May 1994

Reexamining Decisions-Making Processes in International Environmental Law

David A. Wirth
Boston College Law School, wirthd@bc.edu

Follow this and additional works at: https://lawdigitalcommons.bc.edu/lsfp
Part of the Administrative Law Commons, Environmental Law Commons, and the International Law Commons

Recommended Citation
Reexamining Decision-Making Processes in International Environmental Law

David A. Wirth*

INTRODUCTION

International environmental law, like international law generally, is first and foremost a set of rules or norms governing relations among states. But many threats addressed by multilateral environmental diplomacy—the "greenhouse" effect, stratospheric ozone depletion, acid rain, international trade in hazardous substances, and loss of biological diversity and tropical forests—strain traditional models of international interactions.1 Not coincidentally, as public concern about these hazards has heightened, international law has received closer scrutiny and occasionally been criticized as ineffective in providing meaningful responses to potentially serious global environmental perils.2 Simultaneously, with the end of the Cold War, some have called for democratization of foreign policy processes generally, even in areas typically considered core national security concerns.3 Such trends

*Assistant Professor of Law, Washington and Lee University, Lexington, Virginia. This work was supported by grants from the Creswell Foundation and the Frances Lewis Law Center of Washington and Lee University. The author gratefully acknowledges the advice and assistance of Elizabeth P. Barratt-Brown, Randall P. Bezanson, Mary M. Brandt, Mark H. Grunewald, Louise A. Halper, Frederic L. Kirgis, Jr., Alan S. Miller, Brian C. Murchison, Peter H. Sand, Bernhard Schloh, Kathryn Sessions, Mary A. Stilts, and Kevin C. Wells. This Article is based on presentations delivered by the author at a conference entitled "Earth Rights and Responsibilities: Human Rights and Environmental Protection" at Yale Law School, New Haven, Connecticut, on April 4, 1992 and at the American Bar Association's Twentieth Annual Conference on the Environment entitled "The Role of Law in the United Nations' 1992 Conference on Environment and Development" at Airlie House, Warrenton, Virginia on May 18, 1991.


2. See Developments in the Law—International Environmental Law, 104 Harv. L. Rev. 1484 (1991). This extended essay decries the alleged ineffectiveness of the customary law of state responsibility as a tool for improving environmental quality, id. at 1492-1504 (criticizing "stillborn regime of international liability"), the supposedly inconsequential role of state-to-state third party dispute resolution processes, id. at 1561-63 (describing "failure of international adjudication"), and the asserted vagueness to the point of unenforceability of many existing substantive requirements, id. at 1504-06. See also David A. Wirth, Book Review, 2 Y.B. Int'l Envtl. L. 479 (1991) (reviewing International Law and Pollution (Daniel B. Magraw, ed., 1991)).

3. E.g., Mark Danner, How the Foreign Policy Machine Broke Down, N.Y. Times, Mar. 7, 1993, § 6 (Magazine), at 32. Danner argues, "The United States, because it became a superpower during the early nuclear era, created for itself a foreign-policy-making machinery that in the end had little to do with the principles underlying the country's institutions and political beliefs." Id. at 34. He then identifies "making a democratic foreign policy" as a critical imperative. Id.
have stimulated a change in thinking about the role of nonstate actors in the international system, and international environmental law is at the forefront of these developments.4

Heightened attention to a new generation of international issues such as environment, concerned less with national security and more with individual welfare, has given rise to increasing demands from the public for a voice in international organizations and processes.5 International environmental law often has direct analogues in municipal laws and regulations intended to protect public health and to preserve natural resources, which until recently were considered matters of primarily national concern. Consequently, in recent years the distinction between domestic and international environmental policies has blurred. This "internationalization" of environmental law also has raised expectations of congruence between the international system and national decision-making procedures, under which a high level of public input is often the rule for addressing environmental issues currently discussed in multilateral fora.6

To be sure, by comparison with states as represented by their governments, individuals and other nonstate actors still play a small role in making, assuring observance of, and settling disputes concerning international environmental law. On the international level, however, as well as the domestic, public participation in defining, implementing, and applying international environmental law can facilitate the twin goals of accountability and efficacy.7 Accordingly, this Article addresses four topics that have


7. This Article considers opportunities to expand and regularize institutional roles for nongovernmental entities by analogy to both domestic and international models that the international community can implement without disrupting the fundamental fabric of international law. The analysis is neither a strict proof of the need for those vehicles nor evidence of the legitimacy of the constraints imposed by existing international law. By contrast, other commentators assert the need for supranational authorities that would exercise some of the sovereign authority now held by national governments. See Jessica T. Mathews, Redefining Security, Foreign Aff., Spring 1989, at 162, 174 ("[T]he need for . . . new institutions and regulatory regimes to cope with the world's growing environmental interdependence is . . . compelling. . . . Put bluntly, our accepted definition of the limits of national sovereignty as coinciding with national borders is obsolete."); Sands, supra note 4, at 393 ("[T]he notion of sovereignty which underlies the current [international legal] regime poses insurmountable obstacles when the problems to be addressed are transnational in scope."); cf. infra text accompanying note 98 (describing Declaration of the Hague). But see Marc A. Levy et al., Institutions for Promoting International Environmental Protection, Env't, May 1992, at 12, 36
attracted little explicit attention in the international legal field, but that may have considerable potential for overcoming impediments in international environmental law. First, after examining the role of the public in the creation of international law, this Article assesses the potential for expanding and regularizing access to multilateral negotiations and other international fora by nongovernmental observers. Next, this Article evaluates the public's role in the implementation of international law and suggests employing a "private attorney general" theory of international oversight that nonstate actors can initiate. The Article then analyzes the role of the public in formal international dispute settlement processes and considers the creation of greater opportunities for members of the public to express views as amici to international tribunals. Finally, the Article scrutinizes the utility of nonconsensus decision-making models on the international level and makes recommendations for situations in which procedures that could bind states without their consent might be appropriate.

I. THE LAW-MAKING FUNCTION AND THE PUBLIC

International legal standards in the environmental field lack the sophistication that characterizes some areas of international law. For instance, basic principles concerning freedom of the high seas have evolved over several centuries and were codified more than three decades ago. By contrast, the creation of environmental norms still absorbs the international community. Indeed, the first binding, substantive, and potentially global multilateral agreements on such pressing environmental problems as exportation of hazardous wastes and depletion of the stratospheric ozone layer have been agreed upon only in the last ten years. Negotiations on (arguing that the world community can mitigate international environmental problems without departing from fundamental principles of international law pertaining to state sovereignty). Unless the context requires otherwise, in this Article terms such as "nonstate actor," "the public," "private entity," and "private party" refer without distinction to any nongovernmental entity, including but not limited to individuals, nonprofit environmental organizations, and privately owned business corporations.


the creation of the first international legal norms designed to safeguard the integrity of the Earth's climate and the first comprehensive attempt to provide in situ protection for the planet's biological diversity have just recently concluded. These two new multilateral conventions were opened for signature at the United Nations Conference on Environment and Development (UNCED)—the "Earth Summit"—held in Rio de Janeiro in June 1992 and attended by more than 100 heads of state.

Principle 10 of the Rio Declaration on Environment and Development, one of the principal instruments adopted at the Earth Summit, states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities [sic], and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. Thanks to UNCED's universal scope, this statement clearly endorses the relationship between public participation and democratic decision-making processes on the one hand and environmental quality on the other. This nexus previously had been acknowledged on the international level in piecemeal fashion at best.

---


An explicit call for direct public participation in international processes is notably absent from this exhortation. That is not surprising. Private entities in international law traditionally had no procedural rights whatsoever, whether in informal bilateral discussions between two governments or in more formal multilateral undertakings at intergovernmental organizations like the United Nations. That situation is slowly changing.


15. See Letter from Peter H. Sand, Principal Program Officer, United Nations Conference on Environment and Development, to David A. Wirth (Sept. 29, 1992) (on file with the Iowa Law Review) (noting that although the words "at the relevant level" in Principle 10 and the Rio Declaration generally do not provide for public participation in decision-making on the international level, Agenda 21, another UNCED instrument, anticipates entry points into multilateral processes for members of the public). But see Jeffrey D. Kovar, A Short Guide to the Rio Declaration, 4 Colo. J. Int’l Envtl. L. & Pol’y 119, 131 (1993) (asserting that Principle 10 "calls for broad participation by the public at national and international levels").

Private parties, including scientists, businesspeople, and representatives of public interest organizations, have begun to participate as observers in international negotiations, especially those on environmental issues. As a result, practice with respect to nongovernmental observers now varies widely among international organizations, which appear to have significantly differing theories of public participation.17

Public participation in law-making functions, particularly those that unelected officials carry out in settings such as administrative rulemakings in the United States, has been justified on theories of facilitating accountability to the public,18 informed decisionmaking by public authorities,19 and


18. See, e.g., Sierra Club v. Costle, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (“Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall.”); Arthur E. Bonfield, The Federal APA and State Administrative Law, 72 Va. L. Rev. 297, 316-18 (1986) (“[A]n administrative agency is not ordinarily a representative body, its deliberations are not usually conducted in public, and its members are not subject to direct political controls in the same way as legislators. . . . Broad citizen participation in the rulemaking process is therefore an excellent check on agencies that are unresponsive to public needs.”); Daniel J. Fiorino, Environmental Risk and Democratic
governmental efficiency. The National Environmental Policy Act, for similar reasons explicitly provides for public participation in preparing environmental documentation required by that legislation. Numerous environmental statutes require public notice of proposed regulations, an opportunity for public comment.


The job of the public administrator is not merely to make decisions on the public’s behalf, but to help the public deliberate over the decisions that need to be made. Rather than view debate and controversy as managerial failures that make policy-making and implementation more difficult, the public administrator should see them as natural and desirable aspects of the formation of public values, contributing to society’s self-understanding.

Id. at 1637. See also Ann Bray, Comment, Scientific Decision Making: A Barrier to Citizen Participation in Environmental Agency Decision Making, 17 Wm. Mitchell L. Rev. 1111 (1991) (analyzing responses to survey of agency staff and members of public).

19. See, e.g., National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672, 683 (D.C. Cir. 1979) (public participation “opens up the process of agency policy innovation to a broad range of criticism, advice, and data”); Bonfield, supra note 18. Bonfield states:

An agency’s accumulated knowledge and expertise are rarely sufficient to provide all the needed data for rulemaking decisions. Persons who are affected by agency actions are often in the best position to provide much of the specific information necessary for wise rule formulation. An opportunity for interested persons to inform appropriate administrators of facts, views, or arguments that they consider relevant to a proposed rule is, therefore, necessary for the sound operation of government.

Id. at 316-17. See also James T. Harrington & Barbara A. Frick, Opportunities for Public Participation in Administrative Rulemaking, 15 Nat. Resources Law. 537, 557-98 (1983) (“Administrative agencies actively solicit detailed, technical information from the regulated community in recognition that it is impossible to draft appropriate regulations in a factual vacuum. . . . [I]t is not only a person’s right, but his duty to provide agencies with . . . hard technical data and scientific information on the proposal and its economic effect.”); Magat & Schroeder, supra note 18, at 316-19 (“Fairness and accuracy are interrelated, because techniques for ensuring fairness — adequate notice and the opportunity to participate meaningfully in proceedings affecting one’s interests — will also ensure accuracy.”); Paul R. Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 280 (1978).


on those proposals, and agency response to public comments. Congress included notice-and-comment rulemaking requirements in the Administrative Procedure Act, generally applicable to a wide variety of domestic United States administrative processes, to assure the responsiveness and efficacy of bureaucratic initiatives. Although the details of the mechanisms obviously differ somewhat, other municipal legal systems reflect similar underlying policies.

At a high level of generality the analogy between international procedures, in which diplomats and other technical experts ordinarily represent governments, and domestic administrative law is a good one, at least in the field of environment. There is no principled reason why the standards set out in Principle 10 should not apply at the international, as well as the domestic, level. Indeed, governments may not adequately


26. A leading treatise describes administrative rulemaking as “one of the greatest inventions of modern government.” . . . During coming decades, the prospect is that governments all over the world will adopt American ideas about rulemaking as a mainstay of governmental machinery.” Kenneth C. Davis, Administrative Law Treatise § 6:1, at 448-49 (2d ed. 1978); see Final Report of the Attorney General’s Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. 102 (1941) (asserting that rulemaking “should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses” and help decision-makers obtain “the information, facts, and probabilities which are necessary to fair and intelligent action.”); see also H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S.C.C.A.N. 1195, 1205 (The APA’s “public information section is basic, because it requires agencies to take the initiative in informing the public.”).

27. See generally Participation and Litigation Rights of Environmental Associations in Europe (Martin Fuhr & Gerhard Roller eds., 1991) [hereinafter Participation and Litigation Rights]. See also sources cited supra note 14 (discussing international instruments specifying rights of participation on national level in context of environmental impact assessment and risk communication).

28. Participation in international processes through national governments is not necessarily an adequate substitute for direct access to an international forum. For example, the World Bank and the International Monetary Fund have arranged for accreditation of representatives of public interest organizations to annual meetings of their Boards of Governors through national delegations. A number of governments, however, have refused to approve the participation of their own nationals. See Environmental Impact of World Bank Lending: Hearings Before the Subcomm. on Human Rights and International Organizations and Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 101st Cong., 1st Sess. 22, 41-42 (1989) (statement of David A. Wirth). But cf. Ibrahim
represent certain issues, positions, interests, or concerns in multilateral fora.\textsuperscript{29} To the extent that municipal political and legal structures are more responsive than the international legal order to public concerns, the discontinuities between the two may delay or impede associated domestic requirements like ratification of international agreements.\textsuperscript{30} This phenomenon, in turn, may undermine the efficacy of international cooperation.\textsuperscript{31}

As noted in the domestic context, "[t]he goal of public participation . . . is not to transfer the actual decision-making power over the formulation and adoption of rules to the interested public, but only to assure an adequate opportunity for interested persons to communicate their views and information to the appropriate . . . officials."\textsuperscript{32} As on the domestic level, input from members of the public should not disrupt the smooth functioning of international mechanisms in which the chief participants are governments.\textsuperscript{33} Further, international processes cannot be expected to incorporate the lawmaking requirements of every participating nation.

Even within these limits, the international community can make substantial progress in creating mechanisms to assure the integrity and public accountability of international law. While care is required in making analogies between municipal legal systems and international law, the requirements associated with domestic rulemaking in the United States might be a starting point for creating those mechanisms. Perhaps, however, an entirely different scheme is necessary to respond to the peculiarities of the international legal system, as well as to the domestic legal systems of various states. Despite the potential complexities, it is nonetheless possible generically to identify a minimum set of requirements, using Principle 10 of the Rio Declaration as a guidepost.

F.I. Shihata, The World Bank and Non-Governmental Organizations, 25 Cornell Int'l L.J. 623, 641 (1992) (statement by World Bank Vice President and General Counsel describing Bank's intention to "pay[] particular attention to the practice of involving the beneficiaries and potentially adversely affected populations at the earliest possible stage in the design of Bank-financed projects").

\textsuperscript{29} See infra text accompanying notes 77-83 (discussing "tuna dolphin" dispute in GATT).

\textsuperscript{30} See infra note 97 and accompanying text (discussing the "lowest common denominator" and "slowest boat" phenomena).


\textsuperscript{32} Bonfield, supra note 18, at 319.

\textsuperscript{33} The United Nations Charter explicitly provides for participation by private entities as observers in the work of the Organization. U.N. Charter art. 71 ("The Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence."). The principal vehicle governing consultative relationships with nongovernmental organizations is E.S.C. Res. 1296, U.N. ESCOR 45th Sess., Supp. No. 1, at 21, U.N. Doc. E/4548 (1968). Paragraph 13 of that instrument specifies that consultative arrangements with nongovernmental organizations "should not be such as to overburden the [Economic and Social] Council or transform it from a body for co-ordination of policy and action, as contemplated in the [UN] Charter, into a general forum for discussion." Id.
First, the public should have access to interim drafts of legal and other significant instruments, including multilateral treaties, decisions of international organizations, and nonbinding principles and guidelines.\textsuperscript{34} Second, nongovernmental entities ought to have an opportunity to comment on those drafts, to have their critiques distributed to governmental negotiators and the secretariats of international organizations, and to have their suggestions considered in good faith by representatives of states and international organizations. Finally, multilateral fora should permit those nonstate actors demonstrating an economic stake or other serious concern or expertise with respect to a particular subject matter to participate as observers in at least some negotiating sessions. A threshold requirement of this sort, analogous to the "standing" inquiry in domestic law,\textsuperscript{35} would assure representation of affected interests without distorting the fundamental focus on representatives of states.

At least one precedent on the international level goes considerably further than this proposal. In the International Labor Organization (ILO), founded just after World War I, workers and employers organizations are participating, voting delegates to the annual International Labor Conference. The ILO's "tripartite" structure assures that nongovernmental representatives equal governmental delegates in total numbers at the Conference, which is the ILO's plenary body that adopts binding multilateral conventions.\textsuperscript{36} In any event, the complexities of the task should not distract from the need for greater accountability as international law begins to address more issues that affect people's lives, livelihoods, and the very habitability of the planet.

II. INTERNATIONAL SUPERVISORY MECHANISMS AND THE PUBLIC

Without adequate implementation, legal rules, international as well as domestic, are only black marks on a piece of paper. Consequently, many federal environmental statutes not only authorize governmental authorities, but also empower members of the public, to sue polluters directly for violations of those laws. These "citizen suits" supplement governmental

\textsuperscript{34} See supra note 13 (distinguishing binding and nonbinding instruments).

\textsuperscript{35} See, e.g., E.S.C. Res. 1296, supra note 33, which establishes standards organizations should satisfy to obtain consultative status with the UN Economic and Social Council (ECOSOC). The organization must "be of representative character and of recognized international standing," id. at para. 4, "represent a substantial proportion, and express the views of major sections, of the population or of the organized persons within the particular field of its competence," id., "have a democratically adopted constitution," id. at para. 5, and "have the authority to speak for its members through its authorized representatives." Id. at para. 6.

enforcement efforts, especially those that are inadequate or deficient.\textsuperscript{37} Proceeding under a theory of judicial review, private parties may even compel the government and governmental officials to comply with applicable legal standards.\textsuperscript{38} In addition to creating a remedy for individual grievances, this "private attorney general" model of citizen enforcement furthers the public interest by encouraging strict compliance with applicable standards.\textsuperscript{39}

On the international level there is also great, and perhaps increasing, concern for full compliance with, and adequate mechanisms to assure observance of, environmental norms. States undertaking major environmental obligations often want assurances that their treaty partners to multilateral agreements are in fact implementing the same requirements. Especially in the environmental field, where fulfilling international obligations may involve significant economic costs, deviations from international norms can create competitive advantages for noncomplying states. Accordingly, assuring widespread compliance by removing the benefits to potential scofflaws and laggards is in the interest of both states and the public worldwide. Moreover, members of the public are the ultimate intended beneficiaries of many international obligations, particularly in the areas of environment and public health and welfare.

A variety of factors can stymie efforts by one state to compel performance by another. The availability of compulsory, third-party, state-to-state dispute resolution alone does not assure full compliance with international environmental norms.\textsuperscript{40} For example, a state whose own performance of international obligations is inadequate may hesitate to proceed against others for fear of calling attention to itself or establishing undesirable precedents. Notwithstanding a meritorious legal claim on an environmental matter, one state may be reluctant to initiate a third-party dispute settlement process against another state for fear of jeopardizing other strategic or economic bilateral relationships. To encourage conscientious and widespread observation of international standards, obligations can be structured in a way that facilitates implementation.\textsuperscript{41} Less formal, streamlined dispute


\textsuperscript{38} Actions initiated by a private party pursuant to a citizen suit provision to compel federal officials to perform nondiscretionary acts or duties are analytically distinct from citizen suits. Timbers & Wirth, supra note 37, at 405 n.8. Under the Administrative Procedure Act, a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (1988). For citations to the federal environmental laws providing for judicial review, see Timbers & Wirth, supra note 37, at 407 n.13.

\textsuperscript{39} See generally Timbers & Wirth, supra note 37.


settlement approaches for treating allegations of noncompliance, such as those included in the 1990 amendments to the Montreal Protocol on Substances That Deplete the Ozone Layer, may also overcome some impediments to compliance.

Because of the numerous disincentives for governments to encourage other governments to abide by international obligations and because of the substantial impediments to initiating even informal proceedings, the international legal system presents, if anything, a greater need for private attorneys general than does municipal law. There is, however, nothing analogous to a domestic citizen suit or judicial review action in international environmental law.

Several nonbinding recommendations on transfrontier pollution adopted under the auspices of the Organization for Economic Cooperation and Development (OECD) in the late 1970s articulate an equal right of access for private parties to national remedies for pollution originating in one state and causing risks or harm in another. The Nordic Environmental Protection Convention establishes similar avenues in a binding treaty


Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

The provisions of the first paragraph of this Article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out.
context for both abatement of and compensation for harm from transboundary pollution. Still, the availability of remedies at the national level, a matter of domestic law, circumscribes the efficacy of these remedies. Particularly as applied to international legal norms, this principle of equal right of access may be of little utility. In the United States, for example, the "self-executing" doctrine can substantially constrict access to judicial relief by private parties in response to a violation of an international agreement.45 Indeed, the United States and Canada agreed to an international arbitration of the famous Trail Smelter dispute46 precisely because the law of both countries precluded a domestic judicial remedy for affected private parties.47

The recently adopted trilateral North American Agreement on Environmental Cooperation (NAAEC)48—the so-called "side" or "supplemental" agreement to the North American Free Trade Agreement49—is something of a hybrid that creates entry points for the public at the international level primarily to assure the enforcement of domestic environmental laws. The NAAEC establishes a Commission for Environmental Cooperation headed by the environment ministers of the three states to the agreement, serviced by a professional secretariat, and advised by a committee of individuals appointed in their personal capacities.50 Private organizations and individuals may complain to the secretariat, alleging that one of the three parties to the NAAEC has failed effectively to enforce its environmental law.51

There are, however, a number of potentially insurmountable impediments to a resolution of such a submission on the merits. A valid complaint must meet the subjective requirement of "appear[ing] to be aimed at

Nordic Environmental Protection Convention, supra, art. 3. See generally Charles Phillips, Nordic Co-operation for the Protection of the Environment Against Air Pollution and the Possibility of Transboundary Private Litigation, in Transboundary Air Pollution: International Legal Aspects of the Co-operation of States 153 (Cees Flinterman et al. eds., 1986); Rubinton, supra note 4, at 489-91.


50. NAAEC, supra note 48, arts. 8-9, 11, 16.

51. Id. at art. 14.
promoting enforcement rather than at harassing industry.\textsuperscript{52} The secretariat will request a response from the government in question only if the complaint "raises matters whose further study in this process would advance the goals"\textsuperscript{53} of the NAAEC, a similarly vague standard. The secretariat may move forward to the next step, the preparation of a factual record, only if the three environment ministers, who are governmental representatives, approve by a two-thirds majority.\textsuperscript{54} The Commission's jurisdiction is circumscribed by the exclusion of the very large category of domestic measures "the primary purpose of which is managing the commercial harvest or exploitation . . . of natural resources"\textsuperscript{55} and "any statute or regulation . . . directly related to worker safety or health."\textsuperscript{56} Even then, governments may avoid adverse findings if they can justify non-enforcement that meets the highly indeterminate test of "a reasonable exercise of . . . discretion in respect of investigatory, prosecutorial, regulatory or compliance matters"\textsuperscript{57} or that "results from bona fide decisions to allocate resources to enforcement in respect of environmental matters determined to have higher priorities."\textsuperscript{58} In any event, the sole remedy is a factual record, which does not become public unless two of the three ministers agree.\textsuperscript{59}

Precedents outside a strictly environmental context provide examples of multilaterally established mechanisms through which private parties can assure that states implement international obligations. The supervisory machinery of the ILO has a number of mechanisms available to private parties, as represented by workers and employers organizations, to draw public attention to nonobservance of binding standards established under ILO auspices.\textsuperscript{60} International human rights law creates remedies for

\textsuperscript{52} Id. at para. 1(d).
\textsuperscript{53} Id. at para. 2(b).
\textsuperscript{54} Id. at art. 15, para. 2.
\textsuperscript{55} NAAEC, supra note 48, at art. 45, para. 2(b).
\textsuperscript{56} Id. at para. 2(a).
\textsuperscript{57} Id. at para. 1(a).
\textsuperscript{58} Id. at art. 45, para. 1(b).
\textsuperscript{59} Id. at art. 15, para. 7.
\textsuperscript{60} One such mechanism, specified in Articles 26 to 29 of the ILO Constitution, supra note 36, can be initiated by the ILO's Governing Body upon the request of a delegate, including a worker or employer, to the Conference. The Governing Body can then establish an independent "Commission of Enquiry" to adjudicate a complaint alleging failure by a state to fulfill its obligations under an ILO convention. Alternatively, under articles 24 and 25 of the ILO Constitution, an organization of workers or employers can make a "representation" alleging a state's nonobservance of an ILO convention to which that state is a party. The tripartite Governing Body Committee on Freedom of Association is another mechanism for resolving complaints from governments and workers' and employers' organizations alleging violations of important ILO human rights conventions guaranteeing the right to organize and to bargain collectively. Tellingly, because of the importance of these principles of "freedom of association" to the ILO's constitutional aims and purposes, complaints may be lodged with the Committee on Freedom of Association whether or not that state has ratified the two freedom of association conventions. Last, the Committee of Experts on the Application of Conventions and Recommendations, whose members are appointed in their individual capacities, receives regular reports from governments on progress in the implementation of ratified conventions. The Committee of Experts also receives comments from workers' and employers' organiza-
private parties against states before bodies such as the UN Human Rights Committee, the UN Commission on Human Rights, and regional courts and commissions. Some of these procedures could serve as useful models for access by nongovernmental parties to international remedies to redress environmental harm.61

In a major step, the World Bank's Board of Executive Directors recently created an independent Inspection Panel that provides new opportunities for private parties to initiate proceedings to encourage performance of international standards. According to a resolution adopted in September 1993,62 nongovernmental organizations may seek review of both failures by the Bank's professional staff to observe that institution's own internal standards and inadequate supervision by Bank staff of the implementation of loan covenants by borrowing country governments. The new Panel consists of three independent experts appointed in their personal capacities. It is not yet clear whether the Panel will be primarily investigatory or an adjudicatory body, and in the end it will probably include some elements of both approaches.

The resolution creating the Panel establishes some potentially significant limitations to its authority. Only organizations, and not individuals, may initiate an action before the Inspection Panel. Additionally, the Panel is confined to considering "failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank."63 These internal Bank standards, which govern such issues as the prior evaluation of environmental impacts,64 involuntary resettlement,65 and indigenous peoples66 do not necessarily reflect customary norms in areas such as human rights. In

62. International Bank for Reconstruction and Development Res. No. 93-10; International Development Association Res. No. 93-6 (Sept. 22, 1993) [hereinafter Inspection Panel Resolution]. The World Bank's Board of Executive Directors adopted this resolution after release of a report prepared as a result of an ad hoc independent review of the Bank-funded Sardar Sarovar Projects. Sardar Sarovar: Report of the Independent Review (1992). In 1985, the World Bank agreed to lend a total of $450 million to the Government of India for a series of dams and irrigation projects on the Narmada River. One of them, the Sardar Sarovar Dam, became the subject of heated environmental and human rights controversy. In an unprecedented step, the Bank appointed Bradford Morse, former Administrator of the UN Development Agency, to lead a panel of independent experts appointed in their personal capacities in examining the undertaking. The Independent Review confirmed the anticipated displacement of at least 100,000 people, the lack of an adequate prior environmental analysis by either the borrower or the Bank, and virtually no attention by the Bank to the Project's potential to increase the incidence of water-borne disease. This extraordinary independent review in effect became a conduit for the local public—the intended beneficiary of the project—to have an indirect input into the Bank's activities. See generally David B. Hunter & Lori Udall, The World Bank's New Inspection Panel, Env't, Nov. 1994, at 2.
addition, the Panel, after receiving a request for inspection, may proceed only with the subsequent approval of the Bank's Board of Executive Directors. Despite these weaknesses, the new Inspection Panel creates entirely new formal opportunities for nonstate actors to assure compliance with international standards, both by the Bank's professional staff and, indirectly, by borrowing country governments.

Article 169 of the Treaty of Rome establishes a mechanism within the European Economic Community (EEC) that is perhaps more analogous to a suit for judicial review under United States law. That provision creates a cause of action before the European Court of Justice alleging that a member state has failed to fulfill an obligation under the Treaty or has not implemented a mandatory Community instrument, such as a directive. In contrast to the institution of judicial review in the United States, a private party cannot commence an action as of right, but must instead petition the Commission of the European Communities, which alone has power to initiate a proceeding against a member state before the Court of Justice. As recently amended by the Treaty on European Union, the "Maastricht Treaty," Article 171 of the Treaty of Rome permits the Court of Justice both to compel member state performance and to assess monetary penalties.

67. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. After the entry into force of the Maastricht Treaty, infra note 70, on November 1, 1993, the European Community changed its name to the European Union (EU). The European Economic Community, created by the Treaty of Rome, continues to exist as a legal entity within the expanded framework of the European Union. The Commission of the European Communities continues to use that title in legal and formal contexts, but otherwise now refers to itself as the European Commission. The Council of Ministers of the European Communities changed its name to the Council of Ministers of the European Union.


69. Article 173, paragraph 1 of the Treaty of Rome, supra note 67, creates a cause of action pursuant to which "[t]he Court of Justice shall review the lawfulness of acts . . . of the [EU] Council and the Commission," the principal policy-making organs of the Community. But in contrast to Article 169 proceedings against member states, Article 173, paragraph 2 expressly provides that "[a]ny natural or legal person may . . . [institute proceedings] against a decision addressed to [that person] or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and specific concern to [the former]." Although Article 173 appears to create a mechanism for private parties to seek judicial review of the legality of actions taken by the Commission or the Council, restrictive standing rules and a narrow interpretation of the Treaty of Rome have tended to undermine the effectiveness of that legal mechanism. Ludwig Kramer, Participation of Environmental Organisations in the Activities of the EEC, in Participation and Litigation Rights, supra note 27, at 129, 134.

against member states for violations of Community law. More importantly, the Article 169 procedure creates informal channels through which the Commission can encourage implementation of Community law before reference to the Court of Justice for a formal judgment.  

Mechanisms initiated by private parties to encourage states' compliance with international environmental norms need not disrupt existing international law or institutions. Nor must vehicles for measuring states' performance of legal obligations be wholly, or even primarily, adjudicatory in nature. Indeed, many existing and effective international remedies rely primarily on appeals to public opinion, the so-called "mobilization of shame." New international bodies, like those in the ILO scheme, might be created to encourage compliance with international environmental obligations. Alternatively, the jurisdiction and procedure of others, like the underutilized, but still extant Permanent Court of Arbitration, might be expanded. These modifications might include the establishment of preliminary, streamlined screening functions to assure quick dismissal of frivolous or unsubstantiated complaints. If nations create effective domestic causes of action, national courts might also be efficacious fora for enforcing international legal obligations undertaken by their own governments.

71. See Peter H. Sand, Lessons Learned in Global Environmental Governance 32-33 (1990) (noting that "[t]he mere opening of EEC action can ... have internal political and economic consequences in member states," and compiling statistics of letters of notice, reasoned opinions, and references to Court of Justice rendered by Commission in environmental context); Alan Dashwood & Robin White, Enforcement Actions Under Articles 169 and 170 EEC, 14 Eur. L. Rev. 388, 388-89 (1989) (observing that informal communications between the Commission and the member state normally precede formal action and noting cases initiated and resolved).


73. See supra notes 60-61 and accompanying text.


75. Cf. 1907 Hague Convention, supra note 74, at arts. 9-36 (establishing international commissions of inquiry to settle factual disputes); 1899 Hague Convention, supra note 74, at arts. 9-14 (same).

Although supervisory mechanisms invoked by nonstate actors are largely unfamiliar in the environmental area, there is reasonable precedent in other areas of international law. More importantly, the potential benefits of effective measures to encourage states' observation of international environmental norms suggest that actions initiated by nongovernmental entities to encourage compliance deserve focused attention.

III. INTERNATIONAL DISPUTE SETTLEMENT AND THE PUBLIC

As previously discussed, individuals as well as states have a stake in states' full performance of international obligations. Adjudications of rights and obligations among states in formal, third-party dispute resolution processes, such as contentious cases before the International Court of Justice (ICJ) or international arbitral tribunals, may also affect both private interests and matters of public concern.

A recent example demonstrates the need for procedural guarantees of public access to international dispute settlement proceedings. The "tuna dolphin" dispute,77 addressed within the framework of the General Agreement on Tariffs and Trade (GATT),78 was an international challenge to a ban on imports of yellowfin tuna into the United States from Mexico and other countries. Acting pursuant to a court order obtained by two private environmental organizations,79 the Executive Branch imposed these trade restrictions under U.S. legislation designed to protect marine mammals harmed during tuna fishing operations with "purse seine" nets.80

After consultations with the United States failed to provide a satisfactory resolution, Mexico requested the creation of a three-member dispute

---


In strong contrast to the domestic legal process, the oral proceedings and written statements before the GATT panel were inaccessible to the public. Moreover, the environmental groups that initiated the U.S. domestic legal action had no right or opportunity to appear in oral proceedings before, or to make a formal written submission to, the GATT panel. Representation of the United States by the Executive Branch, which had implemented the tuna ban only under a court order, raised additional questions concerning the adequacy of the spectrum of issues presented to the GATT panel.

The very restrictive public access policies governing GATT dispute panels appear to be something of an aberration. As in GATT dispute

---

81. GATT, supra note 78, arts. XXII, XXIII (consultation and nullification and impairment); Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance [hereinafter GATT Understanding], reprinted in Basic Instruments and Selected Documents 210, 217 (26th Supp. 1980).

82. See GATT Understanding, supra note 81, at Annex para. 6(iv) ("Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute.").

83. Dispute settlement in GATT does not provide for participation by private parties as intervenors or amici. See id. at para. 15 ("Any contracting party having a substantial interest in the matter before a panel, and having notified this to the Council, should have an opportunity to be heard by the panel."). In the tuna dolphin dispute, ten other GATT parties and the European Economic Community made written submissions to the panel, all of which were critical of the MMPA ban and most of which argued that that action is inconsistent with GATT. See United States — Restrictions on Imports of Tuna, supra note 77, at 1610-16.

84. The Uruguay Round of Multilateral Trade Negotiations in GATT concluded in December 1993 with a proposal to establish a new World Trade Organization (WTO) to replace the GATT as an international institution. See Agreement Establishing the World Trade Organization, 33 I.L.M. 15. Revised procedures for the WTO would relax the confidentiality requirements for dispute settlement somewhat. See Understanding on Rules and Procedures Governing the Settlement of Disputes para. 18.2, 33 I.L.M. 114, 124, which states:

Written submissions to the panel or the [newly created] Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statement [sic] of its own positions to the public. Members shall treat as confidential, information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

settlement, only states can be parties to contentious cases before the ICJ. But in contrast to the GATT, the ICJ's oral proceedings are customarily open and accessible to the public. Written pleadings and other document-

The United States will challenge the dispute settlement panel's failure to provide a fair hearing and due process, and will ask for a full review of the report, both substantively and procedurally, by the GATT council, or reconsideration by the panel in this case. The GATT Council or panel should hold further proceedings in public and allow non-governmental organizations (NGOs) to participate. In addition, all documents filed from any source should be immediately made public.

USTR Kantor to Challenge GATT Panel's Failure to Provide Open Hearings and Due Process Regarding U.S. Tuna Embargoes, Substantive Matters, Office of the United States Trade Representative Press Release (May 23, 1994). In a discussion of the second report, the GATT Council is reported to have rejected a proposal along these lines from the United States that would have opened further Council meetings on that case to the public. See GATT Focus, Aug.-Sept. 1994, at 6. Mexico was also said to be considering a request to the GATT Council to adopt the first tuna report. See Frances Williams, GATT Shuts Door on Environmentalists, Fin. Times, July 21, 1994, at 6. As of this writing, neither report has been adopted by the GATT Council and hence neither has yet acquired legal force. See William J. Davey, Dispute Settlement in GATT, 11 Fordham Int'l L.J. 51, 94 (1987). One of the principal authorities on the GATT has observed that:

[The GATT] tends too often to try to operate in secrecy, attempting to avoid public and news media accounts of its actions. In recent years, this has become almost a charade, because many of the key documents, most importantly the early results of a GATT dispute settlement panel report, leak out almost immediately to the press. For purposes of gaining a broader constituency among the various policy interested communities in the world, gaining the trust of those constituencies, enhancing public understanding, as well as avoiding the "charade" of ineffective attempts to maintain secrecy, the GATT could go much further in providing "transparency" of its processes.


86. Id. at art. 46 ("The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted."); Rules of Court art. 59 (1978) (same) [hereinafter Rules of Court]; see Shabtai Rosenne, Procedure in the International Court: A Commentary on the 1976 Rules of the International Court of Justice 129 (1983) (documenting only "two exceptional occasions" when the ICJ held parts of hearings in closed sessions). Oral hearings before the Permanent Court of International Justice (PCIJ), which had a similar rule, "in practice . . . [were] invariably public." Manley O. Hudson, The Permanent Court of International Justice 172 (1934). But see 1907 Hague Convention, supra note 74, at art. 66 (Oral proceedings "are public only if it be so decided by the [arbitral] tribunal, with the assent of the parties."); 1899 Hague Convention, supra note 74, at art. 41 (same).

Open, public hearings are fundamental to Anglo-American jurisprudence. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) ("[H]istorically both civil and criminal trials have been presumptively open."); id. at 599 (Stewart, J., concurring) ("[T]he First and Fourteenth Amendments clearly give . . . the public a right of access to trials . . . , civil as well as criminal."); Gannett Co. v. DePasquale, 443 U.S. 368, 420 (1979) (Blackmun, J., dissenting) ("[T]here is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history."). One commentator gives the following rationale for this precept:

Persons not called as parties to the suits before the court may nevertheless be affected, or think themselves likely to be affected, by pending litigation. They should have the opportunity of learning whether they are thus affected, and of protecting
tary filings are also ordinarily available to the public by the time the Court begins oral proceedings and are eventually published.\textsuperscript{87}

Even so, there could be instances similar to the GATT tuna dolphin dispute in which the parties' arguments do not reflect the full range of issues presented by the dispute or in which members of the public have additional significant, relevant information to provide. The Statute of the Court and its rules anticipate both discretionary intervention\textsuperscript{88} and intervention as of right by states.\textsuperscript{89} But because nongovernmental entities themselves accordingly; they have "a right to be present for the purpose of hearing what is going on."

\textemdash

In general, therefore, and as a rule, a trial must be conducted in such a way as to allow the access of the general public.

6 Wigmore on Evidence § 1834 (Chadbourn rev. 1976) (citation omitted).

A number of international human rights instruments explicitly address public access to domestic adjudicatory processes. See International Covenant on Civil and Political Rights, supra note 16, at art. 14, para. 1 (providing that in criminal cases or cases at law "everyone shall be entitled to a fair and public hearing," although the public may be excluded "for reasons of morals, public order . . . or national security in a democratic society, or when the interest of the private lives of the parties so requires," or when justice would be prejudiced); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, at para. 1, 213 U.N.T.S. 222, 228 (same); Universal Declaration of Human Rights, supra note 16, art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

87. Rules of Court, supra note 86, at art. 53 (1978) ("The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings."). The 1978 revision to the Court's rules altered the previous text, which had required the consent of the parties, to the current "after ascertaining the views" of the parties before the Court makes its own decision. The revision also established the date for public release as the commencement of oral hearings instead of the termination of the case, as previously. See Rosenne, supra note 86, at 118. The PCIJ once rejected a request by a party not to publish written proceedings. Manley O. Hudson, The Permanent Court of International Justice: 1920-1942, at 560 n.80 (1943).

88. ICJ Statute, supra note 85, at art. 62 ("Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene."); Rules of Court, supra note 86, at arts. 81, 83-85 (requiring intervening states to describe the legal interest that might be affected and the scope of the proposed intervention and providing for notification to other parties, which then may object to the request for intervention). See generally Rosenne, supra note 86, at 175-81. There were few, if any, precedents for Article 62 of the ICJ Statute, which was a "wholly new concept . . . in international law." C.M. Chinkin, Third-Party Intervention Before the International Court of Justice, 80 Am. J. Int'l L. 495, 498 (1986).

89. ICJ Statute, supra note 85, at art. 63 ("Whenever the construction of a convention to which states other than those concerned in the case are parties is in question . . . [such a state] has the right to intervene in the proceedings."); Rules of Court, supra note 86, at arts. 82-84, 86 (requiring intervening states to identify provisions of international agreement at issue and to justify intervenor's proposed interpretation and providing for notification to other parties, which then may object to the request for intervention). See generally Rosenne, supra note 86, at 177-82. In contrast to Article 62, Article 63 had a direct precursor in the PCIJ's statute and has been assumed to have the same meaning as its predecessor. D.W. Grieg, Third Party Rights and Intervention Before the International Court, 32 Va. J. Int'l L. 285, 307 (1992). Similar provisions appear in the statute of the Permanent Court of Arbitration. See 1907 Hague Convention, supra note 74, at art. 84; 1899 Hague Convention, supra note 74, at art. 56. The ICJ's Statute, supra note 85, articulates less demanding requirements for both
cannot be parties to a contentious case before the ICJ and cannot be bound by its judgment, those entities cannot intervene in a proceeding before the Court.\(^9\)

In practice, however, the judgment of an international tribunal may affect the interests of private parties or the public generally no less than those of third party states.\(^9\) Policy reasons justifying intervention by states in contentious cases before the ICJ apply with similar force to intervention by nongovernmental entities if there is reason to believe that the states party to a dispute involving questions of public international law will not adequately represent particular private interests. Limited participation by nonstate actors in appropriate cases could reduce the risk of subsequent duplicative proceedings involving private parties in municipal fora or international arbitral tribunals in which nonstate entities have standing. The presence of affected nongovernmental parties would widen perspectives on the underlying dispute, thereby reducing the likelihood of erroneous conclusions. Their participation also would make an effective resolution more likely, especially in cases that involve multiple actors at least some of which are nongovernmental entities. In situations like GATT dispute settlement, which has been the subject of significant controversy since the panel's tuna dolphin report, greater receptivity to private parties as potential amici could enhance the stature of international adjudication.\(^9\)

Private parties might submit additional statements or arguments in cases like the GATT tuna dolphin dispute in a capacity and manner similar to that of amici curiae in domestic law.\(^9\) If an international tribunal

discretionary intervention and intervention as of right than for the initiation of a claim by an aggrieved state. Customary international law contains an implicit "standing" requirement that ordinarily turns on a demonstration that one state has violated an obligation owed to another. See Case Concerning the Barcelona Traction, Light & Power Co., Ltd. (Second Phase) (Belg. v. Spain), 1970 I.C.J. 3, 32-33; South West Africa Cases (Second Phase) (Eth. & Liber. v. S. Afr.), 1966 I.C.J. 6, 47; Restatement, supra note 8, § 902.

90. Because as a general matter nonstate actors are not subjects of international law, it would seem that they technically cannot have a legal interest in a proceeding before the ICJ. Cf. ICJ Statute, supra note 85, at art. 34, para. 2, art. 66, para. 2 (providing, in both contentious cases and cases of requests for advisory opinions, for submissions by international organizations, which cannot be parties in cases before the Court); Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957, art. 37, para. 2, 298 U.N.T.S. 147, 154 (providing for intervention by private parties in cases before Court of Justice "except in cases between Member States, between institutions of the Community or between Member States and institutions of the Community").

91. See, e.g., Committee of U.S. Citizens in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) (unsuccessfully seeking to enforce ICJ judgment as domestic law); Chinkin, supra note 88, at 504 (1986) (identifying Barcelona Traction, 1970 I.C.J. 3 as example in which multinational corporation might be permitted to intervene).

92. See, e.g., GATT Focus, Aug.-Sept. 1994, at 6 (describing assertion of United States in debate in GATT Council on second tuna panel report that "with the public now more interested in trade issues, moves for greater openness such as the holding of the public meeting [of the GATT Council] would impart greater credibility to the GATT system"). Cf. Chinkin, supra note 88, at 500-01; Lori F. Damrosch, Multilateral Disputes, in The International Court of Justice at a Crossroads 377, 387 (Lori F. Damrosch ed., 1987) (favoring greater receptivity to intervention); Grieg, supra note 89, at 363-64 (same).

93. At least one author advocates allowing private parties limited rights of participation as amicus curiae in the ICJ. John T. Miller, Jr., Intervention in Proceedings Before the
grants amicus status only after approving a written application, to which the states party to the underlying dispute could respond, then the tribunal could assure that there is no disruption to the orderly administration of justice. The tribunal might require an application to document the applicant's interest, the adequacy of representation of that interest by existing parties and amici, the applicant's potential contribution to satisfactory resolution of the dispute, the prejudice to the original parties and intervener states if participation is permitted, and the scope of the proposed submission as amicus curiae. If the applicant were permitted to present a written submission, the tribunal could then decide the additional, distinct question of whether to hear the applicant during oral proceedings. In light of the significant potential benefits to the international legal system and the public and the numerous procedural safeguards available to prevent abuse, the role of the public in formal, third-party international dispute resolution demands considerably greater attention than it has received.

IV. NONCONSENSUS DECISION-MAKING PROCEDURES

Another consequence of the primacy of states in the international legal system is the emphasis on consent and consensus in multilateral undertakings. In contrast to law-making techniques in many municipal legal systems, the "legislative" instruments of multilateral treaties—the principal source of international environmental law—are ordinarily adopted by "consensus," which in practice implies unanimity. Even after acquiescing in those agreements' adoption, states may decline to be bound by most multilateral agreements merely by withholding approval in a subsequent domestic ratification process. International decision-making characterized by multiple junctures at which the consent of states is necessary can produce disappointing "lowest common denominator" obligations determined by

International Court of Justice, in 2 The Future of the International Court of Justice 550 (Leo Gross ed., 1976). Although this piece states that participation by private parties in contentious cases would "require a rather profound change of approach by the Court," it ultimately advocates that change. Id. at 560. Miller notes that the true stakeholder in a contentious case before the ICJ may be a nongovernmental entity, such as a multinational corporation or an alien denied equality of treatment, possessing helpful additional information or perspective. Id. at 552-53, 561. He notes that, in at least one instance, the employee of an international organization was permitted to file a written statement in a proceeding involving review of the judgment of an administrative tribunal concerning that employee. Id. at 561-62. Miller further argues that the court ought to regularize this practice by adopting a rule permitting affected employees to present written statements as a matter of right. Id. at 562. Miller concludes the court could correct or eliminate the principal drawbacks to the participation of nongovernmental entities in an amicus capacity—limited availability of pleadings and the potential to delay or complicate proceedings—through changes to the court's rules and appropriate standards for reviewing applications to file written statements as amici curiae. Id. at 560-63.

94. Cf. David L. Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721 (1968) (examining, in civil actions, the factors that determine whether and to what extent intervention is proper).

95. See Wirth, supra note 17, at 380 n.12.

the more reluctant, rather than the more ambitious, participants.97

Recently, there have been calls for nonconsensus decision-making, particularly in the environmental field. While wholesale adoption of majority voting in international law is neither likely nor necessarily desirable, limited departures from the principles of consent and consensus in certain discrete areas can overcome inertial drag and improve the effectiveness of international decision-making processes. For instance, the Declaration of the Hague, adopted in March 1989 by no fewer than seventeen heads of state, asserts the need for a new international body that would exercise some of the sovereign prerogatives of states and operate pursuant to "such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved."98

Amendments to existing multilateral agreements are particularly promising candidates for nonconsensus techniques. Under customary international law, an amendment to a multilateral treaty is binding only on those states that indicate their affirmative intent to accept the revised obligations, ordinarily through ratification or acceptance of the amendment.99 In effect, an amendment is a new agreement under international law.

Unfortunately, the fit between the law and many environmental problems is poor. Scientific knowledge, the touchstone of multilateral environmental negotiations, can change rapidly. Consequently, multilateral environmental agreements typically establish ongoing consultations among parties, including in some cases scheduled reviews of treaty provisions in light of new scientific developments.100 Repeated amendments may create classes of parties with different obligations. In the case of complex regulatory instruments, such as the recent multilateral agreements on international trade in waste101 and protection of the stratospheric ozone layer,102 an otherwise highly desirable reevaluation of international obligations may disrupt or destroy the effectiveness of the treaty regime. Presumably for this reason, the Montreal Protocol on Substances that Deplete the Ozone Layer rejects the customary rule of consensus by explicitly stating that a two-thirds majority may adopt "adjustments" to the agreement's reduction schedule.103 Such adjustments then are binding on

97. E.g., Sand, supra note 71, at 5. Obligations of an agreement may not enter into force for some time after adoption because of the delay required for ratification and the lag until a critical mass of states triggers entry into force, a related but distinct effect sometimes known as the "slowest boat" phenomenon. Id. at 14-18.


100. E.g., Montreal Protocol, supra note 10, at art. 6.

101. See Basel Convention, supra note 9.


103. Id. at art. 2, para. 9(c).
all parties to the original instrument.104

Outside the field of international environmental law, nonconsensus amendment rules, even in international "constitutional" instruments, are established even more firmly. The World Bank's constituent treaties, for instance, provide for most amendments to become effective for all members upon approval by three-fifths of the Bank's members holding four-fifths of the total weighted voting power.105 Although in practice a formal vote is rare,106 in theory other members could adopt amendments to the Bank's constitutional instruments over the objection of the United States, which, as the institution's largest single shareholder, still holds less than twenty percent of the weighted votes in the component institutions of the Bank. Likewise, the constituent agreements of the International Monetary Fund (IMF),107 the four regional development banks of which the United States is a member,108 the ILO,109 the World Health Organization (WHO),110 the International Atomic Energy Agency (IAEA),111 and the

104. Id. at art. 2, para 9(d). See generally Wirth & Lashof, supra note 11, at 110 (discussing distinction between adjustment and amendment).


109. ILO Constitution, supra note 36, at art. 36. Amendments bind all parties when adopted by a two-thirds majority of the annual Conference, one-half of whom represent workers and employers, not governments. Id. Amendments enter into force after ratification or acceptance by two-thirds of members of the Organization, including at least five of the ten states of chief industrial importance. Id. A pending amendment to the ILO's Constitution, which was adopted in 1986 but has not yet entered into force, would require adoption by three-fourths vote for certain amendments to the Constitution, which then would enter into force only upon ratification by three quarters of the members of the Organization. Instrument of Amendment of the Constitution of the International Labour Organisation, 69 Off. Bull., Ser. B, 60, 66-67 (1986), 72 Rec. Proc. 36/1, 56/7 (1986).

World Intellectual Property Organization provide for amendments that become effective for all members upon approval by a qualified majority.\(^{113}\) Decisions taken pursuant to an established international—typically treaty — regime are a second area where nonconsensus decision-making may be particularly palatable. The Board of Executive Directors of the World Bank, for example, exercises quasi-legislative authority in approving loan proposals by weighted majority vote.\(^{114}\) The IMF and the regional banks have similar majority voting rules in their constitutional instruments.\(^{115}\)


113. These situations are distinguishable from those in which a majority or qualified majority can adopt amendments that bind only those states that subsequently ratify, accept, or approve the amendments. See, e.g., Espoo Convention, supra note 14, at art. 14, paras. 3, 4, 30 I.L.M. 802, 809-10 (not in force) (three-fourths majority); Basel Convention, supra note 9, at art. 17, paras. 3, 5 (three-fourths majority); Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, art. 9, paras. 3, 5, T.I.A.S. No. 11,097, 26 I.L.M. 1516, 1532-33 (three-fourths majority), reprinted in 14 Envt'l Pol'y & L. 72, 74 (1985), and in Int'l Env't Rep. (BNA) 21:3101, at :3103; cf. ILO Constitution, supra note 36, at art. 19, paras. 2 & 5 (multilateral conventions adopted by two-thirds majority vote of conference, including workers' and employers' delegates, but bind only states that subsequently ratify); WHO Constitution, supra note 110, at art. 19 (multilateral conventions adopted by two-thirds majority vote but bind only states that subsequently become parties).

114. See Zamora, supra note 106, at 589-92 (characterizing Board votes as legitimizing decisions made by staff, and weighted majority voting as most successful in technical areas that rarely directly affect important interests of individual states).

115. See Agreement Establishing the European Bank for Reconstruction and Development, supra note 108, at art. 29, paras. 2, 3; Articles of Agreement Establishing the Asian Development Bank, supra note 108, at art. 33, paras. 2, 3; Agreement Establishing the African Development Bank, supra note 108, at art. 35, para. 5; Articles of Agreement of the International Development Association, supra note 105, at art. VI, sec. 3, para. b; Agreement Establishing the Inter-American Development Bank, supra note 108, at art. VIII, sec. 4, paras. b & c; Articles of Agreement of the International Finance Corporation, supra note 105, at art. IV, sec. 3, para. b; Articles of Agreement of the International Bank for Reconstruction and Development, supra note 105, at art. V, sec. 3, para. b; Articles of Agreement of the International Monetary Fund, supra note 107, at art. XII, sec. 5, para. d; see also Chayes & Chayes, Adjustment and Compliance, supra note 41, at 284-85 (discussing IMF). With the exception of the European Bank for Reconstruction and Development, which is still too new, these institutions have all been targets of environmental criticism. See Patricia Adams, Odious Debt: Loose Lending, Corruption, and the Third World's Environmental Legacy (1991); Raymond F. Mikesell & Larry Williams, International Banks and the Environment: From Growth to Sustainability: An Unfinished Agenda (1992); Bruce Rich, Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development (1994); Robert E. Stein & Brian Johnson,Banking on the Biosphere? (1979) (case studies of World Bank, Inter-American Development Bank, Asian Development Bank, Caribbean Develop-
Majority voting may be especially desirable for highly scientific and technical matters often associated with other policy, legal, and economic issues in the environmental field. While not a true nonconsensus approach, a number of maritime pollution agreements incorporate specific, streamlined provisions for establishing technical requirements. Most notable are those for the protection of the Mediterranean\textsuperscript{116} and Caribbean\textsuperscript{117} Seas and the South Pacific region,\textsuperscript{118} and the prevention of marine pollution by ships\textsuperscript{119} and from dumping at sea.\textsuperscript{120} Similar rules govern the establishment of harvest limits under the International Convention for the Regulation of Whaling\textsuperscript{121} and the Convention for the Conservation of Antarctic Seals.\textsuperscript{122}

\begin{itemize}
\item 122. June 1, 1972, at art. 9, para. 3, 11 I.L.M. 251, 256 (two-thirds majority), \textit{reprinted in} Kiss, supra note 44, at 272 (two-thirds majority).
\end{itemize}
These agreements set out simplified mechanisms for adopting or amending technical annexes that require approval by only a qualified majority of states. After a specified "opt-out" period, those actions then become binding on all states that have not objected to them. In principle, the consequences of publicly rejecting an international standard—the "mobilization of shame"—tends to discourage states from opting out. Other treaties contain even further refinements. By a two-thirds majority, the Council of the International Civil Aviation Organization (ICAO) can adopt international standards and recommended practices, which are then binding on all members unless disapproved by a majority. It would be a small but significant step to remove the opt-out provisions from these models. Indeed, the "adjustments" to the Montreal Protocol adopted by a two-thirds super-majority can be considered a special case of these precedents.

Assuring the procedural integrity of streamlined decision-making processes may facilitate further progress toward the adoption of nonconsensus approaches. One possibility for streamlining these procedures might be to establish the role of scientific information and methodologies in resolving scientific uncertainties. Avenues for challenging and reviewing

123. Cf. Single European Act, at 5 (Supp. No. 2 1986), Feb. 17 & 28, 1986, at art. 18, 19 Bull. Eur. Comm., reprinted in 25 I.L.M. 506 (adding new article 100A, paragraph 4, to Treaty of Rome specifying that "[i]f, after the adoption of a [Community-wide] harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions . . . relating to protection of the environment or the working environment, it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.").


126. See supra note 104.

127. See Rio Declaration, supra note 13, Principle 15 ("In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."); Climate Convention, supra note 11, at art. 3, para. 3 ("The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures . . . "); see also Daniel Bodansky, Scientific Uncertainty and the Precautionary Principle, Env't, Sept. 1991, at 4; James Cameron & Juli Abouchar, The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment, 14 B.C. Int'l & Comp. L. Rev., Winter 1991, at 1; Lothar Gundling, The Status in International Law of the Principle of Precautionary Action, in The North Sea: Perspectives on Regional Environmental
nonconsensus decisions and verifying scientific information—similar to the United States system of judicial review of administrative action, although not necessarily relying on courts for implementation—might be created for aggrieved states. Alternatively, states bound by decisions with which they disagree might have the right to request early reconsideration of that action. In any case, the potential utility of these nonconsensus decision models has yet to be fully appreciated by the international community.

CONCLUSION

Procedure matters, not only domestically but also in international decision-making processes. The structure of international procedures can affect the substantive content of international law. Especially for an area like environment, in which international norms may be thin or ineffective in responding to real-world imperatives, multilateral procedures assume commensurately greater significance. As the fiction that states and governments adequately represent the interests of nongovernmental actors under their jurisdiction becomes increasingly difficult to maintain, the regularity and transparency of procedures in public international law acquire ever more importance.

Some situations may even elude direct treatment by substantive law. For example, the “precautionary principle,” which asserts that governments should not delay implementing needed regulatory measures because of uncertainties in scientific data, is now well accepted. However, applying the principle to a wide variety of environmental risks is difficult in practice. Likewise, even if states acknowledged an international legal right to a minimally acceptable environment, the content of that right would be very difficult to define and its application to particular cases a task of formidable proportions. In such settings, process-oriented rights are


128. See supra text accompanying note 38.
129. See supra note 127.
131. See supra note 16.
132. Constitutions of at least two states that articulate governmental duties to safeguard environmental integrity explicitly state that those provisions are not enforceable through judicial processes. Const. of India, pt. 4, at art. 37, reprinted in 8 Constitutions of the Countries of the World (Albert F. Blaustein & Gisbert H. Flanz eds.), India, at 62 (1990) (provisions "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"); Const. of the Democratic Socialist Republic of Sri Lanka, ch. VI, at art. 29, reprinted in 18 Constitutions of the Countries of the World, supra, Sri Lanka, at 24 (1989) (provisions "do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall
useful for filling substantive gaps. Apart from any nexus with substantive law, procedural integrity is itself an important source of authority and legitimacy for international law.\footnote{135}

The recent explosion in the number of international meetings on the global environment,\footnote{134} including most notably the 1992 Earth Summit, has presented numerous opportunities for addressing procedural rights for the
public and analyzing the effectiveness of international decision-making procedures. The intent behind UNCED, which was self-consciously designed to stimulate change on such pervasive issues of structure, institution, and principle, went even further.\textsuperscript{136} But neither the binding multilateral conventions\textsuperscript{136} nor the aspirational declarations\textsuperscript{137} that resulted from the Rio meeting necessarily hold the greatest promise for improving the accountability and efficacy of international decision-making mechanisms.

Rather, Agenda 21,\textsuperscript{138} the action plan for the future adopted by more than one hundred heads of state in Brazil, directed the establishment of a new Commission on Sustainable Development (CSD)\textsuperscript{139} that would report to the UN's Economic and Social Council (ECOSOC). The principal mandate of the CSD, a “sleeper” at the Earth Summit but potentially one of its most significant long-term developments, is to monitor and review the implementation of Agenda 21 by states, international organizations, and multilateral environmental treaty regimes. The Commission will also provide a permanent forum for multilateral discussion of sustainable development—the nexus between environment and development that was the central theme of the Rio conference. The members of the Commission

\begin{itemize}
  \item 135. Strong, supra note 5, at 290 (statement by Secretary General of United Nations Conference on Environment and Development that purpose of UNCED was to “move environmental issues into the center of economic policy and decision making”).
  \item 136. \textit{See} Convention on Biological Diversity, supra note 12; Climate Convention, supra note 11.
are governmental representatives of fifty-three states. Additionally, the Secretary-General has appointed a twenty-one member High-Level Advisory Board of independent experts to assist him in working with the Commission.

A portion of the Commission's mandate addresses the role of nonstate actors, including nongovernmental organizations, the scientific community, the private sector, and women's groups, which Agenda 21 expressly anticipates will play a role in the CSD's deliberations. A separate portion of Agenda 21, addressing the role of nongovernmental organizations
throughout multilateral activities, augments the force of this directive.\textsuperscript{143} Similarly, Agenda 21 also calls for improved mechanisms for international oversight, implementation, and dispute settlement as part of a "further development of international law on sustainable development,"\textsuperscript{144} including, presumably, progress in international environmental law.

Over time, both formal and informal access for nonstate actors into the Commission’s decision-making processes, similar to those now existing in the ILO supervisory machinery\textsuperscript{145} and the UN Commission on Human Rights,\textsuperscript{146} might evolve. Further, as suggested by its title, Agenda 21 is merely the starting point for continued international action by the Commission on Sustainable Development. The Commission could, consistent with the intent of UNCED, adopt concrete measures promoting further

\textsuperscript{143} As specified in paragraph 27.9 of Agenda 21, \textit{reprinted in} Johnson, supra note 11, at 420-21, \textit{and in} 22 Envtl. Pol'y & L. at 292:

The United Nations system, including international finance and development agencies, and all intergovernmental organisations and forums should, in consultation with non-governmental organisations, take measures to:

(a) Review and report on ways of enhancing existing procedures and mechanisms by which non-governmental organisations contribute to policy design, decision-making, implementation and evaluation at the individual agency level, in inter-agency discussions and in United Nations conferences;

(b) On the basis of subparagraph (a) above, enhance existing or, where they do not exist, establish, mechanisms and procedures within each agency to draw on the expertise and views of non-governmental organisations in policy and programme design, implementation and evaluation;

(c) Review levels of financial and administrative support for non-governmental organisations and the extent and effectiveness of their involvement in project and programme implementation, with a view to augmenting their role as social partners;

(d) Design open and effective means of achieving the participation of non-governmental organisations in the processes established to review and evaluate the implementation of Agenda 21 at all levels;

(e) Promote and allow non-governmental organisations and their self-organised networks to contribute to the review and evaluation of policies and programmes designed to implement Agenda 21, including support for developing country non-governmental organisations and their self-organised networks;

(f) Take into account the findings of non-governmental review systems and evaluation processes in relevant reports of the Secretary-General to the General Assembly, and of all pertinent United Nations organisations and other intergovernmental organisations and forums concerning implementation of Agenda 21, in accordance with the review process for Agenda 21;

(g) Provide access for non-governmental organisations to accurate and timely data and information to promote the effectiveness of their programmes and activities and their roles in support of sustainable development.

\textsuperscript{144} Agenda 21, part. 39.1(a), \textit{reprinted in} Johnson, supra note 11, at 500, \textit{and in} 22 Envtl. Pol'y & L. at 500. \textit{See generally} The Effectiveness of International Environmental Agreements (Peter H. Sand ed., 1992) (reprinting background research papers surveying effectiveness of existing international legal mechanisms developed as part of UNCED preparatory process); 2-3 Robinson, supra note 11, at 1061-1614.

\textsuperscript{145} \textit{See} supra note 60.

\textsuperscript{146} \textit{See} supra note 61.
progress on such issues as the initiation of enforcement measures by nonstate actors and the adoption of nonconsensus decision-making approaches.

A transition toward expanded participation in multilateral intergovernmental processes by individuals and nongovernmental organizations—including scientists, industry representatives, and environmentalists—might create some short-term disarray. In the long run, however, there are likely to be net gains in the accountability, legitimacy, authority, and even efficiency of international decision-making processes. Ultimately, there may be few alternatives to extending procedural rights to nonstate actors. For example, sustained criticism of the sort leveled at the GATT panel process in the tuna dolphin controversy over time threatens to undermine international confidence in, and perceptions of the integrity of, multilateral dispute settlement procedures in trade agreements.

Indeed, significant progress in closing the "democracy gap" can be purchased quite cheaply through reasonably simple, forward-looking changes on the international level. It is very difficult to quarrel with the proposition that international environmental obligations ought to be strictly observed. There is, or ought to be, considerable apprehension by states such as the United States that have a firm commitment to fulfilling international obligations concerning compliance by treaty partners, particularly when there is a potential for competitive disadvantage. Allowing the public to participate in monitoring the implementation of existing or future international agreements like those adopted at UNCED would further the national interest in full global compliance while simultaneously advancing the cause of environmental quality. Moreover, the desirability of access by the public to fora in which international law is made, implemented, and adjudicated and the need for certain nonconsensus decision-making procedures are well illustrated by, but by no means confined to, the environmental field.

Environment is already at the cutting edge of international legal developments. Environment may very well be a paradigm that prefigures the development of the larger body of international law well into the twenty-first century. In any event, the anticipated follow-up to the Earth Summit presents major opportunities for progress in this previously neglected area.