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Sandrine Maljean-Dubois, Vanessa Richard

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institut du développement durable et des relations internationales – 6, rue du Général Clergerie – 75116 Paris – France – Tél. : 01 53 70 22 35 – iddri@iddri.org – www.iddri.org

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Mechanisms for monitoring and implementation of international environmental protection agreements

Sandrine Maljean-Dubois and Vanessa Richard (Ceric)

Sandrine Maljean-Dubois and Vanessa Richard presented this communication at the conference entitled «International

environment governance» organised by Iddri and UICN the 15th and 16th march 2004 in Paris.

This text only commits its authors.

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Mechanisms for Monitoring and Implementation of International Environmental Protection Agreements

Sandrine Maljean-Dubois

CERIC, France

Vanessa Richard

CERIC, France

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With the support of the French Ministry for Ecology and Sustainable Development, France

Institut du développement durable et des relations internationales

6, rue Général Clergerie

75116 Paris, France

Téléphone : 33 (0)1 53 70 22 35 - iddri@iddri.org

IDDRI (Institute for sustainable development and international relations) is a policy research institute based in Paris. It is supported by French research institutions, business, NGOs, as well as the French government. IDDRI has been created as a forum for debate, and a network, where stakeholders public administrations, the scientific community, NGOs, the private sector meet to define issues requiring new research, debate and to identify consensus and diverging opinions, thereby creating a common culture.

IDDRI works on major governance issues related to sustainable development, in collaboration with international research networks.

As part of the debate on international environmental governance, the IDDRI, is co-ordinating a series of studies commissioned to international experts. This series of studies looks at various facets of international environmental governance identified during the conference which IDDRI organised on this theme in March 2004 in Paris. The purpose of this exercise is to provide the working groups with some background information in the context of France's initiative to initiate discussions around the creation of a United Nations Environmental Organisation.

The series of reports will deal with the following themes:

- Issues raised by the international environmental governance system
- Mobilisation, diffusion and use of scientific expertise
- Observation system and alert
- Mechanisms to monitor member states' commitments
- Articulation between the various levels of government
- Role of the stake-holders
- Implication of a UNEO for the global architecture of the international environmental governance system
- Financing for environment and development

Project manager: Benoît Martimort-Asso – benoit.martimort-asso@iddri.org

Author

Sandrine Maljean-Dubois Chargée de recherche CNRS Vice Head of the CERIC (UMR 6201) 38 avenue de l'Europe 13090 Aix en Provence France maljean.dubois@wanadoo.fr http://www.ceric-aix.fr/	Vanessa Richard Post-doctoral Researcher CERIC (UMR 6201) 38 avenue de l'Europe 13090 Aix en Provence France vanrichard@yahoo.com http://www.ceric-aix.fr/
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Contents

Introduction	4
Section 1: Current Situation – Analysis and Assessment of Monitoring and Implementation Mechanisms.....	6
A) The vitality of international environmental law.....	6
1. Normative vitality	6
1.1. Normative profusion	6
1.2. Normative innovations	7
2. Institutional vitality.....	10
2.1. Institutional profusion.....	10
2.2. Institutional innovations: new actors	12
B) Effectiveness of international environmental law.....	13
1. Structural implementation deficiencies	13
1.1. Efficacité, effectivité and effectiveness	13
1.2. Difficulties peculiar to the international legal order.....	14
1.3. Difficulties peculiar to international environmental law.....	14
2. Methods of promoting implementation	16
2.1. Supporting implementation: monitoring and verification.....	16
2.2. Incentives.....	22
2.3. Sanctions.....	23
Section 2 – Prospects and Future Options.....	29
A) Options to improve and strengthen monitoring and implementation.....	29
Option 1 – Improvement and strengthening within the present decentralized framework	29
1.1. Improving information States supply.....	29
1.2. Developing potential inquiries and inspections	30
1.3. Strengthening follow-up support for Parties experiencing difficulties.....	31
1.4. Harmonizing donor countries and organizations' environmental policies	31

Option 2 – Improvement and strengthening within a new centralized framework	33
Sub-option 2.1. Centralizing without a WEO	33
2.1.1. Clustering.....	33
2.1.2. UNEP and the centralization of monitoring and implementation.....	33
2.1.3. GEF and the implementation of international environmental protection agreements.....	34
Sub-option 2.2. Centralizing with a WEO	34
B) Options for improving and strengthening dispute settlement	37
Option 1 – Improvement and strengthening within the present decentralized framework	37
1.1. Fostering the triggering of international proceedings	37
1.1.1. As regards States’ submissions.....	38
1.1.2. As regards non-State rights of action.....	41
1.2. Improving connections between international proceedings.....	42
1.3. Better equip international jurisdictions to deal with environmental disputes.....	43
1.3.1. Handling of technical issues.....	43
1.3.2. Provisional measures	44
1.4. Developing the role of the domestic judge.....	44
Option 2 – Improvement and strengthening within a new centralized framework.....	45
2.1. In favor of an International Environmental Court	46
2.2. Against an International Environmental Court	46
2.3. What could or should an International Environmental Court look like?.....	47

Introduction

1. Whether from public or private sources, whether regional or global, on a regular basis numerous and lengthy reports bear witness to the continued deterioration of the state of the environment. At the beginning of the 21st century, environmental changes are of great concern and in several respects carry the risk of being irreversible.
2. The latest environmental assessment issued by UNEP, referred to as "GEO3" for Global Environmental Outlook, warns of continued deforestation and loss of biodiversity at an unprecedented pace in the history of humankind.¹ According to the report, "the increasing pace of change and degree of interaction between regions and issues has made it more difficult than ever to look into the future with confidence" (UNEP, 2002). The World Bank's report on World Development in 2003 notes that the next fifty years could see world population increase by 50% reaching 9 billion people and a fourfold increase in gross domestic product reaching 140 billion dollars. This kind of growth risks, by its unreasonable expansion and unequal distribution, provoking social and environmental tensions threatening development efforts and living conditions.²
3. For more than thirty years, legal instruments have been used to protect the environment, and specifically international law when the stakes involve a strong transnational aspect. International environmental law has experienced remarkable growth both in quantity and in scope.
4. Following a "frenetic" normative phase, during which the objective was to build a body of rules and little attention was paid to implementation, a relative ineffectiveness of the legal instruments adopted was observed. At the beginning of the 90s, legal scholars and practitioners started thinking about the reasons for such relative ineffectiveness and possible solutions.³ Lawyers and experts in international relations follow the same trend: after having focused mostly on the terms of adoption and the substance of international regimes, they are now focusing on implementation (RISSE, 2000). Until then, a rationalistic bias had led to the hasty conclusion that: (1) governments make commitments only after having determined that these are in their interests, (2) and therefore they generally implement treaties and comply with their commitments and that (3) if they do not do so, sanctions will be applied to "punish" non-compliance as well as to deter other potential breaches. Reality is totally different and a lot more subtle, in particular in the environmental field where many diverse reasons can motivate States to make commitments, and where they sometimes make them without even intending to implement the commitments, or they otherwise attempt to implement their commitments but lack the necessary means (BROWN WEISS & JACOBSON, 1998).
5. The issue of effectiveness has gradually become a major field of research in economics and international relations, and in international law (SPRINZ, 2000), giving rise to various analyses, from the most empirical to the most theoretical, with writers attempting to qualify or even quantify (CARSTEN & SPRINZ, 2000; SPRINZ, 2003) the degree of effectiveness of instruments and to explain the disparities observed. As part of a constantly evolving legal and institutional order, understanding these phenomena is a crucial preliminary requirement before attempting to strengthen the body of rules and instruments, and more broadly, improving the international "governance" of the environment.
6. This is a burning issue. In spite of intense diplomatic activity, Heads of State and Governments which met during the Earth Summit Rio+5 in New York in June 1997 admitted they were "deeply concerned that the overall trends with respect to sustainable development [were] worse today than they were in 1992" and committed "[them]selves to ensuring that the next comprehensive review of Agenda 21 in the year 2002 demonstrates greater measurable progress in achieving sustainable development."⁴ Five years later, the Johannesburg Declaration echoed this pessimistic assessment: "The global environment continues to suffer." "Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effects of climate change are already evident, natural

¹ The rate of extinction of vertebrates could reach 15 to 20% over the next 100 years (UNEP, 2002).

² *Chronique des faits internationaux, RGDI*, t. 106, 2002-4, p. 95.

³ The same trend can be identified at the European Community level: European Commission, Communication of the European Commission 96 (500) on implementation of European environment law, 22 October 1996

⁴ Closing Declaration of the Earth Summit Rio +5, doc. A/S-19/29, 27 June 1997.

disasters are more frequent and more devastating, and developing countries more vulnerable, and air, water and marine pollution continue to rob millions of a decent life.⁵...

7. We will attempt in this paper, first to describe and assess monitoring and implementation mechanisms (Section I), and second to put forward a few trails for improving and strengthening these mechanisms (Section II).

5 Johannesburg Declaration on Sustainable Development, A/CONF.199/L.6/Rev.2, 4 Sept. 2002.

Section 1: Current Situation – Analysis and Assessment of Monitoring and Implementation Mechanisms

8. Even though international environmental law is remarkable for its vitality (A), its effectiveness is not always guaranteed (B). Thus, its strengthening is a major challenge for the future.

A) The vitality of international environmental law

9. This vitality is expressed at both normative (1) and institutional (2) levels. Abundance and originality characterize this field from both standpoints, so much so that international environmental law offers — as a consequence of such a strong vitality — a rather messy or even dislocated picture.

1. Normative vitality

10. International environmental law's normative vitality can be measured with respect to its rapid and ample growth as well as with respect to its innovations, as regards in particular “new law-making methods.”

1.1. Normative profusion

11. Partially responsible for the current environmental crisis, the law is also seen as one of its major remedy (HUGLO & LEPAGE-JESSUA, 1995). Legal rules' usefulness was recognized early on. Thus, in the 3rd century B.C., the Indian emperor Asoka enacted the first edict that protected various animal species (DE SADELEER, 1995). Nevertheless, the development of international environmental law is much more recent. Though a few milestones were laid out early — such as the 1902 Paris Convention for the Protection of Birds Useful to Agriculture — it was actually during the second half of the 20th century and in particular since the end of the 70s that environmental protection regulations grew rapidly and simultaneously in most countries, “following a new awareness that our planet is threatened by the population explosion and its consequences, by the impact of increasingly invasive technologies and the disorganized increase in anthropogenic activity” (KISS, 1989). Under pressure from public opinion, warned by scientists, relayed by many local and international associations and NGOs, governments have found in legal instruments a means for combating the dramatic deterioration in the state of the environment. Simultaneously, international cooperation was spurred on by the growing awareness of the global nature of the risk and the solidarity that links environmental factors. Initially limited to the bilateral framework, cooperation quickly expanded multilaterally and gave rise to unprecedented, ample and fast-paced regulatory activity. Its growth has been marked by a series of environmental disasters (KISS, 1989).

12. According to René-Jean Dupuy, this “normative profusion” is an “obvious demonstration of how serious the warning was for the conscience of nations” (DUPUY, 1991). The understanding of the fragility of our planetary ecosystem and of the increasing threats posed to it, make for “a return and rediscovery in international discourse of the old Aristotelian and Thomist concept of ‘global commons’” (BADIE & SMOUTS, 1992). International environmental law develops in pursue of these “global commons”. And international law but also Community law as regards European Union countries often precede domestic laws that they energize and force to evolve.

13. Nowadays, apart from bilateral treaties which are far more numerous, over five hundred multilateral treaties — essentially regional — have been adopted in the environmental field. More than three hundred were negotiated after 1972. The adoption of treaties allowed the formalization, sector after sector, domain after domain, of *international regimes*, institutionalized, organized and supported by financial commitments.

14. Such a profusion of international agreements involves risks. Influenced by various factors, States multiply their commitments. It should then come as no surprise that the means for implementing adopted instruments — “capacities” in the UN jargon — are insufficient, both at the institutional level and financially and in particular for developing countries.

15. The increasing number of international agreements and other instruments creates a lack of consistency. International law suffers from a certain degree of fragmentation, all the more dangerously so because of institutional compartmentalization. Because they were quickly elaborated and without prior overall thought, treaty systems are not — except in rare circumstances i.e., systems established by a framework convention and its additional protocols — organized into a hierarchy. Loosely linked, they

look more like a juxtaposition of parallel legal systems than like a network. Hopes Agenda 21 expressed in 1992 —Chapter 38—were not fulfilled from this point of view.⁶ As summarized in the 1997 resolution of the *Institut du droit international*: “the growth of international environmental law was accomplished in an uncoordinated manner, resulting in duplications, inconsistencies and gaps.”⁷

16. Missing within the field of international environmental law, consistency is hardly a feature of the relationship between international environmental law and the rules set-forth in other fields of international law, despite the fact that the notion of sustainable development is supposed to rest on three “interdependent and mutually reinforcing pillars”: “economic development, social development and environmental protection”⁸. The trade/environment relationship is probably the best example of this lack of consistency. In Johannesburg, the chapter of the Plan of Implementation related to the relationships between trade and environment was heavily debated. The reluctance of developing countries met with the circumspection of certain industrialized countries – mainly but not exclusively the United States, which attempted to go back on the small achievements of the Doha Declaration⁹. The Action Plan, as adopted, was limited in the end to this Declaration, including as regards the relationship between multilateral environmental agreements (MEAs) and WTO law.¹⁰ Reflecting the refusal of the WTO Appellate Body to read WTO rules in “clinical isolation” from public international law,¹¹ references to “mutual support” or to “deference” do not solve problems related to the lack of consistency of the international legal order. Failing an agreement which would organize obligations into a hierarchy, these expressions confront two bodies of special rules, both equal and autonomous. Having missed this opportunity, if a clarification takes place in the relationship between MEAs and the WTO Agreements, it will be accomplished within the WTO framework.¹² However, the issue arises more and more often, including with treaties that are not particularly exposed, such as the Ramsar Convention on Wetlands of International Importance,¹³ while irritating debates poison the negotiation of new environmental treaties that increasingly use trade measures. The entry into force of the Cartagena Protocol on International Trade in Living Modified Organisms (LMOs), as well as that of the Kyoto Protocol to the UN Framework Convention on Climate Change, is very likely to be highly controversial in this respect.

17. The development of international environmental law has been rapid, wide-ranging and also to a large extent innovative.

1.2. Normative innovations

18. From a methodological point of view, international environmental law is innovative in two ways: trying-out new law-making processes, it is also a hotbed of new tools.

1.2.1. New ways of making law

19. Similarly to other “new” legal fields, international environmental law’s formal sources of are highly diversified, from *lex feranda* to *lex lata*. The classical theory of international law sources is not resisting very well, in several respects, to the rough treatment inflicted by this young legal domain.

20. International treaties have, up to now, been the most common tool for inter-State cooperation, in particular because their substance is compulsory pursuant to the principle *Pacta sunt servanda* recalled in Article 26 of the Vienna Convention on the Law of Treaties.¹⁴ Over the past few years diplomatic activism has carried on the elaboration of international environmental law treaties on a regular basis

⁶ *Agenda 21. Rio Declaration on Environment and Development. Statement of Principles on Forests*, United Nations, 1993.

⁷ IDI, *Procédures d'adoption et de mise en œuvre des règles en matière d'environnement*, Resolution of 4 September 1997, RBDI, No. 1997/2.

⁸ Johannesburg Declaration on Sustainable Development, A/CONF.199/L.6/Rev.2, 4 Sept. 2002.

⁹ Ministerial Declaration adopted on November 14, 2001, Ministerial Conference, Doha, WT/MIN(01)/DEC/1, 20 November 2001.

¹⁰ Including with respect to the relationship between the Convention on Biodiversity and the TRIPS Agreement: § 100.

¹¹ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R of 29 April 1996.

¹² See the various possible clarification methods: BOISSON DE CHAZOURNES & MBENGUE, 2002(2).

¹³ Concerning impediments to international trade that a policy of protection against “exotic” species may result in (*ENB*, 2002, No. 18).

¹⁴ “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

(KISS, 2001). However, considering its modest accomplishments, such normative proliferation is beginning to look like a blind pursuit. A kind of “Convention fatigue” (SMOUTS, 2001) also explains why the adoption of new conventions was not on the agenda at Johannesburg, the World Summit on Sustainable Development signaling a rejection — at least temporarily — of the treaty adoption-technique for dealing with a number of conflict-prone issues calling for compulsory commitments, such as corporate liability in particular for transnational corporations, or the various aspects of “sustainable” agriculture. The Plan of Implementation reaffirms, on the contrary, the necessity of reducing “the amount of time spent on negotiated outcomes in favour of more time spent on practical matters related to implementation” (§156)... It often insists, moreover, on the need for the ratification and implementation of the various existing conventions.¹⁵

21. With a subject that is so new and controversial, there is very few customary law. Except for the hypothetical “instantaneous” custom, the creation of customary law is a long and hesitant process. So, considering the urgency, the best is to seek other solutions.

22. The traditional display of international law sources —as listed in Article 38 §1 of the Statute of the International Court of Justice, drafted in 1920 — does not take into account the importance of soft law in the formation of international law. Soft law — that is to say “green” law, which might be a better expression — is not monolithic: unilateral acts of States, unilateral acts of international organizations (recommendations, declarations, programs, decisions etc.) or diplomatic conferences, non-treaty concerted acts (communiqués, charters, codes of conduct, memoranda...) etc. The profusion of soft law is such that it would be difficult to make an inventory of it (KISS & BEURIER, 2000). The environment is still an area where “‘non-law’ [absence of a rule of law] is quantifiably larger than that covered by law” (CARBONNIER, 1963). This wealth of soft law is a pathological symptom (WEILL, 1982) if ever there was one, of the fact that this field is still new and far from having achieved worldwide consensus, affected in particular by the North-South or the Euro-Atlantic fracture. But even if soft law is theoretically considered to be non-binding, it may have some practical legal validity: the careful negotiation of the substance of soft law instruments, as well as the fact that States sometimes accept the establishment of mechanisms for monitoring and verifying their implementation,¹⁶ are rather reliable indicators of their actual (non-)binding character. The degree of normativity and effectiveness of these instruments are in fact variable. The *summa divisio* between “hard” and “soft” law, between compulsory and non-compulsory, does not stand up to thorough analysis (SHELTON, 2000). One example of it can be the effects and legal consequences of multilateral development banks’ conditionalities. The World Bank, for instance, has adopted Operational Policies (OPs), Bank Procedures (PBs) and identified good practices (GPs), elaborated by and for the Bank and which apply to its staff only for the design, assessment and carrying out of funded projects. These quasi-legal instruments obviously have an influence on the substance of the loan agreements signed with borrowing States (BOISSON DE CHAZOURNES, 2000), which are binding (BROCHES, 1959). Most of them require, moreover, that the Bank’s staff demand that the borrowing State adapt its behavior in a number of ways, failing which the Bank will refuse to fund the project. From the perspective of promoting sustainable development, we can notice that the relevant policies and procedures of international development banks are inspired by principles that are sometimes only *lex ferenda*, or whose legal nature is imprecise. Their assimilation as a conditionality for receiving funding consequently “hardens” their normative outlines and internationalizes the decision-making process in environmental matters (HANDL, 1998).

23. The traditional presentation of sources of international law also refuses to acknowledge the participation of private actors as a law-making source, that was originally strictly intergovernmental but has gradually become transnational. These trends correspond to the increasing heterogeneousness of international society, which includes, besides States and traditional international organizations, international and even national public agencies, non-governmental organizations and private entities, firms in particular. These “new actors” are pushing forward “breaking the traditional mold of standard international law” and are also contributing to the making of international law (CARREAU, 1994). For example, at the World Summit on Sustainable Development for the first time a UN Conference produced, besides traditional “outcomes” referred to as Type 1 (and non-binding), Type 2 outcomes. The latter, which are referred to as partnerships, are tangible projects which bring together public entities and the

¹⁵ In particular the PIC and POP Conventions (§23a), the Basel Convention (e), the United Nations Convention on the Law of the Sea (§30 a), the Convention on biological diversity and its Protocol on Biosafety (§ 44).

¹⁶ See the role of the Commission on Sustainable Development in monitoring Agenda 21.

private sector. Voluntary and self-organizing by nature, framed by vague “guiding principles,”¹⁷ partnerships apply a concept that already existed in Rio, according to which the private sector and the “major groups” must be fully associated and mobilized, since governments cannot act alone. The UN Secretary General made this his creed. Moreover, in order to instill “civic virtue in the global marketplace,” he took the initiative of the Global Compact, launched in July 2000. It aims at leading the private sector — firms but also unions or NGOs — to give a commitment that it will respect nine core principles related to human rights, labor rights and protection of the environment, commitment which can also lead to partnerships.¹⁸ The practical terms and conditions for the follow-up and monitoring of these partnerships’ implementation nevertheless remain to be defined.¹⁹

1.2.2. New tools

24. In 1992, the Rio Declaration referred in Principle 16 to economic instruments when declaring that States should “endeavour to promote the internalization of environmental costs and the use of economic instruments.” Agenda 21 goes in line with the Declaration. It declares in particular that States must “establish a policy framework that encourages the creation of new markets in pollution control and environmentally sounder resource management.”²⁰ More generally, International and European law induces and influences a diversification of national public policies, by largely promoting the use of economic tools, the latter being used increasingly at International and European levels themselves through property rights, eco-certification, financial incentives or the market on emissions trading (MALJEAN-BUBOIS, 2002).

25. The 1997 signing of the Kyoto Protocol to the UN Framework Convention on Climate Change is an excellent example. For the first time at the international level the economic instrument was designed as the main way of reaching the objectives of pollutant emissions’ reduction; the underlying inspiration of the Protocol perfectly mirrors the preeminence of market strategies (BOISSON DE CHAZOURNES, 2002(1)). The European Commission had proposed establishing an eco-tax, on both carbon and energy, but the United States and Japan refused that option. The Conference in the end decided to use emissions trading as an international coordination tool (GODARD, 1998).

26. Implementation of this innovating instrument raises some serious difficulties. Beyond the ethical issues, there are numerous technical and political obstacles to the feasibility of the proposed scheme and many questions remain. As D. Wirth observed: “Leaving aside the political significance of their adoption, the Bonn Agreement and Marrakesh Accords are noteworthy for their high level of technical complexity, extensive use of specialized jargon, and lengthy enumeration of a mass apparent minutiae. Indeed, the text would be nearly incomprehensible to almost anyone not directly involved in the negotiation process” (WIRTH, 2002)... This kind of tool’s implementation differs in its principle from classic instruments based on a command and control approach. However, it should be noted with Dominique Dron that, indeed, the Kyoto Protocol corresponds to the individualistic and case-law Anglo-Saxon conception, which has confidence in economic instruments for the management of relationships among human beings with the required flexibility. But even if the role of public authorities is diminished, an effective monitoring of the honesty of trading as well as the punishment for fraud are mandatory conditions for the scheme to operate properly. Therefore, similarly to the community-based and regulatory concept originating in Roman law, which delineates *a priori* rights and prohibitions as closely as possible, this approach runs into the dilemma of monitoring (DRON, 2001). In both cases, the monitoring of implementation represents a core stake.

¹⁷ Doc., no call number, available at <http://www.un.org/esa/sustdev/partnerships/guiding_principles7june2002.pdf>. There is also a list of the adopted partnerships.

¹⁸ Several hundred companies joined (close to three hundred for France); the list is available at <<http://www.unglobalcompact.org/Portal>>. United Nations Secretary-General, Report of the Secretary-General, *Strengthening of the United Nations: an agenda for further change*, A/57/387, 9 Sept. 2002. 2002.

¹⁹ United Nations Secretary-General, Report of the Secretary-General, *Follow-up to Johannesburg and the Future Role of the CSD - The Implementation Track*, E/CN.17/2003 /2, 18 February 2003.

²⁰ *Agenda 21. Rio Declaration on Environment and Development. Statement of Principles on Forests*, United Nations, 1993.

2. Institutional vitality

27. At the institutional level too, profusion goes with innovation.

2.1. Institutional profusion

28. Though sustainable development concerns every international institution to some extent, two UN bodies are specifically responsible for the issues it raises: the United Nations Environment Programme (UNEP) and the Commission on Sustainable Development (CSD).

29. UNEP, established in 1972 following the Stockholm Conference, was designed from the start as a catalyst to stimulate the actions of other institutions (SANDS, 1995). The General Assembly stated at the time that it was aware of “the urgent need to draft, within the framework of the United Nations Organization, permanent institutional arrangements for the protection and improvement of the environment.”²¹ But UNEP has suffered from structural deficiencies since its establishment. Because of its statute and funding, it does not carry much authority, neither over the States nor with international organizations (KIMBALL, 1992). In particular, it does not have any means of coercion (NADA, 1995). Moreover its institutional structure is burdensome and complex, which is hardly a guarantee of effectiveness, and many States criticize its opacity.

30. As for the CSD, established by the Economic and Social Council upon recommendation of the General Assembly following the Rio Conference, its mission is to ensure effective monitoring of UNCTAD, to foster international cooperation and rationalize intergovernmental capacities in decision-making, and to report the progress in the implementation of Agenda 21 (ORLIANGE, 1993). While it held its 12th session in Spring 2004, discussions are getting bogged down, the level of country representation is weak; it is not a place for political debate (TUBIANA, 2000).²²

31. In spite of the obvious inadequacy and inefficiency of the current institutional structure, no tangible prospect was laid out in Johannesburg. Questions regarding the methods and international architecture — what the Plan calls the “institutional framework” for sustainable development at the international level — have not been given any tangible answers. The Plan limits itself to repeated calls for improvements in effectiveness and coordination which, in spite of being mentioned in the new international creed of “good governance”, are no new issues: in 1972, Principle 25 of the Stockholm Declaration recommended that States ensure that international organizations play a coordinated, effective and driving role for the protection of the environment.²³

32. As regards the Commission on Sustainable Development, the Johannesburg Plan mentions a “strengthening,” even though current attempts to revitalize an institution that is far removed from the ideas put forth by the Group of Experts of the Brundtland Commission seem deemed to fail (E/CN.17/2003/2). As far as UNEP is concerned, the Plan remains just as vague. Any strengthening of the latter would first require more financial resources. The possibility was mentioned, in order to ensure stable and increased financing, of implementing a schedule of contribution quota shares to the Global Environment Facility (GEF). But this simple idea has proved highly controversial. In fact, the Johannesburg Plan limits itself to calling on the General Assembly to study the “important but complex issue of establishing universal membership for the Governing Council/Global Ministerial Environment Forum” (§140). The issue of the links between UNEP and the CSD is not dealt with either. Should

²¹ UNGA, Resolution 2997(XXVII), *Institutional and financial arrangements for international environmental cooperation*.

²² Summary of the Eleventh Session of the Commission on Sustainable Development, 28 April-9 Mai 2003, *ENB*, CDD-11 Final, 12 May 2003

²³ It is necessary to take a larger view to detect traces of a process of rationalization and improved coordination, regarding in particular institutional matters. The United Nations, relying on the objectives set forth in the Millennium Declaration (A/55/L.2, 8 September 2000) — most of the time designated as the MDGs, Millennium Development Goals, launched a vast undertaking to harmonize development policies of its bodies and specialized institutions. It was entrusted to the Group for the Development of the United Nations (GDUN), established in 1997. The GDUN's mandate is to improve, at the level of States which receive international development assistance, the performances of the UN system in the field of development cooperation. It is working on rationalizing the terms and conditions for the intervention of the United Nations and specialized institutions and on the strengthening of the capacities of partner countries so that they are able to harmonize their cooperation procedures with the United Nations and specialized agencies. Practically speaking, it should enable the latter to work together on projects concerning the same State, to produce joint studies or strategies, as well as to ensure joint monitoring and, if needed, modification of the projects undertaken. Therefore, even though the work of the GDUN is meant to better ensure sustainable development, its final objective is in no way to proceed with an institutional streamlining in environmental matters.

UNEP's mandate reach beyond the environment towards sustainable development? This was the conclusion of consultations with civil society on international governance in environmental matters that took place in May 2001. But what would happen then to the CSD?

33. Moreover, we must add to all the institutions in the UN system – from UNESCO to the FAO including ILO, WHO, WMO, IMO, ICAO or IAEA who have established environmental programs – the incidence of a “soft and protean institutionalization” (DAILLIER & PELLET, 1999) within the framework of existing treaties. Indeed, the extremely dense treaty network that has given rise to the environmental field at the international level has a counterpart in an institutional network that is no less dense and complex. Since the beginning of the 70s the trend has been to establish, with the adoption of each new convention, *ad hoc* institutions. These treaty-based structures are extremely varied in practice, due in part to the date they were elaborated, to their regional or universal nature and to their purpose. Their legal nature is uncertain and most likely varies; their composition, powers and means are extremely dissimilar. They seem however to converge as to their organization towards a three-tiered institutional model, each new convention being inspired to a large extent by prior ones. Established cooperation structures are generally composed of one or several leading bodies of a political nature – decisional bodies; of scientific structures – consultative bodies composed of experts; and administrative structures – in charge of the secretariat; to which are sometimes added clearing house mechanisms and/or financing mechanisms, or even regional centers.

34. Such institutions quickly proved to be necessary in environmental matters. Their operations are often considered to be an indication of the effectiveness of their relevant instruments (SAND, 1992; BOYLE, 1991; KEOHANE, HASS & LEVY, 1994). Institutionalization of cooperation is a useful contribution to the implementation of treaties, to the extent that it assists in the interpretation of the legal documents that are often initially vague and imprecise and that it helps to adapt them to the new knowledge on the environment and its effects on human activities. It also offers support for exchanging information among Parties and cooperation, or for providing multilateral technical or financial assistance to some of the Parties. Institutionalization is also essential for implementing effective monitoring of the contracting States' compliance with their treaty obligations. Therefore, intergovernmental institutions are an essential machinery of environmental treaties.

35. Institutional profusion raises some practical difficulties. For example, “The increasing complexity and fragmentation in international environmental governance is partly the consequence of the growing number of actors, both governmental and non-governmental, in the field of the environment. In addition, the proliferation of United Nations and other international bodies that incorporate elements of the environmental agenda adds to the complexity”: this was the conclusion of a recent UNEP (2001) report. It perfectly summarizes the current situation: “The growing number of environmental institutions, issues and agreements are placing stress on the current systems and our ability to manage them. The continuous increase in the number of international bodies with environmental competence carries the risk of reduced participation by States due to limited capacity in the face of an increased workload, and makes it necessary to create or strengthen synergies between all these bodies. With weak support and working in a disorganized manner, these institutions are less effective than they could be, whereas their resources are increasingly drained. The proliferation of international demands has placed a particularly heavy burden on developing countries, which are often not equipped to participate meaningfully in the development of international environmental policy” (UNEP, 2001).

36. In these conditions, the issue of institutional interaction becomes crucial. A number of intergovernmental decisions were taken and various initiatives launched to consider methods for improving the operation of the (non) system. Strengthening of inter-institutional cooperation has also generated the establishment of new “coordinating”²⁴ bodies and institutions... Obviously, cooperation is

²⁴ Cf., already in 1997, the Programme for the Further Implementation of Agenda 21, § (46h), and the Plan of Implementation of 2002, e.g. §140. In 1998, the UN General-Secretary established, within the framework of his reform projects, a Task Force on Environment and Human Settlements, which completed its work in 1999. It mainly involved the issue of inter-organization ties, of intergovernmental bodies, as well as UNEP's revitalization. Its recommendations were reviewed by UNEP's Governing Council and adopted by the General Assembly in Resolution No. 53/242. One recommendation related to establishing an Environmental Management Group for the purpose of enhancing inter-agency coordination and among conventions, which held its first meeting in January 2001. Another recommendation related to establishing a Global Ministerial Environment Forum scheduled to meet yearly during the session of the Governing Council; it held its first meeting in 2000. Finally, an Intergovernmental Group of Ministers or ministerial representatives with unrestricted membership on international environmental governance was established. Cf. Second Meeting, 17 July 2001, UNEP/IGM/2/6, 2 August 2001.

beginning to take shape among treaty systems,²⁵ but all possibilities are far from being explored (UNEP, Open-Ended Intergovernmental Group, 2001). At the same time, one of the most important questions remains unanswered concerning relations between environmental institutions — whether treaty-based or not — and the World Trade Organization.

2.2. Institutional innovations: new actors

37. The international scene has gradually opened up. States and their derivative subjects — intergovernmental organizations — still enjoy a privileged status. However, non-State actors — including non-governmental organizations and businesses, but also, for example, “indigenous peoples” — play an increasing role. These changes are particularly controversial and necessary in the environmental field (VON MOLTKE, 2002). They are, nevertheless, impeded by the fact that international society was originally conceived for and by States.

38. Many international instruments advocate participatory democracy’s development. This is well illustrated in Principle 10 of the 1992 Rio Declaration, following which “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided,” or for an example at the treaty level, in the Treaty adopted at Aarhus on 25 June 1998 under the aegis of the United Nations Economic Commission for Europe, that specifically covers access to information, public participation in decision-making and access to the courts in the environmental area.²⁶ However, these developments are principally advocated at domestic level. Democratization of international society faces resistance from States which are jealous of their prerogatives, thereby guaranteeing the failure of international law to organize *de facto* a globalized society (CHEMILLIER-GENDREAU, 2002).

39. Under pressure from “new actors,” political and legal strongholds have gradually and at least partially loosened. Thus, new actors are involved in the preparation, monitoring and implementation of international rules. Still exceptional in the 70s, their participation is now the rule. NGOs, firms, industry representatives, and local communities: these non-traditional actors are not afforded, however, the same rights and privileges as “traditional” actors. Their situation is completely different and much more favorable as regards the creation of “new sources” of international law, including, among others, partnerships. Regarding implementation, we will return below to the role of NGOs as far as international monitoring procedures are concerned. The functioning of the World Bank Inspection Panel, associations within several treaty mechanisms, the acceptance of *amicus curiae* before the WTO Dispute Settlement Body are good examples. Even international courts are gradually opening up to private actors, individuals or businesses, with the significant exception of the International Court of Justice. Individuals are now subjects of human rights law: the human right to a “healthy environment” and the capacity to act on the international level are gradually being recognized. In a recent judgment, the European Court of Human Rights ruled not only that “a violation of the right to life can be envisaged in relation to environmental issues” but that the right to life, recognized in Article 2 of the Convention, was violated following the death caused by a landslide in a municipal rubbish tip spilling into a slum in Turkey.²⁷

40. Rich and innovating, at normative and institutional levels, international environmental law is often described as a “testing ground” for international law. Such vitality assessment must not mask the numerous and severe difficulties encountered when implementing the defined rules.

²⁵ For example, there has been a remarkable increase in the number of memoranda of understanding — MOUs — signed between Conventions, which is a sign of an increased political will to cooperate more closely in the implementation of their working programs over the period (mostly for agreements on biodiversity and regional seas). Memoranda of understanding concern joint working plans, implementation measures or the implementation of an information mechanism.

²⁶ Entry into force on 30 October 2001. Text available on the Web at: <<http://www.mem.dk/aarhus-conference/issues/public-participation/ppartikler.htm>>.

²⁷ ECHR, *Öneriyildiz v. Turkey* (Application No. 48939/99), judgment of 18 June 2002 (non-final judgment).

B) Effectiveness of international environmental law

41. Beyond conjunctural difficulties, the subject matter suffers from structural implementation deficiencies (1). Playing anew as a “testing ground” for international law, it attempts to compensate by developing ways to promote international law that are adapted to the stakes and largely innovative (2).

1. Structural implementation deficiencies

42. International environmental law norms must meet in order to be *effective* in the English meaning of the word, a double condition of efficiency and effectiveness (1.1). But the *effectiveness* of international environmental law has run into obstacles: some, of a general nature, stem from the specificities of international law (1.2); the others, of a particular nature, stem from the environmental field (1.3).

1.1. Efficacité, effectivité and effectiveness

43. French language has no equivalent of the word “effectiveness”. Therefore, in order to understand what the latter mean and to transpose its various connotations into French, it is necessary to use two concepts: *efficacité* and *effectivité*. Looking at the treaty level only, for norms to be tangibly applied treaties need to satisfy a double condition:

- First, to be *efficace*. Along with C. de Visscher, we recognize as *efficaces*, the provisions of an international act when, considered in themselves, they are adapted to the purposes put forth (DE VISSCHER, 1967). This first condition is not easy to fulfill in the environmental field. Due to a lack of knowledge or consensus, environmental objectives or methods are not always expressed clearly. This level of thinking leads beyond the frontiers of law when it comes to finding an answer, on the basis of a substantive analysis, to this question: can the quality of the environment or the condition of the resource be improved by the regime/treaty? But the “needs” of the environment or the resource must be known and meeting them must be possible, which is easier in some circumstances than in others.
- And then to be *effectives*, because the *efficacité* of an international instrument does not foretell its *effectivité*. Along with C. de Visscher, the *effectivité* of the provisions of a treaty can be evaluated according to whether they proved capable – or not – of influencing the behavior of the relevant targets. Yet, the general remark of the author, according to which too many surely *efficaces* treaties that enjoy numerous nominal adhesions lack *effectivité* (DE VISSCHER, 1967), is also relevant to international environmental law. Though international cooperation has shown significant progress (however the instruments must nevertheless enter into force quickly and enjoy wide participation and be adapted to their purpose), national enforcement, in particular by the transcription of international norms into domestic law, remains incomplete. The fact that most obligations are not self-enforcing, in addition to the fact that standard reaction mechanisms to substantial violations of treaty obligations are ill-adapted when the obligation in question constitutes an unilateral commitment, exempted from reciprocity, contributes to making the implementation of rules difficult (KISS, 1991).

44. *A priori*, if these two tests are met – *efficacité* and *effectivité* – in the final analysis, the quality of the environment or the condition of the resource will be improved because of the regime/treaty (problem solving) (KEHOANE & al, 1994). The regime/treaty is then effective in the English sense of the term, since effectiveness covers these two aspects.²⁸ “Effectiveness of” is analyzed as the “impact of a given international institution in terms of problem-solving or achieving its policy objectives.”²⁹ Besides the polysemic characteristic of the word, the evaluation of effectiveness is not easy because of the complexity of social and ecological systems that are constantly evolving, and because of the difficulty in establishing a causal link between an international policy measure and the observed results (VON MOLTKE, 2000). Some political successes are not met with achievements at the environmental level (KÜTTING, 2000). Appropriate effectiveness indicators are still lacking; reflection remains extremely theoretical.

²⁸ “A regime is effective to the extent that it achieves the objectives or purposes for which it was intended and to the extent that its members abide by its norms and rules.” (HASENCLAVER & AL, 1996).

²⁹ This has to be distinguished from “implementation” which means a “process of putting international rules into legal and administrative practice i.e. incorporating them into domestic law, providing administrative infrastructure and resources necessary to put the rule into practice, and instituting effective monitoring and enforcement mechanisms, both internationally and domestically” and from “compliance with” which means “rule-consistent behavior, i.e. ‘state of conformity or identity between an actor’s behavior and a specified rule.’” (RISSE, 2001).

45. Effectiveness is multidimensional. A regime can be considered effective if it:
- Ensures the protection of the environment,
 - Fosters compliance with rules and standards,
 - Leads to the desired modification in human behavior,
 - Is transposed at various institutional levels (regional, national, local) by the enactment of laws, regulations and the conduct of some administrative activities,
 - Has an impact by its very existence, that is to say is independent of the adoption of specific measures (VON MOLTKE, 2000).
46. And yet very few regimes cumulatively satisfy all these aspects of effectiveness. This is only possible when environmental issues are well defined and understood and when the required economic and social changes are limited. Most often, a regime is only effective with respect to one or another of these aspects (VON MOLTKE, 2000; YOUNG, 1999).

1.2. Difficulties peculiar to the international legal order

47. International law faces a dilemma: the need for hierarchy and constraint — in order to negotiate, cooperate, define regulatory instruments and implement them — has never been stronger. However, contemporary international society is one of concurrent sovereign entities lacking a hierarchical order, still influenced by the primacy of consent. One of the characteristics of the international legal order, where States are the major actors, is that they are the source of the creation of law — at least for standard sources — and are also responsible for its enforcement. States are free to make commitments or not: by accepting external norms, a State limits itself. Except in rare instances, following an “intersubjective logic”, the State’s consent remains the only source of the obligations it undertakes (MARCHI, 2002). Voluntarism is an obstacle to the development of a truly common law (CHEMILLIER-GENDREAU, 2002). This is shown by the failure of past collectivist constructions such as the Common Heritage of Mankind, or the current disaffection for *jus cogens, erga omnes* obligations, international crimes of the State and other *non-transgressible norms of international law*, including their extensions in the law of treaties or the law of liability. Progress in the construction of a public international order — or even in the recognition that the environment has “a value shared by all of mankind, the preservation of which is of concern to the entire international community, and that the rules that apply to it embody most of the principles related to the common heritage of mankind: lack of reciprocity, obligation to preserve and rationally manage, and non-appropriation.” (DAILLIER & PELLET, 1999) — are all relative. The fact is that States have kept a nearly exclusive jurisdiction and are the first ones to be responsible for it. The popularity — especially among legal scholars — of the concept of “global commons” will probably not have any practical consequences, at least in the near future, because of its legal vagueness (KAUL, GRUNBERG & STERN, 2002; KAUL, 2000).

48. In spite of major advances at institutional and normative levels, the famous quote — famous for international jurists — from the *Lotus Case*, following which “The rules of law binding upon States therefore emanate from their own free will”³⁰ remains valid... Patrimonial conceptions “do not mesh with the structure of international society, where there is a lack of hierarchical bodies and integration, both needed to clarify their substance and to implement them” and it is very difficult to draft rules for a “sector such as the environment, where a public interest exists, but where taking it into account relies on assuming acceptance of higher means of enforcement than the sum of individual interests allows.” (RUIZ FABRI, 2000) The fact that international law “has never ceased to be developed and motivated by the individual interests of States and depends on the balance of their respective powers,” (*ibid.*) should never be concealed.

49. In the environmental field these general difficulties are even worse.

1.3. Difficulties peculiar to international environmental law

50. The most convincing success in international environmental law is the restoring of the ozone layer. Scientist announced in December 2000 that according to their observations and calculations, the ozone layer was likely to reform within 50 years if governments continue to comply with their obligations

³⁰ PCIJ *SS Lotus Case*, judgment of 7 September 1927, Series A No. 10.

pursuant to the Montreal Protocol adopted in 1987.³¹ This great success of international environmental law remains, however, exceptional: the ozone layer has benefited from rather special circumstances (THEYS, FAUCHEUX & NOËL, 1988; FAUCHEUX & NOËL, 1990). More often, the implementation of environmental agreements faces major practical difficulties: slowness of processes and weakness of content – which reflects by definition a consensus that reaches the lowest common denominator only, all the more so since the States concerned are numerous and diversified –, lack of financing and means of implementation, weak monitoring, lack of sanctions in case of non-compliance.

51. Taken on its own, climate change perfectly illustrates the issue. On the one hand, the Kyoto Protocol to the UN Framework Convention on Climate Change introduces an international regime that is probably the most sophisticated and original for the management of a common common, a regime that from a legal perspective appears “astonishingly complex” (KISS, 2001). On the other hand, lengthy negotiations and slow progress – within an international regime that has been built by stages since 1992 –, the lack of commitments – both too modest and unclear³² –, combine with the impossibility to persuade the United States to participate – even though it is currently the biggest producer of greenhouse gases –, with the slow pace of ratifications and with the complexity of monitoring and implementation issues.

52. In the environmental field, the violation of a treaty-based obligation is seldom the result of a deliberate and premeditated act. The softness of norms – an abundance of soft law, the frequent very general nature of the obligations, with weak means of enforcement, that are not quantified, and mitigated – the fact that most obligations are not self-enforcing, in addition to the fact that standard reaction mechanisms to a substantial breach of treaty obligations are ill-adapted when the obligations in question constitute an unilateral commitment, exempted from reciprocity, contribute to the difficulty of implementing the rules (KISS, 1991). Non-compliance is often also rooted in the interpretation of unclear and/or vague treaties, or even in the inability of the treaty to evolve and to take into account changes in circumstances such as new scientific discoveries. The profusion of norms is also a source of difficulties, as mentioned above: international environmental law forms a body of rules elaborated under urgent pressure, on a case by case basis, suffering from a lack of internal consistency and even from external interaction problems caused by normative and institutional compartmentalization with regard to other bodies of law – trade, investment, human rights etc.

53. Weak implementation is also often caused by a lack of material resources, for international environmental obligations often require a huge economic or social cost for their implementation. Thus, in order to comprehensively reflect reality, legal analysis must also rely on sociological and economic analyses. In this respect, the regimes theory³³ in particular contributes to the explanation of the differences in the results and effectiveness from one regime to another and, from a more prospective point of view, it sketches out the forms international mechanisms should take in order to be more *efficaces/effectifs*.

54. The analyses of Oran Young skillfully show the practical difficulties met by international regimes/institutions. These are ranked into three categories:

55. • Issues of fit, of discrepancies between environmental needs, ecosystems and institutions (institutional misfits) As social constructs, it should be possible to adapt institutions to bio-geophysical features of environmental issues. Nevertheless there are gaps and even when they are identified as such, it is difficult to correct these.

56. • Issues of interplay, concerning horizontal or vertical links between the various institutions.

57. • Issues of scale, concerning variations in the evolution of systems from one level to the other in spatial as well as temporal terms (YOUNG, 2002).

58. While seeking to adapt the law and procedures to the stakes, specific implementation difficulties have resulted in developing specific implementation methods.

³¹ “Summary of the Fourteenth Meeting of the Parties to the Montreal Protocol and the Sixth Conference of the Parties to the Vienna Convention, 25-29 November 2002.” *ENB*, 2002, vol. 19, n°24. However, these views may be tempered in the future.

³² Several studies conclude that the Protocol, even if implemented, would be much too weak in view of the stakes considering the requirement it sets forth (MORIN, 2002).

³³ A regime is a “series of principles, of norms, of implicit or explicit rules and decision-making procedures, around which the expectations of the actors converge within a specific field.” (KRASNER & AL, 1983).

2. Methods of promoting implementation

59. Because of the mentioned above implementation difficulties, early international treaties on the protection of the environment were immediately relegated to the rank of *sleeping treaties*. Like it happened in other new fields of international law (human rights, disarmament for example), the importance of measures which aimed at implementing the law have been recognized gradually. Depending on the areas and levels of intervention (regional or universal), a wide range of measures is now being tested to *promote* international environmental law. Ideally, measures should make it possible to prevent cases of non-compliance through cooperation, to ensure compliance, to furnish assistance in cases of non-compliance, to offer a dispute settlement mechanism and enforcement measures (LANG, 1996). These various aspects closely intertwine: processes are dynamic and the same facts may give rise over time to a full range of measures (BROWN WEISS, 1997).

60. These measures range from support (2.1) to incentives (2.2) and to sanctions (2.3).

2.1. Supporting implementation: monitoring and verification

61. When implementing their international obligations, States are “assisted” by international implementation review mechanisms. Since recourse to the courts is exceptional and in several respects inadequate for monitoring treaty-based obligations — which represent most of the environmental *corpus* on the international level — States have set up specific non-judicial procedures, partly inspired by tried and tested methods in other legal fields which are also innovative to a large extent. Moreover, the objectives of these procedures are not limited to the sole monitoring of the States’ implementation of their international obligations. They also make it possible to clarify these obligations, since they are often originally vague, and they also foster collective learning (learning by doing). Heightened transparency also allows for confidence to settle in and to limit free riding.

2.1.1. Purpose of these procedures

62. The environmental field has given rise to many scheduled review procedures, also referred to as monitoring and/or verification. They allow the assessment of both:

- Behavior of the parties, knowing that the assessment may be of a general nature and might not question the behavior of a specific party, or may specifically target individual State behaviors in order to be informed or to correct it;
- Efficiency of agreed norms, which may possibly lead to their adaptation.

63. Compliance with the law by international law subjects is generally presumed, with the result that a State does not have to prove *ab initio* that it is acting in conformity with the law (COMBACAU & SUR, 1997). Implementation by multilateral bodies which will be entrusted with these tasks and the definition of adequate procedures is a new element in international affairs: in the past, cases of violation of law were scarcely explicitly specified in international instruments, since States are hardly inclined to designate themselves as targets of a possible reaction.

64. The first treaties did not provide for specific and internalized review mechanisms, nor did they institutionalize cooperation between contracting parties, a *sine qua non* condition for this kind of monitoring. These treaties were not very effective. From the mid 70s, cooperation became institutionalized and various monitoring methods were tried, inspired to some extent by the human rights sector. The most used of these methods is without doubt the “reporting system.” Outside of the treaty framework, this is also the method the CSD uses to assess the implementation of Agenda 21. Though not lacking in merits, it is not, however, among the most sophisticated monitoring methods in international law and it suffers from serious limitations.

65. From the 90s, environmental agreements are characterized by the reinvention, alongside and to back-up the henceforth classic second-generation monitoring methods, of the reaction to non-compliance, in a more flexible form.

66. The non-compliance procedure introduced under the Montreal Protocol on Substances that Deplete the Ozone Layer is the first model which has been largely duplicated since then. Such procedure, used again in the 1979 Geneva Convention on Long Range Transboundary³⁴ Air Pollution, has just been

³⁴ Decision 1997/2, The Implementation Committee, Its Structure and Functions and Procedures for Review of Compliance, ECE/EB.AIR/53, annex III, <http://www.unece.org/env/lrtap/conv/report/eb53_a3.htm>.

included in the Basel Convention on the Transboundary Movement of Hazardous Wastes³⁵ and the Cartagena Protocol on International Trade in Living Modified Organisms.³⁶ Furthermore, from a similar perspective negotiations on climate change have given rise to an extremely original monitoring system, inspired by non-compliance procedures which have been tested up to then, but going much farther. Observance, which was particularly controversial, was one of the last issues to be settled in the Bonn-Marrakesh Agreements in 2001. The Conference of the Parties to the Framework Convention on Climate Change adopted at the time a text that defined observance procedures and mechanisms under the provisions of the Kyoto Protocol and recommended it for adoption at the First Conference of the Parties to the Protocol.³⁷ Though it is not final, this intensely debated proposal outlines the mechanism-to-be.

2.1.2. Features of these procedures

67. The aim of these procedures is essentially to *promote law*. For example, under the Kyoto Protocol, the stated goal is indeed “facilitating, promoting and enforcing adherence to [the Protocol’s] commitments (...)” In the spirit of non-compliance procedures established within the framework of other treaties, the institution is above all preventive; the purpose is to foster implementation of the Protocol. However, the approach differs according to whether a Party launches the procedure for itself or is “raising concerns about another Party, with relevant factual information.”

68. Monitoring is indeed listed as one of the methods for ensuring more effective implementation of international environmental law. This analysis shows that thorough monitoring is partially capable of compensating the softness of international environmental law. The objective is not without consequences regarding the methods used. From this perspective, innovative procedures already described elsewhere (IMPERIALI, 1998) have two main features: monitoring is institutionalized and systematic.

• Institutionalized nature

69. Procedures are institutionalized. Exercised collectively, monitoring loses its traditional reciprocal aspect: it is handed over to *ad hoc* bodies by the various environmental protection agreements — Conferences of the Parties, committees and secretariats — that play an essential role therein (CHURCHILL & ULFSTEIN, 2000).

70. Though the way monitoring is performed varies according to the treaty systems, it usually involves several actors and is shared, however unequally, between Conferences of the Parties and secretariats. Administrative structures or independent agencies — expert agencies or NGOs — are entrusted or unofficially perform some of the powers in matters of monitoring strictly speaking, including information gathering and processing. But only the political body usually controls the follow-up on monitoring, e.g., is competent to issue recommendations and sanctions, if non-compliance is challenged. If it can be criticized for its lack of objectivity, its intervention has unquestionable advantages in terms of realism and authority. Peer-review is an option accepted under several treaty systems, for example, the 1994 Convention on Nuclear Safety.

71. NGOs often offer substantial support. They are normally easily granted observer status during sessions of the political bodies and they are increasingly participating. But they do not have voting rights and their participation is usually not allowed in informal restricted working sessions, though these are decisive.

72. This multiplicity of participants can be described as a true “monitoring network,” to use the expression of Jean Charpentier, where the successive or parallel participation of several bodies — either independent or political — minimizes in the end the disadvantages and maximizes the inherent advantages of each monitoring system and therefore contributes to the strengthening of their efficiency (CHARPENTIER, 1983).

³⁵ “Summary of the Sixth Conference of the Parties to the Basel Convention: 9-14 December 2002 », *ENB*, 2002, vol. 20, n°12.

³⁶ Decision BS-1/7 of the First Meeting of the Parties to the Protocol, “Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety,” February 2004.

³⁷ Decision 24/CP.7 Procedures and mechanisms relating to compliance under the Kyoto Protocol FCCC/CP/2001/13/Add.3

• *Systematic nature*

73. These procedures later became systematic, and are usually applied in most instances *a priori* rather than *a posteriori*.

74. Several reasons explain the essentially *preventive* nature of monitoring, among which are the nature of the obligations being monitored, in other words, the fact that damage to the environment is often irreversible and that under these conditions it is better to prevent than to cure. Another factor that comes to mind is that the subject is rather new, and therefore evolving rapidly, and because it is so “sensitive”, States prefer more flexible political monitoring policies that they can better control. Because it is preventive, monitoring is not performed in reaction to the violation of an obligation; it is not sequential. On the contrary, it tends to be *continuous*. This can be viewed as a *systematic* monitoring, which is performed in most instances *a priori* and not *a posteriori*. Not only does it focus on violations of obligations but also on threats of violations thereof. Moreover, the outcome of these procedures is usually that the States at “fault” are not sanctioned but assistance is given for a good implementation, whether financial, technical, legal or otherwise. Cooperation replaces sanctions or compensation. Procedures involve such a mix of reaction, sanctions, incentives or encouragement that it is difficult to distinguish between these various aspects.

75. Keeping in mind that the treaties were adopted for our “common welfare”, without States receiving any short or medium-term benefit out of them, it is indeed more important to promote the obligations they contain than to sanction non-compliance. Recourse to sanctions would also risk not serving the purpose of a treaty and in particular discourage States from participating in it. Thus, we no longer mention “violations”, but “situations of non-compliance”, or even “dossiers.” The terms of “dispute,” of “States parties to a dispute,” “defendants,” “plaintiffs” or “applicants” have given way to those of “relevant party” or “interested party” in a “situation” or simply — it would be hard to be more neutral — the formulation of “Contracting Parties.” The choice of words amply proves the determination to move away from traditional contentious procedures, even though the mechanism is clearly there to react to illegality (DUPUY, 1997). There are few means of sanctioning non-compliance. When these do exist, they serve as a deterrent and aim in reality at preventing breaches.

76. The procedure worked out under the Kyoto Protocol is two-fold, relying on a Compliance Committee made up of two branches, a “Facilitative Branch” and an “Enforcement Branch.” The Facilitative Branch is multidisciplinary and aims at providing advice and assistance to Parties which have problems meeting their targets, even before the beginning of a commitment period. It must take into account the “respective capacities of the Parties” as well as “circumstances surrounding the issues referred to it.” The approach is first educational. Prior proposals — aimed at empowering the Facilitative Branch to declare publicly a potential or actual non-compliance, to issue warnings or to refer the matter to the other Branch in the event of non-compliance with its recommendations — were not adopted (GAUTHIER, 2002). Inspired by another approach, the Enforcement Branch is a quasi-judicial body. The procedure before the Branch offers some guarantees, concerning a specific timeframe and rights of the defendant, and appeals may be made to the Meeting of the Parties. Granted authority to monitor, exclusively by the Annex I Parties, the implementation of the Protocol, the Branch is competent to decide on eligibility to flexibility mechanisms and on compliance with commitments at periods’ end.

2.1.3. *Methods*

77. An analytical grid on the terms and conditions of monitoring was developed through a comparative approach, on the basis of qualitative criteria related to sources of information, status and jurisdiction of monitoring institutions and content of gathered information. Therefore, the effectiveness of current existing systems can be evaluated. The scale runs from a level zero — “sleeping treaties” — to an optimal level where monitoring bodies carry out very advanced and intrusive tasks. *Systematic* monitoring — to prevent violations — may be complemented by a *reactive* monitoring — to react to suspected non-compliance.

a. Systematic supervision

78. The monitoring objective is to know as precisely as possible the practical details of the implementation of treaties on the territories of the various member States and to monitor implementation on a regular basis. However, the purpose is rather aimed at gathering information than at monitoring the behavior of States from a strictly legal point of view. Thus, several systematic monitoring methods are being tested. On an initial elementary level, monitoring relies on a simple

exchange of information between Parties to a treaty. This exchange of information is sometimes spread depending on the seriousness of the potential impact of the measures the Parties plan.³⁸

79. State obligations in environmental matters are often extended and formalized by “reporting systems.” This monitoring method, the most commonly used in agreements, requires each State Party to file reports on a regular basis, detailing its activities in the field covered by the agreement. The reporting system is a key element in collecting and processing data, and even if there are other reliable supplementary methods, it remains the cornerstone of the entire monitoring procedure. The treaty obligation is often strengthened: reports are complemented with questionnaires, with the diffusion of sample forms, guidelines etc. But the system is not perfect. First, the inherent risk of “governmental information” is that States may only release incomplete information, thus giving a distorted or even idealized picture of the facts. Second, generally States do not fulfill these obligations very well. They do not remit their reports on a systematic basis and when they do, the reports are imprecise and incomplete. It must be said that as regards many States, in particular developing countries, the procedure is burdensome, nearly overwhelming, and that they do not have enough human and financial resources. A few secretariats have started considering techniques in order to relieve States and to help developing countries meet their obligations under a reporting system. But standardization and harmonization proposals in several treaty systems have not been successful at the international level. A first step was made, nevertheless, at the European Community level, where the systematic supervision method is applied in all environmental protection directives.³⁹

80. The technique is also more sophisticated if the tasks of the treaty institutions — generally the secretariats — are not limited to the diffusion of reports received from the parties but involve to add an input. This is the case when administrative structures, after States’ reports are gathered, process and analyze the information in order to draft “summary reports” or other “reports on the reports” (according to CITES terminology). These summary reports are more exploitable than a series of distinct reports. They are very useful for they offer an “overall picture” of the implementation of each treaty, provision after provision. Moreover, by processing information received in the reports, monitoring bodies can spot non-compliance situations. However, the quality of the summary report depends on the timely transmittal of national reports and their respective qualities. It also varies depending on the latitude enjoyed by the secretariats, for example the option of incorporating into the report additional sources of information, in particular non-governmental sources.

81. Indeed, NGOs furnish increasing support in this respect, revealing through constant monitoring certain implementation problems or violations. Their participation lessens the disadvantages associated with the governmental nature of the information contained in the reports. Its sophistication depends on the treaty systems. Sometimes NGOs’ intervene unofficially, sometimes their participation is officialized when they are granted observer status. It can even go further: some of them, as the IUCN in the CITES system, or a group of NGOs under the Montreal Protocol on Ozone, have been granted the status of “partner NGOs.” IUCN is also in charge of the Secretariat of the Ramsar Convention on Wetlands of

³⁸ Thus, the *a priori* monitoring system provided for in the Agreement on Cooperation for the Sustainable Development of the Mekong River Basin — signed at Chiang Rai, Thailand, 5 April 1995 — relies on a triple distinction: notifications, consultations and prior specific agreements. Their objective is to prevent situations when the use of the Mekong basin waters by one of the Parties to the Agreement would harm other riparians. Under Article 5 of the 1995 Agreement, utilization of the water of tributaries of the Mekong River and inter-basin diversions (between basins of the Mekong tributaries and basins of neighboring rivers) shall be notified to the Joint Committee. As regards uses of the mainstream of the Mekong River and its inter-basin diversions, the Agreement distinguishes between the wet season and the dry season, taking into consideration hydrographic and climate factors peculiar to the Mekong basin. During the wet season, mainstream river uses shall be notified to the Joint Committee and inter-basin diversions are subject to prior consultation, which aims at arriving at an agreement within the Joint Committee. During the dry season, uses are referred, after consultation, to the Joint Committee, which aims at arriving at an agreement, and inter-basin diversions shall obtain the prior specific agreement of the Joint Committee. However, should there be a surplus quantity of water available, in excess of the proposed uses of all parties in any dry season, verified and unanimously confirmed by the Joint Committee, an inter-basin diversion of the surplus can be made, subject to prior consultation. See Agreement on Cooperation for the Sustainable Development of the Mekong River Basin, 34 ILM, 864 (1995).

³⁹ Council Directive 91/692/EEC of 23 December 1991 standardizing and rationalizing reports on the implementation of certain Directives relating to the environment, OJEC No L 377 31/12/1991. At the international level, UNEP launched an initiative on biodiversity conventions.

International Importance. Nevertheless the end result is that many entities are playing a role in the implementation of treaties, thereby contributing to an improvement in monitoring mechanisms.⁴⁰

82. It should also be noted that in some treaty systems the reporting system is supplemented by a systematic inspection mechanism, i.e., scheduled inspections irrespective of whether non-compliance with international obligations has been identified or suspected. For example, the Canberra Convention for the Conservation of Antarctic Marine Living Resources of 22 May 1980 establishes a system of monitoring and inspection carried out by the Contracting Parties themselves.⁴¹ During the negotiations that lead to the adoption of the 1991 Protocol on Environmental Protection to the Antarctic Treaty — referred to as the Madrid Protocol — the creation of a permanent inspection unit was even proposed, but because of its high financial impact the suggestion was not retained (PUISSOCHET, 1991).⁴² Likewise, the International Convention for the Regulation of Whaling was amended in 1977 in order to authorize the establishment of an International Observation System (IOS), which operates through bilateral exchanges of observers on vessels or land, on a voluntary basis. The observers then report to the Whaling Commission on any possible violations they find (CHAYES and CHAYES, 1998).

83. It is still unusual for scheduled monitoring to be supplemented and backed by independent mechanisms responsible for gathering environmental data. This is one of the emerging roles of the European Environment Agency and the European Environment Information and Observation Network, regarding the implementation of EC environmental law, since the Agency's mission is to "contribute to the monitoring of environmental measures."⁴³

84. At the international level, the EMEP system (Cooperative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe) stands out as an exception. Implemented by a 28 September 1984 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution,⁴⁴ it operates as a network of monitoring stations located on the territory of States Parties. It transmits in a report on an annual basis information gathered to the Executive Body of the Geneva Convention. The EMEP thereby allows, in particular, to supplement or even invalidate information transmitted by States Parties under the reporting system. Even if this type of monitoring program is "not aimed at identifying States that violate their obligations (...) the possibility of comparing information that [States transmit] with that obtained within the scope of the monitoring systems on the basis of the submission of State reports puts indirect pressure on States, possibly inciting them to modify their behavior" (BOISSON DE CHAZOURNES, 1995). A more standard technical support of this kind deserves without doubt to be extended beyond the field of this Convention. This is the real significance of Oran Young's proposals concerning "GEOMAP", an observation mechanism for monitoring and

⁴⁰ Under the 1979 Bern Convention on the Conservation of European Wildlife, NGOs are recognized a substantive "right to petition" and can launch, by their correspondence, the opening of a "dossier" concerning some States. Under NAFTA, NGOs may submit information to the Secretariat of the Commission for Environmental Cooperation asserting that one of the three States is failing to effectively enforce its environmental law; these submissions may lead to the preparation of a factual record and to investigations.

⁴¹ The Antarctic Treaty grants to the Parties rights of inspection on site to monitor its implementation. The Canberra Convention reproduces and extends these provisions. It creates a type of *actio popularis*. Pursuant to Article 22: "1. Each Contracting Party undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity contrary to the objective of this Convention. 2. Each Contracting Party shall notify the Commission of any such activity which comes to its attention." Article 24 establishes a system of observation and inspection. It includes, *inter alia*, procedures for boarding and inspection by observers and inspectors designated by the Members of the Commission, on vessels engaged in scientific research or harvesting of marine living resources in the area where the Convention applies. Inspectors shall report to the Member of the Commission by which they have been designated, which in turn shall report to the Commission. The system was implemented belatedly (COURATIER, 1991).

⁴² The type of inspection established is the one provided for in Article 7 of the Antarctic Treaty. However, observers may be designated not only by the Parties to the Treaty, but also by the Consultative Meetings "to carry out inspections under procedures to be established by [themselves]." Observers shall be given access to all parts of stations, installations, equipment, ships and aircrafts, as well as to all records maintained thereon which are called for pursuant to the Protocol. Inspection reports shall be sent for comment to the concerned Parties, and thereon circulate to all the Parties and the Committee established for the protection of the environment, in order to be considered at the next Consultative Meeting. And thereafter these are made publicly available. See Article 14 for details on the procedure.

⁴³ Council Regulation (EC) No 933/1999 of 29 April 1999 amending Regulation (EEC) No 1210/90 on the establishment of the European Environment Agency and the European environment information and observation network, OJEC No. L117 of 05/05/1999.

⁴⁴ <http://www.unece.org/env/lrtap/emep_h1.htm> .

evaluating the state of the environment, financed by UNEP and UNDP and working closely with the secretariats of international agreements (YOUNG, 2002). For the time being, under a treaty framework, even when expert bodies are established, they do not play — or only rarely — a role of this type, for which they usually are not granted a mandate or financing.

85. If the monitoring of the implementation of treaties gives rise to suspicions or reveals non-compliance, the monitoring bodies must be able to react: monitoring becomes *reactive*.

b. Reactive monitoring

86. Monitoring bodies must be in a position to gather supplementary information by leading investigations, or even carrying out on-the-spot inspections. These mechanisms are not new — Rhine Commission of 1804 — but still developing. An increasing number of treaties allow monitoring bodies to carry out investigations — here the term “investigation” must be understood broadly — and includes all the means enabling them to play an active role in processing information, i.e., not being simply satisfied with receiving information passively but requesting that the Parties supply further information.

87. Several treaty systems do not accept this option. For example, under the 1979 Convention on Long-range Transboundary Air Pollution and several of its Protocols, the secretariat has no investigating power. Neither is it authorized to verify data submitted in State reports, nor to take measures if submitted reports are inadequate (WOLFRUM, 1998).

88. Other treaty systems grant secretariats strengthened roles. For example, under CITES, data contained in national reports is entered into computers, allowing for comparative analyses that give new information and even better enable the spotting of instances of frauds and violations. Fraud and violations can also be spotted by using other information, from non-governmental or governmental sources. If the Secretariat deems that the provisions of the treaty are incorrectly implemented, it informs the relevant Party, which must answer within a maximum period of one month and possibly furnish additional information. Thereafter, the Secretariat maintains a registry of instances of violations of the treaty. In 2002, the Conference of the Parties requested that the Secretariat hands in a report reviewing presumed violations at each of its meetings, on the basis of Articles 12 and 13. The Secretariat lists suspicious transactions that may have been observed and/or processed between two Conferences of the Parties.⁴⁵

89. Likewise, the Secretariat of the Montreal Protocol was given significant powers. It can on its own launch a “non-compliance” procedure from information received or not received from States under the reporting system. The Secretariat can also decide to launch the procedure on the basis of information gathered from other sources, including from non-State sources i.e., NGOs. This is a means NGOs have to participate indirectly in the Protocol’s implementation. Thus, they find a way to enter through the back door, since the front door was shut when Contracting Parties, after heated discussions, finally decided not to formally authorize them to trigger the procedure (KOSKENNIEMI, 1992).

90. “Reactive” inspection, the most sophisticated form of investigation, is obviously the most efficient method, because it allows to gather information from the source and limits filtering by States. Other fields of international law, for example disarmament, have extensively developed inspection procedures. In the environmental field, even if exceptional, inspections — the term itself is not always used, but this is what it is about actually — are organized under some treaties. They are carried out by independent experts, assisted by administrative staff. However, the prior consent of the territorial State is required. Inspections cannot be carried out effectively without its cooperation.

91. Since 1984, the date when the Standing Committee accepted the principle of them, inspections have been carried out under the Bern Convention on the Conservation of European Wildlife and Natural Habitats. They have taken place at the request of the Standing Committee, subject to the authorization of the concerned State, in particular when “sensitive” cases are opened.⁴⁶ They are carried out by an independent expert, however designated by the Secretary General of the Council of Europe and subject to approval by the relevant Party. The expert is given a mandate by the Committee. Following the

⁴⁵ CITES Secretariat, *Interpretation and Implementation of the Convention. General Compliance Issues*, CoP12 Doc. 26, Twelfth Conference of the Parties, Santiago, Chile, November 2002

⁴⁶ The Rules of Procedure of the Committee currently provide that: “the Committee may, if the gravity of the situation so demands, decide that the natural habitat in question should be inspected by an expert with powers to make on-the-spot enquiries and report back to the Committee.” (Article 11). In urgent cases, the Chairman may authorize the Secretariat to consult the Standing Committee by post in order that a decision may be reached to organize a visit. The applicable rules to on-the-spot inspections are set forth in an Appendix to the Rules of Procedure.

inspection, the expert transmits an expert report to the concerned State. Several inspections of this type have been conducted, and the reports haven't always pleased the inspected States.⁴⁷

92. Inspections may also occur under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. The Implementation Committee, in virtue of the non-compliance procedure, must first attempt a friendly settlement that must be accepted by all the Parties involved and the concerned Party. It has some investigating powers: it can "request, when it considers necessary, through the Secretariat, further information on matters under its consideration," or undertake information gathering in the territory, but only "upon invitation of the Parties concerned."⁴⁸

93. Thus, reporting systems, investigations and inspections are increasingly accomplished procedures even if the reporting system is managed with varying degrees of vigor depending on the treaties, or if no general investigation and inspection rule exists yet, but rather sector-based agreements. Instead of rearranging these procedures, they could be improved by allocating greater facilities to secretariats, the staff of which is usually not large enough to carry out this task. Though it is essential, the monitoring of reports proves in practice to be rather uneven. Investigations and inspections are not very developed yet, not only because a large number of States view such procedures as an infringement of their sovereignty or an interference in their domestic affairs, but also because the means to carry out these investigations and inspections are not always available.

94. The "law-promotion strategy" is not supported by monitoring only. When implementation or even non-compliance problems are identified, monitoring bodies combine, when reacting, incentives and sanctions.

2.2. Incentives

95. Incentives mostly include technical and financial assistance. However, they are relatively limited because of a lack of means. For example, technical assistance within treaties' frameworks has shown an interesting potential but is largely subject to available financial means. As regards technology transfers, they remain very limited in scope in spite of the increasing number of technology clearing houses treaties create. Likewise, the implementation of environmental agreements suffers from poor financing. Financial incentives rely on an increasing number of treaty-based financial mechanisms but sums are rather small. Funds or facilities treaties establish are fed with voluntary contributions, by nature variable and unpredictable, and moreover, diminishing in times of economic crisis.

96. This was well illustrated by the meeting of the Sixth Conference of the Parties to the Biodiversity Convention in The Hague in May 2002. The meeting turned out to be very conflictual when it came to the definition of specific means of action involving deadlines and financing, concerning forests, access to genetic resources and invasive species. No commitment was taken on these issues. The Cancun Declaration of twelve "megadiverse" developing countries preceded the Conference, recalling that they host 70% of the planet's biological diversity and requesting in particular the establishment of an international fund under the authority of South countries and financed by North countries which use tropical plants and animals (KEMPF, 2002).

97. Though the proposal was not adopted, economic cooperation has involved, here and there, relatively new forms. It relies, for example, on treaty-based financial mechanisms, such as the Ramsar Convention's Wetlands Conservation Fund established in 1990, or the Multilateral Fund established by the Montreal Protocol on Substances that Deplete the Ozone Layer, established in 1991. Aimed at helping

⁴⁷ See the observations of Greece concerning the report elaborated following to the inspection of the Zakynthos area, *in* Standing Committee, *Ninth Meeting*, 5-8 December 1989, Doc. T-PVS (89) 50. A similar mechanism referred to as the "Consultative Mission" exists in the system of the Ramsar Convention on Wetlands of International Importance of 2 February 1971. But the procedure that very skillfully combines technical assistance and review is probably more cooperative. About fifty missions have taken place since the procedure was established. Obviously, in exchange for technical assistance, the Bureau obtains a right to see how the Convention is implemented on the territory of the Party concerned, even if the right is tightly regulated and anyway cannot be exercised without the consent of the Party concerned. The same holds true for the "Montreux Record", since each year the Parties must submit reports to the Bureau on the situation and the conservation of sites listed in the record (Record of Ramsar sites where changes in ecological character have occurred, are occurring, or are likely to occur, *Resolutions of the Fifth Meeting of the Conference of the Contracting Parties*, Convention on Wetlands of International Importance, Kushiuro, Japan 9-16 June 1993 UICN, Gland, vol 1, Res. C.5.4). The "Consultative Missions" were established by the Conference of the Parties in Montreux in Resolution C.4.7.

⁴⁸ Decision IV/5, Report of the Fourth Meeting of the Parties the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL. Pro.4/15, Annexes IV and V, 25 November 1992

developing countries to meet their treaty obligations, these mechanisms are innovating in many respects (RICHARD, 2002). The Global Environment Facility, the main financial lever of environmental agreements, has proved to be an original tool to implement treaties, flexible and practical in its operations (BOISSON DE CHARZOURNES, 1999; RICHARD, 2002).⁴⁹ Relying on voluntary contributions, upon its third replenishment it was allocated 2.9 billion dollars; this should cover operations until 2006. Its scope has also been extended to the Convention on Desertification which until now was very poorly funded, and to the 2001 Stockholm Convention on Persistent Organic Pollutants.

98. Several treaty systems thus have an holistic approach of the environment, intertwining issues of development, access to resources, intellectual property rights, financial assistance and allocation of profits (WOLFRUM, 1998).

99. There again the Kyoto Protocol to the UN Framework Convention on Climate Change establishes the most original system. The Protocol's principle is exemplary since it only sets reduction commitments for developed countries, in application of the principle of common but differentiated responsibilities. This is one of the reasons which have motivated the U.S. withdrawal. Because of their demographic size, China and India are already among the largest global producers of greenhouse gases, though their per-capita contribution is still low. In 2020, developing countries will probably release more greenhouse gases than industrialized countries. The United States wanted them to be integrated into the market process: since their marginal improvement costs are very low, this would have divided by five the cost per ton of carbon saved (DRON, 2001). Besides the fact that this was clearly an attempt to exonerate itself from its national effort, it would have undermined the initial compromise according to which the North, because of its primary responsibility in the deterioration of the atmosphere, would progress before associating the South. It is hard to convince developing countries to participate in the system without winning their trust. "In spite of the economic theory, and without criticizing the correctness of its calculations, it is not possible in the real world to launch a credible diplomatic initiative that binds States over the long term, by first pushing into the far future the efforts of those that bear the largest responsibility" (DRON, 2001). But at the present time the Kyoto mechanism is not attractive enough for developing countries (REVERCHON, 2003).

100. Until the integration of developing countries, the Bonn Accord confirmed the implementation, among flexibility mechanisms, of the Clean Development Mechanism (CDM) which authorizes a country to finance in another country some development investments that spare more energy and CO₂ than what would have been spared normally, and to share, pursuant to not yet established rules, the benefits of operations in terms of emission credits in a less costly manner than by financing national reduction measures (TUBIANA, 2000; WIRTH, 2000).

101. At the institutional level, we note that the decision to grant incentives under one form or another is exclusively within the purview of political bodies and depends on their assessment. But it also relies on cooperation with the secretariats. Thus, the institutionalization of cooperation also plays up to this point a fundamental role. The presence of NGOs often serve as a sound box for debates that would otherwise remain subdued: it transforms a secret negotiation between State representatives into a public meeting, since none of these NGOs are subject to a duty of confidentiality.

2.3. Sanctions

102. Generally speaking, international law recognizes, within the framework of a multilateral treaty, that a State may respond to another State's violation of a treaty obligation by suspending partially or fully its application of the treaty.⁵⁰ This kind of reaction is inadequate as far as environmental protection agreements are concerned. Counter-measures threats can be efficient if States actually have a mutual interest in correctly implementing the treaty. This is no longer the case when treaties' obligations are non-mutual and based on the concept of greater public interest – "common welfare." However, international law is not entirely powerless when trying to compel its enforcement, since the possibility of sanctions nevertheless exists, in a non-jurisdictional as well as in a jurisdictional framework.

⁴⁹ Decision 2/CP.7, Capacity Building in Developing Countries (Parties non-concerned by Annex I), The Marrakesh Accords, FCCC/CP/2001/13/Add.1.

⁵⁰ Article 60 of the Vienna Convention on the Law of Treaties, 23 May 1969.

2.3.1. Within a non-jurisdictional framework

103. Treaty institutions are not totally powerless. Some sanctions can be envisaged in theory and can actually be implemented. These collective sanctions have proven to be more appropriate than individual sanctions when treaties provide for non-mutual obligations (no *do ut des*) and when it aims at ensuring compliance with an objective rule.

104. First, sanctions can be “moral” or “psychological”: the “name and shame effect” indeed plays a major role in the environmental field, where it can be useful and efficient. The stigmatization of States by issuing reports, or by passing resolutions or even discussions at Conferences of the Parties, is strengthened by the presence of NGOs that act as intermediaries of public opinions.

105. Second, sanctions can be “disciplinary”: suspension of voting rights, or even suspension of all rights and privileges inherent to the status of Party.

106. Sanctions can finally be economic. It consists mainly in withdrawing advantages that States find in participating in environmental agreements⁵¹: unlisting of a site from an international register or from a quality label, withdrawal of financial subsidies, suspension of assistance missions etc. These sanctions are by their very nature specific and limited. Specific, because all treaties do not provide such benefits and are therefore not able to withdraw them, but also because those that do provide them only do so specifically.⁵² Limited, because these sanctions must directly correspond to the violation in question. Whether to unlist or not a site from a register for its failure to comply with an obligation other than preserving the site concerned is not an accepted option yet. Likewise, if financial subsidies are withdrawn, the withdrawal must correspond to a violation in the use of these resources and not to a violation of the treaty remotely linked to the payment of subsidies.

107. Lastly, it is easy to understand why these reactions only come into play as a measure of last resort because they work against the purpose of environmental treaties. For example, under the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage, a site may be deleted from the List when it has deteriorated to the extent that it has lost those characteristics which determined its inclusion, or else when the intrinsic qualities of a world heritage site were already threatened at the time of its listing and the necessary corrective measures as outlined by the State Party have not been adopted within the proposed time (WHC/2/Revised/B).⁵³ Of course, the exclusion of a site occurs as a last resort. In any case, such an exclusion will not help its preservation, which is the objective that was sought. Reversely, the exclusion threat may contribute to the site's preservation. Inclusion of a site on an international list actually shows that its importance and international value are recognized. This is flattering for the territorial State. The exclusion of a site can finally be assimilated to a psychological sanction of the same kind — even if it does have material consequences — than a statement of non-compliance. At the same time, the sanction goes further. Since inclusion of a site helps garner international financing, its exclusion from the list is indeed likely to equal a tangible loss in financial benefits.

108. The same is true with the withdrawal of financial subsidies. It punishes the State, thereby encouraging it to avoid subsidy withdrawals, but goes against the objectives of the treaty since the funds were granted to encourage its implementation.

109. This kind of sanction is not yet actually applied. However, the increasing number of treaty-based financial mechanisms could allow the development of it. This would strengthen monitoring since as soon as States receive some international financing, they are required to report on the use they make of the funds — for example, by remitting reports on funds' use — or to accept verification missions, even if these

⁵¹ The decision is taken here under a Treaty's operation. It is a genuine *decision*, a legal act that is imperative for the targeted Party, the implementation of which is not released to the media by the Contracting Parties. This option is rooted in the concept of parallel jurisdiction: the body that granted a benefit can withdraw it if it believes that the State has not put it to good use. The principle itself is not questioned. But its application is sometimes controversial, since the decision may always be somewhat subjective, though the collegial aspect of the decision-making body tempers it.

⁵² This is particularly true with financial subsidies. Sites can be listed on a large scale, depending on the policies enacted, and cover up to hundreds of sites.

⁵³ The decision is made by the Committee at a two-thirds majority of members attending and voting.

missions are *a priori* not mandatory. This is how systems seem to evolve, as the Ramsar Convention's Small Grants Fund for Wetland Conservation and Wise Use⁵⁴ illustrates.

110. Moreover, treaties that advocate recourse to economic tools or involve trade measures are better equipped from this perspective than strictly environmental treaties — for nature preservation for example. Indeed, such treaties give the option of temporarily excluding trade in the regulated products between States parties and the non-compliant State. Such sanctions were adopted under CITES — 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora. Though adopted with the objective of protecting endangered species, the treaty also includes reciprocal provisions enabling the implementation of counter-measures which can be individual or collective.⁵⁵

111. The principle is similar under the Non-Compliance Procedure established in the framework of the Montreal Protocol on the Ozone Layer. Sanctions occur as a last resort, only after recommendations, incentives and international assistance measures have had no effect and if the State is not cooperating sufficiently or shows ill-will. As L. Boisson de Chazournes says: “there is the idea that a State party could not live without the advantages of international cooperation. Its benefits having motivated it to join the Protocol, they should also convince it to comply with its obligations.” (BOISSON DE CHAZOURNES, 1995). As regards their substance, sanctions consist here in withdrawing the main benefits offered by the Protocol.⁵⁶ It mainly involves the withdrawal/refusal of financial subsidies or technical assistance, these measures targeting more specifically developing countries. They may involve the suspension of bilateral and/or multilateral assistance which is offered under the Multilateral Fund and under the GEF (GEF, 1996). Trade sanctions can also be adopted; they may affect indiscriminately developing or developed countries. A debate is currently under way between States parties regarding the opportunity to strengthen the procedure by increasing sanctions.⁵⁷ Following the discussions, parties have set up an *ad hoc* working group on non-compliance, composed of legal and technical experts, which was made responsible for reviewing the procedure and making appropriate conclusions and recommendations to the parties.⁵⁸

112. In another context — compliance with the Kyoto Protocol to the UN Framework Convention on Climate Change — the Enforcement Branch should be made responsible for applying “consecutive measures” in the event of non-compliance with the provisions. These measures aim at “restoring compliance with the provisions to ensure the integrity and respect for the environment.” Though not automatically, such measures can be sanctions.⁵⁹ Planned as it is, the system has a degree of refinement and complexity that no treaty-based monitoring mechanism in the environmental field equals to this day. Moreover, it is in fact mandatory since a State's eligibility is tied to its submission to the procedures which are applicable for the monitoring of its compliance with the provisions. However, it remains to be tested in operation.

⁵⁴ The beneficiary Contracting Parties must transmit reports on the use of the Ramsar Small Grants Fund in conformity with the implementation guidelines, referred to as “Project Reports on implementation.” Attribution is often tied to the implementation of a continuous monitoring procedure.

⁵⁵ The Convention allows, for example, importing States to monitor its application by exporting States, in particular the issuance and validity of export permits and to deny the import of specimens if they deem these not to comply with the requirements defined in the Convention. This option was used several times, in particular by the United States and the European Community to force States as Singapore or Indonesia to comply with the Convention. However, it is controversial because exporting States view this oversight into their policies as an interference in their domestic affairs. Collective counter-measures are preferable, because at least they are naturally less subjective, less arbitrary and therefore less subject to controversy. Pursuant to Article 14, the Conference of the Parties may request that the Parties cease to accept documents issued by certain States, not allowing them to trade with other Parties. Bolivia, the United Arab Emirates, El Salvador, Thailand, and China or Taiwan have been on the CITES “blacklist.” For the targeted State this is a sanction. On the contrary, for the States that are supposed to implement the measure it is only a recommendation, which they are free to follow or not, but that they usually abide, “hampered” by various political constraints. Since the provision is rarely used its symbolic force is even greater. (SANDS, 1999; LAMBERT, 2000)

⁵⁶ *Indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Protocol*, UNEP/OzL.pro.4/15, Annex 5.

⁵⁷ “Montreal Protocol. Open-ended Working Group of the Parties.” *EPL*, 27/5 (1997).

⁵⁸ Decision IX/35, Review of the Non-compliance Procedure, *Report of the Ninth Meeting of the parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP/OzL.Pro.9/12, 25 September 1997.

⁵⁹ For each ton of a country's emissions of greenhouse gases beyond its target, it must reduce its emissions by 1.3 additional tons during the second commitment period of the Protocol, which will begin in 2013. A non-complying State may also be barred from selling under emissions trading.

113. The procedures mentioned until now are non-judicial in nature. It is in part because judicial review was considered ill-suited in the environmental field that non-judicial procedures developed. Nevertheless, judicial proceedings might be triggered upstream, downstream or at the same time as these non-judicial procedures. This is all the more necessary since sanctions decided within a non-judicial framework are not always sufficient to change a State's behavior: "When a State had the choice between loss of membership in an International Organization and maintaining its own options, though they may have been illegal, it always chooses to preserve its national priorities" (CARREAU, 1994).

2.3.2. Within a jurisdictional framework

114. In the environmental field, States have been defiant to a certain extent concerning international jurisdictional mechanisms. Their traditional reluctance in referring disputes to an international judge is even stronger here, because the obligations provided for are often vague, even in treaties, because many environmental elements have little or no market value, and moreover because the specifics of environmental damage discourage the triggering of judicial proceedings. (LANFRANCHI & MALJEAN-DUBOIS, 2000).

115. In its Principle 22, the Stockholm Declaration already invited States to cooperate "to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." But the issue is very scarcely dealt with by treaties.⁶⁰ Practice has not contributed either to the development of international responsibility law because nearly all inter-State disputes are settled through the negotiation of compensation agreements, resolved without reference to international litigation rules (BOISSON DE CHAZOURNES, 1995), at least when the issue did not shift towards international private law. Several treaties aim at helping settle these types of disputes by "channeling" operators' liability (managers or owners), by providing for the establishment of compensation funds that will permit the payment of compensations if the operators are insolvent or if the damage exceeds a certain sum, by developing "objective" liability systems, by determining the competent jurisdiction or guaranteeing the enforcement of judgments.⁶¹ However, liability transfers have not been achieved in every sector; only certain activities are covered, for example the transportation of dangerous goods and in particular oil or nuclear energy. States are reluctant to generalize these principles, as shows the failure to ratify the (too?) ambitious Council of Europe's Lugano Convention on Civil Liability Resulting from Activities Dangerous to the Environment or the slow progress of the work of the European Commission in drafting a Directive on the issue.⁶²

116. However, though the role of international judges has been marginalized for a long time, over the past few years they have been increasingly sought-after in the environmental field. The ICJ issued a major judgment on this question in 1997.⁶³ A large number of cases decided by the new International Tribunal on the Law of the Sea (ITLOS) concerns the environment,⁶⁴ while disputes concerning trade measures affecting the environment have been referred to the WTO Dispute Settlement Bodies – Panels or

⁶⁰ In the words of L. Boisson de Chazournes (1995). See, however, the draft Convention of the International Law Commission on the Prevention of Transboundary Harm from Hazardous Activities, which attempts to develop the subject: text of the draft and related comments, adopted in 2001, <<http://www.un.org/law/ilc/texts/prevention/preventionfra.htm>>.

⁶¹ See, for example, the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (10 December 1999), as well as the deliberations under the Cartagena Protocol on Biosafety. Cf. *Liability and Redress for Damage Resulting from Transboundary Movements of Living Modified Organisms*, Note by the Executive Secretary, UNEP/CBD/ICCP/3/3, 6 March 2002.

⁶² The Lugano Convention of 21 June 1993 on Civil Liability Resulting from Activities Dangerous to the Environment, adopted under the aegis of the Council of Europe, has not obtained any ratifications to this day. Cf. also, Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage *JOCE* No. L 143 of 30/04/2004 p. 56.

⁶³ ICJ, *Gabcikovo-Nagymaros Case*, judgment of 25 September 1997, ICJ Report, 1997.

⁶⁴ ITLOS, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile/ European Community), Case No. 7, order 2000/3 of 20 December 2000 and 2001/1 of 15 March 2001; ITLOS, *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), case Nos. 3 and 4, order of 27 August 1999; ITLOS, *The MOX Plant Case* (Ireland v. United Kingdom), case No 10, order 2001/5 of 13 November 2001 and 3 December 2001.

Appellate Body.⁶⁵ The European Court of Human Rights heard several cases that had an environmental⁶⁶ aspect over the past few years, while the new International Criminal Court could theoretically have to decide on war-crime cases which entail environmental dimensions.⁶⁷ Finally, the Permanent Court of Arbitration (PCA) issued in 2001 its *Optional rules for arbitration of disputes relating to natural resources and/or the environment* which open interesting prospects.

117. Beyond the diversity of these courts that are unevenly armed, in particular as far as procedural aspects are concerned, a review of recent cases shows their capacity to “judge” disputes involving environmental elements. WTO dispute settlement bodies are also increasingly dealing with “non-trade” concerns. For instance, in the *Shrimp II* case, the Appellate Body, with its interpretation which lets environmental unilateral measures in, refutes critics related to its indifference to environmental concerns (WECKEL, 2002; RUIZ FABRI, 2002(1); BOISSON DE CHAZOURNES, 2003).⁶⁸

118. Furthermore, peaceful dispute settlement mechanisms frequently provided for in environmental agreements — including referral to the ICJ or the establishment of an arbitral tribunal— are hardly used. Consequently, systematic monitoring acts as a simple substitute for these mechanisms, while non-contentious and contentious procedures should interact better. Judges’ intervention could act as a follow-up to violations observed at the end of the systematic monitoring process. Admittedly, contrary to systematic monitoring, international liability and peaceful dispute settlement mechanisms are not preventive but aim to correct improper implementation in a specific case. By their very essence, they are subsequent to a violation. Liability mechanisms appear on their own to be some inappropriate means of reaction: could’nt they be used to supplement non-contentious procedures? The option exists in most environmental agreements but has never been operated.

119. For example, the 1985 Vienna Convention on the Ozone Layer includes in Article 11 a classic dispute settlement clause according to which parties shall seek a solution by negotiation in the event of a dispute between Parties concerning the interpretation or application of this Convention.⁶⁹ This mechanism of the Convention is at first sight applicable to the Montreal Protocol: doesn’t Article 11 §6 of the Convention indeed provide that the provision concerning the settlement of disputes shall apply “to any protocol except as provided in the protocol concerned”?.. And it happens that the Protocol does not contain any contrary provisions. Furthermore, the 1992 Decision of the Meeting of the Parties establishing the non-compliance procedure mentions that the latter “shall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention.” Therefore, we can consider along with P.-M. Dupuy that the invocation of classic liability mechanisms is still possible, even though they might prove to be less suited than an *ad hoc* non-compliance procedure (DUPUY, 1997). In any case, though the use of these mechanisms is not excluded they are only subsidiary *vis a vis* the special procedure defined by the parties (KOSKENNIEMI, 1992).

120. Finally, it should be noted that international judges are not the only ones who can intercede. The Court of Justice of the European Communities can also play a role in the implementation of international environmental protection agreements, if these agreements have penetrated the Community legal system

⁶⁵ *United States — Standards for Reformulated and Conventional Gasoline*, Panel Report, 29 January 1996, WT/DS2/AB/R, Appellate Body Report, 22 April 1996, WT/DS2/AB/R; *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, Report of the Appellate Body, 22 October 2001 WT/DS58/AB/RW.

⁶⁶ ECHR, *Öneryildiz v. Turkey* (Application No. 48939/99), judgment of 18 June 2002, op. cit.

⁶⁷ “War crimes” means: “Intentionally launching an attack in the knowledge that such attack will cause (...) widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” (Article 8 iv of the Rome Statute of the ICC). In contrast, damage to the environment is not listed in the crimes against humanity (Article 7).

⁶⁸ In this case, an invitation to cooperate and negotiate lead directly to the signing of a Convention on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia, adopted 14 July 2000 and entered into force on 1 October 2001. Cf. WT/DS58/AB/R, Appellate Body Report, 22 October 2001.

⁶⁹ See Article 11 of the Convention, which in theory backs the implementation of States’ liability for a violation of their Treaty obligations, even though it has never been used for that purpose. Its potential use is obvious, since it could act as a follow-up to the violations noted during a systematic verification, in particular for repeated failures to cooperate. If the text of the Convention does not clearly imply a recognition of the right to collective or group action, in contrast with provisions existing in the human rights sector, the language used, as well as the fact that any State Party has a legal interest in the respect of conventional obligations, can lead to believe that a clause of this type could be very broadly interpreted. The scenario of collective actions, which is probably more acceptable if are kept in mind the precedents of State action before the bodies of the European Convention on Human Rights, might be conceivable.

— whether the Community has acceded to them or by transposition of their provisions in EC's legal order. Even if the CJEC's judgements are not always enforced very quickly and thoroughly, the participation of such a unique actor changes the legal context in which treaties are performed (LANFRANCHI, 1998). The increasing role of national courts in monitoring the implementation of international environmental law should also be mentioned.

121. The normative and institutional fragmentation of international environmental law can also be found at the level of the means of implementation. In such a decentralized universe, in spite of transfers from one to another each treaty system has developed its own procedures. They vary depending on the age of the cooperation, their regional or universal scope, whether they are based on economic instruments or use more classic "command and control" tools, whether the procedures are cooperative and/or conflictual, depending on the purpose of the treaties and whether a trade dimension is involved or not etc. Widely original and innovative, implementation measures contribute to the strengthening this field of international cooperation. Changes rapidly occur, even though it takes time for States to become accustomed to a "compliance culture". What are, from this point of view, the prospects and paths for the future?

Section 2 – Prospects and Future Options

122. In this Section we will explore options to improve and strengthen monitoring and implementation procedures (A) and dispute settlement (B). These two phases are distinguished for clearer comprehension though obviously the two are interrelated and should be considered together. Monitoring and implementation (non-jurisdictional) procedures could actually result in a jurisdictional dispute settlement procedure in the most sensitive cases. The effectiveness of international environmental law has everything to gain from a better interaction between the two “phases.”

A) Options to improve and strengthen monitoring and implementation

123. Generally speaking, there are two ways of envisaging the improvement and the strengthening of monitoring and implementation of obligations rooted in international environmental protection agreements. The first consists in strengthening monitoring and implementation within the current decentralized framework (Option 1). The second considers the establishment of a new centralized framework that would combine old and/or new mechanisms (Option 2).

Option 1 – Improvement and strengthening within the present decentralized framework

124. Within the present decentralized framework, there are several options to explore to strengthen and improve monitoring and implementation, in order whether to increase the accuracy and reliability of information supplied by States, or to develop inquiry and investigation opportunities or to strengthen follow-up support for Parties experiencing difficulties.

125. Non-compliance procedures have proven themselves. Spreading them to the whole of international environmental protection agreements would be a major improvement. Currently, several “model procedures” exist that can be adapted on a case-by-case basis depending on various factors: agreements on nature preservation or on the control of pollution and nuisances, agreement which include trade measures or not, regional or universal scope etc. Treaty systems have often already established some components of these procedures, however without linking them together in a coherent scheme. Therefore, the objective is not to sweep what currently exists away but to formalize and solidify advances that are made. It should be noted that UNEP could easily offer its expertise to treaty systems that wish to evolve.

126. During the formalization of these procedures, particular attention must be paid to the ways and means of improving data and information supplied by States, of developing inquiry and inspection procedures, of strengthening the follow-up support aimed at Parties experiencing difficulties. It would also be useful, in addition, to harmonize donor country and organizations’ environmental policies.

1.1. Improving information States supply

127. The reporting system is widespread. Very few international treaties do not use them. Reports must be **accurate, reliable and consistent, useable and actually used by treaty institutions**. Most treaties suffer from weaknesses in one or several of these criteria.

In response, cumulative action may be taken at three levels:

> **Upstream:** generalized use of the reporting system has produced a certain amount of saturation within national administrative agencies. This symptom is particularly noticeable in developing countries that do not have the capacities in terms of staff to draft numerous reports every year. Each treaty system must consider:

- Whether those reports are actually useful: they are often only purely formal requirements. Much energy is spent uselessly within national administrative agencies and international treaty secretariats.
- Available methods to alleviate the reporting requirement: spacing out deadlines, bringing reports to be remitted together (between a treaty and a protocol, between several treaties on a specific issue or environment such as biodiversity, air pollution, the marine environment etc.).
- Means of assisting States in reassessing the implementation of a relevant treaty (development of indicators, technical and financial assistance missions, encouragement of international

cooperation among environment ministries based on the example of IMPEL regarding the implementation of European environmental law).

> **at the current reporting systems level:** by developing reporting grids that are both simple and accurate (standardization, establishment of guidelines). Many treaties do this, but the habit is not yet widespread.

> **Downstream:** by making sure that reports supplied by States are properly read and processed. Data processing allows, under some treaties (trade data, importing and importation of hazardous matter or specimens of protected species), for crosschecking and can reveal breaches in the treaty or problems with its implementation (modeled on CITES). **This assumes that great resources are granted to secretariats.**

1.2. Developing potential inquiries and inspections

128. Monitoring and follow-up go further if secretariats are given the opportunity to investigate (the right to request additional information from a State, the option of accepting complaints from third-parties and in particular NGOs, the option of conducting an enquiry or of entrusting enquiries to a third party such as a consultant, NGO, expert or group of experts etc.).

Increasing and widespread use of inquiries, for now only experimented with under some treaties and sometimes on shaky grounds, presupposes **three types of changes:**

- States must lift their reluctance and accept this development,
- More resources must be allocated to secretariats to process, analyze information received, identify grey areas and to be able to seek additional information (financial means, increased staff),
- Secretariats' opportunity to call on a monitoring system independent of States parties (CITES) must be widely expanded.

It would be useful if the secretariats could use information they obtain from NGOs, often unofficially. **Relations with NGOs should be in general clarified, officialized and organized.** One inspiration may come from the initiative of the Secretariat to the Framework Convention on Climate Change which, for example, has established a **unit** for the specific purpose of maintaining inter-session contacts with accredited NGOs.

Under non-compliance procedures, NGOs could, subject to certain conditions, be recognized a **right of petition** (modeled on the Standing Committee of the Bern Convention on the Conservation of European Wildlife). The World Bank Inspection Panel offers a **rare example** to this day of a procedure (inquiry followed by recommendations to the Board who decides on a follow-up) that can be launched by private persons who believe they have been harmed by the Bank's non-compliance with its own policies and procedures.

At the same time, we note here and there some regressions. For example, pursuant to procedures and mechanisms related to compliance with the Cartagena Protocol on the Prevention of Biotechnological Risks (2004), the Protocol's Secretariat is not authorized to trigger a non-compliance procedure on its own initiative. Only the States Parties are (peer-review system). On the other hand, the Secretariat to the Montreal Protocol on Substances that Deplete the Ozone Layer is authorized to do so pursuant to a procedure defined in 1992, i.e., twelve years before.

129. For the time being, only a few treaty systems authorize on-the-spot inspections.

An opportunity for on-the-spot inspection should be provided for under each treaty system and in particular under each non-compliance procedure.

At least, States grant permission on a case-by-case basis; are warned that an inspection is planned and accompany the third parties on its territory.

At the maximum, inspection is mandatory and can occur without warning (surprise inspection).

These two approaches can also be combined. If the State follows a cooperative approach (e.g., if it launched the non-compliance procedure on its own), it is logical to ask for its permission and to expect it to plan its participation in the mission. But in the event of serious and repeated breaches or obvious bad faith, it would be useful to shift to a more coercive form of inspection.

130. Additionally, an environmental monitoring mechanism could be strengthened, evolving towards the European Environment Agency model — more resources, more independence, publication of an annual

report on the state of the global environment (GEO) and regular publication of sectoral reports to be linked with treaties.

1.3. Strengthening follow-up support for Parties experiencing difficulties

131. Identifying non-compliance with treaty obligations, or more generally problems in complying with them, is only a phase — even though it is a key step — of international implementation procedures. Many positive changes have occurred at this stage. But follow-up must take place and treaty institutions must have the means to react by offering follow-up support to non-complying States; this should ideally be a policy mix that would associate — depending on the context, the case and the time of the intervention — **incentives to comply with the treaty and sanctions for non-compliance. For the moment, this facet has not been “explored” much and much remains to be accomplished.**

Therefore, in each treaty system a policy mix must be systematically provided, i.e., a series of means combining incentives and reactions. Identification of non-compliance situations should result in recommendations to the CoP (at least, the sanction resides in the “name and shame” effect) or, in cases where it will be possible (treaties providing for the withdrawal of certain rights and privileges, with trade aspects and/or giving certain economic or financial benefits), in **decisions establishing sanctions** (modeled on CITES, the Montreal Protocol on Ozone...).

132. Among the options to explore, the following may be listed:

- Pursuant to the principles adopted and the commitments made at Rio and restated during each major international conference since then, a **channeling of public development assistance towards treaty mechanisms and a subsequent increase in resources allocated**, which would allow on the one hand, a strengthening of the embryonic international environmental administration formed by the often meager secretariats of the international environmental protection agreements and on the other, increasing resources allocated to assistance missions.
- **Systematic creation in each treaty of a funding mechanism** (whether exclusive or shared on the same model as the GEF) and the supply of the Fund through a quota system (periodic contributions ensuring a degree of predictability and consistency) and not just on a voluntary basis.
- **The clarification of the status of “sanction type” trade restrictions could also be adopted under or in application of several environmental agreements in respect of WTO law.** This clarification would rely mainly on negotiations to take place within WTO. But WTO State Members and parties to environmental agreements are generally the same. Schizophrenic behavior must be avoided and the relationship must be clarified. An issue of such political and strategic importance cannot be left up to the appreciation of the WTO Dispute Settlement Body.

1.4. Harmonizing donor countries and organizations’ environmental policies

133. During the International Conference on Financing for Development held in Monterrey in March 2002, it was largely stressed that more efficient financing required that donor countries and organizations harmonize their development assistance policies.⁷⁰ The Organization for Economic Cooperation and Development (OECD) had already launched, since 2001, consultations with the World Bank and the United Nations, and had created within its Development Assistance Committee (DAC) a Task Force on Donor Practices responsible for compiling an inventory of the procedures and policies of the so-called “official development assistance” (ODA) (DCD/DAC/TFDP(2001)10; DCD/DAC/TFDP(2001)1; DCD/DAC/TFDP(2002)8).⁷¹ In February 2003, the convergence of the work of the United Nations,

⁷⁰ UNGA, “Report of the Secretary-General to the Preparatory Committee for the High-level International Intergovernmental Event on Financing for Development”, 18 December 2000, Doc. A/AC.257/12; p. Monterrey Consensus, 22 March 2002, Doc. A/CONF.198/11.

⁷¹ However, the OECD did not entirely pioneer this approach, since in 1995 a number of banks came together under the Arab Funds Coordination Group, the Islamic Development Bank, the Abu Dhabi Development Fund, the OPEC International Fund for International Development, the Saudi Development Fund, the Arab Fund for Economic and

OECD and other donor countries and organizations resulted in the adoption of the Rome Declaration on Harmonization, approved by the ministers, and heads of assistance organizations and senior civil servants of 28 partner countries benefiting from assistance, and by over 40 bilateral and multilateral development assistance institutions.⁷²

134. The DAC — and more extensively the OECD which remains one of the major drivers in the process of harmonizing the modalities of international development assistance and which work is often referred to as a reference — outlined six areas in which good practices must be compiled, in order to integrate them with donors' policies and procedures, contributing thereby to harmonization while meeting the expectations of partner countries. This concerns among others cooperation between donors (dialogue between various contributors in the same country and same sector), the monitoring of funded projects and reporting system (improved use of the reporting system and monitoring enabling a government to obtain information needed, more understandable and streamlined procedures) and delegated cooperation (allowing, when different donors get involved in the same country on the same project, to delegate funds' management and monitoring to one of the donors).

135. Besides defining these crucial thematic areas within DAC, multilateral development banks have established working groups, specifically responsible for identifying priorities for financial management, lending terms, environmental assessments and assessing outcomes of the financed projects when compared to their initial objectives (World Bank and DAC, 2003). These efforts tie up with those of the United Nations Development Group (UNDG) (RICHARD, 2004), of the Strategic Partnership with Africa⁷³ and the Arab Funds Coordination Group. Without attempting to make a thorough presentation of all the aspects of the harmonization process officially launched in Rome in 2003, it seems necessary to mention the establishment of the Like-Minded Group (LMDG), which brings together Canada, Denmark, Finland, Germany, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom in a joint harmonization effort,⁷⁴ as well as the work of the European Commission which, since 2002, has strived to develop proposals on the subject that will be submitted to Member States (EUROPEAN COMMISSION, 2003).

136. A year and a half after the High-Level Rome Forum, we can state on the whole that though the work is making progress, its practical consequences have hardly been sorted out. Harmonization activities have currently seemed to focus more on rationalizing assistance to partner countries for each development bank, and moving towards an alignment of loan conditionalities does not appear quite as advanced. From the latter perspective, a few tangible outcomes seem to have emerged. **The Working Group on Environment has laid the groundwork for a joint framework for environmental assessment** (MFI-WGE, 2003), which strives to consolidate the practices of international financial institutions in this field. Thus, some progress in aligning conditionalities is already tangible, even though it is hard to say the Rome process is exclusively responsible for it, because the problems that the alignment is attempting to solve have been severely criticized, in particular by NGOs. One recent example is the major revision of the Asian Development Bank's (ADB) procedures and operational policies, carried out for the most part in October 2003. More recently, in May 2004, ADB started applying Policy No. 53 concerning the protection of indigenous populations,⁷⁵ which did not exist until then and which is in line with the World Bank's Operational Directive 4.20, dating back to September 1991.

Social Development, the Kuwaiti Fund for Arab Economic Development and the Arab Bank for Economic Development in Africa (Islamic Development Bank, 2003).

⁷² Rome Declaration on Harmonization, 25 February 2003, <<http://www.aidharmonization.org>>. The Declaration states that the signatories will ensure that ODA is delivered in accordance with partner country priorities, that donors will work to revise, simplify and harmonize their documentation, policies and procedures when appropriate, will disseminate good practices they have identified, will foster partner countries-led efforts to streamline donor procedures and practices, and that the signatories agree to promote harmonized approaches in global and regional programs: Art. 5. See also, World Bank and DAC, 2003. On the other hand, the Declaration does not mention the compatibility of donor procedures and practices with relevant principles of international environmental law. The United Nations, for its part, insists on the fact that carrying out the MDGs should be a priority concern under the harmonization process (UN, 2003).

⁷³ The PSA is a specific harmonization process which gathers DAC, the Economic Commission for Africa, the IMF, the World Bank and the United Nations together.

⁷⁴ *Report of the Regional Preparatory Workshop for the High-Level Forum on Harmonization*, Hanoi, 22-24 January 2003, <<http://www.aidharmonization.org>>.

⁷⁵ On how the Asian Bank took into account, prior to the revision of its procedures and policies, the rights of indigenous peoples and, generally, the social aspects of the projects it finances, see OGM, 2001

137. The process officially launched in Rome needs to be spread in the direction of an alignment with the environmental conditionalities all the ODA donor countries and organizations, while ensuring that the alignment is not done at the lowest common denominator level but aimed at lifting environmental standards.

Governments should **exert pressure so that environmental conditionalities for the financing of international development are aligned with acceptable standards, relying on international environmental law when it exists.** They should also **align their own bilateral loan conditionalities.**

Option 2 – Improvement and strengthening within a new centralized framework

138. We suggest two sub-options: centralization without establishing a WEO and centralization by and within the framework of a WEO. The first sub-option could serve as a “testing ground” while waiting for the implementation of the second sub-option.

Sub-option 2.1. Centralizing without a WEO

139. Centralizing remains possible without even establishing a WEO, by working on some existing institutions. Among the various available options, we are considering in particular the strengthening of UNEP and the GEF. However, clustering may also represent another option of centralization

2.1.1. Clustering

140. A suggestion was made on many occasions **that secretariats of the MEAs could be brought together according to their sphere of activity:** this is referred to as “collocating.” This would, in theory at least, enable MEAs’ bodies working in overlapping or related fields to increase information exchange and create synergies (ROBINSON, 2000), according to a logic of clustering. It would, therefore, be possible to host in the same building bodies that are competent in the field of biodiversity, or for example, protection of the atmosphere (HIERLMEIER, 2002). Some have even proposed establishing not only a single global environmental organization but several, depending on their focus; for example, UNEP, the International Maritime Organization and the bodies of the Convention on the Law of the Sea could merge into a single organization (VON MOLTKE, 2001). Others have stressed the artificial and arbitrary nature of such inter-linking (CHARNOVITZ, 2002). Moreover, the choice of a location for these structures often elicits a jealous reaction from States that wish to exert their influence by welcoming them. Furthermore, geographic proximity does not necessarily ensure better cooperation among institutions. New information technologies can in part solve the remoteness problem and dispersion enables avoiding “ghettoization” of international cooperation in environmental matters (LE PRESTE & MARTIMORT-ASSO, 2004).

2.1.2. UNEP and the centralization of monitoring and implementation

141. We are looking here at the option of centralizing, within the UNEP framework, monitoring and implementation of international agreements. Naturally, such option is closely dependent on the evolution of UNEP trends and must therefore be studied taking into account all the assumptions made for strengthening UNEP and improving its operations.

142. We turned our attention on three ideas: the creation of an International Environmental Agency, the creation of a body of experts under the aegis of UNEP and the generalization of OECD’s review mechanism.

a. Establishing within UNEP an International Environmental Agency based on the European Environment Agency (see, above, Point 1.2.)

b. Establishing a body of experts under UNEP’s aegis

143. **The establishment under UNEP’s aegis of a body of pluridisciplinary experts could be considered** (science and technology, law, economics and management, administrative sciences etc.); these can easily and quickly be mobilized by treaty systems for specific assistance missions to States parties. This would not preclude preserving existing and satisfactory systems, which rely on the contribution of non-governmental organizations (e.g., Ramsar Convention on Wetlands of International Importance).

144. The body could also carry out on-the-spot inspections under non-compliance procedures and/or be given the task of reviewing periodic States reports.

c. Generalizing OECD's environmental performance review mechanism

145. In 1991 OECD implemented an environmental performance review of its member countries and a few non-members that volunteered (Belarus, Bulgaria, Russia). It is based on the "peer review" method, i.e., its objective is that other States systematically review the performance of a State, in a particular area.⁷⁶ OECD's environmental performance reviews are based on a number of predefined criteria, with predetermined and well-established procedures, and the "peers" in charge are appointed in rotation. Moreover, the OECD Secretariat contributes to the process by furnishing data, organizing meetings and monitoring compliance with review procedures. Evaluation criteria are based primarily on the Environmental Strategy adopted by the OECD Environment Ministers. The "Strategy for the first decade of the 21st century," adopted in 2001, establishes five detailed objectives: preserving the integrity of ecosystems through the efficient management of natural resources, the decoupling between environmental pressure and economic growth, improved decision-making information and measuring progress through indicators, improving the quality of life within the socio-environmental interface, and improving governance and cooperation, from a global environmental interdependence perspective (OECD, 2001). In order to conduct their review, OECD Member States, in addition, have access to a series of environmental indicators developed by the Organization (OECD, 2003, OECD, 2004). Besides the Strategy, peers review environmental performance by verifying the degree of implementation of international obligations entered into by the State under review, in particular the ones it is incumbent upon this State to comply with under the MEAs (SG/LEG(2002)1). A first cycle of reviews took place between 1993 and 2000 and enabled evaluating the environmental performances of all member countries (OECD, 2000), without running into specific obstacles.⁷⁷ A second cycle is underway.

146. How can we explain the success of these reviews? A large part of the explanation rests on the fact that they are **not based on a logic of sanction and the outcome does not consist in mandatory obligations**. Performance reviews are made public during press conferences and the State under review has two years to respond. The review procedures are also extremely "secure": **Member States adhere to shared values, are similarly involved and the procedure as well as review criteria are strictly applied and monitored**. (SG/LEG(2002)1).

By relying on **the same concern for transparency and use of stable procedures and criteria** (and why not refer directly to OECD's environmental review criteria?), it should be possible to **universally extend environmental performance reviews**. A strengthened UNEP could centralize the process. A review of this type could be established, at worldwide level, by concluding a multilateral treaty that would precisely define the terms and conditions of the performance review and set up procedures for monitoring compliance with these terms in order to reassure the States.

2.1.3. GEF and the implementation of international environmental protection agreements

147. The GEF can already be considered as a means of inter-treaty coordination and limits the damaging scattering of funds. Consequently, the temptation would be to strengthen its resources while turning it into a financial mechanism for an increasing number of treaties. The advantage of this option is in its flexibility: the evolution can occur gradually, one stage at a time, one treaty after another.

Sub-option 2.2. Centralizing with a WEO

Table 1. Summary of the main options concerning the World Environmental Organization

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⁷⁶ It should be noted that the peer review method is not unique to OECD. Other institutions, such as the UN Economic Commission for Europe (in the environmental field), UNCTAD (in some investment programs) or WTO (under the Trade Policy Review Mechanism), also make use of it.

⁷⁷ It should be noted that OECD Member States are required to cooperate with examiners and the Secretariat.

	“Modest” Option	“Ambitious” Option
Purpose	The environment	Sustainable development
Sphere of action	Global issues	Global + regional and sub-regional issues
Relations with the UN	Part of the UN system	Outside the UN system (WTO, Bretton Woods institutions)
Structure	Standard (inter-State)	Multiparty (ILO variety)
Powers	Cooperative organization	Integrating organization
Normative production	Conferences organized under its aegis adopting new norms or modifying old ones	Producing derivative law
Financing	Voluntary contributions	Mandatory contributions (quota share, international tax)
Relationship with the GEF	Not integrating the GEF	Integrating the GEF
Dispute settlement	No mandatory arbitration mechanism and/or International Environmental Court	Provides for a mandatory arbitration mechanism and/or International Environmental Court

148. The history and substance of the various proposals for establishing a World Environmental Organization are presented in a report by Mr. Le Prestre and Mr. Martimort-Asso. We will focus here on the following issue: what can we expect from a WEO regarding the monitoring and implementation of the international commitments of States? We will only examine the various options available in light of that issue.

149. **If a WEO were established, most of its work would concern the implementation of international environmental law.** Clearly, the international normative structure, while not exhaustive, is rather comprehensive and the international community must focus more of its energy on the implementation of current rules rather than defining new ones.

150. **Centralization of international aspects of the implementation of treaties is possible** as demonstrated, in the environmental field, by the World Maritime Organization with respect to maritime oil pollution from ships. However, the main difficulty a WEO would face would be the pre-existing international agreements and their institutional arrangements, and some of these have been in place for a long time (1973 for CITES for example). It would be difficult to backtrack, centralize and regroup *a posteriori* autonomous (and happy to be so) institutional arrangements within which “local fealties”⁷⁸ have formed. The process can only be gradual and respect these arrangements — on a voluntary basis. Existing treaty bodies must first be convinced that the evolution is attractive. In view of this requirement, a WEO can only be seen as a “service provider” for existing treaty institutions (WEO umbrella model). The situation would be different for future institutions established under new treaties, negotiated under the aegis of the WEO, and for which it could then play a greater role.

151. In this debate, we should remain aware that centralization can only be gradual, with the organization slowly coming up to speed, and that it can only be established on a voluntary basis (accession and acceptance by autonomous treaty arrangements).

152. *A minima*, a WEO could play the role suggested above for a strengthened UNEP: it could set up its own body of environmental examiners, that it could make available to institutional arrangements of environmental treaties on a voluntary basis; organize systematic State inspections on a worldwide scale (adopting the OECD mechanism) focused on treaty law but also on a wider basis (soft law of the Agenda

⁷⁸ To borrow an expression from Pierre-Marie Dupuy. Also see HIERLMEIER, 2002.

21 type, Johannesburg outcomes etc. — a WEO could in this instance replace the Commission on Sustainable Development).

153. *A maxima*, a WEO could be responsible for monitoring the implementation of environmental agreements, in coordination with their relevant institutional arrangements: gathering reports, analyzing and processing information contained in the reports, inquiry and inspection, “warning” to Conferences of the Parties.

154. In dealing with cases of non-compliance or implementation difficulties, the WEO could house the GEF and thereby foster assistance and incentives for implementation. By raising the alarm in the most sensitive non-compliance cases, possibly in a framework open to non-State actors (civil society), it could amplify the “name and shame” effect. It could then inform the relevant CoP, which could then decide on concrete sanctions.

155. It would be particularly interesting to consider generalizing, within the WEO, a non-compliance procedure with respect to environmental treaty obligations (patterned after the Montreal Protocol on the Ozone, or the observance of the Kyoto Protocol, extended to other treaties if not all of them).

Though the terms and conditions can be defined easily, discussions could focus on three issues:

- **Submission/referral:** who triggers the procedure? States attempt to keep these procedures in the inter-State sphere. However, for optimum operations under the WEO, it would be interesting to allow the relevant secretariat (as was accepted for ozone) to launch a procedure, or even for the WEO to do so itself (decision of its General Assembly after a debate, establishment of an international environmental “prosecutor” etc.), or even non-State actors (NGOs expressly “authorized” for example).

- **Inquiry and inspection:** will States agree to grant intrusive powers to an international institution (such as the body of inspection suggested above)?

- **Reactions to non-compliance:** this type of procedure must include sanctions as one of its outcomes, if only for their deterrent effect. Currently, sanctions are rarely provided for and rarely possible. When they are, they must be subject to a condition of proportionality and restricted to the sphere of the relevant treaty. Could the WEO reach beyond this embryonic stage to extend the scope of sanctions based on the example of the WTO countermeasures (e.g., a CITES violation could result in an exclusion from trade under CITES but also under other treaties on the ozone, climate etc.)? Consideration must also be given to daily penalties or financial penalties (modeled on the EU where the Court of Justice may order daily penalties for non-compliance in enforcing its judgments). But we should keep in mind that very often States — in particular developing countries — need assistance more than sanctions. Finally, a link to a **jurisdictional mechanism** should be established, so that the outcome in the most serious cases is an international court judgment or an arbitral award (see below). A link could be established with the **UN Security Council**, to be warned in the event of a threat to international peace, which could then exercise the powers conferred to it in Chapter VII of the UN Charter.

156. International society being what it is, it is important to act in a practical manner and carefully: under no circumstance should the establishment of a WEO mean a harmonization of procedures on a lowest common denominator basis, which would signal a regression in the most advanced fields (CITES, ozone...). On the contrary the objective is a strengthening of existing procedures and the generation of economies of scale by centralizing some operations (inspection, financing).

157. The WTO is the model often cited for a WEO. However, it is inadequate.

- **A WEO cannot be as coercive**, in particular in its implementation mechanisms. States are willing to participate in the WTO on a voluntary basis, because — at least for industrialized and emerging countries — they see a direct and immediate interest in fitting into the flow of international trade and its liberalization. They agreed to the Dispute Settlement Body (DSB) because it guarantees the system.
- **A WEO cannot be such a minimalist organization.** Besides the DSB, the WTO is mostly a framework for trade negotiations. With respect to the tasks entrusted to it, a WEO should have a larger permanent administration (environmental agency, inspectors etc.) and greater means (budget). It would not just be mission-oriented administration but would have functional powers (patterned on UNEP, the World Bank).
- **With respect to principles of information, transparency and participation, established as early as 1992 during the Earth Summit, a WEO must associate under one form or another private actors**, and to a

much larger extent than the WTO does (the insufficient role of civil society within WTO is one of the major criticisms leveled against it). Such participation is necessary in terms of legitimacy and effectiveness (in particular for monitoring, to which NGOs contribute, as mentioned above, by giving valuable information which is added to governmental information, and serve as a sound box with public opinion). On this point, a WEO must be innovating. At the international level, few institutions reach beyond the inter-State structure. ILO is an illustration, but it cannot be directly copied.

B) Options for improving and strengthening dispute settlement

158. Two main options can be considered: the option of preserving a decentralized framework and the centralization option.

Option 1 – Improvement and strengthening within the present decentralized framework

159. The facts show that the problem is not currently caused by a lack of jurisdictional *fora* for international dispute settlement, but that States have failed to use them, speaking of the ICJ, *ad hoc* arbitral tribunals (including the rather unique PCA), the ITLOS, the DSB, the International Center for the Settlement of Investment Disputes (ICSID) etc., and at regional level, the ECHR or the CJEC. Admittedly, there is no international environmental court, but there are a multitude of more general *fora*, or reversely, specialized ones in another field of international law that sometimes encounters environmental law (WTO, ICSID, arbitration of the International Chamber of Commerce, or even the International Criminal Court). We can only wish that in the future international jurisdictions will give more weight to environmental requirements and international environmental law (ICJ's resistance to recognize the polluter-pays principle, WTO Appellate Body, ITLOS, or even the refusal of the Arbitral Tribunal to recognize the customary force of the polluter-pays principle in the *Alsace Potash* case). Within the current decentralized framework, several options are available: encouraging the launching of international proceedings, improving the interaction of international proceedings, better equip international jurisdictions to deal with environmental disputes and expanding the role of national judges.

1.1. Fostering the triggering of international proceedings

160. Currently, only two inter-State disputes have been settled through jurisdictional proceedings under international environmental protection agreements:

- The arbitral award issued in the *MOX Plant* case, Ireland v. United Kingdom, 2 July 2003. The arbitration was conducted pursuant to the rules of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).
- The arbitral award issued 12 march 2004 in the *Case concerning the settlement of the accounts between the Kingdom of the Netherlands and the French Republic under the 25 September 1991 Additional Protocol to the Convention on the Protection of the Rhine against Pollution by Chlorides of December 3, 1976*.

161. Both cases involved very “bilateralized” disputes that were in the end rather standard. The fact that they occurred confirms a resurgence in the activity of international courts in environmental matters. However, it would be excessive to see this as foretelling an increase in the use of treaty dispute settlement mechanisms. Actually there are only two cases, related to very specific contexts. Though these cases relate to two multilateral environmental agreements, they can be compared with the classic issue of good neighborly relations between States, on the same basis, for example, than the 1941 arbitral award in the *Trail Smelter* case between Canada and the United States. In neither case were the plaintiff States seeking to enforce an objective interest in compliance with the rule of law, that of all the States parties to a treaty.

162. But these two cases also show that opportunities are not lacking, but rather a desire to explore them. This was particularly true in the *MOX Plant* case where no less than four international jurisdictions were involved: the ITLOS, an Arbitral Tribunal established under the 1982 Montego Bay Convention on the Law of the Sea (Annex VII), an Arbitral Tribunal established under the above-mentioned OSPAR Convention (Article 32) and the CJEC. Nevertheless, under current circumstances, a number of impediments or barriers concerning the right of action and submission of disputes to a court, can block the triggering of international proceedings.

1.1.1. As regards States' submissions

163. Within international society, States are undoubtedly the actors which have the widest access to international courts. At the same time, this right is strictly regulated. Jealously guarding their sovereignty, States have for a long time limited the role international courts play.

• Increasing the use of compulsory jurisdiction clauses in international environmental protection agreements

164. International proceedings are extremely respectful of State sovereignty. The following fact should never be forgotten: a State cannot be brought before an international jurisdiction without its consent. It is obviously difficult for it to give its consent after a dispute has arisen, but this is usually a key requirement (e.g., the clause in the Rio Convention on the Peaceful Settlement of Disputes). This is why some treaties give States the opportunity to accept *a priori*, before there is any dispute, in general or for certain types of disputes the jurisdiction of a court or *ad hoc* arbitral tribunal. Thus, an Arbitral Tribunal was established under the OSPAR Convention, which Article 32§1 provides that: "Any dispute between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned, for instance by means of inquiry or conciliation within the Commission, shall at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in this Article." In this instance, by ratifying the Convention, and therefore *a priori*, a State — in this case the United Kingdom — consented to an international judge's intervention. The same was true in the *Alsace Potash* case, because the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976 provides in its Article 13 that any dispute which cannot be settled by negotiation shall "at the request of either of them" — in this case the Netherlands — be submitted to arbitration.

165. However, this type of provision is relatively rare and generally environmental agreements provide that consent must be given after a dispute has arisen and after the failure of non-judicial dispute settlement methods (negotiations, good offices, mediation or conciliation). An example of this can be found in Article 27 of the Rio Convention on Biodiversity, which provides that:

- “1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.
2. If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.
3. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:
 - (a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II.
 - (b) Submission of the dispute to the International Court of Justice.
4. If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.”

166. In such case, prior consent to the submission of the dispute to an international court is optional and therefore States rarely use the option. Under the Biodiversity Convention, only Austria, Georgia and Latvia agreed to the two dispute settlement methods, whereas Cuba accepted arbitration but not International Court's jurisdiction. The influence of the reciprocity condition makes it hypothetical that, under this provision, a dispute would be submitted through either procedure. Compared with WTO mechanisms — that may be launched unilaterally, are pre-established and permit a relatively rapid and coercive settlement — these mechanisms appear very weak.

In the future, clauses should be systematically included in new environmental protection agreements that provide for unilateral referral of disputes to a judge or arbitrator (a compulsory arbitration clause or the compulsory jurisdiction of the ICJ). For the time being, these clauses are still rare and are only included in regional agreements. The first two arbitral awards issued under international environmental protection agreements would not have been possible without the existence of a compulsory arbitration clause (Article 32 of the OSPAR Convention, for *MOX Plant*; Article 13 of the Protection of the Rhine against Pollution by Chlorides, for *Alsace Potash*).

Regarding **existing environmental protection agreements**, solutions that come to mind involve:

- Amending the texts as indicated above or adopting specific protocols concerning dispute settlement and providing for those clauses.
- Encouraging States to issue prior declarations accepting the jurisdiction of international courts as compulsory.

• *Developing “objective” rights of action*

167. The **International Court of Justice** does not, at least normally, admit the existence of an “objective” right of action. A real and actual dispute must exist for the jurisdictional function to be exercised at the contentious level. And the Court interprets very narrowly the concept of dispute, limiting even more the scope of disputes and the field of actions. For example, it excludes “virtual” or “abstract” disputes. For the Court “there is a dispute, in the legal meaning of the term, when a State issues a claim which is challenged by another State from a legal point of view,” (DE VISSCHER, 1966). Therefore, conflicting opinions are not enough. Likewise, “it must be shown that the claim of one party was positively opposed by the other.”⁷⁹ In fact, the Court appears to accept a right of action *erga omnes* very restrictively. As a general rule, international law does not recognize collective or group actions, i.e., the possibility for one State to establish the responsibility of any other State that has breached the international legality. In 1966, the Court stated: “though certain systems of domestic law may know the concept, it is not known to international law as it stands at present.”⁸⁰

168. This principle, however, suffers an exception: *erga omnes* obligations, if they establish *omnium* rights with which each person can expect compliance. The Court has already mentioned the concept explicitly on several occasions. In the judgment on preliminary objections, issued in the *Bosnia-and-Herzegovina v. Yugoslavia* case, the court confirmed that “the rights and obligations defined by the Convention [on genocide] are *erga omnes* rights and obligations.”⁸¹ The concept’s core principle is that any State has an interest to act in the event of a breach of an obligation of this type. This is exactly what the Court noted in the *Barcelona Traction* case, stating that “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection”⁸² Indeed, it is well recognized that a violation of the prohibition of genocide “gives the right to any other State to demand not to perpetrate this act. Any other international subject may therefore demand the non-perpetration of other acts of genocide from another State, or at least demand from the State to put an end to these. Every State in the world has the right to expressly demand that the prohibition is observed.” (CASSESE, 1991)

169. The Court again mentioned *erga omnes* obligations in its 9 July 2004 advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The court makes it clear (§§ 87-88) that the right of peoples to self-determination is a right *erga omnes*. It deduces from this right the legal consequences for “other States” besides Israel. Since Israel has violated certain international *erga omnes* obligations (obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law), and given the character and the importance of the rights and obligations involved, all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. Every State, while respecting the United Nations Charter and international law, must make sure that any impediment, resulting from the construction of

⁷⁹ ICJ, *South West Africa, Ethiopia v. South Africa, Liberia v. South Africa*, Preliminary objections, judgment of 21 December 1962, ICJ Report 1962). The case *Northern Cameroons*, (ICJ, Cameroons v. United Kingdom, Preliminary objections, judgment of 2 December 1963, ICJ Report 1963) was a stunning illustration. The Court stated it was “impossible for it to issue an effectively applicable judgment” since it was not asked to either “correct the alleged injustice” nor “award any kind of compensation.” It recalled that its function was to state the law but in concrete cases where there exists at the time of judgment an actual dispute involving a legal conflict of interests between the Parties and that its judgment must be able of having some practical consequences in the sense that it must affect the legal rights and obligations of existing parties, dissipating any uncertainties in their legal relationships.

⁸⁰ The wording was strongly contested, including within the Court (ICJ, *South West Africa Case*, Second phase, judgment of 18 July 1966, ICJ Report 1966, and dissenting opinion of Judge Jessup).

⁸¹ ICJ, *Application of the convention on the prevention and punishment of the crime of genocide*, judgment on preliminary objections, 11 July 1966, ICJ Report 1966.

⁸² ICJ, *Barcelona Traction Light and Power Company, Ltd, Belgium v. Spain, Second Phase*, judgment of 5 February 1970, ICJ Report 1970.

the wall, to the exercise by the Palestinian people of its right to self-determination, is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

170. The issue is no longer to assert a subjective right, but an objective interest in compliance with the rule of law. This leads straight to an *actio popularis*, even though limited, and environmental protection seems to be among the specific fields in which a right of action of this kind is recognized. Therefore, a State does not have to prove an individualized damage. Likewise, the former Article 19 § 2 and § 3d) of the draft ILC Articles on State responsibility recognized that the violation of an environmental protection obligation could constitute an international “crime.”⁸³ Though the ambiguous word “crime” was abandoned, the idea remains in ILC’s new draft articles adopted in 2001. At the end of the second half of the text there is now a Chapter 3 entitled “Serious breaches of obligations under peremptory norms of general international law.” The Commission decided to make the category of primary superior norms (since they cannot be breached) of imperative law coincide with a specific category of secondary norms consecutive to their breach.

171. This is a double condition: there must be a “serious” violation (if it “involves a gross or systematic failure by the responsible State to fulfill the obligation”) of an “obligation arising under a peremptory norm of general international law” (Art. 40). This is an attempt to introduce into international law mechanisms in order to guarantee international legality against violations, reaching beyond the classic compensation for damage resulting from the illegality. The State is therefore responsible *vis a vis* a number of States beyond the State that is a direct victim. In broader terms, the ILC draft articles expand the concept of “injured State”: a State is injured if the obligation breached is owed individually, but also if it is owed to “A group of States including that State, or the international community as a whole, and the breach of the obligation specially affects that State/or is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.” Moreover, any State other than an injured State is entitled to invoke the responsibility of another State if “(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole.” (Art. 48) It remains to be seen at the present time whether an extension of this type corresponds to positive law, even if it follows the trend in international law over the last twenty years.

172. Under the **European Convention on Human Rights**, there are two referral methods: individual submissions and inter-State actions.

173. With respect to applications of individuals, it has often been mentioned that Article 25 [34] of the Convention does not establish an *actio popularis* enabling any person to report any breach of the Convention by a State party. The applicant, in order to show its legal interest in the dispute, must claim to be personally a victim of a violation of the Convention. Legal entities (“any non-governmental organization or group of individuals”) are authorized to submit a dispute before the Court, but must also meet the above-mentioned requirement. It would be impossible to defend a public ecological order or argue for objective verification, or else to request a review of the compatibility of a law with the convention *in abstracto*. An association, a NGO for example, would not be permitted to denounce a violation suffered by its members or some of them, nor a breach resulting from an instrument that infringed the group interests it was its mission to defend.

174. On the other hand, objective applications are possible under the European Convention on Human Rights if the right of action is exercised by States and not individuals. The inter-State right of action (Article 24 [33] of the Convention) is potentially interesting in the field of the environment because it is one of the rare instances where an international contentious tribunal authorizes States have an objective right of action. It is accepted that States have a legal interest in acting each time there is a breach to the Convention, regardless of the manner and of the State concerned. In this instance, States do not have to prove a personal or direct interest. Applications can deal with the violation of the rights of certain individuals; it can also concern the incompatibility of a law with the freedoms guaranteed in the Convention. In other words, States have here the possibility to exercise an international public right of

⁸³ “...a serious violation of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or the seas.”

action. Unfortunately, States' right of action has been anecdotal. Only in five cases in all — and these are old cases — have States had the political and diplomatic courage to (collectively) use the option provided for in the Convention. However, the option remains open and represents a non-trivial potential for defending a "public ecological order."

States must make more **ample use of the opportunities international law offers.**

Judges and arbitrators involved in legal proceedings have not, up to now, had the opportunity to rule on the evolution of international law in these matters. However, **ICJ case-law regarding humanitarian law or the peoples' rights to self-determination leads us to believe that a judge or arbitrator could, without too much daring, have *erga omnes* obligations carry their full effect in the environmental field.**

States should also consider the option of group or multiparty (several States v. another) rights of action. Adapted to the various objectives, in particular when dealing with the interpretation or implementation of an international agreement, they are by nature less unfriendly and lessen the risk of a "boomerang effect", whereas an individual right of action is risky in that respect.

The Optional rules for arbitration of disputes relating to natural resources and/or the environment produced by the PCA provide that disputes having a conservation or environmental component can involve several parties, and specifically provides multiparty choice of arbitrators, sharing of costs, and where appropriate, safeguards to cover interim measures' cost.

175. Nevertheless, State right of action remains politically sensitive. Therefore, the expansion of the submission of cases by non-State actors before international tribunals needs to be examined.

1.1.2. As regards non-State rights of action

176. Non-State actors include private actors (citizens, businesses, NGOs) and public actors (local authorities, international organizations, treaty secretariats). Traditionally closed to non-State actors, international courts are gradually opening up.

177. In this respect, the **ICJ** remains very restrictive. Article 34 of the Statute, which reserves the capacity to act in contentious matters before the Court to States, has not been amended. Individuals, private persons or legal entities, are excluded from the proceedings. The only opening (diplomatic protection) is indirect and subject to very strict conditions (after all paths of appeal have been exhausted, consent of the State...). Legal scholars often suggest that the court should be open to other parties, which would be a real revolution at all levels. Without trying to launch a debate, it should nevertheless be noted that most of the other international courts have extended the right of action to private persons, e.g., the International Tribunal on the Law of the Sea, the ECHR, the CJEC, and international administrative courts. This trend is surely unavoidable, even though its success seems unlikely for the time being in the short or medium term. The contentious function also excludes international organizations that can only request advisory opinions, but subject to very strict conditions. Secretariats or Conferences of the Parties of multilateral environmental agreements are also excluded, as well as regarding the advisory procedure. These restrictions represent huge limits to the exercise of the Court's jurisdiction.

178. **Arbitration proceedings** seem more flexible. In general, States have the right of action; arbitration is an inter-State settlement method. Individuals can only act indirectly here, through the channel of diplomatic protection; they remain behind the State's screen. Nevertheless, in practice there are a few precedents of transnational or interstate litigation between a State and private parties, for example before the **ICSID**, established in 1965 for the settlement of investment disputes between States and nationals of other States. The idea of establishing an "ICSID" with jurisdiction on environmental disputes is very stimulating, but States are certainly not ready to establish a counterpart to ICSID; they do not have the same interests in it.⁸⁴

179. Modeled on the joint arbitral tribunals established by the peace treaties after the First World War between the Allies and the defeated States — to rule on private claims pursuant to confiscation measures taken during the war against nationals of the former and after the war against those of the latter — or the Joint Commission on German external debt following the Second World War — also competent to rule on private petitions — **the creation of *ad hoc* arbitral tribunals** that would rule on individual

⁸⁴ It should also be noted, moreover, that recent ICSID decisions are hardly encouraging as regards environmental protection. On 30 August 2000, in the *Metalclad Corporation v. Mexico* case, the ICSID in fact showed little consideration for the environmental concerns that had in part pushed Mexico to ignore its contractual commitments as well as its commitments under the North American Free Trade Agreement (of which some provisions concern environmental protection). See in particular on this case and its lessons: YEE, 2002; DHOOGHE, 2001.

environmental claims could be considered. These would be well suited for settling specific disputes concerning a large number of private parties, e.g., in the case of an accident causing massive transboundary pollution.

180. It should be noted that the Optional rules for arbitration of disputes relating to natural resources and the environment (2001) drafted by the PCA concern, precisely, disputes for which “one party at least is not a State.” It is extremely flexible, and may involve “private parties, other entities existing under national or international law, international organizations, and States.” According to the PCA, the rules may be used by States, IOs, NGOs, multinational companies or any other private party. It is extremely flexible regarding the nature and number of parties because environmental disputes often oppose several parties from mixed backgrounds, governmental/non-governmental or even commercial.

181. Promoting the PCA rules

The *Optional rules for arbitration of disputes relating to natural resources and the environment* (2001) drafted by the Permanent Court of Arbitration offers real potential concerning non exclusively inter-State transnational disputes. Still little-known, this document should be given greater publicity. Its major limitation is that it is optional.

It could be made compulsory by referring to it in international environmental protection agreements to be negotiated in the future, or in agreements currently in force, amended appropriately, modeled on the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on The Protection and Use of Transboundary Watercourses and International Lakes and the 1992 Convention on the Transboundary Effects of Industrial Accidents (Kiev, 21 May 2003), which provides in Article 14 “Arbitration”: “In the event of a dispute between persons claiming for damage pursuant to the Protocol and persons liable under the Protocol, and where agreed by both or all parties, the dispute may be submitted to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.”

We note that the PCA has also contributed to the elaboration of the draft clauses for the settlement of disputes that could be included in carbon emissions trading contracts. The International Emissions Trading Association (IETA) recommends, in its informational documentation and advice on carbon contracts, the use of the PCA’s Environmental Rules (arbitration and conciliation).

1.2. Improving connections between international proceedings

182. The issue of the connection between the above-mentioned dispute settlement mechanisms and the WTO’s came to light very quickly with the *Swordfish* case (European Union and Chile). Because the law of the sea — resulting from the Montego Bay Convention — the Straddling Stocks Convention and WTO law interacted, the case was referred to both the ITLOS and the WTO’s DSB. The dispute was settled out of court,⁸⁵ probably because everyone understood that it was in no one’s interest to push too far and materialize precisely the prospect of potentially contradictory decisions. However, the case shows that this type of conflict is far from inconceivable. Its occurrence, or the likelihood of it, can on the contrary be a factor in the strategy of the parties, increasing tension in order to arrive at a friendly settlement, and we cannot bet too much on the “reason” of States (RUIZ FABRI, 2002(2)). The case is now pending before the tribunal (it is currently the only case on the docket).

It appears rather unlikely to succeed in elaborating procedures of withdrawal in order to allow another court to settle a dispute, allowing a transfer of a case from one proceeding to another, if only because the various international tribunals may not address a dispute in the same terms. The same facts may give rise in practice to various “disputes” in their legal meaning. In the *MOX Plant* case, the ITLOS and the Arbitral Tribunal established under Annex VII of the Convention on the Law of Sea were asked to decide on non-compliance with the Convention, the OSPAR Arbitral Tribunal for non compliance with the OSPAR Convention, the CJEC for non-compliance with EC law.

But this may be the right moment to consider the best method in order to improve the connections between the various jurisdictions:

⁸⁵ Initially, the Parties agreed to submit the dispute to an arbitration tribunal under the provisions of the Montego Bay Convention before coming to a friendly settlement. But, simultaneously, a Panel had been convened by the DSB (in December 2000), that procedure was also abandoned following the friendly settlement.

- The ICJ could issue advisory opinions detailing certain legal issues at the request of the secretariats of environmental treaties or WTO.
- Procedures of transmission in order to submit a legal issue to another court could be tested (of the type that exists between domestic courts or the Court of Justice of the European Community).
- Treaty secretariats' would be permitted to present *amicus curiae* before the ICJ, an Arbitral Tribunal or WTO's Dispute Settlement Body.

1.3. Better equip international jurisdictions to deal with environmental disputes

1.3.1. Handling of technical issues

183. Environmental cases often involve huge and complex technical or scientific aspects. And yet these are crucial to the outcome of the proceedings. Therefore, a judge must have the means to evaluate such evidence and needs to be able to call in experts or perform on-the-spot investigations.

184. The **ICJ** has a large number of options available. Its Statute gives it the right, while preparing the case, to order inquiries, expert reports, and on-the-spot inspections if it deems that these measures are needed to gather evidence. But in the only environmental case the court has heard, regarding the Danube hydraulic installations of *Gabcikovo-Nagymaros*, the assessment of the technical and scientific material was extremely sensitive since the Parties had put forth totally contradictory arguments regarding the project's environmental impact. The evaluation was at the same time crucial to the case. However, the Court preferred not to rule on the question. It dodged the issue and specified that "it has given most careful attention to this material," and "concludes, however, that, as will be shown below, it is not necessary, to reply to the questions asked in the settlement, to determine which of those points of view is scientifically better founded." In this case, the Court found a way not to get wrapped-up in the parties' demonstrations. However, in principle, expert reports supplied by the parties hold the risk of being biased and in the future the Court should not hesitate to call on experts to assist it in evaluating technical or scientific issues (SOHNLE, 1998).

185. Options for IO/NGOs to intervene have been extremely limited up to now. It should be noted, however, that in the case on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), the Court authorized the Islamic Conference Organization, following its request, to participate in the proceedings.⁸⁶ The Secretariat General of the Organization had requested that it be authorized to furnish information on the issues submitted to the Court by the UN General Assembly. It was permitted to submit a written communication to the Court.

186. As for **arbitrators and arbitration bodies** the options depend on the founding instrument, but all possibilities remain open. Moreover, in the *Trail Smelter* case, the Tribunal had ordered the conduct of studies which it used to determine the behavior the parties should follow in the future. The possibility that a tribunal could include experts among its members could even be considered; this would depend on the free choice of the parties.⁸⁷

187. In the **PCA** framework, under the Optional Rules,⁸⁸ States have appointed experts (one in law, another in science) specialized in environmental issues.⁸⁹

Here too, secretariats should be authorized to present *amicus curiae* before international tribunals.

⁸⁶ See Press Release of 22 January 2004.

⁸⁷ It should be noted that in this case, the tribunal carried out a 6-day on-the-spot inspection.

⁸⁸ Article 27 §5 of the Optional Rules: "The Secretary-General will provide an indicative list of persons considered to have expertise in the scientific or technical matters in respect of which these Rules might be relied upon (see Annex II). In appointing one or more experts pursuant to paragraph 1 above, the arbitral tribunal shall not be limited in its choice to any person or persons appearing on the indicative list of experts."

⁸⁹ Remark: in November 2001, the Cousteau team signed an agreement with the PCA to make available to it the association's science research staff and special purpose ship, *L'Alcyone*, to carry out missions to gather factual evidence, conducted under the aegis of the PCA.

1.3.2. Provisional measures

188. The **ICJ** can order provisional measures. Two conditions are required: on the one hand, imminence of irreparable harm and on the other the risk that the dispute may worsen. But a controversy exists on whether these measures are binding or not. Pursuant to Article 41 of the Statute: “the Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.” Though it is not worth mentioning here again the huge controversy generated by the ambiguous wording of Article 41 of the Statute concerning the legal weight of these measures, we note that States do not comply, generally, with the measures ordered by the Court. For example, in the first *Nuclear Test* case, the Court ordered provisional measures.

189. Regarding the **ITLOS**, the provisions of the ICJ Statute were reproduced, except for one thing: the creation of a possibility of exclusive and compulsory jurisdiction of the Tribunal. One option is very useful: pending the constitution of an Arbitral Tribunal, the ITLOS may, subject to certain circumstances, be asked to order provisional measures (Art. 290-5). Any party may request that the ITLOS prescribe, modify or revoke provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires (except if the parties agree to appoint another tribunal or court within two weeks from the date of the request for provisional measures). The Article expressly provides that measures may be prescribed “to preserve the respective rights of the parties to the dispute” (standard) but also “to prevent serious harm to the marine environment, pending the final decision” (innovative). In its Order of 27 August 1999 in the *Southern Bluefin Tuna* case (New Zealand v. Japan; Australia v. Japan), the ITLOS relied on the urgency of preserving the rights of the parties and preventing any new deterioration in the stocks of bluefin tuna to justify ordering provisional measures. However, in the *MOX Plant* case (above-mentioned decision), the Tribunal refused to grant Ireland’s request for provisional measures, even though it could legitimately claim there were risks of serious and permanent damage to the environment.

190. Regarding an **arbitral tribunal**, the possibility of ordering provisional measures is allowed,⁹⁰ but it all depends on the founding arbitration agreement, and therefore, on the States parties to the dispute.

191. The PCA’s Optional Rules for Arbitration provide “1. Unless the parties otherwise agree the arbitral tribunal may, at the request of any party and having obtained the views of all the parties, take any interim measures including provisional orders with respect to the subject matter of the dispute it deems necessary to preserve the rights of any party or to prevent serious harm to the environment falling within the subject matter of the dispute.”

192. 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require appropriate security for such measures.” (Article 26)

193. The **ECHR** can do the same. “Temporary measures” may be ordered at the request of any contracting State, at the request of the applicant or any other interested party or at the judge’s own initiative. The text of the Convention is silent on that point, but the Court claimed the right in Article 39 of its Rules of Procedure. In a judgment of 6 February 2003, *Mamatkulov de Abdurasulovic v. Turkey*, the Court goes back on its *Cruz Varas v. Sweden* judgment of 20 March 1991. It ruled that a State that does not comply with a provisional measure is hindering the right to freely file an individual application guaranteed by Article 34. These provisional measures are generally used when a violation of the right to life is claimed.

We note that an international judge can generally order provisional measures, which is especially necessary in environmental issues. But judges are still shy in the use of them (ITLOS) or the binding nature of the measures is not well established (ICJ).

1.4. Developing the role of the domestic judge

194. Up to this point we have focused on international proceedings, but the role of domestic judges must also be mentioned for they may also become involved in monitoring the implementation of international environmental obligations of States. Their role might greatly develop as international law itself develops in connection with the harmonization of environmental criminal laws or national legislations on civil liability for environmental damage. For the time being, international law is only developing in a few sectors (e.g., oil pollution, transportation of dangerous waste). Only on the regional level have more ambitious attempts been conducted, and even then, with very qualified success (Convention of the

⁹⁰ Cf. General Act of Arbitration, Art. 33; Model Rules, Art. 20.

Council of Europe on Civil Liability for Damage resulting from Activities Dangerous to the Environment and on the Protection of Environment through Criminal Law). Some doubts can be raised as to whether these examples can be extended at universal level.

195. “Transnational public law litigations”

The expression *Transnational public law litigation* appeared for the first time in 1987 in the work of the American Harold Koh, and refers to lawsuits filed by foreign private persons, in the U.S. courts, for breaches of international law committed by U.S. nationals (physical and artificial persons) abroad. More specifically, it refers to lawsuits filed in the United States under the Alien Tort Claim Act (ATCA). The Act, passed by Congress in 1789, provides that “*US district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States;*” it seems to have been initially targeted at crimes of piracy or abductions of ambassadors. Since the mid 90s, ATCA lawsuits have increased in the United States, involving foreign private parties suing U.S. multinationals (ABADIE, 2004). Some of these suits are based on alleged violations of customary international environmental law. Up to now, none have been successful, either because they did not meet the admissibility conditions U.S. law requires or because the courts ruled that the rights such as the right to a healthy environment or the right to health were not “clear and unambiguous” rules of customary international law (United States Court of Appeals for the Second Circuit, *Flores v. Southern Peru Copper Corp.*, case No. 343 F.3d 140, 2003).

The originality of *Transnational Public Litigations* is that they offer the opportunity to place in the same courtroom private persons (physical and artificial persons) for breaches of international law committed abroad that have not necessarily been transposed into the domestic law of the accused. Moreover, through their lawsuits, plaintiffs are not only seeking recognition and compensation for the injury incurred but are also provoking an interaction of transnational norms through domestic litigation (RUTHERFORD, 2002). In other words, **they allow to improve compliance of businesses working abroad with the minimal environmental standards in a sector where intergovernmental negotiation and the work of international organizations hardly provoke any effect.**

Option 2 – Improvement and strengthening within a new centralized framework

196. The issue of whether to establish an International Environmental Court is not new.

197. It reappeared in 1992 in Rio, during the Conference on Environment and Development. This was the symbolic reason why the International Court of Justice decided to establish a specialized Chamber for Environmental Matters: “In view of the growing concern to protect the environment manifested in recent decades, and the parallel development of environmental law, the Court considered that it should be in a position to deal as efficiently as possible with any environmental matter within its jurisdiction that might be submitted.”⁹¹ Fearing a proliferation of specialized jurisdictions, in particular following the establishment of the International Tribunal for the Law of the Sea, the Court sent a “strong signal” to States.

198. Soon after it began operating, the International Tribunal for the Law of the Sea also formed a specialized chamber for settling environmental disputes.

199. But neither of these institutions experienced the expected success: no cases have ever been referred to them. The fact that they were established does not close the debate because both of these international tribunals are of the standard type both in form and procedure; they reserve in particular — except in rare instances — the right to institute proceedings to States. This shows how ill-suited they are to environmental questions.

In the debate on whether to establish an international jurisdiction specialized in environmental disputes, **however, we should never lose sight of the ICJ and ITLOS in the international legal landscape, and their jurisdiction over these disputes (ICJ’s unlimited jurisdiction, ITLOS’ specialized jurisdiction on the marine environment).** We should also not forget **arbitration’s largely underused potential.** The Optional Rules of

⁹¹ These are the terms of the press release dated 19 July 1993 announcing the establishment of the Chamber. It has not yet functioned. Cf. on the subject: RANJEVA, 1994.

the Permanent Court are especially relevant and well-suited for environmental disputes. Furthermore, we should keep in mind that other courts exist, **courts specialized in other areas but which for cross-functional reasons have to deal with environmental issues (international trade, international investments, human rights, humanitarian law)**, without mentioning the role played by domestic judges or the Court of Justice of the European Communities in Luxembourg.

200. In a context that is already complex, to facilitate the discussion we should question the advantages and drawbacks of establishing an international environmental court, thereby helping to define its “optimum” shape.

2.1. In favor of an International Environmental Court

201. It would meet a real need concerning:

- **ICJ’s and ITLOS’ unsuitability** (exclusive State right of action, duration of the proceedings).
- **The intrinsic defects of arbitration proceedings** (no pre-constituted tribunals, resulting in start up delays and problems establishing coherent case-law, lack of harmonization and centralization).
- **The strong attraction of courts or quasi-tribunals specialized in another field**, e.g., WTO’s DSB. Pre-constituted, mandatory because cases can be submitted to it unilaterally — i.e., without the consent of the defendant — working according to a predefined procedure and held to a relatively short timeframe, the DSB is in a good position to attract disputes with trade and environmental aspects, including those arising under an environmental treaty. The dispute settlement mechanisms of environmental treaties are in fact “no match” for the DSB: they are its negative (generally not pre-constituted, optional, often with a procedure that is not predetermined). Disputes arising under conventions such as the PIC or POP Conventions, the Kyoto Protocol, the Protocol on Biosafety, run the risk of being adjudicated by WTO and not under their respective conventions. However, WTO’s dispute settlement mechanisms (Panels and optionally the Appellate Body) **apply in priority WTO law**, even if admittedly WTO law could not be envizaged in “clinical isolation” from international law, and therefore from international environmental law. **This situation prompts to establish an environmental *alter ego* to these mechanisms.**
- More generally, the deteriorating state of the environment and the increasing concern of public opinion, the major growth in international environmental law at the treaty-level (400 to 500 multilateral treaties) and consequently, the **automatic increase in disputes arising from the interpretation and implementation of these treaties.**

2.2. Against an International Environmental Court

202. Without raising here the issue of the political feasibility of the establishment of an International Environmental Court, it is relevant to stress that there already is a **vast number of various existing jurisdictional dispute settlement *fora***.

203. From a positive point of view such diversity already allows for **forum shopping** (the possibility of choosing the most suited institution, or even to play one proceeding against the other, as shown by Ireland’s choice in the *MOX Plant* case, handled by four different courts).

204. But such diversity can also have **pernicious effects**. The lack of interaction between these courts and the rules aimed at avoiding conflicts of jurisdiction (*non bis in idem*, *res judicata*, withdrawal procedures, transmission of certain legal issues to another court to seek its opinion etc), there is a noticeable scattering of the legal adjudication of disputes, a damaging competition among courts that can lead to conflicts in interpretation and solutions, at the very least generating discomfort and tensions and at the very most, confirming the analysis according to which international law is dislocated, which is so damaging to environmental protection (RUIZ FABRI, 2002(2); MALJEAN-DUBOIS, 2000). Does establishing a new institution risk encouraging the trend? Actually, it would appear difficult, even impossible, from a strictly legal point of view, to centralize within a single forum all environmental disputes.

205. Moreover, the risk is that an institution of this kind would require a major investment, both financial and in terms of energy, and would not be “cost-effective.” On a daily basis, have we not observed that the current large and varied “choice” of fora is clearly underused by States? In environmental matters, jurisdictional dispute settlement mechanisms have been considered “too heavy, often random, their use politically damaging” (DUPUY, 1998). States often prefer a discreet friendly settlement (KISS, 1992). This is a general trend in international law, which frequently prefers flexible procedures and policies for settling disputes rather than court adjudication. Standard diplomatic mechanisms have the advantage of flexibility and often discretion, and allow for smoothing over disputes while saving face. Several reasons explain why the trend is more pronounced in environmental matters (LANFRANCHI & MALJEAN-DUBOIS, 2000).

2.3. What could or should an International Environmental Court look like?

206. Two major options are available: a permanent court or an *ad hoc* arbitral tribunal varying its membership and procedure according to the disputes.

207. Considering the variety of environmental disputes and the existence of the International Court of Justice (which can also be called upon), it would be preferable to choose the **arbitral tribunal** option. The procedure is more flexible and the tribunal can be “designed” on a case-by-case basis by the litigants (membership, procedure, timeframe, access to treaty secretariats etc.). Well-suited for environmental disputes, the PCA’s Optional Rules could serve as a negotiating basis.

208. The disadvantage compared with a permanent court would be the time required to establish the arbitral tribunal. However, this could be eased with the involvement of a WEO Director-General, to break a deadlock in the proceedings (e.g., appoint an arbitrator in the event of a prolonged disagreement of the parties, modeled on the WTO).

209. By joining the WEO (as provided in its founding charter), all States would agree to a **compulsory** dispute settlement arbitration mechanism in connection with the interpretation and implementation of international environmental law. As for treaties and conventions, WEO mechanisms would supplement rather than be substitute. The mechanism would only be activated if the dispute cannot be settled under the relevant environmental treaty, in particular if it did not provide for a compulsory jurisdictional mechanism. Subject to a contrary agreement of the parties, the PCA’s Rules (or rules of procedure amending them) would govern the procedure.

210. A mechanism of this type could nevertheless be implemented **outside the WEO** by an international treaty providing for it. States would then have to ratify or accede to the convention for the mechanism to become mandatory for them.

An optional mechanism would not add anything more to what currently exists, a situation in which many options are available but there is no will to use them.

The fact that the proposed mechanism would be compulsory would represent enormous progress, even though it would not, with a wave of the magic wand, solve every problem. This is where the WEO would be likely to represent a major advantage, a real added value compared to the decentralized option.

This “design” is legally feasible and would easily enable to create connections between environmental agreements without having to amend them. However, it remains to be seen whether it is politically acceptable and if a goal of this kind would not run the risk of ruining the chances of the WEO project.

To come closer to the “WTO model”, two stages would have to be established, i.e., an appeal process would need to be provided. WTO’s experience shows that the Appellate Body has made a major contribution in “judicializing”, strengthening and adding consistency to international trade law. The possibility also deserves to be examined in the environmental area.

211. Our feeling is that the proponents of an international environmental governance reform toward centralization (establishment of a WEO or UNEO) have a tendency to deny the advantages of the current decentralized system and conversely to exaggerate the benefits of a centralized solution (LE PRESTE & MARTIMORT-ASSO, 2004). Won’t the establishment of a WEO risk being a simple political and symbolic gesture and only stand for an illusory advance? **The current system of international environmental governance certainly leaves room for improvement. However, the main stakes are elsewhere: the lack of support for existing institutions and monitoring**

mechanisms (UNEP/IGM/3/2). Yet, the establishment of a WEO in no way guarantees better support. On the contrary, it runs the risk of allowing the international community to ease its conscience at a lesser cost, thereby avoiding difficult decisions and measures. The WEO will not mean progress if it suffers from the same ills as UNEP (weak means, attempts at confinement, marginalization of environmental issues on the international agenda). **We definitely prefer the strengthened decentralized option.**

212. If, in addition, the question is asked at the political level, in terms of feasibility, we note that few defend the “WEO” option. As delicate as it may be in the current context, the “strengthened decentralized option” offers the great advantage of allowing a pragmatic and gradual move forward, in small steps, depending on the field and/or regions. It seems to us to lead more rapidly and surely to tangible outcomes. Moreover, it is entirely possible to advance in this direction, for example, by merging the mandates of UNEP and UNDP in conjunction with a strengthening of the GEF and establishing a compulsory arbitration mechanism (LE PRESTE & MARTIMORT-ASSO, 2004).

213. However, whatever is the option chosen, the major stakes rest in an increased mobilization of States in supporting environmental issues.

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