behave and create a common responsibility in certain circumstances. There is a limitation of states' domestic actions stemming from an expansion of one state's responsibility to a community-shared responsibility at the global level. But it does not mean there is a collective action from the international community at large. Rather, the international community watches and attempts to accompany the concerned state in its compliance with environmental standards.[248] However, the concerned states can agree to bind themselves by environmental obligations. This is what occurred in a number of cases, as demonstrated by the regulation of international watercourses. Indeed, the 1997 UN Watercourses Convention, which entered into force in 2014, reaffirms the principle that international watercourses are a shared resource, creating specific obligations of cooperation towards the watercourses states (article 8). It indeed regulates international watercourses as a whole resource and obliges states to coordinate and cooperate in the non-navigational uses of those international watercourses.[249]

This type of obligation can be described as emerging from the concept of diffuse reciprocity, which has been explained as a phenomenon where "participants typically view diffuse reciprocity as an ongoing series of sequential actions which may continue indefinitely, never balancing but continuing to entail mutual concessions within the context of shared commitments and values".[250] Moreover, interdependent obligations

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[248] Laurence Boisson de Chazournes, 'Le Droit International et La Promotion Des Intérêts Collectifs: à Propos de La Protection de L'environnement Global' 197 <http://archive-ouverte.unige.ch/unige:13071>.
[249] The Convention namely contains obligations to use international watercourses equitably and reasonably (article 5); it furthermore creates an obligation of prior notification of planned measures (article 11).
[250] Robert O Keohane, 'Reciprocity in International Relations' (1986) 40 International Organizations 1, 4.

can only exist when *all* parties participate: it is a necessary condition for the regime to work. In Fitzmaurice's words, "the participation of all the parties is a condition of the obligatory force of the treaty".[251]

Obligations relating to shared resources represent interdependent obligations, because of the nature of the relationship of the states over the same resources. They are forced to enter into interdependent obligations led by the need for long-term mutual arrangements. Pauwelyn would categorise these obligations as interdependent.[252] All the states parties have interests in respecting the same obligations as they agreed on sharing resources in a mutually beneficial way.

Although global consensus over shared resources has not been reached, the UNEP has addressed the issue and adopted guidelines emphasising the need for collaboration between states sharing resources. What stops states from attaining a global consensus is their reluctance to limit their sovereign rights over natural resources: the guidelines specify that "without prejudice to the generality of the above principle [the sovereign right over natural resources], it should be interpreted taking into account, where appropriate, the practical capabilities of States sharing the natural resource".[253] As this affirmation is controversial, it has never been formally accepted by the international community.[254] However, many shared resources have been regulated specifically, as exemplified above.

The main contribution of the UNEP guidelines for the purpose of this chapter is to confirm the interdependent nature of obligations over shared resources. Specifically, principle 1 enunciates that

> "It is necessary for States to co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources

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[251] Sir Gerald Fitzmaurice, *Second Report of the Special Rapporteur (9th Session of the ILC) A/CN.4/107*, vol II (Yearbook of the International Law Commission 1957) 36.

[252] Pauwelyn, *Conflict of Norms in Public International Law* (n 240) 60.

[253] Principle 3, United Nations Environment Programme (UNEP), Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Nature Resources Shared by Two or More States, Nairobi, May 9, 1978.

[254] Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (CUP 1997) 130–133.

> shared by two or more States. Accordingly, it is necessary that consistent with the concept of equitable utilization of shared natural resources, States co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources. Such co-operation is to take place on an equal footing and taking into account the sovereignty, rights and interests of the States concerned."[255]

From this conception of shared resources, it is possible to conclude they are obligations *erga omnes partes*, and therefore belong to the category of collective obligations. However, since shared resources have been regulated separately and according to the specific contexts of the resources, it is possible for international courts and tribunals to individualise the dispute. Generally, treaties over shared resources include few states and have a defined scope. This indicates the suitability of international courts and tribunals to respond to conflicts over shared resources. States will not find it difficult first to show they are specially affected by a violation as described in the law on state responsibility and second to individualise the violation on one state. Thus, problems of enforcement through judicial means will not be related to the type of the obligation as such and can be assimilated to conflicts with transboundary impacts.

iii. Areas and resources beyond national jurisdiction

Whereas the types of environmental obligations aforementioned were strongly based on the sovereignty of states over specific geographic areas or resources within their own territory, this section is about areas and resources beyond national jurisdiction. The difference with other types of environmental obligations is that there is no need for the state to prove an injury. Indeed, they are characterised by the fact no state can claim sovereignty over these areas or resources. They do not belong to any state in particular. They are common property, which entails all states have open access to these areas and are able to exploit their resources, unless international agreement has been made, as in the case of the international seabed area.[256] The resources located in the common areas

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[255] Principle 1, United Nations Environment Programme (UNEP), Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Nature Resources Shared by Two or More States, Nairobi, May 9, 1978.

[256] Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 557–558.

beyond national jurisdiction need an extra protection since, at the moment, the regulation of areas and resources beyond national jurisdiction is partial.

In relation to marine areas beyond national jurisdiction, the UNCLOS offers some protection, such as article 192, obliging states to protect and preserve the marine environment, regardless of whether it is in sovereign territory or not. The UNCLOS also regulates specifically the deep seabed. Part XI of UNCLOS states that "activities in the [Seabed] Area shall [...] be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States".[257] The Seabed Area is moreover governed by an institutional framework; the International Seabed Authority (ISA) was created, in charge of organising and controlling activities within the Area. Indeed, article 137 (2) UNCLOS states that "[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act". However, the ISA has jurisdiction only over activities concerning mineral resources.

The way the deep seabed is regulated crystallises the concept of common heritage of humankind. This concept has been developed in order to play the role of regulator by instituting an obligation to share equitably and among all states these resources beyond national jurisdiction; it is a concept of exploitation of resources beyond national jurisdiction.[258] This was confirmed by the Seabed Disputes Chamber in 2011 when it said that "the role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind".[259] Moreover, the creation of the ISA institutionalised the concept of the common heritage of humankind. It is there to represent the interests of humankind towards the deep seabed.

In sum, the mere fact states cannot appropriate themselves any of these areas of common heritage entails a common and cooperative legal framework. Reciprocity is no longer a tool to regulate states' interactions. The obligations linked to these areas beyond

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[257] Article 140 (1) UNCLOS.

[258] John E Noyes, 'The Common Heritage of Mankind: Past, Present, and Future' (2012) 40 Denver Journal of International Law and Policy 447, 450–451.

[259] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 90), par. 226.

national jurisdiction therefore cannot be associated directly with a direct harm to a specific state. They are integral in nature, "in the sense that their binding effect is collective and the different relationships [...] cannot be separated into bilateral components".[260]

iv. Global environmental problems

The protection of the global environment is directly linked to the concept of a common concern of humankind. It appears in Principle 7 of the Rio Declaration, which mentions a "global partnership" of all states "to conserve, protect and restore the health and integrity of the Earth's ecosystem".[261] It is expressed especially in the concepts of climate change and biological diversity. The two conventions regulating those issues (the UNFCCC and the CBD) encompass the globality of the problems, regardless where they have direct and visible effects.[262] For an example of a multilateral treaty encompassing public interests, the Whaling Convention states that it is in "the interests of the nations of the world" to safeguard "for future generations the great natural resources represented by the whale stocks". It adds that "it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress".[263]

Such concept has emerged because the existing framework was not sufficient: "neither territorial control, on the one hand, nor the international regulation of areas beyond territorial control, on the other, is capable of providing an effective structure for the global regulation of environmental problems".[264] The existence of a common concern

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[260] Pauwelyn, *Conflict of Norms in Public International Law* (n 240) 53.

[261] "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. [...]", Principle 7, Rio Declaration on Environment and Development 1992 (UN).

[262] "The Contracting Parties, [...] Affirming that the conservation of biological diversity is a common concern of humankind [...], Preamble of the Convention on Biological Diversity 1992 (UN).
"The Parties to this Convention, acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind [...]", Preamble of the United Nations Framework Convention on Climate Change 1992.

[263] Preamble of the International Convention for the Regulation of Whaling (1946).

[264] Duncan French, 'Common Concern, Common Heritage and Other Global(-Ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar 2016) 335.

concept is therefore used to fill this gap. Indeed, it adds a layer to international environmental protection, not tied by any geographical and territorial criteria. This is mainly what differentiates the concept of common concern from the one of common heritage of humankind. There is no link between one state's appropriation of the resources and the protection of the resources as a global concern.[265] The idea of common concern can also be compared with shared resources. Although states keep their sovereign rights, they accept restrictions on their sovereign rights, regardless of any transboundary impacts. The nature of the interests at stake differs however between common concerns of humankind and common concerns of certain states. Global environmental problems are truly *erga omnes*, and not just *erga omnes partes*.

As for a definition, Brunnée said the common interest[266] is a "notion of an interest in the protection of certain values common to the international community which can only be safeguarded by international cooperation and through international law".[267] This view of having some values inherent to the international community stems from the globalisation of the world and therefore the need for protection of certain values from encroachment by states. It goes against a more bilateral understanding of international legal relationships, as underlined by Simma in his course at the Hague Academy of International Law.[268]

This expansion of international obligations of states to respect certain environmental standards in common areas has been backed up by the notion of global public goods, which gives an economic perspective on the need for cooperation between states.[269] It has been used as a framework to achieve the geographical transcendence of global environmental problems, representing another way of thinking about interests common

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[265] Jimena Murillo, 'Common Concern of Humankind and Its Implications in International Environmental Law' (2008) 5 Macquarie Journal of International and Comparative Environmental Law 133.

[266] In the literature, authors speak about common, public or general interests indistinctively.

[267] Jutta Brunnée, '"Common Interest" - Echoes from an Empty Shell?' (1989) 49 Heidelberg Journal of International Law 791, 797.

[268] Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Collected Courses of the Hague Academy of International Law 217, 233–235.

[269] See Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' (2012) 23 The European Journal of International Law 651.

to the international community. Global public goods are considered as "common values the benefits of which are "indivisibly spread among the entire community" and are typically non-rival and non-excludable, so that nobody has a rational economic incentive to supply them because everyone equally benefits from these goods and nobody can be excluded from their benefits".[270] Both international rules and economic concepts acknowledge the integral nature of some environmental protection. The label of global public goods confirms the existence of certain common concerns of humankind. Boer took the example of land degradation, which became a global public good as a physical manifestation of a common concern of humankind.[271] As opposed to the current system based on the sovereignty of states, the notion of public good poses problems for the roles and the use of international courts and tribunals because its legal substance is not clearly defined.

Common concerns of humankind exist because global environmental issues transcend sovereign territories. Political borders do not matter for global environmental issues.[272] This is the reason why pure bilateral or reciprocal obligations analysed before are not enough to protect the environment effectively. Instead a more multilateral and community response is needed.[273] This transcendence of geographical boundaries is well exemplified in the treatment of the global atmosphere, as the UNGA Resolution 43/53 and the UNFCCC show that an injury to the global atmosphere as a unity can affect the whole community.[274]

Legally, common concerns of humankind have created rules that "impose duties on society as a whole and on each individual member of the community".[275] More precisely,

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[270] Elisa Morgera, 'Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' (2012) 23 The European Journal of International Law 743, 748.

[271] Ben Boer, 'Land Degradation as a Common Concern of Humankind' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart 2014) 291–293.

[272] Boisson de Chazournes (n 248) 191.

[273] ibid 196.

[274] Patricia W Birnie, Alan E Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press 2009) 130, 338.

[275] Dinah Shelton, 'Common Concern of Humanity' (2009) 39 Environmental Policy and Law 83, 85.

three consequences have been identified by Birnie, Boyle and Redgwell: first, the existence and recognition of common concerns of humankind have brought legitimacy over the interests of the international community over those common concerns. Secondly, the concept entails placing a responsibility on the international community to assist in sustainable development. Finally, it constrains states' sovereignty over their natural resources, as it is no longer absolute and infinite.[276]

The chapter began by identifying obligations deriving from a common property of all states over specific areas and their resources to a more global response to environmental problems and the recognition of general concepts binding the community of states, regardless whether the actions required by the concerned states lie within their territory or not. The fact these obligations are not "bilateralisable" is something they have in common.[277] Despite this last category of international legal obligations being controversial, states are reluctant to admit any binding value to it. The principal argument is that collective action is necessary. Emphasis is placed on the need for cooperation and community response instead of coexistence.[278] The concept of common concern of humankind gives states "delegated powers in the interest of humankind".[279] In other words, their obligations are integral.

2.2 Public Interests litigation as a means to enforce international environmental law

This section centres on the issue of the judicial enforcement of those environmental rules identified in the previous section as integral. Integral obligations require specific adjustments in order to be judicially enforced, hence the development of public interests litigation. In other words, because the protection of the environment at large embraces the idea of common values without boundaries – from the regulation of shared resources to the regulation of areas beyond national jurisdiction, or the norms based on the

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[276] Birnie, Boyle and Redgwell (n 21) 130.

[277] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 233) 48–53.

[278] Geir Ulfstein, Thilo Marauhn and Andreas Zimmerman, 'Introduction' in Geir Ulfstein (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (CUP 2007).

[279] René-Jean Dupuy, 'Humanity and the Environment' (1991) 2 Colorado Journal of International Environmental Law and Policy 201, 203.

concept of the common concern of humankind, the concept of public interest litigation can help enhance judicial enforcement. Indeed, public interests have been identified and exist, but they need specific tools to be judicially enforced. Two legal tools have been developed; one relying on the development of *erga omnes* obligations and the law on state responsibility. The second is based on the idea of *actio popularis*.

i. Concept of public interests

It has been observed that international law "has gradually begun to ... recognis[e] public interests of the world community whose protection transcends mere reciprocal relations between states and constitutes an obligation of the individual states vis-à-vis the international community as a whole."[280]

Norms that contain this community element can be identified and classified in different categories. Such identification is not an attempt to class obligations according to higher or lower values, but it is rather an attempt to flesh out the structure of community norms. For example, *jus cogens* norms, by establishing a communal foundation of the international community as a whole, are representative of the presence of communal elements of the international community itself. They first challenge the voluntarist perspective that only consented rules bind states. They show that the principle of non-intervention into state national affairs is not absolute.[281] As such, they are a straight forward example of integral obligations.

Other examples of public interests that have been integrated in substantive norms can be found in the jurisprudence: when the ICJ affirmed in the *Icelandic Fisheries case* that "the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all",[282] it recognised that the rule had a public interest character. Likewise, the ICJ acknowledged in the *S.S Wimbledon case*

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[280] Rüdiger Wolfrum, 'Purposes and Principles of International Environmental Law' (1990) 33 German Yearbook of International Law 308, 325.

[281] Simone Peter, *Public Interest and Common Good in International Law* (Helbing Lichtenhahn Verlag 2012) 134–138.

[282] *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) [1974] ICJ Rep 1974, p 175, par. 64.

that the Kiel Canal "has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world."[283] Moreover, while interpreting the Convention on the Prohibition of Genocide, the Court recognised that the particular convention is based on a "common interest".[284] This offers further evidence that the Court recognises the existence of public interests that benefit all states.

These cases have in common the fact they recognise there are not only individual interests juxtaposed but also community concerns that must be protected at a community level. However, in those cases, the Court did not attach any particular legal mechanism to these public interests rules, whereby these public interests could be defended judicially in a different way.

The existence of public interests rules affects mainly state sovereignty. Indeed, states recognising that some public environmental interests exist agree national sovereignty will be exerted within the limits imposed by these public environmental interests.[285] But it can also have consequences on judicial litigation.

ii. Legal effects

In the context of enforcement of international environmental law, the best way to interpret public interests may be to consider them as a frame of reference. Indeed, the common interest approach in international environmental law opens a supplementary means of addressing serious global environmental problems and is the reason for the development of such global environmental protection; it does not displace the bilateral enforcement of legal obligations.[286]

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[283] *SS 'Wimbledon'* (Judgment) [1923] PCIJ Series A No 1, p. 22.

[284] 'In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention.' *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 1951, p 15, p. 23/12.

[285] Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 Georgetown Law Journal 675, 710.

[286] Ulrich Beyerlin, 'State Community Interests and Institution-Building in International Environmental Law' (1996) 56 Heidelberg Journal of International Law 602, 605.

Indeed, the public interest character of certain obligations does not automatically prevent international litigation. Disputes over interdependent and integral obligations can be "bilateralised", i.e. individualised in such manner that a dispute compatible in the judicial context can be formulated.[287] The prime example of such dispute is the *Whaling* case (see below). However, there are certain consequences particular to collective obligations that reflect the public interest character.[288] This argument is linked to the broader purpose of the thesis to refute the claim according to which international courts and tribunals cannot adequately adapt to new environmental problems that go beyond the strictly bilateral structure.

The argument developed here is not about whether one rule should become binding upon parties that have not consented to the rule.[289] The point is rather one of looking at the impacts of the public interest character on the categorisation of environmental obligations with a public interest as either "simple" bilateral obligations, interdependent or integral obligations. At the end, this will help clarify what disputes international courts and tribunals can hear.

It is important to remember that rules on standing can be adapted by treaty-based obligations; they do not have to follow automatically the general international rules of standing.[290] The law on state responsibility also deals with public interest norms, as will be analysed below, which is crucial to the interpretation of the rules on standing in judicial institutions, but it can be modified by *leges specialis*.

Collective obligations, either interdependent or integral can also be qualified as either *erga omnes partes* or *erga omnes* obligations. The next section will reflect on their meaning and judicial implications. This discussion will then lead to the question whether the idea of *actio popularis* is emerging in international judicial proceedings.

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[287] André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 The European Journal of International Law 769, 779–780.
[288] Peter (n 281) 149.
[289] About this question, see for instance Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 100ss.
[290] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 233) 69–96.

a. *Erga omnes (partes) obligations*

International environmental law is a major field that has developed several concepts representing some public interests, both through *erga omnes* concepts and multilateral treaty-based obligations (*erga omnes partes*),[291] as demonstrated in the first part of the chapter examining collective obligations.

The specificity of *erga omnes partes* obligations is that they do not require an extension of the application of those rules on non-parties. Indeed, one of the main challenges of obligations that are truly *erga omnes* is to assess whether public interest norms can be binding on non-parties.[292] Obligations *erga omnes partes* are collective to the community of states who accept to be bound by them, whereas obligations *erga omnes* apply to all states regardless. In other words, obligations contained in multilateral environmental treaties are *erga omnes partes*, therefore collective, and can be seen as encompassing the value-based approach to the public interest. Indeed, as Peter explained, *erga omnes partes* obligations can be seen as merely representing the lowest common denominator of the state parties, or as representing the core community interest.[293] The latter means states acknowledge the need for a broader agreement on a problem common to a plurality of states, since they are seeking for a multilateral accord. This can easily be understood as a recognition of the states of the common interest attached to the problem.

Obligations *erga omnes* must be appreciated as opposing obligations *inter partes*. Indeed, obligations *erga omnes* are automatically considered as having a public interest character, since they are binding upon the whole international community. This has been confirmed by the ICJ in the *Barcelona Traction* case:

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

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[291] Brunnée (n 256) 566.

[292] Pauwelyn, *Conflict of Norms in Public International Law* (n 240) 100ss.

[293] Peter (n 281) 146–153.

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law *(Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951,* p. 23); others are conferred by international instruments of a universal or quasi-universal character.
>
> Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance."[294]

Additionally, both obligations *erga omnes* and *erga omnes partes* will influence the secondary rules attached to it.[295] The standard rule allowing states to invoke the responsibility of another state restricts such standing to injured states only, as shown in Article 42(a) of the ILC Draft Articles on State Responsibility. It affirms that an injured state has to owe individually the obligation breached. There is, however, a possibility of triggering the responsibility of a state breaching obligations *erga omnes (partes)*. In particular, articles 42(b)(i) and (ii) and 48(1)(a) and (b) can be read as creating responsibility for *erga omnes (partes)* obligations, also referred to as solidarity measures.[296]

> **Article 42. Invocation of responsibility by an injured State**
> A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
> (*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:
> (i) specially affects that State; or
> (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.
>
> **Article 48. Invocation of responsibility by a State other than an injured State**

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[294] *Barcelona Traction, Light and Power Company, Limited* (Merits) [1970] ICJ Rep 1970 p 3, par. 33-35.

[295] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 233) Chapter 3.

[296] See Martii Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order' (2001) 72 British Yearbook of International Law 337.

> 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
> (*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
> (*b*) the obligation breached is owed to the international community as a whole.

Article 42(b) expands the notion of injured states to the violation of obligations owed to a group of States, "consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be considered for that purpose as making up a community of States of a functional character".[297] Article 48 creates a legal regime whereby other states that do not qualify as injured can invoke responsibility. The commentary to the article 48(1)(a) explicitly refers to collective obligations meaning obligations that "apply between a group of States and have been established in some collective interest".[298] Moreover, the environment is specifically mentioned as an example of such obligations. Article 48(1)(b) exists because of the ICJ's statement reproduced above in the *Barcelona Traction* case. It targets directly the truly *erga omnes* obligations.[299]

Article 48(1)(b) has been mentioned by a tribunal for the first time in 2011, in the Advisory Opinion given by the Seabed Disputes Chamber of the ITLOS:

> "Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility."[300]

This statement embraces the idea that every state party to the UNCLOS will have a legal interest to invoke state responsibility on the basis of Article 48. It reflects the idea that

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[297] Commentary of Article 42, ILC Articles on Responsibility of States for Internationally Wrongful Acts, adopted at the 53rd session, 2001 (Yearbook of the International Law Commission, 2001, vol. II, Part Two) 118–119.

[298] Commentary of Article 48, ibid 126.

[299] ibid 127.

[300] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 90), par. 180.

"every state has a procedural right, i.e. *locus standi* to invoke [the] application [of article 48] on behalf and for the benefit of the international community as a whole".[301]

In sum, *erga omnes (partes)* obligations as understood in the law on state responsibility show that interdependent and integral obligations are taken into account and can be upheld for what they are as they offer the possibility for states to act in the collective interest. However, obligations *erga omnes (partes)* should be used cautiously. Koskenniemi warned about the dangers of recognising such obligations referred to as "solidarity measures":

> "There is a strong community interest in limiting spontaneous solidarity measures. Because the primary rules that govern the field are insufficiently precise, the danger of abuse is great. On the other hand, there is a strong community interest to force the cessation of acts of which the ICJ once remarked that they 'shock the conscience of mankind'. In a domestic society, criminal law strikes the balance by striving towards as much precision as possible. But no such precision is available in international life."[302]

But does that mean such *erga omnes* obligations should not exist? Is it the role of the law on state responsibility to define what community interests are? The fact that the ILC Draft articles are vague might not create such uncertainty as they will have to be related to other primary rules, those which will have to be defined as interdependent or integral.

Moreover, obligations *erga omnes* relating to the protection of the environment are increasingly precise. The tribunal in the *South China Sea* arbitration, for example, confirmed that "the environmental obligations in Part XII [UNCLOS] apply to States irrespective of where the alleged harmful activities took place".[303] This is a prime example of an obligation *erga omnes*. Not only does it cover areas beyond national jurisdictions but also any national territory. The protection of the marine environment

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[301] James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interests: Essays in Honour of Bruno Simma* (OUP 2011) 227.

[302] Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order' (n 296) 355.

[303] *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (n 34), par. 927.

is not attached to any sovereign claim over territory and therefore considered a public interest that needs to be implemented *erga omnes*.

Overall, obligations *erga omnes* as developed in the law on state responsibility contain the germs for a greater judicial response in favour of public interests. The consequences of recognising obligations *erga omnes* are multiple[304], however, and do not automatically imply that judicial procedures are open to the defence of public interests. Judges have the legal framework to develop the judicial application of *erga omnes* obligations in the future.

b. The actio popularis

The concept of the *actio popularis* – originated in Roman law – relies on the fact that under certain circumstances, anyone can claim standing regardless of any personal or direct interest, creating a general standing. It translates the normative feature of *erga omnes* obligations into judicial terms.[305] Despite its existence in certain domestic legal orders, at the international level, its existence is questioned.[306]

A particular problem posed by the notion of an *actio popularis* in the context of international law is the definition of the international community. In order to apply obligations *erga omnes* through a public interests litigation, we need to know who the "*omnes*" are, so we know who can defend the obligation. Do we mean the interests of the community of states as a sum, or do we mean the interests of an international community with a separate legal personality? In other words, who is guaranteeing their protection? Indeed, the question of whether or not one state alone can defend a public interest in the name of the international community is different from the question of whether a state as a party to an international dispute settlement procedure can defend a

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[304] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 233) 'Distinguishing types of erga omnes effects', chapter 3.

[305] François Voeffray, *L'actio Popularis Ou La Défense de L'intérêt Collectif Devant Les Jurisdictions Internationales* (Presses Universitaires de France 2004) 6–12, 261.

[306] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 2000) 210–214.

public interest. The former can also be called "public interest enforcement" or *actio popularis*.[307]

Defining the international community arouses a variety of responses and opinions depending on the perspectives of parties involved. But in any case, since there is no centralised entity to act in the name of the international community, the question of which stakeholders are most able to represent the public interest, or in other words, how the public interest is represented – if, at all – in an international dispute, is central.

The lack of the existence of a recognised notion of the international community prevents the existence *per se* of the *actio popularis*. But international courts and tribunals have been enlarging the notion of standing of states themselves, moving in the direction of the *actio popularis*.

iii. Role of the tribunal itself in defending public interests

As has been mentioned in chapter 1.4, the tribunal itself can play a major role in the conduct of public interests litigation. Adjudication itself has a public function and therefore can be entitled to decide on the basis of a public interest. Because the interests the law protects can be either public or private, the judicial system also reflects this bipolarity of the legal system.[308] Through their interpretative choices first, international courts and tribunals can put forward public interests over private ones. There is some evidence in the recognition of the existence of *erga omnes* obligations, or even through *obiter dicta*, where courts have favoured common interests over private ones. Indeed, in various separate cases, as shown by Kolb in the case of the PCIJ, the courts can prefer a public interest interpretation.[309] Public interests litigation is not only about who is entitled to denounce violations of international law. It is necessarily related to the content of such public interests and their recognition over other private interests.

International tribunals have a role to play in the defence of public interests not only because of their importance as judicial actors as part of the broader international

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[307] Christian J Tams, 'Individual States as Guardians of Community Interests' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interests: Essays in Honour of Bruno Simma* (OUP 2011).
[308] Kolb (n 211) 16–19.
[309] ibid 20–29.

community, but also because they are the guardians of their own procedures, as the ultimate decision-makers on the procedural matters. In particular, international courts and tribunals are given certain procedural powers that they can exercise *proprio motu*, meaning that they do not need the specific consent of the states involved in the dispute in order to award them. For example, a major decision that international courts and tribunals can decide for themselves is their jurisdiction (article 36(6) ICJ Statute).[310] Another example is their capacity to award provisional measures *proprio motu*. Notably, ITLOS can proclaim provisional measures in order to protect the environment, to "prevent serious harm to the marine environment".[311]Although their flexibility is not without boundaries, these examples show that judicial bodies are entrusted with certain powers that they can exercise by themselves and which can make a difference in the defence of public interests.

Indeed, "procedure is not only the transmitter of substance, or protector of intrinsic procedural rights, but is co-determinative of what the law is in the first place".[312] In this regard, through the exercise of their judicial powers, and even more when they have *proprio motu* powers, international courts and tribunals have the chance to reflect the substantial changes in international environmental law in their procedures, as well as in their legal interpretations.

2.3 Participation in contentious disputes

In opposition with this collective understanding of international obligations, the judicial settlement of international disputes tackles problems between two (or more) specific states. Traditionally, it is only when the conflict is concretely formed between particular states and when those states cannot find an agreed solution that they go to court (*ex post facto* adjustment). Indeed, the judicial system is based on the sovereignty of the states. But the evolution of the concepts under international environmental law – such as common concerns of humankind – challenge substantially such strong basis on state

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[310] Mohamed Sameh M Amr, *The Role of the International Court of Justice as the Principal Organ of the United Nations* (Kluwer Law International 2003) 103.
[311] Article 290 (1) UNCLOS.
[312] Nollkaemper (n 287) 785.

sovereignty.[313] They therefore require adjustments of the general judicial mechanisms. However, in the absence of a clear definition of the international community and the lack of support for the *actio popularis*, other indirect means have to be pursued in order to defend public interests.

In general, the fact of considering litigation as a means to uphold public interests at the international level represents the shift from a vertical view of the international society where the state is the only subject to international law toward a more horizontal view where "the rule of law applies to some extent at least, over and above the role of States"[314]. Therefore, the analysis of the roles of international adjudication must be made in light of the opening to other actors on the international scene. In particular, the fact international courts and tribunals exist for the protection of the common good is very important.

There are other stakeholders involved in the defence of public interests than states. Debates around multi-stakeholderism in the process of normative developments can give us differing perspectives on why such analysis is necessary also in the enforcement of international norms. Upfront multi-stakeholderism is linked to an increased democratic legitimacy, leading towards more inclusive structures of governance.[315] Why is it necessary to open up litigation to other actors? "No single approach, no single group is capable of adequately representing the complexities of environmental reality."[316]

Concretely, however, states are the first actors to be entrusted with upholding public interests in international litigation, and it is argued that the range of states who can uphold them can be broadened. Indeed, states generally act on the basis of their personal interests, but it is also possible that they act as trustees of certain public interests.

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[313] Sandrine Maljean-Dubois, *Les Notes de l'Iddri n°4* (2003) 24.

[314] Orrego Vicuna, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (Cambridge University Press, 2004).

[315] Wolfgang Benedek, 'Multi-Stakeholderism in the Development of International Law', in Fastenrath U et al., *From Bilateralism to Community Interests: Essays in Honour of Bruno Simma* (OUP 2011) 202-212.

[316] Konrad von Moltke, 'The Relationship between Policy, Science, Technology, Economics and Law in the Implementation of the Precautionary Principle' in David Freestone and Ellen Hey (eds), *The Precautionary Principle and International Law: The Challenge of Implementation*, vol 31 (Kluwer Law International 1996) 97.

But other actors also have means to interject in a judicial procedure. These will be analysed through the possibility to intervene in judicial proceedings, as well as the submission of *amicus curiae*. Indeed, the impacts of public interests on the procedure before an international court or tribunal are expressed in the lesser degree of party autonomy. They limit the influence of the parties on the whole judicial process.

The following part will analyse the different possibilities for the different actors to interfere in an international judicial procedure, namely as a party, an intervenor or an *amicus curiae*. The array of possibilities for different actors to represent public interests before judicial institutions – although not as broad as it could be – is already a sign of progress towards a more encompassing system of judicial enforcement. The fact that other non-state actors can intervene during a procedure is an indication that international courts and tribunals understand their changing role.

i. Right to initiate a procedure

States are the first subjects of international law to be able to institute judicial proceedings. Articles 34 (1) of the ICJ Statute, 20 (1) ITLOS Statute, II WTO Agreement all render the tribunal competent in cases brought by state parties. The main judicial bodies (excluding criminal and human rights courts) are competent in interstate disputes. Whereas the ICJ and the WTO cannot open a case on the request of actors other than states, the UNCLOS says that "the [ITLOS] 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".[317]

To become a party to the dispute, the state has to show it has a legal interest to sue. Tams explained that a "legal interest" is a vague and flexible notion. Indeed, the thresholds to get the standing before a tribunal changed over time and depend either on various direct jurisdictional clauses, or derive from the general rules on state responsibility, and have to be interpreted in light of the jurisprudence developed by the

[317] Article 20 (2) UNCLOS.

different tribunals.[318] This is the reason why international courts and tribunals are important in the development of public interests litigation. With their interpretative powers (see chapter 1.2), they have a critical role to play in the implementation of *erga omnes (partes)* obligations as described above.

Moreover, it is not because the judicial system has been created as state-centric and bilateral that it is by essence contradictory to some public interests. Some states might have a private interest to uphold a public interest. Even though it is an indirect and insecure channel, it should not be dismissed. A state is of course expected to be the guardian of its own legal interests first and foremost. But it does not exclude any other motives, especially when the obligations are considered *erga omnes*. Although the jurisprudence has not been consistent in allowing standing for states acting in the common interests (even within a single case)[319], such standing of states based on common interests has clearly been recognised in the *Belgium v Senegal* case:

> "The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end."[320]

The Court recognised that Belgium was a state other than an injured state in the sense of Article 48(1)(a) of the ILC Draft Articles on State Responsibility: "In the view of the Court, Belgium is entitled to invoke Senegal's responsibility before this Court without necessarily having a special interest in Senegal's compliance with the Convention".[321] This was criticised by several judges as too restrictive. Belgium argued for recognition as

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[318] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 233) 32–36.

[319] The South West Africa cases are famous for their contradiction about their treatment of Ethiopia and Liberia's standing. The first judgment recognised those two states a legal interest to sue, which was then rejected in the second phase of the dispute. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (n 146), p. 343; *South West Africa, Second Phase* (n 102), p. 29.

[320] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 2012, p 422, par. 69.

[321] Separate Opinion of Judge Skotnikov ibid, par. 3.

an "injured state" in the sense of Article 42(b) of the ILC Draft Articles, but the Court did not pursue its analysis in this direction. The consequences of such categorisation are felt in the way Belgium will be able to ask for remedies.[322]

Moreover, in the *Whaling* case, although the case was brought under the jurisdiction of Article 36(2) of the ICJ Statute, the tribunal had to admit Australia legal standing, and that on the basis of the collective nature of the obligations invoked. It could have rejected Australia's standing despite having jurisdiction over the case, because of the lack of individuality of Australia to the particular case at hand for example – but it did not.

Indeed, these cases have embraced the idea of a single state upholding collective obligations.The *Whaling* case, which was filed by Australia, and whose interests were not primarily focused on the violation of its own physical and material interests, but focused on the broader aim of the ICRW, is an example where the court did not reject judicial proceedings for lack of standing. Indeed, Australia solely based its legal standing on the collective nature of the obligations invoked. Several times during the hearings, the councels referred to the dependence of the standing on the *erga omnes partes* character of the ICRW, at the exclusion of any more individual standing based on the special injury faced by the state.[323]

> "Australia does not claim to be an injured State because of the fact that some of the JARPA II take is from waters over which Australia claims sovereignty rights and jurisdiction. ... Every party has the same interest in ensuring compliance by every other party with its obligations under the 1946 Convention. Australia is seeking to uphold its collective interest, an interest it shares with all other parties."[324]
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> "In the view of their shared values, as set forth in the 1946 Convention, all States parties to that Convention have a common interest in each State complying with its obligations under the Convention and the regime deriving from it. ... All the States parties 'have a legal interest' in the protection of the rights involved."[325]

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[322] Declaration of Judge Owada ibid, par. 22.

[323] Christian J Tams, 'Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill 2016) 204–205.

[324] Mr Burmester, *Whaling in the Antarctic (Australia v Japan)* (n 27) (CR 2013/18), p. 28, par. 19.

[325] Mrs Boisson de Chazournes, ibid (CR 2013/18), p. 33, par. 18.

Despite Australia's clarity, the Court itself did not reiterate their reasoning in the final judgment. As Tams advocated, it was a missed opportunity for the court to clarify that it accepts disputes under collective standing. No mention in the final judgment was made regarding legal standing.[326] However, this lack of clarification does not automatically mean that the Court dismissed Australia's argument. It could also be interpreted as a tacit continuation of the *Belgium v Senegal* jurisprudence.[327] These two cases are important as they may confirm the tendency of international courts and tribunals to accept legal standing in cases of collective obligations.

Generally, an important distinction must be drawn between the judicial competence of a tribunal and the standing of a state. Indeed, Judge Skotnikov criticised the Court's findings in the *Belgium v Senegal* case as being broader than the convention in question. He argued that it is not possible to deduce "a procedural right of one state party to invoke the responsibility of another" from the nature of the obligation as protecting a common interest. He used the fact that states can make reservations to the court's jurisdiction as evidence of the misinterpretation of the judgment.[328] However, this argument does not take into account the difference between the standing of state before a court and this court's competence. This lack of distinction between the two also led the ICJ to some confusion in the *Barcelona Traction* case, presenting an apparent contradiction between its *obiter dictum* recognising obligations *erga omnes* (and therefore legal interest to all state parties) and a later paragraph where it recognises that some human rights treaties require a nationality link with the state in order for it to file a judicial case.[329] This is not, however, a contradiction as such, but rather an unfortunate conflation of concepts. The nature of the obligation and its impact on standing has to be distinguished from the trigger mechanism of the competence of the court.[330]

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[326] Tams, 'Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment' (n 323) 209.

[327] ibid 210–211.

[328] Separate Opinion of Judge Skotnikov, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 320), par. 12-16.

[329] *Barcelona Traction, Light and Power Company, Limited* (n 294), par. 90.

[330] Voeffray (n 305) 76–78.

The ability to trigger judicial procedures is limited to states only in the ICJ. However, arbitration can have a broader understanding of those rules on standing and can accommodate other actors than states as parties. The PCA Optional Rules for Arbitrating Disputes between Two States do not contain a clause on the need for a legal interest to sue, but only states that "[w]here the parties to a treaty or other agreement have agreed in writing that disputes shall be referred to arbitration ..., then such disputes shall be settled in accordance with these Rules" (Article 1). However, other problems are encountered with arbitration affecting the potential public interests angle of litigation. Indeed, the fact judicial proceedings are not automatically public and that parties to the dispute are directly responsible for funding of the proceedings can impair the role of arbitration in the public interest.[331]

Moreover, the ITLOS can be accessed by other actors than states, as it "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".[332] In particular, the ISA as set out in Article 137 (2) UNCLOS has a special status in international law, and it is a perfect example of a public international organisation acting in the public interest. As mentioned above, it is also entrusted with the right to initiate judicial proceedings. However, the question remains for other international organisations: whose rights and interests are they likely to uphold when they are given *locus standi*? In addition, whose actions will they be held accountable for?

ii. Right to intervene

Most international courts are open to third states to intervene in an already instituted dispute. It is true for the ICJ[333], ITLOS[334], ECJ[335], WTO DSU[336], as well as it is stated in

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[331] See for example, Alexander J Belohlavek, 'Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals' in Alexander J Belohlavek and Nadezda Rozehnalova (eds), *Czech Yearbook of International Law*, vol II (Juris Publishing 2011).

[332] Article 20(2) Annex VI UNCLOS, Statute of the ITLOS.

[333] Article 62 and 63 of the ICJ Statute.

[334] Article 31 and 32 ITLOS Statute.

[335] Article 40 of the Protocol on the ECJ Statute.

[336] Article 10 WTO DSU.

the Convention on the Pacific Settlement of International Disputes[337]. Interventions were first instigated to allow third states affected by the case to protect their own interests. States have neither used the possibility of intervening nor were accepted by the Court very often.[338] Indeed, there have been ten cases where interventions were requested.[339] Interventions – as well as *amicus curiae* – give some actors the right to have a say during a judicial procedure, as opposed to a party to a dispute, who has a direct right to a remedy. Their very nature is different.

However, interventions could be used by states to bring public interest claims, depending on how the Court is defining how affected should a third state be. Indeed, what exactly do third states have to prove in order to be accepted by the tribunal? In the case of the WTO, the third states have to show a substantial interest, which does not have to be legal and can be only factual.[340] In the case of the ICJ, third states have two options available.[341] Either the intervention of a third state has to be supported by a legal interest which is decided at the discretion of the Court (article 62 ICJ Statute)[342] or the state has a right to intervene "whenever the construction of a convention to which states other than those concerned in the case are parties" (article 63 ICJ Statute).[343] Only in the case of article 63 will the judgment be binding on the intervenor.

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[337] Article 84 of the Convention on the Pacific Settlement of International Disputes (The Hague, 1907).

[338] Rüdiger Wolfrum, 'Interventions in Proceedings Before International Courts and Tribunals: To What Extent May Interventions Serve the Pursuance of Community Interests?' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser 2013) 220.

[339] The Court accepted three interventions in the event of article 62, and one intervention in the event of article 63. Wimbledon case (PCIJ, 1923); Nuclear Tests case (ICJ, 1973); Continental Shelf Tunisia/Lybia (ICJ, 1981); Continental Shelf Lybia/Malta (ICJ, 1984); Frontier Dispute El Salvado/Honduras (ICJ, 1990); Territorial Delimitation Cameroon/Nigeria (ICJ, 1999); Sovereignty over Pulau Litigan and Pulau Sipadan Indonesia/Malaysia (ICJ, 2001); Jurisdictional Immunities of the State Germany/Italy (ICJ, 2001); Territorial and Maritime Dispute Nicaragua/Columbia (ICJ, 2011); Whaling case Japan/Australia (ICJ, 2014).

[340] Rüdiger Wolfrum, Peter-Tobias Stoll and Karen Kaiser (eds), *WTO - Institutions and Dispute Settlement* (Martinus Nijhoff 2006) 376.

[341] The ITLOS Statute and Rules replicate the ICJ Statute in that regard. The provisions on interventions by third states are the same.

[342] See Christine Chinkin, 'Article 62' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (Second Edition, OUP 2012).

[343] See Christine Chinkin, 'Article 63' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (Second Edition, OUP 2012).

In the application of article 62, a limit between a third state raising a new dispute and a third state intervening in a procedure has to be set, as a result of the nature of the intervention. It indeed exists in order to represent other interests within the existing judicial procedure. The line between the two can be difficult to draw, as the *Libya/Malta Continental Shelf case* exemplified. The interests of the intervenor must be more general than claiming a specific right, otherwise it becomes a party to the dispute. However, the interests of the intervenor cannot be too specific as raising legal issues for itself, because it would modify the object of the dispute. Indeed, Italy's request to intervene in the *Libya/Malta Continental Shelf* case was rejected because it would entail that the court decide on Italy's sovereign rights.[344] Additionally, the purpose of the intervention must be given by the third state in order to be accepted by the ICJ.[345] The court said that "the precise object of an intervention must be connected with the subject of the main dispute".[346] Although third states generally invoked their own interests that would be affected by the decision, it might be only a step towards the submission by a third state invoking a public interest norm applicable in the dispute.

Article 62 ICJ Statute (together with article 81 ICJ Rules) gives the opportunity to all states with any interest of a legal nature which may be affected by the decision to intervene, regardless if they ratified the litigious convention. In this case, a state could bring to the dispute its views on the violation of *erga omnes* norms, but only if the court authorises the intervention. In the case concerning *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*, the court did not say that it was impossible for a third state to bring an interest of a legal nature other than in the subject-matter of the case, but it said that in that case, the third state "bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have".[347]

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[344] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene* (Judgment) [1984] ICJ Rep 1984, p 3. "The legal interest of Italy is thus not merely an interest, but the 'sovereign rights' over the appropriate areas of continental shelf (par. 15). 'If Italy were permitted to intervene in the present proceedings in order to pursue the course it has itself indicated it wishes to pursue, the Court would be called upon, in order to give effect to the intervention, to determine a dispute, or some part of a dispute, between Italy and one or both of the principal Parties' (par. 31).

[345] Article 81 (2(b)) of the Rules of the Court.

[346] Territorial and Maritime Dispute Case (Nicaragua/Colombia) 2011, par. 44.

[347] *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene* (Judgment) [2001] ICJ Rep 2001, p 575, par. 59.

That would potentially allow third states to bring in the case violations of obligations owed to the international community as a whole, without the need to prove the existence of a multilateral treaty, as for article 63.

Relating interventions of third states in judicial proceedings to the defence of public interest norms, article 63 ICJ Statute is a great example of the enforcement of *erga omnes partes* obligations. The fact that all parties to a treaty have a right to intervene in the case endorses the idea of obligations owed to a group of states. In the *Whaling* case, for example, New Zealand was granted the right to intervene according to article 63 ICJ Statute. It intervened "in its capacity as a party to the treaty at the centre of the proceedings, the [Whaling] Convention". It provided the Court with "New Zealand's views on the issues of interpretation under the Convention that are relevant to a determination of the case before the Court".[348] In this situation, New Zealand did not defend its own national interests. It instead took the opportunity to interpret the multilateral obligations contained in the ICRW.

Interventions by states can be used to adapt the procedural rules to the collective nature of certain environmental rules, both through article 62 and 63 of the ICJ Statute.

iii. Amicus curiae

Another possibility that would see actors other than the two states party to a dispute participate in the proceedings is the submission of *amicus curiae* briefs. Third states are allowed to submit *amicus curiae*,[349] but it is the only procedure where non-state actors (such as international organisations, NGOs or individuals) are introduced in international dispute settlement mechanisms. They have a potentially big role to play as

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[348] Written Observations of New Zealand (4 April 2013) *Whaling in the Antarctic (Australia v Japan)* (n 27), par. 2.

[349] *European Communities - Trade Description of Sardines* - AB-2002-3 - Report of the Appellate Body WT/DS231/AB/R, par. 165-167: 'Just because [articles10.2 and 17.4] stipulate when a Member may participate in a dispute settlement proceeding as a third party or third participant, does not, in our view, lead inevitably to the conclusion that participation by a Member as an amicus curiae is prohibited. The fact that Morocco, as a sovereign State, has chosen not to exercise its right to participate in this dispute by availing itself of its third-party rights at the panel stage does not, in our opinion, undermine our legal authority under the DSU and our Working Procedures to accept and consider the amicus curiae brief submitted by Morocco. Therefore, we find that we are entitled to accept the amicus curiae brief submitted by Morocco, and to consider it.'

defenders of public interests in a specific dispute since they can bring independent analysis to the case. A significant difference with the two previous possibilities to participate in a dispute is that the submission of an *amicus curiae* brief is not a right. The WTO says explicitly that "participation as *amici* in WTO appellate proceedings is not a legal right, and [it] has no duty to accept any *amicus curiae* brief".[350]

More specifically, the question of allowing private actors, normally not subjects of international law in a formal judicial procedure among sovereign states highlights the need for a broadening of the scope of international law. Both international tribunals and private actors will use the institution of *amicus curiae* to further their own interests. Judicial bodies will use *amicus curiae* to enhance their legitimacy, whereas private actors see them as an opportunity to raise public interests in a normally closed procedure. In both cases, an urge to include non-state actors on the international scene is palpable.

There are several issues regarding the submission of *amicus curiae* briefs that must be tackled. Firstly, it is critical to ask exactly what constitutes a brief and what kind of arguments it can contain. Additional central questions to ask are: who is entitled to submit a brief? According to what criteria a court should receive or refuse a brief? The rules on this are either non-existent or vague.[351] It may even be characterised as a "free zone", with few written rules.[352] Over the last decades the types of amicus interventions have evolved. I will focus on the evolution of the use by other actors of *amicus curiae* and try to determine what functions *amicus curiae* briefs can play in order to represent public interests, and apply it to an environmental context. Pursuing a more speculative line of enquiry, this section will also touch upon the use of *amicus curiae* by international organisations as relevant actors.

Firstly, the practices of (or lack of) different international tribunals vary from one another. The powers through which a tribunal can allow *amicus curiae* briefs (inherent to the constitution of a judicial body or through the consent of state-parties to the

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[350] ibid, par. 166.

[351] See Jona Razzaque, 'Changing Role of Friends of the Court in the International Courts and Tribunals' (2002) 1 Non-State Actors and International Law 169.

[352] Hervé Ascensio, 'L'amicus Curiae Devant Les Juridictions Internationales' (2001) 4 Revue Générale de Droit International Public 897, 911.

foundational treaty) influence the use of *amicus curiae* briefs by the tribunal.[353] The WTO DSU for instance has an extended case-law on *amicus curiae*[354], much more defined than in other tribunals such as the ICJ or the ITLOS. Because *amicus curiae* were not discussed at the time of the creation of the ICJ or the ITLOS, it is only through judicial decisions that *amicus curiae* can be created. The WTO DSU however contains a specific clause (articles 13 and 12.1), which enables the panels to allow *amicus curiae* without the need to justify why.

Interstate courts in general have been rather reluctant to accept *amicus curiae* briefs, compared to the practice of human rights and international criminal courts. As a result of their jurisdictional scope, human rights and international criminal courts have had to endorse broad participation. Their jurisdictions are indeed open to individuals, as opposed to interstate courts. Human rights and criminal courts will therefore have a more open practice towards the submission of *amicus curiae* briefs. Interstate courts could get inspiration from this practice.[355] To return to interstate courts, the question of what are the different functions *amicus curiae* can play in an environmental context depends on who is the friend of the court. There are two main relevant actors for public interests in an environmental context, namely nongovernmental and intergovernmental organisations. Both actors have the potential to uphold public interests in interstate judicial proceedings, but they do not have the same status as *amicus curiae* in international tribunals. Each tribunal has different procedural standards, determining diversely who can be an *amicus curiae* and how the interests of the *amicus curiae* should be affected.

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[353] Duncan B Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty' (2002) 25 Boston College International and Comparative Law Review 235, 238–239.

[354] *US - Import Prohibition of Certain Shrimp and Shrimp Products* Report of the Appellate Body (AB-1998-4), WT/DS58/AB/R; *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* Report of the Appellate Body (AB-2000-1), WT/DS138/AB/R; *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* Report of the Panel, WT/DS135/R, 18 September 2000.

[355] See Ascensio (n 352) 901, 905; Christine Chinkin and Ruth Mackenzie, 'Intergovernmental Organizations as "Friends of the Court"' in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, Inc 2002) 139, 145, 149.

About the ICJ, article 34 (2) of the ICJ Statute authorises public international organisations to submit "information relevant to the case" in contentious cases, which are understood as excluding NGOs,[356] but it was suggested that it could be interpreted as "encompassing international public interest organisations".[357] However, the case law so far confirms that NGOs are excluded from direct participation in the judicial proceedings. Indeed, the Court was clear in the *Asylum* case when it rejected the submission made by the International League of Rights of Man, because it could not "be characterised as public international organization as envisaged by Statute".[358] States tried to bypass this prohibition of amicus briefs by including them in their own memorials as parties to the dispute. It happened in the *Gabcikovo-Nagymaros* case, where Hungary joined a report from the NGO 'World Wildlife Fund' (WWF).[359] However, this solution is not optimal, as the role of an amicus curiae is to assist the court as a "friend of the court", rather than serve the argument of a party as a "friend of the party".[360] In advisory proceedings, similar views apply. Practice Direction XII – adopted in 2012 – clearly states that

> "1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file. 2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain."[361]

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[356] NGOs were at first authorised to submit amicus curiae briefs, see *International status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 1950 p 128, par. 324; but the Court made it clear later that NGOs were excluded, although in the *Legality of the Threat or Use of Nuclear Weapons* (n 66) it seems that the judges had access to numerous documents submitted by NGOs. See Ascensio (n 352) 906.

[357] Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 The American Journal of International Law 611, 625.

[358] Telegram from the Registrar, *Colombian-Peruvian Asylum Case* (Merits) [1950] ICJ Rep 1950, p 266 Pleadings, II, p. 228.

[359] Memorial of the Republic of Hungary, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (n 63), Annexes, Scientific Reports, Volume 5, Part II, Annex 20 (2 May 1994), p. 841-860.

[360] Saratoon Santivasa, 'The NGOs' Participation in the Proceedings of the International Court of Justice' (2012) 5 Journal of East Asia & International Law 377, 391.

[361] Accessed on July 24, 2016, < http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0/ >.

Judges can therefore read statements written by NGOs, but such statements are not formally part of the judicial procedure. It confirms the Court has not changed its restrictive approach since 1970. A letter from the Registrar of the court during the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* case stated that "the Court would be unwilling to open the floodgates to what might be a vast amount of proffered assistance".[362] Overall, *amicus curiae* made by NGOs are not accepted in proceedings in the ICJ, apart from a very indirect way in advisory opinions. However, such restrictions do not apply for intergovernmental organisations, as clearly stated in article 34(2).

In the ITLOS, there is no direct mention of *amicus curiae*, but according to Article 84 of the Rules of the Tribunal, "[t]he Tribunal may, [...] at the request of a party or *proprio motu*, request an appropriate intergovernmental organization to furnish information relevant to a case before it". Although this article limits the possibility to submit briefs to intergovernmental organisations, Article 48 of the Rules offers the possibility to the parties to the dispute to modify or add rules, which gives some leeway in the application of Article 84 when all parties agree.[363] In contentious cases, the Seabed Disputes Chamber follows the same procedure (article 115 of the ITLOS Rules). As for the advisory jurisdiction, both the Tribunal and the Seabed Disputes Chamber follow the same procedure as in contentious cases, according to article 130 and 138 (3) of the Rules of the ITLOS.

The ITLOS is therefore open to receive briefs from international organisations, but it appears the drafters of the ITLOS Rules excluded voluntarily NGOs by specifying that its jurisdiction is open only to intergovernmental organisations, in order to prevent the controversy that happened before the ICJ.[364] Despite this restrictive view, NGOs have submitted *amicus curiae* briefs, but were rejected, as expected. For instance, the tribunal

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[362] Letter from the Registrar to Professor Reisman, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1970] ICJ Rep 1971, p 16, 1970 ICJ Pleadings, II, pp. 638–639.

[363] Anna Dolidze, 'The Arctic Sunrise and NGOs in International Judicial Proceedings' (2014) *18 ASIL Insight* <http://www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings>.

[364] Lance Bartholomeusz, 'The Amicus Curiae before International Courts and Tribunals' (2005) *5 Non-State Actors and International Law 209,* 230–231.

did not accept the submission by Stitching Greenpeace Council and the World Wide Fund for Nature (WWF) in the Advisory Opinion on *Responsibility and Liability of States Sponsoring Persons and Entities with Respect to Activities in the Area*, because "it had not been submitted under article 133 of the Rules". It has, however, been "transmitted to the States Parties, the Authority and the intergovernmental organisations that had submitted written statements".[365] In subsequent cases, namely Nos. 21 and 22, the WWF International and Stitching Greenpeace Council submitted *amicus curiae* briefs. Both claimed to assist or provide assistance to the tribunal, and none mention on what grounds they submitted an *amicus curiae* brief.[366]

The WTO dispute settlement system started to enable access to the dispute settlement process to *amicus curiae* in 1998, with the *Shrimp-Turtle* case[367], through article 13 DSU, which allows panels to "seek information [...] from any individual or body which it deems appropriate". It did not totally admit the submission of *amicus curiae* briefs, but it made it possible for the Appellate Body to expand from there – as the submission of *amicus curiae* briefs was only provided in the DSU for the panels' proceedings,[368] which it did first in the *Lead and Bismuth II* case,[369] and especially in the *Asbestos* case.[370] Indeed, the Appellate Body adopted guidelines on how to submit an amicus curiae brief, setting out the conditions under which an *amicus curiae* brief could be submitted.[371] The Appellate Body also clarified that member-states not parties to the dispute could be friends of the court.[372] Through its extensive practice, the WTO dispute settlement system has to some extent defined rules on the submission of *amicus curiae* briefs, taken

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[365] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (No. 17)* (Advisory Opinion, 1 February 2011), Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, paras. 13 and 14.

[366] See the *Memorial filed on behalf of WWF* (29 November 2013) for the Case No. 21, para. 2; *Amicus Curiae Submission by Stitching Greenpeace Council* (20 October 2013) for the Case No. 22, para. 12.

[367] *US - Import Prohibition of Certain Shrimp and Shrimp Products* (n 354), par. 102-106.

[368] Bartholomeusz (n 364) 254–259.

[369] *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (n 354), par. 40-42.

[370] *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* (n 354), p. 390.

[371] *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* Report of the Appellate Body, AB-2000-11 (WT/DS132/AB/R), 12 March 2001, par. 52.

[372] European Communities – Trade Description of Sardines, WT/DS231/AB/R, para. 164.

directly by the different investment arbitral tribunals (NAFTA and ICSID for instance).[373] It is quite a different perspective from that pursued by the ICJ and the ITLOS, which could prove them wrong. Indeed, the concerns expressed by the Registrar in 1970 have not become features of the WTO DSU practice, allowing us to conclude that they may be unfounded.[374]

The PCA does not contain any specific rules on *amicus curiae*, but the parties to a dispute are free to accept them if they both agree to do so.[375] Arbitration is in this context less equipped than permanent courts because of the possibility of confidential proceedings. It limits here the potential for *amicus curiae* briefs.[376] However, because procedural rules can be adopted freely by the parties to the dispute, it could allow more progressive developments.

Despite the procedural differences enumerated above, it is possible to draw some general comments, especially about the actual contribution of *amicus curiae*. To what extent have they represented public interests and is the current structure suited enough to respond to the use of *amicus curiae* for that purpose? Razzaque says that a friend of the court participates in judicial disputes "without any direct interest in the litigation [...] to make a suggestion to the court on matters of fact and law within his knowledge".[377] In other words, their role is to be a neutral bystander. Besides, they do not need to have a legal interest to participate, since they are not recognised a legal right to participate. The judicial body will always have the final word about whether it accepts the brief. It means it could be easier to bring to the ongoing dispute public interest norms that might have been violated but that no other means allowed upholding, since an *amicus curiae* does not need to prove any particular legal interest. From that perspective, the dynamics

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[373] Bartholomeusz (n 364) 272.

[374] See Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (CUP 2006) 363–364.

[375] *Mesa Power Group LLC v. Government of Canada,* PCA Case No. 2012-7, Notification to Non-Disputing Parties and Potential Amicus Curiae; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Procedural Order No. 8 (18 April 2011).

[376] Jona Razzaque, 'Access to Remedies in Environmental Matters and the North-South Divide' in Shawkat Alam and others (eds), *International Environmental Law and the Global South* (CUP 2015) 600.

[377] Jona Razzaque, 'Changing Role of Friends of the Court in the International Courts and Tribunals' (2002) *1 Non-State Actors and International Law 169*, 170.

between intervenors and *amicus curiae* are different: an *amicus curiae* has to prove to the tribunal it is useful to it, whereas an intervenor has to prove it has a legal interest itself.

An *amicus curiae* can be useful in different ways, the most important of which being to assist the court, with either specialist legal expertise, factual information,[378] or by providing a measure of due process.[379] Moreover, the use of these non-state actors (both nongovernmental and intergovernmental organisations) in the decision-making process regarding environmental protection can be very useful since they already participate in the law-making, during treaty negotiations for instance. NGOs working on the defence of any aspect of environmental protection and international organisations such as UNEP play a large role in the elaboration of new legal frameworks, and should be able to defend their cause in litigation. However, the relevant function for the purpose of this chapter is the representation of public interests. The problem with the submission of an *amicus* brief by NGOs is that they do not automatically represent the interests of the international community as a whole. Indeed, it should not be forgotten that they also have their own agenda – each NGO exists to pursue a specific purpose – which could undermine their ability to bring forward public interests in general, in the event where their own goals differ from more general public interests.[380] In other words, the participation of non-state actors does not automatically equate with the representation of public interests. It means instead that participation from civil society is allowed, which gives a different perspective on the issues at stake. They represent a particular audience with specific interests at stake, which might differ from the two parties to the dispute, but not necessarily the broader common interest.[381] They can merge in some cases, but it is not an automatic process. Rather, international organisations correspond better to the needs of public interest norms. They can potentially represent the interests of the international community but more importantly they are allowed to participate, as

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[378] See below, chapter 3.3.ii.c (evidence submitted by NGOs).

[379] Bartholomeusz (n 364) 278–279.

[380] Luisa Vierucci, 'NGOs Before International Courts and Tribunals' in Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar 2007) 166.

[381] Chinkin and Mackenzie (n 355) 136.

opposed to NGOs, both in the ITLOS and in the ICJ proceedings – they have the exclusivity to be friends of the court in contentious cases. Especially if a state did not take the opportunity to intervene,[382] an international organisation will be able to use its *amicus curiae* function to bring forward obligations *erga omnes partes,* for instance those within which they were created. It would be for example the case of International Whaling Commission submitting a brief in the *Whaling* case, or the UNEP in other environmental cases. However, the absence of submissions of *amicus* briefs by intergovernmental organisations is noticeable. It has been argued that problems related to the internal competence to decide when to submit *amicus curiae* were the reason why such practices are absent in practice. Indeed, such uncertainties can dissuade international organisations to take action.[383]

2.4 The Advisory jurisdiction

Having analysed the different options international judicial bodies offer concerning the standing in contentious cases, particular attention must be paid to the advisory jurisdiction of these bodies. Indeed, as Chinkin and MacKenzie said, "it is perhaps worth noting that the advisory function is closer to the domestic concept of public interest litigation than the bilateral contentious jurisdiction where party interests prevail. In its advisory jurisdiction the Court gives an opinion on some matter of general international law outside the bilateral, adversarial formulation of a dispute framed for contentious proceedings."[384]

There are different factors why the advisory jurisdiction could act as a remedy for the relevance of international courts and tribunals in environmental matters. One factor is about who can request an advisory opinion. Article 65 (1) of the ICJ Statute says that "the Court may give an advisory opinion [...] at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request". In contrast with standing in contentious cases, the ICJ is in this case open to other entities than states. Moreover, as we have seen, international organisations can be

[382] As described in the previous section.
[383] Chinkin and Mackenzie (n 355) 141–143.
[384] ibid 145.

adequate in bringing up some general or public interests. In ITLOS advisory proceedings, international organisations also have the opportunity to request advisory opinions. Both the *2011 Seabed Disputes Chamber* and the *SRFC* advisory opinions have been requested by international organisations: the ISA in the first instance and the Sub-Regional Fisheries Commission (SRFC) in the second.

Furthermore, the ITLOS has to "give notice of the request for an advisory opinion to all States Parties" as well as to "the intergovernmental organisations which are likely to be able to furnish information on the question".[385] For example, in the request for an advisory opinion submitted by the SRFC, the Tribunal made an extensive list of forty-eight intergovernmental organisations, regional or global, which were considered able to submit memorials in the case. These organisations were considered "likely to be able to furnish information on the questions submitted ... for an advisory opinion", according to article 133 (2) of the ITLOS Rules.[386] Since the purpose of an advisory opinion is different from a contentious case, the fact it is more open to entities other than states parties to the procedure is understandable.

Moreover, although not formally allowed in the ICJ procedure, *amicus* briefs will become accessible through public domain, and will be held on the Peace Palace (Practice Direction XII, par. 3). It is a slightly broader rule than in contentious cases. In the case of the ITLOS procedure, NGOs are not allowed to submit written statements, but if they do, they will also be available on the tribunal's website, as in the case of the *SRFC* Advisory Opinion.[387]

Since the purpose of the advisory jurisdiction differs from the one in contentious cases, advisory opinions are of relevance in environmental matters. For the ICJ and ITLOS, advisory opinions are more a matter of interpretation or clarification of the law. The purpose is broader than settling a bilateral dispute. In the *SRFC* opinion, the tribunal

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[385] Article 133 (1) and (2) of the Rules of the ITLOS.

[386] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Procedural Order) [23 May 2013] p. 3, and Annex to Order 2013/2 of the International Tribunal for the Law of the Sea.

[387] *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (n 217), par. 23.

recalled that "[t]he object of the request by the SRFC is to seek guidance in respect of its own actions".[388] Since the overall objective of the Commission is to reinforce fisheries policies in the states members' territorial waters and EEZ,[389] it is possible to conclude that the advisory opinion was requested in the common interests of the member states sharing fisheries resources. The *2011 Seabed Disputes Chamber* opinion is even more striking, because the Seabed Disputes Chamber is competent to hear cases about the Seabed Area, which is located beyond national jurisdictions and is the "common heritage of humankind". Since the ISA is responsible for the exploitation of minerals in the Area, it is also able to seek advice by requesting an advisory opinion. The existence of such proceedings triggered by the ISA is a great example of how an international organisation can defend *erga omnes* obligations, in the interests of the international community as a whole.

The Seabed Disputes Chamber noted that the underlying reason for the political organ to ask for an advisory opinion was that it needed the "assistance of an independent and impartial body".[390] Or the international organisation could come to the conclusion there is a legal dispute that may need to be resolved, but cannot be brought to the contentious jurisdiction for lack of consent between the two concerned states. The international organisation could then request an advisory opinion that will influence the result of the existing but not settled dispute. For example, the Court explained why it accepted to give an advisory opinion in the case of the *Construction of a Wall*, and said that "[t]he opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute".[391] The court thus confirmed that the prerequisite for using judicial settlement to solve a dispute, namely the consent of both interested parties, was overridden by the general concern raised by the General Assembly. The same can be said about the *Namibia* case. South Africa would never have accepted the Court's jurisdiction in a

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[388] ibid, par. 76.

[389] See the SRFC's website, last accessed August 23, 2016. < http://www.fao.org/fishery/rfb/srfc/en >.

[390] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 90), par. 26.

[391] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 197), par. 50.

contentious case. The institution of advisory opinions therefore opens up the court's jurisdiction. It may be very useful for environmental disputes in that regard.

It has also been argued that the ICJ or the ITLOS advisory jurisdictions would be a good forum to hear a case on climate change.[392] In the first case, the UNGA would be able to request an advisory opinion, but other international organisations could do it. In the case of an ITLOS advisory opinion, the object of the opinion would be limited to the law of the sea because of the scope of the tribunal's jurisdiction. An advisory opinion on climate change would be a prime example of an *erga omnes* procedure, since the obligations created under the UNFCCC are integral in nature and the existence of the UNFCCC is based on the nature of the climate change problem as "common concern" of the international community.

The advisory jurisdiction serves the general or public interest in a more satisfactory manner. Therefore, it allows issues to be voiced that would otherwise have been kept silent in a bilateral contentious case, but does not exist to help solving an existing dispute. Indeed, advisory opinions are always non-binding. One of the indirect consequences of an advisory opinion can be to prevent a dispute to arise. Indeed, for an advisory opinion to be brought to the court, it cannot be a bilateral dispute. It leaves the door open to any legal question, regardless of the fact a dispute is shaped as a dispute between two states. This may be easier because of the non-binding nature of an advisory opinion.[393] The *Western Sahara* case and the *Kosovo* case showed that advisory opinions can also cover other disputes than strictly inter-state disputes. In that sense they could even prevent an international dispute to arise.

If we consider the legal effect of advisory opinions, we know they are not legally binding. Nonetheless, in practice the effects can go "beyond the scope of the UN Charter".[394] They influence the development of international law, the states' behaviours, and even give precedence on a legal question. But the remaining question is whether the nature

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[392] See Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (n 208).

[393] Wolfrum, 'Panel II: Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?' (n 105) 64.

[394] ibid 92.

of advisory opinions, and the fact they are not binding, enhances or disadvantages the outcome. Both sides can be argued. On the one hand, states might be more inclined to listen to the Court delivering its interpretation of the law. The court is thus guiding states in their effort to comply with the international norms. Their sovereignty is preserved. On the other hand, there is little to be done if one state decides not to follow the court's opinion.

2.5 Conclusion

There are different layers of protection – international environmental law is a sum of multi-layered regimes. This affects the concept of sovereignty as these layers add restrictions on each state's sovereignty. Although states retain their full sovereignty on their natural resources,[395] restrictions are multiple. The fact the state responsibility is extended from a narrow individual responsibility to a states' community responsibility is a good example of this evolution.[396]

In reflection, the categorisation of international environmental obligations as reciprocal, interdependent or integral obligations – the element of reciprocity being the key change – has been used as a basis for the further analysis of judicial responses to standing. If the obligation is reciprocal – bilateral – the interested state, or injured state in the case of a violation of an environmental rule will be easily identifiable. It will be possible for the affected state(s) to bring a legal claim on the basis of this reciprocal obligation (either through the particular dispute settlement clauses or through general state responsibility). However, if the obligation is integral, as in the cases where the intention of the rule is to protect the global environment, a problem concerning the standing before a judicial international body occurs.

Focusing specifically on bilateral adversarial disputes, there is no reason to object to the appropriateness of adjudication. The characteristics of adjudication are no longer

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[395] Principle 2 of the Rio Declaration: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[396] Article 33 ILC Draft Articles on State Responsibility.

problematic in the event of a traditional transboundary dispute. Romano particularly emphasised the usefulness of arbitration in the event of transboundary conflicts. Amerasinghe even sustained adjudication is one of the "most viable means of international dispute settlement" and provides four distinctive features in support to his affirmation.[397] On the whole, the fact the judicial function is by essence independent and impartial, that states accept the character of judicial organs as judicial organs, that judicial bodies have inherent powers and that they are not subordinate nor subsidiary to any other body are the key elements for the success of the international judiciary.

Focusing on judicial implementation of *erga omnes (partes)* obligations, when we think of public interest enforcement, we need to consider the question whether a state is entitled to defend a given community interest without the need to individualise the injury (leading towards the acceptance of an international *actio popularis*) separately from the question whether a state can defend a community interest through the traditional dispute settlement mechanisms. There are good examples where a judicial procedure was based on communitarian standing (the *Whaling* case being the most recent), or when *erga omnes* standing was recognised (*Seabed Disputes Chamber* 2011 Advisory Opinion) but the existence of an *actio popularis* cannot be recognised yet. There is indeed room for improvement regarding the development of litigation of *erga omnes* obligations.

Overall, this chapter highlighted the deficiencies in the rules of standing, and focused on how public interests can be upheld by both states and other non-state actors. Participation in judicial proceedings can be pursued down different paths. The debate on public interests litigation has a major impact on such rules of participation. By letting other actors interfering into a state's affairs, other interests can be represented. It means that not only states have a right to have a say. However, states also play an active role since they mainly get the right to a remedy, which can also be influenced by public interest norms. States primarily have a right to a remedy as an initiator or intervenor, as opposed to other actors who have the right to have a say in judicial proceedings, and not even a right but a possibility to be taken into account. Emphasis on intergovernmental organisations as potential upholders of public interests of the international community

[397] Amerasinghe (n 215) 122.

(or a part of) is critical. As demonstrated by the ISA, certain international organisations have the potential to play an important role in the defence of public interests. Such conclusions go towards the general argument of the thesis that certain procedural obstacles can be overcome. The role of international organisations in environmental disputes has been underlined and is an effective tool that can improve the adequacy of international dispute settlement.

3. SCIENTIFIC FACTS IN INTERNATIONAL ENVIRONMENTAL LITIGATION

The central aim of this chapter is to assess the role of judicial institutions when complex environmental cases rely on contradictory and controversial scientific evidence. International environmental disputes highlight complex scientific data, often novel, and uncertain, on which judges have to take a stance. More broadly, the protection of the environment involves the management of scientific uncertainty, as a prerequisite. A key question to be answered is: when it comes to the interpretation and application of such rules of environmental protection, how should international judges deal with a changing scientific environment, or even with the unknown? This chapter will cover the extent to which international courts and tribunals can use their existing powers over fact-finding methods in order to respond effectively to the needs of environmental disputes.

In international litigation, facts have never been a prominent source of disagreement between the parties to a certain dispute. Overall, states disagree on legal interpretations rather than factual determinations. Yet, problems concerning evidence have arisen in various cases, such as the ones involving the determination of territorial boundaries, where the parties would disagree on the factual situation as a result of different interpretations of maps and other cartographic evidence.[398] Problems of proof also arose in very different cases, altogether setting the ground for further developments in environmental disputes. However, international dispute settlement bodies have been criticised for failing to offer procedural solutions to the specific challenges related to scientific facts in disputes on environmental matters. The fact the ICJ neglected all scientific facts from its reasoning in the *Gabčíkovo/Nagymaros* case, for example, was seen as a weakness, since the parties' arguments relied heavily on certain controversial scientific facts.[399] The fact the Court did not consider any of those facts can arguably delegitimise its ability to judge cases with a heavy scientific input. In the *Pulp Mills* case, the Court learnt from the *Gabcikovo-Nagymaros* case and appreciated abundant

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[398] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Merits) [1986] ICJ Rep 1986, p 554. The Court needed to interpret certain maps, but the complexity did not lie in their scientific value, rather on the legal and probative values of those maps (par. 53-56).

[399] Alan Boyle and James Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4 Journal of International Dispute Settlement 245, 268.

scientific evidence, but it created different problems concerning the process of assessment of this evidence by the Court.[400] However, judicial practice keeps reacting rapidly between cases that involve uncertain scientific facts, showing its ability to adapt to current developments. Such rapid response shows that international courts and tribunals are aware of the specificities of environmental disputes and willing to make certain changes to better handle environmental disputes.

Disputes over science are part and parcel of environmental conflicts, and represent more broadly the exercise of assessing the risks related to certain actions and decisions. Indeed, the WTO case-law shows great emphasis on scientific issues, especially when science is used to establish the existence of risk justifying certain trade measures (under the SPS Agreement for example).[401]

This chapter will show the different procedural options available to judicial bodies, how they have been used and their potential for even further developments. It will consider these questions within the context of special environmental rules. Indeed, the role of international courts and tribunals also depends on which rules they are implementing. This chapter will focus on the different combinations between environmental rules dealing with scientific facts and certain procedural principles.

3.1 Challenges for international adjudication

The use and assessment of scientific facts in international judicial courts is part of a broader debate about the ability of a tribunal to determine the truth, or a truth. A critical question in judicial terms is whether or not it is possible to determine a true fact. A tribunal has to fix a certain factual setting from that given at a certain time before it. Indeed, it bears the responsibility to ascertain the facts at the basis of the dispute, which are considered distinct from the legal aspects of the dispute, as commonly understood

[400] Joint dissenting opinion Judges Al-Khasawneh and Simma, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28).

[401] Markus Wagner, 'Law Talk v. Science Talk: The Languages of Law and Science in WTO Proceedings' (2011) 35 Fordham International Law Journal 151, 154.

through the rationalist tradition.[402] In order to establish the facts and convince the tribunal, sufficient proof must be given. In that sense, proof is only a means to persuade of a certain truth, which can be based on the coherence of the discourse or on its consistency with reality.[403]

Is scientific fact-finding conceptually different from any other fact-finding process? D'Aspremont and Mbengue explained that a particularity of scientific fact-finding as opposed to other traditional fact-finding is that it is based on probabilities instead of veracities, creating tensions within a judicial procedure. This distinction between true and probable facts can be explained by the intrinsic lack of certainty of scientific facts. Science as a field is based on the verification of hypotheses, which evolve with the development of knowledge; new advanced knowledge replaces current knowledge, making current knowledge inherently unstable.[404] Scientific knowledge is proven through the establishment of scientific evidence. The legal methods are completely detached from the process of affirming scientific facts. Therefore, a tribunal will have to encompass new techniques and rely on sources other than legal sources. Although there are certain facts so common they are considered as veracities and need not to be proved, such as the days of the week,[405] all the other facts stay subject to examination and have different weights at the specific time the judicial decision is made. The increasing importance of scientific facts necessary to solve a legal dispute emphasises the limited ability of an international court or tribunal to decide adequately on the right application of the law in a particular case, therefore challenging the role of a legal court towards science. The uncertainty of scientific facts is demonstrated by the lack of clear evidence

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[402] Foster (n 157) 5, Citing William Twining, Rethinking Evidence: Explanatory essays, 2nd Edition (CUP 2006) and Jeremy Bentham, Rationale of Judicial Evidence: Specially applied to English Practice: From the manuscripts of Jeremy Bentham (Hunt and Clarke 1827).

[403] Joseph Ngambi, *La Preuve Dans Le Règlement Des Différends de l'Organisation Mondiale Du Commerce* (Bruylant 2010) 3.

[404] Jean D'Aspremont and Makane Moïse Mbengue, 'Strategies of Engagement with Scientific Fact-Finding in International Adjudication' (2014) 5 Journal of International Dispute Settlement 240, 246–247.

[405] André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001, Volume 6* (Intersentia 2003) 118.

in international litigation, and the complexity of the controversies affects how evidence is collected.

In particular, environmental issues often derive from scientific controversies. The science at the basis of environmental concerns is often uncertain and debated among the scientific communities. Therefore, when it comes to proving environmental rules and principles have not been breached, the dispute over legal interpretation drifts towards a dispute over who has the most irrefutable scientific proof.

The principles and tools used to guide international courts and tribunals are vague, with the aim of giving flexibility to the parties and respecting their sovereignty, as well as leaving open all means of ascertaining the facts.[406] Indeed, international courts and tribunals can assess evidence freely, and there is no hierarchy among the different types of evidence.[407] The importance of scientific facts challenges the structure of the current system in which rules on evidence are loose. In this regard, the highly scientific content of these disputes often implies a high recourse to expertise,[408] creating a tension between judges and experts. Should he/she decide on scientific matters? How should scientific facts be used in court? Indeed, scientific facts are not just an empirical tool to prove a legal argument, but have a meaning on their own.[409] These are best explained by scientists themselves, as highlighted in the *Whaling* case, where the Court had to analyse the meaning of the "scientific purposes" of Japan's activities. Some are of the opinion that a court of law is not suited to determine what science is and that the question is: how far should the courts go in this venture? Nonetheless a court will have to determine facts, scientific and others. International judges might not always be best suited to accomplishing this task and might need to call for special external help. The risk in doing this is that judges may hand over some capacity to assess the facts to experts, therefore

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[406] Anna Riddell, 'Evidence, Fact-Finding, and Experts' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 850–852.

[407] Eve Truilhé-Marengo, 'Scientific Expertise in International Disputes. The Case of the WTO' in Yann Kerbrat and Sandrine Maljean-Dubois (eds), *The Transformation of International Environmental Law* (A Pedone & Hart 2011) 321–338.

[408] Treves (n 35) 295.

[409] D'Aspremont and Mbengue (n 404) 247–249.

compromising the judicial function of the court.[410] Not only do judges have to receive facts, but they must also decide on their meaning. They need to appreciate and weigh the facts. The uncertainty and complexity of scientific facts in this sense challenges the interpretation of the burden and standard of proof. How to judge on science lies at the heart of the problem.

However, one constraint exists for international tribunals: procedural fairness. This concept frames the role of international courts and tribunals. The rules governing procedural matters – including collecting and assessing evidence – have to protect the proper administration of justice and preserve the fair opportunity for each party to comment on the opponent's legal and factual contentions. Indeed, establishing facts in a transparent and adequate manner is a defining feature of a court. Without it, a tribunal loses its legitimacy.

The adaptation of the courts to this different type of scientific evidence has not taken place evenly. The ICJ, for instance, has been slow to adapt to the scientific content of environmental claims.[411] However, arbitral tribunals have adapted more rapidly and innovated earlier with regard to procedural changes.[412] The lack of clear rules on evidence has contributed to this slow adaptation, but at the same time offers possibilities for judges to innovate.

Sands showed challenges are not only faced by tribunals but also by the legal teams pleading in a case, highlighting the importance of a scientist in the formation of the legal arguments and the impacts of scientific reports to determine the legal outcomes.[413] But the role of the judicial body itself is pushed by the lack of certainty in science, as it makes the application of the law to those facts harder. The uncertainty has effects on the application of the law itself. This chapter, therefore, focuses first on the impacts of

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[410] Declaration of Judge Yusuf, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment [2010], par. 10.

[411] As it was shown in *the Gabcikovo/Nagymaros* case, where scientific data was almost ignored by the Court, which was followed by the *Pulp Mills* case with a mishandling of experts by the Court.

[412] In particular, certain procedural innovations have occurred in some cases, such as *Trail Smelter Case (United States v Canada)* (n 237); *Indus Waters Kishenganga Arbitration (Pakistan v India)* (n 31).

[413] Philippe Sands, 'Water and International Law: Science and Evidence in International Litigation' (2014) 44 Environmental Policy and Law 188, 196.

science in international environmental law and subsequently the consequences of this for international dispute settlement. In particular, it will analyse how reliance on scientific knowledge has changed the rules themselves, consequently affecting the judicial procedures relating to these rules. Indeed, there is a correlation between the heavy dependence on science during the creation of adequate legal frameworks, and the reaction of an adjudicative body once a violation of some international environmental rules is alleged.

3.2 International environmental law based on the development of science

"Science makes the environment speak. Without science, trees have no standing".[414] With this memorable phrase, von Moltke emphasised the crucial role of science in the development of environmental protection.

i. Dependence on scientific progress

The development of rules of environmental protection depends extensively on the progress of scientific knowledge.[415] This reliance on science takes different shapes. It can be seen at every stage of the process, from the intent to legislate at the policy level to the determination of the content of the rules. Policy-makers, in determining the level of protection required to have an efficient impact, need to rely on scientific developments.[416] But science is used not only to diagnosing the problems under scrutiny, but also to solving the problems. It is in the latter case that law-making is affected by scientific developments. Scientific bodies exist within some international organisations or are part of multilateral environmental regimes, researching specific environmental matters, and directly examining issues related to the organisations' interests. Separate scientific organisations have also been created "to provide independent scientific advice

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[414] von Moltke (n 316) 98.

[415] See Steinar Andresen and Jon Birger Skærseth, 'Science and Technology: From Agenda Setting to Implementation' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2010) 182–202.

[416] For a full account on the use and 'abuse' of science by policy-makers, see Steinar Andresen and others, *Science and Politics in International Environmental Regimes: Between Integrity and Involvement* (Manchester University Press 2000).

and research" on topics it judges relevant to law-makers.[417] Moreover, the centrality of scientific issues to the structure of legal frameworks has resulted in the creation of so-called "regulatory scientific institutions", defined as hybrid institutions, "reliev[ing] rule-making bodies from identifying the scientific position on controversial regulatory questions", and filling the lack of "legal-political decision-making powers".[418]

As a result, many international environmental rules are dependent on scientific knowledge in two different fashions, either translating scientific data into law directly or referring generally to science. Rules that fix the maximum cap on the use of certain chemicals in order to preserve the ozone layer, for example, are using scientific data to directly determine the content of the rule.[419]

On the other hand, rules can refer to scientific developments without defining what those developments are. The exception permitted by the ICRW for killing whales for scientific purposes, for example, does not identify what those purposes are.[420] Moreover, rules relating to the prevention of transboundary harm and those preventing the threat of transboundary harm are another example of implicit reliance on science. Indeed, how these obligations will be fulfilled very much depends on how advanced the science is. Certain standards – inevitably evolving with time – are expected in the implementation of such obligations.

ii. Impact of the uncertainty of scientific knowledge on environmental principles

There are dangers attached to such a high reliance on science. One of these is the uncertain nature of most scientific knowledge related to the environment. Indeed, the main characteristic of today's environmental protection is the lack of agreement from

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[417] Birnie, Boyle and Redgwell (n 21) 99–100. The International Council for Exploration of the Seas (ICES) is a scientific organisation that cooperated with many intergovernmental organisations in the formation of new rules. The Intergovernmental Panel on Climate Change (IPCC) is another example of a body composed of scientists advising the governing body of the UNFCCC.

[418] Oren Perez, 'The Hybrid Legal-Scientific Dynamic of Transnational Scientific Institutions' (2015) 26 The European Journal of International Law 391, 394–395.

[419] See Article 2A of the Montreal Protocol on Substances that Deplete the Ozone Layer, regulating the consumption of CFCs released in the atmosphere.

[420] Article VIII of the International Convention for the Regulation of Whaling.

the scientific community on the evidence of certain natural phenomena, effects of certain activities or substances. This influences the behaviour of actors at all stages in both the law-making and decision-making processes. A central question that arises is: how should courts decide on a certain regulation when the evidence is limited, weak or inconsistent? A tension exists between scientists who do not have to give a final and definitive answer until they find all necessary evidence and law-makers who need to make decisions and cannot delay them indefinitely. Indeed, science uses the methods of confirming hypotheses by repeatedly scrutinising them until answers are strong enough. This process is a "cumulative effort, with answers generated through a long sequence of hypotheses, each moving closer towards full insight".[421]

Hence there is a need to resolve that tension and find a way to reconcile these two opposite stances. The need for preventive measures – even in unclear scientific cases – has been developed, as part of the obligation of due diligence by states.[422] Legal responses have emerged, led by the development of the precautionary principle, which exists in order "to make greater allowance for uncertainty in the regulation of environmental risks and the sustainable use of natural resources".[423] Indeed, the precautionary principle is one of the pillars of international environmental law, formulated in the benchmark Rio Declaration at Principle 15, although the essence of the principle was already being used before 1992. The issue of not being able to ascertain causes or potential future effects of certain activities has then forced states to implement the precautionary principle in various international environmental conventions and regimes. When scientific certainty is lacking in order to define what the risks of certain activities or substances are for the environment, the precautionary principle guides states by asking them to be more cautious and take into account the uncertainties.[424] The innovation of the precautionary principle is "that it changes the role of scientific data".[425] It furthermore "assumes that

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[421] von Moltke (n 316) 98.

[422] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28), par. 101.

[423] Birnie, Boyle and Redgwell (n 21) 136.

[424] ibid 153–157.

[425] ibid 155, quoting David Freestone, 'The Road from Rio: International Environmental Law After the Earth Summit' (1994) 6 Journal of Environmental Law 193.

science does not always provide the insights needed to protect the environment effectively".[426]

Although the scope and exact content of the precautionary principle vary among the international community, three versions have been identified by Wiener.[427] The principle entails the following: either it allows regulation in the absence of certain and complete evidence, demands regulation when the risks are uncertain, or affects how evidence is weighed in courts by either shifting the burden of proof from the complaining party to the defending party or lowering the standard of proof. The last version will be discussed later, but the developments regarding the two first versions show how the reliance on science is crucial and can shape the political debates to create certain rules. The essence of the precautionary principle is that it is a legal standard that affects the interpretation of the rules primarily, thus not having a direct impact on the conduct of the judicial procedures themselves.

However, in the cases where the rules rely implicitly on science, it is important to underline that the legal standards to be applied to certain behaviours do influence the interpretative decisions of international courts and tribunals. Indeed, science helps to determine whether the standards have been met, but the standards themselves, being the application of the precautionary principle for example, will have the determining impact on the final decision from the judges. The nature of the applicable legal standard will require specific solutions from the court. There is a correlation between the substance of the rule and the role of the tribunal. Indeed, legal standards as applied by the judges must take into account such scientific uncertainty. The fact the rule itself sets a different threshold of intervention will influence how far a tribunal will intervene. In particular, the application of the precautionary principle will prefer restrictive measures

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[426] David Freestone and Ellen Hey, 'Origins and Development of the Precautionary Principle' in David Freestone and Ellen Hey (eds), *The Precautionary Principle and International Law: The Challenge of Implementation*, vol 31 (Kluwer Law International 1996) 12.

[427] Jonathan B Wiener, 'Precaution' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2010) 602–607.

over other measures.[428] It goes without saying that since science evolves, the application of the precautionary principle will vary over time.

iii. Development of procedural obligations

Another practical result of scientific uncertainty is the creation of procedural rules, as exemplified in the 2001 ILC Articles on Transboundary Harm[429] in the form of obligations to conduct environmental impact assessments, and obligations to notify or monitor certain activities likely to cause harm. Procedural obligations relating to environmental protection can be seen as instruments to achieve certain environmental standards.[430] The conduct of an environmental impact assessment, for instance, will be a yardstick used to decide whether the due diligence required for a state to pursue a certain project has been respected. The obligations to notify other states of certain activities or exchange data on certain substances force states to collect relevant data in order to reach the most correct decision.

Procedural obligations shift the discourse at the law-making level: instead of reaching political consensus over more substantial concepts, lawmakers create procedural rules eliciting the need for greater consensus over the issue at stake.[431] Notwithstanding that the proceduralisation of international environmental law is directly related to the lack of political consensus on substantial issues, it is connected with the high pace of developments in science, precisely because it leaves open the outcome of the particular project,[432] including the scientific content related to the project. The procedural obligation will remain the same while the basis to comply with it will evolve with the development of scientific knowledge. The fact the outcome has not been decided by the

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[428] See for example the EEA Court's statement in the Case E-3/100, *EFTA Surveillance Authority v. Norway* [2001] 2 CMLR 47. "When the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations, make it impossible to determine with certainty the risk or hazard, but the likelihood of considerable harm still persists were the negative eventuality to occur, the precautionary principle would justify the taking of restrictive measures".

[429] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (Yearbook of the ILC, 2001, vol. II, Part Two).

[430] Phoebe N Okowa, 'Procedural Obligations in International Environmental Agreements' in Ian Brownlie and James Crawford (eds), *British Yearbook of International Law*, vol 67 (OUP 1996) 278.

[431] Martii Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 60 Nordic Journal of International Law 73, 74 and 78.

[432] Okowa (n 430) 278.

substantial rule leaves room for scientific developments and the adjustment of the procedural rules. Therefore, an environmental impact assessment will have to be carried out according to the knowledge at the time. Procedural obligations provide some flexibility in their application that can be positive regarding the incorporation of scientific developments.

In delineating the role of international courts and tribunals, the question of whether the role of the court changes when it applies procedural or substantive obligations arises. Since procedural obligations in international environmental law have multiplied, international courts and tribunals must apply them regularly (as in the *Trail Smelter* case, the *Pulp Mills* case, or the *Certain Activities* case). Rules such as the obligation to enter into consultations, or to notify other states are easier to implement and verify, however they will not lead the court in its understanding of the purpose of the rules. Therefore, international adjudication will seem at first glance more apt to resolve a dispute over procedural obligations, because the verification of compliance seems easier. However, the interpretation of procedural obligations cannot be divorced from the broader scientific context within which environmental rules exist. The judicial exercise of determining the meaning of the rules is thus as complex for procedural rules as for any other rule.

Moreover, does the level of scientific contents affect the role of the courts differently depending on what type of obligation is invoked? While the court does change the interpretative process it will apply to different types of rules, it does not affect the approach of a tribunal in establishing scientific facts. It could be imagined that the application of procedural obligations sidesteps the need to assess the scientific content of the substantive obligations, in the sense that the scope of procedural obligations is limited to narrower legal issues, excluding the scientific debates around the substantive obligations. In practice, however, this is not the case. Instead, international judges will have a broader mandate to determine the facts, as the exact scientific measures are left purposely open. It shifts the burden from the law-making body to the judicial body, which must pin down the exact scientific facts at the time of the dispute.

3.3 Procedural issues faced by courts and tribunals in environmental disputes involving complex science

In order to encompass the specificities relating to the nature of international environmental rules, international courts and tribunals must use their fact-finding tools extensively. These tools are often part of the tribunal's founding text, but are very rudimentary, leaving some interpretative space for the tribunals to adapt to the particular circumstances. This chapter therefore focuses on how international courts and tribunals can use this interpretative space in an adequate manner for environmental disputes. Changes in the case law have already been taken, as it will be demonstrated further, and the interpretative space is big enough for international courts and tribunals to adapt their methods for environmental disputes.

There are two major stances on the role of a court in the fact-finding process. On the one hand, procedures can be adversarial, leaving the collection of evidence to the parties only without intervention. On the other hand, tribunals can be given a more investigative role in the fact-finding process, where they have their own methods to gather facts.[433]

The international system oscillates between the two since it gives international tribunals some independent fact-finding capacities, yet contains adversarial elements. In addition, parties are free to agree on the procedure at the beginning of a dispute. This is particularly important in the context of arbitration,[434] however, parties retain some control over procedural issues as well in permanent courts, where "in every case submitted to the [International Court of Justice], the President shall ascertain the views of the parties with regard to questions of procedure".[435] Nonetheless, there are some limits to this freedom.

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[433] Markus Benzing, 'Evidentiary Issues' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (Second Edition, OUP 2012) 1238.

[434] The introduction of the PCA Optional Rules For Arbitrating Disputes Between Two States (1992) states that "[t]he Rules are optional and emphasize flexibility and party autonomy. Article 1(1) also emphasises the fact that the parties to a dispute under the PCA can modify procedural rules as they wish.

[435] Article 31 of the Rules of Court (1978).

i. From procedural freedom to procedural fairness

The parties and the tribunal are not free to decide on procedural rules as they want, but must respect certain rules as part of the respect of procedural fairness and procedural justice at large. Despite the fact the general concept of due process is not often mentioned in the context of interstate adjudication (in contrast with international criminal law or human rights law), it is present in interstate proceedings. Indeed, interstate litigation is based on the principle that the parties are equal; they are not automatically in a situation of unequal resources or means to collect evidence, as it would be the case in a criminal context.[436] Therefore, rules of protection with the aim of balancing the parties do not appear as crucial as in other types of litigation precisely because the sovereignty of states is translated directly into the procedure as procedural equality. Nonetheless the principles associated with due process are present in interstate litigation.

In particular, two fundamental principles are attached to the concept of international procedural justice, namely the impartiality of international courts and tribunals and the equality between the two parties to the dispute.[437] They are sometimes translated in the procedures of the various international courts and tribunals through their own rules of procedures,[438] but also form general principles of international law, and are arguably part of the inherent powers of international courts and tribunals.[439] A sound (or proper) administration of justice commands the actions of international judicial bodies, as shown in the *Military and Paramilitary Activities in and against Nicaragua* case, where the

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[436] Rüdiger Wolfrum, 'Taking and Assessing Evidence in International Adjudication' in Tafsir Malik Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 343.

[437] John P Gaffney, 'Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System' (1999) 14 American University International Law Review 1174, 1179.

[438] Article 11 of the WTO DSU: "[...] a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

[439] Filippo Fontanelli and Paolo Busco, 'What We Talk About When We Talk About Procedural Fairness' in Arman Sarvarian and others (eds), *Procedural Fairness in International Courts and Tribunals* (The British Institute of International and Comparative Law 2015) 33.

Court's assessment of the impacts of an absent party on the proceedings was led by the application of such sound administration of justice.[440] The *South China Sea* award also illustrates the awareness of the judges to ensure procedural fairness for both parties. Measures taken by the arbitral tribunal to ensure the procedural rights of each party to the dispute became especially important during the proceedings in this case since the People's Republic of China did not participate at all. Imbalance in the procedure existed, and the tribunal had to compensate such imbalance in the name of procedural fairness.[441]

For the purposes of this chapter, the most relevant guarantee a tribunal has to offer to the litigants is the guarantee it will find the most exact facts at the basis of the dispute. The fact-finding function of a tribunal is one of the core features of the due process requirement of judicial procedures and a core issue for interstate adjudication. Indeed, the link between accurate facts and fairness exists because tribunals are expected to apply the law consistently and in uniformity, task that can be done only when the facts have been accurately ascertained.[442] This function becomes harder to fulfil when the main facts are scientific, let alone when the science is uncertain. Because "scientific facts are rooted in methods of science [...] and not in methods of law",[443] the application of procedural fairness needs to be adjusted. Indeed, scientific facts, in particular, affect fact-finding methods, i.e. how the facts are gathered is critical, as the accessibility of the information required can be obstructed by territorial boundaries, high costs and/or the use of advanced techniques. Uncertain facts influence the way international tribunals weigh and evaluate the value of those facts.

ii. Types of evidence

The different ways of ascertaining scientific facts have a clear impact on the quality of the understanding necessary to judge in a fair and transparent way. How best represent

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[440] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Merits) [1986] ICJ Reports 1986 p 85, par. 31.

[441] *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (n 34), par. 119-128.

[442] Michelle T Grando, 'The Process of Fact-Finding before International Tribunals: A Study of the WTO Dispute Settlement System' (Library and Archives Canada, Published Heritage Branch 2008) 10.

[443] D'Aspremont and Mbengue (n 404) 246.

the factual situation in case of complex and uncertain scientific facts? In order to answer this question, a distinction between what kinds of evidence are used and who is in charge of bringing it to the proceedings must be drawn. In other words, the first issue is about the delegation of powers from the legal field to the scientific field, whereby the gathering of the facts is "outsourced"[444] to scientific experts. The second issue is about the balance between the concept of monopolistic control of the fact-finding mission by the parties and the need for intervention by the tribunal and/or by other actors such as NGOs.

In assessing the first issue, it is important to point out that "factual investigation and legal reasoning will need to proceed in tandem"[445] in international adjudication. Therefore, the facts must be put forward alongside the legal arguments. Facts do not stand on their own. As a consequence of the nature of scientific facts, experts offer crucial proof, as Judges Al-Khasawneh and Simma explained:

> "[t]he adjudication of disputes in which the assessment of scientific questions by experts is indispensable, as is the case here, requires an interweaving of legal process with knowledge and expertise that can only be drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the Court."[446]

Experts play a large role in identifying the relevant facts and their meaning in the context of the case under dispute.[447] Arbitral tribunals are also familiar with the use of experts, as demonstrated in cases such as the *Trail Smelter* case, or the *Iron Rhine Railway* case, where experts' opinions were relied upon by the tribunal. They are one of the most important ways to explain and support evidence of certain scientific facts. However, the limits of their role are not clear, and the relationship between them and judges need to be clarified.

In the case of complex scientific disputes, the reliance on experts legitimises the decision of the court, only if procedural fairness and transparency are respected. The difference

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[444] ibid 257–262.

[445] Foster (n 157) 162.

[446] Joint Dissenting Opinion *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28), par. 3.

[447] Gabrielle Z Marceau and Jennifer K Hawkins, 'Experts in WTO Dispute Settlement' (2012) 3 Journal of International Dispute Settlement 493, 504.

between identifying the facts, understanding their meaning and deciding the case poses several problems for international courts and tribunals. The balance between the experts' scientific input and their impact on legal questions must be measured. Knowing that, the ICJ has been careful in its reference to experts' opinions by wording their input as "information" rather than "evidence".[448] The WTO Appellate Body also reaffirms that experts help panellists to "understand and evaluate the evidence submitted and the arguments made". Although "the purpose of the expert opinion must be to assist the Court in giving judgment upon the issues submitted to it for decision",[449] several authors have highlighted the dangers of relying too heavily on scientific experts, enabling them to almost judge on legal issues as well as clarify facts, because of the nature of legal obligations being dependent on science (as seen above at 3.2.i). The risk is that the line between experts and judges becomes thinner.[450] Indeed, the role of the experts to present facts and data to the bench in an understandable manner – and to offer their own interpretation of these facts and data in the form of an opinion – can encroach on the role of the judges. In this sense, experts have a role beyond the fact-finding process because they influence the standards of proof and review the Court chooses to adopt regarding certain state actions. Indeed, the weight international courts and tribunals grant to certain facts depends on the level of persuasion and judges must assess experts in contrast to one another in order to test their credibility.

As highlighted at the beginning of this section, different actors can contribute to the fact-finding mission in different ways. Indeed, different mechanisms are in place to determine the facts as accurately as possible; in addition to the use of experts by the parties, NGOs can provide factual information, and the court itself has several ways to intervene in the fact-finding process, through the appointment of experts or assessors and site visits. The creation of enquiries by the tribunal is a special case, as it separates

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[448] Shabtai Rosenne, 'Fact-Finding before the International Court of Justice', *Essays on International Law and Practice* (Brill 2007) 238–239.

[449] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v Libyan Arab Jamahiriya)* Judgment [1985] ICJ Rep 1985, p 192, par. 65.

[450] Makane Moïse Mbengue, 'Between Law and Science: A Commentary on the Whaling in the Antarctic Case' (2015) 14 Questions of International Law 3, 4–5.

the process of fact-finding from the legal claims. These different mechanisms will now be analysed.

a. *Evidence collected by the parties*

As Article 24 (1) of the PCA Optional Rules confirms, each party to the dispute has to prove the facts it relies on in support of its claim or defence. During the first phase of the proceedings, the parties will submit evidence with their written pleadings. Each will substantiate its claims based on factual information that can come from various sources, such as studies conducted by specific national institutes or by specialists commissioned by EU institutions or individual experts in a certain field.[451] Parties are free to present any type of evidence, but will choose the most probing ones.

During the oral hearings, the parties have different ways to convey the relevant facts: strategically, they can choose either to bring the factual and legal issues together, as in the *Gabcikovo/Nagymaros* case, where scientists acted as counsels. Alternatively, they can separate factual issues and call independent experts as witnesses. In the latter case, experts will be subject to cross-examination and questioning by the judges while in the former they will be part of the overall legal argumentation.[452] The practice of the tribunals shows a clear preference for separating experts from legal counsels after the *Pulp Mills* case especially, where the Court asked expressly for the separation in the future.[453] Indeed, in all future cases experts were brought to the dispute in their individual capacity, and were subject to cross-examination and questions from the judges themselves.[454] Cross-examination however can also be heavily influenced by the skills of the counsel, which may be seen as a displacement of the same problem.

In order to mitigate the negative impacts of cross-examination and to promote procedural efficiency, Gros suggested using the mechanisms of prehearing conferences or conferencing experts, as developed by the International Bar Association Rules of

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[451] Foster (n 157) 81–84.

[452] ibid 88–94, 97–102.

[453] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28) par. 167.

[454] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (n 32); *Whaling in the Antarctic (Australia v Japan)* (n 27).

Evidence (article 8 (3) (f)). The purpose of this is to bring the experts together and let them establish where they agree and disagree.[455] It means the legal part is disjointed from the scientific part. Only the experts discuss together, with the intervention of the tribunal for questions and clarifications, but the purpose is to trigger a debate among the experts.[456] The process serves to narrow down the points of contention before the legal proceedings start interfering with the science.

One risk of party-appointed experts relates to the question of the experts' integrity. Indeed, the neutrality and independence of the experts towards the funder (i.e. the party) must be preserved in order for the evidence to be taken into consideration. When the reports are part of a research group led by a separate entity, such as the IFC, the World Bank, or the IPCC, the problem of direct bias towards the party submitting is avoided, but this risks the use of incomplete information, as it has not been prepared for the same purpose.

Another risk with leaving the fact-finding process entirely in the hands of the parties without potential intervention by the judicial body is an asymmetry between the parties' capacity to gather the necessary information. This asymmetry can come from different factors, such as territorial boundaries or the availability of financial resources. Although parties must act in good faith and disclose information inaccessible to the other party (if requested), one party can be disadvantaged in trying to prove certain facts sufficiently by not having access to the other party's territory. Indeed, there can be material obstacles preventing one party from accessing the information or data its experts need to give full account of their position. That is one reason why even with the parties retaining the control over evidence, the Court can to some extent still supervise the production of the evidence by the parties through Article 49 of the ICJ Statute, Article 24 (3) of the PCA Optional Rules, or through inherent powers in general for any international tribunal.[457] The judges can request the parties to submit certain information they consider necessary for a better understanding of the case, a power that some argue stems from the fact there

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[455] Guillaume Gros, 'The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?' (2015) 6 Journal of International Dispute Settlement 578, 586–588.

[456] Foster (n 157) 123–125.

[457] Chittharanjan F Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff 2005) 152–154.

is no possibility of appealing the decision of an international tribunal. In this case, the parties retain control over the evidence itself despite the fact the tribunal asked for particular points to be raised.

b. *Evidence collected by the Court*

Despite the fact international courts and tribunals are all granted fact-finding powers,[458] the debate over whether a specific tribunal should use its powers to determine certain facts is to be answered in every particular case. As the WTO Appellate Body underlined, the fact-finding powers of a panel should not be used as a means to replace the duty of the claimant to make a case for itself. The burden of proof remains on the claimant.[459] Therefore, in what circumstances can international courts and tribunals use their fact-finding powers?

i. Appointment of experts and enquiries

All international tribunals have the possibility of appointing experts at their own discretion either through express provision or through their inherent powers.[460] Although the ICJ has shown some reluctance in doing so, it used article 50 of its Statute in some cases, namely the *Corfu Channel* case, the *Delimitation of the Maritime Boundary in the Gulf of Main Area* case, and the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* case. Its predecessor appointed experts only once in the *Chorzow Factory* case. In all these cases, experts were asked a series of precise questions they should tackle, therefore giving a delimited scope to their contribution. The experts in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* case, for example, have to "advise the Court regarding the state of the coast between the point

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[458] Article 15 ITLOS Rules; article 50 ICJ Statute; article 29 PCA Optional Arbitration Rules 2012.

[459] *Japan - Measures Affecting Agricultural Products (Japan – Agricultural Products II)* 1998 - Report of the Panel WT/DS76/R par. 127–130.

[460] Francesca Romanin Jacur, 'Remarks on the Role of Ex Curia Scientific Experts in International Environmental Disputes' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser 2013) 444–448.

suggested by Costa Rica and the point suggested by Nicaragua ... as the starting-point of the maritime boundary".[461]

Through the practice of other tribunals as well as the ICJ, it will be shown what the risks and advantages are of using court-appointed experts. The WTO in particular has fostered an extensive body of cases where experts were appointed, contributing to the development of the regime applied to court-appointed experts. In this regard, the *EC – Hormones* case, besides confirming the ability of the panels to seek technical advice at their discretion,[462] highlighted inconsistencies that can arise with the appointment of such independent experts and parties' experts. Indeed, even when appointed by the Panel, the capacity in which they give their expert opinions may be biased in favour of one party. In this case, the Panel used experts from a specific institution, which could be considered as unfavourable for the defending party.[463] Subsequently, the WTO Appellate Body tried to homogenise the practice of the dispute settlement bodies concerning the appointment of scientific experts in the *Japanese Measures Affecting Agricultural Products* case where the Panel established a code of conduct for the selection of experts and their relationship with the panels. The Panel wrote to the parties with a detailed outline of how it would nominate the experts and what they will be asked to do:

> "Nature of advice
> (a) On the basis of the first submissions from both parties, the Panel will determine the areas in which it intends to seek expert advice.
> Selection of experts and questions to experts
> (a) The Panel will seek expert advice from individual experts.
> (b) The number of experts the Panel will select will be determined in light of the number of issues on which advice will be sought, as well as by how many of the different issues each expert can provide expertise on.
> (c) The Panel will solicit suggestions of possible experts from the Secretariat of the International Plant Protection Convention (IPPC), and, subsequently, from the parties. The parties should not contact the individuals suggested.

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[461] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (The Court to arrange for an expert opinion) [Order of the 31 May 2016], par. 10 (2).

[462] *European Communities - EC Measures Concerning Meat and Meat Products (Hormones)* Report of the Appellate Body (AB-1997-4), WT/DS26/AB/R; WT/DS48/AB/R par. 147.

[463] Theofanis Christoforou, 'WTO Panels in the Face of Scientific Uncertainty' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 248–253.

(d) The Panel does not intend to appoint experts who are nationals of any of the parties involved in the dispute unless the parties agree with such appointment or in the event the Panel considers that otherwise the need for specialized scientific expertise cannot be fulfilled. Parties are, however, free to include in their delegations scientific experts of their own nationality and may, of course, submit scientific evidence produced by their own nationals.
(e) The Secretariat will seek brief CVs from the individuals suggested. To the extent possible, these will be provided to the parties.
(f) The Panel will prepare specific questions for the experts. These will be provided to the parties.
(g) The parties will have the opportunity to comment on and to make known any compelling objections to any particular expert under consideration. At the same time, the parties will have the opportunity to comment on the proposed questions, or suggest additional ones, before the questions are sent to the experts.
(h) The Panel will inform the parties of the experts it has selected, and submit the questions to the experts.
(i) The experts will be provided with all relevant parts of the parties' submissions on a confidential basis.
(j) The experts will be requested to provide responses in writing; copies of these responses will be provided to the parties. The parties will have the opportunity to comment in writing on the responses from the experts.
Meeting with Experts
(a) Should the Panel decide it opportune, or should a party so request, a meeting with experts, immediately prior to the second substantive meeting, may be held. Prior to such a meeting, the Panel would ensure that: (i) the parties' comments on the experts' responses would be provided to the experts; (ii) the experts would individually be provided with their colleagues' (the other experts) responses to the Panel's questions."[464]

This outline is interesting in the way it lays out how experts will be chosen. It gives transparency to the appointment of experts by the tribunal and examination of their reports. This practice has not been clearly set out in the ICJ proceedings, although the appointment of experts seems to follow the same principles. Article 67 (1) of the Rules of the ICJ requests the Court to issue an order stating among others the "mode of appointment" of the experts, which has varied from case to case. In both the *Corfu Channel* case and the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* case, the Court simply disclosed the names of the experts, without any further justification or explanation.[465] In both the *Gulf of Maine* case and the *Chorzow Factory*

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[464] *Japan - Measures Affecting Agricultural Products (Japan – Agricultural Products II)* (n 459), par. 6.2.

[465] *Corfu Channel Case (UK v Albania)* (Appointment of experts) [Order of 17th December 1948] ICJ Rep 1948, p 124 par. II, p. 126/6; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Appointment of Experts) [Order of 16 June 2016], p. 1.

case, the parties themselves agreed on the experts the Court should appoint in the first case, and were allowed to appoint one each, together with one appointed by the Court itself.[466] In comparison with the ICJ practice, the outline made by the WTO reflects a greater transparency in the mode of appointment of experts; a practice that should be encouraged.

The Panel also offered the possibility for the parties to meet with the court-appointed experts. This is an important guarantee a judicial body should offer, as it is necessary to enhance procedural fairness throughout the proceedings, in particular, the parties' right to be heard. The PCA Optional Rules provide for the parties to comment on the court-appointed experts with both written and oral material (Article 27 (3) and (4)), as well as article 67 (2) of the Rules of the ICJ. This practice is indeed common among international courts, and important for the respect of the parties' rights.

An additional challenge for court-appointed experts is their field work. When it is necessary for them to go on the disputed sites, located within the territory of one party, it must grant them access. The tribunal might not always be able to guarantee such access. Indeed, such restriction can prevent court-appointed experts from delivering their opinions.

Court-appointed experts, however, offer certain advantages. Indeed, the possibility for tribunals to appoint scientific experts is another way to ensure the scientific facts are accurate and understood. The fact this possibility exists can counterbalance the fact the burden of proof cannot shift (see below 3.3.iii.b). In particular, it can re-establish some fairness in the process by externalising the process of fact-finding from the parties to an independent group of experts, especially when costs are disproportionate between the parties. If the scientific procedure needed to ascertain facts is complex and very technological, some equality between the parties could be rebalanced if experts are appointed by the tribunal. Similarly, court-appointed experts would not be faced with territorial issues and could access both territories equally, enhancing due process in

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[466] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Appointment of experts) [Order of 30 March 1984] ICJ Rep 1984, p 165, par. 4, p. 166/5; *Factory at Chorzow* (Appointment of Experts) [Order of 13 September 1928] PCIJ Series A (A17) par. 3, p. 100-101.

certain circumstances. As in the *South China Sea* arbitration, the tribunal appointed experts in order to compensate from the lack of China's participation. The experts were specifically asked by the tribunal to

> "examin[e] and analys[e] the record submitted by the Philippines on the issue of environmental harm to coral reefs as a result of island building activities [...]; assess the accuracy and certainty of the scientific conclusions drawn by the Philippines and its experts."[467]

The tasks of these independent experts were clearly set by the tribunal in a way to offer a second perspective on the evidence, in addition to the Philippines' submissions.

Moreover, the ICJ Statute mentions a special mechanism: enquiries. Article 50, read with article 67 of the Rules of the ICJ, allow judges to ask for an enquiry to be conducted. Enquiries are different from expert opinions in the sense that they do not have to be conducted by qualified experts with a special knowledge. Their purpose is to establish certain facts the Court is not satisfied with, task that does not have to be conducted by an expert, as opposed to the appointment of experts, who are expected to give advice to the Court because of their special knowledge. Enquiries are a fact-finding mechanism. In practice, the differences between expert opinions and enquiries are hard to pin down; both mechanisms overlap. As a consequence, the Court may appoint experts who are in charge of the determination of certain factual uncertainties, when it should carry out an enquiry.[468] The results are similar, however, since the court will give specific instructions to the experts; they will determine exactly the scope of their work.

Arbitral tribunals also showed their willingness to use fact-finding methods. For instance, in the *Trail Smelter* case the tribunal created a special scientific committee to gather and determine some scientific data on a particular question about what regime to apply to the smelter in the case that it was found infringing environmental laws. The tribunal delayed the final decision in order to give time for the data to be collected

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[467] Assessment of the potential environmental consequences of construction activities on seven reefs in the Spratly Islands in the South China Sea, Independent Expert Report (May 26, 2014), 6. Last viewed August 21, 2016 < https://pcacases.com/web/view/7 >.

[468] Christian Tams, 'Article 50' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (Second Edition, OUP 2012) 1289.

comprehensively.[469] Similarly, in the *Iron Rhine Railway* arbitration, the tribunal recommended the parties to create a committee of independent experts, without giving instructions on who and how they would be chosen. Nevertheless, it did offer a precise definition of the committee's tasks, and the outcome of their findings.[470]

This mechanism would correspond to some scientific committees existing under some MEAs where special groups have the task of gathering evidence. This is exemplified by the Scientific Assessment Panel under the Montreal Protocol (Article 6), which is composed of many recognised scientists and who prepares a report on the status of the ozone layer depletion.[471] Indeed, enquiries in a judicial context would have the same purpose as a scientific committee since it would have a mandate to gather evidence on a certain point. In the event such a committee has already gathered evidence relating to a case submitted to an international court, it could play the role of an enquiry. Indeed, existing reports from scientific committees could be used as such in judicial proceedings. They have been carried out at the request of treaty bodies of MEAs and are composed of a varied group of scientists, suggesting they could replace a court-appointed enquiry. There is room for cooperation between judicial bodies and scientific bodies created by MEAs.

ii. Site visits

Most international courts and tribunals have the ability to visit certain locations in the course of the proceedings. The ICJ Statute expressly offers the possibility in article 44 (2). Arbitral tribunals have also used site visits, as exemplified during the *Kishenganga Arbitration*, where the judges went to visit areas where the hydroelectric projects were planned to be built.[472]

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[469] *Trail Smelter Case (United States v Canada)* (n 237), p. 1934-1937.

[470] *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (n 62), par. 235.

[471] < http://ozone.unep.org/en/assessment-panels/scientific-assessment-panel >, last accessed on 28 July 2016.

[472] *Indus Waters Kishenganga Arbitration (Pakistan v India)* Order on Interim Measures (September 23, 2011) <http://www.pca-cpa.org/showpage.asp?pag_id=1392>, par. 22-27.

In this case, it may be argued the site visit was one factor that allowed the court to decide on what specific activities should or should not be stopped at the provisional measures stage. The fact the tribunal was able to distinguish between particular aspects of the construction can be explained by the site visit:

> "As seen during the Court's site visit, the construction and completion of these elements of the KHEP occur at some distance from the Kishenganga/Neelum riverbed, and would thus not in and of themselves affect the flow of the river."[473]

The site visit directly contributed to the way the tribunal would award certain provisional measures. It made it possible for the judges to see for themselves what the consequences of their measures would be. Although most environmental damage cannot be seen blatantly (as in the *Gabcikovo/Nagymaros* case), site visits give context to the judges and enhance their understanding of the problem.[474] They can be considered as a supportive tool for the judges to better determine the factual situation. The contributions of site visits to the legal reasoning of the judges, however, can be questioned.[475]

Moreover, site visits cannot be conducted without respecting certain due process requirements, which must be created by the tribunal on a case-by-case basis.[476] For instance, during the site visit in the *Gabcikovo/Nagymaros* case as well as in the *Kishenganga Arbitration* and the *Bay of Bengal Arbitration*, representatives of the parties were not allowed to make any legal arguments,[477] therefore guaranteeing a certain equality of the parties. Moreover, the fact experts involved in the case on the side of one party offered technical advice during the site visit should not be considered as infringing any due process requirements *a priori*, on the condition that the expert's opinion is

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[473] ibid, par. 142.

[474] Such view is supported by Marcin Kaldunski, 'A Commentary on Maritime Boundary Arbitration between Bangladesh and India Concerning the Bay of Bengal' (2015) 28 Leiden Journal of International Law 799, 800.

[475] Michael A Becker and Cecily Rose, 'Investigating the Value of Site Visits in Inter-State Arbitration and Adjudication' (published online May 27, 2016) Advance Access doi:10.1093/jnlids/idw005 Journal of International Dispute Settlement 1, 15–16.

[476] James Harrison, 'Addressing the Procedural Challenges of Environmental Litigation in the Context of Investor-State Arbitration: The Role of Scientific Evidence and Community Interests' (2013) 14–15.

[477] See Foster (n 157) 108; *Indus Waters Kishenganga Arbitration (Pakistan v India)* Partial Award (18 February 2013) <http://www.pca-cpa.org/showpageb106.html?pag_id=1392> par. 36; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (Procedural Order No.1 Concerning the Site Visit of October 2013) [28 August 2013, revised 11 October 2013], point 5.

independent from the party's opinion. If the experts are proven to be acting in their own name, their presence and contribution to site visits cannot infringe the impartiality of the tribunal nor the equality between the parties. However, in this respect, it could be suggested to ask for all experts involved to be present, in order to further guarantee equality and impartiality. This has been achieved in the Bay of Bengal site visit, where each party was allowed eight members on their delegation, including experts.[478]

c. *Evidence submitted by third states, intergovernmental organisations, and NGOs*

Although not clearly stated in the procedural texts instituting the ICJ, third states may submit evidence, either at the request of the Court or at their own initiative. The former case is possible, although such a request would not be binding on the third state.[479] The latter happened in the *Corfu Channel* case, when Yugoslavia submitted evidence. The Court did not reject the evidence on the basis it was submitted by a third state, instead affirming that "Yugoslavia's absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves".[480] In the *US – Shrimp* case, the Appellate Body notoriously said that "a panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not.*"[481] The WTO Appellate Body also confirmed member-states not party to the disputes can submit relevant information.[482]

Moreover, intergovernmental organisations can also provide information relevant to the case (article 34 (2) of the ICJ Statute read together with article 69 (1) of the ICJ Rules). Such information coming from international organisations can also be submitted either at the request of the Court or may be initiated by the organisation itself.

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[478] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (n 477), point 2.1.

[479] Benzing (n 433) 1252.

[480] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep, p 4, p. 17.

[481] *US - Import Prohibition of Certain Shrimp and Shrimp Products* (n 354), par. 108.

[482] *Canada - Measures Affecting the Export of Civilian Aircraft* Report of the Appellate Body, AB-1999-2 (WT/DS70/AB/R), par. 185.

Additionally, through the submission of *amicus* briefs, NGOs can both participate by giving different legal arguments and representing interests at stake other than those belonging to the parties' (as discussed in Chapter 2). They can also submit scientific data. *Amicus curiae* are especially useful in this regard as they are not limited to legal issues. The WTO Appellate Body, for instance, confirmed the view that panels have a discretionary power to procure any factual information relevant to the case based on article 13.1 of the DSU, including information coming from *amicus curiae*.[483]

The possibilities explored above show that judicial procedures allow for a plurality of sources when it comes to fact-finding and the gathering of evidence in general. Although the submissions by these other actors are not necessarily useful to uncover unknown evidence, they can contribute to the elaboration of the most accurate factual representation. Indeed, the multiplicity of actors enhances not only the legitimacy of the legal decision made by the judges, but may also provide for a more rigorous determination of the facts.

Judges have to be careful about all the potential biases brought by the external contributors, and can dismiss their evidentiary value on that basis. Notably, this occurred in the *Armed Activities* case, where they dismissed reports made by the UN Secretary General.[484] However, the existence of many types of evidence contributes to a better system where the fact-finding process is not left to one actor. Many different actors can indeed bring different factual aspects to the dispute, therefore allowing environmental disputes to be better tackled by the judges.

iii. Weighing evidence

After receiving and hearing all evidence needed for the dispute, the tribunal will have to choose which is more convincing for the final decision on the law. In doing so, the tribunal will assign certain evidence a higher value than that of others. This task becomes

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[483] James Cameron and Stephen J Orava, 'GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 227.

[484] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (n 101), par. 159.

harder when scientific knowledge is uncertain and the legal interpretation depends on it. Indeed, when presented with different scientific explanations, the tribunal will have to choose which ones better prove the case. The process of weighing evidence is therefore essential as it "becomes a question of determination as to which type of rationality is the most instrumental in persuasiveness of the decision and hence legitimacy and authority and efficacy of international dispute-settlement bodies".[485] Indeed, judicial bodies must be as transparent as possible in order to avoid arbitrariness and consequent loss of their authoritative status. They must adapt their argumentative process as a result of the structural differences of scientific facts. Judges cannot gauge evidence without justifying what has led to the particular decision. In doing so, judges may rely on external sources other than themselves, which can cause problems of legitimacy. The tension is inherent to the situation where judges themselves cannot appreciate fully the meaning of the facts underlying the dispute.

The structural differences of scientific facts focus on their nature and their different epistemology, as well as their intrinsic uncertainty. Practically speaking, one question is whether environmental cases can be argued on the basis of what could have happened or could happen in the future rather than on tangible events.[486] In other words, what is the effect of scientific uncertainty on the standard of proof? What standard could the courts and tribunals apply then? In the case that a state has already taken a policy decision based on a certain scientific understanding, can judicial bodies review the scientific justifications themselves or only the decision-making process?

a. *Appreciation of the evidence*

i. Expert-fantômes

One practice that has been identified is the use of expert-fantômes in certain complex cases.[487] In certain occasions, the ICJ nominated expert-fantômes, whose role was

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[485] D'Aspremont and Mbengue (n 404) 269.

[486] See part 3.2 of this chapter, especially point (ii).

[487] Sir Robert Jennings, 'International Lawyers and the Progressive Development of International Law' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski* (Kluwer Law International 1996) 416.

arguably to define the standard of review the judges should apply to various scientific data. Since they were used by the court to help, by giving their specific opinions on the scientific facts of the case, they would therefore set the standard for the judges.

This practice, however, has been criticised as infringing due process requirements. Indeed, because the use of such experts has occurred behind closed doors, and the choice of experts by the court does not follow any known process, this practice is not desirable.[488] Notwithstanding the fact expert-fantômes have scientific credibility, they set the standard according to their personal views, which is problematic and goes against a number of procedural fairness requirements, the most urgent of which is transparency.

ii. Experts

The use of expert-fantômes was the method that sparked the need for more understanding from judges. The means to acquire this knowledge, however, was promoting a degree of arbitrariness. Therefore, a more transparent way to appreciate and assess the evidence had to be developed: the use of court-appointed experts. As explained above, a tribunal can nominate external individuals to both carry out the fact-finding process and help to determine the quality and meaning of the evidence presented before the court. Indeed, experts are expressly asked to give their opinions, on the basis of their special knowledge. They are not limited to assert evidence, but can also tell how they interpret such evidence and its broader meaning for the proceedings.

In cases where the court has not appointed experts, cross-examination and questions by the judges to the experts themselves can enhance their understanding of the scientific issues at stake. Article 65 of the ICJ Rules allows such intervention by the judges. Indeed, judges started asking directly the experts to clarify certain points. In the *Whaling* case for example, experts were questioned not only by the other party but by the judges. During the hearings in 2013, the expert brought by Japan – Mr Walløe – was cross-examined and then interrogated by five different judges.[489] A similar procedure was

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[488] Daniel Peat, 'The Use of Court-Appointed Experts by the International Court of Justice' (2013) 84 British Yearbook of International Law 271, 288.

[489] Public hearing, 3 July 2013, 3pm, *Whaling in the Antarctic (Australia v Japan)* (n 27) CR 2014/14, p. 49-59.

undertaken for the expert brought by Australia. The fact judges have the possibility to intervene directly can only improve the quality of their understanding of the scientific issues under review.

iii. Assessors

The ICJ has the power to appoint assessors, who differ from experts in the sense they can sit with the court during the deliberations, albeit without a right to vote.[490] The UNCLOS does not use the term "assessor" but offers the same possibility for the ITLOS to nominate "scientific or technical experts" who can sit with the tribunal but cannot vote.[491] Assessors have been mentioned only in the *Western Sahara* Advisory Opinion by Judge Petrén, who suggested that the Court had used "experts in Islamic law or in the history of northern Africa to sit with it".[492] It could be a method of replicating the achievements of the *Kishenganga Arbitration* in a permanent court. In this landmark case, the tribunal adapted its composition to fit the scientific nature of the dispute. Indeed, Prof Howard Weather, specialised in hydrology, and a member of the department of civil and environmental engineering at Imperial College London was one of the seven judges.[493] This unusual appointment of a non-legal specialist as an arbitrator is an example of a progressive shift towards an understanding of the need to integrate the epistemological divide between law and (environmental) science. Albeit limited to arbitral tribunals, this practice is encouraging, but depends solely on the will of the parties.

b. Burden of proof

Some rules on the allocation of the burden of proof are needed in order to guarantee the judicial proceedings always carry through.[494] The rules of the burden of proof have

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[490] Article 30 (2) of the Statute of the ICJ, combined with Article 9 and 21 (2) of the Rules of the ICJ.
[491] Article 289 UNCLOS.
[492] Separate Opinion of Judge Petrén, *Western Sahara* (n 200).
[493] See information available at <http://www.imperial.ac.uk/people/h.wheater>, accessed on 25/02/2016.
[494] Foster (n 157) 187.

been used in international judicial procedures as if they have always existed.[495] They have not been discussed *per se* but have been used indiscriminately. The allocation of the burden of proof on the party who asserts the facts (*actori incumbit probatio*) has also always been treated as an unquestioned assumption in international law and is based on the idea of procedural fairness. It is not always as easy to determine because of the difficulties to separate the burdens between claimant and defendant.[496]

However, it is clear that the question of who bears the burden of proof can be crucial to the outcome of proceedings when the facts are scientifically complex and uncertain. The WTO even recognised the role it plays even in the decision to institute proceedings in the first place in many instances.[497] Therefore, the allocation of the burden of proof becomes a central question in environmental disputes, and the question of who should bear the consequences of scientific uncertainty must be answered.

The assignation of the burden of proof has been developed customarily through the practice of international courts and tribunals. Although subject to changes, the general rule is that the party asserting a fact has to prove it. Indeed, the allocation of the burden should be fair. The general rule relies on the presumption that states act in good faith,[498] which mean that when another state affirms there is a breach of international law, it will have to prove it.[499] More precisely, Foster emphasises the role of the theory of compliance in the application of the rules on burden of proof, whereby states comply with their obligations unless proven otherwise.[500] One case where this presumption can be lifted is when the respondent state bases its defence on a rule considered as an

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[495] Georges Ripert, 'Les Règles Du Droit Civil Applicables Aux Rapports Internationaux' (1933) 44 Receuil des Cours 569, 646.

[496] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, vol III (Fourth Edition, Martinus Nijhoff 2006) 1039–1040.

[497] See Foster (n 157) 188 for a full account on the WTO's statements on the burden of proof.

[498] Article 26 of the Vienna Convention on the Law of Treaties (1969).

[499] Foster (n 157) 190–191, referring to the Judge ad hoc Ečer Dissenting Opinion in the Corfu Channel case (United Kingdom v. Albania), Judgment of 9 April 1949, ICJ Rep 1949 2, par. 119.

[500] ibid 190.

exception to the substantive rules,[501] as exemplified in the *Whaling* case.[502] In this case, the Court placed the burden on Japan to prove the objective basis of its scientific programme and not on Australia.[503] Although the Court did not explicitly explain why the burden was shouldered by Japan in this particular case, it is justified since the rule relied on by the defendant is an exception to the general rule. The fact it is an exception shows that the defendant did not want to comply with the general rule, thereby contradicting the theory of compliance.

Consequently, the burden of proof generally follows the facts needed to prove the legal claims of the parties, and the international legal system does not recognise the "evidential" burden of proof. This occurs when the party with the claim reaches a certain threshold and the burden passes onto the other party – even though it is not its claim. Such process that allows a reversal of the burden of proof from one party to the other within the same claim does not exist in international judicial proceedings.

There are other cases where the general rule might seem unfair and might need to be adapted. Does the burden change when a party has to prove a negative fact, i.e. when the other party failed to do something it should have? Should the rule on the burden of proof take into account the access to information available to each party? While these circumstances could be argued as justifying a reversal of the burden of proof, the jurisprudence appears not to differentiate between negative and positive facts, and instead seems to reject the allocation of the burden depending on the access to the information.[504] Despite the emphasis of the Court on the flexibility of the rules on the burden of proof no later than in 2010 in the *Diallo* case,[505] it did not shift the burden,

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[501] ibid 209–223.

[502] James Harrison, 'Onus Probandi in the Whaling Case – a Comment' <http://voelkerrechtsblog.com/2015/05/06/onus-probandi-in-the-whaling-case-a-comment/>.

[503] *Whaling in the Antarctic (Australia v Japan)* (n 27), par. 68 in combination with par. 53-54.

[504] See Foster (n 157) 198–209 for a complete analysis of the rules on burden of proof.

[505] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 2010 p 639, par. 54.

neither in this particular case nor in similar earlier cases such as the *Avena and Other Mexican Nationals* case.[506]

The ICJ, while reaffirming the general principle applicable to the allocation of the burden of proof, acknowledged that it can be subject to change:

> "As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact (see, most recently, the Judgment delivered in the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports 2010 (I), p. 71, para. 162). However, it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case."

However, the court itself in this judgment contradicted this principle, as Judge Cançado Trindade pointed out that:

> "[t]he fact remains that it has not been demonstrated that Article 10 (1) has been complied with either. The Court's majority seems to have taken a somewhat hurried decision on this particular point, applying the presumption in favour of the Respondent State. In human rights cases of the kind, presumptions apply in favour of the ostensibly weaker party, the individual, the alleged victim. In the circumstances of the present case, the burden of proof cannot fall upon the Applicant State; it is the Respondent State that knows — or is supposed to know — the conditions of detention, and it is, accordingly, upon it that the burden of proof lies.
> After all, it is the receiving State (of residence), rather than the sending State (of nationality), that is supposed to know what is going on in its own prisons, how detainees under its custody are being treated."[507]

Although the general rule on the burden of proof is clearly not absolute, the Court has not embraced a more nuanced approach to the allocation of the burden of proof in the *Diallo* case.

Are there other circumstances that could justify a shift of the burden of proof? It has been argued the precautionary principle should be used to reverse the burden of proof,

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[506] *Avena and Other Mexican Nationals (Mexico v United States of America)* (Merits) [2004] ICJ Rep 2004 p 12, par. 55-57.

[507] Separate opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 505), par. 73-74.

especially in cases of scientific uncertainty. Indeed, scientific uncertainty creates disequilibrium incompatible with the principle of a good administration of justice. In order to re-establish procedural fairness, a reversal of the burden of proof would be necessary and justified by the application of the precautionary principle.[508]

The problem with the application of the precautionary principle in establishing who bears the burden of proof is that it does not give clear conditions in which a reversal is justified. Instead it gives general guidance. Consequently, there are some clear views on the incompatibility of the precautionary principle with other rules of international law on risk management:

> "The common but essentially incoherent belief that the principle always shifts the burden of proof and requires states to prove that development projects pose no risk of harm misunderstands both the nature of the precautionary principle and its relationship to other rules of international law on risk management".[509]

The ICJ has also declined to reverse the burden of proof by the application of the precautionary principle.[510] In this context, the relationship between the legal obligations and the burden of proof must be emphasised. On the one hand, the principle of *onus probandi incumbit actori* has been established by the ICJ's practice as regulating the determination of the burden of proof. On the other hand, the burden of proof depends on the primary legal obligation. Indeed, in the *Pulp Mills* case, the ICJ emphasised the importance of the applicable law as the determining element for applying a different rule on the burden of proof by saying that "there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties."[511]

Would a shift of the burden of proof be useful in the context of scientific facts? A shift of the burden will not alter the fact that their nature is precarious, resulting in general uncertainty of the issue at stake in the dispute. In the case of complex scientific facts, the question of heaviness and costs of the burden is not the most central question, especially

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[508] Foster (n 157) 240–261.

[509] Birnie, Boyle and Redgwell (n 21) 164.

[510] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28): 'The Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof.'

[511] ibid.

if other methods which do not rely on the parties only to gather evidence are used (see 3.3.ii.b and c). In the case of uncertain scientific facts the problem is not about the difficulty of obtaining the information, but instead about the precariousness of the information. The question of who bears the burden of proof therefore may not be as crucial as it appears. Rather, the lowering of the standard of proof might be of more use in this context.

c. *Standard of proof*

In general, a certain standard of proof is applied to the facts parties bring forward in the dispute. Different standards exist, requiring more or less certainty in the evidence presented before the tribunal. In the *Pulp Mills* case, for instance, the ICJ rejected some facts on the ground they had not "been established to the satisfaction of the Court".[512] The point of contention there was the cause of the unusual algal bloom that happened in February 2009; a fact that could not be proven sufficiently by the parties despite both submitting scientific facts explaining this particular event. In this case, the Court did not justify on what basis these facts were dismissed. It shows, however, that it made a decision on the scientific "value" of the parties' arguments.

It is argued here that the standard of proof should be entwined with the reality of scientific uncertainty. Therefore, the applicable threshold in environmental cases should be adapted to the scientific uncertainty. Boyle and Harrison precisely criticised the tribunal in the *Trail Smelter* case when it considered only "clear and convincing scientific proof of actual or threatened harm". This approach taken by the tribunal is indeed no longer applicable. If it were, the "general duty to prevent transboundary harm as many longer-term or complex causes of environmental harm would escape regulation".[513]

Therefore, it is possible to sustain that when a risk of harm is argued as being the source of the violation by the other party, the standard of proof must consequently adapt. Since we cannot know whether harm will occur with certainty, the potentiality of it should be enough to confirm the violation of an obligation. Indeed, the rule itself sets a different

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[512] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 28) 97, par. 250.
[513] Stephens, *International Courts and Environmental Protection* (n 14) 134.

standard of proof, commanding the tribunal to apply it (see 3.2.i). In the case of a dispute about actual environmental harm and one about the risk of future environmental harm, a tribunal will not assess the evidence at the same standard of proof because the rules themselves contain a different standard, one which requires the proof of existing harm and the other only the possibility of negative impacts on the environment.

It is not the precautionary principle that would affect the standard of proof but the uncertainty of the scientific knowledge that authorises the tribunal to accept evidence of potential harm. Indeed, if the precautionary principle would apply in determining the standard of proof, the court would be in a situation where a legal standard is misused as a standard of proof. The application of the precautionary principle would determine what to prove, but not to what extent the argument should be proved.[514] However, because of the nature of scientific uncertainty which entails that none of the parties could prove a violation to a high enough standard, it seems unfair to make the complainant suffer the consequences of losing the case for lack of sufficient evidence.

What standard of proof should then be used in cases of scientific uncertainty? There is no set rule on what applicable standard of proof is to be used by international courts and tribunals, but different thresholds exist, namely the proof beyond a reasonable doubt, the proof in a convincing manner, the preponderance of evidence, and the special case of the *prima facie* evidence (which is the lowest possible standard of proof). The choice of standard generally depends on the case and the gravity of the claim.[515] In the same way as a tribunal traditionally imposes a higher standard of proof in criminal matters, or more generally when the gravity of the accusation is considered higher,[516] it could apply a lower standard of proof in cases of scientific uncertainty.

The *prima facie* standard as it has been used so far does not seem to offer the best solution as it contradicts the international procedural principles of the allocation of the

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[514] See Grando (n 442) 82 for the differentiation between legal standards and standards of proof.

[515] Separate Opinion of Judge Higgins *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment [2003] ICJ Rep 2003 p 161, 234, par. 33; *Corfu Channel Case (UK v Albania)* (n 480).

[516] Amerasinghe (n 457) 236.

burden of proof and does not offer a useful solution.[517] However, if a tribunal admits a lower standard of proof than the preponderance of evidence, meaning that:

> "although the evidence presented in support of a certain proposition is not sufficient to allow the tribunals to conclude that the proposition at issue is at least more probable than not, there are other facts and circumstances surrounding the dispute which when analysed together with the less than conclusive evidence allow the tribunals to arrive at such conclusion,"[518]

it will not reject a claim at the outset. Uncertainty could be one of the facts or circumstances that permits the expectation of a lower standard of proof. The tribunal will hear uncertain facts from both parties, and will therefore judge on a more hypothetical basis. This will be more representative of the reality. The fact the lower standard applies to both parties allows the tribunal to decide more on the balance of probabilities. In this regard, the WTO confirmed the fact a scientific opinion represents a minority opinion does not *a priori* devalue the strength of the evidence.[519]

It is different from a reversal of the burden of proof in the sense that the tribunal acknowledges the scientific knowledge at large is lacking in the particular issue it has to decide. Rather than reversing the burden of proof, the tribunal shows its understanding of scientific uncertainty and takes it into account when it determines what degree of evidence is sufficient to convince it. However, lowering the standard of proof does not affect the fact evidence has to be appreciated at its highest quality possible.

d. Standard of Review

The analysis of certain actions performed by states on the basis of certain scientific facts is a different exercise that an international court or tribunal must confront. How does a tribunal know if a certain programme is scientific or if an environmental impact assessment has been carried out according to certain standards? In other words, against what should tribunals review decision-making processes that are based on certain

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[517] Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?' (1998) 1 Journal of International Economic Law 227, 244–246.

[518] Grando (n 442) 137.

[519] *European Communities - EC Measures Concerning Meat and Meat Products (Hormones)* (n 462), par. 194; Jacqueline Peel, *Science and Risk Regulation in International Law* (CUP 2010) 194.

scientific facts? The question is not only what facts meet the standard of proof required by an adjudicative body, but can the action taken by a certain state on the basis of certain scientific facts be considered persuasive enough by that same body. The object under scrutiny is not the scientific justification of certain acts per se, but whether the court can substitute itself for the decision-maker.

There is an apparent tension as to the capacity of judicial bodies to assess the scientific grounds of a particular situation. International courts and tribunals are qualified to decide in the legal issues, but are *prima facie* not equipped to make decisions on scientific issues. Therefore, they need to decide how to tackle such issues.

The WTO seems to provide an express answer, as Article 11 of the DSU mentions that "a panel should make an objective assessment of the matter before it, including an *objective assessment of the facts* of the case and the applicability of and conformity with the relevant covered agreements". However, other tribunals' constitutive texts do not refer specifically to any standard of review, which leaves the door open for judges to decide on various applications of standards of review. The WTO opted for a standard of objectivity, which was clarified in the *Hormones II* case as meaning that:

> "the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable."[520]

The EC argued in this case that the tribunal could take two opposite directions: it can decide to either review the facts *de novo* or to use a deferential standard (as the WTO DSB). In the first case, it would mean the judges are able to review all information and facts of the case themselves, regardless of the decisions made by the states on the basis of previously selected information, whereas in the second case, the judges may review only the decision-making process of the state in question.[521] However, the Appellate Body clearly made a decision that panels did not have the power to either review facts *de novo* or use total deference as a standard, and should instead use the "objective

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[520] *United States - Continued Suspension of Obligations in the EC - Hormones Dispute* Report of the Appellate Body (AB-2008-5), WT/DS320/AB/R, par. 590.
[521] Gros (n 455) 590–593.

assessment" as the applicable standard of review.[522] The justification for the rejection of a *de novo* review is clear, for an international judicial body should not replace the national body that has already made the decision. Total deference is also to be rejected as it would give judicial bodies too little to review, to the point where their role might be questioned.

In the *Whaling* case, the ICJ had to decide how to assess the decision made by Japan to carry out a scientific programme. It established a test of "objective reasonableness" to review Japan's decision. This test can be seen as astandard of review rather similar to the WTO practice mentioned above. Gros showed how ambiguous this standard of review is, focusing especially on the fact that the Court interpreted this standard in both a *de novo* way and a deferential way.[523] Is it for the court to decide whether a decision a state took on the basis of certain scientific evidence should have been taken differently because the scientific evidence was flawed? However, it is argued here that such test of "objective reasonableness" does not mean that the ICJ had to review Japan's actions. Rather, it is a clever way to avoid precisely the question of standard of review. By limiting the scope of its review to whether the actions were objectively reasonable, the ICJ opts out from reviewing the actions themselves. It only assesses whether they seem reasonable enough.

In the *Kishenganga Arbitration*, the tribunal went further and found that the facts put forward by Pakistan were more conclusive than those submitted by India because "in the Court's view, the differences between the Parties must be viewed in light of the evolving science of predicting the environmental changes that would result from altered flow conditions".[524] Therefore, the tribunal was able to decide whether the actions by India were justified or not. The *Kishenganga Arbitration* offers a different perspective on the relationship between the role of a judicial body in reviewing states' actions on the basis of scientific accuracy. The tribunal's composition – formed by international law specialists and a scientist – provided the justification, allowing the court to judge on

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[522] Axel G Desmedt, 'Hormones: "Objective Assessment" and (or As) Standard of Review' (1998) 1 Journal of International Economic Law 695, 697.

[523] Gros (n 455) 590–619.

[524] *Indus Waters Kishenganga Arbitration (Pakistan v India)* (n 31), par. 98.

scientific matters and to draw conclusions. Indeed, when the court had to answer the question whether it could deal with technical matters, as India argued that only a Neutral Expert was qualified to do so, excluding the capacity of a court of arbitration to do so,[525] it said the treaty did not exclude the competence of the court, and that the court's competence was reinforced by its very composition.[526]

The question of standard of review is still controversial and future cases will have to develop further its meaning and applicability.

3.4 Conclusion

As this chapter illustrates, the intermingling of factual and legal question in environmental matters proves a critical dilemma for international courts and tribunals, which consequently forces them to adapt to this different type of disputes. This chapter has shown the flexibility of the procedural rules regulating the fact-finding process. The question is then how far can those procedural rules be pushed to modify the role of international courts and tribunals? Several factors can lead to a different understanding of the function of international adjudication, among which the means to gather evidence and the determination of the standard of review of factual situations have direct consequences.

Regarding the methods of gathering evidence, in cases where only the parties submit factual evidence, the tribunal is allowed to review the substance of the scientific findings of the parties. This means judges decide on both the most satisfactory interpretation of the law and on how scientific facts underpinning the dispute should be understood. The tribunal therefore becomes an arbitrator on scientific matters as well as on legal matters. A similar conclusion can be reached by the establishment of enquiries and the appointment of assessors or experts by the court. In this case, the fact-finders will give the authoritative interpretation of the scientific facts that the court will use directly as the basis for its decision. Although the tribunal defers the fact-finding process to particular

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[525] ibid, par. 483ss.

[526] ibid par. 486–487. 'One of the Court's umpires is required to be a "highly qualified engineer", and indeed, nothing would stop the Parties from appointing engineers as their Party-appointed arbitrators or as the Chairman of the Court. [...] The Court considers that no dispute brought before a court of arbitration could be rendered inadmissible merely on the grounds that it involved a technical question.'

individuals, their conclusions will be followed by the tribunal. Therefore, the biggest challenge is to strike the balance between the different mechanisms in order to gather enough facts necessary to legitimise a judicial legal decision.

In the case of fact-finding methods where international courts and tribunals are in charge, by using court-appointed experts or taking into account NGOs submissions for example, it makes evidence more objective, as long as the experts are chosen on an impartial and independent basis. The tribunal then bears the burden of choosing to rely on certain evidence – a process that is far from risk-free.

Regarding the question of who performs the fact-finding function, scholars continue to propose ideas that combine evidence gathered both by the parties and by the tribunal. For example, in relation to international commercial arbitration, Sachs and Schmidt-Ahrendts have argued for a hybrid system of fact-finding, whereby the parties and the judges cooperate in the appointment of experts.[527] It is named "expert teaming": an exercise combining the good elements of both party- and court-appointed experts. Both parties would submit a list of potential experts, comment on each other's list, and let the tribunal pick two experts from each list. These four experts then form an expert team which mission is set out by the tribunal. This solution seems to prevent parties to use biased experts as well as prevent the risk of having only one expert and therefore one opinion on evidentiary matters.

Moreover, despite the inflexibility of the rules on the burden of proof, judges have means at their disposal to rectify procedural imbalances where the claimant bears the burden of proof. In particular, international courts can apply a different standard of proof to uncertain, complex scientific facts. Indeed, the best option seems to shift towards a different understanding of the standard of proof. This suggestion joins the general argument of the thesis in the sense that it shows how international courts and tribunals have certain means to adapt to environmental disputes. In this case, the

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[527] Klaus Sachs and Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', *International Council For Commercial Arbitration: Advocacy In Changing Times* (Kluwer Law International 2011).

scientific uncertainty of environmental protection can be integrated in the judicial procedure by lowering the standard of proof.

Innovations have been taking place in various judicial institutions, without much coherence. As the sources of the rules on evidence are not limited to the separate constitutive texts of each tribunal, but can be linked to their inherent powers, it leaves room for cross-fertilisation of best practices and amelioration of legal processes across all judicial institutions. The WTO has developed a strong practice related to the handling of court-appointed experts; international arbitration shows great flexibility in appointing experts as member of the arbitral panel itself. The ICJ has also shown itself capable of making enquiries and appointing assessors. All these different variations will be vital in pursuing the creation of a law on evidence better suited to the shifting reality of scientific facts.

4. PREVENTION, LAW ON REMEDIES, AND PROVISIONAL MEASURES OF PROTECTION

This chapter originates from the general criticism that courts are not a suitable forum for preventing environmental harm. Some regard judicial procedure as ill-suited to responding to international environmental legal violations, which can destroy permanently the environment. This section of the thesis will first review the current law on remedies and show its limitations in terms of preventive effects. Remedies provided by the ILC Articles on State Responsibility do not aim at preventing damage or harm. After a brief overview of the law on remedies, the main body of the chapter focuses on the development of provisional measures of protection as preventive remedies.

Judicial remedies are not the object of this chapter – they are introduced to give context to the argument of the chapter, namely the use of provisional measures as remedies to untimely decisions. The criticism according to which international courts and tribunals cannot prevent environmental harm is based on the fact that remedies can only be given at the end of the lengthy procedure. This chapter therefore focuses on this time element, but first introduces the general framework of remedies, explaining what kind of actions can be required as a result of a judicial procedure, as a way of introducing what actions can international courts and tribunals order.

4.1 The use of general remedies

Different sorts of remedies are at the disposal of international courts and tribunals, stemming from different legal sources. Before 2001, the only source was from the jurisprudence of the various arbitral tribunals, followed by the decisions from different permanent courts.[528] With the adoption of the ILC Articles on State Responsibility, a list of remedies was established in article 34 which states that:

> "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in according with the provisions of this Chapter."

[528] For an overview of the jurisprudential developments, see Christine D Gray, *Judicial Remedies in International Law* (Clarendon Press 1987).

These different forms of remedies may be overcome by the application of other more specialised rules of international law,[529] and can be adapted depending on the primary obligations violated and the circumstances of each particular case.[530]

The ILC Articles also provide for cessation and guarantees and assurances of non-repetition (Article 30) as a consequence of an internationally wrongful act, which have been awarded in some cases by international courts and tribunals.

A key general issue is the extent of the remedy: how far can – and should – the international tribunal go? The remedy ordered by the Court in the *Avena and Other Mexican Nationals* case, for example, demanded the United States to "review and reconsider the convictions and sentences by means of its choice". This did not appear precise enough to be effective, however, as underlined by Judge Sepulveda-Amor, who affirmed that:

> "an unsatisfactory rule on the remedial action that is to be assumed by a State found in a breach of a treaty obligation or of a customary rule may mean a chain of proceedings before the Court in the forthcoming future, as a result of an inconclusive determination of how to remedy a violation of international duties by States."[531]

This shows how the choice of remedies before a tribunal is strongly linked to the parties' demands. There are different factors contributing to the appropriate remedies, pointed out by Brown as being "the nature of the court, the type of the dispute, the identity of the parties and [...] the particular relief sought by the claimant in the proceedings".[532]

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[529] Article 55.

[530] Christine D Gray, 'Remedies' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 874.

[531] Separate Opinion of Judge ad hoc Sepúlveda, *Avena and Other Mexican Nationals (Mexico v. United States of America)* (n 506), par. 8.

[532] Brown (n 181) 192.

In particular, it must be noted that although parties themselves suggest remedies they would want to see implemented by the court,[533] this does not impede on the court's discretion over what remedies it allocates.[534] The parties' demands in the first stages of the procedure as to which remedy they are seeking give an indication of the aim of these particular judicial proceedings. In certain types of disputes, the applicant state only seeks satisfaction – such as in cases involving the determination of a border, showing they are not interested in possible reparation. In those cases, awarding further remedies might even harm the diplomatic relationship, but it does not automatically mean that harm has not occurred. It is a sign of the purpose of the particular dispute, and is closely related to the scope of the jurisdiction of the tribunal in the first place. In exercising its discretional power while awarding remedies, the Court shows its stance on its role within a particular dispute, having to balance the scope of the dispute framed by the parties, the right interpretation and application of international law and the consequences attached to it.

The discretion of a tribunal also extends to the remedy itself. Once it has decided which remedy to award, it has to decide on its precise scope. In doing so, an international court is confronted by the complications of interfering with a state's sovereignty.[535] The question whether a tribunal can award specific remedies mandatorily has been treated differently across cases. Indeed, the intrusion of a court in determining the exact way to offer adequate remedy has not been consistent.[536] The lack of development of the current state of the law on remedies has contributed to this discrepancy in practices.

Moreover, if the primary obligation breached already asks for the occurrence of some damage in order to be breached, such as the obligation of states sponsoring persons and

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[533] Article 43 (2), ILC Articles on Responsibility of States for Internationally Wrongful Acts, adopted at the 53rd session, 2001 (Yearbook of the International Law Commission, 2001, vol. II, Part Two) (n 297).
[534] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP 2002) 262–263.
[535] Robert E Hudec, 'Broadening the Scope of Remedies in WTO Dispute Settlement' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 369.
[536] Brown (n 181) 209–216.

entities with respect to activities in the seabed area,[537] the question of reparation is limited to determining the monetary compensation. The rationale for awarding reparation in such a case is based on the primary rule itself, rather than on secondary rules or inherent judicial powers, which then has an impact on the way international courts and tribunals will award certain remedies.[538]

Broadly, judicial remedies can be classified in two categories: retrospective and prospective remedies. The former focuses on how to annul the effects of the wrongful act, the latter centres on how to make sure it will not happen again. Sometimes, a single remedy can serve both purposes, such as in the *Tehran Hostages* case, where the release by the Iranian authorities of the American staff held in their embassy restored the *status quo ante* and stopped a current violation from having future effects.[539] Combinations of different remedies are also possible.

Prospective remedies do not aim at reparation as such but set the ground for future compliance. They focus on the implementation of the judicial decision, ensuring the breach does not continue in the future. This prospective element can be found in different types of remedies, such as the obligation of cessation and guarantees of non-repetition, in certain consequential orders and is a pillar of the WTO dispute settlement system. Their existence shows that international adjudication is now also concerned with the compliance of judicial judgments, and this chapter will show how international adjudication has tackled this task as part of the judicial function. In some instances, courts and tribunals have been more innovative, embracing the idea of future compliance by the parties (see briefly chapter 5.1.iv).

Retrospective remedies have been developed in the context of the law on state responsibility, codified by the ILC in 2001 under the umbrella of "reparation". Reparation can take three forms according to the ILC Articles on State Responsibility,

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[537] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 90), par. 178-184.

[538] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search If Clarity' (2015) 26 The European Journal of International Law 471, 481–483. In spite of being focused on the analysis of the notion of causation, this article shows directly the link between the nature of the obligation and the award of remedies by international courts and tribunals.

[539] Crawford (n 534) 197.

either restitution, or compensation or satisfaction.[540] These three forms of reparation do not allow for prevention of harm, as will now be shown.

i. Restitution

First, the obligation of restitution in kind (*restitutio in integrum*) is the established form of reparation for material injury and is considered to be the preferred remedy a tribunal should seek, awarding other remedies only when the restitution in kind is not available.[541] Restitution has been long defined as an obligation to "wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed".[542] Despite being the primary remedy, the obligation of restitution is limited, as often full reparation is not possible. In cases of environmental harm especially, a material impossibility can arise when the damage done is irreversible. This restricts considerably the application of the obligation of restitution. Indeed, restitution in kind makes sense only if the damage is reversible.

Moreover, restoring the *status quo ante* in some cases might create more adverse effects. Where a state has already built a road or a dam, for instance, there may be no benefits to be gained from tearing down the construction. On the contrary, the restoration of the situation would not produce the right remedy, especially when the obligation breached is a procedural one. In the *Certain Activities* case, where the ICJ said that "restoring the original condition of the area where the road is located would not constitute an appropriate remedy for Costa Rica's breach of its obligation to carry out an environmental impact assessment", this was clearly the case.[543] This is an example of a situation where it is impracticable to grant restitution. International courts and tribunals have some flexibility in striking the balance, using the concept of proportionality as a

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[540] Article 34.

[541] Juan José Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (Brill/Nijhoff 2015) 1131.

[542] *Factory at Chorzow* (Merits). Judgment No. 13, 1928, PCIJ, Series A, No. 17, par. 47.

[543] *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica)* (Merits) [16 December 2015] ICJ Rep 2015, par. 226.

means to achieve the right balance. Therefore, it is possible for an international tribunal to reject a restitution that is not impossible but disproportional.[544]

In sum, restitution in kind seems to have a limited application in environmental cases, as it is often impossible or disproportional for the wrongdoer state to restore the situation. Despite the primary character of restitution, it is not the most suitable remedy in an environmental context. The nature of environmental harm is frequently disconnected with the possibility of restitution as the damage is irreversible.

ii. Compensation

Compensation is the alternative form of reparation for material injury in case restitution in kind is materially impossible. Its purpose is to compensate monetarily what is considered to be the value of the restitution in kind.[545] Brown gives a full account on the state of the development of how compensation has been awarded and concludes the various international tribunals are not coordinated in that matter. The jurisprudence varies a lot, and it is difficult to draw a consistent practice.[546]

Moreover, quantification of the damage and the follow-up on the use of the compensation is traditionally not handled by the judicial institutions, as the decision made by the ICJ in the *Certain Activities* case shows, whereby it ordered the state parties to the dispute to negotiate the amount of the compensation. Only if they do not reach an agreement within the next twelve months after the judicial decision would the Court intervene on their behalf. The Court left the decision regarding the precise amount of the compensation to the parties, and limited itself to state that Nicaragua must compensate Costa Rica for its violation of Costa Rica's territorial integrity.[547]

Regarding the allocation of compensation for damage that is not quantifiable in economic terms, the work of the United Nations Compensation Commission (UNCC)

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[544] Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (n 175) 850.

[545] Gray (n 530) 873.

[546] Brown (n 181) 198–208.

[547] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (n 32), par. 142. This decision follows a trend identified in cases such as Corfu Channel, Diplomatic and Consular Staff, Military and Paramilitary Activities, Gabčkovo/Nagymaros, Diallo, and DRC v Uganda.

in awarding compensation for environmental damages committed during the Gulf War must be emphasised. Although the UNCC is not a judicial institution *per se*, rather an administrative organ,[548] its concrete role can be associated with a quasi-judicial function.[549] More particularly, the states being compensated had to prove the funds would be distributed to the claimants, and in case of failure the UNCC would be able to prevent further funds from being allocated to them.[550]

Overall, compensation is another form of reparation, also based on the retrospective idea of remedies.

iii. Satisfaction

Satisfaction exists for moral damages. It constitutes an acknowledgment of the breach, or an expression of regret; a formal apology or another appropriate modality. This may include a court judgment declaring the breach. An example of a declaratory judgment which constitutes satisfaction can be found in the *Certain Activities* case, which states that:

> "The declaration by the Court that Nicaragua breached the territorial sovereignty of Costa Rica by excavating three *caños* and establishing a military presence in the disputed territory provides adequate satisfaction for the non-material injury suffered on this account. The same applies to the declaration of the breach of the obligations under the Court's Order of 8 March 2011 on provisional measures. Finally, the declaration of the breach of Costa Rica's rights of navigation in the terms determined above in Section D provides adequate satisfaction for that breach."[551]

This is a common outcome for environmental cases (see chapter 1.3.ii). International courts and tribunals often limit their role to a statement on the law or a clarification of

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[548] Edward H. Brans, *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment* (Kluwer Law International 2001) 382–383.

[549] Malcolm Shaw, *International Law* (Sixth Edition, CUP 2008) 758.

[550] David D Caron, 'Finding Out What the Oceans Claim: The 1991 Gulf War, the Marine Environment, and the United Nations Compensation Commission' in David D Caron and Harry N Scheiber (eds), *Bringing New Law to Ocean Waters* (Brill/Nijhoff 2004) 413.

[551] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (n 32), par. 139.

the parties' obligations. The fact judgments do not often go beyond this declaratory effect limits their roles in terms of concrete future change in states' behaviour.

4.2 Importance of provisional measures in the application of international environmental law

The limited availability of remedies is not the only reason for concluding that international courts are unable to prevent environmental harm; it has also been argued a judicial decision usually comes after other deliberations and therefore takes too long for the environment to be protected effectively.[552] In response to this argument, this chapter tackles the time element in the process of judicial resolution. The core of the chapter lies in the idea that provisional measures rescue the relevance of judicial bodies precisely because they can be awarded very fast. The construction of a major site (for example a road, dam, factory) can affect dramatically the surrounding environment, or the conduct of an experimental programme can violate number of environmental rules. These might range from the conservation of biodiversity to the protection of endangered species. To address this issue, international courts and tribunals have at their disposal procedures that allow interim measures to be applied as a matter of urgency. Articles 74 (1) and (2) of the Rules of the International Court of Justice, for example, emphasise the possibility of the provisional measures procedure to move swiftly as it has "priority over all cases", and as "the Court ... shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency". Similarly, the Rules of the ITLOS say that a "request... has priority over all other proceedings before the Tribunal".[553]

This illustrates the importance of understanding whether or not provisional measures offer a useful legal tool where a threat of the environment exists but a judicial settlement would not be considered because of its lengthy duration and its *ex post facto* effect. Also examined in this chapter is the scope of provisional measures, specifically: in what circumstances may courts and tribunals intervene, and on what basis? The first question to be tackled is to what extent they can use their power to grant provisional measures: is

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[552] See introduction.

[553] Rules of the Tribunal, Article 90 (1)

a request for provisional measures a right to a party or a right of the international community? How far can the court represent other interests and act accordingly?

Another relevant issue to be considered concerns the correct way to achieve the balance between taking measures for the effective protection of the environment and ensuring the rights of the respondent state are not unduly constrained pending the final outcome of the dispute. Courts and tribunals have developed a set of tests in order to help this balancing exercise. One question is about the implications of the choice of tests made by different judicial bodies, another is how they affect the creation of a regime of provisional measures. This chapter will argue that if international courts and tribunals take a less restrictive approach in the application of the set of tests than they have been taking recently, environmental protection will benefit from the procedure of provisional measures.

The focus on provisional measures of protection is part and parcel of the overall argument that international courts and tribunals have tools available to them to adapt to environmental disputes. By using provisional measures in a meaningful way, they can overcome the procedural obstacle of untimely decisions. Indeed, it will be shown how provisional measures can contribute to ameliorate the adequacy of international courts and tribunals in environmental disputes.

4.3 Nature of provisional measures

A request for provisional measures must be filed after the case has been brought to the court or tribunal, but before the tribunal decides on the merits. In between the time the case has been filed and the time it is heard, both parties have the opportunity to request provisional measures. The procedure is meant to be incidental, meaning the jurisdiction to prescribe provisional measures stems from its jurisdiction over the merits of the dispute.[554] Its matching concept in various national legal systems is known as the interim

[554] John G Merrills, *International Dispute Settlement* (Fourth Edition, CUP 2005) 136.

injunctions[555] or interdict procedure.[556] Provisional measures are expressly provided by the founding texts of both the ICJ and the ITLOS, respectively in Article 41 of the ICJ Statute and in Article 290 UNCLOS read in conjunction with Article 25 of the ITLOS Statute, whereby provisional measures can be requested by either party to a dispute previously filed.

The precise status of provisional measures orders was unclear in the early practice of the Court. In the *LaGrand* case, the Court explained that such uncertainty stemmed from the modifications of the wording of the Statute while drafting it for the PCIJ, which has changed between the Court "ordering" provisional measures and "suggesting" or "indicating" them (the latter being the current version).[557] This issue has been clarified in the *LaGrand* case when the Court held that the parties which are not respecting provisional measures orders are violating international law. Indeed, provisional measures orders are binding on the parties.[558] This controversy was avoided in the case of the ITLOS where no doubt was left regarding the binding nature of provisional measures, as the Tribunal has "the power to prescribe provisional measures".[559]

Following this new jurisprudence, Brown asked whether the measures were inherent to a judicial institution or if they had to be agreed on by the parties on a case-to-case basis.[560] In other words, can a court or tribunal grant a provisional measures order even in the absence of explicit power in its constituent instrument? This issue is especially important in *ad hoc* arbitration when the tribunal is set up for the resolution of a specific dispute. Although the PCA's founding texts (1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes) do not mention interim measures, all the recent

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[555] See for the United Kingdom, Practice Direction 25A, supplement of the CPR Part 25 (Civil Procedures Rules), available at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a >.

[556] See for Scotland, Joanna Fulton 'Litigation and enforcement in UK (Scotland): overview (2015) Global Guide 2015/16 Dispute Resolution, available at < http://uk.practicallaw.com/8-593-3006 >.

[557] *LaGrand (Germany v United States of America)* (Merits) [2001] ICJ Rep 2001 p 466, par. 104-107.

[558] ibid, par. 109.

[559] Article 25 of the Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea).

[560] Brown (n 181) Chapter 4 'Power of International Courts to Grant Provisional Measures'.

PCA Arbitration Rules include a section on interim measures.[561] This change not only shows the adaptation of the PCA but also that it embraces the argument that it is part of the judicial function itself. Before such rules were created, specific arbitral tribunals included interim measures of protection in their own rules of procedure, such as the *Iron Rhine* arbitration in 2005 (Article 21). There has not yet been a case where a party requested provisional measures from a tribunal that did not have express powers to grant them.

The key question is the extent to which the tribunal will dispose of its powers. Indeed, if the power to grant provisional measures is inherent to the judicial function, it is then crucial to analyse the extent to which it can be used, and for what purposes. Initially, the constitutive statutes of the various permanent courts set a framework defining the scope of the provisional measures procedure, but they also leave a generous margin of appreciation to the courts. It must be noted the scope of provisional measures orders may depend on the precise language of the applicable rules. The fact international courts and tribunals use their inherent powers does not automatically imply a uniformity of their practices. Indeed, despite the development of a certain harmonisation, the *Kishenganga* Arbitration underlined the importance of the different wording of the applicable rule. In this case, the disparities between the Indus Waters Treaty and the ICJ Statute allowed the tribunal to draw away from the ICJ jurisprudence on provisional measures.[562]

It is also crucial to underline that the proceedings are totally independent from the proceedings on the merits. As Rosenne said, "all findings of fact and of law and all decisions in connection with provisional measures are provisional and do not directly affect the merits of the case, or any related incidental question of jurisdiction or admissibility."[563] This is especially important both at the procedural level and in the analysis of the substantial conditions, because the tribunal will not be bound by its

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[561] Article 26 of the Arbitration Rules 2012; Article 26 of the Optional Rules for Arbitrating Disputes between Two States; Article 26 of the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. < http://www.pca-cpa.org/showpage.asp?pag_id=1188 >.

[562] *Indus Waters Kishenganga Arbitration (Pakistan v India)* (n 472), par. 130.

[563] Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP 2005) 159.

decision on provisional measures. This has been the case in the *Southern Bluefin Tuna* case, where the ITLOS ordered provisional measures because it found *prima facie* jurisdiction of the Annex VII arbitral tribunal, then denied by the arbitral tribunal itself. Indeed, it affirmed that "the ITLOS holdings upheld no more than the jurisdiction *prima facie* of this Tribunal. It remains for it to decide if it has jurisdiction to pass upon the merits of the dispute".[564] It shows the provisional measures regime should be autonomous, especially since the urgency of the situation forces the tribunals to decide without full account of legal arguments and factual evidence. However, courts need a mechanism to prevent them from going too far in granting provisional measures. Indeed, a court or tribunal seeks to avoid granting measures that in fact prejudge the case. It needs therefore to create a regime that precludes a party from obtaining what it would during the main phase of the proceedings.[565] This has always been a clear threshold the court would never want to overstep.[566] That is exactly why provisional measures can be an appropriate remedy to the role of international courts and tribunals in environmental disputes. The fact there must be a clear separation between the measures adopted at the incidental level and at the merits level emphasises the role of provisional measures as measures of precaution. It reiterates the importance of framing the tribunal's decision in terms of precaution versus sovereignty (see below 4.5). It is, however, possible that the relief sought at the provisional measures stage is identical to the one sought at the merits stage. For example, Argentina requested the provisional release of its warship from Ghana, which also constituted the measure it was seeking permanently in the merits. The ITLOS did not find the similarity of the measure requested with the relief sought at the merits problematic, as its decision could be reversed. Judge Paik even argued that certain circumstances can allow provisional measures to be similar to the relief sought in the merits. Despite acknowledging that "any request designed to obtain an interim judgment in favour of a part of the claim formulated in the application should

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[564] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan* (n 148), par. 37.

[565] Article 41 (1) ICJ Statute; article 290 (1) UNCLOS.

[566] Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (n 563) 190–191. It has been exemplified already in the Chorzow Factory case, PCIJ Serie A 12 (1927), and also in the U.S Diplomatic and Consular Staff in Tehran (Provisional Measures case).

be dismissed", he accepted that "this does not mean that a party cannot seek relief through a request for provisional measures which is in substance identical with the principal relief sought on the merits of the claim".[567]

Finally, it must be noted that requests of provisional measures are limited to contentious cases, and are not open to the advisory jurisdiction. This is because in advisory opinions the court is only giving an interpretation of a legal rule, without relying on the existence of a dispute. Although a request for an advisory opinion stems from a concrete problem the international community is facing, the request aims mostly at clarifying the law.

4.4 Purposes of provisional measures

Provisional measures do not exist solely to allow the courts and tribunals to exercise their judicial function fully. Different purposes have been enunciated by courts and tribunals,[568] such as the preservation of the respective rights of the parties,[569] the maintenance or restoration of the *status quo*,[570] the avoidance of any aggravation or extension of the dispute,[571] the prevention of serious harm to the marine environment.[572]

The general PCA Arbitration Rules 2012 provide a non-exhaustive list of purposes which are concerned with the maintenance or restoration of the *status quo* and the prevention of current or imminent harm[573] (both aiming at the protection of broader interests than the parties' respective rights), and add another type of measures that aim at securing the arbitral process itself,[574] such as the preservation of "assets out of which a

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[567] Declaration of Judge Paik, *The 'ARA Libertad' case (Argentina v Ghana)* (Provisional Measures, Order of 15 December 2012) ITLOS Reports 2012, par. 8.

[568] Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (n 563) 3–11; Brown (n 181) 121–122.

[569] Article 41 ICJ Statute; article 290 (1) and (5) UNCLOS.

[570] *LaGrand (Germany v United States of America)* (n 176) par. 11-12; Public sitting, *Avena and Other Mexican Nationals (Mexico v United States of America)* (Request for Provisional Measures), CR 2003/1 ICJ, par. 32 (Santiago Oñate).

[571] *Nuclear Tests (Australia v France)* (Provisional Measures) [1973] ICJ Rep 99, par. 106; *Case concerning Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore)* (n 30); *The MOX Plant Case (Ireland v United Kingdom) No. 10* (n 81).

[572] Article 290 (1) and (5) UNCLOS.

[573] Article 26 (a) and (b) (i).

[574] Article 26 (2) (b) (ii).

subsequent award may be satisfied",[575] or the preservation of "evidence that may be relevant and [of] material to the resolution of the dispute".[576] In addition, the specific Optional Rules for Inter-State Arbitration mention the preservation of the respective rights of the parties (article 26 (1)), but none of the other possibilities contained in the general Rules. In contrast, the Optional Rules on natural resources and environment mention the prevention of "serious harm to the environment falling within the subject-matter of the dispute".[577] Taking the various Optional Rules together, all the existing purposes are articulated.

These categories fall either within the idea of a bilateral judicial dispute only concerned with the parties' interests or within the idea that the court or tribunal offer the possibility to defend other values or interests. In particular, protection of the environment can fall within the narrower scope of provisional measures as a way of preserving the parties' rights. If not, however, it will be part of the broader purpose of non-aggravation of the dispute. In the second case, it is critical to establish that provisional measures can also ensure the maintenance of the *status quo* – or in other words the protection of the "object of the litigation".[578] Indeed, the institution of provisional measures can be viewed as a mere attribute to the parties' rights once a judicial procedure has started, or as an opportunity for the tribunal to include other interests at stake. This dichotomy is reflected in the different purposes attached to provisional measures. The dependence of the measures solely on the rights of the parties restricts the use of provisional measures, in the sense that it prevents other measures to be taken in light of the parties' rights but to preserve broader situations, unless the rights claimed by the applicant did not exist at the time of the order.[579] When the Court in the *Nuclear Tests* case indicated

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[575] Article 26 (2) (c).

[576] Article 26 (2) (d).

[577] Article 26 (1) of the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

[578] Joint Separate Opinion of Judge Wolfrum and Judge Cot, *The 'ARA Libertad' case (Argentina v Ghana)* (n 567), par. 4.

[579] Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (n 563) 209; In the *Nuclear Tests (Australia v France)* (n 571) the court granted provisional measures to preserve Australia and New Zealand's rights, which the Court was not sure whether they existed or not.

provisional measures to "ensure that no action of any kind is taken which might aggravate or extend the dispute" it did not limit its competence to the preservation of the parties' rights only. Ensuring certain rights are safeguarded is not the same as ensuring the situation is not aggravated, i.e. to maintain the *status quo*. The latter entails a wider variety of measures than the former.[580] Moreover, it means the court acts as a defender of values other than the parties' rights. The same applies to the specific measure of the UNCLOS to prevent serious harm to the marine environment. It relies not just on the preservation of the parties' rights, but goes beyond the rights of parties to protect the marine environment. Indeed, the UNCLOS mentions the possibility of granting provisional measures for the protection of the marine environment. Article 290 (1) UNCLOS does not only aim at protecting the rights of the parties, but contains this element of protection of the global commons.

The ITLOS mentioned article 290 (1) in the *Southern Bluefin Tuna* case, but did not focus its argumentation on it. The closest it came to this was when the tribunal found that "measures should be taken as a matter of urgency to preserve the rights of the parties *and to avert further deterioration of the southern Bluefin tuna stock* (emphasis added)".[581] The wording of the emphasised sentence recalls the ICJ's position when it says that provisional measure can be granted to "avoid any aggravation or extension of the dispute". The ITLOS does not seem to differ substantially from the ICJ's jurisprudence in that respect. Indeed, the prevention of serious harm to the marine environment as seen by the ITLOS falls into the ICJ's interpretation of the avoidance of any aggravation or extension of the dispute. However, in the *Land Reclamation* case, although the ITLOS establishes a "group of independent experts [...] to deal with any adverse effects of such land reclamation", it does not justify its decision on the prevention of serious harm to the marine environment. The same happens in the *MOX*

[580] Paolo Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21 Leiden Journal of International Law 623, 626–627.
[581] *Southern Bluefin Tuna cases (New Zealand v Japan/Australia v Japan)* (n 29), par. 67 and 80.

Plant case where the prevention of serious harm to the marine environment is mentioned several times, yet never invoked separately.[582]

Notwithstanding the underuse of the possibility offered by the text of UNCLOS, the tribunal has not restricted its application of provisional measures. It does consider seriously irreparable harm in the situation at stake, which can be affiliated with a broader conception of the protection of global commons. This can be compared with the way the ICJ can protect the non-aggravation of the dispute.

In the ICJ jurisprudence, an example where provisional measures can seek to protect more than just the parties' rights can be found in the *Certain Activities* case. Indeed, Costa Rica, by requesting the suspension of the activities carried out by Nicaragua in the disputed area, not only preserves its right of sovereignty over its territory, but also contributes to the protection of the environment, separately from its sovereignty claim.[583] Indeed, the maintenance of the state of the environment in the area is necessary both as an attribute of the sovereignty claim and as a requirement for the settlement of the dispute. Therefore, by protecting the wetlands and forests where the activities are taking place, the Court prevents further violations to Costa Rica's territorial sovereignty and also protects further potential deterioration of the environment. This represents an example of when the Court takes the liberty to defend the protection of the environment not as a direct right of Costa Rica. It does so in order to preserve the situation until the court decides on the merits.

What if a party invokes *erga omnes* obligations to be protected at the provisional measures level? If the party requested provisional measures for the defence of an *erga omnes* obligation being violated, it would not only benefit its own right to the respect of this *erga omnes* obligation, but also all the others'. The consequences of the provisional measures would be broader, but the purpose of provisional measures would remain the same: the tribunal will still act to preserve the party's rights. The difference would be in

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[582] *Case concerning Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore)* (n 30), par. 106.1 and 106.2; *The MOX Plant Case (Ireland v United Kingdom) No. 10* (n 81), par. 63, 64, 73, 75.

[583] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) [2011] ICJ Rep 2011, p 6, par. 4 and 5.

the type of measures the tribunal chooses to order, as it would have to take into account the multilateralism of the right invoked (see 4.7.iii).

Provisional measures are not dependent on a party's request. Indeed, if a party does not ask for provisional measures, the tribunal would have to act itself. The ICJ is given the opportunity to grant provisional measures *proprio motu*, which would be the basis for its intervention.[584] It is recognised that the Court can intervene on its own initiative when circumstances so require; a further expression of its inherent powers to order provisional measures.

International courts have two ways of using their power *proprio motu*. Firstly, if provisional measures have been requested by either party, they will be able to modify the request as it wishes. This possibility is found in Article 75 (2) of the Rules of the ICJ and Article 89 (5) of the Rules of ITLOS. They can adapt and change the measures proposed in the request to better fit the circumstances. Secondly, the ICJ can order provisional measures "irrespective of whether or not it has been seized by the parties of a request for the indication of provisional measures"[585] (Article 75 (1) Rules of the ICJ). It has been used in the *LaGrand* case to justify that the Court indicates provisional measures without any proceedings[586] and does not have the equivalent in the ITLOS. It gives full powers to the court to decide on provisional measures even without the consent of any party.

International courts and tribunals can then protect an interest that neither party deemed worth protecting. In that case, judicial bodies may have interests in integrating evolutions that take place in international environmental law, especially the developments relating to legal protection beyond territorial boundaries, i.e. global commons. They would therefore need to justify their intervention on the interests of the court to preserve or prevent further aggravation of the factual situation. Their role would be in this case to

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[584] Article 75 of the Rules of Court.

[585] *LaGrand (Germany v United States of America)* (n 176), par. 21.

[586] ibid, par. 21.

protect common interests of the international community. In other words, they could be a third party defending interests that might go beyond the parties' interests.

Kolb has mentioned rightly that the tribunals are "the guardians of the objective interest, as a matter of judicial integrity". He meant that they have to preserve the "value of their judicial functions".[587] It can go even further than that and may be argued this power to protect the objective interest also entails any interests beyond the parties to the dispute – still strongly related to the ongoing dispute – and should be taken into account by the courts and tribunals.

4.5 Balance between sovereignty and precaution

Not only is the question of the role of the court or tribunal in granting provisional measures relevant in determining the importance of the latter in international environmental law. It also represents the balance the tribunal must strike in analysing the range of possible provisional measures applicable in the individual case. The two stances on the purposes of provisional measures developed above may be explained with the balancing exercise the tribunal or court has to pursue. If the tribunal decides that the preservation of the parties' rights weighs more than the preservation of the factual situation, it is generally to safeguard the sovereignty of the respondent. There is a connection between which principle the Court decides to put forward and the conceptual approach to provisional measures.

On the one hand, most judgments refer to possible infringements to the sovereignty of the respondent as opposed to the precaution required by provisional measures requested by the applicant. The refusal of the Court to grant provisional measures in the *Passage through the Great Belt* case for example was based on the exercise of Denmark's sovereignty over its own affairs. Finland was asking the ICJ to grant provisional measures to protect its right of passage through the Great Belt, as Denmark was building the East Channel Bridge. The Court sustained that

> "it is for Denmark, which is informed of the nature of Finland's claim, to consider the impact which a judgment upholding it could have upon the

[587] Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 616-617.

> implementation of the Great Belt Project, and to decide whether or to what extent it should accordingly delay or modify that project."

At this stage of the procedure, it can be difficult for a court to

> "restrain a State from doing what it claims it has a legal right to do without having heard it in defence of that right, or without having required the requesting State to show that there is at least a possibility of the existence of the right for the preservation of which the measures are sought."[588]

These extracts show the emphasis on protecting the sovereignty of the parties, to the detriment of the need for precaution. In this particular case, the Court judged that the urgency required for granting provisional measures was not proven in a satisfactory way to overcome Denmark's sovereignty and dismissed the case.

Also, a "proceed at your own risks" principle has been used to protect the sovereignty of the party allegedly violating the other party's rights. The idea centres on the importance of leaving the parties to determine their activities within their territories, as long as they are responsible for their own actions. It has been mentioned as such in the *Indus Waters Kishenganga Arbitration*, allowing India to keep working on a diversion of the river Kishenganga/Neelum, as part of a bigger hydroelectric project.

On the other hand, the idea of precaution has been underlined by Judge Cançado Trindade who described the anticipatory effect of provisional measures several times, and declared among others that "[provisional measures of protection] are endowed with a preventive character, being anticipatory in nature, looking forward in time".[589] Pakistan also stressed the importance of precaution in the provisional measures procedure in the *Indus Waters Kishenganga Arbitration*, saying that "interim measures are necessary to prevent the creation of a *fait accompli* and harm the likelihood of any remedy that the Court may order".[590] In this sense, the tribunal might impose measures restricting the sovereignty of either state party.

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[588] Separate Opinion Judge Shahabuddeen *Passage through the Great Belt (Finland v Denmark)* (Provisional Measures) [1991] ICJ Rep 1991, p 12, p. 28/20.

[589] Separate Opinion Judge Cançado Trindade. *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Provisional Measures) [2011] ICJ Rep 2011, p 537, par. 64.

[590] *Indus Waters Kishenganga Arbitration (Pakistan v India)* (n 472), par. 99.

As an example of the balancing exercise, the arbitral tribunal in the latter case explicitly made a choice as to what parts of the construction should be suspended. Indeed, on the one hand, it said that

> "consistent with the nature of interim measures, the Court, on a provisional basis, cannot exclude that the by-pass tunnel [...] is a "temporary by-pass" within the meaning of [the Indus Waters Treaty], ... which has been intended to be essentially of temporary use and would thus not by itself be capable of rendering more or less likely the implementation of any remedies that the Court may decide upon in its Award".[591]

However, the tribunal treated the construction of some elements of the actual dam differently. As these elements were part of the final permanent project, precaution required their suspension.

> "A temporary halt to the construction of the dam would ... go a long way toward avoiding any situation of potential inconsistency with the Treaty while these proceedings are ongoing ... Moreover, even if the Court were ultimately to reject Pakistan's arguments regarding the alleged illegality of the KHEP in all its elements, ... the Court at this stage cannot rule out that adjustments to the design of the KHEP dam or related works ... may be required. The entirely unconstrained construction of the KHEP *pendente lite* thus presents a risk of constricting the legal principles to which the Court may have recourse in its Award."[592]

The element of precaution took over the concurrent sovereign right of India to build a tunnel, because the operation had a direct impact on the waters, which were at the heart of the dispute. Conversely, when the construction of some parts of the installations did not interfere directly with the waters themselves, the Court applied the "proceed at own risks" principle, which excluded Pakistan's responsibility but did not prevent the construction from happening.[593] The tribunal for each of the actions of India balanced precaution with sovereignty. This case shows that even within one procedure, some measures justify the infringement of a state's sovereignty, but not all. Despite the fact the arbitral tribunal's powers to award provisional measures in the *Kishenganga Arbitration*

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[591] ibid, par. 145.
[592] ibid, par. 147-148.
[593] ibid, par. 143.

were based on the Indus Water Treaty specifically,[594] the award shows how a tribunal can balance interests which broadly either belong to the protection of the sovereignty of either party or to the guarantee of precaution inherent to provisional measures.

It is important to emphasise the precautionary nature of the procedure, therefore it is important to think of the balancing exercise in terms of sovereignty against precaution, even though there are variations in what is in the balance. The reason why it is important to think in those terms is to not depart from the very nature of the procedure. The consequences are not procedural, but conceptual. Opposing sovereignty and precaution creates a tool to delimit the frame within which the tribunal exercises its powers. Indeed, the balance could be described in different terms, for instance the protection of the environment versus the right to development, as in the *Pulp Mills* case. However, this reasoning would allow the court to make political decisions outside the scope of the procedure.[595] If the balancing exercise is constrained to sovereignty versus precaution, the essence of provisional measures is preserved. In other words, if the role of the court is defined in the balance between two sovereign rights without the precaution element, the court loses the most important reason for the existence of provisional measures. Furthermore, it is beneficial to think in those terms since the protection of the environment requires an urgent response – almost pre-emptive in certain cases.

This balancing exercise is present in the analysis of every condition the tribunal has to consider. Each time the question asked is: how far can the tribunal go to protect the parties' rights or the non-aggravation of the dispute without infringing on the depleted party's rights either? The development of international environmental law has had an impact on the examination of those conditions, especially when the court must determine when the risk of irreparable harm is worth protection.

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[594] Paragraph 28 of Annexure G of the Indus Waters Treaty: "Either Party may request the Court at its first meeting to lay down, pending its Award, such interim measures as, in the opinion of that Party, are necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute".

[595] Karin Oellers-Frahm, 'Use and Abuse of Interim Protection before International Courts and Tribunals' in Holger Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity (2 vols.) Liber Amicorum Rüdiger Wolfrum* (Brill 2011) 1685–1703.

4.6 Conditions for provisional measures to be granted

The impact of the choice between the two stances on granting provisional measures discussed above is reflected in the determination of certain conditions by the various tribunals. Also, it is through the analysis of the specific conditions in each individual case that the tribunal or court makes its balancing exercise. Whether the court or tribunal will favour a greater protection over the sovereign rights of the parties depends on how it considers the following conditions are fulfilled. The ICJ is the leading court in the provisional measures cases and it is the jurisprudence of this Court that will provide the main focus of the analysis. However, the ITLOS or arbitral tribunals have interesting inputs and sometimes divergent approaches.

First, some criteria must be established. The grounds for setting these criteria are Article 41 of the ICJ Statute and 73 to 78 of the Rules of Court. The Court must at first establish its *prima facie* jurisdiction, which does not require such an in-depth analysis as on the merits. Then, at least two common elements have to be present: the measures must prevent an irreparable prejudice and must be required as a matter of urgency, which I will call here the risk of irreparable harm.[596] The provisional measures requested must also be in connection with the case on the merits. And in the latest jurisprudence a new criterion seems to have appeared repetitively, which will be called the "plausibility test".

Each of these conditions will be analysed with the ICJ jurisprudence, and with judgments from other interstate courts. The analysis will demonstrate how they relate to the different purposes enunciated above and to environmental protection.

i. *Prima facie* jurisdiction

As the request for provisional measures is an incidental procedure, the tribunal needs only to establish that its jurisdiction is not obviously excluded. Although it does not have the time to affirm its jurisdiction in a comprehensive way, the tribunal must still found

[596] See for a clear expression of the two conditions, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua),* (Provisional Measures) [2013] ICJ Rep 2013, p 398, par. 24 and 25.

its jurisdiction on an existing basis. In other words, the jurisdiction of the court must *appear* well-founded.[597]

One of the key questions is which test an international tribunal should apply to determine the threshold when its jurisdiction is granted. The *prima facie* test responds to the justified need of the court to not grant something it would never be able to judge on the merits. It also adapts to the fact that the court needs to decide quickly on the request. Practically, the tribunal will accept its jurisdiction unless the contrary is obvious and clear. Yet it is not sufficient for a party to invoke provisions of a treaty in abstract. The provisions at the basis of the request must be applicable and sustained by relevant facts put forward at the time of the request. The court has to establish its jurisdiction *rationae personae*, *rationae materiae*, *rationae temporis* and *rationae loci*.[598] The competence *rationae materiae* is the most controversial, as the tribunal needs to analyse to some extent the content of the norms invoked in order to determine whether the dispute falls under their scope. Often the responding party will claim the norms forming the basis of the request are not applicable to the facts in question. The court is then faced with the possibility of overruling the merits. But the case-law has been consistent in its application of the *prima facie* test as a low threshold,[599] as opposed to the phase of preliminary objections to the jurisdiction, taking place before the phase on the merits (as it suspends the proceedings) but not in urgency, where the question of jurisdiction is examined definitively yet the Court cannot prejudge the merits either.[600] They do not share the same analysis of their jurisdiction over the merits.

The advantage of this accelerated and superficial analysis is that even in the doubt of an overlap between different allegedly applicable treaties and their dispute settlement

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[597] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures) [2009] ICJ Reports 2009, p 139, par. 40-55.

[598] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures) [2008] ICJ Reports 2008, p 353, par. 87-93.

[599] Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (n 563) 93.

[600] See Separate Opinion Judge Higgins, *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection, Judgment) [1996] ICJ Reports 1996, p 803.

mechanisms, the tribunal will accept its jurisdiction.[601] In the *Southern Bluefin Tuna* cases, for example, the ITLOS accepted its *prima facie* jurisdiction, which was ultimately revoked by the arbitral tribunal, as it based its jurisdiction on a regional treaty excluding its jurisdiction according to UNCLOS. By accepting its *prima facie* jurisdiction, however, the tribunal could freeze the ongoing situation, temporarily prevent Japan from continuing to catch Bluefin tunas, and reinforce the importance of cooperation between the parties.[602]

ii. Urgent risk of irreparable harm

The fact provisional measures are granted when there is a risk of irreparable harm (or prejudice) is the main reason they are relevant in an environmental context. Provisional measures must be taken only when an urgent reaction is needed and when – if the tribunal does not intervene – it will cause an irreparable damage. In other words, the notions of urgency and irreparable prejudice are at the very heart of the institution of provisional measures.

Irreparable harm is a "concept [which] does not relate to the rights as legal positions [...] but to the substance of the right".[603] It is concerned with the impact on the concrete situation protected by the right. This makes it very important for environmental protection. It has long been established that the damage can be legal or factual.[604]

The criterion of urgency was first developed by the courts but it has since been codified in some instruments, such as Article 290 (5) UNCLOS. It requires that measures are immediately necessary at the time they are requested. As Rosenne said, "the substantive implication of urgency is to ensure that [...] no action taken *pendente lite* by a State

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[601] Alan Boyle, 'The Environmental Jurisprudence of the International Tribunal for the Law of the Sea' (2007) 22 The International Journal of Marine and Coastal Law 369, 381.

[602] *Southern Bluefin Tuna cases (New Zealand v Japan/Australia v Japan)* (n 29), par. 90.

[603] Kolb (n 587) 621.

[604] ibid 629.

engaged with another State in dispute before the Court can have any effect whatsoever as regards the legal situation which the Court is called upon to decide".[605]

From an environmental law perspective, the development of the "precautionary approach" has had a significant impact in the court's approach to the notions of irreparable harm and urgency. The balancing exercise tribunals must pursue has been influenced by the precautionary approach, although not consistently and homogeneously. In some other cases, such as the *Southern Bluefin Tuna* case, the lack of an explicit link between urgency and the precautionary approach has been criticised. In his separate opinion, Judge Treves said expressly that provisional measures under article 290 UNCLOS have a natural affinity with the precautionary approach and that "a precautionary approach seems to me inherent in the very notions of provisional measures", and regretted that the tribunal did not acknowledge its importance explicitly.[606]

An important aspect courts have to determine is the threshold when risks become worth protection. And the determination of such threshold should be influenced by the precautionary approach. Indeed, the meaning of what a risk of irreparable harm is can have different consequences on the perspective the court takes on provisional measures. The key problem in assessing whether harm is irreparable and the situation urgent is the uncertainty of the situation created by the alleged violation of one party to the dispute. With the application of the precautionary approach, the party that requests the measures will have to comply with a lower threshold. Because states have an obligation to prevent or reduce future harm, within or outside their territorial boundaries, the tribunal will be more inclined to order provisional measures for the same purpose. However, judges have not been unanimous.

Moreover, the ITLOS is specifically able to grant provisional measures when there is a risk of serious harm to the marine environment. Despite this it has failed to allocate such measures for the prevention of serious harm to the marine environment under Article

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[605] Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (n 563) 136.

[606] Separate Opinion of Judge Treves, *Southern Bluefin Tuna cases (New Zealand v Japan/Australia v Japan)* (n 29), par. 8-9.

290(1) UNCLOS in the both the *Land Reclamation* and *MOX Plant* cases.[607] In particular, in the *MOX Plant* case, Judge Treves explained the reason why the tribunal was not able to recognise the urgency of the situation:

> "Scientific evidence linking risks to the marine environment specifically to the commissioning of the MOX plant within the relevant time-frame was not substantial and focused enough to permit discussion of whether or not such evidence was conclusive as to the causal relationship between the activity envisaged and the risk to the marine environment."[608]

The question of the weighing of evidence by international tribunals has been examined in the previous chapter and is applicable to provisional measures as well. Overall, because the harm to the marine environment can only be factual (as opposed to a legal harm), the proof of such harm requires stronger evidence, which can explain why tribunals have not granted many provisional measures under this heading. The *Southern Bluefin Tuna* case stands out precisely because it was acknowledged that the stock was endangered, so such fact needed not to be proven.[609]

If the requesting party fails to sufficiently prove the existence of a risk of irreparable harm, the procedure ends there and the tribunal will not grant such provisional measures. Establishing a risk of irreparable harm is not yet enough to grant provisional measures on its own, however, because this risk must be related to the alleged rights of the parties.

iii. Link between the rights and the measures

One of the requirements developed by the courts is the proof of a connection between the measures granted by the court and the dispute over the merits needing to be established. Since provisional measures are incidental (they take place within a procedure), they must relate either directly or indirectly to the subject of the dispute on the merits otherwise another dispute is created.

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[607] Tim Stephens, 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 The International Journal of Marine and Coastal Law 177, 193–194.

[608] Separate Opinion of Judge Treves *The MOX Plant Case (Ireland v United Kingdom) No. 10* (n 81), par. 8.

[609] *Southern Bluefin Tuna cases (New Zealand v Japan/Australia v Japan)* (n 29), par. 71.

As Kolb said, this condition is "functional and causal", because it is necessary to the proceedings and because provisional measures cannot exist without an existing dispute. However, this condition can "also limit the scope of the provisional measures that the Court may indicate *proprio motu*". He further sustained that "'[n]ot to aggravate the dispute' and to protect the procedure against external challenges are two elements that are sufficiently connected to the very subject matter of the dispute".[610] For environmental protection, the stance on the necessity and scope of this condition is crucial, focusing in particular on the question of whether the link has to be direct or may be indirect. The protection of the environment is a very factual protection, which depends on a legal right, but which needs a very concrete approach. So the relation between the legal right and its counterpart in the "real world" must be the drive to order provisional measures. Therefore, the more the order is embedded in the factual situation, the more efficient it is for the environment. It means the tribunal needs a slightly broader margin of action, which is precisely given by the purposes of non-aggravation or extension of the dispute or the maintenance of the *status quo*. As stated above, these objects are related to the subject of the main dispute, albeit in an indirect way. In the jurisprudence, the tribunals recognised their power to grant provisional measures indirectly, based on the prevention of the aggravation of the dispute. This approach is not consistent, however, and in the more recent jurisprudence, the ICJ especially seems to have limited its margin of appreciation with the "plausibility test" (below section 4.6.iv).

The links between the measures and the rights invoked can be direct or indirect, meaning the tribunal will justify taking provisional measures on the grounds of either the protection of the parties' rights or the protection of the situation. Exemplifying the first possibility, in the *Questions relating to the Obligation to Prosecute or Extradite* case, the Court mentioned that "the Court must be concerned to preserve by [provisional] measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent".[611] Similarly, in the *Convention on Racial Discrimination* case, the Court said that "the rights which Georgia invokes in, and seeks to protect by, its Request for the indication of provisional measures have a sufficient

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[610] Kolb (n 587) 625.

[611] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 597), par. 56.

connection with the merits of the case".[612] Exemplifying the second possibility, in the *Frontier Dispute* case, where the Court said that "armed actions within the territory in dispute could result in the destruction of evidence material to the Chamber's eventual decision".[613] In the *Indus Waters Kishenganga* case, the arbitral tribunal said that "discretion from the Court in the form of interim measures [...] is necessary to "avoid prejudice to the final solution" of the present dispute as it may be prescribed in the Court's eventual Award".[614] In the *Land Reclamation* case, the ITLOS said that "given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation [...]".[615] These cases represent the scenario where tribunals protect the situation where states exercise their rights, instead of their rights directly.

It is important to mention that when provisional measures are granted on the basis of the protection of rights, it does not mean the measures themselves will be narrower. In the *Certain Activities* case, for example, the measures awarded are based on the protection of Costa Rica's rights. Nevertheless, they are generous.[616] It is not because it is based on the narrower and direct link between the measures and the rights that the provisional measures ordered will be narrower as well. Broader grounds for granting provisional measures are necessary because they give more possibilities for states to request provisional measures successfully.

iv. Plausibility of the alleged right

This condition is connected to the previous one which required a link between the measures and the rights invoked. The "plausibility test" goes further in the sense that

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[612] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* (n 598), par. 126.

[613] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Provisional Measures) [1986] ICJ Rep 1986, p 3, par. 20.

[614] *Indus Waters Kishenganga Arbitration (Pakistan v India)* (n 472), par. 136.

[615] *Case concerning Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore)* (n 30). par. 99.

[616] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (n 583), par. 60-62.

not only a link must exist, but the alleged right itself must be plausible. This condition has not always been required by the ICJ. Indeed, there has been a shift in the jurisprudence of the ICJ from the affirmation in the *Frontier Dispute* case in 1986 (followed in the *Land and Maritime Boundary between Cameroon and Nigeria in 1996* case and in the *Armed Activities on the Territory of the Congo* case in 2000)[617] stating that:

> "Independently of the requests submitted by the Parties for the indication of provisional measures, the Court or accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require".[618]

As seen above, by emphasising the possibility that the Court can indicate provisional measures to prevent the aggravation or extension of the dispute, it means the regime of provisional measures is not restricted to the alleged rights of the parties. Provisional measures are an attribute of the judicial function as such, and are therefore not strictly dependent on the parties' rights. Despite this, in the later decisions of the ICJ, the conditions upon which the Court would grant provisional measures include automatically the analysis of the "plausibility test". The jurisprudence in that sense shifted because it seems the Court forgot the other ground for provisional measures to be granted, and only analysed the criterion based on the rights of the parties on the merits. This is also mentioned by Judge Sepulveda-Amor as the Court "appear[s] to make the "plausibility" of rights a definite requirement for interim protection under Article 41 of the Statute".[619]

In the *Certain Activities* case, the "plausibility test" was examined as a necessary condition to grant provisional measures, based on the affirmation that provisional measures are concerned with the "preservation of the respective rights of the parties

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[617] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Provisional Measures) [2000] ICJ Rep 2000 p 111, par. 44.

[618] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (n 613), par. 18.

[619] Separate Opinion Judge Sepulveda-Amor, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (n 583), par. 10.

pending [the Court's] decision".[620] Similarly, the Court said both in the *Questions Relating to the Seizure and Detention of Certain Documents and Data* case and the *Request for Interpretation of the Judgment in the Case Concerning the Temple of Preah Vihear* case that it "may exercise the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible".[621]

Following this trend, the ITLOS used the plausibility test for the first time in its order on the *"Enrica Lexie" Incident* case.[622] Previously, it has not mentioned the plausibility test as such, but it can be argued it includes it in the examination of the *prima facie* jurisdiction. The reason why the plausibility test may have been included in the analysis on *prima facie* jurisdiction is that it is a specialised tribunal with a particular scope, which makes its jurisdiction depend on the alleged rights of the parties. But it seems much sounder to make the jurisdiction depend on the rights of the parties rather than the decision on the types of measures. Indeed, in the *ARA Libertad* case for example, the tribunal said that

> "the Tribunal does not need to establish definitively the existence of the rights claimed by Argentina and yet, before prescribing provisional measures, the Tribunal must satisfy itself that the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded."[623]

This connection between the existence of rights and the basis for jurisdiction seems much sounder than the extraction of a plausibility test as a separate test in a tribunal with restricted jurisdiction.

In the ICJ, a first debate has emerged about the scope of the "plausibility test". On the one hand, some judges strongly disagree on the use of the "plausibility test", qualifying

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[620] ibid, par. 53; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (n 589), par. 33; It also has been mentioned in the case *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (n 597), par. 57.

[621] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Provisional Measures) [2014] ICJ Rep 2014, p 147, par. 22.

[622] *The 'Enrica Lexie' Incident (Italy v India), Case No 24* ITLOS (Provisional Measures) [2015], par. 84-85.

[623] *The 'ARA Libertad' case (Argentina v Ghana)* (n 567), par. 60.

it as "inconsistent with the settled jurisprudence of the Court, according to which the applicant has to *demonstrate* that an existing right is threatened and needs to be protected".[624] In this sense, the plausibility test is lowering the threshold as a consequence of its vague phrasing. On the other hand, some are in favour, because it specifies the threshold which ought to be "something more than assertion but less than proof".[625] Secondly, it has been argued that the use of the plausibility test is justified to avoid prejudgement on the merits. This argument proves to be unreliable, especially since the Court was criticised precisely because its analysis of the plausibility of the rights led to a deeper analysis of the rights.[626]

In the *Indus Waters Kishenganga Arbitration*, Pakistan raised an interesting point about the difference in the Indus Waters Treaty between the existence of "interests" rather than "rights" upon which the granting of interim measures depends. It further contended that "it is enough that Pakistan has an interest in not having these claimed rights prejudiced pending the decision of this Court".[627]

Since provisional measures can be granted for many non-exclusive and alternative reasons, their dependence on the alleged rights of the parties should not be automatic. Having a link between the right and the measures is necessary, however. This condition means that *if* the right exists, a connection must be established between the right and the measures. It is more a practical condition, to make the procedure efficient. However, the "plausibility test" means the tribunal must know whether the right exists or not.

Although any tribunal has to consider how the incidental procedure relates to the case on the merits and therefore establish some connection, the "plausibility test" does not answer that question. So what are the legal principles used to constrain the competence of the court at the incidental level? Thus far, the Court has been relying on two

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[624] Separate Opinion Judge Koroma, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (n 583), par. 6.

[625] Declaration Judge Greenwood, ibid, par. 4-5.

[626] Declaration Judge Skotnikov, ibid, par. 4.

[627] *Indus Waters Kishenganga Arbitration (Pakistan v India)* (n 472), par. 97.

safeguards to prevent the incidental procedure to be unrelated to the merits, namely the *prima facie* jurisdiction and the irreparable harm requirement.

The basic requirement of *prima facie* jurisdiction is relevant in the discussion around the need for the "plausibility test", precisely because the court has to examine at the first place whether it has jurisdiction over the dispute. In order to answer the question over its jurisdiction, the court or tribunal will need to look at what rights are invoked by the parties. It is especially clear in specialised courts with a limited scope, such as the ITLOS (when it is not based on its compulsory jurisdiction) or an arbitral tribunal, since their competence depends on the type of rights or obligations relied on the parties. It is more complex in the case of the ICJ, which has a general jurisdiction as the principal judicial organ of the United Nations, but the same can be sustained.

It could be therefore argued that when the court looks at its *prima facie* jurisdiction, it already satisfies the "plausibility test". As Judge Abraham said, the tension is about how restricted the review over the substance of the case should be,[628] and if we take the view of Judge Cançado Trindade that there should be an autonomous legal regime of provisional measures,[629] the review of the court over the substance cannot be strong. Therefore, the analysis of the *prima facie* jurisdiction coupled with the need for a link between the measures and the dispute should be enough.

A second safeguard exists: the risk of irreparable harm. Indeed, the court needs to know what is harmed by a conduct or omission of a party. In analysing this, it also satisfies the requirement of the incidental nature of provisional measures.

The consequence for the protection of the environment of the automatic use of the "plausibility test" is that it sets another threshold for indicating provisional measures, which does not take into account the developments of environmental protection as the conditions of urgency and irreparable harm do.

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[628] Separate Opinion Judge Abraham, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Provisional Measures) [2006] ICJ Rep 2006, p 113, par. 9.

[629] Separate Opinion Judge Cançado Trindade, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (n 621), par. 59-62.

The idea of creating an autonomous regime of provisional measures can be achieved if unanimity is found in the notion that the test of the *prima facie* jurisdiction added with a thorough analysis of the risks of irreparable harm could potentially offer enough of a justification to create the link with the dispute on the merits. However, the jurisprudence has asked for more. Not only must the tribunal appear to have jurisdiction, but a link between the rights and the measures must exist and the rights alleged must be plausible. It is a question of threshold where the tribunal considers it has enough power to grant specific provisional measures. The same can be said for the existence of an irreparable harm. Through the analysis of the harm caused by the actions or omissions of the defendant, the tribunal must consider what is harmed.

4.7 Types of measures

The measures themselves ordered by the different international courts and tribunals are interesting to analyse, especially in relation to environmental disputes. This is because judges have shown creativity in the specification of the measures. Depending on the type of measures, they may concretely achieve different purposes within the dispute. The courts and tribunals have shown a great variety of measures, but there are three main relevant types, namely measures imposing obligations on the respondent only, measures focused on the cooperation between the parties and also common obligations, and measures that create a regime with their complexity and adaptability.

i. Unilateral acts of the defendant

Different tribunals ordered the respondents to cease the alleged violation and prevented them from taking further action. It happened in relation to the protection of the environment in the *Nuclear Tests* case, the *Land Reclamation* case, and the *Southern Bluefin Tuna* case, among others. The measures taken are good examples of the preventive effect of provisional measures and the courts clearly imposed the allegedly violating states to stop their actions. In the *Nuclear Tests* case, the ICJ indicated that "the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory".[630] Similarly, in the *Land Reclamation* case, Singapore

[630] *Nuclear Tests (Australia v France)* (n 571), par. 35.

was directed "not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment".[631] Finally, in the *Southern Bluefin Tuna* case, the ITLOS also prevented Japan to catch more Bluefin tunas than what was agreed by the parties, including the catches in the name of the experimental fishing programme in the total number of catches.[632] These measures are similar as the "wrongdoer state" is obliged to stop its activities until the case is decided on the merits or by the arbitral tribunal appointed for the merits. The measures are directly influencing the environmental protection of the object of the dispute.

Although it has not been used many times in practice, the enforcement of such measures is clearly enunciated in Articles 95 (1) and (2) of the Rules of the ITLOS, and less obviously mentioned in the Rules of the ICJ. The latter only mentions in Article 78 that "the Court may request information from the parties on any matter concerned with the implementation of any provisional measures it has indicated". The former creates a formal obligation for the parties and requires them to "submit an initial report upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures prescribed" (Article 95 (1) of the Rules of ITLOS). Such actions have been required by the ITLOS in the *Land Reclamation* case,[633] as well as by the ICJ in the *Certain Activities* case, where

> "the Court also directed each Party to inform it, at three-month intervals, as to compliance with the provisional measures. By various communications, each of the Parties notified the Court of the measures they had taken with reference to the aforementioned Order and made observations on the compliance by the other Party with the said Order."[634]

The existence of such a mechanism strengthens the position of the court in the following up of its orders. It emphasises the fact provisional measures are meant to have concrete

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[631] *Case concerning Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore)* (n 30), par. 106(2).
[632] *Southern Bluefin Tuna cases (New Zealand v Japan/Australia v Japan)* (n 29), par. 90(c).
[633] *Case concerning Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore)* (n 30), par. 106, point 3.
[634] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (n 32), par. 26.

impacts on the behaviour of the parties. Provisional measures do not merely have a declaratory effect; they exist in order to have a tangible impact on countries' conduct.

Furthermore, it is not just international courts and tribunals that have imposed unilateral measures on one of the parties, but the parties themselves have also taken active steps before the procedure reaches its endpoint. Indeed, the mere fact of asking for provisional measures can sometimes trigger anticipated reactions by the alleged "guilty" party, which will then take initiatives unilaterally to avoid that provisional measures are granted against it. In the *Questions Relating to the Seizure and Detention of Certain Documents and Data* case, for instance, between the moments Timor-Leste filed a request to file a dispute before the ICJ and the public hearings for provisional measures, Australia provided the Court with various undertakings the Attorney-General gave to satisfy Australia's compliance before the Court ruled.[635] Similarly, during the *Indus Waters Kishenganga Arbitration*, India decided to unilaterally comply with one of the requested measures, which was to notify Pakistan of any "actual or imminent development or steps [...] that would have significant adverse effect on Pakistan's rights or interests".[636] During the hearings – before the Court decided anything – India voluntarily committed to respect one of Pakistan's requests. Although these voluntary actions are evidence of the party's good faith, they do not replace a formal order granted by an international court. The ICJ still ordered some provisional measures for Australia to respect despite its efforts to show its compliance. The Court did not reject Australia's efforts but it formally issued its opinion nonetheless. These voluntary acts do not replace the binding power of a provisional measure order.

ii. Strengthening of the cooperation between the parties

One of the recurrent types of measures is the obligation to cooperate. A famous example of this obligation is given in the *MOX Plant* case by the ITLOS as it stated that

> "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general

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[635] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (n 621), par. 35.

[636] *Indus Waters Kishenganga Arbitration (Pakistan v India)* (n 472), par. 94.

> international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention".[637]

This statement is important not only for the meaning of the prevention of pollution, but also for provisional measures orders. It shows that international courts and tribunals can develop orders more complex than simply unilateral orders.

Interestingly, the ITLOS indicated measures to cooperate between the two parties, not only between themselves, but also by establishing a group of independent experts. The appointment of an external body to assess the situation had the effect of devolving the power to decide on more specific measures that are dependent on the scientific findings. In the *Land Reclamation* case, the tribunal prescribed a general obligation for the two parties to cooperate, but left it to the experts' panel to investigate whether the operations conducted by Singapore have adverse effects, in which case it would propose new measures. Indeed, the experts' mandate was clearly set out by the tribunal and the experts were given one year to fulfil it. Parties were also ordered to exchange information regularly. Moreover, when the tribunal appointed independent experts, they were specially monitoring that the states' actions are well implemented. They added a layer to the supervision of the implementation of the measures, as well as objectivity in the process.[638]

The tribunal in the *Southern Bluefin Tuna* case did not create itself an independent expert team, but it helped the Commission for the Conservation of Southern Bluefin Tuna to do so. Although this last case was rejected on the merits, the order on provisional measures helped the parties to collaborate and create an independent scientific research programme, instead of employing separate national scientific advisers.[639]

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[637] *The MOX Plant Case (Ireland v United Kingdom) No. 10* (n 81), par. 82.

[638] *Case concerning Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore)* (n 30), par. 106.

[639] Stephens, 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (n 133) 183–186.

This new mechanism will lead to the creation of more complex regimes, as analysed below, with different purposes and responsibilities.

iii. Regime creation

While international courts and tribunals (especially the ICJ) might have been restrictive in their approach towards the regime of provisional measures, it is interesting to look at the measures themselves, and see whether a pattern can be drawn that can be particularly interesting when applied in an environmental context. In some cases, the court went further than just imposing independent advisors on the parties to help them collaborate better, and created systems of guarantors. In this system, the third party is involved in a sort of monitoring process created by the measure.

This practice can be grounded in a broader conceptual approach towards the amplitude of choice of measures by the tribunals. In the context of the prohibition of the use or threat of force, the ICJ has had an expansive approach in the measures it chose to grant. As Judge Cançado Trindade underlined:

> "[i]n those previous three cases [*Frontier Dispute* (Burkina Faso v. Republic of Mali), *Land and Maritime Boundary* (Cameroon v. Nigeria), *Armed Activities on the territory of Congo* (Democratic Republic of Congo v. Uganda)], the Court, in indicating provisional measures of protection, most significantly went beyond the inter-state dimension, in expressing its concern also for the human persons in situations of risk, or vulnerability and adversity".[640]

In other words, the Court created a regime that goes beyond the interests of the parties. It is not one single state who benefits from the provisional measures, rather the irreparable environmental harm caused is of concern of all. In these cases, serious human rights violations were at stake, which appeared to justify such measures. Whether they could be granted for environmental violations as well is a significant question. The threshold seems to relate to the gravity of the situation.

There are two main examples to support this idea of creating a new regime within the realm of a bilateral dispute through the use of a separate established body: the *Certain*

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[640] Separate Opinion Judge Cançado Trindade, *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (n 589), par. 73-74.

Activities Carried Out by Nicaragua in the Border Area case[641] and the *Temple of Preah Vihear* case.[642] In the former, the ICJ ordered the parties to cooperate through a specialised organisation, the Secretariat of the Ramsar Convention[643] and in the latter case through ASEAN. The Court delegated the responsibility to multilateral regimes to ensure better cooperation between the parties and to respect the provisional measures order.

In particular, the Court directly empowered the Ramsar Secretariat to supervise and guarantee the actions taken by Costa Rica in the area under dispute are consistent with the Court's order. The Court refers to this specific Secretariat because the disputed area is composed of wetlands, which are protected under the Ramsar Convention and the two parties of the dispute are member-states of the Ramsar Convention. Indeed, the Court indicated that "Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to the actions [of dispatching civilian personnel charged with the protection of the environment]".[644] The Ramsar Secretariat is given an active role, since Costa Rica cannot take action without previous consultation to it. In other words, its role is to guarantee the good execution of the provisional measure granted by the Court. In that sense, they make sure the order is enforced by the parties.

Moreover, in the second request for provisional measures Costa Rica filed two years later regarding the same area of wetlands, the Court reiterated that "pending delivery of the Judgment on the merits, Costa Rica shall consult with the Secretariat of the Ramsar Convention for an evaluation of the environmental situation created by the construction of the two new *caños*".[645] A continuous thread may be drawn between the measures. Allotting responsibility to a multilateral treaty body also allows a number of measures to be taken under the umbrella of the broad measure ordered by the court. It also allows

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[641] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (n 583), par. 80.

[642] *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (n 589), par. 64 and 69(3).

[643] Convention on Wetlands of International Importance (1971).

[644] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (n 583), par. 86(2).

[645] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* (n 596), par. 54.

for the creation of interrelations between both the different bodies and the various actions to be taken. The series of measures are not isolated, but become part of a bigger picture, part of a regime. By confirming its first order, the ICJ endorses this approach.

Another characteristic of these measures involving a third party is the potential incremental development of the measures. Indeed, as mentioned above, the fact they create an umbrella under which a series of other measures can be taken also allows the organisations in charge of the implementation of the measure to reflect the passing of the time. They are more flexible and capable of adjusting, in order to respond to the evolving circumstances. This is especially important because the parties can request other provisional measures if the circumstances evolve. In the *Pulp Mills* case, Argentina tried to obtain provisional measures two times, on the basis the situation had changed. In that sense, by creating such a regime with a third party would allow us to take into account such changes.

In sum, the inclusion of another institution in the judgments shows the permeability of different regimes, and a positive outcome of their interactions. The tribunal acknowledged that the applicable legal framework was multilateral, and therefore the dispute was of concern of all the parties to that framework. Judge Sepulveda-Amor emphasised that "the fact that wetlands are interconnected means that their environmental protection requires a wider bilateral collaboration and the full assistance of the Ramsar Secretariat".[646] It introduces a third actor in the procedure, which, although not active within the judicial procedure, plays a direct role in the management of the dispute. The court embraces the existence of obligations *erga omnes partes* and acts upon it. It takes into account the multilateral nature of the rights invoked. The measure taken in the *Request for Interpretation of the Temple of Preah Vihear decision* case is a great example since it obliges the parties not only to cooperate with the help of ASEAN but also to "allow the observers appointed by [ASEAN] to have access to the provisional demilitarised zone".[647]

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[646] Separate Opinion Judge Sepulveda-Amor, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (n 583), par. 5.

[647] *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (n 589), par. 69 (3).

Since the Court can decide provisional measures *proprio motu*, it opens to a variety of measures, and this case is an example of adaptation of the ICJ towards the developments of international environmental law. In a way, the tribunal exercises the role of an external party, with the defence of other interests (or values) than the interests of the parties. The tribunal not only guarantees the good administration of justice, but it is argued the provisional measures granted in those two cases may be interpreted further as the recognition of interests (or values) common to the international community.

4.8 Conclusion

This analysis of provisional measures in an environmental context shows they contain some permeability, since they are designed to adapt fast to harmful situations. This chapter highlighted good practices in awarding provisional measures. They are an important tool for solving environmental disputes: both their incidental nature and the variety of different measures on offer provide a great springboard from which the court or tribunal can leap to pursue decisions that will assist the protection of the environment.

Moreover, the nature of the right invoked by the party plays a role when it comes to choosing the right measures to order. If, however, the tribunal decides to use provisional measures in the purpose of non-aggravation of the dispute, a broader set of measures are available. In the *MOX Plant* case, for example, Judge Anderson argued the measures granted were outside the scope of the preservation of the rights of the parties.[648] It can, however, be argued that they were within the scope of the non-aggravation of the dispute. Indeed, the existence of provisional measures for the purpose of preventing the aggravation of the dispute is a window of opportunities for environmental disputes.

Although international tribunals are trying to reduce their margin of appreciation and lose the important factor of autonomy given to them by the relevant statutes (especially through the indication of measures *proprio motu*), the relevance of provisional measures remains as the choice of measures is wide. The *Certain Activities* case is a great example of judicial creativity and interaction between regimes, which is a positive development

[648] Separate Opinion of Judge Anderson, *The MOX Plant Case (Ireland v United Kingdom) No. 10* (n 81), point 2.

for the future. It also shows that a tribunal can integrate a third actor in the resolution of the case indirectly and therefore represent other interests than the primary interests of the parties. Such practice also enhances collaboration between the parties, key to better prevention of environmental harm.

Moreover, when the object of protection is common to the international community, the fact international courts and tribunals can grant provisional measures *proprio motu* becomes crucial. Such judicial freedom – exercised through international courts and tribunals' inherent powers – can be beneficial for environmental disputes.

5. RELATIONSHIPS BETWEEN JUDICIAL DISPUTE SETTLEMENT AND NON-COMPLIANCE PROCEDURES

This chapter focuses on the enforcement of multilateral environmental treaties (MEAs) and the role of international adjudication in this context. Indeed, most of the MEAs include provisions both about traditional enforcement mechanisms and non-compliance procedures. Non-compliance procedures are separate treaty-based procedures which have been created only in the context of environmental protection, as a response to dissatisfaction with the inappropriate use of traditional enforcement mechanisms. In other words, non-compliance procedures were created to respond to the specificities of international environmental obligations, as an alternative to international courts and tribunals.[649] They are endogenous to a specific treaty, in opposition to international adjudication, which is an exogenous mechanism independent from any treaty institution.

The rationale for this chapter to focus on non-compliance procedures is based on the *raison d'être* of non-compliance procedures: they exist to offer a different and separate way of enforcing environmental obligations. In case of potential violations, states could bring claims to non-compliance mechanisms. Therefore, the purpose of such mechanisms is not far from the purpose of formal international courts and tribunals; it therefore questions the use of international courts and tribunals *per se*. Hence the need to identify the ways in which both procedures can collaborate – if at all.

Non-compliance procedures are embracing the ideas of another type of compliance theory.[650] Indeed, compliance can be viewed as a process of interactions between regulators and those who they regulate (theories of regulatory process).[651] They consider compliance to be a flexible concept, with the idea of self-regulation as the backbone.[652] This conception is based on concepts other than judicial enforcement, which believes

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[649] Fitzmaurice and Redgwell (n 17) 37.

[650] Martii Koskenniemi, 'New Institutions and Procedures for Implementation Control and Reaction' in Jacob Werksman (ed), *Greening International Institutions* (Earthscan Publications Limited 1996) 236–238.

[651] Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 Michigan Journal of International Law 345, 349.

[652] ibid 364–365.

in binding legal decisions by an independent body as the authority to decide on the violation of an international rule. Judicial settlement leaves no room for hybrid situations where one state is not complying yet is not condemned. Despite opposite theoretical backgrounds, both systems have similar aims: they want states to comply again with the rules by which they abide. The means to achieve those aims are, however, different.

Since the purpose of the thesis is to clarify the role of international courts, and if we acknowledge international adjudication has potential for developments in hearing environmental cases, the question of its relationships with non-compliance procedures has to be answered. A core question must be whether or not both mechanisms are "competitors" excluding each other or "guarantors" working together, and which of these cases is better for environmental protection. In other words: how do they interact and could potential coordination enhance environmental protection? To this end, technical differences between non-compliance procedures and international adjudication will be emphasised, leading to the analysis of the different models on which their relationship can be based. At a practical level, the different legal principles that can be used to fill the gaps will be analysed, as well as certain elements of collaboration between the two systems.

The main feature of non-compliance procedures is that they are based on dispute avoidance rather than on dispute settlement, and therefore have a facilitative nature. However, these can become corrective if non-compliance persists.[653] The difficulty with this lies in diversity: each non-compliance procedure can vary considerably from one another. Moreover, not all multilateral environmental agreements have developed such non-compliance procedures to the same degree. The first successful example of a more complex procedure was established under the Montreal Protocol[654] in 1992, which created its own permanent "Implementation Committee".[655] On the contrary, CITES distributes the compliance review between the Secretariat and the Standing Committee,

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[653] Massimiliano Montini, 'Procedural Guarantees in Non-Compliance Mechanisms' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 389.

[654] The Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989).

[655] *Decision IV/5 on Non-Compliance Procedure*, doc. UNEP/OzL.Pro.3/11 (21 June 1991).

where the two bodies share competence.[656] However, the UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements[657] were precisely about gathering the common practices among the MEAs and putting them together in a unique text. The task of information gathering, reporting control, data analysis, monitoring, financial support and capacity-building are all present in the tasks of a compliance committee.[658]

Although non-compliance procedures are led by the principle of dispute avoidance, their nature is far from clear. It is generally agreed that they are not judicial in nature[659] but there seems to be little agreement beyond that on what non-compliance procedures are.

One reason for such disagreement is that the technical differences between non-compliance procedures and judicial procedures are numerous, and can be interpreted in different ways. Some specific characteristics weigh more than others in the determination of the nature of non-compliance procedures. And depending on the legal nature assigned to them, the relationships with international courts and tribunals will vary. Among others, non-compliance procedures have been described as diplomatic procedures *sui generis* (as opposed to judicial procedures) and particular procedures have been identified as quasi-judicial.[660] But they also have been labelled as administrative procedures as part of a "wider category of non-confrontational avoidance

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[656] See Susan Biniaz, 'Remarks about the Cites Compliance Regime' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Martinus Nijhoff 2006).

[657] Document of the Governing Council of the United Nations Environment Programme, adopted during the Seventh special session in Cartagena, 13-15 February 2002. UNEP/GCSS.VII/4/Add.2, 23 November 2001.

[658] Elizabeth Maruma Mrema, 'Cross-Cutting Issues Related to Ensuring Compliance with MEAs' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Martinus Nijhoff 2006) 217–220.

[659] For example, article 15 of the Aarhus Convention provides that: "The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, *non-judicial* and consultative nature for reviewing compliance with the provisions of this Convention (emphasis added).

[660] Boisson de Chazournes and Mbengue (n 55).

procedures".[661] In this same trend, they have been characterised as "supervisory mechanisms" that exert "continuous review and evaluation [of the] effective implementation" of the Convention (as exemplified in Article 15 of the Basel Convention).[662] Thus, it has been suggested that what differentiates these procedures from judicial mechanisms is:

> "[t]he general lack of procedural safeguards for the Parties involved in the process; the minimal consideration of burden of proof issues; and the fact that the outcomes of the compliance process are principally recommendations to the COP."[663]

Another way of differentiating the role of non-compliance procedures from judicial dispute settlement is to analyse their purposes. The general aim is to provide a non-confrontational solution to potential problems with the implementation and enforcement of the treaty. Most of the procedures exist to "facilitate", "promote" and "assist" Parties to comply with their obligations.[664] Some mechanisms emphasise the "distinctive collaborative spirit of the Convention", as well as the need for the compliance committee to always "secure a constructive solution", or even in the Montreal Protocol regime to "secure an amicable solution". The manner in which a compliance committee has to achieve this aim shall be "simple, non-confrontational, non-adversarial, transparent, supportive and cooperative".[665] Shibata deducted from the difference of purposes in non-compliance procedures and judicial bodies that both systems can "coexist without prejudicing each other."[666] Does that mean that they are not related at all? Is the functional difference a barrier for their interactions? A potential danger may arise in allowing the two procedures to interact, based on the recognition of

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[661] Attila Tanzi and Cesare Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 580.

[662] Alan Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 Journal of Environmental Law 229, 234.

[663] Hugh Adsett and others, 'Compliance Committees and Recent Multilateral Environmental Agreements: The Canadian Experience with Their Negotiation and Operation' (2004) 42 Canadian Yearbook of International Law 91, 103.

[664] See for example, part I of the Annex to the Decision BS-I/7 (First meeting of the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety (BS COP MOP 1).

[665] Decision VI/1, par. 5, under the Water and Health Protocol regime (ECE/MP.WAT/37/Add.2).

[666] Akiho Shibata, 'The Basel Compliance Mechanism' (2003) 12 RECIEL 183, 196.

an overlap, because despite the fact the nature of non-compliance procedures is debated, they lack major features specific to judicial bodies. Admitting an overlap would mean elevating the non-compliance procedures to an equal institutional footing as the judiciary. However, the fact they are dependent on political instruments should prevent them from being related to judicial dispute settlement. They belong to the category of diplomatic instruments and should not be interpreted extensively.

In contrast, some compliance mechanisms are closer to adjudication. Thus, Boisson de Chazournes and Mbengue have compared the Kyoto Protocol mechanism with international adjudication based on the identification of the core features of international adjudication. What makes the Kyoto Protocol mechanism quasi-judicial is the presence of some elements that are essential for a judicial body[667], especially its clear distinction between the Facilitative Branch and the Enforcement Branch.[668] The major difference in the case of the Kyoto Protocol regime is that the recommendations taken by the Branches are not dependent on a final approval by the COP, i.e. they do not need to be adopted by the COP to enter into force. The possibility to appeal to the COP against one of the branches' decision is the only restriction to the branches' power.[669]

However, we classify them, in the context of international environmental law, compliance mechanisms have a specific role to represent the interests of the treaty, and therefore acquire a special status. Thus, it has been argued that trying to fit non-compliance procedures into a known category is not possible, because "they are a *genus* on their own".[670] However, if they are to be completely separated from general dispute settlement mechanisms, fragmentation of the law is more likely to happen. Therefore, it will be argued in this chapter that clearer and well defined relationships between non-

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[667] Criteria such as the necessity for a tribunal to decide on the basis of international law, the independence of a tribunal and its authority to make a final and legally binding decision.

[668] Boisson de Chazournes and Mbengue (n *55*).

[669] Article XI of the Annex to the Decision 27/CMP.1 "Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol", FCCC/KP/CMP/2005/8/Add.3, p. 92.

compliance bodies and judicial bodies will enhance the whole system of enforcement. Nonetheless, arguing in favour of a clearer relationship between non-compliance procedures and judicial bodies does not entail conflating their roles. It is not because the process of each procedure impacts on the other that they may be conflated. Their roles are different and separate, and the analysis will show the extent to which they overlap, bearing in mind they are meant to play the same role in the enforcement of international environmental rules.

5.1 Differences and similarities between the compliance mechanisms

In order to understand what kind of relationships the two systems have, it is necessary to analyse the differences between traditional adjudication and non-compliance procedures. Both systems are centred on contrasting concepts, so it is critical to know where they overlap. Indeed, it is necessary to compare exactly where they differ and therefore what consequences may be drawn. The two systems diverge on a number of issues: when and how can be triggered, by whom, who they concern, when they operate, who are they composed of, and their decision-making processes and outcomes.

This exercise tests the permeability of non-compliance procedures to a certain "judicialisation". Although the aim of this section is not to decide whether a non-compliance procedure equates to an international court or tribunal[671], it demonstrates the blurred lines between an institution created as judicial and the different mechanisms created within MEAs.

i. Triggers

All non-compliance procedures contain the Party-to-Party trigger – the closest to an adversarial mechanism. Although the existence of a legal dispute is not a requirement[672] to initiate the procedure, the party-to-party trigger shows the more adversarial nature of the procedure.

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[671] See Boisson de Chazournes and Mbengue (n 55). They defined what an institution needs to be considered as an international jurisdiction and analysed whether the Kyoto Protocol mechanism corresponds to the definition.

[672] As opposed to a judicial procedure. *Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Merits) [1924] PCIJ Rep Series A No 2.

In this case, some procedural rules mirroring litigation exist creating a higher threshold for states. Indeed, in numerous regimes, only an "affected state" can make a submission to the compliance committee about another Party's non-compliance[673], which creates a threshold when a case can be submitted by a Party. It restrains the inclusiveness of the process to only affected Parties of the agreement, criticism often made regarding international courts and tribunals. The bilaterality of the judicial process (as examined in a previous chapter) and its restrictive rules on standing are reflected to some extent in non-compliance procedures.

Other rules limiting the trigger mechanisms for states exist. Some regimes, for example, prevent Parties from making a submission against another Party without having informed the concerned Party[674] or having undertaken consultations to try to resolve the matter[675]. The former requirement resembles the rule stating judicial procedures should be triggered only after other diplomatic means have been exhausted. Although non-compliance procedures do not ask for the existence of a dispute as such, a state cannot trigger such procedures without at least informing the other party. The latter requirement creates some procedural safeguards, establishing a threshold under which submissions are not admissible, when they do not emanate from the secretariat. They concern the form of the submissions and the quality of the information contained. For instance, under the LRTAP regime, a "submission [by another Party] shall be addressed *in writing* to the secretariat and *supported by corroborating information*" (emphasis added)[676]. Another common safeguard giving some discretion to the compliance committee is the "*de minimis* or ill-founded" clause. It exists under the Cartagena Protocol regime for instance, where the compliance committee has to reject submissions

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[673] The Basel Convention regime provides that only "a Party that has concerns or is affected by a failure to comply ... by another Party with whom it is directly involved" can trigger the compliance mechanism (par. 9 (b) of Decision VI/12, Appendix (UNEP/CHW.6/40)). Similarly, the regime under the London Convention for the Prevention of Marine Pollution requires the Party to have "an interest that is affected or likely to be affected by the possible non-compliance (par. 4.1.3 of Decision LC 29/17, Annex 7). The Cartagena Protocol regime also allows a Party-to-Party trigger only when a Party "is affected or likely to be affected" (par. IV.1 (b) of Decision BS-I/7).

[674] Under the Water and Health Protocol regime, at par. 25 of Annex I to Decision VI/1.

[675] Under the Basel Convention regime, at par. 9 (b) of Appendix to Decision VI/12.

[676] Par. 4(a) of the Decision 2006/2 (ECE/EB.AIR/2006/2), reaffirmed in the Decision 2012/25 (ECE/EB.AIR/113/Add.1).

that are "*de minimis* or ill-founded"[677]. The Rotterdam Convention COP has not yet adopted a non-compliance mechanism but the latest draft articles also provide for the exclusion of cases *de minimis* or manifestly ill-founded.[678] Although the exact meaning of a *de minimis* case is still open, the LRTAP Committee, as an attempt to define this concept, explained that cases of very low exceedance are considered as *de minimis* cases.[679]

However, beside the Party-to-Party trigger, four major differences[680] – or innovations – from international adjudication can be found in the different non-compliance procedures, namely: the self-trigger when a state, accepting it is itself in non-compliance, wants help to comply again; the trigger by the administrative organ of the treaty; the trigger by the compliance committee itself; and the peculiar trigger by members of the public, which is the most innovative mechanism. First, the different triggers will be analysed and then it will be argued they should be treated differently from a Party-to-Party trigger.

The self-trigger is used by a state when it knows it will not be able to respect its obligations and seeks assistance before "getting caught". The Montreal Protocol Non-Compliance Procedure explains that the reason why a Party would announce its lack of compliance is to show that despite its best and *bona fide* efforts, special circumstances prevented it from complying.[681] For instance, the Democratic People's Republic of Korea foresaw its non-compliance in 2013 for the next three years, due to "delays in the disbursement of funds for the institutional strengthening renewal project ... and the lack of approval for its HCFC phase-out management plan".[682] By admitting its non-compliance, the Democratic People's Republic of Korea requests assistance and puts its case in the

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[677] Par. IV (1)(b).

[678] Par. 17 of Annex to Decision RC-6/9.

[679] Document ECE/EB.AIR/2014/3, par. 48.

[680] For a complete survey of the different triggers, see Francesca Romanin Jacur, 'Triggering Non-Compliance Procedures' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009).

[681] MOP Decision X/10 (1998), Annex II, par. 3 (UNEP/OzL.Pro.10/9).

[682] Report of the Implementation Committee under the Non-Compliance Procedure for the Protocol on the work of its fifty-third meeting (UNEP/OxL.Pro/ImpCom/53/4), par. 42.

forefront. Indeed, the Implementation Committee considers its case "as a matter of urgency".[683] The self-trigger is the direct expression of the non-confrontational nature of the non-compliance procedure.

The second difference is the possibility for an organ of the treaty to trigger the procedure. Widely adopted as well, this trigger allows the administrative organ – the secretariat – which receives the reports and data to point out where there might be a case of non-compliance and then refer it to the compliance committee.[684] It is important to note the Secretariat's power is not discretionary as it may not refer the case to the compliance committee without the obligation to do so, but its power is rather mandatory so that the Secretariat *shall* bring the matter to the compliance committee after a certain period meant to be used to resolve the issue as exemplified in the LRTAP Convention regime[685]and in the Aarhus Convention regime[686] for example. Moreover, once the Secretariat brought the issue to the compliance committee, the former has to proceed to the examination of the case, without specific mention of an applicable threshold for admissibility. It assumes that the Secretariat already excluded *de minimis* or ill-suited cases.

The compliance committee itself can also be entitled to review compliance generally, particularly used for the review of the Parties' reporting obligations. The Implementation Committee under the LRTAP Convention, for instance, reviews general matters relevant to compliance and especially reviews compliance with the Parties' reporting obligations. It "evaluated compliance by Parties with their emission data reporting obligations under the seven Protocols in force on the basis of information provided by the secretariat. The evaluation covered the completeness and timeliness of reporting".[687] The compliance committee will not need a referral by the Secretariat, and

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[683] Ibid., par. 43.

[684] In its seventeenth report dated from September 2014, the Implementation Committee of the LRTAP Convention considered five new cases of non-compliance referred to it by the Secretariat, made by Former Yugoslav Republic of Macedonia, Latvia, Estonia, Lichtenstein and Slovenia (Document ECE/EB.AIR/2014/2, par. 121-146).

[685] Par. 5 of Decision 2012/25 for the LRTAP Convention regime.

[686] Par. 17 of Decision I/7 for the Aarhus Convention regime.

[687] Decision ECE/EB.AIR/2014/3, especially par. 22.

will assess systematically how many Parties have submitted the reports. In addition, it will then make a recommendation to these Parties to comply again. This general competence changes drastically from the role of an adjudicatory body. It therefore does not depend on the submission by an organ or Party, but can start a procedure on the basis of the information at its disposal.

Lastly, a special mechanism exists under the Water and Health Protocol regime, where the Implementation Committee can take the initiative to request a Party to provide necessary information when it becomes aware of a possible non-compliance, on the basis of information received from the public.[688] The Implementation Committee has the discretion to decide whether the information received from the public is valuable and worth pursuing, but it still gives the opportunity for an NGO or an individual to point at a possible non-compliance. This trigger is similar to the mechanism under the Aarhus Convention regime[689], whereby members of the public (individuals or NGOs) can trigger a non-compliance procedure.[690] The submission of communications from the public to the Compliance Committee shows a will to make the process more open to all parties. It allows members of the public to submit a claim that a state party is in non-compliance, subject to the fulfilment of some admissibility criteria.[691] These criteria give the opportunity to the compliance committee to reject certain issues when they are brought anonymously, when they are abusive, manifestly unreasonable or incompatible with the object of the treaty. They spell out a certain definition of what other treaties call *de minimis* or ill-suited cases. These two examples show the flexibility of non-compliance procedures and their adaptability to the object of protection of the treaty they are implementing. Whereas international adjudication is strictly initiated only by states,

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[688] Par. 28.

[689] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 20 October 2001) 2161 UNTS 447 (Aarhus Convention) Art 15.

[690] Par. 18-24 of Decision I/7.

[691] Par. 20 of Decision I/7:
"The Committee shall consider any such communication unless it determines that the communication is:
(a) Anonymous;
(b) An abuse of the right to make such communications;
(c) Manifestly unreasonable;
(d) Incompatible with the provisions of this decision or with the Convention."

states have agreed to give voice in a procedure reviewing their behaviour to individuals, members of the public.

Procedures initiated by these different triggers have to be analysed separately from the party-to-party situation. Despite having similarities with judicial bodies in general, the role of non-compliance procedures changes drastically from being a mere tool for a third party to assess and interpret the law and its potential breaches by the Parties.

ii. Compositions and Procedures

The composition of the compliance committees influences their independence from the Contracting Parties to the treaty. Indeed, the compliance committees are never composed of all parties to the treaty they are enforcing but by a smaller group of experts, from eight to fifteen members. States have – in early mechanisms – opted for the members to be representatives of the contracting parties, instead of being completely independent experts, with the view of representing the different geographic regions in an equitable way. Members are elected by the political body of the treaty, generally the COP/MOP.[692]

In more recent cases, the members of the compliance committee are elected as representatives but have to be objective. In other cases, the members of the committees are completely independent from the political body, as in the Aarhus Convention regime, where the members of the Compliance Committee "shall serve in their personal capacity".[693] Under the Water and Health Protocol regime, the members also "shall serve in their personal capacity and objectively, in the best interest of the Convention".[694] Under the Kyoto Protocol regime, they "shall serve in [their] individual capacity ..., act in an independent and impartial manner and avoid real or apparent conflicts of interests".[695] Most of the non-compliance procedures contain clauses on conflicts of

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[692] For example, under the Cartagena Protocol regime, at par. II.2 of Decision BS-I/7.

[693] Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Decision I/7 (adopted in 2002), Annex, par. 1, (ECE/MP.PP/2/Add/8).

[694] Par. 3 of Annex to Decision VI/1.

[695] Rule 4.1 of the Rules of procedure of the Compliance Committee (version of 3 February 2014).

interests,[696] prohibiting both direct and indirect conflicts. The experts themselves of a compliance committee should have a "recognised competence" in the field of the treaty "including legal or technical expertise".[697] The Aarhus Convention regime even adds that members should be "persons of high moral character",[698] a characteristic borrowed from the International Court of Justice.[699]

Those rules show that members of compliance committees are not representing their national states' interests, and therefore guarantee a certain degree of independence. Compliance Committees are not mere organs of the Convention they implement; they represent the interests of the Convention itself in the name of the community of states parties to it. In that sense, as they act as an autonomous entity from the states, they can be related to international courts and tribunals.

Leaving aside the political dependence of members of some compliance committees, the internal procedure leading to the adoption of a recommendation also shows some crossovers with international adjudication. The rules of procedure are in general adapted to the specific treaty and vary in their level of detail. Moreover, although some elements can be found in multiple agreements, they do not follow a common system.[700] The question of the existence of procedural guarantees and their development in non-compliance procedures has been thoroughly analysed by Montini, who observes they are "of a different nature and degree than those normally available in judicial proceedings".[701] Yet they exist, such as the right to be heard, in the way that the Parties concerned can participate in the procedure, generally in writing and by submitting

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[696] Under the Water and Health Protocol regime, at par. III of the Annex to the Decision VI/1 (2012).

[697] First Meeting of the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety (COP/MOP 1), Decision BS-I/7.

[698] Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Decision I/7 (adopted in 2002), Annex, par. 2, (ECE/MP.PP/2/Add/8).

[699] Article 2 of the Statute of the ICJ.

[700] Montini (n 653) 389.

[701] See Montini (n 653). He analyses if and what kind of procedural guarantees exist in non-compliance procedures. He focuses on the principle of due process and its components, namely the right to participate, the deadlines for submissions of statements, the languages allowed, the minimum content of those submissions, the possibility to comment and respond by the Party in potential non-compliance, transparency and confidentiality.

comments and information. They will, however, generally be excluded from the elaboration and adoption of the recommendation. The under-development of such procedural rules is a reason why non-compliance procedures cannot be called judicial *per se*. But the more the non-compliance procedures are formalised, the more they resemble a judicial procedure. Indeed, such a trend has been noticed in the regimes of the Aarhus Convention,[702] the Espoo Convention,[703] and the Kyoto Protocol.[704]

iii. Types of review

A distinction must be made between the fact-finding side of a compliance committee's tasks and its legal determination of non-compliance, which is based on the different functions expressed in the various non-compliance mechanisms and the material being reviewed. A compliance committee is always entitled to review the information about the relevant facts, such as the submission of specific reports and data on emissions of limited substances, but is also entitled to "make recommendations ... on systemic compliance issues ... or on individual situations of possible non-compliance" in the case of the of the London Convention regime for example.[705] Indeed, a compliance mechanism is empowered with the review of general issues of compliance, always directed by the COP/MOP. It also pursues reviews on a case-by-case basis.

The first function of the review process has merely a fact-finding purpose.[706] It does not aim at stating and interpreting the law in any sense, but rather focuses on the facts, the circumstances and causes of non-compliance.[707] Compliance committees review the information states have given them on national implementing laws, they also review that

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[702] Cesare Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 466.

[703] See Jerzy Jendrośka, 'Practice and Relevant Cases Emerged in the Context of the Espoo Convention Implementation Committee' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009).

[704] Jan Klabbers, 'Compliance Procedures' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 999.

[705] Par. 2.2.2 and 2.2.3 of the Decision LC 29/17, annex 7 (adopted in 2007).

[706] Adsett and others (n 663) 121.

[707] As exemplified under the Montreal Protocol regime in par. 7 (d) of the Decision X/10, Annex II (1998).

specific bodies or administrative roles are created to enforce those laws. In the case of the Montreal Protocol regime, this included data showing that the levels of forbidden products or pollution have not effectively increased. This function is related to a certain type of obligations contained in the MEAs. These obligations can be labelled as obligations of surveillance, because they intend to make sure states regulate and control activities – often made by non-state actors, such as industrial companies, etc. – susceptible to lead to violations by the states of the substantial obligations.[708] What is therefore needed from the states is that they make sure the obligations are transcribed and respected under their jurisdiction. It explains that obligations are either about collecting, analysing and sharing information on scientific data about the amount of emissions created in a period of time, or the state of a species under protection. It also explains about obligations that force states to submit information about its legal implementation of the treaty.[709] An advanced example of a mechanism facilitating information exchange is the Biosafety Clearing-House operating under the Cartagena Protocol.[710] It is a database available online for the exchange of information from state parties about their decisions on the release of Living Modified Organisms, on risk assessments or on their national laws. State parties have an obligation to submit their information to this Clearing House. Because of the nature of these obligations reviewed, a part of the work of a compliance committee is continuous. Indeed, it reviews parties' compliance on a regular basis, every time they have to submit a report.

In conjunction with this type of review, compliance mechanisms can interpret the information and assess their legality. Indeed, the second function resembles much more the function of a judicial body, as it gives scope to the compliance committee to analyse the facts in light of the applicable legal framework. For example, in relation to the Clearing House created under the Cartagena Protocol, the Compliance Committee is

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[708] Alexandre Kiss, 'Reporting Obligations and Assessment of Reports' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Martinus Nijhoff 2006) 229.

[709] For instance, the Implementation Committee of the LRTAP Convention (1979 Convention on Long-Range Transboundary Air Pollution) periodically reviews reports on both the States' emissions and their implementation policies.

[710] According to Article 20 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003).

empowered to "consider information submitted to it"[711] and will therefore be able to decide on a state's non-compliance of its information sharing obligation.

The same Compliance Committee will be also able to use the information submitted to the Clearing House to "review general issues of compliance"[712] with its own will. This separate function translates the instrumental nature and dependence of the compliance committee on the COP/MOP since it is commanded by the latter.[713] Indeed, despite the fact it is given the opportunity to flag up what could be improved by a group of states or by all the state parties, it can only do that within the mandate given by the COP/MOP.

When the compliance committees are limited to a fact-finding function, it is easier to see how they could be considered as evidence by international courts and tribunals in their own procedure. However, the capacity of compliance committees to deliver reporting review of general scope goes beyond what an international court or tribunal can do because it considers compliance issues in a multilateral way. So it is difficult to argue for a hierarchical relationship with judicial institutions in this case. And in specific cases over a particular state's compliance, they make a legal decision on the compliance of that state. When they do so, they almost adjudicate the situation. Therefore, a separation can be made between the scientific and administrative role and the legal role of non-compliance mechanisms.

iv. Outcomes

Kingsbury explains that the purpose of the compliance committee under the Montreal Protocol regime is to "build cooperative relations by refraining from challenging data submitted by particular countries where possible non-conformity with Protocol rules was outweighed by the more fundamental interest in keeping the country moving in the direction required by the Protocol". It seeks to "build trust and authority among state

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[711] Par. III (b) of the Annex to the COP/MOP decision BS-I/7.

[712] Par. III (d) of the Annex to the COP/MOP decision BS-I/7.

[713] For example, it is because the MOP of the Cartagena Protocol requested in its decision BS-VII/3 for a general review that the Compliance Committee was able to do so: "The Conference of the Parties serving as the meeting of the Parties to the Cartagena Protocol on Biosafety ... *Requests* the Compliance Committee to provide input into the third assessment and review of the Protocol and the mid-term evaluation of the Strategic Plan in the form of an evaluation of the status of implementation of the Protocol in meeting its objectives".

parties".[714] The Secretariat "induces states to invoke the non-compliance procedure rather than simply to seek a blanket five-year waiver from the Meeting of the Parties". Therefore, dialogue with the Committee is crucial.[715] This type of measures can be categorised as "political adjustments and compromise".[716] By contrast, international courts and tribunals are asked to remedy the violations committed which will have a final and definitive status, and which will be legally binding.

On the other hand, compliance mechanisms can be used in a more corrective way, such as in the case of the recommendations from the Implementation Committee of the LRTAP Convention regime:

> "Szell, Keizer and Kuokkanen have identified three main elements in the recommendations of the [Implementation Committee]: first, there must be a conclusion of non-compliance. Second, the Party concerned is urged to fulfil its obligations as soon as possible. Third, the Party concerned is requested to provide a periodic progress report to the IC."[717]

The "*de facto* determination of a party's compliance or non-compliance"[718] is necessary for the exercise of the corrective sanctions. It is a pre-condition allowing the compliance committees to then decide on further specific sanctions. There are different ways to pressurise a party; if the party does not respond to the first signal from the compliance committee, urging it to come back to compliance, it will have to provide a periodic progress report, which means a Party is required to provide a timetable framing the time needed to return to compliance, and to explain the measures it will undertake to do so. Milano emphasises that "the purpose of these requirements is to put pressure on the

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[714] Kingsbury (n 651) 365–367.

[715] ibid.

[716] Martii Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 Yearbook of International Environmental Law 123, 159.

[717] Enrico Milano, 'Procedures and Mechanisms for Review of Compliance under the 1979 Long-Range Transboundary Air Pollution Convention and Its Protocols' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 176.

[718] Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (n 716) 159.

Parties in question to bring about full compliance as soon as possible"[719], sign of a disciplinary decision.

In sum, the effects of the recommendations made by non-compliance committees can be either facilitative or more corrective. In the former case, the compliance committee will provide assistance to the Party and help it bring itself back into compliance. In the latter case, the compliance committee can impose sanctions such as the suspension of rights in the Montreal Protocol regime.[720] Some stronger regimes have even established non-exhaustive lists of possible measures that may be taken by the compliance committee.[721] Some weaker regimes give less room for manoeuvre to their compliance committees in the elaboration of corrective sanctions, such as the Basel Convention and the Aarhus Convention, which require some form of consent by the party in violation on the choice of sanction. Indeed, the compliance committees have to decide the outcome "after coordination" with the party concerned, or should decide "in agreement" with the Party, or in "consultation with the party".[722]

This contrasts with judicial remedies, as international courts and tribunals will decide on the individual responsibility of states for breaches of international law, which gives rise to the award of remedies for the injured party to the proceedings. Remedies can only be awarded to the party requesting them. Whereas non-compliance procedures look for a collective approach to sanctions using peer-pressure mechanisms, international courts and tribunals are bound to award remedies to the plaintiff. One innovation provided by the creation of non-compliance procedures is the possibility of finding different solutions to non-compliance. In particular, the fact it can work with a community of states to improve compliance[723] is something an international court is not yet able to do as such.

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[719] Milano (n 717) 176.

[720] Annex V of the 4th Meeting of the Parties to the Montreal Protocol, UNEP/OzL.Pro.4/15 (1992).

[721] Kyoto Protocol regime; Water and Health Protocol regime (par. 41-43 of Decision VI/1); Rotterdam Convention regime (par. 19 of Decision RC-6/9); Cartagena Protocol regime (par. VI of Decision BS-I/7).

[722] Enrico Milano, 'The Outcomes of the Procedure and Their Legal Effects' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 409.

[723] See the section 'Outcomes' in the next chapter.

However, there could be some developments in the future. Indeed, since remedies depend significantly on the type of obligation violated (see chapter 4.1), they could be adapted to multilateral obligations, or even *erga omnes* obligations. The type of substantive obligation breached would determine the recipients of the obligation of reparation. The tribunal would analyse which states are entitled to reparation and what kind of reparation. If the wrongful act in question is of a non-bilateral type of obligation, it means the remedy sought by the court would adapt accordingly. In other words, if the obligation is of *erga omnes* character, the entire community of states could be asked to do something. Interestingly, in the *Construction of a Wall* Advisory Opinion, the ICJ expressly declared that in cases where *erga omnes* obligations are violated – in this case by Israel's construction of a wall in Palestinian territory – "all States are under an obligation not to recognise the illegal situation" and "not to render aid or assistance in maintaining the situation created by such construction".[724] However, such a statement was part of an advisory opinion, as opposed to a contentious case, and therefore non-binding. Although the Court gave instructions to states, they did not qualify *per se* as remedies. Moreover, the issue with judicial remedies remains: a judicial body is limited to the responsibility of the wrongdoer brought before it.

Furthermore, judicial remedies are more focused on retrospective aspects of reparation and therefore do not contribute as much to the future compliance of wrongdoers. However, there is a possibility for judicial bodies to award prospective remedies. These remedies are specifically provided for in Article 30 of the ILC Articles on State Responsibility, and oblige states to cease the wrongful act and to guarantee the non-repetition of the wrongful act. Cessation is the "negative aspect of future performance" and assurances and guaranties are the "positive reinforcement of future performance", with a preventive character.[725] These remedies are relevant only in the case where the

[724] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 197).
[725] Crawford (n 534) 196.

obligations breached are continuing.[726] It has emphasised the adequacy of these remedies for breaches of ongoing obligations.[727]

However, the ICJ has refused to order specific guarantees of non-repetition in numerous cases, explaining that there were no circumstances to justify such an order, as the good faith of the violating state in implementing the judgment should be presumed.[728] Guarantees of non-repetition are awarded only in certain cases under "special circumstances" – a criterion that has not been defined more precisely so far. For instance, in the *Certain Activities in the Border Area* case, special circumstances did not exist despite the fact the Respondent Nicaragua had previously failed to comply with the first provisional measures order already. The non-compliance with the first provisional measures order did not justify granting guarantees of future non-repetition in the eyes of the Court. This was because Nicaragua complied with the second provisional measures order issued two years after the first one.[729]

Circumstances justifying the award of such prospective remedies have been found in the *LaGrand* case. In this case, the violation was not isolated to a certain set of facts, but could reoccur if there was no change in the domestic legal practice of the United States. Moreover, the consequences of a future violation of the same rule were likely to be irreversible. On the contrary, in the *Certain Activities* case for example, there was no further legal reason to believe that Nicaragua would repeat its violation in another factual context. The state was legally equipped to prevent future violations of the same rule, and there was no sufficient evidence demonstrating its bad faith in applying international obligations. In the *Construction of a Road* case, the ICJ reaffirmed this perspective when it refused to grant the remedy sought by Nicaragua because the obligation breached by Costa Rica i.e. the "failure to conduct an environmental impact assessment does not *at present* adversely affect the *rights* of Nicaragua nor is it *likely* to affect them." (emphasis

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[726] Quintana (n 541) 1150.

[727] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2007, p 43, par. 466.

[728] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Merits) [2009] ICJ Rep 2009, p 213, par. 150.

[729] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (n 32), par. 141.

added). It shows the illegal conduct is terminated and therefore there is no reason why the Court should specifically ask Costa Rica to cease the illegal act.

Generally, judicial remedies are not originally intended to promote compliance, although certain developments have been noticed. On the other hand, a recommendation from a non-compliance committee is based on the concept of future compliance. Its structure itself links to the concept of what compliance means, which can vary from one mechanism to the other, and even within one mechanism, depending on the type, degree or frequency of the non-compliance. It reflects the broader distinction between countermeasures and amicable solutions.[730] Moreover, recommendations from non-compliance committees aim primarily at changing the future behaviour of the state, whereas judicial remedies – although some prospective remedies exist – are not so strong on this issue.

v. Status of Compliance Decisions

There are different issues with the outcomes of a recommendation made by a compliance committee. First, how are they adopted? Consequently, are they binding? The outcomes of a compliance committee's conclusions have been viewed as political rather than legal because of their adoption process.

First, the decisions are only named "recommendations" or "draft decisions" to emphasise their non-binding nature. And the expressions used by compliance committees are not authoritative, such as when they "urge", "request" or "call on" the party to comply again.[731]

Second, the process of adoption does not end when the recommendations by the compliance committees are taken, but those recommendations have to be endorsed by the COP/MOP. In the case of the Montreal Protocol, the LRTAP Convention and the

[730] Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (n 716).
[731] Milano (n 717) 176.

Aarhus Convention among others,[732] it is true the procedure can be described as a two-stage procedure.[733] The role of the COP/MOP must be emphasised, as they will in most cases be the body conferring a legal effect on the compliance committee's decisions. This is a consequence of the relationship between a compliance committee and the COP/MOP of the treaty. Indeed, a compliance committee is in most cases a subsidiary body of the COP/MOP. Therefore, the outcome that should be taken in consideration is the one taken by the COP/MOP, "on behalf of the compliance committee", if it is a clear subsidiary body, or according to the compliance committee's recommendations if it is not a subsidiary body, but just another treaty body. This has been considered not to affect the independence of the compliance committee vis-à-vis the COP/MOP[734], although it questions the legal nature of the recommendations themselves. The Montreal Protocol Implementation Committee, for instance, "shall report to the Meeting of the Parties, including any recommendations it considers appropriate" and at the same time, "after receiving a report by the Committee the Parties may decide upon and call for steps to bring about full compliance with the Protocol". Thus, the final decision rests with the COP/MOP. This is a political decision and the COP/MOP may ultimately reject or modify the recommendations by simple vote. A different process takes place with judgments made by DSU panels and the Appellate Body, which are automatically adopted by the members unless they all reach consensus against the particular decision.[735]

As a result, the compliance committee being rarely entitled to decide on a party's non-compliance without the adoption of a decision by the COP/MOP, the effects produced by the recommendations themselves are unlikely to be considered as binding. They

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[732] Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Decision I/7 (adopted in 2002), Annex, par. 37, (ECE/MP.PP/2/Add/8).

[733] Rüdiger Wolfrum, 'Means of Ensuring Compliance With and Enforcement of International Environmental Law' (1998) 272 Recueil des Cours 9, 120–121.

[734] Alessandro Fodella, 'Structural and Institutional Aspects of Non-Compliance Mechanisms' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 359–360.

[735] Article 16 (4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) 33 ILM 1125 (Annex 2).

need to be endorsed by the COP/MOP to produce binding effects on the states parties to the multilateral environmental agreement.

In practice the COP/MOP does not challenge the findings of the compliance committee but reinforces its statement. The COP/MOP indeed transcribes the draft decisions of the Implementation Committee as they were, without any intention to review or question them; a practice that derives from the status of a subsidiary body. Indeed, practice demonstrates that recommendations of compliance bodies can have an effect even before they have been adopted by the COP/MOP. For instance, the report of the 53rd meeting of the Implementation Committee (14-15 November 2014) found Liechtenstein in non-compliance with Article 7 of the Montreal Protocol and therefore drafted a decision "urg[ing] Liechtenstein ... to report the required data",[736] and by the time the MOP met a week later (17-21 November 2014), Liechtenstein had already submitted the relevant data and asked to "be removed from the draft decision before its adoption".[737]

From the example of Liechtenstein and the LRTAP Convention regime, it can be concluded that the recommendations have the same weight as the decisions taken by the COP/MOP *de facto*. Nonetheless, the possibility of the COP/MOP changing or even not adopting the recommendations made by the compliance committee remains. This is the biggest hurdle that prevents non-compliance procedures from being apolitical, unlike an independent judicial tribunal, where decisions are directly binding.

One exception must be mentioned: the Kyoto Protocol mechanism is independent from the political body. The only possibility for the COP/MOP to have a say in the procedure is in the case of an appeal, but decisions taken by the branches do not need to be adopted by the COP/MOP. This is one of the reasons why the Kyoto Protocol mechanism has been qualified as quasi-judicial.

The importance for the parties to a multilateral environmental agreement that the effects of a compliance committee remain non-binding has been considered as a key element

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[736] Draft decision XXVI of the 53rd report of the Implementation Committee.

[737] Par. 164 of the Report of the 10th meeting of the Conference of the Parties.

for the successful functioning of the non-compliance procedures.[738] Indeed, the reasons why states agreed on such "invasive" non-compliance procedures are so they can choose to prioritise other interests if needed.

However, the fact the recommendations are never binding does not mean they do not produce effects on the determination of the law, as this chapter examines. Kingsbury argued that the recommendation about "Russia's non-conforming conduct might exclude some remedies for breach of treaty".[739] In this view, despite their non-bindingness, they have consequences on general international law, especially the law on state responsibility.[740] Indeed, they do not trigger state responsibility as such, and cannot determine the wrongfulness of an act,[741] but some recommendations can influence such concepts.

vi. Concluding remarks

In conclusion, the debate around the nature of non-compliance mechanisms has not been resolved since it has proven difficult to justify which characteristics should be prioritised over others. Apart from their non-confrontational, supportive, cooperative, facilitative nature, to name a few characteristics enumerated in some foundational texts of non-compliance procedures, it is not clear in which category they belong or if they are a category on their own.

Although the purposes for which they have been created are clearer, some of the work of a compliance committee can be seen as contradictory to its purposes. Indeed, what is similar to an adjudicative process and a non-compliance procedure is the Party-to-Party trigger, which takes places in a straight-forward manner. It resembles a traditional dispute in the sense it is more adversarial: a state will complain about another state's violation of a treaty-rule. It will generally have to complain either to the specific compliance

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[738] Milano (n 722) 417.

[739] Kingsbury (n 651) 367.

[740] For a full analysis, see Laura Pineschi, 'Non-Compliance Procedures and the Law of State Responsibility' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009).

[741] Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (n 716) 144–145.

committee or to the secretariat. The party triggering the mechanism can be required to be directly affected by the potential non-compliance. In the cases of the London Convention, the Basel Convention, the Stockholm and Rotterdam Conventions (which have not yet adopted formally a non-compliance procedure), the texts require the affected Party to "undertake consultations with the Party whose compliance is in question" before triggering the compliance mechanism.[742] These two conditions show that non-compliance procedures contain some elements common with international adjudication, associated with the creation of a dispute in a judicial sense. But some other regimes do not attach any requirement to a Party's submission, such as the Montreal Protocol, the Aarhus Convention and the LRTAP Convention regimes where any state Party can trigger the mechanism, as long as its submission is supported by "corroborating information".[743]

Compliance committees are also able to review states' compliance in different ways. The review can be either of the relevant information required or of the legal obligations themselves, let alone the competence to review general compliance issues only at the request of the COP/MOP. The type of review they are using will affect the way in which they collaborate with judicial courts. The type of measures – facilitative or corrective – at the disposal of compliance committees also affects their role, but the question whether it affects the collaboration with judicial courts is unclear.

Non-compliance procedures do not completely live up to the expectation of a purely multilateral and collective process. Indeed, Koskenniemi pointed at the contradiction between the concept of multilateral process in view of protecting collective rights to facilitate compliance and the need to find an "amicable solution" between the parties in conflict.[744] Further contradictions can be found in the bilateral triggers, some of the

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[742] Par.4.1.3 of the Decision LC 29/17, Annex 7 for the London Convention; par. 9 (b) of the Appendix to Decision VI/12 for the Basel Convention; par. 17 (b) of the Annex to Decision SC-6/26 for the Stockholm Convention; par. 12 (b) of the Annex of Decision RC-6/9 for the Rotterdam Convention.

[743] Par. 15 of Decision I/7 for the Aarhus Convention regime; par. 1 of Annex II attached to Decision X/10 for the Montreal Protocol regime; par. 4 (a) of the Annex to Decision 2012/25 for the LRTAP Convention regime.

[744] Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (n 716) 149.

thresholds established for the admissibility of such claims, and the certain steps in the decision-making process of certain compliance committees.

However, the current lack of judicial remedies for multilateral obligations and for areas beyond national jurisdictions may be a reason for a greater collaboration between non-compliance procedures and international courts and tribunals. Indeed, it may be an efficient solution to defer compliance issues to non-compliance mechanisms when obligations breached are of multilateral or *erga omnes* nature. Moreover, the existing judicial remedies are mostly retrospective. Despite the existence of prospective judicial remedies, international courts and tribunals have awarded them scarcely. This is another reason for collaboration between non-compliance procedures and judicial bodies (see below 5.2.iv).

5.2 Models of relationships

Having discussed the nature of non-compliance procedures and how they differ from international adjudication, the chapter will now turn to the relationship between compliance procedures and traditional dispute settlement procedures involving courts and tribunals. To begin with, it must be noted that no case has been brought before both a compliance committee and a judicial body; no such an overlap has happened until now. Although there has never been a situation in which the same alleged violations are submitted to a compliance committee and an international tribunal at the same time, it could happen in the future and determining more precisely how the two procedures can interact will help shaping each regime's role. Indeed, the purpose of this chapter lies in the argument that potential collaboration between the two mechanisms can enhance the overall protection of the environment.

Reviewing the case law of international courts and tribunals, the recent disputes with a multilateral environmental agreement for object are rare. The *Whaling case* between Japan and Australia/New Zealand is one of them, the *Certain Activities Carried Out by Nicaragua in the Border Area case* between Costa Rica and Nicaragua being the second. The two treaties involved are the Whaling Convention (ICRW) and the RAMSAR Convention and, interestingly, none contain a compliance control mechanism endogenous to the treaty. A central question must be, therefore: is there an inverse correlation between the fact a non-compliance procedure does not exist and the use of

international adjudication by State Parties to those treaties? Fisheries disputes are another illustration of multilateral treaties without an institutional mechanism of compliance and clear advice where disputes get settled in court.

However, since the two mechanisms in some ways overlap[745], the question of how they should interact with each other needs to be answered, that is, the jurisdictional rules applicable must be determined. To this end, it is necessary to find an organisational model to know which procedure should be used in the event of potential non-compliance.

Alongside the normative claims in support of either model of relationship, different legal tools are available, from both specific treaty rules and general principles of law, which can be used to define how the relationship between non-compliance procedures and judicial dispute settlement can be shaped practically. First, the express provision in most of the multilateral environmental agreements will be analysed as the basis for the relationship between non-compliance procedures and international courts and tribunals and then the analysis will focus on the relevant general principles of law potentially applicable in this case. Indeed, the only existing clause is the common "without prejudice" clause contained in most of the multilateral environmental agreements. But other principles may be applicable to the relationship between non-compliance procedures and judicial procedures, in order to try to clarify the system of enforcement in multilateral environmental treaties.

i. The automatic use of non-compliance procedures before a judicial dispute settlement

The first question to be answered is whether a non-compliance procedure should always be used before a formal dispute settlement mechanism. In that regard, two solutions have been advanced, with various justifications, either based on a hierarchical system or on parallel systems. If a hierarchical model is favoured, a state will have to use non-compliance procedures before going to a judicial court. Moreover, the commencement

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[745] Despite the fact non-compliance procedures are non-binding they are grouped with formal adjudication and therefore rules concerning jurisdictional competition must apply. Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2004) 6–7 and 16–17.

of a procedure before a compliance committee will prevent the commencement of a judicial procedure. If a parallel model is favoured, a state will be able to trigger any of the procedures, and rules to organise competing jurisdictions must be applied.

Some scholars have taken the approach that non-compliance procedures should prevail over judicial procedures,[746] because they consider that non-compliance procedures have a different purpose of dispute avoidance. As Klabbers argued, "the non-compliance procedure finds its *raison d'être* precisely in the attempts to defuse the adversarial or confrontational nature of dispute settlement, so why should it not be allowed to prevail?"[747] Another argument has been advanced confirming the application of the hierarchical model, which is the application of the *lex specialis* principle. Indeed, in the context of the Kyoto Protocol, Boisson de Chazournes and Mbengue suggest considering the non-compliance procedure set up in the decision 27/CMP.1 and the subsequent relevant decisions as *lex specialis*, which would have as a consequence that the non-compliance procedure would take precedence over Art. 14 of the UNFCCC.[748] On the whole, the application of the hierarchical model means that a Sstate cannot initiate a formal adjudicative procedure before having submitted the conflict to the relevant compliance committee. Yet, the question of the impact of a decision by a compliance committee on a judicial procedure remains.

However, it is also possible to sustain that the two procedures should evolve in parallel, as Treves affirmed that "non-compliance procedures and judicial procedures are independent, neither of which excludes the other. But some impacts are unavoidable and explainable in the light of international law."[749] One justification is that they are inherently different, as non-compliance procedures are non-confrontational. They do not affect any judicial procedure, especially since they can be triggered without the existence of a legal dispute as required in formal judicial procedures and because the

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[746] Klabbers, 'Compliance Procedures' (n 704) 1006.
[747] ibid.
[748] Boisson de Chazournes and Mbengue (n 55) 87 and 109.
[749] Treves (n 241) 517.

decisions are non-binding. Furthermore, Romanin Jacur[750] argues that, in the case of the Montreal Protocol, the two procedures run in parallel, based on the negotiation of the non-compliance procedure and its "without prejudice" clause.

Most non-compliance procedures contain a clause stating they should be without prejudice to the dispute settlement clause.[751] For example, the Basel Convention NCP says that

> "the present mechanism shall be without prejudice to the provisions of article 20 on settlement of disputes. In performing its functions under paragraphs 19, 20 and 21, the Committee shall take into account any specific procedures provided for under the Convention concerning failures to meet Convention obligations".[752]

The meaning of this clause is not entirely clear. It explains broadly what happens when a procedure before an international tribunal is initiated while there is a pending non-compliance procedure, but it does not give an answer for when there is a decision by a compliance committee and yet parties go to court. Koskenniemi is of the opinion that

> "It follows from the express reservation regarding Article 11 of the Vienna Convention in the preamble of the NCP ... that the fact that an alleged breach is or has been under consideration in the Implementation Committee cannot function as a bar for invoking the jurisdictional clauses. Consequently, any party – including the allegedly defaulting state – may initiate the procedures in Article 11 of the Vienna Convention either immediately upon the emergence of a dispute regarding the latter's performance of its obligations or at any stage later, regardless of whether the matter has come up in the Implementation Committee

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[750] Francesca Romanin Jacur, 'The Non-Compliance Procedure of the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances That Deplete the Ozone Layer' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 27–28.

[751] The LRTAP regime also contains a "without prejudice" clause at par. 12 of the Decision 2006/2 which relates to a provision (contained in each of the specific Protocols rather than in the main LRTAP Convention) on dispute settlement before the ICJ or an arbitral tribunal, only if the Party accepted this option at the time of ratification, approval or accession. Similar clause exists in the NCP of the 1996 Protocol to the 1972 London Convention (LC 29/17, annex 7, par. 7), in the NCP of the Water and Health Protocol (Decision VI/1, Annex I, par. 45), in the NCP of the Kyoto Protocol (Decision 27/CMP.1, Annex, par. XVI), in the NCP of the Cartagena Protocol (Decision BS-I/7, Annex, Preamble), in the NCP of the ESPOO Convention (Decision III/2, as amended by Decision VI/2, Appendix, par. 14).

[752] Decision VI/12 of the 6th COP (10 February 2003) (UNEP/CHW.6/40), Appendix, par. 27 and 28.

> or the Committee has reached an amicable settlement or a determination of non-compliance."[753]

A similar analysis has been found for the Basel Convention, as the "without prejudice" clause permits dispute settlement procedures in spite of a pending non-compliance procedure.[754] As a result, Scott came to the conclusion it meant that dispute settlement procedures are given a formal primacy over non-compliance procedures.[755] To emphasise this view, the Montreal Protocol states that "the Meeting of the Parties may, pending completion of proceedings initiated under Article 11 of the Convention, issue an interim call and/or recommendation"[756], which could interrupt the non-compliance procedure until the end of the judicial procedure.

The main shortcoming of the "without prejudice" clause is that it does not provide with more specific rules on the consequences of the initiation of a procedure on the other.[757] It only states that the trigger of a non-compliance procedure should not prejudice a formal judicial procedure. At an operational level, the "without prejudice" clause as interpreted above supports the opposite view on hierarchical relationships between the two mechanisms. It would give priority to formal dispute settlement at the expenses of the non-compliance procedures. However, this sweeping interpretation may be considered too extensive,[758] and therefore the "without prejudice" clause should be interpreted as supporting the model of parallel relationships, where the two mechanisms coexist, using the "without prejudice" clause only as an "interpretative tool".[759]

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[753] Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (n 716) 157.

[754] Alessandro Fodella, 'Mechanism for Promoting Implementation and Compliance with the 1989 Basel Convention on the Transboundary Movements of Wastes and Their Disposal' in Tullio Treves and others (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009) 45.

[755] Karen N Scott, 'Non-Compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements' in Duncan French, Matthew Saul and Nigel White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart 2010) 252.

[756] Par. 13 of the Decision X/10, Annex II (1998).

[757] Scott (n 755) 255.

[758] Fodella (n 754) 45–46.

[759] ibid 46.

The "without prejudice" clause would prevent a situation where the court has to dismiss the case because it is not admissible, such as in the *Georgia v. Russian Federation* case. In this case, the CERD treaty said diplomatic means must be exhausted before a judicial procedure can be started. If the precondition is not fulfilled, the judicial procedure is not admissible.[760] But MEAs do not contain such a rule; just the opposite, the "without prejudice" clause does not prevent state parties from initiating a judicial procedure. Indeed, the clause can be qualified as "non-exclusive jurisdiction clause", and does not "waive the right" of State Parties to pursue formal dispute settlement.[761]

In addition, the "without prejudice" clause says nothing about the situation where a formal dispute settlement could prejudice a non-compliance procedure. Indeed, Sands noted that it "does not purport to apply in reverse".[762] Accordingly, the "without prejudice" clause, alongside the fact it does not define precisely the consequences of the initiation of a formal dispute settlement procedure on a (pending or future) non-compliance procedure, it can be interpreted narrowly or extensively. In any case it does not make the initiation of a judicial procedure dependent upon the exhaustion of a non-compliance procedure. Therefore, the hierarchical model of relationship cannot be sustained with respect to the "without prejudice" clause. Indeed, it favours a parallel model, where the two procedures do not obstruct each other. The State Parties have free choice between the two procedures.

Knowing that, the parallel relationship still needs to be regulated. Three different situations can arise: the first occurs when one procedure is initiated while the other is already pending; the second is when a non-compliance procedure has decided on a matter then brought to a court or tribunal; the third one is when a judicial decision already exists and a non-compliance procedure is triggered afterwards. Each of these scenarios will be analysed below.

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[760] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections, Judgment) [2011] ICJ Rep 2011, p 70, par. 141.

[761] Shany (n 745) 199.

[762] Philippe Sands, 'Non-Compliance and Dispute Settlement' in Ulrich Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Martinus Nijhoff 2006) 354.

ii. The effects of the initiation of one procedure on the other

The problem of having two procedures running concurrently must be resolved, to avoid contrary decisions, and to avert some unnecessary problems. Indeed, since there is no clear solution to the extent of the impact of one procedure on the other, one institution should wait until the other has decided. The following section will examine the extent to which the principle of *lis pendens* applicable is to the present case, as well as the doctrine of comity. These two general principles give a solution to the consequences of pending competing jurisdictions, but prove difficult to apply fully to the situation between non-compliance procedures and judicial procedures.

a. Lis pendens principle

The *lis pendens* principle is a general concept normally only associated with effects that judicial procedures create between each other and helps solving the problem of competing jurisdiction. Competition between them occurs only when two features are present: the parties are the same in both procedures, and the same issues are raised.[763] Moreover, *lis pendens* is closely related to *res judicata*, as the *lis pendens* principle "anticipates the result which will ultimately obtain from application of the rule of *res judicata*" (analysed further).[764] Therefore, the application of the *lis pendens* principle would suspend the second procedure. It would mean *stricto sensu* that the triggering of a non-compliance procedure prevents a judicial procedure from being initiated or vice-versa.

However, to what extent is *lis pendens* applicable to the relationship between non-compliance procedures and judicial procedures? In other words: could non-compliance procedures also create *lis pendens* without being fully considered as judicial bodies? Some authors have been of the opinion that none of the general principles of litispendence and *res judicata* are applicable to non-compliance procedures.

> "The determination by the COP/MOP is not binding upon the Parties, if by "binding" we refer to the fact that the determination involves a finding of international responsibility, entailing a number of consequences under general

[763] Shany (n 745) 24–28.

[764] Campbell McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff 2009) 22.

> international law. It does not entail the application of the principles of *res judicata* or *lis pendens*."[765]

In this view, the non-binding character of a recommendation issued by a compliance committee prevents the application of *lis pendens* and *res judicata*.[766] However, the contrary has been argued, suggesting the non-binding character does not affect the jurisdictions to be competing. Instead, the practical significance of non-compliance procedures to dispute settlement, together with their minimal practical differences with judicial bodies, has outweighed their non-bindingness.[767] Indeed, in the case of the application of the *lis pendens* principle only, the binding character is not the decisive element, but the potential substantial overlaps are. The fact the non-compliance procedures can ultimately give a recommendation on the application of the same law as judicial procedures is enough to justify the application of *lis pendens*.

Thus, in the case that *lis pendens* is applicable to non-compliance procedures, three criteria must be fulfilled: identity of parties, identity of object, and identity of ground.[768] The application of those principles on the relationship between non-compliance procedures and international courts and tribunals will depend upon the interpretation of these criteria. Although non-compliance procedures have broader rules on standing than judicial bodies (as seen in the aforementioned section on triggers), they can also overlap because of similarities of objects or grounds. But in that regard, different arguments have been advanced to justify that in particular, the identities of object and ground do not exist.

First, concerning the application of the condition of identical parties, the fact the triggers are broader in non-compliance procedures than in judicial ones means that a lot of situations are excluded from the application of the *lis pendens* principle. The criterion of identical object between the two procedures poses a problem for non-compliance

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[765] Milano (n 722) 413.

[766] The non-bindingness feature of non-compliance procedures is also considered as potentially preventing the application of *res judicata* in Sands, 'Non-Compliance and Dispute Settlement' (n 762) 356.

[767] Shany (n 745) 1–17.

[768] August Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 The Law and Practice of International Courts and Tribunals 37, 55–72.

procedures, because of their political nature.[769] This criterion requires not only that what is decided must be identical, but also that the relief granted in the action (remedies) is identical. In this case, the difference is that the general outcome of a compliance committee decision is not to hold a party responsible for its non-compliance, but instead to help this party comply again by changing its behaviour. As mentioned before, the outcomes of a non-compliance procedure can vary between decisions that are cooperative in nature and those that contain sanctions. In the latter case, the principle of *lis pendens* might preclude the judicial proceedings coming after such a decision. In this case, the issue is again about the nature of the sanctions. Treves is of the opinion that even the sanctions taken by compliance committees go beyond what a judge or arbitrator can do, therefore having no impact on judicial proceedings.[770] Indeed, if a judge finds a state in violation with international law, it will trigger this state's responsibility and the judge will be able to order reparations. This is not a task that any compliance committee has been entitled to do. This criterion would exclude the application of *lis pendens* to all cases of overlap between non-compliance procedures and judicial bodies. Lastly, an identity of ground must be found between the two procedures, meaning the parties must have argued the same rights in both procedures. Another reason to dismiss the application of *lis pendens* is that it can be triggered without the existence of a dispute in the judicial sense, which means that there is no identity of object.[771] However, the identity of reliefs and of grounds should not be interpreted restrictively, because if

> "only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of *res judicata,* then litigants could easily evade this by slightly modifying".[772]

As a result, the application of the specific principle of *lis pendens* proves limiting since it excludes potentially all overlaps, by the fact that not only the parties can be different in numerous cases, and the identity of ground is difficult to be met, but also because the

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[769] Sands, 'Non-Compliance and Dispute Settlement' (n 762) 356–357.
[770] Treves (n 241) 510.
[771] ibid 507.
[772] Reinisch (n 768) 62.

fulfilment of the criterion of identity of objet might be impossible to ever fulfil if a restrictive interpretation is chosen.

Since the *lis pendens* principle is not an appropriate tool to regulate a relationship between non-compliance procedures and judicial procedures, another principle must be relied upon to organise their relationship. Indeed, if no principle is applicable at all, triggering the second instance will result in having to ignore the existence of the first procedure, and there are chances that the decisions will be incompatible. This situation is avoidable if the second instance chooses to invoke the principle of comity.

b. Doctrine of comity

The doctrine of comity offers an alternative to the *lis pendens* principle, as it gives the opportunity to a court or tribunal to interrupt the proceedings until the other tribunal decides in respect of the other procedure. Shany explains that the doctrine of comity found in domestic legal systems "was invoked in situations of multiple proceedings to justify restraint in the exercise of jurisdiction and in the issuance of extraterritorial remedies, in order to minimise jurisdictional conflicts".[773] In this context, it was originally used as a "discretionary doctrine that empowered courts to decide when to defer to foreign law out of respect for foreign sovereigns" and was transformed into a "rule that obligates courts to apply foreign law in certain circumstances".[774] However, this general principle has not been applied consistently at the international level by courts and tribunals. Yet, when it has been used, it was considered as part of the inherent powers of a tribunal, as exemplified in the *Pyramids* case.[775] Although this case was concerned with proceedings pending in a French domestic court and an ICSID arbitral tribunal, it has been considered as representative of the good use of the doctrine of comity by an international tribunal, especially because the ICSID tribunal decided to suspend the proceedings rather than decline jurisdiction, therefore preventing a situation where the

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[773] Shany (n 745) 260.

[774] Joel R Paul, 'The Transformation of International Comity' (2008) 71 Law and Contemporary Problems 19, 20.

[775] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (Decision on Jurisdiction) [14 April 1988] 3 ICSID Reports 131, par. 129.

parties are left with no remedies at all.[776] It is also important to mention the Separate Opinion of Judge Treves in the *MOX Plant* case, where the doctrine of comity is mentioned as a solution to parallel procedures.[777] More importantly, the Annex VII tribunal set up for the *MOX Plant* case used the doctrine of comity as a justification to suspend the proceedings. It said that

> "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute".[778]

The doctrine of comity has been used in this case because the *lis pendens* principle was not applicable as such. Indeed, the parties to the *MOX Plant* dispute at the European level were not the same as the ones before the international arbitral tribunal.

The practice of comity by international courts among themselves being already scarce, it might be considered inconceivable to broaden even more its application to concurrent proceedings with non-compliance procedures. The doctrine of comity, however is better suited to answering the question of the implications of the initiation of one procedure (either judicial or non-compliance) on the other pending one precisely because it does not require strict conditions to be fulfilled, and can be used at the discretion of the tribunal. Indeed, comity being a rule that can be considered "inherent to the proper function of judicial bodies", it does not require specific rules to be used by tribunals.[779] It could be beneficial to use the doctrine of comity when the *lis pendens* principle is not applicable.

This would apply consequently to non-compliance procedures since their work entails legal determination of one party's non-compliance, but in the case that they only exercise their facilitative and advisory function, they should not be restricted at all. Indeed, when their purpose is to offer a political forum for the parties, nothing seems to prevent them

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[776] Shany (n 745) 263–265.

[777] Separate Opinion Judge Treves *The MOX Plant Case (Ireland v United Kingdom) No. 10* (n 81), par. 5.

[778] *The MOX Plant Case (Ireland v. United Kingdom)* (n 81), par. 28.

[779] Shany (n 745) 279.

from doing so. As Koskenniemi said with the support of the *Case Concerning Passage through the Great Belt*, "the saisin of an arbitral or judicial organ prevents a definite determination of non-compliance by the Implementation Committee, but does not bring the attempts to reach an amicable solution to an end.[780] Indeed, their political role would not be affected by a potential suspension through the application of comity. The diplomatic role of non-compliance procedures is not related to judicial procedures. Non-compliance bodies would still be able to perform their role as a negotiator and try to reach an amicable solution to the disagreement despite the existence of judicial proceedings.

iii. The effects of a recommendation adopted at the end of a non-compliance procedure on a judicial procedure

In the event that a non-compliance procedure has resulted in the adoption of a formal recommendation adopted by the COP/MOP, how should a tribunal react to this recommendation? Is the outcome of a non-compliance procedure final and does it therefore prevent the tribunal from making a decision on the same matter? Or can the tribunal reverse the decision taken by the non-compliance procedure? These questions of successive jurisdictions can be partially answered by the application of the *res judicata* principle. However, this principle does not cover all the cases of successive jurisdictions between non-compliance procedures and international courts and tribunals. Therefore, it will be analysed what are the options available to international courts and tribunals when they have to hear a case already decided by a compliance committee.

a. Res judicata principle

The doctrine of *res judicata* entails that the decision of an international court or tribunal is final and immutable. It prevents the same dispute to be adjudicated twice (*ne bis in idem*).[781] Unlike the *lis pendens* principle, the *res judicata* principle is more broadly recognised in international law.[782] Not only is the final character of the awards mentioned

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[780] Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (n 716) 160.

[781] Boisson de Chazournes and Mbengue (n 55) 101.

[782] Shany (n 745) 223.

expressly in both the ICJ Statute[783] and UNCLOS,[784] but it is also reaffirmed for arbitral decisions, such as in the *Trail Smelter* case, reaffirming that "the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law".[785] Concretely, the application of the principle of *res judicata* would prevent a judicial court from ruling on a situation that arose previously before a compliance committee and is dependent on the fulfilment of the same three criteria as for the *lis pendens* principle, namely the identity of parties, objects and grounds.

The non-binding and political nature of non-compliance procedures is crucial to the application of the *res judicata* principle. It has been underlined by Judge Torres Bernárdez in his dissenting opinion in the *Qatar v. Bahrain* case:

> "[I]f it was not an international arbitration, how could the 1939 British "decision" (independently of its validity) be *res judicata* or have become so in international law? In fact, the 1939 British "decision is not the product of a jurisdictional organ or a political organ acting *in casu* in a jurisdictional capacity. Thus the "decision" cannot have the finality of *res judicata*; it does not express the legal truth (vérité légale) *non-varietur*. Political decisions may have binding effects but not *res judicata* binding effects."[786]

Applied to the present relationship, it means international adjudication can give a legal answer to conflicts where non-compliance procedures – as a political means – are unable to give a suitable answer.[787] Moreover, the principle of *res judicata* does not apply to recommendations issued by compliance committees because they are not binding. Therefore, the tribunal is allowed to review the same facts and the same dispute, because the nature of the procedure cannot be affiliated to a judicial legal process. However, Judge Torres Bernárdez mentions that "political organs acting ... in a jurisdictional capacity may be able to create *res judicata* effects". A difference could then be made

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[783] Article 60 of the ICJ Statute.

[784] Article 296 UNCLOS.

[785] *Trail Smelter Arbitration (United States v. Canada)* [1938 and 1941] VOLUME III pp. 1905-1982, United Nations Reports of International Arbitral Awards, p. 1950.

[786] Dissenting Opinion of Judge Torres Bernárdez, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* (Merits, Judgment) [2001], ICJ Rep. 2001, p. 40, par. 302.

[787] Sands, in Ndiaye and Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes,* 313-325 (The Netherlands, 2007); Treves, in Kerbrat & Maljean-Dubois (eds), *The Transformation of International Environmental Law,* (Paris – Oxford, 2011) 286.

between the decisions by compliance committees producing corrective – or jurisdictional-like – and facilitative – or diplomatic-like – effects. Only in the former case would the *res judicata* principle apply to recommendations made by compliance committees, if the two other criteria of identical parties and grounds are met as well. Only in this narrow scenario would the non-compliance procedure produce *res judicata* effects. In the other cases, the international tribunal seized would be able to decide regardless of the existence of a non-compliance procedure, and the question of how it would use the non-compliance procedure arises.

b. *'Review' by international courts and tribunals*

The question of a potential judicial review of a non-compliance procedure as a quasi-judicial entity is linked to the idea of a judicial court functioning as a "supervisory" organ, or an "appeal" court in a sense. However, a problem is created by the fact procedural safeguards that exist in the non-compliance procedures are weaker than in a formal judicial procedure. Indeed, the principles of due process and fairness in proceedings are not guaranteed as formally and fully as in a judicial procedure, as well as the possibilities for the allegedly non-complying Party to defend itself.[788] In other words, since the procedural safeguards are not as developed as in a judicial procedure, an international tribunal would be the first instance where those procedural safeguards are applied properly and therefore could not play the role of an "appeal" court.

The question of judicial review of a non-compliance procedure as a political entity is linked to the idea of justiciability of political acts. The issue attached to a potential judicial review by international courts and tribunals is that it relates legally the two mechanisms. If the optimal situation is where they are clearly separated in principle as non-compliance procedures are considered political and judicial courts are considered legal, linking the two through a judicial review process can be dangerous.[789]

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[788] See Montini (n 653).

[789] See in general about judicial review by the ICJ, Kolb (n 587) 863–913.

iv. The effects of a judicial decision on a potential future non-compliance procedure

In this case, the non-compliance has not been triggered before a decision has been taken by a judicial body. What is the impact of this decision on a future non-compliance procedure? The first question is whether a judicial decision prevents a non-compliance procedure from being triggered, and the second question is whether there are possibilities of cooperation between the two institutions.

The first effect of a judicial decision is its bindingness upon the parties to the dispute. According to the *res judicata* principle a non-compliance procedure cannot take the case. Indeed, the decision is binding and final and therefore not only binds the states part of the dispute and then involved in a non-compliance procedure, but also the compliance committee and the COP/MOP of the particular treaty.

A non-compliance procedure can nonetheless play a complementary role. It would have to follow-up on the judicial decision. There are different ways for the non-compliance procedure to take action, even though a judicial decision exists, without compromising or re-judging the case. In addition, there are ways for the court or tribunal to include the non-compliance procedure as part of the execution of the decision. The cooperation between the two institutions is worth considering in an effort to bridge gaps and potential tensions between them.

Denying the importance of the findings of a compliance committee in an international court or tribunal would encourage the idea that environmental regimes created by multilateral environmental agreements are self-sustaining in the sense that they have exclusivity over the application of their rules.[790] This consequence is to be avoided precisely because multilateral environmental agreements and the following creation of non-compliance procedures should not work on their own. Hence, cooperation between non-compliance procedures and judicial tribunals should be promoted, which can take various shapes. The aforesaid analysis of the specificities of non-compliance procedures helps defining how cooperation can take place. The different types of review

[790] Report of the Study Group of the International Law Commission (n 88) par. 129.

by compliance committees, for instance, can be used differently by judicial courts. But how will the tribunal use it?

a. *Cooperation with fact-finding*

The first possibility is for the court to treat it as evidence. It is important to say that by analysing it as evidence, the court is not making a "judicial review". But it is a review nonetheless, with the difference that it cannot affect the outcome of the non-compliance procedure. Indeed, the court cannot overrule the sanctions taken by the compliance committee but it can take them into account. The scope of the review is different from a review of the legality of the previous recommendation or decision since the parties to the judicial dispute would argue about the right interpretation on the basis of the result of the non-compliance procedure, but would not argue about the legality of the procedure.

The use of the fact-finding reports by international courts and tribunal could strengthen their approach to scientific evidence. In the *Certain Activities Carried Out in the Border Area* (Nicaragua v. Costa Rica), for example, the Court analyses the RAMSAR Convention and the work undertaken by its committees. Although the RAMSAR Convention does not create a non-compliance procedure, its scientific body issued reports on the status of specific wetlands located in the area under dispute before the ICJ. This use of fact-finding reports could also be developed by international courts and tribunals with regards to non-compliance procedures.

b. *Cooperation with the legal assessment*

The second type of review – the legal assessment that compliance committees make in order to decide on non-compliance – triggers more complex issues, especially if we consider the quasi-judicial nature of non-compliance procedures. Although their decisions do not create the status of *res judicata*, it does not mean that the analysis by compliance committees should be dismissed as such. If they are considered as a merely political process from which states receive only assistance (material and financial), international courts and tribunals could use them as a piece of evidence, as much as fact-finding reports. The problem is that they are more than mere diplomatic efforts to resolve the non-compliance and less than judicial procedures, especially when they take

more corrective measures. Should we make a difference between those two types of outcomes?

c. *Cooperation with implementation of judgments*

Since both purposes of non-compliance procedures and international adjudication aim at rectifying illegal behaviours, collaboration between them regarding the implementation of judgments does not seem impossible. Indeed, non-compliance mechanisms have special tools to bring states back into compliance, which international courts and tribunals do not have. It is then possible to imagine some collaboration, especially through the way international courts award remedies. They could contain some deference to non-compliance procedures in implementing judicial decisions, especially when multilateral obligations are breached. Collaboration between the two different institutions could compensate for the lack of multilateral judicial remedies.

5.3 Conclusion

The whole system of enforcement benefits from a clearer understanding of the interrelations between non-compliance procedures and formal judicial dispute settlement. More precisely, although the *raison d'être* of the non-compliance procedures is to provide a flexible and non-confrontational mechanism, where non-compliance can be corrected and not punished, it can become less clear through the development of judicial-like procedural requirements and the application of sanctions. Therefore, the most distinctive aspect of the two procedures is eroded by the extension of the powers of non-compliance procedures. It is for this key reason that a closer analysis of their relationship with formal adjudicatory mechanisms is critical.

Non-compliance procedures and judicial procedures do not compete against each other. They can be triggered independently from each other, but when one is triggered, it creates consequences that the other procedure cannot circumvent. Indeed, both can be triggered for the same legal issues, creating a situation in which an overlap between the two jurisdictions occurs and needs to be organised. This potential overlap can be exploited in the advantage of environmental disputes, especially in the case where a judicial procedure is triggered before a non-compliance procedure is.

In the spirit of clarifying the role of adjudication towards non-compliance procedures and vice-versa, there are situations when non-compliance procedures seem more appropriate. Indeed, it is important to remember some environmental obligations are more difficult to enforce in a bilateral setting. Therefore, the fact the obligation of reducing emissions of certain substances harming the ozone layer is not "bilateralisable", for example, in the sense that another state will not be directly harmed by a violation. It is a case where non-compliance procedures may be better suited than international courts. Indeed, in the event a state violates such an obligation, it will be easier to argue the community of states that are complying will be taken in default and the object and purpose of the treaty will be violated – an argument that seems successful in a compliance committee. Compliance Committees exist precisely to represent the interests of the community of states of the treaty, rather than to apply the stricter rules on state responsibility before an international court or tribunal. When such an obstacle arises, the option of a non-compliance procedure can become a solution. However, it does not mean a judicial tribunal is not able to hear such community interests, as proven in the *Whaling* case where Australia did not justify its own harm to be the basis of the claim. With a greater use of the rules on participation in international adjudication, more cases will arise, blurring the lines between each procedure's specific roles. Moreover, in the case that a dispute arises over a matter encompassing more than one multilateral environmental agreement, or other rules outside multilateral environmental agreements, an international court or tribunal might save some complexities that would emerge from the trigger of separate non-compliance procedures.

Why is cooperation emphasised in this chapter? On the one hand, a key question is whether the collaboration between the two mechanisms could undermine the independent character of the judicial process by the use of a political decision objectively. Courts always use political decisions as evidence of certain practices or beliefs, but if they rely on such decisions as impartial and independent, it might impact on the impartiality and independency of the judicial process itself. As mentioned in the chapter, the arguments in favour of keeping the two procedures apart are strong, but a careful collaboration should not be prevented. On the other hand, cooperation is set within a broader concept of harmonisation of judicial decisions. Indeed, it is part of the idea to "encourage increased jurisprudential consistency and strive to contribute towards

the development of a more coherent 'community of law'".[791] Moreover, cooperation is especially beneficial for international courts and tribunals as it defines more clearly their role and also strengthens their legitimacy. Indeed, one major consequence of their collaboration with non-compliance procedures is the inclusion of a multilateral process within the judicial process. The COP/MOP of the treaty adopts the recommendations made by the compliance committee by consensus and therefore represents all the parties to the treaty, so if an international tribunal uses this decision in its procedure, it means that it includes all the parties to the treaty's views, rather than a decision coming from a limited number of judges, even in the case that other actors participate to the judicial procedure.

[791] Shany (n 745) 278.

CONCLUSION

The purpose of this thesis was to demonstrate that international courts and tribunals can adequately overcome certain procedural obstacles prominent in environmental disputes. The aim of the thesis itself was to rebut some of the easy assumptions about the role of international adjudication in the development of international environmental law. Mostly seen as inadequate, I wanted to see the extent to which the contrary was true. It can be now concluded that international courts and tribunals are equipped with procedural tools that can be adapted and interpreted in ways to accommodate environmental disputes. Indeed, judicial settlement of environmental disputes can be an effective mechanism to enhance environmental protection. Adaptation and interpretation of procedural tools are necessary, but in some instances, international courts and tribunals have already shown they are willing to adapt and interpret in a manner to respond adequately to environmental challenges. If they have not yet done so, practices identified in this thesis could be followed by international courts and tribunals without the need for radical change within the judicial institutions.

The overall original contribution of this thesis consists of building a bridge between international adjudication and international environmental law. It has sought to establish a connection between the substantive rules forming international environmental law and procedural rules regulating international courts and tribunals. In presenting this research it has shone a light on the extent of the powers of international courts and tribunals, and analysed how these may be used profitably in an environmental context. By focusing on different procedural problems particularly prominent in environmental disputes, the thesis highlights the importance and intrinsic values of procedural rules.[792] In doing so it offers a unified vision of how international environmental principles interact with procedural rules.

The general framework within which international courts and tribunals develop is defined by the notions of independence, impartiality and judicial freedom. Indeed, seeds for greater applicability and broader judicial impact exist: they must now be used

[792] Nollkaemper (n 287) 782–784.

appropriately. This thesis has pinned down where judicial bodies can make a difference for environmental protection. In other words, the contribution of this thesis in the wider context is to offer a unique, in-depth analysis of how judicial procedures can be strengthened. Indeed, specific procedures are highlighted throughout the thesis, showing how judicial institutions can use them more adequately and more authoritatively.

Although international courts and tribunals always have to juggle with the sovereignty of states, which hinders their independence *per se*,[793] emancipation of international courts and tribunals from states can happen through procedural choices and applications. Procedural developments indeed encourage more emancipation from the part of international courts and tribunals.[794]

The arguments presented in this PhD may be located within a body of scholarship that tries to answer the question: what is the role of international courts in the international legal system at large, especially when other actors have potentially competing values or objectives? Helfer says that "an international court that is adroit at developing international legal norms ... may, as a result, narrow the discretion of government policymakers or diminish state sovereignty".[795] In that sense, this thesis – by focusing on the weakest aspects of international adjudication in environmental disputes –emphasises the reality that international courts and tribunals cannot (and should not) be afraid to use their mechanisms as a counter-power to states and intergovernmental policymakers.

Moreover, the thesis also contributes to the determination of the meaning of "judicial powers". By analysing some of the structuring characteristics as defined by Hernandez,[796]

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[793] See Eric A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) 93 California Law Review 3.

[794] See Rosalyn Higgins, *Themes and Theories* (OUP 2009), in particular chapter 9.3, 'Respecting Sovereign States and Running a Tight Courtroom'.

[795] Laurence R Helfer, 'The Effectiveness of International Adjudicators' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 466.

[796] Hernández (n 131) 52. 'Whether due to exigencies of the sound administration of justice, or lacunae in its constitutive Statute that must be filled by way of necessary implication, the Court's settled practice has been to claim a number of inherent powers as part of its claim that it exercises a specifically judicial function. In this respect, it may be more interesting to examine the specific powers so claimed, and how their elucidation by the Court helps to sketch the contours of its judicial consciousness. The discussion that follows will seek to illuminate this phenomenon somewhat, by enumerating certain powers that purportedly derive from some inherent power of the Court: compétence de la compétence; the power to set its procedure; the power to indicate interim measures of protection; the power to define its own rules

this thesis helps defining how far the judicial function has been taken by international courts and tribunals themselves. Indeed, each chapter has focused on particular procedural elements at every stage of the judicial proceedings, from their triggers to their remedies.

The analysis included both the study of the powers international courts and tribunals have and how they have exercised their powers. In doing so, the analysis brought to light the best practices found throughout case law, and the potential role of international courts and tribunals in developing those powers based on these best practices. Overall, the thesis has identified where there is room for improvement, and how far international courts and tribunals have used the opportunities to develop practices favourable to a better adjudicative system responding to the specificities of environmental disputes. While the developments analysed in the thesis have not all come to fruition yet, the future looks promising.

Throughout the different chapters, four main concerns have been tackled: the need for integration of the collective nature of certain environmental rules and the public element of adjudication, the judicial response to technical uncertainties, the need for more preventive actions, and the judicial response to environmental bodies (NCPs) competent in potential environmental disputes.

The thesis first showed that the system of international adjudication is not closed to a bilateral setting, but can encompass multilateral elements of environmental disputes. The rise of legal protection of areas beyond national jurisdiction and the legal responses to global concerns have created a potential implementation gap. Judicial institutions, despite having been created in the restricted bilateral conception of international law, contain certain elements crucial for closing this implementation gap. In particular, the foundations for a broader consideration of standing exist, laid down in the articles on state responsibility, whereby states could initiate judicial proceedings without a direct personal injury. Indeed, articles 42 and 48 of the ILC Articles on State Responsibility open up standing to "community obligations" and can be used as a legal basis for

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of evidence; the power to interpret or to revise its judgments; and the power to permit the intervention of a third party.

international courts and tribunals to allow proceedings in the public interest. Such behaviour has not been consistent but the *Whaling* case is the latest example of a potential acceptance of broader rules on standing. Moreover, other actors, such as international organisations or NGOs, have ways to participate in bilateral disputes through the mechanisms of intervention and *amicus curiae*, as well as through the advisory jurisdiction.

The role of scientific experts and NGOs in the fact-finding process can also influence the judicial decision. The need for more multilaterality in international adjudication is closely related with the fact that most environmental disputes are also based on highly complex factual situations, often involving scientific disagreements and contrary opinions. This feature is problematic especially in the handling of scientific evidence by international courts and tribunals, as it creates a misbalance between the parties. There are, however, ways to interpret scientific evidence which can rebalance the parties, based on the idea that scientific facts, by their nature, ask for a different treatment than other facts. Such technical complexities can also impact the duration of the disputes, problem that can be tackled by a greater use of provisional measures orders, especially since international courts have not shied away from some collaboration with specific relevant environmental bodies in the implementation of their orders. Indeed, they have used their inherent powers in order to collaborate with specific environmental institutions at the provisional measures level. In the *Certain Activities* case for example, the ICJ entrusted the Ramsar Secretariat with the task to supervise and ensure better collaboration between the states in dispute.

International courts and tribunals can also find adequate responses in a greater collaboration with non-compliance procedures, although this has not happened yet. This suggestion could improve not only the judicial response to the implementation of multilateral obligations but also compliance with provisional measures and final judgments.

Moreover, international adjudication has a public role to play. International dispute settlement mechanisms have not been created just for settling disputes between states. This has been emphasised in the nature of provisional measures orders and the role of the courts in their intervention during the fact-finding process. The award of provisional

measures can clearly be justified on the basis of the non-aggravation of the dispute, justification that goes beyond the mere interests of the parties. International courts and tribunals have indeed used their powers to protect broader interests, such as the protection of the marine environment in the case of the ITLOS.

The possibility offered to international courts and tribunals to participate in fact-finding processes is also an element showing their public function. If they consider it necessary, international courts and tribunals can get involved in the determination of the facts by appointing experts or assessors for example. The motivation to do so will have to be based on the principle of procedural fairness, and will aim at allowing the court to make a better decision legally.

Another concern often raised when analysing international adjudication in an environmental context is its lack of preventive role. This thesis showed that the possibility of ordering provisional measures is an efficient way of using international adjudication as a preventive tool. The *raison d'être* of provisional measures is precaution. While awarding different measures, judges will look at whether the situation is urgent and creates a risk of irreparable harm. The definition of such threshold and their application to environmental cases show that international courts and tribunals are ready to protect the environment through provisional measures.

There are, however, other developments that go towards a more preventive judicial attitude. Indeed, the developments concerning evidence and the award of remedies can be seen as a more proactive understanding of the shift in environmental protection. By understanding that the process of weighing scientific evidence requires an approach to the standard of proof, international courts and tribunals would better encompass the fact that scientific facts are uncertain. A more cautious approach towards them will improve the quality of judicial response as international courts will be able to accept scientific facts as sufficient evidence, rendering the whole judicial process more appropriate in an environmental context. Moreover, if judicial practices show a greater understanding of scientific uncertainty, states will react and adapt their conducts accordingly, improving the preventive aspect necessary for environmental protection.

In conclusion, international courts and tribunals have a margin of appreciation large enough to encompass many concerns important for handling environmental disputes in

a more adequate way. Some developments have already been endorsed in specific cases, and some suggestions I made throughout the thesis can be implemented in the future without need for further formal reform of the judicial institutions.

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