INTERNATIONAL ENVIRONMENTAL DISPUTES

International forums for non-compliance and dispute settlement in environment-related cases

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Introduction: environment-related disputes

'The environment' is increasingly featuring as a factor in disagreements between countries in various international forums – and, indeed, the number of available forums in which these disputes can be heard is itself increasing. This is a reflection partly of the steady expansion of international environmental obligations, partly of the growing reach and complexity of other international regimes (e.g. the multilateral trading system) and partly of the growing understanding – and evidence – of the environmental implications of almost any economic act or policy.

The existing system for dealing with such disputes remains, however, fragmented. This bears obvious dangers: the risk of duplication of effort and lack of coordination, and the likelihood of countries 'shopping around' for the forum in which they are most likely to be successful. The most recent case in the list of international environment-related disputes, the EU–Chile swordfish dispute, saw the EU requesting the establishment of a WTO dispute panel while Chile initiated proceedings before the International Tribunal for the Law of the Sea. Fortunately – or unfortunately from the point of view of academics poised to write about the clash of dispute forums – the case was resolved by agreement between the two countries on 25 January 2001.

This paper describes the main agreements and institutions under and before which international environment-related disputes may arise, and some of the cases with which they have dealt.[1] It is primarily a descriptive rather than analytical paper, and I have not attempted to draw firm conclusions about the future – though I have provided some tentative thoughts about possible developments.

It is important to distinguish at the outset two different categories of dealing with such disputes:

- *Dispute settlement mechanisms* exist primarily to deal with disputes between two (or more) countries about their obligations under particular international agreements. Some kind of tribunal or court is established to hear the case and reach conclusions, though there is usually a preliminary phase where the parties in dispute are encouraged to reach an amicable settlement. Dispute settlement mechanisms are clearly most appropriate where the breach of an agreement causes measurable harm to a country (e.g. loss of market access in a trade agreement) and where the case revolves around the interpretation of general rules and principles (e.g. the WTO agreements).

- *Non-compliance systems* exist in many multilateral environmental agreements (MEAs) where a party's failure to comply with the obligations set out in the MEA damages the integrity and success of the regime itself, rather than causing direct and measurable harm to any single country. Non-compliance systems work best where an agreement deals with global environmental issues (e.g. atmospheric pollution) and its provisions are highly specific (e.g. the Montreal Protocol).

To simplify grossly, dispute settlement mechanisms tend to be bilateral (or plurilateral) whereas non-compliance systems are multilateral.

[1] I am greatly indebted to Patrick Szell and Philippe Sands for their invaluable advice. Two articles in particular have provided much of the material under the 'dispute settlement' section and most of the direct quotes: Philippe Sands, 'Human Rights, Environment and the *Lopez-Ostra* Case: Context and Consequences' (*European Human Rights Law Review* issue 6, 1996) and Philippe Sands, 'International Environmental Litigation and its Future' (*University of Richmond Law Review* 32:5, January 1999). Thanks also for comments from Karen Campbell, Aaron Cosbey, Gavin Hayman, Alice Palmer, Ros Reeve and Jake Werksmann.

Dispute settlement

Dispute settlement systems exist in many international agreements and institutions, not only, of course, environmental ones. This section lists notable examples, together with the most important environment-related cases that have been settled under them.

International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations, established in 1945, along with the UN itself, in continuation of its predecessor, the Permanent Court of International Justice. It is a standing court and Article 36.1 of its statute provides that its jurisdiction 'comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'.

All UN members undertake upon joining to comply with the decisions of the ICJ in any case to which they are a party – in other words, the Court's decisions are binding on the parties in the case in question. Article 94.2 provides that if a party fails to carry out the requirements imposed on it by the Court, the other party is entitled to refer the matter to the Security Council, which 'may, if it deems fit, make recommendations or decide upon measures to be taken to give effect to the judgment'. Ultimate enforcement is therefore a political, rather than a legal matter – hardly surprisingly, given that the ICJ deals with relations between states. However, in addition to their legal standing, ICJ decisions have a very powerful moral and political impact, partly because of the high standing of its judges, and its long experience, and there are very few cases of sustained resistance to them.

The Court's reach is far from universal, however: a state is only subject to its jurisdiction if it is subject to a multilateral agreement which stipulates it; if it appears before the Court without objecting to it exercising jurisdiction in the case in question; or if it makes a unilateral declaration recognising its jurisdiction (to date about fifty states have done so, though several with reservations).

The ICJ clearly has full competence over all aspects of international environmental law, and a number of MEAs specifically stipulate its jurisdiction. In July 1993 the Court established an environmental chamber, comprising seven of its fifteen judges, with the intention of building up a body of specific expertise in that area. To date, however, no state has opted to have any dispute heard by the new chamber.

Specific disputes

The ICJ itself has, however, dealt with a small number of environment-related disputes. In September 1995, despite declining on jurisdictional grounds to accede to New Zealand's request to consider the legality of the resumption by France of underground nuclear testing, the Court stated that its order was 'without prejudice to the obligations of States to respect and protect the natural environment' – a statement that was at least partly based on the 1972 Stockholm Declaration and the 1992 Rio Declaration. Similarly, in 1996, delivering an advisory opinion in the question of the legality of the use of nuclear weapons, the ICJ observed that although international environmental law 'does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account …'.

More significant for the purposes of this paper was the Court's judgment in the case involving Hungary and Slovakia in the Gabcikovo-Nagymaros Project, involving the construction of a barrage on the Danube. Commissioned in 1977, by the late 1980s public opinion in Hungary – linked with the fall of the communist regime – led to the suspension of work and eventual Hungarian withdrawal from the 1977 treaty. Czechoslovakia (later Slovakia), proceeded unilaterally with a more limited scheme involving the diversion of 80% of the waters of the Danube into a bypass canal (with, in due course, significant damage to local biodiversity). Under pressure from the European Commission, the two countries referred the dispute to the ICJ in 1993. Its judgment, in 1997, while finding that Hungary was not entitled unilaterally to suspend the joint project solely on environmental grounds, nevertheless accepted the principle of 'ecological necessity' whereby a state may seek to preclude responsibility for otherwise wrongful acts by invoking the law of state responsibility. The Court also accepted that concerns for the natural environment represented an 'essential interest' of a state, that norms of environmental law had to be taken into consideration in implementing the treaty, and – most importantly – that later developments in environmental law and standards should be taken into account when addressing activities begun in the past. The Court also invoked the 'concept of sustainable development', while declining to explain what it thought its implications might be.

None of these three decisions really develop the relevant concepts in any great detail. They do, however, underline, albeit in a rather hesitant manner, that the ICJ is available to handle environmental disputes and that there are no impediments to bringing environmental considerations into the mainstream of international law.

European Court of Justice

In contrast to the ICJ, the European Court of Justice (ECJ) has already had a clear and direct impact on the development of the environmental law of the European Community. The ECJ resolves disputes over interpretations of the EU treaties and obligations flowing from them. As far back as 1985, it recognised that environmental protection was an 'essential objective' of the EC and in the following ten years over 150 environmental cases came before it. It has, on occasion, given environmental protection objectives equal or greater weight over economic and trade objectives, and has demonstrated a willingness to recognise and act upon some of the special characteristics of environmental issues.[2]

The ECJ's enforcement procedure has recently been strengthened as a result of the renegotiation of the treaty at Amsterdam. Fines are now applied to member states failing to comply with ECJ judgments within a reasonable period (unspecified, but perhaps two to three years).The first cases are only now beginning to surface; Greece is currently being fined for its failure to deal with a waste dump near a village in Crete, and Germany and the UK are near to incurring penalties relating to the Environmental Impact Assessment and Bathing Water Directives respectively. The fines, which are fairly substantial, are calculated relative to GDP, and applied on a daily basis. They do, accordingly, carry a substantial deterrent effect.

The ECJ has been able to act so effectively, of course, because of the regional and closely knit structure of the EU, in which a reasonably homogeneous group of states have ceded some legal and political power to the central institutions. No other regional or global institution of a comparable nature yet exists.

[2] Sands, 'International Environmental Litigation'.

Human Rights Courts

The connection between human rights and environmental protection was first formally recognised at the international level in 1968, when the UN General Assembly noted the relationship between the quality of the human environment and the enjoyment of basic rights; subsequent declarations, including the 1972 Stockholm Declaration on the Human Environment, have reiterated the importance of the link. In 1981, the African Charter of Human and People's Rights was the first international legal instrument to connect the two; it was followed in 1989 by a protocol to the American Convention on Human Rights. The Inter-American Commission on Human Rights has dealt with several environment-related cases; in the Yanomani case, for example, the Commission concluded that the ecological destruction of Yanomani lands in Brazil had violated the rights to life, health and food found in the American Declaration of the Rights and Duties of Man.

Occasional efforts in the Council of Europe, beginning in the 1970s, to draft an environmental protocol to the European Convention on Human Rights have all failed. Nevertheless, environmental issues have been raised in relation to various provisions of the Convention, including most notably Article 8 (right to respect for private and family life) and Article 1 of the First Protocol (right to peaceful enjoyment of possessions). In 1980, the Commission on Human Rights accepted, for the first time, the link between noise pollution and human rights, and subsequently dealt with a series of cases involving aircraft noise. In 1991, the Court recognised 'that in today's society the protection of the environment is an increasingly important consideration', and in 1993 dealt with its most important environmental case to date (Lopez-Ostra) concerning harmful emissions from a leather industry waste treatment plant. In the end the Court found for the complainant under Article 8 of the Convention, concluding that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'.

World Trade Organisation

The International Trade Organisation was supposed to come into existence, alongside the World Bank and the IMF, as the third leg of the Bretton Woods tripod in 1946. Opposition, primarily from the US, led to only a part of its structure, the General Agreement on Tariffs and Trade (GATT), being adopted 'provisionally' for the next fifty years. The GATT sets out broad principles aiming at the removal of trade barriers and non-discrimination in trading arrangements, and was gradually supplemented by a series of additional codes and agreements (now totalling nineteen) dealing with specific issues and sectors. In 1995, the World Trade Organisation was brought into existence as a permanent institution overseeing the application of these agreements – the 'multilateral trading system'.

Disputes between WTO members over their application of the principles set out in the GATT and other agreements are decided by the WTO's two-stage disputes procedure: a dispute panel produces a finding, after taking evidence and arguments from all sides; this may be appealed against, in which case the same procedure is followed by the Appellate Body (which is, unlike the panels, a standing body). Decisions of the Appellate Body are binding unless WTO members decide – unanimously – not to adopt them, a feature that gives the dispute settlement system very considerable power. Given the fact that several key terms in the text of the GATT and other agreements – such as 'like product' – are not defined, the findings of panels and the Appellate Body in a series of dispute cases have in practice determined how the multilateral trading system treats trade-related environmental measures, and will continue to do so in the absence of any agreement to modify or further extend the WTO agreements.

Despite the effectiveness of the WTO dispute settlement system, it does suffer from a number of weaknesses. There are procedural points which have been raised for some time by NGOs and some governments – a lack of transparency, a resistance to involvement by civil society (e.g. through submission of 'amicus curiae' briefs on cases), a limited ability to take on board specialist advice, and the fact that poor countries are at an obvious disadvantage in preparing complex legal briefs. Perhaps more importantly, enforcement of dispute settlement decisions depends on unilateral action on the part of the complainant countries, who are authorised to apply trade sanctions, of various forms, to the value of the benefits they are calculated to have foregone. While this clearly is an effective sanction where large trading countries or blocs, such as the US or EU, are involved, it is of far less value where small countries are the complainants.

Specific disputes

Eight GATT and WTO dispute cases are normally cited as being of most relevance to environmental issues, though arguments and findings in others are, of course, also important. Three arose under the GATT: the two tuna-dolphin cases, in 1991 and 1994, concerned US embargoes on imports of tuna caught by methods which killed larger numbers of dolphins than US legislation allowed US boats; and the CAFE case dealt with US taxes on imports of European automobiles. The other five have been dealt with by the WTO: reformulated gasoline, concerning US requirements for gasoline standards; shrimp-turtle, dealing with a US embargo on imports of shrimp caught by countries which did not require trawlers to fit devices allowing sea turtles to escape from the nets; beef hormones, concerning EU restrictions on imports of beef from cattle treated with growth hormones; Australia salmon, covering an Australian embargo on untreated salmon imported from Canada; and asbestos, dealing with a French ban on imports of Canadian asbestos and products containing asbestos.

The panels' and Appellate Body's reasoning has clearly evolved over time, and – in general – become more environmentally responsive. There was little question, in most of the cases, that the various trade measures employed were in breach of the general obligations of the GATT; the key arguments revolved around the question of whether they could be 'saved' by the 'general exceptions' clauses in Article XX. The earlier panels' conclusions tended to find against the various trade measures as either not 'necessary to protect human, animal or plant life or health' (Article XX(b)) – because they believed that there were other, less trade-restrictive measures available to fulfil their objective – or not 'relating to the conservation of exhaustible natural resources' (Article XX(g)) – because extra-territorial measures were not considered acceptable in achieving primarily domestic objectives.

However, the Appellate Body in the reformulated gasoline and shrimp-turtle cases differed from the panels' findings in important respects. Crucially, they accepted that the trade measures *could* be justified under Article XX(g), though in both cases they ultimately found against them (under the headnote to Article XX) because of the discriminatory ways in which the US had applied the trade restrictions – in the shrimp-turtle case, for example, the south-east Asian countries which brought the case were treated entirely differently by the US from Caribbean nations, with whom a multilateral agreement was negotiated. This case in particular appears to open the way to process-based trade restrictions (i.e. discrimination between 'like products' on the basis of the ways in which they are produced, a key factor in much environmental policy), as long as they are applied in ways which do not discriminate between WTO members.

The shrimp-turtle case is also of importance for three other reasons: the use the Appellate Body made of the reference to sustainable development in the preamble to the agreement establishing the WTO[3] (before this case, the phrase was generally regarded as having no operational significance); the references the Appellate Body made to a number of MEAs (dispute panels having hitherto regarded other international agreements as irrelevant to the interpretation of the GATT); and the fact that the Appellate Body allowed, for the first time, submissions from NGOs. (However, the Appellate Body's decision in late 2000 to publish procedures for NGOs to file such amicus briefs caused considerable debate amongst the WTO General Council, with almost all members expressing unhappiness about the principle of allowing NGO access.)

The beef hormones case was slightly different, dealing as it did with a dispute under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), which allows WTO members to take protective measures in the face of a threat to health from one of a number of specific causes as long as certain conditions are met, including the requirement that the measure is based on a risk assessment. Here the Appellate Body found that the EU ban could be justified as long as the EU provided convincing scientific evidence of the danger to human health; when the European Commission failed to supply this within the set period, the WTO authorised the US to levy tariffs on specific categories of EU exports. This was not, however, an argument about discrimination, as the EU bans its own producers from using the hormones in question; it is effectively an argument about global standard-setting, and raises in turn questions of the appropriateness of the standard-setting bodies (in this case the Codex Alimentarius Commission) and the relevance and weight of the precautionary principle. The Australia salmon case, on which the Appellate Body issued its ruling in October 1998, raised similar issues. Concerned with the possibility of importing disease-causing organisms, an Australian risk assessment had confirmed a 1995 prohibition on the import of untreated fresh, chilled or frozen salmon from Canada. A WTO panel, and the Appellate Body, found that the risk assessment did not justify the import ban, and that Australia was therefore in violation of the SPS Agreement.

In the most recent case, involving a complaint from Canada over a French ban on imports of asbestos and products containing asbestos, the panel reported in September 2000; Canada has appealed against its decision but the Appellate Body has not yet considered the appeal. The case is notable as the first time a dispute panel has found that a trade restriction can be justified by Article XX(b) of the GATT, in this case because of the health risks of exposure to asbestos fibres. The arguments used by the panel, however, appear from an environmental point of view somewhat suspect, as they concluded that products containing asbestos and non-asbestos-containing substitutes are 'like products'; the end use of the product was the only relevant factor.

One further averted dispute is of relevance, the complaint raised by the EU over a ban by Chile, on conservation grounds, on the import and transit of swordfish. When the EU requested and obtained the establishment of a WTO panel, Chile, in turn, initiated proceedings before the International Tribunal for the Law of the Sea (see further below), whose parent convention contains provisions relating to the conservation of marine resources. In January 2001, however, the EU and Chile reached a settlement providing limited access for EU fishing boats to Chilean ports, scientific and technical co-operation on conservation of swordfish stocks, and the establishment of a multilateral framework for the conservation and management of swordfish in the Southeastern Pacific.

[3] The agreement recognises that trade should be conducted '… while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so …'.

Permanent Court of Arbitration

The Permanent Court of Arbitration was created in 1899 to assist international dispute resolution through arbitration and other peaceful means such as conciliation and mediation. It is not a court in the strict sense of the word but consists of a panel of some 265 jurists, nominated by the eighty-five parties, from among whom the parties to a dispute can choose, if they wish, the person(s) to whom they will entrust the task of settling their dispute. In contrast to the ICJ, the PCA has, in addition to the power to resolve disputes between states, the authority to settle disputes between states and private parties and those involving intergovernmental organisations. For a case to come before the PCA, there has to be mutual agreement between the parties to the dispute. A working group was established in 1996 to work on the preparation of draft environmental procedure rules for the PCA.

International Centre for the Settlement of Investment Disputes

The International Centre for the Settlement of Investment Disputes (ICSID), was established in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which came into force that year. It hosts arbitrations to resolve disputes between investors and states that are alleged to have interfered with investments. Recourse to ICSID conciliation and arbitration is entirely voluntary, but once the parties have consented to arbitration, neither can unilaterally withdraw. All ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognise and enforce arbitral awards.

Advance consent by governments to submit investment disputes to ICSID arbitration is specified in about twenty investment laws and in over 900 bilateral investment treaties. ICSID arbitration is one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties, including the North American Free Trade Agreement and the Energy Charter Treaty.

The number of cases submitted to the Centre has increased significantly in recent years and now typically concern claims over such events as civil strife in the state, alleged expropriation or denials of justice by it, and actions of its political subdivisions. A number of arbitrations currently before ICSID raise serious issues of international environmental law, including whether environmental legislation can constitute a form of expropriation and whether full compensation must be paid where a taking is for environmental reasons.

World Bank Inspection Panel

The World Bank Inspection Panel was established in 1993, becoming operational in late 1994. It is authorised to receive requests for inspection from a party which claims to be affected by a World Bank project, including claims in respect of environmental injuries. The Panel, which consist of three members, may make a recommendation to the Executive Directors as to whether a matter complained of should be investigated; if the investigation goes ahead, one or more Panel members conducts it and reports back, first to the Panel, and then to the Executive Directors, on whether the Bank has complied with its relevant policies and procedures. To date, the Panel has received a number of applications from NGOs that raise issues of general international environmental law, in particular environmental impact assessment.

NAFTA

The North American Free Trade Agreement (NAFTA) was inspired by the success of the EU in eliminating tariffs and stimulating trade. A Canadian–US free-trade agreement was concluded in 1988; NAFTA, including Mexico, was agreed in 1992 and came into force in 1995. Separate side agreements were adopted on labour and the environment.

In contrast to other trade agreements, NAFTA contains provisions allowing investors directly to challenge any of the host governments alleged to have breached its investment obligations under Chapter 11. The complainant may choose as an arbitral mechanism ICSID, the rules of the United Nations Commission for International Trade Law (UNCITRAL) or the remedies available in the host country's domestic courts. An important feature of these provisions is the enforceability in domestic courts of final awards by arbitration tribunals. The mechanism was initially sought by the US and Canada to protect their investors, but was also welcomed by Mexico.

Several environment-related disputes have arisen under the Chapter 11 investor-state provision. In 1996 the US-based Ethyl Corporation sued the Canadian government for legislation banning the import of and inter-provincial trade in – though not domestic production of – a petrol additive; the Canadian government eventually settled out of court. In 1996 the US-based Metalclad Corporation sued the Mexican government for actions by the local and state government preventing it from opening a hazardous waste landfill. The tribunal held that Mexico's actions amounted to expropriation under Chapter 11; the decision was due to be reviewed in February 2001. In 1998 the US firm Pope & Talbot Inc claimed against the US for the manner in which the Canada–US Softwood Lumber Agreement was implemented by giving quotas and special levies to producers in only some provinces. The tribunal found, again, that the regulations constituted measures tantamount to expropriation. In 1998 the US firm S. D. Myers claimed against Canada for its ban on exports of PCBs; in November 2000, the tribunal ruled in favour of the company, finding that there were no legitimate environmental reasons for the ban and that it was a protectionist measure designed to help Canadian companies.

In 1999 the Canadian Methanex Corporation announced notice of an intent to arbitrate under Chapter 11 as a result of a Californian announcement of a future ban on a petrol additive of which Methanex manufactured a major input. The company claimed that the value of its shares had dropped as a result of the announcement, amounting to expropriation, and also argued that alternative measures were available to California which would have had a lesser impact on the company. In a potentially important procedural development, in January 2001 the tribunal ruled that it would accept an 'amicus curiae' brief from the International Institute for Sustainable Development, a Canada-based NGO.

Other parts of NAFTA also have implications for environment-related disputes. A recent ruling in a case brought under Chapter 20 found against a US ban on licensing of Mexican truckers to operate in the US, ostensibly on environment, health and safety grounds. The environment side agreement, the North American Agreement on Environmental Cooperation, permits private citizens and NGOs to lodge submissions with the North American Commission on Environmental Cooperation alleging that one of the NAFTA governments is not enforcing its environmental laws. The Commission has no power to compel governments, but can investigate complaints and publish its findings – which have had some impact. It is the Chapter 11 investor-state provisions, however, which have caused most concern. Under pressure from NGOs, Canada proposed, at the NAFTA ministerial in May 1999, to limit the definition of what government actions amount to expropriation, but was strongly opposed by Mexico. In February 2001 Canada announced that it would intervene in the review of the Metalclad case, arguing that the tribunal's decision in effect expanded NAFTA obligations beyond what had been originally intended.

MEAs

Almost all MEAs have provision for dispute settlement. A typical example is the Vienna Convention, (the parent convention of the Montreal Protocol), which provides a series of options: negotiation, mediation by a third party (if both parties agree), submission to the ICJ (if the parties agree) or settlement by a conciliation commission jointly chosen by the two parties. What is notable, however, is that MEA dispute settlement procedures have never been used. The multilateral nature of the issues dealt with by the MEA (see discussion above) make the provision for bilateral dispute settlement procedures largely irrelevant, particularly where an effective non-compliance mechanism is in existence.

International Tribunal for the Law of the Sea

The UN Convention for the Law of the Sea was agreed, after protracted negotiations, in 1982 and entered into force ten years later. As with the example of the Vienna Convention cited above, it makes provision for various forms of compulsory dispute settlement which parties may designate: the ICJ, various forms of arbitral tribunal, and the International Tribunal for the Law of the Sea. Compulsory dispute settlement is limited to certain disputes under the Convention.

The International Tribunal, established in 1996, comprises twenty-one individuals elected by parties to the Convention; a subsidiary Seabed Disputes Chamber includes eleven of the twenty-one. The Tribunal has dealt so far with six cases, and almost dealt with a seventh, the dispute between EU and Chile over catching and landing of swordfish. The two parties settled the dispute before either the Tribunal or the WTO panel could rule (see above).

A number of the disputes involved environmental issues. In 1999, in the face of the declining profitability of its domestic tuna industry due to economic recession and rising labour costs, coupled with loss of market share, Japan unilaterally implemented an ‘experimental’ fishery of about 1500 tonnes in the area covered by the Convention for the Conservation of Southern Bluefin Tuna. After protests, Australia and New Zealand requested ‘provisional measures’ – an interim injunction – to prevent the fishery. They also excluded Japanese fleets from their exclusive economic zones (EEZ), which led Japan to file a counter-request for interim measures. The Tribunal found it had jurisdiction over the dispute and ruled against Japan in August 1999. However, co-operation has not fully recovered: the parties have been unable to resume a catch quota and a dispute still runs about stock levels.

Two of the Tribunal’s cases dealt with allegations of illegal fishing. In September 1999, when the French authorities arrested the Spanish-owned but Panama-flagged *Camouco* for poaching toothfish nearly 160 nautical miles inside the French EEZ of Crozet, the Tribunal – after a complaint by Panama – judged that they had failed to set a reasonable bond (as required by the Convention) and that notification of arrest to the flag state was ‘tardy and incomplete’. The value of the bond was lowered from FF20m to FF8m, but the Tribunal did not uphold Panama’s claim that France had engaged in ‘unlawful detention’, as France had not applied criminal measures to the captain but had merely confiscated his passport. In December 2000 the Tribunal reached a similar decision in the case of the Seychelles-flagged *Monte Confurco,* which was arrested by the French authorities for fishing in the EEZ of the Kerguelen Islands without prior notification, as required under the Convention.

Conclusions

A few broad conclusions are suggested by the above discussion. Note these are not meant to be comprehensive.

- Enforcement of dispute settlement decisions is often not straightforward (e.g. in the WTO, where it effectively depends on economic power).
- Despite some proposals for the establishment of a World Environment Court, there does not seem to be a strong case for it, given (a) the existence of the ICJ and its environmental chamber and (b) the uncertainty about what exactly constitutes an 'environmental' dispute, as opposed, for instance, to a trade or investment dispute. It would seem better to pursue the route of policy integration, and ensure that all relevant institutions and agreements are fully informed by, and fully equipped to deal with, the environmental dimension.
- Following from that, many of the institutions listed above may benefit from en enhanced ability to deal with specialist environmental input.
- Disputes, although in general undesirable, can have positive outcomes. In some cases they may help to clarify the law; in some cases they may stimulate the negotiation of international agreements.
- The problem of dealing with multiple dispute resolution forums is likely to become more acute.

Non-compliance

Many – though not all – multilateral environmental agreements (MEAs) possess non-compliance mechanisms. These are a set of procedures and institutions established to assess parties' compliance with the obligations set out under the MEA and to recommend particular courses of action in cases of non-compliance. Normally a specific body is set up within the MEA to carry out these functions, and cases of non-compliance can be reported to it by the party in respect of itself, by any other party or by the MEA's secretariat. Almost invariably the last route has been followed in practice, emphasising the multilateral natures of these regimes, and the desire of individual parties to avoid being seen as the regime's policeman. Procedures to follow in cases of non-compliance (sometimes also applied against non-parties) vary widely, from diplomatic pressure, provision of assistance, issuing cautions and warnings to withdrawal of financial and technical assistance, and trade restrictions. Notable examples of MEA non-compliance mechanisms are listed below.

Montreal Protocol

The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer was the first MEA explicitly to include from the start a requirement to establish a formal mechanism for identifying and handling cases of non-compliance – though the details of the procedure took a few years to sort out. The meeting of the parties elects an Implementation Committee composed of two members from each of the UN's five geographical regions. It meets twice a year and receives reports from the Ozone Secretariat on the status of compliance with the Protocol's phase-out schedules and other obligations, based on the reports the Secretariat receives from the parties.

If instances of possible non-compliance are detected, the party concerned is invited to the Committee to explain the reasons. The emphasis is very much on working with the party to discover why non-compliance has occurred and to suggest ways and means in which the party could meet its obligations. However, it can be argued that the Committee does have teeth: the list of measures that can be taken include issuing formal cautions and suspension from specific rights and privileges under the Protocol, including those dealing with finance and trade (the Protocol requires parties not to trade in ozone-depleting substances (ODS) and in products containing ODS with non-parties). The Committee's recommendations are forwarded to the meeting of the parties for consideration and adoption.

Between 1995 (the last year before total phase-out of CFCs in industrialised countries) and 1999, a total of twenty-four decisions were taken on compliance by twelve specific countries, all of them transition economies (six of which had warned the 1995 meeting of the parties that they were unlikely to achieve compliance due to political and economic disruption). The decisions followed similar formulations, expressing concern or encouragement as appropriate, calling on the parties concerned to report full data to the Secretariat, where necessary laying out specific plans for phase-out schedules (where phase-out was not in line with the Protocol's requirements) and policy implementation, and sometimes specifying restrictions on the country's ability to export and withholding financial assistance (from the GEF) until particular obligations had been met. In the case of Russia, the most serious non-complying party (and the only producer), a World Bank special initiative mobilised additional funding to ensure production sector phase-out, which was achieved in 2000.

The regime's record has been a positive one, with every country identified moving gradually back into compliance with relatively few diplomatic feathers ruffled along the way (despite a walk-out by the Russian delegation of the 1995 meeting of the parties). The regime will be tested again in the next few

years, as developing countries meet, or fail to meet, their own phase-out schedules (which were delayed for ten years compared with those of developed countries), but it has already established a considerable degree of expertise and confidence.

CITES

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has developed a non-compliance regime unique, amongst MEAs, in its comparative aggressiveness – the strongest example of the 'enforcement school' of compliance as opposed to the 'management school', which emphasises a softer approach.

It is also notable in having an independent data monitoring and verification function, carried out by the World Conservation Monitoring Centre, originally an NGO but now part of UNEP. Its database of trade records, going back to 1975, allows import and export records to be cross-matched, and enables export records to be matched against export quotas agreed with parties. Discrepancies are reported to the CITES Secretariat. NGOs are also an important source of information; since1976, TRAFFIC (Trade Records Analysis of Fauna and Flora in Commerce), an NGO established by WWF and IUCN, has collected information on illegal wildlife trade and transmitted it to the Secretariat and national authorities. This network of data gathering is generally regarded as giving CITES one of the best operational information sources of any MEA – possibly just as well, since data reporting by parties has historically been relatively poor, though substantial efforts are currently being made to improve it.

The CITES non-compliance response system has evolved over time through resolutions and practice; it was not included in the treaty when it was originally negotiated. The CITES Secretariat provides a report to each conference of the parties highlighting major infractions, including non-compliance by parties, and illegal trade (though the infractions report to the most recent conference was severely curtailed, limiting its usefulness). Serious cases of infraction can also be brought to the attention of the Standing Committee in between conferences.

The system uses 'carrots', mostly in the form of technical assistance, strongly backed by 'sticks' in the form of trade sanctions. In cases of serious non-compliance, the Standing Committee, based on Secretariat advice, has on several occasions recommended all parties to apply Article XIV(1) of the Convention, which allows parties to take stricter domestic measures than those provided by the treaty, including complete prohibitions of trade in CITES-listed species, collectively (albeit temporarily) against the offending countries. (Unlike the Montreal Protocol, for example, there is no *requirement* on parties to take action against non-parties.) Notable examples include Bolivia (the only case where the conference of the parties recommended sanctions), United Arab Emirates, Thailand, Italy and Greece. Trade sanctions were also recommended against Guyana and Senegal for failing to enact CITES legislation, and the procedure has also been used against states not party to the Convention, including El Salvador, Equatorial Guinea and Grenada.

In 1992, the significant trade review process, designed to monitor, and where necessary regulate, trade in Appendix II species (those not necessarily yet threatened with extinction, but which may become so unless trade is subject to strict regulation) was modified. Parties failing to implement appropriate CITES-related legislation were to have suspensions of trade in specific species recommended by the Secretariat to the Standing Committee. Including countries dealt with in this way, a total of 37 countries have been subject to general CITES or species-specific trade sanctions, with 17 actually

having trade bans applied.[4] The success rate to date is almost 100% – though it is important to note that, with the exception of a few countries, no real major economic interests are involved in the trade, which means that parties are, in general, not under much pressure to resist a strong non-compliance regime.

International Whaling Commission

The 1946 International Convention for the Regulation of Whaling, better known by the name of its governing body, the International Whaling Commission (IWC), along with CITES developed a system for assessing compliance well after the agreement entered into force. After extensive experience of non-compliance in the 1960s – although the Soviet Union, for example, had reported 152 blue whale catches for the whole of the decade, in 1995, Russian scientists released the true figure of 7,207 – an international observer scheme (IOS) was introduced in 1971. Member states receive, voluntarily, observers nominated by other member states. Infraction reports provided by the observers are reviewed by the Infraction Committee each year and made public. Up until the moratorium on commercial whaling in 1985–86, there were criticisms of the IOS, including a lack of coverage and abuse of the system, and the scheme has been under review. The Bureau on International Whaling Statistics (established by the industry in the 1920s) also provides data on commercial whaling activities.

The Scientific Committee meets immediately before the annual IWC meeting; the information and advice it provides on the status of whale stocks form the basis on which the Commission develops regulations for the control of whaling. These require a three-quarters majority of the Commissioners voting; any changes become effective ninety days later, unless a member state has lodged an objection, in which case the new regulation is not binding on that country – a significant weakness of the regime. In addition, if the Commission cannot reach agreement on a quota for a particular species, no limit is set and catches are effectively unregulated. The regulations adopted by the Commission are implemented through the national legislation of the member states.

International Convention for the Conservation of Atlantic Tunas

ICCAT does not contain trade measures in its text, but a number of resolutions of the parties – recommended by the Convention's Compliance Committee – have contained trade restrictions. Parties have decided to ban imports of bluefin tuna, Atlantic swordfish and products from three non-parties (Belize, Honduras and Panama) and from one non-complying party (Equatorial Guinea); a number of warnings have been issued to other countries. As a result, Panama has become a party and implemented appropriate regulations; however, many vessels registered with Belize, Honduras and Panama, and considered to be fishing illegally, have now registered with other countries – an example of the flag of convenience problem.

Convention for the Conservation of Antarctic Marine Living Resources

As with ICCAT, CCAMLR does not contain trade measures, but parties have agreed to adopt some, notably a prohibition on parties allowing landing or transhipment of fish from the vessel of a non-party sighted fishing in CCAMLR-protected areas. Compliance with the conservation measures agreed by

[4] As at late 2000; information from Rob Hepworth, UNEP.

the parties is subject to an inspection process involving inspectors designated by members. Flag States are required to report to the CCAMLR Commission on prosecutions and sanctions imposed as a consequence of inspections conducted on vessels flying their flags. The Standing Committee on Observation and Inspection considers and prepares advice to the Commission on all matters related to inspections undertaken and steps taken by members to enforce compliance.

Convention on Long-Range Transboundary Air Pollution

The 1979 Convention on Long-Range Transboundary Air Pollution has only recently developed a non-compliance regime, based substantially on the model of the Montreal Protocol. An Implementation Committee was created in December 1997 to review compliance with the reporting requirements and other obligations under the various protocols to the Convention. Like CITES, the LRTBAP Convention has the advantage of a strong, independent and experienced analytical body, EMEP, which verifies the emissions levels of parties for the Implementation Committee. The first two cases, of Slovenia and Norway, are now being processed; interestingly, both arose from self-notification of the problems and requests for advice on how to deal with them – partly deliberately, to assist the non-compliance system to evolve and develop.

Climate regime

Negotiation of the two climate change MEAs has been fraught with difficulties and sensitivities, due of course to the major economic interests involved. Countries unenthusiastic about the regime have proved reluctant to see any kind of relatively tough non-compliance mechanism, akin to that of the Montreal Protocol, evolve.

The UN Framework Convention on Climate Change contained an article calling for the development of a 'multilateral consultative process … for the resolution of questions regarding the implementation of the Convention'. The Ad Hoc Group on Article 13, set up in 1995, moved increasingly in the direction of an advisory, rather than supervisory, regime, aiming to provide a 'help desk' function to parties facing difficulty in fulfilling their obligations; the Group's proposals were agreed, apart from the composition of the relevant committee, in 1998 and 1999.

Non-compliance with the Kyoto Protocol is, of course, a much more serious issue, given the specific commitments entered into by parties. Given the failure of the sixth conference of the parties to the FCCC, in the Hague in late 2000, to reach final agreement, the details of the system have not yet been finalised. However, the joint working group on compliance prepared an almost complete set of proposals that resolved most of the issues, although differences remain between countries favouring a strong compliance mechanism, with penalties for failure to meet targets (EU, most developing countries) and those less keen on tough legally binding consequences (US, Australia, Japan, New Zealand, Russia, some developing countries).

The working group proposed the establishment of a Compliance Committee with two sub-groups, a facilitative branch and an enforcement branch. The facilitative branch was to be responsible for providing advice and facilitation to parties in implementing the Protocol, and for promoting compliance with commitments. In cases of non-compliance, various options were presented, including provision of advice, financial and technical assistance, providing recommendations for the non-complying party to follow and issuing cautions. The enforcement branch was to be responsible for determining whether or not a party was in compliance, and for applying penalties. A wide range of options were presented, including requiring agreement on a 'compliance action plan' to bring the party

back into compliance, reducing the party's allowed emissions in the subsequent commitment period, restriction or prohibition on participating in the various emissions trading mechanisms, payment of fines into a compliance fund and suspension of other rights and privileges. Whatever the final set of options chosen, the non-compliance mechanism will have to be adopted as an amendment to the Kyoto Protocol, though various options for bringing it into force more quickly are under consideration.

Other MEAs

Some important MEAs, including, for example, the Biodiversity Convention, do not contain any non-compliance mechanism. Others, such as the Rotterdam Convention, Cartagena Protocol and the new convention on persistent organic pollutants, have designated it as an area to be worked out once the agreement enters into force. Several MEAs now in force, including the Espoo Convention on environmental impact assessment, and the Aarhus Convention on access to information, public participation and access to justice in environmental matters, are currently developing non-compliance systems; as is the 1989 Basel Convention on transboundary movements of hazardous waste, which is also negotiating a protocol on liability.

Conclusions

MEA non-compliance regimes are likely to be more effective if they:

- Possess an effective system of data reporting, with an independent verification and monitoring function.
- Possess a non-compliance institution (e.g. an Implementation Committee) with balanced geographical representation and, ideally, considerable experience of operating the system.
- Possess a range of compliance instruments, ranging from the 'soft', consultative, assistance-oriented (e.g. technical and financial assistance) to the 'hard', compulsion-oriented (e.g. warnings, withdrawal of financial support, trade measures).
- Do not involve major economic interests.
- Deal with multilateral problems, as opposed to bilateral disagreements.