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ONE PERSON CAN MAKE A DIFFERENCE: AN INDIVIDUAL PETITION SYSTEM FOR INTERNATIONAL ENVIRONMENTAL LAW

Jason N E Varuhas*

State compliance with international environmental law has generally been poor. Environmental regimes have experimented with many compliance techniques to solve this problem, yet non-compliance persists. This is a pressing issue given the declining state of the global environment. This article advocates the adoption of an individual petition system for international environmental law on the basis that such a system would improve state compliance. A model petition system and procedure are proposed. Such a petition system would attach to a "parent" environmental treaty, contain four treaty bodies and entail a three-stage process of admissibility, consideration on the merits and implementation. The system would be of a flexible and investigatory character. Private individuals, non-governmental organisations and companies would have the right of petition. Issues of standing and admissibility are addressed. Practical issues associated with implementing such a mechanism are also considered.

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level.[1]

* Judges' Clerk, New Zealand Court of Appeal. This article is the revised text of a paper that won the 2004 Quentin-Baxter LLM Prize for Public and International Law at Victoria University of Wellington. The author would like to thank Joanna Mossop, who originally supervised this paper, Alberto Costi for his help in editing the paper and Nicola Varuhas for her support and comments on drafts. The opinions expressed in this article are the author's own and do not necessarily reflect those of either the New Zealand Court of Appeal or the Ministry of Justice.

1 Rio Declaration on Environment and Development (14 June 1992) 31 ILM 874, Principle 10 ["Rio Declaration"].

> [S]ustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels.[2]

I INTRODUCTION

The global environment is in crisis. The air and atmosphere are polluted by dangerous chemicals, the oceans and seas are plundered, freshwater resources are irreparably polluted, hazardous wastes and materials abound on our planet, ecosystems are destroyed and more and more species of flora and fauna are threatened with extinction. The state of the world's environment has been in steady decline and is now reaching breaking point.[3] A myriad of international environmental treaties has been concluded over the past 30 years to try to stop this gradual descent. Yet, these treaties have generally failed to halt the degradation of the global environment.[4] State non-compliance with international environmental commitments has contributed to the failure of these instruments.[5] States have failed to perform the obligations they are duty-bound to fulfil.

In response to the problem of non-compliance many different compliance control mechanisms have been implemented in international environmental law (IEL). Such methods have included reporting, monitoring, diplomacy, shame tactics, persuasion, capacity building, sanctions and non-compliance procedures. However, for all of these methods non-compliance remains a serious issue.

This article advocates the adoption of an individual petition system (IPS) in the area of IEL to address the problem of non-compliance. Under such a system, private individuals would be afforded the right to file petitions with a supranational body alleging that their

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2 Johannesburg Declaration on Sustainable Development (4 September 2002) A/CONF.199/L.6/Rev.2, Principle 26.

3 For a thorough analysis of the present state of the global environment and the trends over the last 30 years, see United Nations Environment Programme *Global Environment Outlook 3: Past, Present and Future Perspectives* (Earthscan Publications, London, 2002) ch 2 ["Global Environment Outlook"]. The analysis shows "indisputable evidence of continuing and widespread environmental degradation" (at 298).

4 See "Global Environment Outlook", above n 3, ch 1. The report concludes that the global environment is generally in a more fragile and degraded state than it was 30 years ago, despite the conclusion of numerous environmental accords.

5 There is a wealth of literature devoted to the study of how to improve state compliance with international environmental accords: see for example James Cameron, Jacob Werksman and Peter Roderick (eds) *Improving Compliance with International Environmental Law* (Earthscan Publications, London, 1996); Alexandre Kiss, Dinah Shelton and Kanami Ishibashi (eds) *Economic Globalization and Compliance with International Environmental Agreements* (Kluwer Law International, The Hague, 2003); Edith Brown Weiss and Harold K Jacobson (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, Cambridge, 1998).

state of nationality was breaching its international environmental obligations. Such a petition system would attach to a "parent" environmental treaty and receive petitions in relation to the rules of that treaty. There is a trend in the area of IEL towards the adoption of such a mechanism as evidenced by the North American Agreement on Environmental Cooperation (NAAEC) Submissions Procedure,[6] and the European Court of Justice's (ECJ) consideration of environmental disputes.

This article contends that an IPS would improve compliance with IEL and proposes a model petition system.

Part II provides a general introduction to IPSs. Part III contends that an IPS has advantages over current compliance mechanisms, and that the establishment of an IPS within an IEL regime would have compliance enhancing effects.

Part IV proposes the model IPS for IEL. The IPS would investigate and make determinations as to compliance. The system would involve a three-stage process of admissibility, consideration on the merits and implementation, conducted by four treaty bodies. The petition system would be a flexible procedure of an investigative nature. A set of requirements for standing are proposed.

Part V highlights a number of practical issues associated with implementing an IPS.

II INDIVIDUAL PETITION SYSTEMS: AN INTRODUCTION

IPSs are by no means a new idea. Roughly 2700 years ago in Ancient Greece the *poleis* of Stymphalos and Sikyon concluded a bilateral agreement which allowed citizens of one state to call the other state to account for breaches of mutually agreed laws.[7] Provision was made for an independent judge to adjudicate such disputes. In essence, individuals were given the right to call states to account in international law. This idea of individual petition has been revived in the modern era with the establishment of IPSs in many areas of international law.

An IPS is a mechanism whereby private individuals (and other non-state actors) can file petitions with a supranational tribunal alleging that a state is breaching its international obligations. The supranational tribunal investigates the allegations and issues a decision on compliance. Individuals in effect act as private attorneys-general.

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6 Created under the North American Agreement on Environmental Cooperation (14 September 1993) 32 ILM 1480, arts 14–15 ["NAAEC"].

7 Bilateral Judicial Agreement Between Stymphalos (Arkadia-Peloponnese) and Sikyon-Demetrias (Korinthia-Peloponnese) (303–300 BC) in Ilias Arnaoutoglou *Ancient Greek Laws: A Source Book* (Routledge, London, 1998) 133–137.

IPSs attach to "parent" treaties and hear petitions only in relation to those treaties. For example, the European Court of Human Rights (ECHR) hears complaints only in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention or European Convention on Human Rights),[8] while the Human Rights Committee (HRC) deals with communications alleging breaches of the International Covenant on Civil and Political Rights (ICCPR).[9]

Generally the process is analogous to a judicial proceeding in that both parties are entitled to make submissions, the principles of natural justice are adhered to and a final decision is issued by an independent body composed of legal experts. The level of judicialisation and legalisation of the process is a point of variation between the different IPSs. For example, the ECHR functions in the same way as a domestic court, while the NAAEC Submissions Procedure is more akin to a citizen-triggered investigative mechanism. Whether court-like or not, such mechanisms have admissibility requirements.

IPSs typically appear in areas of international law that directly concern individuals, such as human rights law,[10] economic law[11] and labour law.[12] However, there is a growing

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8 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221 (as amended by Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (11 May 1994) ETS no 155) ["European Convention"].

9 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 ["ICCPR"].

10 See for example the individual petition systems (IPSs) created under the following treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (6 October 1999) 38 ILM 763 ["CEDAW Optional Protocol"]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, art 22 ["CAT"]; Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 302 ["ICCPR Optional Protocol"]; American Convention on Human Rights (22 November 1969) 1144 UNTS 123 ["ACHR"]; European Convention, above n 8; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 June 1998) OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III).

11 Examples include the World Bank Inspection Panel (WBIP) procedure: International Bank for Reconstruction and Development "The World Bank Inspection Panel" (22 September 1993) Resolution No IBRD 93-10 ["Resolution No IBRD 93-10"]; International Development Association "The World Bank Inspection Panel" (22 September 1993) Resolution No IDA 93-6 ["Resolution No IDA 93-6"]; the Mercosur Trade Agreement procedure: Protocol of Brasilia for the Solution of Controversies (17 December 1991) 36 ILM 691; MERCOSUR/CMC/DEC NO 1/91, ch V; the International Centre for Settlement of Investment Disputes: Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159; the North American Free Trade Agreement: North American Free Trade Agreement (17 December 1992) 32 ILM 289, ch 11(B).

trend, as evidenced by the ECJ's consideration of environmental disputes[13] and the NAAEC Submissions Procedure, to extend such mechanisms to other areas such as IEL. This article advocates such an extension.

III WHY A PETITION SYSTEM?

With the remarkable growth of IEL over the past 30 years has come the challenge of securing state compliance. Many methods have been used to secure state compliance; however, compliance with international environmental accords remains generally poor.[14] Where other mechanisms have failed this article suggests that an IPS would succeed.

A Advantages of an IPS

One of the fundamental reasons current mechanisms fail is that they rely too heavily on states for information on compliance. For example, self-reporting procedures and non-compliance procedures rely primarily on states for information by which to scrutinise compliance. Such systems produce adverse incentive effects: states are unwilling to expose their own non-compliance given that such exposure will lead to pressure to comply, reputational costs and sanctions. States will also be unwilling to expose other states' non-compliance given the potentially weighty political costs and the likelihood of reciprocal action.[15] Further, the costs of accurately reporting complex environmental data can be prohibitive especially for developing states.[16] In reality there exists very little incentive for

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12 A number of complaints procedures have been developed by the International Labour Organization (ILO): "representations" and "complaints" can be made under Articles 24 and 26 of the ILO Constitution while "special procedures" exist for complaints concerning freedom of expression: Constitution of the International Labour Organization, Treaty of Versailles, Part XXIII (28 June 1919) UKTS no 4 (the Constitution has been amended since 1919 and the most recent version is available online at ILO Constitution <http://www-ilo-mirror.cornell.edu/public/english/about> (last accessed 24 September 2004)); see generally Lee Swepston "Human Rights Complaint Procedures of the International Labor Organization" in Hurst Hannum (ed) *Guide to International Human Rights Practice* (3 ed, Transnational Publishers, New York, 1999) 85.

13 See generally Han Somsen (ed) *Protecting the European Environment: Enforcing EC Environmental Law* (Blackstone Press, London, 1996).

14 As mentioned in Part I Introduction, such methods include reporting, monitoring, diplomacy, shame tactics, persuasion, capacity building, sanctions and non-compliance procedures.

15 See for example David A Wirth "Re-examining Decision-making Processes in International Environmental Law" (1994) 79 Iowa L Rev 769, 779–780.

16 In regard to the difficulties faced by developing countries in fulfilling reporting requirements generally see Kal Raustiala "The 'Participatory Revolution' in International Environmental Law" (1997) 21 Harv Envt'l L Rev 537, 560–561 ["The 'Participatory Revolution'"].

states to file reports at all, and even less incentive to file accurate information exposing non-compliance.[17]

An IPS can remedy such problems. By allowing individuals the right to expose recalcitrant states, more instances of non-compliance will be detected than otherwise would be.[18] Individuals are more likely to detect non-compliance because they are "close to the action" and have a better understanding of what is happening domestically than do distant international organisations.[19] Also, individuals do not face the same disincentives as states regarding exposure of non-compliance.[20] Individuals, particularly when they have incurred harm as a result of state non-compliance, may possess very strong incentives to call states to account.[21] Under self-reporting systems, states can avoid accountability by not filing a report, but under an IPS, non-compliance is exposed independently of state control or consent. Once non-compliance is exposed, steps can be taken to bring about compliance.

B Compliance Theories

This section argues that an IPS would improve compliance with IEL by reference to prominent compliance theories. Compliance theories seek to explain why states comply with international law and how regimes can be tailored to encourage compliance. While being termed "theories" the models developed are grounded in the experience of international regimes and empirical evidence. As the literature in this area has grown several theories have been established. These major compliance theories – enforcement,

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17 See "The 'Participatory Revolution'", above n 16, 560–561: "Reporting is often spotty; governments distort their information, lie, and simply fail to report at all". For an extreme case of state failure to file reports see United Nations Human Rights Committee "Report of the Human Rights Committee" (26 October 2001) A/56/40, Vol I, para 66 ["HRC Report 2001"] where the Human Rights Committee (HRC) expresses concern that the reports of 40 states are more than five years overdue, the worst (Gambia) being 16 years overdue.

18 See Andrea K Schneider "Democracy and Dispute Resolution: Individual Rights in International Trade Organizations" (1998) 19 U Pa J Int'l Econ L 587, 629.

19 See Joel P Trachtman and Philip M Moremen "Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right is it Anyway?" (2003) 44 Harv Int'l LJ 221, 246 where the authors discuss the informational advantages of private litigants.

20 Schneider, above n 18, 608–609: "Private actors … do not have the political baggage of bringing a case against another state"; Glen T Schleyer "Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System" (1997) 65 Fordham L Rev 2275.

21 See Mark Gibney "On the Need for an International Civil Court" (2002) 26 Fletcher Forum of World Affairs 47, 51, 53 (in the context of human rights violations); Laurence R Helfer and Anne-Marie Slaughter "Toward a Theory of Effective Supranational Adjudication" (1997) 107 Yale LJ 273, 387.

managerialism, transnationalism and legitimacy – can be used to assess whether an IPS would improve state compliance with international environmental commitments and give guidance as to the form of such a system.

1 Enforcement: rational actor models

Enforcement models cast states as rational self-interested actors.[22] In deciding whether to comply with their international commitments, states weigh up the costs and benefits of compliance and non-compliance. Such theories suggest enforcement mechanisms based on coercion such as sanctions and adjudication, the rationale being that states are less likely to breach their obligations if the costs of non-compliance are high.[23]

An IPS would improve compliance based on the rational actor model. A finding by a supranational body that a state has breached its obligations carries with it several costs that would erode the net benefits associated with non-compliance. First, such a finding can damage a state's reputation in the international arena. Secondly, a government that is publicly held to have breached an international obligation will be viewed unfavourably by its domestic constituency. Thirdly, the state could incur direct costs if the petition system provides for sanctions. Such sanctions could include membership, military or economic sanctions.

For such an enforcement system to work well, it must not only impose potential costs for non-compliance, but there must also be a likelihood of recalcitrant behaviour being detected.[24] As stated above, non-compliance will be more likely to be detected under an individual-triggered mechanism than under present systems that are subject to state control.[25]

2 Managerialism

Managerialists present a model of compliance that differs markedly from rational actor models. Managerialists believe that states demonstrate a general propensity to comply

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22 For a general overview of these models see Oona A Hathaway "Do Human Rights Treaties Make a Difference?" (2002) 111 Yale LJ 1935, 1944–1955; Kal Raustiala "Compliance and Effectiveness in International Regulatory Cooperation" (2000) 32 Case Western Reserve J Int'l Law 387, 400–404 ["Compliance and Effectiveness"].

23 See generally Andrew T Guzman "International Law: A Compliance Based Theory" (2001) UC Berkeley Public Law Research Paper No 47.

24 A rational actor takes into account both the potential costs of being caught and the probability of being caught when deciding whether to breach a rule: Robert Cooter and Thomas Ulen *Law and Economics* (4 ed, Pearson Addison Wesley, Boston, 2004) 473–475.

25 See Part III A Advantages of an IPS.

with international obligations[26] and suggest that the "principal source of non-compliance is not wilful disobedience but the lack of capability or clarity or priority".[27] Managerialism emphasises the normative effect of international obligations and suggests that participation and interaction within a regime have norm creating and norm reinforcing effects that lead to iterative compliance improvements.

Chayes and Chayes suggest that ensuring transparency, providing for dispute settlement, capacity building and the use of persuasion all aid the normative strength of international commitments and thus facilitate compliance.[28] An IPS can potentially accommodate and promote all of those things.

(a) Transparency

The generation and dissemination of information about the requirements of the regime and the parties' performance under it is important as it facilitates coordination converging on treaty norms, provides reassurance to states parties that other parties are not "free-riding" and acts as a deterrent against those contemplating non-compliance.[29] In managerial regimes transparency is typically achieved through monitoring systems, whereby states submit reports on their own compliance,[30] which are analysed and performance evaluated.[31] An IPS works in a similar fashion:[32] after a petition is filed, the state is called to account by a panel of experts who make a finding as to compliance. As mentioned above, such a system has advantages over traditional self-reporting systems where states are unlikely to want to expose their own non-compliance.[33]

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26 Abram Chayes and Antonia H Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, 1995) 3.

27 Chayes and Chayes, above n 26, 22.

28 Chayes and Chayes, above n 26, 22–28, chs 7–9.

29 Chayes and Chayes, above n 26, 22; See also Abram Chayes, Antonia H Chayes and Ronald B Mitchell "Managing Compliance: A Comparative Perspective" in Brown Weiss and Jacobson (eds), above n 5, 39, 43–45.

30 Chayes, Chayes and Mitchell, above n 29, 46–47.

31 Chayes, Chayes and Mitchell, above n 29, 47–49.

32 Some have even ventured to call such a system "complaint-based monitoring": John H Knox "A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission" (2001) 28 Ecology LQ 1.

33 Even managerialists have conceded the weaknesses of state self-reporting: Chayes, Chayes and Mitchell, above n 29, 46–47; see also Edith Brown Weiss "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1999) 32 U Rich L Rev 1555, 1574. Brown Weiss also draws attention to the problem of "reporting congestion" where

(b) Dispute settlement

Because managerialists consider ambiguous treaty provisions to be a source of non-compliance, they view procedures which give authoritative interpretations of such provisions as a way of facilitating compliance. IPSs are a mechanism through which rules can be interpreted. Decisions of supranational tribunals typically include a definitive analysis of the treaty provision at issue. Managerialists may object to such a mechanism as they favour non-binding procedures which are less contentious and have a preventive or anticipatory value. However, IPSs are arguably less contentious than typical inter-state dispute settlement systems as they do not involve the politically charged situation of one state bringing a case against another state. Also, the decisions of supranational tribunals need not be binding. In terms of anticipatory and preventive value, the decisions of such tribunals can be supplemented by "general comments" which interpret provisions of the relevant treaty, allowing states to modify their behaviour before non-compliance need occur. Tribunal decisions have precedent value and can have a similar preventive effect.

(c) Capacity building

Managerialists point to a lack of technical, bureaucratic and financial capability as potential sources of non-compliance. The managerialist solution to this problem is to provide for "capacity building": the transfer of resources to states that lack capacity to comply. Enabling such countries to comply will be more productive than punishing non-compliance. Prima facie an IPS does not deal with issues of capacity, but rather seeks to expose and punish non-compliance. However, a capacity building mechanism could be built into an IPS and, because IPSs expose instances of non-compliance, such mechanisms can be important in highlighting areas where states lack capacity.

(d) The use of persuasion

The maintenance of discourse between key actors will, according to managerialists, lead to gradual compliance improvements.[34] An IPS can facilitate such discourse. Findings of non-compliance against states enable other states parties, the treaty organisation and the public to call the recalcitrant state to account by discussing and debating the issues involved. In this way, pressure is put on the offending state to justify its non-compliance and modify its behaviour.

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government officials may spend most of their time collating reports rather than addressing compliance issues.

34 Chayes and Chayes, above n 26, 25.

3 Transnationalism

The transnational model as espoused by its protagonist, Professor Koh, suggests that nations obey international law due to the "transnational legal process": the "process whereby an international rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic system".[35]

The operation of an IPS can lead states to internalise international norms into their domestic legal systems, leading states to obey those norms. An example of this process is the adoption of proportionality review in the United Kingdom.[36] The United Kingdom had been continually rebuffed by the ECHR because its weak form of judicial review did not provide citizens with sufficient protection vis-à-vis the executive.[37] Over time, and as the United Kingdom was found against at Strasbourg, the English judiciary came to adopt European-style proportionality review as a distinct head of review.[38] The repeated process of interaction (between the petitioners, the defendant state and its judiciary, and the supranational tribunal) and interpretation (of the provisions of the European Convention by the ECHR) had the cumulative effect of causing the norm of proportionality to be internalised into United Kingdom municipal law (via the modification of judicial review by the English courts).

4 Legitimacy and fairness

Some commentators believe that the more legitimate a regime is, in the eyes of both states parties and the wider public, the more likely states will obey the rules of the regime.[39] Several features of IPSs and supranational tribunals will enhance the legitimacy of the regimes and rules to which they attach.

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35 Harold Hongju Koh "The 1998 Frankel Lecture: Bringing International Law Home" (1998) 35 Hou L Rev 623, 626.

36 See generally Jason Varuhas *Keeping Things in Proportion: The Judiciary, Executive Action, and Human Rights* (LLB(Hons) Research Paper, Victoria University of Wellington, 2003).

37 See for example *Smith and Grady v UK* (2000) 29 EHRR 493 (ECHR); *Chahal v UK* (1996) 23 EHRR 413 (ECHR).

38 The House of Lords initially dismissed proportionality as a discrete head of review (see *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (HL)) but the influence of the Strasbourg Court eventually led to its adoption: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 115 (HL).

39 See for example Thomas M Franck *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995); Thomas M Franck "Legitimacy in the International System" (1988) 82 Am J Int'l L 705 ["Legitimacy in the International System"]; Daniel Bodansky "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 Am J Int'l L 596.

(a) Expertise

Having an expert tribunal making compliance determinations will enhance the legitimacy of an IEL regime.[40] Entrusting such decisions to an expert panel such as a supranational tribunal gives states and the public confidence in the system.

(b) Coherence and clarity

A regime will be viewed as legitimate if its rules are applied uniformly to all states in every similar and applicable instance (unless there is a reasonable justification for not doing so).[41] The best way to ensure that rules are applied equally to all is to entrust such application to an adjudicatory body characterised by principles of impartiality, natural justice and the doctrine of precedent. Supranational tribunals associated with IPSs typically carry such attributes, and will ensure the equal application of rules. Supranational tribunals are also important as they clarify the meaning of treaty obligations so that states know what is required of them. This is important because clear rules are generally perceived as being more legitimate and exert a greater "compliance pull" than do ambiguous rules.[42]

(c) Public participation

Cementing public access to a regime via an IPS will cause the public to view the regime as open and transparent and will promote democratic legitimacy.[43] Further, provision of the right of petition casts the public as stakeholders in state compliance.[44]

(d) Symbolism

Franck says that symbolism, ritual and pedigree can act as "cues to elicit compliance".[45] In this regard, the creation of an IPS is highly symbolic – of state accountability, of commitment to the rules of the relevant treaty and of transparency.

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40 Bodansky, above n 39, 619–622.

41 "Legitimacy in the International System", above n 39, 735–751.

42 "Legitimacy in the International System", above n 39, 713, 721–724.

43 Bodansky, above n 39, 611. For example, the opaque and obscure procedures of the European Union have often led to allegations of democratic deficit.

44 Bodansky, above n 39, 617: "Participation can contribute to popular democracy by giving stakeholders a sense of ownership in the process".

45 "Legitimacy in the International System", above n 39, 725.

Tellingly, each of the compliance theories discussed here signals that the creation of an IPS within an international regime would enhance compliance with the rules of that regime.

IV PROPOSAL

This section proposes a model IPS for IEL. The form of model is discussed, as are the structure and the bodies that would make up the IPS. Admissibility and standing requirements are also addressed.

A The Model: A Petition-Information System

The form of mechanism proposed for IEL is a "petition-information" system.[46] This will be the most effective form of petition system for improving state compliance with IEL: a "petition-information" system fits well with the nature of international environmental obligations and of environmental issues. Such a system is also desirable as it melds the managerialist and enforcement models.

1 What is a petition-information system?

The focus of a petition-information system, as indicated by its name, is on investigating and gathering information regarding individual petitions that allege state non-compliance. The individual, rather than acting as a plaintiff, acts as a private attorney-general or "whistle-blower". Once an allegation is made, the tribunal will gather information relevant to the allegation from a range of sources. The process is a non-adversarial one and is essentially a fact-finding procedure, the aim of which is the exposure of non-compliance. Such a system is characterised by flexibility and loose rules of procedure.

It is informative to consider several examples of petition-information systems: the NAAEC Submissions Procedure,[47] the World Bank Inspection Panel (WBIP),[48] the United Nations Commission on Human Rights (UNCHR) 1503 Procedure[49] and the Convention

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46 The terms "petition-information" and "petition-redress" have been adopted by Tardu and Alston: M E Tardu "United Nations Response to Gross Violations of Human Rights: The 1503 Procedure" (1980) 20 Santa Clara L Rev 559, 561–562; Philip Alston "The Commission on Human Rights" in Philip Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, Oxford, 1992) 126, 145–146.

47 The NAAEC Submissions Procedure is established under NAAEC, above n 6, arts 14–15.

48 See "Resolution No IBRD 93-10" and "Resolution No IDA 93-6", above n 11.

49 The UNCHR 1503 Procedure was set up by Economic and Social Council (ECOSOC) Resolution 1503 (XLVIII) (27 May 1970) as amended by ECOSOC Resolution 2000/3 (16 June 2000).

on the Elimination of All Forms of Discrimination against Women (CEDAW) investigative procedure.[50]

Under the NAAEC Submissions Procedure, individuals may file petitions alleging that states are failing to effectively enforce their domestic environmental laws.[51] If the petition fulfils admissibility criteria and the central representative body of the regime (the Council) approves, the Secretariat (that oversees the process) may initiate a fact-finding process drawing on a range of sources including the public, the parties and independent experts.[52] Once the Secretariat has conducted its investigation it issues a "factual record" which includes the facts uncovered in the investigatory process.[53] Whether the factual record is made public depends on a Council vote.[54] The NAAEC procedure has generally been seen as a progressive step in the evolution of environmental compliance mechanisms.[55]

The WBIP is designed "to provide an independent forum to private citizens who believe that they or their interests have been or could be directly harmed by a project financed by the World Bank".[56] The WBIP receives complaints from private individuals and if a decision to investigate is taken then the Panel can institute far-reaching investigative procedures.[57] The Panel can hold public hearings, visit project sites, hire independent consultants, receive written and oral submissions and meet with governmental, local and non-governmental entities.[58] The Panel's decision is made public and includes all relevant findings of fact and a conclusion as to compliance.[59]

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50 Established by CEDAW Optional Protocol, above n 10, art 8; see also the investigative procedure established under CAT, above n 10, art 20.

51 NAAEC, above n 6, art 14.

52 NAAEC, above n 6, arts 14–15.

53 NAAEC, above n 6, art 15.

54 NAAEC, above n 6, art 15(7).

55 Knox, above n 32, 120–122; Laura C Bickel "Baby Teeth: An Argument in Defense of the Commission for Environmental Cooperation" (2003) 37 N Eng L Rev 815, 863.

56 WBIP website <http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WOverview> (last accessed 24 September 2004); The WBIP model is not strictly an IPS as defined in Part II A Definition, in that private petitioners are not seeking to call a state to account, but rather an international organisation. However, the investigative method and procedure of the system are informative to the study of IPSs given the similarities between the systems.

57 See WBIP "Operating Procedures" (19 August 1994) 34 ILM 503, Part VII ["WBIP Operating Procedures"].

58 WBIP Operating Procedures, above n 57, para 45.

59 WBIP Operating Procedures, above n 57, paras 52, 56.

Under the UNCHR 1503 Procedure, non-governmental actors may file complaints alleging a "consistent pattern of gross and reliably attested [human rights] violations".[60] The UNCHR, in conjunction with working groups and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, takes cognisance of the complaint and proceeds to gather information in relation to the allegation.[61] Under the CEDAW investigative procedure, if the CEDAW Committee receives "reliable information indicating grave or systematic violations" by states parties of rights set forth in CEDAW, the Committee may proceed to investigate the allegations.[62]

The NAAEC, World Bank, 1503 and CEDAW mechanisms can properly be characterised as individual-triggered monitoring or investigatory systems.[63] The aim is to collate information in order to determine whether a state is compliant or not. Such systems are geared towards answering broad questions of compliance on a macro level.

Petition-information systems can be contrasted with "petition-redress" systems such as domestic courts or the ECHR. The aim of petition-redress systems is remedial and vindicatory. The process is adversarial with the plaintiff seeking recompense from the respondent. Each case is limited to the case as stated by the individual petitioner. The processes are characterised by formalistic rules of procedure.[64] The focus is not on the wider issue of compliance, as it is in petition-information systems, but on the narrower issue of private loss: such systems are geared towards answering narrow questions of compliance on an individual level.

2 Petition-information system and fit with international environmental law

To be successful and effective, an IPS must be tailored to the specific rules that it concerns. In this regard, a petition-information rather than a petition-redress system best fits with international environmental obligations.

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60 ECOSOC Resolution 1503, above n 49, arts 1, 5.

61 See ECOSOC Resolution 1503 and ECOSOC Resolution 2000/3, above n 49, for the full procedure.

62 CEDAW Optional Protocol, above n 10, art 8(1). It should be noted that a major weakness of both the 1503 and CEDAW procedures is that the processes are not public and no public decision is rendered at the conclusion of the investigations.

63 Knox describes the NAAEC Submissions Procedure as a system of "complaint-based monitoring": Knox, above n 32, 45, 59.

64 See for example European Court of Human Rights "Rules of Court" (March 2005) <http://www.echr.coe.int/echr> (last accessed 22 September 2005) ["ECHR Rules"]; Inter-American Court of Human Rights "Rules of Procedure" (1 January 2004) <http://www.corteidh.or.cr/general_ing/rules.html> (last accessed 18 October 2005).

The aim of IEL in contrast to, for example, that of international human rights law is not to protect individuals but to protect the global environment. Environmental treaties typically impose broad obligations upon states parties, such as reducing emissions of greenhouse gases[65] or forming national policies to promote conservation of wetlands.[66] Giving redress to an individual who suffers harm as a result of state non-compliance does not aid the attainment of the stated obligations.[67] By focusing on the question of individual redress, a petition-redress system would sideline or fail to address the issue of whether the state is non-compliant on a wider level, whereas such questions would be the main focus of a petition-information system.

A redress-based system would also be incompatible with the nature of environmental harm. When states breach their obligations under IEL, the harm caused, such as pollution of the commons, generally harms all people indirectly. In any given instance of non-compliance there may be no direct harm to one identifiable individual, meaning that no petition would be filed under a redress-based system. The non-compliance would go undetected. Another problem with redress-orientated systems is that the provision of redress is often impossible in environmental law.[68] Once a state breaches its obligations the damage done to the environment may be irreversible, making compensation meaningless. It is preferable to avoid such a situation and remedy non-compliance before harm is done.

Because of the narrow focus of petition-redress systems, the relevant supranational tribunal would not be able to gather evidence or consider issues beyond the ambit of the original petition. However, flexibility and information gathering are vital in the environmental sphere where it is necessary to look at the "big picture". Further, environmental issues are of a "common concern" nature and other interested parties

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65 See Kyoto Protocol to the United Nations Framework Convention on Climate Change (10 December 1997) 37 ILM 32.

66 See Convention on Wetlands of International Importance Especially as Waterfowl Habitat (2 February 1971) 11 ILM 963 ["Ramsar Convention"].

67 Craik, writing in the context of international environmental dispute resolution, has stated that while two parties may solve the particular dispute between them, "if the resolution of the dispute does not conform to the needs of the affected community as a whole, then it will do little to address the real problem". Craik sees the settlement of international environmental law (IEL) disputes as having two functions. First, a private one, settling the dispute between the two parties. Secondly, a public one, of "equitable resource allocation and protection and preservation of the global commons": A Neil Craik "Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law" (1998) 10 Geo Int'l Envtl L Rev 551, 564–565.

68 See for example Alexandre Kiss "Present Limits to the Enforcement of State Responsibility for Environmental Damage" in Francesco Francioni and Tullio Scovazzi (eds) *International Responsibility for Environmental Harm* (Graham and Trotman, London, 1991) 3, 6.

should be allowed to submit information. Complex scientific questions raised by environmental problems will also require the submission of opinions by scientific experts. While this would not be possible in a redress-based system, it would be common practice in a petition-information system.

The central purpose of having an IPS for IEL is to improve across the board compliance rather than to provide recompense or remedy. To answer broad questions of compliance IPSs require wide investigatory powers and the ability to collect information from a variety of sources. As such, a petition-information system is the most appropriate model for IEL.

3 Melding managerialism and enforcement

Managerialists posit that the "principal source of non-compliance is not wilful disobedience but the lack of capability or clarity or priority".[69] In contrast, enforcement theorists contend that non-compliance is intentional and based on rational self-interest. Reality and experience show that both the managerialist and enforcement contentions are true.[70] Because some non-compliance is intentional and some unintentional, it is important to develop an IPS that can deal with and remedy both forms of non-compliance.[71] For instance, an IPS that penalised all instances of non-compliance would be futile in dealing with a state that did not have the capacity to comply. On the other hand, subjecting intentional and repeat offenders to light-handed tactics would also be otiose. A follow-up mechanism that has recourse to facilitative and coercive measures would be an appropriate way of dealing with both types of non-compliance.

But it is not only in the area of addressing and remedying non-compliance that managerialism and enforcement must be balanced. The practice and process of the IPS must also meld the attributes of managerialism and enforcement theory. Court-like processes favoured by enforcement theorists[72] are by their nature formalistic, legalistic and

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69 Chayes and Chayes, above n 26, 22.

70 Ronald B Mitchell "Compliance Theory: An Overview" in Cameron, Werksman and Roderick (eds), above n 5, 3, 11–13; Harold K Jacobson and Edith Brown Weiss "Compliance with International Environmental Accords" in Mats Rolén, Helen Sjöberg and Uno Svedin (eds) *International Governance on Environmental Issues* (Kluwer Academic Publishers, Dordrecht, 1997) 78, 108.

71 Victor has found, in the context of the Montreal Protocol non-compliance procedure, that an approach that blends both managerialist and enforcement techniques is most effective in dealing with non-compliance: David G Victor "The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure" in David G Victor, Kal Raustiala and Eugene B Skolnikoff (eds) *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press, Cambridge, 1998) 137, 139, 154.

72 See for example Johanna Rinceanu "Enforcement Mechanisms in International Environmental Law: Quo Vadunt?" (2000) 15 Envtl L & Litig 147, 154–155, 175–176.

judicialised. On the other hand, managerial procedures are characteristically informational,[73] informal, non-adversarial and flexible.[74] Managerial processes seek to expose non-compliance, ensure transparency and initiate dialogue while enforcement processes characteristically seek to hold offenders accountable and to punish. A petition-information system would mesh the attributes of both managerialist and enforcement processes. Such a system would be akin to an individual-triggered monitoring system.[75] Such a system would stay faithful to enforcement theory by subjecting the state's actions to scrutiny, applying legal standards to the facts of each case and having a tribunal issue a judicial-style decision on compliance. On the other hand, the process would also have managerial characteristics: in petition-information systems the tribunal considering the petition is able to call upon and receive information from a wide range of sources, is not governed by strict rules of evidence and is characterised by flexible processes.

Thus a petition-information system brings together the qualities of the managerialist and enforcement theories. States are called to account through a quasi-judicial, quasi-monitoring system, while the provision of a follow-up procedure that has recourse to facilitative and enforcement measures will help remedy both intentional and unintentional non-compliance.

B Structure and Bodies

The previous section concluded that a petition-information system would be the most appropriate form of petition system for IEL: such a model best suits the nature of environmental obligations and meshes managerialism and enforcement theory. This section explains the structure of the proposed petition system and the key treaty bodies that would be involved.

1 An overview of the general structure

The proposed model includes four full time treaty bodies and a three-stage procedure. The first stage is the admissibility stage which would be carried out by the "Commission". The second stage is the consideration stage which would be carried out by the "Tribunal" and would involve the "Scientific Committee". The third stage is the implementation stage which would be overseen by the "Implementation Committee" as part of the "follow-up mechanism". This three-stage process draws on the design of existing petition systems.

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73 See Chayes and Chayes, above n 26, ch 7.

74 See Chayes and Chayes, above n 26, 201–225 in the context of dispute settlement.

75 Knox has said that such a complaint-based monitoring system melds enforcement-style adjudication into the managerial model: Knox, above n 32, 36–45.

One of the main features of the proposed model is the allocation of separate functions to separate treaty organs. The benefit of this is specialisation and, as a result, efficiency and the development of expertise at each phase. Typically, in IPSs such as that under the Optional Protocol to the ICCPR, the admissibility and consideration functions are both performed by one body.[76] However, separating these functions out, as is proposed here, will give the Tribunal more time to consider each petition on the merits and thus prevent a backlog accumulating as has typically been the case in existing petition systems.[77] The result will be a system that operates more "smoothly" without bottlenecks.[78] Such a system is used in the European Union where the European Commission screens complaints before they reach the ECJ.[79] Even where the same body conducts both tasks, as in the ECHR system, admissibility decisions are made separately from merits decisions by a small division of the Court.[80] It is particularly important to separate the functions in a petition-information system where the task of gathering and examining all information relevant to the cases can be time consuming for the Tribunal: allowing the Tribunal more time to investigate petitions and form opinions will lead to better reasoned and more thorough decisions, which will in turn enhance the effectiveness and legitimacy of the system.[81]

Separating out these functions also means that each organ can foster expertise in its particular area of operation. Over time, the Commission will become adept at detecting baseless claims, while the Tribunal will accumulate expertise in the application of legal principles and scientific evidence. The Implementation Committee will learn with practice and experience what techniques are best at coaxing compliance in certain situations.

Another feature of the model worth highlighting is the absence of state involvement in decision-making. State representatives would have no role to play in the consideration of

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76 See United Nations Human Rights Committee "Rules of Procedure of the Human Rights Committee" (24 April 2001) CCPR/C/3/Rev.6, r 89(1) ["HRC Rules"]. A working group may also declare a communication admissible under r 87(2).

77 For example the HRC has experienced substantial backlogs: see United Nations Human Rights Committee "Report of the Human Rights Committee" (31 October 2002) A/57/40, Vol I, paras 38, 88–89 ["HRC Report 2002"].

78 See Wirth, above n 15, 785 positing that the establishment of "preliminary, streamlined screening functions" can "assure the quick dismissal of frivolous or unsubstantiated complaints".

79 Once the Commission has received a complaint it can decide whether to institute formal proceedings against the member state under art 169 of the Treaty Establishing the European Economic Community (25 March 1957) 298 UNTS 11. In this way the Commission acts as a screening body filtering out baseless claims.

80 European Convention, above n 8, art 28; see Protocol No 11, above n 8, Explanatory Report, paras 40, 75–76.

81 See Helfer and Slaughter, above n 21, 318–323.

petitions, ensuring that the process remained objective and independent. The influence of politics and state interests can lead to petition systems being viewed as illegitimate.[82] For example the UNCHR has come to be known as an "abuser's club"[83] while the dependency of the NAAEC Submissions Procedure on the Council,[84] which is a political body, has drawn scepticism from commentators.[85]

Below, the three stages of the IPS procedure and the role of the four proposed treaty organs are described.

2 *Admissibility stage: The Commission*

All IPSs have admissibility requirements that must be met before a petition can be considered on the merits.[86] Typically such requirements prescribe who can bring a petition and what criteria a petition must fulfil to be admissible.

It would be the Commission's role to make admissibility decisions. The Commission would issue a written decision outlining the reasons why the petition was admissible or inadmissible.[87] The issuance of a written decision should be mandatory for several reasons. If a petition is declared inadmissible the petitioner has a right to know the reasons why. Further, the provision of reasons can help the petitioner understand how they could amend their petition so as to fulfil the admissibility requirements. The requirement that reasons be given would also assure that the Commission did not make arbitrary or capricious decisions.[88] Adherence to notions of fairness and natural justice would serve to enhance the legitimacy and credibility of the petition system and regime. The issuance of decisions also has an important precedent value and serves to inform potential petitioners of the requirements that must be met. These decisions must as such be made public and accessible.

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82 Knox, above n 32, 90.

83 See Human Rights Watch "Libya Should Not Chair UN Commission" (9 August 2002) Press Release.

84 See NAAEC, above n 6, arts 15(2), 15(7): the Council has the final say on whether a factual record is prepared and whether it is made public.

85 Knox, above n 32, 89–91.

86 A set of admissibility requirements for the model proposed here are recommended below: Part IV C Standing.

87 The ECHR is required to issue written reasons for admissibility decisions: European Convention, above n 8, art 45(1).

88 See Helfer and Slaughter, above n 21, 320–321.

As to the composition of the Commission, I would suggest the appointment of independent legal experts. Some may argue that lay administrative staff could perform the "formalistic" task of judging admissibility. However, admissibility decisions involve the application of legal standards, the elaboration and development of legal principles and the exercise of discretion, and as such are best entrusted to lawyers.

3 *Consideration stage: The Tribunal and the Scientific Committee*

If a petition were admissible it would proceed to the Tribunal. The role of the Tribunal would be to investigate the petitioner's claim of state non-compliance and reach a decision on the merits. In light of my preference for a petition-information system, the process by which the Tribunal reaches its decision would be largely investigative and would rely heavily on information gathering and fact-finding.

In line with the practice of existing petition systems, the first step taken by the Tribunal would be to request a response from the state party concerned.[89] If the Tribunal then required further information from the petitioner or the state party, it could call for such information.[90] The Tribunal, like the Secretariat in the NAAEC Submissions Procedure, would be empowered to seek information or advice from other sources such as individual experts, non-governmental organisations (NGOs) and UN agencies.[91] In most cases it would be unlikely that a private individual would have access to the same amount and quality of information as entities such as NGOs and international bodies.

The Tribunal should be able to receive amicus briefs. Amicus briefs can provide valuable information relating to compliance and also ensure that a variety of interests are represented.[92] Of course, whether such briefs are considered or incorporated into the final decision would be within the Tribunal's discretion, as is the procedure in the World Trade Organization (WTO) Dispute Resolution system.[93]

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89 See ICCPR Optional Protocol, above n 10, art 4; NAAEC, above n 6, art 14(2).

90 See HRC Rules, above n 76, rr 80, 91(4), (6), 93; ECHR Rules, above n 64, r 54(2).

91 NAAEC, above n 6, art 15(4). See also the investigative powers of the WBIP: WBIP Operating Procedures, above n 57, Part VII.

92 It is important that the Tribunal considers a wide range of interests because the petitioner may not be acting in the interest of society as a whole. See Trachtman and Moremen, above n 19, 233–234; Wirth, above n 15, 786–791.

93 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, paras 108–110 (Appellate Body); World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) 33 ILM 1226, art 13 ["WTO DSU"].

Another important feature of the Tribunal would be the power to order interim measures. Given that environmental harm, once caused, may be irreversible, it will be necessary for the Tribunal to have the power to order the cessation of potentially harmful activities while the petition is investigated. A number of existing IPSs possess such a power.[94] Byrnes has observed that interim measures issued by the HRC have generally been complied with by states.[95]

The Tribunal would be composed of independent legal experts with expertise in the area of IEL and in the subject matter of the parent treaty. This is a common requirement among petition systems[96] and has led to a high standard of judgments and legal reasoning in systems such as the ECHR.[97] A high standard of legal reasoning is a key element in securing the legitimacy and effectiveness of an IPS.[98] The legal experts must be qualified lawyers, given that the function of the Tribunal is inherently a legal one: interpreting the law, developing legal principles and applying the relevant law to the facts. Further, the Tribunal must be independent, meaning that experts must act in their individual capacity and not be representative of any state.[99]

By its nature, IEL typically involves complex scientific issues. Because the Tribunal members will be legal experts but not necessarily scientific experts a Scientific Committee could be established to complement the Tribunal. This Committee would be composed of independent scientific experts.[100] Many existing environmental regimes have standing scientific committees to provide advice and resolve complex scientific questions.[101] The

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94 See HRC Rules, above n 76, r 86; ECHR Rules, above n 64, r 39.

95 See Andrew Byrnes "An Effective Complaints Procedure in the Context of International Human Rights Law" in Anne F Bayefsky (ed) *The UN Human Rights System in the 21st Century* (Kluwer Law International, The Hague, 2000) 139, 147.

96 See for example the ECHR criteria for office: European Convention, above n 8, art 21.

97 Helfer and Slaughter, above n 21, 300–301, 318–323.

98 Helfer and Slaughter, above n 21, 318–323.

99 See Part IV B 5 Composition of the treaty bodies.

100 Craik, above n 67, 572 states that independence is important so as to "ensure that conclusions represent an accurate reflection of current scientific opinion".

101 See for example Convention on the Conservation of Antarctic Marine Living Resources (20 May 1980) 1329 UNTS 47, arts XIV–XVI ["CCAMLR"]; United Nations Framework Convention on Climate Change (9 May 1992) 31 ILM 849, art 9 ["UNFCCC"].

Tribunal could refer questions to and seek advice from the Scientific Committee.[102] In reality the Scientific Committee would provide information just as any other source would, but would have the benefit of being independent and impartial, making it a trusted source of information. Further, the Scientific Committee would have a high level of expertise in the treaty subject matter.

The Tribunal would generally make its decisions on the papers but would have the ability to question any relevant party in person. Most IPSs, and particularly global rather than regional systems, consider petitions on the papers.[103] While oral hearings would be preferable, decisions made on the papers take far less time and are more practically feasible in the international context.[104] The decision would state all of the relevant facts uncovered in the investigative process and contain a definitive statement of whether the state was compliant or non-compliant. The Tribunal's decision would be a legally binding statement as to compliance.[105]

4 Implementation stage: The Implementation Committee and the follow-up mechanism

If the Tribunal found that the state was non-compliant the case would be passed on to the Implementation Committee. The role of the Implementation Committee would be to ensure that the state came into compliance with its obligations.[106] Without a follow-up mechanism it would be all too easy for a state to simply ignore a finding of non-

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102 Similarly, the Montreal Protocol provides that panels of experts may be convened to prepare reports for major reviews of control measures by the Meeting of the Parties. Panels include the Panel for Scientific Assessment and the Panel for Environmental Assessment: see Montreal Protocol on Substances that Deplete the Ozone Layer (16 September 1987) 1522 UNTS 3 (as amended and adjusted by the Meetings of the Parties), art 6 ["Montreal Protocol"].

103 See for example ICCPR Optional Protocol, above n 10, arts 5(1), 5(3); compare ECHR Rules, above n 64, rr 35, 36, 59; Title II, ch VI.

104 See Anne F Bayefsky "Discussion" in Bayefsky (ed), above n 95, 315, 328 ["Discussion"]. On this issue generally see Byrnes, above n 95, 148–149.

105 See Helfer and Slaughter, above n 21, 307: "On balance, we conclude that the effectiveness of a supranational tribunal is enhanced where states make its decisions legally binding". The HRC has expressed dissatisfaction that its "views" are not binding. It considers this lack of bindingness to be "a major shortcoming in the implementation machinery established by the Covenant" and has suggested that the Optional Protocol be amended to make its decisions binding: United Nations Human Rights Committee "Report of the Human Rights Committee" (7 October 1993) A/48/40, Part I, Annex X(B), 222, 225.

106 The importance of monitoring implementation is generally demonstrated by the fact that many environmental treaties incorporate systems for implementation review, see Victor, Raustiala and Skolnikoff (eds), above n 71, 47–303, where various authors discuss a wide range of systems for implementation review in IEL.

compliance.[107] For example, the "views" of the HRC have generally been poorly complied with and in response the HRC has instituted a follow-up procedure.[108]

As discussed above, non-compliance can be either intentional or unintentional. The Kyoto Protocol compliance mechanism has recognised these different forms of non-compliance by dividing the Compliance Committee into two branches: a facilitative branch and an enforcement branch.[109] In a similar vein the proposed follow-up system will entail, in the first instance, the initiation of dialogue with non-compliant states and the facilitation of compliance. If this does not prove successful, recourse to stronger enforcement measures will be required.

(a) Facilitative techniques

One reason for non-compliance is ambiguity of treaty obligations. States may not realise what is required of them. As such, a definitive interpretation of the relevant treaty provisions by the Tribunal may be all that is required. The Implementation Committee can help the state understand where it has gone wrong and what is required for compliance.[110]

Another possible reason for non-compliance is lack of capacity. A state may not have the financial, technological or human resources to comply with the treaty obligations. In such a situation the role of the Implementation Committee will be to facilitate compliance

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107 See for example the poor response of states to follow-up enquiries by the Special Rapporteur for Follow-Up of HRC views: see "HRC Report 2001", above n 17, Vol I, ch VI.

108 See United Nations Human Rights Committee "Report of the Human Rights Committee" (4 October 1990) A/45/40, Vol I 144–145, Vol II Appendix XI; HRC Rules, above n 76, r 95; Alfred M De Zayas "The Follow-Up Procedure of the UN Human Rights Committee" (1991) 47 Int'l Com Jur Rev 28.

109 See Conference of the Parties "Report of the Conference of the Parties on its Seventh Session, held at Marrakesh from 29 October to 10 November 2001" (21 January 2002) FCCC/CP/2001/13/Add.3, Addendum, Part 2, Vol III, Decision 24/CP.7, Annex, arts II(2), IV, V ["COP Decision 24/CP.7"]. See also Jutta Brunnée "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol" (2000) 13(2) Tul Envtl LJ 223. The compliance mechanism has been agreed upon by the Conference of the Parties; however, it is dependent upon approval by the first Meeting of the Parties to the Kyoto Protocol, which will take place in late 2005.

110 See for example the actions open to the Facilitative Branch of the proposed Kyoto Protocol Compliance Committee: "COP Decision 24/CP.7", above n 109, Annex, art XIV(a): "The facilitative branch … shall decide on the application of one or more of the following consequences: (a) Provision of advice and facilitation to individual Parties regarding the implementation of the Protocol".

in the manner of both the Montreal Protocol non-compliance procedure[111] and the Kyoto Protocol Compliance Committee facilitative branch.[112] The Implementation Committee should have at its disposal a "multilateral fund" funded by the states parties.[113] This fund could be used to provide capacity to states that lack the capability to comply.[114] The Implementation Committee would oversee the use of the funds and ensure the monies provided are spent on compliance related activities.

While financial capacity issues are common, problems can sometimes be of a non-economic nature. For example, the Implementation Committee could help a state by assisting in drafting legislation or advising on domestic policy options for implementing treaty obligations. Such simple facilitative techniques are often all that is needed to bring about compliance: much of the success of the Ozone Regime has been accredited to the facilitative approach adopted by the non-compliance procedure.[115]

(b) Enforcement measures

Often, facilitative techniques will prove effective in securing compliance. However, where states intentionally choose not to comply, facilitative techniques will be ineffective. Also, states that initially faced problems of clarity and capacity may continue to violate treaty rules even after such problems have been remedied. In such cases further steps will need to be taken to secure compliance.

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111 The non-compliance procedure was created pursuant to art 8 of the Montreal Protocol: Meeting of the Parties "Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer" (25 November 1992) UNEP/OzL.Pro.4/15, Decision IV/5 ["Report of the Fourth MOP to the Montreal Protocol"]. In the same report, see Annexes IV and V for the procedure under the non-compliance procedure and the measures that can be taken in response to non-compliance. On the facilitative approach adopted by the non-compliance procedure, see O Yoshida "Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions" (1999) 10 Colo J Int'l Envtl L & Pol'y 95.

112 See "COP Decision 24/CP.7", above n 109, Annex, arts II(2), IV, XIV.

113 Such a fund has been created in the Ozone Regime: Montreal Protocol, above n 102, art 10. See Meeting of the Parties "Report of the Second Meeting of the Parties to the Montreal Protocol" (29 June 1990) UNEP/OzL.Pro.2/3, Decision II/8, Annexes II(T), IV ["Decision II/8"]; "Report of the Fourth MOP to the Montreal Protocol", above n 111, Decision IV/18, Annex IX. See also Owen Greene "The System for Implementation Review in the Ozone Regime" in Victor, Raustiala and Skolnikoff (eds), above n 71, 89, 101–105.

114 See for example the actions open to the Facilitative Branch of the proposed Kyoto Protocol Compliance Committee: "COP Decision 24/CP.7", above n 109, Annex, art XIV(b), (c).

115 "Compliance and Effectiveness", above n 22, 417–420.

Where non-compliance is intentional, making public the Tribunal's findings may be enough to cause the state to comply.[116] The "sunshine" effects of the petition system, coupled with pressure from state and non-state actors and the embarrassment of being exposed, may cause compliance.[117] For this reason, it is important that Tribunal decisions are made public and accessible.

If the exposure of non-compliance and facilitative techniques are not enough to bring about compliance, shame tactics or diplomatic measures may be appropriate. For example, the "black listing" of non-compliant states can be effective if states value their standing in the international community.[118] Another effective tactic could involve the Implementation Committee having the power to refer cases to the Meeting of the Parties of the relevant regime for consideration and debate.[119] Discourse regarding non-compliance in the central forum of the regime could prove very effective in causing compliance.[120] Further, such discourse causes greater awareness of non-compliance making the state accountable to a wider group of stakeholders.

Under the managerialist rationale, the above procedures would be enough to cause compliance. However, reality has shown that some obstinate states do not respond to such strategies and enforcement-style procedures must be initiated to bring about compliance. Sanctions could be imposed, such as suspension of membership or the benefits of membership and diplomatic or economic sanctions.[121] It may be necessary that the

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116 For example the Enforcement Branch of the proposed Kyoto Protocol Compliance Committee has the power to make a public declaration of non-compliance: "COP Decision 24/CP.7", above n 109, Annex, art XV(1)(a).

117 Victor has found, in relation to the Montreal Protocol, that transparency can have some effect on state behaviour although transparency alone has not caused significant changes: Victor, above n 71, 151–152, 154.

118 For example the annual reports of the HRC list those states that have not complied with reporting requirements and the follow-up procedure: see for example "HRC Report 2001", above n 17, Vol I, 29–30, 132–141; the CCAMLR Commission maintains an "IUU Vessel List" of vessels that have engaged in activities in the Convention area that have diminished the effectiveness of CCAMLR conservation measures. Contracting Parties whose vessels appear on the List must take necessary measures to address the offending fishing activities of their vessels: see CCAMLR Conservation Measure 10-06 (2002).

119 In the Ozone Regime the Montreal Protocol Implementation Committee has interacted with the Meeting of the Parties regarding compliance issues: see Yoshida, above n 111, 117–118; "Report of the Fourth MOP to the Montreal Protocol", above n 111, Annexes IV(9), (14), V.

120 Managerialists believe that such a discursive process will lead to compliance improvements: see Part III B 2 Managerialism.

121 On the use of trade sanctions in IEL see Leesteffy Jenkins "Trade Sanctions: Effective Enforcement Tools" in Cameron, Werksman and Roderick (eds), above n 5, 221.

Implementation Committee refer such issues, especially economic sanctions, to the states parties themselves given the political sensitivity and severity of such sanctions. In terms of precedent, some existing environmental regimes have given compliance institutions the ability to impose powerful sanctions. Under the Montreal Protocol, the Implementation Committee may recommend suspending the party's access to positive measures such as financial support.[122] Under the Kyoto Protocol, the Compliance Committee can impose emissions target penalties as well as barring a state from trading emissions.[123] And under recent conservation measures made under the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), provision is made for the imposition of trade sanctions.[124] Analogous measures could be imposed by the Implementation Committee.

5 Composition of the treaty bodies

The treaty bodies outlined above are to be staffed by independent experts. However, in practice, independence among treaty body members is hard to secure. Existing petition systems have struggled to find a watertight method of appointment that removes political considerations. Ultimately the states parties to the treaty must have some role in the appointment of treaty body members.

The prevalent method of appointment is by a vote conducted by the central representative organ of the regime, typically the Meeting of the Parties,[125] with candidates being nominated by their state of nationality.[126] It would be hard to escape such a model given that states will want to retain control over the process; however, a framework can be created by which the risk of politicisation of treaty body members is minimised.[127]

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122 See "Report of the Fourth MOP to the Montreal Protocol", above n 111, Annexes IV(9), (14), V(c). In 1994, the decision to terminate access to the multilateral fund for some countries had the direct effect of improving compliance: Victor, above n 71, 152.

123 "COP Decision 24/CP.7", above n 109, Annex, art XV(5).

124 CCAMLR Conservation Measure 10-06 (2002), para 19; CCAMLR Conservation Measure 10-07 (2003), para 16.

125 ICCPR, above n 9, arts 28(3), 29, 30; European Convention, above n 8, art 22; ACHR, above n 10, art 53(1); Protocol of the Court of Justice of the African Union (11 July 2003) <http://www.africa-union.org> (last accessed 26 September 2004) (not yet in force), art 7 ["African Protocol"].

126 ICCPR, above n 9, arts 29(2), 30(3); European Convention, above n 8, arts 20, 22; ACHR, above n 10, art 53(2).

127 See Helfer and Slaughter, above n 21, 313: "The challenge for a court seeking to present itself as judicial rather than a political body is thus to demonstrate its independence from both political authorities and political modes of dispute resolution. *The judicial selection and tenure process … are obviously key factors here*" (emphasis added).

Drawing on current systems, the following recommendations would serve to promote independence. No more than one member from each state should be allowed to serve on any treaty body at any one time.[128] A member should not be allowed to sit on a case to which their country of nationality is a party.[129] The membership of the bodies should be geographically representative.[130] Each member should have a limited tenure and only be able to stand for re-election a prescribed number of times.[131] Members should hold no other post that could cause a conflict of interest,[132] such as foreign diplomat or state representative, and should serve in their individual capacity.[133] A code of conduct should be developed to guide members' conduct.[134] Members should be of a high moral character and be sufficiently experienced and qualified in their field of expertise.[135] Before nominating candidates, states should consult domestic legal institutions and referees. NGOs and private parties should also be afforded the right to comment on candidates.[136]

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128 ICCPR, above n 9, art 31(1); European Convention, above n 8, art 20; African Protocol, above n 125, art 3(4).

129 WTO DSU, above n 93, arts 8(3), 17(3); HRC Rules, above n 76, r 84(1)(a); compare ACHR, above n 10, art 55 where a judge that is a national of any of the states party to a case submitted to the Inter-American Court of Human Rights retains the right to hear that case.

130 ICCPR, above n 9, art 31(2); African Protocol, above n 125, art 3(6).

131 ICCPR, above n 9, art 32(1); European Convention, above n 8, art 23; ACHR, above n 10, art 54(1). It has been suggested that members of the UN human rights treaty bodies be appointed for non-renewable terms: Andrew Clapham "Defining the Role of Non-Governmental Organizations with Regard to the UN Human Rights Treaty Bodies" in Bayefsky (ed), above n 95, 183, 194.

132 European Convention, above n 8, art 21(3). See also Statute of the Inter-American Court of Human Rights (October 1979) OAS Res 448 (IX-0/79), art 18(1)(a)–(c) and compare the situation in the UN human rights system where some treaty body members have full-time jobs as government officials "producing a glaring conflict of interest": Clapham, above n 131, 193–194.

133 ICCPR, above n 9, art 28(3); European Convention, above n 8, art 21(2).

134 Some have recommended the adoption of such a code for the UN human rights treaty body members: Anne F Bayefsky "Conclusions and Recommendations" in Bayefsky (ed), above n 95, 331, 340 ["Conclusions and Recommendations"]. See also the Statute of the Inter-American Court of Human Rights, above n 132, ch IV which lays out the "rights, duties and responsibilities" of the judges of the Inter-American Court of Human Rights.

135 ICCPR, above n 9, arts 28(2), 38; European Convention, above n 8, art 21(1); ACHR, above n 10, art 52.

136 Commentators have suggested a role for non-governmental organisations (NGOs) in scrutinising candidates: Mark Thomson "Defining the Role of Non-Governmental Organizations: Splendid Isolation or Better Use of NGO Expertise?" in Bayefsky (ed), above n 95, 219, 224–225; "Conclusions and Recommendations", above n 134, 340.

While states are inevitably involved in the appointment of treaty body members, regimes such as the ECHR have shown that this need not be a bar to independent and impartial decision-making.

6 The importance of an integrated approach

An IPS can improve compliance with international environmental obligations; however, it does not present a complete answer to the issue of non-compliance. While procedures such as self-reporting have their limitations, so too do IPSs. For example, IPSs deal with non-compliance on a case-by-case basis. Such ad hoc detection of non-compliance does not provide the same overall picture of compliance that full and accurate state reports can. Because no one compliance control mechanism can solve all compliance problems, an integrated approach is required.[137] By combating non-compliance on a number of levels and in a number of ways, gaps can be closed and loopholes tightened.[138]

It is further important that different compliance mechanisms coordinate and "cross-fertilise".[139] For example, information from a state report may be relevant to the determination of a petition while information uncovered through the petition system may expose falsities in state reports. A coordinated and integrated compliance strategy increases the likelihood of detecting non-compliance.

C Standing

The question of standing is a pivotal issue in the establishment of an IPS for IEL. Standing requirements can affect the number of complaints filed, the meritoriousness of complaints, the workload of the supranational tribunal and ultimately the efficacy of the IPS in securing greater state compliance. There are two key elements to the issue of standing which will be discussed here: who can bring a case and the criteria that must be fulfilled for a petition to be admissible.

1 Who can bring a complaint?

This article has so far only contemplated a private individual petitioning their state of nationality. This section contends that the right of petition should be extended to include

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137 Kamen Sachariew "Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms" (1991) 2 YB Int'l Envtl L 31, 50–51; Knox, above n 32, 42, 110–118.

138 See for example the success of an integrated approach under the Ozone Regime: Greene, above n 113, 118–124.

139 See Alfred De Zayas "Petitioning the United Nations" (2001) 95 ASIL Proc 82, 83; Knox, above n 32, 110.

NGOs.[140] Existing petition systems such as the 1503 Procedure,[141] the CEDAW petition system,[142] the WBIP[143] and the NAAEC Submissions Procedure[144] afford NGOs the right of petition. The extension of standing to legal personalities such as companies is also advocated.[145]

Many benefits can accrue from granting NGOs the right of petition.[146] Environmental NGOs would bring great knowledge and experience in the area under dispute.[147] NGOs invest heavily in monitoring and have well-established systems in place meaning they are more likely to attain more credible, detailed and compelling evidence of state non-compliance than are private individuals.[148] Further, NGOs keep constant tabs on state compliance and will more quickly identify violations. NGOs are also more likely to be aware of the legal principles and rules at issue and will thus know what to look for when investigating non-compliance. In terms of litigation experience, NGOs are experienced at

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140 Agenda 21 specifically calls for greater NGO participation in the pursuit of sustainable development: United Nations Conference on Environment and Development "Agenda 21" (13 June 1992) A.CONF.151/4, ch 27 ["Agenda 21"]. For an account of the increased involvement of NGOs in the area of compliance control, see specifically James Cameron and Ruth MacKenzie "Access to Environmental Justice and Procedural Rights in International Institutions" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 129, 146–149.

141 Under the 1503 Procedure, any individual or group can file a communication as long as the communication fulfils admissibility criteria: see Office of the High Commissioner of Human Rights "Complaint Procedures" Fact Sheet No.7/Rev.1, Part 2 available at <http://www.ohchr.org/english/about/publications/docs/fs7.htm> (last accessed 24 September 2004).

142 Under the CEDAW Optional Protocol, above n 10, NGOs can file petitions on behalf of individuals or groups (art 2) and initiate the investigative mechanism (art 8(1)).

143 WBIP Operating Procedures, above n 57, para 4(a).

144 NAAEC, above n 6, art 14(1).

145 Agenda 21, above n 140, ch 30 contemplates a role for business and industry in the pursuit of sustainable development.

146 On the benefits of including NGOs in international regimes generally see "The 'Participatory Revolution'", above n 16, 557–565.

147 Raustiala comments that "large, expertly staffed, and often well-funded NGOs exist that devote considerable effort and resources to policy research and development and often possess substantial international expertise on environmental policy": "The 'Participatory Revolution'", above n 16, 559; see also Jonas Ebbesson "The Notion of Public Participation in International Environmental Law" (1997) 8 YB Int'l Envtl L 51, 68.

148 See "The 'Participatory Revolution'", above n 16, 560–561; Ebbesson, above n 147, 69.

calling states to account in the courtroom and will be well versed in what is required to bring a winning case.

For petition systems to work they must receive a critical mass of claims.[149] If few petitions are filed then the usefulness of the IPS in detecting violations will be limited. In this sense it is potential petitioners who have a large say in how successful a petition system will be. While individuals who are harmed as a result of state non-compliance will have an incentive to file a petition, individuals who have suffered no harm may be indifferent towards state compliance.[150] Filing a claim may be even less appealing if legal costs are involved.[151] On the other hand, because NGOs are specifically constituted to pursue compliance issues they will have strong incentives to file petitions.[152] For example in the NAAEC Submissions Procedure the vast majority of submissions have been submitted by NGOs,[153] while the same holds true for citizen suits in the United States.[154] A system that extends standing to NGOs will expose a greater number of violations than a system that only affords standing to individuals.

Critics of NGO involvement may contend that NGOs will bring spurious claims in order to pursue their own agendas and to harass states and industry. However, such a contention is unfounded. The practice in the NAAEC Submissions Procedure has shown that cases brought by NGOs are generally legitimate and bona fide.[155] NGOs would not seek to abuse the IPS because it is in their interests to see it preserved as a legitimate mechanism by which states can be called to account. NGOs would also not wish to damage their own credibility given they may risk their continued involvement in international

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149 Helfer and Slaughter, above n 21, 301–303.

150 See Trachtman and Moremen, above n 19, 246.

151 In regard to the cost of proceedings the ECHR provides a system of legal aid (see ECHR Rules, above n 64, Title II, ch X); however, most IPSs do not and states are typically unwilling to grant legal aid for claims to be brought against them. See for example *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA) and *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC), where both the New Zealand Court of Appeal and Privy Council held that under New Zealand domestic legislation, legal aid could not be acquired to fund a communication to the HRC.

152 See "The 'Participatory Revolution'", above n 16, 567.

153 Seventy-three per cent of submissions filed under the NAAEC Submissions Procedure have been filed by NGOs (55 per cent) or NGOs and private individuals jointly (18 per cent) as at 2 October 2004.

154 See Michael S Greve "The Private Enforcement of Environmental Law" (1990) 65 Tul L Rev 339, 351.

155 For example 49 per cent of submissions filed by NGOs solely have led to factual records being produced (as at 2 October 2004).

fora.[156] Even if baseless claims were lodged, it is the role of the Commission to dismiss such claims and as admissibility precedents are set baseless claims will be deterred.

Some may contend that NGOs could skew the Tribunal's analysis because of their fundamentalist views;[157] however, this seems unlikely. First, such an allegation makes the spurious assumption that all NGOs have such views. Secondly, the Tribunal's legal experts are charged to review cases objectively based on the law and facts before them and are unlikely to be swayed by extremist agendas.[158] Thirdly, the Tribunal in the proposed model would be able to seek information from a range of sources and receive amicus briefs which represent a variety of views.

For the reasons discussed, the involvement of NGOs is integral to the success of an IPS in environmental law.

Legal personalities such as companies should also be extended the right of petition. Typically, companies have an interest in environmental issues, often being involved with or affected by IEL.[159] The extension of standing to companies provides many of the same benefits as including NGOs. For example, companies may have access to compliance information that no private individual could gain access to. Companies may also have stronger incentives to file petitions than private individuals, especially if profits are threatened by state non-compliance.

2 What criteria need to be fulfilled to gain standing?

Generally there exist several "admissibility" criteria that a petition must fulfil before it can be considered on the merits. Such criteria can help to ensure that only legitimate and meritorious claims are brought. Importantly, admissibility criteria can be set so as to strike a balance between having too few and too many claims. An IPS requires enough claims to

156 See for example Dan A Tarlock "The Role of Non-Governmental Organizations in the Development of International Environmental Law" (1992) 68 Chi-Kent L Rev 61, 75–76.

157 See for example Trachtman and Moremen, above n 19, 228; "The 'Participatory Revolution'", above n 16, 567.

158 See Peter L Lallas "The Role of Process and Participation in the Development of Effective International Environmental Agreements: A Study of the Global Treaty on Persistent Organic Pollutants (POPS)" (2000–2001) 19 UCLA J Envtl L & Pol'y 83, 137, commenting on NGO participation in the International Negotiating Committee which was established to negotiate a persistent organic pollutants regime: "[W]hile NGO participation might, in some cases, increase the tone and pitch of dialogue during INC sessions, and present different forms of information, participants in the process should be and are capable of judging views and information presented".

159 Raustiala says businesses are stakeholders in IEL: "The 'Participatory Revolution'", above n 16, 557–558.

make it effective, but on the other hand will face bottlenecks and delays if it is overloaded with petitions. The expeditious consideration of petitions is particularly important in IEL given environmental damage once done can be impossible to reverse. To be balanced against such practical considerations is the fact that it would be undesirable to turn away legitimate and worthwhile petitions because of overly formal admissibility requirements.[160] With these considerations in mind, a number of admissibility criteria for the proposed model are recommended here.

(a) Formal admissibility requirements

All IPSs in international law have a number of formal requirements that must be met for a petition to be admissible. These criteria are "formal" in the sense that if any of them are not fulfilled the petition will be inadmissible *ipso facto*. The criteria suggested here are drawn from the NAAEC Submissions Procedure, the UN human rights petition systems, and the ECHR, and are typical of most IPSs. The criteria are:

1. Relation to treaty: the petition must allege state non-compliance with the provisions of the treaty to which the IPS relates.[161]
2. Sufficiency of information: submissions must provide sufficient information upon which a case can proceed.[162]
3. Abuse of process: the petition must not represent an abuse of the IPS.[163] The petition must not be filed with an ulterior motive such as harassing industry, advancing a political agenda or trying to gain personal media attention.[164]
4. Miscellaneous: other typical requirements include that the petition must be in writing[165] and that the petition not be anonymous.[166]

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160 See Bickel, above n 55, 837: "The dismissal of claims for procedural deficiencies rather than on the merits … provokes uneasiness in the lawyer and the layman alike – especially because there may be an environmental harm at issue".

161 ICCPR Optional Protocol, above n 10, arts 1, 3; European Convention, above n 8, art 35(3).

162 NAAEC, above n 6, art 14(1)(c); HRC Rules, above n 76, r 90(b).

163 ICCPR Optional Protocol, above n 10, art 3; European Convention, above n 8, art 35(3).

164 NAAEC, above n 6, art 14(1)(d); NAAEC Guidelines on Submissions (28 June 1999) Council Resolution 99-06, para 5.4 ["NAAEC Guidelines"].

165 NAAEC, above n 6, art 14(1)(a); ICCPR Optional Protocol, above n 10, art 2.

166 ICCPR Optional Protocol, above n 10, art 3; European Convention, above n 8, art 35(2)(a).

(b) Does the petition warrant substantive consideration?

While the above criteria are of an administrative nature, the criteria considered below are of a more substantive nature. A decision as to whether the following criteria are fulfilled would require a greater exercise of discretion and judgment by the Commission.

(i) Exhaustion of domestic remedies

Typically a petitioner must exhaust domestic remedies before they can file a petition.[167] This generally requires a petitioner to pursue all judicial and administrative avenues that offer him or her a reasonable prospect of success.[168] Such a condition gives states the chance to remedy non-compliance domestically before any international action need be taken.

Such a general rule is sensible but must not be enforced without exception. The HRC has ruled that in two instances the rule should be waived.[169] First, local remedies may be unavailable because no legal process exists under which compliance can be scrutinised or because access to the courts has been denied. Secondly, local remedies may be ineffective because available procedures may not provide adequate remedies, domestic processes may involve unreasonable delay or a consistent pattern of violation renders legal proceedings meaningless.

It is important here to explain what is meant by "remedy" and to explain what "wrong" is being "remedied". The remedy sought in a domestic claim is potentially twofold: a remedy which causes the state to comply with the international obligations at issue and a remedy for direct harm to the individual caused by the non-compliance. In my view, the relevant remedy that must be exhausted domestically is the one relating to compliance. The main purpose of the IPS is to improve compliance with international environmental obligations and if this can be done sufficiently through domestic channels then there is no need for the dispute to be raised to the international level.

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167 ICCPR Optional Protocol, above n 10, arts 2, 5(2)(b); European Convention, above n 8, art 35(1).

168 See *Patiño v Panama (Communication No. 437/1990)* (21 October 1994) CCPR/C/52/D/437/1990, para 5.2 (HRC); *Thompson v Panama (Communication No 438/1990)* (21 October 1994) CCPR/C/52/D/438/1990, para 5.2 (HRC).

169 See for example *Torres Ramirez v Uruguay (Communication No 4/1977)* (8 April 1980) CCPR/C/10/D/4/1977, para 9 (HRC). For a thorough analysis of HRC decisions regarding exhaustion of domestic remedies see P R Ghandhi *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Ashgate, Aldershot, 1998) ch 11.

(ii) Harm

This section considers whether a potential petitioner is required to demonstrate harm to their legitimate interests as a result of non-compliance before they can file a petition. Three different and competing models of standing are analysed here: the *actio popularis* model, the legitimate interest model and a model based on the NAAEC Submissions Procedure.

The *actio popularis* model would not require proof of direct harm.[170] In this model, private individuals act as private attorneys-general calling states to account for non-compliance. The 1503 Procedure and the CEDAW investigative procedure are such models.

One could argue for the *actio popularis* model on the basis that because every person is ultimately affected by environmental degradation, each of us has an interest in preserving the environment. Such an argument is consistent with the common concern of humankind contemplation of the global environment.[171] Also, it will typically be difficult to demonstrate that anyone is directly harmed when non-compliance occurs in the global commons.[172] Further, in principle, it would be undesirable to reject petitions that demonstrate a clear instance of non-compliance on the basis that no identifiable individual can prove harm.[173]

Despite these benefits, having no harm requirement would lead to a flood of claims and invite baseless claims threatening the expeditiousness of the process. Also, if harm were a requirement at least there would be certainty that a harmful activity existed: with the *actio popularis* model, there is no such guarantee.

An alternative to the *actio popularis* model is to require that the petitioner have a "legitimate interest" in what is being adversely affected. Only individuals who can demonstrate actual or potential harm will have standing to bring a petition.[174]

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170 Interestingly, under the Montreal Protocol non-compliance procedure the non-compliance mechanism can be initiated by any party who has "reservations regarding another party's implementation of its obligations under the Protocol" which is essentially an *actio popularis* in that no harm need be proved. See "Report of the Fourth MOP to the Montreal Protocol", above n 111, Annex IV(1).

171 Craik, above n 67, 554–556.

172 Craik, above n 67, 565.

173 Laboni Amena Hoq "The Women's Convention and its Optional Protocol: Empowering Women to Claim their Internationally Protected Rights" (2001) 32 Col HRL Rev 677, 709–713.

174 In the human rights systems the harm requirement is manifested as a "victim" requirement: ICCPR Optional Protocol, above n 10, arts 1, 2; European Convention, above n 8, art 25(1).

While a harm criterion can help to address the limitations of the *actio popularis* model, several problems exist with requiring a legitimate interest. It may be hard to determine what constitutes "injury" or "harm": as stated above, the common concern of humankind contemplation of the global environment would suggest that every instance of non-compliance by states causes some harm. It is often hard to characterise environmental degradation as harming only one or several identifiable individuals especially if the harm occurs in the commons.

Another difficulty arises in relation to causation. Typically, harm criteria require that the injury be traceable to the challenged activity.[175] In relation to environmental problems a petitioner trying to prove causation would encounter severe evidential difficulties.[176] For example, it may be near impossible to prove that the damage to a petitioner's recreational interest in a wetland was traceable to the state's failure to meet the requirements of the Ramsar Convention.[177] Further, the state's role in causing the harm may be only one of several contributing factors, while the fact that environmental issues are scientifically complex also clouds the causation analysis.[178]

This model may also unduly restrict legitimate claims being brought. Differentiating between two equally meritorious petitions on the basis that one petitioner can demonstrate direct harm and the other cannot seems arbitrary, and would frustrate the purpose of the IPS.

In my view, the appropriate model lies somewhere in between the *actio popularis* and legitimate interest models. The NAAEC Submissions Procedure is such a system and provides an optimal model for the proposed IPS.

In the NAAEC system, harm is not a prerequisite for lodging a complaint, but one of a number of factors to be balanced in deciding whether a response should be sought from

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175 See for example the legitimate interest test developed in United States municipal law in regard to environmental citizen suits: Robert V Percival, Alan S Miller, Christopher H Schroeder and James P Leape *Environmental Regulation: Law, Science and Policy* (3 ed, Aspen Law & Business, New York, 2000) 1039–1040.

176 See Kiss, above n 68, 5: "evidence for the existence of a causal link between a given activity and its supposed effects may be difficult or even practically impossible to bring in a court or even in negotiation tending to compensation for damage"; Sachariew, above n 137, 32; Brennan Van Dyke "A Proposal to Introduce the Right to a Healthy Environment into the European Convention Regime" (1994) 13 Virg Envtl LJ 323, 344–345.

177 Ramsar Convention, above n 66.

178 Kiss, above n 68, 5–6.

the state concerned. The NAAEC system, while having suffered an initial backlog,[179] has generally performed well in striking a balance between having too many and too few cases. The Secretariat has received 51 petitions in 10 years having released 10 factual records, closed 30 other files and currently having 11 active files.[180] The flow of cases has been steady and the workload manageable. Also, the ratio of petitions that have not led to a factual record to the number that have is low,[181] meaning the system has not attracted a flood of baseless claims.

The standing criteria of the NAAEC model thus warrant further consideration. The NAAEC Secretariat in considering whether to request a state response is to be guided by whether:[182]

> (a) the submission alleges harm to the person or organization making the submission;
>
> (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement;
>
> (c) private remedies available under the Party's law have been pursued; and
>
> (d) the submission is drawn exclusively from mass media reports.

By making harm only one of a number of factors to be taken into account, the NAAEC criteria strike an appropriate balance between the need to expose state non-compliance and the need for administrative expeditiousness. In particular, criteria 1 and 2 seem to facilitate such a balance. For example, a claim that does not allege direct harm but does however demonstrate serious and systematic violations by a state party would likely be admissible because under 2 it would advance the goals of the relevant agreement for the claim to be considered. On the other hand, a petition that alleges some modest harm but does not promote state compliance would likely be inadmissible. By making the criteria flexible, a filtering body (such as the Commission in the proposed model) is able to make jurisdictional decisions based on the merits of the petition rather than by reference to formalistic and potentially arbitrary criteria. While being more flexible, the NAAEC criteria also provide a threshold by which to dismiss baseless claims. Further, because the

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179 This backlog was caused more by a lack of resources than by the standing criteria. See Knox, above n 32, 78–79 for a discussion of the resources problem.

180 Current to 27 May 2005; See Current Status of Filed Submissions <http://www.cec.org/citizen/status/index.cfm?varlan=english> (last accessed 27 May 2005) for updates.

181 The ratio is 30:10 meaning that 25 per cent of petitions have led to the production and publication of a factual record (as at 27 May 2005).

182 NAAEC, above n 6, art 14(2)(a)–(d). See further NAAEC Guidelines, above n 164, paras 7.3–7.6.

criteria are only guidelines and not exhaustive, other relevant factors could also be taken into account.

The NAAEC Procedure includes the "domestic remedies" element proposed above, but distinctively requires domestic remedies be "pursued" rather than "exhausted". While "pursued" appears to be a lesser threshold, it is generally equivalent to the "exhaustion" criterion when coupled with the two exceptions outlined above.[183] The Submissions Procedure Guidelines suggest such a similarity.[184] Including the domestic remedies element as a factor to be balanced, rather than as a formal requirement, has the benefit of flexibility, so that a very serious allegation of non-compliance, while not having strictly exhausted domestic remedies, could be admitted.

The last criterion in the NAAEC model is whether "the submission is drawn exclusively from mass media reports".[185] It is undesirable for the petition to be based exclusively on such reports. The inclusion of no first-hand evidence would tend to suggest the allegations are speculative at best. NGOs in particular, given their resources, should be able to muster weightier evidence. On the other hand, media reports may be the only evidence a private individual can gather to prove non-compliance.[186] As such, this criterion should be a factor to be weighed rather than a formal requirement.

I would suggest the adoption of the NAAEC criteria.

V ISSUES IN IMPLEMENTATION

The preceding discussion has taken place without reference to certain practical and implementation issues. This section addresses those issues to ensure that the practical realities of creating and maintaining an IPS are not forgotten.

A Political Will

One of the potential impediments to the creation of an IPS in IEL is political will. The creation of an IPS would involve states giving up an amount of autonomy and sovereignty to a binding adjudicatory mechanism, which states are generally reluctant to do.[187]

183 See Part IV C 2 (b) (i) Exhaustion of domestic remedies.

184 NAAEC Guidelines, above n 164, para 7.5(b): "In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether … reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases".

185 NAAEC, above n 6, art 14(2)(d).

186 The NAAEC Guidelines, above n 164, acknowledge this at para 7.6.

187 See Peggy Rodgers Kalas "International Environmental Dispute Resolution and the Need for Access by Non-State Actors" (2001) 12 Col J Int'l Envt'l L & Pol 191, 223, 239, 242.

Typically, in international regimes states must consent before a case can be submitted to binding third party dispute resolution.[188] However, in an IPS, states have no control over which cases go to the Tribunal given that it is non-state actors that trigger the mechanism.[189] Further, given that states have generally been apathetic towards environmental commitments, it seems unlikely they would want to be exposed to greater scrutiny.[190]

However, there are certain benefits for states of having an IPS in place. First, the creation of an IPS would help to ensure other states do not "free-ride" on their commitments. An IPS can serve as a "credible commitment" by states to their international obligations.[191] Secondly, an IPS serves to ensure that rules are applied equally to all. In a political forum, equality and fairness are not assured.[192] Further, the uniform interpretation of treaty obligations can serve to maintain the complex balance of rights and obligations agreed to by the parties in the relevant treaty.[193] Thirdly, the Tribunal will provide authoritative interpretations of treaty obligations, clarifying rules for states and enhancing certainty. Fourthly, the legitimacy-enhancing effects of an IPS strengthen the entire regime. Fifthly, the instances in which states will have to call other states to account will be reduced, leading to more "harmonious" relationships among states. Sixthly, the creation of an IPS partially shifts the policing burden onto society at large rather than states and international institutions.[194] Lastly, states may believe that the protection of the environment is a worthwhile goal and view an IPS as a means by which that goal can be

188 See for example the dispute settlement clauses in: The Antarctic Treaty (1 December 1959) 402 UNTS 71, art XI; Convention on International Trade in Endangered Species of Wild Fauna and Flora (3 March 1973) 993 UNTS 243, art XVIII ["CITES"]. See also the dicta in *Status of Eastern Carelia* (Advisory Opinion) (1923–1924) 2 ILR 394, 396 (PCIJ); *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 177–178.

189 Craik, above n 67, 571 has commented that "[s]tates may … be reluctant to allow non-state actors, over whom they exert little control, to participate directly in dispute settlement".

190 See Thomson, above n 136, 224, commenting in the context of UN treaty body reform: "[States Parties] will not want to introduce a system that from the outset is likely to give them a harder time about their implementation commitments".

191 See Trachtman and Moremen, above n 19, 241–243, where the authors view private rights of action as a form of commitment device.

192 See Schleyer, above n 20, arguing that a legalistic approach to dispute resolution that allowed for private participation would serve to overcome the power disparities that persist in the WTO.

193 Craik, above n 67, 574–575.

194 Raustiala has commented that "fire alarms" (decentralised modes of oversight that rely on interested outside parties; for example IPSs) can be more efficient than other internal means of oversight because "the costs associated with oversight are borne by the empowered outside parties": "The 'Participatory Revolution'", above n 16, 562.

achieved.[195] In this regard it is a positive sign that many states have already subjected themselves to the jurisdiction of IPSs in contentious areas of international law. For example, there are 105 parties to the First Optional Protocol to the ICCPR, while the 46 members of the Council of Europe are subject to the jurisdiction of the ECHR and 71 parties have ratified the Optional Protocol to CEDAW,[196] which is a highly contentious treaty for many states. Even the United States, a state typically precious in regard to its sovereignty, has assented to an environmental petition system: the NAAEC procedure.

Issues of political will, however, may extend beyond the creation of an IPS. States may disagree on the structure of the mechanism or on issues such as the bindingness of decisions and the extensiveness of any follow-up mechanism. However, while it may be hard to agree on the design of such a system, this should not be considered terminal. Many complex systems have been agreed upon in the past by many states, including the Montreal Protocol non-compliance procedure and the ICCPR petition system as well as other complex systems not related to compliance, such as the elaborate Kyoto Protocol emissions trading system.

Another potential problem is that while some states may agree to be subject to the jurisdiction of the petition system, other "free-riding" states may not, undermining the effectiveness of the system. This problem is potentially weighty but should not be overstated. If the IPS was created in an established regime, there would be much political pressure for all states to get on board. Also, incentives such as access to the multilateral fund could be used to gather support as could more severe measures, such as imposing penalties on states that do not join the regime: the instigation of trade measures against non-parties under the Montreal Convention proved effective in encouraging states to join the regime.[197] A more radical approach could be that the Tribunal hear complaints in relation to a state even if it has not submitted to the jurisdiction of the IPS. The decision rendered will not be binding because the state would not have consented to be bound, but there is nothing in principle to stop the Tribunal rendering such a decision.[198] If this became the practice of the Tribunal then non-parties would have an incentive to join the regime in order to formally defend themselves before the Tribunal.

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195 For example, the commitment of states to remedying the problems caused by ozone depleting substances has been a key contributor to the success of the Ozone Regime: Greene, above n 113, 123.

196 Current to 21 August 2005.

197 See Montreal Protocol, above n 102, art 4; See also CITES, above n 188, art X.

198 Assuming such action is not ultra vires the parent treaty.

This leads into another issue: what if a state does not respond to allegations or ignores the decisions of the Tribunal? If a state does not respond, the Tribunal should continue to consider the case regardless, as is the practice in several human rights IPSs.[199] Information can be gathered regarding the allegations from other sources. However, typically, a state has an incentive to defend itself to ensure allegations are properly contested and to avoid negative stigma. In the case where a state ignores a decision, the follow-up procedure will eventually lead to the imposition of sanctions.[200]

Even if states do agree to the jurisdiction of the IPS, this may lead to weaker treaty commitments. Because states will be subject to greater scrutiny through the petition system they may not be willing to agree to onerous obligations in the parent treaty. However, while this is a possibility, regimes such as the WTO show that stricter supervision need not correlate with weaker commitments. Over four decades, the WTO has developed far-reaching supervision mechanisms while treaty obligations have grown more complex.[201] As a regime and petition system gain greater legitimacy and normative weight, states may be more willing to agree to weightier obligations.

Thus while political will and the rule of state consent can potentially be a stumbling block to the creation and maintenance of an IPS, such hurdles should not be overstated and strategies exist to resolve most of the issues outlined above.

B Effectiveness: Will it Work in Practice?

IPSs such as the ECHR, the ECJ and the NAAEC Submissions Procedure have all shown that petition systems can be successful in securing state compliance.[202] However, other IPSs, such as the ICCPR procedure, have proved less successful.[203] Several commentators, most notably Professors Helfer and Slaughter, have analysed a range of petition systems and pinpointed a number of factors that can bear on the success or failure of a petition system.[204] While it is beyond the scope of this article to consider all such

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199 See ECHR Rules, above n 64, r 65; Chidi Anselm Odinkalu "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment" (1998) 8 TRNATLCP 359, 377–378.

200 See Part IV B 4 (b) Enforcement measures.

201 See Victor, above n 71, 166–167.

202 See Helfer and Slaughter, above n 21, where the authors discuss the unprecedented success of the ECJ and the ECHR and develop a theory of effective supranational adjudication based on those two systems. In regard to the NAAEC Procedure, see Bickel, above n 55, noting the promise of the NAAEC system; see also Knox, above n 32.

203 See Helfer and Slaughter, above n 21, 365–366.

204 Helfer and Slaughter, above n 21; see also Knox, above n 32, who has added to Helfer and Slaughter's model; Byrnes, above n 95, discusses the elements of an effective IPS.

factors, it is important to highlight two factors which are particularly noteworthy: resources and awareness of political boundaries.[205]

1 Resources

A lack of human, financial and material resources, as has been experienced by some petition systems,[206] can severely limit the effectiveness of an IPS.[207] For example, both the NAAEC Submissions Procedure[208] and the HRC[209] have experienced bottlenecks and, at times, huge backlogs because of a lack of resources.

If states are not willing to fund the petition system properly it will be hard to attract qualified and experienced experts to staff the treaty bodies. Such experts could earn substantial salaries in the private sector or elsewhere and it is necessary to provide them with a competitive wage.

It is also important to invest in publicising the petition system and making it accessible for petitioners, given that the system must receive a critical mass of individual petitions to be effective.[210] Also of importance to the model proposed is the funding of a "multilateral fund" that would be used to build capacity to facilitate compliance. Such a fund would rely on contributions by states parties.[211]

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205 Other relevant factors (for example, the composition and independence of the Tribunal, the expeditiousness of the mechanism, and caseload) have already been addressed.

206 See Helfer and Slaughter, above n 21, 347–349; see also Odinkalu, above n 199, 398–400, discussing the lack of money, funds and ability to act that has been experienced by the African human rights system. The African Commission on Human and Peoples' Rights in the period 1988–97 received an average of only US$485,814 per year in funding.

207 Helfer and Slaughter, above n 21, 301–303; Knox, above n 32, 77–83.

208 See Knox, above n 32, 78–79 and Bickel, above n 55, 852–854, discussing the Commission on Environmental Cooperation's limited budget but noting that the budget per annum has been gradually increasing.

209 The HRC has approximately a three and a half to four year backlog of cases: "Discussion", above n 104, 327; Byrnes, above n 95, 146. The HRC itself has commented that resources are needed to address the backlog of communications: "HRC Report 2002", above n 77, Vol I, paras 38–39.

210 See Helfer and Slaughter, above n 21, 301: "A court that is scarcely used, for whatever reason, cannot hope to make much of a mark". In regard to accessibility and awareness see Byrnes, above n 95, 144–146; "HRC Report 2002", above n 77, Vol I, para 40.

211 For example, the Montreal Protocol Multilateral Fund is funded on the basis of a United Nations scale of assessment, with developed countries contributing the greatest amount: see Montreal Protocol, above n 102, art 10(6); "Decision II/8", above n 113, Annex XI (Appendix III). There may be a number of problems associated with the creation and maintenance of such a fund. States may not want to contribute to the cost of other states' compliance. There may be problems with

Given the relatively weighty resource burden associated with an effective IPS, it is likely that a petition system can only be supported by a large multilateral regime or a regime composing a high proportion of developed states.

2 *Awareness of political boundaries*

It is important that the proposed Tribunal demonstrate an awareness of political boundaries.[212] If a supranational tribunal goes "too far too fast" in its decisions, it could cause a backlash by member states.[213] The Tribunal, especially in its formative stages, must develop incrementally,[214] gathering a certain degree of legitimacy and acceptance before it can begin to test the limits of its jurisdiction. For example, the ECHR has used the doctrine of margin of appreciation to balance the goals of the European Convention and the goals of domestic decision-makers.[215] Such a doctrine based on the concept of deference to domestic authorities can be useful especially because of its malleability. However, whilst the Tribunal must be careful not to "overstep the mark" it must also be aware of its role as an independent adjudicator.[216] The Tribunal cannot be seen to be subservient to states parties as this would threaten the legitimacy of the IPS and potential petitioners' faith in the system. The line between judicial autonomy and crossing political boundaries is a difficult one to tread and one that can only be achieved by the enlightened exercise of judicial discretion.

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coordinating such a fund and it may be difficult to get states to agree on their quota. See generally Mitchell, above n 70, 14.

212 Helfer and Slaughter, above n 21, 314–317.

213 Helfer and Slaughter, above n 21, 315; Laurence R Helfer "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes" (2002) 102 Col L Rev 1832 in regard to Jamaica, Trinidad and Tobago, and Guyana's denunciation of human rights treaties.

214 For example, the Montreal Protocol Implementation Committee in its formative years avoided highly politicised issues, establishing itself gradually and cautiously. See Greene, above n 113, 94–95 and "Compliance and Effectiveness", above n 22, 420. See also Helfer and Slaughter, above n 21, 314–317 in regard to the ECHR and the ECJ.

215 See Helfer and Slaughter, above n 21, 316–317. See the leading case of *Handyside v UK* (1976) 1 EHRR 737 (ECHR) and contrast Eyal Benvenisti "Margin of Appreciation, Consensus, and Universal Standards" (1999) 31 NYU J Int'l L & Pol 843, where the author advises caution in the application of the margin of appreciation doctrine so that treaty rules and standards are not undermined.

216 Helfer and Slaughter, above n 21, 312–314.

C Appropriateness and Regime Fit

The proposed IPS is a "best practice" model and may not be appropriate for all environmental regimes. The model may need to be amended to ensure a good "fit" with the environmental treaty to which it attaches. For example, not all environmental obligations involve complex questions of science, meaning that a Scientific Committee may not be required. Also, standing criteria may vary depending on which groups are affected by the environmental treaty.

Some rules may not be conducive to being supervised via a petition system. For example, some obligations in IEL are very ambiguous, such as "sustainable development"[217] or "the precautionary principle".[218] It would be very difficult for a panel of experts to determine what the obligation entails and whether a state is compliant or not. Further, there may be certain degrees of compliance.[219] An IPS suits a regime where the obligations are more "black and white", for example, where non-compliance can be determined empirically or by questions of fact and evidence. An obligation such as Article 2 of the Ramsar Convention, which requires the creation of a "List of Wetlands of International Importance", is amenable to consideration by a supranational tribunal given that the question of compliance is a fairly straightforward one.[220]

VI CONCLUSION

This article has advanced two key propositions. First, an IPS would improve compliance with international environmental accords. Secondly, this article has advocated the adoption of an IPS for IEL and proposed a "best practice" model.

An IPS would improve state compliance with IEL obligations. IPSs have clear advantages over present compliance mechanisms and, tellingly, all four of the compliance theories applied indicate that an IPS would have a positive effect on compliance.

The proposed model would be the optimal form of petition system. A petition-information system "fits" best with the nature of IEL and melds managerialism and enforcement theory. The division of functions between the treaty bodies would ensure the expeditious consideration of petitions and the development of specialist expertise at each stage of the process. The ability of the Tribunal to draw on and receive information from a

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217 See for example Convention on Biological Diversity (5 June 1992) 31 ILM 818, art 10; UNFCCC, above n 101, art 4(1)(d).

218 See for example Convention for the Protection of the Marine Environment of the North-East Atlantic (22 September 1992) 32 ILM 1069, art 2(2)(a).

219 See Chayes and Chayes, above n 26, 17–22.

220 Ramsar Convention, above n 66, art 2(1).

range of sources is necessary to ensure all relevant compliance information is uncovered and a range of views represented. The wide range of powers and mechanisms available to the Implementation Committee would allow it to address both intentional and unintentional non-compliance.

The proposed requirements for standing would strike an important balance between preventing a flood of claims that could overload the system and ensuring meritorious petitions are not unduly dismissed. Individuals, NGOs and companies should all have standing.

Practical issues may arise in implementation. A lack of political will among states could stymie the development of the IPS, while certain elements necessary for the effective performance of the IPS may be absent, such as resources or an awareness of political boundaries. However, such practical impediments can be overstated and are not insurmountable.

Two further points are vital to the consideration of an IPS for IEL. First, an integrated approach is critical. An IPS is not a panacea and must be complemented by other compliance control mechanisms. Secondly, the IPS must mould to fit the particular rules to which it attaches and, further, the rules must be appropriate for supervision by a petition system.

The state of the global environment is fast reaching breaking point and environmental treaties have generally failed to halt this decline. State non-compliance is a major reason for this failure. The world is in a precarious situation: urgent and innovative solutions are required. The adoption of an IPS would improve compliance with IEL and must be considered a serious option for international regimes and states committed to the protection of the environment. Our survival may very well depend on it and each individual should be given the opportunity to make a difference.