COMMENTARY

The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective

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First published online 21 February 2012

Abstract
This essay places transnational environmental law in an epistemological context. Starting from the general concept of ‘transnational law’ and the specific environmental dimension of ‘international administrative law’, four case histories are presented to illustrate the integrant approach of transnational environmental law. The cases – all arising in the 1970s – deal with transboundary problems of aircraft noise, ocean dumping, river pollution, and marine protected areas. In addition to traditional aspects of public international law in the environmental field, they typically interface with questions of administrative law, private international law, criminal law, and human rights law. The essay advocates a new focus on mechanisms for participation by civil society in the operation and implementation of transnational environmental law.

Keywords: Transnational Law, Public Participation, Aircraft Noise, Ocean Dumping, River Pollution, Marine Protected Areas

1. INTRODUCTION

The concept of ‘transnational law’ is generally associated with Judge Philip Jessup’s seminal Storrs Lectures at Yale Law School in 1955, and his famous definition of ‘all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules that do not wholly fit into such standard categories’.1 Subsequently embedded in a Harvard casebook classic, Steiner and Vagts’ Transnational Legal Problems,2 the word was to become a household term for generations of law students,3 and has long received universal coinage – to

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Comments by two anonymous reviewers are gratefully acknowledged.

1 P. Jessup, Transnational Law (Yale University Press, 1956), at p. 2.
the point where transnational law is even said to be ‘eclipsing’ or ‘marginalizing’ classical public international law,⁴ while transnational governance networks begin to expand and transform the traditional architecture of international relations.⁵

It is less well known that the label ‘transnational’ had already been suggested much earlier by a Viennese law professor, in the fifth edition of his treatise on private international law,⁶ for the purpose of distinguishing rules regarding conflict of laws from the broader field of rules common to different states for historical reasons or by virtue of treaties harmonizing and transplanting legal concepts internationally. Gustav Walker’s use of the word came close indeed to modern usage of ‘transnational’ terminology in international economic law (lex mercatoria).⁷

Curiously enough, international environmental law – which only emerged as a distinct discipline in the 1970s and 1980s⁸ – has long been confined to the orthodox category of public international law, viewed as ‘law among nations’. Rather typically, perhaps, the term ‘international law’ in the 1972 Stockholm Declaration’s famous Principle 21 (later restated in Principle 2 of the 1992 Rio Declaration) was rendered as ‘law of nations’ (Völkerrecht) in the semi-official German translation;⁹ and, to this date, German-language treatises on international environmental law continue to be titled ‘environmental law of nations’ (Umweltvölkerrecht).¹⁰ In substance, the same approach seems to prevail throughout most contemporary literature on international environmental law in other languages as well: the subject is invariably defined using the traditional epistemology of ‘sources of law’ from Article 38 of the Statute of the International Court of Justice (ICJ) Statute); and the case law discussed tends to be limited to litigation among states¹¹ – expressly excluding issues of private international law,

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regardless of their manifest and growing significance in trans-frontier relations and regulation. The divide between ‘public’ and ‘private’ international law in this field has indeed been likened to ‘a Berlin Wall or an Iron Curtain’.  

Yet, one of the earliest academic studies of what today would unquestionably qualify as ‘environmental law’ was published in 1922 by a renowned scholar in private international law: volume 2(ii) of Karl Neumeyer’s treatise on so-called ‘international administrative law’. Neumeyer had begun his work on the topic before the First World War in Munich and published a preview in the French Revue Générale de Droit International Public in 1911; the final ‘general part’ appeared 26 years later in Switzerland, at a time when the Nazi authorities had already prohibited him from publishing in Germany. Chapter 8 of Neumeyer’s treatise deals with the transboundary aspects of natural resources and natural products, discussing them in four sections: water and hydropower; mineral resources; agricultural and forest resources; hunting and fishery resources. It includes comparative analysis not only of the applicable international treaties and intergovernmental case law, but also of state practice regarding the legal status of individuals, groups and corporations in trans-frontier disputes, ranging from administrative to civil and criminal cases.

Karl Neumeyer tragically did not live to see his vision and pioneering work generally accepted. He was of Jewish ancestry; and when the Nazi regime took over in Germany, he was at first forced into retirement in 1934, and ultimately into suicide in 1941. His innovative concept of international administrative law survived, however, and resurfaced in recent years as ‘global administrative law’ – with an offshoot labelled ‘international administrative law for the environment’. There can be little doubt that this new branch of administrative law is an essential component of what is now being staked out as ‘transnational environmental law’.


15 K. Neumeyer, Internationales Verwaltungsrecht, vol. 1 (Schweitzer Verlag, 1910); see Walker, n. 6 above, at p. 15.
2. CASE HISTORIES

It is worth recalling that, in reality, transboundary legal regulation of environmental issues was never limited to the procrustean catalogue of ‘sources of law’ enumerated in Article 38 of the ICJ Statute. Even the legendary Trail Smelter case in the 1930s – curtain-raiser of every treatise on international environmental law – started out as a straightforward problem of private international law. The claims were for pollution damage to privately owned agricultural lands in the United States (US) state of Washington, from a privately owned smelter across the border in the Canadian province of British Columbia. Yet the Canadian courts, under an ancient ruling by the British House of Lords, would have refused to take jurisdiction over a case involving land situated abroad, while the US courts would have refused to permit smoke easements by a foreign corporation. It was only because of this unfortunate deadlock between Canadian and American rules on conflict of laws that the case eventually wound up in an intergovernmental arbitral tribunal.

Lo and behold, the next major trans-frontier air pollution dispute, with rather similar factual circumstances arising on the French-German border in the 1950s, was settled through private international law remedies: in Poro v. Houillères du Bassin de Lorraine (HBL), the claims were for pollution damage to privately owned horticultural and recreational land in Germany from a state-owned power station across the Saar River in France. The German civil court of appeals in Saarbrücken awarded damages in tort on the basis of the French Civil Code. The case was thus decided at the level of an ordinary domestic court, even though the underlying pollution problem eventually had to be resolved by bilateral intergovernmental negotiations. The lesson, then, is simple: most transnational environmental fact situations require a multilevel regulatory approach, because their ‘public’ international law features tend to be

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22 British South Africa Co. v. Companhia de Mocambique [1893] AC 602.
inextricably mixed with equally relevant aspects of international and comparative private law, commercial law, administrative law, human rights, and even criminal law.

The point is best illustrated by four exemplary transboundary environment cases that arose in the 1970s – over aircraft noise, ocean dumping, river pollution, and marine protected areas, respectively.

2.1. The Salzburg Airport Case: Territoriality and the Domestic Fiction

In Township of Freilassing and Max Aicher v. Austrian Federal Ministry of Transport and State-Owned Enterprises, the Austrian Administrative High Court denied standing to foreign individuals and municipalities in a lawsuit involving harmful environmental impacts of an airport expansion project which affected residential areas across the border in Germany, on grounds which mirror the court’s equally restrictive reasoning in a 1913 precedent involving boundary waters on the Austro-Hungarian frontier. The decision was upheld by the Austrian Constitutional Court. In essence, it perpetuated the well-established principle of ‘territoriality’ in matters of transnational administrative law, first formulated in 1913 by the court’s predecessor (the Imperial and Royal Administrative High Court), which denied standing under Austrian water law to neighbouring Hungarian municipalities on the other side of the Leitha River.

Even though the rigid territoriality of the Salzburg Airport case has been criticized as ‘hostile to international law’, it has been reiterated by the court in subsequent decisions, and it is probably fair to say that it still reflects the mainstream conservative jurisprudence of national administrative courts in other European countries today. This is notwithstanding repeated calls for non-discriminatory treatment of foreign pollution victims across frontiers, and the growing significance of decentralized environmental linkages among local government units under the 1980 European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities. Yet, when the German Federal Administrative Court in 1986 granted a neighbouring Dutch resident leave to appeal against the operating permit for a new nuclear power plant on the border, it was criticized in the literature.

33 See the OECD recommendations at n. 98 below.
for abandoning the territoriality principle.\textsuperscript{36} The appeal, including recourse to the Federal Constitutional Court, was ultimately dismissed, and the Emsland plant went into operation in 1988 – although it is now scheduled to close down in 2022, following Germany’s decision in 2011 to phase out all nuclear power production. There have since been more restrictive decisions regarding the participation rights of foreign neighbours in the Dutch–German frontier region, in proceedings involving permits for airport operations (2008) and wind power installations (2011).\textsuperscript{37}

In the case of Salzburg Airport, the problem of standing was eventually bypassed by a bilateral intergovernmental agreement ratified in 1974,\textsuperscript{38} which introduced special transnational compensation arrangements. In the event of damage arising on German territory from the construction or operation of the Austrian airport, claimants were given recourse to the ordinary German courts, with the German government substituted for the Austrian government as defendant, followed by subsequent intergovernmental reimbursement for any claims settled, so that for the purposes of German legal provisions to be applied, ‘the airport of Salzburg is deemed to be situated on German territory’.\textsuperscript{39}

The substitution/compensation scheme so introduced is not a novelty: it has long been practised for the transnational settlement of noise and sonic boom damage caused by foreign military aircraft in Europe, under the 1951 NATO Status of Forces Agreement (sofa), which equates allied military aircraft to national aircraft for procedural purposes.\textsuperscript{40} It is indeed reminiscent of a strategy already employed in the 1909 US-Canadian Boundary Waters Treaty, to the effect

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that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in an injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs.\textsuperscript{41}
\end{quote}

In other words, a simple legal fiction (pretending that some foreign territory is part of domestic territory) serves to circumvent the irritant territoriality principle.


\textsuperscript{41} Art. II, Treaty relating to the Boundary Waters and Questions Arising along the Boundary between the United States and Canada, Washington, DC (US), 11 Jan. 1909, (1910) 36 Statutes at Large 2448 (emphasis added).
2.2. The Scarlino Red Slicks Case: Exploring the Spectrum of Remedies

In Italian Republic, Prud’homme des Marins Pêcheurs de Bastia et al. v. Cefis, Montecatini Edison (Montedison) S.p.a. et al., an association of professional fishermen from the French island of Corsica was permitted to join in criminal proceedings before an Italian magistrate’s court in Livorno against the managers of a leading Italian chemical corporation which had been dumping toxic titanium dioxide wastes from two company-owned tankers (the Scarlino i and Scarlino ii) since 1972, causing visible ‘red slicks’ in the Mediterranean sea off Corsica. In 1974, the defendants were sentenced to three months and 20 days in prison (suspended on probation). Following new legislation, however, the decision was reversed on appeal, and all defendants were acquitted in 1976.43 The Bastia Fishermen’s Union then brought an action in tort against the Italian corporation before the local courts in Corsica, which on appeal went up to the French Supreme Court,44 resulting in an award of damages totalling 680,000 francs in 1985.45 Attempts by the defendant company to counter the pluralism of lawsuits by raising procedural exceptions of lis pendens were ultimately unsuccessful.46 While a related verdict by the Italian Court of Accounts against the coastguard officials who had authorized the waste discharges was eventually quashed by the Italian Supreme Court in 1989,47 the latter did confirm the fiduciary right (and duty) of the government to claim compensation for damage to the marine environment as part of the national heritage,48 thereby adding a further administrative law dimension to the arsenal of remedies available.

Meanwhile, the Italian government – concerned over transnational competitive disadvantages – had prompted the European Commission in 1975 to propose a new Directive on disposal of wastes from the titanium dioxide industry, aiming at a 90% reduction of waste discharges in all European Union (EU) Member States.49
Simultaneously, as a result of a French–Italian diplomatic compromise, the Dumping Protocol\(^\text{50}\) to the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution\(^\text{51}\) added to its blacklist of prohibited substances ‘acid and alkaline compounds of such composition and in such quantity that they may seriously impair the quality of sea water’ – including, if not naming, titanium dioxide wastes.\(^\text{52}\)

The net environmental outcome of the Scarlino case is that the chemical plant concerned, in Scarlino/Tuscany, continues to produce titanium dioxide pigments, but toxic wastes are now reprocessed on land instead of being dumped at sea. That positive outcome was brought about essentially by a combination of economic impacts on the business sector affected, through a plurality of transnational remedies rather than because of any formal international legal responsibility. The plant, which now goes by the name of Tioxide S.r.l. Europe, was acquired by Imperial Chemical Industries (UK) in 1990 and by Huntsman Corporation (US) in 1999. Current annual production is estimated at 80,000 tonnes, according to US Securities and Exchange Commission (SEC) 10-K forms filed for 2010.\(^\text{53}\) The plant is a certified facility under ISO 14001 environmental standards\(^\text{54}\) and submits annual environmental performance reports under the global chemical industry’s ‘Responsible Care’ programme.\(^\text{55}\)

2.3. The Rhinesalt Case: Multilevel Strategies Applied

In Bier Handelskwekerij et al. v. Mines de Potasse d’Alsace,\(^\text{56}\) a group of Dutch horticulturalists downstream in the Rhine estuary teamed up with the Reinwater Foundation, an international environmental non-governmental organization (NGO),\(^\text{57}\) to bring an action against a (partly state-owned) French mining company located upstream in Alsace. The company dumped large quantities of potash (potassium/kali) mining wastes in the Rhine river, thereby raising water salinity to harmful levels. Repeated attempts to resolve the issue through the International Commission for the

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\(^{52}\) N. 50 above, Annex I(A) para. 8 (subject to further negotiations on specific thresholds).


\(^{54}\) See http://www.iso.org/iso_14000_essentials.

\(^{55}\) See http://www.responsiblecare.org.


\(^{57}\) The Foundation had to withdraw from the case after being denied standing in an interim decision by the Rotterdam District Court on 8 Jan. 1979: see Siehr, n. 12 above, at 381.
Protection of the Rhine against Pollution (ICPR) proved unsuccessful. In 1976, the Rotterdam Court of Appeals referred the case to the European Court of Justice (ECJ) in Luxembourg for a preliminary ruling pursuant to (now) Article 267 of the Treaty on the Functioning of the European Union (TFEU, formerly Article 177 of the Treaty establishing the European Economic Community) on the question of jurisdiction. The ECJ held that under Article 5(3) of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (EEX Convention) the plaintiffs had an option to bring their suit either in the courts at the place where the pollution damage occurred (the Netherlands) or at the place where the act causing the pollution occurred (France).

Lawsuits then proceeded in both countries. Alongside the action for civil tort damages in the Netherlands – which went up to the Dutch Supreme Court (Hoge Raad), and eventually led to an out-of-court settlement for a total of 3.75 million guilders in 1988 – an action for injunctive relief was brought before the Tribunal Administratif in Strasbourg by several of the pollution victims (including the City of Amsterdam, the Province of North Holland, and several water supply agencies) against the French government’s waste discharge permit. Annulment of the permit was granted by the tribunal in 1983, and confirmed by the French Council of State (Conseil d’État) in 1986. In a related action for punitive damages against the potash mining company, launched before the ordinary local court in Mulhouse/Alsace and ultimately decided by the Paris Cour d’Appel, the claimants were awarded damages totalling 2 million francs in 1990.

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Meanwhile, diplomatic negotiations between the four riparian countries (France, Germany, the Netherlands, and Switzerland) had produced the 1976 Bonn Convention concerning the Protection of the Rhine against Pollution by Chlorides,\(^65\) which provided for the joint financing of potash waste disposal measures upstream in Alsace.\(^66\) After considerable local opposition in France, the Convention finally entered into force in 1985, followed in 1991 by an Additional Protocol for joint funding of pollution abatement measures downstream in the Netherlands.\(^67\) It took further arbitration proceedings between the Dutch and French governments in the Permanent Court of Arbitration to settle, in 2004, the question of intergovernmental reimbursements under the Protocol.\(^68\) By that time, the Alsatian potash deposits were already depleted and the mine had closed down. The remaining issues of chloride pollution from other sources are being dealt with by the ICPR, which now administers both the 1976 Bonn Convention and the new 1999 Bern Convention for the Protection of the Rhine,\(^69\) under the overall regional framework of the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes.\(^70\) All riparian countries except Switzerland and Liechtenstein are additionally bound by EU Directive 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy (Water Framework Directive).\(^71\)

2.4. The Chagos Archipelago Case: Environment versus Human Rights?

The case of Chagos Islanders v. United Kingdom, currently pending in the European Court of Human Rights (ECHR),\(^72\) is about a small indigenous community of approximately 1,500 people who were expelled from their native islands in the Indian Ocean between 1968 and 1973 to make way for a British-American military base.\(^73\) Consequently, according to the United Kingdom (UK) Foreign and Commonwealth Office, the ‘British Indian Ocean Territory’ (BIOT) – which, for this purpose, had been

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\(^{68}\) B. McMahon (ed.), The Rhine Chlorides Arbitration Concerning the Auditing of Accounts (Netherlands-France), PCA Award Series, vol. 4 (Permanent Court of Arbitration, 2008).


‘excised’ from the former crown colony of Mauritius74 ‘by reason of the absence of any permanent population’ – was no longer subject to the trusteeship obligations regarding non self-governing territories under Article 73 of the United Nations (UN) Charter.75 By the same token, most of the human rights and environmental treaties ratified by the UK are considered to be inapplicable to the archipelago because they were deliberately not extended to the BIOT,76 thus turning the territory into a new international legal ‘black hole’.

Military construction and operation of the base on the main island of Diego Garcia – which played a major strategic role in both Gulf Wars and in the bombing of Afghanistan until 2006 – resulted in serious environmental damage to the coral reefs. The Diego Garcia base boasts the world’s longest slipform-paved airport runway built on crushed coral (3.6 km); in the course of military construction works in the 1980s, a total of more than 3.8 million m³ of ‘coral fill’ was ‘harvested’.78 The damage to the reef was irreparable.79 Nonetheless, the British government has since designated the Diego Garcia lagoon – dynamited and deep-dredged to accommodate the US Navy 5th Fleet’s nuclear submarines, aircraft carriers, and ammunition supply vessels – as part of an internationally protected ‘nature reserve’ under the Ramsar Convention on Wetlands of International Importance.80

74 British Indian Ocean Territory Order, SI 1963/1920, amended by SI 1968/111. Mauritius continues to claim sovereignty over the area and, according to Art. 111 of its constitution, ‘Mauritius includes . . . the Chagos Archipelago, including Diego Garcia’; see G.H. Flanz (ed.), Constitutions of the Countries of the World (Oceana, 1998), pp. 81, 93; and n. 89 below.
Starting in the 1990s, the exiled islanders instituted lawsuits in American federal courts and in the British High Court, claiming compensation and annulment of the colonial ordinances that had denied them the right of return to their homeland. After their claims were dismissed by the US courts in 2006-07, and by the UK House of Lords' Appellate Committee in 2008, they turned to the ECtHR in Strasbourg, where their case is currently pending. In April 2010, however, the British government proclaimed the entire 200-mile zone of the BIOT (544,000 km$^2$ – more than double the size of the UK) to be a 'marine protected area', thereby expecting to 'put paid to resettlement claims of the archipelago’s former residents', while ostensibly preserving global biological diversity. While this unilateral act raises new questions of compatibility with the UN Convention on the Law of the Sea (UNCLOS), refuelling a long-standing sovereignty dispute with both Mauritius and the Maldives, the central issue remains its manifest disregard for basic human rights of the Chagos islanders, and their continuing exclusion from a decision process that critics have characterized as outright ‘eco-imperialism’, or colonial ‘fortress conservation’. The standard ‘environmental' pretext for denying the islanders a right of return has thus been the allegation that...

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84 British Indian Ocean Territory, Proclamation No. 1 of 2010 (Marine Protected Area) and Sch., 1 Apr. 2010; see P.H. Sand, ‘The Chagos Archipelago: Footprint of Empire, or World Heritage?’ (2010) 40 Environmental Policy and Law, pp. 232–42.
sea-level rise caused by global warming would soon make the islands uninhabitable,\(^92\) a claim disproved by recent data for this particular area.\(^93\)

3. A CHANGE OF PERSPECTIVE: THE BACK OF THE MIRROR

One common feature of this string of case histories is the crucial role of civil society in triggering, shaping, and eventually resolving the transnational environmental disputes discussed – an epistemic dimension which the tunnel vision of public international lawyers, and their ‘obsession with territory’,\(^94\) has long ignored. Borrowing a metaphor from ethologist Konrad Lorenz, it is ‘the back of the mirror’\(^95\) (that is, in a legal context the social reality of *people* interacting with governments and other people beyond boundaries)\(^96\) that is essential for an understanding of complex transnational relationships in this field.

The first international provisions for the mutual granting of non-discriminatory treatment to foreign plaintiffs in judicial and administrative proceedings for environmental matters are found in Articles 3 (foreign individuals) and 4 (foreign designated authorities) of the 1974 Nordic Environmental Protection Convention,\(^97\) followed by several recommendations of the Organization for Economic Co-operation and Development (OECD),\(^98\) a growing number of multilateral environmental agreements,\(^99\) and the UN International Law Commission’s Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.\(^100\) The transnational procedural

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\(^92\) R v. SoS Foreign and Commonwealth Affairs (Bancoult 2), n. 83 above, at para. 23 (‘looming over the whole debate was the effect of global warming which was raising the sea level’).


and institutional pattern so emerging may indeed be said to move closer to Karl Neumeyer’s vision of a harmonized system based on mutual/reciprocal recognition of administrative decision-making for the environment.101

International mechanisms to integrate non-state actors in the operation and effective implementation of environmental law have made their appearance since the 1980s: following the introduction of a control procedure for national application of the EU environmental Directives102 and the establishment of a ‘complaints registry’ in Brussels for that purpose,103 more than half of the infringement proceedings initiated against Member States since 1982 were based not on the European Commission’s own compliance monitoring but on citizen complaints.104 In 1993, the North American Agreement on Environmental Cooperation (NAAEC) empowered natural and legal persons and NGOs to lodge complaints to the Commission for Environmental Cooperation (CEC) that a Member State ‘is failing to effectively enforce its environmental law.’105 At the level of multilateral financial institutions, the Inspection Panel established by the World Bank in 1993 initiated a review process which entitled ‘project-affected people’ to hold the organization accountable for compliance with its own legal ‘safeguards’ for development projects.106 This model of a transnational quasi-judicial mechanism, with a distinct focus on environmental rules,107 has since spread to several regional development banks.108

A momentous ‘participatory revolution’ in this field109 was ushered in by the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),110 which

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101 See text at nn. 14–18 above.
resulted in the establishment of a ‘Compliance Committee’ in 2002.\textsuperscript{111} To be sure, the Aarhus mechanism is not entirely new, building in part on the non-compliance procedures created in the context of the ozone layer regime since 1990,\textsuperscript{112} which were later transplanted into several other environmental treaty regimes.\textsuperscript{113} Sometimes referred to as ‘non-adversarial’ or ‘non-confrontational’\textsuperscript{114} – even though they definitely contain a ‘confrontational’ element of compulsion, since they may be triggered without the consent of the offending party\textsuperscript{115} – these procedures effectively bypass the (notoriously ineffective) traditional treaty procedure of state-versus-state dispute settlement,\textsuperscript{116} and instead allow collective scrutiny of treaty implementation by all Member States, through periodic reviews by the Conference of Contracting Parties or a special committee delegated for this purpose by the Conference.\textsuperscript{117}

The innovations now injected into this process by the Aarhus compliance regime are both procedural and institutional: Articles 3(9) and 15 of the Convention empower ‘the public’ – individuals and groups as defined in Article 2(4)–(5), without discrimination as to citizenship, nationality or domicile – to submit complaints about governmental non-compliance with the Convention.\textsuperscript{118} These submissions are then reviewed by a board composed of nine independent experts, including members nominated by NGOs.\textsuperscript{119} The mechanism thus opens a new (manifestly confrontational/adversarial) relationship between governments and representatives of civil society, who can hold Member States – and since 2005, also the EU – ‘transnationally’ accountable for their national implementation of the treaty.\textsuperscript{120} In this regard, the

\textsuperscript{111} See Decision I/7 of the 1st Meeting of the Parties, UN Doc. ECE/MP.PP/2002/2/Add.8, Annex, Geneva (Switzerland), Oct. 2002.


\textsuperscript{113} See generally T. Treves et al. (eds.), Non-Compliance Procedures and Mechanisms, and the Effectiveness of International Environmental Agreements (Asser Press, 2009).


\textsuperscript{116} The standard dispute settlement provisions of most multilateral environmental treaties have never been used in practice: see Romano, n. 11 above, at p. 1041.


\textsuperscript{120} On recent jurisprudence of the Committee, see V. Koester, ‘The Compliance Mechanism: Outcomes and Stocktaking’ (2011) 41 Environmental Policy and Law, pp. 196–204.
Aarhus regime may indeed be said to have revolutionized the participation of non-state actors in the operation of a multilateral environmental agreement.

As it stands, territorial application of the Aarhus Convention remains restricted to metropolitan Europe. Even though, according to its Article 19(3), the Convention is open to all UN Member States, all current members are European countries (Canada and the US, though both automatically eligible for membership in their capacity as original UNECE members, have not signed or ratified to date). Moreover, European governments have notoriously been reluctant to extend the Convention to their non-metropolitan overseas territories. In the Chagos Archipelago case, the UK Foreign and Commonwealth Office thus takes the position that the Convention ‘has no practical relevance to the British Indian Ocean Territory’, since ‘BIOT has no permanent residents’\(^\text{121}\) (the Chagos Islanders having been expelled 40 years ago).

Yet, there have been a number of calls for ‘globalizing’ Aarhus, building on Principle 10 of the 1992 Rio Declaration on Environment and Development,\(^\text{122}\) most recently in the context of preparations for the 2012 UN Conference on Sustainable Development (Rio+20).\(^\text{123}\) Non-governmental networks such as the ‘Access Initiative’\(^\text{124}\) have long promoted common global standards for public participation in environment-related civil and administrative proceedings.\(^\text{125}\) In 2010, the Governing Council of the UN Environment Programme (UNEP) adopted a set of ‘guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters’.\(^\text{126}\) Chances are, therefore, that the new instruments emerging from these initiatives may not be limited to traditional treaty law, but will reflect new patterns of transnational environmental law-making, vindicating Sir Francis Bacon’s premonitory advice:

> And he that will not apply New Remedies, must expect New Evils: For Time is the greatest Innovator.\(^\text{127}\)

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121 E-mail communication from the BIOT Administrator to the author (26 Nov. 2008); see also nn. 75 and 76 above. The UK ratified the Convention in 2005, without extension to overseas territories.


127 See F. Bacon, Essays or Counsel, Civill and Morall (Havilland, 1625): 24 (‘Of Innovations’).