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Transboundary Dispute Resolution
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Commentaries on Cesare Romano's
THE PEACEFUL SETTLEMENT OF
INTERNATIONAL ENVIRONMENTAL
DISPUTES: A PRAGMATIC
APPROACH (2000)

Henry W. McGee, Jr.¹ and Timothy W. Woolsey²

I.

NEGOTIATION AND THE TREATY PROCESS IN THE
RESOLUTION OF INTERNATIONAL
ENVIRONMENTAL DISPUTES

Cesare R. P. Romano, of the New York University Center for Global Cooperation, argues for and advocates arbitral processes as the most tenable means of solving transboundary conflicts over the impacts of environmental pollution as well as access to natural resources. Against the backdrop of the thus far immortal principle of sovereignty, Romano eschews traditional explanations of the process by which nations settle these disputes in this important, comprehensive, and very readable book that surveys and reviews the classic conflicts of international environmental law.

Romano introduces his authoritative and comprehensive work with an analysis of the existing treaty framework in which the

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conflicts have had to be resolved. He suggests that the present regime is not productive as the literature (and our hopes) might suggest, especially if the outcome is an analogue of national legal systems in which someone is found eventually at fault, and compensation is the natural right of the victorious litigant. Instead, he views arbitration and non-compliance procedures as more effective means of resolving transboundary international environmental disputes. Romano accepts the reality of sovereignty as a construct and entrenched obstacle that frustrates the search for a just resolution of environmental wrongs when redress is sought from nation states. He does, however, briefly consider current trends to fashion non-traditional organs of justice as well as increased roles for non-state actors in global environmental problem solving.

In distinguishing international environmental disputes, Romano's book at its outset develops the parameters of such disputes. He argues that sifting such conflicts from the ocean of international conflict is difficult because many, indeed nearly all, conflicts between nations have their origins in environmental impacts and resource allocation and access. Nonetheless, his study considers clashes over impacts by nations and their nationals which are caused by declining natural resources availability. In fact, Romano draws no theoretical distinction in his consideration of transboundary contamination and struggles to maximize shares of natural resources. Romano demonstrates that resolution of either aspect of environmental conflict is resolved within the context of existing modes of international dispute resolution, which, in his view, remains the negotiated treaty model that strives for a "win-win" outcome.

Indeed, Romano's book, an expansion of a remarkable dissertation, is most effective and useful in its detailing of the trends of dispute settlement procedures in multilateral treaties. His analysis exposes the complexity of these procedures while highlighting common aspects that resonate in more than 270 environmental treaties. Romano demonstrates that environmental conflicts are resolved through a process that mimics the negotiation of treaties—whatever the subject. The ultimate resolution resembles an incident-specific solution-cum-treaty.

Romano maintains that negotiation of environmental treaties replicates the process by which nearly all disputes between nations are resolved (where there is no resort to the instruments of coercion or the use of violence, viz, warfare). Romano's study is

thus important for its development of how treaties assist nations to take advantage of institutionalized procedural trends while granting them some range of choice as to the actual process invoked. For example, recent multilateral treaties provide for compulsory conciliation as a condition precedent to the use of more formal processes, such as resort to the International Court of Justice ("ICJ"). Also, recent agreements have recognized the importance of non-governmental organizations ("NGOs") and third party intervention.

However, the emergence of non-compliance procedures has been the most remarkable development in multilateral accords. So while the nearly exponential increase of multi-nation accords with respect to the environment has increasingly formalized dispute resolution, such adjudicative processes are often by-passed for non-compliance procedures. The emergence of non-compliance procedures, since the "success" story of international ozone protection, fuels Romano's pragmatism in his view of international environmental/resource dispute resolution. In his view, states rarely subordinate sovereignty and its cluster of "values" to international adjudication of arbitration, preferring the non-confrontational multilateral methodology of non-compliance procedures. He also points out that the monumental, most intractable, and finally most threatening environmental problems such as global warming and ozone depletion do not fit the traditional state-to-state tort model of bilateral, transboundary contamination. Rather, problems such as deforestation or even species extinction are at least regional and, at worst, global. Violators in such instances are responsible to the collective global community, not to sovereign rivals across an international boundary line.

As the ozone protection regime illustrates, non-compliance regimes depend on a network of accommodating international regimes, buttressed by international law. Such regimes, such as that established in Montreal, provide an evolving institution which keeps pace with metamorphosis in the relevant science and provides for expansion of the original terms of the original treaty establishing a secretariat. Sovereignty is protected for each of the nations that participate in the regime to a far greater extent than the uncertainty intrinsic to third-party adjudication. Romano, in fact, concludes that non-compliance procedures have a prophylactic function. They succeed precisely because nations agree to their terms on an evolving and negotiated basis and do

not commit them a fortiori to legal obligations that may prove, in their view, to be ruinous.

Nonetheless, Romano contends that an additional advantage of non-compliance has been some increased support for adjudication through what he terms a “mature” stance towards adjudication. The increasing pervasiveness of adjudication clauses in multilateral treaties is evidence that states are, in many instances, willing to accept third party determinations as a means of ultimately resolving disputes. This willingness to accept a resolution by a “neutral” decision-maker is, however, hedged by a lack of compulsory jurisdiction for international adjudication. Thus, states commonly make it clear that International Court of Justice jurisdiction is subject to the capacity of states to withdraw from its jurisdiction when disputes are submitted to it by opposing sovereigns.

However, the “mature” stance towards legally-binding adjudication has not been evident when it comes to climate change. Despite the U.S.’s absence at the July 2001 climate talks in Bonn, Germany, Japan thwarted a legally-binding non-compliance procedure for the Kyoto Protocol.³ This current lack of legally-binding consequences for non-compliance results in nation’s carbon emission commitments from the already negotiated first phase of reductions spilling over into the yet-negotiated second phase—with 30% of the non-complying nation’s original reduction commitment added to the total carbon reduction requirement.⁴ Because the parties to the Kyoto Protocol have not yet negotiated the second phase of reductions, non-complying nations may rely on the negotiation process rather than brave any legal consequences.⁵ The evolving, negotiated nature of non-compliance procedures, as described by Romano, trumps calls for compulsory international adjudication. Some agree with Romano that in order for Kyoto to be successful, its non-compliance procedures must remain flexible and evolving, like those of the Montreal Protocol.⁶ The success of Kyoto’s non-compliance procedure appears to rest on the protection of sovereignty of member states by permitting the system to evolve over time.

3. See Vanessa Houlder, *Bonn Climate Talks Reach Agreement on Kyoto*, FINANCIAL TIMES, July 22, 2001, at A19, available at www.ft.com/kyoto.

4. See R.J. Kopp, *An Analysis of the Bonn Agreement*, available at <http://www.weathervane.rff.org/features/feature134.htm> (last visited Sept. 14, 2001).

5. See *id.*

6. See Edward A. Parson, *Moving Beyond the Kyoto Impasse*, N.Y. TIMES, July 31, 2001, at A23.

Romano, not incidentally, discusses with great facility and comprehension the role of the ICJ in international environmental disputes. However, he does not discuss other, sometimes compulsory, adjudication contained in such multilateral agreements as the United Nations Convention on the Law of the Sea (“UNCLOS”), the World Trade Organization (“WTO”), and regional entities such as the European Union (“EU”) and the North American Free Trade Agreement (“NAFTA”). In the end, Romano believes arbitration succeeds because on an ad hoc basis states can determine the choice of law, rules of procedure, and time frames of the process. One consequence of practical significance is the expensive and time-consuming nature of the process, given the threshold issues that must be resolved. Thus, real obstacles to resolution remain even if substantive issues are not yet reached for discussion. Arbitration’s dynamic nature is also its most significant disadvantage. An additional advantage to the reader, however, is that Romano’s expert comparison of the provisions of the various treaties provides a subtle and comprehensive overview of the arbitration process.

As a prelude to the introduction of the many and highly readable ICJ case studies which make up much of the book, Romano discusses the ICJ in sufficient detail for one to understand the tribunal’s intrinsic limits, and thus the modest outcomes of its deliberations. The Court decides cases only upon mutual conference of jurisdiction or if the given bi-lateral or multi-lateral agreement stipulates that the ICJ shall serve as a forum. Optional declarations of jurisdiction are sometimes a feature of treaties.

Romano describes the recent development of the ICJ chamber on Environmental Matters. The chamber’s creation may reduce the possibility of the ICJ losing some of its functions to other international adjudicative bodies, such as the proposed International Environmental Court. Advocates of this new court are driven by the interests of non-state entities, such as private litigants (receptors of the effects of transboundary pollution unrepresented by their national governments) or NGOs, whose environmental passion is sometimes stronger than their national prejudices or even loyalties. Possibly, the activation of this body will not only undermine the ICJ’s proposed chamber, but will also pose a threat to sovereignty-linked dispute resolution. And, of course, the greater the threat to sovereignty, the less likely there will be a resolution which will protect the environment

more than the national interests of the states involved, narrowly conceived.

Interestingly, individuals and NGOs attempted to bring claims against France for its nuclear testing in the South Pacific in the mid 1990s. Complaints were filed before the European Commission of Human Rights, the Human Rights Committee, and the Court of Justice of the European Communities—all of which determined that they had no jurisdiction. In this conflict in which nuclear contamination posed the potential to radiate a significant part of the planet's largest expanse of water, the organs of international justice were largely impotent.

Much of Romano's work is devoted to exceptionally well-done case studies of celebrated international environmental disputes. Commencing with the Bering Sea Fur Seals arbitration, the book continues its surveys with other conflicts that turned on marine biological resources: Icelandic Fisheries Jurisdiction, or the Icelandic/English Cod War, the Canadian-Spanish Turbot, and the Southern Bluefin Tuna conflict. Three cases involve disputes about international watercourses: Lake Lanoux, Diversion of the Meuse river, and Gabcikovo-Nagymaros. Three classics of transboundary pollution complete the case studies: Trail Smelter, 1966-1972 French Nuclear Tests, Phosphates of Nauru. Each study describes the settlement process employed, the legal pleadings and awards granted. Of equal consequence, Romano devotes attention to the environmental outcome and whether the adjudication was protective or ameliorative.

Of Romano's case studies, the Turbot dispute between Canada and Spain (represented by the EU) best exemplifies his thesis. In 1994-1995, the dispute flared up when Canada enforced its domestic fisheries protection laws beyond its 200-mile exclusive economic zone against Spanish trawlers. While proceedings before the ICJ dragged on for three years after the conflict (ultimately ending with the case being thrown out for lack of jurisdiction which Canada refused to grant), the legal issues that were to be argued were ultimately solved through negotiations and international agreements within a few months. The EU and Canada signed a bilateral agreement within six months of the conflict and four months later the UN Convention on the Law of the Sea Relating to the Conservation of Straddling Fish Stocks was adopted. These agreements brought a solution to the dispute, supporting Romano's thesis that international environmental disputes tend

to be solved through negotiation between nations rather than international adjudication.

Central to Romano's book is his belief that adjudication will not solve the global environmental "problematique," to use Guruswamy's phrase.⁷ He believes that international adjudication will always be enveloped by the wider political context in which environmental problem solving must necessarily occur. He does, however, concede the utility of the Court as a subtle coercive force influencing states to solve environmental and resource access disputes through diplomacy rather than the time-consuming and unpredictable process of ICJ decisions. Also, the ICJ can be helpful in its articulation of manageable and bright-line legal principles that may form the common law basis of subsequent dispute resolution. Nonetheless, whatever the case for the ICJ, Romano argues that its decisions have not been determinative in the solution of environmental problems, for no other reason than the requirement that states relinquish sovereignty.

Arbitration/mediation in the end shapes the reality of environmental conflict resolution. Its capacity to adapt to evolving scientific discovery and the consequent flexibility this gives the negotiating parties makes the process more realistic, and thus more fruitful. Multilateral treaties, which include in some cases non-compliance processes, will shift the "action" away from the traditional modes of judicial decision.

Romano predicts, and indeed hopes for, an increased role for private parties and NGOs as significant players on the international scene, citing examples of international dispute resolution entities that grant some access to non-state actors. However, consistent perhaps with the pragmatism which he argues underlies his view, he leaves hopes unexplored. This path not taken is, however, one which merits further consideration in this essay.

II.

CITIZEN LITIGANTS, NGOS AND INTERNATIONAL DISPUTE RESOLUTION PROCESSES

Access to international dispute resolution bodies by non-state actors concerning environmental protection has been limited at best. The United Nations Convention on the Law of the Sea ("UNCLOS") is the first to accord status to NGOs in the dispute

7. L. GURUSWAMY ET. AL., *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK* 228 (2d ed. 1999).

resolution process. Most international environmental institutions lack forums with jurisdiction to resolve international environmental disputes between nations, more less provide a forum for private actors. Some individuals and NGOs have gained a measure of success in airing international environmental disputes in domestic courts. Bringing international environmental cases in international judicial bodies like the ICJ has thus far eluded non-state litigants because jurisdiction is limited to state actors.⁸

Several regional bodies have provided some access for private parties, but non-state party standing has yet to substantially take root in the world of multilateral international environmental judicial regimes.⁹ At first glance, it would seem that a lack of private party standing in international environmental dispute resolution bodies conforms with traditional jurisdictional limits between sovereign states. However, international bodies that do grant standing to non-state parties now outnumber those with limited state-to-state jurisdiction.¹⁰ However, these bodies generally do not have an environmental focus.¹¹

Non-state party access to international environmental dispute resolution remains limited at best, despite the liberalization of international trade. Even before the rise of the WTO and regional international trade blocks like the EU and NAFTA, non-state parties had access to international dispute resolution bodies when the issues disputed concerned economic interests in trade, investments, labor, etc. Thus, while the cries for the free will and self-determination of sovereignty outweighed calls for a more organized international system, international institutions granting private parties access to resolution of economic disputes thrived. Despite minor participation by non-state individuals and NGOs in global environmental and human rights disputes, the WTO and regional organizations have thrust forward the trade liberalization cause by granting increased participation for non-state actors in trade disputes.

However, international trade is inherently linked to the health of the global environment and non-state actors are beginning to

8. See ELIJU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 67-72 (1991).

9. See Convention on the Protection of the Environment, Feb. 19, 1974, Den.-Fin.-Nor.-Swed., 13 I.L.M. 591-97, art. 3 (providing foreign pollution victims access to the offending state's tribunal in these four countries).

10. See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U.J. INT'L L. & POL. 709 (1999).

11. See *id.*

sneak their way before international trade dispute resolution bodies. While the doors to ICJ remain closed to non-state actors, private parties are beginning to gain a voice of their own in international environmental disputes through trade dispute resolution bodies designed to further international trade. The following limited survey of several major international bodies that grant limited access to private parties uncovers the opportunities and limitations that these bodies provide.

A. *Existing International Forums for Non-State Actors: The Inspection Panel*

The World Bank Inspection Panel (“Inspection Panel”) is one of the only international dispute resolution bodies that is specifically designed as a forum for non-state actors to bring environmental and human rights disputes. Created in 1993, the Inspection Panel is the World Bank’s most significant effort to reach out to the non-state community of NGOs and individuals to formally dispute the Bank’s decision-making process.¹² The specific purpose of the three-member Inspection Panel is to permit private citizens who feel that projects sponsored by the Bank adversely or potentially harm their rights and interests to register complaints for review and inspection.¹³ To date, the Inspection Panel has received complaints against twenty Bank-sponsored projects.¹⁴

So far, results from the Inspection Panel’s reviews have ranged from Bank management’s complete withdrawal of Bank support of development projects to reassessment of Bank projects. These remedies, however, are not usually a result of Inspection Panel decrees. Instead they are generally the result of the indirect pressure applied to Bank lenders when Bank projects’ flaws are exposed through review and inspection by the Panel.¹⁵ Still, review is only limited to Bank projects that receive complaints from pri-

12. See Chi Carmony, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT’L L. REV. 1321, 1327-29 (2000).

13. See *id.*

14. See *id.* (listing eighteen projects); see also World Bank Inspection Panel website available at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf> (last visited Jan. 10, 2002) (listing two additional projects).

15. See Richard E. Bissell, *Current Development: Recent Practice of the Inspection Panel of the World Bank*, 91 A.J.I.L. 741, 742 (1997) (finding indirect pressure from the World Bank Inspection Panel potentially more effective than its formal procedures).

vate parties. Thus, the Inspection Panel's jurisdiction is limited only to Bank projects.

The Inspection Panel's jurisdiction is limited to complaints from a group of persons with common interests affected by a Bank act or omission due to a violation of Bank policy.¹⁶ Also, the request for review is only available after all of the avenues of review through the Bank's management have been exhausted and the loan has not yet closed or been ninety-five percent disbursed.¹⁷ Third-party members of the global community, however, may submit supplemental briefs to the Inspection Panel for consideration. These memoranda often provide important technical information from NGOs with members not directly impacted by the project at issue.¹⁸

Even though the Inspection Panel is an international body that allows private actors to raise environmental disputes, subject matter before the Inspection Panel is limited to the activities of the Bank. Even further, the Inspection Panel is limited in that it may only review whether the Bank observes its own policies and procedures. The policies and procedures may not be reviewed themselves.¹⁹ The Inspection Panel is a small, limited window for non-state actors to access quasi-judicial processes and norms of providing a forum to hear and investigate complaints. Its narrow focus on administrative oversight does not permit it to come close to addressing private party's international environmental grievances beyond the scope of World Bank loans.

B. *Non-State Actors on the High Seas*

Unlike the terrestrial Inspection Panel, the International Tribunal for the Law of the Sea ("ITLOS") is a more traditional international tribunal. The tribunal is required to employ other international treaties and customary law within its decision-making, as well as the specific provisions of UNCLOS. While ITLOS may hear any international dispute over a contract or the terms and obligations of UNCLOS (including fifty-nine of its three hundred and twenty provisions specifically dedicated to environmental protection),²⁰ the tribunal's jurisdiction is mostly limited

16. See Houlder, *supra* note 3, at 1322.

17. See *id.*

18. See Bissell, *supra* note 15, at 743.

19. See Houlder, *supra* note 3, at 1322.

20. Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes*, 7 MINN. J. GLOBAL TRADE 287, 291 (1998).

to disputes between states. However, ITLOS's Sea-Bed Disputes Chamber is permitted to hear cases between states and non-state actors.²¹

But ITLOS accessibility is deceptive. The Sea-Bed Disputes Chamber is the organ of ITLOS with specific jurisdiction over all disputes concerning the exploration and exploitation of the sea-bed area.²² Private, non-state actors are permitted to be parties in deep sea mining disputes before the chamber, but only for the purpose of interpreting contractual obligations.²³ Thus, corporations that make up the future sea-bed mining industry would be the only non-state parties with access to the tribunal. No individuals or NGOs would be permitted to raise environmental issues before the tribunal because these cases would not have the applicable contractual subject matter. Although the future private sea-bed mining industry would have access to the tribunal in these limited circumstances, to apply for permission to mine the deep sea-bed under UNCLOS industry must be sponsored by their own state government.²⁴ Thus, state sponsorship is at least initially required to gain access to ITLOS, even for private corporations. Still, states yield a little sovereignty to the contractual interests of the corporate mining industry, but the doors to ITLOS's Sea-Bed Disputes Chamber remain closed to non-state actors seeking environmental justice.

C. *Access to the WTO Dispute Settlement Process*

Private party access to information from behind the closed doors of WTO dispute settlement panels has been scarce, and private party access to the dispute settlement process is almost non-existent.²⁵ Under the WTO, Panels and the Appellate Body may only consider trade complaints and third-party intervention submitted by Member Governments.²⁶ The powers of the WTO's

21. See Convention on the Law of the Sea, Dec. 10, 1982, United Nations, 21 I.L.M. 1261, part XI, § 5, art. 187, available at www.un.org/Depts/los/unclos/closindx.htm (hereinafter UNCLOS).

22. See Peggy Rodgers Kalas and Alexia Herwig, *Dispute Resolution Under the Kyoto Protocol*, 27 *ECOLOGY L. Q.* 53, 76 (2000).

23. See UNCLOS, part XI, § 5, annex VI.

24. Romano, *supra* note 10, at 745.

25. See Steve Charnovitz, *Participation of Non-Governmental Parties in the World Trade Organization: Participation of Non-Governmental Organizations in the World Trade Organization*, 17 *U. PA. J. INT'L ECON. L.* 331, 333 (1996).

26. See Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 *COLO. J. INT'L ENVTL. L. &*

dispute settlement bodies are not trivial, with the strength to rule that nations must abolish or amend domestic law deemed trade restrictive or face trade sanctions. Thus, under the WTO, Member States yield a great deal of sovereignty in the name of free trade. The WTO's lack of transparency and disregard for non-state actors is well noted, but despite private parties' lack of *locus standi*, NGOs are beginning to pierce the WTO's fierce façade.

In the famous dispute over a U.S. ban on shrimp imports from countries that did not require sea turtle excluder devices on shrimp nets, the WTO Appellate Body overturned a lower panel decision holding that the panel could not consider supplementary environmental briefs submitted by NGOs.²⁷ While the Appellate Body did not rule that the panel had a legal obligation to use the NGO briefs, it held that panels have the discretion to accept unsolicited non-state submissions.²⁸

Thus, non-state actors may now submit briefs directly to the panel and the panel must at least consider the briefs before they can be dismissed.²⁹ While supplemental briefs can be submitted by NGOs on environmental issues, access is also available to any private party, opening the possibility of corporate access to WTO panels. Although the doors to bringing actions before the WTO's dispute resolution panels remain tightly closed to non-state actors, private parties reached the first steps toward these doors when they were permitted to provide technical and legal guidance on environmental matters through supplemental briefs.

Under the WTO, state sovereignty to make domestic trade policy is easily surrendered in favor of the smooth flow of global trade, while, at the polar opposite, sovereignty is closely guarded by limited access to the WTO's dispute resolution system. Nations were eager to discard sovereignty in the name of a liberal global economy, so long as they could be sure environmental regulations would not get in the way. Thus, because the WTO deems all other international environmental law irrelevant and limits standing to Member States, even if private parties raise issues based on international environmental treaties signed by every

POL'Y 47, 62 (2001); see also Uruguay Round of Multilateral Trade Negotiations Final Act (World Trade Organization Agreements), Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/final_e.htm (last visited June 3, 2001).

27. *Id.* at 65; see also United States Import Prohibition of Certain Shrimp and Shrimp Product, WT/DS58/AB/R (Oct. 12, 1998), available at 1998 WL 720123.

28. *Id.* at 66.

29. *Id.* at 68.

WTO Member State, environmental issues raised by non-state actors are excluded from WTO dispute resolution.³⁰

D. *NAFTA's Private Party Access*

While private actors have made scant progress in accessing the WTO's state-to-state dispute resolution, NAFTA willingly provides non-state access to dispute resolution forums.³¹ Under NAFTA, non-state actors have standing to international dispute resolution when the non-state actor is an investor from one of the three NAFTA Member States and the non-state actor has made or is seeking to make an investment in one of the other NAFTA Member States.³² NAFTA's "side agreement," The North American Agreement on Environmental Cooperation ("NAEC"), also provides a forum for private parties to bring complaints before a trilateral Commission for Environmental Cooperation ("CEC").³³

NAFTA's Chapter 11 provides for arbitration for investment disputes through international systems that already exist: the World Bank's International Center for the Settlement of Investment Disputes ("ICSID"); the ICSID's Additional Facility Rules; or the rules of the United Nations Commission for International Trade Law ("UNCITRAL rules").³⁴ Although the arbitration provided under Chapter 11 equalizes state and non-state actors under international law, it is only available to non-state actors in investment disputes.³⁵ Thus, while private parties have access to arbitration for investment disputes, dispute resolution is limited for environmental disputes.³⁶

Interestingly, because cross-border investment involves issues that impact the environment like vehicles and transportation, telecommunications, and agriculture, NAFTA indirectly grants access for investors to these environmental issues.³⁷ Here, NAFTA grants standing under Chapter 11 for cross-border pri-

30. See GURUSWANY *supra* note 71, at 288.

31. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605, ch. 11, § B, available at <http://www.nafta-sec-alena.org/english/index.htm> (last visited June 2, 2001) (hereinafter NAFTA).

32. Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B. C. INT'L & COMP. L. REV. 1, 14 (1998).

33. See RALPH H. FOLSOM, NAFTA IN A NUTSHELL 208 (1999).

34. See NAFTA, ch. 11.

35. See Gal-Or, *supra* note 32, at 26.

36. *Id.* at 14.

37. *Id.* at 26.

vate investors in investment disputes with Member States, not other citizens who may have an even greater stake in these environmental disputes.

However, NAFTA provides private party access to environmental dispute resolution under the NAEC side agreement. NAEC foremost requires member states to provide private parties access to environmental remedies within each member state. While the NAEC requires member states to enforce their own environmental regulations and standards, indirect private access to international environmental dispute resolution is available through this side agreement. The NAEC's CEC Secretariat may issue Article 13 reports on environmental matters to the CEC Council of Ministers, made up of member-state cabinet officials.³⁸ Unless rejected by a two-thirds majority of the Council of Ministers, private parties may petition the Secretariat to issue Article 13 reports.³⁹ The information made available in these reports has resulted in U.S. and Mexican government environmental clean-up and information exchange concerning air pollution impact on migratory birds.⁴⁰ Thus, by petitioning the Secretariat for Article 13 reports, private parties have a voice in rousing investigation and exposure of cross-border environmental problems.

More directly, under Article 14, non-state parties may submit complaints (called Submissions on Enforcement Matters ("SEM")) concerning workplaces, enterprises, or sectors that produce goods or services addressed by NAFTA/NAEC to the Secretariat that allege a party is not enforcing its own environmental laws.⁴¹ If the Secretariat finds that the SEM deserves a response from the member state in question, the Secretariat may then develop a factual report to the Council, upon two-thirds approval by the Council.⁴² The report is presented to the Council, which, upon another two-thirds approval, may release the report to the public.⁴³ While public exposure is the only sanction availa-

38. See North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480, art. 13, available at http://www.cic.org/pubs_info_resources/law_treat_agree/naaec05.cfm?varlan=english (last visited Aug. 12, 2001) [hereinafter NAAEC].

39. *Id.*

40. See *supra* note 24, at 210; see also NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, SECRETARIAT REPORT ON THE DEATH OF MIGRATORY BIRDS AT THE SILVA RESERVOIR (1994-95).

41. See NAAEC, art. 14.

42. See *id.*

43. See *id.*

ble to private parties under Article 14, it has resulted in member-states abandoning environmentally harmful decisions.⁴⁴

Article 14 complaints must first clear many hurdles to be accepted by the Secretariat. First, all internal, domestic private remedies must be exhausted within the national system before the Secretariat will receive the complaint.⁴⁵ Second, because NAAEC excludes issues arising from occupational health and safety and natural resource exploitation, the complaint must not address claims over these issues.⁴⁶ Third, alleged government inaction must not be due to a reasonable exercise of official discretion in investigation, prosecution, regulation, and compliance.⁴⁷ Fourth, Article 14 complaints must be aimed at promoting enforcement rather than "harassing industry."⁴⁸ Fifth, complaints must be filed in a timely manner.⁴⁹ Finally, while personal standing for the complaining party is usually found liberally, because NAEC is focused on compliance with existing domestic law, complaints can be raised against legislative action.⁵⁰ Once a complaint clears each of these standing hurdles it may be filed. Thus, despite the access provided to non-state actors under Article 14 of NAEC, the submission must still weave through a maze of

44. *See, e.g.*, Citizen Submissions on Enforcement Matters, Comité Para la Protección de los Recursos Naturales, et al., Mex., SEM-96-001, Jan. 17, 1996, available at http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submission.

45. *See* Citizen Submissions on Enforcement Matters, The Friends of Old Man River, Can., SEM-96-003, Secretariat's Determination, art. 15(1), Nov. 8, 1996, available at http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submission; Citizen Submissions on Enforcement Matters, Aage Tottrup, Can., SEM 96-002, Secretariat's Determination, art. 14(2), May 28, 1996, available at http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submission.

46. *See, e.g.*, Citizen Submissions on Enforcement Matters, Canadian Environmental Defense Fund, Can., SEM-98-002, Secretariat's Determination, art. 14 (1), Aug. 25, 1997, available at http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submission.

47. *See* NAAEC, art. 14

48. *See id.*

49. *See, e.g.*, Citizen Submissions on Enforcement Matters, Hector Gregorio Ortiz Martinez, Mex., SEM-97-004, Oct. 14, 1997, available at http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submission.

50. *See, e.g.*, Citizen Submissions on Enforcement Matters, Sierra Club et al., U.S., SEM-95-001, Secretariat's Determination, arts. 14(1), 14(2), Dec. 8, 1995, available at http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submission; Citizen Submissions on Enforcement Matters, Biodiversity Legal Foundation et al., U.S., SEM 95-002, Secretariat's Determination, art. 14(2), Sept. 21, 1995, available at http://www.cec.org/citizen/guides_registry/registryview.cfm?&varlan=english&submission.

standing requirements. Still, NAFTA's NAEC provides an international forum for private parties to bring environmental disputes.

E. *Access for Investors: The ICSID*

Although the ICSID has served as a forum for NAFTA investment disputes since 1994, it has served as a forum for international investment arbitration since 1966.⁵¹ The ICSID provides a neutral setting for arbitration between nations and foreign investors when their initial investment agreement expressly provides for ICSID arbitration.⁵² Therefore, nations are not bound by the ICSID unless they opt to include ICSID arbitration in their agreements with private investors.⁵³ Because it is a nation's prerogative to subject itself to ICSID arbitration, private investors may only seek arbitration with a nation if the nation agrees to be subject to the ICSID.⁵⁴ However, less developed states continually yield their own sovereignty to ICSID arbitration to attract international commerce.⁵⁵

While private parties have access to the ICSID through agreements with host states, the access is only available for investors. Therefore, NGOs and concerned global citizens would usually be unable to utilize the ICSID for arbitrating environmental disputes with nations, even if the nation agreed. Perhaps more importantly, NGOs and other concerned citizens are unable to participate as affected parties in ICSID proceedings because they are generally not included in investor-nation agreements.⁵⁶ This is significant in the context of the ICSID because of the more than fifty cases registered since 1966, more than forty have substantial environmental impact, including: energy projects (oil, gas, hydroelectric), hotel & resort construction, manufacturing (including a chemical plant project, and several waste disposal

51. See International Center for the Settlement of Investment Disputes web site at <http://www.worldbank.org/icsid/about/about.htm> (last visited June 2, 2001).

52. See *id.*

53. See Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 *FORDHAM L. REV.* 2275, 2305-06 (1997).

54. See *id.*

55. See *id.*

56. See Christopher M. Koa, *The International Bank for Reconstruction and Development and Dispute Resolution: Conciliating and Arbitrating with China through the International Center for Settlement of Investment Disputes*, 24 *N.Y.U.J. INT'L L.* 7 *POL.* 439, 448-50 (1991).

projects), mining, forestry exploitation, and road building.⁵⁷ Almost always between a multinational corporation and a developing nation, most of these investment disputes have substantial environmental impacts due to the nature of the investment projects. Despite the huge environmental consequences of ICSID arbitrations, non-state actors that are not investors are not permitted a voice in ICSID arbitration. Again, under the ICSID, states cede sovereignty for the benefits of international trade and investment, disregarding other possible non-state actors with environmental concerns.

F. *Access through the ILO*

The International Labor Organization (“ILO”), an agency of the UN, is perhaps the most open international forum for non-state actors to bring complaints against nations.⁵⁸ Under Articles 24 and 25 of the ILO Constitution, workers’ organizations can raise “representations of non-observance” against Member States that they allege are not in compliance with ILO principles.⁵⁹ These representations brought by NGOs spark investigations by the ILO Governing Body that may lead to public exposure through a public report. More interestingly, the report may lead to an official state complaint under Article 26 of the ILO Constitution, which ultimately may result in the case being heard by the ICJ (upon agreement by the accused state).⁶⁰ Bringing environmental claims before the ILO is possible, as long as the claims are based on ILO conventions.⁶¹

While the ILO’s power has less bite than the WTO, its adjudication process is significantly more open to non-state actors than most other international organizations.⁶² While the ILO’s power is limited to public embarrassment, and diplomatic scolding, it provides NGOs with a voice. However, the ILO’s limited power is mainly due to states clinging to their sovereign rights to dictate

57. *Id.*; see also International Center, *supra* note 37.

58. See Schleyer, *supra* note 53 at 2306-07.

59. David A. Wirth, *Reexamining Decision Making processes in International Environmental Law*, 79 IOWA L. REV. 769, 782 (1994); see also INTERNATIONAL LABOUR ORGANIZATION CONST., art. 24, 25, available at <http://www.ilo.org/public/english/about/iloconst.htm> (last visited June 11, 2001).

60. See INTERNATIONAL LABOUR ORGANIZATION CONST., art. 26 at <http://www.ilo.org/public/english/standards/norm/enforced/index.htm> (last visited June 11, 2001).

61. See generally *id.*, at art. 10.

62. See Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 555 (1997).

their own labor laws and practices. Despite the ILO's obvious weaknesses, it could be a valuable resource for non-state actors to bring environmental complaints.

G. *The European Court of Justice*

As a regional tribunal, the European Court of Justice ("ECJ") permits significantly more non-state actor participation in actions against environmental polluters than its global counterparts.⁶³ As with other international tribunals, individuals and NGOs may lobby Member States to bring actions on environmental issues before the ECJ, and, where permitted by domestic rules, non-state actors can bring actions in Member's domestic courts based on EU environmental law.⁶⁴ NGOs may also use the ECJ's "preliminary reference" procedure to obtain ECJ judgments on EU environmental law issues raised in Member State courts.⁶⁵ However, much like standing requirements in the United States, NGOs and individuals may only bring actions that are of "direct and individual concern" to the NGO or individual.⁶⁶

Meeting ECJ standing requirements can sometimes be difficult. Several cases before the Court have tested the extent of the direct individual concern requirements.⁶⁷ In an attempt to stretch the standing rules so they reflect the broad, shared environmental interests of the global community, Greenpeace International attempted to challenge the European Commission's disbursement of funds to Spain for the construction of two power-plants in the Canary Islands.⁶⁸ The Court rejected Greenpeace's standing to challenge EU actions in the ECJ, preferring to give deference to Member's national courts.⁶⁹ However, the ECJ's standing requirements may soon be relaxed because the EU and all of its

63. See Philippe Sands, *European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection*, 100 YALE L.J. 2511, 2518 (1991).

64. See *id.*

65. Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 47, 50 (2001).

66. See *id.*; see also Treaty Establishing the European Community, Mar. 25, 1957, 298 U.N.T.S. 11, art. 230 (formerly art. 173), available at <http://www.europa.eu.int/eur-lex/en/treaties/index.html> (last visited May 27, 2001).

67. See Peel, *supra* note 26, at 50-55.

68. See *Stichting Greenpeace Council (Greenpeace International) v. The Commission of European Communities*, 1998 ECJ CELEX LEXIS 9723; 1998 ECR I-1651.

69. See *id.*

Member States signed on to the 1998 Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, granting NGOs wider access to justice on environmental matters.⁷⁰ While the Court refuses to grant standing based on common, shared environmental interests and interconnected ecosystems, it is eager to uphold traditional notions of law based on property and contracts. Thus, international corporations seeking dispute resolution may easily bring cases before the ECJ and environmental NGOs must weave their way through a maze of standing requirements for relief.

While the desire to compartmentalize international issues into categories like “security,” “economics and trade,” “human rights,” and “environment” may be hard to resist, the once solid lines between these subjects blur as the world becomes interconnected. Trade organizations particularly seem to begin their existence by attempting to remain purely focused on trade, without mixing in the impurities of issues like environmental health. However, as with the European Union (and the United States of America), trade organizations require oversight of more than just trade because they are too interconnected with these other aspects of global society.

III.

EMERGING PARADIGMS OF CITIZEN ACCESS IN INTERNATIONAL ENVIRONMENTAL CONFLICTS

In an attempt to clear the sovereignty hurdle that Romano skillfully highlights in his book, some researchers call for an international procedural system granting reciprocal access to domestic courts.⁷¹ Though private party access to international dispute resolution bodies remains limited in scope in all but a few exceptions, equal access to foreign domestic courts is a possible alternative to over-arching international regimes with dispute resolution mechanisms. International agreements that grant non-state actors an equal right of access to administrative and judicial

70. See Peel, *supra* note 26, at 54-62; see also Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, available at <http://www.unece.org/env/pp/treatytext.htm>.

71. See ORGANIZATION OF AMERICAN STATES, REPORT FROM THE SIXTH MEETING OF EXPERTS FOR THE SIXTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW (CIDIP-VI), TOPIC III: PART 2: CIVIL INTERNATIONAL LIABILITY FOR CROSSBOUNDARY POLLUTION, (Dec. 3-4, 1998) (on file with author).

procedures in the state where environmental harm originates provide the same redress available to the citizenry in which the harm originates.

The European Court of Justice provides parties within the EU access to an international tribunal for international environmental wrongs. However, in most of the EU, private party equal access by foreigners to domestic courts is still largely non-existent.⁷² The Nordic Convention on the Protection of the Environment remains the exception to this rule, granting non-state actors from Denmark, Finland, Norway and Sweden standing to sue in the domestic courts of the other parties to the treaty.

When the Nordic Convention was signed in 1974, it was truly a bold endeavor. Its diminutive length is no accident. While the four constituents crafted the treaty for the protection of the Scandinavian environment, the treaty has no specific technical standards or substantive environmental protections. Instead, it is completely process-oriented.⁷³ The Convention relaxes standing requirements, permitting receptors of foreign pollution equal access to the same remedies as citizens of the offending state.⁷⁴ The Convention specifically ensures that the private party raising the complaint is treated the same throughout the legal system of the nation in which the harm originates.⁷⁵ This also opens the legal systems of the four member-states to the full appellate process.⁷⁶

Many have argued for a similar reform of standing throughout Europe and the rest of the world.⁷⁷ In Africa, for example, the Bamako Convention on the Ban of Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa calls for a protocol to be drafted by experts on a liability scheme—which may include a reciprocal system similar to the Nordic Convention.⁷⁸ Such a cross-boundary liability regime with open access to non-state actors would

72. See EUROPEAN UNION PREPARATORY ACTS, WHITE PAPER ON ENVIRONMENTAL LIABILITY, (Feb. 9, 2000), EU: COM 2000/0066, Celex NO. 500DC0066 [hereinafter White Paper].

73. See Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 A.J.I.L. 24, 47 (1994).

74. See Nordic Convention, art. 3.

75. See *id.*

76. See *id.*

77. See Ann M. Lininger, *Liberalizing Standing for Environmental Plaintiffs in the European Union*, 4 N.Y.U. ENVTL. L. J. 90 (1995).

78. Bamako Convention on the Ban of Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, 30 I.L.M. 773, art. 12.

provide an international system that grants possible remedies to victims of international environmental harm, while maintaining state sovereignty.⁷⁹ States would retain the ability to legislate and interpret their own laws, but would permit non-nationals equal access to their courts. In this respect, the Nordic Convention moots traditional concerns that states will lose their sovereignty to international organizations.

The open access to national courts established by the Nordic Convention may provide non-state actors redress to international environmental wrongs. However, its system of reciprocal jurisdiction is by definition limited to the four signatories to the treaty. Thus, the citizens of the member-states have no standing by virtue of the treaty to redress for environmental harms originated in states not parties to the Nordic Treaty.

A more fundamental systemic problem lies at the heart of the Nordic treaty. Foreign plaintiffs may only receive the environmental protection the offending state provides to its own citizens.⁸⁰ Thus, foreign plaintiffs may have no remedy if the state that is the source of the environmental harm provides no protection to its own nationals through its laws. While this is probably not a major issue for the four signatories to the treaty because their economies and legal systems are similar and they share many cultural/environmental values, a treaty expanded beyond such a kindred group of nations would surely need to account for major inconsistencies and lacunae in the environmental laws of nation states.

The Nordic treaty and other agreements to regionalize judicial access is an important step in expanding remedies for international environmental wrongs. As the European Community White Paper on Environmental Liability suggests:

Environmental liability aims at making the causer of environmental damage (the polluter) pay for remedying the damage that he has caused. Environmental regulation lays down norms and procedures aimed at preserving the environment. Without liability, failure to comply with existing norms and procedures may merely result in administrative or penal sanctions. However, if liability is added to regulation, potential polluters also face the prospect of

79. See Treaty Establishing the European Community, *supra* note 66, at 132.

80. David Scott Rubinton, *Toward a Recognition of the Rights of Non-States in International Environmental Law*, 9 *PACE ENVTL. L. REV.* 475, 490 (1992).

having to pay for restoration or compensation of the damage they caused.⁸¹

Environmental liability is a way of implementing the main principles of environmental policy enshrined in the EC Treaty (Article 174 (2)), above all the polluter pays the principle. If this principle is not applied to covering the costs of restoration of environmental damage, either the environment remains unrestored or the State, and ultimately the taxpayer, has to pay for it. Therefore, a first objective is making the polluter liable for the damage he has caused. If polluters need to pay for damage caused, they will cut back pollution to the point where the marginal cost of abatement exceeds the compensation avoided. Thus, environmental liability results in prevention of damage and in internalization of environmental costs. Liability may also lead to the application of more precaution, resulting in avoidance of risk and damage, as well as it may encourage investment in R & D for improving knowledge and technologies.

Internalization of environmental costs means that the costs of preventing and restoring environmental pollution will be paid directly by the parties responsible for the damage rather than being financed by society in general.⁸²

The White Paper thus suggests a Nordic regime for the entire European Union and provides a coherent rationalization for non-state enforcement of environmental norms. Where nations may fear to tread for reasons of state sovereignty, individual plaintiffs are less likely to weigh foreign policy considerations in their quest for compensation for damages personally served.

And despite the White Paper's reservation about expanding concepts of individual liability for environmental pollution "to pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with the activities of individual actors,"⁸³ environmental advocacy groups are discussing lawsuits designed to impose financial responsibility for acts which contribute to global warming.

The White Paper argues that its liability concept is not suitable for dealing with the "effects of climate change brought about by CO₂ and other emissions [or] forests dying as a result of acid rain,"⁸⁴ environmental lawyers representing groups like Greenpeace, the World Wildlife Fund and the Natural Resources De-

81. See White Paper, *supra* note 72, § 2.1

82. *Id.* § 3.1.

83. *Id.* § 2.2.

84. *Id.*

fense Council recently met to consider filing lawsuits against corporations whose plants emit greenhouse gases and thus contribute to global climate change.⁸⁵

In the environmental summit meeting, the lawyers for the advocacy groups did not decide whether legal action should be taken in U.S. courts or international tribunals. But plaintiffs would be people, or even nations such as the island states who are threatened with submersion if ocean levels continue to rise. In addition to the corporations, defendants could be federal agencies such as the Environmental Protection Agency which fails to regulate adequately the generation of pollutants, or the Energy Department which subsidizes the use of fossil fuels.

Though environmental scholars were generally skeptical, reflecting many of the reservations of the EU White Paper (a lawyer for the conservative Pacific Legal Foundation called the approach “nuts”),⁸⁶ legal scholars such as Professor Andrew Strauss have argued that globalization has shifted dispute settlement from diplomatic links forged by nations to private dispute resolution.⁸⁷ Another commentator who was skeptical about the success of liability regimes for global environmental harms conceded that, “[i]n some circumstances, legal actions are evaluated or pursued not with expectations of success in court, but recognizing that a real victory would be in the court of public opinion.”⁸⁸

Obviously non-state actor lawsuits for compensation for the consequences of global environmental pollution are in a nascent, if not embryonic stage. But the imaginative strategies of environmental advocacy groups suggest that non-state actors are increasingly important players in the protection of the international environment. At more than a conceptual level, personal liability for harms to the global commons as well as transboundary pollution has emerged out of nation-state deadlock as a potentially effective strategy to protect the environment and to abate pollution.

85. See Kathryn Q. Seelye, *Global Warming May Bring New Variety of Class Action*, N.Y. TIMES, Sept. 6, 2001, at A16.

86. See *id.*

87. Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L., 191 (2000).

88. See Seelye, *supra*, note 81.

To be sure, private access to international environmental justice, either in national courts or in international tribunals, collides with the nearly sacrosanct principle of sovereignty (a ground norm for developed as well as developing nations). Romano's legal realistic perspective on sovereignty concedes it as an obstacle to the adjudication of environmental disputes in the international law/state-to-state sphere. Indeed, he argues that allowing non-state actors access to the ICJ would contradict the very nature of the Court which is "to serve the needs of peace and justice" of the community of sovereign states.⁸⁹ Elsewhere, however, he suggests that ICJ standing should be extended to specialized international organizations to avoid disturbing the "nature" of the Court.⁹⁰ Though arguing for institutional coherence of the ICJ, he recognizes the logic of non-state intervention in some disputes ostensibly between nations.⁹¹ Finally, he also accepts a role for non-state actors, even where the legal action before the ICJ concerns antagonistic states, arguing that the ICJ ought to accept NGO petitions for advisory opinions.⁹²

Romano's suggestions may not satisfy the desires of non-state actors to gain access to foreign courts and international tribunals like the ICJ, but they are consistent with his realist view that international environmental law must be approached by conceding the persistent view of sovereignty's saliency. Within this context, non-state actors should continue to force open the doors of international dispute resolution bodies by both frontal assaults and by end-runs around the borders of sovereignty.

89. See Romano, *supra* note 10, at 335.

90. See *id.*

91. See *id.*

92. See *id.* at 336.