ENHANCED IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL TREATIES BY JUDICIARY - ACCESS TO JUSTICE IN INTERNATIONAL ENVIRONMENTAL LAW FOR INDIVIDUALS AND NGOs: EFFICACIOUS ENFORCEMENT BY THE PERMANENT COURT OF ARBITRATION

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I INTRODUCTION

At present an environmental crisis looms large. Two main interrelated causes can be identified: a continuing environmental degradation and a lack of respect for the law going hand in hand with a changed approach to ethical and moral values. Recent monitoring and data-collection systems evidence the increasing, frightening amount of threats and damages to the environment with global, transboundary and national deleterious effects. Although the endeavours on the national and international level to avoid and prevent environmental risks and infringements have intensified since Rio 1992, alas the object has not been achieved adequately. This negative result was also stated by the UN Millennium Declaration of September 2000 and confirmed again by the Johannesburg Declaration on Sustainable Development in September 2002. Under para 13 it says:

The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effects of climate change are already evident, natural disasters are more

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frequent and more devastating and developing countries more vulnerable, and air, water and marine pollution continue to rob millions of a decent life. 4

To alter this state the Millennium Declaration stressed the urgent need to implement and respect the principles of equity and social justice, of tolerance, eradication of poverty and to develop a new ethic of conservation and stewardship for our common environment with more respect for nature to guarantee in the end peace and security on our planet. Emphasising the opportunities of globalization in general, the Declaration states that ‘at present its benefits are very unevenly shared, while its costs are unevenly distributed’. 5 In order to translate all these shared values into actions, it postulates to develop more efficient capacity-building, good governance and democracy instruments and to promote the protection of human rights, inter alia by peaceful dispute resolution in conformity with the principles of justice and international law. 6 The Johannesburg Summit, which can be characterized as the ‘Summit of implementation, accountability and of partnership’, 7 picked up and stressed these targets and undertook to speed up improved, more effective implementation of Agenda 21 and of further political commitments by its Plan of Implementation. 8 Regrettably it does not directly address aspects of legal access to courts and refers to the position of non-governmental actors only in a very general way in the context of building partnerships with governments. 9

Here is an unique challenge and opportunity, inter alia, for national and international lawyers to promote and support this implementation process. They have to offer innovative legal instruments such as progressive environmental laws and international agreements on the one side and to guarantee their implementation and execution on the other. As unfortunately a huge deficiency in the application of legal norms can still be stated, the tool of judicial control by independent institutions is indispensable. According to the theory of separation of powers it belongs to the hallmarks of each democratic legal order that at least an independent judicial institution is empowered to control the legislative and executive organs to guarantee the implementation, application and execution of law. Without such an instrument the existence of any legal system is endangered. This author, who for more than three decades has recommended the need to pay more attention to legal aspects and the role of judiciary, 10 accordingly welcomes the Johannesburg

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4 UN Doc A/Conf.199/L 6 Rev 2 and Corr 1 adopted on 4 September 2002; the text is also published in (2002) 35 EPL 234.
5 Declaration, above n 3, 5.
6 Declaration, above n 3, 4.
7 UNEP Executive Director Klaus Töpfer in his speech at the WSSD Opening Plenary of 26 August 2002; cf: M A Buenker, ‘Setting a Path for Improved Implementation of Agenda’ (2002) 32 EPL 190, 192.
9 See: A/Conf 199/20 under 163 and 168.
10 A Rest, International Protection of the Environment and Liability: The Legal Responsibility of State and Individuals in cases of Transfrontier Pollution (1978); A Rest, The More Favourable
Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium in August 2002. The judges are right to remind the Community of States and all parts of society to respect, uphold, strengthen and enforce the Rule of Law. They are right to affirm that:

an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law.

The judges further stress that the ‘Judiciary has a key role to play in Integrating Human Values set out in the United Nations Millennium Declaration ….’ By its four key principles and the adopted, concerted and sustained programme of work — determining in a very precise manner the elements of information, data-exchange, environmental law education, access to justice etc. — the judges have proposed fundamental environmental law capacity building instruments to promote the implementation of the Montevideo Programme III and to effectuate sustainable development in the future. It is noteworthy to mention that the Montevideo Programme by its ruled 20 objectives, and very detailed fixed actions, has laid a general strong foundation for the further development of environmental law and the means for making it more effective.

The UNEP Governing Council with its recent Decision 22/17 on Governance and Law adopted on 7 February 2003, recalling inter alia the six regional judges symposia on environmental law convened by the UNEP Programme during the period 1996-2001, noted with appreciation the Global Judges Symposium of Johannesburg. It calls on the Executive Director to support within the Montevideo


11 For the text see (2002) 32 EPL 236.
12 Cf: 5th paragraph.
15 To mention but the following few objectives: 1. Implementation, compliance and enforcement of environmental law; 2. Capacity-building; 3. Prevention and mitigation of environmental damage; 4. Avoidance and settlement of international environmental disputes; 5. Strengthening and development of international environmental law; 6. Harmonization and coordination; 7. Public participation and access to information; 8. Information and technology; 9. Innovative approaches to environmental law.
Programme the improvement of judicial capacity-building commitments. The Decision stresses the need to improve:

the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law at the national and local levels such as judges, prosecutors, legislators and other relevant stakeholders, to carry out their functions on a well informed basis with the necessary skills, information and material with a view to mobilizing the full potential of the judiciaries around the world for the implementation and enforcement of environmental law, and promoting access to justice for the settlement of environmental disputes, public participation in environmental decision-making, the protection and advancement of environmental rights and public access to relevant information.  

This demand reflects Principle 10 of the Rio Declaration\(^\text{18}\) and the goals which have been implemented in the meantime by the Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.\(^\text{19}\) It must be stressed that such an approach is restricted to the national law level and may fail in solving transnational, international environmental law affairs and cases as will be demonstrated later. That part on ‘Enhancing the Application of Principle 10 of the Rio Declaration’ of Decision 22/17 merits special attention. Thereby the Governing Council requests the Executive Director:

...to assess the possibility of promoting, at the national and international levels, the application of principle 10 … and determine, inter alia, if there is value in initiating an intergovernmental process for the preparation of guidelines on the application of principle 10.\(^\text{20}\)

The concrete contents and meaning behind this demand remain ambiguous. Could for instance such potential guidelines enable concerned citizens and victims of transnational environmental damage to bring an action against State organs – even against the foreign polluter-State – and to grant them legal access to international courts, such as the International Court of Justice? Such an assumption certainly would be unconventional, because the sovereignty of States stands against it and the States are not willing to relinquish their sovereign rights. What States have in mind is to rule the complex problems of legal access on the level of private actors, ie, on the level of domestic or comparative national law. This tendency is also manifested by promoting the instrument of civil liability concepts\(^\text{21}\) and the lack of progress in setting up binding obligations in the field of State Responsibility/Liability as

\(^{17}\) See: Decision 22/17 Governance and Law under II, A, 2, 50.
\(^{18}\) For the Text see (1992) 22 EPL 268.
\(^{20}\) Cf: Decision 22/17 under II, B, 3, 51.
\(^{21}\) See: for instance objective 3 of the Montevideo III Programme.
enhanced by the Work of the UN International Law Commission. The future will prove whether this ‘private-actors’ approach can sufficiently meet the environmental challenges of today or not. Nevertheless, enhancing legal access to national courts according to the law on conflicts and international procedural law is a first step in the right direction. The Governing Council has requested the Executive Director to submit a report on the progress in the implementation of the Decision at its Twenty-Third Session. For clarification it must be added that not only individuals directly or potentially affected in their legal interests must be granted direct access to the courts. Civil society organizations, such as environmental interest groups and NGOs representing common societal and environmental interests and acting as guardians of the state of the environment, must have legal access as well. Accordingly, the Montevideo Programme stresses new options “for advancing the effective involvement of non-state-actors in promoting international environmental law and its enforcement at the domestic level”. Regrettably, such need at the international level has not explicitly been emphasised.

The following examination of national jurisdiction in Germany and in other European Member States will show whether the ‘domestic judiciary’ approach for the time being is sufficient or not, or must be changed, or expanded and amended by new instruments on the international level of jurisdiction.

A Examples of national jurisdiction in Germany and Europe

There is no doubt, that in States possessing an advanced legal system and a developed mechanism of jurisdiction, judicial control plays a major role in the implementation and execution of environmental law. So in Germany, according to a long-standing tradition in jurisdiction, potentially injured legal persons and individuals can rely on the lawful execution of national environmental law by claims brought to the competent courts. Judicial decisions can also promote legislation by constructive criticism of possible ambiguities of regulations. As far as the litigation concerns only national matters of disputes and the application of national environmental law, German judiciary grants effective legal protection.

But as soon as transboundary or transnational effects and objectives of international environmental law are at stake, national jurisdiction may be deficient or even fail. This is evidenced, for instance, by German case law concerning the cases of Chernobyl, Sandoz and of the nuclear power plant of Lingen to name


Cf: Decision 22/17 under II, A, para 5 and B, para 5, 50 et seq.

Cf: action I,1, 1 of the Programme.

but a few. All of these cases reflect the general tendency that in cases of transboundary/transnational pollution, the injured individual victims have no prospect of success and only a limited opportunity to bring an action against a foreign polluter, and specifically against a foreign polluter-state or its organs before national courts.  

Cases like the Dutch-French litigation concerning the salinisation of the river Rhine and the judgments of Austrian and Swiss courts in the case of Chernobyl or the cases of the nuclear power plants of Mochovce, Temelin (Slovakia) and Cattenom (France) as well as of the Slovenian Hydropower plant at Soboth, demonstrate the same tendency in almost all European States.  

The project of the American Society of International Law’s Interest Group on ‘International Environmental Law in Domestic Courts’ 1997, examining for instance national judiciary in Australian, Canadian, Dutch, German, Indian, Japanese and US courts, also reiterates, that for the time being, international environmental law aspects are not sufficiently considered in depth and implemented by national courts (with the exception of the Dutch judiciary).

At the symposium ‘on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development’ of UNEP and the South Asia Co-operation Environment Programme (SACEP), held from 4-6 July 1997 at Colombo, Sri Lanka, it was recommended and emphasised that national judiciary has the responsibility to mould emerging environmental law principles – such as the polluter-pays-principle, the precautionary principle, the principle of continuous mandamus and of the erga omnes obligations - with a view to giving these a sense of coherence and direction.  

The published *Compendium of Summaries of Judicial*...
Decisions in Environment Related Cases, \(^{34}\) also manifests the existing deficiency in national jurisdiction in the application of international environmental law, which has to be changed. The Conference further emphasised the problems of the ‘aggrieved person’ and of ‘locus standi’ in regard to environmental damage and liability, which need to be solved.

As regards the practice of German courts, a distinction needs to be made between civil, public and criminal law cases.

When it comes to litigation before civil courts of the polluted state, both claims for compensation and also actions to cease environmentally harmful and hazardous activities meet with failure.\(^{35}\) Moreover, meagre attention is paid to aspects of protecting the global commons.\(^{36}\) There are a number of reasons for this, including:

- individuals mostly abstain from filing a lawsuit because of the potentially high costs and the problem of dealing with a foreign language;
- immunity from jurisdiction may hinder the competence of the home-courts as well as of the court of the polluter-state;
- pursuant to the rules on the law of conflicts or of the ‘ordre public’ the application of the substantive law can be excluded; and
- immunity from enforcement can defeat the enforcement of a foreign decision.

As regards lawsuits brought before the administrative courts of the polluter-state the ius standi can be very problematic. In particular, the application of the substantive law, dominated by the principle of territoriality, can be refused if it does not protect foreign legal interests. By reason of sovereignty the home-court of the injured individual has no competence to examine public foreign law aspects. The polluter-state’s court will argue that its decision cannot be enforced abroad by reason of immunity from enforcement.

With regard to environmental protection by the criminal courts, the German Supreme Criminal Court has emphasised in a case concerning the transboundary movement of hazardous waste from Germany to Poland that the German criminal

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\(^{36}\) For a discussion on global commons, common heritage, common concern and interest, and erga-omnes obligations cf: Rest, above n 22, 31.
law does not protect the legal interests of foreign injured individuals and will only apply on German territory.

Accordingly, national judicial proceedings are still mostly ineffective because they lack the requisite powers and have to be further improved in matters concerning international environmental law. The long duration of litigation, lasting sometimes more than a decade - as with the River Rhine Salinisation case and the Lingen case - also undermines legal protection. The protection of the global commons remains outside the scope of national jurisdiction and courts refuse, or are very reluctant to guarantee these legal interests by an interpretation pursuant to public international law. Can it be that such a task of interpretation demands too much from the national judge who is not as proficient in international law? Therefore the demand of the Johannesburg Global Judges Symposium to strengthen environmental law education is welcome.

In this context it is worth mentioning that the Supreme Court of India has recently demanded the establishment of special national environmental courts composed of judges highly qualified in environmental law and with technical experts and scientists very proficient and experienced in environmental matters. The Permanent Court of Arbitration has implemented this approach by its recent procedural Optional Rules for conciliation and arbitration of international disputes in the field of the environment, as will be shown later.

As a unique exception for the protection of global commons and the implementation of the principles of intergenerational equity and responsibility the decision of the Supreme Court of the Philippines in the famous Oposa case of 1993 is noteworthy. The plaintiffs, all minors, duly represented by their parents, successfully claimed to cease the continuing deforestation of the tropical rainforests – the indispensable natural resource for the life of present and future generations.

To summarise: In a country like Germany, with an advanced legal system and highly developed jurisdiction, there still exists a deficiency in the application of international environmental law. No wonder that in countries having not yet established a legal system the lack of implementation will be ongoing. Therefore, to support the development of a legal order and to promote national jurisdiction

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37 To this and other criminal law cases cf: Rest, above n 27, 419.
38 Cf: para (d) in (2002) EPL 237.
40 Cf: judgment of 1 December 2000 (A P Pollution Control Board II v Prof. M V Nayudu) (2000) SOL Case No 673, under Nos 65 et seq.
mechanisms according to international law principles, strong safeguards should be ensured by instruments and institutions at the international law level. In particular, the idea to establish an international environmental court – postulated since 1988 by the International Court of the Environment Foundation (ICEF) Rome – stands open for further discussion and deliberation. Such a court could be the proper institution for the surveillance of the application of international regulations agreed to by environmental treaties. It also could give guidance to national courts how best to apply international environmental law in the frame of national law. It is highly desirable that in addition to States and International Organisations, such an international court could be appealed to by NGOs, environmental interest groups, enterprises or individuals as well, or be addressed by national courts, to decide by procedure of preliminary decision or by interpretation, conflicts between international and national environmental law. Its decisions certainly could have impressive impact and abiding influence on the further development of national environmental law and national judiciary as well.

B Indispensability of International Judiciary

Although there is not the slightest doubt about the indispensability and fundamental role of domestic judiciary for effective enforcement of environmental law, cases with transnational effects cannot always be solved sufficiently for numerous various reasons as shown before. Therefore national jurisdiction must be flanked by international judiciary. It is indispensable for the following main reasons:

- the behaviour of the states must fall within judicial control, as states themselves may commit or tolerate environmental destruction;
- only an independent judicial institution can scrutinize the implementation and enforcement of international treaty law and international law obligations, if the States at an earlier stage have failed to achieve compliance by ‘political non-confrontational’ mechanisms or agreement;
- the necessary protection of Global Commons and the development of ‘erga omnes-obligations’, as well as of a Human Right to a decent environment can be ensured and promoted by international judiciary.

44 Example: the forest burning in Indonesia was tolerated by the government although the existing law prohibited such activities. For the details and further examples see Rest, above n 42, 575, 579.
45 To the ‘Global Commons’ and ‘erga-omnes’ obligations cf: A Rest, above n 22, 31.
Another crucial problem is the *initiating of an international dispute settlement procedure*, if not merely state interests but interests of individuals or environmental associations as well are at stake. States, not infrequently, by political opportunity are very reluctant or refuse to support their injured nationals and to bring the ‘polluter-state’ to court, as for instance in the Chernobyl case. State interests, in particular economical priorities, can stand against those of citizens and the environment. Therefore also individuals, enterprises and environmental civil society organisations must be granted direct access to international judicial institutions. This demand has been supported also by two Resolutions of the famous *Institut de Droit International*. For the controlling of state activities as well as of private actors we should uphold the engagement of NGOs, environmental interest groups and individuals as guardians of environmental matters, as daily environmental grievances are clearly highlighted by the activities of these groups. Recollect the protesting activities of Greenpeace against the introduction of toxic substances into rivers and the North Sea, against the nuclear tests on the Mururoa-Atoll, or the campaign against the disposal of the oil platform ‘Brent Spar’ in addition to the numerous activities of the *World Conservation Union (IUCN)* in the fields of nature protection and biodiversity.

Despite the indispensability of an international judicial institution one must be aware of the fact that even a tribunal or a court in the end cannot engender or replace the *will of states* to implement effectively their obligations under international agreements because the competence of an international arbitral or tribunal instrument also depends on the will of the states, ie an agreement or compromise. Nevertheless, decisions of a court and impending potential sanctions may press states to implement their obligations.

The importance of peaceful settlement of environmental disputes is emphasised in Principle 26 of the *Rio Declaration*, in *Agenda 21* and in the *Montevideo III Programme*. Paragraph 39.10 of *Agenda 21* emphasises, *inter alia*, the importance of the judicial settlement of disputes. It calls on states ‘to further study mechanisms for effective implementation of international agreements, such as modalities for dispute avoidance and settlement’. It identifies the full range of

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49 Cf: Para 4, b, V

Enhanced Implementation of International Environmental Treaties by Judiciary

Techniques such as: prior consultation, fact-finding, commissions of inquiry, conciliation, mediation, non-compliance procedures, arbitration and judicial settlement of disputes. Paragraph 4 of the Montevideo Programme which undertakes to realise the respective targets of Agenda 21 in particular stresses the need ‘to consider innovative approaches to dispute avoidance’.\(^51\) There is a general consensus that all *preventive instruments* of dispute avoidance should be favoured in principle. The ‘political’ non-confrontational mechanisms of ‘compliance-procedure’\(^52\) as well as of ‘Conference of the Parties (COP)’ need special attention.\(^53\) Regarding the Convention on Biodiversity (CBD) for example, it is noted that the CBD does not contain a provision establishing a compliance regime.\(^54\) Instead of this the COP-mechanism is favoured in Article 23. In case an agreement cannot be achieved by further negotiation or a decision of COP, Article 27 para 3 of the CBD provides for an agreed compulsory settlement of disputes either by arbitration or submission of the dispute to the International Court of Justice. The CBD also recognises the indispensability of a judicial control mechanism, if all modalities for dispute avoidance remain unsuccessful.\(^55\) Laudable though this approach is, it must be stressed that these ‘non-judicial’ instruments operate only between the *organs of the states*. NGOs or private third parties are not involved yet. They also cannot participate in the non-compliance procedure.

A laudable, unique exception is the new ‘compliance-procedure’ to the *Convention for the Protection of Alps* and its protocols adopted in November 2002.\(^56\) It enables NGOs – under certain conditions of confidentiality - to participate in the controlling mechanisms concerning the implementation and enforcement of the Convention. Such an innovative approach reflects the idea of participation as described in the Report ‘Implementing Agenda 21’ of the UN Secretary-General.\(^57\) It emphasises that:

> Participation generates shared values, mutually reinforced commitments, joint ownership and partnership, which are crucial to achieving sustainable development

\(^51\) Cf. Para 4 (a), i-V.
\(^53\) Article 6 of the ‘Convention for the Protection of the Ozone Layer’ (1987) *ILM* 1516 has incorporated the COP-mechanism as well. Together with the amending ‘Montreal Protocol on Substances that deplete the Ozone Layer’ (1987) *ILM* 1541 this mechanism is combined with the non-compliance-procedure ruled in Article 8.
\(^54\) Cf: to this statement Széll, above n 52, 305.
\(^56\) Cf: Rest, above n 2. See also: T Enderlin, ‘A Different Compliance Mechanism’ (2003) 33 EPL 155
\(^57\) UN Doc E/CN.17/202/PC.2/Advanced Unedited Text.
... The increase in major group participation has been a key area of success in the post-Rio period.³⁸

But also worthy of notice is its critical remark on the participation of non-state-actors at the national and international level:

Participation is often based on temporary and ad hoc rather than permanent and reliable mechanisms and procedures. A strengthened sense of ownership of the decisions taken among participating stakeholders would help in implementing many decisions relating to sustainable development.³⁹

II JUDICIAL CONTROL BY AN INTERNATIONAL ENVIRONMENTAL COURT

As international judiciary is indispensable, the next question is whether one of the existing international courts can meet the task of an international environmental court, or whether a new, separate International Court for the Environment is needed.

A International Court of Justice (ICJ)

Although in 1993 it established an ad hoc chamber for environmental matters, the International Court of Justice cannot be the right forum, because states alone have direct access. This is regrettable because by its very function, the ICJ could be the proper institution to control the implementation of environmental treaty obligations – as shown in the Gabčíkovo-Nagymaros case,⁶⁰ – to develop further and improve international environmental law and to concentrate on the urgent problems of protecting the global commons by applying the concept of \textit{erga omnes} obligations. Sooner or later, under the influence of the current efforts and programmes of the state community to strengthen and enhance the legal position of NGOs, non-state-actors will also be granted legal access to the ICJ. But such step would require states to relinquish sovereignty⁶¹ and expose themselves to legal proceedings as a prerequisite. Such necessary reform of the ICJ Statute and of the UN Charter seems to be unrealistic at the moment.⁶²

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³⁸ Cf: p 37, (Text box) of the Report.
³⁹ Cf: p 38, section 170
⁴⁰ See the judgment of 25 September 1997 which has conciliation character, Case Concerning the Gabčíkovo-Nagymaros Project between Hungary and Slovakia in ICJ Reports No 92; to further details cf: Rest, above n 42, 581.
⁴¹ What is necessary is a new understanding of sovereignty which can meet the environmental challenges of our world in transition. Cf: S Bhatt, ‘Ecology and International Law’ \textit{Indian Journal of International Law} (1982) 422.
B International Tribunal for the Law of the Sea (ITLOS)

As regards the protection of the marine environment, according to Article 20 of the Statute of the Tribunal, the ‘States Parties’ to the Law on the Sea Convention, can submit disputes concerning interpretation and implementation of the regulations to the International Tribunal for the Law of the Sea, established in Hamburg in October 1996. Pursuant to para 2 of Article 20 the Tribunal is also open to ‘entities other than States’ in cases provided for in Part XI of the Convention. This concerns the competence of the special Sea-Bed Disputes Chamber with regard to seabed activities. The Chamber can hear cases brought by or against the International Sea-bed Authority, parties – including non-State parties – to a contract and prospective contractors. The same provision extends further the jurisdiction ratione personae of the Tribunal in ‘any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case’. According to Article 187 para (c) read in connection with Article 153, private natural persons can present the dispute to the chamber only with the consent of a State. In general it must be emphasised that Articles 20 et seq of the Statute only enable a limited jurisdiction in the field of the ‘Area’ and do not go beyond. Also the term ‘entities’ still needs to be precisely defined by future jurisdiction of the Tribunal. Finally, it is doubtful whether comprehensive protection of the marine environment is actually granted, as evidenced, inter alia, by Article 135 which ‘shall not affect the legal status of the waters superjacent to the Area or that of the air space above those waters’.

Meanwhile the Tribunal has rendered some important judgments. Whilst the cases ‘M/V Saiga’ and ‘Camouco’ concern the arrest of ships, that is, are not related to environmental matters, the ‘Southern Bluefin Tuna’ case concerned the protection of marine mammals. In this case the Tribunal ordered provisional measures for the catches against Japan. Marine pollution was the subject of the ‘MOX Plant Dispute’. In this case Ireland requested the prescription of provisional measures against the United Kingdom to stop the activities of the plant. The dispute stems from the UK’s authorisation to open a new MOX facility in Sellafield. The facility

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65 Treves, above n 64, 428.
66 Cf: Article 20, second sentence and also Article 21, (1982) 21 ILM 1348.
67 For the Definition of ‘entities’ cf: Article 1 para 2 and Article 305 paras 1 b, c, d, e and f UNCLOS.
70 For the details of the order of 27 August 1999 see list of cases Nos 3 and 4 : http://www.un.org /Depts/los/ITLOS/Order-tuna34.htm.
is designed to reprocess spent nuclear fuel into a new fuel, which combines reprocessed plutonium with uranium and is known as mixed oxide fuel (MOX). The Irish Government has pointed out that the plant will contribute to the pollution of the Irish Sea, and emphasised the potential risks involved in the transportation of radioactive material to and from the plant. By its order of 3 December 2001\textsuperscript{72} the Tribunal prescribed as provisional measures co-operation in exchanging information concerning risks or possible effects of the operation of the MOX Plant and devising ways to deal with them. It must be mentioned that on 18 June 2001 Dublin initiated a second international arbitration process in this case at the Permanent Court of Arbitration. It concerns access to information under Article 9 of the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic in relation to the authorisation of the MOX Plant.

As neither NGOs nor individuals have access to the ITLOS, this tribunal does not offer yet the desired perfect solution for future protection of the marine environment. But unquestionably it plays a very important progressive role in this field.

C The Court of First Instance and the Court of Justice of the European Communities (ECJ)

In Europe NGOs, enterprises and individuals have access to the Court of First Instance, established in 1988, and the Court of Justice of the European Community (also court of appeal), if the interpretation of primary and secondary European environmental law or the correct implementation and application of EU-Regulations and Directives is concerned. However, a claim of legal and natural persons is admitted only if their rights are potentially injured \textit{directly} and \textit{individually}. This was stated by judgment of the ECJ of 2 April 1998 where Greenpeace International and concerned residents claimed in vain against a subvention granted by the EU Commission for the establishment of two electricity-power-installations in \textit{Gran Canaria} and \textit{Tenerife}.\textsuperscript{73} The claim of three French nationals with residence on Tahiti against the testing of atomic bombs on the \textit{Mururoa-Atoll} were rejected as well in 1995.\textsuperscript{74} In general the courts can be proud of an extensive case-load in environmental matters,\textsuperscript{75} but according to the \textit{restricted regional field} of application of European Law their jurisdiction does not go as far as is desirable for global

\textsuperscript{72} The text is available at www.itlos.org.
\textsuperscript{74} See E C R 1995, Part II, 3051.
environmental protection. Nevertheless the importance of these courts for the further development of regional environmental law and general environmental principles remains unquestioned.76

D European Court on Human Rights (ECHR)

The jurisdiction of the European Court on Human Rights77 has paved new ways to improve environmental protection through an expanded concept of human rights and by linking both fields of law which traditionally have been treated separately. Through its groundbreaking López-Ostra decision in 199478 the Court has opened the door for the protection of human rights against nearly all sources of environmental pollution, as opposed to just noise emissions and radiation, as was the case in the 1970s and 1980s.79 This laudable progressive decision provides for a more comprehensive environmental protection of the individual and stimulates the discussion on the existence of a human right to a decent environment.80 The background to López-Ostra case is as follows: In 1988 Gregoria López Ostra, living with her family close to Lorca (Murcia, Spain), suffered from emissions from a waste treatment plant built on municipal property with a government subsidy just twelve metres from her home. Foul smells and gas fumes causing health problems were emitted from the installation, which operated without a required permit. The family lived there until February 1992. Although in September 1988 the local council ordered cessation of some plant activities, the family continued to suffer health problems and noted a deterioration in the environment and quality of life. Doctors confirmed that López Ostra’s daughter suffered from nausea, vomiting, allergic reactions, bronchitis and anorexia because of her residence in a highly polluted area. Authorities for the Murcia region also reported health risks from the plant following many complaints from residents. López Ostra urged the municipality to find a solution to the nuisance in vain. Accordingly she filed complaints with the Administrative Division of the Murcia Audiencia Territorial, the Supreme Court and the Constitutional Court. These applications were based on violations of fundamental rights under the Spanish Constitution. Each of the courts rejected her complaints or found them inadmissible despite official reports of the health dangers. Two of López Ostra’s sisters-in-law, living in the same building, also brought administrative and criminal complaints. Although the courts in these

76 For the judgments in the cases of the electricity power stations in Gran Canaria and Tenerife and the nuclear test cases on the Mururoa-Atoll cf: A Rest, ‘Friedliche Streitbeilegung internationaler Umweltkonflikte durch den Ständigen Schiedshof. Seine zukünftige Rolle als internationaler Umweltgerichtshof, in honour of H Schiedermair’ in Dörr, Fink, Hillgruber, Kempen and Murswiek (eds), Die Macht des Geistes (2001) 937, 956.
78 López-Ostra v Spain, ECHR Series A, Vol 303/C; A Rest, ‘Improved Environmental Protection …’, above n 77, 215.
79 See for the judgments against noise pollution concerning the airports Gatwick (Arendelle v UK) and Heathrow (Bags, Powell and Rayner v UK) and other cases discussed and cited in A Rest, ‘Improved Environmental Protection …’, above n 77, 213, 215.
proceedings ordered closure of the plant, the orders were suspended due to appeals. In February 1993, the family bought a new house and moved. In May 1990, López Ostra applied to the European Commission of Human Rights complaining that local authorities’ inaction violated her rights under the European Convention of Human Rights. She based her legal claims on Article 8 of the Convention (protection of private life and family life) and Article 3 (prohibition against torture and inhuman and degrading treatment) and claimed compensation. She asserted that the Spanish government failed to protect her privacy rights by maintaining a passive attitude toward the plant’s disturbances. She also contended that the nuisance caused severe distress constituting degrading treatment. The Commission, which found a violation of Article 8 but rejected the Article 3 claim, referred the case to the Court. The Court issued its decision on 9 December 1994, unanimously holding that the pollution from the plant and Spain’s inaction violated Article 8. It explained that States have both a positive duty to take measures to secure rights under Article 8 and a negative duty to stop official interference. The Court stated:

that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being – that of having a waste-treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her family life.

The judges rejected the claim based on Article 3. The Court also observed that the applicant undeniably:

sustained a non-pecuniary damage. In addition to the nuisance caused by gas fumes, noise and smells from the plant, she felt distress and anxiety as she saw the situation persisting and her daughter’s health deteriorating.

Therefore, Spain was held liable for four million pesetas in damages and more than one million pesetas for costs and expenses.

Altogether the judgment shows the Court’s jurisprudential flexibility and willingness to view environmental infringements as human rights harms. It has also enhanced the legal protection of the environmental victim to claim against nearly all sources of pollution by applying Article 8. However, it should be borne in mind that the disadvantage in relying solely on Article 8 is that its para 2 can be the basis for restricting rights for reasons such as security, safety, morality or economics. Thus it is desirable to deliberate the possibility of strengthening the individual’s environmental position in the future by applying the right to life (Article 2) or the right to physical integrity and health (Article 3), because neither of these provisions are subject to broad exceptions. Laudably, the Court has also promoted the concept of state liability, which has been debated by the UN International Law Commission for over 30 years and which still remains unresolved.
In its judgment in the *Mühleberg* (Canton of Berne, Switzerland) nuclear power station case of 1997\(^1\) the Court regrettably did not pursue or even extend its progressive judiciary. In this case the applicants – living within a radius of four or five kilometres from the nuclear power station – appealed against the extension of the nuclear installation’s operating licence for an indefinite period and maintained that the power plant did not meet current safety standards. The applicants argued that they were exposed to a *risk of accident* which was greater than usual and had been affected in their civil rights. They also stressed the *lack of access* to a Swiss Court when attacking the decision of the Federal Council (executive, administrative authority) and asserted a violation of Articles 6 and 13 of the European Convention on Human Rights. By *twelve to eight votes* the Court rejected the applicants’ objections. It upheld that the applicants:

> did not establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent.\(^2\)

The repercussions on the population therefore remained hypothetical. It is remarkable that the *dissenting opinions* of seven judges with regard to the proof of a link and of a potential danger have emphasised that the majority of the judges:

> appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of common heritage.\(^3\)

These judges also underlined the importance of the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*\(^4\) stressing the special hazards of certain installations, which need to be obviated by new international-law measures and through the exercise of effective remedies. Such a statement is laudable and encouraging. It facilitates that in future the judges will take into account these new trends in international environmental law and thereby pursue the progressive López-Ostra judiciary. But alas, in general, decisions in the field of nuclear energy aspects follow their own rules because of their political importance. Therefore it was not a surprise that in its judgment of 6 April 2000

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concerning the Swiss nuclear power plant Beznau II\(^85\) – which was nearly identical with the Mühleberg-case – the court rejected again the claim of neighbours against the operating licence, stressing that the applicants failed to prove being personally directly exposed to an imminent nuclear risk.

Recently the Court has considered a case concerning the right to a safe environment under Articles 1 and 2 of Protocol No 1. In the Oneryildiz v Turkey case the applicant and some members of his family lived in an illegally-built house in the vicinity of a rubbish tip in Umraniye (Istanbul). The members of the applicant’s family died and their house was destroyed as a consequence of a methane explosion from the rubbish tip. In its judgment of 18 June 2002 the Court found a violation of Article 2 – as far as the death of the applicant’s family members and the ineffectiveness of the Turkish judicial mechanism in the prevailing circumstances are concerned – and of Article 1 of Protocol No 1. This judgment is not final, the case having been referred to the Grand Chamber under Articles 43 and 44 of the Convention.\(^86\)

Despite some progress achieved by the Court, the main problem of direct access to the ECHR still remains. An individual is only allowed access to the Court after having exhausted all local remedies, that is, all stages of jurisdiction in the individual’s home-state. Such a time-consuming, thorny procedure considerably blocks better protection of environmental human rights.

E. International Criminal Court (ICC)

A conceivable perspective for the future could perhaps also be the International Criminal Court which was established on 17 July 1998 by the United Nations Diplomatic Conference of Rome.\(^87\) According to Article 5 of its Statute\(^88\) the Court has jurisdiction for the most serious crimes of concern to the international community as a whole. Those crimes are the crime of genocide, crimes against humanity, war crimes, as well as the crime of aggression. The creation of a highly desirable, autonomous, explicit jurisdiction in environmental matters by extending the list of crimes to ‘crimes against the environment’, as ruled for instance in Article 19(d) of the ILC’s Draft Articles on State Responsibility,\(^89\) regrettably failed to gain support in the deliberations to the Statute. During the work of the

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\(^85\) Judgment in the Case of Athanassoglou and Others v Switzerland of 6 April 2000, (Application no 27644/95).

\(^86\) For this and various other environment related cases see A Mularoni, ‘The Right to a safe Environment in the Case-law of the European Court of Human Rights’ (2003) Symposium on Environmental Law for Judges.


\(^89\) Article 19(d) provides: ‘the serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas’ as an international crime. Cf: Yearbook of the International Law Commission (YILC) (1980) Vol II, Part Two, 30, 32.
Preparatory Committee on the Establishment of an ICC, a large majority of States wanted to limit the jurisdiction of the ICC to the core crimes mentioned and refused to include the so-called ‘treaty-crimes’. Instead of this it was decided to insert environmental aspects in a modified form under the heading of either a crime against humanity or a war crime. Article 8, para 2, lit b (iv) of the Statute defines as a war crime:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.\footnote{To the problem of defining war crimes under Article 8 para 2 cf: the excellent comment of C Kress, ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice’ (2000) 30 Israel Yearbook on Human Rights 103, 134.}

Although this regulation does not grant comprehensive protection of all elements of the environment, in general this approach is a preliminary step in the right direction. The extension of the ICC’s jurisdiction to prosecute environmental crimes could be on the agenda again in the near future if environmental crimes cannot be stopped and steadily increase, and if, at a propitious moment, Article 19(d) Draft Article on State Responsibility becomes binding treaty law. Although the ‘criminal approach’ is based on ‘individual responsibility’, this concept could also easily be extended to responsibility of state organs. The Criminal Court’s competences in general need not be regarded as competing with the pursuits of the other courts mentioned, because of its specific criminal law approach. On the contrary, in combination with the other international courts, and acting as a complement to them, an effective basis to fight international environmental pollution could be developed. But this target can only be achieved if NGOs and individuals have legal access as well.

To sum up: at the moment the existing above-mentioned international courts cannot offer an optimum solution for the protection of the environment and the injured individual. They can only play an important, desirable and complementary role.

F Permanent Court of Arbitration (PCA) as proper forum

As a specialist International Environmental Court with mandatory jurisdiction does not yet exist, the Permanent Court of Arbitration, The Hague, could be the appropriate forum to settle environmental disputes.\footnote{Supporting this idea with convincing arguments C P R Romano, The Peaceful Settlement of International Environmental Disputes. A Pragmatic Approach (2000) 125; T T van den Hout, ‘Resolving environmental disputes – from negotiation to adjudication’ in A Vlavianos-Arvanitis (ed), Biopolitics, The BIO-Environment (2001) Vol VIII; A Rest, ‘An International Court for the Environment: The Role of the Permanent Court of Arbitration’ (1999) 4 Asia Pacific Journal of Environmental Law 107.} This idea was born at the First
Conference of the Members of the Court in September 1993. This author introduced it at the ICEF-Venice Conference 1994, where this idea found strong support, inter alia, from the Secretary-General of the International Bureau of the PCA. In the meantime numerous resolutions also stressed the potential role of the PCA to act as the competent institution for the settlement of disputes in environmental matters, for example, the Resolutions of the George Washington University and of the American Bar Association, Washington, April 1999, of ICEF, Rome, October 2000 and of Biopolitics International Organisation, Athens 2001. The Second Conference of the Members of the PCA by its Resolution of May 1999 also called upon the Secretary-General and the International Bureau of the PCA:

to expand the Court’s role ... including the area of environmental disputes, taking into account the entire range of international dispute resolution mechanisms administered by the Court.

There are a good number of reasons which favour the PCA in this role.

First, this institution, having its roots in the Hague Peace Conferences of 1899 and 1907, in particular the Conventions for the Pacific Settlement of International Disputes, is well recognized and accepted by numerous UN Member States.

Second, it is a very flexible and unique institution, because it offers facilities for four of the dispute-settlement methods listed in Article 33 of the UN Charter: inquiry, mediation, conciliation and arbitration.

As regards conciliation the PCA established in 1996 new Optional Conciliation Rules, enabling the Parties, including States, International Organisations, NGOs,
companies and private associations to use this mechanism. The Rules are based on the UNCITRAL-Conciliation Rules\textsuperscript{100} and can be linked with possible arbitration.

Concerning arbitration, the Court adopted in 1992 Optional Rules for Arbitrating Disputes between Two States,\textsuperscript{101} and in 1993 Optional Rules for Disputes between Two Parties of Which Only One is a State.\textsuperscript{102} As a consequence disputes between a non-state-actor and a state can be submitted to the Court. In May 1996 the set of Optional Rules was extended in Rules for Arbitration involving International Organisations and States\textsuperscript{103} as well as between International Organisations and Private Parties.\textsuperscript{104} By widening its jurisdiction to all parties of the community of states, including organisations, and all members of society, it goes far beyond the competence of the International Court of Justice.

Third, the important issue of the extra financing required for a new Court for the Environment speaks in favour of the PCA with an existing administrative and logistical infrastructure. The costs of arbitration proceedings are borne by the parties. Besides, the PCA Financial Assistance Fund for the Settlement of International Disputes of 1995\textsuperscript{105} grants financial support to a State which needs such help to meet the costs involved. In future this model should be extended also to non-state-actors.

Fourth, the flexibility of the Court with regard to the place of arbitration should also be noted. In transnational environmental litigation in particular, this place can be important in terms of providing evidence of the harm which has occurred. The parties can agree upon it. Where there is no agreement, the arbitration shall take place at the Hague, the seat of the PCA.

Fifth, it is very advantageous that the PCA is very experienced in matters of trade law, investment law and socio-economical matters which it can combine with environmental aspects. To take into account the interdependence of all these fields, is indispensable in our world of globalisation.

Although the PCA would be the proper institution to settle environmental disputes, one must bear in mind that it is only by an agreement of the parties or by compromise that the competence of the Court can be established. If the parties are states or only one is a state, this huge impediment must be overcome. Ultimately, submitting a dispute to the court depends on the political preparedness of a state. It

\textsuperscript{101} Optional Rules of 20 October 1992, in PCA Basic Documents, 41.
\textsuperscript{102} Optional Rules of 6 July 1993, in: PCA Basic Documents, 69.
\textsuperscript{103} Optional Rules of 1 July 1996, in: PCA Basic Documents, 97.
\textsuperscript{104} Optional Rules of 1 July 1996, in: PCA Basic Documents, 125.
would be a huge step if the states would rule in future environmental treaties the competence of the PCA by a *special dispute settlement clause*, as done for instance in the *Bonn Convention on the Conservation of Migratory Species of Wild Animals, 1979*\(^{106}\) and foreseen in the *IUCN Draft International Covenant on Environment and Development*, 1995\(^{107}\). In 1998 the PCA developed guidelines for negotiating and drafting such dispute settlement clauses.\(^{108}\)

Nevertheless, what is encouraging is the *increasing number of arbitral decisions* of the PCA since the last decade. For the first time the Optional Rules for Arbitrating Disputes between Two Parties of which only One is a State were applied by an award of 25 November 1996 in a dispute between Technosystem SpA (Italy) on the one side and Taraba State and Nigeria on the other.\(^{109}\)

1 *A new Dimension: the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*

By its recent and special *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* of 19 June 2001\(^{110}\) – unanimously adopted by 94 Member States – the PCA has opened a new dimension for peaceful settlement of international environmental conflicts. In a unique manner the Rules which seek to address the principal lacunae in environmental dispute resolution meet most of the respective requirements of the *Montevideo III Programme* and have effectuated the fundamental targets of legal access of non-state-actors to judiciary, of legal protection and of effective control of implementation and enforcement of international environmental treaty obligations and of international environmental law in general. The Rules, which have been drafted by a special PCA Working Group on Environmental and Natural Resources Law since June 1996,\(^{111}\) are structured into four main sections: the Introductory Rules (Section I, Articles 1-4), the Composition of the Arbitral Tribunal (Section II, Articles 5-14), the Arbitral


\(^{110}\) Published by the Secretary-General and the International Bureau of the PCA (2001); cf: also www.pca-cpa.org.

Proceedings (Section III, Articles 15-30) and the Award (Section IV, Articles 31-41). They are joined by an Explanatory Memorandum.

The Rules contain the following significant innovations:

1. As the introduction emphasises, the rules will be available for the use of all parties who have agreed to apply them. That means States, inter-governmental organisations, non-governmental organisations, and private entities, including, inter alia, corporations, companies, environmental interest groups and individuals can have recourse to the forum offered. The rules thus permit greater flexibility in the number and nature of the parties than currently exists elsewhere.

2. In order to provide rapidly both scientific and juridical resources to the parties seeking resolution of a dispute, the rules provide for the optional use of:

   (a) a panel of environmental scientists nominated by the Member States and the Secretary-General respectively who can provide expert scientific assistance to the parties and the arbitral tribunal;\(^\text{112}\)

   (b) a panel of arbitrators with experience and expertise in environmental or conservation of natural resources law nominated by the Member States and the Secretary-General respectively.\(^\text{113}\)

3. Where arbitrations deal with highly technical questions, provision is made for the submission to the tribunal of a document agreed by the parties summarizing and providing background to any scientific or technical issues which they wish to raise in their memorials or at oral hearings.\(^\text{114}\)

4. The tribunal is empowered, unless in their compromise the parties chose otherwise, to order any interim measures necessary to prevent serious harm to natural resources and the environment.\(^\text{115}\)

5. Because time may be of the essence in environmental disputes, the rules provide for arbitration in a shorter period of time than under previous PCA Optional rules or the UNCITRAL rules. The tribunal itself can be constituted rapidly because if the parties cannot agree on arbitrators, the Secretary-General can appoint them, rather than designating an appointing authority as is the case with UNCITRAL.

6. Measures to protect the confidentiality of information provided by the parties are specifically described in Article 15 paras 4-6. Whereas these powers were

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\(^{112}\) Cf: Article 27, para 5.

\(^{113}\) Article 8, para 3.

\(^{114}\) Article 24, para 4.

\(^{115}\) Cf: Article 26, paras 1-3.
previously deemed to be inherent in the tribunal, the description in the rules of an optional mechanism for resolving confidentiality issues is intended to save the time required if the tribunal and/or the parties were to design a system to ensure accountability for confidentiality.

To summarise: the Rules contain a lot of innovative instruments which will contribute to an enhanced judicial control concerning the application of environmental law and strengthen the legal position of NGOs as well as of the individual victims of deleterious environmental activities. The Secretary-General plans to explain the aim and contents of the various Articles by a comprehensive Commentary at a later stage.116

(a) Recent Cases

Two recent cases involving environmental protection concerns are a promising start for the role of the PCA in this area.117 On 18 June 2001 Ireland initiated arbitration proceedings against the United Kingdom pursuant to Article 32 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (‘OSPAR’).118 The proceedings concern access to information under Article 9 of the OSPAR Convention in relation to the authorisation of the MOX plant located at the Sellafield nuclear facility in the UK. By Final Award of 2 July 2003 Ireland’s claim was dismissed. By majority decision the Tribunal found ‘that Ireland’s claim for information does not fall within Article 9(2) of the OSPAR Convention’.119

In the second case which began in summer 2001, the Netherlands claimed that France should apply and comply with the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 and the Additional Protocol of 25 September 1991. The arbitration procedure was still initiated on the basis of the Optional Rules for Arbitrating Disputes between Two States of 1992. In this case, aspects of compensation are at stake.

Altogether, this recent judiciary manifests the significant role which the PCA has instantly gained in the area of environmental dispute resolution.

2 Progressive Perspective: the PCA Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment

A further very progressive instrument for the amicable and non-confrontational settlement of disputes is the Optional Rules for Conciliation of Disputes Relating to

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117 For further details cf: www.pca-cpa.org/English/RPC.
119 For the details cf: (2003) 42 ILM 1118-1186, in particular at 1152.
Natural Resources and/or the Environment which were adopted by 96 PCA Member States on 16 April 2002. Being primarily based on the PCA Conciliation Rules and UNCITRAL Conciliation Rules, the Optional Rules reflect the particular characteristics of disputes having a natural resources conservation or environmental protection component. They emphasize greatest flexibility and party autonomy. So for example, the Rules may be used for dispute resolution between two or more States which are parties to a bi- or multilateral agreement relating to access to and utilization of natural resources concerning its interpretation or application. It is most important – as stressed in the Introduction – that the Rules and the services of the Secretary-General and the International Bureau of the PCA are also ‘available for use by private parties, other entities existing under national or international law, international organizations, and States’. By this laudable, progressive statement it is clarified that ‘ratione personae’, even non-state-actors besides the States, can initiate the conciliation procedure if their legal interests are concerned. According to the general ‘preventive’ aim of conciliation it should be used prior to arbitration and replace such procedure as far as possible. Therefore Article 15 determines:

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving and/or the interim protection of its rights.

According to Article 1 para 1 ‘conciliation’ is defined as:

a process whereby parties request a third person, or a panel of persons, to assist them in their attempt to reach an amicable settlement of their dispute relating to natural resources and/or the environment.

It should be emphasized that the ‘characterization of the dispute as relating to the environment or natural resources is not necessary for application of these Rules, where all parties have agreed to settle a specific dispute under these Rules’. The appointment of the conciliator – which can be one, three or five persons – is the choice of the parties. If a party has not appointed its conciliator, or the parties have not agreed on the conciliator within sixty days, the Secretary-General of the PCA can make such an appointment within thirty days. The parties are free to choose conciliators from the PCA Panel of Arbitrators constituted under the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, or Members of the PCA. The parties are also free to choose expert witnesses from the PCA Panel of Scientific and Technical Experts constituted under

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120 The Rules are published by the Secretary-General and the International Bureau of the PCA, The Hague 2002; cf. also www.pca-cpa.org.
121 Cf: Introduction under (i).
122 See Article 1, para 1, Sentence 2.
123 Cf: Article 4, para 1, Subparas (a)-(c).
124 Article 4, para 1, Subparas (d) and (e).
the aforementioned PCA Arbitration Rules. However, in general the choice of conciliators or experts is not limited to PCA Panels. The role of the conciliator consists of assisting the parties in an independent and impartial manner in their attempt to reach an amicable dispute resolution (Article 7, para 1). At any stage of the conciliation proceedings he/she can make proposals and may communicate with the parties together or with each of them separately. When it appears to the conciliator that elements of a settlement exist which would be acceptable to the parties, the terms of a possible settlement are formulated and submitted to the parties for their observations. If the parties reach agreement, they draw up and sign a written settlement agreement which is binding for the parties and puts an end to the dispute. Of special interest for the implementation of the agreement is the establishment of an ‘implementation committee’ which may monitor the implementation and will guarantee the enforcement of the settlement agreement. Finally, it should be emphasised that underlying the whole conciliation procedure is the principle of confidentiality unless the parties agree otherwise, or disclosure is required by a court or tribunal of competent jurisdiction.

To summarise: the Conciliation Rules offer an innovative, effective mechanism to resolve disputes in the field of the use of natural resources and the environment amicably before initiating an arbitral dispute settlement procedure. Though such a preventive, non-confrontational procedure comes close to the aim of the ‘political’ compliance-procedure, it extends far beyond, as non-state-actors themselves can initiate the conciliation process and be directly protected in their rights.

III CONCLUSION

By its recent Johannesburg Principles on the Role of Law and Sustainable Development, the Global Judges Symposium – which was built on the previous six regional judges’ symposia that UNEP and various partners have convened – laudably has stressed the indispensability of judiciary for the effective implementation of environmental law at the national and international level and to promote sustainable development. For too long the role of judiciary – which also belongs to the branch of government – has received too meagre attention and less realisation in environmental policy-making. The judges have given a very essential, necessary input to governmental representatives by recalling and highlighting the importance of the Rule of Law and of judiciary. The judges are right in postulating the enhancement of national jurisdiction and stressing the urgent need to strengthen the capacity of judges, prosecutors and legislators in the

125 Cf: Introduction under (iii) and (iv).
126 Introduction, (v).
127 Article 7, para 5 and Article 8, para 1.
128 Article 12.
129 Cf: Article 12, paras 2 and 3.
130 Article 12, para 4 (c).
131 Article 13.
environmental law field. As manifested by numerous legal studies of academicians and practising lawyers on national environmental jurisdiction in various regions of the world and especially in German and European judiciaries, this is still very ineffective where transboundary/transnational detrimental effects to the environment are concerned. Therefore, out of necessity to focus attention on national jurisdiction first, such an approach must be extended and in parallel, international judicial control is needed. It is indispensable for the protection of the environment on the regional and the global level as well, for the protection of the endangered Global Commons and for the protection of Human Rights of the threatened or injured individuals in cases of transnational pollution.

International judiciary is also strongly needed for the control of activities of the States to remind them of their responsibility for the environment and to guarantee the implementation and application of international environmental agreements and of international environmental law in general. Courts such as ICJ, ITLOS, the Courts of the European Community, ECHR and ICC cannot offer an optimum solution at the moment. These either do not have comprehensive competence to protect the environment sufficiently, or cannot guarantee the rights of NGOs or individuals, because of lack of legal access. Nevertheless the international courts mentioned are prerequisite to evolving international environmental law and certainly can play a very important complementary role to support the work of the PCA, which could be the proper forum.

Through its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (2001) the PCA offers new innovative instruments for effective control of the application of national and international environmental law. The Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment (2002) contain new preventive mechanisms for avoiding disputes and conflict resolution. Both Rules have opened a new dimension for dispute avoidance and dispute settlement and transferred numerous instruments and elements into practice as proposed in the Montevideo III Programme and the Millennium Declaration. By enabling ‘private parties’ and other ‘non-state-actors’ to initiate the conciliation and arbitration process and to participate in these procedures, the Rules are unique. Thereby, they take into account the increasing importance of NGOs, environmental interest groups and individuals in the field of environmental protection and emphasise the ‘vital role of NGOs they play in the shaping and implementation of participatory democracy’.

Transnational environmental problems can effectively be solved only by all parts of the national and international society. States need this cooperation and support of private institutions. These private elements must still be merged more closely into inter-state mechanisms, especially in international environmental treaties, to give

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134 Cf: Agenda 21, Chapter 27.
them a real chance of efficient contributions in decision-making, as well as in implementing international environmental law. To meet such challenges of our modern, globalized world the States must cooperate with non-state-actors *albeit with the limitation of their sovereignty*. Altogether, both PCA Optional Rules can play a model role for the enhancement of a *ius standi* for ‘non-state-actors’ and for the international environmental judiciary in general. This target could also be achieved and supported by the amendment of *dispute settlement clauses* in existing environmental agreements and their insertion into future treaties. The *PCA Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements* of 1998 offer significant assistance in this regard. As to international judiciary the open question ‘Do we need a new International Court for the Environment with mandatory jurisdiction?’ needs further deliberation as well.136

Altogether, the recent activities of judges recalling and asserting the importance of the Rule of Law and of the indispensability of judiciary in the field of environmental protection at the national and international level, is an appropriate impetus contributing to meeting more effectively the aim of sustainable development in future.

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135 See: Article 62 para 2, above n 107.