

# Learning requirements

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- Knowledge of the relevant practice of international courts and tribunals in cases that deal with environmental disputes and thorough knowledge of the sources (custom, treaties and general principles) of IEL.

# The context of courts

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- Main court functions
  - Dispute settlement
  - Evolution and implementation of rules
  - Ensure compliance, contribute to enforcement
- Implementation
  - Adoption of domestic measures
  - Ensuring effectiveness of domestic measures
  - Fulfilling procedural requirements of international institutions
- Compliance
  - Compliance vs. acceptance of obligations
  - Compliance with international rules vs. compliance with domestic rules – links between domestic and international rules
- Enforcement
  - The taking of measures to ensure compliance

# Dispute settlement

- Multiple methods for settlement of disputes
  - Art. 33 of the UN Charter: Negotiation, consultation, good offices, mediation, enquiry, conciliation, arbitration, judicial settlement
  - Which results are "legally binding"?
  - Courts vs. compliance mechanisms
- Who can bring environmental disputes to international courts?
- Why bring environmental disputes to courts?
  - The issue of reciprocity
  - Erga omnes
- Treaty-based access to courts and arbitration
  - Multilateral treaties (ICJ, ITLOS, arbitration)
  - Bilateral treaties (ICJ or arbitration)
  - Ad hoc

# Env'l disputes in other courts

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- Courts that are likely to deal with such cases
  - WTO and regional trade/economic integration courts
  - Human rights courts and treaty bodies
  - International criminal courts
  - Investment treaty arbitration
  - Arbitration and claims commissions
- Why would this be a challenge?
  - Why would countries bring such cases?
  - How should courts deal with such cases?

# Implementation and compliance

- Treaty-based courts not available, except for ITLOS
  - ICJ or arbitration? Not used in practice under multilateral treaties with the exception of the Whaling Case
  - Significant use under bilateral treaties – resolve issues or direct states to find solutions?
- Other means of securing evolution and implementation
  - Framework agreements and negotiations
  - Soft law
- Implementation mechanisms
  - Expert committees under multilateral treaties: examples UNFCCC and CBD: Subsidiary Body for Implementation
  - Review country reports, draft recommendatory documents

# Compliance mechanisms

- The struggle to establish such mechanisms
  - Facilitative vs. confrontational
  - The Stockholm POPs Convention Art. 17: “The Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance.”
  - The Kyoto Protocol and the Paris Agreement
  - Most successful at the regional level – Europe
- Degree of independence
  - Composition and the role of the secretariat
  - Subsequent dependence of COPs
- The operation of compliance mechanisms
  - The Aarhus Convention

# Paris Agreement

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Art. 15: “ A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.

The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties.

The committee shall operate under the modalities and procedures adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its first session ...”

# Customary international law

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- The respective roles of the ICJ and the ILC
- Examples in the field of international environmental law:
  - State responsibility and liability – Gabčíkovo-Nagymaros case
  - Procedural duties (environmental impact assessment, consultations, negotiations) – Pulp Mills case
  - Environmental principles (prevention, precaution, no harm) – Nuclear Weapons case
- The interaction between customary international law and treaties



# A "World Environment Court"?

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- Do we need alternatives to the ICJ and the Permanent Court of Arbitration?
- Can we construct an environmental court based on the current fragmented regime?
- Could implementation and compliance mechanisms be the «courts» of international environmental law?

# Fauchald vs. Norway - background

Section 2 of the Nature Diversity Act: “On the continental shelf and in ... the economic zone of Norway, sections 1, 3 to 5, 7 to 10, 14 to 16, 57 and 58 apply to the extent they are appropriate.”

## ■ Provisions excluded:

- General duty of care (S. 6)
- User pays principle (S.11)
- Environmentally sound techniques and methods of operation (S.12)
- Priority species (S. 23-24)
- Alien species (Ch. IV)
- Marine protected areas (S. 39)
- Selected habitat types (Ch. VI)
- Genetic materials in public collections or from other countries (S. 59-60)

# Issues

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- The Ministry admitted that the request should have been dealt with under the Environmental Information Act and reconsidered the request – sufficient remedy?
- Is the government allowed to keep legal assessments confidential as «internal communications»?
- Would it damage «Norwegian interests» if such assessments were to be made public?
- Is the Parliamentary Ombudsman an effective remedy?
- The time used to reconsider the case and the lack of follow-up by the Ombudsman (2 years and 5 months)

# Aarhus Compliance Committee

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## ■ Art. 15:

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

## ■ MoP Decision I/7 of 2002

# Characteristics of the Committee

- Eight members who serve in their personal capacity (they shall make a solemn declaration that they will perform their functions impartially and conscientiously)
- Candidates can be nominated by environmental NGOs
- Elected by consensus or secret ballot
- Cases in the form of 1) submissions by other parties, 2) referrals by the Secretariat, and 3) communications from the public
- Tasks in relation to communications from the public:
  - consider the communication
  - examine compliance issues
  - make recommendations if and as appropriate

# Procedure

- Admissibility, reasons for rejection:
  - Anonymous;
  - An abuse of the right to make such communications;
  - Manifestly unreasonable;
  - Incompatible with the provisions of the decision or the Convention
- Domestic remedies: take into account unless the application is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress
- Written statements from the state clarifying the matter and describing any response that it may have made
- May gather information in the territory of a party (provided consent) and hold hearings

# Findings

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- Draft findings, measures and recommendations are to be submitted to the state and the person who submitted the case, comments are to be taken into account
- Final findings to be submitted to the MoP
- Powers of the MoP:
  - Request a strategy from the country on how to achieve compliance
  - Specific recommendations
  - Declaration of non-compliance
  - Cautions
  - Suspend the country's rights and privileges under the Convention

# Some facts

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- Four meetings of the Compliance Committee per year
- Submissions: 64% NGOs; 33% individuals; 3% anonymous; none from the Secretariat or other countries
- 105 cases since October 2003
  - 70% found admissible
  - Findings adopted in 47 cases, non-compliance found in 28
  - 28 decisions on non-compliance by MoP
  - Does also review EU's compliance
  - The MoP follows the Compliance Committee's recommendations, defines measures to be taken within specific deadlines, and keeps the case open until compliance has been achieved