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**Standard Setting, Compliance Control and the Development of International
Environmental Law: Through the Practice of International Arbitral, Judicial and
Quasi-Judicial Procedures**

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Abstract

Although the main purpose of the international judiciary (covering international arbitral, judicial and quasi-judicial procedures) is to settle disputes, it can also perform other tasks: a concept described by LAUTERPACHT as 'a heterogeny of aims'. This thesis focuses on three other functions which the international judiciary is expected to fulfil in the international society lacking a centralized legislative body and sufficient law enforcement mechanisms, namely standard setting, compliance control and law development. The field of international environmental law is highly suitable for this study, on account of: 1) an abundance of *ambiguous rules* which demand clear standards for their practical application; 2) *scientific uncertainty, rapid changeability of situations and non-compliance derived from incapability of States*, all of which need special considerations for compliance control; and 3) *newness* of global environmental concern, which necessitates a substantial degree of law development. The above three functions are analyzed from the perspectives of inter-State relations and State-individual relations, on the one hand, and 'soft' control and 'hard' control, on the other. They are integrated into the concept of 'judicial control', whose main purpose lies in containing deviance within acceptable levels through adjudicative means. Several reforms are proposed to facilitate the improved functioning of international environment law through 'judicial control'. The most important in this context is that the international judiciary should ensure active but harmonized interaction of inner-régime law and outer-régime law. Thus even if the international judiciary is attached to a certain treaty-régime, it can make considerable use of the advantages of 'judicial control' over 'non-judicial control', namely its capacity to control States' compliance with outer-régime law, and to clarify a certain norm's meaning for all States in the international society.

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Abbreviations

AB	Appellate Body (WTO)
ADV	<i>Archiv des Völkerrechts</i>
AFDI	<i>Annuaire Français de Droit International</i>
Afr.Chart.H.P.R.	African Charter on Human and Peoples' Rights
AfrCmHPR	African Commission on Human and Peoples' Rights
AfrCtHPR	African Court on Human and Peoples' Rights
AJIL	<i>American Journal of International Law</i>
All ELR	<i>All England Law Reports</i>
Am.Conv.H.R.	American Convention on Human Rights
Ann.Dig.	<i>Annual Digest of Public International Law Cases</i>
Annuaire	<i>Annuaire de l'Institut de Droit International</i>
ASDI	<i>Annuaire Swiss de Droit International</i>
ASIL Proceedings	<i>American Society of International Law Proceedings</i>
Austrian JPIL	<i>Austrian Journal of Public and International Law</i>
BFSP	<i>British Foreign and State Papers</i>
BISD	<i>Basic Instruments and Selected Documents (GATT)</i>
BYIL	<i>British Year Book of International Law</i>
CCSBT	Convention for the Conservation of Southern Bluefin Tuna
CFI	Court of First Instance of the European Communities
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMLR	<i>Common Market Law Review</i>
Colorado J. of Int'l Envtl L. & Policy	<i>Colorado Journal of International Environmental Law and Policy</i>
CPE	<i>Chronique de Politique Étrangère</i>
CTE	Committee on Trade and Environment (WTO)
CYIL	<i>Canadian Yearbook of International Law</i>

<i>Den. J. Int'l L. & Pol'y</i>	<i>Denver Journal of International Law and Policy</i>
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO)
<i>D&R</i>	<i>European Commission of Human Rights, Decisions and Reports</i>
EC	European Communities (or European Community)
ECJ	European Court of Justice (Court of Justice of the European Communities)
<i>ECR</i>	<i>European Court Reports</i>
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFP	Experimental Fishing Programme
<i>EHRR</i>	<i>European Human Rights Report</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>ELR</i>	<i>Environmental Law Reports</i>
EU	European Union
ECmHR	European Commission of Human Rights
Euratom	European Atomic Energy Community
ECtHR	European Court of Human Rights
<i>Eur. Ct. H.R (ser. A)</i>	<i>Reports of the European Court of Human Rights, Series A</i>
FRG	Federal Republic of Germany
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
GEF	Global Environment Facility
<i>GYIL</i>	<i>German Yearbook of International Law</i>
HRC	Human Rights Committee (ICCPR)
IAEA	International Atomic Energy Agency
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IELR	<i>International Environmental Law Reports</i>
IJC	International Joint Commission (Canada/USA)
ILA	International Law Association
ILC	International Law Commission (UN)
ILM	<i>International Legal Materials</i>
InterAmCmHR	Inter-American Commission on Human Rights
InterAmCtHR	Inter-American Court of Human Rights
	<i>Inter.Am.Ct.H.R. (Ser. C) Reports of the Inter-American Court of Human Rights, Series C</i>
ITLOS	International Tribunal for the Law of the Sea
JEL	<i>Journal of Environmental Law</i>
JWT	<i>Journal of World Trade</i>
Kyoto NCP	Kyoto Protocol Non-Compliance Procedure
MEA(s)	Multilateral Environmental Agreement(s)
Montreal NCP	Montreal Protocol Non-Compliance Procedure
NAFTA	North American Free Trade Agreement
NCP	Non-Compliance Procedure
NILR	<i>Netherlands International Law Review</i>
NYIL	<i>Netherlands Yearbook of International Law</i>
NLB	<i>Nuclear Law Bulletin</i>
NRJ	<i>Natural Resources Journal</i>
N.Y.U.J. Int'l L & Pol.	<i>New York University Journal of International Law and Policy</i>
OECD	Organization for Economic Co-operation and Development
O.J. C	<i>Official Journal of the European Communities, Information and</i>

Notices

O.J. L	<i>Official Journal of the European Communities, Legislation</i>
ÖJZ	<i>Österreichische Juristen-Zeitung</i>
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RCEP	Royal Commission on Environmental Pollution (UK)
RDC	<i>Recueil des Cours</i>
RGDIP	<i>Revue Général de Droit International Public</i>
RIAA	<i>Reports of International Arbitral Awards</i>
SAC	Special Area of Conservation
SPA	Special Protection Area
SPS	Sanitary and Phytosanitary
Stanford JIL	<i>Stanford Journal of International Law</i>
Syr. J. Int'l L. & Com.	<i>Syracuse Journal of International Law and Commerce</i>
TREM(s)	Trade-Related Environmental Measure(s)
Tulane J. of Int'l & Comp. Law	<i>Tulane Journal of International and Comparative Law</i>
UCLA Law Review	<i>University of California Los Angeles Law Review</i>
UK	United Kingdom (of Great Britain and Northern Ireland)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	<i>United Nations Treaty Series</i>
US(A)	United States (of America)

USSR	Union of Soviet Socialist Republic
WCED	World Commission on Environment and Development
WLR	<i>Weekly Law Reports</i>
WTO	World Trade Organization
<i>Yale J. Int'l L.</i>	<i>Yale Journal of International Law</i>
YECHR	<i>Yearbook of the European Convention on Human Rights</i>
YIEL	<i>Yearbook of International Environmental Law</i>
YILC	<i>Yearbook of the International Law Commission</i>
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

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1.1. Inter-State Arbitral Tribunals

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Dubai-Sharjah Border case (19 October 1981), 91 *ILR* 543 (1993).

Eritrea-Yemen case (Second Stage: Maritime Delimitation, 17 December 1999), 40 *ILM* 983 (2001).

Filleting case *Case Concerning Filleting Within the Gulf of St Lawrence* (Canada/France, 17 July 1986) composed of three members: *President* PAUL DE VISSCHER [Belgium]; *Arbitrators* DONAT PHARAND [Canada], JEAN-PIERRE QUÉNEUDEC [France]), 19 *RIAA*, 22; 82 *ILR* 591 (1990) [English translation].

Fur-Seals case *Bering Sea Fur-Seals case* (UK/USA, 15 August 1893), MOORE, 1 *History and Digest* 755. The Tribunal was composed of seven members: *President* ALPHONSE DE COURCEL [France]; *Arbitrators* JOHN M. HARLAN [USA], JOHN T. MORGAN [USA], LORD HANNEN [UK], JOHN THOMPSON [UK], EMILIO VISCONTI VENOSTA [Italy], GREGERS GRAM [Sweden and Norway]).

Island of Palmas case (Netherlands/USA, 4 April 1928) [PCA], 2 *RIAA* 829.

Lake Lanoux case *Affaire du Lac Lanoux* (France v. Spain, 16 November 1957), 12 *RIAA* 285; 24 *ILR* 101 (1957).

MOX Plant case (Ireland v. UK) [Arbitral Tribunal under the UNCLOS] (*President*: THOMAS A. MENSAH; *Members*: JAMES CRAWFORD, L. YVES FORTIER, GERHARD HAFNER, ARTHUR WATTS). For this case and its pleadings, see <http://www.pca-cpa.org>

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OSPAR Convention case (Ireland v. UK, 2 July 2003) [Arbitral Tribunal under the OSPAR Convention] (Chairman: W. MICHAEL REISMAN; Members: GAVAN GRIFFITH and LORD MUSTILL). For this case and its pleadings, see <http://www.pca-cpa.org>.

Southern Bluefin Tuna case (New Zealand v. Japan; Australia v. Japan) [Jurisdiction] (4 August 2000) [Arbitral Tribunal under the UNCLOS] (see <http://www.pict-pcti.org/news/archvie>), composed of 5 members: *President* SCHWEBEL [USA]; *Arbitrators* FELICIANO [Philippines], KEITH [UK], TRESSELT [Norway], YAMADA [Japan].

Trail Smelter case (USA/Canada, 16 April 1938 and 11 March 1941), 3 *RIAA* 1907.

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3. ICJ (see <http://www.icj-cij.org>)

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Swordfish case Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (ITLOS Special Chamber, Chile/EC, to be composed of 5 members: President CHANDRASEKHARA RAO; Judges CAMINOS, YANKOV, WOLFRUM [FRG], Judge ad hoc OREGGO VICUÑA [Chile]). See Order of 20 December 2000 concerning constitution of chamber, available at http://www.un.org/Depts/los/itlos_new/itlosindex.

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Croatian Review case Judgement in the request of the Republic of Croatia for Review of the decision of Trial Chamber II of 18 July 1997 (29 October 1997).

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6. ICTR (see <http://www.icttr.org>)

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7. GATT Panels (see <http://gatt.stanford.edu/bin/browse/docs>)

Canada – Herring and Salmon Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, complained by USA. *Panel Report* (L/6268-35S/98), circulated on 20 November 1987 and adopted on 22 March 1988.

Tuna/Dolphin I US –Restrictions on Imports of Tuna, complained by Mexico, and intervened by Australia, EC, Indonesia, Japan, Korea, Philippines, Senegal, Thailand, Venezuela, Canada and Norway. *Panel report* (DS21/R-39S/155), circulated on 3 September 1991, not adopted due to the US opposition.

Tuna/Dolphin II US –Restrictions on Imports of Tuna, complained by EEC and Netherlands (on behalf of the Netherlands Antilles), and intervened by Australia, Canada, Japan, New Zealand, Thailand and Venezuela. *Panel report* (DS29/R), circulated on 16 June 1994, not adopted due to the US opposition.

US–Petroleum Taxes US–Taxes on Petroleum and Certain Imported Substances (L/6175-34S/136), complained by Canada, EEC and Mexico, and intervened by Australia, Indonesia, Kuwait, Malaysia, Nigeria and Norway. *Panel Report*, circulated on 5 June 1987 and adopted on 17 June 1987.

8. WTO Panels and AB (see <http://www.wto.org>)

Australia – Salmon Australia – Measures Affecting Importation of Salmon, complained by Canada, and intervened by EC, India, Norway and USA. *Panel Report* (WT/DS18/R), circulated on 12 June 1998, *AB Report* (WT/DS18/AB/R), circulated on 20 October 1998, both adopted on 6 November 1998. Arbitration under Article 21.3 (c) of the DSU allowed eight months for implementing *Panel* and *AB Reports*.

Arbitration Report (WT/DS18/9), circulated on 23 February 1999. *Panel Report on Compliance* in response to Canada's recourse to Article 21.5 of the DSU (WT/DS18/RW), circulated on 18 February 2000 and adopted on 20 March 2000 (no appeal made).

EC – Asbestos EC – Measures Affecting Asbestos and Asbestos-Containing Products, complained by Canada, and intervened by Brazil, USA and Zimbabwe. *Panel Report (WT/DS135/R)*, circulated on 18 September 2000, *AB Report (WT/DS135/AB/R)*, circulated on 12 March 2001, both adopted on 5 April 2001.

EC – Bananas EC – Regime for the Importation, Sale and Distribution of Bananas, *Panel Report (WT/DS27/R)*, circulated on 22 May 1997, *AB Report (WT/DS27/AB/R)*, circulated on 9 September 1997, both adopted on 25 September 1997.

EC – Hormones EC – Measures Concerning Meat and Meat Products (Hormones), complained by USA and Canada, and intervened by Australia, New Zealand and Norway. *Panel Reports* for USA (WT/DS26/R/USA) and for Canada (WT/DS46/R/Canada), circulated on 18 August 1997. *AB Report* co-handling these two claims (WT/DS26/AB/R; WT/DS48/AB/R), circulated on 16 January 1998 and adopted together with the *Panel Reports* on 13 February 1998. For implementing *Panel* and *AB Reports*, a 15 month period was allowed by arbitration under Article 21.3 (C) of the DSU (WT/DS26/15; WT/DS48/13, circulated on 29 May 1998, para. 48). EC's non-implementation within that period was complained, and the levels of nullification or impairment suffered by USA and Canada were determined to be US\$ 116.8 million per year (WT/DS26/ARB, circulated on 12 July 1999, para. 83) and CDN\$11.3 million per year (WT/DS48/ARB, circulated on 12 July 1999, para. 72), respectively.

EC – Poultry EC – Measures Affecting the Importation of Certain Poultry Products, complained by Brazil, *Panel Report (WT/DS69/R)*, circulated on 12 March 1998, *AB Report (WT/DS69/AB/R)*, circulated on 13 July 1998, both adopted on 23 July 1998.

Guatemala – Cement Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico, *AB Report (WT/DS60/AB/R)*, circulated on 2 November 1998 and adopted on 25 November 1998.

Japan – Agricultural Products *Japan – Measures Affecting Agricultural Products*, complained by USA, and intervened by Brazil, EC and Hungary. *Panel Report* (WT/DS76/R), circulated on 27 October 1998, *AB Report* (WT/DS76/AB/R), circulated on 22 February 1999, both adopted on 19 March 1999.

Japan – Apples *Japan – Measures Affecting the Importation of Apples*, complained by USA, and intervened by Australia, Brazil, EC, New Zealand and Taiwan. *Panel Report* (WT/DS245/R), circulated on 15 July 2003, *AB Report* (WT/DS245/AB/R), circulated on 26 November 2003, both adopted on 10 December 2003.

Korea – Beef *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, complained by USA and Australia, *Panel Report* (WT/DS161/R; WT/DS169/R), circulated on 31 July 2000, *AB Report* (WT/DS161/AB/R, WT/DS169/AB/R), circulated on 11 December 2000, both adopted on 10 January 2001.

Korea – Procurement *Korea – Measures Affecting Government Procurement*, complained by USA, *Panel Report* (WT/DS163/R), circulated on 1 May 2000 and adopted without appeal on 19 June 2000.

Turkey – Textile *Turkey – Restrictions on Imports of Textile and Clothing Products*, complained by India, and intervened by EC, Hong Kong, Japan, Philippines, Thailand and USA. *AB Report* (WT/DS34/AB/R) circulated on 22 October 1999 and adopted on 19 November 1999.

US – Gasoline *US – Standards for Reformulated and Conventional Gasoline*, complained by Venezuela and Brazil, and intervened by EC and Norway. *Panel Report* (WT/DS2/R), circulated on 29 January 1996, *AB Report* (WT/DS2/AB/R), circulated on 29 April 1996, both adopted on 20 May 1996.

US – Hot-Rolled Steel *US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, complained by Japan, and intervened by Brazil, Canada, Chile, EC and Korea. *AB Report* (WT/DS184/AB/R) circulated on 24 July 2001 and adopted on 23 August 2001.

US – Lead and Bismuth II *US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, complained by EC and intervened by Brazil and Mexico, *AB Report* (WT/DS138/AB/R),

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US – Shrimp *US – Import Prohibition of Certain Shrimp and Shrimp Products*, complained by India, Pakistan Thailand and Malaysia, and intervened by Australia, Ecuador, El Salvador, EC, Guatemala, Hong Kong(China), Japan, Nigeria, Philippines, Singapore and Venezuela. *Panel Report* (WT/DS58/R), circulated on 15 May 1998, *AB Report* (WT/DS58/AB/R), circulated on 12 October 1998, both adopted on 6 November 1998. *Panel Report on Malaysia’s recourse to Article 21.5 of the DSU [Panel Report on Compliance]* (WT/DS58/RW), circulated on 15 June 2001, its *AB Report [AB Report on Compliance]* (WT/DS58/AB/RW), circulated on 22 October 2001, both adopted on 21 November 2001.

9. ECJ (see <http://curia.eu.int/en/content/juris/index.htm>)

9.1. ECJ Contentious Cases

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1. Introduction

1.1. The Significance of the Subject

It has been observed that international law has three particular problems which undermine its *effectiveness* (i.e. the degree of realization of what ought to be, which is determined by international law):¹ namely, 1) *ambiguity of rules*;² 2) a widespread perception of recurrent *non-compliance*;³ and 3) *absence or defects of rules*.⁴ These problems are largely attributable to the fact that the present international society has neither a centralized legislative body nor sufficient law enforcement mechanisms.⁵ Therefore, many international lawyers have emphasized the necessity of *standard setting*⁶, *compliance control*⁷ and the *development*⁸ of international law.

In the field of international environmental law⁹, these problems are particularly

¹ VAN DIJK, 'Normative Force', at 9.

² BRIERLY, *Law of Nations* 75-76: 'It is a natural consequence of the absence of authoritative law-declaring machinery that many of the principles of international law, and even more the detailed application of accepted principles, are uncertain.'

³ See generally CHAYES & CHAYES, 'On Compliance', at 177. For example, MACHIAVELLI, *Prince* 99-100: 'a prudent ruler cannot, and should not, honour his word when it places him at a disadvantage and when the reasons for which he made his promise no longer exist.' See also BRIERLY, *Law of Nations* 71-72, where he himself, however, states that '[v]iolation of law are rare in all customary systems, and they are so in international law.'

⁴ See LAUTERPACHT, *Development* 6-7.

⁵ See BRIERLY, *Law of Nations* 73; MALANCZUK, *Akehurst's* 6-7.

⁶ See for example, LAUTERPACHT, *Development* 227: 'In the absence of adequate standards —as distinguished from rules— of interpretation, treaties concluded by Governments may become political instruments safeguarding their freedom of action instead of being a source of legal obligations.'

⁷ See generally, HENKIN, *How Nations Behave*; FISHER, *Improving Compliance with International Law*; BUTLER, *Control over Compliance*; CHAYES & CHAYES, *New Sovereignty*; CAMERON, *et al.*, *Improving Compliance with International Environmental Law*; BULTERMAN & KUIJER, *Compliance with Judgments*; SHELTON, *Commitment and Compliance*.

⁸ See LAUTERPACHT, *Development* 7.

⁹ 'International environmental law' is used as signifying a branch of international law whose main purpose is to protect the environment. See SANDS, *Principles* 15; BIRNIE and BOYLE, *Environment* 1; KISS & SHELTON, *International Environmental Law* 1. As

pronounced for the following three reasons. First, although global environmental issues are relative newcomers to the international law stage,¹⁰ awareness and concern is now growing at a tremendous pace,¹¹ creating an increasing need for the development of laws aimed at environmental protection. Secondly, environmental issues are often accompanied by scientific uncertainty,¹² rapidly changing situations¹³ and non-compliance attributable to the incapability of States¹⁴: therefore, special considerations for compliance control become necessary.¹⁵ And finally, both customary international law and treaties (which are sometimes linguistically indeterminate due to time constraints during the negotiation phase)¹⁶ contain ambiguous rules which are likely to engender non-compliance¹⁷ and which therefore demand clear standards¹⁸ for their practical application.¹⁹

paragraph 1 of the Preamble of the Stockholm Declaration on Human Environment suggests, the protection of not only *natural* environment but also *man-made* environment is implied by 'international environmental law', though the former has in fact more weight than the latter.

¹⁰ According to SANDS, the origin of international environmental law can be traced back to bilateral fisheries conventions concluded in the mid-19th century. SANDS, *Principles* 25-26. However, the UN Charter has no environmental provision, and the UNEP was created in 1972, just after the first world environmental conference at Stockholm.

¹¹ Since 1970, a large number of global environmental treaties have been concluded. See Asser Institut, *Documents*.

¹² See MITCHELL, 'Compliance Theory', at 13; SANDS, *Principles* 5-8; BIRNIE & BOYLE, *Environment* 179.

¹³ See SAND, 'Institution-Building', at 786.

¹⁴ See CHAYES & CHAYES, *New Sovereignty* 13-15; MITCHELL, 'Compliance Theory', at 12-13.

¹⁵ The following three factors make compliance control a matter of special concern of international environmental law: 1) the regulations' technical, detailed and complex nature; 2) the demand for ensuring economic equality; 3) the need of frequent normative change. HANDL, 'Compliance Control', at 30-32.

¹⁶ Time limits impacted on the 1992 UNFCCC and Biodiversity Convention negotiations. See SANDS, *Principles* 129.

¹⁷ See MITCHELL, 'Compliance Theory', at 19.

¹⁸ See CONTINI & SAND, 'Ecostandards', at 38; SAND, *Transnational Environmental Law* 11-33, 255-260.

¹⁹ WINTER, 'Standard-setting', at 109: 'Environmental law which has not been put into operation by means of standards rarely "works" in practice, but will often remain exhortative.'

One method for tackling these problems is to have recourse to international dispute settlement procedures.²⁰ Traditionally, those procedures have been divided into *diplomatic means* (i.e. negotiation, inquiry, good office, mediation and conciliation) and *legal [judicial] means* (i.e. arbitration and judicial settlement [adjudication])²¹. While neither of these categories is inherently superior, legal means have sometimes been regarded as more apposite because of their findings' objective and binding nature.²² It might therefore be argued that standard setting, compliance control and law development could be and should be carried out by international arbitral and judicial procedures.²³ For example, LAUTERPACHT remarks that 'debarred from directly acting as an important instrument of peace, the Court [the PCIJ and ICJ] has made a tangible contribution to the development and clarification of the rules and principles of international law.'²⁴ Similarly, there exist provisions obliging international courts and tribunals to control compliance with their provisional measures (e.g. the International Tribunal for the Law of the Sea (ITLOS))²⁵ and with their judgments (e.g. the Inter-American Court of Human Rights (InterAmCtHR)).²⁶

However, not only are States and judges reluctant to ascertain States' rights and obligations in the field of international environmental law,²⁷ but moreover, the *legal means* themselves have been criticized for being of little value in dispute settlement in this field.²⁸ In addition, particularly in the case of compliance control, some authors consider *legal means* as inadequate because of their *non-consensual, confrontational,*

²⁰ See LAUTERPACHT, *Development* 6-7; BRIERLY, *Law of Nations* 76.

²¹ See MERRILLS, *Settlement* ix. See also MALANCZUK, *Akehurst's* 273, where AKEHURST himself classifies 'dispute settlement procedures among the member States of international organizations' into a different category, however.

²² See TABATA, 2 *Shinko* 69

²³ For standard setting and law development, see LAUTERPACHT, *Development*. For compliance control, see DUPUY, 'International Control', at 309-312.

²⁴ LAUTERPACHT, *Development* 5.

²⁵ See Article 95 of the ITLOS Rules (see Appendix 2.3.).

²⁶ See Article 65 of the Am.Conv.H.R. (see Appendix 5.1.)

²⁷ See BILDER, 'Settlement', at 155; BIRNIE & BOYLE, *Environment* 178-179.

²⁸ See OKOWA, 'Settlement', at 158-161.

punitive and *authoritative* nature.²⁹ Indeed, this recognition has contributed towards the emergence of new types of compliance control mechanisms which are characteristically *consensual, non-confrontational, non-punitive* and *facilitative*, as in the case of the Montreal Protocol Non-Compliance Procedure (Montreal NCP).³⁰

Nonetheless, there are a number of international arbitral and judicial decisions which refer to rules of international environmental law, and therefore contribute to its development.³¹ Moreover, with regard to standard setting and compliance control, the 1941 *Trail Smelter* final award, for example, succeeded in setting environmental standards, accompanied by a régime for controlling their compliance, in order to facilitate the practical application of the obligation not to cause transfrontier pollution harm.³² Furthermore, international quasi-judicial procedures (to be defined below) have dealt with many cases involving environmental issues,³³ necessitating the study of those procedures.

Based on the above observations, this thesis seeks to explore the possibilities and limits of international arbitral, judicial and quasi-judicial procedures as vehicles for standard setting, compliance control and law development in the area of international environmental law. This approach is unique in the following four respects. First, it synthesizes three different functions, i.e. *standard setting, compliance control* and *law development* into one, in the light of the close relationship among them. Secondly, it analyzes not only international *arbitral* and *judicial* procedures but also international *quasi-judicial* procedures, in view of the latter's importance to those three functions.

²⁹ OKOWA, *id.*, at 158; BIRNIE & BOYLE, *Environment* 179-180, 220-230; GEHRING, 'Regimes', at 51; SANDS, 'Litigation', at 1637-1640. Legal means' delayed responses and bilateral character are also regarded as unsuitable for environmental issues. OKOWA, 'Settlement', at 158-160; BOTHE, 'Evaluation', at 32-33. According to CHAYES & CHAYES, these disadvantages of legal means hold true of international law in general, and are not limited to the environmental field. See CHAYES & CHAYES, *New Sovereignty* 24, 205; DUPUY, 'International Control', at 311-312.

³⁰ See 4.2. of this thesis.

³¹ SANDS, 'ICJ and ECJ', at 234-235; ROBB, 1-3 *IELR*.

³² (USA/Canada), see 3 *RIAA* 1966-1980.

³³ See for example, 2 *IELR*; BOYLE & ANDERSON, *Human Rights Approaches*.

This gives an overall perspective of the contribution, to the effective functioning of international environmental law, of the ‘international judiciary’, i.e. the entity equipped with procedures of an *adjudicative* nature. Thirdly, it focuses on the practice of procedures in order to understand the real nature and impacts of those procedures. And lastly, it assesses the interdependence of the various procedures now operating, with a view to finding coordination among them, which could lead to promotion of the above three functions.

It should be pointed out that, as far as international *arbitral* and *judicial* procedures are concerned, a similar attempt has already been made by ROMANO.³⁴ Based on his thorough study of the practice of arbitration and judicial settlement for ‘international environmental disputes’, i.e. ‘[a] conflict of views or of interest between two or more States, taking the form of specific opposing claims and relating to an anthropogenic alteration of an ecosystem, having detrimental effect on human society and leading to environmental scarcity of natural resources’³⁵, he concludes that *arbitration* is more effective than *judicial settlement* in the sense that States are more inclined to submit to the former than to the latter.³⁶ This conclusion seems intuitive because, in *arbitration*, the Parties are in principle free to decide whether or not to refer a particular dispute to it. Thus *arbitration* usually implies that the Parties are willing to settle a particular dispute through that particular procedure.³⁷

However, there is a category of *compulsory arbitration*, to which *unilateral application* is possible: here the consent of all Parties to settling a particular dispute through that particular procedure cannot necessarily be assumed. An illustration of compulsory arbitration is contained in the UN Convention on the Law of the Sea (UNCLOS)³⁸ and exemplified in the 2000 *Southern Bluefin Tuna* case³⁹. Moreover, it

³⁴ ROMANO, *Peaceful Settlement*.

³⁵ *Id.*, at 29.

³⁶ *Id.*, at xi (LUCIUS CAFLISCH’s ‘Foreword’), at 324-329.

³⁷ See *id.*, at 324-328. The other advantage of arbitration is, according to him, its capability for considering long and deep scientific study. See *id.*, at 328-331.

³⁸ See Article 287(3) and (5) as well as Annex VII of the UNCLOS.

³⁹ [Jurisdiction] (*New Zealand v. Japan; Australia v. Japan*), available at

is possible that the Parties refer by agreement (*compromis*) a particular dispute to *judicial settlement*, as seen in the currently docketed ITLOS *Swordfish* case⁴⁰. Therefore, it is questionable whether ROMANO's conclusion also applies to *arbitration by unilateral application* and *judicial settlement by compromis*.

In order to assess the effectiveness of dispute settlement bodies in the field of the environment, it is arguably necessary to evaluate not only the degree of achieving dispute settlement but also the degree of achieving environmental protection. ROMANO himself seeks to examine the practical implications of the judgments on the environment.⁴¹ Although this is a commendable and valuable effort, it needs a kind of *scientific assessment*, over which there can be significant differences of opinion even among learned scholars.⁴² Such a scientific assessment is beyond this author's capability, and so the present study will be confined to an evaluation of the significance of the practice of international arbitral, judicial and quasi-judicial procedures, and thus their *effectiveness*⁴³, from the perspectives of *standard setting*, *compliance control* and *law development*.

Bearing in mind the above, this thesis examines the practice of international arbitral, judicial and quasi-judicial procedures, taking account of not only the differences between *arbitral*, *judicial* and *quasi-judicial* characteristics, but also the differences in the degree of *amicable settlement*; the degree of the completeness of *ruling-enforcement mechanisms*; and the degree of the *law development function*

<http://www.pict-pcti.org/news/archvie>. ROMANO, too, noticed the compulsory character of this arbitration, but at the time of his writing, it had not yet been rendered. See ROMANO, *Peaceful Settlement* 325.

⁴⁰ (Chile/EC), see http://www.un.org/Depts/los/itlos_new/itlosindex.

⁴¹ See ROMANO, *Peaceful Settlement* xlv.

⁴² See for example, the pleadings of the ICJ *Gabcikovo* case.

⁴³ Certainly the *effectiveness* of a dispute settlement body can be measured, in accordance with 'the most intuitively appealing sense', by the degree to which that body 'eliminates or alleviates the problem that prompts its creation', i.e. by the degree of having achieved dispute settlement. See YOUNG & LEVY, 'Effectiveness', at 4-6. However, in this thesis, we measure such *effectiveness* by the degree to which that body 'eliminates or alleviates the problem whose solution is expected of that body', i.e. by the degree of having achieved *standard setting*, *compliance control* and *law development*.

provided by the constituent instruments. At the same time, an attention will also be paid to the difference between *actors*, i.e. *States* (and *inter-State organisations*) or *individuals*, to the different *way of application*, i.e. *voluntary, unilateral, by compromis* or by *secretariat submission*, and to the different *nature of rights and obligations* concerned, i.e. *reciprocal* or *erga omnes*.

1.2. Methodology and Structure

This thesis includes *six chapters*, namely, **‘Introduction’ (Chapter 1)**, **‘Preparatory Considerations’ (Chapter 2)**, **‘Standard Setting’ (Chapter 3)**, **‘Compliance Control’ (Chapter 4)**, **‘Law Development’ (Chapter 5)**, and **‘Synthesis of the Analysis’ (Chapter 6)**. Although *standard setting, compliance control* and *law development* are separately dealt with in each chapter, this is merely for the purpose of emphasizing the subject matter. Thus, for example, *standard setting* and *law development* are, to some extent, also referred to in the section of *compliance control*.

‘Preparatory Considerations’ (Chapter 2) looks at necessity and permissibility in relation to functions which were not within the original contemplation of the procedure, as is the case in standard setting, compliance control and law development. The chapter then provides some conceptual clarifications and concludes with angles of the analysis.

‘Standard Setting’ (Chapter 3) has three objectives. First, it offers an example, in *inter-State* relations, of environmental standard setting for the conservation of marine living resources. Secondly, it seeks to demonstrate the feasibility of setting, in *inter-State* relations, environmental standards as *lex specialis* between the Parties. Here we refer to the ICJ maritime delimitation cases, since environmental standard setting between the Parties and maritime delimitation between them are in common in the sense that the subject matter is what the Parties can freely decide it to be insofar as their decisions violate neither international law nor third Parties’ interests, and that therefore ‘conciliatory law-making’ is needed. Finally, we will examine the use of environmental standard setting in *State-individual* relations for the purpose of protecting

human rights against environmental destruction.

‘Compliance Control’ (Chapter 4) examines the Montreal NCP, the ECJ, and the GATT/WTO judiciary. The Montreal NCP, a prototype of the *procedurally* ‘soft’ control, elucidates the essential characteristics of this type of control. The ECJ, exercising not only the *procedurally* ‘hard’ control but also, in certain fields, the *substantively* ‘hard’ control, clarifies the conditions which enable the *procedurally* and *substantively* ‘hard’ control. Here the analysis is confined to the fields of nature conservation and hazardous waste management, in which fields the ECJ’s *substantively* ‘hard’ control is typically manifested. The GATT/WTO judiciary, representing a transition from the ‘soft’ control to ‘hard’ control not only in the *procedural* aspect but also in the *substantive* aspect, demonstrates the proper way to enhance the *substantive* control. In this context, the followings should be noted.

First, we will look at the control process from FISHER’s perspective of *first/second-order compliance*, setting aside MITCHELL’s model comprised of a ‘primary rule system’, a ‘compliance information system’ and a ‘non-compliance response system’.

Second, because of insufficient information, knowledge and skills for evaluating the degree of compliance, in this study only the following *formal reactions* are heeded: 1) whether the Parties clearly reject or are negligent in implementing rules of international law or the rulings; 2) whether there is an explicit complaint by the Parties or by the treaty-implementing bodies against other Parties’ non-compliance with such rules or rulings; and 3) whether there is a formal withdrawal of the complaint by the Parties or by the treaty-implementing bodies.⁴⁴ The first situation would show real failure of compliance control by those procedures, the second situation would pose a question about its effectiveness, and the third situation would indicate a *prima facie* return to compliance.

‘Law Development’ (Chapter 5) focuses on two rules well established under customary international law, namely, the obligation not to cause transfrontier pollution

⁴⁴ For a more thorough approach, see CHURCHILL & YOUNG, ‘UK Experience’.

harm (the *no pollution harm* rule) and the principle of equitable utilization of international watercourses (the *equitable utilization* principle).

‘**Synthesis of the Analysis**’ (Chapter 6) seeks to describe the difference of impacts upon standard setting, compliance control and law development, mainly from the perspectives of inter-State relations v. State-individual relations, on the one hand, and of ‘soft’ control v. ‘hard’ control, on the other. It also looks at other factors which contribute to these differences, and explores ways in which desirable impacts might be enhanced. An attempt will be made to ascribe the cause of different impacts to the different characteristics of each procedure, while taking into consideration the peculiarity of each case and of each environmental field. In analyzing compliance control, this study will use and verify MITCHELL’s model, and will make some observations about DUPUY’s concepts of ‘adjudicative control’ and ‘non-adjudicative control’. The chapter concludes with an evaluation of the achievements of this research and an indication of those problems which remain to be studied in the future.

1.3. Main Propositions

In conclusion, we propose that MITCHELL’s compliance model (consisting of a ‘primary rule system’, a ‘compliance information system’ and a ‘non-compliance response system’) holds true of ‘judicial control’ integrating standard setting and law development, and that the great advantage of ‘judicial control’ as opposed to ‘non-judicial control’ is, as DUPUY points out, that its permeability is not confined to a specific treaty-régime to which the judiciary is attached. We argue that international judiciaries, by making great use of the said advantage of ‘judicial control’ —which results in controlling States’ compliance with outer-régime law, and clarifying a certain norm’s meaning for all States in the international society— could strengthen the rule of law in the international society, if due regard is paid to their *judicial independence* and *impartiality*, and if institutional arrangements among them are adequately made in order to realize harmonized interaction of inner-régime law and outer-régime law.

2. Preparatory Considerations

2.1. Necessity and Permissibility of Functions Not Within the Original Contemplation of the Procedure

When a dispute settlement procedure carries out standard setting, compliance control and law development, it simultaneously contributes to the realization of its main purpose, i.e. the pacific settlement of disputes. This is because there is a clearly discernible close *short-term relationship* between dispute settlement, on the one hand, and standard setting, compliance control and law development, on the other. This proximate relationship is due to the fact that: 1) a dispute is often caused by ambiguity of rules, by doubts as to compliance, or by absence or defects of rules; and 2) the process or result of dispute settlement can contribute to standard setting, compliance control and law development. In addition, there is also a close *long-term relationship* between dispute settlement and law development, as observed by LAUTERPACHT:

The development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction. It is because Governments have often manifested an inclination to make the scope of obligatory jurisdiction conferred upon international tribunals dependent upon the existence of clear rules of international law.⁴⁵

As he remarks, it is not uncommon that '[i]nstitutions set up for the achievement of definite purposes grow to fulfil tasks not wholly identical with those which were in the minds of their authors at the time of their creation.' According to him, '[i]n sociology this phenomenon is at times described as "a heterogeny of aims"'.⁴⁶

Therefore, it can easily be understood that a procedure originally aimed at settling

⁴⁵ LAUTERPACHT, *Development* 6-7.

⁴⁶ *Id.*, at 5.

disputes may be used to carry out standard setting, compliance control and law development in order to address the shortcomings of the international society which has neither a centralized legislative body for standard setting and law development, nor sufficient law enforcement mechanisms for compliance control. Likewise, a procedure originally aimed at controlling compliance might be required to set standards and develop law in response to the demand for legalizing the decision-making process, as suggested by the practice of the Montreal NCP.⁴⁷ Moreover, a dispute settlement procedure might be utilized to set environmental standards between the Parties, at the request of either or both Parties or on its own initiative for the final settlement of the dispute,⁴⁸ since setting environmental standards between the Parties may require its ‘conciliatory law-making’ (i.e. ‘law-making equitably adjusting the Parties’ interests’) function. This is because the subject matter is, just as in boundary delimitation, what the Parties can freely decide it to be, insofar as their decisions violate neither international law nor third Parties’ interests.⁴⁹

As far as international *arbitral* and *quasi-judicial* procedures are concerned, there seems little reason to object to a procedure’s exercising functions such as compliance control and law development, even if they are not originally intended for that procedure. This is because an international *arbitral* procedure, which tended to be regarded as *amiable compositeur*,⁵⁰ can be empowered by agreement of the Parties to exercise the functions which the Parties choose it to have, and because an international *quasi-judicial* procedure, as one of the international organizations, ‘must be deemed to have those powers which . . . are conferred upon it by necessary implication as being essential to the performance of its duties.’⁵¹

However, as far as international *judicial* procedures are concerned, it is

⁴⁷ See 4.2. of this thesis.

⁴⁸ See 3.3. of this thesis.

⁴⁹ The ICJ states in the 1974 *Fisheries Jurisdiction* cases that ‘[t]he most appropriate method for the solution of the dispute is clearly that of negotiation’. 1974 *ICJ Reports* 31, para. 73.

⁵⁰ See TABATA, 2 *Shinko* 145.

⁵¹ *Reparation case*, 1949 *ICJ Reports* 182.

questionable whether functions not originally intended for them are permissible, since their main purpose is the pacific settlement of disputes through law.⁵² For example, the ICJ in the 1966 *South West Africa* cases states: ‘the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it’⁵³.

In this context a similar concern was raised when it was discussed whether the PCIJ, the predecessor of the ICJ, should be given advisory jurisdiction in addition to contentious jurisdiction. It is true that Article 14⁵⁴ of the Covenant of the League of Nations foresaw the PCIJ’s advisory jurisdiction. However, the draft Article 36 concerning advisory opinions was deleted at the adoption of the original 1920 PCIJ Statute. Although Articles 71-74 of the PCIJ Rules of 1922, 1926 and 1931 prescribed their procedural provisions,⁵⁵ it was in 1929 that the provisions for advisory opinions were inserted into the amended PCIJ Statute.⁵⁶ The main reason against introducing such provisions for advisory opinions was the concern that giving non-binding opinions might be incompatible with the PCIJ’s judicial character, as stated by MOORE, a PCIJ judge at the time of the 1922 Rules’ drafting.⁵⁷ In the light of this concern, the 1922 PCIJ Rules sought to secure the PCIJ’s judicial character by making the advisory opinion procedures similar to the contentious procedures as far as possible.⁵⁸

In line with the PCIJ, the ICJ’s judicial character is also emphasized in Article 92 of the UN Charter and Article 1 of the ICJ Statutes, both of which provide that the ICJ is the principal *judicial* organ of the UN.

Therefore although it was problematic to give an advisory function to a judicial body, whose function it is to end disputes by deciding them, the advisory function was eventually allowed to the PCIJ and ICJ, mainly because it was regarded as essential for

⁵² LAUTERPACHT, *Development* 3; HUDSON, *International Tribunals* 248-249 (in part): ‘If it [a permanent international court] were overloaded with functions not related to adjudication, its prestige might soon be dissipated.’

⁵³ *1966 ICJ Reports* 48, para. 89.

⁵⁴ See Appendix 1.1.

⁵⁵ HUDSON, *PCIJ* 484. For the 1922 PCIJ Rules, see 16 *AJIL Supp.* 173 (1922).

⁵⁶ HUDSON, ‘Eight Year’, at 44.

⁵⁷ See Appendix 1.4.

⁵⁸ SUGIHARA, *Kokusai Shiho* 399; HUDSON, ‘Advisory Opinions’, at 992.

the effective functioning of international organizations.⁵⁹ Thus the PCIJ and ICJ more or less had to respond to the expectation that they should act as legal advisers for the international organizations closely linked to them. Here we can see the international need for cooperation, called upon by the systematisation of the international society, between administrative and judicial organizations, just as cooperation between executive and judicial branches is required domestically.⁶⁰ This systematization of the international society would also necessitate a judicial body's *legislative function* for *standard setting* and *law development*, on the one hand, and its *supervisory function* for *compliance control*, on the other. This is because, while these two functions should essentially be attributed to legislative and/or administrative bodies, such bodies are not well arranged in the international society.

Where then is the limit to such extension of a judicial procedure's functions? This question will be explored in detail in relation to standard setting, compliance control and law development, respectively. However, as a general principle, the answer seems to lie in the adequacy of procedural guarantees, and the willingness of the judges to maintain that procedure's judicial character in exercising those extended functions, as suggested by the history of the creation of advisory opinion procedures of the PCIJ.

2.2. Some Conceptual Clarifications

2.2.1. Standard Setting

Although the term 'standard' can be used generally to indicate 'a criterion for measuring acceptability, quality, or accuracy'⁶¹, we are concerned here with its meaning in the context of international environmental law.

⁵⁹ Only international (inter-State) organizations can request advisory opinions of the PCIJ and ICJ. See Article 72 of the 1922 PCIJ Rules, Article 96 of the UN Charter and Article 65(1) of the ICJ Statute.

⁶⁰ See HUDSON, 'Advisory Opinions', at 975.

⁶¹ *Black's Law Dictionary* (7th ed.), at 1412-1413.

The definition of *environmental standards*, which seems most widely accepted by a variety of specialists including environmental lawyers, is the one given by the UK Royal Commission on Environmental Pollution (RCEP)⁶² in 1998:

An environmental standard is any judgment about the acceptability of environmental modifications resulting from human activities which fulfils the following two conditions:

- 1) it is formally stated after some consideration and intended to apply generally to a defined class of cases; and
- 2) because of its relationship to certain sanctions, rewards or values, it can be expected to exert an influence, direct or indirect, on activities that affect the environment.⁶³

This definition of environmental standards appears to require no modification in the context of international environmental law. It seems an appropriate and useful definition to adopt in this thesis, which explores how such law might be made effective.⁶⁴

It follows that ‘standard setting’ is to mean ‘the act of establishing standards’⁶⁵ as defined above. Certainly this act can be regarded as part of *law-making* conceived as a process of *creating* new law or *changing* the existing law,⁶⁶ both of which can also

⁶² For the RCEP, see Appendix 16.1.

⁶³ RCEP, *21st Report* 3. For a similar view, see HOLDGATE, *Environmental Pollution* 143, 162: ‘Standards are statements about the levels of target exposure or pollutant concentration that are considered acceptable at particular times and under particular circumstances’; ‘Standards are codified statements about allowable performance or allowable exposure.’

⁶⁴ See WINTER, ‘Standard-setting’, at 109: ‘Standards are the working level of regulatory environmental law.’

⁶⁵ *Loc. cit.*

⁶⁶ See LAUTERPACHT, *Development* 155.

contribute to *clarifying* existing law in a broader perspective. Therefore it could be treated as an aspect of *law development*. However, this thesis looks at standard setting as an independent research subject in the light of its special importance to international environmental law. It is to be noted that standard setting concerns the creation and change of not only *lex generalis* in the international society as a whole but also of *lex specialis* between the Parties of a dispute, which requires ‘conciliatory law-making’ equitably adjusting the Parties’ interests.

Environmental standards, which can be set either *domestically* or *internationally* (i.e. *bilaterally*, *regionally* and *globally*), take diverse forms: *general* or *individual*;⁶⁷ *uniform* or *differential*;⁶⁸ *precise* or *vague*;⁶⁹ *specified* or *unspecified*;⁷⁰ and *binding* or *non-binding*.⁷¹

The advantages of environmental standards are considerable:⁷² a standard often reduces the cost of obtaining information and doing business because those who may be

⁶⁷ E.g. *general emission standards* addressed to all polluters as opposed to *individual emission standards* addressed to a particular polluter. See WINTER, ‘Standard-setting’, at 110.

⁶⁸ E.g. centrally set *uniform emission standards* as opposed to locally set *differential emission standards*. See BELL & MCGILLIVRAY, *Environmental Law* 189.

⁶⁹ E.g. *precise environmental quality standards* set by reference to a numerical value as opposed to *vague process standards* such as ‘Best Practical Means’ (BPM) and ‘Best Available Techniques’ (BAT) or *vague environmental quality standards* such as the common law test of nuisance. See *id.*, at 187. For positive and negative views on vague standards, see TUNC, ‘Standards juridiques’.

⁷⁰ E.g. *specification standards* as opposed to *performance standards*. *Specification standards* decree not what goal must be accomplished but how it must be accomplished. *Performance standards*, by contrast, allow polluters to act as they wish, so long as their emissions do not exceed specified limits for particular pollutants. KRIER, ‘Pollution Problem’, at 463-464.

⁷¹ RCEP used the term ‘standards’ to include standards which are not mandatory but contained in guidelines, codes of practice or sets of criteria for deciding individual cases as well as standards not set by governments which carry authority for other reasons, especially the scientific eminence or market power of those who set them. RCEP, *21st Report* 3. Non-binding standards are sometimes called ‘goals’ or ‘objectives’. See HOLDGATE, *Environmental Pollution* 144.

⁷² Environmental standards also have some disadvantages, however: 1) a single figure cannot adequately reflect the complexities of actual situations; 2) any concentration below that specified might be taken as ‘safe’; 3) following a general standard may not achieve what would be the optimal solutions in individual cases. RCEP, *21st Report* 5.

affected by a decision on an environmental matter have a right to know in advance what criteria will be applied; it can determine the point at which a sanction may be applied against someone damaging the environment; it also provides a benchmark for performance; it may provide a basis for assessing the adequacy of policies and regulatory systems; and where it relates to a specified future date, it serves as an important guide for investment plans.⁷³ In short, environmental standards can make environmental law really work⁷⁴ by giving all Parties concerned adequate criteria on which to base their decisions. The significance of environmental standard setting, which is typically *direct regulation*, cannot be diminished despite the emergence of other new *non-regulatory approaches* such as the use of economic instruments and self-regulation.⁷⁵

Environmental standard setting necessitates a substantial amount of *scientific knowledge* and *policy considerations*.⁷⁶ Although it is part of law-making, its task is often delegated, in some countries such as the UK and Germany, by the legislative branch to the administrative branch because of its very technical nature. In those countries, the judicial branch has tended not to intervene in administrative decisions on standard setting or its application, on account of a judicial reluctance to intervene in the exercise of administrative discretion.⁷⁷ However, even in the UK there are some cases in which administrative decisions have been judicially reviewed, and standards have been set for decision makers, especially in relation to human rights.⁷⁸ Moreover,

⁷³ *Loc. cit.*

⁷⁴ See WINTER, 'Standard-setting', at 109.

⁷⁵ RCEP, *21st Report* 126.

⁷⁶ See *id.*, at 28, 122-123. See generally BARNETT & O'HAGAN, *Environmental Standards*.

⁷⁷ For the UK, see BELL & MCGILLIVRAY, *Environmental Law* 194-195; for Germany, see WINTER, 'Standard-setting', at 127.

⁷⁸ See MCELDOWNEY & MCELDOWNEY, *Environmental Law & Regulation* 103-110. In a case concerning the legality of the Foreign Secretary's decision to approve aid and trade provision for the construction of a dam and hydro-electric power station in Malaysia, the High Court of Justice stated: 'The Secretary of State is . . . fully entitled when making decisions to take into account political and economic considerations such as the promotion of regional stability, good government, human rights and British commercial interests. . . . But . . . I am of the view . . . that there was, in July 1991, no

certain environmental standards derived from private law doctrines such as *nuisance*, *trespass* and *negligence* have been set, in the UK, through judicial decisions.⁷⁹ In the international society, where equal sovereign States co-exist, private law analogy is substantially valid.⁸⁰ It is not unreasonable therefore to envisage a process of standard setting by the judiciary in the international society, where neither a centralized legislative body nor sufficient administrative organizations exist, particularly in the environmental field.⁸¹ In fact, the 1941 *Trail Smelter* final award can be regarded as an example which set, on the one hand, a *vague environmental quality standard* prohibiting *serious* harm, and on the other hand, a *vague process standard* requiring *due diligence*, while, based on the Parties' agreement to a decision *ex aequo et bono*, setting *precise emission standards* and *precise process standards*.⁸²

Nevertheless, law-making by the international judiciary is even in the international society regarded as an exception and not a rule. The *raison d'être* of judiciary lies in *applying the law in force*, not in creating the law.⁸³ Moreover, the jurisdiction of the international judiciary and the execution of its decisions depend on the willingness of States, which do not want to be subject to laws created without their involvement.⁸⁴

such purpose [a developmental promotion purpose] within the section [section 1 of the Overseas Development and Co-operation Act 1980]. It follows that the July 1991 decision was, in my judgment, unlawful.' *R. v. State for Foreign Affairs, ex parte World Development Movement Ltd*, 1995/1 All ELR 627. For the judicial review of the procedural requirements of administrative decisions on night flights at Heathrow Airport, see *R. v. Secretary of State for Transport, ex parte Richmond-upon-Thames London Borough Council and Others*, 1994/1 WLR 88-91; 1995/3 ELR 405-406; 1996/1 WLR 1478-1481. See also the 2001 ECtHR *Hatton and Others v. UK*, paras. 94-107, 113-116.

⁷⁹ See BELL & MCGILLIVRAY, *Environmental Law* 257-289. For a classical example of the *strict liability standard* in place of the *due diligence standard* for hazardous activities, see *Rylands v. Fletcher*, 1968/3 *The Law Reports (the House of Lords)* 330.

⁸⁰ See generally LAUTERPACHT, *Private Law Sources*.

⁸¹ Some authors have already emphasised the importance of environmental standard setting by international organizations. See CONTINI and SAND, 'Ecostandards', at 37; Sand, *Transnational Environmental Law* 255-260.

⁸² 3 RIAA 1965-1980. See Articles 3(3) and 4 of the USA-UK *compromis* (1935) (see Appendix 12.4.).

⁸³ LAUTERPACHT, *Development* 76.

⁸⁴ *Loc. cit.*

Therefore, it is interesting to understand how the international judiciary overcomes such limits to law-making, especially in the case of *judicial settlement* where the strict application of law is statutorily required,⁸⁵ and especially in the light of the fact that environmental standards are often very technical and frequently need periodical revision.⁸⁶

2.2.2. Compliance Control

The New Oxford Dictionary of English entry on ‘compliance’ reads:

‘compliance’: the action or fact of complying with a wish or command;
‘compliance with’: the state or fact of according with or meeting rules or standards.⁸⁷

This demonstrates that ‘compliance’ can indicate either 1) the *action* of an actor that meets a particular rule or standard; or 2) the *state or fact* that a particular rule or standard is met. However, in order to clarify the causes of non-compliance and to design more effective compliance mechanisms, significant attention should be paid to the *action* of an actor. Moreover, compliance with international environmental law is now a subject of considerable interest not only to lawyers, but to those engaged in a range of disciplines, including political scientists, economists and sociologists.⁸⁸ Therefore, it is desirable to adopt a definition acceptable to all of these professionals. In this respect, MITCHELL’s definition of compliance as ‘an actor’s behaviour that

⁸⁵ See Article 38(1) of the ICJ Statute (see Appendix 1.3); Article 293(1) of the UNCLOS (as referred to by Article 23 of the ITLOS Statute) (see Appendix 2.1).

⁸⁶ CONTINI & SAND, ‘Ecostandards’, at 41: ‘The technical standards provide detailed rules and codes of practice, drafted by technicians or scientists rather than diplomats or lawyers, and periodically revised by a designated international body.’

⁸⁷ At 376.

⁸⁸ See WEISS & JACOBSON, *Engaging Countries* xiv.

conforms to a treaty's explicit rules'⁸⁹ is useful, since it has already secured consensus within an inter-disciplinary research group.⁹⁰

While this definition covers only a *treaty's* rules, it seems justifiable to extend its scope to rules of *customary international law*, 'although it would be more difficult to acquire data needed for the analysis'.⁹¹ Considering that rules of customary international law are not always explicit, the definition should refer to 'rules of international law' which can contain explicit as well as *implicit* rules of treaties and customary international law, hence:

'compliance' is 'an actor's behaviour that conforms to rules of international law'.

It is relevant here to mention the concept of 'over-compliance'. According to KEOHANE,

'over-complying' is 'doing better than the rules require'.⁹²

From a similar perspective, YOUNG & LEVY state:

[I]nstitutions that goad members to undertake measures that go beyond what is required for compliance are considered more effective than those that only elicit the minimum behavioral change required.⁹³

Therefore, it seems worth covering the concept of 'over-compliance' in our study, which could be defined, based on YOUNG & LEVY's remarks, as follows:

'over-compliance' is going beyond what is required for compliance.

⁸⁹ MITCHELL, 'Compliance Theory', at 5.

⁹⁰ WEISS & JACOBSON, *Engaging Countries*, at 39.

⁹¹ *Id.*, at 4.

⁹² ROBERT KEOHANE's remarks, *1995 ASIL Proceedings* 216.

⁹³ YOUNG & LEVY, 'Effectiveness', at 6.

Then we proceed to the concept of ‘compliance control’. Although our concern here lies in realizing compliance, we choose ‘controlling’ compliance instead of ‘ensuring’ or ‘securing’ compliance; for the latter sounds too strict whereas the former can imply the aim of containing deviance *within acceptable levels*,⁹⁴ which seems a realistic target. Such a choice also fits in with the fact that in international law the term ‘control’, though having various meanings⁹⁵, has largely been equated with ‘supervision’⁹⁶, i.e. ‘the act of managing, directing, or overseeing persons or projects’⁹⁷. From this teleological perspective, the concept of ‘compliance control’ may be understood as follows:

Compliance control is the supervisory act or process of leading the actor to compliance and, if possible, to over-compliance.⁹⁸

It is pertinent here to distinguish ‘compliance’ from the related concepts of ‘implementation’, ‘enforcement’, ‘national compliance’ and ‘effectiveness’.

As regards the distinction between compliance and implementation, ‘compliance goes beyond implementation’ and ‘[m]easuring compliance is more difficult than measuring implementation’ because ‘[i]t involves assessing the extent to which governments follow through on the steps that they have taken to implement international accords’.⁹⁹ Here ‘implementation’ is understood as ‘measures that States take to make international accords effective’¹⁰⁰, which include domestic as well as

⁹⁴ CHAYES & CHAYES, *New Sovereignty* 18.

⁹⁵ For example, five meanings of ‘contrôle’ are found in *Dictionnaire de la terminologie du droit international* 167-169.

⁹⁶ See HAHN, ‘International Controls’.

⁹⁷ *Black’s Law Dictionary* (7th ed.) 1452.

⁹⁸ For a similar view, see HANDL, ‘Compliance Control’, at 30, where he uses the term ‘compliance control’ as denoting ‘international efforts and procedures aimed at securing both implementation and compliance with treaty-based obligations’.

⁹⁹ WEISS & JACOBSON, *Engaging Countries* 4.

¹⁰⁰ *Loc. cit.*; HANDL, ‘Compliance Control’, at 30.

international measures such as reporting.¹⁰¹ Despite the difficulty, measuring compliance rather than implementation should be the focal point, because full implementation does not necessarily lead to compliance (e.g. CO2 increase by accidents or miscalculation), while poor implementation sometimes results in compliance (e.g. CO2 decrease by economic recession).

‘Enforcement’ means all actions taken to make the State carry out implementation.¹⁰² It includes both ‘carrots’, such as the granting of economic aid and ‘sticks’, for example the suspension of rights, the imposition of trade restrictions, and the determination of responsibility/liability.¹⁰³ As ‘[e]nforcement is the reaction to an identified non-compliance’,¹⁰⁴ this concept only covers part of the compliance control mechanism (i.e. the ‘non-compliance response system’) and does not touch upon the ‘primary rule system’ and the ‘compliance information system’ as will be seen below.¹⁰⁵ Moreover, ‘enforcement’ seeks full implementation, whereas ‘control’ allows certain deviation.

‘National compliance’ is relevant to this study only when it raises any problem related to compliance by the State in question with a particular international obligation. Here ‘national compliance’ refers to compliance, by entities within a State’s jurisdiction or control, with a domestically implemented international obligation.¹⁰⁶

‘Effectiveness’, either ‘in achieving the stated objectives of the treaty’ or ‘in addressing the problems that led to the treaty’, ‘is related to, but is not identical with, compliance’. This is because

[c]ountries may be in compliance with a treaty, but the treaty may nevertheless be

¹⁰¹ See SANDS, *Principles* 175, 180-182.

¹⁰² See WOLFRUM, ‘Means of Ensuring Compliance’, at 30, where he states: ‘Enforcement finally is to be understood as all the actions undertaken by States or other entities to induce or compel States to achieve compliance with environmental obligations entered into.’

¹⁰³ See *id.*, at 56-150.

¹⁰⁴ *Id.*, at 30.

¹⁰⁵ See 2.3.2. of this thesis.

¹⁰⁶ See SANDS, *Principles* 143-147.

ineffective in attaining its objectives. And even treaties that are effective in attaining their stated objectives may not be effective in addressing the problems that they were intended to address.¹⁰⁷

Research on compliance is sometimes criticized as being of little significance, because the real problem is, according to these critics, not compliance but *effectiveness*.¹⁰⁸ However, it is suggested that compliance is a useful indicator of *prima facie* effectiveness, and that effectiveness is a more difficult concept to evaluate, especially in an area which is beset with scientific uncertainty.

2.2.3. Law Development

Under instructions of Article 13(1) of the UN Charter which obliges the UNGA to ‘initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification’, the UN International Law Commission (ILC), established by the UNGA in 1947¹⁰⁹ and charged with the task of promoting ‘the progressive development of international law and its codification’ (Article 1(1) of the ILC Statute), uses the expression ‘progressive development of international law’ for convenience as meaning:

the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States (Article 15 of the ILC Statute).

It demonstrates that the ILC regards ‘the development of international law’ as *creation* or *modification* of law, i.e. *change* of existing law, as opposed to *clarification* of

¹⁰⁷ WEISS & JACOBSON, *Engaging Countries* 5. Although this statement only refers to treaties, it would also hold true of customary international law.

¹⁰⁸ For example, see VICTOR, ‘Introduction and Overview’, at 7.

¹⁰⁹ UNGA Res. 174 (II).

existing law. The latter is to be realized in the process of the ‘codification of international law’, which expression is used for convenience as meaning:

the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine (Article 15 of the ILC Statute).

It is true that some authors see, in the concept of ‘development’, the element of ‘change’. For example, SCHACHTER uses ‘development’ as referring to:

the changes in international law brought about by the purposive action of governments and of other relevant actors.¹¹⁰

However, as OPPENHEIM puts it:

the theoretical value of the distinction [between the codification and the development of international law] is limited and its practical application insignificant.¹¹¹

Moreover, LAUTERPACHT sometimes uses the expression ‘the development of international law’ in a broad sense, as including both the *development* (in a narrow sense, i.e. ‘legislation’ or ‘law-making’ signifying ‘change’) and *clarification* of international law.¹¹² His view seems reasonable because of their close relationship: the former sometimes contributes to realizing the latter in a broader perspective. Therefore, in this thesis, the term ‘law development’ (‘the development of law’) is used in a broad sense:

¹¹⁰ SCHACHTER, ‘Nature and Process’, at 746.

¹¹¹ JENNINGS & WATTS, *Oppenheim’s International Law* (9th ed.) 110.

¹¹² See LAUTERPACHT, *Development*, esp. 5-7, 155-157.

Law development is the qualitative and quantitative enrichment of law through *clarification, modification and creation* of rules.

The international judiciary has realized law development in this sense through, for example, *clarifying* the contents of existing rules (*law clarification*), *modifying* existing rules so as to adapt them to new conditions (*law modification*) and *creating* new rules (*law creation*).¹¹³ As stated above, *standard setting*, which is part of *law-making* conceived as a process of *law modification* and *law creation*, and which also contributes to *law clarification*, will be examined separately in this thesis.

2.2.4. International Arbitral, Judicial and Quasi-Judicial Procedures

In order to define international arbitral, judicial and quasi-judicial procedures, we have to clarify the procedure's *arbitral, judicial and quasi-judicial* nature as well as its *international* character. Here 'judicial' is used in two meanings. In a narrow sense, it merely distinguishes the dispute settlement mechanism known as *judicial settlement* from that known as *arbitration*. However, in a broad sense, it signifies the *adjudicative* nature, which is common to both arbitration and judicial settlement, and which is also seen, to some extent, in quasi-judicial procedures.

2.2.4.1. Arbitral, Judicial and Quasi-Judicial Nature

As regards *arbitration* in a strict sense, we can start from the following statement of the 2001 ICJ *Maritime Delimitation* case:

¹¹³ See generally, LAUTERPACHT, *Development*. See also HIGGINS, *Problems and Process* 202-204; Individual Opinion of Judge ALVAREZ in the *Fisheries case, 1951 ICJ Reports* 146; SHELTON, *Remedies* 145, where she cites the remarks of the Committee on the Elimination of Racial Discrimination, whose rulings are not binding and therefore which would be regarded as a quasi-judicial procedure, stating that 'there was a general rule of international law that obliged all States to take effective measures to prevent torture and to punish acts of torture.'

[T]he word arbitration, for purposes of public international law, usually refers to ‘the settlement of differences between States by judges of their own choice, and on the basis of respect for law’.¹¹⁴

However, this phrase does not adequately capture the concept, and requires some modification. In particular, the phrase ‘between States’ which appears to be used to signify the international character of the procedure, should be replaced by the neutral phrase ‘between the Parties’, since international entities other than States (such as international organizations) can also be Parties to arbitration. (This substitution is not problematic, because the international character of the procedure will be separately dealt with below.) In addition, the statement of the *Maritime Delimitation* case fails to mention the legally binding force of an arbitral award, which is generally accepted to be a feature of such an award even when ‘arbitration’ is used in its wide sense.¹¹⁵ A modified definition of *arbitral* procedures is as follows:

Arbitral procedures, whose rulings are legally binding, are those for the settlement of differences between the Parties by judges of their own choice and on the basis of respect for law.

The key differences between *arbitration* and *judicial settlement* are usually cited as:¹¹⁶

1) the selection of judges: in arbitration the judges are selected by the Parties while in judicial settlement the judges are pre-fixed; and **2) the criteria of the decision:** in

¹¹⁴ (Qatar v. Bahrain) [Merits] 2001 ICJ Reports 76, para. 113.

¹¹⁵ ‘If the word “arbitration” is taken in a wide sense, characterized simply by the *binding force* of the pronouncement made by a third Party to whom the interested Parties have had recourse, it may well be said that the decision in question is an “arbitral award” (*emphasis added*). This term, on the other hand, would hardly be the right one, if the intention were to convey a common and more limited conception of arbitration’ Article 3, Paragraph 2, of the Treaty of Lausanne, PCIJ Series B, No. 12 (1925), at 26.

¹¹⁶ TABATA, 2 *Shinko* 134.

arbitration the decision is made *on the basis of respect for law* while in judicial settlement it is made *in accordance with law*,¹¹⁷ i.e. strictly law-oriented. Thus *judicial procedures* (in a narrow sense) can be defined as follows:

Judicial procedures (in a narrow sense), whose rulings are legally binding, are those for the settlement of differences between the Parties by pre-fixed judges and in accordance with law.

The institutions for arbitration and judicial settlement are called ‘courts and tribunals’. While there is no fixed definition of ‘courts and tribunals’ in international law,¹¹⁸ three common features, besides the rulings’ legally binding force, of ‘courts and tribunals’ are drawn from the above definitions of *arbitral procedures* and *judicial procedures* (in a narrow sense): **1) settlement of differences; 2) judges; 3) legal process.**

1) settlement of differences connotes *ex post* dispute solution, contrasted to *ex ante* dispute prevention;¹¹⁹

2) judges implies, on the one hand, the *adjudicative* and *passive* role of the members and institution,¹²⁰ and on the other hand, the members’ *independence*¹²¹ and *impartiality*¹²² necessarily involving the institution’s

¹¹⁷ See Article 38(1) of the ICJ Statute (see Appendix 1.2.).

¹¹⁸ For the details, see Appendix 16.2.

¹¹⁹ See ADEDE, ‘Avoidance’, at 53-54.

¹²⁰ *Polish Postal Service in Danzig, PCIJ Series B, No. 11*, at 26: ‘[T]he functions of the High Commissioner are of a judicial character and are limited to deciding questions submitted by one or other of the Parties. The high Commissioner, therefore, had no authority to decide questions which the Parties had not submitted to him.’

¹²¹ KELSEN, *Principles* 523: ‘The individual or the individuals appointed to settle the dispute are judges in the true sense of the term if they are independent, especially independent of the governments which have appointed them.’ See Article 2 of the ICJ Statute: ‘The Court shall be composed of a body of independent judges’

¹²² Para. 196 of the ICTY *Furundzija* Appeal Judgment (21 July 2000): ‘there is a

*independence*¹²³ and *impartiality*¹²⁴;

3) legal process would include both the *substantive* aspect i.e. *interpretation* and *application of law*¹²⁵ and the *procedural* aspect i.e. *due process*¹²⁶.

These three elements can be regarded as constituting the very basis of the *adjudicative* nature (*judicial* nature in a broad sense). Thus those procedures more or less having these three elements altogether can be called *quasi-judicial* procedures. Consequently, the definitions of *judicial* procedures (in a broad sense) and *quasi-judicial* procedures would be as follows:

Judicial procedures (in a broad sense), which include arbitral procedures and judicial procedures (in a narrow sense), and whose rulings are legally binding, are those for the settlement of differences between the Parties by judges through legal

presumption of impartiality which attaches to a Judge. This presumption has been recognized in municipal law.’ See Articles 16, 17 and 24 of the ICJ Statute.

¹²³ *UN Administrative Tribunal* opinion, 1954 *ICJ Reports* 53: ‘the [UN administrative] Tribunal is established . . . as an independent and truly judicial body . . .’

¹²⁴ Para. 91 of the ICTR *Akayesu* Appeal Judgement (1 June 2001): ‘there is a presumption of impartiality that attaches to a Judge or a *Tribunal*’ (emphasis added).

¹²⁵ See Article 220 [ex Article 164] EC (see Appendix 7.2.). See also Article 36(2)(a), (b), (c) and (d) as well as Article 38(1) of the ICJ Statute.

¹²⁶ The PCIJ in the 1925 *Polish Postal Service in Danzig* opinion states: ‘From what has already been said with regard to the judicial functions of the High Commissioner, it follows that he cannot give a decision . . . unless the essentials of a judicial procedure have been complied with.’ *PCIJ Series B, No. 11*, at 32. The Court of Arbitration in *Dubai-Sharjah Border Arbitration* of 19 October 1981 states: ‘For these two reasons, the lack of opportunity for the Parties to present their arguments and the absence of reasoning for the decisions, the Court has come to the conclusion that the Tripp decisions cannot be said to have constituted arbitral awards. . . . Mr Tripp’s decisions were binding upon the two Rulers and this Court would characterise them as administrative decisions.’ 91 *ILR* 543 at 577 (1993). However, the ICJ regards reasoning as not always required: ‘Finally, the Courts notes that, while the reasoning supporting the 1939 decision was not communicated to the Rulers of Bahrain and Qatar, this lack of reasons has no influence on the validity of the decision taken, because no obligation to state reasons had been imposed on the British Government when it was entrusted with the settlement of the matter.’ 2001 *Maritime Delimitation (Qatar v. Bahrain)* case [Merits], Judgment para. 143.

process.

Quasi-judicial procedures, whose rulings are either legally binding or non-binding, are those more or less destined for the settlement of differences between the Parties by judge-like persons through, to some extent, legal process.

2.2.4.2. International Character

In order to define *international* character, the effects, under *lex generalis*,¹²⁷ of being an *international* tribunal shall first of all be clarified. It may be the case that under the law of treaties an international tribunal is required to adopt a restrictive interpretation of its jurisdictional provisions,¹²⁸ and that under the law of State responsibility its act is not attributable to the State where the tribunal is placed.¹²⁹ However, these are subsidiary effects, applicable to individual sectors of international law. In order to determine the *fundamental* implications of international character, i.e. those which hold true for all sectors of international law, one may take, as a starting point, MOHEBI's assertion that, if a tribunal is designated as *international*,

[i]t follows, inevitably, that as such it [the tribunal] pertains to international order, rather than any municipal law system either that of its creating States or of its eventual or actual seat;

the arbitral process before such international tribunal is detached from any *lex fori*, and its arbitral award will have international quality the enforcement of which is

¹²⁷ For the effects under *lex specialis*, see for example, inadmissibility of application submitted to another procedure of international investigation or settlement, as prescribed in Article 35(2)(ii) of the Eur.Conv.H.R. and in Article 5(2)(a) of the Optional Protocol to the ICCPR.

¹²⁸ See UNESCO opinion, 1956 ICJ Reports 97.

¹²⁹ See ECmHR, Decision concerning application No. 235/56 (10 June 1958), 1958-1959 YECHR 256 at 298.

subject to international rules and principles; and more importantly the non-compliance with the terms of such international award will cause international responsibility for the refusing Party;¹³⁰

its award would enjoy an international nature enforceable at international level, any claim the Tribunal has dismissed on merit or otherwise non-jurisdictional grounds would enjoy *res judicata* sanction and, finally, its jurisprudence will have such evidential value for international law as introduced in Article 38 (1) of the I.C.J. Statute.¹³¹

Of these suggested implications, the first one (i.e. pertaining to international order) would appear to be non-contentious. It is merely a logical consequence of being an *international* tribunal. The *res judicata* effect and evidential value are confirmed by the 1954 ICJ *UN Administrative Tribunal* opinion¹³² and the ICJ Statute, respectively. However, other aspects of MOHEBI's proposition require further consideration.

First, it is debatable whether the arbitral process need necessarily be detached from any *lex fori* for its award to have international quality. This is supported by the history of the Central Office, which acted as the arbitral tribunal of the Union for International Transport by Rail. Created in 1892, it dealt with 22 cases over a period of 50 years. Most of these cases involved Parties who were State railways, yet the Central Office

¹³⁰ MOHEBI, *International Law Character* 31.

¹³¹ *Id.*, at xxviii.

¹³² 1954 ICJ Reports 53: 'According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute.' The *res judicata* effect is also implied in the 1925 PCIJ *Polish Postal Service in Danzig* opinion: '[T]he [Permanent] Court of Arbitration [in the 1902 *Pious Funds of California* case] applied the doctrine of *res judicata* because not only the Parties but also the matter in dispute was the same [T]here can be no doubt that the said opinion is irrelevant to the point actually decided by him [the High Commissioner] and therefore has no binding force. This conclusion, which is drawn from the very nature of judicial decisions' *PCIJ Series B, No. 11*, at 30.

was in fact organized by the Swiss Government.¹³³ Therefore, MOHEBI's view is supportable only insofar as it does not exclude the situation where a domestically instituted tribunal is asked to settle international disputes under the international legal order.

A further difficulty with MOHEBI's proposition relates to his suggestion that the ruling of an international tribunal is always enforceable at the international level subject to international rules and principles, and that non-compliance with the ruling necessarily causes international responsibility for the refusing Party. The flaw here is that the rulings of the ECJ and ITLOS incumbent upon an individual are not enforceable at the international level, but only at the domestic level, and non-compliance of those rulings does not seem to entail the individual's international responsibility.¹³⁴

Consequently, under *lex generalis* the following effects are derived from being a tribunal's international status:

- 1) the tribunal, though it might be a domestic institution, is detached from any *lex fori*, and pertains to international legal order, rather than any domestic legal order;
- 2) its ruling has international quality, including the *res judicata* effect and evidential value at the international level.

Here two provisos should be noted: a) in order to have the first effect, the tribunal, although it may be subject to a domestic legal order in its *institutional* aspect (as in the

¹³³ HUDSON *International Tribunals* 24, where he states: 'Though of national composition, the tribunal is competent in international cases and may be classified as an international tribunal.'

¹³⁴ For the ECJ, see Article 244 [ex Article 187] EC, and for the ITLOS, see Article 39 of the ITLOS Statute (see Appendixes 7.2. and 2.2. respectively). MOHEBI himself regards the ECJ as an international judiciary. MOHEBI, *International Law Character* 49. Before the ECJ and ITLOS, an individual can be a litigant. For the ECJ, see Article 238 [ex Article 181] EC, and for the ITLOS, see Article 187 of the UNCLOS (see Appendixes 7.2. and 2.1. respectively).

Rail Tribunal scenario, above) it must not be subject thereto in its *operational* aspect; b) in order to have the second effect, the tribunal must be given the power to make a decision having international legal force by two or more international subjects having the treaty-making power, i.e. States or international organizations.

These two requirements seem to be the necessary conditions for a tribunal to be properly regarded as *international*. Therefore, an international tribunal may be defined as follows:

An international tribunal is a tribunal which is given the power to make a decision having international legal force by two or more States or international organizations, and which is not subject to any domestic legal order in its *operational* aspect.

However, the question remains: is this definition complete, or should further criteria be considered essential? There have been numerous attempts to define the *international* character of tribunals, including the following comprehensive list of characteristics produced by NØRGAARD.

Characteristics with regard to *creation and organization*: 1) The intention of the Parties to establish an *international* tribunal; 2) The designation of the tribunal as international; 3) The creation of the tribunal by or by virtue of a treaty, i.e. by international law between two or more States; 4) The tribunal may not be part of the judiciary of one single State; 5) The composition of the tribunal of independent judges of different nationality; 6) The Parties in a case before the tribunal each shall have the right to have a judge of their own nationality on the bench.

Characteristics with regard to *function and competence*: 7) The tribunal shall apply international law; 8) The jurisdiction of the tribunal must be international, i.e. the jurisdiction of the tribunal must not be limited, i.e. it shall exceed the jurisdiction which one single State itself can confer upon its municipal tribunals; 9) The tribunal shall have jurisdiction in cases between States; 10) The tribunal shall have jurisdiction only in cases in which the Parties either in general or by special

agreement have accepted the jurisdiction of the tribunal.

In NØRGAARD's view, the characteristics of 3), 4), 7) and 8) are essential.¹³⁵ Other commentators offer differing views on the criteria required to confer international status on a tribunal: for BROWNLIE the critical elements are organization and jurisdiction;¹³⁶ CAVARÉ refers to 'la composition, la qualité de ses justiciables, la nature du différend, le droit applicable, la procédure, la question de savoir au nom de qui est rendue la sentence', the last being decisive in his view, however;¹³⁷ WOETZEL relies on the consent and approval of the international community;¹³⁸ and for MOHEBI the origin must be an international document, applicable law must be international law, and the creating Parties must be subjects of international law.¹³⁹

Of these criteria, the consent and approval of the international community suggested by WOETZEL seem to relate to the *opposability* of the ruling, and MOHEBI's third criterion (the creating Parties being subjects of international law) could be seen as the same as his first (origin being an international document). The organization and procedure of the tribunal, applicable law, the status of the litigants and jurisdiction¹⁴⁰ have nothing to do with the ruling's *international legal force*, since this force could, irrespective of these elements, be given by agreement of States or international organizations. CAVARÉ's decisive criterion ('la question de savoir au nom de qui est rendue la sentence') appears to show which legal order, domestic or international, the tribunal is subject to in its *institutional* aspect,¹⁴¹ which is not important for our purpose.

¹³⁵ NØRGAARD, *Position of the Individual* 179-183.

¹³⁶ BROWNLIE, *Principles* (6th ed.) 713.

¹³⁷ CAVARÉ, 'La notion de juridiction internationale', at 505, 509.

¹³⁸ WOETZEL, *Nuremberg Trials* 49.

¹³⁹ MOHEBI, *International Law Character* 29-54.

¹⁴⁰ For example, the International Tribunal in Saar, which is 'compétent à l'exclusion de tout autre organisme juridictionnel', had only domestic jurisdiction. See Article 1 of its statute (see Appendix 7.43.).

¹⁴¹ See the ECmHR's Decision on Application No.235/56, 1958-1959 *YECHR* 298: 'The Supreme [Restitution] Court is an independent international tribunal which pronounces its judgments in its own name whereas the Mixed Courts in Egypt formed part of the Egyptian judicial system and pronounced their judgments in the name of the

Thus there is nothing to be added to the above definition of an international tribunal.

According to this definition, arbitral tribunals under the International Chamber of Commerce (ICC), International Centre for the Settlement of Investment Disputes (ICSID) and UN Commission on International Trade Law (UNCITRAL) are *not* international tribunals, since those tribunals are created by private Parties or by a private Party and a State. Likewise, an arbitral tribunal under NAFTA Chapter 11 (using ICSID, ICSID Additional Facility or UNCITRAL) is *not* an international tribunal. In contrast, the Iran-US Claims Tribunal is an international tribunal, since it is created by States (i.e. Iran and USA).

The above definition of an international tribunal is also applicable to quasi-judicial procedures, with the replacement of ‘tribunal’ by ‘procedure’, though their rulings might not have the *res judicata* effect,¹⁴² and their rulings’ evidential value might be very weak.

2.2.4.3. Scope of the Procedures Covered by this Thesis

Based on the above definitions of international arbitral, judicial and quasi-judicial procedures, we can make the following classification as to the major international procedures likely to deal with cases related to the environment.

- 1) **International Arbitral Procedures:** inter-State arbitral tribunals.

- 2) **International Judicial Procedures:** a) **Contentious Procedures** PCIJ, ICJ, ITLOS, ECJ, ICTY, ICTR, ECtHR, InterAmCtHR, AfrCtHPR, Administrative Tribunals (UN, ILO, World Bank); b) **Opinion Procedures:** ECJ.

King of Egypt.’

¹⁴² However, quasi-judicial procedures’ rulings could have effects similar to so-called ‘soft law’, e.g. UNGA resolutions of a recommendatory nature. One of them would be the ‘justifying effect’ on the States having accepted the soft rule concerned. See SEIDLE-HOHENVELDERN, ‘International Economic “Soft Law” ’, at 196.

3) International Quasi-Judicial Procedures: a) Contentious or Complaints Procedures ECmHR, AfrCmHPR, InterAmCmHR, HRC(ICCPR), GATT/WTO panels and WTO AB, Montreal NCP, EC Commission, EC Ombudsman, World Bank Inspection Panel, UN Compensation Commission, IJC(Canada/US); **b) Opinion Procedures** PCIJ, ICJ, ITLOS, InterAmCtHR.

This thesis will focus on those of the above procedures which are based on global instruments rather than regional or bilateral instruments, because of their global significance. However, it will also take account of those cases in arbitral tribunals (which are usually established by bilateral agreements) which have significantly impacted upon the development of general international law. Furthermore, cases related to the EC and Eur.Conv.H.R. will also be thoroughly explored, since they are regarded as the most developed models of regional integration and human rights protection.

2.3. The Overall Analytical Framework: ‘Judicial Control’ Integrating Standard Setting and Law Development

2.3.1. The Origin of the Concept of ‘Judicial Control’

The importance of compliance control as understood above only came to be fully recognized within the international society after the first World War.¹⁴³ The likely explanation for this development was the growing interdependence of States in the political, economic, technical, social and cultural fields, which interdependence

¹⁴³ See VAN HOOFF, ‘Mechanisms of International Supervision’, at 8-9. After World War I, a number of commentaries on compliance control in the international society appeared. These included: KAASIK, *Le contrôle en droit international*; KOPELMANAS, ‘Le contrôle international’; HAHN, ‘Internationale Kontrollen’; Merle, ‘Le contrôle exercé par les organisations internationales’; LANDY, *Effectiveness of International Supervision*; VALTICOS, ‘Un système de contrôle international’; AUDRETSCH, *Supervision in EC Law*; VALTICOS, ‘Contrôle’.

necessitated controlling States' mutual compliance with their obligations under international law in order to keep the international society viable.¹⁴⁴ Various international organizations were created to control such mutual compliance institutionally. Thus it is not surprising that most of the writing has focused on 'non-judicial' (diplomatic, political or administrative) control by international organizations and by their member States, and that the emphasis has been on public interests (*services publics* in French) in the international society as the purpose of control.¹⁴⁵

However, it is also important to examine the possibilities and limits of 'judicial' control by the international judiciary, especially in the face of its current proliferation.¹⁴⁶ While it is acknowledged that there was a long standing discourse on such matters (leading KAASIK to remark as early as 1933 that '[l]e contrôle judiciaire, tel qu'il s'est établi en droit international sous la forme de la juridiction internationale est minutieusement étudié par beaucoup d'auteurs dans toutes ses manifestations'¹⁴⁷), the scope of those studies was mostly limited to the three functions of the international judiciary: namely, **1) dispute settlement; 2) interpretation and application of law; 3) promotion of legal order formation.**¹⁴⁸ At that time little attention was paid to whether a ruling truly contributed to promoting compliance with standing rules (*first-order compliance*), whether that ruling was actually complied with by the Parties (*second-order compliance*), and how such *first/second-order compliance* could be improved: we had to wait for FISHER to consider these perspectives.¹⁴⁹ Moreover, even when *first/second-order compliance* was specifically targeted, the studies sought to focus on compliance with *erga omnes* obligations established by a particular international institution, rather than on compliance with international law in general.

¹⁴⁴ See VAN HOOFF, 'Mechanisms of International Supervision', at 8.

¹⁴⁵ See the writings listed in *supra* note 143.

¹⁴⁶ See generally, 'Proliferation of International Tribunals'.

¹⁴⁷ KAASIK, *Le contrôle en droit international* 17.

¹⁴⁸ TAMADA, 'L'excès de pouvoir (1)', at 109.

¹⁴⁹ FISHER, *Improving Compliance with International Law* 25. For an example of recent study on this aspect, see BULTERMAN & KUIJER, *Compliance with Judgments*.

This approach is clearly evident in BROWNLIE's study, which limits 'judicial supervision' to the cases of *actio popularis*, where the applicant State does not need to allege any injury to legal rights representing its individual interest.¹⁵⁰ Such a tendency seems to originate in a desire to make a clear distinction between *compliance control* and *dispute settlement*.¹⁵¹ Perhaps, however, one should view this as an example of 'a heterogeneity of aims', where institutions set up for the achievement of *dispute settlement* grow to fulfil tasks of *compliance control*, as suggested above by LAUTERPACHT with regard to law development. Moreover, to realize compliance with international law in general and with international environmental law in particular would enhance 'the rule of law' and environmental protection, which are typical *general interests* in the international society, even if the obligations in question are *reciprocal* in nature. Furthermore, it is still uncommon —at least at present¹⁵²— for the international judiciary to handle cases brought up by *actio popularis*. Therefore this thesis examines how to control compliance not only with *erga omnes* obligations but also with *reciprocal* obligations.¹⁵³

2.3.2. A Proposed Model of 'Judicial Control'

One of the few authors sharing this view is PIERRE-MARIE DUPUY. He distinguishes two categories of international control, i.e. 'adjudicative control' and 'non-adjudicative control', both of which cover compliance with international law of *erga omnes* as well as *reciprocal* nature.¹⁵⁴ According to him, 'international control' is

¹⁵⁰ See BROWNLIE, *Principles* (4th ed.) 648-649 (in later versions, this part was deleted). To realize public interests in the international society is regarded, by a Japanese author, as the essence of the concept of 'international control'. MORITA, *Le contrôle international* 79. According to him, to be named as 'judicial' control, the case shall be brought up not by the injured Party for recovering its subjective interests but by *actio popularis*. MORITA, *id.*, at 98-99, 165.

¹⁵¹ See MORITA, *id.*, at 50-51, 97-102.

¹⁵² See for example, *South West Africa* cases, 1966 ICJ Reports 51, para. 99.

¹⁵³ KAASIK adopts the same approach. See Appendix 15.1. According to him, judicial control was born before administrative control appeared. See *id.*

¹⁵⁴ DUPUY, 'International Control', at 309-312.

comprised of three stages, namely *verification*, *qualification* and *reaction to non-compliance*, though he thinks that the *reaction* is only a consequence of the *qualification* and therefore does not fall within the strict meaning of ‘international control’.¹⁵⁵ His classification is also in accord with that of *Encyclopedia of Public International Law*, which states that the concept of ‘control’ embraces the *establishment of pertinent facts and their verification*, their *assessment in terms of relevant legal criteria*, and finally the *recommendation of such corrective adjustment* as may be required.¹⁵⁶ It follows that the process of compliance control can contain at least three stages: **1) factual evaluation (verification)**, **2) legal evaluation (qualification)** and **3) corrective adjustment (reaction to non-compliance)**.

However, we should also take account of the close interrelationship between the legal rules which regulate an actor’s behaviours (the ‘primary rules’) and the level of compliance with them. For example, MITCHELL states:

Increasing specificity increases compliance in at least two ways. First, for actors disposed to comply, specific rules make compliance easier by reducing the uncertainty about what they need to do to comply. Specific rules also reassure actors that others will not dispute the compliance of a given act. The actor can therefore act without fear of facing sanctions for non-compliance despite a good faith effort to comply. Second, for actors predisposed to non-compliance, precise treaty language removes the excuse of inadvertence and misinterpretation from actors when they must account for non-compliance.¹⁵⁷

Moreover, FISHER considers clarification of existing law as one of the most important techniques of inducing respect for a rule.¹⁵⁸ In addition, especially for the purpose of controlling compliance with international environmental law, the need for frequent

¹⁵⁵ See *id.*, at 309.

¹⁵⁶ HAHN, ‘International Controls’.

¹⁵⁷ MITCHELL, ‘Compliance Theory’, at 19.

¹⁵⁸ FISHER, *Improving Compliance with International Law* 116.

normative change should be heeded, as HANDL suggests.¹⁵⁹

Therefore, if we consider the above-mentioned four constituents, including *primary rule setting*, of the compliance control mechanism, MITCHELL's proposition of a 'compliance system', which is composed of a 'primary rule system', a 'compliance information system' and a 'non-compliance response system', becomes persuasive. According to him:

A 'compliance system' is that subset of the treaty's rules and procedures that influence the compliance level of a given rule. The *primary rule system* consists of the actors, rules and processes related to the behavior that is the substantive target of the regime. The *compliance information system* consists of the actors, rules and processes that collect, analyse and disseminate information regarding the instances of, and parties responsible for, violations and compliance. The *non-compliance response system* consists of the actors, rules and processes governing the formal and informal responses undertaken to induce those identified as in non-compliance to comply.¹⁶⁰

In his view, both *factual* and *legal evaluation* are included in 'analysis of information' in the framework of a 'compliance information system'.

In the light of the above considerations, it seems appropriate to base this study of compliance control on MITCHELL's model. As the study of *standard setting* and *law development* overlaps that of a 'primary rule system', more attention will be paid to the latter two constituents, namely, a 'compliance information system' and a 'non-compliance response system'.

With regard to a 'compliance information system', it is important to evaluate the ability of the international judiciary to *collect, analyze (factually and legally)* and *disseminate* information. In this context, because the *contentious procedures* of the

¹⁵⁹ See *supra* note 15.

¹⁶⁰ MITCHELL, 'Compliance Theory', at 17.

international judiciary are *ad hoc*, *ex post* and *bilateral* in nature, the feasibility of the followings activities is of special interest: *continuous* activities such as monitoring; *preventive* activities such as ordering interim (provisional) measures or giving information for compliance before rendering judgments; and activities for the benefit of *third Parties* or of the *international society* as a whole, such as information collection and dissemination through third Parties or legal evaluation based on third Parties' interests or on general interests. This enquiry will enable us to determine whether, as DUPUY argues,¹⁶¹ 'adjudicative control' really exists, and if so, what is the main difference between 'adjudicative control' and 'non-adjudicative control'.

In respect of a 'non-compliance response system', this thesis will investigate not only an actors' initial action of bringing a case before the international judiciary, but also its following action to make the alleged non-compliant State comply with the judiciary's decisions or recommendations, since both actions can be regarded as its reaction to the alleged non-compliance.¹⁶²

Moreover, as MITCHELL constructed his model from an analysis of a particular *treaty* system, i.e. conventions related to marine oil pollution,¹⁶³ it will be necessary to determine not only the validity of that model itself, but also whether or not the model is applicable to *customary international law*.

Finally, we should remember that MITCHELL's model is compatible with FISHER's concept of *first/second-order compliance*, since both *first* and *second order compliance control* can contain a 'primary rule system', a 'compliance information system' and a 'non-compliance response system'. Since FISHER's concept directly targets the international judiciary's compliance control and is much simpler than MITCHELL's model, the analysis will commence from FISHER's perspective. After examining the 'primary rule system' (including *standard setting* and *law development*), a comprehensive appraisal from MITCHELL's perspectives will be undertaken.

The adoption of a compliance control perspective, as described above, will

¹⁶¹ See DUPUY, 'International Control'; *Droit international public* 505-514.

¹⁶² See SANDS, *Principles* 182.

¹⁶³ See MITCHELL, *Oil Pollution*.

facilitate the demonstration of the international judiciary's possible functions, functions which are not well clarified when one adopts the perspective of dispute settlement. These functions include: finding out the causes of non-compliance; choosing the best solution suitable for the Party and for the cause of non-compliance; setting or modifying rules to be complied with; setting achievable (intermediate) goals and time-tables; collecting and disseminating information for compliance; monitoring and checking the degree of compliance; preventing possible non-compliance; providing assistance for compliance; and resorting to (the threat of) sanction against non-compliance.

2.4. Angles of the Analysis

2.4.1. Inter-State Relations v. State-Individual Relations

No State formally claimed compensation against the USSR after the *Chernobyl* nuclear accident.¹⁶⁴ This clearly demonstrates that inter-State procedures are not well utilized under conditions of *reciprocity*, namely, where there is the possibility of a complaining State being sued by other States for the commission of similar wrongdoings on its own account. However, State-individual procedures do not suffer from this drawback. Therefore, it seems appropriate, in respect of *compliance control*, to distinguish between these two categories of procedures. Although international organizations (and their organs) are treated as State-like entities because they are composed of States, it is assumed that they are less vulnerable to the mutually restraining effect of reciprocity.

Moreover, in inter-State relations, the international judiciary's intervention is likely to be restricted, as suggested by the ICJ *UNESCO* opinion,¹⁶⁵ whereas, in State-individual relations, the derogation of State sovereignty might be allowed to protect *minimum* human rights. In contrast, conciliatory law-making which equitably

¹⁶⁴ See SANDS, *Principles* 887. See also 5.2. of this thesis.

¹⁶⁵ *1956 ICJ Reports* 77 at 97.

adjusts the Parties' interests could be done in inter-State relations, while, in State-individual relations, State interests tend to prevail over individual interests under its territory because of State sovereignty. It is interesting to see how these two contradictory vectors influence *standard setting* and *law development*.

In the light of the above, this thesis will consider whether there is any difference, between inter-State relations and State-individual relations, in the degree of *standard setting*, *compliance control* and *law development*.

2.4.2. 'Soft' Control v. 'Hard' Control

Here a distinction will be drawn between *procedurally* 'soft/hard' control and *substantively* 'soft/hard' control.

Procedurally 'soft' control is characterized by the procedure's *consensual*, *non-confrontational*, *non-punitive* and *facilitative* nature, whereas *procedurally* 'hard' control is characterized by the procedure's *non-consensual*, *confrontational*, *punitive* and *authoritative* nature.

The difference between the *substantively* 'hard' control and the *substantively* 'soft' control lies in the *strictness/looseness* of the judiciary's review process: *substantively* 'hard' control is characterized by the judiciary's attitude of 1) making stringent review through strict interpretation and application of or substantial reference to the relevant rules, and 2) deciding to take severe measures (which reflect State responsibility) against non-compliance thereby found. Opposite appellation is to be given to the contrary.

As *substantively* 'soft'/'hard' control is related to the substance of a judiciary's findings and therefore no *a priori* hypothesis can be made, here we merely propose some hypotheses as regards *procedurally* 'soft/hard' control.

With regard to **inter-State procedures**, *non-binding* and *facilitative* procedures might work better than *binding* and *authoritative* procedures at least in relation to

compliance control, as suggested by the creation of the Montreal NCP.¹⁶⁶ This is not only because of reciprocity's mutual restraining effect, as referred to above, but also because of the peculiarity of environmental issues, i.e. *scientific uncertainty*, *rapid changeability* of situations and non-compliance caused by *incapability* of States.

Moreover, *compromis* application, either for arbitration or for judicial settlement, would be better than unilateral application in respect of *standard setting*, as shown by the practice of inter-State arbitral and judicial procedures in the field of the conservation of marine living resources.¹⁶⁷ Better *standard setting* could also lead to better *compliance control*.

Therefore, with regard to inter-State procedures, it could generally be assumed that in the field of the environment the *procedurally 'soft' control* works better than the *procedurally 'hard' control*. However, those inter-State procedures which deal with **world trade** matters, though touching upon environmental issues at the same time, could be *procedurally 'hard'*, as suggested by the creation of the WTO's very strict dispute settlement procedures. This is because there are already clear and detailed international rules of trade, and because the Parties need prompt and uniform solutions in order not to lose trade interests. The *procedurally 'hard' control* could also be exercised, even in the environmental field, by the ECJ—a mixture of inter-State and State-individual procedures—since there exist active non-State applicants, i.e. individuals and the EC Commission.

By contrast, as regards **State-individual procedures**, the *procedurally 'hard' control* in environmental matters is not only desirable because the matters are most likely to concern individuals' lives as well, but also feasible because reciprocity's mutual restraining effect is absent, as seen from the active life of the ECtHR resulting in the disappearance of the ECmHR in 1998.

Bearing in mind the above, an attempt will be made to expose the effectiveness, conditions and limits of the *substantively/procedurally 'soft'/'hard' control*.

¹⁶⁶ See 4.2. of this thesis.

¹⁶⁷ See 3.2. of this thesis.

3. Standard Setting

3.1. Standard Setting in International Environmental Law

An ‘environmental standard’ has already been defined as any judgment about the acceptability of environmental modifications resulting from human activities which fulfils the following two conditions: 1) it is formally stated after some consideration and intended to apply generally to a defined class of cases; and 2) because of its relationship to certain sanctions, rewards or values, it can be expected to exert an influence, direct or indirect, on activities that affect the environment. Here we clarify the concept of environmental standard setting by the international judiciary from a broader perspective.

Environmental standards are technical standards which have been internationally developed since the mid-19th Century.¹⁶⁸ Technical standards have been similarly developed in other fields, such as telecommunications, aviation, health and meteorology. As with compliance control, the likely explanation for this development was the growing interdependence of States in various fields, which necessitated technical standardization among States so as to facilitate international transaction between them. In this sense, ‘standards’ in international law in general may well be said to be those norms under which an average conduct is to be reasonably expected from the State under certain conditions. Such ‘standards’ have been much debated since the mid-19th Century in the context of the conflict between ‘the international standard’ and ‘the national standard’ regarding the treatment of foreigners,¹⁶⁹ and are now also argued in

¹⁶⁸ CONTINI & SAND, ‘Ecostandards’, at 40. In 1865 the International Telegraph Union (later, ‘the International Telecommunications Union (ITU)’) was created, which set technical standards in 1875. See *id.*, at 41-42. The ITU website states: ‘The need for technical standardization was recognized by Prussia and Austria and in October 1849, these two countries made the first attempt to link telegraph systems with a common code.’ <http://www.museum.tv/archives/etv/I/htmlI/international/international.htm>.

¹⁶⁹ See BROWNLIE, *Principles* 527, footnote 26, where he states: ‘The equality principle [the national standard] was advocated as early as 1868 by the Argentinian jurist Calvo.’

the context of the protection of human rights and investment.¹⁷⁰ Thus although not mentioned as a decision criterion in Article 38(1) of the ICJ statute, ‘standards’ can function as such where they constitute the content of the binding rules (applicable to the case) of customary international law or of treaties. Note however that even if ‘standards’ remain non-binding or binding but inapplicable to the case (these standards are hereinafter called ‘non-binding or binding but inapplicable’ standards),¹⁷¹ they can provide the international judiciary with a decision criterion, as clearly exemplified by the environmental standards in the following instances:

First, the international judiciary might refer to ‘non-binding or binding but inapplicable’ environmental standards, where its constituent instruments so require, as is the case of Articles 60 and 61 of the Afr.Chart.H.P.R.¹⁷² In fact, the AfrCmHPR in the *Ogoni* decision found a violation in the light of *international human rights standards* relating to the environment.¹⁷³

Secondly, it might refer to ‘non-binding or binding but inapplicable’ environmental standards so as to make ‘evolutionary interpretation’, as demonstrated by the WTO AB in the *US – Shrimp* case.¹⁷⁴

Thirdly, it might refer to those standards which both Parties have accepted or are committed to comply with, as exemplified by the WTO Panel on Compliance in the *US*

¹⁷⁰ See *id.*, at 528-531.

¹⁷¹ The international judiciary would apply environmental standards—even if they are non-binding per se—as part of binding rules applicable to the case where a treaty rule so requires. See Article 211(2) of the UNCLOS which refers to ‘generally accepted international rules and standards’ regarding pollution. See also Article 41(a) of the Statute of the River Uruguay, which refers to ‘the guidelines and recommendations of international technical bodies’, 1295 UNTS 340 at 344 (1982); *Pulp Mills* case (ICJ, Order of 13 July 2006), paras. 43, 45, 51. Likewise, it would apply those standards where both Parties or its constituent instruments so require, as suggested by the analogy of the ICJ *Tunisia/Libya Continental Shelf* case. See 1982 ICJ Reports 23. Those standards are excluded from ‘non-binding or binding but inapplicable’ standards.

¹⁷² See Appendix 6.

¹⁷³ See *infra* note 345.

¹⁷⁴ *US – Shrimp AB Report*, paras. 129-130 (see *infra* note 727 and the accompanying text).

—*Shrimp* case.¹⁷⁵

Lastly, it might examine whether or not the discretion of the State or of the institution is appropriate in the light of those standards, as exemplified by ECJ cases.¹⁷⁶

The reasons for the consideration of those standards vary: the first can be regarded as applying the constituent instruments; the second comes from the application of ‘evolutionary interpretation’, whose basis is said to lie in the *object and purpose* of the treaty in question —the most basic interpretative method as recognized in Article 31(1) of the Vienna Convention—; the third derives from the application of Article 31(3)(c) of the Vienna Convention, which takes into account ‘any relevant rules of international law applicable in the relationship between the parties’; and the last originates in a technique of examining the appropriateness (and the excess) of the discretion.

The consideration of ‘non-binding or binding but inapplicable’ standards by the international judiciary is not unique to the environmental field. In fact, ‘evolutionary interpretation’ was originally developed in the European human rights protection system.¹⁷⁷ However, the abundance of environmental examples demonstrates the international judiciary’s significant efforts to respond to both the rapid expansion of scientific knowledge and unprecedented levels of public awareness in relation to environmental matters.

The international judiciary’s consideration of environmental standards —either as the content of the binding rules applicable to the case or as ‘non-binding or binding but inapplicable’ norms— necessarily results in concretizing and reshaping these standards in a particular context. In consequence, environmental standards are to be set by the judiciary through interpretation and application of law. However, the judiciary might also in its ruling set by itself (or help the Parties to set) environmental standards without legal foundations, on the basis of the Parties’ agreement to a decision *ex aequo et bono*,

¹⁷⁵ *US –Shrimp Panel on Compliance Report*, para. 5.57 (see *infra* note 731 and the accompanying text).

¹⁷⁶ For example, *IBA 89* case (see *infra* note 600 and the accompanying text) and *C-405/92 Etablissements Armand Mondiet SA v. Armement Islais SARL* (see *infra* note 615).

¹⁷⁷ See 3.4.4. of this thesis.

as in the *Fur-Seals* and the *Atlantic Fisheries* arbitrations, or in interim (provisional) measures, as in the ICJ *Fisheries Jurisdiction* cases and the ITLOS *Southern Bluefin Tuna* case.¹⁷⁸ The environmental standards thus set cover vague standards such as ‘optimum utilization’ (as shown by the ITLOS provisional measures of the 1999 *Southern Bluefin Tuna* case¹⁷⁹) and ‘fishing activities’ sustainability’ (as demonstrated by the HRC in its 2000 decision in *Apirana Mahuika et al. v. New Zealand*¹⁸⁰), which can clearly indicate the limits of environmental modification, as differentiated from concepts such as ‘sustainable development’ or ‘intergenerational equity’ which cannot do so.

The various methods of environmental standard setting by the judiciary will be fully examined below.

3.2. Standard Setting for the Conservation of Marine Living Resources: Through the Practice of the ICJ, the ITLOS and Arbitral Tribunals

3.2.1. Introduction

The conservation¹⁸¹ of marine living resources¹⁸² has been a major concern of international environmental law since its earliest days, as exemplified in the 1893 *Fur-Seals* arbitration¹⁸³. An analysis of the international judiciary’s practice in this particular field should therefore contribute substantially to the understanding of its role

¹⁷⁸ See 3.2.3.2. of this thesis.

¹⁷⁹ 1999 Judgment, para. 90 [1(f)].

¹⁸⁰ CCPR/C/70/D/547/1993, Decision paras. 9.6, 9.8.

¹⁸¹ ‘Conservation’ is used to mean: ‘prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment.’ See Article 2(3)(a) of the Convention on the Conservation of Antarctic Marine Living Resources.

¹⁸² Although ‘marine living resources’ can include all living organisms found in the sea, the focus is on fish and marine mammals.

¹⁸³ (UK/USA), see MOORE, 1 *History and Digest* 755.

in the field of international environmental law in general.

This section will examine a number of inter-State cases where problems relating to the conservation of marine living resources have been dealt with through the mechanisms of *arbitration* or *judicial settlement*. As regards the latter, the focus will be on international judicial bodies with global, rather than regional, jurisdiction over maritime affairs namely the ICJ¹⁸⁴ and the ITLOS¹⁸⁵. Particular attention will be paid to the international judiciary's role in the setting of environmental standards, since these standards are of significant practical importance to the realization of environmental protection. This section will also seek to explore the impact of a number of variables upon the efficacy of environmental standard setting. Thus differences of impact will be compared from the perspective of both the *fora* (arbitration and judicial settlement) and *application type* (*compromis* and unilateral)¹⁸⁶ within which these standards were set.

Although environmental standards have mainly been posited in relation to pollution,¹⁸⁷ they can also deal with the conservation of marine living resources.¹⁸⁸ In

¹⁸⁴ The ICJ, the principal judicial organ of the UN (Article 92 of the UN Charter), has global jurisdiction on general matters. See Article 36 of the ICJ Statute. Although the PCIJ, the predecessor of the ICJ, was also of the same character, it never heard a case relating to the conservation of marine living resources.

¹⁸⁵ The ITLOS, which started operating in 1996, has global jurisdiction on maritime matters. See Article 288(1) and (2) of the UNCLOS as well as Article 21 of the ITLOS Statute (Annex VI of the UNCLOS).

¹⁸⁶ While *compromis* application shows the collaborative will of the Parties to settle a particular dispute before a particular dispute settlement body, unilateral application shows the lack of such will, though the basis of jurisdiction of both arbitration and judicial settlement is agreement between the Parties. Unilateral application can be made on the basis of an agreement (e.g. a dispute settlement convention or clause), of a unilateral declaration (e.g. Article 36(2) of the ICJ Statute, i.e. 'optional clause') or of domestic legislation (e.g. Article 25(1) of the ICSID Convention). *Forum prorogutum* is also classified as unilateral application; for here the respondent's consent to jurisdiction is given after unilateral application was made, which shows the lack of such collaborative will. In fact, *compromis* application is possible after either Party made unilateral application, as seen in the ICJ *Corfu Channel* case where *compromis* was agreed upon between the UK, which made unilateral application, and Albania, after the Judgment rejecting Albania's preliminary objection was rendered in 1948. See 1949 *ICJ Reports* 6-7.

¹⁸⁷ RCEP classifies environmental standards related to pollution into two categories:

this respect, key concepts are ‘resource standards’ and ‘catch standards’. Resource standards, analogous to environmental quality standards¹⁸⁹, indicate how much of a resource must be conserved; whereas catch standards demonstrate how much and what kind of fish may be caught in what period and in what zone (i.e. ‘catch limits’, analogous to emission standards¹⁹⁰, which include ‘quotas’, ‘species limits’, ‘size limits’, ‘period limits’ and ‘zone limits’), as well as what catch method must be used (i.e. ‘method standards’, analogous to process standards¹⁹¹).

3.2.2. The International Judiciary’s Contribution to Setting Environmental Standards

It is suggested that the international judiciary has contributed to the setting of various kinds of environmental standards in at least three modes: **A)** standard setting by the international judiciary itself; **B)** assistance for standard setting by the Parties; and **C)** clarification of the requirements for valid domestic standard setting.

3.2.2.1. Standard Setting by the International Judiciary Itself

standards applying directly to a point on a pathway (*biological standards, exposure standards, quality standards, emission standards and product standards*) and other forms of environmental standards (*process standards, life-cycle based standards, use standards and management standards*). See RCEP, 21st Report 4. Another way of classification can be target-related standards (i.e. *environmental quality standards*) and source-related standards (i.e. *emission standards, process standards and product standards*). See BELL & MCGILLIVRAY, *Environmental Law* (5th ed.) 184-186. See also OECD, *Environmental Standards*.

¹⁸⁸ See RCEP, 21st Report 3.

¹⁸⁹ An *environmental quality standard* is a standard where conformity is measured by reference to the effect of a pollutant on the receiving environment. BELL & MCGILLIVRAY, *Environmental Law* (5th ed.) 184.

¹⁹⁰ An *emission standard* is a standard where conformity is measured by reference to what is emitted rather than the effect on the receiving environment. *Id.*, at 185.

¹⁹¹ A *process standard* is a standard imposed on a process either by stipulating precisely the process which must be carried on, or by setting performance requirements that the process must reach. *Loc. cit.*

The international judiciary can set, by itself, environmental standards for the Parties. In the *Fur-Seals* arbitration, the tribunal, based on the Parties' agreement to a decision *ex aequo et bono*, set individual and precise catch standards in the form of both binding decisions and non-binding recommendations.¹⁹² In the ICJ *Fisheries Jurisdiction* cases¹⁹³ as well as in the ITLOS *Southern Bluefin Tuna* case¹⁹⁴, the Court and the ITLOS respectively set individual and precise catch standards in the 1972 ICJ interim measures¹⁹⁵ whose binding force has seriously been questioned¹⁹⁶ and in the 1999 ITLOS provisional measures¹⁹⁷ whose binding force is statutorily recognized.¹⁹⁸

3.2.2.2. Assistance for Standard Setting by the Parties

Another role which the international judiciary can play is to assist the Parties in their own setting of environmental standards. In the *Fur-Seals* arbitration¹⁹⁹, the tribunal established a mechanism enabling the Parties to modify the regulations

¹⁹² See Articles 2, 3, 4, 6 of the Regulations, cited in MOORE, 1 *History and Digest* 949-950. See also Article 7 of the UK-USA *Compromis* (1892) (see Appendix 2.4.).

¹⁹³ (UK v. Iceland; FRG v. Iceland), 1974 ICJ Reports 3, 175.

¹⁹⁴ (New Zealand v. Japan; Australia v. Japan), Judgment available at http://www.un.org/Depts/los/itlos_new/itlosindex.

¹⁹⁵ The Court limited the UK's catch to 170,000 metric tons as opposed to the claimed 185,000 metric tons, and the FRG's catch to 119,000 metric tons as opposed to the claimed 120,000 metric tons, on the basis of the available statistical information before the court for the five years 1967-1971. 1972 ICJ Reports, at 17, paras. 25-26, at 34-35, paras. 26-27.

¹⁹⁶ See the arguments for (para. 4.122 of Germany's Memorial) and against (para. 139 of the US Counter Memorial) in the ICJ *LaGrand* case (Germany v. USA, 27 June 2001). The Court, in this case, admitted the binding force of the ICJ's interim measures. See Judgment, para. 109. However, serious doubt is raised by Judge ODA about the manner of the Court's finding. See Dissenting Opinion of Judge ODA, para. 30.

¹⁹⁷ Those measures included *catch standards* such as the imposition of *quotas* on each Party (1999 Judgment para. 90 [1(c)]) and the ban (=zero quota) of unilateral Experimental Fishing Programme (EFP) beyond each annual allocation (*id.*, para. 90 [1(d)]).

¹⁹⁸ Article 290(6) of the UNCLOS, which is referred to by Article 25(1) of the ITLOS Statute, provides: 'The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.'

¹⁹⁹ Article 9 of the Regulations. See MOORE, 1 *History and Digest* 951.

continuously. In the 1910 *Atlantic Fisheries* arbitration²⁰⁰, the tribunal delegated the task of reviewing the catch standards set by the UK to the Commission of experts, and recommended framework rules enabling the UK to set those standards. In the 1974 ICJ *Fisheries Jurisdiction* cases²⁰¹, the Court provided in the form of binding decisions, negotiation guidelines to help the Parties to set individual standards in conformity with general standards. Similar guidelines including a vague resource standard of ‘optimum utilization’ were shown, in the form of recommendation, by the ITLOS provisional measures of the 1999 *Southern Bluefin Tuna* case.²⁰² In the 2000 *Southern Bluefin Tuna* arbitration²⁰³ under the UNCLOS, the arbitral tribunal denied its jurisdiction since Japan preferred the regional framework (i.e. the CCSBT régime) rather than the global framework (i.e. the UNCLOS régime) in settling the dispute, and thus allowed the Parties to set *differential* standards according to the region, while pointing out that they had the obligation to resolve the dispute by various peaceful means which could contribute to setting environmental standards. However, the arbitral tribunal also reminded the Parties of the usefulness of *uniform* standards as reflected in the 1995 Straddling Fish Stock Agreement, which is global in scale and which has more detailed and far-reaching environmental standards than the UNCLOS or the CCSBT. In the currently docketed ITLOS *Swordfish* case²⁰⁴, the ITLOS seems to have assisted the Parties in reaching a provisional agreement which could lead to the setting of environmental standards.

3.2.2.3. Clarification of the Requirements for Valid Domestic Standard Setting

The international judiciary can also play a meaningful role in clarifying those requirements which should be complied with when setting domestic environmental standards in conformity with international law. In the 1910 *Atlantic Fisheries*

²⁰⁰ (UK/USA), 11 *RIAA* 167 at 190-192.

²⁰¹ 1974 *ICJ reports*, at 31-32, para. 73, at 201, para. 65.

²⁰² 1999 Judgment, para. 90 [1(f)].

²⁰³ 2000 Judgment paras. 70-72.

²⁰⁴ See *No. 45 ITLOS Press Release* (21 March 2001).

arbitration²⁰⁵, the tribunal clarified the test of reasonableness that should be used to determine the adequacy of the catch standards set by the UK. In the 1986 *Filleting* arbitration²⁰⁶, the tribunal denied Canada's right to set catch standards *after* the catch, while allowing the possibility of its justification by reasonableness. And in the 1998 ICJ *Estai* case²⁰⁷, the Court held that Canada's act of setting environmental standards was, insofar as it was of a technical nature and for the purpose of conservation, covered by the 'conservation and management measures' in general international law even if it was contrary thereto.

3.2.3. A Comparison between *Compromis* Application and Unilateral Application

3.2.3.1. The Difference of the Influence

As far as the above three modes of contributing to standard setting are concerned, there is no significant difference between arbitration and judicial settlement, on the one hand, and between *compromis* application and unilateral application, on the other, with regard to the second (assistance for standard setting by the Parties)²⁰⁸ and third (clarification of the requirements for valid domestic standard setting)²⁰⁹ modes of

²⁰⁵ 11 *RIAA* 188-189.

²⁰⁶ (Canada/France), 82 *ILR* 591 at 630-631, paras. 52-54 (1990).

²⁰⁷ (Spain v. Canada), 1998 *ICJ Reports* 461, para. 70.

²⁰⁸ However, in the case of judicial settlement not only making *binding decisions* without being based on the strict application of law but also making *non-binding recommendations* might be difficult except in the interim or provisional measures.

²⁰⁹ The criticism for the absence of the 'necessary tradition of continuity' on the part of arbitration, as made by LAUTERPACHT (see *Development* 6), seems exaggerated. It is true that the finding on the regulations' reasonableness given in the *Filleting* arbitration was criticized, by Arbitrator PHARAND, as inconsistent with the *Atlantic Fisheries* arbitration. 82 *ILR* 658, para. 63. However, the tribunal examined '[a]ny relevant rules of international law applicable in the relations between the Parties' and invoked the test of reasonableness mentioned in the *Atlantic Fisheries* arbitration as well as in the 1970 ICJ *Barcelona Traction* case. *Id.*, at 631, para. 54. Moreover, although not directly related to environmental standard setting, the UNCLOS arbitral tribunal's efforts to harmonize the 2000 *Southern Bluefin Tuna* case with the 1999 ITLOS case thereof should also be noted. See 2000 Judgment para. 52.

standard setting. However, as regards the first mode (standard setting by the international judiciary itself), the difference seems very clear; for although both arbitration (all submitted by *compromis* application) and judicial settlement (all submitted by unilateral application) succeeded in setting individual and precise catch standards either in the binding or non-binding form, judicial settlement by unilateral application only set provisional quotas reflecting the *status quo ante*, which can, relatively easily, be calculated on the basis of the past annual average catches. This seems to show the disadvantages both unilateral application and judicial settlement.

As far as application type is concerned, *compromis* application is preferable to unilateral application for the following three reasons: 1) in a *compromis* case the Parties are readily disposed to jointly ask the international judiciary to set environmental standards in its decisions or recommendations, whereas in a unilateral application case this is barely conceivable; 2) within *compromis* the Parties can clarify and limit the issues to be decided; and 3) also within *compromis* the Parties can introduce into the proceedings a system to reflect the views of scientists and fishery specialists.²¹⁰

As far as forum type is concerned, in the case of judicial settlement, the judicial body's capability to set environmental standards cannot necessarily be assured. In fact in the 1974 ICJ *Fisheries Jurisdiction* case the Court, admitting the lack of 'detailed scientific knowledge of the fishing grounds', confessed that '[t]he Court would . . . meet with difficulties if it were itself to attempt to lay down a precise scheme for an equitable adjustment of the rights involved.'²¹¹ Arbitration, for its part, seems more promising: here the Parties can choose arbitrators who have good skills on the basis of enough scientific, factual and legal knowledge about the matters in question; moreover, an arbitral tribunal can devote itself exclusively to a particular case, and allow sufficient

²¹⁰ With regard to the *Southern Bluefin Tuna* dispute, a Japanese diplomat relates that Japan was ready to accept arbitration under the CCSBT if the issues to be decided were limited to the difference of scientific views and if the views of scientists and fishery specialists could duly be reflected in the proceedings. KANEHARA, 'Southern Bluefin Tuna Case', at 270, note 78.

²¹¹ 1974 ICJ reports, at 32, para. 73, at 201, para. 65.

time to enable thorough scientific research to be undertaken by experts;²¹² furthermore, if the arbitration is based on the *compromis*, the agreement between the Parties can allow the tribunal to either make binding decisions without being based on the strict application of law, which is regarded as extremely exceptional in the case of judicial settlement,²¹³ or make non-binding recommendations, which might be seen as incompatible with the judicial function.²¹⁴

3.2.3.2. Methods to Overcome the Difficulties in Setting Standards

Environmental standard setting by the international judiciary is beset with a number of difficulties. In particular: **I)** environmental standard setting requires a considerable amount of scientific knowledge; **II)** environmental standards are often very technical; **III)** environmental standards frequently need periodic revision; **IV)** environmental standards need to be set in the context of policy considerations; and **V)** the scope of law-making by the international judiciary —especially in the case of judicial settlement where the strict application of law is statutorily required— is inherently limited.

²¹² It is legally possible for the ICJ and the ITLOS to do so. For the use of experts, see Article 50 of the ICJ Statute and Article 289 of the UNCLOS. However, whether it is in reality feasible for the ICJ is highly dubious in the light of the present heavy case load, and for the ITLOS yet unknown.

²¹³ Article 38(2) of the ICJ Statute and Article 293(2) of the UNCLOS allow the ICJ and the ITLOS respectively to decide a case *ex aequo et bono* if the Parties so request. But so far there has been no case where such a request has been formally made. See MERRILLS, *Settlement* 151. Note however that Judge ODA regards the 1985 ICJ *Libya/Malta Continental Shelf* case as given on the basis of *ex aequo et bono*. See Dissenting Opinion of Judge ODA in the 1993 ICJ *Jan Mayen* case, 1993 ICJ Reports 113, para. 86.

²¹⁴ LAUTERPACHT alludes to the opportunity for *recommendation* by the Court when the Parties request the Court to do so. See *Development* 217-220. Judge ODA, too, has stated: ‘The Court’s task is to indicate one line from among the many lines that may reasonably be proposed.’ Separate Opinion of Judge ODA in the 2001 ICJ *Maritime Delimitation* case (Qatar v. Bahrain), para. 41. However, the Court in the 1951 ICJ *Haya de la Torre* case stated that it was ‘unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function.’ 1951 ICJ Reports 83.

It is important to determine the impact of these difficulties upon the three modes of standard setting identified above, namely **A)** standard setting by the international judiciary itself; **B)** assistance for standard setting by the Parties; and **C)** clarification of the requirements for valid domestic standard setting.

As far as the first and second difficulties are concerned, these do not impact upon the second and third modes, because in those situations it is not the international judiciary, but the Parties themselves who set the environmental standards. Scientific and technical difficulties do however present significant problems in cases falling within mode one, i.e. those cases where standards are set by the international judiciary itself. There are three ways in which these problems might be resolved. The first solution would be to utilize arbitration to a greater extent, since in the case of arbitration, not only can the Parties choose arbitrators who have sufficient scientific, factual and legal knowledge relating to the matters in question, but also an arbitral tribunal can devote itself exclusively to the particular case in question, expend ample time thereon, and enable thorough scientific research by experts to be undertaken. The second solution would be to promote *compromis* application. As stated above, in a *compromis* case the Parties are disposed to jointly ask the international judiciary to set environmental standards in its decisions or recommendations, can clarify and limit the issues to be decided and can introduce into the proceedings a system to reflect the views of scientists and fishery specialists. The third solution would be to reform judicial settlement institutions—in other words, to introduce into judicial settlement itself, insofar as possible, the advantages of arbitration and *compromis* application.

The third difficulty relates to the need for periodic revision of environmental standards. Clearly such a task is not suited to the international judiciary, which is an essentially *ad hoc* dispute settlement system, and it would therefore be hard to remove this difficulty in respect of the first mode (i.e. cases involving standard setting by the international judiciary itself). However, in relation to the second mode (i.e. assistance for standard setting by the Parties), it should be recalled that in the *Fur-Seals* arbitration the tribunal established a mechanism enabling the Parties to continuously modify the regulations; and that in the *Atlantic Fisheries* arbitration the tribunal

delegated the task of reviewing the catch standards set by the UK to the Commission of experts. Thus whilst not able to undertake periodic revision itself, the international judiciary is, in this manner, able to facilitate such revision by presenting the Parties with a framework which enables them to review the adequacy of environmental standards and to carry out continuous monitoring and revision thereof. The third mode (i.e. clarification of the requirements for valid domestic standard setting) is also useful for facilitating revision by the Parties and would not be significantly adversely affected by the need for periodic revision of environmental standards.

The fourth difficulty, i.e. the need to consider policy when setting standards, can impact upon all three modes of environmental standard setting. In exploring this problem, it is difficult to define adequate policy considerations in a concrete manner. It is suggested, however, that the basis of an adequate policy perspective lies in balancing the interests of the Parties and of third Parties, and setting these against the need for 'the conservation and development' of the fishery resources, as stated in the 1974 ICJ *Fisheries Jurisdiction* case.²¹⁵ While there is a danger that among these interests, the Parties' interests might be given special priority in arbitration cases, the precedents (i.e. the *Fur-Seals* arbitration, the *Atlantic Fisheries* arbitration, the *Filleting* arbitration and the 2000 *Southern Bluefin Tuna* arbitration) suggest that a well-balanced approach has in fact been taken. Judicial settlement, for its part, would need to boldly adopt the perspective of seeking an equitable adjustment of the Parties' interests while taking account of third Parties' interests as well as of the need of 'the conservation and development' of the fishery resources.

The fifth difficulty, which relates to the limits of law-making by the international judiciary, can be problematic for all three modes of environmental standard setting. Closer analysis of each of these three modes demonstrates that such environmental standard setting is done at least in five situations as follows:

a) where environmental standards are set in relation to matters falling *outside* the regulation of current international law, on the basis of authorization of the Parties and in

²¹⁵ See 1974 ICJ Reports, at 34-35, para. 79, at 205-206, para. 77.

the form of binding decisions (the *Fur-Seals* arbitration [the first and second modes]) or of non-binding recommendations (the *Fur-Seals* arbitration [the first mode]);

b) where environmental standards are set in relation to matters falling *inside* the regulation of current international law, on the basis of authorization of the Parties and in the form of binding decisions (the *Atlantic Fisheries* arbitration [the second mode]) or of non-binding recommendations (the *Atlantic Fisheries* arbitration [the second mode]);

c) where environmental standards are set in relation to matters falling *inside* the regulation of current international law, on the basis of interpretation and application of that law and in the form of binding decisions (the *Atlantic Fisheries* arbitration [the third mode], the 1974 ICJ *Fisheries Jurisdiction* case [the second mode], the *Filleting* arbitration [the third mode], the 1998 ICJ *Estai* case [the third mode] and the 2000 *Southern Bluefin Tuna* arbitration [the second mode]) or of non-binding recommendations;

d) where environmental standards are set, urgently and provisionally, for the purpose of preserving the Parties' rights or of protecting the marine environment, in the form of binding decisions (the 1972 ICJ Order of Interim Measures concerning the 1974 *Fisheries Jurisdiction* case [the first mode], the 1999 ITLOS Order of Provisional Measures concerning the *Southern Bluefin Tuna* case [the first mode]) or of non-binding recommendations (the said 1999 ITLOS Order [the second mode]);

e) where environmental standards are set, in the form of some assistance other than decisions or orders (the currently docketed ITLOS *Swordfish* case [the second mode]) .

Among these five situations, it is the first three that are affected by the limits of law-making by the international judiciary.

In situations a) and b), where environmental standards are set on the basis of authorization of the Parties, the key point is the presence or absence of such authorization. While such authorization has been present in arbitration cases such as the *Fur-Seals* and *Atlantic Fisheries* arbitrations, it is yet to be seen in the practice of judicial settlement (in the latter case it amounts to agreement to a decision *ex aequo et bono* in the meaning of Article 38(2) of the ICJ Statute and Article 293(2) of the UNCLOS). Moreover, it is highly debatable whether non-binding recommendations

are permissible in the case of judicial settlement. In the light of these observations, therefore, arbitration based on the authorization of the Parties seems more promising than judicial settlement in settling a dispute in situations a) and b).

There is no precedent for the adoption of the first mode (standard setting by the international judiciary itself) in a situation where environmental standards are set on the basis of interpretation and application of current international law (situation c)). This fact suggests that interpretation and application of law is not helpful for the international judiciary to set a definitive environmental standard with a sufficient legal basis.²¹⁶ Furthermore, in situation c), too, it is also doubtful whether non-binding recommendations would be permissible in the case of judicial settlement. However, one cannot exclude the possibility that arbitration or judicial settlement bodies themselves set environmental standards which they regard as equitable in the form of binding decisions and through interpretation and application of legal rules requiring equity. In fact, in the field of maritime delimitation, there are precedents where arbitral tribunals²¹⁷ and the ICJ²¹⁸ themselves have determined precise delimitation lines based on equitable principles in their binding decisions, as will be detailed in the next section of this thesis. Moreover, ‘expression of judicial opinion short of recommendation’ is a technique to which both the PCIJ and the ICJ have, on occasions, resorted.²¹⁹ Hence the adoption of these techniques might be used to facilitate standard

²¹⁶ In the 1984 ICJ *Gulf of Maine* case, Judge GROS stated: ‘The Court’s refusal in 1974 to engage in a distribution of fishing quotas already showed that this role is not an easy one for a court of law to assume.’ Dissenting Opinion of Judge GROS, 1984 ICJ Reports 385, para. 40.

²¹⁷ See *Anglo-French Continental Shelf* arbitration (30 June 1977), 18 RIAA 119; *Eritrea-Yemen* arbitration (Second Stage: Maritime Delimitation, 17 December 1999), 40 ILM, (2001), at 985, para. 6, at 1003, para. 116, at 1011-1012, para. 169.

²¹⁸ See *Gulf of Maine* (Canada/USA) and *Maritime Delimitation* (Qatar v. Bahrain) cases.

²¹⁹ See LAUTERPACHT, *Development* 220-223. For example, the PCIJ in the 1932 *Free Zones* case stated: ‘The Court does not hesitate to express its opinion that if, by the maintenance in force of the old treaties, Switzerland obtains the economic advantages derived from the free zones, she ought in return to grant compensatory economic advantages to the people of the zones.’ PCIJ Series A/B, No. 46 (1932), at 169. Similarly, in the 1969 *North Sea Continental Shelf* case the ICJ remarked that

setting by the international judiciary itself, even in situation c).

3.2.4. Concluding Remarks

The above analysis demonstrates that the international judiciary can significantly contribute to setting environmental standards for the conservation of marine living resources in at least three ways. Among these three ways, the first (standard setting by the international judiciary itself) strikingly reflects the differences between arbitration and judicial settlement and between *compromis* application and unilateral application. Its background is deeply overshadowed by the influence of the difficulties in setting environmental standards through the international judiciary's practice. In order to overcome such difficulties and to enhance, from now on, environmental standard setting by the international judiciary itself, we need to utilize arbitration, promote *compromis* application, reform judicial settlement institutions and devise adjudicative techniques. For this purpose it might be worth considering the establishment of not only a fund to give financial aid to the Parties of arbitration by *compromis* application but also a committee of environmental experts to help legal settlement including judicial settlement, say within the UN or UNEP. Moreover, we should make every effort, by adopting the second (assistance for standard setting by the Parties) and third (clarification of the requirements for valid domestic standard setting) modes, in order to compensate for the defects of standard setting by the international judiciary itself.

It is true that '[t]he most appropriate method for the solution of the dispute is clearly that of negotiation', as the ICJ in the 1974 *Fisheries Jurisdiction* cases states.²²⁰ However, the international judiciary can help the Parties to reach agreement on setting environmental standards by providing negotiation guidelines or by assisting negotiation. Moreover, in cases where negotiation fails, it might be an attractive option to delegate

'agreement for joint exploitation' appears 'particularly appropriate when it is a question of preserving the unity of a deposit.' 1969 *ICJ Reports* 52, para. 99. This technique was also used in the 2000 *Southern Bluefin Tuna* arbitration (see Appendix 2.7.).

²²⁰ 1969 *ICJ Reports*, at 31, para. 73, at 201, para. 65.

the task of setting environmental standards to the international judiciary, especially if the proposals mentioned above are adopted.

3.3. Towards Environmental Standard Setting as Conciliatory Law-Making between the Parties: Lessons Learned from the ICJ Maritime Delimitation Cases

3.3.1. Introduction: The Expected Conciliatory Role of the ICJ

Just as a judicial body's advisory function is needed by international organizations, its conciliatory role is expected by those States confronting boundary delimitation.²²¹ For example, in the *Tunisia/Libya Continental Shelf* case, Article 1 of the *compromis* requested the ICJ to 'take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as the *new accepted trends in the Third Conference on the Law of the Sea*';²²² in the *Gulf of Maine* case, Article 2 of the *compromis* requested the ICJ to decide 'the *single maritime boundary* that divides the continental shelf and fisheries zones' of Canada and the USA;²²³ and in the *Frontier Dispute* case, the preamble of the *compromis* expressed the Parties' desire that the line should be 'based in particular on respect for the *principle of the intangibility of frontiers inherited from colonization*'.²²⁴ The above boundary delimitation cases show that a judicial body is sometimes asked to act as a conciliator by helping the Parties to settle the dispute as they like; for the subject matter is at the disposal of the Parties to the dispute, allowing those Parties to freely make the decision insofar as it violates neither international law nor third Parties' interests. However, this might be incompatible with such a body's judicial function because the basis of its decision should be the law, rather than the Parties' views. Indeed, in the *Tunisia/Libya Continental Shelf* case, the Court

²²¹ See MERRILLS, *Settlement* 151-155, esp. 154.

²²² 1982 ICJ Reports 23.

²²³ (Canada/USA), 1984 ICJ Reports 253.

²²⁴ (Burkina Faso/Mali), 1986 ICJ Reports 557.

denied the conciliatory character of its decision.²²⁵

However, analysis of the following maritime delimitation cases confirms that the ICJ has in fact played a conciliatory role by doing ‘conciliatory law-making’ when applying and interpreting equitable principles. In spite of the *South West Africa* cases’ statements,²²⁶ the ICJ has done law-making, conceived as a process of creating new law or changing the existing law, based on the fiction that it is no more than an application of an existing legal principle or an interpretation of an existing text.²²⁷ This law-making character of the ICJ decisions is evidenced, for example, by the *Fisheries* case²²⁸, where the Court recognized economic interests (i.e. ‘economic interests peculiar to a region’²²⁹ and ‘the vital needs of the population’²³⁰) as a legitimate element in delimitating maritime areas by drawing straight baselines.²³¹

Although there are different views as to whether the ICJ decisions can be regarded as an independent source of international law,²³² those decisions can no doubt contribute to creating new law or changing the existing law by affecting treaty and customary international law formation process.²³³ Indeed, the drawing of straight baselines and the taking into account, for this purpose, of economic interests, as recognized by the *Fisheries* case, are accepted in both Article 4 of the 1958 Territorial Sea Convention²³⁴ and Article 7 of the UNCLOS²³⁵.

²²⁵ 1982 ICJ Reports 60, para. 71.

²²⁶ 1966 ICJ Reports 48, para. 89.

²²⁷ See LAUTERPACHT, *Development* 155.

²²⁸ (UK v. Norway), 1951 ICJ Reports 116.

²²⁹ *Id.*, at 133.

²³⁰ *Id.*, at 142, where the Court added that the inhabitants’ rights shall be ‘attested by very ancient and peaceful usage’.

²³¹ See LAUTERPACHT, *Development* 193.

²³² STARZHINA, ‘Auxiliary Sources’, at 523; NAWAZ, ‘Other Sources’, at 528-530.

²³³ DOEHRING thinks that a decision of the ICJ cannot contribute to the creation of customary international law because ‘the obligation to respect such a decision does not always rest on the conviction that substantive law has been created this way’ and because ‘the practice of the International Court does not represent State practice’. See DOEHRING, ‘Participation’, at 6, 10. But this argument discards the practice and *opinio juris*, affected by a decision of the ICJ, of States other than the Parties to the case.

²³⁴ This provision was drafted by reference to the *Fisheries* case. See LAUTERPACHT, *Development* 197, footnote 23.

The ICJ law-making decisions referred to above concern not only *lex generalis* but also *lex specialis* between the Parties. While the former has been the subject of much debate,²³⁶ the latter is particularly significant in settling disputes where the subject matter is at the disposal of the Parties, as is the case in environmental standard setting as well as in maritime delimitation. Therefore it is important to emphasize the ICJ's role in creating and changing *lex specialis* between the Parties. It follows that the concept of 'the ICJ's conciliatory law-making' to be discussed here is wide enough to cover the situation where the Parties themselves, based on the ICJ orders or judgments equitably adjusting their interests, do law-making by agreement, as seen in the *North Sea Continental Shelf* cases²³⁷.

The task now is to analyze not only the methods in which the ICJ carries out conciliatory law-making but also the conditions and criteria upon which such law-making is predicated. It will then be necessary to determine whether the conclusions derived from this analysis are equally applicable to environmental standard setting, for which conciliatory law-making is also required. Given that our main concern lies in how to deal with the matter at the disposal of the disputing Parties only,²³⁸ the focus here will be on ICJ maritime delimitation cases which involve overlapping jurisdictional claims to areas which appertain to either of the two disputing States.²³⁹ The analysis will therefore not include the *Fisheries* case, the *Fisheries jurisdiction* case or the *Estai* case, where the subject matter concerned the coastal States' claims to extend their jurisdiction to the high seas. Nor will it include the

²³⁵ See Appendix 2.1.

²³⁶ See STARZHINA, 'Auxiliary Sources', at 524; NAWAZ, 'Other Sources', at 540; LACHS, 'Some Reflections', at 278; DANILENKO, *Law-Making* 261; MCWHINNEY, *World Court*, at 157 ff.; MCWHINNEY, 'Legislative Rôle', at p. 578; REISMAN, 'Politicization', at 77; JENNINGS, 'Judiciary', at 8.

²³⁷ (FRG/Denmark; FRG/Netherlands), *1969 ICJ Reports* 3.

²³⁸ According to Judge ODA, '[w]hile the entitlement to areas is *erga omnes*, the delimitation of areas is solely related to the drawing of a line between two conflicting entitlements, which remains a matter for the States concerned.' Separate Opinion of Judge ODA in the 1993 *Jan Mayen* case, *1993 ICJ Reports* 110, para. 75.

²³⁹ In the Court's words, 'delimitation . . . of drawing a boundary line between areas which already appertain to one or other of the States affected'. *North Sea Continental Shelf* cases, *1969 ICJ Reports* 22, para. 20.

Aegean Sea case²⁴⁰ or the *Land, Island and Maritime Frontier Dispute* case²⁴¹, in both of which no maritime delimitation was carried out due to the Court's lack of jurisdiction.²⁴²

3.3.2. Methods in which the ICJ engages in Conciliatory Law-Making in Maritime Delimitation

3.3.2.1. Obedience to the Parties' Common Views

The first point to note is that the Court is obliged to obey the Parties' common views provided that they are relevant (legally and factually) to the case, and to the extent that they are not contrary to international law. In the *North Sea Continental Shelf* cases, the Court included among the 'relevant circumstances' natural prolongation as well as the continental shelf areas' physical/geological structure and natural resources.²⁴³ In the *Tunisia/Libya Continental Shelf* case the Court not only examined the effect on the role of the concept of natural prolongation of 'the new accepted trends in the Third Conference on the Law of the Sea',²⁴⁴ but also included among the 'relevant circumstances' the marked change between Ras Ajdir and Ras Kaboudia as well as a reasonable degree of proportionality,²⁴⁵ and indicated a delimitation line starting from Ras Ajdir when showing the 'practical method'.²⁴⁶ In the *Jan Mayen* case, the Court regarded an equitable access to capelin stock as one of the 'relevant

²⁴⁰ (*Greece v. Turkey*) 1978 ICJ Reports 3.

²⁴¹ (*El Salvador/Honduras*), 1992 ICJ Reports 351 (the Chamber's decision intervened by Nicaragua).

²⁴² 1978 ICJ Reports 45, para. 109; 1992 ICJ Reports 617, para. 432 (2).

²⁴³ 1969 ICJ Reports 53-54, para. 101, (C) (1) and (D) (2). For the Parties' views, see *id.*, at 31, paras. 43-44, at 52, para. 97.

²⁴⁴ 1982 ICJ Reports, at 47, para. 45, at 49, para. 50. For the Parties' views, see Article 1 of the *compromis* (English translation supplied by Libya), *id.*, at 23.

²⁴⁵ *Id.*, at 93, para. 133 B (2) and (5). For the Parties' views, see *id.*, at 26, para. 15, at 62, para. 76, at 75, para. 103, at 80, para. 112, at 86, para. 122.

²⁴⁶ *Id.*, at 66, paras. 85-86.

circumstances'.²⁴⁷ In the *Gulf of Maine* case the Chamber agreed to draw a single delimitation line,²⁴⁸ accepted the triangle enclosing the delimitation area,²⁴⁹ chose virtually the same orientation of the final segment of the line as the two Parties respectively envisaged,²⁵⁰ and lastly, considered the Parties' fishing activities as a criterion against which to check whether the delimitation line would be radically inequitable.²⁵¹ In the *Maritime Delimitation* case the Court adopted the dichotomy between the southern part and the northern part of the delimitation area,²⁵² and treated Fasht ad Dibal as a low-tide elevation without examination.²⁵³

3.3.2.2. Adoption of Each Party's Views

Secondly, the Court exercises its discretion to adopt each Party's views if they are well founded (legally and factually) or appropriate to the case. In the *North Sea Continental Shelf* cases, the Court counted among the 'relevant circumstances' the general configuration of the coasts of the Parties, the presence of any special or unusual features, and a reasonable degree of proportionality, all of which were claimed by the FRG.²⁵⁴ In the *Tunisia/Libya Continental Shelf* case the Court included among the 'relevant circumstances' the existence and position of the Kerkennah Islands claimed by Tunisia,²⁵⁵ and in the *Libya/Malta Continental Shelf* case, the proportionality argued by

²⁴⁷ (Denmark v. Norway) 1993 ICJ Reports 38 at 72, para. 76. For the Parties' views, see *id.*, at 70, para. 73.

²⁴⁸ 1984 ICJ Reports 267, para. 27. For the Parties' views, see Article 2 of the *compromis*, *id.*, at 253.

²⁴⁹ *Id.*, at 266, paras. 22-23.

²⁵⁰ *Id.*, at 338, para. 225.

²⁵¹ *Id.*, at 342-343, paras. 237-238.

²⁵² (Qatar v. Bahrain), 2001 Judgment [Merits] paras. 169-170, 221, 224. For the Parties' views, see Qatar's Memorial [Merits], Vol. 1, paras. 9.6-9.7; Bahrain's Memorial [Merits], Vol. 1, para. 559.

²⁵³ 2001 Judgment [Merits] para. 220.

²⁵⁴ 1969 ICJ Reports 54, para. 101 (D) (1) and (3). For the FRG's views, see *id.*, at 20-21, paras. 15-16.

²⁵⁵ 1982 ICJ Reports 93, para. 133 B (3). For Tunisia's view, see *id.*, at 26, para. 15, at 62, para. 76.

Libya.²⁵⁶ In the *Jan Mayen* case the Court, on the one hand, regarded the disparity between the lengths of coasts claimed by Denmark as one of the ‘special or relevant circumstances’,²⁵⁷ and on the other hand, engaged with the process of fixing a delimitation line as requested by Denmark for the purpose of the final settlement of the dispute.²⁵⁸ In the *Gulf of Maine* case the Chamber, on the one hand, took account of the US arguments of the difference between the coastline lengths of each Party²⁵⁹ and of ‘no-cutting-off’ of the seaward projection of the coasts of another State,²⁶⁰ and on the other hand, clarified the two conditions enabling the Parties’ proposed methods to be regarded as appropriate.²⁶¹

3.3.2.3. Elaboration of the Court’s Own Views Equitably Adjusting the Parties’ Interests

Thirdly, the Court elaborates its own views, equitably adjusting the Parties’ interests. In the *Tunisia/Libya Continental Shelf* case the Court fixed the two delimitation lines based on the ‘practical method’ while showing their reasonableness.²⁶² In the *Libya/Malta Continental Shelf* case the Court drew a delimitation line which reflected Libya’s proportionality argument as well as Malta’s arguments of equidistance and of ‘what if Malta did not exist’.²⁶³ In the *Jan Mayen* case the Court indicated an approximate delimitation line which realized, within the ‘discretion conferred on the Court by the need to arrive at an equitable result’, not only the consideration for the marked disparity in coastal lengths argued by Denmark but

²⁵⁶ 1985 ICJ Reports at 50, para. 68, at 57, para. 79 B (2) and (3).

²⁵⁷ 1993 ICJ Reports 68-69, para. 68. For Denmark’s view, see *id.*, at 65, para. 61.

²⁵⁸ *Id.*, at 78, para. 89. For Denmark’s view, see *id.*, at 42, para. 9.

²⁵⁹ 1984 ICJ Reports, at 327-328, paras. 195-197, at 331, para. 206, at 336, paras. 221-222.

²⁶⁰ *Id.*, at 328, para. 196, at 335-337, paras. 219-222.

²⁶¹ *Id.*, at 321, para. 180.

²⁶² 1982 ICJ Reports, at 66, paras. 85-86, at 84-85, paras. 118-120, at 87-88, paras. 123-126, at 89, para. 129.

²⁶³ 1985 ICJ Reports, at 19, para. 11, at 77, para. 3 of the Joint Separate Opinion.

also each Party's equitable access to fishing resources.²⁶⁴ In the *Gulf of Maine* case the Chamber, at the request of the Parties, drew a single maritime delimitation line, based on its own views, though greatly influenced not only by the Parties' common views but also by each Party's view.²⁶⁵ In the *Maritime Delimitation* case the Court, when it tried to draw the equidistance line, not only avoided the determination on whether Fasht al Azm was to be regarded as part of the island of Sitrah of Bahrain or as a low-tide elevation²⁶⁶ but also made efforts to strike some balance in the delimitation by giving Bahrain more gains in the southern sector while giving Qatar more gains in the north.²⁶⁷

3.3.3. Concluding Remarks

Although the ICJ is statutorily required to apply the law strictly, it has been demonstrated that under certain conditions and subject to certain criteria, it can undertake a conciliatory law-making role in maritime delimitation cases.

The basic precondition for such law-making activity to occur is the existence of a relevant legal rule requiring equity to be considered, as are equitable principles for maritime delimitation.²⁶⁸ Supplementary preconditions might be: a) the Parties' common views²⁶⁹, b) the availability of judicial discretion²⁷⁰ and c) the need for final settlement of a dispute²⁷¹.

Assuming these conditions are satisfied, it is possible for the ICJ to engage in conciliatory law-making within the context of the following criteria: 1) the absence of

²⁶⁴ 1993 ICJ Reports 79, para. 90.

²⁶⁵ 1984 ICJ Reports 344, para. 241.

²⁶⁶ See 2001 Judgment [Merits] paras. 179, 190, 216, 220.

²⁶⁷ See Dissenting Opinion of Judge TORRES BERNÁRDEZ attached to the 2001 Judgment [Merits], para. 546.

²⁶⁸ See *North Sea Continental Shelf* cases, 1969 ICJ Reports 48, para. 88; *Tunisia/Libya Continental Shelf* case, 1982 ICJ Reports 60, para. 71.

²⁶⁹ See *Gulf of Maine* case, 1984 ICJ Reports, at 266, para. 22, at 338, para. 225.

²⁷⁰ See *Jan Mayen* case, 1993 ICJ Reports 79, para. 90. But see *contra*, *Tunisia/Libya Continental Shelf* case, 1982 ICJ Reports 60, para. 71.

²⁷¹ See *Jan Mayen* case, 1993 ICJ Reports 78, para. 89.

clearly prohibiting rules²⁷², 2) the protection of third Parties' interests²⁷³, 3) the achievement of an equitable result²⁷⁴, 4) the relevance or appropriateness of the Parties' views²⁷⁵, and 5) the inviolability of the ICJ decisions' binding force and finality²⁷⁶.

Within the context of these preconditions and criteria, the ICJ could, by analogy, use its conciliatory law-making role to set environmental standards. In the field of international environmental law, there are a number of legal rules which require equity to be considered, such as the principle of equitable utilization of international watercourses²⁷⁷, the principle of equity²⁷⁸, and the principle of common but differentiated responsibilities²⁷⁹. Moreover, the obligation to prevent, with *due diligence, serious* harm to other States²⁸⁰ inevitably requires equity to be considered.²⁸¹ Therefore, the ICJ clearly has the potential to set environmental standards—even precise standards—through conciliatory law-making.

However, environmental standard setting involves particular difficulties which are not present in maritime delimitation cases. First, environmental standards are variable, whereas maritime boundaries, once fixed, are seldom altered. Therefore, variable factors such as relative poverty²⁸², relative economic position²⁸³ and population or socio-economic factors would have to be taken into account for setting environmental standards. Secondly, environmental standard setting, which is a process of setting a

²⁷² See *Gulf of Maine case*, 1984 ICJ Reports 267, para. 27. However, one judge has expressed the view that a clearly authorizing rule is necessary. Para. 5 of Dissenting Opinion of Judge GROS, *id.*, at 363.

²⁷³ See *Libya/Malta Continental Shelf case*, 1985 ICJ Reports 25, para. 21.

²⁷⁴ See *Tunisia/Libya Continental Shelf case*, 1982 ICJ Reports 59, para. 70.

²⁷⁵ See 3.3.2.1. and 3.3.2.2. of this thesis. It does not seem essential—however desirable it may be—to prove the reasonableness of the Court's own views equitably adjusting the Parties' interests; for such proof is often very difficult and is in fact not pursued in the cases except the *Tunisia/Libya Continental Shelf case*.

²⁷⁶ See *Tunisia/Libya Continental Shelf case*, 1982 ICJ Reports 40, para. 29.

²⁷⁷ See Articles 5 and 6 of the 1997 Watercourses Convention.

²⁷⁸ See Article 3(1) of the UNFCCC.

²⁷⁹ See *id.*

²⁸⁰ See 5.2. of this thesis.

²⁸¹ See this author, '*Equitable Utilization*', at 159-160.

²⁸² See *Tunisia/Libya Continental Shelf case*, 1982 ICJ Reports 77-78, paras. 106-107.

²⁸³ See *Libya/Malta Continental Shelf case*, 1985 ICJ Reports 41, para. 50.

limit *de novo*, generates a wider spectrum of policy considerations than does maritime delimitation, which is a process of finding out an already established limit.²⁸⁴ Therefore, in setting environmental standards, not only would historical and geo-related factors need to be taken into account, as is the case in maritime delimitation, but also current and non geo-related factors would need to come into play

Thus environmental standard setting takes place in a more complicated context than maritime delimitation. This complexity generates difficulties in interpretation and application of law for a judiciary which lacks scientific and factual knowledge, and which is therefore beset with difficulties caused by ‘scientific uncertainty’. As a result, there is a danger that the judiciary cannot exercise its ‘law-making’ function on the pretext of ‘law-finding’. However, there are, more or less, similar difficulties in maritime delimitation. Therefore, the feasibility of setting precise environmental standards in the merits phase of judicial settlement could depend on the judiciary’s ability to persuasively present a conclusion acceptable to the Parties.

The ICJ is to be commended for its role in conciliatory law-making. It has made significant efforts to realize a more party-oriented dispute settlement within a certain legal framework. These efforts indicate that ‘running a tight courtroom’ of the kind advocated by Judge HIGGINS,²⁸⁵ need not extend to the *substantive* aspect of dispute settlement, where the subject matter is at the disposal of the Parties, as is the case of maritime delimitation and of environmental standard setting, and where the expected role of the ICJ is to make *lex specialis* between the Parties by equitably adjusting their interests. It remains to be seen, in such a situation, whether and to what extent it is desirable or undesirable for a judicial settlement body to arrange the *procedural* aspect in accordance with the Parties’ views.²⁸⁶

²⁸⁴ See *North Sea Continental Shelf* cases, 1969 ICJ Reports 22, paras. 18-20; *Jan Mayen* case, 1993 ICJ Reports 67, para. 64. Contra, see Dissenting Opinion of Judge ODA in the *Libya/Malta Continental Shelf* case, 1985 ICJ Reports 158-159, para. 64.

²⁸⁵ She remarks: ‘I think it is time to move away . . . from undue deference to the litigants by virtue of their rank as sovereign States.’ HIGGINS, ‘Tight Courtroom’, at 124.

²⁸⁶ CHINKIN suggests the usefulness of party-oriented dispute settlement procedures,

3.4. Setting Minimum and Vague Environmental Standards and More: The International Human Rights Judiciary's Challenge to State Sovereignty

3.4.1. Introduction

As early as in 1972, the 'right to environment' as a human right²⁸⁷ was proclaimed in a global level, and was set out in Principle 1²⁸⁸ of the Stockholm Declaration. Later on, the concept of the 'right to environment' began to appear in regional convention provisions, such as Article 24²⁸⁹ of the 1981 African Charter on Human and Peoples' Rights ('Afr.Chart.H.P.R.')²⁹⁰ as well as Article 11²⁹¹ of the 1988 San Salvador Protocol²⁹² to the 1969 American Convention on Human Rights ('Am.Conv.H.R.')²⁹³.

The necessity of human rights protection against environmental destruction is now widely acknowledged,²⁹⁴ though debate continues as to whether the concept of the 'right to environment' is desirable.²⁹⁵ What then is the contribution that can be made

other than arbitration and judicial settlement, in international law. See CHINKIN, 'Alternative Dispute Resolution'. In the *Gulf of Maine* case, the Chamber was constituted 'after consultation with the Parties' (Article 1 of the 1979 Canada/US Special Agreement), though only the number of judges was to be approved by the Parties (Article 26(2) of the ICJ Statute). See 1984 ICJ Reports, at 252, para. 3, at 253, para. 5.

²⁸⁷ The human 'right to environment' is distinguished from the 'right of the environment', i.e. a legal status or standing for components of the environment, which is not a human right. SHELTON, 'Right to Environment', at 105, footnote 7. For the latter concept, see STONE, 'Should Trees have Standing?', at 1-47.

²⁸⁸ See Appendix 12.1.

²⁸⁹ See Appendix 6.

²⁹⁰ (Banjul, 20 June 1981).

²⁹¹ See Appendix 5.2.

²⁹² (San Salvador, 18 November 1988).

²⁹³ (San José, 22 November 1969).

²⁹⁴ See the KSENTINI Report (UN Doc., E/CN.4/Sub.2/1994/9). See also DESGAGNÉ, 'Integrating Environmental Values'; SCHWARTZ, 'Environmental Abuse'.

²⁹⁵ The 'right to environment' concept's uncertainty, anthropocentricity and possible redundancy have been criticized. See BOYLE, 'Role of International Human Rights Law', at 50-57. See also REDGWELL, 'Life, The Universe and Everything'; HANDL, '“Revisionist” View'.

by the international human rights judiciary towards the development of this right? This section will consider the answer to this question from the perspective of environmental standard-setting.

Before considering ways in which judicial bodies might strengthen environmental standards, a brief survey of the status quo is needed. International human rights bodies can be divided into two categories. On the one hand there are some whose legal basis requires an individual focus such as the Human Rights Committee ('HRC') of the International Covenant on Civil and Political Rights ('ICCPR'),²⁹⁶ and the European Commission ('ECmHR') and Court ('ECtHR') of Human Rights.²⁹⁷ Other bodies, such as the Inter-American Commission on Human Rights ('InterAmCmHR'), the Inter-American Court of Human Rights ('InterAmCtHR'),²⁹⁸ and the African Commission on Human and Peoples' Rights ('AfrCmHPR')²⁹⁹ can be said to have *population-oriented* provisions, i.e. they contain a 'right to environment' provision,³⁰⁰ and their rules of procedure allow for the hearing of an *actio popularis*.³⁰¹ The attitude of each type of system towards environmental destruction³⁰² will be examined

²⁹⁶ (New York, 16 December 1966)

²⁹⁷ Although both the ECmHR and ECtHR were created by the 1950 Eur.Conv.H.R., the former was abolished in accordance with the 11th Protocol's entry into force on 1 November 1998.

²⁹⁸ Both the InterAmCmHR and InterAmCtHR were created by the 1969 Am.Conv.H.R.

²⁹⁹ The AfrCmHPR was created by the 1981 Afr.Chart.H.P.R. Although by its 1998 Protocol the African Court on Human and Peoples' Rights was also created, the protocol only entered into force on 25 January 2004.

³⁰⁰ See Article 11 of the San Salvador Protocol; Article 24 of the Afr.Chart.H.P.R.

³⁰¹ 'Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.' The 2001 *Ogoni* decision [available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.htm>], para. 49. See Articles 44 and 46 of the Am.Conv.H.R. and Articles 55 and 56 of the Afr.Chart.H.P.R. Although the InterAmCtHR's jurisdiction is reserved for the State Parties and InterAmCmHR (Article 61 of the Am.Conv.H.R.), the InterAmCtHR can seize a case of the InterAmCmHR submitted by *actio popularis*.

³⁰² Although the international human rights judiciary can also protect human rights against unreasonable environmental restriction, we do not handle this topic here. This is because its implications to the 'right to environment' seems somewhat indirect, even if other people's 'right to environment' could be used to emphasize the environmental restriction's legitimate aim, as in 2001 ECtHR *Chapman v. UK* (see Appendix 4.5.).

separately.

The survey will show that in general, the international human rights judiciary, whether operating on an individual-oriented or population-oriented basis, tends to confine itself to setting minimum and vague environmental standards out of respect for state sovereignty. However, since the population-oriented judiciary seems to be more vigorous in its standard-setting, it may be possible to explore options which would allow higher and more precise environmental standards to become available under the individual-oriented conventions.

3.4.2. Setting Minimum and Vague Environmental Standards: the Individual-Oriented Judiciary

The individual-oriented judiciary's practice shows that it rarely sets environmental standards and, even when it does, it tends to set only minimum and vague environmental standards. Three aspects of the case law of these institutions merit particular examination, viz. the coverage of harm, the requirement for there to be a 'victim' and the discretion afforded to the State.

3.4.2.1. Coverage of Harm

3.4.2.1.1. Health Effects

Although there are no reported decisions of the HRC concerning environmental standards which cause poor health, some European cases have considered the impact which environmental issues may have on the right to respect for private life under Article 8 of the European Convention on Human Rights ('Eur.Conv.H.R.'). The ECmHR has opined that noise levels may amount to an interference under Article 8(1),

For this topic in the context of the European human rights protection system, see DÉJEANT-PONS, 'Le droit de l'homme à l'environnement', at 396-414.

although there will be no breach of the Convention if such interference is legal and is a proportionate interference which protects a legitimate interest. The ECtHR has been prepared to consider in addition, whether the government concerned has failed to strike a 'fair balance' by exceeding the 'margin of appreciation' which the Convention provides in these matters.

The 1986 ECmHR's admissibility decisions³⁰³ in *Powell v. UK* and *Rayner v. UK* are more sophisticated than its decisions in 1980 *Arrondelle v. UK*³⁰⁴ and 1985 *Baggs v. UK*³⁰⁵: there they distinguish the noise level amounting to an interference under Article 8(1) (i.e. *considerable* in respect of physical well-being and amenities of life) from *disproportional* one unjustifiable under Article 8(2) (i.e. *intolerable* and *exceptional* in respect of its *degree* and *frequency*). The latter standard is thought much of by the ECmHR in the admissibility phase of 1989 *Vearncombe v. UK*³⁰⁶, which holds that noise nuisance amounting to a possible interference under Article 8 is *intolerable* and *exceptional* in the light of its *level* and *frequency*, such as *continuous important* noise nuisance.

The ECtHR in 1994 *Lopez Ostra v. Spain*³⁰⁷ —as referred to by 1998 *Guerra and Others v. Italy*³⁰⁸, 2003 *Kyrtatos v. Greece*³⁰⁹ and 2003 *Hatton and Others v. UK*³¹⁰— found the occurrence of *severe* environmental pollution, which amounts to an interference under Article 8 but which does not *seriously* endanger the health.

Thus the Strasbourg bodies have set environmental standards which are qualitatively vague, using words such as *considerable* nuisance, *intolerable* and *exceptional* nuisance, *severe* environmental pollution and *serious* health risk. The expression 'considerable nuisance' and 'severe environmental pollution' implies that the threshold of nuisance which will amount to an interference under Article 8 is rather high.

³⁰³ *Powell v. UK*, 9 EHRR 241 at 242 (1987); *Rayner v. UK*, *id.*, at 375, 376-377.

³⁰⁴ *E.A. Arrondelle v. UK*, 19 D&R 186 at 199 (1980).

³⁰⁵ *Frederick William Baggs v. UK*, 44 D&R 13 at 20 (1985).

³⁰⁶ *George Vearncombe et al. v. UK and FRG*, 59 D&R 186 at 196 (1989).

³⁰⁷ 20 EHRR 277 at 295, para. 51 (1995).

³⁰⁸ 26 EHRR 357 at 383, para. 60 (1998).

³⁰⁹ 6 Eur. Ct. H.R. 257, 268, para. 52 (2003).

³¹⁰ Grand Chamber Judgment, 37 EHRR 611, 634, para. 96 (2003).

In fact in *Kyrtatos v. Greece*³¹¹ the ECtHR held that the disturbances (noises, night-lights, etc.) had not reached a *sufficient degree of seriousness* to be taken into account for the purposes of Article 8. Moreover, even if the nuisance reaches the threshold, it could still be held to be justified unless it is intolerable and exceptional (in the ECmHR's view) or the government exceeds its 'margin of appreciation' (in the ECtHR's view).

Likewise, the ECtHR sets a vague process standard, i.e. the 'fair balance' test allowing a certain 'margin of appreciation'. The 'margin' is declared to be *wide* (1990 *Powell and Rayner*³¹²), *narrow* (1994 *Lopez Ostra v. Spain*³¹³), the *narrowest* (2001 *Hatton and Others v. UK Chamber judgment*³¹⁴), and *wide* in the *substantive aspect* (2003 *Hatton and Others v. UK Grand Chamber judgment*³¹⁵). According to the last judgment, the ECtHR would, in the *substantive aspect*, hardly review the government's behavior.

3.4.2.1.2 Property Value's Depreciation

In addition to health grounds a number of cases have been brought claiming property damage as a result of failure to adequately protect the environment. As the ICCPR does not guarantee the right to property, the relevant HRC cases are those related to the rights of minorities (Article 27)³¹⁶, whereas the Strasbourg Court has generally dealt with such cases directly by way of Article 1³¹⁷ of the First Protocol to the Eur.Conv.H.R.

In its 2000 decision in *Apirana Mahuika et al. v. New Zealand*³¹⁸ the HRC found that there was no violation of the rights of the Maori, in the light of the existence of the

³¹¹ 6 *Eur. Ct. H.R.* 269, para. 54 (2003).

³¹² 12 *EHRR* 355 at 369, paras. 42-45 (1990).

³¹³ 20 *EHRR* 296-297, paras. 52-57 (1995).

³¹⁴ Chamber Judgment, 34 *EHRR* 1, 23-24, paras. 96-97 (2002).

³¹⁵ Grand Chamber Judgment, 37 *EHRR* 634, para. 100.

³¹⁶ See Appendix 3.

³¹⁷ See Appendix 4.2.

³¹⁸ CCPR/C/70/D/547/1993, Decision paras. 9.6, 9.8.

process of broad prior consultation duly respecting Maori fishing activities' sustainability. Thus it sets a vague environmental quality standard, i.e. *sustainability*, which does not, however—in the eyes of the complainants— fully cover the loss of their fishing resources.

In its admissibility decisions³¹⁹ in *Powell v. UK* and *Rayner v. UK*, the ECmHR stated that Protocol No.1's Article 1 did not, in principle, guarantee a right to the peaceful enjoyment of possessions in a *pleasant environment*. According to this decision, that provision provides environmental protection only if the value of the property is substantially diminished. Likewise, in 1990 in *S. v. France*³²⁰ the ECmHR suggested that Protocol No.1's Article 1 did not guarantee the right to full compensation in all cases. Furthermore, in 1984 in *M. v. Austria*³²¹ the ECmHR seems to have ruled out the possibility of an environmental standard stemming from the Protocol, holding that: 'the right to shared use of the common . . . cannot be considered as a property right within the meaning of Article 1 of Protocol No. 1.'

Thus Protocol No.1's Article 1 does not fully cover the property value's depreciation caused by environmental destruction. Even if it were to be included, the threshold at which protection begins is very high, given that a substantial diminution of value would need to be shown.

3.4.2.1.3. Amenity Deterioration

In the context of the ICCPR, amenity deterioration could be dealt with by the right to family and privacy (Articles 17(1)³²² and 23(1)³²³), as shown by the HRC's 1997 decision in *Francis Hopu and Tepooaitu Bessert v. France*.³²⁴ In this case the HRC stated that the interference with family life or privacy which was not reasonable in the

³¹⁹ 9 *EHRR* 242-243, 378 (1987).

³²⁰ 65 *D&R* 250 at 262 (1990).

³²¹ 39 *D&R* 85 at 87 (1984).

³²² See Appendix 3.

³²³ See *id.*

³²⁴ CCPR/C/60/D/549/1993/Rev.1, Decision para. 10.3.

circumstances was prohibited. Even if the ‘reasonable interference’ test could be regarded as a kind of process standard, it is extremely *vague*, and awaits a lot of clarification by *procedural* requirements.

The Eur.Conv.H.R. might also provide protection against amenity deterioration under Article 8, as demonstrated by the ECmHR admissibility decisions³²⁵ on *Powell and Rayner*, where it was stated that considerable noise nuisance ‘may also deprive a person of the possibility of enjoying the *amenities* of his home’ (emphasis added). But these decisions, together with *S. v. France*, were closely related to adverse health effects. Pure amenity deterioration was discussed by the ECtHR in *Kyrtatos v. Greece*.³²⁶ There the ECtHR did not take into account amenity deterioration, holding that it had not been shown that ‘the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect [the applicant’s] own rights under Article 8(1).’ However, the court went on to state that ‘[i]t might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants’ house, a situation which could have affected more directly the applicants’ own well-being.’ Thus the threshold of the violation of Article 8 by amenity deterioration is extremely high, if not totally unreachable in that it requires direct physical effects on the applicant.

3.4.2.1.4. Degradation of the Environment Per Se

Neither the ICCPR nor the Eur.Conv.H.R. covers degradation of the environment per se. In the words of the ECtHR in *Kyrtatos v. Greece*:³²⁷

Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in

³²⁵ 9 *EHRR* 242, 376 (1987).

³²⁶ 6 *Eur. Ct. H.R.* 268-269, para. 53 (2003).

³²⁷ *Id.* at 268, para. 52.

dealing with this particular aspect.

3.4.2.2. The ‘Victim’ Requirement

The ‘victim’ requirement is also a major hurdle to applicants alleging potential harm under both the ICCPR and the Eur.Conv.H.R. The HRC requires ‘imminent prospect of violation’³²⁸ or ‘a real threat of violation’³²⁹. The ECtHR requires *personal* danger that is not only *serious* but also *specific and imminent*.³³⁰ In 1995 in *Tauira v. France*³³¹ the ECmHR endorsed a similar proposition. As the threshold of environmental risk is set so high, environmental harm affecting unspecified people is hardly prevented in advance.

3.4.2.3. State Discretion

In 2003 in *Hatton and Others v. UK*, a Grand Chamber of the ECtHR held that in making decisions on environmental policy decisions national governments are entitled to a wide margin of appreciation. In doing so it rejected the contrary view, taken in its 2001 judgment which was based on a minimum interference approach that sought to achieve a fair balance allowing for a narrow margin of appreciation.

By contrast, the HRC in its 1994 decision in *Ilmari Lämsman et al. v. Finland*³³² clearly rejected the ‘margin of appreciation’ doctrine in the context of minorities’ rights and was prepared to make its own assessment, not only from the *procedural* view point (i.e. whether the applicants were appropriately consulted) but also to consider the *substantive* question of whether minorities’ interests were considered and whether

³²⁸ *E.W. v. Netherlands* (in 1993), CCPR/C/47/D/429/1990, Decision para.6.4.

³²⁹ *Mrs. Vaihere Bordes and Mr. John Temeharo v. France* (in 1996), CCPR/C/57/D/645/1995, Decision para. 5.5.

³³⁰ *Balmer-Schafroth v. Switzerland* (in 1997), 25 *EHRR* 598, 615, para. 40 (1998); *Athanassoglou and Others v. Switzerland* (in 2000), 31 *EHRR* 372, 394-395, para. 51 (2001).

³³¹ 83-A *D&R* 112, 133, para. 2 (1995).

³³² CCPR/C/52/D/511/1992, Decision paras. 9.4, 9.6-9.8.

reindeer herding had been adversely affected by the impugned decision. A similar approach was evident in its 1997 decision in *Francis Hopu and Tepooaitu Bessert v. France*³³³ in respect of the right to family and privacy. However, even the HRC hesitates to make its own assessment on the *harvest standards* set by the government in its 1996 decision in *Jouni E. Länsman et al. v. Finland*.³³⁴ Therefore, both the ECtHR and the HRC have left untouched the State's discretion to set its own environmental standards.

3.4.2.4. Factors Leading to Minimum and Vague Environmental Standards

Several factors could be pointed to which arguably explain this judicial penchant for setting only minimum and vague environmental standards.

3.4.2.4.1. Anthropocentricity of the Human Rights Concept

The first factor to be mentioned here is the concept of anthropocentricity of human rights. It would be very difficult to deal with the degradation of the environment per se through a human rights protection mechanism, as demonstrated by the ECtHR in *Kyrtatos v. Greece*.

3.4.2.4.2. Absence of an Environmental Provision

The absence of an environmental provision such as prescribing the 'right to environment' could be another limiting factor. The non-environmental provisions might not be enough to cover the whole range of human rights violations caused by environmental destruction, especially in respect of amenity deterioration and degradation of environment per se, and might meet more difficulty in satisfying the

³³³ CCPR/C/60/D/549/1993/Rev.1, Decision para. 10.3.

³³⁴ CCPR/C/58/D/671/1995, Decision para. 10.5.

‘victim’ requirement.

3.4.2.4.3. Scientific Uncertainty and Non-Specificity of Environmental Harm

Where the environmental harm is only a *potential* one, it is very difficult for an applicant to claim to be a ‘victim’, since environmental harm quite often involves *scientific uncertainty* and is *non-specific* to a particular individual.³³⁵

3.4.2.4.4. State Sovereignty

Respect for the State’s discretion in setting environmental-standards is derived from the respect for State sovereignty. In recognition of the fact that the State concerned may be in a better position to formulate a suitable policy for its citizens, international bodies tend to confine themselves to reviewing only the most outrageous excesses of the State’s discretion³³⁶.

3.4.3. Setting Higher and More Precise Environmental Standards? The Population-Oriented Judiciary

There are only a few examples of environmental standard-setting by the population-oriented judiciary. The major example of this approach is the decision of the AfrCmHPR in the *Ogoni*³³⁷ in which a number of points were made about environmental standards and human rights.

First, the AfrCmHPR interpreted the ‘right to a general satisfactory environment’

³³⁵ See *E.W. et al. v. Netherlands, Mrs. Vaihere Bordes and Mr. John Temeharo v. France, Noël Narvii Taura and 18 Others v. France, 1997 Balmer-Schafroth v. Switzerland* and *2000 Athanassoglou and Others v. Switzerland*.

³³⁶ See *2003 Hatton and Others v. UK*, and *Jouni E. Länsman et al. v. Finland*, where the HRC did not review the adequacy of the environmental standards set by the government.

³³⁷ See paras. 52, 67. For this decision, see *supra* note 301.

under Article 24 of the Afr.Chart.H.P.R. as obliging governments ‘to take *reasonable* measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.’ Thus in the AfrCmHPR’s view the Charter itself indicates *vague process standards*.

Secondly, the AfrCmHPR found that a failure to prohibit pollution and environmental degradation to a level which was humanly unacceptable could be considered a violation of the right to life under Article 4³³⁸ of the Charter. Here again the Commission set a *vague environmental quality standard*.

While it is difficult to draw conclusions from a single case, it would appear that the population-oriented bodies are also confined to setting qualitatively vague standards. Moreover, the American and African human rights situations are worse than those of Europe and of the world average, and therefore it might be of little use to make a simple comparison as regards the level of environmental standards thus set, between the former and the latter systems. Our main interest is not there, but rather lies in the fact that the American and African population-oriented judiciaries are in the institutional framework suitable for setting environmental standards, and that they actually take a positive stance for setting higher and more precise environmental standards.

3.4.3.1. Decrease of the Factors Leading to Minimum and Vague Environmental Standards

Population-oriented systems encounter difficulties similar to those encountered by individual-oriented systems when it comes to defining precise environmental standards. However not all the factors identified above apply in the same way to population oriented systems.

1) *Anthropocentricity of the human rights concept*

³³⁸ See Appendix 6.

This factor remains unchanged and is still a bar even to the population-oriented human rights judiciary, as evidenced by the fact that neither the American nor African judiciary has referred to the degradation of the environment per se.

2) *Absence of an environmental provision*

This factor disappears before the African judiciary thanks to Article 24 of the Afr.Chart.H.P.R. It would be a minor obstacle to the American judiciary thanks to Article 11 of the San Salvador Protocol, which, while not a legally claimable part of the Convention, might nevertheless be relied upon by the InterAmCmHR and InterAmCtHR for guidance in order to give ‘an evolutionary interpretation of international instruments for the protection of human rights’.³³⁹

3) *Uncertainty and non-specificity of environmental harm*

Since neither the American nor African human rights systems require the applicant to show that he or she is a ‘victim’, problems of uncertainty and non-specificity are unlikely to be as difficult to overcome as in the European and HRC systems. It remains to be seen what influence this factor has in the overall scheme of protection which the instruments provide.

4) *State sovereignty*

This factor must cause the same difficulty even before the population-oriented judiciary. However, active reference to outer-régime law, as seen below, could be a counter-factor against State sovereignty.

³³⁹ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (hereinafter, *Awas Tingni v. Nicaragua*), *Inter.Am.Ct.H.R. (Ser. C)* No. 79, para. 148 (31 Aug. 2001).

3.4.3.2. Potential Factors Enabling Higher and More Precise Environmental Standards

The population-oriented judiciary's more positive stance on environmental standard-setting also seems to point the way towards a mechanism for higher and more precise environmental standard-setting, which could not be seen, at least in the environmental context, in the individual-oriented judiciary's practice.

3.4.3.2.1. The Communal Approach

First, thanks to *actio popularis* seen above, the applicant is not barred by the 'victim' requirement. This is of significant benefit to the applicant alleging potential environmental harm, and opens a way for the judiciary to set environmental standards in the merits phase.

Secondly, in *Awas Tingni v. Nicaragua*³⁴⁰ the InterAmCtHR interpreted Article 21 (right to property)³⁴¹ of the Am.Conv.H.R. as including the rights of members of the indigenous communities within the framework of *communal property*. Although this still falls short of environmental standard-setting, this *communal property* understanding seems suitable for the protection of *common environment* not directly related to personal property.

3.4.3.2.2. Active Reference to Outer-Régime Law

The InterAmCtHR's concept of communal property (which is totally in contrast to the approach of the ECmHR *M. v. Austria*³⁴²) is obtained partly '[t]hrough an evolutionary interpretation of international instruments for the protection of human

³⁴⁰ *Id.* For another environmental case in the American system, see the 1985 *Yanomami* case. See also Resolution No. 12/85, Case No. 7615 (Brazil), decided by the InterAmCmHR on 5 Mar. 1985, available at <http://www.cidh.oas.org>.

³⁴¹ See Appendix 5.1.

³⁴² 39 *D&R* 86 (1984).

rights’.³⁴³

Secondly, the AfrCmHPR, by referring to Article 12 of the ICESCR, to which Nigeria is a Party, interprets the ‘right to a general satisfactory environment’ (Article 24 of the Afr.Chart.H.P.R.).³⁴⁴

Thirdly, the AfrCmHPR interprets the Afr.Chart.H.P.R. and *international law* as prohibiting food *contamination*, and finds a violation of the right to food of the Ogonis in the light of the provisions of the Afr.Chart.H.P.R. and *international human rights standards*.³⁴⁵ This means that the AfrCmHPR makes its own assessment on the adequacy of environmental standards set by the government, by referring to *international human rights standards*.

3.4.4. Reference to Outer-Régime Law as a Way to Set Higher and More Precise Environmental Standards

The above examinations show that there are two insurmountable hurdles before the international human rights judiciary —either individual-oriented or population-oriented— in setting environmental standards, i.e. 1) *anthropocentricity of the human rights concept* and 2) *State sovereignty*. Because of these hurdles, environmental standard-setting by such judiciary tends to be at most at a minimum and vague level. However, the population-oriented judiciaries seem to take a more positive stance on environmental standard-setting than individual-oriented ones, thanks to the former judiciaries’ *communal approach* (i.e. abandonment of the ‘victim’ requirement and acknowledgement of the communal property concept) and *active reference to outer-régime law*. Although the *communal approach* might institutionally be difficult

³⁴³ *Awas Tingni v. Nicaragua* (*supra* note 339), para. 148 (emphasis added).

³⁴⁴ *Ogoni* decision (*supra* note 301), para. 52 (see *infra* note 374).

³⁴⁵ *Id.* paras. 65-66: ‘The African Charter and *international law* require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens.’; ‘[t]he Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and *international human rights standards*, and hence, is in violation of the right to food of the Ogonis.’ (emphasis added).

for the latter judiciaries, *active reference to outer-régime law* is possible.

3.4.4.1. Reference to Outer-Régime Law Binding on the Accused State

As the AfrCmHPR in the *Ogoni* case referred to the *ICESCR* to which Nigeria is a Party as well as *international law* binding on Nigeria, the international human rights judiciary could and should refer to outer-régime law binding on the accused State. This seems justified by Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties [hereinafter, Vienna Convention], which takes into account ‘any relevant rules of international law applicable in the relationship between the parties’.

Although the meaning of ‘the parties’ in this provision is unclear,³⁴⁶ MARCEAU has addressed this issue in the WTO context and argues that a non-WTO treaty can be referred to by the WTO judiciary as a ‘relevant rule’ if one of the Parties of the treaty is a disputing Party.³⁴⁷ According to her, equation of ‘the parties’ with all WTO Members renders this provision useless by greatly reducing the number of the ‘relevant rules’. Likewise, seeing ‘the parties’ as the Parties to a dispute is not adequate, since the Vienna Convention is not used exclusively in the case of disputes. Therefore, she suggests that ‘“parties” may refer more generally to a subset of all the parties to the treaty under interpretation, i.e. the specific countries the relations of which are under examination in light of the treaty at issue.’ She concludes that ‘the acceptance by one party of an outside treaty may provide some, albeit more limited, assistance in interpreting WTO obligations’, in the light of the statement of the Appellate Body (AB) in *EC—Computer Equipment*.³⁴⁸

What she says about the WTO judiciary seems to hold true of the international

³⁴⁶ It is natural to think that ‘the parties’ are different from ‘all the parties’ in Article 31(2)(a) of the Vienna Convention.

³⁴⁷ MARCEAU, ‘Call for Coherence’, at 124-126.

³⁴⁸ *EC—Customs Classification of Certain Computer Equipment* (claimed by United States), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5 June 1998), para. 93: ‘The prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties.’

human rights judiciary to a greater extent, since only one Party of a certain outer-régime treaty is usually concerned as an accused State. Moreover, the *erga omnes* character of human rights protection would make it necessary to refer to an outer-régime treaty, even if only the accused State —among the régime members— is bound by the treaty.

As for customary international law, the same considerations would apply: customary international law rules binding on the accused State would be regarded as ‘relevant rules’,³⁴⁹ as recognized by the ECtHR in the 1996 *Loizidou* case³⁵⁰ and the 2001 *Al-Adsani* case,³⁵¹ both of which expressly referred to Article 31(3)(c) of the Vienna Convention. In this context, ‘principles of international law’ as referred to by the ECtHR in 1975 *Golder v. UK*³⁵² could be regarded as part of customary international law.

When we look at the Strasbourg judiciaries, we can find many cases which have referred to outer-régime treaties binding on the accused State,³⁵³ among which is the ECtHR’s 1983 *Van der Musselle v. Belgium*³⁵⁴ in which it was stated that:

Subject to Article 4 § 3 (art. 4-3), the European Convention, for its part, lays down a general and absolute prohibition of forced or compulsory labour.

The Court will nevertheless take into account the above-mentioned ILO Conventions —which are binding on nearly all the member States of the Council of Europe, *including Belgium*— and especially Convention No. 29. There is in fact a striking similarity, which is not accidental, between paragraph 3 of Article 4

³⁴⁹ This refinement would make a difference when customary international law is regional in scale and therefore seen as *lex specialis*.

³⁵⁰ See *Loizidou v. Turkey* [Merits], 23 EHRR 513, 526-527, paras. 43-44 (1997).

³⁵¹ See *Al-Adsani v. UK*, 34 EHRR 273, 289, 291, paras. 55-56, 61 (2002).

³⁵² *Golder v. UK*, 18 Eur. Ct. H.R. (ser. A) at 17, para. 35 (1975).

³⁵³ See for example, KILKELLY, ‘Children’s Rights’, at 315-324. The cases she mentions are those of Ireland, UK and Netherlands, all of which were Parties to the UN Convention on the Rights of the Child when the rulings were rendered.

³⁵⁴ In *Van der Musselle v. Belgium*, the free legal service imposed on the applicant as a lawyer was found to be no breach of Article 4. See 6 EHRR 163, 169, 181, para. 24 and the operative part (1984).

(art. 4-3) of the European Convention and paragraph 2 of Article 2 of Convention No. 29.³⁵⁵

However, the ECtHR did not intend to impose special obligations on Belgium because it is a Party of the ILO Conventions, but merely general obligations common to all Parties to the Eur.Conv.H.R. Thus the true purpose of referring to outer-régime law binding on the accused State is to lead to ‘comparative interpretation’ as seen below.

3.4.4.2. Reference to Outer-Régime Law Not Binding on the Accused State

When it comes to outer-régime treaties not binding on the accused State, it is not clear whether they are regarded as ‘relevant rules’ within the meaning of Article 31(3)(c) of the Vienna Convention. The drafting history of this provision tells us little, other than that the omission of the words ‘at the time of its conclusion’ allows later rules to be taken into account and that the deletion of ‘general’ before ‘international law’ widened the scope of the rules to be covered.³⁵⁶ MARCEAU, in the context of the WTO judiciary, answers in the affirmative, by invoking the *US-Shrimp* AB report.³⁵⁷ Here the AB refers, when interpreting the words of ‘exhaustible natural resources’ in GATT Article XX (g), to the Convention on Biological Diversity and the Convention of Migratory Species of Wild Animals, neither of which bound the accused State (United States), but some of which were binding on a number of the accusing Parties.³⁵⁸

³⁵⁵ *Id.* at 173, para. 32 (emphasis added).

³⁵⁶ See 1964/1 *YILC* 315-317, 1964/2 *id.* at 52-57, 199-203; 1966/1(2) *id.* at 183-200, 267-270, 1966/2 *id.* at 91-101. On the one hand, an ILC member YASSEEN emphasizes ‘that to be taken into consideration in interpreting the treaty, those rules, although not “general”, must be “common” to the parties to the treaty.’ 1966/1(2) *id.* at 197, para. 52. On the other hand, another ILC member REUTER points out the ambiguity of the provision which could refer both ‘to other rules of international law binding on the parties’, and ‘to other rules of international law relating to the subject-matter of the treaty’. 1966/1(2) *id.* at 188, para. 43.

³⁵⁷ MARCEAU, ‘Call for Coherence’, at 126, footnote 127.

³⁵⁸ *US—Import Prohibition of Certain Shrimp and Shrimp Products* (claimed by India, Pakistan, Thailand and Malaysia), WT/DS58/AB/R (12 Oct. 1998), para. 130. ‘We note

However, unlike trade disputes, human rights disputes usually (i.e. in the case of State-individual litigation) have no accusing Party bound by an outer-régime treaty. Moreover, even if there exists such a Party (i.e. in the case of inter-State litigation), it would be absurd if the extent of human rights protection is variable according to the accusing Party. Therefore, it seems sounder to say that in the human rights litigation the ‘relevant rules’ do not include outer-régime treaties or customary rules of international law not binding on the accused State.

However, a question remains as to whether the ‘relevant rules’ include those which, while not binding on the accused State, are nonetheless agreed by that Party or accepted by the international community as a whole. This possibility is also suggested by the *US-Shrimp* AB report, when it refers, in the context seen above, not only to the Convention on Biological Diversity which the accused State had signed, but also to Agenda 21, which was not binding but was accepted by the international community as a whole.³⁵⁹ Although such a possibility is not excluded, this phenomenon might be better explained from the perspective of ‘evolutive interpretation’,³⁶⁰ which the AB adopted in *US-Shrimp*³⁶¹ just as the InterAmCtHR did in 2001 in the *Awas Tingni v. Nicaragua* decision.

In fact, the Strasbourg judiciaries have commonly used ‘evolutive interpretation’,³⁶² while referring not only to treaties which did not bind the accused State but also to

that India, Malaysia and Pakistan have ratified the Convention on Biological Diversity, and that Thailand and the United States have signed but not ratified the Convention.’ *Id.* footnote 111. ‘We note that India and Pakistan have ratified the Convention on the Conservation of Migratory Species of Wild Animals, but that Malaysia, Thailand and the United States are not parties to the Convention.’ *Id.* footnote 113.

³⁵⁹ *Id.* para. 130.

³⁶⁰ ‘The [*Marckx*] judgment shows that *evolutive interpretation* is closely linked to a search for common European standards on the basis of domestic law and practice in the Member States of the Council of Europe, of *other international or European instruments*, and of the case-law of the Court itself.’ (emphasis added). VAN DIJK & VAN HOOFF, *Theory and Practice* 78.

³⁶¹ ‘From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term “natural resources” in Article XX(g) is not “static” in its content or reference but is rather “by definition, evolutionary”.’ The *US-Shrimp* AB report, para. 130.

³⁶² See for example, *Tyrer v. UK*, 26 *Eur. Ct. H.R.* (ser. A) at 15, para. 31 (1978).

non-binding international instruments, when they are found to represent ‘the European common ground of present-day conditions.’³⁶³ It is natural that, when the latter condition is satisfied, treaties and customary international law rules *binding on* the accused State could be referred to for ‘evolutive interpretation’.

The basis of ‘evolutive interpretation’ in the Eur.Conv.H.R. system is said to lie in the *object and purpose* of the Convention,³⁶⁴ which is the most basic interpretative method as recognized in Article 31(1) of the Vienna Convention. The Eur.Conv.H.R.’s object and purpose could also enable ‘comparative interpretation’.³⁶⁵ Although the borderline between ‘evolutive interpretation’ and ‘comparative interpretation’ is unclear, the latter seems possible even if the international instrument in question does not represent the ‘European common ground of the present-day conditions’.

Thus under either ‘evolutive interpretation’ or ‘comparative interpretation’, the Strasbourg judiciaries, the prototype of the individual-oriented human rights regimes, could not only refer to outer-régime law binding on the accused State (such as treaties and customary international law rules) but also to outer-régime law not binding on the accused State (treaties, customary international law rules and non-binding international instruments), just as the population-oriented human rights judiciaries have so far done. In this sense, the Strasbourg judiciaries are the forerunners drawing inspiration from outer-régime law, as expressly prescribed in Articles 60 and 61 of the

³⁶³ In 1979 *Marckx v. Belgium*, the ECtHR, in order to find out the ‘developments and commonly accepted standards’ ‘of present-day conditions’, resorted to two treaties—one of which was concluded outside the Council of Europe—not binding on the accused State (Belgium) (31 *Eur. Ct. H.R.* (ser. A) at 19, para. 41 (1979)). Likewise, in 1993 *Sigurður A. Sigurjónsson v. Iceland*, the ECtHR, in relation to ‘evolutive interpretation’, relied on non-binding international instruments—among them were the 1948 UN Universal Declaration of Human Rights and the 1989 European Community Charter of the Fundamental Social Rights of Workers (16 *EHRR* 462, 478-479, para. 35 (1993)).

³⁶⁴ BERNHARDT, ‘Evolutive Treaty Interpretation’, at 16-17; VAN DIJK & VAN HOOFF, *Theory and Practice* 73-74. See *Golder v. UK*, 18 *Eur. Ct. H.R.* (ser. A) at 18, para. 36 (1975).

³⁶⁵ It is ‘the interpretation of a particular convention by reference to some other international agreement.’ MATSCHER, ‘Methods’, at 74. See for example, 1989 ECtHR *Soering v. UK*, 11 *EHRR* 439, 467, paras. 87-88 (1989).

3.4.4.3. EU Environmental Law as Referable Outer-Régime Law

Then a question comes up: why have the European human rights bodies failed to apply such ‘evolutive interpretation’ to environmental disputes? The answer seems to lie in the following two assumptions. Firstly, there is no ‘European common ground of present-day conditions’ enabling ‘evolutive interpretation’, in the light of the fact that public consciousness of environmental issues varies widely from one country to another. Secondly, there is no outer-régime law, binding or otherwise, which could, through either ‘evolutive interpretation’ or ‘comparative interpretation’, add anything to the Council of Europe’s already high standard of human rights protection in this field.

It might be true that the former point has become more persuasive following the entry into the Council of Europe of the East European countries who are at a less advanced stage of environmental protection. However, the latter point could be rebutted by consideration of EU environmental law as referable outer-régime law, as demonstrated by the reference, in Judge Costa’s Separate Opinion to the 2001 *Hatton* Chamber judgment as well as in five judges’ Joint Dissenting Opinion³⁶⁷ to its 2003 Grand Chamber judgment, to Article 37³⁶⁸ (the right to a healthy environment) of the

³⁶⁶ See Appendix 6.

³⁶⁷ Joint Dissenting Opinion of Judges COSTA, RESS, TÜRMEN, ZUPANCIC and STEINER, para. 1 (see Appendix 4.7.). A similar statement was made in Judge PETTITI’s dissenting opinion (joined by other judges) to the 1997 ECtHR *Balmer-Schafroth v. Switzerland* (see Appendix 4.6.).

³⁶⁸ See Appendix 7.5. Certainly, it says nothing about a clear standard. However, as regards the protection of the environment as such (i.e. birds and their habitats) not covered, in the ECtHR’s view of 2003 *Kyrtatos v. Greece* (6 *Eur. Ct. H.R.* 268-269, paras. 52-53 (2003)), by the Eur. Conv. H.R., there are: 1) *Birds Directive* (Council Directive 79/409/EEC) implementing the 1971 *Ramsar Convention* as well as the 1979 *Bonn* and *Bern Conventions*, the former two of which were concluded outside the Council of Europe; and 2) *Habitats Directive* (Council Directive 92/43/EEC) implementing the 1992 *Biodiversity Convention*, also concluded outside the Council of Europe. These three outer-régime treaties confirm the belief that birds and their habitats are part of human environment. Thus if read together with these treaties, the

2000 EU Charter of Fundamental Rights.

Some might argue that the standard of EU environmental law has not attained the ‘European common ground of present-day conditions’, the basis of ‘evolutive interpretation’. Others might argue that ‘comparative interpretation’ is inadequate when it brings heavy economic burdens to the Parties in general. However, at least when the case concerns an EU country, like the *Kyrtatos* case (i.e. Greece), the ECtHR might be expected to take into account EU environmental law as outer-régime law binding on the accused State. But this is not the case. Interestingly, not only in environmental cases but also in other cases the EU law’s influence on the Strasbourg judiciaries for a referential purpose has been extremely limited,³⁶⁹ though there were some cases where a Member State’s national measures implementing EC law were found to be in violation of the Eur.Conv.H.R., like the ECtHR’s 1999 *Mathews v. UK*,³⁷⁰ or where the decisions of the EC institutions were alleged to be incompatible therewith, like the ECtHR’s 2004 *Senator Lines v. 15 EC countries*.³⁷¹

The main reason for this would be that the Strasbourg judiciaries regard EC law as inadequate for reference since the object and purpose of EC law is not human rights protection but the efficient operation of the internal market.³⁷² However, such a

Council Directives 79/409/EEC and 92/43/EEC could be regarded as providing some guidance for realizing ‘the right to a healthy environment’.

³⁶⁹ MENDELSON, *Impact* 29.

³⁷⁰ This case concerns the election of the European Parliament in Gibraltar (UK). See 28 *EHRR* 361, 396, para. 32 (1999): ‘The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. States’ responsibility therefore continues even after such a transfer.’ See also para. 67 of *Waite and Kennedy v. Germany* (ECtHR in 1989, 30 *EHRR* 261, 287 (2000)) concerning immunity of the ESA (European Space Agency) from jurisdiction under Article XV § 2 of the ESA Convention and its Annex I; *T.I. v. UK* (ECtHR Decision, 7 Mar. 2000) related to the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims (3 *Eur. Ct. H.R.* 435, 456-457 (2000)).

³⁷¹ See Appendix 4.8. However, the ECtHR did not say anything on this point.

³⁷² POLAKIEWICS, ‘Relationship’ at 77, where he states: ‘Such differences of approach can be explained by the simple fact that one court primarily has responsibility to ensure the efficient operation of the internal market, while the other is charged with protecting fundamental rights.’

negative attitude should be questioned in the light of Article 6(2)³⁷³ of the 1992 Treaty on the European Union as well as the 2000 EU Charter of Fundamental Rights, the latter of which is integrated into Part II of the Treaty Establishing a Constitution for Europe.

3.4.5. Concluding Remarks

State sovereignty, together with *anthropocentricity of the human rights concept* is a major hurdle to the judicial evolution of higher and more precise environmental standards. In order to overcome this, an *active reference to outer-régime law* must be made, as is the case with the population-oriented judiciaries.

In fact, in non-environmental fields the Strasbourg judiciaries have actively referred, without an explicit provision like Articles 60 and 61 of the Afr.Chart.H.P.R., to outer-régime law under either ‘evolutive interpretation’ or ‘comparative interpretation’. Thus in the environmental field, too, they should refer to outer-régime law—especially EU environmental law—irrespective of its *binding* or *non-binding* nature regarding the accused State.

So far, when referring to international treaties, the ECmHR and ECtHR have tried to set standards common to all Parties of the Eur.Conv.H.R., by means of ‘evolutive interpretation’ or ‘comparative interpretation’. They seem to believe that different standards among the Parties are not desirable. This argument is persuasive, since the object and purpose of the Eur.Conv.H.R. is to safeguard *civil rights*, whose level of protection should be the same among all Parties.

However, as the 2001 AfrCmHPR *Ogoni* decision points out, the ‘right to a healthy environment’ includes not only the *civil rights aspect*³⁷⁴ but also the *social rights*

³⁷³ See Appendix 7.3.

³⁷⁴ See the *Ogoni* decision (*supra* note 301), para. 52: ‘The State is under an obligation to respect the just noted rights and this entails largely *non-interventionist conduct from the State* for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.’ (emphasis added).

aspect,³⁷⁵ the latter of which requires differential treatment according to the level of economic development of the State concerned.³⁷⁶ Different economic capability should be distinguished from differing value systems, the latter of which is seen—at least among the Parties to the Eur.Conv.H.R.— as amenable to equally high standards. When it comes to human rights related to the environment, setting high standards common to all Parties is unrealistic. A more realistic way would be to see *the accused State's capability and willingness* to conform to high environmental standards in a certain advanced outer-régime treaty *to which the State is a Party*, as the *Ogoni* decision referred to the ICESCR, to which Nigeria is a Party.

Some might think that such differential treatment among the Parties would vitiate the effective protection of human rights, at least as far as *civil rights* are concerned. However, as environmental destruction mostly derives from the actions of private actors, the State's positive obligations shall be augmented in a similar way to that involved in the protection of social rights. Moreover, setting standards variable according to the Party is not unfamiliar even to the European *civil rights* protection system, which allows the 'margin of appreciation' doctrine.³⁷⁷ Therefore, it is possible to set higher environmental standards to a particular Party by narrowing the 'margin' with the help of outer-régime law, especially EU environmental law.³⁷⁸ This would not vitiate the

³⁷⁵ 'Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the *improvement of all aspects of environmental and industrial hygiene.*' (emphasis added). *Id.* In the 2000 EU Charter of the Fundamental Rights, the provision on environmental protection is included in the Title IV (Solidarity), which covers labour rights, social security and assistance, health care, consumer protection, etc.

³⁷⁶ See Principle 23 of the 1972 Stockholm Declaration and Principle 6 of the 1992 Rio Declaration.

³⁷⁷ Moreover, Article 57 of the Eur.Conv.H.R. allows reservations.

³⁷⁸ *Outer-régime law related to the accused State* is treated as 'relevant rules' within Article 31(3)(c) of the Vienna Convention. See answer (b) in UN Doc., A/CN.4/L.676 (29 July 2005) (*Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*), at 15, para. 32. Here two caveats should be heeded: 1) the 'relevant rules' should be confined to those relating to the *accused State*, not the accusing State, in the light of the *erga omnes* character of human rights protection, whose level should not be varied by the difference of the accusing State; 2) reference to the 'relevant rules' should be made

effective protection of *civil rights*, but, on the contrary, enhance it, by restricting *State sovereignty*.

4. Compliance Control

4.1. Compliance Control in International Environmental Law

‘Compliance control’ has already been defined as the supervisory act or process of leading the actor to compliance and, if possible, to over-compliance. However, this concept should be refined in the context of international environmental law in respect of both ‘compliance’ and ‘control’.

As regards the concept of ‘compliance’, KOSKENNIEMI distinguishes ‘non-compliance’ (which would be a political matter) and ‘breach’ (which would signify an ascertained violation of a binding treaty obligation and give rise to international responsibility) in the light of the Montreal NCP. According to him, although the Montreal NCP can handle cases of both ‘breach’ (i.e. ‘non-compliance as a wrongful act’) and ‘non-compliance without wrongfulness’, the former competence is limited to cases of manifest violation of the Montreal Protocol which are undisputed by all Parties concerned. If disputed, neither the ImpCom nor the MOP can be used to determine wrongfulness in the light of the Montreal Protocol as well as general international law. This task should be left to the dispute settlement procedure under Article 11 of the 1985 Vienna Ozone Convention. In his view, countermeasures against a wrongful act (i.e. suspension of rights) are allowable only in the case of ‘breach’, and nothing but countermeasures which do not, by themselves, constitute *prima facie* violations of the State’s international obligations (i.e. ‘retorsions’) such as cautions and lawful trade restrictions, is permissible in the case of ‘non-compliance without wrongfulness’.³⁷⁹

only for setting standards at a *higher level*, not at a lower level, since the latter would vitiate the object and purpose of human rights treaties, i.e. the effective protection of human rights.

³⁷⁹ KOSKENNIEMI, ‘Breach or Non-Compliance?’, at 143-146.

As he points out, the term ‘non-compliance’ might connote less blameworthiness of the non-performance of obligations.³⁸⁰ However, he himself admits that the Montreal NCP can, to a certain extent, handle cases of the manifest violation which might provoke countermeasures against a wrongful act (hereinafter, ‘distinct breach’ as opposed to ‘indistinct breach’). Moreover, even if we think, as LOIBL argues, that the suspension of rights as provided in the Montreal NCP is not a reaction to State responsibility but merely a reaction to the ‘material breach’ of a multilateral treaty as prescribed in Article 60 of the Vienna Convention of the Law of Treaties, the punitive measures as provided in the Kyoto NCP (i.e. 1.3 times reduction) are likely to be characterized as countermeasures against a wrongful act.³⁸¹ Therefore, despite the different aims between State responsibility and compliance control,³⁸² it would be reasonable to understand the concept of ‘non-compliance’ as also comprising ‘breach’ (i.e. ‘non-compliance as a wrongful act’).³⁸³

It follows that the concept of ‘control’ covers the consequences of both ‘breach’ (which would, in principle, result in ‘hard responsibility’, i.e. State responsibility) and

³⁸⁰ *Id.*, at 146-147.

³⁸¹ LOIBL, ‘Environmental Law and NCP’, at 214-216.

³⁸² FITZMAURICE & REDGWELL, ‘Environmental NCP’, at 56, where they state: ‘First and foremost, the goal of any NCP, at least in the environmental context, is distinguishable from traditional rules on state responsibility. The primary objective of NCPs is to ensure a return to compliance with treaty obligations rather than to require reparation by the defaulting state for the harm caused to another state or states for breach of international obligation. More specifically in the context of countermeasures, NCP measures are concerned with compliance with primary obligations whilst countermeasures are concerned with compliance with secondary obligations.’

³⁸³ Although the powers of the ImpCom of the Montreal NCP are advisory only, the Montreal NCP as a whole (including the MOP which can, according to FITZMAURICE and REDGWELL, make binding decisions) would be regarded as partly constituting a system of collective countermeasures against a wrongful act even in the views of those authors. See *id.*, at 55. It remains to be examined whether a NCP dealing with such breach can be regarded as *lex specialis* within the meaning of Article 55 of the 2001 ILC Articles on State responsibility (which also covers the so-called ‘self-contained regime’). See *id.*, at 57-59; KOSKENNIEMI, ‘Breach or Non-Compliance?’, at 134-137, 144; LOIBL, ‘Environmental Law and NCP’, at 216; CRAWFORD, *ILC’s Articles on State Responsibility*, at 306-308. See also *infra* note 515.

‘non-compliance without wrongfulness’ (which would generate ‘soft responsibility’,³⁸⁴ i.e. moral/political responsibility which could cover the payment of compensation *ex gratia*,³⁸⁵ and legal accountability to give an explanation about non-compliance and to try to realize future compliance).³⁸⁶ The control over ‘breach’ could be called ‘control of legality’ (‘contrôle de légalité’) and the control over ‘non-compliance without wrongfulness’ could be called ‘control of propriety’ (‘contrôle d’efficacité’ or ‘contrôle d’opportunité’).³⁸⁷ The international judiciary can exercise both types of control, although ‘control of propriety’ should be compatible with a sense of justice.³⁸⁸

It could be reasonably understood that the primary rules to be violated are binding rules of treaties and customary international law in the case of ‘breach’, and that they are non-binding rules of international declarations and recommendations in the case of ‘non-compliance without wrongfulness’. However, the consequences of violation could nonetheless remain in ‘soft responsibility’ in the case of ‘indistinct breach’: namely, where the violated binding rules are ambiguous ones unsupported by precise environmental standards, as is the case of the obligation to prevent, with *due diligence*, *serious* transfrontier harm,³⁸⁹ where those binding rules are less mandatory, as is the case of the 1979 Geneva Convention on Long-Range Transboundary Air Pollution;³⁹⁰

³⁸⁴ KISS argues that the violation of ‘soft law’ engenders ‘soft responsibility’. See KISS, *Droit international de l’environnement* 23.

³⁸⁵ See *loc. cit.*

³⁸⁶ In the context of State responsibility, ‘non-compliance without wrongfulness’ might create a presumption of illegality, and accumulation thereof might constitute evidence of an illicit act. See DUPUY, ‘Soft Law’, at 434.

³⁸⁷ The distinction between ‘control of legality’ and ‘control of propriety’ is commonly used in French literatures. See *infra* note 1163 and the accompanying text.

³⁸⁸ See 6.2.5 of this thesis.

³⁸⁹ The violation of this obligation did not lead to any State bringing a formal claim for compensation against the USSR in the *Chernobyl* accident. See 5.2.1. and 5.2.4.3 of this thesis.

³⁹⁰ (Geneva, 13 November 1979), 18 *ILM* 1442 (1979). Article 2 states: ‘The Contracting Parties . . . shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution’ Footnote 1 of Article 8 states: ‘The present Convention does not contain a rule on State liability as to damage.’ DUPUY regards this convention as an example of ‘soft law’. See DUPUY, ‘Le droit international de l’environnement’, at 34.

or where the violation can be found only after a certain period is passed, a scientific calculation is made, and all efforts to comply are finally judged to be insufficient, as are most of the non-compliance cases of the Montreal Protocol. Similarly, only ‘soft responsibility’ is likely to be charged where extenuating circumstances could be pleaded, as in the cases of technical errors and the incapability of States (*bona fide* non-compliance), as sometimes presented before the Montreal NCP.³⁹¹

It could also be recognized that ‘soft’ control is appropriate for dealing with ‘soft responsibility’, whereas ‘hard’ control is suitable for handling ‘hard responsibility’ (State responsibility), since: *procedurally* ‘soft’ control is characterized by the procedure’s *consensual, non-confrontational, non-punitive* and *facilitative* nature, whereas *procedurally* ‘hard’ control is characterized by the procedure’s *non-consensual, confrontational, punitive* and *authoritative* nature; and *substantively* ‘hard’ control is characterized by the judiciary’s attitude of 1) making stringent review through strict interpretation and application of or substantial reference to the relevant rules, and 2) deciding to take severe measures against non-compliance thereby found, whereas opposite appellation is to be given to the contrary. In this context, *severe measures* to be taken in the case of substantively ‘hard’ control are understood to be those reflecting State responsibility.

4.2. The Montreal NCP’s ‘Soft’ Control: Evaluation through the Practice

4.2.1. Introduction

On 25 November 1992, the 4th Meeting of the Parties [hereinafter, MOP-4] to the Montreal Protocol on Substances that Deplete the Ozone Layer³⁹² adopted the Non-Compliance Procedure (NCP).³⁹³ Since its creation, the Montreal NCP, whose

³⁹¹ See 4.2.3. of this thesis.

³⁹² (Montreal, 16 September 1987). For the details, see Appendix 9.1.

³⁹³ See Decision IV/5 and Annex IV of the Report of MOP-4. The Montreal NCP had been adopted, on an interim basis, by MOP-2 in 1990. See Decision II/5 and Annex III

main object is to secure an ‘amicable settlement’³⁹⁴, has been regarded as exercising not only procedurally ‘soft’ control, which is *consensual, non-confrontational, non-punitive* and *facilitative* in character, but also substantively ‘soft’ control by 1) taking a less stringent approach to review, through generous interpretation and application of or little reference to the relevant rules, and by 2) taking a lenient approach in relation to non-compliance thereby found.³⁹⁵ Thus it is seen as a suitable mechanism³⁹⁶ for dealing with the sorts of compliance problems which beset environmental treaties, such as scientific uncertainty, rapid changeability of situations and incapability of States.

However, the first non-compliance case, Russia's case in 1995,³⁹⁷ in which trade restrictions were imposed on Russia notwithstanding its opposition,³⁹⁸ cast doubts on the ‘soft’ nature of the Montreal NCP. These doubts were increased by the MOP’s application of the ‘consensus minus one’ rule in that case.³⁹⁹

To what extent then, can the Montreal NCP’s control realistically be characterized as ‘soft’? And, given that the Montreal NCP can be regarded as a ‘living organism’⁴⁰⁰,

of the Report of MOP-2. For documents on the Montreal Protocol including reports of the MOP, see <http://www.unep.org/ozone>. For the evolving process of the Montreal NCP before 1992, see KOSKENNIEMI, ‘Breach or Non-Compliance?’, at 129-134. See also the Reports of the First (11-14 July 1989), Second (8-10 April 1991) and Third (5-8 November 1991) Meetings of the Ad Hoc Working Group of Legal Experts on Non-Compliance with the Montreal Protocol (UNEP/OzL.Pro.LG.1/3, UNEP/OzL.Pro/WG.3/2/3, UNEP/OzL.Pro/WG.3/3/3, respectively).

³⁹⁴ Para. 8 of the Montreal NCP. See KOSKENNIEMI, ‘Breach or Non-Compliance?’, at 132; UNEP/OzL.Pro.LG.1/3, paras. 9 (b), (f), (i), 11, 17; UNEP/OzL.Pro/WG.3/2/3, paras. 12 (v), 14, 15.

³⁹⁵ See LANG, ‘Compliance Control in International Environmental Law’, at 690; CHAYES & OTTO, ‘Elements’, at 744. Japanese authors, too, generally admit the ‘soft’ nature of the Montreal NCP. See USUKI, ‘Multilateral Measures’, at 90; YOSHIDA, ‘Soft Enforcement’, at 95-99, 121-127, 139-141; TAKAMURA, ‘Ensuring Compliance’, at 75; TOI, ‘Compliance Control’, at 742.

³⁹⁶ LANG, ‘Compliance Control in Respect of the Montreal Protocol’, at 206-210; CHAYES & CHAYES, *New Sovereignty* 224; BOTHE, ‘Evaluation’, at 29-31. The Montreal NCP's dispute avoidance function and multilateral character are also regarded as suitable for environmental issues. See Lang, this note, at 695.

³⁹⁷ See WERKSMAN, ‘Compliance and Transition’.

³⁹⁸ See *id.*, at 766-769.

³⁹⁹ See *id.*, at 771. See also para. 130 of the Report of MOP-7 (see Appendix 9.2.).

⁴⁰⁰ LANG, ‘Compliance Control in International Environmental Law’, at 690.

is there any evidence of a change from a 'soft' to 'hard' nature?⁴⁰¹ In addition, some countries have demanded, as we see shall below, that the determinations of non-compliance as well as measures to be taken should be made within the legal framework. Do such demands for a 'legal' nature oriented to 'legalistic processes' affect the 'soft' nature of the control? Lastly, if it is really 'soft', does it work well? If so, what factors are related to its success? In exploring these questions, the emphasis will be mainly on non-compliance with those provisions which relate to control measures.⁴⁰² The analysis will commence with a brief survey of the Montreal NCP.

4.2.2. A Survey of the Procedure

There are two main bodies involved in the supervision of the Montreal NCP: the Implementation Committee [hereinafter, ImpCom], comprised of representatives of 10 Parties based on an equitable geographical distribution;⁴⁰³ and the MOP, composed of representatives of all Parties of the Protocol.⁴⁰⁴ Of these two bodies, it is suggested that only the ImpCom can be called the judiciary, since it is a quasi-judicial body which is more or less destined for the settlement of differences between the Parties by judge-like persons through, to some extent, legal process. In fact, the ImpCom is expressly required to make its evaluation 'on the basis of respect for the provision of the

⁴⁰¹ The change from a 'soft' to 'hard' nature was observed in the GATT dispute settlement procedure. See CHAYES & CHAYES, *New Sovereignty* 218-221; MERRILLS, *Settlement* 197-219. For the details, see 4.4. of this thesis.

⁴⁰² There are so many Parties who have failed to comply with reporting and/or financial obligations, but none of them have yet met specific measures. It is true that the ImpCom had recommended, in accordance with decision VI/5 of the Sixth Meeting of the Parties, that Mauritania be reclassified as a Party not operating under Article 5 until it reported the necessary data (UNEP/OzL.Pro.7/9/Rev.1, draft decision VII/17 bis). Para. 36 of the Report of MOP-7. However, MOP-7 did not adopt particular measures for Mauritania, but merely requested that all Parties should comply with the reporting obligations. For the relevant part of MOP-7 decision VII/14, see Appendix 9.3.

⁴⁰³ Para. 5 of the Montreal NCP.

⁴⁰⁴ Article 11 of the Montreal Protocol.

Protocol',⁴⁰⁵ and its members are more or less independent from their governments in that '[e]ach Party so elected to the Committee shall be requested to notify the Secretariat . . . of who is to represent it and shall endeavour to ensure that such representation remains throughout the entire term of office.'⁴⁰⁶

That said, since the nature of the ImpCom is reflected in that of the Montreal NCP as a whole, and since the Montreal NCP constitutes an integral procedure, the whole process of the Montreal NCP will be examined here.

There are three ways in which the ImpCom receives submissions of non-compliance. The first is from a non-compliant Party itself [hereinafter, voluntary submissions]⁴⁰⁷, the second is from other Parties⁴⁰⁸ and the third is from the Secretariat [hereinafter, Secretariat submissions].⁴⁰⁹

After a submission is received, it is discussed by the ImpCom, which prepares a report recommending what measures should be taken by the MOP. The report is then referred to the MOP.⁴¹⁰ The MOP then agrees measures 'to bring about full compliance with the Protocol'⁴¹¹ in accordance with the 'Indicative List of Measures that Might be Taken by a Meeting of the Parties in Respect of Non-Compliance with the Protocol' [hereinafter, Indicative List of Measures]⁴¹², which mentions assistance, cautions and suspension of rights and privileges.⁴¹³ Although the ImpCom's reports are not legally binding, and that the MOP decisions' legally binding nature as to non-compliance matters is highly questionable,⁴¹⁴ the MOP decisions to give or

⁴⁰⁵ Para. 8 of the Montreal NCP.

⁴⁰⁶ Para. 5 of the Montreal NCP, as modified in 1998. See MOP-10 Report (UNEP/OzL.Pro.10/9, 3 December 1998), Decision X/10: Review of the non-compliance procedure.

⁴⁰⁷ Para. 4 of the Montreal NCP.

⁴⁰⁸ Para. 1 of the Montreal NCP.

⁴⁰⁹ Para. 3 of the Montreal NCP.

⁴¹⁰ Para. 9 of the Montreal NCP.

⁴¹¹ *Loc. cit.*

⁴¹² Decision IV/5 and Annex V of the Report of MOP-4.

⁴¹³ Paras. a, b, c of the Indicative List of Measures.

⁴¹⁴ KOSKENNIEMI, 'Breach or Non-Compliance?', at 149, 152. The ImpCom can only make 'recommendations' and the MOP 'an interim call and/or recommendations'. Paras. 9 and 13 of the Montreal NCP. However, a variety of views were expressed

withhold assistance through the Multilateral Fund or the Global Environment Facility (GEF) are, in fact, reputed to be heavily influential on Parties' compliance behaviours.⁴¹⁵

These basic features have remained intact following the amendment of the Montreal NCP in 1998.⁴¹⁶

4.2.3. An Examination of the Practice of the Procedure

This section will examine the practice of the Montreal NCP, on the basis of information available as of 31 December 2000.⁴¹⁷ Since its creation in 1992, although no submission by 'other Parties' has yet been reported,⁴¹⁸ eight States, namely Russia, Belarus, Bulgaria, Poland, Ukraine, Lithuania, Latvia and Estonia, have voluntarily expressed their concerns about non-compliance, and non-voluntary submissions of non-compliance by four States, namely Azerbaijan, Czech Republic, Uzbekistan and Turkmenistan, have been made by the Secretariat. Note however that although Estonia made its submission voluntarily, together with Lithuania and Latvia, it will be considered within the category of 'secretariat submissions' because Estonia was not in fact a Party to the Montreal Protocol when its submission was made.

4.2.3.1. Voluntary Submissions

Russia first called attention to the prospect of its non-compliance in MOP-6 (6-7

among the legal experts about the MOP decisions' binding force. See UNEP/OzL.Pro/WG.3/3/3, para. 41.

⁴¹⁵ See WERKSMAN, 'Compliance and Transition', at 756-758.

⁴¹⁶ See Decision X/10 and Annex II of the report of MOP-10. However, it is to be noted that a few words were added to para. 3, stating that the ImpCom 'shall consider the matter as soon as practicable' in response to the Secretariat submission.

⁴¹⁷ The information is available at <http://www.unep.org/ozone>.

⁴¹⁸ However, submissions by other Parties were the originally planned triggering mechanism of the Montreal NCP. See UNEP/OzL.Pro.LG.1/3, Annex, 'Draft Non-compliance Procedure', para. 1; MARAUHN, 'Procedural Law', at 701, footnote 29.

October 1994).⁴¹⁹ At the 11th meeting of the Open-Ended Working Group (8-12 May 1995), Russia, speaking also on behalf of Belarus, Bulgaria, Poland and Ukraine, made a statement asking for some relief from their obligations.⁴²⁰ ImpCom-10 (25 August 1995) characterized this statement as constituting a voluntary submission.⁴²¹ ImpCom-10 agreed to discuss Russia's case first, because Russia was a major producer of controlled substances whereas the other Parties were primarily consumers, and because Russia was the only one of the five Parties that had not reported data.⁴²² ImpCom-10's recommendation on Russia included trade restrictions in new or recycled substances between Russia and the other non-Article 5 countries, in addition to assistance to Russia in the collection of data.⁴²³ Although Russia expressed clear reservations concerning the monitoring and trade restrictions contained in the draft decision VII/16 elaborated by ImpCom-10⁴²⁴, MOP-7 (5-7 December 1995) decided, notwithstanding Russia's opposition, to adopt this draft decision as decision VII/18 maintaining these two measures, by applying the 'consensus minus one' rule.⁴²⁵ Russia seriously criticized this decision on the basis that it was tantamount to a revision of the Montreal Protocol and could lead to further non-compliance with its provisions.⁴²⁶ In fact, Russia would have been able to contest the legality of this decision by reason of the MOP's excess or abuse of power; for the MOP adopted

⁴¹⁹ WERKSMAN, 'Compliance and Transition', at 764. See the Report of MOP-6, para. 40. (No country name was specified, however.)

⁴²⁰ WERKSMAN, *loc. cit.* The demands are: to postpone for up to five years the implementation of their phase-out schedules for CFCs regulated under Article 2A to 2E of the Protocol; to be exempt from payment of their contributions to the Multilateral Fund pending attainment of socio-economic stability; to be provided with international assistance to accelerate the transition towards non ozone-depleting technologies and consumption patterns. The Report of the 11th Meeting of the Open-Ended Working Group of the Parties to the Montreal Protocol, UNEP/PzL.Pro/WG.1/11/10, para. 160.

⁴²¹ Para. 31 of the Report of ImpCom-10.

⁴²² *Id.*, para. 32.

⁴²³ *Id.*, para. 38.

⁴²⁴ *Id.*, para. 32.

⁴²⁴ Para. 44 of the Report of MOP-7.

⁴²⁵ *Id.*, paras. 128-133 and MOP-7 decision VII/18.

⁴²⁶ *Id.*, para. 133.

punitive measures without ascertaining non-compliance by Russia,⁴²⁷ leaving some doubts about the measures' conformity with the principle of proportionality arguably required by general international law.⁴²⁸

While, as seen above, Russia strongly resisted the punitive measures recommended by ImpCom-10 and approved by MOP-7, Belarus and Ukraine agreed to accept such punitive measures in exchange for receiving assistance,⁴²⁹ though they were found to be in compliance with the protocol in 1995.⁴³⁰ No particular measures were adopted for Poland and Bulgaria in 1995⁴³¹ because they had complied and would be able to continue to comply with the Protocol.⁴³²

In 1996, the performance of Russia⁴³³, Belarus⁴³⁴ and Ukraine⁴³⁵ was regarded as

⁴²⁷ The decision only states that 'The Russian Federation was in compliance with its obligations under the Montreal Protocol in 1995 and that it is expected that there will be a situation of non-compliance in the Russian Federation on 1996'. Para. 3 of MOP-7 decision VII/18.

⁴²⁸ See WERKSMAN, 'Compliance and Transition', at 768; UNEP/OzL.Pro/WG.3/3/3, para. 44. KOSKENNIEMI thinks that the MOP can only take proportional punitive measures after finding a Party's prior wrongful act against general international law. See KOSKENNIEMI, 'Breach or Non-Compliance?', at 145, 153. In contrast, GEHRING supports wide discretionary powers of the ImpCom and the MOP not restricted to the strict application of general international law. See GEHRING, 'Regimes', at 52-53.

⁴²⁹ For Belarus, see para. 18 (c), (e) of the Report of ImpCom-11 (31 August 1995) and paras. 6 and 7 of MOP-7 decision VII/17. For Ukraine, see para. 22 (c), (e) of the Report of ImpCom-11 and paras. 6 and 7 of MOP-7 decision VII/19.

⁴³⁰ 'Belarus was in compliance with its obligations under the Montreal Protocol in 1995' and 'there is a possibility of noncompliance in 1996'. Para. 3 of MOP-7 decision VII/17. The same statements were made for Ukraine. See para. 3 of MOP-7 decision VII/19.

⁴³¹ For Poland, see paras. 5-8 of the Report of ImpCom-11 and MOP-7 decision VII/15. For Bulgaria, see paras. 9-13 of the Report of ImpCom-11 and MOP-7 decision VII/16.

⁴³² See para. 3 of MOP-7 decision VII/15 (see Appendix 9.4.); para. 3 of MOP-7 decision VII/16 (see Appendix 9.5.).

⁴³³ See paras. 14-19 of the Report of ImpCom-13 (18-19 March 1996), paras. 19-28 of the Report of ImpCom-14 (23 August 1996), paras. 8-14 of the Report of ImpCom-16 (20 November 1996) and para. 78 of the Report of MOP-8 (25-27 November 1996). See also MOP-8 decision VIII/25 (see Appendix 9.6.).

⁴³⁴ See paras. 9-13 of the Report of ImpCom-13 and paras. 7-8 of the Report of ImpCom-15 (18 November 1996). See also para. 72 of the Report of MOP-8 (see Appendix 9.7.).

⁴³⁵ See paras. 20-22 of the Report of ImpCom-13, para. 14 of the Report of ImpCom-15 and para. 73 of the Report of MOP-8, making the same statement as Belarus shown in

satisfactory by the ImpCom and the MOP, although they were found to be in non-compliance. Russia expressed its appreciation of the work done by the ImpCom and supported its draft decision VIII/21, noting that this offered Russia valuable guidelines and assistance in meeting its obligations under the Protocol⁴³⁶.

On the other hand, in December 1995, Lithuania, Latvia and Estonia requested a longer timeframe for phasing out ozone-depleting substances because of the institutional and financial problems facing those countries.⁴³⁷ As Estonia had not yet been a Party to the Montreal Protocol,⁴³⁸ only the claims of Lithuania and Latvia were dealt with by the Montreal NCP as voluntary submissions at that time.⁴³⁹ In 1996, the ImpCom and the MOP decided to recommend financial assistance for these two States,⁴⁴⁰ without determining their non-compliance.⁴⁴¹

In 1997, non-compliance by Russia⁴⁴², Latvia⁴⁴³ and Lithuania⁴⁴⁴ was discussed and all of them were found to be in non-compliance. Lithuania's request for postponement of its contributions to the Multilateral Fund until the year 2000 was

the previous note.

⁴³⁶ Para. 78 of the Report of MOP-8.

⁴³⁷ Paras. 23 of the Report of ImpCom-13.

⁴³⁸ *Id.*, para. 23 and 25.

⁴³⁹ *Id.*, para. 5.

⁴⁴⁰ For Latvia, see para. 12 (e) of the Report of ImpCom-14 and para. 5 of MOP-8 decision VIII/22. For Lithuania, see para. 27 (f) of the Report of ImpCom-13, para. 18 (e) of the Report of ImpCom-14 and para. 5 of MOP-8 decision VIII/23.

⁴⁴¹ For Latvia, see para. 26 (b) of the Report of ImpCom-13, para. 12 (a) (b) of the Report of ImpCom-14 and MOP-8 decision VIII/22, stating that 'Latvia would be in a situation of noncompliance with the Montreal Protocol in 1996' (para. 1), and that 'there is a possibility of non-compliance by Latvia in 1997' (para. 2). For Lithuania, see para. 27 (b) of the Report of ImpCom-13, para. 18(a) (b) of the Report of ImpCom-14 and MOP-8 decision VIII/23, making the same statements as Latvia.

⁴⁴² See paras. 20-25 of the Report of ImpCom-17 (15-16 April 1997), paras. 19-26 of the Report of ImpCom-18 (2 and 4 June 1997), paras. 10-14 of the Report of ImpCom-19 (8-10 September 1997) and para. 91 of the Report of MOP-9 (15-17 September 1997). See also MOP-9 decision IX/31 (see Appendix 9.10.).

⁴⁴³ See paras. 9-11 of the Report of ImpCom-17, paras. 14-15 of the Report of ImpCom-18 and para. 91 of the Report of MOP-9. See also MOP-9 decision IX/29 (see Appendix 9.8.).

⁴⁴⁴ See paras. 12-17 of the Report of ImpCom-17, paras. 16-18 of the Report of ImpCom-18 and para. 91 of the Report of MOP-9. See also MOP-9 decision IX/30 (see Appendix 9.9.).

rejected because of the absence of a provision in the Protocol permitting such a postponement.⁴⁴⁵

In 1998, non-compliance by Russia⁴⁴⁶, Belarus⁴⁴⁷, Ukraine⁴⁴⁸, Latvia⁴⁴⁹ and Lithuania⁴⁵⁰ was discussed and all of them were found to be in non-compliance,⁴⁵¹ although efforts made by Russia, Latvia and Lithuania were appreciated.⁴⁵²

In 1999, non-compliance by Russia⁴⁵³, Ukraine⁴⁵⁴, Latvia⁴⁵⁵ and Bulgaria⁴⁵⁶ was discussed. Only Bulgaria was found to be in non-compliance, although its efforts were praised.⁴⁵⁷

The above practice demonstrates that, except for the punitive measures taken in 1995 for Russia, Belarus and Ukraine, no punitive measures have actually been taken. However, cautions of punitive measures were issued for Russia, Belarus, Ukraine, Latvia and Lithuania in 1998 and for Bulgaria in 1999, and these included suggestions

⁴⁴⁵ Para. 15 of the Report of ImpCom-17.

⁴⁴⁶ See paras. 65-68 of the Report of ImpCom-20 (6-7 July 1998) and paras. 44-48 of the Report of ImpCom-21 (16 November 1998) and its decision (g), which became MOP-10 (23-24 November 1998) decision X/26.

⁴⁴⁷ See paras. 58-59 of the Report of ImpCom-20 and paras. 22-27 of the Report of ImpCom-21 and its decision (b), which became MOP-10 decision X/21.

⁴⁴⁸ See paras. 69-70 of the Report of ImpCom-20 and paras. 37-38 of the Report of ImpCom-21 and its decision (h), which became MOP-10 decision X/27.

⁴⁴⁹ See paras. 48-50 of the Report of ImpCom-20 and paras. 30-33 of the Report of ImpCom-21 and its decision (e), which became MOP-10 decision X/24.

⁴⁵⁰ See paras. 51-53 of the Report of ImpCom-20 and paras. 34-36 of the Report of ImpCom-21 and its decision (f), which became MOP-10 decision X/25.

⁴⁵¹ Para. 1 of MOP-10 decision X/26 states that 'in 1996, the Russian Federation was in non-compliance with its control obligations under Article 2A through 2E of the Montreal Protocol'. Para. 1 of MOP-10 decisions X/21, X/27, X/24 and X/25 made the same statement for Belarus, Ukraine, Latvia and Lithuania respectively.

⁴⁵² Para. 2 of MOP-10 decision X/26 states: 'To note with appreciation that the Russian Federation is making significant progress in coming into compliance with the Montreal Protocol'. A similar statement was made for Latvia and Lithuania in para. 2 of MOP-10 decisions X/24 and X/25 respectively.

⁴⁵³ See paras. 16-17 of the Report of ImpCom-23 (27 November 1999).

⁴⁵⁴ See paras. 20-21 of the Report of ImpCom-23.

⁴⁵⁵ See para. 11 of the Report of ImpCom-22 (14 June 1999) and paras. 12-13 and 23 of the Report of ImpCom-23.

⁴⁵⁶ See paras. 14-15 of the Report of ImpCom-23.

⁴⁵⁷ See MOP-11 (29 November-3 December 1999) decision XI/24 (see Appendix 9.14.).

for assistance.⁴⁵⁸

4.2.3.2. Secretariat Submissions

The first Secretariat submission of non-compliance was made at ImpCom-15 in 1996, in relation to the Czech republic.⁴⁵⁹ At that time the ImpCom, through the deliberations at its 15th⁴⁶⁰ and 16th⁴⁶¹ meetings, concluded that no further action was necessary regarding the Czech Republic's non-compliance in 1994 with the halon phase-out, in view of its total phase-out in 1995. MOP-8 in 1996, while noting the Czech Republic's non-compliance in 1994,⁴⁶² endorsed this conclusion.⁴⁶³ Again at ImpCom-19 in 1997, the Czech Republic's non-compliance in 1995 with the freeze in the consumption of methyl bromide was detected through its response to the ImpCom-18's request.⁴⁶⁴ Again, the ImpCom, despite requesting that the Czech Republic should ensure that similar cases did not occur again, recommended that no action should be taken, because the average annual consumption for the two years 1995 and 1996 had been below the freeze level.⁴⁶⁵ MOP-9 in 1997, after noting the Czech Republic's non-compliance in 1995,⁴⁶⁶ followed this recommendation.⁴⁶⁷ In July 1998,

⁴⁵⁸ See Para. 3 of ImpCom-21 decision (g) and MOP-10 decision X/26, (see Appendix 9.13.). Similar statements were made for Belarus in para. 3 of ImpCom-21 decision (b) and MOP-10 decision X/21, for Ukraine in para. 4 of ImpCom-21 decision (h) and MOP-10 decision X/27, for Latvia in para. 4 of ImpCom-21 decision (e) and MOP-10 decision X/24, for Lithuania in para. 4 of ImpCom-21 decision (f) and MOP-10 decision X/25 and for Bulgaria in para. 23 of the Report of ImpCom-23 and para. 3 of MOP-11 decision XI/24.

⁴⁵⁹ Para. 28 of the Report of ImpCom-15.

⁴⁶⁰ *Id.*, para. 29.

⁴⁶¹ Paras. 15-16 of the Report of ImpCom-16.

⁴⁶² Para. 1 of MOP-8 decision VIII/24 states: 'To note the Czech Republic's noncompliance in the year 1994 with the halon phase-out'.

⁴⁶³ *Id.*, para. 4.

⁴⁶⁴ Para. 15 of the Report of ImpCom-19.

⁴⁶⁵ *Id.*, para. 16.

⁴⁶⁶ Para. 1 of MOP-9 decision IX/32 states: 'To note the Czech Republic's non-compliance in 1995 with the freeze in the consumption of methyl bromide'.

⁴⁶⁷ *Id.*, para. 3.

the Czech Republic's non-compliance in 1996 with the control measures under Article 2 of the Montreal Protocol was reported by the Secretariat at ImpCom-20.⁴⁶⁸ The ImpCom, while denouncing the country's persistent non-compliance and issuing a warning against its future non-compliance,⁴⁶⁹ concluded that no further action would be necessary so long as the Czech Republic met its stated commitment to a complete phase-out of ozone-depleting substances and its expected compliance in 1997 and 1998.⁴⁷⁰ However, at ImpCom-21 in November 1998, the Czech Republic rebutted the ImpCom-20's identification of non-compliance for its import of controlled substances during 1994, 1995 and 1996, primarily on the basis that it was not bound by terms of the London and Copenhagen amendments to the Montreal Protocol until 18 March 1997, the date on which its accession to those amendments had entered into force.⁴⁷¹ Against this legal argument, one representative, while commending the Czech Republic for its significant efforts towards compliance, pointed out as follows: the control measures in question had been introduced in the London and Copenhagen *adjustments*, which were binding on all Parties to the Montreal Protocol irrespective of whether or not they had ratified the London and Copenhagen *amendments*.⁴⁷² In the end, ImpCom-21 decided that the Czech Republic had been 'in state of technical non-compliance' in 1996, without mentioning any further action.⁴⁷³ MOP-10 in 1998 followed suit.⁴⁷⁴

In addition to the Czech Republic, non-compliance by Azerbaijan, Estonia and Uzbekistan was reported to ImpCom-20 in July 1998.⁴⁷⁵ The ImpCom requested them to provide additional information including their phase-out plans⁴⁷⁶ and recommended

⁴⁶⁸ Para. 54 and 61 (a) of the Report of ImpCom-20.

⁴⁶⁹ *Id.*, para. 61 (c).

⁴⁷⁰ *Id.*, para. 61 (d).

⁴⁷¹ Para. 41 of the Report of ImpCom-21.

⁴⁷² *Id.*, para. 42.

⁴⁷³ *Id.*, para. 43 and ImpCom-21 decision (c).

⁴⁷⁴ MOP-10 decision X/22.

⁴⁷⁵ For Azerbaijan, see paras. 55-57 of the Report of ImpCom-20. For Estonia, see *id.*, paras. 62-64. For Uzbekistan, see *id.*, paras. 71-73.

⁴⁷⁶ For Azerbaijan, see *id.*, para. 57 (c) and (d). For Estonia, see *id.*, para. 64 (c). For Uzbekistan, see *id.*, para. 73 (c).

financial assistance for Azerbaijan and Uzbekistan.⁴⁷⁷ MOP-10 decisions in 1998 based on ImpCom-21 decisions in November 1998,⁴⁷⁸ while appreciating Estonia's significant strides moving towards compliance,⁴⁷⁹ ascertained that these three States' had been in non-compliance in 1996⁴⁸⁰ and issued cautions of punitive measures packaged with suggestions for assistance,⁴⁸¹ as had been done in the voluntary submission cases.⁴⁸²

In June 1999, Turkmenistan's non-compliance was reported to ImpCom-22. The ImpCom identified its non-compliance in 1996 and 1997, and requested its government to provide the required data and a phase-out plan including specific benchmarks.⁴⁸³ MOP-11 decision XI/25 in 1999 based on the recommendation by ImpCom-23 in November 1999⁴⁸⁴ ascertained its non-compliance in 1996,⁴⁸⁵ while appreciating its efforts towards compliance.⁴⁸⁶ This case, too, gave rise to cautions of punitive measures packaged with suggestion of assistance.⁴⁸⁷

4.2.4. Evaluation of the Nature of the Procedure

4.2.4.1. Evidence for a 'Soft' Nature

⁴⁷⁷ For Azerbaijan, see *id.*, para. 57 (e). For Uzbekistan, see *id.*, para. 73 (d).

⁴⁷⁸ ImpCom-21 decision (a) (Azerbaijan); (d) (Estonia); (i) (Uzbekistan).

⁴⁷⁹ Para. 2 of MOP-10 decision X/23.

⁴⁸⁰ Para. 1 of MOP-10 decision X/20 states that 'in 1996, Azerbaijan was in non-compliance with its control obligations under Articles 2A through 2E of the Montreal Protocol'. Para. 1 of MOP-10 decisions X/23 and X/28 made the same statement for Estonia and Uzbekistan respectively.

⁴⁸¹ Para. 4 of MOP-10 decisions X/20 (Azerbaijan), X/23 (Estonia) and X/28 (Uzbekistan).

⁴⁸² See 4.2.3.1. of this thesis.

⁴⁸³ See para. 12 of the Report of ImpCom-22.

⁴⁸⁴ Para. 24 of the Report of ImpCom-23.

⁴⁸⁵ Para. 1 of MOP-11 decision XI/25 states that 'in 1996, Turkmenistan was in non-compliance with its control obligations under Articles 2A through 2E of the Montreal Protocol'.

⁴⁸⁶ See *id.*, para. 2.

⁴⁸⁷ See *id.*, para. 4.

The only cases in which punitive measures i.e. trade restrictions, were recommended by the ImpCom and actually decided upon by the MOP were those of Russia, Belarus and Ukraine in 1995. However, even in these cases, the president of the ImpCom emphasized that ‘the Committee had operated in a cooperative, nonjudicial and nonconfrontational atmosphere’.⁴⁸⁸

It is true, unlike Belarus and Ukraine which agreed to those punitive measures, that Russia initially opposed them. However the following year, Russia expressed appreciation of the work done by the ImpCom and has subsequently made substantial efforts to achieve compliance.

By contrast, international assistance, including financial assistance, has been recommended by the ImpCom and endorsed by the MOP even in cases of Secretariat submissions, as demonstrated in the Azerbaijan, Estonia and Uzbekistan cases in 1998 and the Turkmenistan case in 1999. Assistance has the virtue of flexibility, and can be provided even in the absence of compliance, according to the degree of the Party's efforts towards compliance. This was the approach taken in the MOP decisions in the voluntary submission cases of Russia, Belarus, Ukraine, Latvia and Lithuania in 1998 and of Bulgaria in 1999 as well as in the Secretariat submission cases of Azerbaijan, Estonia and Uzbekistan in 1998 and Turkmenistan in 1999.

These facts seem to suggest that the Montreal NCP remains, in principle, in a ‘soft’ mechanism—in the sense that it exercises procedurally and substantively ‘soft’ control.

This recognition was shared by the Working Group on the 1998 Montreal NCP amendment, although it did not adopt the proposal suggesting that the words ‘to serve as an advisory and conciliatory body’ should be added to characterize the ImpCom because it considered that ‘the character of the procedure was reflected in Article 8 of the Protocol and throughout the non-compliance procedure text’.⁴⁸⁹

⁴⁸⁸ Para. 39 of the Report of MOP-7.

⁴⁸⁹ See para. 21 of the *Report of the Work of the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance with the Montreal Protocol* (3-4 July 1998 and 17-18 November 1998) [hereinafter, the *1998 Working Group Report*], UNEP/OzL.Pro/WG.4/1/3. This working group was established by MOP-9 Decision IX/35 in order to review the Montreal NCP.

4.2.4.2. A Potential Tendency towards a 'Hard' Nature

However, as Russia's case in 1995 demonstrates, the Montreal NCP has also demonstrated the willingness to exercise procedurally and substantively 'hard' control. This tendency was also demonstrated in the cautions of punitive measures in 1998 and 1999. At present, the most influential factor leading to a 'hard' nature seems to lie in the necessity of dealing with 'wilful and persistent non-compliance',⁴⁹⁰ a much debated subject by the Working Group on the 1998 Montreal NCP amendment. To deal with these cases, some experts in the Group supported the suspension of rights while others stressed that the ultimate objective of the mechanism was to help Parties to achieve compliance rather than to impose sanctions.⁴⁹¹ In this context, there emerged difficult problems of how to both define the concept of non-compliance and identify a situation of non-compliance, since it was noted that once a Party was in non-compliance, it might well remain so for several years before a return to compliance.⁴⁹² Finally, the Working Group agreed to make the following recommendation to MOP-10,⁴⁹³ as stated in para. 3 of MOP-10 decision X/10: 'in situations where there has been a persistent pattern of non-compliance by a Party, the Implementation Committee should report and make appropriate recommendations to the Meeting of the Parties with the view to ensuring the integrity of the Montreal Protocol, taking into account the circumstances surrounding the Party's persistent pattern of non-compliance.' Thus, in the case of a 'persistent pattern of non-compliance', the ImpCom should make appropriate recommendations, including punitive measures, to the MOP, taking into account the circumstances in which the 'wilful' factor can be included.

⁴⁹⁰ This was one of the mandates of the Working Group on the 1998 Montreal NCP amendment. See Para. 5 (a) of MOP-9 Decision IX/35 (see Appendix 9.11.). See also para. 26 of the Report of ImpCom-20 (see Appendix 9.12.).

⁴⁹¹ See para. 41 of the *1998 Working Group Report*.

⁴⁹² See *id.*, paras. 42-43.

⁴⁹³ See *id.*, para. 44.

4.2.4.3. A Demand for a 'Legal' Nature

The punitive measures imposed on Russia, Belarus and Ukraine in 1995 were criticized as being out of proportion, given that not only had no determination of non-compliance been made in relation to Russia, but moreover, both Belarus and Ukraine had in fact been found to be in compliance. However, it was felt necessary to monitor the Parties' progress towards compliance by showing not only an endpoint but also intermediate benchmarks, and to consider potential links between the allocation of funding from the Multilateral Fund and fulfilment of reporting requirements.⁴⁹⁴

With these considerations in mind, ImpCom-20 in 1998 agreed to the formalization of its decision-making process based on the following five steps:⁴⁹⁵ first, the identification⁴⁹⁶ of non-compliance or the self-declaration thereto by a Party in non-compliance; secondly, a review by the ImpCom of the country's plan to achieve compliance; thirdly, the ImpCom, in consultation with the Implementing Agencies, would select provisions from that plan for use as specific 'benchmarks'⁴⁹⁷ to be included in a proposed decision on that country by the ImpCom; fourthly, the ImpCom would discuss the proposal with the country and will recommend it to the MOP; and finally, the ImpCom would supervise the implementation of the agreed commitments through monitoring the benchmarks and by recommending the MOP to give or stop assistance or to impose punitive measures.⁴⁹⁸

⁴⁹⁴ See para. 24 of the Report of ImpCom-20 (see Appendix 9.12.).

⁴⁹⁵ See *id.*, paras. 31-32.

⁴⁹⁶ At the time of the 1998 amendment of the Montreal NCP, the following new paragraph 7 (d) was inserted to indicate one of the functions of the ImpCom: 'To identify the facts and possible causes relating to individual cases of non-compliance referred to the Committee, as best as it can, and make appropriate recommendations to the Meeting of the Parties'. The word 'identify' was selected in order to avoid the possible misinterpretation of the meaning of the originally used word 'determine', in the light of the criticism that it was for the MOP to determine the facts on the basis of the information gathered. See paras. 28-29 of the *1998 Working Group Report*. This new paragraph was considered as covering the ImpCom's power to make a formal declaration of non-compliance. See *id.*, para. 35.

⁴⁹⁷ See para. 32. of the Report of ImpCom-20 (see Appendix 9.12.).

⁴⁹⁸ See *id.*, para. 33 (see Appendix 9.12.).

Thus, procedural rules for the ImpCom in dealing with non-compliance have gradually been put in position. Interestingly, it was Russia that demanded, in the same way, the ‘legal’ nature of the Montreal NCP, in its proposal that criteria should be developed for making an objective judgment as to whether a case of non-compliance was a wilful breach or a result of factors beyond the control of the Party concerned.⁴⁹⁹ This seems to demonstrate that a non-compliant Party fears the application of punitive or adverse measures decided arbitrarily, and it is understandable that such a Party would regard a legal framework as a security network for safeguarding the ‘soft’ nature of the Montreal NCP.

However, several attempts to establish a legal framework by setting criteria for identifying non-compliance and for selecting the measures to be taken have yet to bear fruit. For example, ‘the Indicative List of Possible Situations of Non-Compliance’ was not adopted by MOP-4 in 1992;⁵⁰⁰ there was no consensus among the experts of the Working Group on the 1998 Montreal NCP amendment about Russia’s above-mentioned proposal to develop criteria for making an objective judgment,⁵⁰¹ and the proposal by Australia that guidance be given to assist the ImpCom in matching responses to particular types of non-compliance was not adopted by the said Working Group.⁵⁰² Moreover, no expert of that Working Group supported the creation of a

⁴⁹⁹ Russia’s Proposal at the meeting of the Working Group on the 1998 Montreal NCP amendment. See the paper entitled ‘Various Proposals on Reviewing the Non-Compliance Procedure’ [hereinafter, ‘Various Proposals’] distributed at that meeting.

⁵⁰⁰ According to KOSKENNIEMI, this reflected a concern regarding the Meeting’s capacity to qualify, *ex ante*, particular types of acts as non-compliance. KOSKENNIEMI, ‘Breach or Non-Compliance?’, at 133. He also points out the existence of doubts among the experts about the binding force of the MOP decisions and about obligatory character of financial contributions under Article 10 of the Montreal Protocol.

⁵⁰¹ See para. 27 of the 1998 Working Group Report. The view was expressed that such criteria would be developed over time and that there was no need to develop a formal list right away. *Loc. cit.*

⁵⁰² See ‘Various Proposals’. See also para. 40 of the 1998 Working Group Report. It was noted that, in practice, the ImpCom and the MOP were given some indications, but that they had the discretion to adapt their response to the particular case. *Loc. cit.*

mechanism for appeals against decisions of the MOP, as proposed by Peru.⁵⁰³

Such resistance to establishing the legal framework seems to derive both from the fear of losing flexibility to adapt to different cases⁵⁰⁴ having different facts and different causes⁵⁰⁵, and from the fear of introducing confrontational elements into the Montreal NCP⁵⁰⁶. Therefore, its ‘soft’ nature can be said to put a restraint on the Montreal NCP in developing its ‘legal’ nature.

4.2.5. Concluding Remarks

The above analysis demonstrates that the Montreal NCP’s control remains, in essence, procedurally and substantively ‘soft’, although there is a potential tendency towards a ‘hard’ nature, especially in the case of ‘wilful and persistent non-compliance’ requiring punitive or adverse measures. However, a ‘soft’ nature is not incompatible with a ‘legal’ nature, which is particularly demanded by non-compliant Parties, insofar as a ‘legal’ nature does not vitiate the flexibility of the procedure and does not introduce confrontational elements into it. Therefore, it is likely that the Montreal NCP, in the future, will try to develop its ‘legal’ nature while maintaining its ‘soft’ nature. It remains to be seen whether and to what extent the development of the ‘legal’ nature of the Montreal NCP will contribute, through its practice⁵⁰⁷ of legal evaluation⁵⁰⁸, to the

⁵⁰³ See ‘Various Proposals’. See also paras. 53 and 57 of the Report of the 1998 *Working Group Report*. However, some experts expressed the view that, while the proposal was premature, it should not be discarded out of hand. *Id.*, para. 57.

⁵⁰⁴ See the comment in *supra* note 502.

⁵⁰⁵ Para. 7 (d) of the Montreal NCP, which was newly inserted at the time of the 1988 Amendment, emphasizes the ImpCom’s function to ‘identify the facts and possible causes relating to individual cases of non-compliance’.

⁵⁰⁶ See the emphasis on ‘a cooperative, nonjudicial and nonconfrontational atmosphere’ by the president of the ImpCom in dealing with non-compliance of Russia, Belarus and Ukraine in 1995. *Supra* note 488. See also the legal experts’ views in *supra* note 393.

⁵⁰⁷ For the development of judgment criteria by the practice of the ImpCom and the MOP, see the comments in *supra* notes 501 and 502.

⁵⁰⁸ According to MARAUHN, ‘legal evaluation’ is the process of bringing the facts and the law together, while ‘factual evaluation’ means the way in which decisions as to

formation of the jurisprudence of international law.⁵⁰⁹

In respect of compliance control, the Montreal NCP's 'soft' control seems to have worked well so far, since all Parties found to be in non-compliance have made good efforts to comply. It is true that an element of 'hard' control, i.e. sanction, is tactically included in the Montreal NCP: trade restrictions, for example, can be effectuated even when the non-compliant Party won't comply, since the decision of the MOP could be addressed not only to the non-compliant Party but also to other Parties. However, besides this, there appear to be at least two factors enabling its success. First, the causes of non-compliance have, in the context of the present study, been limited to misunderstanding or incapability of the Parties: non-compliance has not come from wilful refusal to comply, either by reason of different legal interpretation of the relevant provisions or by reason of substantial dissatisfaction with the measures taken by the MOP. In such a misunderstanding or incapability case, the non-compliant Party would voluntarily return to compliance, as shown by the cases of the Czech Republic and Russia, if it can get adequate technical assistance or financial aid, the latter of which is hoped to be commensurate with the efforts to comply. Secondly, the MOP can decide to lower the achievement requirements for the non-compliant Parties, taking account of their financial or technical difficulties. Thus *second-order compliance* could be realized even if *first-order compliance* is out of reach.

It follows that the success of 'soft' control depends on the non-compliant Parties' voluntary will to comply, which could be facilitated by adequate technical assistance, motivated by financial aid commensurate with the efforts to comply, and enabled by

whether certain facts exist or do not exist are taken. MARAUHN, 'Procedural Law', at 712. Both the ImpCom and the MOP have the power to make not only 'factual evaluation' but also 'legal evaluation'. See *id.*, at 715-717. The Working Group on the 1998 Montreal NCP amendment, after emphasizing that 'determination of non-compliance was a matter for the Parties', 'noted that the report and data provided to the Meeting of the Parties by the Implementation Committee constituted a *de facto* determination of non-compliance. Para. 27 of the 1998 Working Group Report.

⁵⁰⁹ See KOSKENNIEMI, 'Breach or Non-Compliance?', at 133. However, GEHRING is suspicious of the Montreal NCP's contribution to general international law because '[n]o reference is made to provisions of international law outside the regime's normative structure.' GEHRING, 'Regimes', at 52.

setting achievable individual standards.

4.3. The ECJ's 'Hard' Control over Compliance with International Environmental Law: With Special Emphasis on Nature Conservation and Hazardous Waste Management

4.3.1. Introduction

Pronouncing, from 1985 onward, that environmental protection is 'one of the European Community's essential objectives'⁵¹⁰, the Court of Justice of the European Communities (ECJ) has dealt with many environmental cases⁵¹¹ in the context of the EC Treaty's environment-related provisions.⁵¹²

This section will explore the ECJ's role in controlling compliance with international environmental law in the framework of the European Community (EC), setting aside the European Coal and Steel Community (ECSC) and European Atomic Energy Community (EURATOM).⁵¹³ Here the focus will be on the fields of nature conservation and hazardous waste management, mainly for the following two reasons.

First, in these two fields, there already existed several international conventions,

⁵¹⁰ See Case C-240/83 (*ADBHU case*) [1985] ECR 531, para. 13 (see Appendix 7.6.). See also Case 302/86 *Commission v. Denmark (Danish Bottle case)* [1988] ECR 4607, paras. 9 (see Appendix 7.7.).

⁵¹¹ In this part, the meaning of 'environment' is to be understood broadly as including not only natural environment but also man-made environment, as suggested by 'town and country planning' as prescribed in Article 175(2) [ex Article 130s(2)] EC. In the same way, the meaning of 'environmental cases' is to be understood broadly as including all the cases touching upon environmental issues, among which are the conservation (and allocation) of marine living resources and the distribution, among the EC institutions, of powers to conclude environmental treaties and to make environmental legislation.

⁵¹² See Article 2 [ex Article 2] EC, Article 6 [ex Article 3c] EC and Articles 174–176 [ex Article 130r–ex Article 130t] EC. For EC environmental law, see generally KRÄMER, *EC Environmental Law*; JANS, *European Environmental Law*; KISS & SHELTON, *Manual of European Environmental Law*.

⁵¹³ For the EC, ECSC and EURATOM, see 4.3.2.1. of this thesis.

which were partly to be implemented by the subsequent EC legislation.⁵¹⁴ Therefore, at least in these two fields, the ECJ can be regarded as enforcing not only EC law but also international law.⁵¹⁵

Secondly, in these two fields, the ECJ: 1) often realizes the object and purpose of environmental conventions by strictly interpreting and applying the EC legislation implementing those conventions without mentioning them; 2) sometimes directly applies environmental conventions where there is no relevant EC legislation; and 3) almost always interprets the relevant EC legislation —if any— in strict conformity with international environmental law. Thus we can see here the ECJ's *substantively 'hard' control* for the environment: 1) making stringent review through strict interpretation and application of or substantial reference to the relevant environmental rules, and 2) deciding to take severe measures (which reflect State responsibility) against non-compliance thereby found. This second reason is particularly important, and an attempt will be made to demonstrate the essence of the international judiciary's 'hard' control over compliance with international environmental law, exemplified by the ECJ's apparent use of 'hard' control in *procedural* as well as *substantive* aspects.

In this context, it should be remembered that interpretation of an environmental treaty's provisions is unnecessary where there is EC legislation implementing that treaty,

⁵¹⁴ See 4.3.3.2.1. of this thesis.

⁵¹⁵ According to HARTLEY, Community law is, though deriving its validity from international law, a self-contained sub-system of international law separate therefrom. HARTLEY, *Foundations of EC Law* 89; 'International Law and Law of EU', at 10, 17. See Case C-26/62 *Van Gend en Loos* (see Appendix 7.8.). See also Case C-6/64 *Costa v. ENEL* (see Appendix 7.9.). For other views, see for example, SANDS, 'EC Environmental Law: Evolution', at 2518: '[t]he Community legal order, including its environmental law, remains a part of the old order of public international law from which it grew'. According to SIMMA, the EC system is, just like those of diplomatic relations and of human rights protection, 'self-contained' —in the sense of excluding counter-measures by an injured State— until such time as 'all remedies provided in the "subsystem" have been exhausted without any positive results' and until the time 'when further tolerance of the imbalance of costs and benefits caused by non-performance can no longer *bona fide* be expected from an injured party.' SIMMA, 'Self-Contained Regimes', at 128-129.

as stated by the ECJ in Case C-510/99 (*Tridon case*).⁵¹⁶ Therefore, provided there is relevant EC legislation which does not conflict with international agreements,⁵¹⁷ the ECJ is to interpret and apply that legislation, using international agreements merely for reference, at most. This limitation is not unique to the ECJ, but common to all international judiciaries whose jurisdiction *ratione materiae* is limited to disputes arising under a certain treaty.⁵¹⁸ This is clearly shown by the PCA's 2003 final award for the *OSPAR Convention case*,⁵¹⁹ and implied by its 2003 Order No. 3 for the *MOX Plant case*⁵²⁰ as well as by the ECtHR's 1995 *Loizidou v. Turkey* judgment (Preliminary Objections)⁵²¹. Thus in the fields of nature conservation and hazardous waste management, we are less likely to encounter the ECJ's direct application and interpretation of environmental treaties. Nonetheless, it is still useful to explore the ECJ's substantively 'hard' control over compliance with EC legislation implementing environmental treaties, since that is the most desirable way, if feasible, to realize full implementation of those environmental treaties.

⁵¹⁶ [2001] ECR I-7777, Judgment para. 24.

⁵¹⁷ HARTLEY states that '[i]f it conflicted with a Community act . . . the agreement would be valid', and that '[w]here a directly effective agreement conflicts with a Community act, the act will be invalid if it was subsequent to the agreement, and would probably be regarded as suspended if it was prior to it.' He thinks that this is confirmed by the statement of Advocate General MAYRAS in *International Fruit Company III* ([1972] ECR 1219 at 1233-4), which is, according to him, implicit in the judgment. He also adds that '[o]ne may therefore conclude—tentatively—that an international agreement entered into by the Community will be of no effect within the Community legal system if it is outside the capacity of the Community or if it conflicts with one of the constituent Treaties or (possibly) with a general principle of law.' HARTLEY, *Foundations of EC Law* 185-186.

⁵¹⁸ In the *MOX Plant case* before the PCA, the UK argued that even the PCIJ and the ICJ have the same limit when their jurisdiction is based on Article 36(1) of the Statute (i.e. on a compromissory clause in a treaty), by relying on ROSENNE's remarks, on the 1993 ICJ *Genocide Convention case* and on the 1924 PCIJ *Mavrommatis Palestine Concession case*. ROSENNE, 2 *Law and Procedure* 668; 1993 ICJ Reports 3 at 19, para. 35; 1993 ICJ Reports 325 at 345-346, paras. 42-43; PCIJ Reports, Series A No. 2 (1924), at 15-16. See paras.4.26- 4.29 of the UK's Counter-Memorial. For the UK's conclusion, see *id.*, para. 4.30 (see Appendix 2.10.).

⁵¹⁹ See Appendix. 2.8.

⁵²⁰ See Appendix. 2.9.

⁵²¹ See Appendix 4.4.

4.3.2. Existence of the ECJ's Procedurally 'Hard' Control

4.3.2.1. A Survey of ECJ Procedures

The ECJ, to which the Court of First Instance (CFI)⁵²² is attached, is the judicial institution common to three Communities⁵²³, i.e. the European Community (EC; formerly known as the European Economic Community: EEC)⁵²⁴, the European Coal and Steel Community (ECSC)⁵²⁵ and the European Atomic Energy Community (Euratom)⁵²⁶, all of which Communities were integrated into the European Union (EU)⁵²⁷ by the 1992 Maastricht Treaty⁵²⁸ as amended by the 1997 Amsterdam Treaty⁵²⁹ and the 2001 Nice Treaty⁵³⁰.

4.3.2.1.1. Opinion Procedure

⁵²² See Article 225 [ex Article 168a] EC. The CFI was envisaged in the 1986 Single European Act (SEA) and was established in 1988. Decision 88/591 (ECSC,EEC, Euratom) establishing a Court of First Instance of the European Communities [1988] O.J. L319/1. For the history of the creation of the CFI, BROWN & KENNEDY, *Court of Justice of EC* 77-78.

⁵²³ The ECJ's origin can be traced back to the 1951 ECSC Treaty (see esp. Articles 31-41). ARNULL, *EU and its Court of Justice* 3. A Merger Treaty (the Treaty Establishing a Single Council and a Single Commission of the European Communities) was signed in Brussels on 8 April 1965 and entered into force on 1 July 1967. See HARTLEY, *Foundations of EC Law* 4.

⁵²⁴ For the history of the EC, see Appendix 7.1.

⁵²⁵ For the history of the ECSC, see *id.*

⁵²⁶ For the history of the Euratom, see *id.*

⁵²⁷ The EU comprises three legal persons (i.e. the EC, the ECSC and the Euratom) together with two 'policies and forms of co-operation' (i.e. a 'common foreign and security policy' and 'co-operation in the fields of justice and home affairs'). See HARTLEY, *Foundations of EC Law* 7-8.

⁵²⁸ It was signed on 7 February 1992 and came into force on 1 November 1993.

http://europa.eu.int/abc/treaties_en.htm.

⁵²⁹ The Amsterdam Treaty was signed on 2 October 1997 and came into force on 1 May 1999. *Id.* For the details, see Appendix 7.1

⁵³⁰ The Nice Treaty, whose aim is to make some institutional changes of the EU in order to accept new Member States, was signed on 26 February 2001 and came into force on 1 February 2003. http://europa.eu.int/abc/treaties_en.htm.

The first sentence of Article 300(6) [ex Article 228(6)] EC provides:

The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty.

Thus the main purpose of this procedure is to exercise preventive control over the Community's treaty-making powers.⁵³¹ The second sentence of the above Article shows that the ECJ opinion is legally binding⁵³² because it reads:

Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48⁵³³ of the Treaty on European Union.

Although the ECJ's opinion procedure has dealt with a case related to the 2000 Biosafety Protocol⁵³⁴ attached to the 1992 Biodiversity Convention⁵³⁵ (*Opinion 2/00* of 6 December 2001)⁵³⁶, its main focus relates to the distribution of powers among the EC institutions.⁵³⁷

4.3.2.1.2. Contentious Procedures

⁵³¹ See BEBR, *Development of Judicial Control of EC* 351-356.

⁵³² According to BEBR, this is why Article 300(6) [ex Article 228(6)] EC as well as the Court use the expression 'opinion', carefully avoiding the term 'advisory opinion'. According to him, an advisory opinion, if adverse, could create the erroneous impression that the Community institutions remain free to follow or disregard such an opinion. *Id.*, at 355, footnote 48.

⁵³³ This is the procedure for the amendment of the Treaties on which the Union is founded. See Article 48 [ex Article N] of the Treaty on European Union.

⁵³⁴ (29 January 2000, Cartagena).

⁵³⁵ (5 June 1992, Rio de Janeiro).

⁵³⁶ See <http://curia.eu.int/jurisp>.

⁵³⁷ For the details, see Appendix 7.38.

Contentious cases of EC environmental law can, just as in any other field of law, come up to the ECJ either directly or indirectly.⁵³⁸ Direct ways include: i) *infringement proceedings* (Articles 226-228 [ex Articles 169-171] EC)⁵³⁹; ii) *legality review* (Articles 230-231 [ex Articles 173-174] EC)⁵⁴⁰; iii) *determination of failure to act* (Article 232 [ex Articles 175] EC)⁵⁴¹; and iv) *compensation* (Article 235 [ex Article 178] and Article 288 [ex Article 215] EC)⁵⁴². The *indirect way* is v) *preliminary reference* (Article 234 [ex Article 177] EC)⁵⁴³. The summaries of relevant contentious cases are provided below.

4.3.2.2. An Assessment

There is little doubt that the *direct contentious procedures* (i.e. *infringement proceedings, legality review, determination of failure to act, and compensation*) are procedurally ‘hard’ in the sense that they are *non-consensual, confrontational, punitive and authoritative* in nature, though the ‘hardness’ is somewhat softened in *infringement*

⁵³⁸ SANDS, ‘EC Environmental Law: Legislation’, at 694.

⁵³⁹ The Commission and the Member States can be the applicant. See Articles 226-228 [ex Articles 169-171] EC.

⁵⁴⁰ The Member States, the Council, the Commission, the European Parliament, the Court of Auditors, the European Central Bank (ECB) and, directly and individually concerned private Parties, can be the applicant. See Article 230 [ex Article 173] EC. Now the requirement of ‘individually concerned’ is not so strictly interpreted by the Court, which stated, in Case T-177/01 *Jégo-Quééré & Cie SA v. Commission* [2002] ECR II-2365, para. 51: ‘[A] natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.’

⁵⁴¹ The Member States, Community institutions including the ECB and private Parties can be the applicant. See Article 232 [ex Article 175] EC.

⁵⁴² The applicant must have suffered damage, but there is no limitation on the persons who may sue. See Articles 235 [ex Article 178] and 288(2) [ex Article 215(2)] EC; HARTLEY, *Foundations of EC Law* 451.

⁵⁴³ Any court or tribunal of a Member State can request the ECJ to give preliminary rulings, and shall do so if there is no judicial remedy under national law against its decisions. See Article 234 [ex Article 177] EC.

proceedings because, as we have already seen, the Court is only expected to make a declaratory judgment that a Member State has failed to fulfil its obligations. However, some doubts might occur as to the *opinion procedure* and the *indirect contentious procedure* (i.e. *preliminary reference*). It is true that these two procedures lack punitive colour, but not all decisions of other judicial procedures are punitive. Moreover, the decision of these two procedures is as authoritative as that of other judicial procedures, and their *non-consensual* and *confrontational* aspects are more or less left untouched in the relevant provisions of the ECJ Rules of Procedure, which allow the Parties concerned to submit their written observations,⁵⁴⁴ and in preliminary reference, to present their oral observations⁵⁴⁵ as in fact seen in common practice.⁵⁴⁶ Therefore, the difference between these two procedures and other judicial procedures is actually not so great.

4.3.3. Existence of the ECJ's Substantively 'Hard' Control

4.3.3.1. Preliminary Considerations

4.3.3.1.1. The ECJ's Basic Stance on Control over Compliance with International Law

As the ECJ stated in the *International Dairy Arrangement (IDA)* case:

[T]he primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those

⁵⁴⁴ For preliminary reference, see Article 103(3); for the opinion procedure, see Article 107(1).

⁵⁴⁵ See Article 104(4).

⁵⁴⁶ This is true of almost all the preliminary reference cases cited in this part.

agreements.⁵⁴⁷

Therefore, the ECJ's *substantively 'hard' control* over compliance with international law—in the sense that the ECJ interprets EC legislation as compatible with international law—is not an exception but a principle: it is, to a certain extent, a logical consequence of the following facts: 1) that international agreements concluded by the Community or by all Member States are binding on its institutions;⁵⁴⁸ 2) that international agreements binding on the Communities form part of the Community legal order;⁵⁴⁹ 3) that the ECJ can apply and interpret international agreements;⁵⁵⁰ and 4) that the Commission can bring to the ECJ a case on the infringement of international agreements.⁵⁵¹

4.3.3.1.2. The ECJ's Substantively 'Soft' Control: For the GATT/WTO Agreements

Interpreting provisions of EC legislation as compatible with the GATT/WTO agreements is also an acknowledged function of the ECJ, especially when the issue is related to EC legislation intended to implement the GATT/WTO agreements.⁵⁵²

⁵⁴⁷ Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para. 52. A similar statement was made in the context of the Montreal Protocol on the Ozone Layer: 'It is settled law that Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community.' Case C-284/95 *Safety Hi-Tech Srl. v. S. & T. Srl.* [1998] ECR I-4301, para. 22; Case C-341/95 *Gianni Bettati v. Safety Hi-Tech Srl.* [1998] ECR I-4355, para. 20.

⁵⁴⁸ See Article 300(7) [ex Article 228(7)] EC (see Appendix 7.2.). See also HARTLEY, 'International Law and Law of EU', at 28, footnote 124.

⁵⁴⁹ See Case 181/73 *Haegeman* (see Appendix 7.10.). See also ROSAS, 'EU and International Dispute Settlement', at 65.

⁵⁵⁰ See Case 104/81 *Kupferberg* (see Appendix 7.11.). See also paras. 4.31.-4.33. of the UK's Rejoinder in the *MOX Plant* case before the PCA.

⁵⁵¹ See Case C-61/94 (*IDA case*) (see Appendix 7.12.). See also ROSAS, 'EU and International Dispute Settlement', at 66.

⁵⁵² See Case C-61/94 (*IDA case*), paras. 52-53, interpreting Commission Regulation No. 2228/91 in such a manner as to make it compatible with the International Dairy Arrangement (IDA) concluded within the framework of GATT. Commission

However, even though the EC acceded to the WTO agreements, the ECJ has stated that ‘the WTO agreements are not in principle among the rules in the light of which the Community court is to review the legality of measures adopted by the Community institutions.’⁵⁵³ Thus we can see the ECJ’s *substantively ‘soft’ control* over compliance with the GATT/WTO agreements, in the following two senses: 1) non-recognition of ‘direct applicability’ of the GATT/WTO agreements; and 2) rejection of using the GATT/WTO agreements as a benchmark of EC law violation.

As far as the first is concerned, the ECJ has consistently denied the GATT/WTO agreements’ ‘direct applicability’ which could be relied on for alleging the contested EC or domestic measure’s direct breach thereof. The ECJ has stated vis-à-vis an individual that ‘Article XI of the General Agreement is not capable of conferring on citizens of the community rights which they can invoke before the Courts.’⁵⁵⁴ Likewise, it has also stated vis-à-vis a State that ‘the GATT rules are not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT.’⁵⁵⁵ This position is unchanged in respect of the WTO agreements⁵⁵⁶ including the Agreement on the Application of Sanitary and

Regulation (EEC) No. 2228/91 lays down provisions for the implementation of Council Regulation (EEC) No. 1999/85, which intends to implement inward processing relief arrangements including the IDA. See *id.*, paras. 10 and 50; Council Regulation (EEC) No. 1999/85, Article 5-8 (esp. 5). Cf. Case 187/85 *Fediol v. Commission (Fediol II)* [1988] ECR 4155, para. 12, interpreting, in the light of GATT, the concept of ‘subsidy’ included in Council Regulation No. 2176/84, which refers to GATT in its Annex (L); Case C-53/96 *Hermes* [1998] ECR I-3603, para. 28, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, para. 47 and Case C-89/99 *Schieving-Nijstad and Others* [2001] ECR I-5851, para. 35, all of which cases applied national law in such a manner as to make it compatible with the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).

⁵⁵³ Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para. 47.

⁵⁵⁴ Joined Cases 21-24/72 *International Fruit Company III*, para. 27 (regarding Commission Regulations Nos 459/70, 565/70 and 686/70).

⁵⁵⁵ Case C-280/93 *Germany v. Council* [1994] ECR I-4973, para. 110 (regarding Council Regulation (EEC) No 404/93).

⁵⁵⁶ Vis-à-vis an individual, see Case T-174/00 *Biret International v. Council* [2002] ECR II-17, para. 61 (regarding Council Directives 81/602, 88/146 and 96/22). Vis-à-vis a State, see Case C-149/96 *Portugal v. Council*, para. 42 (regarding Council Decision

Phytosanitary Measures (SPS Agreement)⁵⁵⁷ and the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).⁵⁵⁸

As far as the second is concerned, the EC has rejected using GATT/WTO agreements as a benchmark of EC law violation. In *Beamglow*, the ECJ discarded the applicant's allegation, based on the EC institutions' non-observance of a WTO Dispute Settlement Body (DSB) decision, of their violation of EC law principles such as *pacta sunt servanda*, protection of legitimate expectations, legal certainty, proportionality, and its right to property and right freely to pursue its economic activity.⁵⁵⁹

The exception to the above two instances occurs 'only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT'.⁵⁶⁰ This statement also holds true of the WTO agreements.⁵⁶¹

4.3.3.2. Modalities of the ECJ's Substantively 'Hard' Control

96/386/EC).

⁵⁵⁷ Vis-à-vis an individual, see Case T-174/00 *Biret International v. Council*, para. 65.

⁵⁵⁸ Vis-à-vis an individual, see Joined Cases C-300/98 and C-392/98 *Dior and Others*, para. 44; Case C-89/99 *Schieving-Nijstad and Others*, para. 53 (both regarding provisional measures of a Dutch court).

⁵⁵⁹ Case T-383/00 *Beamglow v. Parliament and Others* (14 Dec. 2005, n.y.r.), paras. 127, 162-163 (regarding the EC's failure to bring the Community's banana import regime into conformity with the WTO agreements).

⁵⁶⁰ Case C-280/93 *Germany v. Council*, para. 111. See Case 70/87 *Fediol v. Commission (Fediol III)* [1989] ECR 1781, paras 19-22, allowing review, in the light of GATT, of Council Regulation No 2641/84 referring to 'international law' and 'the generally accepted rules'; Case C-69/89 *Nakajima v. Council* [1991] ECR I-2069, para. 31, allowing review, on the basis of 'infringement of the Treaty or of any rule of law relating to its application' (Article 173 [Now 230] EC), and in the light of GATT Anti-dumping Code, of Council Regulation No. 2423/88 intending to implement that code; Case C-61/94 *Commission v Germany*, para. 63, finding Germany's violation of the IDA based on the Commission's allegation. The ECJ's different treatment of GATT between Case C-280/93 *Germany v. Council* (main *Bananas* case) and Case C-61/94 (*IDA* case) might be justified not only by the EC's primacy over each Member State as regards the decision of whether or not to respect an international obligation but also by EC law's primacy over international law. See BOURGEOIS, 'ECJ and WTO', at 112-113.

⁵⁶¹ Case T-383/00 *Beamglow*, para. 131. See Case C-149/96 *Portugal v. Council*, para. 49, and Case T-174/00 *Biret International*, para. 63.

The reason for the ECJ's negative attitude to reviewing the legality of EC measures in the light of the GATT/WTO agreements lies in these agreements' 'great flexibility' 'based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements"'.⁵⁶² Since this is a characteristic not shared by environmental treaties like the Biodiversity Convention,⁵⁶³ one can easily imagine the ECJ's substantively 'hard' control over compliance with international environmental law by *explicit enforcement* thereof, namely, by recognizing 'direct applicability' of environmental treaties and by using international environmental law as a benchmark of EC law violation. However, it should be noted here that the ECJ also exercises substantively 'hard' control by *implicit enforcement* of international environmental law, namely, by realizing the object and purpose of environmental treaties without mentioning those treaties. Thus we see the ECJ's substantively 'hard' control over compliance with international environmental law, especially in the fields of nature conservation and hazardous waste⁵⁶⁴ management. Before looking at examples of the ECJ's substantively 'hard' control, the main issues in these fields will be summarised.

4.3.3.2.1. Main Issues in Nature Conservation and Hazardous Waste Management

The contentious cases concerning nature conservation are mainly related to: 1) the 1979 Birds Directive (Council Directive 79/409/EEC)⁵⁶⁵ for implementing the 1971

⁵⁶² Joined Cases 21-24/72 *International Fruit Company III*, para. 21 (stating as regards GATT). For the WTO agreements, see Case C-149/96 *Portugal v. Council*, para. 42. For a WTO DSB decision, see Case T-383/00 *Beamglow*, paras. 127-132.

⁵⁶³ See Case C-377/98 *Netherlands v. Parliament and Others* [2001] ECR I-7079, paras. 52 and 53, the latter of which paragraphs states: 'such an exclusion cannot be applied to the CBD, which, unlike the WTO agreement, is not strictly based on reciprocal and mutually advantageous arrangements.' N.B. CBD refers to the Convention on Biological Diversity.

⁵⁶⁴ There is a longstanding controversy as to what is 'waste' and what is 'hazardous waste'. See KRÄMER, *EC Environmental Law* 324, 329. For the details, see Appendix 7.39.

⁵⁶⁵ [1979] 103 O.J. L 1-18.

Ramsar Convention⁵⁶⁶ as well as the 1979 Bonn⁵⁶⁷ and Bern⁵⁶⁸ Conventions; 2) the 1992 Habitats Directive (Council Directive 92/43/EEC)⁵⁶⁹ for implementing the 1992 Biodiversity Convention⁵⁷⁰; and 3) the 1982 and 1996 CITES Regulations (Council Regulations 3626/82/EEC⁵⁷¹ and 338/97/EEC⁵⁷²) for implementing the 1973 CITES⁵⁷³.

The issues on the Birds and Habitats Directives include a Special Protection Area (SPA) under Article 4(4) of the Birds Directive and a Special Area of Conservation (SAC) under Article 4(4) of the Habitats Directive [*Leybucht Dykes, Santoña Marshes, Lappel Bank, Poitevin Marsh, Pettigo Plateau, Bluhme, First Corporate Shipping and IBA 89 cases*]. An SPA is required by Article 4(1)⁵⁷⁴ of the Ramsar Convention and desired by Article 2(1)⁵⁷⁵ of the Bonn Convention as well as by Article 4(1)⁵⁷⁶ of the Bern Convention. An SAC is specifically needed by Article 8(a)⁵⁷⁷ of the Biodiversity Convention.

The issues on the CITES Regulations include an *import permit* as required by Article 10(1)(b) of the 1982 CITES Regulation as well as by Article 3(3)⁵⁷⁸ of the CITES, and *stricter domestic measures* as allowed by Article 15(1) of that Regulation as well as by Article 14(1)⁵⁷⁹ of the CITES [*Bolivian Wild Cats and Tridon cases*].

Regarding hazardous waste management, the contentious cases are mainly related

⁵⁶⁶ Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, 2 February 1971).

⁵⁶⁷ Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979).

⁵⁶⁸ Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 19 September 1979).

⁵⁶⁹ [1992] 206 *O.J. L* 7-50.

⁵⁷⁰ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992).

⁵⁷¹ [1982] 384 *O.J. L* 1-61.

⁵⁷² [1997] 61 *O.J. L* 1-69.

⁵⁷³ Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 3 March 1973).

⁵⁷⁴ See Appendix 10.1.

⁵⁷⁵ See Appendix 10.2.

⁵⁷⁶ See Appendix 10.3.

⁵⁷⁷ See Appendix 10.4.

⁵⁷⁸ See Appendix 10.5.

⁵⁷⁹ See *id.*

to: 4) the 1991 Hazardous Waste Directive (Council Directive 91/689/EEC)⁵⁸⁰ and 5) the 1993 Waste Shipment Regulation (Council Regulation 259/93/EEC),⁵⁸¹ both for implementing the 1989 Basel Convention⁵⁸².

The issues here include: a) *the principles of self-sufficiency and proximity* set out in the Basel Convention⁵⁸³ [*Wallonia Waste case*]; b) *the obligation to dispose of waste without endangering human health and without harming the environment*, as required by Article 5 of Directive 78/319, Article 4 of Directive 75/442 and Article 4(2)(c)⁵⁸⁴ of the Basel Convention [*First Penalty Payment case*]; c) *stricter domestic measures* as allowed, in the Court's view, by the 1991 Hazardous Waste Directive and by Article 4(11)⁵⁸⁵ of the Basel Convention [*Fornasar case*]; and d) *the competence and obligation of the competent authority of dispatch to detect misclassification of waste*, as derived from the system established by the 1993 Waste Shipment Regulation, especially Articles 26 and 30(1) thereof implementing Article 9(2)⁵⁸⁶ and Article 4(4)⁵⁸⁷ of the Basel Convention respectively [*Abfall Service case*].

Having clarified these issues, it is now possible to examine the evidence of substantively 'hard' control on the part of the ECJ.

4.3.3.2.2. Implicit Enforcement of International Environmental Law

The existence of the ECJ's substantively 'hard' control over compliance with environmental treaties, such as the 1971 Ramsar Convention, the 1979 Bonn and Bern Conventions, the 1992 Biodiversity Convention, the 1973 CITES and the 1989 Basel

⁵⁸⁰ [1991] 377 O.J. L 20-27.

⁵⁸¹ [1993] 30 O.J. L 1-28.

⁵⁸² Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989).

⁵⁸³ See Article 4(2) and para. 8 of the preamble of the Basel Convention (see Appendix 11).

⁵⁸⁴ See Appendix 11.

⁵⁸⁵ See *id.*

⁵⁸⁶ See *id.*

⁵⁸⁷ See *id.*

Convention, is evidenced by the fact that the ECJ tries to realize the object and purpose of those treaties without mentioning them, by giving pro-environmental interpretation to the relevant EC legislation implementing those treaties, as summarized in i)~viii) below.

- i) the power of the Member States to reduce the extent of SPAs pursuant to Article 4(4) of the Birds Directive is justified only on exceptional grounds corresponding to a general interest which is superior to the general interest represented by the ecological objective of that Directive, and the *economic and recreational requirements* mentioned in Article 2 of the Birds Directive *are not to be taken into account* when selecting or reducing an SPA [*Leybucht Dykes*⁵⁸⁸, *Santoña Marshes*⁵⁸⁹ and *Lappel Bank*⁵⁹⁰ cases];
- ii) voluntary and purely hortatory agri-environmental measures do not satisfy Article 4(1) and (2) of the Birds Directive [*Poitevin Marsh* case⁵⁹¹];
- iii) by setting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to the [EIA] Directive, thresholds which take account only of the size of projects, to the exclusion of their nature and location, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive [*Pettigo Plateau* case⁵⁹²];

⁵⁸⁸ Case C-57/89 *Commission v. Germany* [1990] ECR I-4337, paras. 20-22. For the details, see Appendix 7.13.

⁵⁸⁹ Case C-355/90 *Commission v. Spain* [1993] ECR I-4221, paras 18-19. For the details, see Appendix 7.14.

⁵⁹⁰ Case C-44/95, [1990] ECR I-3805, paras. 27, 31, 42. For the details, see Appendix 7.15.

⁵⁹¹ Case C-96/98 *Commission v. France* [1999] ECR I-8531, paras. 25-26. For the details, see Appendix 7.16.

⁵⁹² Case C-392/96 *Commission v. Ireland* [1999] ECR I-5901, para. 72. For the details, see Appendix 7.17.

- iv) a favourable opinion of the national scientific authority in the importing country is only one of the factors for determining whether the criteria laid down in Article 10(1)(b) of the 1982 CITES Regulation are satisfied [*Bolivian Wild Cats case*⁵⁹³];
- v) a Member State, when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of the Habitats Directive, may not take account of economic, social and cultural requirements, or regional and local characteristics [*First Corporate Shipping case*⁵⁹⁴];
- vi) the failure of the *obligation to dispose of waste without endangering human health and without harming the environment*, as required by Article 4 of Directive 75/442 and as set out in Article 130r [now Article 174] EC, could, by the very nature of that obligation, endanger human health directly and harm the environment and *must*, in the light of other obligations, *be regarded as particularly serious* [*First Penalty Payment case*⁵⁹⁵];
- vii) if the notified classification for shipment is incorrect, the competent authority of dispatch must oppose the shipment by raising an objection founded on that misclassification, which obligation derives particularly from Articles 26 and 30(1) of the 1993 Waste Shipment Regulation [*Abfall Service case*⁵⁹⁶];
- viii) the 1991 Hazardous Waste Directive does not prevent the Member State

⁵⁹³ Case C-182/89 *Commission v. France* [1990] ECR I-4337, paras. 4 and 12. For the details, see Appendix 7.18.

⁵⁹⁴ Case C-371/98 [2000] ECR I-9235, paras. 23-25 and the operative part. For the details, see Appendix 7.19.

⁵⁹⁵ Case C-387/97 *Commission v. Greece* [2000] ECR I-5047, paras. 94-95. For the details, see Appendix 7.20.

⁵⁹⁶ Case C-6/00 [2002] ECR I-1961, para.50 and the operative part. For the details, see Appendix 7.21.

from adopting more stringent protective measures in order to prohibit the abandonment, dumping or uncontrolled disposal of hazardous waste, because both Article 130t [now Article 176] EC and the Directive allow the Member States to introduce more stringent protective measures, and because, under Article 130r [now Article 174] EC, Community policy on the environment is to aim at a high level of protection, taking into account the diversity of situations in the various regions of the Community [*Fornasar* case⁵⁹⁷].

The above examples demonstrate the first meaning of substantively ‘hard’ control for the environment, i.e. making stringent review through strict interpretation and application of the relevant environmental rules. However, the *First Penalty Payment* case also realizes the second meaning of substantively ‘hard’ control, i.e. deciding severe measures (which reflect State responsibility) against non-compliance.

4.3.3.2.3. Explicit Enforcement of International Environmental Law

4.3.3.2.3.1. Using International Environmental Law as a Benchmark of EC Law Violation

Where the issue is related to EC legislation implementing an international agreement, the ECJ will take account of that agreement in interpreting the EC legislation, as stated in the *Tridon* case:

[S]ince Regulation No 3626/82 and Regulation No 338/97 both apply . . . in compliance with the *objectives, principles and* (in the case of Regulation No 338/97) *provisions of CITES*, the Court cannot disregard those elements, in so far as

⁵⁹⁷ Case C-318/98 [2000] ECR I-4785, paras. 46, 51 and the operative part. For the details, see Appendix 7.22.

they have to be taken into account in order to interpret the provisions of the regulations (emphasis added).⁵⁹⁸

The consequence of this approach is that when viewed in the light of an international agreement, a stricter domestic measure may be found to be incompatible with EC legislation, as occurred in the *Chrysler* case concerning harmonization:

[T]he Regulation [Council Regulation (EC) No 259/93] was adopted . . . having regard to the commitments entered into by the Community in the context of various international conventions and, in particular, *the Convention on the control of transboundary movements of hazardous wastes and their disposal, signed in Basel*

It therefore follows from the context in which the Regulation was adopted . . . that it regulates in a harmonised manner, at Community level, the question of shipments of waste in order to ensure the protection of the environment.

The answer to the fourth question must therefore be that Articles 3 to 5 of the Regulation preclude a Member State from applying . . . its own procedure in relation to the offer and allocation of the waste.⁵⁹⁹

Likewise, in the light of the IBA 89 [Inventory of Important Bird Areas in the European Community, July 1989], an international non-binding instrument, the ECJ found a

⁵⁹⁸ Case C-510/99 [2001] ECR I-7777, para. 25. For the details, see Appendix 7.23. For another case where the 1996 CITES Regulation was interpreted in the light of CITES, see Case C-154-02 *Jan Nilsson* [2003] ECR I-12733, para. 39. In Case C-286/90 *Poulsen and Diva* [1992] ECR I-6019, para. 11, the ECJ interpreted, in the light of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Article 6 (1) of Council Regulation (EEC) No 3094/86 prohibiting sale of salmon and sea trout caught on the high seas.

⁵⁹⁹ Case C-324/99 [2001] ECR I-9897, paras. 35, 42 and 76 (emphasis added). For the details, see Appendix 7.24.

Member State's classification of SPAs to be beyond its *discretion*:

IBA 89, although not legally binding on the Member States concerned, *can*, by reason of its acknowledged scientific value in the present case, *be used by the Court as a basis of reference* for assessing the extent to which the Netherlands has complied with its obligation to classify SPAs [*IBA 89 case*⁶⁰⁰].

Moreover, even where the issue is not related to EC legislation implementing an international agreement, the ECJ has taken account of that agreement and found that domestic measures were compatible with the EC law requirement of legitimacy (of those measures' purposes), as exemplified by the *Bluhme* case:

Conservation of biodiversity through the establishment of areas in which a population enjoys special protection, which is a method recognized in *the Rio Convention, especially Article 8a thereof*, is already put into practice in Community law.⁶⁰¹

In the *Wallonia Waste* case, the ECJ referred to the Basel Convention, even though the issue had nothing to do with EC legislation implementing that convention. It found, in the light of the Basel Convention, that stricter domestic measures were compatible with EC legislation prohibiting discrimination:

[T]he contested measures cannot be regarded as discriminatory, in the light of the principle that environmental damage should as a matter of priority be remedied at source, which is consistent with the *principles of self-sufficiency and proximity* set

⁶⁰⁰ Case C-3/96 *Commission v. Netherlands* [1998] ECR I-3031, para. 70 (emphasis added). For the details, see Appendix 7.25.

⁶⁰¹ Case C-67/97 [1998] ECR I-8033, para. 36 (emphasis added). For the details, see Appendix 7.26.

out in the *Basel Convention*.⁶⁰²

4.3.3.2.3.2. Recognizing 'Direct Applicability' of Environmental Treaties

Unlike the GATT/WTO agreements, the ECJ sometimes recognizes 'direct applicability' of environmental treaties, as seen in Case C-213/03⁶⁰³ (vis-à-vis an individual) and in Case C-239/03⁶⁰⁴ (vis-à-vis a State), both concerning fresh water discharge by *Électricité de France (EDF)* into a saltwater marsh communicating directly with the Mediterranean Sea.⁶⁰⁵ These cases are related to the 1980 Athens Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources⁶⁰⁶, which is a protocol to the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution⁶⁰⁷ acceded by the EEC.⁶⁰⁸ In these cases, the ECJ, while recognizing 'direct applicability' of the Athens Protocol,⁶⁰⁹ interpreted the Protocol

as prohibiting, without an authorisation issued by the national competent authorities, the discharge into a saltwater marsh communicating with the Mediterranean Sea of substances which, although not toxic, have an adverse effect on the oxygen content of the marine environment,⁶¹⁰

⁶⁰² Case C-2/90 *Commission v. Belgium* [1992] ECR I-4431, paras. 34-36 (emphasis added). For the details, see Appendix 7.27.

⁶⁰³ *Syndicat professionnel coordination des pêcheurs de l'Etang de Berre et de la region v Electricité de France (EDF)*, [2004] ECR I-7357.

⁶⁰⁴ *Commission v. France* [2004] ECR I-9325.

⁶⁰⁵ See Case C-213/03, paras. 19-20; Case C-239/03, paras. 13-14.

⁶⁰⁶ (Athens, 17 May 1980), approved by Council Decision 83/101/EEC of 28 February 1983 ([1983] 67 O.J. L 1). The Protocol's amendments adopted at the Conference of Plenipotentiaries held in Syracuse on 7 and 8 March 1996 were approved by Council Decision 1999/801/EC of 22 October 1999 ([1999] 322 O.J. L 18).

⁶⁰⁷ (Barcelona, 16 February 1976), [1977] 240 O.J. L 3.

⁶⁰⁸ See Council Decision 77/585/EEC of 25 July 1977 ([1977] 240 O.J. L 1).

⁶⁰⁹ See Case C-213/03, para. 47 (see Appendix 7.28.). See also *id.*, para. 41 and Case C-239/03, para. 78.

⁶¹⁰ Case C-213/03, para. 52.

and found that

in light of the provisions of Annex III to the Protocol the French Government has not established that an authorisation for the discharge into the Étang de Berre of the substances listed in Annex II to the Protocol has been issued under Article 6(3) of the Protocol by the competent national authorities.⁶¹¹

4.3.3.2.3.3. Some Considerations

It is ‘only if the Community intended to implement a particular obligation entered into within the framework of GATT/WTO, or if the Community act expressly refers to specific provisions of GATT/WTO’ that the ECJ can explicitly enforce the GATT/WTO agreements by using them as a benchmark of EC law violation or by recognizing their ‘direct applicability’. This limitation is not however seen in the fields of nature conservation and hazardous waste management, and indeed, one might imagine it to be absent in all cases except those relating to the GATT/WTO agreements. Indeed, the criteria for recognising ‘direct applicability’ of the Athens Protocol in Case C-213/03 were not different from those seen in other non-environmental fields,⁶¹² and the ‘direct applicability’ of international treaties⁶¹³ has been admitted by the ECJ even in the trade context.⁶¹⁴ However, the use of international law as a benchmark of EC law violation

⁶¹¹ Case C-239/03, para. 85.

⁶¹² See Case C-213/03, para. 39 (see Appendix 7.28).

⁶¹³ ‘Direct applicability’ of customary international law is also admitted by the ECJ, when it is *jus cogens*. See Case T-306/01 *Yusuf v. Council and Commission* (21 Sep. 2005, n.y.r.), paras. 277, 281, 293-294; Case T-315/01 *Kadi v. Council and Commission* (21 Sep. 2005, n.y.r.), paras. 226, 230, 242-243 (both finding no breach of arbitrary deprivation of the right to property which might be regarded as contrary to *jus cogens*, the only cause to review indirectly the lawfulness of UNSC resolutions).

⁶¹⁴ See those cases affirming ‘direct effect’ on an individual: Case 87/75 *Bresciani* [1976] ECR 129, para. 25 (regarding the 1963 Yaoundé Convention of Association between the EEC and the African States); Case 104/81 *Kupferberg*, paras. 26-27 (regarding the 1972 EEC-Portugal Agreement); Case T-115/94 *Opel Austria* [1997]

is particularly evident in the environmental field. In addition to the cases of nature conservation and hazardous waste management referred to above, the following cases are relevant.

First, there are cases where the ECJ found the EC institutions' *discretion* to be appropriate because of their compliance with international instruments.⁶¹⁵

Secondly, in *Efisol*⁶¹⁶, the Court of First Instance (CFI) rejected the applicant's argument of *legitimate expectation* because the Commission's conduct was inconsistent with the 1987 Montreal Protocol on the Ozone Layer.

Thirdly, in *Matteo Peralta*⁶¹⁷, the ECJ rejected the applicant's argument of *discrimination* in prohibiting ship-source pollution, because the contested Italian legislation was compatible with the customary principle of freedom of the High Seas.

Of course the ECJ has also used international law as a benchmark of EC law violation in non-environmental fields,⁶¹⁸ such as human rights⁶¹⁹ and treaty law⁶²⁰. In

ECR II-39, para. 101 (regarding the Agreement on the European Economic Area (EEA)); Case C-469/93 *Chiquita Italia* [1995] *ECR* I-4533, para. 57 (regarding the Fourth ACP-EEC Conventions (Lomé IV). N.B. ACP refers to African, Caribbean and Pacific States.

⁶¹⁵ See for example, C-405/92 *Etablissements Armand Mondiet SA v. Armement Islais SARL* [1993] *ECR* I-6133, paras. 34-36 (regarding, inter alia, the 1989 UNGA Resolution 44/225 which recommended moratoria and non-expansion of large-scale pelagic driftnet fishing on the high seas); C-120/99 *Italy v. Council* [2001] *ECR* I-7997, para. 46 (regarding binding recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT) established under the 1966 International Convention for the Conservation of Atlantic Tunas acceded by the EC in 1986).

⁶¹⁶ Case T-336/94 *Efisol SA v. Commission* [1996] *ECR* II-1343, para. 36.

⁶¹⁷ C-379/92 *Matteo Peralta* [1994] *ECR* I-3453, paras. 46-48.

⁶¹⁸ See generally, OTT, 'Thirty Years', at 133-136.

⁶¹⁹ For example, see Case C-404/92P *X v. Commission* [1994] *ECR* I-4737, paras. 17, 23-25 (annuling, in the light of the right to respect for private life embodied in Article 8 of the Eur.Conv.H.R., the Commission decision refusing to recruit the applicant after the AIDS-related test).

⁶²⁰ For example, see Case C-162/96 *Racke* [1998] *ECR* I-3655, paras. 52, 55-56 (finding that the Council made *no manifest errors of assessment* in applying a customary international law *principle of a fundamental change of circumstances* when adopting Council Regulation (EEC) No 3300/91 suspending the trade concessions provided for by the Cooperation Agreement between the EEC and Yugoslavia); Case T-115/94 *Opel Austria*, paras. 90, 93-95 (allowing, in the light of Article 18 of the first Vienna Convention reflecting the customary international law *principle of good faith*,

this sense, the environmental field may well be said ‘one of them’. However, the abundance of cases where the ECJ has used international environmental law—even non-binding rules—for such a purpose demonstrates its *substantively* ‘very hard’ control in the environmental field.

Moreover, in the human rights field the ECJ regards fundamental human rights—for whose interpretation human rights treaties such as the Eur.Conv.H.R. can supply guidelines—as forming ‘an integral part of the general principles of law’ which are however subject to ‘limitations justified by the overall objectives pursued by the Community’⁶²¹ Thus when it was disputed whether ‘home’ prescribed in Article 8 paragraph 1 of the Eur.Conv.H.R. covered not only private domicile but also professional offices, the ECJ in the 1989 *Hoechst*⁶²² and *Dow Benelux*⁶²³ cases did not follow⁶²⁴ the ECtHR’s 1989 *Chappell v. UK* which answered it in the affirmative.⁶²⁵

traders to rely on the *principle of protection of legitimate expectation* even before the EEA agreement’s entry into force).

⁶²¹ See Case 4/73 *Nold v. Commission* [1974] ECR 491, para. 12-14. See also Article 6 (2) of the 1992 Treaty on European Union.

⁶²² See Joined cases 46/87 and 227/88 *Hoechst AG v. Commission* [1989] ECR 2859, paras. 17-18 (see Appendix 7.29.).

⁶²³ See Case 85/87 *Dow Benelux NV v. Commission* [1989] ECR 3137, paras. 28-29.

⁶²⁴ In these cases, the ECJ found that the EC Commission did not exceed its powers of investigation on agreements or concerted practices concerning the fixing of prices and delivery quotas for PVC and polyethylene. See *Hoechst*, paras. 2, 38; *Dow Benelux*, paras. 2, 47. It could have been argued, as the ECJ did, that there was no case-law of the ECtHR on that subject, since in the *Chappell* case, unlike the other cases, the premises were used for not only his office but also his home. See *Chappell v. UK*, Judgment para. 26 (b) (see Appendix 4.3.). However, in the above ECJ judgments there was no explanation for that purpose. This suggests the ECJ’s ignorance—intentional or unintentional—of the Strasbourg ruling.

⁶²⁵ See *Chappell v. UK*, Judgment para. 51 (see Appendix 4.3.). In this case, the ECtHR found no violation of Article 8 of the Eur.Conv.H.R., since the interference by the UK’s search on his premises for collecting evidence of illegal tape recording was proportionate to the legitimate aim pursued and therefore ‘necessary in a democratic society’. See Judgment paras. 8, 48, 58, 66-67. The ECtHR in the 1992 *Niemietz v. Germany* rejected the ECJ cases and confirmed the interpretation of the *Chappell* case. *Niemietz v. Germany* (ECtHR, 16 Dec. 1992), Judgment paras. 22, 29-31. In this case, the ECtHR found the search on the office of the applicant (a lawyer) to be in violation of Article 8 of the Eur.Conv.H.R., since the interference was not ‘necessary in a democratic society’. Judgment paras. 11, 37-38 and Operative Part para. 1.

This shows the ECJ's substantively less 'hard' control over compliance with international human rights law, based on the consideration of the efficient operation of the internal market.⁶²⁶

4.3.3.3. Doubts about the ECJ's Substantively 'Hard' Control

So far we have concluded that the ECJ exercises substantively 'hard' control over compliance with international environmental law by *explicit* and *implicit enforcement* thereof. However, three factors possibly undermine this conclusion.

First, none of the contentious cases in the environmental field discussed above gave rise to a *determination of failure to act*. This fact might be taken as evidence of the ECJ's inability to control compliance with international environmental law as regards this category of litigation. However, as the *An Taisce* case⁶²⁷ shows, it is possible for an appellant to make a claim under this rubric,⁶²⁸ though in fact it is

⁶²⁶ See POLAKIEWICZ, 'Relationship', at 77, where he states: 'Such differences of approach [between the ECJ and ECtHR] can be explained by the simple fact that one court [the ECJ] primarily has responsibility to ensure the efficient operation of the internal market, while the other [the ECtHR] charged with protecting fundamental rights.' Although 'a demand for free trade' is one of the limits of substantively 'hard' control over compliance with international environmental law, it merely restricts stricter domestic measures ('*over-compliance*'), as will be seen below.

⁶²⁷ *An Taisce* case (Case T-461/93 *An Taisce – The National Trust for Ireland and World Wide Fund for Nature UK (WWF) v. Commission* [1994] ECR II-733; Case C-325/94 P *An Taisce and WWF v. Commission* [1996] ECR I-3727) concern both legality review and compensation. These cases were raised up from the concern about nature destruction by the construction of a visitor centre at Mullaghmore in the Burren National Park in Ireland, whose compatibility with Article 2 (1) of the Bonn Convention and Article 4 (1) of the Bern Convention might be called into question. See Case T-461/93, para. 9. However, in these cases there were no issues either on the nature conservation directives or on environmental treaties. See Case C-325/94 P, para. 9.

⁶²⁸ SCHERMERS sees the effect of *International Fruit Company III* (Cases 21-4/72 [1972] ECR 1219) and of *Schülter* (Case 9/73 [1973] ECR 1135) as follows: 'When a Community act is contrary to international law the member States may appeal within two months (appeals of individuals will rarely be possible); if they do, the Court will look into all aspects of the legality, including a possible conflict with *any* binding rule of international law. If no appeal is lodged within two months the act will become final to the extent that future questions about the validity under Article 177 will only be

difficult to establish the existence of a certain obligation to act.

Secondly, as regards the ECJ's *opinion procedure*, as far as *Opinion 2/00* is concerned, it has nothing to do with control over compliance with international environmental law. However, this is because that opinion is concerned with the distribution of powers among the EC institutions. Besides such *procedural compatibility*, *substantive compatibility* can be clarified by an ECJ opinion, which might have something to do with the said control.

Lastly, some might doubt whether *individual compliance with second-order* accompanied by its necessary consequence of *individual compliance with first-order* always results in *general compliance with first-order*.⁶²⁹ This is a question to be examined separately. However, certain cases in infringement proceedings, particularly those involving 'non-communication' and 'non-conformity'⁶³⁰ would, if properly complied with, lead to *general compliance with first-order*. Moreover, the possibility of domestic enforcement of the ECJ decisions, to be discussed below, would greatly enhance such *general compliance*.

4.3.4. Factors Enabling the ECJ's 'Hard' Control

A number of factors facilitate the ECJ's exercise of 'hard' control. Among them the following are of particular importance.

considered in relation to rules of international law which individuals can invoke in court. "Validity" in Article 177 would then have a more limited meaning than "legality" in Article 173 and would not include conflicts with rules of international law which citizens cannot invoke in court.' SCHERMERS, 'Community Law and International Law', at 87. It follows that, since the *An Taisce* case falls among the rare cases where individuals were allowed to make an annulment action, the Court would have had to examine the compatibility of the Community act with international law if such an application had been made by the applicant.

⁶²⁹ For the study in the context of the Eur.Conv.H.R., see CHURCHILL & YOUNG, 'UK Experience'.

⁶³⁰ The Commission classifies infringement cases into three categories, i.e. 'non-communication', 'non-conformity' and 'bad application'. For the details, see Appendix 7.40.

4.3.4.1. Factors Enabling Procedurally ‘Hard’ Control

The ECJ’s *procedurally ‘hard’ control* is clearly backed up by the evolution of European integration. No Member State would dare to defy an ECJ judgment, as this would vitiate such integration. Moreover, vital interests to States such as national defence are wisely excluded from the ECJ’s jurisdiction. In addition, the following three factors are of note.

4.3.4.1.1. Presence of the Commission’s Pre-Litigation Procedure

The ECJ is the last resort in the process of infringement proceedings. Most cases are settled in the Commission’s pre-litigation procedure stage, without reaching the ECJ. In fact, on nine years’ average (1996-2004), less than 7.1% of the cases detected came to the ECJ.⁶³¹ This shows the efficiency of the Commission’s pre-litigation procedure. By exercising *procedurally less ‘hard’ control* with escalating pressure based on legal reasoning, persuasion and threat, the Commission rapidly and economically prevents and rectifies *first/second-order non-compliance*, and sorts out cases awaiting the ECJ’s *procedurally real ‘hard’ control*, which consumes more time and money.

It is true that the system requiring prior exhaustion of amicable settlement before the judicial stage, like the EC system, is sometimes criticized for delaying legal remedies to individuals, as clearly manifested by the dissolution of the European Commission of Human Rights (ECmHR.) However, the primary purpose of infringement proceedings is not to give individuals legal remedies but to maintain ‘the rule of law’ within the EC, which would effectively be achieved through the co-operation between the EC Commission and the ECJ.

4.3.4.1.2. Existence of Active Applicants: the Commission and Private Parties

⁶³¹ See Appendix 7.41.

A judicial body is a passive organ waiting for a case to be brought before it. Therefore, in order for judicial control to be duly exercised, there must be active applicants who willingly bring cases. Possible applicants for the ECJ's judicial procedures are as follows:

Opinion procedure: the Council, the Commission and the Member States.

Infringement proceedings: the Commission and the Member States.

Legality review; Determination of failure to act: the Member States, the Council, the Commission, the European Parliament, the Court of Auditors, the ECB and private Parties.

Compensation: all entities who may have been prejudiced by the infringement.

Preliminary reference: private Parties (via the Member States' judiciary)

In most of the above-mentioned cases, the applicants are the Commission and private Parties. Unlike States, they are less bothered by the possibility that the confrontational nature of litigation might generate antipathy between the Parties; nor are they bothered by the possibility of being sued by their opponent at some future date. While it is true that the Commission sometimes exercises its discretion not to submit an infringement case to the Court, and that private Parties sometimes have difficulty establishing *locus standi* before the Court, these two entities are nonetheless the key actors in triggering the ECJ's procedurally 'hard' control.

4.3.4.1.3. Well Arranged Mechanisms for Promoting *Second-Order Compliance*

Even if an active applicant succeeds in triggering the ECJ's procedurally 'hard' control, it is a virtually meaningless mechanism for realizing compliance with standing rules (i.e. for realizing *first-order compliance*) if the decision rendered is not actually complied with by the Parties (i.e. if *second-order compliance* fails). Therefore, the promotion of *second-order compliance* is a key to the realization of *first-order*

compliance.

We have already seen that the Court's decision is, even in the instance of the *opinion procedure*, legally binding, and that its pecuniary judgment is, except against a Member State, enforceable under the Member States' domestic law (Article 244 [ex Article 187] EC; Article 256 [ex Article 192] EC). Moreover, in infringement proceedings, since the entry into force of the Maastricht Treaty, it has been possible for the Court to impose a *lump sum or penalty payment* on the State not complying with the prior judgment (Article 228(2) [ex Article 171(2)] EC).

There have been three Penalty Payment cases⁶³² so far, all related to the environment: the first case confirmed the appropriateness of a penalty payment to a hazardous waste case in the light of the continuing nature of the breaches of obligations, and imposed a penalty payment on Greece,⁶³³ with which decision Greece duly complied;⁶³⁴ the second case, while taking account of progress made by Spain in complying with the initial judgment⁶³⁵, imposed a (reduced) penalty payment on Spain for its non-compliance with Council Directive 76/160/EEC⁶³⁶ of 8 December 1975 concerning the quality of bathing water;⁶³⁷ the third case, in the light of the persistent breach since the initial judgment⁶³⁸ and of the public and private interests at issue, ordered payment of a lumpsum in addition to a penalty payment in relation to France's failure to fulfil its obligations to inspect and to take action regarding violations of technical measures concerning the minimum mesh size, attachments to nets, by-catches and the minimum size of fish.⁶³⁹

However, still problems remain if the infringing State fails to comply with the

⁶³² MEMO/05/482 (14 Dec. 2005), at 3-4.

⁶³³ Case C-387/97 *Commission v. Greece*, paras. 94-95, 99.

⁶³⁴ See *19th Monitoring Report* (2001), COM (2002) 324 final, at 49. para. 2.8.9 (see Appendix 7.42.).

⁶³⁵ Case C-92/96 *Commission v. Spain* [1998] ECR I-505, para 34.

⁶³⁶ [1976] 31 O.J. L 1.

⁶³⁷ See Case C-278/01 *Commission v. Spain* [2003] ECR I-14141, para. 50 (see Appendix 7.30.).

⁶³⁸ Case C-64/88 *Commission v. France* [1991] ECR I-2727, paras. 15, 17, 19, 22, 24.

⁶³⁹ Case C-304/02 *Commission v. France* (12 July 2005) [n.y.r], paras. 113-116.

penalty payment judgment, since it is a pecuniary judgment against a Member State and thus is not enforceable under domestic law. Although the Commission has the option to suspend or reduce Community financing for that State, as seen in the *An Taisce* case⁶⁴⁰, this measure is of questionable efficacy⁶⁴¹ and is in any event only available where the State is in receipt of such financing.⁶⁴² It remains to be seen whether other possible enforcement measures really exist.

Thus the mechanisms to realize *second-order compliance* are incomplete, except for pecuniary judgment not against a Member State. Nonetheless, according to some authors, the Court's judgments have been complied with 'perfectly' by the Community institutions,⁶⁴³ 'generally well' by national courts,⁶⁴⁴ and '80-90%' by the Member States.⁶⁴⁵ In fact, the ratio of non-compliance—in the eyes of the Commission—with infringement judgments, as inferred from the ratio, in the total number of infringement judgments, of the number of reasoned opinions sent under Article 228 is, around 12.7% in 1998, 15.9% in 1999, 31.7% in 2000, 10.1% in 2001, 11.4% in 2002, 13.8% in 2003, 16.8% in 2004, and 15.1% for the seven years of 1998-2004 on average.⁶⁴⁶ Moreover, if we disregard the delay in compliance, all infringement judgments have *perfectly*—at least in the eyes of the Commission—been complied with by the Member States, since there has been no case where a Member State refused to pay the penalty payment, the

⁶⁴⁰ Case T-461/93, para. 34: 'Under Article 24 of Council Regulation (EEC) No 4253/88 of 19 December 1988, the Commission may suspend or reduce assistance in respect of an operation if it finds an irregularity.'

⁶⁴¹ KRÄMER, *E.C. Treaty* 173.

⁶⁴² See BULTERMAN & KUIJER, *Compliance with Judgments* 90-92.

⁶⁴³ *Id.*, at 112.

⁶⁴⁴ *Id.*, at 114.

⁶⁴⁵ *Id.*, at 115, referring to the annual Commission report on supervision of application of Community law.

⁶⁴⁶ See Annex II, Table 2.5., Cases closed in the year, in *16th Monitoring Report* (1998), COM (1999) 301 final; *17th Monitoring Report* (1999), COM (2000) 92 final; *18th Monitoring Report* (2000), COM (2001) 309 final; *19th Monitoring Report* (2001), COM (2002) 324 final; *20th Monitoring Report* (2002), COM (2003) 669 final; *21st Monitoring Report* (2003), COM (2004) 839 final; *22nd Monitoring Report* (2004), COM (2005) 570.

last resort in the infringement proceedings.⁶⁴⁷ Such a high degree of *second-order compliance* seems to result, on the one hand, from the efforts of the Commission and other monitoring bodies, and on the other hand, from domestic enforceability of ECJ decisions.⁶⁴⁸ As regards the former, particular note should be made of the Commission's contact with the Member State authorities in order to ascertain what measures are planned to comply with the Court's judgment in the absence of notification thereof from that State within a few months after the judgment.⁶⁴⁹ The latter domestic enforcement methods include: invocation of the doctrines of *direct effect*⁶⁵⁰ and *supremacy*⁶⁵¹ of EC law; the ECJ's practice of interpreting domestic legislation as compatible with EC law;⁶⁵² and claims for damages resulting from the Member States' failure to implement EC law.⁶⁵³ All of those methods are guaranteed by the procedure of preliminary reference.⁶⁵⁴ Although there is some risk that the preliminary ruling rendered is not followed by national courts other than the one which made the reference,⁶⁵⁵ non-compliance with a preliminary ruling can be rectified by infringement proceedings before the ECJ.⁶⁵⁶

⁶⁴⁷ However, out of 32 cases of second referrals as at 31 December 2004, six cases are still in motion. Others were either terminated or dropped. See *22nd Monitoring Report* (2004), COM (2005) 570, Annex A: Situation in the Different Sectors, at 9-11. No information is available as regards the implementation of the *Second* (Case C-278/01 *Commission v Spain*) and *Third* (Case C-304/02 *Commission v. France*) *Penalty Payment* cases.

⁶⁴⁸ See Case C-26/62 *Van Gend en Loos* [1963] ECR 1 (see Appendix 7.8.).

⁶⁴⁹ The decision of Case C-392/96 *Pettigo Plateau* was rendered on 21 September 1999 and the Commission contacted the Irish authorities by the end of that year. See *17th Monitoring Report* (1999), COM (2000) 92 final, Annex V: Judgment of the Court of Justice up to 31 December 1999 not yet implemented, at 7.

⁶⁵⁰ See Case C-26/62 *Van Gend en Loos* [1963] ECR 12 (see Appendix 7.8.).

⁶⁵¹ See Case C-6/64 *Costa v. ENEL* [1964] ECR 585 at 593-594 (see Appendix 7.9.).

⁶⁵² See for example, Case 14/83 *Von Colson* [1984] ECR 1891, para. 26 (see Appendix 7.31.).

⁶⁵³ See Cases C-6 and 9/90 *Francovich* [1991] ECR I-5357, para. 40 (see Appendix 7.32.).

⁶⁵⁴ See BULTERMAN & KUIJER, *Compliance with Judgments* 93-106.

⁶⁵⁵ See *id.*, at 106-110.

⁶⁵⁶ See for example, Case C-388/95 *Belgium v. Spain* [2000] ECR I-3123. The Belgian Governments etc. claimed that 'by not amending Decree No 157/88 in order to comply with the *Delhaize* judgment, the Kingdom of Spain had failed to fulfil its

4.3.4.2. Factors Enabling the ECJ's Substantively 'Hard' Control

In the *Fornasar* case⁶⁵⁷ the Court stated that 'Community policy on the environment is to aim at a high level of protection', as prescribed in Article 174(2) [ex Article 130r(2)] EC. The ECJ's substantively 'hard' control is a necessary implication of this policy. However, other factors are also relevant.

4.3.4.2.1. Possible Justification by Environmental Treaties

In the *Bluhme* case the Court regarded the purpose of the Danish legislation as legitimate, referring to Article 8(a) of the Biodiversity Convention. In the *Tridon* case the Court took account of the objectives, principles and provisions of CITES in order to interpret the provisions of the 1982 and 1996 CITES Regulations, and recognized the possible legality of the Guyane decree. In the *Wallonia Waste* case the Court regarded the Belgian rules as not discriminatory, in the light of the principle that environmental damage should as a matter of priority be remedied at source, which is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention. Thus environmental treaties can be invoked, not only to prove a certain fact (*evidential effect*) as seen in the *Chrysler* case⁶⁵⁸, but also to justify, in order to realize 'over-compliance', the purpose of stricter domestic measures of environmental protection (*justifying effect*). However, where Community legislation for the implementation of an environmental treaty exists, the invocation of the treaty does not mean that the Court will interpret and

obligations under Article 5 of the Treaty.' *Id.*, para. 32. The Court rejected this claim, holding that 'in this case, the Spanish rules do not correspond to the situation considered by the Court in *Delhaize*'. *Id.*, para. 37.

⁶⁵⁷ Case C-318/98, para. 46.

⁶⁵⁸ Case C-324/99, para. 35 shows that, in the Court's view, various international conventions including, in particular, the 1989 Basel Convention, are main evidence for the harmonization.

apply the treaty as stated in *Tridon*⁶⁵⁹ but rather, that the treaty will provide the Court with guidance for the interpretation and application of the Community legislation.

4.3.4.2.2. Irreparability and Transboundary Effect of the Harm

There must be, in the mind of the Court exercising substantively ‘hard’ control, the fear of *irreparability* of the harm to human health and to the environment. This is well illustrated by the *First*⁶⁶⁰, *Pre-Second*⁶⁶¹ and *Third*⁶⁶² *Penalty Payment* cases. The same is true of the Court’s reasoning in the *Red Grouse* case⁶⁶³ allowing stricter domestic measures for *endangered species* in which red grouse is not included.

Furthermore, concern about the *transboundary effect* of the harm also seems to be a reason for the substantively ‘hard’ control, since the ECJ in the *Red Grouse* case allowed stricter domestic measures for *migratory species* in which red grouse is not included. Here the Court emphasized that the Birds Directive ‘grants special protection to migratory species which constitute, according to the third recital in the preamble to the directive, a common heritage of the Community.’⁶⁶⁴ The same consideration applies to the 1991 Hazardous Waste Directive and the 1993 Waste Shipment Regulation, both of which implement the 1989 Basel Convention controlling ‘transboundary’ movements of hazardous wastes.

4.3.4.2.3. The Necessity for Establishing a Common Market

⁶⁵⁹ The Court recognized that the interpretation of the provisions of CITES was unnecessary in the present case, since those provisions applied at Community level only via the 1982 and 1996 CITES Regulations. Case C-510/99, paras. 24-25.

⁶⁶⁰ See Case C-387/97, para. 94 (see *supra* note 595 and the accompanying text).

⁶⁶¹ Case C-92/96 *Commission v. Spain*, para 57 (see Appendix 7.33.).

⁶⁶² Case C-304/02 *Commission v. France*, para. 105 (see Appendix 7.34.).

⁶⁶³ Case C-169/89 [1990] *ECR* I-2143, para. 11. For the details, see the Appendix 7.35.

⁶⁶⁴ *Loc. cit.* See also Case C-262/85 *Commission v. Italy* [1987] *ECR* 3073, para. 9; Case C-38/99 *Commission v. France*, [2000] *ECR* I-10941, para. 53.

The Court's rejection of *non-compliance by reason of incapability (bona fide non-compliance)* is not limited to the environmental field. It is a general doctrine, as seen, for example, from Case 52/75 *Commission v. Italy*⁶⁶⁵ concerning the marketing of vegetable seed and Case 280/83 *Commission v. Italy*⁶⁶⁶ concerning tobacco taxes. The reason for this doctrine seems to lie in the necessity for establishing a common market, as prescribed in Article 2 [ex Article 2] EC.⁶⁶⁷ As the Court in Case 52/75 *Commission v. Italy* puts it:

[T]he existence of differences in the rules applied in the Member States after these periods have expired might result in discrimination.⁶⁶⁸

The Court's hard stance is justified by the EC entry requirement that national conditions should meet the EC standard, though such a requirement could be attenuated by the grace period, given to the new Member States in their Act of Accession, for certain national provisions relating to public health and the environment.⁶⁶⁹

4.3.5. Limits of the ECJ's 'Hard' Control

4.3.5.1. Limits of Procedurally 'Hard' Control

4.3.5.1.1. Infrequent Utilization of Inter-State Infringement Proceedings

None of the cases examined above involved a Member State lodging a claim against another Member State's infringement. Indeed, at the time of writing, there

⁶⁶⁵ [1976] *ECR* 277, para. 14.

⁶⁶⁶ [1984] *ECR* 2361, para. 4.

⁶⁶⁷ Article 2 [ex Article 2] EC especially necessitates some free trade measures as prescribed in Article 3(1) [ex Article 3(1)]. See Appendix 7.2.

⁶⁶⁸ [1976] *ECR* 277, para. 10.

⁶⁶⁹ A four-year grace period was allowed for Austria, Sweden and Finland. *Sixteenth Monitoring Report* (1998), COM (1999) 301 final, at 61-62.

appear to be only two examples of inter-State infringement proceedings in the ECJ, namely Case 141/78 *France v. UK*⁶⁷⁰ concerning fisheries conservation and Case C-388/95 *Belgium v. Spain*⁶⁷¹ concerning wine bottling. This failure to utilize inter-State infringement proceedings may be due to the Commission's satisfactory prosecution, in which the Member States can intervene if they wish. However, it may also be a reflection of Member States' desire to avoid confrontational litigious relationships which could precipitate retaliatory litigation in the future.

4.3.5.1.2. Respect for the Member States' Discretion

It is the respect for the Member States' discretion that demands the Court, in infringement proceedings, only to make a declaratory judgment that a Member State has failed to fulfil its obligations, without permitting the Court to annul acts, issue orders, award damages, or declare that there is an obligation on a Member State to take certain measures. To allow such States' discretion would bring about more *consensual* results, softening the 'hardness' of the ECJ's control.

4.3.5.2. Limits of Substantively 'Hard' Control

4.3.5.2.1. Respect for the EC Institutions' Discretion

It has already been noted that the Commission has the discretion to decide whether or not to commence infringement proceedings before the Court, the discretion to decide when to lodge an action for these proceedings, and the discretion to decide whether or not to suspend or reduce Community financing. Thus the Court's substantively 'hard' control must bend to that discretion, as was implicit in the *An Taisce* appeal case.⁶⁷² Here the Court dismissed the applicants' claims for the purpose of nature conservation

⁶⁷⁰ Case 141/78 *France v. UK* [1979] ECR 2923. For the details, see Appendix 7.36.

⁶⁷¹ [2000] ECR I-3123.

⁶⁷² Case C-325/94 P, para. 23.

by admitting the Commission's discretion, holding that not only the commencement of infringement proceedings before the Court, but also the Court's declaration of failure to fulfil obligations is one of the factors to be taken into account when the Commission decides whether or not to suspend or reduce Community financing. The same must be true of other EC institutions when they are allowed to exercise certain discretions.

4.3.5.2.2. The Demand for Free Trade

In the *Crayfish Import Ban* case, the Court held that if a Member State maintains or takes stricter measures than those provided for by the 1982 CITES Regulation, it must comply with, in particular, Article 30 [ex Article 36] EC, which prescribes the exception to prohibition of import/export restrictions. In that case the Court determined that Germany, in taking stricter measures for crayfish conservation, was in non-compliance with both Article 30 [ex Article 36] EC and Article 28 [ex Article 30] EC (which prescribes prohibition of quantitative restrictions on imports and of measures having equivalent effects).⁶⁷³ This case demonstrates that substantively 'hard' control, allowing stricter domestic measures compatible with international environmental law ('*over-compliance*'), is sometimes vitiated by the demand for free trade, a scenario that also occurred in the *Red Grouse*⁶⁷⁴ and *Dusseldorp*⁶⁷⁵ cases.

4.3.6. Concluding Remarks

This study shows that the ECJ, while not directly applying and interpreting environmental treaties, exercises *procedurally* and *substantively* 'hard' control over compliance with EC Legislation implementing those treaties, in the fields of nature conservation and hazardous waste management, on certain conditions and within certain

⁶⁷³ Case C-131/93 *Commission v. Germany* [1994] 1 ECR 3303, paras. 1, 21 and 29, and para. 1 of the operative part.

⁶⁷⁴ Case C-169/89, paras. 9-16.

⁶⁷⁵ Case C-203/96 [1998] ECR I-4075, para. 33. For the details, see Appendix 7.37.

limits. Here it can be observed that the factors enabling *procedurally 'hard' control* (i.e. 1) presence of the commission's pre-litigation procedure; 2) existence of the Commission and private Parties as active applicants; and 3) well arranged mechanisms for promoting *second-order compliance*) and the limits thereof (i.e. 1) infrequent utilization of inter-State infringement proceedings; and 2) respect for the Member States' discretion) do not vary according to the subject matter of the case. Moreover, the factors enabling *substantively 'hard' control* (i.e. 1) possible justification by environmental treaties; 2) irreparability and transboundary effect of the harm; and 3) the necessity for establishing a common market) and the limits thereof (i.e. 1) respect for the EC institutions' discretion; and 2) the demand for free trade) hold true of every environmental field, though the degree of transboundary effect is variable. Therefore, it is easy to envisage the ECJ exercising 'hard' control over compliance with international environmental law in general, as partly demonstrated by pollution cases such as *Efisol*⁶⁷⁶ and *Matteo Peralta*⁶⁷⁷, and as also suggested by the three Penalty Payment cases all related to the environment.

Since the ECJ is one of the international judiciaries, one might consider that other international judiciaries could also exercise 'hard' control for the environment. However, simple analogy of the ECJ cannot be applied to them.

First, in respect of *substantively 'hard' control*, where the *necessity for establishing a common market*, one of the factors enabling substantively 'hard' control, does not exist, *non-compliance by reason of incapability (bona fide non-compliance)* would easily be excused. Moreover, a *demand for free trade*, one of the limits of substantively 'hard' control, also comes into play in the world trade context, rejecting stricter domestic measures of environmental protection ('*over-compliance*'). It is worth noting that the potential to realize *substantively 'hard' control* is likely to be significantly dependent upon the substantial degree of eco-consciousness exhibited by EU citizens. This high level of ecological concern is not shared by their 'world

⁶⁷⁶ Case T-336/94 *Efisol SA v. Commission*, para. 36.

⁶⁷⁷ C-379/92 *Matteo Peralta*, paras. 46-48.

citizen' counterparts, most of whom are at present motivated by the desire to pursue economic development rather than environmental protection.

Secondly, with regard to *procedurally 'hard' control*, it seems unlikely, in the light of the present degree of integration of the international society, that other international judiciaries like the ICJ could be equipped with the factors enabling procedurally 'hard' control (i.e. the pre-litigation procedure, active applicants and well arranged mechanisms for promoting *second-order compliance*). The ECJ's *procedurally 'hard' control* is, in infringement proceedings, coupled with the Commission's *procedurally less 'hard' control*. Merely pursuing *procedurally 'hard' control* would be met by the resistance of State sovereignty, especially in a less integrated society such as the international society and before the international judiciary having general jurisdiction dealing with vital interests to States such as national defence. Manifest defiance against the international judiciary's judgment could occur, as seen in the 1986 ICJ *Nicaragua case*.⁶⁷⁸

Nevertheless, it would be feasible for other international judiciaries to adopt some of the ECJ's mechanisms for promoting *second-order compliance*, as follows: **1)** the Party of a judgment would notify a monitoring body of its judgment implementation plan; **2)** in the absence of that notification within a certain time-limit, the monitoring body would contact the Party and ascertain the plan; **3)** the monitoring body would supervise the implementation of the plan by the Party; **4)** in case of (doubt of) non-implementation, the monitoring body would talk with the Party to reach an amicable settlement; **5)** where there is no amicable settlement, the monitoring body would bring the matter to the international judiciary; **6)** individuals and NGOs would be able to bring a complaint of (doubt of) non-implementation by the Party to the monitoring body. Here the monitoring body would be expected to be a relatively independent and impartial body, like the EC Commission. Imposition of a lump sum and/or penalty payment could be introduced into this system, perhaps at a later stage, which is appropriate to environmental cases 'in the light of the continuing nature of the

⁶⁷⁸ 1986 ICJ Reports 14. See HIGASHI, 'Noncompliance of Nicaragua Case'.

breaches of obligations' (*First Penalty Payment* case). For its calculation, it would be worth considering the three requirements for aim achievement, the three basic criteria and the two considerations in criteria application, as presented by the ECJ in that case.⁶⁷⁹

Since there is no executive power in the international society, it is highly important, for the purpose of ensuring the legally binding force of judgments of the international judiciary, to monitor the Party's judgment implementation, as the ECJ and EC Commission are doing. It is a step forward towards the realization of *procedurally 'hard' control*.

4.4. From the GATT Judiciary's 'Soft' Control to the WTO Judiciary's 'Hard' Control for Environmental Protection: Past, Present and Future

4.4.1. Introduction

The GATT panel system for dispute settlement has progressively been 'legalized' and 'judicialized', culminating in the WTO panel and Appellate Body (AB) system.⁶⁸⁰ Thus it could easily be assumed that the control exercised by WTO judiciary (panels and the AB) is, in the *procedural* aspect, 'hard' as compared to the 'soft' control exercised by the GATT judiciary (panels). However, is the same thing true of the *substantive* aspect? It should be recalled that the exercise of *substantively 'hard' control* requires **1)** a stringent review through the strict interpretation and application of or substantial reference to the relevant rules, and **2)** a decision to impose severe measures (which reflect State responsibility) against non-compliance thereby found. Since the GATT and WTO were established for free trade, and not for environmental protection, the GATT/WTO judiciary's 'legalization' and 'judicialization' could mean substantively 'hard' control over compliance with trade rules, but not necessarily with

⁶⁷⁹ See Appendix 7.20.

⁶⁸⁰ See PETERSMANN, *GATT/WTO Dispute Settlement System* 70-72, 182-191.

environmental rules. Bearing this in mind, it is necessary to elucidate the nature of the GATT/WTO judiciary's *substantive* control from the environmental perspective, focusing on its practice on trade-related environmental measures (TREM)s, where we can see an intersection of trade and environment. In this context, only the first aspect of substantively 'hard' control is looked at: substantively 'hard' control for environmental protection is taken to mean a stringent review through the strict interpretation and application of, or substantial reference to, the relevant environmental rules inside and outside the GATT/WTO so as to make it possible to oblige or allow the Party to take pro-environmental measures compatible with these environmental rules.

After a brief review of the GATT/WTO judiciary's *procedural* control, its practice on TREMs will be examined. Although the GATT/WTO judiciary is, in a dominant view,⁶⁸¹ not entitled to directly *apply* international law outside GATT/WTO law [hereinafter, non-GATT/WTO law], it can *refer* to non-GATT/WTO law in interpreting GATT/WTO provisions.⁶⁸² Therefore, when we make an assessment of GATT/WTO judiciary's *substantive* control for the environment, we shall see, among others, the extent of reference to non-GATT/WTO law. In this context, we should especially remember that Article 31(3)(c) of the Vienna Convention prescribes that 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account in treaty interpretation, which will promote the 'cross-fertilization of international law'.⁶⁸³ Moreover, it is also necessary to examine the possibility of direct application of non-GATT/WTO law, since PAUWELYN has recently advocated such possibility as a defence against the accusation of the violation of GATT/WTO law.⁶⁸⁴

4.4.2. The Nature of the GATT/WTO Judiciary's *Procedural* Control

⁶⁸¹ IWASAWA, *Dispute Settlement by WTO* 99.

⁶⁸² See Article 3(2) of Annex II to the WTO Agreement entitled 'Understanding on Rules and Procedures Governing the Settlement of Disputes' [hereinafter, the DSU] (see Appendix 8.3.).

⁶⁸³ See SANDS, 'Sustainable Development'; 'Environmental Protection in 21st Century'.

⁶⁸⁴ See Appendix 15.2.

4.4.2.1. The GATT Judiciary: Relatively ‘Soft’ Control

GATT panels had no explicit foundation in the GATT 1947. They evolved in GATT practice on the basis of GATT Articles XXII and XXIII,⁶⁸⁵ as succinctly described by PETERSMANN.⁶⁸⁶

GATT panel members, though preferably governmental⁶⁸⁷, are expected to serve in their individual capacities⁶⁸⁸, acting independently⁶⁸⁹ and impartially⁶⁹⁰. A GATT panel is to make findings and recommendations as to law and facts,⁶⁹¹ normally setting out the rationale behind them.⁶⁹² A GATT panel report containing findings and recommendations is not itself legally binding on the disputing Parties, but after its consensus adoption by the CONTRACTING PARTIES,⁶⁹³ it might be so argued in the

⁶⁸⁵ ‘In view of the detailed dispute settlement procedures in the 1948 Havana Charter and the temporary function of the GATT 1947 as an interim framework for tariff negotiations until the entry into force of the Havana Charter, GATT Articles XXII and XXIII do not even explicitly mention the words “dispute settlement”’. PETERSMANN, *GATT/WTO Dispute Settlement System* 70.

⁶⁸⁶ See Appendix 8.1.

⁶⁸⁷ ‘The members of a panel would preferably be governmental.’ Para. 11 of the ‘Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance’ of 28 November 1979 [hereinafter, the 1979 Understanding].

⁶⁸⁸ ‘Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization.’ *Id.*, para. 14.

⁶⁸⁹ ‘Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members’ *Loc. cit.*

⁶⁹⁰ ‘It is understood that citizens of countries whose governments are parties to the dispute would not be members of the panel concerned with that dispute.’ *Id.*, para. 11; ‘Members of panels are expected to act impartially without instructions from their governments.’ Para. 6 (iii) of the ‘Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement’ [hereinafter, the 1979 Description] annexed to the 1979 Understanding.

⁶⁹¹ ‘[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 General Agreement.’ Para. 16 of the 1979 Understanding.

⁶⁹² ‘The report of a panel should normally set out the rationale behind any findings and recommendations that it makes.’ *Id.*, para. 17.

⁶⁹³ See para. (x) of 1982 Ministerial Declaration on Dispute Settlement, *GATT*, 29th *BISD Supplement* 13; Section G, para. 3 of 1989 Dispute Settlement Procedures Improvements, *GATT*, 36th *BISD Supplement* 61, both reprinted in PESCATORE,

cases of violation complaints.⁶⁹⁴ The above-featured GATT panel procedure fits in very well with our definition of a *quasi-judicial* procedure.⁶⁹⁵ However, a GATT panel's *procedural* control is regarded as relatively 'soft'⁶⁹⁶, since it also gives the disputing Parties adequate opportunity to develop a mutually satisfactory solution (*consensual* nature),⁶⁹⁷ since requests for its use are understood to involve nothing contentious (*non-confrontational* nature),⁶⁹⁸ and since adoption of its report can be blocked by a single opposing Party (*less authoritative* nature).

4.4.2.2. The WTO Judiciary: Relatively 'Hard' Control

Although most of the above features are also true of a WTO panel,⁶⁹⁹ its report is

Handbook of GATT Dispute Settlement. See generally, COLLIER & LOWE, *Settlement of Disputes* 96-99.

⁶⁹⁴ IWASAWA, while distinguishing between violation complaints and non-violation complaints, argues that in violation complaints a WTO panel report is legally binding on the disputing Parties. IWASAWA, *Dispute Settlement by WTO* 136.

⁶⁹⁵ In our view, '*quasi-judicial* procedures, whose rulings are either legally binding or non-binding, are those more or less destined for the settlement of differences between the Parties by judge-like persons through, to some extent, legal process.'

⁶⁹⁶ The 'soft' control is, in the *procedural* aspect, characterized by the procedure's *consensual, non-confrontational, non-punitive* and *facilitative* nature.

⁶⁹⁷ '[P]anels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.' Para. 16 of the 1979 Understanding.

⁶⁹⁸ 'It is understood that requests for conciliation and the use of the dispute settlement procedures of Article XXIII:2 should not be intended or considered as contentious acts.' *Id.*, para. 9.

⁶⁹⁹ See the DSU: 'Panels shall be composed of well-qualified governmental and/or non-governmental individuals' (Article 8(1)); 'Panel members should be selected with a view to ensuring the independence of the members' (Article 8(2)); 'Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise' (Article 8(3)); 'Panellists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel' (Article 8(9)); '[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 Panels should consult regularly with the

to be adopted almost automatically⁷⁰⁰ by the Dispute Settlement Body (DSB).⁷⁰¹ Moreover, an appeal to the panel report⁷⁰² is susceptible to review by a standing AB,⁷⁰³ whose report is also to be adopted almost automatically⁷⁰⁴ by the DSB. Thus WTO panels and AB, while still remaining *quasi-judicial* bodies since their reports themselves are not legally binding on the disputing Parties —moreover, their legally binding nature after their negative-consensus adoption by the DSB is still controversial even in the cases of violation complaints⁷⁰⁵— are more *authoritative* than GATT panels. Furthermore, at the appellate stage, no opportunity is given to the disputing Parties to develop a mutually satisfactory solution, which would mean the increase of *non-consensual* and *confrontational* elements. In the light of the above, the WTO judiciary is regarded as exercising *procedurally* ‘hard’ control⁷⁰⁶ as compared to the GATT judiciary’s *procedurally* ‘soft’ control.

4.4.3. The WTO Judiciary’s ‘Hard’ Control as Compared to the GATT Judiciary’s

parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution’ (Article 11); ‘[T]he report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes’ (Article 12(7)).

⁷⁰⁰ See DSU Article 16(4) (see Appendix 8.3.).

⁷⁰¹ See DSU Article 2(1) (see *id.*).

⁷⁰² See DSU Article 17(6) (see *id.*).

⁷⁰³ See DSU Article 17(1) and (3) (see *id.*).

⁷⁰⁴ See DSU Article 17(14) (see *id.*).

⁷⁰⁵ See *Footwear Distributors & Retailers of America v. U.S.*, 852 F.Supp. 1078 at 1094-1095 (Ct. Int’l Trade 1994), which refused to consider not only GATT panel reports but also WTO panel and AB reports by pointing out the absence of an explicit DSU provision —unlike NAFTA chapter 19— that such reports are legally binding on the Parties. (For this case, see IWASAWA, *Dispute Settlement by WTO* 145, note 264.) See also BELLO, ‘WTO DSU: Less Is More’, at 416-418: ‘Like the GATT rules that preceded them, the WTO rules are simply not “binding” in the traditional sense. . . . Rather, the WTO . . . relies upon voluntary compliance. . . . The only truly binding WTO obligation is to maintain the balance of concessions negotiated among members.’ For the contrary view in favour of the legally binding nature of WTO reports, see JACKSON, ‘WTO DSU: Misunderstanding’, at 63; ‘International Law Status’, at 123; IWASAWA, *Dispute Settlement by WTO* 137.

⁷⁰⁶ The ‘hard’ control is, in the *procedural* aspect, characterized by the procedure’s *non-consensual*, *confrontational*, *punitive* and *authoritative* nature.

‘Soft’ Control: In the *Substantive* Aspect from the Environmental Perspective

The review of GATT/WTO law has inevitably become stricter as a result of the creation of the AB, which functions to correct panels’ misinterpretation and misapplication of GATT/WTO law. Panels often misinterpret GATT Article XX (b) and (g)⁷⁰⁷ by misapplying ‘customary rules of interpretation of public international law’⁷⁰⁸: the panels, instead of looking at ‘the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object* and *purpose*’⁷⁰⁹, look more at the drafting history,⁷¹⁰ and the object and purpose of the whole of the GATT 1994 and the WTO Agreement,⁷¹¹ rather than the treaty provisions concerned.⁷¹² Moreover, panels sometimes inappropriately invoke former panel rulings⁷¹³ and fail to carry out required examinations.⁷¹⁴

Thus if the case comes to the AB, the WTO judiciary could, in whatever field, exercise substantively ‘hard’ control as compared to the GATT judiciary’s substantively ‘soft’ control. In an environmental context, the WTO judiciary’s substantively ‘hard’ control can be seen in the following three respects.

⁷⁰⁷ See Appendix 8.2.

⁷⁰⁸ *US –Shrimp AB Report*, para. 114.

⁷⁰⁹ Article 31(1) of the Vienna Convention. See the related parts of *US –Gasoline AB Report*, rejecting its panel report’s interpretation of GATT XX (g) regarding ‘*made effective in conjunction with*’. See also *US –Shrimp AB Report*, para. 115.

⁷¹⁰ *US –Tuna/Dolphin I Panel Report*, para. 5.25. However, *US –Tuna/Dolphin II Panel Report* (para. 5.20) correctly understands the secondary role of the drafting history. See Appendix 8.6.

⁷¹¹ See *US –Tuna/Dolphin II Panel Report*, para. 5.38 (see Appendix 8.6). Similar statements are seen in the following: *id.*, para. 5.26; *US –Tuna/Dolphin I Panel Report*, paras. 5.27 and 5.32; *US –Shrimp Panel Report*, para. 7.45.

⁷¹² *US –Shrimp AB Report*, para. 116.

⁷¹³ See *EC –Hormones AB Report*, para. 239 and its footnote 251 (see Appendix 8.7.).

⁷¹⁴ The AB in *Australia-Salmon* denied the 1996 Final Report’s being a risk assessment, rejecting the Panels’ such assumption (*Australia-Salmon Panel Report*, para. 8.99). The AB found it impossible, as against the Panels’ contrary finding, to verify, on the basis of the 1996 Final Report, whether the measures achieved Australia’s appropriate sanitary protection. *Australia-Salmon AB Report*, para. 210.

4.4.3.1. Respect for Each Party's Environmental Autonomy

The WTO judiciary allows each Party to have much more environmental autonomy than is allowed by the GATT judiciary. This is clearly shown by the marked difference between GATT panels in the *Tuna/Dolphin I* and *II* cases, on the one hand, and the WTO AB in the *US – Shrimp* case, on the other. In the latter case, the AB criticized the Panel's interpretation—which followed that adopted by GATT panels in the *Tuna/Dolphin I* and *II* cases—‘that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX’, since ‘[s]uch an interpretation renders most, if not all, of the specific exceptions of Article XX inutile’.⁷¹⁵ The AB expressly recognized ‘the right of a Member to invoke an exception under Article XX’.⁷¹⁶ The AB's interpretation was undoubtedly influenced by ‘colour, texture and shading’ added by the WTO Agreement's preambular language of sustainable development,⁷¹⁷ which language did not exist at the time of the *Tuna/Dolphin I* and *II* cases and was neglected by the *US – Shrimp* Panel. This interpretation would permit unilateral TREMs under certain conditions,⁷¹⁸ though in fact the *US – Shrimp* Panel on Compliance decided to draw ‘the line of equilibrium’ of GATT Article XX in favour of the rights of the other Members rather than in favour of the right of a Member to invoke an exception under this provision.⁷¹⁹

⁷¹⁵ *US – Shrimp AB Report*, para. 121.

⁷¹⁶ *Id.*, paras. 156 and 159.

⁷¹⁷ *Id.*, paras. 153 and 155.

⁷¹⁸ See SCHOENBAUM, ‘The Decision in the Shrimp-Turtle Case’, at 39: ‘If the United States had been able to demonstrate a continued and reasonable pattern of attempts to engage the countries concerned in negotiations as well as a failure by at least some of the countries to negotiate in good faith, unilateral trade action, which treated non-cooperating countries alike and provided due process conditions, might have been approved by the WTO as a countermeasure under international law.’

⁷¹⁹ *US – Shrimp Panel on Compliance Report*, para. 5.57.

4.4.3.2. Consideration of the Characteristics of Environmental Measures

In the 1996 *US – Gasoline* case, the AB refused to infer an empirical ‘effect test’ from the phrase ‘if such measures are *made effective* in conjunction with restrictions on domestic production or consumption’ (GATT Article XX (g)), since in the field of exhaustible natural resources a substantial period of time may have to elapse before the effects may be observable.⁷²⁰ Likewise, in the 2001 *EC – Asbestos* case the AB, in evaluating the necessity as prescribed in GATT Article XX (b), recognized the correlation between the importance of the common interests or values pursued—protection against fatally poisonous materials could be ranked as the highest importance—on the one hand, and the necessity of the measures designed to achieve those ends, on the other.⁷²¹

Thus the WTO judiciary takes into consideration characteristics of environmental measures, which could lead to *substantively* ‘hard’ control for the environment.

4.4.3.3. Reference to Non-GATT/WTO Law

The WTO judiciary has tended to refer to non-GATT/WTO law much more than the GATT judiciary has done, resulting in pro-environmental interpretation of GATT/WTO law.

‘Exhaustible natural resources’ The GATT/WTO judiciary’s practice reveals two ways of handling the ‘exhaustible’ nature of natural resources as regards renewable resources:⁷²² 1) any resource *potentially* exhaustible is covered;⁷²³ 2) only resources

⁷²⁰ See the related part of *US – Gasoline AB Report*.

⁷²¹ *EC – Asbestos AB Report*, para. 172.

⁷²² *Non-renewable resources*, such as petroleum, are *ab initio* regarded as ‘*exhaustible natural resources*’. See *US – Automobile Taxes Panel Report*, para. 5.57.

⁷²³ *US – Tuna/Dolphin II Panel Report*, para. 5.13; *US – Gasoline Panel Report*, para. 6.37. There is no examination of ‘*exhaustible natural resources*’ in *US – Tuna/Dolphin I Panel Report*.

actually being exhausted are covered.⁷²⁴ For the second way, the existence of the Parties' agreement⁷²⁵ and of international conventions⁷²⁶ are regarded as important for establishing the resource's 'exhaustible' nature. Similarly, 'modern *international* conventions and declarations' expressing 'contemporary concerns of the community of nations about the protection and conservation of the environment' are taken into account under evolutionary interpretation for the examination of whether 'natural resources' include not only non-living resources but also living resources.⁷²⁷ Here, on the one hand, international conventions (and declarations) are treated, by the GATT/WTO judiciary, as factual evidence of the resource's 'exhaustible' nature and conservation needs. On the other hand, the Parties' agreement invoked by the two GATT panels could be seen as more than factual evidence: it might have been treated as 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (Article 31(3)(a) of the Vienna Convention).

Extra-jurisdictional measures One of the reasons the Panel in the *US – Tuna/Dolphin II* case allowed extra-jurisdictional measures was the existence of general international law allowing such measures.⁷²⁸ Thus this GATT panel is regarded as resorting to 'any relevant rules of international law applicable in the relations between the parties' (Article 31(3)(c) of the Vienna Convention). However, the same GATT panel does not take account of 'environmental and trade treaties other than the GATT' including the Montreal Protocol, CITES and Basel Convention, since they constitute

⁷²⁴ *US – Tuna Panel Report*, para. 4.9; *Canada – Herring and Salmon Panel Report*, para. 4.4; *US – Shrimp AB Report*, para. 132.

⁷²⁵ *US – Tuna Panel Report*, para. 4.9; *Canada – Herring and Salmon Panel Report*, para. 4.4.

⁷²⁶ *US – Tuna Panel Report*, para. 4.9; *US – Shrimp AB Report*, para. 132.

⁷²⁷ *US – Shrimp AB Report*, paras. 129-130, where it was stated that evolutionary interpretation is enabled by the evolutionary character of the term 'natural resources'.

⁷²⁸ *US – Tuna/Dolphin II Panel Report*, para. 5.17. *US – Tuna/Dolphin I Panel Report* and *US – Shrimp AB Report* do not show any basis, under non-GATT/WTO law, of allowing or disallowing extra-jurisdictional measures: it should have been shown what is the international law basis of the requirement of 'the existence of a sufficient nexus between the migratory and endangered marine populations involved and the United States', as stated by *the latter AB report* (para. 133).

neither ‘any subsequent agreement’ nor ‘any subsequent practice’ (Article 31(3)(a) and (b) of the Vienna Convention), and since they are insignificant even for ‘supplementary means of interpretation’ (Article 32 thereof).⁷²⁹

The chapeau of GATT Article XX The AB and the Panel on Compliance in the WTO *US –Shrimp* case expressly refer to Article 31(3)(c) of the Vienna Convention. For the AB, the ‘relevant rules of international law’ are rules of general international law: here the principle of good faith and its one application, namely the doctrine of *abus de droit*.⁷³⁰ For the Panel on Compliance, they are international treaties and non-binding international instruments which both Parties have accepted or are committed to comply with.⁷³¹

The Polluter-Pays Principle and the precautionary principle The Panel in the *US –Petroleum Taxes* case⁷³² did not take into account the polluter-pays principle, a non-GATT/WTO rule, since, in the GATT Panel’s view, ‘the mandate of the Panel is to examine the case before it “in the light of the relevant GATT provisions”.’ In contrast, the Panels in the *EC –Hormones* case⁷³³ recognized the possibility of using the precautionary principle —if it is customary international law— as ‘a customary rule of interpretation of public international law.’ This would mean, if the strange equation of the precautionary principle with ‘a customary rule of interpretation of public international law’ were accepted,⁷³⁴ that the latter WTO Panels regarded the precautionary principle, also a non-GATT/WTO rule, as one of the possible ‘relevant rules of international law’ (Article 31(3)(c) of the Vienna Convention), which in fact

⁷²⁹ *US –Tuna/Dolphin II Panel Report*, paras. 5.15-5.20.

⁷³⁰ *US –Shrimp AB Report*, para. 158.

⁷³¹ *US –Shrimp Panel on Compliance Report*, para. 5.57. They include the Biodiversity Convention (US signed but not ratified), Rio Declaration, Agenda 21 and 1996 CTE (WTO Committee on Trade and Environment) Report. See *id.*, para. 5.52, footnote 199.

⁷³² *US –Petroleum Taxes Panel Report*, para. 5.2.6.

⁷³³ *EC –Hormones Panel Report*, US: para. 8.157; Canada: 8.160.

⁷³⁴ *EC –Hormones AB Report* (para. 124) rightly rejected this strange equation: ‘the precautionary principle does not . . . relieve a panel from the duty of applying the normal [i.e. customary international law] principles of treaty interpretation in reading the provisions of the SPS Agreement’.

was regarded as irrelevant by the Panels in this case. These Panels' view seems to be endorsed by the AB,⁷³⁵ since it proposes an interpretation taking account of the precautionary principle in other contexts.⁷³⁶ The same would be true of the *Japan – Apples* case, where the AB echoed its *EC – Hormones* findings.⁷³⁷

The above demonstrates that both GATT judiciary and WTO judiciary, 'in accordance with customary rules of interpretation of public international law', have referred to non-GATT/WTO law in order to interpret GATT/WTO provisions. However, we can also see the WTO judiciary's more positive recourse to non-GATT/WTO law in at least three respects: 1) both a WTO panel and the AB expressly mentioned Article 31(3)(c) of the Vienna Convention; 2) a WTO panel regarded the 'relevant rules of international law' therein prescribed as including international treaties and non-binding international instruments to which both Parties agreed; 3) both a WTO panel and the AB allowed to count among the said 'relevant rules of international law' a non-GATT/WTO rule likely to conflict with GATT/WTO law, e.g. the precautionary principle,⁷³⁸ without ignoring it *ab initio*, as a GATT panel did with regard to the polluter-pays principle.

Thus the WTO judiciary is more likely to exercise substantively 'hard' control for environmental protection as compared to the GATT judiciary's substantively 'soft' control, because of its tendency to refer, to a greater extent, to non-GATT/WTO law.

⁷³⁵ See *id.*, paras. 123-124 (see Appendix 8.7.).

⁷³⁶ See the third reason mentioned in *EC – Hormones AB Report*, para.124 (see Appendix 8.7.).

⁷³⁷ See *Japan – Apples AB Report*, para. 233 (see Appendix 8.11.)

⁷³⁸ In relation to the third respect, PAUWELYN argues that in the *EC-Hormones* case 'the Appellate Body should have acknowledged that a rule of customary law, if later in time and in conflict with an earlier (SPS) treaty rule, must prevail over the treaty rule (no inherent hierarchy existing between treaty and custom), unless it found an intention to continue applying the (SPS) treaty rule as *lex specialis*.' PAUWELYN, 'Role of Public International Law', at 570. However, as he himself admits, the EC (and therefore the AB) most probably treated the precautionary principle as not a latter customary rule to be *applied* with priority but as a 'relevant rule of international law' to be *referred* to in interpreting the SPS Agreement. See *id.*, at 569, footnote 224.

4.4.3.4. The Limit of the WTO Judiciary's *Substantively* 'Hard' Control for the Environment: Unavoidable Conflict between GATT/WTO Law and Non-GATT/WTO Law

Having said that, we have to at the same time admit the limit of the WTO judiciary's substantively 'hard' control for the environment. Namely, in case of conflict, which cannot be avoided by conflict-avoidance techniques,⁷³⁹ between a certain GATT/WTO provision and a non-GATT/WTO rule, reference to non-GATT/WTO law ends there, and each Party's environmental autonomy as well as the consideration of characteristics of environmental measures cannot surmount the obstacle set by that GATT/WTO provision.

Here 'unavoidable conflict' should be understood to include not only the 'situation where adherence to the one provision will lead to a violation of the other provision',⁷⁴⁰ but also the 'situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits',⁷⁴¹. This wider concept is necessary in order to analyse the relationship between GATT/WTO law prohibiting trade restriction and non-GATT/WTO law allowing TREMs,⁷⁴² as exemplified by the instance where Article

⁷³⁹ According to PAUWELYN, there are three techniques for conflict-avoidance: 1) co-ordination *ex ante* (conflict prevention); 2) the presumption against conflict; 3) treaty interpretation as a conflict-avoidance tool. PAUWELYN, *Conflict of Norms* 237-274.

⁷⁴⁰ *Guatemala – Cement AB Report*, para. 65; *US – Hot-Rolled Steel AB Report*, para. 51. The strict concept of 'conflict' seems to have been employed in these cases in order to narrow the *exception* (the use of special or additional rules and procedures on dispute settlement) to the *principle* (the use of the rules and procedures of the DSU) when interpreting DSU Article 1(2) in the light of 'the *integrated* dispute settlement system established in the WTO'. See *Guatemala – Cement AB Report*, para. 67.

⁷⁴¹ *EC – Bananas Panel Report*, para. 7.159.

⁷⁴² See PAUWELYN, 'Role of Public International Law', at 551; *Conflict of Norms* 197-199. Contra MARCEAU, 'Conflicts of Norms and Conflicts of Jurisdictions', at 1086: 'An expanded definition of conflicts would lead to providing a third party (an adjudication body or an interpreter) with the power to set aside a provision that has been voluntarily negotiated by States.' However, such is the result of the prioritised application of non-GATT/WTO law, not necessarily the result of the wider concept of 'conflict'.

5(7)⁷⁴³ of the SPS Agreement allows precautionary measures only on a provisional basis accompanied by additional information and measure review whereas Article 10(6) of the Biosafety Protocol allows them on a permanent basis without further conditions.⁷⁴⁴

The concept of ‘unavoidable conflict’ can, as PAUWELYN argues, be categorized into ‘inherent normative conflict’ and ‘conflict in the applicable law’. According to him, the former is the situation where one of the two norms constitutes, in and of itself, breach of the other norm, whereas the latter is the situation where compliance with, or the exercise of rights under, one of the two norms constitutes breach under the other norm. In the former situation, the consequence is that **i)** either of the two norms is ‘invalid’ or ‘terminated’, or **ii)** one of them is ‘illegal’; in the latter situation, the consequence is that **iii)** either of the two norms ‘prevails’, or **iv)** both norms are complete equals.⁷⁴⁵ However, despite its theoretical interest, ‘inherent normative conflict’ need not be examined here since: **1)** it is unlikely that ‘invalidation’ and ‘termination’ would be questioned before the WTO judiciary due not only to its GATT/WTO law interpretation compatible with non-GATT/WTO law including *jus cogens*⁷⁴⁶ but also to the practical difficulty of concluding, by *all* WTO members, a non-GATT/WTO treaty, which is intended to govern the WTO matter, or whose provisions are *so far* incompatible with the WTO covered agreements;⁷⁴⁷ **2)** ‘illegality’ as deriving from Articles 41 and 58 of the Vienna Convention is a matter of State responsibility under non-GATT/WTO law, which is outside the WTO judiciary’s jurisdiction; and **3)** the WTO judiciary would pay more attention to the State conduct

⁷⁴³ See Appendix 8.4.

⁷⁴⁴ See STEWART & JOHANSON, ‘Nexus of Trade and Environment’, at 24; BÖCKENFÖRDE, ‘Operationalization of Precautionary Approach’, at 328.

⁷⁴⁵ PAUWELYN, *Conflict of Norms* 275-276.

⁷⁴⁶ MARCEAU, ‘WTO Dispute Settlement and Human Rights’, at 800: ‘But it may be possible for a panel or the Appellate Body to determine that any violation of *jus cogens* would be inconsistent with the true interpretation/application of the WTO provision. The Panel would then be reading the WTO provision so as to avoid conflicts with *jus cogens*.’

⁷⁴⁷ See Article 59 of the Vienna Convention.

resulting from the conflicting non-GATT/WTO law than to such non-GATT/WTO law itself.⁷⁴⁸

Thus we should concentrate on examining the possibility of applying, with priority, non-GATT/WTO Law in case of ‘conflict in the applicable law’.

4.4.5. The Possibility of the WTO Judiciary’s *Substantively* ‘Harder’ Control for the Environment: Through the Application of Non-GATT/WTO Law

4.4.5.1. Arguments for and against the Application of Non-GATT/WTO Law

Before examining the priority between GATT/WTO law and non-GATT/WTO law, it is necessary to establish whether or not non-GATT/WTO law is applicable before the WTO judiciary.

Both supporters⁷⁴⁹ for and opponents⁷⁵⁰ of the application of non-GATT/WTO law base their arguments on WTO provisions (DSU Articles 3(2)⁷⁵¹, 7(1)⁷⁵², 7(2)⁷⁵³, 11⁷⁵⁴ and 19(2)⁷⁵⁵), the WTO judiciary’s practice and policy reasons. While WTO provisions emphasize the need to make decisions ‘in the light of’ GATT/WTO law, they do not expressly exclude the application of non-GATT/WTO law.⁷⁵⁶ Moreover, although WTO provisions confirm that the DSB and WTO judiciary ‘cannot add to or diminish the rights and obligations provided in the covered agreements’, this phrase

⁷⁴⁸ PAUWELYN, *Conflict of Norms* 303. However, the WTO judiciary might examine whether non-GATT/WTO law is ‘illegalised’ by GATT/WTO law. See *Turkey – Textile AB Report*, para. 60.

⁷⁴⁹ PALMETER & MAVROIDIS, ‘WTO Legal System’, at 399; BARTELS, ‘Applicable Law’, at 499; PAUWELYN, *Conflict of Norms* 472.

⁷⁵⁰ MARCEAU, ‘Call for Coherence’, at 114; TRACHTMAN, ‘Domain’, at 342; IWASAWA, ‘Kosaku’, at 26.

⁷⁵¹ See Appendix 8.3.

⁷⁵² See *id.*

⁷⁵³ See *id.*

⁷⁵⁴ See *id.*

⁷⁵⁵ See *id.*

⁷⁵⁶ See BARTEL, ‘Applicable Law’, at 504-508.

could be read, when coupled with the immediate context of clarifying WTO covered agreements ‘in accordance with customary rules of interpretation’ (DSU Article 3(2)), as stating the inherent limits of *interpretation*, not the limits of *applicable law*.⁷⁵⁷ Therefore it is necessary to fully consider the WTO judiciary’s practice and policy reasons.

As regards the WTO judiciary’s practice, even IWASAWA, a forceful opponent of the application of GATT/WTO law, admits that the WTO judiciary has relied on procedural (secondary) non-GATT/WTO law, i.e. law of treaty, juridical proceedings and State responsibility,⁷⁵⁸ just as the UK argued in the *Mox Plant* case.⁷⁵⁹ In fact, a WTO Panel has approved the application of procedural non-GATT/WTO law (the doctrine of error) not inconsistent with GATT/WTO law.⁷⁶⁰ Since application of procedural non-GATT/WTO law inconsistent with GATT/WTO law does not raise a specific environmental issue, we should focus on whether the WTO judiciary can apply substantive (primary) non-GATT/WTO law inconsistent with GATT/WTO law.⁷⁶¹

The *EC – Poultry* case is often invoked by those against the application of substantive non-GATT/WTO law.⁷⁶² Here the AB refused to apply the Oilseeds agreement between the EC and Brazil,⁷⁶³ while seeing it ‘as a *supplementary means of*

⁷⁵⁷ PAUWELYN, ‘Role of Public International Law’, at 564.

⁷⁵⁸ See IWASAWA, ‘Kosaku’, at 24-26. See also the analysis of PAUWELYN, a supporter of the application of non-GATT/WTO law, in ‘Role of Public International Law’, at 563.

⁷⁵⁹ See para. 4.31 of the UK’s Rejoinder in the *MOX Plant* case before the PCA (see Appendix 2.11.).

⁷⁶⁰ See *Korea – Procurement Panel Report*, para. 7.96 (see Appendix 8.10.).

⁷⁶¹ *Application of substantive non-GATT/WTO law shall, at least theoretically—however difficult practically—be distinguished from reference to substantive non-GATT/WTO law in interpreting GATT/WTO law. The latter is allowed, either through ‘customary rules of interpretation of public international law’, through WTO provisions incorporating non-GATT/WTO law, as seen in the TRIPS Agreement (Articles 2, 3, 9, 10, 14 and 16), or through WTO provisions to be defined or delimited by non-GATT/WTO law, as was the Lomé waiver. See TRACHTMAN, ‘Domain’, at 342; IWASAWA, ‘Kosaku’, at 23-24; MARCEAU, ‘Call for Coherence’, at 112-113.*

⁷⁶² IWASAWA, ‘Kosaku’, at 25; MARCEAU, ‘WTO Dispute Settlement and Human Rights’, at 776.

⁷⁶³ See *EC – Poultry AB Report*, para. 83 (see Appendix 8.8.).

interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention*.⁷⁶⁴ However, PAUWELYN, a strong supporter for non-GATT/WTO law application, does not view this finding as fatal to his theory, ‘since it can be presumed that all pre-1994 GATT related instruments that were not incorporated into the WTO treaty (in particular, into GATT 1994) have been terminated or at least have been superseded by the WTO treaty.’⁷⁶⁵ His reasoning, in contrast to that of MARCEAU,⁷⁶⁶ would hold true of not only the 1989 Fourth Lomé Convention between the EC and African Caribbean Pacific (ACP) countries appearing in the 1997 *EC – Bananas AB Report*⁷⁶⁷, but also the 1990 and 1993 Records of Understanding (ROU) between Korea and Australia as well as between Korea and the USA appearing in the 2000 *Korea – Beef Panel Report*⁷⁶⁸. Thus, as PAUWELYN argues, there seems to be no clear case rejecting the application of substantive non-GATT/WTO law. But we can at the same time confirm a consistent tendency of the WTO judiciary and the disputing Parties to use it for mere reference—without directly applying it—so as to interpret GATT/WTO law, as seen in the *EC – Hormones* and *Japan – Apples* cases related to the precautionary principle. Moreover, the WTO judiciary is unlikely to allow, even if invoked as a defence, a non-GATT/WTO rule—arguably apart from that backed up by *jus cogens*⁷⁶⁹—to ‘override the explicit wording of’ GATT/WTO provisions ‘without a clear textual directive to that effect’ if the rule has already found reflection in the GATT/WTO law, as stated by the AB in the *EC – Hormones* case,⁷⁷⁰ and not questioned by the AB in the *Japan – Apples* case.⁷⁷¹ Hence PAUWELYN’s proposition allowing a defence by non-GATT/WTO law application remains to be validated in respect of non-GATT/WTO rules *not yet pre-empted by*

⁷⁶⁴ *Id.*, para. 85. The Panel took a similar approach, seeing the Oilseeds agreement as reference only. See *EC – Poultry Panel Report*, paras. 196-202.

⁷⁶⁵ PAUWELYN, *Conflict or Norms* 345.

⁷⁶⁶ MARCEAU, ‘WTO Dispute Settlement and Human Rights’, at 776.

⁷⁶⁷ See para. 164.

⁷⁶⁸ See paras. 552-562.

⁷⁶⁹ An interesting question is whether the WTO judiciary allows prioritised application of non-GATT/WTO law materializing *jus cogens*. Imagine the trade restriction against a non-Party of a treaty prohibiting slavery trade.

⁷⁷⁰ *EC – Hormones AB Report*, paras. 124-125.

⁷⁷¹ *Japan – Apples AB Report*, paras. 233-234.

GATT/WTO law,⁷⁷² unlike the precautionary principle.⁷⁷³

With regard to policy reasons, those who support the application of non-GATT/WTO law fear the risk to the unity of international law,⁷⁷⁴ whereas their opponents doubt whether WTO judiciary's members —mere trade specialists— could properly decide a case taking account of other international law fields.⁷⁷⁵ Both concerns merit consideration. Attracted by the WTO judiciary's compulsory jurisdiction, more and more trade/non-trade disputes (trade and environment, trade and human rights, etc.) have come before it.⁷⁷⁶ Thus the WTO judiciary, whether it likes it or not, is often asked to deal with those disputes. In order to preserve the unity of international law while duly taking account of other international law fields, it would be preferable if the WTO judiciary could either refer the disputes to the ICJ (or other specialized judicial bodies), or ask their advisory opinions.⁷⁷⁷ However, until this becomes feasible,⁷⁷⁸ the WTO judiciary's 'adaptive evolution' seems necessary: it

⁷⁷² PAUWELYN's analysis on *EC –Hormones AB Report* overlooks the AB's reasoning in the light of *GATT/WTO law's pre-emption*. See PAUWELYN, 'Role of Public International Law', at 570. MARCEAU sees, in that report, the application of *lex posterior generalis non derogat priori specialis* ('a later law, general in character, does not repeal an earlier law which is special in character'). MARCEAU, 'WTO Dispute Settlement and Human Rights', at 794. However, the AB agrees with the EC 'that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle' (para. 124). Thus the customary rule of the *precautionary principle* is not necessarily *lex generalis* in relation to Article 5(7) of the SPS Agreement considered as *lex specialis*.

⁷⁷³ As previously stated, the precautionary principle was invoked, in the *EC – Hormones* and *Japan –Apples* cases, as mere *reference*. However, the consideration of *GATT/WTO law's pre-emption* suggested by these cases would hold true of the direct *application* of non-GATT/WTO law under the pretext of the *reference* thereto.

⁷⁷⁴ PAUWELYN, *Conflict of Norms* 459.

⁷⁷⁵ IWASAWA, 'Kosaku', at 23.

⁷⁷⁶ *Id.*, at 20.

⁷⁷⁷ PAUWELYN argues: 'In making their assessment of non-WTO rules panels could, however, be assisted by other international tribunals or organisations through the operation of DSU Art. 13.1 allowing panels to "seek information and technical advice from any individual or body which it deems appropriate".' PAUWELYN, *Conflict of Norms* 118. SCHOEMBAUM argues the possibility of asking an ICJ advisory opinion, though he thinks it cumbersome. SCHOEMBAUM, 'WTO Dispute Settlement', at 653, footnote 43. See also MARCEAU, 33(5) *JWT* 142-143.

⁷⁷⁸ MARCEAU, 'Call for Coherence', at 1114.

should have specialists in other international law fields, such as international environmental law and international human rights law, as cases related to these issues come up. This does not seem impossible, as the WTO judiciary could have realized, by adding those who have public international law qualifications to its members, the ‘adaptive evolution’ in using ‘customary rules of interpretation of public international law’. Moreover, as the 1996 WTO Committee on Trade and Environment (CTE) Report suggests,⁷⁷⁹ the WTO judiciary should, as far as possible, urge the Parties to resolve the dispute under the dispute settlement mechanisms in the special field.⁷⁸⁰

In conclusion, only when the disputing Parties could not have had a satisfactory answer from such other dispute settlement mechanisms, and only when members specializing other international law fields join the WTO judiciary, could we move forward to allowing the prioritised application of non-GATT/WTO law inconsistent with GATT/WTO law. Until then, it is a risky option and the WTO judiciary’s not so doing seems a wise choice.⁷⁸¹

4.4.5.2. Proposals for the Prioritised Application of Environmental Non-GATT/WTO Law

There have been many proposals aimed at directly applying, prior to GATT/WTO law, environmental non-GATT/WTO law before the WTO judiciary. However, no consensus on the WTO-Multilateral Environmental Agreement (MEA) relationship has

⁷⁷⁹ See 1996 CTE Report, para. 178 (see Appendix 8.12.).

⁷⁸⁰ This is, according to SHANY, not prohibited by the DSU, and even desirable in the light of ‘comity’ between international tribunals, though such ‘comity’ is not yet supported by sufficient authority under contemporary international law. See SHANY, *Competing Jurisdictions* 184, 261, 266.

⁷⁸¹ Marceau argues that the WTO judiciary should declare *lon liquet* when confronting non-GATT/WTO law (not limited to *jus cogens*) superseding GATT/WTO law, both in cases of ‘inherent normative conflict’ and of ‘conflict in the applicable law’. MARCEAU, ‘Conflicts of Norms and Conflicts of Jurisdictions’, at 1103-1104, 1107-1108; ‘WTO Dispute Settlement and Human Rights’, at 800. This might be useful as a provisional solution for the moment.

yet emerged in the CTE.⁷⁸²

According to SHAW & SCHWARTZ, these proposals can be classified into four broad approaches: 1) 'status quo'; 2) 'waiver'; 3) 'clarification of WTO rules'; and 4) co-operation.⁷⁸³

1) the 'status quo' approach seeks to address the WTO-MEA relationship in various ways while not amending the GATT/WTO, because many WTO Members consider that there is already scope under the WTO provisions to use trade measures for environmental purposes, including in MEAs.⁷⁸⁴

2) under the 'waiver' approach⁷⁸⁵ WTO Members would take a decision to authorize Members to derogate from their obligations for a limited period of time, resorting to the waiver provisions provided for in Article IX of the WTO Agreement. A waiver is subject to adoption by consensus, or by three-quarter majority vote if so requested. A waiver is time-limited and renewable, and need not be ratified by each WTO Member.

3) the 'clarification of WTO rules' approach⁷⁸⁶ prefers to adopt an Understanding or Guidelines on the WTO-MEA relationship or to amend WTO rules, specifically the general exceptions in Article XX, while suggesting procedural and substantive criteria⁷⁸⁷ for enhancing predictability.

4) the co-operation approach⁷⁸⁸ envisages conflict prevention through: an

⁷⁸² SHAW & SCHWARTZ, 'Trade and Environment'. SHAW is the Secretary to the Committee on Trade and Environment of the WTO in Geneva; SCHWARTZ, formerly of the WTO Secretariat, is a Counsel for the Ministry of the Environment, Government of Ontario, Canada.

⁷⁸³ *Id.*, at 134-137.

⁷⁸⁴ The authors exemplify Submissions by India (23 July 1996), Hong Kong (23 July 1996) and Egypt (18 June 1996). *Id.*, at 134, footnote 12.

⁷⁸⁵ The authors show the Proposals by ASEAN, WT/CTE/W/39 (24 July 1996) and Hong Kong (22 July 1996).

⁷⁸⁶ The authors list Submissions by EC, WT/CTE/W/170 (19 October 2000), Switzerland, WT/CTE/W/168 (19 October 2000), Korea (Non-Paper: 19 June 1996), Japan, WT/CTE/W/31 (30 May 1996), and the EC (Non-Paper: 19 February 1996).

⁷⁸⁷ For example, see the EC's first proposal in its Non-Paper (19 February 1996) (see Appendix 8.13.).

⁷⁸⁸ SHAW & SCHWARTZ indicate Submissions by Switzerland, WT/CTE/W/139 (7 June

interpretative decision by WTO Members (Switzerland); an informal dialogue between the WTO and MEAs and a 'code of conduct' jointly developed by the WTO, the UNEP and the MEA Secretariats (EC); or a voluntary consultative mechanisms between WTO, MEAs, UNEP and NGOs (New Zealand).

Given that conflict prevention is preferable to conflict resolution, 4) the co-operation approach should be promoted. However, if the consultation fails, conflict resolution becomes necessary, at which point the first three approaches come into play. To the extent that the consensus on applicable non-GATT/WTO law superseding GATT/WTO law has already been established among the WTO Members, 3) the 'clarification of WTO rules' approach would be preferable, as clearly seen in the NAFTA Article 104(1) specifying the international conventions whose obligations shall prevail in case of inconsistency.⁷⁸⁹ In other cases 2) the 'waiver' approach can be resorted to on an *ad hoc* basis. Only when these two options are not feasible should 1) the 'status quo' approach, leaving the matter to the WTO judiciary, be looked at: before then, much political effort would have been undertaken to lessen its unnecessary burden.

4.4.6. Concluding Remarks

This study shows that in contrast to the GATT judiciary's substantively 'soft' control the WTO judiciary has exercised substantively 'hard' control in relation to the environment, through making greater allowances for each Party's environmental autonomy, demonstrating more consideration of the characteristics of environmental measures, and making greater reference to non-GATT/WTO law.

2000) and WT/CTE/W/168 (19 October 2000), EC, WT/CTE/W/170 (19 October 2000), and New Zealand, WT/CTE/W/162 (10 October 2000) and WT/CTE/W/180 (4 June 2001).

⁷⁸⁹ They are the CITES, 1987 Montreal Protocol, 1989 Basel Convention, and bilateral waste agreements between the USA and Canada (in 1986), and between the USA and Mexico (in 1983). See NAFTA Article 104(1) with Annex thereto. See also PITTS, 'Chapter 10', at 479.

The main reason for the change from ‘soft’ control to ‘hard’ control seems to lie, in addition to institutional innovation (i.e. the creation of the AB), in the explicit prescription of Article 3(2) of the DSU obliging the WTO judiciary to use ‘customary rules of interpretation of public international law’. This is evidenced by, for example, the WTO judiciary’s express reference to Article 31(3)(c) of the Vienna Convention, which reference has never been made by the GATT judiciary.

In addition, one should not overlook the influence of the preamble of the WTO Agreement declaring sustainable development and environmental protection. The preamble’s pro-environmental approach, though underestimated by the Panel in the *US –Shrimp* case,⁷⁹⁰ paves the way for the evolutionary interpretation adopted by the AB in the same case.⁷⁹¹

Due to above factors, the WTO judiciary’s substantively ‘hard’ control for environmental protection will be maintained and reinforced, to the extent that no unavoidable conflict between GATT/WTO law and non-GATT WTO law arises. Most aspects of the alleged conflicts between these two norms could well be harmonized so long as the WTO judiciary takes the positive stance on the ‘cross-fertilization of international law’ which was seen in the *US –Gasoline* AB Report stating that ‘the General Agreement is not to be read in clinical isolation from public international law’.⁷⁹² However, if an unavoidable conflict arises, it is too burdensome for the WTO judiciary to exercise the substantively ‘harder’ control for the environment by applying non-GATT/WTO law inconsistent with GATT/WTO law. Before resorting to the WTO judiciary, more political effort should be made to alleviate its burden, through: *conflict prevention* by the co-operation approach; permanent conflict solution by the ‘clarification of WTO rules’ approach; and *ad hoc* conflict solution by the ‘waiver’ approach. Even if it could lead to ‘harder’ control, the ‘status quo’ approach, leaving

⁷⁹⁰ *US –Shrimp Panel Report*, para. 7.52.

⁷⁹¹ See *US –Shrimp AB Report*, para. 130 (see Appendix 8.9.).

⁷⁹² *US –Gasoline AB Report*, ‘III. The Issue of Justification Under Article XX (g) of the General Agreement’, ‘B. “relating to the conservation of exhaustible natural resources”’.

the matter to the WTO judiciary, would jeopardize the unity of international law unless the disputing Parties had exhausted all the other dispute settlement procedures under MEAs, and unless members specializing in international environmental law have joined the WTO judiciary.

5. Law Development

5.1. Law Development in International Environmental Law

‘Law development’ has already been defined as the qualitative and quantitative enrichment of law through clarification, modification and creation of rules. This task has been carried out by the international judiciary through interpretation and application⁷⁹³ of law and, where the Parties agree to a decision *ex aequo et bono*, through judicial law-making without legal foundations. Since international environmental law is a relatively new branch in international law, there have been many areas which had been totally unregulated or insufficiently regulated by international law, where the judiciary’s active role in law development has been clearly observed, as demonstrated by the *Trail Smelter* arbitral tribunal:

First, the tribunal selected a certain régime, which could prevent *serious* transfrontier pollution harm,⁷⁹⁴ out of many other possible options, although there was no rule of international law which required or authorized the tribunal to choose this particular régime. This means that the tribunal created *lex specialis* between the litigant Parties on the basis of the Parties’ agreement to a decision *ex aequo et bono*.⁷⁹⁵

Secondly, the tribunal interpreted an existing rule which is applicable in the non-environmental and non-transboundary context as also applicable to transfrontier

⁷⁹³ For an example of law development through application of law, see the practice of standard setting by the ECmHR regarding aircraft noise, as detailed in 6.2.4. of this thesis. Here the focus is put on law development through interpretation of law by the application of (or reference to) certain advanced law.

⁷⁹⁴ See 3 *RIAA* 1980.

⁷⁹⁵ See Article IV of the *compromis* (see Appendix 12.4.).

pollution. This means that the tribunal construed the territorial State's obligation to protect, against non-environmental harm, foreign States' rights within its territory (as recognized in the *Palmas Island* case) as also covering the protection, against pollution, of foreign States' rights outside its territory. Thus the tribunal modified an existing rule and created a new rule through interpretation. At the same time, the tribunal clarified the meaning of the new rule thus created, when it interpreted this rule as an obligation to prevent, with *due diligence*, serious transfrontier pollution harm. In order to justify these interpretative operations, the tribunal invoked the *Alabama* case, where a comparable obligation was found in the context of neutrality, as well as State practice concerning non-environmental transfrontier harm and US Supreme Court cases on transfrontier water and air pollution.⁷⁹⁶

The above-mentioned US Supreme Court cases are resorted to on the basis of Article IV of the *compromis* which partly reads: 'The tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America'.⁷⁹⁷ Therefore, notwithstanding the tribunal's confirmation of the US law's conformity with general international law,⁷⁹⁸ the fact remains that the tribunal's function of developing *lex generalis* in the international society was inspired by the application of a particular country's domestic law which was more advanced than international law.

It follows that the judiciary could significantly develop *lex specialis* (applicable to an accused Party or between the litigant Parties) where its constituent instruments allow it to apply *ex aequo et bono*, and that it could substantially develop *lex generalis* (applicable among the contracting Parties, in a particular region, or in the international society) where those instruments allow it to apply (or refer to) certain advanced law. Then it should be questioned whether these law development functions are possible for judiciaries other than arbitral tribunals.

As regards the development of *lex specialis* by the application of *ex aequo et bono*, the prospect of judicial settlement through either the ECJ, the InterAmCtHR, the ICJ or

⁷⁹⁶ See 3 *RIAA* 1963-1966.

⁷⁹⁷ *Id.*, at 1908.

⁷⁹⁸ See *id.*, at 1963 (see Appendix 12.13.).

the ITLOS holds little promise, since the constituent instruments of the ECJ and the InterAmCtHR have no provision allowing them to do so, and although it is possible for the ICJ and the ITLOS if the Parties agree thereto, there has been no precedent thereof in these judiciaries.⁷⁹⁹ The same is true of the WTO judiciary, whose constituent instruments lack such an empowerment provision. However, not only the InterAmCmHR and the ImpCom of the Montreal NCP but also judicial settlement through the ECtHR and the AfrCtHPR might have better prospects, since they could develop *lex specialis* applicable to the accused Party in accordance with their constituent instruments which allow them to secure a friendly or amicable settlement.⁸⁰⁰ In fact, the ImpCom has set lower standards for less capable non-compliant East European countries, as we have already seen.

With regard to the development of *lex generalis* by the application of (or reference to) certain advanced law, the ICJ could not only develop general international law by applying ‘the general principles of law recognized by civilized nations’,⁸⁰¹ but also develop a particular treaty by referring to outer-régime law on the basis of the general rule of treaty interpretation.⁸⁰² Likewise, the ECJ could develop EC law by applying ‘the general principles common to the laws of the Member States’,⁸⁰³ or by applying (if directly applicable) or referring to outer-régime law. A similar development in a treaty law could be made by the AfrCmHPR and the AfrCtHPR, whose constituent instruments expressly allow them to refer to outer-régime law,⁸⁰⁴ as well as by the WTO judiciary, the ECtHR, the InterAmCmHR and the InterAmCtHR, all of which have done so in practice on the basis of the general rule of treaty interpretation. It remains to be seen whether the ImpCom of the Montreal NCP would refer to

⁷⁹⁹ See Article 38(2) of the ICJ Statute; Article 293(2) of the UNCLOS.

⁸⁰⁰ See Article 48(1)(f) of the Am.Conv.HR; Para. 8 of the Montreal NCP; Article 38(1)(b) of the Eur.Conv.HR; Article 9 of the AfrCtHPR Protocol.

⁸⁰¹ See Article 38(1)(c) of the ICJ Statute. See also SANDS, *Principles* 150-152.

⁸⁰² See Article 31 of the Vienna Convention on the Law of Treaties.

⁸⁰³ See Article 288 [ex Article 215] EC. See also HARTLEY, *Foundations of EC Law* 133-135.

⁸⁰⁴ See Articles 61 and 61 of the Afr.Chart.HPR and Article 7 of the AfrCtHPR Protocol.

outer-régime law.

In this context, it should be noted that *lex specialis* could immediately enter into force regarding the litigant Parties or the accused Party because of the ruling's binding force on them. However, *lex generalis* would enter into force only after accepted by the concerned Parties in general. Therefore, in order to elucidate the judiciary's role in developing *lex generalis*, it would be necessary to examine the whole process of the acceptance—within the treaty system, the regional society or the international society—of the rules enunciated in its ruling. This examination will be made below, through the analysis of the obligation not to cause transfrontier pollution harm (the *no pollution harm* principle) and of the principle of equitable utilization of international watercourses (the *equitable utilization* principle), both of which are *lex generalis* in the international society and are well established under customary international law.

5.2. The Obligation Not to Cause Transfrontier Pollution Harm as a Corollary of Territorial Sovereignty: Focusing on the Chernobyl Accident

5.2.1. Introduction

States have, on the basis of territorial sovereignty, the power to take exclusive control within their own territory. But States also have the obligation to prevent injury to rights of other States or their nationals within their own territory,⁸⁰⁵ as declared by Arbitrator MAX HUBER in the 1928 PCA *Palmas Island* arbitration,⁸⁰⁶ and by the ICJ in the 1949 *Corfu Channel* case.⁸⁰⁷

The obligation of States to prevent injury to rights of other States or their nationals can be recognized when those rights are injured in other States' territory by activities done within their own territory.⁸⁰⁸ For example, in the 1872 *Alabama* arbitration, the

⁸⁰⁵ EAGLETON, *Responsibility of States* 78; TABATA, 2 *Shinko* 18-20.

⁸⁰⁶ See Appendix 12.5.

⁸⁰⁷ See Appendix 12.6.

⁸⁰⁸ BROWNLIE, *State Responsibility* 165; EAGLETON, *Responsibility of States* 80.

UK was held responsible because the damage occurring in the USA was derived from its non-fulfilment of the obligation of neutral States to prevent the construction of warships within its own territory.⁸⁰⁹ Likewise, there are some domestic decisions holding that States have the obligation to prevent harm occurring in other States by the use of water of international rivers within their own territory.⁸¹⁰

Accordingly, since in the case of transfrontier pollution⁸¹¹ the territory, properties, or persons in other States are damaged and consequently territorial sovereignty of other States is injured, States would naturally be deemed to have the obligation to prevent from occurring transfrontier pollution harm in other States by activities done within their own territory.⁸¹² In fact, the 1941 *Trail Smelter* arbitration⁸¹³ and some other international decisions, as well as State practice, recognized the obligation of the territorial State to prevent transfrontier pollution.⁸¹⁴ However, although nuclear contamination was scattered around the world and grave harm occurred in other States as a result of the 1996 *Chernobyl* nuclear accident,⁸¹⁵ the USSR denied its liability⁸¹⁶ and no nation brought a claim for compensation against it formally.⁸¹⁷ Cannot territorial sovereignty give sufficient grounds to charge the State with responsibility for causing such transfrontier pollution harm from a nuclear accident? Or does any obstacle exist to do so? If so, does it have any relationship with territorial sovereignty? By examining these points, we will seek to clarify the relationship

⁸⁰⁹ MOORE, 1 *History and Digest* 496.

⁸¹⁰ See for example, *Donauversinkung* case, 1927-1928 *Ann.Dig.* 131. Close examination is done by TSUKIKAWA, 'Diversion'.

⁸¹¹ We carry out our study by following the concept of transfrontier pollution as used in Article 2 of the 1982 ILA Montreal Rules on Transfrontier Pollution (see Appendix 12.3.).

⁸¹² ANDO, 'Pollution Prevention', at pp. 333-337; BROWNLIE, *State Responsibility* 182; TSUKIKAWA, 'Drainage Basins', at 626

⁸¹³ 3 *RIAA* 1965.

⁸¹⁴ See 5.2.3.2. of this thesis. See also ILC Secretariat, *Survey*.

⁸¹⁵ See 5.2.2. of this thesis.

⁸¹⁶ 'Moskau weist Forderungen nach Schadensersatz zurück', *Frankfurter Allgemeine Zeitung* (15 May 1986), at 1-2; 'Soviets Ready to Discuss Liability Pact for Nuclear Mishaps / Moscow Won't Compensate West for Chernobyl Damage but Will Consider Question for Future', *Los Angeles Times*, (27 Sep. 1986), Part 1, at 12.

⁸¹⁷ SANDS, 'Transboundary Nuclear Pollution', at 27.

between territorial sovereignty and transfrontier pollution caused by a nuclear accident. As a consequence, the international judiciary's role in the development of international environmental law in this field should be elucidated.

5.2.2. The Facts of the *Chernobyl* Accident

Chernobyl City, where the *Chernobyl* nuclear power plant was placed, is situated in the Ukraine, then part of the USSR, about 120 kilometres northwest of its capital Kiev.⁸¹⁸ The plant, a productive enterprise having a legal personality separate from the Ukraine government,⁸¹⁹ was for commercial use.⁸²⁰

At 1:23 AM on 26 April 1986, an accident occurred at the fourth unit of the plant during a turbine test.⁸²¹ The prime cause of the accident, according to the USSR report on the accident, was violations of instructions and operating rules committed by the unit staff.⁸²² However, in addition to derogation from the turbine test processes by unit staff, there also seemed to be some connection between the accident and the content of those processes themselves.⁸²³ Furthermore, the IAEA report mentioned some constructional defects of the plant.⁸²⁴ Therefore, the accident might have occurred as a result of complex interactions between these factors.

On 27 April, an abnormal degree of radioactivity was detected at Forsmark nuclear power plant in Sweden, and on the following day, an abnormal degree was detected in many other places in Sweden and Finland. On 29 April, three days after the accident, the USSR national news agency Tass first reported the accident at *Chernobyl*. On the same day, Sweden handed an inquiry note to the USSR Foreign Ministry, expressing its regret at the absence of the USSR's early warning. On 1 May, Mr. KATORI, Japanese

⁸¹⁸ IWAKI, 'Nuclear Catastrophe', at 27.

⁸¹⁹ UIBOPPU, 'Tschernobyl', at 270.

⁸²⁰ KUME, 'How Did Occur?', at 88.

⁸²¹ For a turbine test, see Appendix 16.3.

⁸²² USSR, *Information 2*, 15-25.

⁸²³ See *id.*, at 15 (see Appendix 16.4.).

⁸²⁴ IAEA, *Summary Report* 30.

Ambassador to the USSR, asked the USSR Foreign Ministry for the accident-related information. On 5 May, at the Tokyo Economic Summit, a 'Statement on the Implications of the Chernobyl Nuclear Accident' was adopted, asking the USSR for the said information while proposing an international convention on the information on nuclear accidents.⁸²⁵ From 25 to 29 August, a review meeting on the accident was held in the IAEA, where the USSR's accident report was submitted.⁸²⁶ On 26 September, the Early Notification and Assistance Conventions⁸²⁷ were adopted at the IAEA General Assembly.

The radioactivity released to the environment is estimated to be about 50 million curies, equivalent to tens of Hiroshima-type nuclear bombs,⁸²⁸ likely to bring death from cancer to 120,000 people in Czechoslovakia, 86,000 in Hungary, and 50,000 in the FRG.⁸²⁹ In the FRG, radioactive contamination affected fresh leafy vegetables and grass. In consequence, milk-producing cattle were kept from grazing, and consumption of milk and other foodstuffs was supervised. Certain imports were restricted and travel agencies and transport enterprises specializing in Eastern European business lost their clientele, while seasonal agricultural workers went without work. The FRG paid more than 500 million marks of compensation to the affected people, while the UK paid 4.3 million pounds and Bulgaria paid 48 million pounds.⁸³⁰

5.2.3. State Responsibility for Transfrontier Pollution Harm by a Nuclear Accident

5.2.3.1. Arguments in the ILA

In order to clarify the legal problems in charging States with responsibility for causing transfrontier pollution harm from nuclear accidents, we examine the arguments

⁸²⁵ *No.1336 Genshiryoku Sangyo Shinbun* 6 (1986).

⁸²⁶ *IAEA Bulletin* (Autumn 1986), at 39.

⁸²⁷ *25 ILM* 1370, 1377 (1986).

⁸²⁸ *No.157 Dateline UN* 8 (1990); IWAKI, 'Nuclear Catastrophe', at 48.

⁸²⁹ SEO, 'Assessment', at 154.

⁸³⁰ 'Accident at Chernobyl', at 59-64.

in the ILA 62nd conference held at Seoul in 1986. In the ILA, where discussions on the legal aspects of long-distance air pollution had been carried on since LAMMERS had been appointed as rapporteur in 1984, the *Chernobyl* nuclear accident was picked out, at the Seoul conference, as an example of instantaneous long-distance air pollution.⁸³¹

For the existence of State responsibility, the following two requirements must be satisfied: (i) conduct must occur which consists of an action or omission that is attributable to the State under international law; (ii) that conduct must constitute a breach of an international obligation of the State.⁸³² Therefore, as regards these two requirements, we clarify the issues by contrasting the argument of LAMMERS, who advocated the existence of State responsibility of the USSR, with that of ZEMANEK, who denied it.

First, as to *attribution of the conduct to the State*, LAMMERS argued that regardless of whether the cause of the accident lay in the actions of the personnel, the safety of the reactor, or the control, the accident was at least partly caused by the conduct of State officials and had to be attributed to the State according to international law.⁸³³ On the other hand, ZEMANEK made no mention of this question. However, interestingly a participant pointed out during the discussion that the power plant was an enterprise having a legal personality separate from the State.⁸³⁴

Secondly, as to a *breach of an international obligation*, LAMMERS mainly argued as follows:⁸³⁵ (i) Examination of the treaties. Because the 1979 Geneva Convention on Long-Range Transboundary Air Pollution⁸³⁶ was applicable to this accident, the

⁸³¹ RAUSCHNING, 'Interim Report on LDAP'.

⁸³² TABATA, 2 *Shinko* 9; Article 2 of the Draft Articles on State Responsibility adopted by the ILC in 2001.

⁸³³ ILA, 1986 *Seoul Report* 222, para. 54.

⁸³⁴ See the statement of UIBOPUU, *id.*, at 230. However, he stated that it was questionable whether a State could avoid its obligations under international law by creating separate legal entities with legal personality to restrict the State's liability. *Loc. cit.*

⁸³⁵ *Id.*, at 217-223.

⁸³⁶ (Geneva, 13 November 1979), 18 *ILM* 1442 (1979), entered into force on 16 March 1983. The USSR signed it on 13 November 1979, and ratified it on 22 May 1980. See UN, *Multilateral Treaties Deposited with the Secretary-General* 837 (New York:

USSR was in violation of Articles 2 (Prevention) and 8 (Information). (ii) Examination of customary international law. (a) It is a substantial duty according to general international law, as proved by Article 3(1) of the ILA Montreal Rules on Transfrontier Pollution⁸³⁷ or Principle 21 of the Stockholm Declaration, to prevent transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State. This obligation is also applicable to nuclear pollution, as is clear from the preamble of the 1963 Moscow Testban Treaty, Principle 26 of the Stockholm Declaration, and the complaint brought forward by Australia and New Zealand against France before the ICJ in the *Nuclear Tests* cases.⁸³⁸ For the existence of a breach of this obligation, two prerequisites must be satisfied, that is, the occurrence of *substantial injury* in another State by nuclear transfrontier pollution, and the fact that the State of origin was *capable of preventing* the event by different conduct. In this case, as these two prerequisites were satisfied, the USSR's breach of the international obligation existed. (b) In this accident, the USSR violated the obligation of early notification in cases of emergency, which was established under customary international law, as restated in Article 7 (Emergency Situations) of the said Montreal Rules. From the analysis above, it can be concluded that the USSR owed State responsibility because it violated the obligation to prevent transfrontier nuclear pollution, which is established in the treaty and under customary international law, as well as that of early notification, which is also established under customary international law.

On the contrary, ZEMANEK's argument as to a *breach of an international obligation* was mainly as follows.⁸³⁹ While there was no mention of *treaties*, three problems were referred to on *customary international law*. (i) It is problematic to assert a primary norm of general customary international law prohibiting long-distance air pollution. The reasons are three-fold. (a) State practice in that respect is far from being unequivocal. This is because *Trail Smelter* and a few other cases are all of a

U.N., 1991).

⁸³⁷ See Appendix 12.3.

⁸³⁸ 1973 ICJ Reports 99 at 103; 135 at 139-140.

⁸³⁹ ILA, 1986 Seoul Report 224, 229-230.

bilateral nature and were made possible by special circumstances. (b) Even supposing there exists such a primary norm, it is generally not observed, and pollution, at least up to a certain level, is mutually tolerated. On the one hand, if the obligation not to pollute existed, any transboundary pollution would violate the obligation. On the other hand, if the tolerance of transboundary pollution up to a certain level were recognized, the problem of how to decide the level would arise. (c) The application of the concept of State responsibility is problematic. This is because, although as a consequence of State responsibility the State has to stop the violation and to repair the damage resulting from the violation, it would be unrealistic to expect a State in whose territory a nuclear accident had taken place to cease the peaceful exploitation of nuclear energy altogether. Therefore, what is important is the aspect of liability, which is not necessarily linked to State responsibility. (ii) While liability requires proof of causality, it is problematic that there existed conflicting scientific data of each State in this accident. These data made it difficult to prove that the precautionary measures based on the said data were a necessary consequence of the accident in the sense of the legal notion of causality. (iii) It is also problematic to contend that the duty to inform in cases of emergency is an established rule of general customary international law and to depict the new IAEA Convention on early notification of a nuclear accident as merely emphasizing and specifying the duty, since the negotiations of the convention were protracted.

The above discussions seem to reveal the legal problems in charging the USSR with State responsibility. The key difficulties are as follows:

Attribution of the conduct to the State. The question is whether the conduct of the staff of the *Chernobyl* plant, which had a legal personality separate from the State, was directly attributable to the State.

Breach of an international obligation.

First, the questions are whether the obligation to prevent transfrontier pollution existed, and whether the obligation was applicable to long-distance transfrontier pollution by a nuclear accident. In order to answer these questions, it seems necessary to study whether the existence of that obligation can be read into the 1979 Geneva Convention, and whether that obligation was established under customary international

law. However, the Geneva Convention has the following characteristics: there is controversy on its applicability to nuclear pollution;⁸⁴⁰ it established only the obligation to endeavour to limit and, as far as possible, gradually reduce and prevent air pollution (Article 2); there is no provision on early notification,⁸⁴¹ and it expressly excludes the provision on liability (footnote 1 of Article 8). Therefore, it seems difficult to draw a definite answer from the Geneva Convention to this question. Accordingly, here we research only customary international law, setting aside the Geneva Convention. In doing this, it appears necessary to examine the concrete contents of such an obligation to prevent, the extent of the harm to be prevented and the causal link between the activity causing pollution and the harm caused.

The second question is whether the obligation of early notification in cases of a nuclear accident had been established under customary international law. However, this obligation aims at preventing or minimizing transfrontier pollution harm, as can be seen from the preamble of the Early Notification Convention. Therefore, it seems possible to treat this obligation as part of the obligation to prevent transfrontier pollution harm by a nuclear accident.

The third question is whether, apart from the régime of State responsibility for unlawful acts, the régime of so-called ‘International Liability for Lawful Acts’⁸⁴² can be recognized in relation to transfrontier pollution in customary international law. There is strong objection to recognizing such a liability régime in international law,⁸⁴³

⁸⁴⁰ For an affirmative view, see SANDS, ‘Transboundary Nuclear Pollution’, at 7. For negative views, see REST, ‘Völkerrechtliche Aspekte’, at 609; KISS, ‘L'accident de Tchernobyl’, at 141-142.

⁸⁴¹ Article 8 of the Convention relates to the exchange of information, but does not mention the time limit thereof. See 18 *ILM* 1445 (1979).

⁸⁴² In the ILC, deliberations have been made on ‘International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law’. See BOYLE, ‘Responsibility and Liability’; USUKI, ‘Liability’.

⁸⁴³ For example, BROWNLIE regards the concept of ‘International Liability for Lawful Acts’ as fundamentally misconceived. See BROWNLIE, *State Responsibility* 49-50. According to him, State responsibility for unlawful acts is concerned with categories of lawful activities which have caused harm; it is the content of the relevant rules which is critical, and a global distinction between lawful and unlawful activities is useless. *Loc. cit.*

and ZEMANEK himself thinks that it has not yet been established in customary international law.⁸⁴⁴ Accordingly, here we mainly examine the issues of State responsibility for unlawful acts.

5.2.3.2. Precedents before the *Chernobyl* Accident

We saw many precedents recognizing the general obligation of States to prevent injury to the rights of another State or its nationals caused by activities done within their own territory. But how about transfrontier pollution harm, especially long-distance transfrontier pollution harm caused by a nuclear accident?

First, as a precedent for transfrontier pollution harm, we examine the *Trail Smelter* case, where land and livestock in the State of Washington of the USA were damaged by sulphur dioxide fumes emitted by the *Trail Smelter* in Canada.⁸⁴⁵ The arbitral tribunal⁸⁴⁶ recognized Canada's liability for breaching an international obligation, and showed that States have an obligation under customary international law to prevent, with *due diligence*,⁸⁴⁷ serious harm established by clear and convincing evidence to another State caused by activities done within their own territory.⁸⁴⁸ However, this

⁸⁴⁴ ZEMANEK, 'responsabilité', at 13.

⁸⁴⁵ 3 *RIAA* 1913-1919.

⁸⁴⁶ See Appendix 12.10. In addition, this award also admitted Canada's liability for the future damage occurring notwithstanding the maintenance of the régime. See Appendix 12.11. Relying on this, some authors regard this decision as a precedent recognizing so-called 'International Liability for Lawful Acts'. QUENTIN-BAXTER, '2nd Report on International Liability', 1981/2(1)*YILC*, at 110, para. 28, at 112, para. 39; BARBOZA, '2nd Report on International Liability', 1986/2(1)*YILC*, at 152, para. 30, at 159, para. 63.

⁸⁴⁷ Some authors regard this award as admitting Canada's strict liability because the tribunal did not refer to the problem of fault. See for example, GOLDIE, 'International Principles'. However, the tribunal invoked, as a precedent recognizing States' obligation to prevent private persons within their own territory from causing injury to other States, the *Alabama* arbitration, which recognized the obligation of *due diligence* of the territorial State. 3 *RIAA* 1963.

⁸⁴⁸ It is true, as ZEMANEK suggests, that in this case there existed special circumstances, in which Canada's liability had been recognized before the decision. See HANDL, 'Balancing of Interests', at 168. For example, it is clearly stipulated in Article 1 of the *Compromis* that Canada shall pay 350,000 dollars of compensation to the USA for the

case concerned short-distance transfrontier pollution between two neighbouring States;⁸⁴⁹ the pollutant in this case was not radioactivity but sulphur dioxide fumes; and the pollution was not generated by an accident but by the normal operation of the Smelter.

Secondly, as a precedent for nuclear pollution harm, we refer to the *Daigofukuryumaru* incident in 1954, in which a Japanese fishing boat suffered harm on the high seas, outside the danger zone, caused by the US hydrogen bomb tests at the *Bikini* island under the US trusteeship. The USA paid two million dollars as compensation *ex gratia*. Although this kind of compensation does not necessarily mean that the USA admitted its liability, it should be noted that the USA had stated that every possible precaution would be taken to prevent harm.⁸⁵⁰

Thirdly, for further precedents on nuclear pollution harm, we examine the *Nuclear Tests* cases, where Australia and New Zealand asked the ICJ to cease the French atmospheric nuclear tests at French territory Polynesia in the South Pacific which had been carried out since 1966.⁸⁵¹ Australia and New Zealand asserted the unlawfulness of the French nuclear tests because of the violations to their territorial sovereignty and to the freedom of the high seas,⁸⁵² but France denied the unlawfulness, alleging not only the absence of ascertained harm attributable to its nuclear experiments, but also the ambiguity of a legal norm concerning the threshold of atomic pollution which should not be crossed.⁸⁵³ Before judging the merits, the ICJ ordered provisional measures because it could not be assumed that the applicants might not be able to establish a legal interest in respect of these claims.⁸⁵⁴ Eventually, the ICJ did not rule upon the

damage which occurred prior to the first day of January, 1932. 3 *RIAA* 1907. However, these circumstances do not reduce at all the value of the decision which found the existence of the obligations to prevent transfrontier pollution harm under customary international law. BROWNLIE, *State Responsibility* 182.

⁸⁴⁹ The distance from *Trail* to the US-Canadian boundary line was about seven miles as the crow flies. 3 *RIAA* 1913.

⁸⁵⁰ BROWNLIE, 'Survey', at 3.

⁸⁵¹ 1973 *ICJ Reports* 99-100, 135-136.

⁸⁵² *Id.*, at 103, 139-140.

⁸⁵³ *Id.*, at 104-105.

⁸⁵⁴ *Id.*, at 103, 140. The vote was 8 to 6 in both cases for Australia and New Zealand.

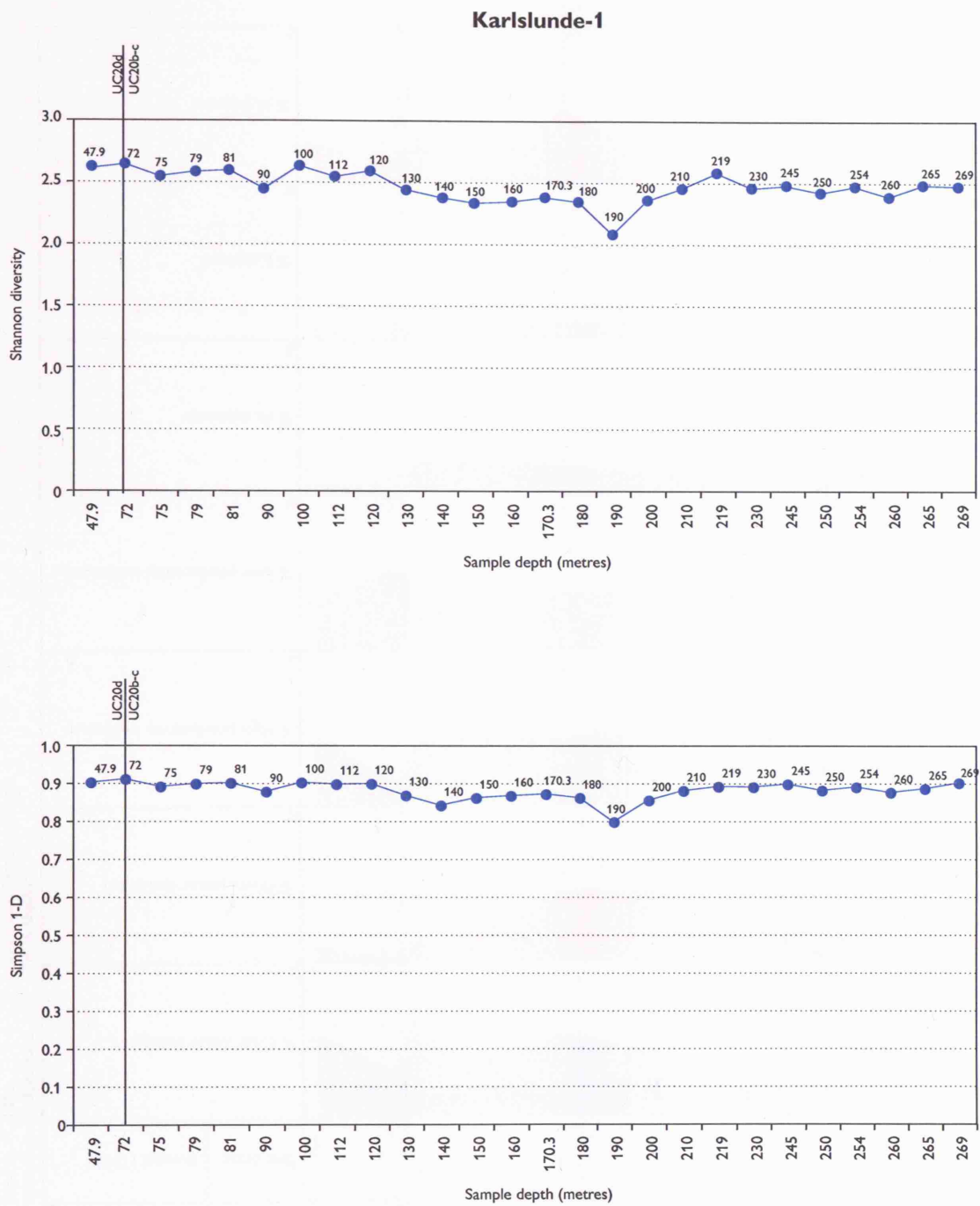


Fig. 5.18 Shannon and Simpson diversity indices for the upper Maastrichtian of the Karlsruhe-1 well (data labels represent sample depths)