Index

Aarhus Convention 220, 221, 222, 223, 224, 228, 232
access to international courts and tribunals 58–105
areas and resources beyond national jurisdiction (common property) and deep seabed 67–8, 71
common interest approach 68, 69, 73, 75, 79, 83, 84–6, 96, 101
and cooperation 63, 65, 69–70
impartiality 102, 104
indispensable third parties and barriers to entry 97–100
indispensable third parties and barriers to entry, interdependent obligation 98–9
indispensable third parties and barriers to entry, Monetary Gold objection 97–8, 99–100
and inter partes adversarial procedures 59, 75
jurisdiction and admissibility, difference between 58
and legal standing 58
and NGOs 90, 92, 93, 96–7, 101
proprio motu (court intervention on own initiative) 80–81, 93
reciprocal obligations 62–3, 65
reparation obligations 62, 99
sovereignty 60, 66, 70–71, 88
access to international courts and tribunals, advisory jurisdiction 100–103
bilateral treaties and disputes 101, 102–3
and climate change 102
legal effect 103
access to international courts and tribunals, bilateral obligations 60–65
erga omnes (partes) 60, 61
and multilateral treaty obligations 62
and state responsibility 61, 62–3
transboundary impacts 61–3, 64–5, 67, 69, 104
access to international courts and tribunals, contentious disputes 81–97
amicus curiae submissions and non-state actors 82, 90–97, 101
amicus curiae submissions and non-state actors, and interstate courts 91–4
amicus curiae submissions and non-state actors, and public interest 92, 96–7
amicus curiae submissions and non-state actors, usefulness of 96
arbitration and actors other than states 86–7
and common interests 83
intervention right by third state 87–90, 97, 99–100
intervention right by third state, and erga omnes norms 89
intervention right by third state, and public interest claims 88–9
intervention right by third state, and sovereign rights 88
and legal interest to sue 90–91
and multi-stakeholderism 81–2
procedure initiation right 82–7
and state responsibility 83
states and legal standing rules 82, 84–6
access to international courts and tribunals, global environment protection and common concern of humankind 68–71
and bilateral treaties and disputes 70, 71
and global public goods 70
and international community responsibilities 71
and multilateral treaties 68–9, 70–71
access to international courts and tribunals, public interest litigation 71–81
actio popularis concept 72, 74, 78–9, 81
actio popularis concept, and international community definition 79, 81
and bilateral treaties and disputes 73, 74, 79, 81
and collective obligations 60, 62, 66, 73–8, 84–5
common interest approach 73
erga omnes and erga omnes partes obligations (multilateral treaties) 74–8, 83, 85, 86
integral obligations 72–4, 77–8
legal effects 73–9
legal standing 74, 78
public interest concept 72–3
self-determination right 75–6
solidarity measures 76–8
tribunal role 80–81
access to international courts and tribunals, shared resources 63–7
and common responsibility 65–6
diffuse reciprocity 65
erga omnes partes obligations 66–7
accessibility and affordability, public interest function 52
actio popularis concept, public interest litigation 72, 74, 78–9, 81
ad hoc arbitration 6, 7
legal development function, factors affecting 34–5
multilateral environmental agreements (MEAs) 23–4
prevention and provisional measures of protection 151
administrative procedures,
non-compliance procedures as 215–16, 220
Adsett, H 216, 224
advisory opinions
access to international courts and tribunals see access to international courts and tribunals, advisory jurisdiction
international litigation functions, dispute settlement function 46–50
international litigation functions, lack of consent 47–8
international litigation functions, legal development and law-making 29–30
international litigation functions, public interest function 53
Amerasinghe, C 52, 104, 122, 141
amicus curiae submissions
access to international courts and tribunals, contentious disputes 82, 90–97, 101
international litigation functions, public interest function 53
scientific evidence, environmental disputes involving complex science 130
applicable law
definition 19
judicial dispute settlement and non-compliance procedure, relationship between 225–6
prevention and provisional measures of protection 176, 180
and scientific evidence 114, 139
appointment of experts, scientific evidence, evidence collected by courts 122–8, 132–5
see also experts
Association of Southeast Asian Nations (ASEAN) 175, 176
assurances, remedies, prospective, assurances or guarantees of non-repetition 187, 197, 208
authoritative determination of international law 19–36
automatic use of non-compliance procedures before judicial dispute settlement 234–7

balancing exercise test, prevention and provisional measures of protection 149–50, 158, 159, 160, 161, 164
Bartholomeusz, L 94, 96
Basel Convention 216, 228, 231, 235, 236
Benvenisti, E 31, 57
Benzing, M 117, 130
bilateral treaties and disputes 10
access to international courts, bilateral obligations see access to international courts and tribunals, bilateral obligations
access to international courts and tribunals, advisory jurisdiction 101, 102–3
access to international courts and tribunals, global environment protection and common concern of humankind 70, 71
access to international courts and tribunals, public interest litigation 73, 74, 79, 81
international litigation functions 17, 20, 24, 25, 28, 36, 47–8, 49, 50, 51, 53
prevention and provisional measures of protection 154, 175, 176
Bilder, R 3, 10, 43
Birnie, P 1, 10, 11, 21, 23, 41, 71, 111–12, 113, 138, 186
Bodansky, D 10, 70
Boisson de Chazournes, L 19, 41, 65, 70, 85, 215, 217, 218, 234
Boyle, A 5, 18, 21, 24, 29, 36, 107, 163, 189, 216
Brown, C 6, 151, 180, 185, 187, 188, 201
Brunnée, J 67, 69–70, 74
burden of proof
scientific evidence see scientific evidence, environmental disputes involving complex science, burden of proof see also evidence
Cartagena Protocol 219, 225
causation between wrongful act and damages 202–3, 205 see also remedies
Central America Court of Justice, Gulf of Fonseca (fish stocks) 64
cessation obligation, remedies 196, 197, 207–8, 209
Chinkin, C 21, 29, 59, 88, 92, 96, 97, 100
climate change
advisory jurisdiction 102
specific performance, and remedies 211
collective obligations, and access to international courts and tribunals, public interest litigation 60, 62, 66, 73–8, 84–5
comity doctrine 240–42
see also judicial dispute settlement and non-compliance procedure, relationship between, relationship models
common concern of humankind see access to international courts and tribunals, global environment protection and common concern of humankind
common interest approach, access to international courts and tribunals 68, 69, 73, 75, 79, 83, 84–6, 96, 101
common practices, judicial dispute settlement and non-compliance procedure, relationship between 215
common property (areas and resources beyond national jurisdiction), access to international courts and tribunals 67–8, 71
compensation
and equity principle, remedies 188–9, 193
and retrospective remedies see remedies, retrospective, compensation
compensatory justice principle 190–91, 192
complex science see scientific evidence, environmental disputes involving complex science
compliance

international litigation functions, dispute settlement function 44
judicial dispute settlement and non-compliance procedure, relationship between 217
prevention and provisional measures of protection 177–8
and remedies 209–10
and scientific evidence, environmental disputes involving complex science, burden of proof 136–7
compliance committees
composition and procedures 222, 224, 226, 229–30, 238, 245
purpose of see judicial dispute settlement and non-compliance procedure, relationship between, purpose of compliance committee
conflicting decisions, judicial dispute settlement and non-compliance procedure, relationship between 237–42
conflicts of interest, composition and procedures of compliance committees 222–3
contentious cases
access to international courts see access to international courts and tribunals, contentious disputes
and prevention and provisional measures of protection 153
Convention on Biological Diversity 2, 51, 68–9
coopération and access to international courts and tribunals 63, 65, 69–70
judicial dispute settlement and non-compliance procedure, relationship between, relationship models 245–7, 248
prevention and provisional measures of protection, types of measures 173–4, 175
COP/MOP, judicial dispute settlement and non-compliance procedure, relationship between 222, 224, 226, 229–30, 238, 245
corrective sanctions, and judicial dispute settlement and non-compliance procedure, relationship between 227, 228
courts, evidence collected by see scientific evidence, environmental disputes involving complex science, evidence collected by courts
see also ‘judicial’ headings
Crawford, J 77, 183, 186, 187
cross-examination and scientific evidence, evidence collected by parties 120–21
customary international law
identification 17, 20, 21–3, 36
D’Aspremont, J 108, 109, 119, 131
de facto determination of compliance or non-compliance 227, 230
see also judicial dispute settlement and non-compliance procedure, relationship between
de minimis or ill-founded clause 219, 220, 222
see also judicial dispute settlement and non-compliance procedure, relationship between, triggers
defendant, unilateral acts 171–3
see also prevention and provisional measures of protection, types of measures
deterrence effect
international litigation functions, dispute settlement function 43
remedies 181, 191, 199
discretion use
Index

judicial dispute settlement and non-compliance procedure, relationship between 219, 220, 221, 240, 241
remedies 181, 185–9, 201
and scientific evidence 122, 123, 130
dispute avoidance and non-compliance 214–15, 234
see also judicial dispute settlement and non-compliance procedure, relationship between
dispute resolution issues 1–12
environmental dispute definition 3–5
environmental dispute definition, and effect on other areas of law 4–5
interstate courts and tribunals overview 5–7
Kompetenz-Kompetenz use 6–7
multilateral environmental agreements (MEAs) 9
dispute resolution issues, judicial procedures and substantive law 7–12
bilateral and adversarial criticisms 10
inadequacy concerns 8–12
and international obligations 11
international procedural law 7–8
scientific knowledge dependence 10
dispute settlement clause 235–6, 237
see also judicial dispute settlement and non-compliance procedure, relationship between, relationship models
dispute settlement function see international litigation functions, dispute settlement function
Downs, G 31, 57
due process, and scientific evidence, environmental disputes involving complex science 117–19, 126, 129–30, 133

ecological damage, remedies, harm concept, pivotal notion 194, 195, 196, 198, 205–6

Elsig, M 25, 27
enforcement
international litigation functions 41–3
multilateral environmental treaties see judicial dispute settlement and non-compliance procedure, relationship between
prevention and provisional measures of protection 177–8
entry barriers, access to international courts and tribunals 97–100
environmental impact assessments
Espoo Convention 2, 22, 61, 224
and international litigation functions 22, 23
international litigation functions 56
remedies 200
scientific evidence 114–15, 116
equity principle, remedies 188–9, 193
_erga omnes (partes)_
access to international courts and tribunals, bilateral obligations 60, 61
access to international courts and tribunals, contentious disputes 89
access to international courts and tribunals, public interest litigation 74–8, 83, 85, 86
access to international courts and tribunals, shared resources 66–7
prevention and provisional measures of protection 149, 156
and remedies, recipients 196, 197, 198
see also _inter partes_ adversarial procedures
Espoo Convention 2, 22, 61, 224
European Convention on Human Rights (ECHR) 37
European Court of Justice (ECJ) 87
European Economic Area Court, _EFTA Surveillance Authority v Norway_ 114
evidence
judicial dispute settlement and non-compliance procedure, relationship between, relationship models 245–6 remedies, retrospective, compensation 203, 205 scientific see scientific evidence see also burden of proof existence of a dispute, need for, international litigation functions 38, 48–9 experts, use of appointment of, scientific evidence, evidence collected by courts 122–8, 132–5, 142, 144, 145, 146 ghost experts 132–3 judicial dispute settlement and non-compliance procedure, relationship between 222, 223 prevention and provisional measures of protection 155, 173–4 remedies 194, 203 and scientific evidence 109, 110, 119–20, 121 fact-finding see evidence fairness, procedural, scientific evidence, environmental disputes involving complex science 117–19, 136 field work (site visits), scientific evidence 126–7, 128–30 financial responsibility, and remedies, retrospective, compensation 202 Fitzmaurice, G 32, 66 Fitzmaurice, M 9, 213 Fodella, A 229, 236 follow-up, remedies, retrospective, compensation 201–2, 203–6 Foster, C 40, 108, 119, 120, 121, 132, 136, 137, 138 French, D 23, 25, 29, 69, 197 functions of international litigation functions see international litigation functions future compliance judicial dispute settlement and non-compliance procedure, relationship between 228 and remedies 207 future non-compliance, judicial decision on potential future non-compliance procedure, effects of 237, 244–5 future overlaps, and judicial dispute settlement and non-compliance procedure, relationship between 233 general rule, scientific evidence, environmental disputes involving complex science, burden of proof 137–9, 142 ghost experts scientific evidence, evidence collected by courts 132–3 see also experts, use of global environment protection see access to international courts and tribunals, global environment protection and common concern of humankind golden rule, international litigation functions 28 Grando, M 119, 140, 141 Gray, C 182, 184, 186, 201, 203–4, 209 Gros, G 121, 132, 143–4 ‘guilty parties’, reaction of, prevention and provisional measures of protection 172–3 harm concept prevention and provisional measures of protection, conditions for granting 163–5, 170 remedies, pivotal notion see remedies, harm concept, pivotal notion remedies, retrospective, compensation 204–6 scientific evidence, environmental disputes involving complex science, standard of proof 140 transboundary see transboundary harm Harrison, J 26, 107, 136 Hernández, G 9, 35, 55, 250–51
humankind, common concern see access to international courts and tribunals, global environment protection and common concern of humankind

ICJ see International Court of Justice (ICJ)

ICRW (International Convention for the Regulation of Whaling) 2, 24, 69, 84, 112, 187, 233

ICSID see International Centre for Settlement of Investment Disputes (ICSID)

identical parties, judicial dispute settlement and non-compliance procedure, relationship between 239–40, 243–4

ILC (International Law Commission) 14, 22, 25, 62, 84, 114, 182, 183–4, 191, 193, 195

ill-founded clause see de minimis or ill-founded clause

impartiality access to international courts and tribunals 102, 104 international litigation functions 29, 37 scientific evidence, environmental disputes involving complex science 118, 129–30, 146 inadequacy concerns, dispute resolution issues 8–12

incidental jurisdiction, prevention and provisional measures of protection 150, 152, 153, 161–2, 165, 167, 170

incremental development of measures, prevention and provisional measures of protection 176

independent law-making and surrogate law-making, distinction between 31

indispensable third parties and barriers to entry 97–100 see also access to international courts and tribunals information assessment see evidence initiation, procedure initiation right 82–7

see also access to international courts and tribunals, contentious disputes

Institut de Droit International 184–5, 188, 191

integral obligations, access to international courts and tribunals, public interest litigation 72–4, 77–8

inter partes adversarial procedures and access to international courts and tribunals 59, 75 see also erga omnes (partes)

Intergovernmental Panel on Climate Change (IPCC) 121, 145

interim injunctions, prevention and provisional measures of protection 150 international adjudication challenges, scientific evidence 107–10


International Centre for Settlement of Investment Disputes (ICSID) 34, 95

Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt (Pyramids) 241

International Convention for the Regulation of Whaling (ICRW) 2, 24, 69, 84, 112, 187, 233

International Court of Justice (ICJ) 6, 12, 16, 19–20, 27, 34, 37, 80, 82, 86, 149, 150 advisory opinions 101, 102 Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) 136, 137–8, 189, 201, 204
Litigating the environment

Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) 209–10

amicus curiae briefs 91, 93, 96–7, 101

Anglo-Iranian Oil Company (United Kingdom v Iran) 209

Applicability of the Obligation to Arbitrate 38

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) 28, 123, 125–6, 131, 136, 140, 141, 167, 191–2, 194, 195, 201–2, 203, 205, 206

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) 19

Avena and Other Mexican Nationals (Mexico v United States of America) 138, 153, 187–8

Barcelona Traction 75, 77, 86

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) 11, 22–3, 115, 120, 128, 136, 156, 161, 166–8, 169, 172, 175, 177, 179, 188, 191, 192, 193, 195, 199–200, 201, 202, 204, 205, 206, 233, 246

Chagos Archipelago 47, 48, 50

Colombian-Peruvian Asylum Case 92

Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) 161, 200

Construction of a Wall in the Occupied Palestinian Territory 47, 48, 49–50, 76, 102, 198

Continental Shelf (Tunisia v Libyan Arab Jamahiriya) 134

Continued Presence of South Africa in Namibia (South West Africa) 93, 102

Corfu Channel (UK v Albania) 122, 125, 130, 141, 201

Delimitation of the Maritime Boundary in the Gulf of Maine Area 122, 125

Diplomatic and Consular Staff in Tehran (United States of America v Iran) 39, 201

East Timor (Portugal v Australia) 75, 98

Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation) 162, 166, 236–7

Fisheries Jurisdiction (Federal Republic of Germany v Iceland) 72, 187, 209

Fisheries Jurisdiction (Spain v Canada) 38, 209

Fisheries Jurisdiction (United Kingdom v Iceland) 8, 209

Frontier Dispute (Burkina Faso v Republic of Mali) 106, 166, 167

Frontier Dispute El Salvador/Honduras 87

Gabčíkovo-Nagymaros Project (Hungary v Slovakia) 4, 21, 23, 26, 36, 46, 56, 59, 63–5, 76, 92, 107, 110, 120, 129, 201

Haya de la Torre (Colombia/Peru) 180, 211

Icelandic Fisheries 36

Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights 49

Interpretation of Peace Treaties between Bulgaria, Hungary and Romania 28, 38

Jurisdictional Immunities of the State Germany v Italy 87

LaGrand (Germany v United States of America) 44, 150–51, 153, 157

Legality of the Threat or Use of Nuclear Weapons 21, 28, 87, 92
Libya/Malta Continental Shelf 87, 88–9

Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua) 122–3, 125

Maritime Delimitation and Territorial Questions (Qatar v Bahrain) 243

Military and Paramilitary Activities in and against Nicaragua 118, 201

Monetary Gold 97–8, 99–100

Northern Cameroons (Cameroon v United Kingdom) 46

Nottebohm 6

Nuclear Arms Race and Nuclear Disarmament (Marshall Islands v United Kingdom) 98–9

Nuclear Tests (Australia v France) 8, 45, 46, 56, 154, 155, 171

Nuclear Tests II (New Zealand v France) 32

Obligation to Prosecute or Extradite (Belgium v Senegal) 50, 83–4, 85, 86, 162, 166, 168, 196, 197

Oil Platforms (Islamic Republic of Iran v United States of America) 141, 162

Passage through the Great Belt (Finland v Denmark) 158, 242

Phosphate Lands in Nauru (Nauru v Australia) 99, 100

Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) 178, 202

Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) 58

Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) 50, 85, 149, 177


Reservations to the Convention on Genocide 73, 75

Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) 168, 170, 172–3

South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) 38, 83, 92

Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia v Malaysia) 87, 89

and state consent 54

Temple of Preah Vihear (Cambodia v Thailand) 159, 168, 174, 175, 176

Territorial Delimitation (Cameroon v Nigeria) 87, 167

Territorial and Maritime Dispute (Nicaragua v Columbia) 87, 89

Tunisia/Libya Continental Shelf 21, 87

Unilateral Declaration of Independence in Respect of Kosovo 46, 48, 49, 103

Western Sahara 46, 49, 103, 135

Whaling in the Antarctic (Australia v Japan) 11, 24, 56, 73, 84, 87, 89, 97, 116, 120, 133–4, 136–7, 143–4, 187, 207–8, 211, 233

International Law Commission (ILC) 14, 22, 25, 62, 84, 114, 182, 183–4, 191, 193, 195

International litigation functions 16–57, 251–2

Applicable law definition 19

Authoritative determination of international law 19–36

Bilateral treaties 17, 20, 24, 25, 28, 36, 47–8, 49, 50, 51, 53
customary international law identification 17, 20, 21–3, 36
and environmental impact assessments 22, 23
environmental impact assessments 56
environmental protection rules 18
impartiality 29, 37
legal contexts of environmental disputes 17–18
legal contexts of environmental disputes, and effects on other areas of law 18
and multilateral environmental agreements (MEAs) 18
and multilateral environmental agreements (MEAs), ad hoc arbitration 23–4
and soft law effects 18, 21, 22, 23, 211
and sustainable development 23, 26, 29–30, 71
and transboundary harm 22–3
treaty interpretation and application 23–8
treaty interpretation and application, judicial decisions, role of 24–7
international litigation functions, dispute settlement function 36–50, 56–7
advisory opinions 46–50
advisory opinions, and lack of consent 47–8
compliance with judicial decisions 44
deterrence role 43
dispute legality requirement 39
enforcement 41–3
existence of a dispute, need for 38, 48–9
international organization assistance 49–50
judicial decision as catalyst for resolution 45
legal clarification issues 42
limits to 44–6
mandates 37
non-compliance mechanisms 43
remedies 43–4
reparation obligations 43–4
and res judicata principle 40
settlement of the facts 39–40
‘win’ consideration 45
international litigation functions, legal development function, factors affecting 34–6
compromised character of international environmental agreements, effects of 35–6
permanent institutions and ad hoc tribunals, distinction between 34–5
personality of judges, effects of 36
substantive law and role of tribunal, relationship between 35, 40
international litigation functions, legal development and law-making 28–34
advisory opinions, relevance of 29–30
golden rule 28
judicial activism issues 30–33
precedential effect 33–4
surrogate law-making and independent law-making, distinction between 31
and transfer of powers 31–2
and will of the parties 31, 135
international litigation functions, political factors affecting judicial proceedings 54–6
and choice of tribunal 55
cost–benefit analysis 54
domestic politics, impact of 55–6
and multilateral environmental agreements (MEAs) 54
state consent 54
international litigation functions, public interest function 50–53
and accessibility and affordability 52
and advisory opinions 53
amicus curiae submission 53
bilateral disputes 51
and international adjudication role 51–2
and multilateral environmental agreements 51
international organization assistance 49–50
see also international litigation functions, dispute settlement function
International Tribunal for the Law of the Sea (ITLOS) 6, 27, 34, 37, 80, 82, 87, 149, 150, 151
advisory opinions 100–101, 102
amicus curiae briefs 91, 93–4, 96–7
‘ARA Libertad’ case (Argentina v Ghana) 153, 154, 168
‘Enrica Lexie’ Incident (Italy v India) 168
Land Reclamation in and Around the Straits of Johor (Malaysia v Singapore) 11, 24, 127–8, 154, 155, 164, 166, 171, 173–4, 177
M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea) 177, 189, 204
Maritime Boundary between Mauritius and Maldives (Mauritius/Maldives) 47
MOX Plant Case (Ireland v United Kingdom) 24, 154, 155–6, 164, 173, 177, 179, 241
Seabed Disputes Chamber 23, 26, 29–31, 48, 67–8, 77, 93, 94, 100, 101–2, 197
Southern Bluefin Tuna cases (New Zealand v Japan/Australia v Japan) 11, 35, 38–9, 40, 45, 54–5, 64, 152, 155, 163, 164, 165, 171–2, 174, 177
Sub-Regional Fisheries Commission (SRFC) 53, 100, 101, 189–90
Swordfish 55
see also UN Convention on the Law of the Sea (UNCLOS)
intervention right by third state 87–90
see also access to international courts and tribunals, contentious disputes
IPCC (Intergovernmental Panel on Climate Change) 121, 145
ITLOS see International Tribunal for the Law of the Sea (ITLOS)
Jennings, R 29, 38, 132
judicial activism issues, international litigation functions 30–33
judicial decisions, and international litigation functions 24–7, 44, 45
judicial dispute settlement and non-compliance procedure, relationship between 213–48
administrative procedures, non-compliance procedures as 215–16, 220
applicable law 225–6
common practices 215
compliance mechanisms 217
composition and procedures of compliance committees 222–4
composition and procedures of compliance committees, and conflicts of interest 222–3
composition and procedures of compliance committees, COP/MOP 222, 224, 226, 229–30, 238, 245
discretion use 219, 220, 221, 240, 241
dispute avoidance and non-compliance 214–15, 234
experts, use of 222, 223
procedure initiation 237
purpose analysis of non-compliance procedures 216–17
purpose analysis of non-compliance procedures, de facto determination of compliance or non-compliance 227, 230
recommendations 227–31
review types 224–6
review types, fact-finding process 224–5
review types, general issues of compliance 226
review types, information assessment 225–6
status of compliance decisions 228–31
status of compliance decisions, recommendation endorsements and COP/MOP 229–30
status of compliance decisions, as recommendations 228–9, 230–31
surveillance obligations 225
technical differences 215–16
see also individual Conventions
judicial dispute settlement and non-compliance procedure, relationship between, purpose of compliance committee 221, 222–4, 226–8
and corrective sanctions 228–9, 239, 245
future compliance concept 228
political adjustments and compromise 227
recommendations, use of 227–8
judicial dispute settlement and non-compliance procedure, relationship between, relationship models 232–47
automatic use of non-compliance procedures before judicial dispute settlement 234–7
comity doctrine 240–42
conflicting decisions and procedure initiation rights 237–42
cooperation possibilities 245–7, 248
cooperation possibilities, implementation of judgments 246–7
differences between 234–5
dispute settlement clause 235–6, 237
evidence and fact-finding 245–6
and future overlaps 233
and identical parties 239–40, 243–4
judicial decision on potential future non-compliance procedure, effects of 237, 244–5
lex specialis and res judicata 234–5
lis pendens and res judicata principles 238–40, 241, 243
parallel relationship 234, 236, 237
recommendation adopted at end of non-compliance procedure 242–4
recommendation adopted at end of non-compliance procedure, judicial review 244
recommendation adopted at end of non-compliance procedure, res judicata principle 242–5, 246
without prejudice clause 233, 235, 236–7
judicial dispute settlement and non-compliance procedure, relationship between, triggers 218–22, 236
and administrative organ 220
de minimis or ill-founded clause 219, 220, 222
members of the public and NGOs 221–2
procedural safeguards 216, 219, 244
self-trigger 219–20
submission requirements 219
thresholds 218–19
judicial procedural innovation opportunities, and scientific evidence 110
judicial procedures and substantial law see dispute resolution issues, judicial procedures and substantial law
Kingsbury, B 213, 226, 231
Klabbers, J 21, 224, 234
Kolb, R 8, 51, 80, 157, 163, 165, 244
Kompetenz-Kompetenz use, dispute resolution issues 6–7
Koskenniemi, M 21, 36, 76, 77–8, 115, 213, 227, 228, 231, 232, 235–6, 242
Kyoto Protocol 217, 222, 224, 230, 234
Lauterpacht, H 32, 33, 34
legal development function see international litigation functions, legal development function, factors affecting
legal standing
access to international courts and tribunals 58
access to international courts and tribunals, contentious disputes 82, 84–6
access to international courts and tribunals, public interest litigation 74, 78 and remedies, recipients 196–7
Leonhardsen, E 162, 177
lex specialis and res judicata,
judicial dispute settlement and non-compliance procedure, relationship between 234–5
lis pendens and res judicata principles, judicial dispute settlement and non-compliance procedure, relationship between 238–40, 241, 243
London Convention 224, 231
Long-Range Transboundary Air Pollution (LRTAP) Convention 219, 220, 221, 227, 230, 232
Lowe, V 16, 23, 28, 37, 51
Mackenzie, R 92, 96, 97, 100 mandates, international litigation functions 37 margin of appreciation prevention and provisional measures of protection 151–2, 166 remedies 185, 187–8 Mbengue, M 19, 108, 109, 119, 131, 134, 217, 218, 234 merits of case, and prevention and provisional measures of protection 150, 152–3, 162, 165–7, 169 Merrills, J 16, 41, 150 Milano, E 227, 228, 229, 230 Mollengarden, Z 98, 100 Montini, M 214, 223, 244 Montreal Protocol 128, 214, 216, 220, 225, 226, 229, 230, 232, 235, 236 moral approach, remedies 192, 193, 206–7 multi-stakeholderism, and contentious disputes 81–2 multilateral environmental agreements (MEAs) dispute resolution issues 9 and international litigation functions 18, 23–4 and international litigation functions, public interest function 51 multilateral environmental treaties enforcement see judicial dispute settlement and non-compliance procedure, relationship between NGOs and access to international courts and tribunals 90, 92, 93, 96–7, 101 judicial dispute settlement and non-compliance procedure, relationship between 221–2 and scientific evidence 119, 120, 130, 146 see also non-state actors; public interest Nollkaemper, A 73, 80, 250 non-aggravation of the dispute, prevention and provisional measures of protection 154–6, 160, 165 non-compliance mechanisms, international litigation functions, dispute settlement function 43 non-compliance procedure and judicial dispute settlement, relationship between see multilateral environmental treaties enforcement, judicial dispute settlement and non-compliance procedure, relationship between non-injured states, remedies, recipients 197–8 non-repetition assurances, remedies 187, 197, 208 non-state actors access to international courts and tribunals, contentious disputes 86–7, 90–97, 104 see also NGOs; public interest North American Free Trade Agreement (NAFTA) 95 Palchetti, P 8, 155, 178 Paparinskis, M 58, 98, 99 parallel relationship, judicial dispute settlement and non-compliance procedure, relationship between 234, 236, 237
Parties, evidence collected by see scientific evidence, environmental disputes involving complex science, evidence collected by parties

Parties, rights of, prevention and provisional measures of protection 154–6

Pauwelyn, J 25, 27, 60–61, 62, 65, 68, 74, 75, 141

Peel, J 20, 31, 41

Permanent Court of Arbitration (PCA) 12, 86, 154

amicus curiae briefs 95

Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India 129–30

Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) 11, 24

Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador 95

Indus Waters Kishenganga Arbitration (Pakistan v India) 11, 24, 110, 128–9, 135, 144, 152, 158, 159–60, 166, 169, 173, 210, 246

Mesa Power Group LLC v Government of Canada 95

South China Sea Arbitration (Philippines v China) 11, 24, 42, 44, 78, 118, 126

Permanent Court of International Justice (PCIJ) 80, 150–51

Chorzów Factory 122, 125, 152, 180, 190–91, 192, 195, 199

Greco-Turkish Agreement 6

Mavrommatis Palestine Concessions (Greece v United Kingdom) 39, 218

River Oder 63, 65

Serbian Loans Issued in France (France v Kingdom of the Serbs, Croats and Slovenes) 39

SS ‘Wimbledon’ 72–3

Status of Eastern Carelia 48

US Diplomatic and Consular Staff in Tehran 152

Wimbledon 87

Permanent institutions and ad hoc tribunals, distinction between 34–5

Personality of judges, effects of, international litigation functions 36

Peter, S 72, 74, 75

Pitea, C 216, 217, 224

Plausibility test, prevention and provisional measures of protection 167–70

Political adjustments and compromise, judicial dispute settlement and non-compliance procedure, relationship between 227

Political factors affecting judicial proceedings see international litigation functions, political factors affecting judicial proceedings

Precautionary principle prevention and provisional measures of protection 153, 157–60, 163–4

Scientific evidence 113–14, 138–9, 140

See also risk and uncertainty

Precedential effect, international litigation functions 33–4

Prehearing conferences suggestion, scientific evidence, environmental disputes involving complex science 121

Prevention and provisional measures of protection 148–79, 253

Ad hoc arbitration 151

Applicable law 176, 180

Balancing exercise test 149–50, 158, 159, 160, 161, 164

Bilateral treaties and disputes 154, 175, 176

Compliance and enforcement 177–8 and contentious cases 153

Erga omnes partes obligations 149, 156

Experts, use of 155, 173–4

Interim injunctions 150
margin of appreciation 151–2, 166
and merits of case 150, 152–3, 162, 165–7, 166, 169
non-aggravation of the dispute 154–6, 160, 165
precautionary measures 153
procedure and status 150–57
proprío motu (court intervention on own initiative) 156–7, 165, 177
provisional measures, importance of 148–50
purposes 153–7
reparation obligations 177–8
rights of the parties 154–6
and risk 158, 163–5, 170
scientific evidence 113
sovereignty and precaution, balance between 157–60
sovereignty and precaution, balance between, ‘proceed at your own risk’ principle 158
status quo, maintenance or restoration 154–5, 165–6
prevention and provisional measures of protection, conditions for granting 161–70
incidental jurisdiction 150, 152, 153, 161–2, 165, 167, 170
plausibility of alleged right 167–70
plausibility of alleged right, concerns over 169
plausibility test 167–70
prima facie jurisdiction 161–3, 168, 169–70
ratione materiae competence 162
threshold of jurisdiction 162–3, 164–5, 169
urgent risk of irreparable harm 163–5
urgent risk of irreparable harm, precautionary approach 163–4
prevention and provisional measures of protection, types of measures 171–7
cooperation between parties, strengthening 173–4, 175
incremental development of measures 176
regime creation 174–7
regime creation, separate established body, use of 175–7
thresholds and gravity of situation 174–5
unilateral acts of the defendant 171–3
unilateral acts of the defendant, ‘guilty parties’, reaction of 172–3
prima facie jurisdiction
prevention and provisional measures of protection 161–3, 168, 169–70
scientific evidence 141, 142, 152
probabilities instead of veracities, scientific evidence 108–10
procedural freedom to procedural fairness, scientific evidence 117–19
procedural obligations, scientific evidence 114–16
procedural safeguards, judicial dispute settlement and non-compliance procedure, relationship between 216, 219, 244
procedure initiation rights
access to international courts and tribunals, contentious disputes 82–7
judicial dispute settlement and non-compliance procedure, relationship between 237–42
proportionality concept, and remedies, retrospective, restitution obligation 200
proprío motu (court intervention on own initiative)
access to international courts and tribunals 80–81, 93
prevention and provisional measures of protection 156–7, 165, 177
prospective remedies 182–3, 207–10
provisional measures and protection see prevention and provisional measures of protection
remedies 206, 208–9
public interest
access to international courts see access to international courts and tribunals, public interest litigation
access to international courts and tribunals, contentious disputes 88–9, 92, 96–7
judicial dispute settlement and non-compliance procedure, relationship between, triggers 221–2
and remedies, recipients 196
see also NGOs; non-state actors
punitive aspect and retribution, remedies 178, 181–2, 191–2
pure environmental harm, and remedies, retrospective, compensation 194, 198, 204–6
purpose analysis of non-compliance procedures, judicial dispute settlement and non-compliance procedure, relationship between 216–17, 227
purpose of compliance committee see judicial dispute settlement and non-compliance procedure, relationship between, purpose of compliance committee
quantification of compensation and follow-up, remedies, retrospective 201–2, 203–6
Ramsar Convention 128, 175–6, 233, 246, 252
rationes materiae competence, prevention and provisional measures of protection 162
Razzaque, J 91, 95
recipients of remedies see remedies, recipients
reciprocal obligations, access to international courts and tribunals 62–3, 65
recommendations, judicial dispute settlement and non-compliance procedure, relationship between 227–31
Redgwell, C 9, 18
regime creation, prevention and provisional measures of protection 174–7
relationship models see judicial dispute settlement and non-compliance procedure, relationship between, relationship models
remedies 180–212
compensation and equity principle 188–9, 193
compensatory justice principle 190–91, 192
and compliance 209–10
deterrence effect 181, 191, 199
discretion use 181, 185–9, 201
environmental impact assessments 200
experts, use of 194, 203
and future compliance 207
and international law obligations 184, 187
involvement of the parties 186–7
margin of appreciation 185, 187–8
moral approach 192, 193, 206–7
non-repetition assurances 187, 197, 208
prospective 182–3, 207–10
prospective, assurances or guarantees of non-repetition 187, 197, 208
prospective, cessation obligation 196, 197, 207–8, 209
provisional measures 206, 208–9
punitive aspect and retribution 191–2
purposes 190–98
reparation obligations 181–2, 183, 186–7, 188, 189–99, 201–2, 204, 205–6, 208–9
specific performance 183, 209, 210–11
specific performance, and climate change 211
state responsibility and judicial remedies 182–5
and status quo ante 195
substance of the remedy 187–8
and substantive obligations 189–90, 196, 200, 206–7
tribunal discretion 185–9
remedies, harm concept, pivotal notion
193–5
ecological damage 194, 195, 196, 198, 205–6
environmental harm 194–5, 198
sovereignty disputes 194
transboundary harm 184, 191, 193, 195
remedies, recipients 195–8
and erga omnes (partes) obligations 196, 197, 198
and legal standing 196–7
non-injured states 197–8
and public interest litigation 196
remedies, retrospective 182, 183, 199–207
moral damages and satisfaction 206–7
remedies, retrospective, compensation 201–6
causation between wrongful act and damages 202–3
causation between wrongful act and damages, and evidence 203, 205
and liability and financial responsibility 202
and pure environmental harm 194, 198, 204–6
quantification and follow-up 201–2, 203–6
special tariff systems, suggestion of 205–6
remedies, retrospective, restitution obligation 186, 193, 199–201
inappropriate 199–200
and proportionality concept 200
and reversible damage 199, 200
and status quo 182–3, 195, 199–200, 208
reparation obligations
access to international courts and tribunals 62, 99
international litigation functions, dispute settlement function 43–4
prevention and provisional measures of protection 177–8
remedies 181–2, 183, 186–7, 188, 189–99, 201–2, 204, 205–6, 208–9
scientific evidence 123, 125, 140, 141
res judicata principle
international litigation functions, dispute settlement function 40
judicial dispute settlement and non-compliance procedure, relationship between 234–5, 238–40, 241, 242–5, 246
restitution obligation, remedies see remedies, retrospective, restitution obligation
retribution and punitive aspect, remedies 178, 181–2, 191–2
retrospective remedies see remedies, retrospective
reversible damage, and remedies, retrospective 199, 200
review standard, scientific evidence, environmental disputes involving complex science 142–5
rights of the parties, prevention and provisional measures of protection 154–6
Rio Declaration 1, 20, 21, 68, 113, 191
risk and uncertainty
and prevention and provisional measures of protection 158, 163–5, 170
scientific evidence 108–10, 112–14
scientific evidence, environmental disputes involving complex science, standard of proof 139–41
see also precautionary principle
Romanin Jacur, F 130, 219, 235
Romano, C 3, 5, 6, 20, 37, 45, 46, 104
Rosenne, S 27, 134, 136, 152, 153, 155, 162, 163
Rotterdam Convention 219, 231
Rudall, J 201, 203, 204, 205, 206
sanctions, and judicial dispute settlement and non-compliance procedure, relationship between 227–8, 239, 245
Sands, P 3, 4, 9, 10, 11, 20, 31, 35–6, 41, 50, 53, 102, 110, 237, 238, 239, 243
Schreuer, C 39, 46
scientific evidence 10, 106–47, 252
and applicable legal standards 114, 139
and discretion 122, 123, 130
environmental impact assessments 114–15, 116
experts, use of 109, 110, 119–20, 121
international adjudication challenges 107–10
and judicial procedural innovation opportunities 110
and NGOs 119, 120, 130, 146
precautionary principle 113–14, 138–9, 140
prima facie jurisdiction 141, 142, 152
probabilities instead of veracities 108–10, 112–14
probabilities instead of veracities, cumulative effort process 113
probabilities instead of veracities, preventive measures, use of 113
procedural obligations 114–16
procedural obligations, versus substantive obligations 115–16, 136
regulatory scientific institutions 112
reparation obligations 123, 125, 140, 141
scientific organizations and scientific advice 111–12
scientific progress, reliance on 111–12, 115
and transboundary harm 112, 114, 128, 140
scientific evidence, environmental disputes involving complex science 116–45
delegation of powers from legal to scientific field (experts) 119–20, 121
and due process 117–19, 126, 129–30, 133
evidence assessment 132–5
evidence assessment, assessors’ appointment 135
evidence submitted by third states, inter-governmental organizations, and NGOs 130–31
evidence submitted by third states, inter-governmental organizations, and NGOs, and amicus curiae 130
evidence types 119–31
evidence, weighing 131–2
experts’ integrity concerns 121
fact-finding function of a tribunal 118–19
impartiality of international courts and tribunals 118, 129–30, 146
procedural freedom to procedural fairness 117–19, 136
standard of review 142–5
standard of review, best available scientific knowledge standard 144–5
standard of review, and objective reasonableness 143–4
scientific evidence, environmental disputes involving complex science, burden of proof 114, 135–9
and compliance theory 136–7
general rule 137–9, 142
precautionary principle 138–9
scientific evidence, environmental disputes involving complex science, evidence collected by courts 122–30
appointment of experts and enquiries 122–8, 132–5, 142, 144, 145, 146
appointment of experts and enquiries, and field work (site visits) 126–7, 128–30
ghost experts 132–3
scientific evidence, environmental disputes involving complex science, evidence collected by parties 120–22
and cross-examination 120–21
information asymmetry concerns 121–2
prehearing conferences suggestion 121
scientific evidence, environmental disputes involving complex science, standard of proof 139–42 and harm risk 140 precautionary principle issues 140 and scientific uncertainty 139–41 thresholds 140–42
Scott, S 45, 54, 56
self-determination right, and public interest litigation 75–6
self-trigger, judicial dispute settlement and non-compliance procedure 219–20
settlement of the facts, international litigation functions 39–40
Shahabuddeen, M 20, 33
Shany, Y 233, 237, 238, 240, 241, 248
shared resources, access to international courts see access to international courts and tribunals, shared resources
Shaw, M 180, 184, 204
Shelton, D 19, 44, 71, 92, 181, 190, 191, 200
Simma, B 70, 79
site visits (field work), scientific evidence 126–7, 128–30
soft law effects, and international litigation functions 18, 21, 22, 23, 211
solidarity measures, access to international courts and tribunals, public interest litigation 76–8
sovereignty access to international courts and tribunals 60, 66, 70–71, 88 prevention and provisional measures of protection 157–60 remedies, harm concept, pivotal notion 194
specific performance, remedies 183, 209, 210–11
standard of proof see scientific evidence, environmental disputes involving complex science, standard of proof
standing see legal standing
state responsibility and access to international courts and tribunals, bilateral obligations 61, 62–3 and access to international courts and tribunals, contentious disputes 83
legal standing rules 82, 84–6
and remedies 182–5
status of compliance decisions, judicial dispute settlement and non-compliance procedure, relationship between 228–31
status quo prevention and provisional measures of protection 154–5, 165–6
and remedies, retrospective, restitution obligation 182–3, 195, 199–200, 208
Stephens, T 9, 10, 20, 35, 41, 45, 56, 78, 140, 164, 174
Stockholm Convention 1–2, 191, 231
substance of the remedy 187–8
substantive obligations and judicial procedures see dispute resolution issues, judicial procedures and substantial law and remedies 189–90, 196, 200, 206–7
and role of tribunal, relationship between 35, 40 scientific evidence 115–16, 136
Sulyok, K 107, 108, 110, 112, 115, 142
surrogate law-making and independent law-making, distinction between 31
surveillance obligations, judicial dispute settlement and non-compliance procedure, relationship between 225
sustainable development, and international litigation functions 23, 26, 29–30, 71
Tams, C 60, 71, 74, 76, 78, 79, 82–3, 84, 85, 86, 127
Tanzi, A 216, 217
tariffs, special tariff systems, suggestion of, and remedies, retrospective, compensation 205–6
Thin, S 50, 79
third parties, indispensable, and barriers to entry 97–100
see also access to international courts and tribunals
third states
access to international courts and tribunals, contentious disputes 87–90, 97, 99–100
scientific evidence, environmental disputes involving complex science 130–31
Thirlway, H 21, 30
thresholds
judicial dispute settlement and non-compliance procedure, relationship between, triggers 218–19
prevention and provisional measures of protection, conditions for granting 162–3, 164–5, 169
prevention and provisional measures of protection, types of measures 174–5
scientific evidence, environmental disputes involving complex science, standard of proof 140–42
transboundary harm
access to international courts and tribunals, bilateral obligations 61–3, 64–5, 67, 69, 104
and international litigation functions 22–3
Long-Range Transboundary Air Pollution (LRTAP) Convention 219, 220, 221, 227, 230, 232
remedies, harm concept, pivotal notion 184, 191, 193, 195, 202
and scientific evidence 112, 114, 128, 140
see also harm concept
transfer of powers, and international litigation functions 31–2
treaty interpretation and application, international litigation functions 23–8
Treves, T 11, 24, 43, 62, 109, 234, 239, 243
triggers see judicial dispute settlement and non-compliance procedure, relationship between, triggers
UN Convention on Climate Change (UNFCCC) 2, 27, 51, 68–9, 71, 102, 234
see also International Tribunal for the Law of the Sea (ITLOS)
UN Environmental Programme (UNEP) 1–2, 22, 66, 96, 97, 215
UN Watercourses Convention 65
uncertainty see risk and uncertainty
unilateral acts of the defendant, prevention and provisional measures of protection 171–3
Venzke, I 33, 34, 52
Vienna Convention on the Law of Treaties (VCLT) 26, 27, 235–6
Von Bogdandy, P 33, 34, 52
Von Moltke, K 81–2, 111, 113
Water and Health Protocol 221, 222
will of the parties, and international litigation functions 31, 135
‘win’ consideration, international litigation functions 45
Wittich, S 19, 37–8, 51
Wolfrum, R 29, 50, 72, 87, 88, 103, 117, 229
World Wide Fund for Nature (WWF) 53, 94
WTO Dispute Settlement 6, 44, 82, 87
amicus curiae briefs 94–5
Canada - Civilian Aircraft 130
Certain Measures affecting the Renewable Energy Generation Sector 4
EC – Asbestos 91, 95
EC – Hormones 123, 141–2, 143
EC – Sardines 90
<table>
<thead>
<tr>
<th>Japan – Agricultural Products II</th>
<th>122, 123–4, 134</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan – Taxes on Alcoholic Beverages</td>
<td>33</td>
</tr>
<tr>
<td>US – Continued Suspension of Obligations in EU - Hormones</td>
<td>143</td>
</tr>
<tr>
<td>US – Shrimp</td>
<td>51, 91, 94, 130</td>
</tr>
<tr>
<td>US – Steel Products</td>
<td>91, 94</td>
</tr>
<tr>
<td>Zamir, N</td>
<td>98, 100</td>
</tr>
</tbody>
</table>