

Roda Verheyen & Cathrin Zengerling

Abstract

International climate-change-related litigation is a topic that receives considerable academic and media attention. However, somewhat surprisingly, although the international climate regime turned 20 in 2012 and anthropogenic climate change is an international environmental concern, there are, in fact, hardly any climate-change-related disputes before international judicial and quasi-judicial bodies. Only the Compliance Committee established under the Kyoto Protocol, the Inter-American Commission on Human Rights, the International Centre for Settlement of Investment Disputes, the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Committee, and the National Contact Points set up under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises have dealt with international *cases* with bearing on climate protection. Neither the International Court of Justice, nor the dispute settlement bodies of the World Trade Organization, nor the International Tribunal for the Law of the Sea have as yet heard a climate case. The outcomes of the few international climate cases that have actually taken place are rather disappointing. Only the decisions of the Kyoto Compliance Committee support the interests of climate protection as laid out in the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol (KP). None of the other bodies have so far contributed to strengthening the international climate regime or to clarifying protection duties of states under general international law.

There is an obvious lack of legal mitigation commitments by states considering the acute problem of climate change and Intergovernmental Panel on Climate Change (IPCC) projections of severe changes in our natural environment with corresponding damage being experienced by states and people alike. The authors have some belief that international dispute settlement and compliance control bodies – drawing on the language agreed to in the UNFCCC and the KP as well as international customary law – could and

should set objective ‘markers’ in the ongoing debate on the international climate regime and thereby help to bridge the political gap and drawbacks the climate regime is experiencing. For example, a court like the International Court of Justice could be asked a question such as: What are the obligations of states under international law in relation to preventing the causes of climate change, minimising its adverse effects and providing compensation for climate change damage? Adjudication in this sense might provide a service to the global commons, i.e. our atmosphere, irrespective of country specifics.

In this article, therefore, the authors not only give an overview on climate change cases dealt with in the international sphere, but also present a list of existing bodies with jurisdiction for all manner of potential disputes, and look at whether and to what extent these bodies can set their *objective marker* with a view to protecting the global climate. To clarify which types of cases might be dealt with by which body, the authors also look at the question of *who has access* to these institutions, given that states have been so reluctant to make use of international bodies in the interest of environmental protection.

A. Introduction and Structure

I. Intention and Scope

This article intends to give an overview of a topic that receives academic and media attention, but for which there is in fact only very little practical experience to draw from: dispute settlement and compliance control, or, possibly, litigation related to anthropogenic climate change in the international sphere.

The past years have seen quite some literature on the topic,¹ yet mostly related to the question in what form national jurisdictions can or are responding to this *new* issue (new in the sense of courts having to deal with it; not so new in the sense that the international climate regime turned 20 in 2012). There are, to date, also quite some interesting court cases to look at in this national setting – especially in the United States of America (USA), but also in other countries – which give a glimpse of the disputes that might

1 Lord et al. (2011); Faure & Peeters (2011).

lie ahead. Yet, a case busying an international tribunal or court with issues of general mitigation duties, damage prevention or even a damage claim has only been brought once – and only if the petition filed by the Inuit to the Inter-American Commission on Human Rights (IACoMHR) in 2005² is considered *a case* before a dispute settlement body. This will be discussed further in Section II.

This of course does not imply that the compliance system of the Kyoto Protocol has been idle – and depending on the definition of dispute settlement or litigation, these cases will be counted as *international climate cases*. The same is true for the two cases brought to the attention of the so-called National Focal Points under the OECD Guidelines for Multinational Enterprises. These will be discussed in some detail in Section C.VIII.

Still, given the obvious lack of legal mitigation commitments by states considering the acute problem of climate change and Intergovernmental Panel on Climate Change (IPCC) projections of severe changes in our natural environment with corresponding damage to be experienced by states and people alike, it is almost surprising to see that an initiative to involve the International Court of Justice (ICJ) has only been officially started in 2012. This will be discussed further in Section C.I.2.

So what can we actually do when asked to describe international institutions and avenues for dispute settlement for climate change when there seems to be little international dispute? There is a need to ‘craft’ types of cases – possible scenarios that might be presented for dispute settlement – to set the scene for discussion of the aptitude of existing international bodies. The authors do this with some belief that international dispute settlement bodies (the definition of these terms will be discussed in the next section) have the opportunity to set an *objective marker* in the ongoing debate in the international climate regime, where states, despite being told of the urgency of the matter by bodies such as the IPCC, still refrain from accepting adequate mitigation (i.e. reduction) obligations for their greenhouse gas emissions. Adjudication in this sense might provide a service to the global commons, i.e. the atmosphere, irrespective of country specifics. A court like the ICJ might be asked a question such as –³

2 For an overview and the petition see http://www.ciel.org/Climate_Change/Inuit.html, last accessed 29 March 2013.

3 See for this and other options FIELD (2011).

What are the obligations of States under international law in relation to preventing the causes of climate change, minimizing its adverse effects and providing compensation for climate change damage?

If this question were asked, it could to some extent help bridge the political gap and drawbacks the climate regime is experiencing. With this in mind, the authors also look at the question of *who has access* to these institutions, given that civil society or individuals may be more willing to entice an international body to work, than states as such, which are the original actors in international law.⁴ In the following sections, we therefore present existing bodies with jurisdiction for all manner of potential disputes, and look at whether and to what extent they can set their *objective marker* with a view to protecting the global climate.

II. International Judicial and Quasi-judicial Institutions

The starting point of this paper is the existing international judicial and quasi-judicial institutions that can serve to settle climate-related disputes. The authors will not dwell too much on the question of what litigation is in legal practice,⁵ but cling to an institutional focus instead. The authors' understanding of 'quasi-judicial' is very broad: it encompasses arbitration and compliance control.

In a study conducted in 2004, the Project on International Courts and Tribunals (PICT) counted more than 80 active international judicial, quasi-judicial, implementation control, and other dispute settlement bodies.⁶ Here the main focus is on international judicial and quasi-judicial bodies that are or could be especially relevant for the enforcement of international climate change law or rules that could serve the protection of the global commons. According to the authors' understanding, an international dispute involves either states or nationals of several states and has its substantive legal basis in international treaty or customary law.

4 For an in depth study of access of environmental NGOs to international judicial and quasi-judicial proceedings see Zengerling (forthcoming 2013).

5 See for some insight Lord et al. (2011); Faure & Peeters (2011) but also – for the USA as jurisdiction the website of the Columbia University Law School at <http://web.law.columbia.edu/climate-change>, last accessed on 29 March 2013.

6 See overview on PICT synoptic chart Version 3.0, November 2004, available at http://www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf, last accessed 29 March 2013.

1. *Judicial Dispute Settlement*

According to the definition of the Project on International Courts and Tribunals, an international judicial body is a permanent institution, composed of independent judges, adjudicating disputes between two or more entities, at least one of which is either a state or an international organisation, works on the basis of predetermined rules of procedure, and renders decisions that are binding.⁷ Inter-state dispute resolution has its origins in international arbitration, and some authors argue that on the international level there is no significant difference between judicial settlement and arbitration. However, the authors of this article share the view that over time international judicial settlement before permanent international courts and tribunals has become a separate category of dispute resolution. Arbitration is far more flexible. For example, parties to a dispute are free to determine the arbitrators, procedure and applicable law. In judicial settlement, these decisions have been taken by all states parties to the international treaty on which the court is based. Therefore international judicial procedures are more responsible to the community of states parties as a whole and consequently more appropriate to influence the further development of international law than arbitral tribunals whose mere focus is on the settlement of a dispute within the framework of case-specific rules set by the respective parties to a dispute on a case-by-case basis.

The above-mentioned characteristics of international judicial bodies make them most appropriate for the development of a coherent international legal order. Additional crucial features are that they usually provide for some control of the implementation of their judgments and that their hearings and judgments are open to the public. Such characteristics enhance independence, predictability, and transparency and thus crucial elements of judicial control. To this extent, international judicial dispute settlement bodies are also most appropriate for the application and development of international climate change law. However, there are several constraints that prevent them from playing a crucial role in the enforcement of international climate change law. The main constraint is that traditional access rules prevent climate change cases from reaching such bodies in the first place. Usually, only states have standing before international judicial dispute settlement bodies and the case law shows that states very rarely bring cases before an inter-

7 (ibid.:2).

national judicial or quasi-judicial body in order to protect environmental interests. Other constraints are the types of remedies available under dispute settlement.

The international judicial institutions discussed in this study are the International Court of Justice, the International Tribunal for the Law of the Sea, the three regional human rights courts, and the dispute settlement bodies of the World Trade Organization.

2. Arbitration

International arbitration is an alternative form of international dispute settlement that produces legally binding decisions. Article 37 of the 1907 Hague Convention for the Pacific Settlement of International Disputes states that international arbitration –

has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the Award.

Arbitral proceedings are of special interest in this analysis for several reasons. Firstly, inter-state arbitration played a significant role in the development of international environmental law. For example, the *Pacific Fur Seals Arbitration* (1893), the *Trail Smelter* case (1935/1941) and the *Lac Lanoux* case (1957) were inter-state disputes settled via arbitration.⁸ Secondly, in many Multilateral Environmental Agreements (MEAs), including the UNFCCC and the United Nations Convention on the Law of the Seas (UNCLOS), dispute settlement clauses establish ad hoc or institutional arbitration as the form of dispute settlement chosen by the parties to the agreement in the event of conflict.⁹ Thirdly, arbitration is a relevant form of dispute settlement in this context because a growing number of bi- and multi-lateral investment treaties provide for investor-state arbitration and such disputes often involve public, including environmental, interests. Furthermore, investor-state arbitration, especially as provided for by the International Centre for the Settlement of Investment Disputes (ICSID) Convention,

8 These cases have often been discussed; for an overview see Sands (2003:213) with further references.

9 See for example arbitration according to Annex VII under the 1982 United Nations Convention on the Law of the Sea.

is a notable development with regard to direct access of non-state actors to international dispute settlement procedures. There are also rules of international arbitration for conflicts between private parties. However, in this context the analysis focuses on inter-state and investor-state international arbitration.

Two bodies of international arbitration are discussed here: The Permanent Court of Arbitration (PCA) is interesting in this context because it is the oldest forum of international arbitration and has been suggested by some authors as a suitable basis for an international environmental court. The IC-SID is an international arbitral tribunal located at the World Bank which settles disputes between private investors and states. Both bodies have already dealt with climate change litigation. The choice of ICSID as an arbiter is offered in treaties such as the Energy Charter Treaty, and many others, including bi- and multilateral investment agreements.

3. *Compliance Control*

In addition to judicial dispute settlement and arbitration, there is also the concept of compliance control, which is a treaty-based concept and thus here mainly relevant in the context of the Kyoto Protocol. The concept of compliance control was developed in the late 1980s and 1990s as a means to enhance implementation and compliance control within international law, for example in the fields of arms control, human rights, and international labour law. Compliance theory is based on the assumption that there is a general propensity for states to comply with international law.¹⁰ It further assumes that the main reasons for non-compliance are unclear treaty language, lack of capacity to implement obligations under a treaty appropriately, and the temporal dimensions of treaty obligations. A “managerial model” based on a cooperative and non-confrontational approach is considered more apt to address such cases of non-compliance.¹¹ Especially in the field of environmental law, compliance control mechanisms have several advantages compared to traditional means of dispute settlement, and the compliance system of the Kyoto Protocol will be looked at not so much in detail but in terms of what its role can become.

10 For further information on compliance theory see Chayes & Handler (1998).

11 (*ibid.*:3, 22ff.).

The Kyoto Protocol is considered an innovative testing ground for compliance theory and is equipped with a facilitative and an enforcement branch. To the authors, it is a quasi-judicial institution because it almost fulfils the PICT definition of an international judicial body. Multilateral environmental agreements usually contain both a clause on dispute settlement and a clause on compliance control, and so does the climate regime. Article 18 of the Kyoto Protocol empowers the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP) to approve a compliance mechanism and Article 19, referring to the UNFCCC, provides for settlement of disputes at the ICJ or an arbitral tribunal. Compliance control is thus not meant to replace dispute settlement but to complement it.

Finally, included in this analysis are two institutions with an administrative rather than a quasi-judicial character, but which also serve to resolve disputes of application and implementation of international rules: the World Heritage Committee and the National Contact Points established under a quasi-legal instrument, the OECD Guidelines for Multinational Enterprises.

III. Types of Cases

There are many different types of cases that could be imagined for the purpose of this article. They will be grouped and categorised according to numbers and letters below.

1. State – State

Naturally, the starting point is a classical state-to-state conflict about the scope or limitations of the legal obligations relating to climate change. These could be based on both treaty law and customary law, i.e. the no harm rule.¹² The remedy sought could be geared at prevention, i.e. seeking stronger mitigation action such as was done in the nuisance case of many US cities and states against electricity utilities in the national courts of the USA¹³ (Type A.1). The remedy could also be prevention in the sense of direct protection measures, i.e. adaptation assistance such as sea walls, re-

12 As for example discussed in the second Volume of this publication by Khan; see comprehensively Verheyen (2005).

13 See Verheyen & Lührs (2009).

forestation or resettlement of communities at risk from extremes (floods, droughts, or storms), or slow onset changes such as sea-level rise, permafrost thawing or water scarcity (Type A.2). The remedy could also – at some point – be reparation through granting land for loss of territory (a very real threat to small island states) or by affording monetary compensation (Type A.3).

2. *Individual – State*

There is the important category of cases which can be called *human rights* cases, where an individual is entitled under international treaty or customary law to invoke an international dispute settlement or quasi-judicial body to ensure the state's obligations with respect to that individual are upheld. Again, the remedy would either be mitigation (B.1) or damage prevention (B.2) or compensation (B.3).

3. *Public Trigger – State*

A type of case which is less common in international law, yet exists today is that the common interest, for example through an NGO or another public trigger, such as an (quasi) administrative body, argues against a state that the state has violated obligations owed to the common interest or certain treaty rules (C). An example would be the compliance control procedure established under the Kyoto Protocol where expert review teams may initiate compliance control procedures against states.

4. *Private Entity/Investor – State*

Today's international law also provides opportunities for investors to initiate proceedings against states before dispute settlement bodies, such as in the case of Vattenfall arguing a breach of the Energy Charter against Germany before ICSID (D). The Permanent Court of Arbitration also deals with investor-state disputes.

5. *NGO/Individual – Multinational Corporation (MNC)*

Very rarely will there be an opportunity for an NGO or an individual to argue a case based on international law before an international body against a multinational corporation, but to some extent this can be done through the system under the OECD Guidelines for Multinational Enterprises. (E.)

B. Climate Regime

Owing to its density of rules and given that the international climate regime is the pertinent treaty regime with respect to the problem of climate change, the authors set the treaty regime aside and discuss its options, which fall in the categories A, B and C, and deal with these institutions (conciliation, arbitration and compliance) first.

I. Dispute Settlement, Conciliation and Arbitration under United Nations Framework Convention on Climate Change

The UNFCCC is the treaty framework for climate change law and has an almost universal membership. The UNFCCC is discussed in many chapters of this publication¹⁴, therefore we will restrict analysis to the two relevant conciliation/dispute settlement provisions. While the UNFCCC foresees a specific dispute settlement provision, there has not been any use made of this option. Article 13 UNFCCC contains the following provision:

RESOLUTION OF QUESTIONS REGARDING IMPLEMENTATION

The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention.

Article 13 set the framework for the establishment of a compliance mechanism, which was thought to be useful in parallel to the mechanism under the Ozone regime.¹⁵ Such a consultative process for the UNFCCC parties

14 See, e.g., the contribution on international climate change policy by von Bassewitz in the second Volume of this publication.

15 Yamin & Depledge (2004:384ff.) who also describe the process of negotiations to arrive at the draft rules in Dec. 10/CP.4.

has been developed and its rules for the most part adopted in 1998,¹⁶ but have never been put in action, while the Kyoto Protocol's compliance mechanism constitutes the much more detailed and effective parallel to Article 13 UNFCCC.

Generally, it is worthwhile contemplating activating this process, as "questions regarding the implementation of the Convention" could, for example, concern the specific duties of states flowing directly from Article 2 and Article 4.2 UNFCCC, rather than from the negotiated reduction targets under the Kyoto Protocol of 1997. The process could help parties agree on criteria for implementation, such as an objective target under Article 2 (e.g. the 2°C threshold)¹⁷ with criteria of allocation of reduction commitments.

However, the constitution of the conciliation commission has not been agreed. The draft rules seem promising as it "shall be composed of persons nominated by Parties who are experts in relevant fields, such as those of science, socio-economics and the environment. The Committee may draw upon such outside expertise as it deems necessary",¹⁸ but until geographical representation has been agreed upon, no commission would be constituted.

The process is expressly not be contingent on a dispute, but shall serve to prevent a dispute and depends on the will of parties to bypass ineffective negotiations and/or dispute settlement in the interest of prompt action. Naturally, it is questionable whether parties which have been unable to agree of Rules of Procedure for the annual meetings (Conference of the Parties) or on an alternative to unanimous voting since 1992 might agree on an effective process under Article 13 UNFCCC. Yet, it might be perceivable to use such a process to move climate negotiations just a little away from political considerations, for example assigning the IPCC a more regime-focused task in such a consultative process. If a process would involve scientific fora, or a real review process of scientific findings, this might be an important step forward to set an objective marker.

16 Decision 10/CP.4.

17 For more details, see the contribution on dangerous anthropogenic climate change from the perspective of adaptation by Kristie Ebi and Ian Burton in the second Volume of this publication; Burton et al. (forthcoming 2013).

18 Decision 10/CP. 4, para. 8.

Article 14 UNFCCC¹⁹ contains the rules on dispute settlement and provides parties with a step-wise approach to be followed, as in most multilateral environmental agreements. As with Article 13 UNFCCC, this provision has not been used in practice in the 21 years of the Convention, even though some parties have made declarations of jurisdiction upon ratification as requested in Article 14 II.

19 Article 14: Settlement of Disputes:

1. In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

2. When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depository that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice, and/or

(b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration.

A Party which is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with the procedures referred to in subparagraph (b) above.

3. A declaration made under paragraph 2 above shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the Depository.

4. A new declaration, a notice of revocation or the expiry of a declaration shall not in any way affect proceedings pending before the International Court of Justice or the arbitral tribunal, unless the parties to the dispute otherwise agree.

5. Subject to the operation of paragraph 2 above, if after twelve months following notification by one Party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through the means mentioned in paragraph 1 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.

6. A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a recommendatory award, which the parties shall consider in good faith.

7. Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation.

8. The provisions of this Article shall apply to any related legal instrument which the Conference of the Parties may adopt, unless the instrument provides otherwise.

Recently, the Foundation for International Environmental Law and Development (FIELD) published a briefing note suggesting that Article 14 be activated, and in particular the conciliation mechanism as stipulated in para. 6, under which a conciliation commission *shall* be tasked with the dispute if one party requests this.²⁰ A precondition is a dispute between two or more parties “concerning the interpretation or application” of the UNFCCC or the Kyoto Protocol, and where an attempt has been made to reach settlement amongst parties within a period of 12 months. If this attempt has been unsuccessful, one party may request conciliation. Article 14 VI has some rudimentary rules on the conciliation commission to be formed (equal members from both parties to the dispute, and a jointly chosen chair). Any award flowing from the commission’s work will be a recommendation, and not legally binding, but under international law it has been common for states to follow such recommendations.

It is possible that a whole group of parties (such as small island states) can launch such a dispute, specifically raising issues of interpretation or implementation, i.e. specific obligations under the UNFCCC towards others. Thus, to some extent, such a process could involve setting important objective markers towards existing or necessary obligations to protect the global climate system. A conciliation commission could go as far as suggesting credible quantified obligations needed for fulfilling the aim set by Article 2 UNFCCC.

In the light of increasing evidence of damage beyond adaptation, and specifically enormous losses to particular countries, including loss of territory, it has been suggested that the dispute settlement provisions of the UNFCCC be used also for matters concerning loss and damage.²¹

II. Compliance Control under Kyoto Protocol

In December 2005, based on the mandate in Article 18 KP, the Conference of the Parties, serving as the Meeting of the Parties to the Protocol (CMP), established a non-compliance mechanism to facilitate the successful implementation of the commitments under the Kyoto Protocol, in particular to support the credibility of the carbon market and the transparency of ac-

20 FIELD (2012).

21 Hyvarinen (2012). See on this concept: Verheyen (forthcoming 2013).

counting by parties.²² At the end of the first commitment period, the Kyoto Protocol had 192 parties and thus an almost global membership that had signed on to what is said to be one of the most progressive international procedures of compliance control.²³

Reflecting the principle of common but differentiated responsibilities, the Compliance Committee established under the Kyoto Protocol comprises two different branches. The enforcement branch (EB) identifies cases of non-compliance and determines the consequences regarding Annex I parties (developed countries with emission reduction commitments under Annex I). Non-Annex I parties may only be subject to a compliance review procedure before the facilitative branch (FB), which advises and assists parties in complying with their commitments.

1. Scope of Review and Access

The Compliance Committee is established to facilitate, promote and enforce compliance with the commitments under the Protocol.²⁴ Among the main tasks of the enforcement branch²⁵ is to determine whether Annex I parties are not in compliance with their emission reduction targets under Article 3(1) KP; the methodological and reporting requirements under Article 5(1), (2) and 7(1), (4) KP; the eligibility requirements under Articles 6 (Joint Implementation), 12 (Clean Development Mechanism), and 17 (international emissions trading).²⁶

Depending on the type of non-compliance, the enforcement branch may apply non-punitive “consequences”.²⁷ For example, if a party is not in compliance with the eligibility requirements, the enforcement branch shall suspend the eligibility of that party.²⁸ If a party is not in compliance with its emission target, the enforcement branch shall declare the party’s non-com-

22 Procedures and mechanism relating to compliance under the Kyoto Protocol, Decision 27/CMP.1, FCCC/KP/CMP/2005/8/Add.3, 9–10 December 2005 (Compliance Procedures). The implementation of Decision 27/CMP.1 is still ongoing.

23 Brunnée (2003:255, 280).

24 Article 18 KP; Compliance Procedures at I.

25 For a detailed description of responsibilities of both branches see Oberthür & Lefebvre (2010).

26 Compliance Procedures at V(4).

27 Compliance Procedures at V(6) and XV.

28 Compliance Procedures at XV(4).

pliance, deduct from the party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions, request the development of a compliance action plan, and suspend the party's eligibility to sell emission units.²⁹ However, it is important to note that the enforcement branch will not review compliance with the parties' emission reduction commitments under Article 3(1) KP before the second half of 2015.³⁰ Decisions of the Compliance Committee are not legally binding.

Compliance procedures may be triggered in three different ways. Any party may initiate a procedure with respect to itself (self-trigger) or with respect to another party (party-to-party trigger). Furthermore, expert review teams indicate questions of implementation in their reports under Article 8 KP and the Secretariat refers them to the Compliance Committee (public trigger).³¹ Competent intergovernmental and non-governmental organisations may submit relevant factual and technical information to the relevant branch.³² However, as far as the authors know, no NGO has yet tried to participate in a compliance procedure.

2. *Questions of Implementation*

As at March 2013, the facilitative branch has dealt with one and the enforcement branch with eight questions of implementation.³³ In May 2006 South Africa filed a question of implementation before the facilitative branch on behalf of the Group of 77 and China with respect to fifteen developed countries alleging that they failed to comply with their reporting obligations under Article 3(2) KP. The facilitative branch did not proceed against two countries because they had submitted their reports in the meantime. With respect to the other countries, the facilitative branch could not agree on a

29 Compliance Procedures at XV(5).

30 The first commitment period ended in 2012; the last inventories are due in April 2014. The ERTs must review the inventories within one year and then parties may transfer emission units during a additional period of 100 days in order to meet their emission reduction targets, Compliance Procedures at XIII.

31 Compliance Procedures at VI(1).

32 Compliance Procedures at VIII(4).

33 The cases are documented at http://unfccc.int/kyoto_protocol/compliance/question_s_of_implementation/items/5451.php, last accessed 29 March 2013.

decision during the three-week preliminary examination period.³⁴ Among the critical issues were the questions whether a submission by a party on behalf of other parties was in accordance with section VI(1) of the Annex to decision 27/CMP.1, whether it was admissible although it did not explicitly name the parties alleged to be in non-compliance and although it did not substantiate the allegations.³⁵ This stalemate experience led to the amendment of the Rules of Procedure, which now provide for certain standards for submissions.

All cases dealt with by the enforcement branch were initiated by the expert review teams through the Secretariat. Exemplarily, the non-compliance procedure against Greece is briefly outlined below. After reviewing the initial report and considering information it had gained during an in-country review, the ERT initiated a compliance procedure against Greece. The ERT found that the national system of Greece was not in full compliance with the guidelines for national systems under Article 5(1) KP and the guidelines for the preparation of the information required under Article 7 KP.³⁶

In particular, the ERT concludes that the maintenance of the institutional and procedural arrangements; the arrangements for the technical competence of the staff; and the capacity for timely performance of Greece's national system is an unresolved problem, and therefore lists it as a question of implementation.

In its Preliminary Examination the enforcement branch decided to proceed with the question of implementation and requested expert advice in the matter.³⁷ After hearing four experts and representatives of Greece the EB adopted a preliminary finding.³⁸ It determined that —³⁹

Greece is not in compliance with the guidelines for national systems under Article 5, paragraph 1, of the Kyoto Protocol (decision 19/CMP.1) and the guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol (decision 15/CMP.1). Hence, Greece does not yet meet the eligibility requirement under Articles 6, 12 and 17 of the Kyoto Protocol to have in place

34 Report on the third meeting of the Facilitative Branch, CC/FB/3/2006/2, 6 September 2006 at 5 and 6 and Annex I Report to the Compliance Committee on the deliberations in the facilitative branch relating to the submission entitled Compliance with Article 3.1 of the Kyoto Protocol (CC/3/2006/5).

35 *Ibid.* at Annex I at 4. A more detailed analysis is provided by Doelle (2010:240).

36 Report of the review of the initial report of Greece, FCCC/IRR/2007/GRC, 28 December 2007, at 244.

37 Decision on Preliminary Examination, CC-2007-1-2/Greece/EB, 22 January 2008.

38 Preliminary Finding, CC-2007-1-6/Greece/EB, 6 March 2008.

39 (*ibid.*:17).

a national system in accordance with Article 5, paragraph 1, of the Kyoto Protocol and the requirements in the guidelines decided thereunder.

The EB ordered that Greece shall develop a plan to come back into compliance within three months, and it stated that Greece was not eligible to participate in the three Kyoto mechanisms (emissions trading, joint implementation, and clean development mechanism).⁴⁰ After a second hearing the EB fully confirmed the preliminary finding in its final decision.⁴¹ Greece timeously submitted a first and a revised compliance plan and requested the reinstatement of eligibility under the three Kyoto mechanisms.⁴² The EB accepted the revised compliance plan. It found that Greece is no longer in non-compliance and that it is now fully eligible to participate in the Kyoto mechanisms.⁴³

3. *Conclusions and Outlook*

The compliance control mechanism established under the Kyoto Protocol is designed to ensure the functioning and the credibility of the Kyoto Protocol and thus, more specifically, its emission reduction obligations and its three core instruments: emissions trading, joint implementation, and the clean development mechanism. The scope of review of the Kyoto Compliance Committee is tailored to the states parties' obligations under the Kyoto Protocol such as emission reduction, reporting and eligibility requirements. Since such obligations aim at preventing climate change, the Kyoto Compliance Committee is accessible for types of cases of categories A.1 (state – state, prevention) and C (as the ERT can safely be considered a public trigger – state).

From an institutional point of view, the Kyoto Compliance Committee has several strong features and seems well equipped to set objective markers with respect to the specific obligations arising under the KP. Most importantly, compliance review procedures can be initiated through a non-state trigger. In practice, till the present time, all admissible cases have been brought before the enforcement branch of the Compliance Committee via

40 (ibid.:18).

41 Final Decision, CC-2007-1-8/Greece/EB, 17 April 2008, at 4 and 5.

42 Request for reinstatement of eligibility, CC-2007-1-12/Greece/EB, 27 October 2008.

43 Decision under paragraph 2 of section X, CC-2007-1-13/Greece/EB, 13 November 2008, at 13.

the ERTs. The public trigger has proved crucial for the activity of the compliance control body. Furthermore, the existence of a facilitative and an enforcement branch is a positive feature of the compliance control mechanism, since it reflects well the principle of common but differentiated responsibilities. However, in practice the facilitative branch only dealt with one case, which it deemed inadmissible, and did not actually fulfil its task as envisaged.

The non-punitive “consequences” that the enforcement branch may apply also appear to be suitable for effective compliance control, considering that several parties came back into compliance after consequences had been applied. Another strength of the mechanism is its openness for *amici curiae*⁴⁴, although to date no IGO nor NGO has participated in a procedure. Finally, it has to be stressed that the Kyoto compliance mechanism is one of the most transparent and publicly accessible international compliance procedures. All core documents are available online and all hearings held so far have been public and webcasted.

Yet, the cases dealt with by the Compliance Committee were – due to its setup and mandate – Kyoto-specific and highly technical. In all cases the EB drew on expert advice. It delivered decisions which were well-reasoned and in good time. As regards the types of cases dealt with by the Committee, it has to be pointed out that compliance with emission reduction obligations – maybe the most important measure of the credibility of the Kyoto regime – will only be reviewed from the second half of 2015. Accordingly, the related “consequence” for non-compliance with emission reduction obligations, namely the deduction of certain assigned emission amounts for the second commitment period, has not been applied yet.

Given the reluctance of states to proceed against other states before judicial and quasi-judicial bodies, it seems rather unlikely that in the future there will be more cases of category A.1 before the Kyoto Compliance Committee. The ERTs will remain the crucial path to activate the compliance control mechanism. The future influence of the Committee will also largely depend on the emission reduction scheme states parties agree to for the second commitment period. Negotiations are still pending. Especially the review of Annex I parties’ emission reduction obligations under the first commitment period will – from the second half of 2015 – generate new cases for the

44 Freely translated: Friendly Submission. This is the term used by tribunals in mostly anglo-american tradition allowing for submissions to be made with respect to a particular case by non-parties to the dispute.

Compliance Committee. How the enforcement branch is going to deal with these cases will be highly relevant for the effectiveness and strengths of the Kyoto compliance review mechanism.

C. Other International Judicial and Quasi-judicial Bodies

I. International Court of Justice

Both, the UNFCCC as well as the Kyoto Protocol provide for dispute settlement before the International Court of Justice.⁴⁵ However, no case concerning a climate change issue has been referred to the ICJ yet. As the principal judicial organ of the United Nations,⁴⁶ the only court on a global scale with a general subject matter jurisdiction and a court which has decided about environmental issues on several occasions, the ICJ could play a crucial role in future climate change litigation.

1. Jurisdiction and Access

The ICJ could deal with climate change issues in contentious or advisory proceedings.

Only states may be parties in contentious cases before the ICJ.⁴⁷ According to Article 36(1) ICJ Statute –

[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

Article 14(2)(a) UNFCCC as well as Article 19 KP provide for the jurisdiction of the ICJ. Under the UNFCCC, parties were invited to accept jurisdiction of the ICJ, which has scarcely been done.⁴⁸ Furthermore, according to Article 36(2) ICJ Statute, states parties can declare at any time that they

45 Article 14(2)(a) UNFCCC, Article 14 KP.

46 Article 7 and chapter XIV of the Charter of the United Nations.

47 Article 34(1) ICJ Statute.

48 See http://unfccc.int/essential_background/convention/items/5410.php, last accessed 29 March 2013. Cuba for example expressly does not accept compulsory dispute settlement, while e.g. the Netherlands will accept jurisdiction if the other Party involved does so.

recognise the jurisdiction of the ICJ as compulsory in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact that would constitute a breach of an international obligation, or the nature or extent of the reparation to be made for the breach of an international obligation. So far 69 states have committed to this *compulsory* jurisdiction under Article 36(2), mostly with certain restricting conditions.⁴⁹

Advisory opinions on legal questions may be requested by the General Assembly, the Security Council, or other organs of the United Nations and specialised agencies, which are duly authorised by the General Assembly, if the legal questions arising lie within the scope of their activity.⁵⁰ Generally, advisory opinions have a consultative character and are not binding on the requesting bodies. However, certain regulations can stipulate in advance that the advisory opinion shall have a binding effect.

In contentious as well as advisory proceedings, the ICJ may apply international conventions, establishing rules expressly recognised by the contesting states; international customary law, the general principles of law, and, subject to Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁵¹ Thus, rules of the UNFCCC and the KP are applicable in cases before the ICJ if they are binding upon the parties to a dispute. Furthermore, international customary law, such as the no-harm rule, may be applied by the ICJ.

Chapter 39.10 of Agenda 21 encourages states to resolve disputes relating to sustainable development through recourse to the ICJ. Following the 1992 UNCED, in 1993, the ICJ set up a seven-member Chamber for Environmental Matters to rule on environmental disputes that fall within its jurisdiction. A case is brought before the Chamber for Environmental Matters rather than before the plenary Court upon agreement of the parties to a dispute. However, not a single case has been referred to the Environmental Chamber and since 2006 it has not been reconstituted.

ICJ rules do not contain *amicus curiae* provisions. However, on a few occasions the ICJ accepted submissions of International NGOs in advisory

49 See list of declarations recognising the jurisdiction of the court as compulsory at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>, last accessed 29 March 2013.

50 Article 96 UN Charter, Article 65 ICJ Statute.

51 Article 38 ICJ Statute.

proceedings. The ICJ is free to draw on expert advice. Hearings are usually public and have been webcast since 2009. The ICJ publishes applications, documents of written proceedings, transcripts of oral proceedings, orders, and judgments on its website.

2. *Case Studies*

So far, the ICJ has not decided on any legal question regarding climate change. However, on a few occasions it has dealt with cases related to environmental protection.⁵² It also contributed to the development of certain principles which may be applied in climate change litigation.

In 1929, the Permanent Court of International Justice (PCIJ), predecessor of the ICJ, supported the ‘community of interest’ rule for shared access to international rivers in the *Territorial Jurisdiction of the International Commission of the River Oder* case.⁵³ This rule is still the basis for sustainable and equitable management of watercourses.⁵⁴ As the atmosphere is – in some sense – a common and shared resource, it might be possible to use some of the principles established here for an objective criterion for carbon budgets, which have been so difficult to negotiate. As with other shared resources, the atmosphere has a ‘user’ limit, which is legally and universally defined in Article 2 UNFCCC.

In the *Corfu Channel* case of 1947 the ICJ held that every state has an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”,⁵⁵ which has to some extent the same basis as the no-harm rule.

In the *Barcelona Traction* case it recognised the principle of *erga omnes* obligations:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature

52 For a comprehensive survey of cases related to environmental protection see Zengerling (forthcoming 2013).

53 *Territorial Jurisdiction of the International Commission of the River Oder (Czechoslovakia, Denmark, France, Germany; Great Britain, Sweden/Poland) [1929] PCIJ (ser. A) no. 23, 5.*

54 (*ibid.*:29).

55 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, Judgment of 9 April 1949, ICJ Reports 1949, 22.

the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.⁵⁶

Clearly, the protection of the global climate system – in particular to prevent the so-called tipping points – is in the interest of all mankind and it could well be argued that limiting greenhouse gases in the atmosphere is an *erga omnes* obligation, given the universal acceptance of the UNFCCC.

In *Gabcikovo-Nagyymaros*⁵⁷ Hungary and Slovakia brought a case before the ICJ regarding the construction and operation of a hydroelectric dam, a joint investment between the two states. With respect to environmental matters the ICJ stated:⁵⁸

[The] need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

In this statement, the ICJ charges the parties with the task of negotiating rather than offering *objective markers*.

In *Pulp Mills on the River Uruguay* the ICJ for the first time stated that it considers an environmental impact assessment a requirement under general international law in cases of transboundary industrial activities.⁵⁹ The ICJ did not define a minimum content of an environmental impact assessment.⁶⁰ The judges considered several technical and scientific issues, for example the production technology used in the pulp mill, the impact of discharges on the water quality, as well as effects on biodiversity and air pol-

56 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, ICJ Reports 1970, 32.

57 *Gabcikovo-Nagyymaros Project (Hungary v Slovakia)*, Judgment, ICJ Reports 1997, 7.

58 (*ibid.*:75).

59 *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment of 20 April 2010 at para 204.

60 (*ibid.*:para 205).

lution in a rather detailed manner.⁶¹ However, they did not seek independent expert advice on these highly complex technical and scientific issues and decided the case applying burden of proof rules.⁶²

While this case turned on environmental law, it offers little insight into a potential climate case. In parts, it could even be said to obstruct such a case given its reluctance, for example, to use the precautionary principle as an argument to reverse the burden of proof. Also, the case is an example of how the ICJ refrains from setting objective markers.

The option of tasking the ICJ with an advisory opinion has been mentioned before. It has been contemplated many times, and a recent round table looked at specific questions, which have also been formulated by the Government of Palau in the UN General Assembly on 11 September 2011.⁶³ This move was supported by the Leaders of Pacific Islands Forum in October 2012⁶⁴. Yet, there has been no vote in the General Assembly, and it seems as if the initiative has not been pursued with much vigour, or even been abandoned.

3. *Conclusions and Outlook*

The ICJ could naturally deal with climate cases of category A (state – state; mitigation, adaptation, reparation, even with regard to affording damages) in contentious and category C (public – state) in advisory proceedings (as the UN General Assembly is a body serving the interest of all mankind). From an institutional point of view, among the strengths of the Court are its central role at the United Nations, its general jurisdiction, its wide range of applicable remedies, its transparent decision-making, and its theoretical option to seek expert advice. The main institutional drawback for climate cases to reach the ICJ is its limited accessibility. For state-to-state litigation seek-

61 (ibid.:paras 228, 265).

62 See also criticism in joint dissenting opinion of Judges Al-Khasawneh and Simma at paras 2, 3, 6, 14, and 28 available on the ICJ's website as part of the case file.

63 See <http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1=#.UVngfjetZ70>, last accessed 29 March 2013. See also the comment by the Climate Justice Programme available at <http://theconversation.com/see-you-in-court-the-rising-tide-of-international-climate-litigation-3542>, last accessed 29 March 2013.

64 See <http://www.un.org/News/Press/docs/2012/sg2191.doc.htm>, last accessed 29 March 2013.

ing mitigation and adaptation measures, the political pressure not to initiate proceedings against other states has so far been too high. At the moment, it even seems that the initiative in the General Assembly to seek an advisory opinion has been stalled. An advisory opinion could also be requested by a specialised agency such as the WHO or the FAO. Unfortunately, there is no UN agency explicitly tasked with environmental protection, UNEP still only having the status of a programme. Yet, since the impacts of climate change touch on many aspects including health and food security, the two agencies could well decide to launch an advisory opinion in principle.

The environmental case load of the ICJ has been rather low. In the *Pulp Mills on the River Uruguay* case, the ICJ considered for the first time several environmental issues in a comparably detailed manner. Thus, despite the critique that the Court should have considered the technical and scientific issues in more depth, there is at least a tendency in ICJ case law towards more openness for environmental arguments. However, if a climate case is to reach the Court it would probably need to make use of *amici curiae* and expert advice, especially on climate science.

In the authors' view, the ICJ could play an important role in, for example, interpreting and adjudicating UNFCCC terms like "common but differentiated responsibilities" or "dangerous climate change" (Article 2), which are not yet fully defined.⁶⁵ Furthermore, the ICJ could contribute to the development of treaty provisions into general law. As discussed elsewhere, it also seems possible to contemplate concrete cases based on the no-harm rule.⁶⁶ Given the abundance of cases of the ICJ which had some dealing with territorial conflicts, this is even more possible considering the projections of loss of land, or at least loss of habitable land under the recent climate change scenarios.

II. International Tribunal for the Law of the Sea

No climate change litigation has been brought before the International Tribunal for the Law of the Sea (ITLOS) up to the present time. However, more than half of the 20 cases ITLOS has dealt with since it took up its work in 1996 relate in some way to the protection of the marine environment. Con-

65 See also Guruswamy (1997:423).

66 See Verheyen (2005).

sidering that climate change has a crucial impact on the world's seas, ITLOS might be in a position to contribute to the interpretation and further development of climate change law.⁶⁷

1. *Jurisdiction and Access*

The ITLOS, which is located in Hamburg, Germany, is composed of 21 independent members, and adjudicates disputes arising out of the interpretation and application of the United Nations Convention on the Law of the Sea (UNCLOS) and its subsequent agreements.⁶⁸ Part XII of the UNCLOS specifically regulates the protection and preservation of the marine environment. Currently, there are ten further multilateral agreements conferring jurisdiction on the ITLOS.⁶⁹ For example, the United Nations Fish Stocks Agreement (UNFSA) could be especially relevant for future climate change litigation.⁷⁰ Among the special chambers of the ITLOS are the Chamber for Marine Environment Disputes and the Chamber for Fisheries Disputes. A dispute is referred to any of these special chambers if parties agree to this. However, so far no case has been submitted.

The ITLOS provides for contentious and advisory proceedings.⁷¹ Law of the sea disputes may be settled before the ITLOS, ICJ or an arbitral tribunal.⁷² So far 32 out of 162 parties to the UNCLOS have chosen the ITLOS as a possible forum for the settlement of disputes.⁷³ A special Seabed Dis-

67 See for an overview of the material law parallels and perspectives Boyle (2012).

68 Article 288(1) UNCLOS; see also Articles 21 and 22 of the ITLOS Statute.

69 Article 288(2) UNCLOS. A list of such provisions is available at http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Relevant_provisions.12.12.07.E.pdf, last accessed 29 March 2013.

70 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA). According to Article 30 UNFSA the provisions of Part XV of UNCLOS regarding the settlement of disputes apply *mutatis mutandis*.

71 Articles 279–299 UNCLOS regulate the settlement of disputes, Articles 286–296 UNCLOS refer to compulsory procedures with binding decisions. For advisory opinions see Article 138(1) ITLOS Rules.

72 Article 287 UNCLOS.

73 See table on choice of procedure under Article 287 UNCLOS at http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm, last accessed 29 March 2013.

putes Chamber adjudicates disputes arising from activities in the Area.⁷⁴ The Assembly or the Council of the International Seabed Authority, not states parties, may request advisory opinions before the Seabed Disputes Chamber.

Generally, only state parties to the UNCLOS may be parties in proceedings before the ITLOS.⁷⁵ Certain non-state parties may act as plaintiffs or defendants before the Seabed Disputes Chamber.⁷⁶ Intergovernmental organisations, but not NGOs, may submit *amici curiae* statements in proceedings before ITLOS.⁷⁷ If disputes involve scientific or technical matters, ITLOS may seek expert advice.⁷⁸

Proceedings before ITLOS are rather transparent. In contentious⁷⁹ and advisory⁸⁰ proceedings, documents are usually made available to the public. Also hearings before the Tribunal are generally open to the public⁸¹ and transmitted via a live webcast.

2. Case Studies

For future climate change litigation, the first and so far only advisory opinion issued by the Seabed Disputes Chamber of the ITLOS can be considered the most relevant decision.⁸² Following a proposal made by Nauru, a developing country sponsoring mineral exploration activities of two corporations in the Area, the Council of the International Seabed Authority requested an advi-

74 Articles 186–191 UNCLOS.

75 Article 291(1) UNCLOS and Article 20(1) ITLOS Statute. Exceptions are provided for in Article 291(2) UNCLOS, Articles 20, 37 ITLOS Statute, and Article 187 UNCLOS. For example, the Assembly or the Council of the International Seabed Authority may ask the Seabed Disputes Chamber for an advisory opinion.

76 Article 187 UNCLOS. Such entities comprise the International Seabed Authority, the Enterprise, natural or juridical persons referred to in Article 153(2)(b) of the UNCLOS, or a state enterprise.

77 Articles 84(1)(2) and (4), 107, 115, 133 ITLOS Rules.

78 Article 289 UNCLOS, Article 82 ITLOS Rules.

79 Article 67(2) ITLOS Rules.

80 Article 134 ITLOS Rules as regards written statements and annexes.

81 Article 26(2) ITLOS Statute, Article 74 ITLOS Rules.

82 Case No. 17, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion of 1 February 2011. All decisions are available at <http://www.itlos.org/index.php?id=35&L=0>, last accessed 29 March 2013.

sory opinion regarding legal responsibilities and obligations and possible liability of states sponsoring exploration and exploitation activities in the Area.⁸³

The Seabed Disputes Chamber held, among others, that sponsoring states have two kinds of obligations under the UNCLOS and related instruments. Firstly, sponsoring states have an obligation to ensure compliance by sponsored contractors with the terms of contract and the obligations set out in the Convention and related instruments (“due diligence obligation”).⁸⁴ Secondly, sponsoring states have so-called “direct obligations”.⁸⁵

Among the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.

Importantly, the Chamber considers the precautionary approach also as part of the due diligence obligations of sponsoring states.⁸⁶ With respect to the status of the precautionary approach in international law, it states that –⁸⁷

the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.

Also regarding environmental impact assessment, the Chamber underlines –⁸⁸

83 Decision ISBA/16/C/13 of 6 May 2010 of the Council of the International Seabed Authority, 16th session.

84 (ibid.:110, 242 no. 3 lit A).

85 (ibid.:121, 242 no. 3 lit B).

86 (ibid.:131). To support its finding the Tribunal refers to the *Southern Bluefin Tuna* orders of 27 August 1999 and also to the contractual obligation in the Sulphides Regulations Annex 4, section 5.1, (ibid.:132, 133).

87 (ibid.:135).

88 (ibid.:145). Giving reasons for its opinion, the Chamber again refers to the *Pulp Mill* judgment of the ICJ; it considers it appropriate to apply the ICJ’s opinion on the status of the EIA, which was focused on the role of an EIA in the context of industrial activities likely to cause transboundary pollution of shared natural re-

that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.

This case points to a progressive interpretation of customary environmental law by the Chamber which might be used in the climate context as there is a certain parallel between the sea bed as a common heritage of mankind (Article 136 UNCLOS) and the UNFCCC referring to a similar concept as a first item of its preamble (acknowledging that change in the Earth's climate and its adverse effects are a “common concern of humankind”). While, naturally, much could be written on the difference between “common heritage of mankind” and “common concern of humankind”, as well as the parallels in detail, this case law of ITLOS could provide a starting point of interpretation of the pollution prevention duties under UNCLOS with respect to the need to reduce greenhouse gas emissions.

Nine of the 19 contentious cases that the ITLOS dealt with are so-called prompt release cases: in five cases the ITLOS ordered provisional measures, and in only two cases it decided on the merits. The *Swordfish* case might have become the first environmental case to be decided on the merits, but it was settled out of court.⁸⁹

The prompt release procedure is especially provided for under UNCLOS and may be initiated by a state party to seek the release of a vessel detained by authorities of another state party (mostly because that vessel is caught fishing in the EEZ or territorial waters of the arresting state without license or quota).⁹⁰ In eight out of the nine prompt release cases, the vessels were detained for alleged illegal fishing. However, the prompt release procedure is not designed to address issues of illegal fishing appropriately. The ITLOS

sources, to the case at hand regarding resource exploitation in an area beyond national jurisdiction and space and resources that are considered the common heritage of humankind, (ibid.:147, 148). In contrast to the ICJ in the *Pulp Mill* case, the Chamber is in a position to further clarify the scope and content of an EIA referring to Article 206 of the Convention, the Mining Regulations and, most importantly, to the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority's Legal and Technical Commission in 2002 pursuant to Regulation 38 of the Nodules Regulations (ISBA/7/LTC/1/Rev. 1 of 13 February 2002), (ibid.:149, 144).

89 Case No. 7, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v European Union)*, Order 2009/1 of 16 December 2009.

90 Articles 292, 73 UNCLOS.

merely determines the amount of a reasonable bond or another security. The alleged violations of UNCLOS environmental law are only cursorily assessed and not remedied.

In four out of five provisional measures cases, the ITLOS prescribed provisional measures also with a view to protect the marine environment.⁹¹ The strongest language can be found in the order on the *Southern Bluefin Tuna* cases. In these cases the Tribunal adopted provisional measures under Article 290(1) UNCLOS to prevent serious harm to the marine environment. It ordered Japan to “refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna”,⁹² unless the catch is deducted from Japan’s annual national allocation. The Tribunal used the language of the precautionary principle without mentioning the term itself. However, it is important to note that this decision on provisional measures was overturned by a later decision because of lack of jurisdiction.⁹³

3. *Conclusions and Outlook*

The cases above have nothing to do with climate change or its consequences. Yet, given impacts such as acidification of the ocean, temperature increase or an increase of rough sea events, as expected with increasing levels of greenhouse gases, it can well be imagined that the law of the sea regime might be asked to provide legal guidance by affected states. Moreover, UNLCOS sets forth its own obligations on member states regarding the protection of the marine environment, which could well be said to be infringed with unabated greenhouse gas emissions.⁹⁴

Generally, ITLOS has jurisdiction to decide on climate cases of category A only. The Seabed Disputes Chamber could, in addition, deal with cases of categories C (public – state, in advisory opinions) and D (corporation –

91 Cases No. 3 and 4, *Southern Bluefin Tuna* cases (*New Zealand v Japan; Australia v Japan*), Provisional Measures, Order of 27 August 1999; Case No. 10, *MOX Plant* case (*Ireland v United Kingdom*), Provisional Measures, Order of 3 December 2006; Case No. 12, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (*Malaysia v Singapore*), Order of 8 October 2003.

92 Cases No. 3 and 4, *Southern Bluefin Tuna* cases (*New Zealand v Japan; Australia v Japan*), Provisional Measures, Order of 27 August 1999, at 90(1)(d).

93 *Southern Bluefin Tuna* cases, Award on Jurisdiction and Admissibility, 4 August 2000.

94 A case study with these provisions in mind contains Tol & Verheyen (2004).

state), but the jurisdiction of this special Chamber is so narrowly defined (“disputes arising from activities in the Area”) that the authors can think of no scenario how a climate case could be tried there.

UNCLOS protects the high seas and the Area as global commons. However, only the Area is to a certain degree protected through a system of rules and judicial safeguards which may be triggered in the public interest. If, for example, the marine ecosystem in the high seas is damaged as a result of climate change, there are no such institutional safeguards in place to protect the global common, but only general substantive obligations such as Article 194 and 212 UNCLOS.

With regard to the effects of climate change on straddling and highly migratory fish stocks, UNFSA might become especially relevant. Under UNFSA, states parties agreed to adopt and implement measures ensuring long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks.⁹⁵ They further agreed to apply the precautionary approach.⁹⁶ Thus, for example, a state party could initiate a contentious procedure against another state party, arguing that the climate change policy of the latter threatens conservation and sustainable use of straddling and highly migratory fish stocks.⁹⁷

III. Regional Human Rights Courts

None of the three human rights courts has dealt with a climate case to date. Most prominently, however, the Inter-American Commission for Human Rights (IACoHR) decided on a petition filed by indigenous peoples of the Arctic region against the United States because of its failure to limit its GHG emissions (*Inuit* case). Considering the severe impact climate change has had, and will have, on individuals’ lives and the courts’ case law in environmental litigation, the human rights courts can well be expected to hear climate cases in the future.

95 Articles 2 and 5 UNFSA.

96 Articles 5(c) and 6 UNFSA.

97 See also Preston (2010).

1. *Jurisdiction and Access*

The Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACoMHR) adjudicate cases regarding the 1969 American Convention on Human Rights (ACHR) and related instruments.⁹⁸ So far 25 Latin American countries have ratified the American Convention on Human Rights and recognised the jurisdiction of the IACtHR. The United States signed the Convention in 1977, but never ratified it. Other than the European Convention on Human Rights (ECHR), the Protocol of San Salvador to the ACHR provides for a right to a healthy environment.⁹⁹ Any person, group of persons, or legally recognised NGO may initiate proceedings before the IACoMHR against a state party alleging a violation of the ACHR.¹⁰⁰ Access to the IACtHR is more limited. Only states parties and the IACoMHR may initiate contentious proceedings before the Court.¹⁰¹ At the request of member states of the Organization of American States (OAS) or specific organs of the OAS, the IACtHR may also issue advisory opinions.¹⁰² The IACtHR accepts submissions of *amici curiae*¹⁰³ and its hearings are generally public.¹⁰⁴

Contentious and advisory proceedings based on the African Charter on Human and Peoples' Rights (African Charter or AfCHPR) and related instruments are adjudicated by the African Commission on Human and Peoples' Rights (AfComHPR) and the African Court on Human and Peoples' Rights (AfCtHPR).¹⁰⁵ Currently, 25 African states have recognised the Court's jurisdiction. The African Charter provides for a "peoples' right to a general satisfactory environment".¹⁰⁶ The AfComHPR, states parties, and African intergovernmental organisations may bring contentious cases before

98 Article 33 ACHR.

99 Article 11 of the Protocol of San Salvador.

100 Article 44 ACHR.

101 Article 61 ACHR. NGOs may act as advisors to the Commission during Court sessions if the Commission so allows, see Taillant (2001:25–27).

102 Article 64(1) ACHR.

103 Article 2(3) and 41 Rules of Procedure of the IACtHR.

104 Article 15 Rules of Procedure of the IACtHR.

105 With regard to the scope of jurisdiction of the AfCtHPR see Articles 3 and 7 Protocol to the African Charter. The relationship between Commission and Court has been described as rather competitive and not yet clearly organised. See Mutua (1999) and Wachira (2008).

106 Article 24 AfCHPR. See also Boyle (2010:3ff.).

the AfCtHPR.¹⁰⁷ The AfCtHPR may also issue advisory opinions at the request of any member state of the African Union (AU), the AU, its organs, or any African organisation recognised by the AU.¹⁰⁸ *Amici curiae* are not explicitly mentioned in the rules of procedure of the AfCtHPR, but individuals and NGOs that participated in procedures before the AfComHPR may continue participating before the AfCtHPR.¹⁰⁹ Hearings at the AfCtHPR are generally held publicly.¹¹⁰

The European Court of Human Rights (ECtHR) has jurisdiction on contentious as well as advisory proceedings in all matters concerning the interpretation and application of the European Convention on Human Rights (ECHR) and its protocols.¹¹¹ As of March 2013, 47 states had ratified the ECHR.¹¹² Contentious cases may be initiated by a state party or by any person, NGO or group of individuals against a state party.¹¹³ It is important to note that the ECtHR may not hear altruistic claims. Admissibility requires that the applicant has suffered significant disadvantage.¹¹⁴ Advisory opinions may be requested by the majority of the representatives of the Committee of Ministers of the Council of Europe (COE) on legal questions concerning the interpretation of the Convention and its protocols, except questions relating to the content or scope of the rights or freedoms defined in Section I (Articles 1–18) of the Convention and the protocols thereto.¹¹⁵ *Amici curiae* statements may be submitted to the ECtHR.¹¹⁶ Generally, hearings at the ECtHR are open to the public.¹¹⁷

107 Article 5(1) Protocol to the African Charter.

108 Article 4 Protocol to the African Charter.

109 Article 55 of the African Charter. Rule 35(4)(d) of the Interim Rules of Court.

110 Article 10 Protocol to the African Charter and Rule 43 of the Interim Rules of Court.

111 Articles 19, 32 ECHR.

112 See current status of ratification at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

113 Articles 33, 34 ECHR, Rule 36 of the Rules of Court. Criteria for admissibility are defined in Article 35 ECHR.

114 Article 35(3)(b) ECHR.

115 Article 47 ECHR.

116 Article 36(2) ECHR. See also Rule 44 (3a) of the Rules of the Court.

117 Article 40 ECHR.

2. Case Studies

All environmental cases decided by the Inter-American Court of and Commission on Human Rights were initiated by indigenous communities who were significantly affected through industrial activities on their land.¹¹⁸ The Court and Commission usually found, among others, a violation of Article 4 (right to life) and Article 21 (right to property) of the ACHR. The IA-ComHR dealt with the first and so far only climate case tried under a human rights regime. In December 2005, the Inuit Circumpolar Conference filed a petition with the Inter-American Commission on Human Rights (IACHR). The petition sought relief from violations of the human rights of Inuit resulting from climate change (or global warming) caused by greenhouse gas emissions from the United States.¹¹⁹ The IACHR rejected the petition on November 16, 2006, without reasons on the merits.¹²⁰ Since then, the IACHR has discussed the linkages between human rights and climate change several times and it remains to be seen if and how further petitions will be brought.

The AfCtHPR has not dealt with an environment-related case so far. However, the 2001 *Ogoniland* decision of the AfComHPR is a landmark decision in human and environmental rights law.¹²¹ Two human rights NGOs filed a communication against Nigeria alleging that the Nigerian government participated in oil production operations which contaminated the environment among the Ogoni People and led to serious health problems. The Af-ComHPR found a violation of, among others, Articles 4 (respect for life and integrity), 14 (right to property), 16 (right to health), and 24 (right to a general satisfactory environment) of the African Charter.

Although the ECHR does not provide for a right to a healthy environment, the ECtHR heard about 14 environmental cases. In almost all industrial pol-

118 See, for example, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR, judgment of 31 August 2001; *The Kichwa Indigenous People of the Sarayaku and its members v Ecuador*, IAComHR, Case No. 167/03, Merits Report No. 138/09, of 18 December 2009; *Maya indigenous community of the Toledo District v Belize*, IAComHR, Case No. 12.053, decision of 12 October 2004.

119 The petition is available at http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf, last accessed 29 March 2013.

120 See Revkin (2006). No official record of the dismissal could be found.

121 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (2001), AfComHPR, case no. 155/96, decision of 27 May 2002 (*Ogoniland* case).

lution cases the Court found a violation of Article 8 of the ECHR (right to respect for private and family life) and awarded between 3,000 and 24,000 Euros just satisfaction for non-pecuniary damage.¹²² Air pollution was an issue in almost all of these cases. For example, in *López-Ostra v Spain* (1994) the plaintiff and her family suffered serious health problems due to emissions from a tannery waste-treatment plant. The ECtHR found a violation of Article 8 ECHR and held that –¹²³

severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.

In *Tatar v Romania* (2009), a case concerning the January 2000 accident at the Baia Mare gold mine with transboundary effects in Hungary, Serbia and Montenegro, the ECtHR explicitly referred to Principle 21 of the Stockholm Declaration and Principle 14 of the Rio Declaration, which both stipulate the duty of states to ensure that local industrial activities do not cause any transboundary harm.¹²⁴

3. Conclusions and Outlook

The main strength of the regional human rights courts and commissions is their accessibility for individuals and partly indigenous communities and NGOs (case group B). However, standing always presupposes that the plaintiff has already suffered significant harm. Thus, climate change cases can only be successfully brought before court if significant damage has already occurred. Prevention and mitigation claims will therefore hardly be tried before human rights courts.

122 Article 41 ECHR. The industrial pollution cases were *Lopez Ostra v Spain*, App. No. 16798/90, judgment of 9 December 1994; *Guerra and Others v Italy*, App. No. 14967/89, judgment of 19 February 1998; *Taskin and Others v Turkey*, App. No. 46117/99, judgment of 10 November 2004; *Öneryildiz v Turkey*, App. No. 48939/99, judgment of 30 November 2004 (here, the ECtHR only found a violation of Articles 2 and 13 ECHR); *Fadeyeva v Russia*, App. No. 55723/00, judgment of 9 June 2005; *Giacomelli v Italy*, App. No. 59909/00, judgment of 2 November 2006. In *Tatar v Romania*, App. No. 67021/01, judgment of 27 January 2009 (here, the ECtHR dismissed the claim for just satisfaction).

123 *Lopez Ostra v Spain*, App. No. 16798/90, judgment of 9 December 1994 at 51.

124 *Tatar v Romania*, App. No. 67021/01, judgment of 27 January 2009 at 111.

Another barrier to successful climate change litigation before human rights courts is the limited regional scope of their jurisdiction. People and states more severely affected by climate change do often not belong to the same region as the states mainly responsible for greenhouse gas emissions. The international judiciary of human rights has not tackled a complex environmental phenomenon such as climate change. Given the fact that a signatory to one of the human rights treaties will always ‘only’ contribute to climate change and would not be solely responsible for an infringement of rights, it is difficult to imagine how and where these procedures can be used. Still, given the linkages between human rights law and refugee law and the fact that climate change will most probably contribute to forced migration,¹²⁵ these fora might well see more cases, especially in the African system – while an international system will not be at the disposal of other affected regions such as Southeast Asia.

IV. Dispute Settlement Bodies of the World Trade Organization

After the adoption of the Kyoto Protocol, there was much discussion about whether the climate and the trade regime were compatible, and about whether trade-related measures were justified to reach Kyoto targets.¹²⁶ This discussion seems to have worn out, and to date, there has been no climate-change-related dispute tried before the otherwise well-used World Trade Organization (WTO) dispute settlement mechanism.¹²⁷ The main objective of the dispute settlement mechanism is “to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”.¹²⁸ The covered agreements encompass, for example, the WTO agreement itself, and the three core multilateral trade agreements such as the 1947 General Agreement on Tariffs and Trade (GATT)¹²⁹, and the 1994 Agreement on Trade-Related Aspects of Intellec-

125 See McAdam (2012:52ff.).

126 See in lieu of many: World Bank (2007).

127 The first WTO climate dispute could arise from the European Union’s policy measure to integrate international aviation into its carbon trading scheme. However, so far no complaint has been filed in this matter.

128 Article 3(2) 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), 1994 Marrakesh Agreement, Annex 2.

129 1994 Marrakesh Agreement, Annex 1A.

tual Property Rights (TRIPS),¹³⁰ but also special agreements such as the Agreement on Subsidies and Countervailing Measures (SCM).

The WTO dispute settlement bodies do not have jurisdiction on international law outside the WTO regime. However, with respect to interpretation of WTO norms, the Appellate Body has held in the *Reformulated Gasoline* case that the “General Agreement [was] not to be read in clinical isolation from public international law.”¹³¹

Only WTO members may be parties to a WTO dispute. Panels and the Appellate Body may consider submissions of *amici curiae*,¹³² but, as yet, have never formally done so. Proceedings before the WTO dispute settlement bodies are confidential,¹³³ while panel and Appellate Body reports are published.

The substantive law of the WTO regime does not contain any norms actively seeking environmental protection. WTO law does, however, provide for several norms of collision, such as Article XX GATT, allowing members under certain conditions to enact environmental policies although they result in trade barriers. All cases related to environmental protection have been tried under these types of norms.¹³⁴ The first *Shrimp-Turtle* case¹³⁵ serves as a good example of how the WTO Appellate Body referred to international environmental law in interpreting Article XX GATT:

130 (ibid.:Annex 1C).

131 *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at III.B. See also Marceau (1999).

132 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, 105-108.

133 Articles 14(1), 17(10), and 18(2) DSU.

134 See *United States – Restrictions on Imports of Tuna*, GATT Doc. DS21/R (1991) and *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (1994); *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996; *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001; *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted on 21 November 2006. For a concise environment-related overview of the WTO dispute settlement body see Sands (2003:220ff.).

135 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998.

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”. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. For instance, the 1982 United Nations Convention on the Law of the Sea ... repeatedly refers in Articles 61 and 62 to “living resources” in specifying rights and duties of states in their exclusive economic zones. The Convention on Biological Diversity uses the concept of “biological resources”. Agenda 21 speaks most broadly of “natural resources” and goes into detailed statements about “marine living resources”.¹³⁶

We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g).¹³⁷

Thus, although due to the nature of WTO law climate protection arguments are likely to be brought forward on the respondent’s side only, the WTO dispute settlement bodies are in a good position to contribute to the strengthening of international climate change law. For example there is still the chance that a country might take trade-related measures to reduce energy consumption or border-tax products from states where energy taxes do not apply. In such a case, climate policy considerations would be used by the respondent state as justification. Another pertinent scenario could be a state violating TRIPS standards to improve adaptation or mitigation technologies, arguing the need to achieve the overall goal of the UNFCCC as codified in Article 2 UNFCCC.¹³⁸

V. Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) is briefly mentioned here because it recently dealt with an arbitration between a private investor and Ukraine, regarding a Joint Implementation Project under the Kyoto Protocol.

Jurisdiction of an arbitral forum is agreed upon in a case-specific arbitration agreement between the parties to a dispute or in the dispute settlement

136 (ibid.:130).

137 (ibid.:131).

138 See on this issue in depth: Rimmer (2011).

clause of a treaty.¹³⁹ In arbitral proceedings parties may agree upon the applicable law. In the absence of such an agreement, a tribunal applies general international law or applicable law according to choice of law rules. In 2001 member states of the PCA adopted optional Environmental Arbitration Rules and Environmental Conciliation Rules.¹⁴⁰ Parties to arbitral proceedings before the PCA may be states, international organisations or private parties. There is no record of *amici curiae* participation in proceedings before the PCA. Arbitration proceedings and awards are confidential unless parties to a dispute agree otherwise.¹⁴¹

According to the information available on the PCA's website, the PCA has dealt with five environmental disputes.¹⁴² As far as is known to the authors, the first climate-related dispute and, at the same time, the first dispute to which the Environmental Arbitration Rules have been applied is the investor-state arbitration *Naftac v Ukraine*.¹⁴³ The PCA does not provide for any official information on this case. According to information available on the internet, the case arose from a Joint Implementation Project under the Kyoto Protocol. The investor Naftac claimed a compensation payment of \$185 million and definition of GHG emission reduction units on his behalf under a Collateral Custody Agreement.¹⁴⁴ Both parties alleged violations of

139 Several international environmental agreements refer to the PCA in their dispute settlement clauses, for example Annex 1(3) of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean or Article 1(2) of the Schedule to the 1991 Protocol to the Antarctic Treaty on Environmental Protection.

140 These rules are based on the UNCITRAL Arbitration Rules but specifically elaborated for environmental disputes. For example, arbitrators and experts may be chosen from a list of persons with special expertise in international environmental law, Articles 8(3) and 27(5) of the Environmental Arbitration Rules.

141 See, for example, Article 32(6) of the Environmental Arbitration Rules.

142 On the majority of the cases there is no information publicly available. The five cases relating to environmental issues are *United States/Great Britain (North Atlantic Coast Fisheries)*; award of 7 September 1910; *Netherlands/France*; award of 12 March 2004; *Ireland/United Kingdom (OSPAR Arbitration)*, award of 2 July 2003; *Ireland/United Kingdom (MOX Plant Case)*, documents on the proceedings are available on the PCA website; *Belgium/Netherlands (Iron Rhine Arbitration)*, award of 24 May 2005.

143 *Naftac Limited (Cyprus) v State Environmental Investment Agency of Ukraine*, award of 4 December 2012 according to a publication of the Ukrainian Bar Association for Foreign Affairs, available at <http://ukrinur.com/publications/?year=2013>, last accessed 29 March 2013. Full article only available in Ukrainian.

144 Peregelynska (2012).

certain obligations under the Collateral Custody Agreement. In the arbitral award the arbitral tribunal dismissed the monetary claim and partly granted the claim regarding the transfer of emission reduction units.¹⁴⁵

If proceedings and the award in an arbitration before the PCA are confidential, the arbitral tribunal is not in a position to set an objective marker on legal issues. Non-transparent proceedings and decisions cannot contribute to the interpretation and further development of international climate change law. For example, Joint Implementation (JI) is one of the three main instruments the Kyoto Protocol provides for to tackle climate change. The proper implementation of JI projects is vital for the functioning and credibility of the climate regime. Therefore, disputes regarding the practice of Kyoto mechanisms should not be dealt with behind closed doors, but in transparent judicial and quasi-judicial fora and proceedings.

VI. International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes (ICSID),¹⁴⁶ linked to the World Bank, offers conciliation and arbitration of investment disputes between member states and nationals (private investors) of other member states.¹⁴⁷ Mutual consent to ICSID proceedings is usually not given on a case-by-case basis, but through a consent clause in an investment treaty between the host state and the investor's state of nationality. More than 2,000 bi- and multilateral treaties in force contain such consent clauses.¹⁴⁸ The arbitral tribunal may accept submissions of *amici curiae* at its discretion.¹⁴⁹ Hearings may be attended by third persons unless either party objects.¹⁵⁰ Documents of the proceedings, including the arbitral award, are generally confidential.¹⁵¹

145 (ibid.).

146 ICSID was established through the 1956 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The ICSID Convention has currently 147 member states, www.icsid.worldbank.org.

147 Article 1(2) ICSID Convention.

148 According to Orrego Vicuña (2006). No party may withdraw its consent unilaterally, Article 25(2) ICSID Convention.

149 Rule 37(2) of the Arbitration Rules (amendment of 2006).

150 Rule 32(2) of the Arbitration Rules.

151 Article 48(5) ICSID Convention, Regulation 22(2) of Administration and Financial Regulations.

Several cases dealt with by arbitral tribunals at the ICSID involved environmental interests.¹⁵² In all cases environmental protection arguments were brought forward on the defendant's (state) side to justify measures against an investor. The first and so far only climate-related case before an ICSID tribunal was the *Vattenfall/Germany* case.¹⁵³ The content of the proceedings and award are confidential. According to information drawn from the media, Greenpeace, and two minor interpellations in the German federal parliament, the Swedish energy corporation Vattenfall owned by the Swedish state claimed €1.4 billion of damages based on an alleged breach of the 1994 Energy Charter Treaty, a multilateral investment protection treaty.¹⁵⁴ As part of the permit of a Vattenfall coal-fired power plant in Hamburg-Moorburg, based on German water law, Hamburg authorities issued permit conditions that required Vattenfall to undertake certain expensive environmental protection measures. Vattenfall argued that such permit conditions violate the clauses on expropriation and fair and equitable treatment of the Energy Charter Treaty.

Confidential proceedings and awards are in the authors' opinion not suitable to deal with public interests such as climate change. Within such procedural settings, ICSID tribunals will not be in a position to contribute to the climate regime in a positive sense, or set *objective markers*. The Vattenfall case has shown that there is an acute danger that the tribunal will interpret national environmental law rules, bypassing the judiciary in participating countries. In the case of the Vattenfall dispute, a recent judgment by the High Administrative Court of Hamburg has actually shown that the settlement reached under ICSID procedures is not valid under applicable environmental law. Given the context of ICSID and the underlying agreements conferring jurisdiction, the authors see no sign that ICSID will contribute to climate protection in a case where, for example, expropriation or investment regulations were justified through climate protection rules.

152 For example, *Metalclad Corp. v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 25 August 2000; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008.

153 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*; ICSID Case No. ARB/09/6; award of 11 March 2011, embodying the parties' settlement agreement.

154 Knauer (2009); see also two minor interpellations (Kleine Anfragen), Bundestagsdrucksachen 17/510 and 17/971; most detailed information available at Greenpeace website http://www.greenpeace.de/themen/klima/nachrichten/artikel/vattenfall_will_sparen_wir_sollen_zahlen/ansicht/bild/, last accessed 29 March 2013.

VII. UNESCO World Heritage Committee

The Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value (World Heritage Committee) established under UNESCO¹⁵⁵ dealt with several petitions regarding the protection of the following world heritage sites from the impacts of climate change: Blue Mountains (Australia), Great Barrier Reef (Australia), Barrier Reef (Belize), Sagarmatha National Park (Nepal), Huascarán National Park (Peru), and Waterton-Glacier Peace Park (USA). All petitions were initiated by several NGOs and individuals requesting to inscribe the world heritage sites threatened by climate change on the List of World Heritage in Danger and issue corrective measures.¹⁵⁶ As part of the corrective measures petitioners also claimed the reduction of GHG emissions.¹⁵⁷

The World Heritage Committee did not follow these requests. In its decision it encouraged “all States Parties to seriously consider the potential impacts of climate change within their management planning ... and to take early action”. It further requested an expert group, including the petitioners, to “jointly develop a strategy to assist States Parties to implement appropriate management responses” and prepare a joint report on “Predicting and managing the effects of climate change on World Heritage”.¹⁵⁸ The strategy describes general mitigation and adaptation measures, but does not require specific action.¹⁵⁹

155 See Articles 8ff. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) 15 UNTS 511, Article 4 (Opened for signature 16 November 1972, entered into force 17 December 1975).

156 For a detailed documentation of such cases see <http://www.climatelaw.org/cases/topic/unesco>, last accessed 29 March 2013. For an overview on world heritage sites affected by climate change see Colette (2007).

157 See, for example, Blue Mountains Petition, paras 62f., available at <http://www.climatelaw.org/cases/country/intl/cases/case-documents/unesco/unozblmntns/body.pdf>, last accessed 29 March 2013. The claim was based on Article 4 of the World Heritage Convention where states parties agreed to do all they can, to the utmost of their own resources, to ensure, among others, the protection and conservation of their cultural and natural heritage sites.

158 World Heritage Commission, Decision 29COM 7B.a (Threats to World Heritage Properties), paras 6, 7, and 9, available at <http://whc.unesco.org/en/decisions/351/>, last accessed 29 March 2013.

159 Strategy and report are available at <http://whc.unesco.org/en/climatechange/> last accessed 29 March 2013.

Given the severe impacts climate change already has, and will increasingly have in the future, on the respective world heritage sites, the decision of the World Heritage Committee appears disappointing. Thus, despite an appropriate mandate and a substantive legal basis in the World Heritage Convention the past practice of the World Heritage Committee indicates that it is not ready to contribute to the strengthening of the climate regime in a meaningful way. Despite the fact that the Committee is not a dispute settlement body as such, it could contribute to setting *objective markers* by ordering countries to protect specific species and ecosystems, paving the way towards an objective interpretation of what “dangerous” might mean with respect to ecosystems in Article 2 UNFCCC. The case studies on impacts of climate change on world heritage sites¹⁶⁰ might provide a slim chance of setting *objective markers*, but they might become more pronounced if sites are actually destroyed such as parts of the Great Barrier Reef in Australia.

VIII. OECD Guidelines for Multinational Enterprises

Two climate cases have been dealt with by the German National Contact Points (NCPs), established under the 1976 OECD Guidelines for Multinational Enterprises (OECD Guidelines). The OECD Guidelines comprise a set of voluntary principles and standards for responsible business conduct. Chapter V specifies such principles and standards with a view to environmental and public health protection. Since a reform of the Guidelines in 2000, they are not only applicable to companies operating within the OECD countries, but also on those operating from OECD member states in non-OECD member states. As control mechanism the OECD Guidelines establish NCPs, located in national government offices, to handle enquiries that may be initiated by parties concerned, including representatives of the business community, labour organisations, environmental organisations, and other members of the public.¹⁶¹ It is important to note, however, that the whole procedure is voluntary. The OECD Guidelines are soft law among states and may not compel companies to respond to enquiries instituted against them.¹⁶² Proceedings are generally confidential.

160 See <http://whc.unesco.org/en/activities/473/>, last accessed 29 March 2013.

161 OECD Guidelines for Multinational Enterprises, Part II, Implementation Procedures at I.B.3. See also Part III, Commentary on the Implementation Procedure, 8.

162 Freeman et al. (2006:17).

In the first climate-related complaint, the German NCP rejected a complaint instituted by Germanwatch against Volkswagen.¹⁶³ Germanwatch argued that product range and business strategy are climate damaging and therefore incompatible with the OECD Guidelines.¹⁶⁴

In the other case, Greenpeace filed a complaint against Vattenfall alleging that the high level of CO₂ emissions from Vattenfall's coal-fired power plant under construction in Hamburg-Moorburg is incompatible with the OECD Guidelines.¹⁶⁵ Greenpeace also argued that Vattenfall's request for arbitration against Germany before ICSID is not in accordance with the Guidelines.¹⁶⁶ The German NCP rejected the complaint.

In the brief reasoning of its decisions, the German NCP basically argued that it does not accept the complaints because neither Vattenfall nor Volkswagen violated any national or international laws. If this were the rationale behind the OECD Guidelines, they would be meaningless. However, the practice of national NCPs varies greatly and there are other examples where NCPs dealt appropriately with environmental cases brought to their attention.¹⁶⁷ Thus, the NCPs established under the OECD Guidelines are still considered to be in a good position to contribute to the strengthening of the climate regime, not least by forcing economic and finance ministries to deal with issues usually reserved for environmental departments.

D. Conclusions

Considering the lack of negotiated success in establishing an effective regime for reducing greenhouse gas emissions, there is a clear need for a 'court order' establishing objective markers. Yet, as our analysis has shown, there is hardly any international jurisdiction for an institution actually to look at climate change in a broad sense. There is practically no avenue for the general public (category C), despite the Kyoto Protocol's compliance sys-

163 *Germanwatch v Volkswagen*, Statement of NCP Germany of 20 November 2007.

164 For the details of the complaint see *Germanwatch v Volkswagen*, Complaint of 7 May 2007.

165 *Greenpeace Germany v Vattenfall*, Statement of NCP Germany of 15 March 2010. Complaint of 29 October 2009, 5–9.

166 (*ibid.*:9–12).

167 See, for example, *Survival International v Vedanta Resources plc*, Statement of NCP UK of 25 September 2009, case file available at http://oecdwatch.org/cases/Case_165, last accessed 29 March 2013.

tem, to engage a court or tribunal. In fact, other than states, private investors have the most direct access to international fora such as IDSID, even though the set of substantive law rules they can apply is not more differentiated than the rules that could be applied by states or public triggers (such as the no-harm rule or general obligations under the UNFCCC).

The truth is that, even though over the past 15 years states have shown a great reluctance to act in earnest to protect the global climate, while predictions of damage as a result of climate change have risen, there have been no international cases to speak of, in any category set forth in the beginning. Yet, this does not necessarily mean that such cases *could* not be brought to court. However, given the reluctance of states to seek objective markers, it might be wise to contemplate more options for public or NGO triggers in fora such as ITLOS or conciliation under the UNFCCC. While this may be a long way off, it seems to the authors that at least using Article 14 UNFCCC might have the potential to engage an international quasi-judicial forum with little diplomatic damage. Whether a state party will make use of this avenue remains to be seen – and it will also depend on the results on the table after 2015.

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