

INTERNATIONAL LAW ASSOCIATION

NEW DELHI CONFERENCE 2002

COMMITTEE ON TRANSNATIONAL ENFORCEMENT OF ENVIRONMENTAL LAW

Members of the Committee:

Professor A E Boyle (UK): *Chair*
Professor Stephen C McCaffrey (USA): *Rapporteur*

Mr Michael Anderson (UK)
Professor David J Bederman (USA)
Dr Gerrit Betlem (Netherlands)
Professor Ulrich Beyerlin (Germany)
Professor Klaus Bosselmann (New Zealand)
Mr James Cameron (UK)
Alternate: Dr Phoebe N Okowa
Associate Professor Jonas Ebbesson (Sweden)
Dr Maria Gavouneli (Hellenic)
Professor Genowefa Grabowska (Poland)
Professor Gunther Handl (USA)
Professor Wolff Heintschel Von Heinegg (Germany)
Professor Toru Iwama (Japan)

Professor Jae-Hyup Lee (Korea)
Dr Ninon Machado Faria Leme Franco (Brazil)
Alternate: Dr Susana Camargo Vieira
Professor Dietrich Murswiek (Germany)
Professor Andre Nollkaemper (Netherlands)
Dr Peter E Nygh (Australia)
Ms Catherine Redgwell (UK)
Professor Myong Joon Roe (Korea)
Mr Harish N Salve (India)
Alternate: Mr Manmohan Lal Sarin
Mr M J Noel-Etienne G Sinatambou (HQ/Mauritius)
Professor Edith Brown Weiss (USA)
Mr Martijn Wilder (Australia)

First Report*

I. INTRODUCTION

1. The Committee's Mandate and Membership

The Committee on Transnational Enforcement of Environmental Law (TEEL) was established by the Executive Council in November, 1997. The committee's mandate is:

To consider: All aspects of the transnational enforcement of environmental law (both national and international) through national legal systems. In particular, the committee's mandate would include: (1) jurisdiction of national courts with respect to transboundary environmental damage or risk; choice of law and forum shopping in environmental litigation; (2) transboundary access to justice and public interest litigation in environmental cases; (3) the use of national courts by foreign plaintiffs seeking redress against multinational companies.

This Report

In the remainder of the Introduction, this report will define the topic of transnational enforcement of environmental law, and consider why there is a need for transnational enforcement, the obstacles to

* The present report has been drafted by Stephen McCaffrey, Alan Boyle and Ulrich Beyerlin in accordance with decisions of the Committee taken at its 3rd meeting, held in April 2001. The committee had before it the following working papers: (i) Bernasconi & Betlem: Effect of Licences on Liability — a Private International Law Perspective; (ii) Cameron: Access to Justice and Litigation Involving Multinational Corporations; (iii) Murswiek: The Legal Protection of Foreign Residents Against Transboundary Environmental Hazards in German; (iv) Bosselmann: Incorporating Environmental Governance: A New Approach to Transnational Enforcement; (v) Beyerlin: The Role of NGOs in International Environmental Litigation; (vi) Ebbesson: Access to Environmental Justice; (vii) Vieira: The Mercosul Waterway and International Environmental Law; (viii) Okowa: Transboundary Co-operation; (viii) Nygh: Liability of Multinational Corporations for the Acts or Defaults of their Subsidiaries in Environmental Matters.

transnational enforcement, and some attempts that have been made to overcome those obstacles. Parts II and III of the report will then consider obstacles to enforcement as well as trends in two specific contexts: Part II will examine the use of human rights law in environmental cases, while Part III will discuss access of NGOs to transboundary environmental litigation. For the present, no conclusions are offered on the ultimate form of the Committee's recommendations. It remains to be determined whether draft articles will be proposed, or what issues might merit such an attempt at codification or progressive development of the law.

In its Second Report, the Committee intends to continue to examine obstacles to transnational enforcement and possible solutions, including the following topics: transnational enforcement and multinational companies; choice of law in transboundary litigation; the Alien Tort Claims Act, 28 U.S. Code §1350 and other comparable procedures if any; transboundary implementation of procedural obligations under international law.

3. Definition of the topic

By "transnational enforcement of environmental law" the Committee understands actions by private persons or non-governmental organizations (NGOs) in national courts or administrative bodies to secure compliance with environmental law, including both national and international, in cases involving more than one state, or a state and areas beyond the limits of national jurisdiction. The typical case would involve efforts by citizens or NGOs in state A to halt or remedy environmental harm or the risk thereof either originating in state B and taking effect outside B's borders, or vice versa. Such environmental risk or harm will be referred to in this report as transboundary environmental harm. It bears emphasis that this expression is understood to include harm or the risk thereof that takes effect, or originates, in areas beyond the limits of national jurisdiction. For convenience, the term private parties will be used to include natural and legal persons as well as NGOs.

4. Why there is a need for transnational enforcement of environmental law?

The essence of the problem addressed by transnational enforcement of environmental law is this: the environment knows no boundaries, yet international law divides the world into discrete geopolitical units, each having sovereignty over its own territory. These units, or states, have only limited authority beyond their borders. Thus their capacity to protect domestic environmental values from harm originating abroad is restricted, at best. Conversely, a state may not adequately control activities within its territory that cause environmental harm outside it, including harm to common areas such as the seas or to migratory species. State efforts to protect the environment against transboundary harm classically take the form of treaties and various forms of dispute settlement, including negotiation, arbitration and judicial settlement. Such strategies are for the most part self-interested, in the sense that their object is protecting important values of the state pursuing them rather than protecting the environment, per se. This provides little assurance of comprehensive protection of the environment against transboundary harm: A state may not regard a particular transboundary environmental problem as being sufficiently important to warrant action or, even where it regards the problem as important, it may decide not to take action against it because of countervailing factors, such as ones of an economic or political nature.

Moreover, resolving transboundary environmental problems at the state-to-state level entails additional problems, including the following: First, certain of these problems may increase in severity over time. Initially the problem may not be considered sufficiently significant, or may be seen as too localized to be taken up at the state level. By the time it is regarded as being sufficiently important to be dealt with at the state level, the problem may have mushroomed and become far more serious than it was originally. Second, addressing transboundary environmental problems at the state level may result in their becoming unnecessarily politicized, hampering or preventing their efficient and effective resolution, or even leading to a decision not to pursue interstate resolution at all. A state may be loath to espouse a private claim for fear of jeopardizing relations with the state of origin of the environmental risk or harm. Third, espousal by states of private claims can be a burdensome and time-consuming process. The claimant must, in any event, first exhaust local remedies, presumably including those available both in the state of origin and in the state in which the environmental harm is threatened or occurs. But then the claimant has no guarantee that the state will espouse the claim, and if it does, the claimant loses control over its prosecution, including the remedy sought. And fourth, states have generally been reluctant to resolve claims, including those concerning transboundary environmental problems, on the basis of international responsibility. This reluctance was dramatically illustrated in the Sandoz¹ and

¹ See H.U. Jessurun D'Oliviera, "The Sandoz Blaze: The Damage and Public and Private Liabilities", in F. Francioni & T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (Dordrecht, 1991) 429, at 439.

Chernobyl² cases; the most outstanding exception is the *Trail Smelter* arbitration,³ discussed below.

On the other hand, private parties have incentives to pursue the resolution of transboundary environmental problems. Individuals or companies that are threatened or injured will wish to protect their own interests. Environmental NGOs are interested in protecting the environment itself, and may address transboundary problems that do not entail sufficient harm to persons to lead them to take action. These factors will result in many cases being pursued on the private level that would not have been acted on by the state. Beyond being supported by policies underlying the doctrine of exhaustion of local remedies,⁴ resolution at this level will usually bring relief to those actually suffering injury more rapidly than diplomatic procedures and will prevent problems from escalating and from becoming unnecessarily politicized. The availability of access by private parties to judicial and administrative procedures in cases involving transboundary environmental problems is likely to avoid disputes between the states themselves by resolving problems at the level of those most directly affected.

The foregoing considerations suggest that private parties have an important role to play in the resolution of transboundary environmental problems. But their ability to contribute depends upon the extent to which they have access to courts and administrative bodies in cases involving such problems and are protected under the applicable law. The following section offers an overview of some of the problems private parties may encounter in this connection.

5. Obstacles to transnational enforcement

Barriers to transnational enforcement of environmental law can take a variety of forms. Some have to do with access to courts and tribunals. Equal access and non-discrimination remain concerns in many countries, as does access of NGOs to judicial and administrative proceedings. Other pre-trial factors that may obstruct enforcement include the availability of affordable legal representation, court fees, rules concerning the awarding of attorney's fees and costs, the availability of contingency fees and sovereign immunity. Judicial jurisdiction, both over the subject matter of the dispute and the person of the defendant, may not exist in some cases of transboundary environmental harm. Even where access and jurisdiction do not present problems, the applicable law may not permit recovery, or if it does, plaintiff may encounter problems of proof⁵ or be unable to enforce the judgment. Other obstacles arise in the context of administrative proceedings. In some national legal systems administrative tribunals do not take cognizance of actual or threatened harm outside their borders, and may not permit parties from other countries to participate in their proceedings. In short, there is no international administrative law as such, which would be a counterpart to private international law.

There is perhaps no better illustration of the effect of obstacles to transnational enforcement than the dispute involving the Trail Smelter.⁶ In that case, a private copper smelter in Trail, British Columbia, near the US border, emitted sulphur dioxide fumes that were carried by prevailing winds down the Columbia River Valley into the U.S. state of Washington where they damaged private crops and timber. The owners of the Washington property were advised by their lawyers that it would not be possible to sue the smelter, absent its consent, either in British Columbia or in Washington. A suit in British Columbia would have been prevented by the "local action rule", applicable there, which requires suits for damage to land to be brought where the land is situated. Plaintiffs could not sue in Washington because it would not have been possible at that time to establish jurisdiction over the smelter.⁷

Thus a transboundary environmental case involving two adjacent common-law jurisdictions with good

² See M. Politi, "The Impact of the Chernobyl Accident on the States' Perception of International Responsibility for Nuclear Damage", in F. Francioni & T. Scovazzi (eds.), *International Responsibility for Environmental Harm*, 473, at 475.

³ *Trail Smelter Arbitration* (U.S. v. Can.), 2 *UNRIIA* 1911 (1941), reprinted in 35 *AJIL* 684 (1941).

⁴ I. Brownlie, *Principles of Public International Law* (5th ed., Oxford, 1998), 496-506, lists a number of "practical considerations" supporting the exhaustion requirement.

⁵ Problems of proof may include difficulties with proof of foreign law and proof of fault and causation.

⁶ N. 3, *supra*.

⁷ Subsequent developments in U.S. law, including so-called "long-arm statutes", would often allow the assertion of jurisdiction in such cases. See West's revised Code of Washington Ann., § 4.28.185 (1)(b), which has been interpreted to mean that for purposes of establishing jurisdiction, a "tortious act" occurs in Washington when an act outside the state produces and injury inside it.

relations and similar judicial traditions was stopped before it got started by procedural obstacles. As is well known, the U.S. government took up the case and reached agreement with Canada to submit it to arbitration. Over twenty years after it began, the dispute was resolved by the arbitral tribunal in an award that helped lay the foundation for the public international law of the environment.⁸ But the resolution was long in coming and could only be obtained on the state-to-state level despite the fact that the case was a relatively simple one involving unidirectional transboundary pollution between two jurisdictions with similar legal traditions. Perhaps counter-intuitively, the private law avenue was simply not available.

More generally, state sovereignty is a barrier to what might be called transboundary environmental and natural resource management. As noted earlier, natural systems such as biomes, ecosystems, airsheds and watersheds can, and often do, span international boundaries. The same is true of migratory species. Without coordination through international agreements or arrangements, this can result in fragmentation of legal protection and regulation of the resources, often with harmful results. The obstacles to transnational enforcement in this context are differing legal regimes applicable to different portions of natural systems. Differences in national laws can also lead multinational companies to locate their operations in countries with lax environmental regulation. This can result in harm to the environment of these countries as well as to indigenous peoples living in the area of the activity in question. Remedies are often not available in the country where the activity is situated: the activity itself is usually lawful there, and affected indigenous peoples typically lack access to effective remedies in their home country.

The foregoing survey has attempted to identify in general terms some of the more significant obstacles to transnational enforcement of environmental law. A closer examination of some of these barriers appears in Parts II and III of this report; others will be treated in the Second Report. Given that there are serious obstacles, the question becomes whether they may be overcome and what the trends are in this regard. This subject will be broached in general terms in the following section.

6. Overcoming the obstacles: strategies and trends

Each obstacle to transnational enforcement has its own particular solution. This section will briefly indicate several strategies and trends that will be examined in greater depth in subsequent sections of this report.

Various attempts have been made to facilitate access to judicial or administrative recourse in transboundary environmental cases. Perhaps the foremost example is the path-breaking 1974 Nordic Environmental Protection Convention,⁹ which generally implements the principles of equal access and non-discrimination in environmental cases in Nordic countries for both courts and administrative authorities. While the Convention has been applied in only a few cases in private litigation, it offers a blueprint for other regions.

Another example of an attempt to overcome barriers to transnational enforcement was inspired by the problems encountered by the private litigants in the *Trail Smelter* case. It consists of a model law drafted by the Canadian and American bar associations and promulgated by the uniform law organizations of the respective countries. The law, entitled the Uniform Transboundary Pollution Reciprocal Access Act,¹⁰ would provide foreign plaintiffs with access to courts in transboundary environmental cases provided the plaintiff's home jurisdiction would do likewise if the facts were reversed. Unfortunately, adoption of the model law in Canadian Provinces and U.S. states has been spotty. In fact, it has not been enacted in either British Columbia or Washington, the jurisdictions involved in the *Trail Smelter* case. Finally, the OECD has made important efforts in the area of equal access and non-discrimination¹¹ and the principle has been reflected in conventional law¹² and authoritative drafts.¹³ At present it appears that most of the efforts at reform in this area have been made in

⁸ N.3, *supra*.

⁹ 13 *ILM* 591 (1974). See J. Ebbesson, "Individuals and Transboundary Pollution: Two Decades with the 1974 Nordic Convention", in Hollo & Martinen (eds.), *North European Environmental Law* (1995), 39.

¹⁰ Uniform Laws Ann., Matrimonial, Family and Health Laws, 1993 Supp. (Pocket Part).

¹¹ OECD Council Recommendations C74(224), C(76)55, C(77)28, in OECD, *OECD and the Environment* (Paris, 1986).

¹² See the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, UN Doc. A/RES/51/229, 36 *ILM* 700 (1997).

¹³ See, e.g., Art. 16 of the draft articles on Prevention of Transboundary Damage from Hazardous Activities adopted on second reading by the UN International Law Commission in 2001: see UN, *Rept. of the ILC* (2001) GAOR A/56/10.

industrialized countries and regions, and that even there, they have not been entirely successful.

While these developments have not yet resulted in great progress in the removal of obstacles to transnational enforcement, they represent first steps and demonstrate a recognition that problems exist in the field of transnational enforcement of environmental law. What is more, they are complemented by several broad trends, each of which could have the effect of facilitating enforcement of environmental law in transnational cases.

The first of these is a trend toward increasing the possibilities for citizen participation in environmental cases and access to environmental information. This trend is reflected most obviously in Principle 10 of the Rio Declaration and the recently adopted Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.¹⁴ Principle 10 is reflected in a number of other instruments¹⁵ and reinforced by developments in international human rights law.¹⁶ The Aarhus Convention is an ECE treaty but even so has implications for most of the northern hemisphere. It contains far-reaching provisions on the three topics indicated in its title and has had influence outside the ECE. Finally, the North American Agreement on Environmental Cooperation, the environmental side-agreement to the NAFTA, relies in part on citizen participation for achieving compliance with certain of its provisions.

A second trend is the use of international human rights law to assist in transnational enforcement of environmental law. While the idea of a human right to a healthy or decent environment remains controversial, there is growing support in case law and international human rights bodies for achieving environmental protection through the use of traditionally recognized human rights, such as the rights to life, private life, property and access to justice.¹⁷

A third trend is the increasing involvement of NGOs in environmental decision-making and litigation.¹⁸ Standing to sue remains a problem for NGOs in many national legal systems and in most international tribunals. Yet their influence in the field of the environment, on both the national and international levels, is undeniable and on the rise. Just as NGOs have been granted enhanced status in human rights bodies, it seems inevitable that they will increasingly be allowed to participate, in appropriate ways, in national and international proceedings having to do with transnational enforcement of environmental law.

As indicated above, these strategies and trends will be examined in greater detail in subsequent parts of this report. Additional trends will be dealt with in the Second Report. We turn now to a technique that has been employed frequently of late in transnational environmental case law: the use of human rights to achieve environmental objectives.

II. HUMAN RIGHTS AND THE ENVIRONMENT

1. Human Rights Approaches to Environmental Protection

At Stockholm in 1972 the UN Conference on the Human Environment declared that 'Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being'.¹⁹ Twenty years later, at the Rio Conference on Environment and Development, this initial emphasis on a human rights perspective was not been maintained. Avoiding the terminology of rights altogether, the Rio Declaration merely asserts that:

¹⁴ UN Doc. ECE/CEP/43 (1998).

¹⁵ These are indicated in Part II of the present report

¹⁶ These developments are discussed in Part II of the present report.

¹⁷ See Part II of the present report.

¹⁸ See Part III of the present report.

¹⁹ Principle 1, Declaration on the Human Environment, *Report of the UN Conference on the Human Environment* (New York, 1973), UN Doc. A/CONF.48/14/Rev. 1. See L. Sohn, "The Stockholm Declaration on the Human Environment", 14 *Harv. ILJ* (1973), 451-5.

'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'²⁰

The Rio Declaration's failure to give greater emphasis to human rights is indicative of continuing uncertainty and debate about the proper place of human rights law in the development of international environmental law. This is not because of any lack of interest in the topic. On the contrary, references to a right to a decent, or healthy, or viable environment have appeared in several global or regional human rights treaties,²¹ and in declarations or resolutions of international organisations.²² Some effort has also been made by human rights institutions,²³ and by writers,²⁴ to derive environmental rights from other, internationally protected, rights, such as life, private life, or property. Certain procedural rights, including access to environmental information and decision-making processes, have also become important elements of the law relating to sustainable development and transboundary risk management.²⁵ There is, moreover, a growing trend to give environmental protection constitutional status in many national legal systems, either explicitly,²⁶ or by judicial interpretation of other constitutional guarantees.

2. Greening Existing Human Rights

Even if no independent right to a decent environment has yet become part of international law, there remains the possibility that environmental rights can usefully be derived from other existing treaty rights, in particular the rights to life, private life, property and access to justice under the 1966 UN Covenant on Civil and Political Rights, the

^{20.} Principle 1, Declaration on Environment and Development, *Report of the UN Conference on Environment and Development*, i. (New York, 1992), UN Doc.A/CONF.151/26/Rev.1. For drafting history, see D. Shelton, "What happened in Rio to human rights", 3 *YbIEL*, (1992), 82 ff.

^{21.} 1981 African Charter on Human Rights and Peoples' Rights, Article 24, 21 *ILM* (1982), 52; 1966 UN Covenant on Economic and Social Rights, Article 12, 6 *ILM* (1967), 360; 1961 European Social Charter, Article 11, 529 *UNTS* 89; 1988 Additional Protocol to the American Convention on Human Rights, Article 11, 28 *ILM* (1989), 156; 1989 Convention on the Rights of the Child, Article 24(2)(c), 28 *ILM* (1989), 1448. For fuller discussion of these treaty provisions, see Churchill, in A. Boyle and M. Anderson (eds.) *Human Approaches to Environmental Protection* (Oxford, 1996), Ch.5.

^{22.} UNGA Res. 45/94 (1990); 1982 World Charter for Nature, Principle 23, 23 *ILM* (1983), 455; 1989 Hague Declaration on the Environment, 28 *ILM* (1989), 1308; 1993 World Conference of Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (pt.1), 20-46.

^{23.} See e.g. *Powell and Rayner v. UK* (1990), ECHR, Ser. A. No. 172; *Lopez Ostra v. Spain* (1994) 20 *EHRR* 277; *Guerra v. Italy* (1998) 26 *EHRR* 357; *LCB v. UK* (1999) 27 *EHRR* 212; *Gronus v. Poland* (1999), ECHR Case no.29695/96; *Port Hope Environmental Group v. Canada*, Communication No. 67/1980, 2 *Selected Decisions of the UN Human Rights Committee* (1990), 20; *Ominayak and the Lubicon Lake Band v. Canada*, UNHRC No. 167/1984, *Rept. Human Rights Committee* (1990) GAOR A/45/40 vol. II; *Bordes v. France*, UNHRC No.645/1995, *Rept. Human Rights Committee* (1996) GAOR A/51/40 vol. II; *Yanomani Indians v. Brazil* (1985), Decision 7615, Inter American Commission on H.R., *Inter-American YB on Hum.Rts.* (1985), 264. These and other decisions of the UN HRC and the ECHR relevant to environmental protection are reproduced in C. Robb (ed.), *International Environmental Law Reports*, vol. 3, (Cambridge, 2001). See also decisions of the Committee of Experts of the European Social Charter, noted by Trindade in E. Brown Weiss (ed.), *Environmental Change and International Law* (Tokyo, 1993), 281-4, and reproduced in Council of Europe, *Fundamental Social Rights* (Strasbourg, 1997).

^{24.} See e.g. R. Churchill, in Boyle and Anderson (eds.) *Human Rights Approaches to Environmental Protection*, Ch.5; S. Weber, "Environmental Information and the European Convention on Human Rights", 12 *HRLJ* (1991), 177; A. Kiss and D. Shelton, *International Environmental Law* (2nd edn., New York, 2000), 141-85; C. Trindade, in Brown Weiss (ed.), *Environmental Change and International Law*, 244 at 274 ff; B. Ramcharan (ed), *The Right to Life in International Law* (Dordrecht, 1985), Ch. 1.; Thorne, 19 *Denver JILP* (1991), 302.; R. Desgagné, "Integrating Environmental Values into the ECHR", 89 *AJIL* (1995), 263; Alfredson and Ovsiook, "Human Rights and the Environment", 60 *Nordic JIL* (1991), 19.

^{25.} See *infra*, section 5.

^{26.} The countries having specific constitutional provisions include: Brazil, Articles 170 and 225; Chile, Articles 19 and 20; China, Article 9; Cuba, Article 27; Ecuador, Article 19; Greece, Article 24; Guatemala, Article 93; Guyana, Article 36; Honduras, Article 145; Hungary, Articles 18 and 70; India, Article 48A; Iran, Article 50; Mozambique, Article 11; Namibia, Article 95; The Netherlands, Article 21; Nicaragua, Article 60; Papua New Guinea, Article 4; Paraguay, Article 93; Peru, Article 123; Portugal, Article 66; Russian Federation, Article 56; South Africa, Section 29; South Korea, Article 35; Spain, Article 45; Thailand, Article 65; Turkey, Article 56; Yemen, Article 16; Yugoslavia, Article 87. See generally Brandt and Bungert, "Constitutional Entrenchment of Environmental Protection", 16 *Harvard ELR* (1992), 1; ECOSOC, *Human Rights and the Environment*, UN Doc.E/CN.4/Sub.2/1992/7 and 1993/7. For studies of South Africa, India and Brazil, see Boyle and Anderson (eds.), *Human Rights Approaches to Environmental Protection*, chs.9, 10, 13. On environmental rights in the European Union see 2000 Charter of Fundamental Rights, Article 37, and Eleftheriadis in, P. Alston (ed.), *The EU and Human Rights* (Oxford, 1999), Ch.16.

1950 European Convention on Human Rights, and the 1969 American Convention on Human Rights. The right to life has been a fruitful source of environmental jurisprudence in several national jurisdictions, especially India. Here the courts have not only closed down industries causing harm to health and safety but have held that "the right to life includes the right to live with human dignity and all that goes along with it", including the right to live in a "healthy environment with minimal disturbance of [the] ecological balance", and they have drawn an explicit link with environmental quality.²⁷

Attempts to invoke the right to life for environmental purposes before international human rights bodies have been less successful; the scope of the right remains uncertain and may differ under various agreements. In *Port Hope Environmental Group v. Canada*²⁸ it was argued by the petitioners that dumping of nuclear wastes violated the right to life of local residents and future generations under Article 6 of the 1966 Civil and Political Rights Covenant. The application was dismissed by the UN Human Rights Committee due to failure to exhaust local remedies, but the Committee did accept that the case raised a serious right to life issue. In *Bordes v. France*,²⁹ a complaint about nuclear tests in the Pacific was dismissed because there was no evidence of serious risk to life. *LCB v. United Kingdom*³⁰ also concerned exposure to nuclear tests; here the European Court of Human Rights found no violation of Article 2 of the 1950 Convention because the state had done all it could to avoid risk to life. Several successful cases before the Inter-American Commission on Human Rights or national courts in Latin America have involved environmental and social effects of economic development on indigenous peoples. In *Yanomani Indians v. Brazil*³¹ the Commission found that the construction of a road through the applicants' traditional lands had so seriously affected their way of life that it violated both the right to life and the right to health.

Article 17 of the 1966 ICCPR and Article 8 of the European Convention on Human Rights, which guarantee respect for private and family life and home, and Article 1, Protocol 1, of the latter treaty, which protects possessions and property, have also been used in environmental cases. In *Lopez Ostra v. Spain*³² and *Guerra v. Italy*³³ the European Court of Human Rights for the first time held that a failure by the state to control industrial pollution was a violation of Article 8 where there was a sufficiently serious interference with the applicants' enjoyment of their home and private life. The interference did not have to threaten the health of the applicants. The court noted, however, that "regard must be had to the fair balance which must be struck between the competing interests of the individual and of the community as a whole", and it is clear from *Powell and Rayner v. United Kingdom*³⁴ that the needs of economic development may in appropriate cases outweigh the individual interests, provided these are not entirely disregarded. For that reason the applicants failed in their complaint about noise from Heathrow Airport, under Article 8, and under Protocol 1, both because of the economic value of the airport and because the state had done all that was reasonable to offer protection from noise. In effect it is the European Court which determines where the right balance lies such cases, although *Powell and Rayner* suggests that a fairly wide margin of discretion is left to governments.³⁵ However, where a polluting activity is already violating the state's own law, as in *Lopez Ostra* and *Guerra*, it is not easy for the respondent state to assert an overriding economic interest in its continued illegal operation.

Both the right to life and the right to respect for private life and property entail more than a simple prohibition on government interference: governments additionally have a positive duty to take appropriate action to

^{27.} *Mullin v. Union Territory of Delhi*, AIR 1981 SC 746 ; *Rural Litigation & Entitlement Kendra v. State of Uttar Pradesh*, AIR 1985 SC 652 and AIR 1987 SC 359 ; *T.Damodhar Rao v. Municipal Corp. of Hyderabad*, AIR 1987 AP 171 ; *Charan Lal Sahu v. Union of India*, (1986) 2 SCC 176; *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420. These and other decisions are collected in UNEP, *Compendium of Summaries of Judicial Decisions in Environment Related Cases* (Colombo,1997). See Anderson, in, Boyle and Anderson (eds.), *Human Rights Approaches*, ch.10.

^{28.} *Supra*, n.23.

^{29.} *Supra*, n.23.

^{30.} *Supra*, n.23.

^{31.} *Supra*, n.23. On this and other cases in Latin America see A. Fabra, in, Boyle and Anderson (eds.), *Human Rights Approaches*, ch.12, but compare E. Fernandes, *ibid.*, ch.13.

^{32.} *Supra*, n.23. See Churchill in Boyle and Anderson (eds.), *Human Rights Approaches*, ch.5.

^{33.} *Supra*, n.23.

^{34.} *Supra*, n.23.

^{35.} Compare *Hatton v. UK*, ECtHR, App. No.36022/97 (2001) in which a claim concerning airport noise at night succeeded.

secure these rights,³⁶ as we can see in both *Guerra* and *Lopez Ostra*, where the essence of the case lay in a failure of government to enforce existing law. One way of reading these decisions is to see them as a guarantee of effective remedies, as called for in Principle 10 of the Rio Declaration.

3. Participatory rights

The narrowest but strongest argument for a human right to the environment focuses not on environmental quality, but on procedural rights, including access to environmental information, access to justice, and participation in environmental decision-making. This approach rests on the view that environmental protection and sustainable development cannot be left to governments alone but require and benefit from notions of civic participation in public affairs already reflected in existing civil and political rights.³⁷ At its broadest, it can be represented as the application to environmental matters of arguments for democratic governance as a human right.³⁸ At its narrowest it is an argument for improving the quality of government and promoting environmental responsibility on the part of the public.

Although the Rio Declaration contains no explicit human right to a decent environment, Principle 10 does give substantial support in mandatory language for participatory rights of a comprehensive kind. It provides:

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.³⁹

Principle 10 is fully reflected in Principle 23 of the World Charter for Nature,⁴⁰ in the 1991 Convention on EIA in a Transboundary Context,⁴¹ in the 1992 Biological Diversity Convention,⁴² and in the 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.⁴³ Access to environmental information is also covered by EC Directives,⁴⁴ and national freedom of information legislation elsewhere. Moreover, access to environmental information may be required in order to give effect to rights to life, private life, or access to justice under human rights treaties.⁴⁵ In *Guerra v. Italy*⁴⁶ and *LCB v. UK*⁴⁷ the European Court of Human Rights held that information concerning serious environmental health risks should have been made available by government to those known to be at risk. Similarly, access to justice articles of the 1966 Covenant on Civil and Political Rights and the European Convention on Human Rights would apply to

^{36.} See Desgagné, 89 *AJIL* (1995), 263.

^{37.} Universal Declaration on Human Rights, Articles 19, 21; 1966 International Covenant on Civil and Political Rights, Articles 19, 25; 1969 Inter American Convention on Human Rights, Article 23; but compare 1950 European Convention on Human Rights, Protocol No. 1, Article 1 of which provides only for free elections. See Partsch, in Henkin (ed), *The International Bill of Rights* (New York, 1981), 241-5 and compare *Nicaragua Case*, ICJ Rep (1986), 14, at 131-2, and 1990 Charter of Paris (CSCE), 30 *ILM* (1991), 193.

^{38.} See T. Franck, "The Emerging Right to Democratic Governance," 86 *AJIL* (1992), 46; J. Crawford, "Democracy in International Law", 64 *BYIL* (1993), 113; Steiner, "Political Participation as a Human Right", 1 *Harvard Human Rights YB* (1988), 77; J. Ebbesson, "The Notion of Public Participation in International Environmental Law", 8 *YbIEL* (1997), 51; 1993 UN Conference on Human Rights, Vienna Declaration, para. 8.

^{39.} See also Agenda 21, Chapter 23, especially 23.2. Compare 1992 Climate Change Convention, Article 6, however.

^{40.} UNGA Res. 37/7, 37 UNGAOR A/37/51 Suppl. (1982), at 17.

^{41.} Articles 2(6) and 3(8). See P. Birnie and A. Boyle, *International Law and the Environment* (2nd edn, Oxford, 2002), ch.3.

^{42.} Article 14, but only 'where appropriate.'

^{43.} Articles 14-16. *Explanatory Report* in Council of Europe CDCJ (92) 50.

^{44.} EC Directives 90/313/EEC and 85/337/EEC.

^{45.} See S. Weber, "Environmental Information and the European Convention on Human Rights", 12 *HRLJ* (1991), 177.

^{46.} *Supra*, n.23.

^{47.} *Supra*, n.23. See also *McGinley and Egan v. U.K.* (1998-III) ECHR Reports.

environmental claims where there is an interference with property rights or a risk to life and health.⁴⁸

More specific provision for access to justice in environmental cases is found in the 1993 North American Agreement on Environmental Co-operation. Article 6 gives persons with a "legally recognized interest" the right to bring proceedings to enforce national environmental laws and to seek remedies for environmental harm; Article 7 provides for these proceedings to be fair, open and equitable and to conform to standards of due process. However, the agreement creates no new rights of public access to information concerning the environment or of public participation in decision-making, although these are matters which the Commission on Environmental Co-operation is required to promote. One unusual provision of this agreement allows individuals and NGOs to complain to the secretariat that a state party is failing to enforce its environmental legislation. This has already resulted in several complaints against Mexico; these are investigated by the secretariat, which then reports its findings to the Commission.⁴⁹

The most significant and comprehensive multilateral scheme for giving effect to Rio Principle 10 is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.⁵⁰ This is a regional convention, open to participation by members or consultative members of the UN Economic Commission for Europe. Since this includes North America and the former Soviet states of Central Asia it is in effect a Northern hemisphere agreement. The convention's preamble also makes explicit reference to Principle 1 of the Stockholm Declaration, the World Charter for Nature and the European Charter on Environment and Health. It recognizes the relationship between environmental protection and basic human rights, including the right to life, and affirms that:

every person has the right to live in an environment adequate to his or her well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.⁵¹

Parties to the convention guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. Rights of access are accorded also to NGOs 'promoting environmental protection' in accordance with national law. Parties are required by Article 9 to make the rights conferred by the convention enforceable by a national court or independent tribunal. Following Rio Principle 10, Article 9 of the Aarhus Convention also makes general provision for access to justice to challenge breaches of national law relating to the environment. Adequate, fair and effective remedies must be provided. This article looks very much like an application of Article 6(1) of the European Convention on Human Rights and of the decisions in *Lopez Ostra* and *Guerra* referred to earlier. Moreover, under article 3(9) of the Aarhus Convention, rights of public participation and access to environmental justice also apply in transboundary claims, and may thus facilitate resolution of transboundary environmental disputes, as we shall see below.

4. Transboundary Application of International Human Rights Law in Environmental Cases

International human rights treaties generally require a state party to secure the relevant rights and freedoms

⁴⁸. 1966 Covenant, Article 14, on which see Glick, 19 *Harv.ELR*(1995), 69; 1950 European Convention, Article 6(1), on which compare *Mc Ginley and Egan v. U.K.* (1998-III) ECHR Reports; *Zander v. Sweden* (1993) ECHR, Ser.A No.279B and *Balmer- Schafroth v. Switzerland* (1997-IV) ECHR Reports.

⁴⁹. See Articles 14 and 15, North American Agreement on Environmental Co-operation (the NAAEC, or the Side Agreement), signed 14 September 1993, entered into force 1 January 1994, 32 *ILM* 1480 (1993). See K. Raustiala, "International 'Enforcement of Enforcement' under the NAAEC", 36 *Va.J.Int'l* (1996), 123; R. McCallum, "Evaluating the Citizens Submission Procedure Under the North American Agreement on Environmental Co-operation", 8 *Colo. J.Int'l L&Pol'y* (1997), 395-422; J. Di Mento & P. Doughman, "Soft Teeth in the Back of the Mouth: the NAFTA Environmental Side Agreement Implemented", 10 *Geo.IELR* (1998), 651-743; D. Markell, "The Commission for Environmental Co-operation's Citizen's Submission Process", 12 *Geo.IELR*, (2000), 545-574.

⁵⁰. UN Doc. ECE/CEP/43. Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998. See K. Brady, "New Convention on Access to Information and Public Participation in Environmental Matters", 28 *EPL* (1998), 69; J. Ebbesson, "The Notion of Public Participation in International Environmental law", 8 *YbIEL* (1997), 51. The convention takes account of the UNECE Guidelines on Access to Environmental Information and Public Participation in Decision-making adopted at Sofia in 1995, 26 *EPL* (1996), 34, and is another example of 'soft law' transformed into hard law and strengthened.

⁵¹. The UK made a declaration on signing the Convention indicating its belief that this provision was 'an aspiration', not a legal right.

for everyone within its own territory or subject to its jurisdiction.⁵² At first sight, this may suggest that a state cannot be held responsible for violating the rights of persons in other countries, but the European Court of Human Rights has in several cases held states responsible for extra-territorial effects. In *Cyprus v. Turkey* the Court re-affirmed that 'the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.'⁵³ Although the context of the cases is very different, they suggest that *Lopez Ostra*, *Guerra* and *Powell and Rayner* could have extra-territorial application if the state's failure to control environmental harm had also affected life, private life or property in neighbouring countries. If states are responsible for their failure to control soldiers and judges abroad, they may likewise be held responsible for their failure to control transboundary pollution and environmental harm caused by activities within their own territory.

To deny transboundary claimants the protection of human rights law would also be hard to reconcile with standards of equality of access to justice and non-discriminatory treatment applied in European regional treaties such as the 1991 EIA Convention and the 1998 Aarhus Convention.⁵⁴ Such transboundary procedures would have to be exhausted before any human rights claims could be brought before an international tribunal, but there is little point making national remedies available to transboundary claimants if they cannot resort to human rights law when necessary to compel the state to enforce its own laws or to take adequate account of extra-territorial effects. Given that transboundary claimants may have to subject themselves to the jurisdiction of the state causing the damage when seeking redress for environmental harm, it seems entirely consistent with the case-law and the intention of the European Convention on Human Rights to conclude that a state party must balance the rights of persons in other states against its own economic benefit, and must adopt and enforce environmental protection laws for their benefit, as well as for the protection of its own population. Governments cannot afford to disregard transboundary risks or effects, whether under general international law, or under international human rights law.

5. Equal access and non-discrimination as human rights

Transboundary claimants may also invoke equality of access to transboundary remedies and procedures based on the principle of non-discrimination. As defined by OECD,⁵⁵ equal access and non-discrimination should ensure that any person who has suffered transboundary environmental damage or who is exposed to a significant risk of such damage obtains at least equivalent treatment to that afforded to individuals in the country of origin. This includes the provision of and access to information concerning transboundary environmental risks; participation in hearings, preliminary enquiries and the opportunity to make objections; and resort to administrative and judicial procedures in order to prevent pollution, secure its abatement or obtain compensation. These rights of equal access are to be accorded not only to individuals affected by the risk of transfrontier injury but also to foreign NGOs and public authorities, insofar as comparable entities possess such rights in the country of origin of the pollution.

(a) *Equal Access and Customary International Law*

It is possible to argue that transboundary claimants should be accorded equal access and non-discriminatory treatment as part of the generally accepted duty of states in international law to act with due diligence in the prevention, reduction and control of transboundary harm, or through the application of a general principle of non-discriminatory treatment.⁵⁶ But the evidence is insufficient to conclude that equal access has become part of international law in this way at present. International policy declarations, including the Stockholm and Rio Declarations, do not explicitly refer to equal access or non-discrimination, nor do they demonstrate a clear consensus in support of the principle. Although the principle of non-discrimination is included in the legal principles on

⁵² 1950 European Convention on Human Rights, Article 1; 1966 UN Covenant on Civil and Political Rights, Article 2.

⁵³ ECtHR No.25781/94 (2001). See also *Loizidou v. Turkey* (Preliminary Objections) (1995) ECtHR, Sers. A, No. 310, para. 87; *Loizidou v. Turkey* (Merits) (1996) ECtHR Reps.- VI, para. 52; *Drozd and Janousek v. France and Spain* (1992) ECtHR Sers. A, No. 240, para. 91; J. Merrills and B. Robertson, *Human Rights in Europe* (4th edn., Manchester, 2001), 23-8.

⁵⁴ See previous section.

⁵⁵ OECD Council Recommendations C74(224); C(76) 55; C(77) 28, in OECD, *OECD and the Environment* (Paris, 1986). See generally S. McCaffrey, "The OECD Principles Concerning Transfrontier Pollution: A Commentary", 1 *EPL* (1975), 1; H. Smets, "Legal Principles Adopted by the OECD Council", 9 *EPL* (1982), 110; A. Willheim, "Private Remedies for Transfrontier Environmental Damage: A Critique of Equal Right of Access", *Australian YIL* (1976), 174; OECD, *Legal Aspects of Transfrontier Pollution* (Paris, 1977); H. Smets, "Le principe de non-discrimination en matière de protection de l'environnement", *Rev.Eur.Droit de l'Env.* (2000), 1.

⁵⁶ Birnie and Boyle, *International Law and the Environment*, ch. 3, sections 4 (2) and 6 (4).

environmental protection proposed by the World Commission on Environment and Development, this body concluded that it was still an 'emerging principle of international law'.⁵⁷

The principle has received more support in the work of the International Law Commission. Its draft Convention on Prevention of Transboundary Harm prohibits discrimination based on nationality, residence, or place of injury in granting access to judicial or other procedures, or compensation, in cases of significant transboundary harm.⁵⁸ Although Article 32 of the 1997 Convention on International Watercourses is comparable, the inclusion of this article was questioned by several states, including India, Russia and Tanzania.⁵⁹ Very few watercourse treaties facilitate equal access and non-discrimination,⁶⁰ and the concept is absent from the 1992 UN Convention on the Protection and Use of Transboundary Watercourses and Lakes.

An alternative argument might seek to derive equal access rights from human rights law, relying on the principles of equal protection of the law and non-discrimination found in Article 7 of the 1948 Universal Declaration on Human Rights and in Article 26 of the 1966 International Covenant on Civil and Political Rights.⁶¹ This latter provision is open-ended in the sense that it is not confined to forms of discrimination which it specifically lists, such as race or sex, and it is therefore potentially capable of application to transboundary discrimination which lacks legitimate purpose or has disproportionate effects. It might reasonably be asserted that the arbitrary exclusion of transboundary litigants violates this standard of international legality.⁶² But other human rights treaties, such as the European Convention on Human Rights,⁶³ do not contain an autonomous non-discrimination provision of this kind. In general international law racial and possibly sexual discrimination are prohibited,⁶⁴ while a principle of non-discrimination or equality of treatment is also well established in international economic law, and in the law dealing with protection of aliens.⁶⁵ Discriminatory restrictions on transboundary access to justice may also violate the right to a fair trial under Article 6(1) of the European Human Rights Convention,⁶⁶ or under Article 14 of the 1966 UN Covenant on Civil and Political Rights, which specifically states that "All persons shall be equal before the courts and tribunals."

(b) Regional Provision for Equal Access

It is mainly at regional level, in Europe and North America, that equal access and non-discrimination have received significant support. OECD was the first international organisation to elaborate the content of the principle in detail and to rely on it as an important element in the development of international environmental policy and law. The UN Economic Commission for Europe's use of equal access and non-discrimination is more recent and not so comprehensive, but because it applies to far more states, it has much greater practical importance. Its 1991

^{57.} R.D. Munro and J.G. Lammers, *Environmental Protection and Sustainable Development* (London, 1986), 88.

^{58.} Article 15. The commentary stresses that the rule is residual: states are free to protect the interests of plaintiffs in other ways. See *Rept. of ILC* (1998), GAOR A/53/10; *idem.*, *Rept. of ILC* (1990), U.N. Doc A/45/10, at 39, Arts. 28-33. See also Articles 52 and 53, IUCN Draft Covenant on Environment and Development, 2001.

^{42.} S. McCaffrey, "The 1997 UN Convention on International Watercourses," 92 *AJIL* (1998), 97, at 104.

^{60.} See 1909 US-Canada Boundary Waters Treaty, Article 2, but compare *Soucheray et al. v. US Corps of Engineers* 483 F Supp.352, denying relief on ground that no action lay in respect of IJC decisions under this treaty. See also ILA, Montreal Rules on Water Pollution in an International Drainage Basin, 1982, Article 8; *id.*, Helsinki Rules on Private Law Remedies for Transboundary Damage in International Watercourses, 1996, Articles 1-3.

^{61.} See also 1981 African Charter on Human and Peoples' Rights, Articles 2 and 3, and generally, B. Ramcharan, in, L. Henkin (ed.), *The International Bill of Rights* (New York, 1981), 246.

^{62.} *South West Africa Case* (1966) *ICJ Rep.* 306, per Judge Tanaka; Ramcharan, in, Henkin (ed.), *The International Bill of Rights*, 263.

^{63.} ECHR, Art. 14: 'The enjoyment of the right and freedoms set forth in this Convention shall be secured without discrimination.....'. However, Protocol No.12, adopted in 2000, will create a free-standing right of non-discriminatory treatment if it enters into force. See also 1969 American Convention on Human Rights, Article 1 (but cf. Article 24); 2000 European Union Charter of Fundamental Rights, Article 21 (2).

^{64.} *Namibia Advisory Opinion* (1971) *ICJ Rep.* 57; *S.W. Africa Case* (1966) *ICJ Rep.* 293-300; 1965 International Convention on the Elimination of all Forms of Racial Discrimination; 1979 Convention on the Elimination of All forms of Discrimination against Women.

^{65.} See 1947 and 1994 General Agreement on Tariffs and Trade, preamble and Articles I and III; *BP v. Libya*, 53 *ILR* (1973), 297, at 329, para. 4.

^{66.} See *Lubbe v. Cape plc* [2000] 1 WLR 1545.

Convention on Environmental Impact Assessment in a Transboundary Context requires that members of the public in the affected state be given the equivalent opportunity to participate in relevant environmental impact assessment procedures available to the public in the party of origin.⁶⁷ The 1992 Convention on the Transboundary Effects of Industrial Accidents "underlines" the principle of non-discrimination, reiterates the EIA Convention's provision for equivalent access to procedures, and affords reciprocal access to justice.⁶⁸ Lastly, but most importantly, Article 3(9) of the 1998 Convention on Access to Information etc. requires the parties to afford access to information, justice, and decision-making without discrimination as to citizenship, domicile or place of registration or business. Because of this convention's extensive impact on the provision of domestic remedies and procedures, this article is potentially the most significant legal basis for claims of equal access in transboundary cases in UNECE states.

European Community law does not explicitly provide for equal access, but the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments, and later related treaties,⁶⁹ have the effect of securing access to justice for transboundary litigants, and of precluding reliance on exclusionary doctrines such as *forum non conveniens*.

6. Conclusions: the Value of Environmental Rights

There is little doubt that the UN Sub-Commission's report is right to emphasise the potential within existing human rights law for promoting environmental protection, and this can be fully observed in much of the national case law. The virtue of looking at environmental protection through other human rights, such as life or property, is that it focuses attention on what matters most: the detriment to important, internationally protected values from uncontrolled environmental harm. This is an approach which avoids the need to define such notions as a satisfactory or decent environment, falls well within the competence of existing human rights bodies, and involves little or no potential for conflict with environmental institutions.

As the internationalisation of environmental law becomes more extensive, through policies of sustainable development and protection of biodiversity, the role of human rights law in democratising national decision-making processes and making them more rational, open and legitimate will become more and not less significant. Public participation, as foreseen in Agenda 21, is thus a central element in sustainable development. The increasing international emphasis on free movement of goods, capital and investment has not yet been matched by a willingness to address the accountability of multinational corporations for environmental and human rights abuses in developing countries. Nevertheless, cases such as *Lubbe* show how national conflict of laws rules which have hitherto shielded business are beginning to be affected by human rights and access to justice issues in novel and important ways that have implications for future environmental litigation.

III. ACCESS OF NGOS TO TRANSBOUNDARY ENVIRONMENTAL LITIGATION

1. Introduction

The ever-increasing presence of NGOs in international environmental relations gives evidence of an emerging international civil society which is going to become, to a certain extent, a counterpart to the community of States. NGOs provide for suitable participation of the public at international level, but they hardly stand for the democratization of global environmental governance. They are involved in the international processes of making and implementing environmental law, as well as enforcing those laws by means of compliance control and dispute settlement. The following deliberations will only deal with NGO participation in the latter respect. In view of the Committee's narrow mandate ("transnational enforcement"), our discussion will focus on NGO participation in transboundary environmental litigation, i.e. cases where environmental conflicts between neighboring States are at stake.⁷⁰

⁶⁷. Article 2(6). See also 1974 Nordic Convention for the Protection of the Environment.

⁶⁸. Preamble and Article 9.

⁶⁹. See also 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and see further, Birnie and Boyle, *International Law and the Environment*, ch.5, section 3(2).

⁷⁰ NGO participation issues, such as access of NGOs to the proceedings of the WTO dispute settlement bodies or the World Bank's Inspection Panel cannot be examined here. See for both U. Beyerlin, "The Role of NGOs in International Environmental Litigation", 61 *ZAöRV* (2001), 357.

First, we will consider whether NGOs may have access to proceedings before international courts and tribunals as parties or *amici curiae*. Second, the same question will be raised with regard to NGO participation in international quasi-judicial proceedings. Third, it will be shown that there is a need for minimum requirements which should be met by any NGO seeking access to an international dispute settlement procedure. Finally, some conclusions will be drawn from the foregoing findings.

2. NGO access to the proceedings before international judicial bodies

(a) *Participation as a party*

Access of NGOs as parties (or third parties) to international courts or tribunals depends on the nature of the dispute concerned. In any case where a State is accused by a neighbor State of having committed a breach of international law, a transboundary inter-State conflict is at stake. In this type of dispute NGOs are hardly able to show a legitimate interest in being admitted as parties (or third parties) in the judicial proceedings concerned. Consequently, NGOs do not have access as parties to international courts or tribunals dealing with inter-State disputes, such as the ICJ.⁷¹ The situation is different in cases where human rights matters are concerned.

The human rights control systems in Europe, America and Africa have in common that individuals and NGOs can claim human rights violations, including those relating to the protection of the environment. However, these systems show considerable differences with regard to the modalities of access. Under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950⁷² individuals as well as NGOs may directly address the European Human Rights Court.⁷³ However, an application made by an NGO is only admissible if the latter proves to be the victim of a human rights violation.⁷⁴ Thus, an NGO is not allowed to institute an *actio popularis*.⁷⁵ As a legal person, it cannot invoke individual rights and freedoms, such as the right to life (Art. 2 ECHR) or the right to privacy (Art. 8 ECHR), but, at best procedural human rights, such as the freedom of information (Art. 10 ECHR) and access to court (Art. 6 ECHR). In the early 1980s, Commission and Court began to establish case law concerning human rights protection in environmental affairs.⁷⁶ Although there is already a considerable number of relevant rulings,⁷⁷ NGOs have so far not had any success as claimants.

⁷¹ According to Art. 34, para. 1, of the ICJ Statute "(o)nly states may be parties in cases before the Court". Consequently, NGOs are not permitted to bring an action before the International Court of Justice (ICJ). Compare also Arts. 62 and 63 of the Statute with regard to the right to intervene. NGOs will not be able to bring an action before an international court, as long as they are not entitled under international treaties to undertake legally meaningful, independent activities in international environmental relations. At present, under some environmental treaties NGOs participate in the process of treaty implementation. However, under all these provisions NGOs are restricted to a mere serving function. They appear to be barred from undertaking legally meaningful, independent action. For details see again Beyerlin, *ibid*.

⁷² See the revised text of the ECHR in: BGBl. 1995 II, 579

⁷³ Under the new control system, which was established by the Eleventh Protocol to the Convention (in force since late 1998), the Court may receive human rights applications directly from individuals, as well as NGOs.

⁷⁴ Art. 34 of the ECHR reads as follows: "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto..." (Oellers-Frahm/ Zimmermann (eds.), *Dispute Settlement in Public International Law*, (2nd edn., 2001), 451 et seq.).

⁷⁵ See e.g. the Decision of the European Commission on Human Rights in the case *Narvii Tauria v. France* of 4 December 1995, declaring that the application of some Polynesian individuals who had argued that they suffered from the detrimental effects of a series of French nuclear tests on Mururoa was manifestly ill-founded (*Decisions and Reports* 83 B [Dec. 1995], 112).

⁷⁶ For a comprehensive analysis of relevant case law see Schmidt-Radefeldt, *Ökologische Menschenrechte* (2000), 55 et seq.

⁷⁷ Perhaps most important is the Court's judgment in the case *López Ostra v. Spain*, supra, n.23, which recognized that applicants residing in very close proximity to an environmentally harmful activity can be victims of a violation of their right to respect for home and private and family life under Art. 8 of the ECHR.

As regards the Inter-American human rights system,⁷⁸ NGOs can lodge human rights petitions to the Inter-American Human Rights Commission, but not to the Inter-American Human Rights Court.⁷⁹ However, contrary to the ECHR, they can claim also on behalf of third persons.⁸⁰

The African Human Rights Court to be established under the 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights⁸¹ may invite NGOs to institute cases directly before it without requiring them to be victims of a human rights violation.⁸² Preceding the adoption of the Protocol, the African Human Rights Commission was entitled to deal with any state action alleging that another state party has committed a human rights violation,⁸³ as well as with any communications made by NGOs.⁸⁴ The latter could even complain in cases where the alleged human rights violations did not affect their own rights.⁸⁵

Due to their mission of defending the interests of civil society, NGOs show a much closer relationship to human rights issues than to inter-state affairs. This is why they should be entitled to bring a case before the human rights courts even if they cannot claim to be victims of human rights violations. Actually, there is much in favor of arguing that NGOs, in particular those specifically committed to defending human rights, should be entitled to act on behalf of affected individuals, whether they are NGO members or non-members. The European Human Rights Court which still handles the "victim" requirement in Art. 34 of the ECHR very strictly, should interpret this clause more flexibly in future to allow for more possibilities of defending human rights. Such a widening of standing for NGOs could help establish a more effective system of ecological human rights protection in Europe.

De lege ferenda there is ongoing discussion on proposals aimed at establishing a special international judicial body for resolving international environmental disputes to which, inter alia, individuals and NGOs might have access. However, neither the proposed International Environmental Court⁸⁶ nor the idea that the Permanent Court of Arbitration might serve as a substitute to the former on an interim basis⁸⁷ is a solution which states can be expected to look on with favour.

⁷⁸ It consists of the 1969 American Convention on Human Rights, 9 *ILM* (1970), 673; Oellers-Frahm/Zimmermann, *Dispute Settlement in Public International Law*, 522 et seq., and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 28 *ILM* (1989), 156.

⁷⁹ NGOs are only entitled to submit *amicus* briefs to the Inter-American Court of Human Rights.

⁸⁰ Art. 44 of the American Convention on Human Rights provides: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State party" (text in: Oellers-Frahm/Zimmermann, *Dispute Settlement in Public International Law*, 524.) Art. 23 of the Rules of Procedure of the Inter-American Commission on Human Rights of 1 May states: "Any person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, ... etc." (40 *ILM* (2001), 752, at 757).

⁸¹ In June 1998, 30 member States of the Organization of African States (OAS) signed this protocol; see its text in: Oellers-Frahm/Zimmermann, *Dispute Settlement in Public International Law*, 625 et seq.

⁸² Art. 5, para. 3, of the said Protocol reads as follows: "The Court may entitle the relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it..." (ibid., 627), provided that in accordance with Art. 34, para. 6, of the Protocol the State party concerned by such a complaint has made "a declaration accepting the competence of the Court to receive cases" (ibid., 632).

⁸³ Arts. 47-54 of the African Human Rights Charter (ibid., 596 et seq.).

⁸⁴ Art. 55 of the Charter is silent in this respect ("communications other than those of States parties to the present Charter").

⁸⁵ Actually, African human rights practice shows that the NGOs have made use of this right, although not in the context of environmental protection.

⁸⁶ See in particular A. Postiglione, "An International Court for the Environment", 23 *EPL* (1993), 73 et seq. The 1992 Draft Statute of the International Environmental Agency and the International Court of the Environment is available at <http://www.xcom.it/icef/statute.html>.

⁸⁷ See A. Rest, "An International Court for the Environment: The Role of the Permanent Court of Arbitration", in, *International Alternative Dispute Resolution: Past, Present and Future* (2000), 53 et seq.

(b) *Participation as amicus curiae*

There is an ongoing debate on whether NGOs may participate in international judicial proceedings as *amicus curiae*, whose status remains far behind that of parties or third parties.⁸⁸ The role of any *amicus curiae* in international judicial proceedings is generally restricted to equipping the court or tribunal concerned with relevant information and expertise. Although limited in substance, this function should not be underestimated. It ensures that the court concerned will make its decision in full knowledge and awareness of the private concerns affected, or likely to be affected, by the outcome of that decision. Acting as representatives of civil society, non-governmental *amici* are able to provide for a minimum of public control.

Some permanent courts prove to be very reluctant to acknowledge non-governmental *amicus* participation in their contentious proceedings. In particular, the ICJ still appears to reserve such a role to “international organizations of States”. It has never officially accepted NGOs as *amici curiae*.⁸⁹ It may do so in its advisory proceedings,⁹⁰ but also in this respect, NGOs have had only limited success in practice.⁹¹ The ICJ’s attitude contrasts with the more liberal attitude of its predecessor, the Permanent International Court of Justice (PICJ)⁹². Permanent courts other than the ICJ pursue a more friendly NGO policy in this respect. For instance, the European Human Rights Court, pursuant to Rule 61, para. 3, of the ECHR Rules of 1998,⁹³ apparently accepts NGOs as *amici curiae*. The same is true with regard to the Inter-American Court.⁹⁴

In August 2000 a Canadian NGO, which was later joined by three U.S. NGOs, brought a transboundary dispute between the Canadian Methanex Corporation and the United States before an arbitral tribunal established under Chapter 11 of NAFTA.⁹⁵ It filed a petition seeking *amicus* status in the proceedings before the Tribunal.⁹⁶ On 15 January 2001 the Tribunal ruled⁹⁷ that pursuant to Art. 15, para. 1 of the UNCITRAL Arbitration Rules⁹⁸ it has the power to accept *amicus* written submissions from the above-mentioned NGOs, although there are no provisions in Chapter 11 of NAFTA that touch directly on that question. Moreover, the Tribunal observed: “There is undoubtedly public interest in this arbitration. The substantive issues extend far

⁸⁸ *Amicus* participation also stands in clear contrast to third-party intervention, which is designed to protect the legal interests or rights of the intervening entity likely to be affected by the expected judgment. However, NGOs mostly fail to show that they themselves have such legal interests. They can, at best, attempt to get *amicus* status.

⁸⁹ Art. 34, para. 2, provides that the Court “may request of public international organizations information relevant to cases before it ...” (Oellers-Frahm/Zimmermann, *Dispute Settlement in Public International Law*, 46. Consequently, Art. 69 para. 4 of the Rules of the Court states that “public international organization” only means an “international organization of States” (ibid, p. 72 et seq.). Nonetheless, in the *Case Concerning the Gabčíkovo-Nagymaros Project* of 1997, the ICJ was reported to have unofficially received written NGO submissions.

⁹⁰ Pursuant to Art. 66, para. 2, of the ICJ Statute “any international organization” considered likely to be able to furnish information shall be notified by the Registrar “that the Court will be prepared to receive ... written statements, or to hear, in a public sitting to be held for the purpose, oral statements relating to the question” (ibid., 51).

⁹¹ Only in the 1950 *South-West Africa* advisory proceeding was the Court prepared to receive a written statement from the International League for Human Rights.

⁹² The PCIJ showed a tendency to give the term “international organization” used in Art. 66 of its Revised Statute a broad interpretation. Compare D. Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings”, 88 *AJIL* (1994), 611, at 621, 623.

⁹³ This rule provides: “In accordance with Article 36 § 2 of the Convention, the President may ... invite or grant leave to any Contracting State which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in an oral hearing” (Oellers-Frahm/Zimmermann, *Dispute Settlement in Public International Law*, 476).

⁹⁴ See for more details Shelton, 88 *AJIL* (1994), 611, 638 et seq.

⁹⁵ 1992 North American Free Trade Agreement between Canada, Mexico and the United States (32 *ILM* (1993), 289).

⁹⁶ The Canadian NGO requested permission to present written submissions, to see the briefs and counter-briefs filed by the parties, to make oral submissions, and to have observer status at oral arguments presented by the parties.

⁹⁷ Decision of the Tribunal on Petitions from Third Persons to Intervene as “*Amici Curiae*”; see 13 *World Trade and Arbitration Materials*, No. 3, June 2001. Compare also the report in 24 *International Environment Reporter* (2001), 85.

⁹⁸ Arbitration Rules of the United Nations Commission on International Trade Law, approved by the UN General Assembly on 15 December 1976. Art. 15, para. 1, of these Rules requests adjudicating bodies to conduct judicial review in the manner they deem appropriate while respecting due process. There is no explicit reference to *amicus curiae* briefs.

beyond those raised by usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State... The public interest in this arbitration arises from its subject-matter... (T)he Chapter 11 arbitral process could benefit from being perceived as more open or transparent... (T)he Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular ...".⁹⁹ This progressive ruling appears to be inspired by the recent friendly NGO policy of the WTO Appellate Body since 1998.¹⁰⁰

3. NGO access to the proceedings before international quasi-judicial bodies

Even today many States take the position that the participation of NGOs as parties, third parties and even *amici curiae* in the proceedings before an international court, which is competent for making a legally binding decision in a dispute concerning inter-State affairs, imperils their sovereign interests. The situation might be different in cases where an NGO makes a complaint about the violation of private interests before an international body which employs means of dispute settlement other than legally binding judgements. Such types of dispute settlement are, at best, quasi-judicial in character. They certainly have less impact on State sovereignty, since the States involved remain legally free to decide whether or not to comply with the body's findings. Thus, NGO participation in the proceedings before an international quasi-judicial body might prove to be a promising alternative to their participation in proceedings before an international court or tribunal.

In the context of transboundary environmental relations, there are only few examples of non-judicial dispute settlement.¹⁰¹ Among them is only one mechanism which involves active NGO participation: the investigation mechanism under the NAFTA Side-Agreement. The North American Agreement on Environmental Cooperation (NAAEC) of 1993¹⁰² requires the States parties Canada, Mexico and the United States to bring their environmental law into accord with its environmental obligations. Most of these obligations are procedural in nature.¹⁰³

It is without parallel in environmental treaty practice that the NAAEC provides for a bifurcated mechanism of law enforcement: While the inter-State arbitration procedure¹⁰⁴ is reserved to cases where a party shows a persistent pattern of failed law enforcement, a specific NGO complaints procedure can be employed in any case where a party's failure to enforce its environmental law is at stake. This procedure is designed to provide for the transnational enforcement of each party's domestic environmental law. Its underlying concept shows certain parallels to that of the human rights control systems established under regional conventions. However, it differs from the latter in one important respect: While the control mechanism under such human rights conventions is designed to insure respect for human rights only, the investigation process under NAAEC aims at enforcing unqualified domestic environmental law.

Pursuant to Art. 14 of NAAEC, the Secretariat of the Commission for Environmental Cooperation (NACEC) "may consider a submission from any non-governmental organization ... asserting that a Party is failing to effectively enforce its environmental law ...". Interestingly enough, any NGO "residing or established

⁹⁹ Para. 49 of the Tribunal's Decision of 15 January 2001.

¹⁰⁰ Compare to this policy U. Beyerlin, 61 *ZAöRV* (2001), 357; J. Peel, "Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization", 12 *Colo. J. Int'l Env. Law and Pol.* (2001), 47, at 64 et seq.; Ohlhoff/Schloemann, "Transcending the Nation State? Private Parties and the Enforcement of International Trade Law," 5 *Max Planck Yearbook of United Nations Law* (2001) (forthcoming); P. Mavroidis, "Amicus Curiae Briefs before the WTO: Much Ado about Nothing," in: *Festschrift für C.-D. Ehlermann* (forthcoming).

¹⁰¹ For references see U. Beyerlin, 61 *ZAöRV* (2001), 357.

¹⁰² Agreement of 8-14 September 1993; text in: 32 *ILM* (1993), 1480.

¹⁰³ Pursuant to NAAEC each party has to publish promptly its laws and regulations (Art. 4); to enforce effectively its environmental laws and regulations by appropriate governmental action (Art. 5, para. 1); to ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws (Art. 5, para. 2); to ensure private access to remedies (Art. 6); and to ensure that its proceedings are fair, open and equitable (Art. 7). See part II of this report.

¹⁰⁴ See Arts. 22 et seq. of NAAEC.

in the territory of a Party”, i.e., not only the party accused in the case at hand, can bring complaints before the NACEC.¹⁰⁵

When the Secretariat determines that the eligibility requirements have been met, it decides whether the submission merits a response from the concerned party. In light of the latter’s response, the Secretariat may notify the Council that development of a factual record is warranted. The Council may, by a two-thirds vote, instruct the Secretariat to prepare a factual record which can be made publicly available upon a two-thirds vote of the Council. Thus, the NACEC is able to exert considerable political pressure on States parties through its authoritative findings on whether the law enforcement measures taken by a party show sufficient effectiveness.¹⁰⁶

In the *BC Hydro* case¹⁰⁷ Canada was blamed by a U.S.-based NGO¹⁰⁸ for having failed effectively to enforce section 35 (1) of the federal Fisheries Act against BC Hydro and Power Authority. It was alleged that this failure permits and condones the ongoing destruction of fish and fish habitat in British Columbia. In its factual record issued on 30 May 2000,¹⁰⁹ the NACEC increased pressure on Canada by making reference to some critical comments by an expert group on the enforcement measures Canada had thus far taken¹¹⁰. While the NACEC abstained from endorsing the experts’ critique, this, nevertheless, appears to be a promising method of strengthening the authority of the NACEC’s findings. Once the factual record has been made public, the accused party must feel driven to reconsider duly its enforcement measures.

The NACEC investigation process providing for the transnational enforcement of domestic environmental law is still without parallel in international environmental practice. In assessing whether it may serve as a model for other regimes of cross-border environmental cooperation, it should be noticed that this mechanism considerably differs from that of compliance control employed in a number of modern environmental agreements. While the former is designed to control the enforcement of the party’s internal environmental law which accords with the NAAEC’s standards, the latter aims at ensuring that any state party complies with its treaty obligations. The idea that NGOs may initiate a process of compliance control has met with resistance by states, since such control is a genuine inter-state process which does not directly affect any private interests.¹¹¹ By contrast, a Party’s failure effectively to enforce its environmental law directly interferes with relevant private interests. Consequently, it appears to be legitimate to allow NGOs to place blame for such failure by making submissions to the NACEC on behalf of the affected individuals.

Perhaps the NAAEC could serve as a model for those international environmental agreements structured in about the same way as the NAAEC. Among the very few agreements of this type is in particular the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.¹¹² This convention aims at protecting “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being” (Art. 1). In order to achieve this aim each Party shall in particular guarantee the rights of access to information (Art. 4), public

¹⁰⁵ This is why a U.S.-based NGO was able to bring a case before the NACEC by asserting that Canada did not comply with its environmental law. See the Factual Record for Submission SEM.97-001 (BC Aboriginal Fisheries Commission et al.), 30 May 2000, 7 et seq.

¹⁰⁶ The Joint Public Advisory Committee to the NACEC recently found that the latter’s process of reviewing private complaints should be considerably expedited in future in order to be credible with the public and to increase its effectiveness; the Committee’s advisory opinion of 6 June 2001 is reported in: 24 *International Environment Reporter* (2001), 521 et seq.

¹⁰⁷ See the Factual Record for Submission SEM.97-001 (BC Aboriginal Fisheries Commission et al.), 30 May 2000, 7 et seq.

¹⁰⁸ On 2 April 1997 the Sierra Legal Defense Fund and the Sierra Club Legal Defense Fund (now Earthjustice) jointly filed a submission with the Secretariat of the CEC, pursuant to Art. 14 of the NAAEC. The submission was filed on behalf of a number of Canadian and U.S. American NGOs.

¹⁰⁹ See the Factual Record (note 107).

¹¹⁰ Compare *ibid.*, paras. 142 et seq.

¹¹¹ Compare Beyerlin, 61 *ZAöRV* (2001), 357, with references.

¹¹² On 6 June 2001 the Aarhus Convention (text in: 38 *ILM* (1999), 517) received its 16th ratification (Estonia), meeting the requirement for its entering into force (30 October 2001).

participation in decision-making processes (Arts. 6-8), and access to a court of law (Art. 9). Some of these procedural rights are owed to “the public” or “the public concerned”.¹¹³

The dispute settlement clause in Art. 16 of the Aarhus Convention addresses only the possibility for states to initiate judicial proceedings.¹¹⁴ It may, therefore, be asked whether this Convention could be better enforced if there were an investigation mechanism available for groups of individual persons and NGOs such as that under the NAAEC. Amending the Convention to this end would be desirable, as the Convention assigns a number of procedural rights to NGOs. Taking into account that under Art. 15 of the Convention the parties are bound to “establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance ...”, which “shall allow for appropriate public involvement and may include the option of considering communications from members of the public ...”, such an amendment might be achieved.

4. Minimum requirements regarding the qualification of NGOs for participation

For years, an ever-growing number of NGOs and other non-state actors with varying reputations and expertise is flooding the international environmental scene. Thus, it appears to be appropriate that any decision on NGO participation in international judicial and quasi-judicial proceedings be left to the discretion of the bodies concerned. The latter should make their decision depending on whether an NGO applying for access fulfils certain minimum requirements or not. Such requirements should be laid down in the rules of procedure of the bodies concerned, rather than established on an ad hoc basis.

ECOSOC Resolution 1296 of 23 May 1968 created the institutional framework for a graded system of consultative relations between ECOSOC and NGOs. This resolution offers some guidance for the determination of relevant minimum requirements to be met by any NGO wishing to obtain consultative status. It makes plain that each NGO must be concerned with matters falling within the competence of ECOSOC and conform with the spirit, purposes and principles of the UN Charter. Furthermore, it „shall be of representative character and of recognized international standing“; it shall have an established headquarters with an executive officer at its disposal and have a „democratically adopted constitution“.

Among the requirements to be met by any NGO seeking access to a transboundary dispute settlement procedure as a party, third party or *amicus curiae*, whether judicial or quasi-judicial in character, should be: the NGO’s representative character, its own affectedness or legitimacy to act on behalf of affected third persons, its specific skills and expertise in environmental affairs, and its accountability for actions taken. As a rule, NGOs which meet these requirements (“qualified” NGOs) should be held eligible as requesters in investigation proceedings before international quasi-judicial bodies. Furthermore, courts should commit themselves to consider duly any non-requested *amicus* briefs submitted by “qualified” NGOs. Equipping courts and quasi-judicial bodies with clear guidelines for measuring the eligibility of NGOs would help to make that process more calculable and transparent. Clarifying the conditions of NGO access to international courts and quasi-judicial bodies in such a way would strengthen the position of NGOs which meet the eligibility conditions, thus proving them to be genuine representatives of civil society. Such a “separation of the wheat from the chaff” in the selection process would considerably enhance the chances of “qualified” NGOs to have a powerful voice in international environmental litigation.

5. Conclusions on the role of NGOs

Today, NGOs still play a very modest role in transboundary environmental litigation. They are barred from being admitted as parties or third parties in the proceedings of most international courts. At best, they can submit ecological human rights complaints to the courts established under the European, Inter-American and African human rights systems. At present, many international courts even show considerable reluctance to

¹¹³ These terms mean not only natural persons, but also legal persons, including NGOs. According to Art. 2, para. 5, of the Convention “(t)he public concerned” means “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirement under national law shall be deemed to have an interest”. Thus, NGOs are certainly among the beneficiaries of these procedural rights.

¹¹⁴ Disputes arising between states parties about the interpretation or application of the Convention, in the last resort, may be submitted to the ICJ or an arbitral tribunal (Art. 16 and Annex II). As shown above, NGOs do not have access to these courts.

accept NGOs as *amici curiae*. In future all international courts and tribunals dealing with inter-state disputes should pledge themselves to consider open-mindedly the admittance of NGOs as *amici* in all cases, provided that the NGOs applying for that status meet some minimum qualifications to be generally determined in advance by the courts concerned.

More promising is the role NGOs can play in international quasi-judicial proceedings. Under the NAFTA Side-Agreement (NAAEC), NGOs can request the Commission of Environmental Cooperation (NACEC) to investigate into any alleged failure by a state party to the NAAEC to enforce its domestic environmental law. Although the NACEC cannot make legally binding decisions, its factual findings, if made public, can help to redress (environmental) harm from private individuals. Thus, the NGO-initiated investigation process under NAAEC may serve as a model for making other international environmental treaty regimes more effective in future.

In conclusion, there are three options for strengthening the role of NGOs in international environmental litigation: First, in ecological human rights cases the regional courts concerned should be prepared to grant NGOs broader standing; in particular, the latter should be entitled to make claims also on behalf of affected individuals. Second, international courts and tribunals should develop a more liberal attitude towards NGOs offering their assistance as *amici curiae*. Third, the possibilities for NGOs to initiate international quasi-judicial procedures aimed at investigating environmental misconduct should be widened.