Chapter 5

Conclusions and Theses

This study scrutinized how environmental NGOs and international judicial and quasi-judicial bodies do currently (de lege lata) interact and should (de lege ferenda) interact to appropriately contribute to the implementation and enforcement of national and international environmental law within a broader concept of global democratic governance for sustainable development.

Four intersecting themes were outlined in the introduction and are reflected in the research approach: the enforcement deficit in environmental law; global environmental governance and sustainable development; the proliferation of international courts, tribunals, and compliance committees; and deliberation and democratic global governance. Chapter 1 sketched the role of environmental NGOs as actors in environment-related law-making and law enforcement on the international level. Firstly, it briefly described how NGOs were and are involved in detecting and tackling environmental problems. Secondly, the main political commitments to enhancing the role of NGOs on the international level were scrutinized as to their scope and limits. The third part of chapter 1 examined the relevance, definition, and legal status of NGOs under international law. Finally, the meaning and relevance of legitimacy and accountability in the context of this study were outlined.

Chapter 2 scrutinized the enforcement of international environmental law on the national and European Union level, with a view to identifying whether there is a need for international judicial and quasi-judicial enforcement of international environmental law. To show that international environmental law is justiciable, first, its main sources, addressees, and contents were summarized. In the second and third part of chapter 2 the contribution of the national courts in Germany and the United States as well as the European Court of Justice to the enforcement of international environmental law was examined. Several opportunities as well as constraints in national and European enforcement procedures and also several types of cases that are falling through the cracks in these procedures could be identified. Furthermore, the question was asked, what lessons for international environmental law enforcement could be learned from the ECJ as a supranational judicial body. Laying the basis for the structure of the analysis in chapters 3 and 4, the fourth part of chapter 2 carved out the main differences between judicial dispute settlement, arbitration, and compliance control, the latter being specifically relevant for dealing with cases of non-compliance with MEAs.

Cathrin Zengerling, Greening International Jurisprudence, pp. 327–349.

Chapters 3 and 4 formed the core of this study.[1] A total of eleven international judicial and quasi-judicial bodies were analyzed in depth and another three presented in brief; each with a special relevance for the implementation and enforcement of international environmental law. Chapter 3 focused on judicial and quasi-judicial bodies that operate within a regional international scope; chapter 4 dealt with those of a universal international scope. Both, chapters 3 and 4 differentiated between judicial dispute settlement, arbitration, and non-compliance procedures since these forms of adjudication and compliance control vary significantly in their roles, structures, competences, institutional arrangements, procedures, access rules, and outcomes. This horizontal and vertical systematization allowed for a differentiated view on the selected bodies and is also mirrored in the conclusions and recommendations.

The eleven bodies that were analyzed in depth were described and evaluated with regard to their scope of jurisdiction, applicable law, institutional arrangements, access, and environmental case law. In particular, the section on institutional arrangements included information on the transparency of the proceedings and outcomes. The section on access addressed access for potential participants as parties, amici curiae, and experts. As regards the role of ENGOs as parties, ENGOs were envisaged as potential applicants, and thus initiators or triggers of a judicial or quasi-judicial procedure, similar to citizen suits or 'Verbandsklagen' at the national level. This was based on the assumption that conferring the right to initiate judicial and quasi-judicial review procedures on NGOs helps to ensure that breaches of international environmental law are brought to the attention of the judiciary in the first place. As amici curiae, environmental NGOs function as "friends of the court" providing factual or legal information on environmental matters relevant for the case at issue. The section on environmental case law scrutinized how environmental interests safeguarded in international environmental law are dealt with in the decision-making process and reflected in the decision of the court, arbitral tribunal or compliance committee in question.

The criteria for the evaluation and the target course for the development of conclusions and recommendations were derived from the four pillars of context as outlined in the introduction. The overall question therefore was: Does the body in question appropriately contribute to the realization of democratic regional or global governance for sustainable development? In particular: Are the procedures and, to a certain degree, also the substantive applicable law appropriately accessible and permeable for interests protected in (international) environmental law? Do those environmental interests appropriately enter the decision-making process of the body in question? Are environmental interests transparently, comprehensively, and appropriately weighed and balanced against other relevant interests? Are the judi-

[1] A synthesis chart with the key characteristics of the international judicial and quasi-judicial bodies analyzed can be found in the appendix.

cial and quasi-judicial procedures that involve environmental interests and their outcomes transparent, i.e. open to the public? Following the evaluation, with respect to each body, a concluding subchapter summarized main strengths and weaknesses and made concrete recommendations for further improvements.

The core findings of this study are summarized below in the form of theses in a roughly chronological order. This summary covers only core aspects of the conclusions and recommendations developed with regard to the international judicial and quasi-judicial bodies analyzed. Detailed conclusions and recommendations can be found at the end of the analysis of each judicial and quasi-judicial body in chapters 3 and 4.

I. Environmental NGOs as High Potentials

ENGOs are competent stakeholders of environmental interests and their participation in international law enforcement procedures enhances the relevant body's accountability towards a global demos.
(Chapter 1.I, III.A and IV)

A review of examples of ENGOs' contributions to international environmental regimes with references to in-depth studies showed that ENGOs are actively involved at all stages of the policy cycle in the main international environmental regimes tackling global and regional environmental problems, such as transboundary air pollution, destruction of the stratospheric ozone layer, transboundary movements of hazardous wastes, loss of biodiversity, pollution and exploitation of the world's seas, and global warming. They have shown commitment and expertise in agenda setting, negotiation, and implementation. The analysis also revealed that the institutional framework of MEAs, set up as such by states, formally and informally acknowledges ENGOs as important partners in coping with global environmental concerns. For example, NGOs have an observer status under all major MEAs in the areas listed above such as, for example, the 1973 CITES, 1992 CBD, 1992 UNFCCC, and 1995 Basel Convention. All of these MEAs have an almost global membership. The role of ENGOs, however, is not limited to this observer status.

There are very different kinds of NGOs with diverse characteristics and focuses, but all in all the main strengths of ENGOs are their ability to gather knowledge on environmental problems and possible solutions, their function as a communication channel between local citizens and international institutions, their potential to enhance the transparency of international decision-making processes, and their role as multiplier of knowledge and capacity. Through their commitment to contributing to solving global environmental problems, they gather competence and resources and are potentially qualified to act as stakeholders of environmental interests in international judicial and quasi-judicial compliance control and enforcement procedures.

The actual qualification can be safeguarded through an accreditation process ensuring that access to law enforcement procedures is only afforded to NGOs that are characterized by the abovementioned strengths. However, it should be noted that, for example, citizen suit provisions under U.S. environmental laws and access rules under the human rights courts' provisions or the compliance mechanism of the Aarhus Convention do not set up such accreditation requirements and this does not seem to result in any disadvantages for the procedure.

NGOs do not have to prove any legitimacy before standing to sue or participatory rights are conferred to them, because democracy only requires the legitimacy of organs that exercise public authority. According to the concept of deliberative polyarchy, democratic legitimacy derives from responsiveness and accountability, including transparency, reason giving, and standing of those affected. The study revealed significant shortcomings in international law enforcement procedures with regard to these elements of deliberation and democratic global governance. Most importantly, affected environmental interests protected in international environmental law do not appropriately enter the decision-making processes of any of the international law enforcement procedures analyzed with an exception of the Aarhus and to a certain degree the Kyoto Compliance Committee. Appropriate reasoning presupposes that affected environmental interests enter the decision-making process. Even insofar as affected environmental interest did enter the judicial and quasi-judicial decision-making processes, the study identified significant shortcomings in the quality of judicial reasoning of decisions that affect environmental interests protected in environmental law in all international law enforcement procedures analyzed with an exception of the Aarhus and the Kyoto Compliance Committee. The reasoning of the WTO dispute settlement bodies in this regard is comparatively well advanced. There is a tendency towards an improved quality of reasoning in decisions regarding affected environmental interests protected in environmental law at the ICJ and ITLOS. Finally, there is also a lack of transparency in procedures before arbitral tribunals and the WTO.

Access for ENGOs to international law enforcement procedures means that affected environmental interests would get a say, the procedure would become more transparent, and the decision-makers would be induced to better reason their handling of affected environmental interests. Consequently, broadly following the concept of deliberative polyarchy, access for ENGOs to bodies of international law enforcement positively contributes to the latter's accountability towards a global demos. Thereby it is important to emsure that NGOs from all regions, and not only from Western or Northern countries, have actual equal access to international judicial and quasi-judicial bodies.

II. Need for Clear Political Commitment

There is little political support for strengthening the role of ENGOs in international law enforcement procedures. A Rio+20 Declaration or a similar political declaration should incorporate a clear statement that ENGOs shall be given effective access to international law enforcement procedures that affect environmental concerns which are protected in international environmental law.
(Chapter 1.II)

A specific political mandate to enhance the role of ENGOs in international judicial and quasi-judicial compliance control and enforcement procedures is still lacking. The clearest political support can be seen in the Aarhus Convention itself for the UNECE region. As far as the implementation and enforcement of the Aarhus Convention is concerned, parties set up a Compliance Committee with wide access for ENGOs and individuals. However, even the parties to the Aarhus Convention were very cautious in addressing wider access of NGOs to international review procedures in their Almaty Guidelines. The least common denominator between the parties to the Aarhus Convention in the Almaty Guidelines was that they agreed to "encourage the consideration" of measures to facilitate public access to international review procedures in international fora. Neither the Rio Declaration, nor Agenda 21, nor the UNEP Montevideo Programmes contain a clear political commitment to a stronger role for NGOs before international judicial and quasi-judicial institutions. However, in the Rio Declaration and Agenda 21, states recognized the importance of citizen and NGO participation in international decision-making processes, generally agreed to strengthen their role, and also underlined that they are aware of shortcomings in compliance with international environmental law.

In the spirit of further developing Principle 10 of the Rio Declaration, a political statement to back up and encourage change in existing and the development of new provisions on access to international law enforcement procedures towards broader access for ENGOs could be part of the outcome of the Rio+20 United Nations Conference on Sustainable Development in 2012 or a later summit. The language of the draft Almaty Guidelines as originally proposed by the expert group could be a blueprint for such a declaration. For example, para 54 of this draft states as follows:

> [Public involvement in international implementation review [and] [compliance] [and dispute settlement] mechanisms could help to ensure the accountability within such mechanisms and contribute to monitoring the implementation of rules related to environmental issues. It could also strengthen the quality of the representation of public interests. The modalities of public involvement may vary depending on the rules and procedures of the international forums but could include, in the case of compliance mechanisms, providing for participation of the public in the development of such mechanisms and [in the process of appointing the members of the relevant bodies (e.g. by providing an entitlement to nominate members), as well as] providing for the mechanism to be triggered by submission of petitions or

communications, including amicus curiae briefs by the public. Parties should consider and, where appropriate, promote such methods of involving the public in international implementation review [and] [compliance] [and dispute settlement] mechanisms.]

III. No Legal Constraints

There are no legal constraints on conferring rights and duties on NGOs in international law enforcement procedures. Whether and what kind of standing or participatory rights are vested in ENGOs is a question of political will.
(Chapter 1.III.B and C)

The search for possible constraints in international law to strengthen the role of ENGOs before international judicial and quasi-judicial bodies did not identify significant barriers. INGOs have a long tradition as actors in international politics and today, according to the UIA, environmental protection is their second most important field of activity. Neither the difficulty of exactly defining "NGO" nor the fact that NGOs gain their legal personality under national rather than international law prevent NGOs from being recognized and addressed as actors with rights and duties under international law. States have in fact frequently conferred rights and duties on NGOs in international legal regimes. For example, Article 71 of the 1945 Charter of the United Nations and, more concretely, UN ECOSOC Resolution 1996/31 confer a consultative status to NGOs, if they fulfill certain requirements.

On several occasions, states have already conferred standing on non-state actors in all three types of international law enforcement procedures: dispute settlement, arbitration, and compliance control. All three regional human rights conventions discussed above provide for direct or indirect access for individuals and NGOs to the human rights courts, in case of the Inter-American Human Rights Court only via the Commission. In several hundred bi- and multilateral investment treaties, states conferred standing rights on private investors who can initiate arbitral proceedings against states in various fora for arbitration such as, for example, ICSID. The compliance mechanism under the Aarhus Convention, established through an MOP decision, puts all 'members of the public' comprising natural and legal persons, as well as their associations, organizations or groups, including environmental NGOs, in the position to trigger a compliance review procedure. Furthermore, NGOs may participate as amici curiae in some international judicial and quasi-judicial enforcement procedures such as, for example, before the ECtHR, IACtHR, ICJ (advisory proceedings), ICSID, NAFTA, and CAFTA-DR.

In drafting similar access rights for NGOs to other international law enforcement bodies, states can draw on these existing examples from the international level or on various models already implemented at national levels. Substantive criteria and an accreditation process can ensure that certain rights and duties are only conferred

on those ENGOs that fulfill certain conditions deemed necessary for being appropriate stakeholders of environmental interests.

IV. International Environmental Law Is Justiciable

Multilateral environmental agreements as well as customary international environmental law contain substantive as well as procedural obligations that are appropriate for judicial review.
(Chapter 2.I)

The central sources of international environmental law are multilateral environmental agreements. Customary international environmental law also plays an important role. Not legally binding but still of special relevance is international environmental soft law. The main addressees of international environmental law are states. MEAs and customary international environmental law contain substantive as well as procedural obligations. An MEA regime usually starts with a framework convention and is fleshed out by subsequent protocols that contain concrete substantive provisions on, for example, emission reduction goals, bans on certain substances or activities, use of certain technologies, or obligations to set up protection areas or management schemes. Examples of procedural obligations include duties to conduct environmental impact assessments or certain reporting or notification procedures. Such legal obligations are sufficiently concrete to be justiciable.

V. Further Regionalize or Globalize Aarhus

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters should evolve from a regional to a global multilateral environmental agreement. Alternatively, other regions should consider adopting and ratifying a similar MEA.
(Chapters 2.II and 3.III)

National administrative and judicial review procedures play a key role in the implementation and enforcement of (international) environmental law. Depending on a state's transformation provisions, international environmental law is directly applicable or becomes legally binding through a transformation act and implementing legislation. In addition, or arguably even prior to strengthening international law enforcement procedures, national administrative and judicial procedures have to be empowered to appropriately cope with environmental interests. Irrespective of whether environmental problems have a local, regional, or global scope, the implementation of solutions to these problems takes place at national level first.

Proper implementation of the Aarhus Convention on a global scale, and here the current German law is not understood as a proper implementation of the altruistic dimension of the Convention, empowers local NGOs to feed in and control local decision-making processes that affect environmental interests.

If environmental problems have a regional or global dimension, they can only be effectively tackled through respectively regional or global international environmental agreements. In these cases, compliance control procedures have to ensure that those agreements are appropriately implemented because otherwise the free rider problem emerges again at the implementation stage and prevents the system established from being effective.

One core principle of environmental law is the precautionary principle. Prevention of environmental harm is crucial for effectively dealing with environmental challenges. For example, permit procedures for industrial activities that have harmful effects on human health and the environment are a core instrument of coping with those harmful effects. Providing citizens and NGOs with access to environmental information, participatory rights in decision-making processes, and access to administrative and judicial review procedures at the national level have proven to be decisive factors in the proper implementation of environmental laws and prevention of environmental harms. If the scope of the environmental or health risk of a certain activity is transboundary, at least all potentially affected citizens and NGOs should enjoy the abovementioned Aarhus rights. In addition, the UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context and the UNECE Convention on the Transboundary Effects of Industrial Accidents provide relevant international environmental law in this regard, which it might also be important to adopt in other regions or on a global scale.

Once damage has occurred, claims for redress also appear to be best settled by national courts. In a transboundary context, international agreements should ensure that affected citizens have access to local court procedures and that their decisions can be enforced effectively.

VI. Gaps in National Judicial Review

National judicial review procedures should be complemented with international judicial and quasi-judicial review procedures to ensure appropriate enforcement of international environmental law.
(Chapter 2.II)

The review of the enforcement of international environmental law in national courts in Germany and the United States identified several opportunities and constraints. While the analysis could generally support the thesis that national courts fulfill an international function in enforcing international environmental law, the review of

empirical studies indicated that in practice national courts are rather reluctant in this regard. This is also true for cases that were brought under the potentially interesting U.S. instrument for cases with an international scope against private polluters, the Alien Tort Claims Act (ATCA). It gives U.S. federal courts jurisdiction over claims by aliens for "torts committed in violation of the law of nations". However, although ATCA has successfully been used in the field of human rights violations, it has been invoked only on a few occasions to enforce international environmental law in U.S. courts and all of these cases were ultimately rejected.

A systematic analysis came to the conclusion that national courts are primarily responsible for adjudicating disputes, if international environmental law is appropriately implemented by the legislature and applied by the administration. However, this is not always the case and in addition there are several gaps in judicial control. Thus, empirical findings as well as the systematic analysis suggest that there are significant gaps in national judicial control that should be complemented by international judicial and quasi-judicial control procedures to safeguard the enforcement of international environmental law.

VII. Constraints on and Opportunities for the ECJ

Environmental NGOs should have standing at the ECJ to institute cases in the public interest. Lessons can be learned from the ECJ about access procedures, communication and coordination in a multi-level and internationally fragmented judiciary.
(Chapter 2.III)

The ECJ plays a significant role in the multilevel enforcement of environmental law. Due to the high number of mixed multilateral environmental agreements, the ECJ has jurisdiction over a significant body of MEA-implementing EU legislation. One significant constraint on the ECJ is that NGOs do not have standing to bring cases before it in relation to an environmental protection interest. In a recent decision, the Compliance Committee of the Aarhus Convention found that continued limited standing for NGOs might be incompatible with the obligations of the EU under the Aarhus Convention. It remains to be seen if the ECJ law on standing changes in the future.

Despite this constraint, many environmental cases reach the ECJ via the preliminary ruling or the Commission initiated infringement procedure. The infringement procedure is interesting from the point of view of other international law enforcement procedures, because it starts with a non-confrontational communication with the party concerned and only if this is not successful is the case brought to the ECJ. The preliminary ruling procedure provides an example of communication between two levels of judiciaries following the subsidiarity principle. Both initiation of the procedure and the final decision on the case remain in the hands of national judges and thus at a local level that might be most appropriate, especially when value

judgments are to be made. Furthermore, the procedure to enforce judgments of the ECJ proved to be necessary and effective in some environmental cases.

A review of environmental case law showed that the ECJ significantly contributes to the enforcement of international environmental law mostly through enforcing MEA implementing legislation of the EU in cases of mixed MEAs. In several decisions, the ECJ also directly applied international environmental law to its cases. On a few occasions, the ECJ has already decided on issues of competing jurisdictions.

Although the European Union is a special regional economic integration organization and its goals are different from those of the global legal order, it is still a vital example of the necessity and success of administrative and judicial law enforcement procedures on a supra-state level, if supra-state law is actually to be implemented. It has to be noted though that the strict law enforcement regime of the EU is complemented by immense funding programs under the EU's regional policy aimed at further territorial cohesion.

Multi-level legal regimes require communication and coordination between the different levels to ensure that each level fulfills its level-specific function. The same is true for the horizontal plane, i.e. in the case of fragmented international regimes. More research needs to be done on what exactly the level- and fragment-specific contributions should be and how, consequently, jurisdictions, competences, applicable law and procedures are designed. The EU provides a valuable case study.

VIII. Cases for the International Level

Three categories of environmental cases are appropriate for international judicial and quasi-judicial review.
(Chapters 1 and 2 in general, Chapter 2.IV)

International enforcement procedures are beneficial in three categories of cases: Firstly, cases arising from activities of states or non-state actors that cause or contribute to regional or global environmental problems, such as, for example, climate change, transboundary movement and disposal of hazardous wastes, loss of biodiversity, or pollution and exploitation of the world's seas. Secondly, cases arising from activities of states or non-state actors that cause or contribute to local transboundary harm, such as industrial activities causing transboundary air or water pollution. Thirdly, cases arising from activities of states or non-state actors that have a purely local detrimental effect on the environment but cannot be effectively tackled within national jurisdictions, such as illegal resource exploitation or pollution caused by transnational corporations. In all of these cases, such activities must potentially violate international environmental treaty or customary law.

As regards the first category, the analysis highlighted several areas, in which incomplete implementation of MEAs is falling through the cracks in national control

procedures. In the case of the second category, the analysis identified several deficits such as the limited jurisdiction of national courts that render an international backup procedure necessary to provide effective legal protection for affected interests. Conflicts between states or non-state actors over shared natural resources also fall within this category. The third category of cases requires international judicial review because the transnational corporate structure of many companies nowadays prevents effective legal proceedings against these companies in the state of harm and, for example, the home state of the parent company.

Many cases reach international judicial and quasi-judicial bodies, for example the ICJ, WTO, ITLOS, or arbitral tribunals, not as environmental cases but still with a factual background that includes environmental interests. In these international procedures, it is important that affected environmental interests also enter the judicial and quasi-judicial decision-making process and are appropriately treated in compliance with applicable environmental law.

IX. Differentiated View on International Law Enforcement Procedures

It is crucial to differentiate between the types of international law enforcement procedures in order to develop type-specific solutions as to how they should deal with environmental interests.
(Chapters 2.IV, 3 and 4)

Judicial dispute settlement bodies, arbitral tribunals, and non-compliance procedures are inherently different. Their competences and procedures vary greatly and they serve different interests. Whereas the main task of adjudicative bodies and arbitral tribunals today is still arguably the peaceful settlement of disputes between states, adjudicative bodies as standing bodies of international law enforcement are responsible towards the community of their members and for the coherent development of an international legal order. Arbitral procedures are far more flexible and tailored by the parties to the dispute according to their case specific interests. Compliance mechanisms are of a non- or quasi-judicial, non-confrontational, and cooperative nature; they do not settle disputes but control compliance with a specific multilateral environmental agreement. Since resolving international environmental problems is dependent on joint efforts and cooperation, they have been developed as and proven to be more appropriate procedures for the enforcement of international environmental law than purely judicial and confrontational means.

There is no clearly defined relationship as yet between dispute settlement and compliance control. In MEAs both procedures are provided for in parallel and without prejudice to each other. Nevertheless, it is also important to note, that there is no clear-cut difference between dispute settlement and compliance control as dispute settlement can always also be seen as a form of compliance control. Furthermore,

an international court, such as the ECJ for example, can be set up to fulfill both tasks, peaceful dispute settlement and compliance control. Disputes are always created through law by conferring certain rights and obligations on actors. However, as regards the existing bodies of international law enforcement examined here, the following theses show that each of these three types of international law enforcement has its own opportunities and constraints in dealing with environmental interests safeguarded in international environmental law and suggestions for further development have to be tailored accordingly.

X. Regional versus Universal

Regional international law enforcement bodies of all three types outlined above do contribute better to democratic governance for sustainable development than their universal counterparts. Nevertheless, they also still have significant deficits in appropriately accommodating environmental protection interests.
(Chapters 3 and 4)

With respect to the criteria focused on in this study, namely accessibility and fair balancing of affected environmental interests as well as transparency of procedures and reasoning of decisions, regional bodies of international law enforcement have a better record than universal ones. It seems to be easier to agree on progressive international law enforcement mechanisms in terms of transparency and proper dealing with environmental interests within a more homogenous community of states. Nevertheless, with the exception of the Aarhus compliance mechanism, significant shortcomings can be identified in all regional law enforcement procedures examined in this study. In general, it can be said that all international judicial and arbitral bodies with the exception of the human rights courts, mainly serve the protection of economic and resource exploitation interests.

XI. More Communication to Further Coherence of the International Legal Order

There should be more vertical and horizontal communication between judicial, arbitral, and compliance review bodies to further develop a coherent international legal order.
(Chapter 2.IV.E)

As regards interaction in a multi-level system of dispute settlement and compliance review, two thoughts might be worth considering. If national or regional courts have to apply international environmental law or law that derives from a multilateral environmental agreement, they may look to decisions of compliance committees for guidance or even contact a compliance committee with a specific question. If cases

reach the international level, the body in charge should consider deciding only the international legal question at issue and defer as much competence as appropriate to the national courts to have the final say on the case, given that the national court is in a better position to accommodate local interests in a manner consistent with international (environmental) law. In addition, "horizontal" communication, thus communication between international judicial, arbitral, and compliance review bodies, might assist the development of a coherent international legal order and overcome, to some extent, certain difficulties that accompany the fragmentation of international regimes. More research needs to be done to further explore these questions and make concrete proposals for procedural rules safeguarding such communication if deemed necessary.

XII. Human Rights Courts and Environmental Protection

Human rights courts are not environmental courts. They should continue to focus on the enforcement of human rights and protect environmental interests insofar as this overlaps with human rights protection.
(Chapter 3.I)

Human rights courts are both powerful and limited when it comes to the protection of environmental interests. They are powerful because individuals, groups of individuals, and NGOs can institute proceedings against states – in case of the IACtHR only through the Commission – procedures are transparent and open for amici curiae submissions, the courts issue legally binding decisions, and the ECtHR in particular has a good record as regards the implementation of its judgments. The IACtHR and the AfCtHPR are also accessible for indigenous people to enforce collective rights regarding the protection and management of their natural resources. All three regional human rights courts have dealt with cases related to environmental protection. Although this is not their main focus of work but rather a side-effect of human rights protection, the review of the environmental case law has shown that they have issued some landmark decisions in international environmental law.

However, it is important to bear in mind that in all environmental cases before the human rights bodies, environmental protection overlapped with human rights protection. The courts and commissions did not directly apply and enforce international environmental law but the relevant human rights convention. The IACtHR/IAComHR usually applied the right to property or the right to life in environment-related cases. The ECtHR found a violation of Article 8 of the ECHR (right to respect for private and family life) in all industrial pollution cases. The overlap is potentially broader if a human rights convention provides for a human right to a healthy environment. The Protocol of San Salvador to the ACHR and the African Charter explicitly provide for such a right to a healthy or generally satisfactory environment

but neither the IACtHR nor the AfCtHPR have so far directly applied these standards in their decisions. Only the AfComHPR has applied the peoples' right to a satisfactory environment safeguarded in the African Charter in the *Ogoniland* case.

There are some further crucial constraints on human rights courts with regard to the enforcement of international environmental law. Firstly, mere environmental degradation or pollution without a direct effect on human beings or without sufficiently severe effects to qualify as a human rights infringement is not at issue before human rights courts. Since most of the violations of international environmental law do not amount to a human rights violation, the human rights courts can contribute to the (indirect) enforcement of international environmental law only to a very limited degree. Secondly, only the AfCtHPR allows citizens and NGOs to initiate cases in the public interest, and only two African countries have recognized this procedure to date. The ECtHR and the IACtHR require that an individual right of the plaintiff has been violated and that he has suffered damage. Thus ENGOs cannot institute cases in the public interest before the IACtHR and the ECtHR. They may have standing if they were deprived of their own participatory rights and this is what their case is based upon, but they do not have standing solely in the interests of environmental protection, for example, to mitigate climate change. Thirdly, human rights courts provide for legal protection only after damage has already occurred. Through their mere existence, they also have a deterrent effect but there are no procedures to enforce precautionary measures or to prevent an activity from putting the environment at disproportionate risk.

The following recommendations may be considered in order to strengthen the role of the three regional human rights courts in contributing to the enforcement of environmental law. Firstly, the group of potential plaintiffs should be significantly widened at the IACtHR and the AfCtHPR. Individuals and NGOs should have direct access not only to the IAComHR but also to the IACtHR. With respect to the AfCtHPR, it is crucial that more African states ratify the Protocol to the African Charter and make a declaration accepting the competence of the court to receive cases initiated by NGOs to actually make use of the most advanced procedural and substantive law provided for under the African human rights regime. Secondly, with respect to damage the European and the Inter-American human rights court should consider the possibility of ordering a comprehensive cleanup as done by the AfComHPR in the *Ogoniland* decision. Thirdly, following the example of many national constitutions and the African human rights regime, the inclusion of a substantive right to environment in combination with an actio popularis should be considered by all regional human rights systems. Fourthly, the establishment of human rights courts in other regions of the world should be considered.

Although these recommendations are intended to strengthen human rights courts in dealing with environmental protection interests, the human rights courts should not become the future international environmental courts. They should contribute

to the protection of environmental interests insofar as this overlaps with human rights protection. However, there are many breaches of international environmental law that do not involve such severe damages that they qualify as human rights violations. It cannot and should not be the task of human rights courts to ensure judicial review in these cases.

XIII. NGOs versus Private Companies under the OECD Guidelines

The review procedure established under the OECD Guidelines for Multinational Enterprises has significant shortcomings and should be strengthened. In particular, NGOs should be able to appeal decisions of the national contact points to the OECD Investment Committee.
(Chapter 3.IV.A)

The control mechanism established under the OECD Guidelines for Multinational Enterprises was significantly improved in 2000. Since then, NGOs can directly initiate proceedings against companies in alleged violation of the OECD Guidelines before national contact points. However, despite a number of cases filed by NGOs since then, not a single case could be identified as a best practice example. Lack of transparency and inconsistency in decision-making by national contact points are among the main deficits in the procedure. Furthermore, there is not yet sufficient incentive for companies to engage in a meaningful dialogue on the case at issue or to implement the recommendations issued by the national contact point.

Therefore, procedures before the national contact points should become more transparent. The decisions of the national contact points should include detailed reasons and NGOs should be given a right to appeal those decisions to the OECD Investment Committee in order to further the development of a more coherent system of implementation control and give companies more incentives to cooperate in an appropriate manner.

Especially when compared to the rights conferred on private investors under international investment agreements, it becomes clear that states are far more willing to safeguard investment interests than environmental protection interests. This should be changed and safeguards should be more balanced. Countries that signed up to the OECD Guidelines for Multinational Enterprises and those struggling with the negative consequences of foreign investments should accede to the Aarhus Convention. Member states of the OECD Guidelines have gone already half way. The implementation of the Aarhus Convention will strengthen local groups, administrations, and courts to appropriately deal with (foreign) investors and companies and ensure that they truly contribute to sustainable development in the region in question.

XIV. Deficits in Universal International Judicial Dispute Settlement Bodies

None of the universal international judicial dispute settlement bodies as yet adequately contributes to the enforcement of (international) environmental law.
(Chapter 4.I and V)

All universal international dispute settlement bodies have dealt with cases that affected environmental interests; none of them has done so in an adequate manner. These bodies do not yet appropriately contribute to democratic global governance for sustainable development. The analysis of institutional arrangements, access rules, transparency of the procedures, and integration of (international) environmental law into the judgments identified three main deficits: lack of plaintiffs, lack of quality of reasoning and expertise, and lack of transparency.

Firstly, many cases in which international environmental law is infringed do not reach universal judicial and arbitral bodies because the people affected or stakeholders in affected interests may not initiate review procedures. Usually only states may trigger procedures and they rarely do so in the context of an environmental protection interest. Environmental NGOs cannot trigger judicial review procedures before any of the universal international judicial and quasi-judicial bodies. Procedures before the Seabed Disputes Chamber of ITLOS, the PCA, ICSID, and the Kyoto Compliance Committee, however, can be initiated by non-state actors. Among the non-state actors are the International Seabed Authority, the Enterprise, state sponsored and controlled natural or juridical persons engaged in exploration or exploitation activities in the Area (Seabed Disputes Chamber), private companies and investors (PCA and ICSID), and Expert Review Teams (established under the Kyoto regime).

Secondly, if a violation of international environmental law gives rise to an international trial, international environmental law and affected environmental interests are not appropriately dealt with in most decision-making processes. Environmental issues are often highly scientific and technical and the decision-making bodies do not draw sufficiently on amicus curiae support from environmental NGOs or the expertise of independent experts to appropriately identify and consider environmental interests in their decision-making. However, there is a tendency towards more official and unofficial recognition of submissions from environmental NGOs in procedures before universal international judicial and arbitral bodies such as the ICJ (with regard to advisory opinions), ITLOS (with regard to advisory opinions before the Seabed Disputes Chamber) and ICSID.

Thirdly, there is a lack of transparency in arbitral proceedings and proceedings before the WTO dispute settlement bodies. Arbitral procedures are not appropriate to deal with cases which involve environmental protection and thus public interests. Despite public interests being affected, there is no public access to documents and hearings, or – in most arbitral proceedings – even to the arbitral award. Equally, in general, proceedings before the WTO panels and Appellate Body are confidential, which is not appropriate as far as public interests are concerned.

XV. ICJ—Limited Chances and Missed Opportunities

The International Court of Justice does not yet contribute appropriately to the enforcement of international environmental law.
(Chapter 4.I.A)

The ICJ, although the central judicial organ of the United Nations, equipped with broad jurisdiction and even, temporarily, with a special chamber for environmental disputes, has not yet been able to contribute appropriately to the realization of democratic global governance for sustainable development and, more specifically, to the application and development of international environmental law. Its main deficits are the limited accessibility in terms of parties, its very cautious practice in making use of amici curiae and expert advice, and its rather reluctant approach to dealing in an appropriate depth with factual and legal environmental issues relevant to its cases.

The following recommendations may be considered: Firstly, the ICJ should apply more substantive international environmental law to cases that involve environmental protection interests and deal with the legal and factual environmental issues in appropriate depth. It should also contribute to the further interpretation and development of international environmental law. Secondly, the ICJ should include more expertise in its decision-making processes in order to deal with the scientific and technical aspects of affected environmental interests in appropriate depth. It should, therefore, allow environmental NGOs, as key stakeholders in environmental interests, to participate in contentious and advisory proceedings as amici curiae and hear more experts and IOs.

The establishment of a new world environment court is favored over putting in place a new strengthened environmental chamber at the ICJ. However, if states agree that more environmental cases are to reach the ICJ, stakeholders in environmental protection interests should have the right to trigger advisory and maybe even contentious proceedings under clearly defined conditions. As a first step, for example, UNEP and the CSD could have the right to invoke environmental community obligations before the ICJ.

XVI. WTO—The In-Built Bias, Lack of Transparency and Access

The WTO dispute settlement mechanism needs to become more transparent and more accessible to environmental interests.
(Chapter 4.I.B)

The core deficits in WTO proceedings from this research's perspective are that they are mainly confidential, that they can only be triggered by states, and that the status of ENGOs as amicus curiae is not formally recognized. Furthermore, despite

some reasonably positive efforts of the Appellate Body in the *Asbestos* and *Shrimp-Turtle* cases, environmental protection arguments, including those adduced by amici statements in the past, are not considered transparently and weighed against other interests in the WTO judgments.

Consequently, proceedings before the WTO dispute settlement bodies that affect environmental protection interests should be open to the public, including all relevant documents and hearings. ENGOs should be given a right to initiate a WTO dispute settlement in cases where trade liberalization and environmental protection coincide, e.g. regarding the enforcement of rules aimed at the elimination of environment-degrading subsidies. Since states have activated non-state actors to enforce international law elsewhere, especially in the field of investment protection, they may consider giving environmental NGOs limited standing before the WTO dispute settlement bodies or a procedural right to notify the WTO secretariat of possible breaches of such rules by WTO members.

ENGOs should also be formally recognized as amici curiae. It has been argued that enhanced participation by environmental NGOs in the WTO dispute settlement mechanism does add some accountability to its influence, because it makes the procedures more transparent and more open for environmental and social arguments. At the same time, it contributes to ensuring a proper informative basis with regard to factual and legal environmental aspects relevant to the case at issue. Meaningful amicus curiae participation by environmental NGOs, however, presupposes that they have access to the hearings and the submissions of the parties in WTO cases that affect environmental interests. Only then they are able to address crucial factual and legal environmental issues relating to the cases in their amicus briefs. The rules developed by the WTO Appellate Body in the *Asbestos* case can be drawn on in relation to the procedure for amicus curiae participation.

If a dispute is originally more an environmental than an economic dispute, the WTO dispute settlement system is not the appropriate forum. If an economic dispute involves environmental interests, the WTO dispute settlement bodies should build on the decisions in *Asbestos* and *Shrimp-Turtle* and further develop transparent reasoning of its judgments. When they have to balance trade and environmental protection interests as they have to do, for example, in applying Article XX GATT and its chapeau, they may consider the use of a three-stage balancing test, including suitability, necessity, and proportionality.

XVII. ITLOS—Prompt Release of IUU Fishing Fleets and Lack of Access

The jurisprudence of ITLOS does not yet appropriately safeguard the marine environmental and fisheries protection provisions of UNCLOS and related instruments.
(Chapter 4.I.C)

On the one hand, ITLOS can build on a number of features that put it, theoretically, in a good position to safeguard marine environmental and fisheries protection interests. Firstly, UNCLOS and its related instruments provide for a rather holistic regime much oriented at what is now called sustainable development. Thus, the core law applicable to ITLOS cases encompasses many substantive laws aimed at the protection of the marine environment. Secondly, a Chamber for Marine Environment Disputes and a Chamber for Fisheries Disputes have been established to ensure specialized decision-making. Thirdly, the majority of the cases ITLOS has dealt with so far directly or indirectly concerned fisheries and the marine environment. Fourthly, proceedings at ITLOS are transparent. Pleadings, orders, judgments and other relevant documents are publicly available on the ITLOS website. Hearings are also open to the public and have already been transmitted live via a webcast.

On the other hand, the Tribunal does not yet sufficiently safeguard the provisions aimed at the protection of the marine environment and fisheries in its decisions. None of the specialized chambers has been used to date. The most popular ITLOS procedure, the prompt release procedure, has severe flaws from an environmental protection perspective. Environmental NGOs can neither initiate cases, nor contribute to the proceedings as amici curiae. In its recent first advisory opinion, however, the Seabed Disputes Chamber accepted an amicus brief filed by two NGOs and published it on its website with the explicit note that it is not part of the case file.

The prompt release procedure is the procedure most often invoked before the ITLOS because it can be triggered by one state alone. The procedure mainly enables states and currently private companies engaged in IUU fishing to reach a fast and cheap release of their vessels and crews. Damage done to the marine environment cannot be appropriately addressed in this procedure, nor does it have a sufficiently deterrent effect. This procedure should therefore be redesigned to include more environmental protection interests. Also, the ITLOS should make better use of its interpretative space and, for example, accept a vessel monitoring system as part of a bond. Consideration might also be given to establishing an ENGO trigger for judicial review procedures before the marine environment and the fisheries dispute chamber of the ITLOS. These procedures could be considered as a testing ground. For example, if ENGOs detect IUU fishing activities, they could bring such a case to the attention of the fisheries dispute chamber.

Ad hoc arbitrations under UNCLOS have not so far been able to contribute to the enforcement of international environmental law. Rather they pose a challenge to the coherence of international law. Proceedings before the ITLOS are significantly more transparent and thus more appropriate for dealing with public interests such as protection of the marine environment and fair and equitable use of marine resources. 30 states have already accepted the jurisdiction of the ITLOS; more states should consider doing so. This would also safeguard a more coherent development of international law.

XVIII. Limit the Influence of International Arbitral Tribunals

International arbitral procedures are not appropriate for dealing with environmental protection interests. Their influence on cases that affect the environment needs to be limited.
(Chapters 3.II and 4.II)

Historically, arbitration is at the root of international dispute settlement. The number of international arbitral proceedings far exceeds the number of cases under judicial dispute settlement and the case load is still rising. Due to its inherent characteristics such as the influence of the parties on the process and applicable law, confidentiality, and the ad hoc nature and composition of the tribunal and its decisions, arbitration is the wrong procedure to deal with public interests in general and environmental protection interests in particular. Therefore, its influence in environmental matters should be limited and not broadened as has been suggested by some scholars.

In the field of international investment law, states have agreed to confer rights on private investors to bring cases against states before arbitral tribunals, such as those under ICSID. Thus, states have shown that they are able to give rights to non-state actors to safeguard the enforcement of international law in quasi-judicial proceedings in the field of investment protection. If there is sufficient political will, they could also do so to protect environmental interests. In practice, investment arbitration poses an additional challenge to national administrations and courts in enforcing environmental law. More and more, investors use those arbitral proceedings to claim that environmental protection measures ordered under national procedures amount to expropriation and unfair treatment. Either through changes in admissibility rules or substantive rulings of arbitral tribunals, these cases have to be removed from the tribunal's dockets. They abuse the system put in place and do not further sustainable development. Arbitral tribunals are not in a position to appropriately deal with public, including environmental, interests.

Under several fora for investor-state disputes such as NAFTA, CAFTA-DR, and also ICSID, notable efforts have been undertaken to allow for amicus curiae participation and, with respect to CAFTA-DR, also making documents and hearings public. These are important steps that must be welcomed. However, the ultimate goal should be to remove cases in which local administrative or judicial bodies properly enforced environmental law against investors from the sphere of influence of international arbitral tribunals.

XIX. Strengthen Compliance Committees under MEAs

Compliance committees under MEAs can play a crucial role in safeguarding compliance with international environmental law. They should be further strengthened and

developed following the example of the compliance mechanism established under the Aarhus Convention.
(Chapters 3.III and 4.III)

Compliance control procedures have been developed under several MEAs with a view to the special aspects of the implementation and enforcement of international environmental law revealed in the research on compliance theory. The two main assumptions in this context are that the effectiveness of an international environmental regime requires cooperation of the highest possible number of states and that the reason why many states do not appropriately implement international environmental law is not lack of will but lack of resources. Consequently, an effective compliance review mechanism needs to be non-confrontational, enhance the cooperation of the party concerned at all stages, reveal the origins of non-compliance, and address them with measures of both "carrots" and "sticks" as deemed appropriate for the case at issue.

The compliance mechanism established under the Aarhus Convention is the most active and, in terms of democratic governance for sustainable development, especially as regards accessibility, participation, and transparency, the furthest developed international compliance review procedure. Citizens and NGOs can file communications directly with the compliance committee. The whole procedure is public and well documented online. Members of the compliance committee are independent and serve in their personal capacity. Decisions of the compliance committee highlighted and addressed specific cases of non-compliance and made recommendations on coming into compliance, without interfering too much with national decision-making powers. Both carrots and sticks have been used to hold parties concerned responsible in cases of non-compliance, at the same time pointing out ways to gain financial and capacity building support in order to tackle the shortcomings identified.

Two characteristics of the compliance mechanism established under the Kyoto Protocol are innovative when it comes to the implementation and enforcement of international environmental law: the non-state trigger of the compliance review procedure via ERTs and the differentiation between a facilitative and an enforcement branch. All six questions of implementation considered on the merits so far have been brought before the Committee via the ERTs. Expert advice also played an important role during the procedures before the enforcement branch since questions of implementation arising under the Kyoto Protocol are highly technical. The facilitative branch has not yet been used as originally envisaged, but facilitative measures have been undertaken by the ERTs. The enforcement branch has dealt with all questions of implementation in a transparent, well-reasoned, and timely manner. Core documents are available on the Kyoto Protocol's website. Hearings are public and can be followed via a webcast. The main weakness of the Kyoto compliance mechanism is that the Committee has no timely way of addressing a case like the

Canadian case where the Canadian government openly declared early on that it is not planning to reach its emission reduction targets.

All MEAs should follow the example of the Aarhus compliance mechanism and establish compliance procedures that are equally widely accessible for citizens and NGOs, transparent with regard to documents and hearings, and independent as regards the members of the compliance committee. To further enhance the incentive of the parties concerned to cooperate and actually solve cases of non-compliance, if these are based on lack of resources, the supportive measures that can be ordered by a compliance committee and endorsed by the MOP could be linked to funds established under the relevant MEA, UNEP, the GEF, or regional development banks, to further the goals of the Convention in question or environmental protection in general. An action plan developed by the party concerned, tailored to its specific needs and approved by the compliance committee and the MOP, could determine which concrete measures should be financed at a local level through those funds in order to come into compliance with the convention.

XX. A New World Environment Court

A new World Environment Court is a crucial institutional cornerstone of democratic global governance for sustainable development.
(Chapter 4.IV)

If states are to take their obligations under existing multilateral environmental agreements and customary international environmental law seriously, they urgently need to create an international judicial institution that oversees and supports the implementation of and compliance with those laws. The study has identified several gaps and deficits in national adjudication and international compliance review mechanisms with regard to the enforcement of international environmental law and thus the need for international judicial control with respect to three categories of environmental cases as outlined in thesis VIII.

A concrete proposal for a new World Environment Court (WEC) has been developed. The proposal covers the institutional setting of a WEC and several concrete features responding to the special characteristics of international environmental law and its implementation and enforcement. The WEC is envisaged as a specialized court, focused on the implementation and enforcement of international environmental treaty law as well as customary law, and linked to a World Environment Organization built on UNEP. It should be accessible via five types of procedures: advisory procedures, direct actions, and infringement, preliminary ruling, and enforcement procedures. States, supranational organizations, and UN entities should be able to request advisory opinions. Direct actions should be triggered by states, ENGOs, and individuals. Infringement procedures should be triggered by compliance

committees or a World Environment Commission. Environmental NGOs could inform such a Commission or compliance committees about possible cases for an infringement procedure. Judges of the national judiciaries could request preliminary rulings or non-binding advisory opinions regarding a concrete case. If judgments of the WEC are not complied with, an enforcement procedure could be triggered, for example, by a World Environment Commission. Proceedings before the WEC should be open for amicus curiae participation and take advantage of expert advice; they should be characterized by a transparent procedure and well-reasoned decision-making. The consequences and remedies applicable by the WEC should comprise "carrots" and "sticks", including capacity building measures, injunctive relief, compensatory damages, and penalty payments. Penalties should be paid to a compliance fund to finance supportive measures.

None of the features listed above is new in international law enforcement. It is a combination of instruments and measures which already exist at the European Court of Justice, regional human rights courts, and compliance committees under MEAs tailored to the specific needs of dealing with the enforcement of international environmental law. A WEC protecting the enforcement of international environmental law is an urgently needed counterweight to existing international judicial and arbitral bodies that mostly protect economic interests. Such a judicial institution would not block development and industrial activities but ensure that development is sustainable and actually serves everyone's interests.