

# **Effective Dispute Resolution**

## **A Review of Options For Dispute Resolution Mechanisms and Procedures**

Prepared for the fifth session of the  
Multilateral High-Level Conference on the Conservation and Management  
of Highly Migratory Fish Stocks  
in the Western and Central Pacific

Prepared by the  
Center for International Environmental Law  
for the

World Wildlife Fund-US

This paper was drafted by David Downes, Senior Attorney, and Braden Penhoet, Project Attorney, Center for International Environmental Law (CIEL), Washington, D.C., URL: <http://www.econet.apc.org/ciel/>. Kris Genovese and Joanne Rotundi assisted with research, editing and production.

September, 1999

# Table of Contents

- I. Introduction**
- II. The Context for Resolution of Disputes in Western and Central Pacific Fisheries**
  - A. Background Principles for Resolving Disputes**
  - B. Values and Criteria Relevant to Design of Dispute Resolution Procedures**
  - C. Types of Disputes That Might Arise**
- III. The Existing Framework for Resolution of Disputes Over Pacific Fish Stocks**
  - A. The Framework for Dispute Resolution Under UNCLOS and SSA**
  - B. Institutional Mechanisms for Dispute Resolution**
- IV. Lessons from Experience With Dispute Settlement Procedures**
  - A. Resolution of Disputes Involving Fisheries**
    - Dispute Resolution in Regional Fisheries Organizations
    - International Court of Justice (ICJ)
    - International Tribunal on the Law of the Sea (ITLOS)
    - Arbitration
    - Collective Action Against Non-Compliant States
    - Challenges to Collective Decision-Making
  - B. Lessons From Other Areas Of International Law**
    - 1. Experience With Active Dispute Settlement Procedures**
      - World Trade Organization (WTO)
      - International Labor Organization (ILO)
      - Montreal Protocol (Compliance Implementation Committee)
      - World Bank Independent Inspection Panel
      - European Court of Justice
      - European Court of Human Rights
      - Commission on Environmental Cooperation
    - 2. Innovative Mechanisms**
      - International Finance Corporation's Ombudsman
      - Nordic Convention: Reciprocal Access to National Remedies
- V. Conclusions and Recommendations**

## I. Introduction

Negotiators discussing the Draft Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Central and Western Pacific Region (Draft Pacific Convention) recognize the urgent need for cooperative action to achieve conservation and sustainable management of the highly migratory fish species in the region. Successful negotiation of a strong new Convention is vitally important. Yet as a recent treatise on international environmental law noted, “[i]t is not sufficient simply to develop new law. The law must be translated into action and it must lead to real improvements in environmental quality; it must be effective.”<sup>1</sup>

To be effective, the new Convention must embody rules and norms whose implementation will ensure the achievement of conservation and sustainable use through effective management. It must provide for procedures and principles through which participants can elaborate and modify more detailed conservation measures in response to changing conditions. Equally important, it must provide for mechanisms to ensure implementation of its provisions and compliance with agreed-upon measures.

International agreements for conservation and environmental protection typically include both active measures to support compliance, and responsive measures to remedy cases of non-compliance. Positive measures include provisions for financial assistance to developing countries, including small island states, technology transfer, national reporting, cooperative research and monitoring, and centralized committees and secretariats that assemble and analyze compliance information.<sup>2</sup> Measures to respond to non-compliance include provisions for reporting and investigation of non-compliance, formulation of collective enforcement responses to non-compliance cases, and — the subject of this paper — resolution of disputes about non-compliance.<sup>3</sup>

In designing dispute resolution mechanisms and procedures, negotiators do not have to start with a blank slate. They will be guided by the goals of the negotiation, as well as the substantive principles of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>4</sup> and the 1994 United Nations Agreement on Highly Migratory and Straddling Fish Stocks (SSA).<sup>5</sup> Equally important, they will be working within the flexible procedural framework for dispute resolution established by the UNCLOS and the SSA. The new Pacific Convention represents the first opportunity to apply the UNCLOS framework as elaborated and enriched by the SSA. Finally, they can draw on lessons learned from the experience with international dispute settlement, not only in the area of high seas fisheries but in other areas of international law.

This paper summarizes these sources of guidance. Part II of this paper reviews key features of the context for selection of dispute resolution procedures. Part II.A discusses the substantive background principles for dispute resolution established in the UNCLOS and the

---

<sup>1</sup> David Hunter, James Salzman and Durwood Zaelke, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 444 (New York: Foundation Press 1999).

<sup>2</sup> See Hunter, et al., *supra* note 1, at 471-78.

<sup>3</sup> See *id.* at 478-99.

<sup>4</sup> See United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc.A/Conf.62/122, *reprinted in* 21 I.L.M. 1261 (1982) (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

<sup>5</sup> See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature*, Dec. 4, 1995, U.N. Doc. A/Conf.164/37, *reprinted in* 34 I.L.M. 1542 (1995) [hereinafter SSA].

SSA, and incorporated by reference into the Draft Pacific Convention.<sup>6</sup> Part II.B discusses the types of disputes that might arise under a future Pacific Convention. Part II.C reviews the values and criteria to which negotiators might refer in designing procedures to resolve those disputes, such as efficiency, a strong scientific basis, consistency with policies favoring information sharing and collective responsibility, precautionary and adaptive management, and authoritative legal interpretations.

Part III details the institutional and procedural framework for dispute resolution established in the UNCLOS and SSA as applicable to regional fisheries arrangements such as the one currently being negotiated. It reviews the International Court of Justice (ICJ), International Tribunal on the Law of the Sea (ITLOS), arbitration, and institutions and procedures provided for the Draft Pacific Convention.

As this discussion demonstrates, while the UNCLOS/SSA framework defines parameters for dispute settlement procedures under the Pacific Convention, that framework affords negotiators significant flexibility to design procedures under the new Convention, both to fit the situation in the region and to reflect lessons from experience in other contexts.

Part IV reviews highlights of actual experience with international dispute resolution mechanisms, both within the context of high seas fisheries and farther afield in international law, including active dispute resolution and compliance mechanisms used under the World Trade Organization (WTO), the International Labor Organization (ILO), the Montreal Protocol, the European Courts of Justice and of Human Rights, the World Bank, and the Commission on Environmental Cooperation (CEC) established under the North American Agreement on Environmental Cooperation (NAAEC). This Part also considers innovative models found under the International Finance Corporation (IFC) and the Nordic Convention.

Part V provides conclusions and recommendations. Based on the lessons learned in Part IV, it identifies options for enhancing efficiency, transparency, precautionary and adaptive management and collective responsibility, within the flexible framework of the UNCLOS and SSA.

## **II. The Context for Resolution of Disputes in Western and Central Pacific Fisheries**

The significant progress achieved by the UNCLOS and the SSA in elaborating shared goals, cooperative institutions, and agreed-upon principles and rules has implications for the design of dispute resolution procedures in the new Pacific Convention (Part II.A). In spite of this common ground, however, several types of disputes could arise (Part II.B). The selection and design of mechanisms to resolve such disputes will be guided by certain shared criteria and values, including the desires for efficiency, transparency, timeliness, precaution, adaptive management, and collective responsibility to implement decisions based in science (III.C).

### **A. Background Principles for Resolving Disputes**

At the outset, it is important to emphasize that participants in the regional arrangement resulting from the present negotiation will be united by their commitment to important shared principles. As reflected in the Draft Pacific Convention, all nations participating in the arrangement will acknowledge the shared interest in ensuring, “through effective management,

---

<sup>6</sup> See Draft Pacific Convention, art. 32, WP.1/Rev.2, prepared by the Chairman, 19 February 1999.

the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the UNCLOS and the SSA.”<sup>7</sup>

The Draft Pacific Convention’s provisions will elaborate and build upon the principles, rights and obligations relating to conservation and management of migratory and straddling stocks found in the UNCLOS and the SSA.<sup>8</sup> The UNCLOS obligates States to cooperate on the conservation and management of straddling and highly migratory fish stocks.<sup>9</sup> The SSA further requires all States fishing a given stock to cooperate with other interested States through a regional arrangement in which they provide for measures to conserve and manage target stocks sustainably, protect dependent and associated species, apply the precautionary approach, and cooperate on enforcement.<sup>10</sup>

With the continuing elaboration of the principles of the law of the sea — as reflected in the successive agreements of the UNCLOS, the SSA and now the treaty under negotiation — disputes arise in a context where the disputants have more and more common ground. Disputes should increasingly be avoidable through resort to this increasingly sophisticated body of rules and set of effective institutions for applying those rules in a cooperative fashion. In the narrowing spectrum of issues where these rules and institutions do not achieve satisfactory results, States are obligated to achieve peaceful resolution of disputes through the standard mechanisms of negotiation, inquiry, mediation, etc., and where those fail, resort to legally binding dispute settlement.<sup>11</sup>

## **B. Values and Criteria Relevant to Design of Dispute Resolution Procedures**

Related to, but distinct from, the legal principles outlined in Part II.A above, there are also a number of values and criteria relevant to the selection and design of dispute resolution procedures. Although the parties may anticipate viewing their interests in any particular case as opposed,<sup>12</sup> important shared values and interests should bring them together to develop and then

---

<sup>7</sup> *Id.* art. 2.

<sup>8</sup> *See id.* art. 4 (providing that “[t]his Convention shall be interpreted and applied in the context of and in a manner consistent with the [UNCLOS] and the [SSA]”).

<sup>9</sup> The UNCLOS, termed a “new constitution for the oceans” when adopted in 1982, includes extensive coverage of marine living resources. One hundred and thirty-two States have acceded to or ratified the UNCLOS and in most respects it is recognized as customary law of the sea. Under Articles 63, 64, and 117-119, States are obligated to cooperate to conserve straddling stocks, highly migratory stocks, and marine living resources on the high seas.

<sup>10</sup> The SSA was adopted by the UN General Assembly in 1995. It has been signed by 59 States and ratified by 23. *See* Current Status of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea, *available at* URL: <[http://www.un.org/Depts/los/STAT\\_164.txt](http://www.un.org/Depts/los/STAT_164.txt)>. It will enter into force after 30 States have ratified it. The SSA establishes principles for managing and conserving straddling and highly migratory stocks, intended to elaborate upon and define in detail the general requirement of cooperation found in the UNCLOS. Under the SSA, Parties shall cooperate through regional and sub-regional arrangements to establish and enforce measures for conservation and management of the stocks as well as protection of associated and dependent species, according to the precautionary approach. All Parties whose vessels fish in the region must comply with agreed-upon measures. Indeed, compliance with these measures is a condition of access to the relevant stocks. Participants in a regional arrangement are authorized to take action consistent with international law to deter activities by non-Parties to the arrangement as well as Parties that are inconsistent with the arrangement’s conservation restrictions.

<sup>11</sup> *See* SSA, *supra* note 5, at art. 27; UNCLOS, *supra* note 4, at arts.279-81; The Charter of the United Nations, art. 33, June 26, 1945, 59 Stat. 1031 (1945) (entered into force Oct. 24, 1945).

<sup>12</sup> For instance, they may perceive that the allocation of competing fishing quotas is a zero-sum game; Coastal States and distant water fishing (DWF) States may perceive their interests as in conflict.

employ a dispute settlement procedure that maximizes their abilities to continue to work cooperatively and adaptively in the precautionary management of fish stocks.

Naturally all the parties have a common interest in the long term maintenance of the stocks in question. By the same token, all parties have an interest in preventing some participants from functioning as “free riders” that create a “tragedy of the commons” problem.

Dispute settlement procedures should operate efficiently (minimizing the duration and expense of proceedings). Indeed, the SSA specifically calls for decision-making procedures that facilitate adoption of conservation measures “in a timely and effective manner.”<sup>13</sup> In addition, dispute resolution mechanisms should produce reasonably predictable outcomes and provide Parties some assurance that similar disputes result in similar outcomes.<sup>14</sup> At the same time, it should maintain some flexibility in its procedures to respond effectively to different types of situations.

Dispute resolution procedures and mechanisms must ensure the collection and sharing of the best possible scientific evidence, consistent with the SSA’s principle that measures to ensure sustainability of stocks are based on the best scientific evidence available.<sup>15</sup> At the same time, the procedure must reflect the SSA’s endorsement of the precautionary approach, such that “[t]he absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.”<sup>16</sup>

Another set of values relate to fairness and due process. Dispute resolution mechanisms and procedures should be fair, equitable, impartial, and should achieve results based on sound legal reasoning and a solid base in fact. Its procedures should provide for the selection of competent and impartial decision-makers. There should be clarity regarding procedures for submission of evidence and argument, standards of proof, appeal, review and adoption of decisions, transparency and reporting, and rights of third party intervenors.

The equitable principle of shared but differentiated responsibility, now prevalent in international environmental law, mandates the provision of assistance to support participation by developing countries — and in the present context, small island states in particular. Indeed, the SSA explicitly requires States to cooperate to “enhance the ability of developing States, in particular the least-developed among them and small island developing States, to conserve and manage” straddling and highly migratory stocks.<sup>17</sup> States shall “facilitate the participation of developing States in subregional and regional fisheries management organizations and arrangements.”<sup>18</sup> This assistance shall include provision of financial assistance, technical assistance, and advisory and consultative services, and shall be directed toward compliance and enforcement.<sup>19</sup> It is evident that these provisions support inclusion of provisions in the Draft Pacific Convention for assistance to developing and small island states to help them participate in whatever dispute resolution procedures are established under the Pacific Convention.

---

<sup>13</sup> SSA, *supra* note 5, at art. 10(j).

<sup>14</sup> Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT’L COMP. L.Q. 37, 40 (1997).

<sup>15</sup> See SSA, *supra* note 5, at art. 5(b).

<sup>16</sup> *Id.* art. 6(2).

<sup>17</sup> *Id.* art. 25(1)(a).

<sup>18</sup> *Id.* art. 25(1)(c).

<sup>19</sup> See *id.* arts. 25(1), (2).

Effective remedies and enforcement are important in building the confidence of participants in a dispute settlement procedure. In recent decades, there has been a trend in a number of international institutions toward increasing transparency of procedures, aimed at enhancing the legal and factual basis of decisions and building the confidence of the public and of States not participating in a specific dispute in the overall process and its legitimacy. In contrast, where institutions have failed to make their decision-making procedures more transparent and open to public input, they have come under increasingly severe public criticism.

A central issue is whether the procedure is accepted as legitimate. As one commentator has observed, a State will:

submit a dispute to a third-party procedure entailing binding judgements ... only when [it] has full confidence in the ability of the pre-constituted international court in question, to discharge its responsibility fairly and squarely. Accordingly, confidence (or lack thereof) in a particular pre-constituted court is an important ingredient that governs the acceptability of such an institution.<sup>20</sup>

Factors that enhance perceived legitimacy include the extent to which the features of a dispute settlement procedure are based on laws which already bind participants, on precedent, and on the lessons of experience with past successes and failures. These factors are discussed in subsequent Parts of this paper.

### **C. Types of Disputes That Might Arise**

There are at least four types of disputes that might arise under a future Pacific Convention. The first three involve disputes about whether one or more States are complying with the requirements of the Convention. Distinctive issues are raised where the State in question is a coastal State applying compatible measures, or where the State in question is a non-Party to the Convention and a non-participant in its arrangements. A final category of possible disputes involves cases where a State questions the validity of a decision made by the Commission under the Convention. These different categories of disputes may involve the resolution of different types of substantive questions.

**Complaints About Compliance.** It is possible that a Party, a group of Parties or the Commission, might bring a complaint against another Party regarding the compliance of that Party's regulations or vessels with the RFMO's provisions, or with measures adopted by the Commission. In principle such disputes revolve around the resolution of scientific and technical issues, although a legal component might also arise to the extent it is necessary to interpret the meaning of terms of the Pacific Convention, the UNCLOS, the SSA, or measures adopted under the Convention.

**Complaints About Compliance: Compatible Measures.** Distinctive issues would arise where a concern about compliance was raised regarding whether a coastal State's conservation and management measures within its own Exclusive Economic Zone (EEZ) are compatible with measures taken under the Pacific Convention. This is because the UNCLOS and SSA provisions on compulsory binding third party dispute settlement are different for such measures in light of the sovereign power of Coastal States within their own EEZs. In principle

---

<sup>20</sup> See Andronico O. Adede, *Avoidance, Prevention and Settlement of International Environmental Disputes*, in UNEP'S NEW WAY FORWARD: ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT 64-65 (Sun Lin ed., 1995).



such disputes revolve around the resolution of scientific and technical issues, with a possible legal component possible as noted above.

**Complaints About Compliance: Non-Parties.** Distinctive issues also would arise if a complaint were raised concerning whether a non-Party to the Pacific Convention or its vessels were complying with provisions of the Convention or measures adopted by the Commission. Under international law, a non-Party to the Convention would be bound by customary international law (such as the provisions of the UNCLOS, most of which are universally recognized as such), but a State is not bound by the terms of an agreement to which it is not a Party. On the other hand, a Party to the SSA is bound to take cooperative measures to address non-Party non-compliance, and indeed under the SSA are obligated to take measures consistent with international law to deter activities of non-Parties' vessels that undermine the effectiveness of the Convention's measures.<sup>21</sup> Decisions in this category, like those in the preceding two categories, would revolve around scientific and technical issues, but would very likely involve a legal component as well.

**Complaints About Collective Decisions.** A final category of dispute that might arise involves a challenge by one or more Parties to a decision or other action taken by the Commission or another organ established by the Convention. Challenged decisions might involve the establishment of the total allowable catch or other conservation measures — raising scientific and technical issues — or on the other hand the allocation of quotas among the fishing States — raising legal and political issues.

### III. The Existing Framework for Resolution of Disputes Over Pacific Fish Stocks

As discussed in Part II.A, above, the Pacific Convention — including its provisions on dispute resolution — is taking shape within the framework established by the UNCLOS and the SSA. The UNCLOS includes elaborate provisions for the resolution of disputes concerning the interpretation or application of its terms.<sup>22</sup> The SSA adopts the dispute resolution provisions of the UNCLOS, *mutatis mutandis* — that is, with changes as needed to adapt them to the new context.<sup>23</sup> Similarly, the Draft Pacific Convention provides that the dispute resolution provisions of the SSA “apply *mutatis mutandis* to any dispute between Contracting Parties concerning the interpretation and application of this Convention, whether or not they are also Parties to the [SSA].”<sup>24</sup>

#### A. The Framework for Dispute Resolution under UNCLOS and SSA

The framework for dispute resolution under the SSA and the Draft Pacific Convention is defined by reference to the UNCLOS. The SSA incorporates the UNCLOS framework by reference with some relatively minor variations. The UNCLOS provides for exceptional treatment of disputes about a coastal State's management within its own EEZ, and the SSA similarly provides special treatment for “compatible measures” taken by a coastal State within its EEZ.

**The UNCLOS.** Part XV of the UNCLOS requires State Parties to the Convention to settle disputes concerning its interpretation or application peacefully in accordance with the

---

<sup>21</sup> See SSA, *supra* note 5, at art. 17(4).

<sup>22</sup> See UNCLOS, *supra* note 4, at arts. 279-99.

<sup>23</sup> See SSA, *supra* note 5, at art. 30.

<sup>24</sup> Draft Pacific Convention, *supra* note 6, at art. 32.

Charter of the United Nations.<sup>25</sup> Such means can include any means chosen by disputing State Parties, or optional conciliation.<sup>26</sup> Where, however, no settlement can be reached, Article 286 of the Convention stipulates that the dispute be submitted at the request of any party to the dispute to one of four mechanisms defined in Article 287:

- (a) The International Tribunal for the Law of the Sea (established in accordance with Annex VI of the Convention) including the Seabed Disputes Chamber;
- (b) The International Court of Justice;
- (c) A (general) arbitral tribunal constituted in accordance with Annex VII of the Convention;
- (d) A special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein (the categories include matters concerning fisheries).

When a State ratifies or accedes to the UNCLOS, it may select one or more of these mechanisms to which disputes in which it is involved shall be submitted.<sup>27</sup> If a State does not select a mechanism, then the default is general arbitration. If two States resort to binding dispute resolution, and they have chosen different mechanisms, then the applicable mechanism shall be arbitration in accordance with Annex VII, unless they agree otherwise.<sup>28</sup>

Regardless of which mechanism a State selects, the UNCLOS vests the ITLOS with jurisdiction to determine what, if any, provisional measures may be taken to address a complaint that the State has violated the UNCLOS's obligations prior to the creation of an arbitral panel or at any time prior to the successful settlement of the dispute, if parties cannot themselves agree on an appropriate court or tribunal to make such prescriptions.<sup>29</sup> The SSA incorporates these provisions, too, by reference, *mutatis mutandis*, except that when a State acceding to or ratifying the SSA is not a Party to the UNCLOS, it may opt out of this clause upon ratification.<sup>30</sup>

**Dispute Resolution Under the SSA.** The SSA incorporates, *mutatis mutandis*, Part XV of the UNCLOS for disputes among parties to the SSA concerning its interpretation or application, *or* concerning the interpretation or application of a subregional or regional fisheries agreement relating to straddling or highly migratory stocks.<sup>31</sup> When a State ratifies or accedes to the SSA, it is bound by its choice of forum when it ratified the UNCLOS, if it is a party to the UNCLOS, unless it specifies a different choice when it ratifies the SSA. Non-Parties to the UNCLOS that ratify the SSA may select from the mechanisms specified in Article 287 of the UNCLOS, and may also participate in the procedures specified in Annexes V, VII and VIII of the UNCLOS (such as the nomination of experts and arbitrators) for the purposes of resolving disputes under the SSA.<sup>32</sup>

---

<sup>25</sup> See UNCLOS, *supra* note 4, at art. 279 (consistent with UN Charter art. 2(3) and art. 33(1)).

<sup>26</sup> See *id.* at Annex V.

<sup>27</sup> See *id.* art. 287(1). As of the end of 1998, the ICJ had been accepted by the following UNCLOS Parties: Austria, Cape Verde, Finland, Germany, Italy, Netherlands, Norway, Oman, Portugal, Spain, Sweden and the UK. The ITLOS had been accepted by Argentina, Austria, Cape Verde, Chile, Finland, Germany, Greece, Italy, Oman, Portugal, Tanzania and Uruguay. Note that Cape Verde has accepted both.

<sup>28</sup> See *id.* art. 287(5).

<sup>29</sup> See *id.* art. 290.5.

<sup>30</sup> See *infra* note 38 and accompanying text.

<sup>31</sup> See SSA, *supra* note 5, at art. 30. See also Francisco Orrego Vicuña, THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES 274 (1999).

<sup>32</sup> See SSA, *supra* note 5, at art. 31(4).

The SSA also establishes an extra step following mediation, conciliation, etc., and prior to binding dispute settlement, by which States may refer a dispute to “an ad hoc expert panel established by them” when it “concerns a matter of a technical nature.”<sup>33</sup>

**Compatible Measures.** The SSA explicitly requires coastal States and distant water fishing States to “cooperate for the purpose of achieving compatible measures” for the high seas and areas under national jurisdiction.<sup>34</sup> The SSA provides that if they fail to agree within a reasonable time, a party may submit the issue for dispute settlement, and may seek provisional measures pending final resolution, in accordance with Part VIII of the SSA.<sup>35</sup> Part VIII incorporates *mutatis mutandis* part XV of the UNCLOS, which provides for special treatment of disputes regarding measures within the EEZ. Compulsory dispute resolution is not available with respect to coastal States’ exercise of their rights and obligations regarding marine living resources in the EEZ, including determinations regarding “the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and obligations.”<sup>36</sup> Instead, compulsory conciliation — which does not produce a legally binding result — is available for disputes about compatible measures where there is evidence that the coastal state has “manifestly” and “arbitrarily” failed to meet its obligations with regard to compatible measures.<sup>37</sup> Left unclear (under UNCLOS) is how such threshold determinations are to be made, and by what processes and institutions. Also less than clear is the relationship between the language on dispute settlement and provisional measures relating to compatible measures in Article 7 of the SSA, dispute settlement under Part VIII of the SSA, and dispute settlement under part XV of the UNCLOS, particularly as these clauses relate to coastal States’ rights and obligations within the EEZ.<sup>38</sup>

**Considerations for a New Regional Agreement.** Standing alone, the UNCLOS framework is not without its limitations. The wide range of permissible forums for addressing dispute was necessary to secure States’ consent to binding dispute resolution in a “package deal” covering a broad range of issues arising under the UNCLOS, including, inter alia, seabed mining, navigation, maritime boundaries and fishing. A more specifically defined approach may be appropriate in the context of a specific regional fisheries management organization (RFMO).<sup>39</sup>

The UNCLOS framework also reflects the traditional vision of one State’s claims that another State has breached its obligation to the first State, or violated the rights of the first State, under general principles of international law.<sup>40</sup> Arguably, the relevance of this paradigm decreases in proportion to the state of development of agreed-upon norms and the progressive development of cooperative institutions and procedures in a field of law.

---

<sup>33</sup> *Id.* art. 29.

<sup>34</sup> *Id.* art. 7(2).

<sup>35</sup> *See id.* art. 7(3).

<sup>36</sup> UNCLOS, *supra* note 4, at art. 297(3)(a); *see also* SSA, *supra* note 5, at art. 32. An exception to this exception arises when a State detains a ship flying the flag of another State and fails to release the vessel or its crew promptly. In such a case the ITLOS has jurisdiction to hear an application for release from the flag State, regardless of whether the detaining State has accepted the ITLOS’s compulsory jurisdiction. *See* UNCLOS, *supra* note 4, at art. 292.

<sup>37</sup> *See* UNCLOS, *supra* note 4, at art. 297(3)(b).

<sup>38</sup> For a detailed discussion of such issues, including treatment of dispute settlement procedure for provisional measures as to coastal states’ EEZs, see Orrego Vicuna, *supra* note 31, at 281-82.

<sup>39</sup> In addition, jurisdictional issues relating to different treatment of high seas and coastal states’ Exclusive Economic Zones (EEZs), and the source of authority for prescribing provisional measures pending the conclusion of dispute resolution proceedings remain to be fully addressed. *See* section III.A., below.

<sup>40</sup> *See* Martti Koskenniemi, *New Institutions and Procedures for Implementation Control and Reaction*, in GREENING INTERNATIONAL INSTITUTIONS 236, 237 (Jacob Werksman ed., 1996).

Similarly, it has been observed that the bilateral paradigm may not be well suited “for interpretation and application of a multilateral treaty.”<sup>41</sup> In that context, the controversy typically concerns “the requirements and functioning of the regime, rather than whether one party has wronged the other and is obligated to make reparations.”<sup>42</sup> With “many parties and a complex interacting set of issues, the bilateral, adversarial model” may not be the most useful model.<sup>43</sup> While the Parties will need a forum of last resort, they may wish to create other less adversarial mechanisms to avoid or defuse disagreements and concerns.

Where a controversy concerns the definition and validity of a norm itself, an adversarial process may be necessary. But in the current context, there is widespread agreement on an increasingly detailed set of principles and rules for managing a shared resource in which all parties have common interests. Thus, where controversy likely will concern the application rather than the definition of a norm, the bilateral adversarial approach may be less useful, at least in the first instance. Instead, dispute resolution, like treaty implementation, “becomes a technical problem, to be dealt with through advice and assistance, rather than a normative problem, raising disputes about blameworthiness and sanction.”<sup>44</sup> Fortunately, the UNCLOS framework provides the flexibility needed to design mechanisms and procedures that fit these conditions.

## **B. Institutional Mechanisms for Dispute Resolution**

The UNCLOS allows its Parties to select from among four procedural mechanisms for binding dispute resolution. This provision is incorporated by reference into the SSA and the Draft Pacific Convention. Two of these mechanisms, the ICJ and the ITLOS, involve resort to established international institutions. In addition, the Draft Pacific Convention proposes a special mechanism for a dissenting Party to challenge a Commission decision on certain specific grounds. The Draft Pacific Convention also proposes formation of regional institutions in the form of a Technical and Compliance Committee and a Secretariat, both of which could logically have supportive roles in dispute resolution.

**The International Court of Justice (ICJ).** Cases may be brought before the ICJ by special agreement as well as through prior acceptance of the compulsory jurisdiction of the ICJ. The ICJ issues opinions on contentious cases between States, and issues advisory opinions when requested by the General Assembly or authorized organs of the United Nations. Only States may be parties in cases before the Court.<sup>45</sup> The Court may request that public international organizations provide information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.<sup>46</sup> The Court may ask the parties to the dispute to produce additional evidence or explanations, and “may itself seek other information” needed “for the elucidation of any aspect of the matters in issue.”<sup>47</sup> The Court may arrange for

---

<sup>41</sup> Abram Chayes & Antonia Handler Chayes, *THE NEW SOVEREIGNTY, COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 206 (Harvard Univ. Press 1995).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Koskenniemi, *supra* note 40, at 247.

<sup>45</sup> See Statute for the International Court of Justice, art. 34 (1945) [hereinafter ICJ Statute].

<sup>46</sup> ICJ, Rules of Court, art. 69, adopted April 14, 1978, available at <<http://www.icj-cij.org/Basicdoc/Basetext/irulesofcourt.html>>.

<sup>47</sup> ICJ, Rules of Court, *supra* note 46, at art. 62.

testimony by witnesses and experts, or obtain evidence at a place relating to the case.<sup>48</sup> Other States may intervene in a case according to Article 62 of the ICJ Statute.<sup>49</sup>

The Court applies international law, including the law of conventions — such as the UNCLOS, SSA and regional fisheries agreements; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations subject to the provisions of Article 59, and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>50</sup>

**The International Tribunal for the Law of the Sea (ITLOS).** The International Tribunal for the Law of the Sea (ITLOS) is a standing body of 21 independent jurists nominated by the State Parties to the UNCLOS.<sup>51</sup> ITLOS hears all disputes and all applications submitted to it in accordance with the UNCLOS and all matters specifically provided for in any other agreement that confers jurisdiction on it, such as the SSA. Decisions of ITLOS are final and are to be complied with by all the parties to the dispute. However, decisions will not have a binding force except between dispute parties in connection with the matter immediately at issue.

For the most part, ITLOS has jurisdiction over a case only where both parties to the dispute have accepted its compulsory jurisdiction under the UNCLOS or the SSA. In certain situations, however, ITLOS has jurisdiction even over disputes involving a Party that has not explicitly consented to its jurisdiction. First, where Parties to the SSA or the UNCLOS are in a dispute under any mechanism, a disputant may appeal to the ITLOS to establish provisional measures to address the matter under dispute pending its resolution.<sup>52</sup> Second, under the UNCLOS, where the authorities of a State has detained a vessel flying the flag of another State, the second State may bring a complaint to the ITLOS that the detaining State has not complied with the provisions of the UNCLOS for the prompt release of the vessel or its crew (as required upon the posting of a reasonable bond or other financial security), failing agreement between the Parties within ten days from the time of detention.<sup>53</sup>

States Parties to the UNCLOS and the SSA have access to the ITLOS, as well as entities other than States in any case submitted pursuant to any other agreement conferring such jurisdiction on the Tribunal.<sup>54</sup> ITLOS may accept submissions from State Parties not directly involved in a dispute where it finds such States have legal interests in the outcome of the dispute.<sup>55</sup> As with the ICJ, the ITLOS may seek information “necessary for the elucidation of any aspect of the matters in issue,” may arrange for testimony by a witness or expert, may obtain evidence at a place relating to the case, may appoint a person to make an inquiry, and may

---

<sup>48</sup> *See id.* arts. 62, 66, 67.

<sup>49</sup> If a State believes that it has “an interest of 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.” ICJ Statute, *supra* note 45, at art. 62.

<sup>50</sup> *See* ICJ Statute, *supra* note 45, at art. 38.

<sup>51</sup> *See* UNCLOS, *supra* note 4, at Annex VI, Statute of the International Tribunal for the Law of the Sea [hereinafter ITLOS].

<sup>52</sup> UNCLOS, *supra* note 4, at art. 290(5).

<sup>53</sup> *Id.* at art. 292.

<sup>54</sup> *See* ITLOS, art. 20 of Annex VI of UNCLOS, *supra* note 4, at Annex VI.

<sup>55</sup> *See* ITLOS, *Rules of the Tribunal*, art. 31, Doc. No. ITLOS/8, available at <[http://www.un.org/Depts/los/rules\\_e.htm](http://www.un.org/Depts/los/rules_e.htm)>.

request a public international organization to provide information relevant to the case.<sup>56</sup> A public international organization may also submit relevant information on its own initiative.<sup>57</sup>

Unless the President of ITLOS decides otherwise, or disputing parties insist, all hearings of the Tribunal are to be open to the public.<sup>58</sup> Similarly, documents submitted to the Tribunal are public unless the Tribunal decides otherwise, and the Tribunal will publish a record of public proceedings.<sup>59</sup>

**General Arbitration.** Part XV of the UNCLOS on binding dispute resolution provides for two alternative forms of arbitration. The first is governed by Annex VII. Annex VII provides for the convening of arbitral panels of five members, preferably chosen from a list nominated by State Parties to the UNCLOS and maintained by the Secretary-General of the United Nations. Each disputant selects one arbitrator, and the parties must agree on the remaining three.<sup>60</sup> While Annex VII arbitrators set their own procedural rules (unless the parties otherwise agree and so direct), the Annex does direct States Parties to disclose all relevant information and acquiesce to the panel's independent fact-finding through calling experts, other witnesses, and arranging site visits.<sup>61</sup> Annex VII arbitration is binding upon the parties, with appeal of rulings only when parties agree in advance to allow it.<sup>62</sup> Once constituted, an Annex VII panel can conclude its work and rule even where one party fails to appear or defend itself.<sup>63</sup>

**Special Arbitration.** Special arbitration is governed by Annex VIII. This mechanism provides for resort to specialized expertise in resolving disputes that may arise in the contexts of fisheries, marine environmental protection, marine scientific research and navigation (including dumping issues).<sup>64</sup> States may nominate experts to separate lists for arbitral panels for the various specific issues. A list of experts on fisheries is maintained by the UN Food and Agriculture Organization (FAO).

One significant difference from Annex VII arbitration is that each party unilaterally chooses two, not one, panelist.<sup>65</sup> Another is that the Secretary-General of the United Nations, not the President of the ITLOS, steps in to appoint panelists when the parties fail to make nominations or agree on the selection of a panel President.<sup>66</sup>

Beyond the selection of panelists, Annex VIII arbitration incorporates most of the features of Annex VII arbitration,<sup>67</sup> including the binding nature and finality of the decision. It

---

<sup>56</sup> *Id.* arts. 62, 66, 67, 69.

<sup>57</sup> *See id.* art. 69(2).

<sup>58</sup> *See* ITLOS, art. 26(2) of Annex VI of THE UNCLOS, *supra* note 4, at Annex VI.

<sup>59</sup> *See* ITLOS, *Rules of the Tribunal*, *supra* note 55, at arts. 67, 71(6). Indeed, the ITLOS has already posted on the Web transcripts of its August 1999 hearing on the request for provisional measures brought by Australia and New Zealand regarding Japan's fishing for Southern blue fin tuna. *See* URL: <[http://www.un.org/Depts/los/ITLOS/ITLOSproc.htm#Tuna\\_Cases](http://www.un.org/Depts/los/ITLOS/ITLOSproc.htm#Tuna_Cases)>.

<sup>60</sup> Where the Parties fail to agree, then the ITLOS makes the appointments.

<sup>61</sup> *See* UNCLOS, *supra* note 4, at Annex VII, art. 6.

<sup>62</sup> *See id.* art. 6.

<sup>63</sup> *See id.* art. 9.

<sup>64</sup> *See id.* at Annex VIII, art. 1.

<sup>65</sup> *See id.* arts. 3(b),(c).

<sup>66</sup> *See id.* art. 3(e).

<sup>67</sup> *See id.* art. 4 ("Annex VII, article 4 to 13 [Functions of Arbitral Tribunal, Procedure, Duties of Parties to a Dispute, Expenses, Required Majority for Decisions, Default of Appearance, Award, Finality of Award, Interpretation or implementation of Award, Application to Entities other than States Parties], apply mutatis mutandis to the special arbitration proceedings in accordance with this Annex.").

does, however, provide a unique option with regard to fact finding, in which the Parties may agree to use the special tribunal to carry out a fact-finding inquiry; the fact finding is deemed conclusive unless the parties elect to treat the tribunal's findings as merely recommendations on which the parties can conduct further review of the issues between them.<sup>68</sup>

**Other Mechanisms.** In addition to these four mechanisms, the Draft Pacific Convention discusses several other mechanisms relevant to dispute resolution, including an appeal process for Commission decisions, a Secretariat, a Technical and Compliance Committee, and the Commission itself.

First, it provides that a State that voted against a Commission decision or that was absent during a vote can bring a complaint that the decision is inconsistent with the UNCLOS, the SSA, or the Convention, or result in unjustifiable discrimination against such dissenters.<sup>69</sup> A review tribunal would hear such a complaint and make recommendations to the Commission.<sup>70</sup> If the tribunal concludes that the decision must be changed, then the Commission must convene a meeting within sixty days at which it “shall modify or amend its decision in order to conform with the findings and recommendations of the review tribunal or it may decide to revoke the decision.”<sup>71</sup>

This mechanism is broadly consistent with the general provisions of the SSA giving RFMOs' discretion to develop appropriate decision-making procedures “which facilitate the adoption of conservation and management measures in a timely and effective manner.”<sup>72</sup> However, it could be useful to clarify that the Party's complaint must include an explanation of valid reasons for being absent from the meeting at which the vote was held, in order to prevent unreasonable delays in decision-making.

The draft also proposes a Technical and Compliance Committee that provides advice, recommendations and information to the Commission regarding “the implementation of, and compliance with, conservation and management measures.”<sup>73</sup> The Committee is charged with monitoring and reviewing compliance, investigating matters referred to it by the Commission, report its findings on compliance, and make recommendations regarding enforcement.<sup>74</sup>

The Draft Pacific Convention also proposes a Secretariat which could play a supportive role in dispute resolution. Its functions would include facilitating compilation and distribution of data relevant to achieving the Convention's objectives, and administering agreed arrangements for monitoring and control.<sup>75</sup> Finally, the Draft Pacific Convention provides that the

---

<sup>68</sup> *See id.* art. 5.

<sup>69</sup> *See* Draft Pacific Convention, *supra* note 6, at art. 21(4). As an aside, this mechanism could be understood as pertaining to decision-making as well as to dispute resolution. WWF and CIEL produced a white paper on decision-making procedures for the last negotiating session, which remains available from either organization.

<sup>70</sup> *See id.* at Annex II. The review panel has the power to rule that the Commission decision be “modified, amended or revoked,” but it “shall not ... substitute its decision for that of the Commission.” *See id.* art. 21(5), and Annex II, art. 10.

<sup>71</sup> *Id.* art. 21(5).

<sup>72</sup> SSA, *supra* note 5, at art. 10(j).

<sup>73</sup> Draft Pacific Convention, *supra* note 6, at art. 14(1).

<sup>74</sup> *See id.* art. 15(2).

<sup>75</sup> *See id.* art. 16(4).

Commission established under the Convention shall “promote the peaceful settlement of disputes.”<sup>76</sup>

#### IV. Lessons from Experience with Various Dispute Settlement Procedures

This section discusses highlights of both experience and innovation involving dispute settlement procedures. Part IV.A reviews experience in the area of fisheries, while Part IV.B discusses analogous experience in other areas of international law.

##### A. Resolution of Disputes Involving Fisheries

The experience with dispute settlement in international law is often viewed as unsatisfactory. Formal procedures for binding resolution cases in which a State claims that another State has breached the first State’s rights or failed to carry out a duty toward it have not often been used.<sup>77</sup> A variety of reasons have been offered for the disinclination of governments to resort to formal dispute settlement procedures: litigation style procedures are slow, cumbersome, risky, unpredictable, expensive, and intensify the confrontational aspects of a dispute in an “undiplomatic” manner.<sup>78</sup>

Fisheries management is no exception to this tendency. Indeed, regional fisheries organizations negotiated prior to the entry into force of the UNCLOS and the negotiation of the SSA typically lacked binding dispute resolution procedures altogether. The failure of governments to resolve their disagreements and agree on conservation measures or quotas has hampered effective management of many fisheries. Similarly, collective action has often been hampered when individual governments dissatisfied with the majority’s approach opt out of group decisions.

To date, dispute settlement procedures have not been particularly effective in resolving these problems. In general, regional fisheries organizations do not provide for binding dispute settlement procedures. The ICJ has dealt with relatively few of the many international problems involving fisheries management. The ITLOS, first constituted in 1996, just recently heard its first case on fisheries management. Countries have resorted to arbitration only occasionally. The result has been repeated, numerous, flagrant violations of conservation measures, in spite of the fact that those measures are internationally recognized to be necessary to protect fish stocks. Clearly, improvements are sorely needed in this area.

**Dispute Settlement in Regional Fisheries Organizations.** A review of a sampling of existing RFMOs indicates that binding dispute resolution has typically not been a part of their framework.<sup>79</sup> Arguably, this lack of mechanisms contributes to the inadequacy of the framework for managing straddling and highly migratory fish stocks that led to the current fisheries crisis and sparked the negotiation of the SSA.<sup>80</sup>

---

<sup>76</sup> *Id.* art. 10(1)(n).

<sup>77</sup> See Koskenniemi, *supra* note 40, at 238; Chayes & Chayes, *supra* note 41, at 205.

<sup>78</sup> See Chayes & Chayes, *supra* note 41, at 205; Koskenniemi, *supra* note 40, at 238.

<sup>79</sup> Reviewing the pre-SSA scene, one commentator concluded that “virtually no regional fisheries agreement contains procedures for compulsory, binding dispute settlement.” David A. Balton, *Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 27 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 125, 142 (1996), *quoted in* Orrego Vicuña, *supra* note 31, at 276.

<sup>80</sup> See generally, Orrego Vicuña, *supra* note 31, at 20.



The International Convention for the Conservation of Atlantic Tunas (ICCAT)<sup>81</sup> is one example. ICCAT establishes a Commission charged with the monitoring and study of the status of Atlantic Tuna stocks.<sup>82</sup> The Commission is empowered to make recommendations legally binding on its Parties regarding management strategies and practices in connection with tuna and “tuna-like” fishes. A dissenter to a recommendation may register the objection within a six-month window for objections before the recommendation goes into effect.<sup>83</sup>

Two subsidiary bodies of the ICCAT Commission play quasi-dispute settlement roles: a Compliance Committee reviews Contracting Parties' compliance with recommendations of the Commission, to consider any infractions, and to seek effective ways to enforce such regulations. A Permanent Working Group on ICCAT Statistics and Conservation Measures (PWG) reviews the status of compliance or non-compliance of ICCAT conservation and management measures by non-Contracting Parties, to take effective action to encourage and enforce the Commission's measures by such Parties.<sup>84</sup> The Commission has voted to impose trade sanctions against non-Parties fishing relevant stocks in violation of ICCAT recommendations. The ICCAT lacks, however, an explicit binding third party mechanism to administer disputes between Parties.

Another example is the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR). CCAMLR's objective is the conservation of Antarctic marine living resources within the Southern Ocean, bounded by the Southern convergence. CCAMLR is precedent-setting in taking an ecosystem management approach. The Convention operates through a Commission, whose members consist of the Contracting Parties.<sup>85</sup> In addition, the Convention creates a Scientific Committee to provide advice and consultation to the Commission and establish criteria and methods to advance the Convention's goals of conservation and rational use of the Southern Ocean ecosystem. The CCAMLR has detailed provisions relating to information sharing and observation and inspections by and of Contracting Parties,<sup>86</sup> and obliges Contracting Parties to cooperate “to ensure the effective implementation of such obligations.”<sup>87</sup>

However, CCAMLR's provisions relating to dispute resolution are noncompulsory. Disputing Contracting Parties are urged to consult each other “with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means.”<sup>88</sup> Failing such resolution, the disputants are urged, but not required, to consent to the submittal of the dispute to the International Court of Justice or to arbitration. The CCAMLR provides guidelines for arbitral panels convened to hear disputes arising from the obligations of the Convention.<sup>89</sup>

**The International Court of Justice (ICJ).** From 1958 until 1996 there were a total of seven ICJ cases relating to the law of the sea, but most of these involved disputes over

---

<sup>81</sup> International Convention for the Conservation of Atlantic Tunas, 6 I.L.M. 293, *signed* May 14, 1966, (entered into force March 21, 1969), *available at* URL: <<http://www.iccat.es/orgdec.htm>> (official World Wide Web site of the International Commission For The Conservation Of Atlantic Tuna) [hereinafter ICCAT].

<sup>82</sup> *See id.* art. 4.

<sup>83</sup> *See id.* art. 8(3).

<sup>84</sup> Report available at <<http://www.iccat.es/orgdec.htm>>

<sup>85</sup> Convention for the Conservation of Antarctic Marine Living Resources, art. 7(2), 19 I.L.M. 841 (1980), *signed* May 20, 1980 (entered into force April 7, 1981) [hereinafter CCAMLR].

<sup>86</sup> *See, e.g., id.* art. 21.

<sup>87</sup> *Id.* art. 24.

<sup>88</sup> *Id.* art. 25(1).

<sup>89</sup> *See id.* at Annex for an Arbitral Panel, ¶ 1.

delimitation of maritime boundaries.<sup>90</sup> The most recent fisheries dispute at the ICJ, and the only fisheries case since 1982, is Spain's case against Canada filed in March 1995. Spain argued that Canada's boarding and seizure of a Spanish fishing vessel on the high seas in March 1995 was inconsistent with Canada's obligations and Spain's rights under the customary law of the sea. Canada took this action pursuant to the Canadian Coastal Fisheries Protection Act and its implementing regulations, which purported to extend Canada's enforcement jurisdiction to the entire area regulated by the Northwest Atlantic Fisheries Organization (NAFO), which includes areas of the high seas. In essence, Canada sought to take upon itself the responsibility of enforcing NAFO quotas and other conservation measures on the high seas (NAFO having no enforcement powers of its own). Prior to the amendment of the Canadian Coastal Fisheries Protection Act to include these measures, Canada entered a reservation to its earlier declaration accepting the jurisdiction of the ICJ.<sup>91</sup> Canada's reservation excluded disputes arising from management and conservation measures taken by Canada with respect to fishing vessels in the NAFO regulatory area and the enforcement of such measures.

Spain challenged Canada's seizure of the vessel at the ICJ, and argued that Canada's legislation itself was inconsistent with international law insofar as it purported to extend Canada's jurisdiction over the high seas. Canada asserted that the Court had no jurisdiction over the case. The ICJ did not resolve this question of jurisdiction, which precedes consideration of the merits of the case.

Experience with the ICJ and fisheries suggests several tentative conclusions. The ICJ does not provide speedy resolution of disputes.<sup>92</sup> As illustrated by the Canada/Spain case, the ICJ not infrequently fails even to reach the merits of a dispute brought before it. Resort to the ICJ can also be costly. Further, the ICJ may not be as suitable as more specialized forums for the resolution of disputes in an area such as high seas fisheries where there is an increasingly elaborate body of treaty law.<sup>93</sup>

**The International Tribunal for the Law of the Seas (ITLOS).** The ITLOS was established in Hamburg in 1994, pursuant to Annex VI of the UNCLOS. Its 21 judges were selected in 1996. The Tribunal is open to State parties to the UNCLOS, and is open to hear disputes from other agreements, such as the SSA, that provide for it to have a role in dispute resolution.<sup>94</sup> To date, twelve countries have accepted the Tribunal's jurisdiction to hear disputes involving them.<sup>95</sup> The Draft Pacific Convention incorporates by reference the UNCLOS package of dispute settlement procedures, meaning that Parties to the Convention could select the ITLOS as their preferred mechanism for dispute resolution.

So far, the ITLOS has ruled in two controversies. In the "Saiga" case, Saint Vincent & the Grenadines challenged the arrest by Guinea in 1997 of an oil tanker and its crew accused of piracy and smuggling. The Tribunal ruled in favor of St. Vincent & the Grenadines, ordering the

---

<sup>90</sup> See Boyle, *supra* note 14, at 41.

<sup>91</sup> Canada's earlier declaration accepting ICJ jurisdiction was made independently of ratification of the UNCLOS.

<sup>92</sup> Cf. Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 81 (1997).

<sup>93</sup> See *id.*

<sup>94</sup> States that ratify the SSA which are already Parties to the UNCLOS are bound by their selection of a tribunal under the UNCLOS, unless they explicitly specify a different one. Non-parties to the UNCLOS that ratify the SSA can also specify any of the UNCLOS dispute resolution options when they ratify.

<sup>95</sup> As mentioned above, these countries are Argentina, Austria, Cape Verde, Chile, Finland, Germany, Greece, Italy, Oman, Portugal, Tanzania and Uruguay.

prompt release of the vessel pursuant to the UNCLOS Article 292. The Tribunal rendered a decision in only three weeks, and later rendered a judgment for damages against Guinea.<sup>96</sup>

The second case to come before the ITLOS was filed recently, on July 30, 1999, and concerned fishing of a highly migratory species. In that case, Australia and New Zealand requested prescription of provisional measures against Japan, during the pendency of an arbitration procedure which they had requested under Annex VII of the UNCLOS. The two States argued that Japan's commencement of a unilateral experimental fishing programme for Southern Bluefin Tuna (*Thunnus maccoyii*) in 1998 and 1999 poses "serious or irreversible damage to the Southern Bluefin Tuna," which is "significantly overfished and is below commonly accepted thresholds for biologically safe parental biomass."<sup>97</sup> Japan filed a response on August 9, and the ITLOS scheduled hearings for August 18-20.

On August 27, less than a month after the case was brought, the tribunal issued its decision. It found that "there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern."<sup>98</sup> It declared that "the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna."<sup>99</sup> While acknowledging that "there is scientific uncertainty" and disagreement among the parties regarding what conservation measures should be taken, the tribunal found that measures should be taken "as a matter of urgency" to prevent further deterioration. In particular, total catches shall not exceed previously set catch levels except by agreement among the parties. Thus, the Tribunal ruled that the three countries shall not exceed their previously set quotas, that they shall not conduct experimental fishing. If they do conduct experimental fishing, it counts toward the previously established quotas which they shall not exceed. The Tribunal also ruled that the parties to the dispute should renew their efforts to resolve their disagreement.

The experience to date with the ITLOS suggests that it may be able to render decisions in a more timely fashion than other forums such as the ICJ.<sup>100</sup> As a specialized forum, ITLOS can also bring to bear greater specialist expertise than can a generalist institution like the ICJ.<sup>101</sup> The repeated resort to the ITLOS could also facilitate development of a consistent global understanding of the meaning of the UNCLOS and SSA, which in turn would promote predictability.<sup>102</sup>

**Arbitration.** The actual experience with arbitration is similar to the experience with dispute settlement at the ICJ in that countries seem not to resort to its use very frequently. From 1958 to 1996, there were just seven cases of international arbitration regarding the law of the

---

<sup>96</sup> ITLOS documents related to this case are available on the web page for the UN Office on the Law of the Sea and Ocean Affairs at URL: <<http://www.un.org/Depts/los/index.htm>>.

<sup>97</sup> ITLOS, Press Release, *Dispute Concerning Southern Bluefin Tuna: Australia And New Zealand Versus Japan: Provisional Measures Requested*, ITLOS/Press 24, available at URL: <[http://www.un.org/Depts/los/Press/ITLOS/ITLOS\\_24.htm](http://www.un.org/Depts/los/Press/ITLOS/ITLOS_24.htm)>.

<sup>98</sup> *ITLOS, Southern Bluefin Tuna Cases: Requests for provisional measures: Order*, ¶ 71, Case Nos. 3 & 4 (Aug. 27, 1999), available at URL: <<http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>>.

<sup>99</sup> *Southern Bluefin Tuna Cases*, ¶ 77.

<sup>100</sup> See John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 111 (1998).

<sup>101</sup> See *id.*

<sup>102</sup> Cf. Charney, *supra* note 92, at 84-85.

sea.<sup>103</sup> The secrecy in which arbitration proceedings may be conducted renders it more difficult to evaluate the effectiveness of the mechanism.

In comparison with institutional forums like the ICJ or ITLOS, arbitration is perceived as having the advantage of flexibility. Traditionally, States have found arbitration useful in that it permits secrecy, allows control over the selection of adjudicators, hinders third-party interventions, and permits them to select the factual and legal issues to be adjudicated.<sup>104</sup> In addition, arbitration may appeal to States with sensitive disputes requiring the application of equitable principles as well as the rule of law.<sup>105</sup> The power to select arbitrators and establish procedural rules can respond to States' desire that the process be sensitive to their "social or legal culture" or their "historical experience."<sup>106</sup> Arbitral decisions carry less weight as precedent than do formal rulings of standing international law tribunals, which some disputants may find appealing.

It is unclear, however, whether these considerations continue to be compelling in light of the evolving landscape of the international law of fisheries. The new Pacific Convention, in the context of the UNCLOS and SSA, will embody an elaborate set of principles, rules, procedures and institutions agreed upon by the participants. This constitutes a shared "social [and] legal culture" in itself. While equitable principles will always play a part, they are embedded in the context of specific legal rules for determining the outcomes of decisions. Secret decision-making would be particularly incongruous with the SSA's emphasis on reliance on science, as the collection, testing and verification of scientific findings is inherently a public, cooperative process involving the open exchange of information and spirited critical debate. Finally, the reliance on arbitration would reduce the significance of any given decision, and could reduce "uniformity in the outcome of similar cases between different tribunals,"<sup>107</sup> slowing the clarification and rationalization of international law of fisheries.

**Collective Action against Non-Compliant States.** Consistent with the exploration of alternatives to the bilateral adversarial model of dispute resolution, there have been efforts to respond to problems of non-compliance through mechanisms that constitute a kind of middle ground between the bilateral dispute model and collective legislative-style decision-making.

One example involves the ICCAT sanctions against non-Parties violating its conservation measures. At its annual meeting in November 1996, ICCAT authorized member countries to impose bans on the import of bluefin tuna from Belize, Honduras and Panama.<sup>108</sup> These non-member countries had failed to comply with ICCAT catch restrictions after their non-compliance had been highlighted at the ICCAT's 1995 meeting, based on investigation into data on trade, vessel sightings and port inspection. At the same time, ICCAT established penalties to be imposed on members if they overharvest tuna beyond specified quotas. Successively severe penalties include fines equivalent to the value of overharvests, reductions in future quotas, and

---

<sup>103</sup> See Boyle, *supra* note 14, at 41.

<sup>104</sup> See Christine Gray & Benedict Kingsbury, *Inter-State Arbitration Since 1945: Overview and Evaluation*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 55, 63 (Mark W. Janis ed., 1992) (noting dearth of information about the resolution of cases involving several high-profile arbitrations); Charney, *supra* note 92, at 70; Adede, *supra* note 20, at 64-65.

<sup>105</sup> Gray & Kingsbury, *supra* note 104, at 56.

<sup>106</sup> *Id.* at 64.

<sup>107</sup> Boyle, *supra* note 14, at 40.

<sup>108</sup> See U.S. National Oceanic and Atmospheric Administration, Office of Legislative Affairs, *NOAA Legislative Informer*, Jan. 1997, Issue #21, at 1.

import bans as a last resort. In 1997, the US acted pursuant to this decision to prohibit imports of bluefin tuna from Panama, Honduras and Belize.<sup>109</sup>

**Challenges to Collective Decision-Making.** As discussed, the Draft Pacific Convention contains a provision for a dissenting State Party to bring a complaint to a review panel on the basis that a decision of the Commission was contrary to the terms of the UNCLOS, the SSA or the Pacific Convention, or discriminated unjustifiably against the complaining Party.<sup>110</sup> Few procedures exist in international law that provide for challenges to decisions of an intergovernmental body like a Commission of a RFMO. Examples are reviewed in Part III.B below, including the World Bank Independent Inspection Panel and the European Court of Justice.

## **B. Lessons From Other Areas Of International Law**

This section discusses highlights from the experience in other areas of international law. Part IV.B.1 reviews mechanisms that are actively used, some of which have strong provisions for enforcement of judgments. These include the WTO, the European Court of Justice, the European Court of Human Rights, the Montreal Non-Compliance Procedure, the World Bank Independent Inspection Panel, and the Commission on Environmental Cooperation.

Part IV.B.2 reviews other mechanisms that are not as well known, nor necessarily as actively used, but that offer interesting models that might be relevant to discussions of options for use in the Pacific Convention.

### **1. Experience With Active Dispute Settlement Procedures**

We begin with the WTO, which has an active dispute settlement system with provisions for enforcement that is widely regarded as one of the most effective in the world today. Although not as well known, and without the binding nature of the WTO, the ILO's procedures for addressing complaints about compliance are well developed and frequently used. The World Bank has established an Independent Inspection Panel to hear complaints about projects that it funds in violation of its own policies and procedures; several other international financial institutions have established similar mechanisms. The World Bank mechanism, too, is fairly active and significant experience has developed with its use.

**The World Trade Organization (WTO).** The WTO was established in 1995 as a result of the Agreement Establishing the World Trade Organization (WTO Agreement), the product of the Uruguay Round of multilateral trade negotiations. The WTO Agreement contains a set of interrelated agreements, which together establish the bulk of the multilateral rules governing international trade, and which are binding on the WTO's 134 members. The basic principles of the world trading system are embodied in the General Agreement on Tariffs and Trade (GATT); originally signed in 1947, this agreement was incorporated into the Uruguay Round agreements.

---

<sup>109</sup> See NOAA, *U.S. Bans Bluefin Tuna Imports from Three Nations Fishing in Violation of ICCAT*, press release dated Aug. 21, 1997, available at URL: <<http://www.noaa.gov/public-affairs/pr97/aug97/noaa97-r158.html>>.

<sup>110</sup> See Draft Pacific Convention, *supra* note 6, at art. 21(4).

Also among the WTO Agreements is the WTO Understanding on the Settlement of Disputes.<sup>111</sup> This agreement establishes an elaborate mechanism, in the Dispute Settlement Body (DSB), for binding resolution of disputes according to trade rules defined in other WTO Agreements. The dispute settlement mechanism is intended to maintain a rules-based system to prevent trading nations from engaging in unconstrained use of economic power to impose protectionist, excessively burdensome, arbitrary or discriminatory measures on trading partners. The WTO DSB is widely viewed as perhaps the most potent dispute settlement system in existence at the international level.

As in the predecessor procedures under the GATT, a dispute is initiated by a request for consultation by the complainant(s).<sup>112</sup> Consultations are a prerequisite to further dispute settlement proceedings. If the consultation fails, the complainant government may initiate a panel process.<sup>113</sup> The dispute settlement panel assesses the facts of the case and the applicability of and conformity with the relevant covered agreements.<sup>114</sup> It receives oral and written arguments from and consults regularly with the parties.<sup>115</sup> The Panel has discretion to seek information from other sources, including outside experts in any relevant discipline.<sup>116</sup> The panel formulates a report which is published after the parties have opportunities to comment and to put forward changes.<sup>117</sup>

Under the DSB, dispute panels drawn from a roster of trade experts have compulsory jurisdiction of complaints brought by WTO Members concerning violations of WTO rules. A losing party has the right of appeal to the Appellate Body, and in practice the loser generally exercises its right. An Appellate Body decision becomes binding unless it is rejected by a consensus of the General Council, which is the governing body of the WTO during the interims between Ministerial Conferences. This is an advance on procedures under the predecessor to the WTO — the GATT 1947 — in which the final panel report had to gain approval from a consensus of all the GATT Parties, giving each Party — including the loser of the dispute itself — a right of veto.<sup>118</sup> The departure from the positive consensus system marks a further shift in a direction already begun under the GATT,<sup>119</sup> from a diplomacy/negotiation approach based on political compromise between specific parties to a dispute to an adjudicative approach based on the impartial application of general rules.<sup>120</sup>

Unlike the dispute-resolution mechanisms defined under many other international agreements, the WTO dispute settlement system can handle large numbers of disputes with relative efficiency (although at present the legal division, which provides technical support to the panels, is understaffed relative to the number of cases pending and anticipated). Since the WTO's establishment in 1995, the DSB has entertained 179 consultation requests involving 138

---

<sup>111</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, Multilateral Trade Negotiations Doc. MTN/FA, 33 I.L.M.1 (1994) [hereinafter DSU].

<sup>112</sup> See *id.* art. 4. Under the DSU, the relief for non-violation cases is only negotiation for appropriate compensation. See *id.* art. 26.

<sup>113</sup> See *id.* art. 6.

<sup>114</sup> See *id.* art. 11.

<sup>115</sup> See *id.* arts. 11, 12(6).

<sup>116</sup> See *id.* art. 13.2

<sup>117</sup> See *id.* art. 12(7).

<sup>118</sup> See Jose Maria Beneyto, *The EU and the WTO*, EuZW 10/1996, at 295, 296; see also Chayes & Chayes, *supra* note 41, at 220.

<sup>119</sup> See John H. Jackson, *THE WORLD TRADE ORGANIZATION, CONSTITUTION AND JURISPRUDENCE* 66-71 (Royal Institute of International Affairs 1998).

<sup>120</sup> See Maria Beneyto, *supra* note 118, at 295, 296; see also Chayes & Chayes, *supra* note 41, at 220.

distinct matters. These included 105 matters initiated by developed countries, thirty matters initiated by developing countries, and four matters involving complaints from both developed and developing countries. Twenty-two cases were carried through to a final step in the dispute settlement process, while thirty-seven were settled or inactive.<sup>121</sup>

The WTO DSB is also unusual in that significant measures are available to enforce compliance with judgments. If a WTO Member's trade measure is ruled inconsistent with its WTO obligations by the DSB, the Member faces a difficult choice. It must lift the measure, or it will be required either to compensate the challenging party for the harm caused by the measures, or to suffer the effects of proportionate retaliatory measures from the challenging Member.

Traditionally, dispute resolution under the WTO, and its predecessor, the GATT, has been non-transparent. Hearings have been closed. Documents submitted by disputants have been confidential. There appears, however, to be a slow trend toward greater transparency. Some disputants have attached friend of the court briefs by NGOs to their submissions. The WTO posts the decisions from DSB proceedings (once approved) on its web site. The Appellate Body recently confirmed that under the DSU dispute panels have the discretion to accept submissions from NGOs in the course of proceedings, as part of their power to seek information from any source.<sup>122</sup>

Another significant difference between the WTO procedures and their predecessors under the GATT is the creation of the Appellate Body and the provision for appeals of right. An appeal of a dispute settlement panel report stays the binding effect of that report. The Appellate Body receives arguments of the parties again and writes its own report. This second report becomes adopted, unless a negative consensus emerges among WTO Members to block it.<sup>123</sup>

Importantly, the DSU includes specific limits on the duration of proceedings. Delay in the panel process should be avoided and, generally, is not to exceed six months.<sup>124</sup> Specific deadlines for intermediate steps in dispute settlement appear as well.<sup>125</sup> For instance, Article 17(5) provides that "[a]s a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. . . . In no case shall the proceeding exceed 90 days."

The credibility of the procedures and the acceptance of the reports and the enforcement measures depend on the persons who sit in the panels and in the Appellate Body and the application of the procedural guarantees.<sup>126</sup> According to Art. 8(1) the panels can be composed of well-qualified governmental and/or non-governmental individuals, while the members of the Appellate Body should be unaffiliated with any government under Art. 17(3). The members of the panels are drawn as appropriate from a list maintained by the Secretariat.<sup>127</sup> The DSB

---

<sup>121</sup> See WTO Secretariat, OVERVIEW OF THE STATE-OF-PLAY OF WTO DISPUTES, available at URL: <<http://www.wto.org/dispute/bulletin.htm>> (updated Aug. 6, 1999).

<sup>122</sup> See World Trade Organization, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: AB-1998-4: Report of the Appellate Body*, Doc. No. WT/DS58/AB/R, available at URL: <<http://www.wto.org>>.

<sup>123</sup> See DSU, *supra* note 111, at art. 17(14).

<sup>124</sup> See *id.* arts. 12(2), (8).

<sup>125</sup> Other terms are established with the articles 4(4), 4(7), 4(8), 4(11), 5(4), 8(5), 8(7), 12(8), 12(9), 16(1), 16(2), 16(4), 17(5), 17(14), 20, 21(3), 21(5), 21(6), 22(2), 22(6).

<sup>126</sup> Article 17(9) of the DSU empowers the Appellate Body to draw up working procedures in consultation with the Chairman of the DSB and the Director General.

<sup>127</sup> See *id.* art. 8(4).

appoints persons to serve on the Appellate Body for a four-year term.<sup>128</sup> Of the actual seven members of the Appellate Body three were chosen by the largest trading powers (US, EC, Japan), while the others come from less powerful countries.<sup>129</sup> This permanent roster of seven members draws the Appellate Body made by three individuals.<sup>130</sup> Though, by exchange of documents and gathering together all seven members of the roster are integrated in and part of the decision process.<sup>131</sup>

*Conclusions.* The WTO model offers both advantages and drawbacks. Strict time limits and experienced decision-makers have made the process far more efficient and less time consuming than is typical at the international level. Panelists drawn from the roster set up for the DSB tend to have significant trade expertise. The potential for imposition of trade sanctions or judgments requiring compensation constitutes an unusual enforcement mechanism in international law.

Yet a number of problems have arisen as well. Conflicts continue over the question of implementation of judgments. Controversy and dissatisfaction have arisen about the DSB's handling of disputes that involve mixed issues of trade and environment or trade and public health. In particular, critics have charged that the DSB's methods for getting access to environmental or health expertise are inadequate, so that decisions do not properly take account of other policy objectives or of the realities of science, regulation and risk assessment in those areas. The lack of transparency in procedures that can have a major impact on the economies, laws and policies of Member nations has also been severely criticized. Finally, the difficulties that developing countries have in participating on an equal basis in dispute settlement has been identified as a serious problem.

**International Labor Organization (ILO).** The International Labor Organization (ILO) has several mechanisms for resolving disputes about the interpretation and application of the many conventions formed under its auspices. One mechanism is primarily designed to handle disputes between and among State Parties to the ILO. Another involves a standing committee which meets to review governments' periodic reports on implementation as well as information submitted by voluntary associations of employees or employers. A third consists of a combination of two Commissions mandated to investigate claims of significant impairment of the freedom of labor groups to organize within the jurisdiction of one or more State Parties.

*Complaints About State Failure to Implement a Convention.* Complaints concerning a State's implementation of an ILO Convention go to the ILO's Governing Body.<sup>132</sup> The Governing Body also may initiate the complaint and investigation procedures on its own, or on a motion by a delegate to the periodic governing Conference of the ILO (delegates can be representatives of employer's or employees' associations as well as of governments).<sup>133</sup> If the Governing Body does not receive a satisfactory response from the State in question, it may appoint a Commission of Inquiry, which investigates and recommends remedial action in a

---

<sup>128</sup> See *id.* art. 17(2).

<sup>129</sup> See Jackson, *supra* note 119, at 78.

<sup>130</sup> See DSU, *supra* note 111, at art. 17(1).

<sup>131</sup> See Jackson, *supra* note 119, at 80.

<sup>132</sup> The Governing Body of the ILO consists of 56 persons, (28 government representatives, 14 employer representatives, and 14 labor representatives). The Governing Body elects the ILO Director-General. The Governing Body was established by art. 7 of the Constitution of the International Labour Organization, adopted April, 1919 (becoming Part XIII of the Treaty of Versailles, available at <URL: <http://www.ilo.org>>).

<sup>133</sup> Hector Bartolomei de la Cruz et al., THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS 93 (1996).



report to the disputants and the Governing Body. Where the Commission recommends remedial action, the State in question must notify the Governing Body whether it intends to adhere to the ruling or not, and if not, whether it consents to an appeal to the ICJ. Such ICJ review, if it occurs, becomes a final judgment.<sup>134</sup>

From 1961 until 1994, 22 complaints were filed according to this procedure. As a practical matter, it is reported that the later steps in dispute resolution are rarely necessary, as governments generally accept the Commission's recommendations at least in part.<sup>135</sup> Only twice have governments not accepted the initial judgment of the Commission of Inquiry, and a dispute has never been submitted to the ICJ.<sup>136</sup>

Procedurally, Commissions of Inquiry can solicit information from government parties, hear witnesses, and also make investigations on their own into the circumstances of the disputes. Matters of procedure are left to each specially appointed Commission, but such procedures have consistently included:

- Hearing witnesses and independently seeking information from intergovernmental organizations of employers and workers, and other international associations;
- Investigative trip to country complained of, with interviews of public authorities, employers associations, unions, academics, journalists, church representatives, etc. (Commission solicits guarantees from host nation that interviewees will not suffer "reprisals").
- Drafting final report and submission to the GB.

*Reviews of Implementation.* A second procedure involves periodic reviews of States' implementation of Conventions to which they are Parties. Parties to a convention submit reports every five years regarding their compliance. A Committee of Experts on the Application of Conventions and Recommendations meets yearly to review and make comments on all reports submitted. The Committee may also make requests to governments for further information. Members of the ILO, which include employees' and employers' associations as well as governments, may also submit information to the Committee. The Committee makes requests to governments concerning improved compliance, and publishes comments on reports, which can influence a government's compliance with its legal obligations.

*Investigation of Freedom of Association.* The ILO has paid particular attention to the question of whether governments are ensuring that workers have the freedom needed to organize. The Governing Body has established a Committee on Freedom of Association, which conducts preliminary examinations of complaints about violations of freedom of association, and Fact-Finding and Conciliation Commission on Freedom of Association, which investigates alleged violations and consults with the relevant government to seek solutions.

The Committee can consider complaints submitted by governments, employers associations or workers associations. Proceedings are private, and representatives of the government complained against as well as the complaining organization are excluded. The Committee may request additional information from the complainant or the government complained against, but has little additional investigative power. Where trade unionists are

---

<sup>134</sup> See *id.* at 94-95. If the losing disputant does not comply with the findings of the Commission of Inquiry or the ICJ (if applicable), the Governing Body can recommend to the full conference of ILO members measures it believes will secure compliance. This step has never been taken in practice. See *id.* at 95.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

detained, the Commission's practice is to place the burden on the government to prove that the detention is not related to trade union activities.<sup>137</sup>

In urgent situations the Committee may make preliminary recommendations to the government to ameliorate a problem. In serious cases the Committee may ask the ILO Director-General to consult with the government or hold a hearing. The Committee may conclude its examination with submission of a report including suggestions for corrective measures to be taken by the government. In cases where governments have not cooperated the Governing Body may publicize the Committee's negative findings.

This procedure has been used some 1,800 times from 1951 through 1994.<sup>138</sup> Over the years the Commission has created a significant body of "jurisprudence" which clarifies and illustrates the meaning of the Conventions concerning freedom of association.

The Fact-Finding and Conciliation Commission, in contrast, can respond to a complaint only when the government in question consents.<sup>139</sup> It has the power to take testimony from interested parties, and to consult in search of solutions with the government. Since governments have been reluctant to consent to its intervention, the Commission carried out only five inquiries from 1964 to 1994.<sup>140</sup>

*Conclusions.* These procedures have clear drawbacks. They do not produce legally binding results. There are few powers of enforcement available other than the negative sanction resulting from bad publicity. Yet observers argue that they have had significant positive impacts. The institutions have built up significant authority and respectability over the years. They offer remedies to people suffering from violations of their rights who otherwise might have nowhere to turn. It is claimed that the Committee's activities often encourage governments to resolve problems, to avoid measures that would violate their obligations under ILO Conventions, and in as many as 500 cases to release wrongfully imprisoned trade union members.<sup>141</sup>

In the present context, the following features are worthy of note. First, the right of non-governmental entities to trigger collective action distributes the work of monitoring and enforcement, reducing the burden on governments themselves. Second, transparency and reporting of results promotes publicity, which in turn encourages good behavior. Third, the repeated use of the procedure over the years helps create a "jurisprudence" with significant authority and legitimacy, that gives Parties guidance as to the nature of their obligations under international law.

**Montreal Protocol Non-Compliance Procedure (Implementation Committee).** The parties to the Montreal Protocol have developed a Non-Compliance Procedure that has become a model for other treaty regimes.<sup>142</sup> The procedure is a flexible mechanism adopted at the Fourth

---

<sup>137</sup> *Id.* at 106.

<sup>138</sup> *See id.* at 101.

<sup>139</sup> *See id.* at 107.

<sup>140</sup> *See id.* at 108.

<sup>141</sup> *See id.* at 106.

<sup>142</sup> Protocols adopted under the UN-ECE Convention on Long-Range Transboundary Air Pollution have called for compliance provisions similar to the Montreal Protocol. *See* Protocol on Further Reductions of Sulphur Emissions, art.7, *reprinted in* 33 I.L.M. 1540 (1994); Protocol Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, art. 3(3), *reprinted in* 31 I.L.M. 568 (1992) (directing the parties to establish a compliance monitoring mechanism once the protocol enters into force). The legal drafting

Meeting of the Parties in 1992, pursuant to Article 8 of the Montreal Protocol.<sup>143</sup> The procedure was intended “to create a multilateral mechanism that would build confidence through non-confrontational discussion rather than adjudication” and help parties pursue “amicable solutions” to noncompliance problems.<sup>144</sup>

According to one commentator, the procedure has efficiently contributed to compliance with the Montreal Protocol regime. It has informally resolved disputes about procedural compliance, principally reporting of baseline and annual data.<sup>145</sup> Substantive issues addressed have included failures to phase out the use of ozone-depleting substances (ODS) as required under the Protocol.

The primary institution under the Non-Compliance Procedure is the Implementation Committee (IC). The IC functions as both a standing body with regular meetings, and as an ad hoc mechanism to respond to compliance problems as they are brought to its attention.<sup>146</sup> The IC consists of 10 members with balanced geographical representation of both industrialized and developing nations, appointed by a meeting of the Parties.<sup>147</sup> Only IC members, the Secretariat and Parties involved in submissions have the right to participate in IC proceedings.<sup>148</sup> The IC may, however, solicit participation of others as needed, and representatives of the Multilateral Fund (MLF) and Global Environmental Facility (GEF) representatives frequently participate in IC procedures in order to stay informed about compliance of recipient nations with international commitments.

The IC’s functions include discussion, the making of recommendations to the Parties regarding compliance issues, and publicizing information about the adequacy of Parties’ compliance.<sup>149</sup> A separate Technology and Economic Assessment Panel advises the IC about issues beyond the scope of the IC’s expertise. While it has no power to make decisions in its own right, and disavows any power to interpret the provisions of the Protocol,<sup>150</sup> the IC’s recommendations and proposals are frequently adopted without change by the Meeting of the Parties (MOP). The IC’s “invitations” to countries to attend IC meetings to explain questions about their compliance have inspired some culprits to rectify violations of reporting requirements.<sup>151</sup>

Most data-reporting problems come to the IC’s attention via the Secretariat or the IC members themselves. The Montreal Protocol Secretariat compiles baseline and annual statistics regarding use of ozone-depleting substances, and alerts the IC to States’ failures or anticipated

---

group of the Sulphur Protocol has proposed a compliance regime that follows closely the Montreal Protocol model. See U.N. Doc. EB.AIR/WG.5/24, March 10, 1994, Annex I.

<sup>143</sup> Article 8 directs the parties to “consider and approve procedures and institutional mechanisms” for determining non-compliance with the protocol’s requirements and dealing with parties found to be in non-compliance. The non-compliance procedure was adopted at the Fourth Meeting of the Parties held in Copenhagen, 23-25 December 1992, Decision IV/5, Annex IV.

<sup>144</sup> David G. Victor, *The Operation and Effectiveness of the Montreal Protocol’s Non-Compliance Procedure*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 137, 141 (1998).

<sup>145</sup> See *id.* at 141, 149.

<sup>146</sup> See *id.* at 141.

<sup>147</sup> See *id.* at 141-42.

<sup>148</sup> See *id.* at 142.

<sup>149</sup> See *id.* at 149.

<sup>150</sup> See *id.* at 164.

<sup>151</sup> See *id.* at 151.

failures to meet such reporting requirements.<sup>152</sup> Issues about compliance with substantive obligations to phase out ozone-depleting substances arise primarily through Parties' submissions.<sup>153</sup> Parties may make submissions about their own implementation of Protocol obligations or about another Party's compliance or lack thereof. In one case a Party's request for a special grace period for the phase-out of certain ODCs was "rerouted" from the MOP to the IC, where the request was addressed as a "submission" (in essence, a self-accusation) regarding noncompliance.<sup>154</sup>

The IC's recommendations were lent force by a 1994 decision at a Meeting of the Parties (MOP) to cut the MLF assistance to Parties that fail to report baseline data and progress on institutional capacity building in connection with meeting their treaty obligations.<sup>155</sup> As a result, the IC sometimes recommends to the MOP that Parties lose their MLF funding because of lapses of compliance, although such measures have been recommended only for failures to supply initial baseline data.<sup>156</sup>

The activities of this committee appear to have contributed significantly to compliance. The IC's public findings and recommendations about Parties' non-compliance have repeatedly spurred those Parties to improve their performance. One notable shortcoming of the procedure, however, is that it seems to be applied inequitably as between developed and developing countries: there is no measure for promoting compliance by developed countries equivalent to the placing of conditions on financial assistance that is employed with developing countries.

**The World Bank Independent Inspection Panel.** Critics have charged that the development policies of international financial institutions (IFIs) like the World Bank or the International Monetary Fund have contributed significantly to the mismanagement of the world's fisheries, by contributing to the overcapacity now universally recognized as a principal underlying cause of over-fishing.<sup>157</sup> Nevertheless, the World Bank has been a leader in creating an innovative mechanism for international dispute resolution that offers interesting lessons for negotiators in the current fisheries context.

The Bank's Independent Inspection Panel is precedent-setting in that it provides an avenue to bring complaints to an international tribunal concerning the conduct of an intergovernmental organization. In this sense it is relevant to the question of how to manage challenges by dissenting governments to Commission decisions. It is also unusual among international tribunals in that it gives standing to citizens and non-governmental organizations. In this respect it is relevant to the question of how to distribute the function of monitoring and

---

<sup>152</sup> The Secretariat's active role in reviewing compliance information and distributing it to Parties is not unique. The Secretariat of the Convention on International Trade in Endangered Species (CITES) also organizes information that it receives regarding compliance from a variety of sources and makes it available to CITES parties in the Standing Committee. If the Standing Committee determines that a Party is significantly faltering in implementation, it may recommend that Parties take stricter domestic measures with respect to wildlife trade with that Party, and the Secretariat will distribute the recommendation to all Parties.

<sup>153</sup> See Victor, *supra* note 144, at 149.

<sup>154</sup> See *id.* at 156.

<sup>155</sup> See *id.* at 146-47. Developing countries that are Parties to the Montreal Protocol are eligible for funds from the MLF to help them meet their obligations to reduce the manufacture and use of ozone-depleting substances. Former Soviet bloc states (those in "economic transition") are not eligible, but have access to funds from the Global Environmental Facility (GEF) in connection with meeting their Montreal Protocol obligations.

<sup>156</sup> See *id.* at 151, 165-66.

<sup>157</sup> See Claudia Carr, *The Legacy and Challenge of International Aid in Marine Resource Development*, in *FREEDOM FOR THE SEAS IN THE 21<sup>ST</sup> CENTURY* 340, 345-47, 349 (Jon M. Van Dyke, Durwood Zaelke, & Grant Hewison eds., Washington Island Press 1993).

enforcing compliance with Pacific Convention obligations.

The World Bank's Independent Inspection Panel was created in 1993.<sup>158</sup> The Panel, composed of three independent individuals selected for their expertise by the Bank President and Board, is empowered to consider claims brought by citizens whose environments have been harmed by a World Bank-financed project due to the Bank's failure to follow its own policies or procedures.

After receiving a claim, the Panel initiates a two-stage fact-finding investigation to determine whether World Bank policies or loan covenants were violated. The Panel first conducts a preliminary assessment, including a site visit and a review of the claim and the Bank's response. Based on this assessment, the Panel recommends to the Bank's Board of Executive Directors (the political leadership of the Bank) whether a full inspection is warranted. The Executive Directors retain sole power to authorize a full inspection. For inspections that go forward to the second stage, the Panel enjoys broad investigative powers including access to all Bank Management and staff. After the investigation, the Panel issues a report with its recommendations to Bank Management and the Executive Directors. In most cases, the Panel process has resulted in the Bank adopting some form of an action plan to address the underlying harms alleged in the claims.

As of the end of 1998, thirteen claims had been filed at the World Bank Inspection Panel. Seven of these had passed through the Panel's initial screens and three were pending. In five of the seven the Panel recommended an investigation. Only one of these received full Board approval. That case did not make it completely through the process, because, after the Panel completed its investigation and presented its report to the Board, the President of the World Bank cancelled the Bank's support for the Project. Although the process has become highly politicized, the cases have identified problems of non-compliance, and have resulted in some relief, while at the same time triggering high level discussions about broader policy issues.<sup>159</sup>

In addition to the World Bank, both the InterAmerican Development Bank (IDB) and the Asian Development Bank have created inspection panels. As of the end of 1998, one claim had been filed with the IDB and one with the the Asian Development Bank.

**European Court of Justice.** The European Court of Justice and its subordinate Court of First Instance (together "ECJ") adjudicate a wide variety of economic, social and environmental disputes at the supranational level in the European Union. For instance, in its first twenty years the ECJ Instance addressed over 150 cases with significant environmental dimensions.<sup>160</sup> The Courts operate in the context of the increasingly integrated economic, financial and regulatory European Union.

The ECJ has jurisdiction to hear complaints from Member States that other Member States have breached their Treaty obligations, although such invocations in the context of environmental issues is rare.<sup>161</sup> The European Commission can, and frequently does, bring cases

---

<sup>158</sup> See World Bank Inspection Panel, *IBRD Resolution No. 93-10* (Sept. 23, 1993); World Bank Inspection Panel, *Operating Procedures* (Aug. 1994); Dana Clark & Michael Hsu, *A CITIZEN'S GUIDE TO THE WORLD BANK INSPECTION PANEL* (CIEL 1997).

<sup>159</sup> See Lori Udall, *THE WORLD BANK INSPECTION PANEL: A THREE YEAR REVIEW* (Washington, Bank Information Center 1997).

<sup>160</sup> See Phillippe Sands, *The International Court of Justice and The European Court of Justice*, in *GREENING INTERNATIONAL INSTITUTIONS* 219, 227 (Jacob Werksman ed., 1996).

<sup>161</sup> See EC Treaty, art. 170; see also Sands, *supra* note 160, at 228.

to the ECJ when it determines or suspects that member States have violated their obligations under the EC Treaty.<sup>162</sup> Conversely, Members States, the EC Council, and in many cases the European Parliament and Central Bank, can petition the ECJ to review Commission decisions on the basis that the Commission acted beyond its competence or authority, violated procedural norms, or otherwise violated the EC Treaty.<sup>163</sup> Even individuals or nongovernmental organizations can bring claims if they demonstrate that the acts complained of concerned them individually and particularly.<sup>164</sup>

Analogies with the Pacific fisheries situation are necessarily distant, as the ECJ's nature and context are radically different. Yet the ECJ is striking in a number of respects. Its decisions are legally binding and compliance is strong. States, supranational organizations, non-governmental organizations and individuals all have standing to bring cases. The ECJ has jurisdiction over cases brought against a supranational entity such as the Commission. Its procedures are transparent.

**European Court of Human Rights.** While human rights and fisheries law are far afield from one another, they have in common that both seek to protect values and interests that are not purely defined by the relationships between States – fundamental human rights in one instance and the integrity of a natural resource on the other. In light of this, resolution of disputes over resource conservation might benefit from several features of the European human rights system — a body that can bring investigative and conciliatory powers to bear in response to complaints, a transparent process, and the opportunity for appeal.

The European Court of Human Rights (ECHR), founded in 1959 and with its seat in Strasbourg, along with the European Commission on Human Rights, was created in connection with the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention).<sup>165</sup>

An individual petition under the European Convention can be made by “any person, NGO or group of individuals claiming to be the victim of a violation” of a European Convention right by one of the Parties to the European Convention.<sup>166</sup> States also have the right to bring complaints of European Convention violations.<sup>167</sup> The complainant must have exhausted all available domestic remedies prior to filing the petition, and the complaint cannot be the focus of any other international investigation.

The petitioner can complete the process in a reasonable period of time, and is rewarded at the end with a specific judgment which is final under the new Protocol 11 procedures and binding on the European Convention Parties. The European Council of Ministers is responsible for supervising their execution. The European Court has broad discretion to fashion remedies. In one case, for example, the Court ordered the Kingdom of Belgium to reorganize its educational system to accommodate the language needs of a significant minority populations.

---

<sup>162</sup> See EC Treaty, *supra* note 161, at art. 169; see also Sands, *supra* note 160, at 228.

<sup>163</sup> See EC Treaty, *supra* note 161, at art. 173; see also Sands, *supra* note 160, at 228.

<sup>164</sup> Sands, *supra* note 160, at 228.

<sup>165</sup> See European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 005, signed in Rome on June 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention]. Amended by Protocols 3 (Sept. 21, 1970), 5 (Dec. 20, 1971), 8 (Jan 1, 1990) and 11 (May, 11, 1994).

<sup>166</sup> *Id.* art. 25(1). Currently, petitions are examined first by the European Commission, but soon they will go directly into the European Court system.

<sup>167</sup> See *id.* art. 24.

The Commission carries out the initial review of a complaint, may perform an investigation, and tries to facilitate negotiated resolution. Absent resolution, the Commission prepares a report and preliminary legal judgment on possible violations of the Convention. As such, the Commission operates as a “gatekeeper” to more formal dispute resolution before the ECHR.<sup>168</sup>

After the Commission investigation and report is completed, either the Commission or the State defendant can bring a case to the Court itself.<sup>169</sup> From its inception until 1987, the Commission completed over twelve thousand reports concerning applications for dispute resolution. The Court, in contrast, hears between twenty and forty cases per year.<sup>170</sup>

**Commission on Environmental Cooperation.** In conjunction with the formation of North American Free Trade Agreement (NAFTA), Canada, the United States and Mexico also entered into the North American Agreement on Environmental Cooperation (NAAEC). The NAAEC established the Commission on Environmental Cooperation (CEC). The CEC is governed by the Council, including the Environment Ministers of Canada and Mexico and the Administrator of the US Environmental Protection Agency. The CEC’s day-to-day operations are run by the Secretariat.

Articles 14 and 15 of the NAAEC provides for citizen submissions in cases in which it is alleged that environmental laws are not being enforced or are otherwise not effective. Under Article 14, any non-governmental organization or person established or residing in the territory of a NAAEC Party may make a submission to the CEC Secretariat asserting that a Party is failing to enforce its environmental law effectively.<sup>171</sup>

Section 14(1) of the NAAEC lays out criteria for submissions, and the Secretariat has provided additional guidance on the 14(1) criteria.<sup>172</sup> The submitting party must identify the applicable statute or regulation that is not being enforced and must show that they have exhausted domestic remedies. A submission must appear to be aimed at promoting enforcement rather than at harassing industry. The Secretariat has also made clear that the submission must involve a current or ongoing failure to enforce and not a past failure to enforce.<sup>173</sup>

If the Secretariat determines that the Article 14(1) criteria are met, then the Secretariat determines whether to request a response from the Party named in the submission under Article

---

<sup>168</sup> See Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369, 2375-76 (1993).

<sup>169</sup> See *id.* at 2376.

<sup>170</sup> See *id.*

<sup>171</sup> See North American Agreement on Environmental cooperation between the Government of the United States of America, The Government of Canada, and the Government of the United Mexican States, art. 14, Sept. 14, 1993, 32 I.L.M. 1480 (1993) (*entered into force* Jan. 1, 1994) [hereinafter NAAEC].

<sup>172</sup> See *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (“Guidelines”), available at URL: <<http://www.cec.org/>>.

<sup>173</sup> A submission challenging Canada for failing to conduct the appropriate environmental assessment of The Atlantic Groudfish Strategy (TAGS) – Canada’s response to the collapse of the Atlantic cod fishery – was rejected because it was not brought in a timely manner. Submission No. SEM-97-004. The submission was made in 1997 challenging adoption of the TAGS in 1994. The environmental assessment legislation that Canada was charged with failing to enforce had already been replaced at the time of the submission; the new environmental assessment legislation did not cover government policies or procedures, such as the TAGs. The Secretariat found that one of the requirements of Article 14(1) is that the failure to enforce environmental law be current or ongoing and not wholly in the past. In essence the submission was rejected because it was not brought in a timely manner.

14(2). The Secretariat will forward to the Party a copy of the submission and any supporting information provided by the submitting party. The Secretariat may not proceed if the matter raised in the submission is the subject of a pending judicial or administrative proceeding.

The Secretariat may recommend that a factual record be prepared in accordance with Article 15 of the NAAEC, depending upon the response of the party. The CEC Council can instruct the Secretariat to prepare a factual record on the submission. Assuming that the Secretariat is allowed to conduct its inquiry, the final factual records prepared by the Secretariat will contain: (a) a summary of the submission that initiated the process; (b) a summary of the response, if any, provided by the concerned Party; (c) a summary of any other relevant factual information; and (d) the facts presented by the Secretariat with respect to the matters raised in the submission. The final factual record will be made publicly available if at least two of the countries on the Council vote for it to be made available.

Although the only remedy available under the Article 14 submission procedure is preparation of a factual record, this can prompt action by the Party to increase enforcement. A factual record can also be used for non-traditional enforcement through media, campaigning and boycotts. The Secretariat keeps a registry of submissions, which is available over the Internet.

## **2. Innovative Mechanisms**

While the mechanisms reviewed in this section do not have such wide application or such extensive experience as those in the preceding section, they are included here because they offer models that may be of interest to negotiators as they consider options for dispute settlement procedures to be included in the Pacific Convention. Discussed below are the ombudsman position created recently by the International Finance Corporation, and the Nordic Convention's provision for citizens' reciprocal access to the national courts of the other parties.

**International Finance Corporation's Ombudsman.** The International Finance Corporation (IFC) is the arm of the World Bank Group that lends at near-market rates to the private sector in the developing world. The IFC has recently created an ombudsman position to investigate environmental problems relating to activities supported through IFC lending. The ombudsman will investigate complaints about the environmental impacts of IFC-funded projects from citizens living in the project area. This mechanism provides an opportunity for the public to raise concerns and submit evidence to an official with investigative powers who is part of the intergovernmental organization whose conduct is in question, while avoiding the confrontational aspects of direct dispute settlement procedures. The specific guidelines governing the ombudsman's duties and powers have yet to be developed.

**Nordic Convention: Reciprocal Access to National Remedies.** The Nordic Convention embodies an unusual mechanism for resolving disputes involving international environmental problems. It provides reciprocal access to administrative and judicial authorities of each party for the citizens of each participating nation. The purpose is to provide affected individuals the ability to bring an action against the source of an environmental "nuisance" located in another State in that State's tribunals. Under the Nordic Convention, the complaining foreign national must be accorded the same treatment that a host country national would have under purely domestic circumstances.<sup>174</sup> An affected individual may seek both to prevent environmental harm

---

<sup>174</sup> Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden, done February 19, 1974, at art. 3, 1092 U.N.T.S. 279 (1974), *reprinted in* 13 I.L.M. 591 (1974) [hereinafter *Nordic Convention on Protecting the Environment*].



and to recover compensation for damages already suffered.<sup>175</sup> Analogous reciprocity in the regional fisheries context might involve a provision that nationals of any Party whose interest in the fishery is injured by illegal conduct of vessels flying the flag of another Party have the right to bring claims against those vessels in the courts of the second Party.

## V. Conclusions and Recommendations

The framework established by the UNCLOS and SSA for dispute settlement procedures affords negotiators of a new Pacific Convention significant flexibility to design procedures that respond to their shared objectives and values, to the situation in the region, and to lessons from experience in other contexts. Experience with dispute resolution both in connection with fisheries management and in other areas of international law suggests that there are a number of useful mechanisms and techniques that negotiators can employ to enrich and complement the UNCLOS/SSA structure.

The standard package of the UNCLOS procedures discussed in Part II appears to contemplate bilateral disputes between two parties that perceive that they have mutually exclusive interests.<sup>176</sup> In contrast, however, many of the disputes likely to arise under a Pacific Convention, as noted in Part II above, would involve questions whether a State has complied with *collectively* determined norms. A State's failure to comply with those norms would conflict with collective interests, not merely with the interest of one other Party.

For these types of disputes, the bilateral State-to-State paradigm of the UNCLOS package could be enriched by reference to the mechanisms developed in other forums for addressing problems involving compliance and enforcement by specific States. These include the standing commissions/committees found under the ILO, the Montreal Protocol and the ombudsman model recently implemented by the IFC. Adaptation of these models for consideration in the context of the current negotiations would likely involve the assignment of monitoring, information gathering and enforcement functions to the Commission, the Technical and Compliance Committee and the Secretariat envisioned under the Draft Pacific Convention.

*Timely Precaution and Adaptive Management.* As discussed in Part \_\_, timely response to non-compliance is critical in order to ensure a precautionary approach and adaptive management. There must be effective mechanisms for identifying compliance issues, including those that could lead to disputes.<sup>177</sup> This will involve an ensemble of institutions carrying out monitoring, information gathering, reporting, investigative and conciliatory or mediating functions.

The Secretariat of the new Pacific Convention can collect and distribute compliance information from all reliable sources, as do other Secretariats such as those of the CITES and Montreal Protocol. The Secretariat could also play an active role in following up and confirming reports, as do the organs of the ILO, and in certain cases the World Bank Independent Inspection

---

<sup>175</sup> *Id.*

<sup>176</sup> Thus, typical ICJ and arbitration cases involving the law of the sea have involved delineation of maritime boundaries, fisheries jurisdiction and continental shelves. *See Boyle, supra* note 14, at 40-41.

<sup>177</sup> Timeliness is particularly important in connection with disputes about the management and conservation of limited natural resources, like fish stocks, because "in the field of the environment, certain damage may occur for which no monetary compensation, however large, and no efforts at restoration, however diligent, would ever return the ... resources to their original conditions." Adede, *supra* note 20, at 53 (arguing for, where possible, the avoidance of disputes).

Panel and the Commission on Environmental Cooperation. Where a dispute arises outside of the Pacific Convention's institutions, the Secretariat might initiate contact with disputing Parties and even make recommendations as to the choice, where necessary, of appropriate forums or procedures for resolving the issue.

Where dispute resolution procedures are invoked, it will be important to provide for adherence to strict deadlines such as those that have contributed to the success of the WTO Dispute Settlement Body, and prompt responses to complaints such as those provided to date by the ITLOS, and keep information publicly available about conflict resolution and changes in fish stocks management that result. The need for timely response also suggests that it would be valuable for the Technical and Compliance Committee to receive frequent updates from the Secretariat, to meet regularly, and perhaps communicate through electronic means and telephone between meetings.

The precautionary approach may also have implications for the allocation of the burden of proof in dispute resolution proceedings. Scientific uncertainty should not be a basis for delaying protective action. On the contrary, the burden of proof should be placed upon the party proposing a reduction in the level of protection.

*Scientific Basis for Decisions.* Experience suggests several ways to enhance implementation of the SSA's strong emphasis on science. A strong role for both the Scientific and the Technical and Compliance Committees will be important, with regular consultations and openness to input from all sources. The Montreal Protocol's linkage between the Implementation Committee and a technical and scientific advisory panel suggests that a linkage between the Scientific Committee and the Technical and Compliance Committee could be valuable, and other linkages to expertise could be considered. The Secretariat should have adequate expertise and staffing resources to support these bodies.

*Transparency.* Transparency of proceedings is particularly important as science depends on the open exchange of information and an open, vigorous debate about the strength of observations and validity of conclusions. Transparency is also vital for building legitimacy of the institution in the public eye, as well as validating the outcome of a proceeding involving a small number of Parties to an agreement in the eyes of other Parties who also are likely to have a direct or indirect interest in the outcome. In light of these factors, procedures under the new Convention should incorporate maximum transparency consistent with a continuing trend as evidenced by regional, supranational and international institutions such as the ILO, CEC, ECJ, and the European Court of Human Rights.

*Cost.* Dispute resolution procedures must take account of the need to minimize costs in the interest of efficiency. This can be addressed in part through measures such as strict deadlines for each step of the procedure, and simplified and informal procedures, at least at the early stages to *facilitate* negotiated solutions before resort to formal, adversarial dispute settlement mechanisms becomes necessary. Another option is to distribute the burden of monitoring and enforcement by empowering a variety of parties to bring forward evidence regarding compliance, as is the practice in institutions such as the ILO, Commission on Environmental Cooperation, World Bank Independent Inspection Panel, and Nordic Convention. Concerns about efficiency and overburdening of forums could be addressed through appropriate design of procedural requirements (e.g. variations in formality, as under the ILO and ECHR, binding versus non-binding mechanisms, as under the ILO and CEC, or procedural and evidentiary requirements as under the CEC).

*Fairness.* Fairness demands procedural clarity and rule-based, impartial consideration of each case. Yet this must be balanced with flexibility and equitable consideration as well. Particularly important and unequivocal is the need to provide financial and technical assistance to developing countries, including least developed countries and small island states, so that they can participate effectively in whatever dispute resolution procedures are defined under the new Convention. A procedure for appeal, for instance to the ITLOS as suggested below, could provide a check on erroneous decisions in the first instance.

*Range of Measures for Compliance.* Dispute resolution procedures are one of a set of mechanisms for promoting compliance and implementation. Consistent with the SSA, the Convention should also provide for assistance to developing countries, technology transfer, and reporting and information sharing. This panoply of measures is characteristic of contemporary multilateral agreements on environment and sustainable development.

*Ensemble of Institutions.* Experience indicates that the range of mechanisms for compliance should be administered through an appropriate set of institutions. An active Secretariat contributes significantly to effectiveness, as evidenced by the Montreal Protocol and CITES. The IFC Ombudsman could be the model for according the Secretariat investigative powers in response to submissions about compliance, at least in certain defined situations. The Technical and Compliance Committee also has a significant role in assessing compliance, serving as a forum for discussion of compliance disputes, and developing collective responses to non-compliance.

*Graduated Series of Responses to Disputes.* Experience suggests that there should be a graduated series of options for dispute resolution along the spectrum from non-adversarial to adversarial. It is not generally constructive to move immediately into a confrontational proceeding. Active, if non-binding, facilitation or conciliation may be important roles for negotiators to consider for the Secretariat, the Technical and Compliance Committee, or a specially-created committee. Initial mechanisms should involve submissions to a Secretariat or compliance committee, as under the Montreal Protocol, ILO, Commission on Environmental Cooperation, and other forums. If warranted, the next step would be an inquiry to the Party. Further steps could include investigation, conciliation, and only then formal dispute settlement. There may be value in defining a clear route of appeal, as is found in the WTO or ECJ. A process that involves appeal from an initial non-binding investigation or hearing before a panel, to a formal forum for binding resolution, would be an option, as is found in the ILO.

If the ITLOS were the endpoint for this process, there would be both drawbacks and advantages. The ITLOS would probably not have expertise most relevant to the area and stocks covered by the Convention, although it would have the power to seek out relevant information and advice. On the other hand, it could help develop a consistent jurisprudence interpreting the SSA, which would be of value not only for the Pacific Convention but for other fisheries organizations and arrangements. Furthermore, the ITLOS could hear cases authorized under the Pacific Convention involving disputes between a dissenting Party and the Commission itself, thus providing a procedure for appeal from Commission decisions (if the Convention were drafted accordingly).