

ANNEX I

Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements

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I. INTRODUCTION

1. This Study¹ has been prepared in the context of, and with a view to contributing to the implementation of, Principle 26 of the 1992 Rio Declaration on Environment and Development, which called on States to resolve their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations. Paragraph 39.10 of Agenda 21 amplifies that objective, calling on States to

“further study and consider methods to broaden and make more effective the range of techniques available at present, taking into account, among others, relevant experience under existing international agreements, instruments or institutions and, where appropriate, their implementing mechanisms such as modalities for dispute avoidance and settlement. This may include mechanisms and procedures for the exchange of data and information, notification and consultation regarding situations that might lead to disputes with other states in the field of sustainable development and for the effective peaceful means of dispute settlement in accordance with the Charter of the United Nations, including, where appropriate, recourse to the International Court of Justice, and their inclusion in treaties relating to sustainable development.”

2. Among other things, the study develops ideas, which emerged at a meeting convened by the Permanent Court of Arbitration (“PCA”) in June 1996 in The Hague, to consider the potential role of the PCA in the settlement of environmental disputes. Part of this Study draws upon the Background Paper prepared for that meeting.

3. The Study proposes specific roles for the PCA in the prevention and settlement of environmental disputes in two ways. First, it identifies an institutional role for the PCA in the dispute settlement provisions of new environmental agreements – in the form of draft model clauses. Second, it identifies existing environmental agreements with dispute settlement provisions that might allow the PCA to play a role where it has existing capacity and experience: fact-finding, conciliation, and arbitration.

4. The Study recognizes that the treatment of traditional dispute settlement provisions in international environmental agreements varies greatly. Generally, three approaches have been taken. First, in the case of many of the earlier agreements, there are no dispute settlement provisions at all. Second, in rather more cases, the dispute settlement provision identifies one or more means of dispute settlement to be utilized but does not specify the rules or institutional arrangements to govern the procedure to be followed. And third – and this has been the approach in recent multilateral agreements – detailed rules are provided for one or more of the traditional dispute settlement mechanisms, but not for others, and additional non-contentious compliance mechanisms are provided or envisaged.

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1. The financial support provided by the Netherlands Ministry of Housing, Spatial Planning and the Environment in the preparation of these guidelines is gratefully acknowledged. The authors would like to thank Erasmo Lara Cabrera for his assistance in the preparation of this paper.
 2. P. Sands, “Environmental Disputes and the Permanent Court of Arbitration: Issues for Consideration”, Background Paper for the Secretary-General of the Permanent Court of Arbitration (March 1996).

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5. To the extent that States negotiating new international environmental agreements, or completing the dispute settlement provisions of those already adopted, wish to follow precedents, they have a range of options to draw from. In identifying a role for the PCA, the Study recognizes that fact and is structured as follows:

- Section II describes the principal methods of inter-State dispute settlement utilized in international environmental agreements;
- Section III identifies trends in provisions on dispute settlement contained in international environmental agreements;
- Section IV outlines some of the strengths and weaknesses of the approaches described in Section II;
- Section V identifies dispute settlement provisions in existing environmental agreements in which the PCA might play a role and for which the International Bureau might usefully establish contact with the secretariats; and
- Section VI sets forth potential model clauses on dispute settlement for possible inclusion or incorporation in future international environmental agreements.

6. Some seventy international and regional environmental agreements were surveyed for the purposes of this study. The Study considers only procedures relating to disputes *between States* arising under international environmental agreements.

II. METHODS OF DISPUTE SETTLEMENT

7. Article 33 of the UN Charter provides that disputes should be settled by “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means”. This provision is reflected in the dispute settlement provisions of many international environmental agreements. The different techniques can be divided into two broad categories: diplomatic means, according to which the parties retain control over the dispute insofar as they may accept or reject a proposed settlement (fact-finding, negotiation, consultation, mediation, inquiry, conciliation); and legal means, which result in legally binding decisions for the parties to the dispute (arbitration and judicial settlement). Recourse to regional arrangements and international organisations as mediators and conciliators provide something of a middle way: the legal consequences of any decision taken by the institution will depend on the treaty establishing the institution.

8. Negotiation and consultation are well-established methods of dispute avoidance and settlement. Almost all environmental agreements that address the settlement of disputes envisage consultation and negotiation as the first resort where a dispute arises between parties. However, they do not specify the institutional arrangements to be followed, and since there is unlikely to be a role for the PCA in negotiation and consultation, we do not address these means further in this paper.

3. See generally J.G. Merrills, *International Dispute Settlement*, 2nd ed. (1991). As Gray and Kingsbury note, “this list is not exhaustive and suggests a precision in classification which is belied by the complexity of dispute settlement practice”. C.D. Gray and B. Kingsbury, “Developments in Dispute Settlement: Inter-State Arbitration since 1945”, 63 *Brit. Y. B. Int'l L.* (1992) pp. 97-134, at p. 97.

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9. The other principal mechanisms utilised can be divided into six main categories:

- (1) mediation;
- (2) conciliation;
- (3) arbitration;
- (4) judicial settlement;
- (5) commissions of inquiry/fact-finding; and
- (6) non-compliance procedures.

10. Of these, the first four reflect the traditional approaches of Article 33 of the UN Charter. The fifth provides a means of inquiring into disputes of fact. Finally, non-compliance procedures are a recent development in international environmental agreements, with two operational procedures in place and a number of others under development, or envisaged under other agreements. Of the six categories, the PCA has a potential role to play in all except judicial settlement and non-compliance procedures.

11. The six categories of dispute settlement techniques can be further subdivided in two principal ways. First, according to whether they provide for *mandatory* dispute settlement (either compulsory, or providing for recourse to a dispute settlement mechanism at the request of *one* of the parties to a dispute) or whether they simply provide for *optional* recourse to a dispute settlement procedure (e.g., a provision allowing a party to accept as compulsory, without more, submission of disputes arising under the Convention to arbitration or to the International Court of Justice (“ICJ”); or allowing the parties to a dispute, upon mutual agreement, to submit their dispute to judicial settlement, arbitration or conciliation).

12. Second, according to whether they provide *detailed rules* for the establishment of the dispute settlement body and the procedures that body should follow (e.g., in an

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4. Montreal Protocol on Substances that Deplete the Ozone Layer, September 16, 1987, entered into force January 1, 1989, 26 ILM (1987) p. 154 [hereinafter 1987 Montreal Protocol]; Fifteenth Session of the Executive Body of the Convention on Long-Range Transboundary Air Pollution [see *infra* fn. 39], Decision 1997/2 concerning the Implementation Committee, its Structure and Functions and Procedures for Review of Compliance.
 5. For example, under the United Nations Framework Convention on Climate Change, New York, May 9, 1992, entered into force March 24, 1994, 31 ILM (1992) p. 849 [hereinafter 1992 Climate Change Convention]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 11, 1997, not in force, 37 ILM (1998) p. 22 [hereinafter 1997 Kyoto Protocol].
 6. United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, entered into force December 26, 1996, 33 ILM (1994) p. 1328 [hereinafter 1994 Desertification Convention]; 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, November 7, 1996, not in force, IMO Doc. LC/SM 1/6, November 14, 1996 [hereinafter 1996 London Convention Protocol]; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, September 10, 1998, not in force, 38 ILM (1999) p. 1 [hereinafter 1998 Rotterdam Convention]; Cartagena Protocol on Biosafety, January 29, 2000, not in force, <http://www.biodiv.org> [hereinafter 2000 Biosafety Protocol].

arbitration or conciliation annex, or in an article of the convention), or whether they leave the detail to later agreement between parties.

13. A further distinction that has been suggested concerns whether the dispute settlement provisions rely upon an *existing institution* (such as the ICJ or the PCA, or regional institutions) or provide for *special or ad hoc arrangements*. In a 1983 study of eighty-three multilateral agreements, Kiss found that designation of existing institutions for dispute settlement was relatively rare, and that instead the large majority of multilateral environmental agreements containing dispute settlement provisions foresaw recourse to *ad hoc* bodies or procedures.

14. Another distinction apparent from a survey of the dispute settlement provisions in the treaties is that some treaties providing for mandatory procedures allow or provide for the *exclusion of certain categories of disputes* from the procedure. For example, the elaborate compulsory dispute settlement provisions of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) exclude from the scope of mandatory dispute settlement disputes relating to certain highly sensitive matters, involving for example the sovereign rights of coastal States with respect to the living resources of the exclusive economic zone.⁸ Similarly the dispute settlement provisions of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (“CRAMRA”) and the 1991 Protocol on Environmental Protection to the Antarctic Treaty¹⁰ exclude certain categories of disputes from the mandatory provisions. Some treaties, while providing for compulsory dispute settlement procedures, allow States on signature or ratification¹¹ to exclude from compulsory dispute settlement certain categories of disputes,¹² or to opt out of the compulsory dispute settlement provisions.

15. The following discussion outlines the various methods of dispute settlement.

1. Mediation

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7. A. Kiss, “Le règlement des différends dans les conventions multilatérales relatives à la protection de l’environnement”, R.J. Dupuy, ed., *The Settlement of Disputes on the New Natural Resources* (1993) pp. 119-130, at pp. 122-123.
 8. United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982, entered into force November 16, 1994, 21 ILM (1982) p. 1261 [hereinafter 1982 UNCLOS], Art. 297(3)(a).
 9. See, e.g., Convention on the Regulation of Antarctic Mineral Resource Activities, Wellington, June 2, 1988, not in force, 27 ILM (1988) p. 868 [hereinafter 1988 CRAMRA], Art. 57. Essentially, the exclusion relates to disputes concerning territorial claims in relation to Antarctica.
 10. Protocol on Environmental Protection to the Antarctic Treaty, Madrid, October 4, 1991, entered into force January 14, 1998, 30 ILM (1991) p. 1461 [hereinafter 1991 Antarctic Environment Protocol].
 11. See, e.g., 1988 CRAMRA, *supra* fn. 9, at Art. 58; 1982 UNCLOS *supra* fn. 8, at Art. 298. With regard to the exercise by States party to UNCLOS of their right under Art. 298 to exclude categories of disputes from compulsory dispute settlement, see L. Sohn, “Settlement of Law of the Sea Disputes”, 10(2) Int’l J. Marine & Coastal L. (1995) p. 205, at p. 210.
 12. See, e.g., Convention on Early Notification of Nuclear Accidents, Vienna, September 26, 1986, entered into force October 27, 1986, 25 ILM (1986) p. 1370 [hereinafter 1986 Early Notification Convention].

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16. Mediation involves the intervention of a third person as an active participant in the interchange of proposals between the parties to a dispute. The mediator may even offer informal proposals of his or her own. Many environmental treaties provide for settlement of disputes by mediation or the good offices of a third party where negotiation has failed to settle a dispute, and before progressing to the more formal (and legally binding) dispute settlement mechanisms. However, the treaties examined for this Study do not provide rules or an institutional “home” for mediation, or give any guidance as to how it should be carried out.

17. Some conventions provide a mediation role for institutions established under the convention. For example, the 1979 Berne Convention provides that the Standing Committee established under the Convention (composed of representatives of parties) shall, in the first instance, facilitate “friendly settlement of any difficulty” that may arise.

2. Conciliation

18. Many environmental treaties include provisions relating to conciliation between parties to a dispute. In conciliation, the third party assumes a more formal role and

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13. See, e.g., African Convention on the Conservation of Nature and Natural Resources, Algiers, September 15, 1968, entered into force October 9, 1969, 1001 UNTS, p. 4 [hereinafter 1968 African Nature Convention] (referring disputes to the Commission of Mediation, Conciliation and Arbitration of the OAU); 1982 UNCLOS, *supra* fn. 8; Convention for the Protection of the Ozone Layer, Vienna, March 22, 1985, entered into force September 22, 1988, 26 ILM (1987) p. 1529 [hereinafter 1985 Vienna Convention]; 1987 Montreal Protocol, *supra* fn. 4; Convention on Biological Diversity, Rio de Janeiro, June 5, 1992, entered into force December 29, 1993, 31 ILM (1992) p. 822 [hereinafter 1992 Biodiversity Convention]; 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, entered into force January 17, 2000, OJ C L73/20, 16/3/94 [hereinafter 1992 Baltic Convention]; 1996 London Convention Protocol, *supra* fn. 6; Convention on the Law of Non-Navigational Uses of International Watercourses, New York, May 21, 1997, not in force, UN Doc. A/51/869 [hereinafter 1997 International Watercourses Convention]; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Noumea, November 25, 1986, entered into force August 22, 1990, 26 ILM (1987) p. 38 (1986 Noumea Convention); Antarctic Treaty, Washington, December 1, 1959, entered into force June 23, 1961, 402 UNTS, p. 71 [hereinafter 1959 Antarctic Treaty]; 1988 CRAMRA, *supra* fn. 9.
 14. Convention on the Conservation of European Wildlife and Natural Habitats, Berne, September 19, 1979, entered into force June 1, 1982, 104 ETS [hereinafter 1979 Berne Convention], Chap. VIII, Art. 18(1).
 15. See, e.g., Optional Protocol Concerning the Compulsory Settlement of Disputes to the Convention on Civil Liability for Nuclear Damage, Vienna, May 29, 1963, not in force, W.E. Burhenne, ed., *International Environmental Law: Multilateral Treaties*, Vol. 3 (Kluwer Law International 1995) 963:41/001; 1985 Vienna Convention, *supra* fn. 13; 1992 Biodiversity Convention, *supra* fn. 13; 1992 Climate Change Convention, *supra* fn. 5; Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, entered into force March 25, 1998, 32 ILM (1993) p. 1068 [hereinafter 1992 OSPAR Convention] (within the Commission); 1997 International Watercourses Convention, *supra* fn. 13 (e.g.,

often investigates the factual aspects underlying the dispute, making formal proposals for the resolution of the dispute in accordance with the applicable law. Conciliation results in non-binding recommendations for the settlement of the dispute, which the parties should consider in good faith. As provided for in the treaties, conciliation may be either a *mandatory* or *optional* procedure. Where settlement through conciliation is provided, some conventions provide detailed rules concerning the constitution and operation of the conciliation commission.¹⁶ Other conventions are silent, or contain only a brief clause on the conciliation procedure,¹⁷ and in these cases the PCA, with its conciliation rules and existing facilities, might provide a suitable forum.

A. Mandatory Conciliation

19. Conciliation may be made mandatory where a dispute has not been settled by other means and where the parties have not accepted the same or any other method of dispute settlement (e.g., arbitration or judicial settlement).¹⁸ The 1992 Biodiversity Convention and the 1985 Vienna Convention take this approach. The Biodiversity Convention includes in an annex more detailed rules on the establishment and operation of a Conciliation Commission. However, no institutional “home” or support is provided for the conduct of the conciliation. A Conciliation Commission has never been convened under the Convention, although some states apparently came close to invoking the provision in the summer of 1995 in the context of French nuclear testing.

20. Some conventions provide that where a dispute has not been settled by other means and the parties have not accepted the same or any means of dispute settlement available under the treaty, then the dispute may be submitted to conciliation at the request of *either* party to the dispute – i.e., in such circumstances the other party is bound to submit the dispute to the conciliation procedure, unless the parties agree otherwise (though it is not bound by the recommendations). This approach is taken, for example, in the 1992 Climate Change Convention and in the 1994 Second Sulphur Protocol. Again, treaties that provide for conciliation in these circumstances may provide, or provide for the adoption of, detailed rules regarding the establishment of the conciliation commission.

through joint watercourse institutions); 1982 UNCLOS, *supra* fn. 8 (for certain disputes); International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Damage, Brussels, November 29, 1969, entered into force May 6, 1975, 9 ILM (1970) p. 25 (1969 Intervention Convention); 1994 Desertification Convention, *supra* fn. 6; 1968 African Nature Convention, *supra* fn. 13; 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution [see *infra* fn. 39] on Further Reduction of Sulphur Emissions, Oslo, June 14, 1994, entered into force August 5, 1998, 33 ILM (1994) p. 1540 [hereinafter 1994 Second Sulphur Protocol].

16. For example, the 1992 Biodiversity Convention, *supra* fn. 13. Both the 1992 Climate Change Convention (*supra* fn. 5) and the 1994 Desertification Convention (*supra* fn. 6) provide that the Conference of the Parties will adopt conciliation annexes.

17. For example, the 1985 Vienna Convention (*supra* fn. 13) and the 1994 Second Sulphur Protocol (*supra* fn. 15).

18. For example, the 1992 Biodiversity Convention (*supra* fn. 13) and the 1985 Vienna Convention (*supra* fn. 13).

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21. Compulsory non-binding conciliation is also provided for certain categories of dispute under the 1982 UNCLOS. The procedure for compulsory conciliation is set out in Section 2 of Annex V to UNCLOS.

B. Optional Conciliation

22. Some treaties simply provide for conciliation as one amongst a number of dispute settlement options, allowing a dispute to be submitted to conciliation if the parties to the dispute so agree. Some conventions also refer to conciliation within Commissions or other bodies established by the convention. Such Commissions are made up of representatives of the parties to the relevant convention. This approach was reflected, for example, in the 1974 Paris Convention and in the 1992 OSPAR Convention, which superseded it.

3. Arbitration

23. Again, arbitration may be either *mandatory* (if a dispute has not been settled by other means, and/or upon the request of any one party) or *optional*. Many treaties allow parties at the time of ratification or at any time thereafter to accept as compulsory *ipso facto* submission of disputes to arbitration. Where a party makes such a declaration, if a dispute arises with another party that has made the same choice, then if the dispute cannot be settled by other means, it must be submitted to arbitration.

24. Conventions that provide for resort to arbitration frequently include arbitration annexes (or provide for the adoption of such annexes) setting out *detailed rules* as to, for example, the appointment of arbitrators. Both the 1992 Climate Change Convention and the 1994 Desertification Convention provide for the adoption of annexes on arbitration by the Conference of the Parties. Some treaties however, refer simply to

19. See, e.g., 1997 International Watercourses Convention (*supra* fn. 13) and the 1959 Antarctic Treaty (*supra* fn. 13).

20. Convention for the Prevention of Marine Pollution from Land-based Sources, Paris, June 4, 1974, <http://infoserver.ciesin.org/pidb/texts/marine.pollution.land.based.sources.1974.html> [hereinafter 1974 Paris Convention], Art. 21; 1992 OSPAR Convention, *supra* fn. 15, at Art. 32.

21. For example, the 1992 Climate Change Convention, *supra* fn. 5; 1992 Biodiversity Convention, *supra* fn. 13; 1994 Second Sulphur Protocol, *supra* fn. 15; 1985 Vienna Convention, *supra* fn. 13; Convention for the Protection of the Mediterranean Sea Against Pollution, Barcelona, February 16, 1976, entered into force February 12, 1978, 15 ILM (1976) p. 290 [hereinafter 1976 Barcelona Convention]; Convention on the Transboundary Effects of Industrial Accidents, Helsinki, March 17, 1992, entered into force April 19, 2000, 31 ILM (1992) p. 1330 [hereinafter 1992 Industrial Accidents Convention]. However, parties rarely exercise this option. For example, by 1996, the Solomon Islands was the only party to the 1992 Climate Change Convention (*supra* fn. 5) to have made such a declaration under that Convention; see H. Ott, "Elements of a Supervisory Procedure for the Climate Regime", 56(3) ZaoRV (1996) p. 732, at p. 736; UN Doc. FCCC/CP/1996/inf.1.

22. The 1985 Vienna Convention (*supra* fn. 13) and the 1994 Second Sulphur Protocol (*supra* fn. 15) both contain a similar provision. The first meeting of the Conference of the Parties to the 1985 Vienna Convention in 1989 adopted an annex on arbitration, UNEP/OzL.Conv.1/5, Annex II. On the arbitration annex of the 1994

the possibility of submitting disputes to arbitration without providing specific arrangements for the establishment of such a body or its working arrangements.²³

25. It is not common for conventions to refer to arbitration taking place under the auspices of *specific institutions*, although this does occur in certain cases.²⁴ For example, the 1972 CITES and the 1979 Bonn Convention on Migratory Species²⁵ both provide that if a dispute has not been settled by negotiation, then by mutual consent of the parties to the dispute it may be submitted to binding arbitration, "in particular that of the Permanent Court of Arbitration at the Hague". The 1968 African Nature Convention refers to dispute settlement through the Organisation of African Unity's Commission of Mediation, Conciliation and Arbitration. The 1992 Baltic Convention provides that, upon common agreement, disputes may²⁶ be submitted, *inter alia*, to *ad hoc* arbitration or to a permanent arbitration tribunal.

A. Mandatory Arbitration

26. A number of agreements provide that if a dispute has not been settled by arbitration or mediation,²⁷ then it shall be submitted to arbitration at the request of one party to the dispute.²⁸ According to one review carried out in 1995, some twenty-three multilateral²⁹ environmental conventions provide for unilateral submission of disputes to arbitration. However, some treaties allow a party to declare at the time of signature or ratification that it is not bound by parts of the dispute settlement provisions, including submission to arbitration.

27. Arbitration is also one of the options provided in the 1982 UNCLOS, which a party may accept as compulsory. Where a party to UNCLOS has not made any declaration accepting a particular method of dispute resolution, it is deemed to have accepted arbitration. So far, most parties to UNCLOS²⁸ have not made declarations and thus would be deemed to have accepted arbitration. In addition, where the parties have not made the same or any choice, arbitration would apply. UNCLOS also allows

Desertification Convention, see *infra* fn. 63.

23. For example, the 1992 Baltic Convention, *supra* fn. 13, at Art. 26.

24. Convention on the Conservation of Migratory Species of Wild Animals, Bonn, June 23, 1979, entered into force November 1, 1983, 19 ILM (1980) p. 11.

25. 1992 Baltic Convention, *supra* fn. 13.

26. See, e.g., 1974 Paris Convention, *supra* fn. 20; 1992 OSPAR Convention, *supra* fn. 15; Convention on the Protection of the Rhine Against Chemical Pollution, Bonn, December 3, 1976, entered into force February 1, 1979, 16 ILM (1977) p. 242 (1976 Rhine Chemical Convention); Convention on the Protection of the Rhine Against Pollution by Chlorides, Bonn, December 3, 1976, ¶ (1976 Rhine Chlorides Convention); International Convention on the Prevention of Pollution by Ships London, February 17, 1978, entered into force October 2, 1983, 17 ILM (1978) p. 246 (1973/78 MARPOL); 1979 Berne Convention, *supra* fn. 14; 1986 Early Notification Convention, *supra* fn. 12 (subject to opt out); 1974 Paris Convention, *supra* fn. 20; 1996 London Convention Protocol, *supra* fn. 6.

27. Romano, "Peaceful Settlement of Disputes in Multilateral Environmental Treaties", (on file with authors, 1995) p. 23, fn. 89.

28. See Sohn, *supra* fn. 11, at p. 207. By November 16, 1999, twenty-four States Party to the 1982 UNCLOS (*supra* fn. 8) had made Art. 287 declarations, http://www.un.org/Depts/los/los_sdm1.htm.

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parties to select arbitration by a “special arbitral tribunal” as the mandatory procedure for the settlement of certain types of disputes. Special arbitration may be used where a dispute relates to fisheries' protection and preservation of the marine environment, marine scientific research or navigation.

28. Again, many of the agreements, which provide for mandatory arbitration provide detailed rules on the constitution of the arbitral tribunal in an annex. However, under the mechanisms contained in the treaties arbitration is *ad hoc* and specific institutional support is not provided. It is not explicitly provided in the conventions that the Secretariat or Bureau of the relevant convention is to provide administrative or logistical support to any arbitration under the Convention. Many convention secretariats may not have the financial and human resources to do so.

B. Optional Arbitration

29. As mentioned above, many treaties provide that upon signature or ratification parties may accept as compulsory submission of disputes to arbitration.

30. Certain environmental treaties provide for the submission of disputes to arbitration by mutual (*ad hoc*) consent of the relevant parties. A 1995 study noted that twenty-one environmental conventions require the agreement of parties for the submission of a dispute to arbitration.

4. Judicial Settlement

31. Some environmental agreements provide that States may accept as compulsory, without more, the submission of disputes to the International Court of Justice. However, very few States take up this option. Submission of disputes to the International Court of Justice is also one of the dispute settlement methods that parties to the 1982 UNCLOS may accept as compulsory under Article 297.

32. The 1982 UNCLOS also establishes a special judicial body, the International Tribunal on the Law of the Sea (“ITLOS”). Again, States may declare that they accept the jurisdiction of the ITLOS as compulsory for the settlement of certain categories of disputes under UNCLOS. The Statute of the ITLOS is contained in Annex VI to UNCLOS. The Tribunal is composed of twenty-one members, representing the principal legal systems of the world, with equitable geographic representation. The Tribunal is located in Hamburg, Germany. Under its Statute, the Tribunal may establish special chambers to hear particular categories of disputes. In addition, a Sea Bed Dispute Chamber is provided for under the Statute and is assigned specific functions under UNCLOS. The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement conferring jurisdiction on the Tribunal.

29. 1982 UNCLOS, *supra* fn. 8, at Annex VIII.

30. See *supra* fn. 21.

31. See Romano, *supra* fn. 27, at p. 23, fn. 88.

32. 1982 UNCLOS, *supra* fn. 8, at Annex VI, Art. 2.

33. *Id.* at Annex VI, Art. 21.

5. *Commissions of Inquiry/Fact-finding*

33. Numerous examples exist of provisions for the establishment of commissions of inquiry or “fact-finding” commissions. For example, under Article IX of the 1909 Boundary Waters Treaty, the International Joint Commission, comprised of commissioners appointed by the parties, may, on the request of either party to a dispute, examine and report on the facts and circumstances of the question referred to it and make recommendations. The 1974 Nordic Environment Convention provides for the establishment of a Commission upon the demand of each party to give an opinion on the permissibility of environmentally harmful activities that entail considerable nuisance to another party. The 1985 South Pacific Nuclear Free Zone Treaty establishes a control system which includes a complaints procedure involving the possible convening of a Consultative Committee to consider complaints and evidence of breach of obligations, with certain inspection powers, and the right to report fully to members of the South Pacific Forum and give its decision as to whether a breach of obligations has occurred.

34. Annex VIII of the 1982 UNCLOS, relating to the special arbitral tribunal, allows parties to a dispute to restrict the tribunal to an inquiry into the facts giving rise to the dispute in question. In such instances such a finding of fact will be considered as “conclusive as between the parties”, unless the parties agree otherwise.

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34. See, e.g., FAO Agreement for the Establishment of a General Fisheries Council for the Mediterranean, Rome, September 24, 1949, entered into force December 3, 1963, 126 UNTS, p. 237, Article XIII; FAO International Plant Protection Convention, Rome, December 6, 1951, entered into force April 3, 1952, 150 UNTS, p. 67, Art. IX; International Convention for the High Seas Fisheries of the North Pacific Ocean, Tokyo, May 9, 1952, entered into force June 12, 1953 (special committee of scientists); Nordic Convention on the Protection of the Environment, Stockholm, February 19, 1974, entered into force October 5, 1976, 13 ILM (1974) p. 511 [hereinafter 1974 Nordic Environment Convention]; Treaty Relating to the Boundary Waters and Questions Arising along the Boundary Between the United States and Canada, Washington, January 11, 1909, entered into force May 5, 1910, reprinted in S. Ruster and B. Simma, eds., *International Protection of the Environment: Treaties and Related Documents*, Vol. 10 (1995) p. 5158 [hereinafter 1909 Boundary Waters Treaty]; Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, February 25, 1991, not in force, 30 ILM (1991) p. 802 [hereinafter 1991 Espoo Convention] (inquiry commission); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1992 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, opened for signature December 4, 1995, [hereinafter 1995 Straddling Stocks Agreement] (*ad hoc* expert panel); Treaty for Amazonian Cooperation, Brasilia, July 3, 1978, entered into force February 2, 1980, 17 ILM (1978) p. 1045, Art. XXIV (special commission); 1997 International Watercourses Convention, *supra* fn. 13 (Fact-finding Commission).
35. South Pacific Nuclear Free Zone Treaty, Rarotonga, August 6, 1985, entered into force December 11, 1986, 24 ILM (1985) p. 1440.
36. *Id.* at Art. 8 and Annex 4.
37. 1982 UNCLOS, *supra* fn. 8, at Annex VIII, Art. 5. See Sohn, *supra* fn. 11, at p. 213.

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35. In 1991, a draft resolution was put forward by six countries, Hungary, Italy, Poland, Austria, the Czech and Slovak Federal Republic and Yugoslavia, to the Preparatory Committee of UNCED for the establishment of commissions of inquiry to clarify, establish and report on the factual issues of situations likely to give rise to environmental disputes. However, this proposal was not taken up at UNCED.

36. More recently, the 1997 International Watercourses Convention provides that where disputes have not been settled within a specified time, they may be submitted at the request of any of the parties to the dispute to impartial fact-finding (unless the parties agree otherwise). The Convention sets out rules regarding the composition of the fact-finding commission. The Commission is to submit a report to the parties involved in the dispute setting forth its findings with reasons and recommendations for an equitable solution of the dispute.

6. Non-compliance Procedures

37. Non-compliance procedures of the type established under the 1987 Montreal Protocol and for the Protocols to the Convention on Long-Range Transboundary Air Pollution are envisaged for the 1992 Climate Change Convention and its Kyoto Protocol; the 1994 Desertification Convention; the 1989 Basel Convention; the 1998 Rotterdam Convention on Prior Informed Consent; and the 2000 Biosafety Protocol. However, the great majority of earlier environmental agreements made no provision for such procedures, and existing or proposed procedures could not be applied to disputes arising outside the scope of these conventions.

38. The non-compliance procedure established under the 1987 Montreal Protocol was the first of its kind and represents an approach likely to be followed by other environmental agreements. It operates under the auspices of an Implementation Committee established in 1987. Any party, which has reservations about another

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38. See Sands, *supra* fn. 2; J. Bhagwati, "Environmental Disputes", P. Sand, ed., *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (1992), pp. 436-452, at p. 442; P. Sand, "New Approaches to Transnational Environmental Disputes", 3 *Int'l Env'tl. Aff.* (1991) p. 193. For the proposal, see UN Doc. A/CONF.151/PC/L.29.
39. Convention on Long-Range Transboundary Air Pollution, Geneva, November 13, 1979, entered into force March 16, 1983, 18 *ILM* (1979) p. 1442 [hereinafter 1979 LRTAP].
40. See Decision III/11 of the Conference of the Parties to the Basel Convention, requesting the Consultative Sub-group of Legal and Technical Experts to study all issues related to the establishment of a mechanism for monitoring implementation of and compliance with the Basel Convention and its design, and to report its findings to the fourth meeting of the Conference of the Parties.
41. 1998 Rotterdam Convention, *supra* fn. 6, at Art. 17.
42. 2000 Biosafety Protocol, *supra* fn. 6, at Art. 34.
43. See Decision II/5 (Non-compliance), Report of the Second Meeting of the Parties to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.2/3, June 29, 1990; see now Decision IV/5 and Annexes IV and V, adopting the non-compliance procedure; Report of the Fourth Meeting of the Parties, UNEP/OzL.Pro.4/15, November 25, 1992, 32 *ILM* (1993) p. 874 and revised by Decision X/10 of the Tenth Meeting of the Parties, UNEP/Oz L Pro 10/9,

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party's implementation of its obligations under the Protocol, may indicate its concerns in writing to the Secretariat, with corroborating information. The Secretariat will then determine with the assistance of the Party alleged to be in violation whether it is unable to comply with its obligations under the Protocol, and will transmit the original submission, its reply and other information to the Implementation Committee.

39. The functions of the Implementation Committee (comprising ten parties) is to receive, consider and report on submissions made by any party concerning reservations regarding another Party's implementation of its obligations under the Protocol, and any information or observations forwarded by the Secretariat. The Committee may, at the invitation of the Party concerned, undertake information gathering in the territory of that Party, and will also maintain an exchange of information with the Executive Committee of the Multilateral Fund related to the provisions of financial and technical cooperation to developing country parties. The Committee is to try to secure "an amicable resolution of the matter on the basis of respect for the provisions of the Protocol" and report to the Meeting of the Parties, which may decide upon and call for steps to bring about full compliance with the Protocol. The Fourth Meeting of the Parties to the 1987 Montreal Protocol adopted an indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance:

- (i) appropriate assistance;
- (ii) issuing of cautions; and
- (iii) suspension (in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty) of specific rights and privileges under the Protocol.

40. The report is not to contain any confidential information and is to be made available to any person upon request. Resort to the non-compliance procedure does not prejudice the dispute settlement provisions available under Article 11 of the 1985 Vienna Convention, which include negotiation, good offices, mediation, arbitration, submission to the International Court of Justice and the establishment of a conciliation commission.

41. Under the 1979 LRTAP, an Implementation Committee has been established to review compliance of parties with their obligations under the various Protocols to the

December 3, 1998. Art. 13 of the 1992 Climate Change Convention (*supra* fn. 5) provides for the possible establishment of a "multilateral consultative process, available to the Parties on their request, for the resolution of questions regarding the implementation of the Convention". Art. 18 of the 1997 Kyoto Protocol (*supra* fn. 5) provides that at its first session the meeting of the Parties to the Protocol shall "approve appropriate and effective procedures and mechanisms to determine and address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance." Art. 18 further provides that "[a]ny procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol".

44. Fourth Meeting of the Parties to the 1987 Montreal Protocol, *supra* fn. 43, Decision IV/5.

45. *Id.* at paras. 15 and 16.

46 Convention. The Committee is, *inter alia*, to consider submissions or referrals regarding a party's compliance, "with a view to securing a constructive solution".

42. In general, practice and commentary to date suggest that the non-compliance procedures are intended to operate in a non-confrontational manner, and are aimed at facilitating compliance with obligations under the instrument in question. However, discussions to date with regard to the compliance procedure envisaged for the 1997 Kyoto Protocol⁴⁷ suggest that the procedure eventually adopted may entail binding consequences.

III. EMERGING TRENDS IN DISPUTE SETTLEMENT UNDER INTERNATIONAL ENVIRONMENTAL AGREEMENTS

43. The review carried out for this study reveals some trends in dispute settlement provisions in treaties. For example, many of the earliest environmental and natural resource agreements did not provide for any dispute settlement mechanisms at all.⁴⁸ The early tendency was to use informal and non-binding mechanisms, such as negotiation and consultation, only occasionally supplemented by the use of more formal mechanisms, such as conciliation, arbitration and judicial settlement. Most of the conventions that contain dispute settlement provisions reflect to a greater or lesser degree the methods for peaceful settlement of disputes set out in Article 33 of the UN Charter.

46. Report of the Fifteenth Session of the Executive Body, Decision 1997/2 (concerning the Implementation Committee, its structure and functions and procedures for review of compliance). The Implementation Committee is now used for the 1991 LRTAP Protocol concerning the Control of Emissions of Volatile Organic Compounds ["VOC"] (Decision 1997/3 of the Executive Body on Compliance Monitoring for the VOC Protocol), and the 1994 Second Sulphur Protocol, *supra* fn. 15 (Decision 1998/6 of the Executive Body concerning the application of the compliance procedure to the Oslo Protocol). It is also referred to in additional Protocols to the 1979 LRTAP which are not yet in force: 1998 Protocol on Heavy Metals; 1998 Protocol on Persistent Organic Pollutants; and the 1999 Protocol to Abate Acidification, Eutrophication and Ground Level Ozone.

47. See *supra* fn. 43.

48. See, e.g., Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Washington, October 12, 1940, entered into force May 1, 1942, 161 UNTS, p. 193 (1940 Western Hemisphere Convention); International Convention for the Regulation of Whaling, Washington, December 2, 1946, entered into force November 10, 1948, 161 UNTS, p. 72 (1946 International Whaling Convention); Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Ramsar, February 2, 1971, entered into force December 21, 1975, 996 UNTS, p. 245 (1971 Ramsar Convention); Convention for the Protection of the World Cultural and Natural Heritage, Paris, November 16, 1972, entered into force December 17, 1975, 11 ILM (1972) p. 1358 (1972 World Heritage Convention). Conventions establishing civil liability regimes for damage caused by oil pollution at sea or the carriage of hazardous and noxious substances at sea also do not contain provisions on inter-State dispute settlement relating to the interpretation and application of the convention.

44. Most recent environmental agreements provide parties with a *range of options* for dispute avoidance and settlement. It is not unusual for environmental agreements adopted in recent years to include three or four options, some of which may be invoked or applied simultaneously. These agreements in effect offer parties a “hierarchy” of procedures ranging from the informal, non-contentious and non-adversarial through to more formal (and highly contentious and adversarial) mechanisms for utilisation where other means have not succeeded in resolving the dispute. Whereas most environmental conventions still do not include mandatory dispute settlement provisions, but require agreement of the parties to a dispute to submit it to a particular form of dispute settlement, a number of recent agreements do provide for recourse to some mandatory dispute settlement mechanism as a last resort where other methods have failed or where the parties to the dispute have not agreed to the dispute settlement procedure.

45. The trend towards comprehensive dispute settlement arrangements is most apparent in the 1982 UNCLOS. UNCLOS also represents an example of the tailoring of dispute settlement options to deal with particular *categories of disputes* under the Convention, with for example the establishment of specialist chambers within the ITLOS, and the exclusion of certain categories of disputes from the otherwise mandatory, binding procedures.

46. Where a convention provides for the adoption of protocols, the subsequent protocols tend to rely on the dispute settlement provisions of the “parent” convention. This may be a disadvantage in some instances where the original

49. See Sand, *supra* fn. 38, at p. 194 (noting in 1991 that although there is no shortage of dispute settlement provisions in environmental agreements, closer analysis reveals that these provisions cannot usually be invoked unilaterally at the request of one state, but generally require prior compromisory negotiation).

50. For example, compulsory conciliation under the 1992 Biodiversity Convention, *supra* fn. 13; arbitration under the 1992 OSPAR Convention, *supra* fn. 15. Gray and Kingsbury note that the provision for non-excludable binding arbitration in the 1991 Antarctic Environment Protocol (*supra* fn. 10) appears to be indicative of a new attitude, at least in specialized areas, and note that the provisions of the Protocol are more sweeping than the dispute settlement provisions in a number of other agreements. They suggest that the increased willingness of the States of central Europe and the former USSR to accept compulsory third-party settlement is one factor, but not the only one, in this shift. Gray and Kingsbury, *supra* fn. 3, at, fn. 251.

51. See International Tribunal for the Law of the Sea, Press Release 5, March 3, 1997. At its meeting from February 3-28, 1997, the Tribunal established two standing special chambers: the Chamber on Fisheries Matters and the Chamber on the Marine Environment. In addition, the Seabed Disputes Chamber is a distinct judicial body within the Tribunal, established in accordance with Part XI, Section 5 of the 1982 UNCLOS (*supra* fn. 8) and Art. 14 of the Statute of the ITLOS.

52. See A. Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction”, 46 ICLQ (1997) p. 37; Sohn, *supra* fn. 11.

53. See, e.g., 1985 Vienna Convention (*supra* fn. 13); 1987 Montreal Protocol (*supra* fn. 4); 1979 LRTAP (*supra* fn. 39) and 1985 Sulphur Protocol; Protocol Concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes, Sofia, October 31, 1988, entered into force February 14, 1991, 28 ILM (1988) p. 214; 1991

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dispute settlement provisions are weak (for example, the 1979 LRTAP). However there are signs that this weakness is being addressed, with the 1994 Second Sulphur Protocol containing a far more extensive dispute settlement clause than the LRTAP Convention. In some cases reference back to dispute settlement provisions in an earlier treaty may reflect a progressive trend – for example, the reference to Part XV of the 1982 UNCLOS in the 1996 London Convention Protocol and in the 1995 Straddling Stocks Convention.

47. There is also a clear trend towards the development of *non-compliance mechanisms* in environmental treaties, aimed at facilitating compliance with the obligations contained in the treaty. This trend is noticeable in treaties that address the protection of the global commons, for example, the ozone layer and global climate change and the high seas (1996 London Convention Protocol). While non-compliance procedures have been broadly characterised as non-confrontational, decisions under the procedures might be taken over the objection of the non-complying party, as early experience with the 1987 Montreal Protocol procedure demonstrates.

48. There also appears to be a gradual trend towards developing mechanisms for resolving *disputes of fact* between parties to environmental conventions. For example, the Fact-finding Commissions under the 1997 International Watercourses Convention are intended to provide impartial fact-finding. Similarly, the inquiry commissions under the 1991 Espoo Convention are designed to advise upon whether a proposed activity is likely to have a significant transboundary impact where the parties do not agree.

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49. As Kiss noted in 1983, a large majority of international environmental agreements still tend to rely on special *ad hoc* arrangements, rather than providing for recourse to the International Court of Justice or other standing institutions, even

VOC's Protocol; 1997 Kyoto Protocol (*supra* fn. 5); 2000 Biosafety Protocol, *supra* fn. 6.

54. There is a growing literature on this area. See, for example: J. Cameron, J. Werksman and P. Roderick, eds., *Improving Compliance with International Environmental Law* (1996); Vol. 56/3 *ZaoRV*, *Heidelberg Journal of International Law* (1996); P. Szell, "The Development of Multilateral Mechanisms for Monitoring Compliance", W. Lang, ed., *Sustainable Development and International Law* (1995); D. Victor, "The Operation and Effectiveness of the Montreal Protocol Implementation Committee (IIASA) (1995); G. Handl, "Compliance Control Mechanisms and International Environmental Obligations", 5 *Tul. J. Int'l & Comp. L.* (1997) p. 29. See also 1993 Lucerne ECE Ministerial Declaration urging contracting parties to environmental agreements to adopt non-compliance procedures: Declaration by Ministers of the Environment of the region of the UN Economic Commission for Europe (UN/ECE) and the Member of the Commission of the European Communities Responsible for the Environment (April 30, 1993) p. 7, para. 23.1, cited in Handl, fn. 15.
55. See, e.g., Bhagwati, *supra* fn. 38, at p. 447; Sand, *supra* fn. 38, at p. 197.
56. See J. Werksman, "Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime", 56(3) *ZaoRV* (1996) p. 750. The decision of the Meeting of the Parties to the Protocol on Russia's non-compliance was adopted by consensus, although over Russia's objections, following the rule of "consensus minus one". *Id.* at p. 771.
57. 1991 Espoo Convention, *supra* fn. 34, at Art. 3(7).
58. Kiss, *supra* fn. 7.

though a number of agreements do now provide for optional acceptance of the jurisdiction of the ICJ. In addition, there appears to be an increasing trend towards including language for the establishment and operation of *ad hoc* arbitration or conciliation bodies (or providing that the relevant Conference of the Parties should develop such an annex at an early stage). For example, twenty-eight of the agreements surveyed for this study contain, or provide for the adoption of, provisions or annexes on arbitration procedures. The arbitration provisions included in the treaties vary in the degree of detail they provide, but where they are included they generally provide, for example, for the appointment of arbitrators, the adoption of rules of procedure by the arbitral tribunal and the costs of the tribunal.

50. Taken together, these trends suggest that there may be a move away from the tendency to great dispute settlement as an “afterthought”, opting for boilerplate provisions, principally to satisfy a desire for completeness. As more thought is given to mechanisms for dispute settlement, it may be that further attention will be paid to specific rules to govern not only the constitution of dispute settlement bodies but also their procedures. There is also an increasing tendency to include in environmental conventions separate articles dealing with dispute avoidance (consultation and notification provisions), dispute settlement and non-compliance.

IV. A BRIEF ASSESSMENT OF CURRENT APPROACHES

51. A number of commentators have begun to analyse the strengths and weaknesses of the mechanisms for dispute settlement contained in international environmental treaties. In particular, this growth in interest has developed since the entry into force of the 1982 UNCLOS with its innovative provisions on dispute settlement, and in relation to the development of new non-compliance mechanisms in some recent treaties. However, at present it remains difficult to assess the relative strengths and weaknesses of the dispute settlement provisions, as they have been little used in practice, other than the non-compliance mechanism under the 1987 Montreal Protocol. States have shown marked reluctance to utilise formal dispute settlement procedures established under the treaties.

52. One key weakness in the dispute settlement provisions adopted to date is that by and large they lack compulsory character. Submission of disputes to settlement procedures, even non-binding procedures, must still in many instances be by agreement. Where compulsory settlement is provided, as for example most notably in the 1982 UNCLOS, categories of disputes are or may be still excluded from compulsory procedures. Moreover, it has been noted that these exclusions do not have a functional basis, but exist because of the political sensitivity of the issues involved, or because of trade-offs in the negotiation of the agreement. Thus, characterisation of a dispute may, in certain cases, affect whether or not it may be the subject of a compulsory procedure, and this categorisation may itself not always be straightforward.

59. A. Adede, “Avoidance, Prevention and Settlement of International Environmental Disputes”, L. Kurukulasuriya, ed., *UNEP's New Way Forward: Environmental Law and Sustainable Development* (1995) p. 62. Koskenniemi has described this as a “ritualistic nod” towards legal settlement. M. Koskenniemi, “Peaceful Settlement of Environmental Disputes”, 60 *Nordic J. Int'l L.* (1991) p. 73, at p. 82.

60. See Adede, *supra* fn. 59, at p. 64.

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53. For the purposes of this Study, our primary focus is upon any procedural deficiencies in the existing arrangements under the treaties. Although as shown above, the arrangements differ from convention to convention, setting aside the cases where a convention contains no dispute settlement provisions there are two main situations where shortcomings might be identified:

- (i) where the convention provides for, say, arbitration or conciliation, but contains or has adopted no detailed rules to govern these procedures; and
- (ii) where there are deficiencies or gaps in the procedural rules that have been adopted.

54. Where a convention does not contain rules for the specified dispute settlement procedure, these must be agreed on by the parties to a dispute *ad hoc*. This may result in the delay of the establishment of a tribunal or commission. If a convention provides that the Conference of the Parties, or a similar body, will adopt more precise rules in the form of an annex, but a dispute arises before this is done, it is not clear which procedural rules would be applied. For example, the 1992 Climate Change Convention provides for the Conference of the Parties to adopt an annex on arbitration and on conciliation. Conciliation of disputes is mandatory under the Convention (at the request of one party) if a dispute has not been settled by other means. However, a conciliation annex has not yet been adopted. In addition, it is by no means certain that in an increasingly crowded negotiating schedule there will be the requisite time or will to devote attention to elaborating dispute settlement annexes.

55. In a number of cases where a convention provides for a “fall back” mandatory dispute settlement procedure for disputes that have not been settled by other means, they do not always provide a time limit after which the mandatory procedure must be followed. This problem arises, for example, in the case of the 1985 Vienna Convention and 1992 Biodiversity Convention. It may provide an opportunity for one party to delay the onset of conciliation by arguing that other options, such as negotiation or mediation, are not yet exhausted.

56. Where more detailed procedural rules have been incorporated into a convention or subsequently adopted, they may not always be sufficient. At first glance for example, the arbitration annexes of international environmental agreements appear less detailed than corresponding arbitration rules adopted under the auspices of, for example, UNCITRAL or the PCA. Particularly if mandatory procedures are to apply, it is desirable that the rules adopted provide effectively for all eventualities, such as, for example, non-appointment of arbitrators or conciliators by one party, or non-appearance of a party in proceedings. In relation to environmental disputes, effective arbitration provisions may also require, in particular, a provision for interim measures pending the tribunal's award. Disputes under international environmental agreements might well involve more than two parties to the convention, and thus procedures for multiparty disputes and for third-party intervention may also be required.

57. As noted above, while many agreements contain arbitration or conciliation annexes, these tend not to provide for institutional support to the arbitral or conciliation

61. See, e.g., *Southern Bluefin Tuna cases, Australia v. Japan* (case no. 4), International Tribunal for the Law of the Sea, Order for Provisional Measures, August 27, 1999, <http://www.un.org/depts/los/ITLOS/order-tuna34.htm>.

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proceedings. While it may well fall within the residual functions of the convention secretariat (or the secretariat may be mandated by the Conference of the Parties) to provide this support, the secretariat may not have the resources of expertise to carry out these functions effectively. With the exception of a small number of recent global conventions, convention secretariats are often small, specialised units.

V. A ROLE FOR THE PERMANENT COURT OF ARBITRATION IN EXISTING ARRANGEMENTS

58. Sections II-IV of this Study indicate that there are a number of multilateral environmental agreements that lack either procedural rules for and/or institutional mechanisms to support arbitration, conciliation or fact-finding. As noted, in most agreements provision for dispute settlement relies upon *ad hoc* arrangements rather than upon existing bodies. This provides an opportunity for the PCA, working with the parties of the relevant treaties, to assist in filling the gaps. The PCA may consider that it is in a position to offer institutional support to proceedings that might be instituted under these agreements, or, where necessary, that the procedural rules of the PCA on arbitration, conciliation and inquiry commissions might themselves be adopted and utilised under those agreements. In this regard, our preliminary view is that the existing PCA rules do not require modification for the purposes of environmental disputes. In many cases, there may be a lack of awareness among the negotiators and administrators of the environmental agreements as to the potential for the use of PCA Rules or facilities. It may therefore be appropriate for the PCA to establish contact with the relevant convention secretariats to inform them of the PCA's existing rules and the administrative support that the PCA can offer in relation to arbitral, conciliation or inquiry procedures.

59. Among the conventions that could benefit from procedural rules (where none exist) or institutional support (where procedural rules exist but the Convention organs have no expertise in the conduct of proceedings) are the following:

Arbitration – procedural rules

- 1992 Climate Change Convention (annex on arbitration not yet adopted by the Conference of the Parties)

62. This list is not comprehensive, but represents a selection of international environmental agreements, which may benefit from procedural and/or administrative support.

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- 1994 Decertification Convention (annex on arbitration to be adopted by the Conference of the Parties) 1994 Second Sulphur Protocol (annex on arbitration to be adopted by Executive Body)
- 1992 Baltic Sea Convention
- 1998 Rotterdam Convention on Prior Informed Consent (annex on arbitration to be adopted by the Conference of the Parties)

Arbitration – institutional support

- 1992 Biodiversity Convention
- 1989 Basel Convention
- 1985 Vienna Convention (and 1987 Montreal Protocol)
- 1992 OSPAR Convention
- 1979 Berne Convention
- 1991 Espoo Convention
- 1992 Industrial Accidents Convention
- 1992 Transboundary Watercourses Convention
- 1983 Cartagena Convention
- 1976 Barcelona Convention
- 1998 Rotterdam Convention on Prior Informed Consent (annex on conciliation to be adopted by the Conference of the Parties no later than at its second meeting)

Conciliation – procedural rules

- 1992 Climate Change Convention (annex on conciliation not yet adopted by the Conference of the Parties)

63. The resolution of questions of implementation, arbitration and conciliation procedures was considered by the Conference of the Parties to the 1994 Desertification Convention in 1999. It decided to convene an open-ended *ad hoc* group of experts to examine and make recommendations on, *inter alia*, annexes on arbitration and conciliation procedures at its fourth session, due to meet in Bonn in December 2000, Decision 20/COP.3, November 26, 1999, ICCD/COP(3)/20/Add.1. Parties to the Convention were invited to submit their views on these issues to the Convention Secretariat by May 31, 2000. The Secretariat will compile the views of Parties for consideration by the Conference of the Parties. A Draft Annex on arbitration was included in the documentation prepared by the Convention Secretariat for the Third Session of the Conference of the Parties, ICCD/COP(3)/7, July 19, 1999.

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- 1994 Desertification Convention (annex on conciliation to be adopted by the Conference of the Parties)
- 1994 Second Sulphur Protocol
- 1985 Vienna Convention (and 1987 Montreal Protocol)
- 1997 International Watercourses Convention

Conciliation – institutional support

- 1992 Biodiversity Convention

Fact-finding/commissions of enquiry

- 1991 Espoo Convention
- 1997 International Watercourses Convention

60. In the context of the large number of environmental agreements with which the PCA might build a relationship, consideration could be given to the possibility that the PCA might establish a “Facility for Environmental Disputes”. This could be an entity existing within the PCA that would be charged with (1) developing relations with the secretariats of the conventions; (2) advising secretariats on general aspects of procedural and institutional issues associated with fact-finding, conciliation and arbitration; and (3) providing advice and assistance on particular matters as they arise. In developing this idea it might be useful to convene a meeting in The Hague for legal advisers to the secretariats of the principal international environmental agreements, with a view to obtaining their impressions of potential requirements and the utility of such a service to be performed by the PCA.

VI. GUIDELINES AND MODEL CLAUSES FOR TRADITIONAL DISPUTE SETTLEMENT

61. In coming years it is likely that there will be new international environmental agreements, or that protocols containing dispute settlement provisions will be adopted to existing agreements. With that in mind, and taking account of the potential role of the PCA, we propose the following guidelines and model clauses for consideration. They draw on elements of the agreements discussed above, taking into account recent developments. The model clauses address only disputes between States party to multilateral environmental agreements, and do not attempt to address, for example, mechanisms for the settlement of grievances of non-State actors regarding implementation of an agreement by a State Party.

1. Guidelines

64. Such as, 1992 Climate Change Convention, *supra* fn. 5; 1992 Biodiversity Convention, *supra* fn. 13; 1994 Desertification Convention, *supra* fn. 6; 1987 Montreal Protocol, *supra* fn. 4; 1997 International Watercourses Convention, *supra* fn. 13; etc.

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In negotiating new international environmental agreements or protocols increased attention is likely to be given to issues of compliance and dispute settlement. There are a number of reasons for this, but two in particular stand out. The first is broadly political, namely the desire to ensure that environmental obligations are complied with in order to maximize prospects of environmental protection. The second is economic: as international environmental obligations address an ever wider range of economic activities, States fear that non-compliance by their neighbours will bring competitive advantages. For these reasons there is every prospect that greater attention will be given to the details of non-compliance and dispute settlement procedures.

In setting out the model clauses that follow we have drawn only from precedents. In our experience, the chances of reaching agreement on provisions of this type are increased by being able to point to pre-existing approaches, which have, at least in some cases, been tried and tested. Moreover, there is nothing to suggest that existing models are especially deficient in any way. Those that have been utilized (for example, the non-compliance procedure) are generally considered to have operated in an efficient, effective and equitable manner. Although most of the others have not been invoked specifically in the context of environmental agreements, elsewhere the utilisation of techniques such as arbitration, conciliation and the ICJ are generally considered to be acceptable. We assume, therefore, that new instruments will draw upon precedent, with modification where necessary. But even with precedents in mind a range of issues arise which negotiators will have to address. Although different States will take different views on what is appropriate, the essential issues are common.

The first issue is inevitably for the negotiating States to decide whether they wish to include non-compliance or dispute settlement provisions. These days it will be rare for multilateral environmental agreements⁶⁵ to include one or more procedures, although some bilateral agreements do not.

65. Assuming that States agree on the need to incorporate some procedures, they must then agree on which procedure or procedures to incorporate. The options include the following (see generally paragraphs 7 to 41 of the Study):

- mediation;
- conciliation;
- arbitration;
- judicial settlement;
- fact-finding/commissions of inquiry; and
- non-compliance procedures.

If more than one is chosen, as seems likely given recent tendencies, the negotiating States will need to decide upon the relationship between the various modalities (see, for example, Model Clause 7 below, dealing with the relationship between a compliance procedure and the various dispute settlement procedures).

65. See, e.g., Bangladesh-India: Treaty on Sharing of the Ganges Water at Farakka, New Delhi, December 12, 1996, entered into force upon signature, 36 ILM (1997) p. 519.

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It will not be sufficient to identify the procedure or procedures. Depending upon the degree of detail into which they wish to descend, negotiating States will need to decide on a range of generic issues that are common to each of the six general options. Of course it is not necessary to deal with all of these within the treaty itself. Many can be addressed subsequently by the Conference of the Parties or other organ established under the treaty, and some even by the dispute settlement body itself. These include (in no particular order of importance) exhaustion of prior remedies; jurisdiction; applicable law; appointment of adjudicators or members of the compliance/dispute settlement body; the powers of the dispute settlement body; interim relief; third-party intervention; the identification of rules of procedure; administrative matters; timetabling issues; and costs. We briefly address each of these below.

A. Exhaustion of Prior Remedies

Many international environmental agreements include a provision requiring States wishing to invoke a dispute settlement procedure to take some prior steps to seek to resolve the dispute. A typical example is set out in Model Clause 1, which in effect requires parties to attempt to negotiate a solution before invoking other procedures.

B. Invoking the Dispute Settlement Procedure

One of the most basic issues will be that of determining whether the dispute settlement procedure can be invoked by one or more parties unilaterally (the “mandatory” approach) or only by prior agreement of the two or more parties involved in the dispute (the “optional” procedure). As indicated in the Study, there are no general rules in this regard, although the tendency recently has been for at least one of the dispute settlement procedures to be subject to the mandatory approach, usually fact-finding or conciliation, occasionally arbitration. Examples of optional arbitration are set out in Model Clause 3, Alternative A. Examples of mandatory arbitration, conciliation and fact-finding/commissions of inquiry are set out, respectively, in Model Clause 3, Alternatives B and C; Model Clause 4, Alternatives A and B; and Model Clause 5, Alternatives A and B.

Where a mandatory dispute settlement procedure is provided, provision should be made for the absence or default of a party to a dispute. (See, for example, Model Clause 3, Alternative B, para. 7(e).)

C. Jurisdiction

Frequently differences between parties involved in a dispute arise over the scope of jurisdiction of the dispute settlement body. It is therefore worth considering, particularly in relation to those procedures, which can lead to a legally binding result such as arbitration, whether the jurisdictional aspects have been addressed sufficiently. Specifically:

- Jurisdiction *ratione materiae*: do the provisions specify with sufficient clarity the subject matters which can be subject to the dispute settlement procedure (i.e., which disputes can and cannot be submitted for dispute settlement)?
- Jurisdiction *ratione personae*: do the provisions adequately determine which party (or third person) may invoke the dispute settlement procedure, against which party it may be invoked, and whether third parties should or should not be entitled to participate in the proceedings?

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- Jurisdiction *ratione temporis*: do the provisions adequately specify which disputes in terms of time may be brought before the procedure (for example, will the body have jurisdiction over disputes which may have arisen before the treaty concerned was adopted or entered into force for the States concerned)?

D. Applicable Law

The dispute settlement body will need to apply rules under one or more systems of law. In most cases these will be limited to the treaty under which the dispute has arisen, but occasionally reference may be made to general international law or to one or more related treaties. (See, for example, Model Clause 3, Alternative B, para. 6(a); see also PCA Optional Rules for Arbitrating Disputes between Two States, Article 33.)

E. Adjudicators or Members of the Body

Each of the procedures requires the designation of members of the dispute settlement body, whether as conciliator, mediator, arbitrator or member of a non-compliance body. Care should be taken to ensure that the text adequately provides for determining who those persons or bodies are to be. In the event that subsequent nomination is foreseen, provision will need to be made to determine what will happen if there is disagreement between the parties to the dispute as to any designation or appointment. Additional matters that may require consideration include the possibility that disputes may involve more than two parties, and the consequences of the resignation, illness or death of a member of the dispute settlement body during proceedings. (See, for example, Model Clause 3, Alternative B, paras. 4 and 5; Model Clause 4, Alternative A, paras. 2-4; Model Clause 5, Alternative A, paras. 2 and 3; see also PCA Arbitration Rules, Articles 5-14; PCA Optional Conciliation Rules, Articles 3-4).

F. Powers of the Dispute Settlement Body

A number of related issues arise: What powers should the dispute settlement body have? Are they limited to questions of fact or can they also address questions of law? If it can address questions of fact, should the body concerned be able to make site visits, or appoint technical or scientific assessors or advisors? Should the dispute settlement body be permitted to hear related counterclaims? What remedies should the body concerned be empowered to hand down? How should any disputes concerning the interpretation or application of an award be dealt with?

G. Interim Relief

Related to the previous point is the question of whether the dispute settlement body should have the power to declare or order interim measures of protection, e.g., to call upon the parties to desist from further acts which may exacerbate the dispute pending

66. PCA Optional Rules for Arbitrating Disputes between Two States [hereinafter PCA Optional Arbitration Rules], *Permanent Court of Arbitration – Basic Documents* (The Secretary-General and the International Bureau of the Permanent Court of Arbitration, The Hague 1998) [hereinafter *PCA Basic Documents*] pp. 41-67.

67. PCA Optional Conciliation Rules, *PCA Basic Documents*, *supra* fn. 66, at pp. 153-170.

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the outcome of the dispute settlement procedure. (See, for example, Model Clause 3, Alternative B, para. 7(b); see also PCA Optional Arbitration Rules, Article 26.)

H. Third-party Intervention

The dispute settlement procedures should provide whether interested third parties should be permitted to intervene in a dispute between two parties. (See, for example, model Clause 3, Alternative B, para. 9.)

I. Procedural Rules

All dispute settlement bodies need their own procedural rules, addressing a wide range of matters. Although some of these rules can be addressed in the treaty establishing the body, many others are far too detailed to be dealt with at the stage of negotiating a treaty. Two basic options exist. The first is to leave the treaty silent on this point and leave it to the dispute settlement body to adopt its own rules. The second is to refer to established rules (for example, the PCA Optional Arbitration Rules or the UNCITRAL Rules, or other rules dealing with specialised types of disputes, such as the World Intellectual Property Organisation (“WIPO”) rules). (See, for example, Model Clause 3, Alternative B, para. 6(b); Model Clause 4, Alternative A, para. 5; Model Clause 5, Alternative A, para. 4.)

J. Timetable

One aspect of a dispute-settlement body's procedures concerns the timetable according to which it will work. Traditionally, treaties have been silent on this aspect. More recently, however, in the field of trade law detailed rules have been established governing the timetable according to which the dispute settlement procedure is to be conducted. For certain categories of environmental cases it may be possible, or even desirable, for a strict timetable to be adhered to.

K. Costs

Provision might also be made for meeting the costs of the dispute settlement body. Generally, dispute settlement procedures (such as arbitration) have required parties to a dispute to bear their own costs and to share the costs incurred by the dispute settlement body. (See, for example, Model Clause 3, Alternative B, para. 8; Model Clause 5, Alternative A, para. 7; see also PCA Optional Arbitration Rules, Articles 38-40; PCA Optional Conciliation Rules, Article 17.)

2. *Model Clauses*

Clause 1: General Provision on Negotiation

1. In the event of a dispute between Contracting Parties concerning the interpretation or application of the Convention, the Contracting Parties concerned shall seek a solution by negotiation at the request of one of the Contracting Parties concerned.

Clause 2: General Provision on Good Offices and/or Mediation

2. If the Contracting Parties concerned cannot reach agreement by negotiation, they may seek the good offices of, or request mediation by, a third party.

Clause 3: Arbitration and/or International Court of Justice

ANNEX I: GUIDELINES FOR DISPUTE SETTLEMENT CLAUSES

Alternative A: Optional Arbitration/ICJ

- 3A. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organisation may declare in writing to the Depository that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 of this Article, it accepts one or both of the following means of dispute settlement as compulsory:
1. Arbitration, [in accordance with the procedure laid down in Annex I] [in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States];
 2. Submission of the dispute to the International Court of Justice.

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Alternative B: Mandatory Arbitration under Convention's own Institution

- 3B. 1. Any disputes between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned, shall at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in this Article.
2. Unless the parties to the dispute decide otherwise, the procedure of the arbitration referred to in paragraph 1 of this Article shall be in accordance with paragraphs 3 to 10 of this Article.
3. (a) At the request addressed by one Contracting Party to another Contracting Party in accordance with paragraph 1 of this Article, an arbitral tribunal shall be constituted. The request for arbitration shall state the subject matter of the application including in particular the Articles of the Convention, the interpretation or application of which is in dispute.
- (b) The applicant party shall inform the Secretariat that it has requested the setting up of an arbitral tribunal, stating the name of the other party to the dispute and the Articles of the Convention the interpretation or application of which, in its opinion, is in dispute. The Secretariat shall forward the information thus received to all Parties to the Convention.
4. The arbitral tribunal shall consist of three members: each of the parties to the dispute shall appoint one arbitrator; the two arbitrators

68. This model clause is based upon Art. 32 of the 1992 OSPAR Convention, *supra* fn. 15. Alternatively, the provisions contained in paragraphs 3 to 10 might be included in an annex on arbitration (Annex I) to the convention. Language for the composition of the arbitral tribunal in disputes involving more than two parties also needs to be added. For example, the clause might provide that the parties to the dispute should appoint all arbitrators by agreement, or that an appointing authority (for example, the Secretary-General of the United Nations, the Secretary-General of the PCA or the President of the ICJ) be entrusted with this task.

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so appointed shall designate by common agreement the third arbitrator who shall be the chairman of the tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

5. (a) If the chairman of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the [Secretary-General of the United Nations] [Secretary-General of the Permanent Court of Arbitration] [President of the International Court of Justice] shall, at the request of either party, designate him within a further two-month period.
- (b) If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the [Secretary-General of the United Nations] [Secretary-General of the Permanent Court of Arbitration] [President of the International Court of Justice] who shall designate the chairman of the arbitral tribunal within a further two-months period. Upon designation, the chairman of the arbitral tribunal shall request the party that has not appointed an arbitrator to do so within two months. After such period, he shall inform the [Secretary-General of the United Nations] [Secretary-General of the Permanent Court of Arbitration] [President of the International Court of Justice] who shall make this appointment within a further two-month period.
6. (a) The arbitral tribunal shall decide according to the rules of international law and, in particular, those of the Convention.
- (b) Any arbitral tribunal constituted under the provisions of this Article shall draw up its own rules of procedure.
- (c) In the event of a dispute as to whether the arbitral tribunal has jurisdiction, the matter shall be decided by the decision of the arbitral tribunal.
7. (a) The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority voting of its members.
- (b) The arbitral tribunal may take all appropriate measures in order to establish the facts. It may, at the request of one of the parties, recommend essential interim measures of protection.
- (c) If two or more arbitral tribunals constituted under the provisions of this Article are seized of requests with identical or similar subjects, they may inform themselves of the procedures for establishing the facts and take them into account as far as possible.

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- (d) The parties to the dispute shall provide all facilities necessary for the effective conduct of the proceedings.
 - (e) The absence or default of a party to the dispute shall not constitute an impediment to the proceedings.
8. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.
9. Any Contracting Party that has an interest of a legal nature in the subject matter of the dispute, which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.
10. (a) The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon the parties to the dispute.
- (b) Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another arbitral tribunal constituted for this purpose in the same manner as the first.

Alternative C: Mandatory Arbitration under PCA Rules

- 3C. 1. If any dispute arises between the Contracting Parties as to the interpretation, application or performance of the Convention, either party may submit the dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, as in effect on the date on which the dispute arises, unless the parties otherwise agree.

Clause 4: Conciliation

Alternative A: Mandatory Conciliation under Convention's own Institutional Arrangements

- 4A 1. If the parties to the dispute have not, in accordance with paragraph 3A above, accepted the same or any procedure, and, after six months

69. The articles dealing with the appointment of arbitrators (Arts. 6-8) and sharing of costs (Arts. 38-40) may need to be modified for disputes involving more than two parties. For example, it might be provided that the appointing authority (the Secretary-General of the PCA) would designate all arbitrators if the parties do not agree upon arbitrators within a specified period. See PCA Optional Arbitration Rules, *supra* fn. 66, at pp. 49-51, 64.

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from the time of the request for negotiations referred to in Clause 1, the Contracting Parties have not been able to settle their dispute through negotiation or any other means, the dispute shall be submitted to conciliation in accordance with the procedure set out in this Article, unless the parties to the dispute otherwise agree.

2. A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall, unless the parties otherwise agree, be composed of three members, two appointed by each Party concerned and a President chosen jointly by those members.
3. If any appointments by the parties are not made within two months of the date of the request to create a conciliation commission, the [Secretary-General of the United Nations] [Secretary-General of the Permanent Court of Arbitration] [President of the International Court of Justice] shall, if asked to do so by a party that made the request, make those appointments within a further two-month period.
4. If a President of the conciliation commission has not been chosen within two months of the last of the members of the commission being appointed, the [Secretary-General of the United Nations] [Secretary-General of the Permanent Court of Arbitration] [President of the International Court of Justice] shall, if asked to do so by a party, designate a President within a further two-month period.
5. The conciliation commission shall take its decisions by majority vote of its members. It shall, unless the parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the parties shall consider in good faith.
6. A disagreement as to whether the conciliation commission has competence shall be decided by the commission.

Alternative B: Mandatory Conciliation under PCA Rules

- 4B. If the parties to the dispute have not, in accordance with paragraph 3A above, accepted the same or any procedure, and, after six months from the time of the request for negotiations referred to in Clause 1, have not been able to settle their dispute through negotiation or any other means, the dispute shall be submitted to conciliation in accordance with the Permanent Court of Arbitration Optional Conciliation Rules, as in effect on the date on which the dispute arises, unless the parties otherwise agree.

70. These provisions are drawn from Annex II, Part 2 of the 1992 Biodiversity Convention, *supra* fn. 13. The number of conciliators has been reduced from five to three. Note that for disputes involving more than two parties, similar considerations as noted in *supra* fn. 69 would apply regarding the appointment of conciliators.

71. Note, however, that Art. 15(d) provides for unilateral withdrawal from conciliation proceedings. See PCA Optional Conciliation Rules, *supra* fn. 67, at p. 166.

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Clause 5: Fact-finding/Commissions of Inquiry

Note: This would be an alternative to conciliation.

Alternative A: Mandatory Fact-finding/Commission of Inquiry under Convention's own Institutional Arrangements

- 5A. 1. If, after six months from the time of the request for negotiations referred to in Clause 1, the Contracting Parties concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraphs 1 to 3 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with paragraphs 2 to 7, unless the parties to the dispute otherwise agree.
2. A Fact-finding Commission shall be established, composed of one member nominated by each Contracting Party concerned and in addition a member not having the nationality of any of the Contracting Parties concerned chosen by the nominated members who shall serve as Chairman.
3. If the members nominated by the parties to the dispute are unable to agree on a Chairman within three months of the request for the establishment of the Commission, any party concerned may request the [Secretary-General of the United Nations] [Secretary-General of the Permanent Court of Arbitration] [President of the International Court of Justice] to appoint the Chairman who shall not have the nationality of any of the parties to the dispute. If one of the parties fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party concerned may request the [Secretary-General of the United Nations] [Secretary-General of the Permanent Court of Arbitration] [President of the International Court of Justice] to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.
4. The Commission shall determine its own procedure.
5. The Contracting Parties concerned have the obligation to provide the Commission with such information as it may require and, on request, to permit the Commission to have access to their respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its enquiry.
6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the Contracting Parties concerned setting forth its findings and the

72. This model clause is based upon Art. 33(3)-(9) of the 1997 International Watercourses Convention, *supra* fn. 13.

73. Similar considerations will apply concerning disputes involving more than two parties, as noted in *supra* fn. 69.

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reasons therefor and such recommendations as it deems appropriate for an equitable solution of the dispute, which the Contracting Parties concerned shall consider in good faith.

7. The expenses of the Commission shall be borne equally by the Contracting Parties concerned.

Alternative B: Mandatory Fact-finding/Commission of Inquiry under PCA Rules

- 5B. If, after six months from the time of the request for negotiations referred to in paragraph 1, the Contracting Parties concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraphs 1 to 3 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with the [Permanent Court of Arbitration Optional Rules for Fact-finding Commissions of Inquiry], as in effect on the date upon which the dispute arises, unless the Contracting Parties concerned otherwise agree.

Clause 6: Scope of Application of Dispute Settlement Article

6. The provisions of this Article shall apply with respect to any protocol to this Convention, except as may be otherwise provided in the protocol concerned.

Clause 7: Relationship between this Article and Non-compliance Procedures Available under the Convention

7. 1. To the extent that the convention includes a non-compliance procedure such as that adopted under the 1987 Montreal Protocol or envisaged under other agreements (see above), it will be necessary in this Article or elsewhere in the convention to specify the relationship between traditional dispute settlement and the non-compliance procedure⁷⁵. Under the Montreal Protocol the two are not mutually exclusive. To the extent that States wish to follow that approach the following might serve as model language to be inserted into the relevant non-compliance procedure: –
 2. The following compliance procedure has been formulated pursuant to Article [] of the Convention. It shall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article [] of the Convention.

VII. CONCLUSION

74. PCA Optional Rules for Fact-finding Commissions of Inquiry, *PCA Basic Documents*, *supra* fn. 66, at pp. 171-184.

75. See *supra* Section II(6) of this paper. See also Handl, *supra* fn. 54, at pp. 46-48; M. Koskenniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", 3 Y. B. Int'l Env'tl. L. (1992) p. 123, at pp. 155-161.

76. This language follows that included in the Montreal Protocol Non-Compliance Procedure, UNEP/OzL.Pro.4/15, November 25, 1992, 32 ILM (1993) p. 874.

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61. This Study has noted that the treatment of dispute settlement has developed in international environmental agreements in recent years so that more elaborate provisions are being adopted. Increasingly, States are adopting agreements containing flexible dispute settlement arrangements, often with one mandatory, if non-binding, “fall back” procedure, such as conciliation or fact-finding. However, despite these developments, gaps in existing arrangements can⁷⁷ be identified. As noted in the earlier Background Paper prepared for the PCA, among the key gaps in existing arrangements are:

- those relating to techniques expressly envisaged by an environmental agreement but where the treaty is completely silent as to the rules governing the conduct of a particular technique; and
- those relating to techniques expressly envisaged by an environmental agreement but where the treaty provides for some, but not all, of the rules governing the conduct of a particular technique.

62. The lack of institutional support for dispute settlement procedures has also been identified as a gap. In practical terms, an important step in exploring the potential contribution of the PCA in these areas would be increasing awareness of the PCA rules and facilities among the Conferences of the Parties to environmental agreements and in the negotiating bodies (often titled Inter-governmental Negotiating Committees) responsible for elaborating new agreements, and in particular among key governmental delegations in those bodies. As a first step, a few key agreements might be identified under which the Parties or negotiators will shortly have to make choices regarding dispute settlement procedures – either through the adoption of arbitration or conciliation annexes or through the adoption of dispute settlement provisions in new agreements. These key agreements might include, for example, the Climate Change and Desertification Conventions. The response to the Montreal Protocol Non-Compliance Procedure suggests that developments in one environmental agreement are frequently taken up or considered subsequently in others.

77. Sands, *supra* fn. 2.