THE CASE FOR AN INTERNATIONAL COURT FOR THE ENVIRONMENT

*Stephen Hockman QC**

The Nature of the Problem

In his foreword to the *Principles of International Environmental Law* by Philippe Sands, Sir Robert Jennings QC, visiting Whewell Professor of International Law at the University of Cambridge, and former president of the International Court of Justice (ICJ), wrote: "It is a trite observation that environmental problems, although they closely affect municipal laws, are essentially international; and that the main structure of control can therefore be no other than that of international law."[1]

Jennings wrote those words in 1995, many years before the potential effects of climate change had transformed public perceptions of this topic.

And yet, even today, after all the thousands of publications written on the subject of climate change and its causes and consequences, many may think that we are hardly any further forward in establishing, in Jennings' words, a "structure of control."[2]

*Stephen Hockman QC is a Deputy High Court Judge and a Master of the Bench of the Middle Temple. The focus of his practice is regulatory, environmental and health and safety law. He is also the chairman of the International Court for the Environment Coalition.

1. PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 187 (Cambridge University Press 2d ed. 2003)(1995).
2. *Id.*

Indeed, Jennings' observation that the problem is mainly to be solved by legal means might now seem, not so much "trite,"[3] as unorthodox, bold, or even eccentric.

Of course, no one doubts the scale of the problem. When Jennings wrote in 1995, the problems were perceived mostly in terms of major cases of environmental pollution that were regarded as having international implications. Perhaps the most infamous case of environmental liability on the part of a transnational corporation occurred on December 2, 1983, in Bhopal, India, when Union Carbide, a multinational company incorporated in the United States, released forty tons of toxic methyl isocyanate from its plant, killing 3,500 people and affecting over 200,000 others.[4] Proceedings brought in the United States courts having failed, the injured parties settled the ensuing litigation in the Indian courts for some $470 million (an average of about $15,000 per deceased person).[5]

Scroll forward to 2010, and the potential effects of climate change have of course been given an altogether new and critical focus by a number of recent developments, including reports by the Intergovernmental Panel on Climate Change and by Nicholas Stern on behalf of the United Kingdom Government.[6] Few now deny the urgency of a solution to these problems, though even fewer claim to have in hand a serious and comprehensive set of solutions. Statements emanating from international summits only confirm the diplomatic efforts involved in attaining linguistic (not to mention policy) consensus.

In these circumstances, it seems at least timely (a) to review those international legal instruments which already exist to facilitate a solution to the problem, and (b) to suggest that the creation of a new instrument deserves consideration.

I do entirely acknowledge that to many distinguished international environmental lawyers this idea is still heterodox. Indeed, I understand that Jennings himself may have disclaimed

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3. *Id.*

4. Mark Magnier and Anshul Rana, *India Convicts 7 In 1984 Bhopal Gas Disaster*, L.A. TIMES, June 7, 2010, *available at* http://articles.latimes.com/2010/jun/07/world/la-fg-bhopal-verdict-20100608/2.

5. *Id.*

6. *Global Emissions Only 'Few Billion Tonnes' Short Of Targets, Says Stern*, THE GUARDIAN, Dec. 3, 2009, *available at* http://www.guardian.co.uk/environment/2009/dec/03/nicholas-stern-copenhagen-pledges.

support for the idea. On the other hand, Jennings himself in the foreword which I have already mentioned pointed out that what is urgently needed today is a more general realization in the contemporary global situation of the need to create a true international society. And if the inspiration of the former president of the (ICJ) is insufficient, let me also cite the views of our last and perhaps most distinguished Senior Law Lord, Lord Bingham of Cornhill, who in his recent book, *The Rule of Law*, lamented the fact that the compulsory jurisdiction of the ICJ is accepted by only a minority of member states of the United Nations (U.N.), and by only one of the five permanent members of the Security Council (namely the United Kingdom). [7] Lord Bingham states: "[I]f the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order."[8]

Dispute Resolution Systems

I now turn to review some of the existing provisions and mechanisms for dispute resolution. The oldest legal institution dedicated to resolving international disputes is the Permanent Court of Arbitration (PCA), established at The Hague by inter-governmental agreement in 1899.[9] The PCA has jurisdiction over disputes when at least one party is a state (or an organization of states) and when both parties to the dispute expressly agree to submit their dispute for resolution. It has been suggested in the past that the PCA might be an interim forum for resolving international environmental disputes.[10] In 2001, the PCA adopted some "optional rules" for arbitration of disputes relating to the environment and/or natural resources. However, as already indicated, at least one party to any dispute must be a state, the court has no compulsory jurisdiction and, importantly, its decisions are not, as I understand, made available for public

7. THOMAS BINGHAM, THE RULE OF LAW 128-129 (Penguin Books 2010).
8. *Id.*
9. Permanent Court of Arbitration: About Us, http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Nov. 22, 2010).
10. *Id.*

inspection.[11]

Turning to the ICJ, this was established (as a successor to the earlier Permanent Court of International Justice) in 1945.[12] Jurisdiction depends on whether two or more states have consented to its jurisdiction. While the ICJ may accept cases that are environmentally related, only states have standing.[13] The ICJ established within its structure in 1993 a chamber specifically to deal with environmental matters.[14] However, no state has ever submitted a dispute to that environmental chamber and the chamber has now been disbanded.[15] On rare occasions, the ICJ has heard a case in an environmental context, including most recently the case of the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, in which Argentina brought proceedings against Uruguay based upon the allegedly unlawful construction of two pulp mills on the river Uruguay which are said to jeopardize conservation of the river environment.[16] The case has been fully argued (with British counsel on both sides) and a decision is awaited.

In 1992, representatives from 176 states and several thousand non-governmental organizations (NGOs) met in Brazil for the United Nations Conference on Environment and Development.[17] At this Conference, often referred to as the Earth Summit, there was adopted the Rio Declaration on Environment and Development, Principle 10 of which provides that: "States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be available."[18]

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11. *Id.*
12. U.N. Charter art. 92-96.
13. U.N. Charter art. 93.
14. Press Release, ICJ Composition of the Chamber of Enviro Matters (Mar. 4, 2002) (*available at* http://www.icj-cij.org/presscom/index.php?pr=106&p1=6&p2=1&search=%22%22Composition+of+the+Chamber+for+Environmental+Matters%22%22).
15. *Id.*
16. ICJ, SUMMARIES OF JUDGMENTS: *CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY* (*ARGENTINA V. URUGUAY*) (April 20, 2010), *available at* http://untreaty.un.org/cod/ICJsummaries/documents/english/177_e.pdf.
17. U.N. Conference on the Environment and Development 1992, http://www.un.org/geninfo/bp/enviro.html (last visited Nov. 20, 2010).
18. U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Rio Declaration on Environment and Development*, A/CONF.151/26, *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

The Rio Declaration of 1992 (and accompanying Framework Convention on Climate Change) famously led to the Kyoto Protocol signed in Japan on December 11, 1997. This protocol, for the first time, contained international obligations requiring countries to reduce their greenhouse gas emissions below specified levels.[19] It had been agreed that the Kyoto Protocol would only come into force when countries emitting 55% of the world's carbon dioxide had proceeded to ratification. The 55% trigger was finally met in February 2005, after ratification by Russia. The protocol was ratified by Australia in December 2007, leaving the United States of America as the only developed nation not to have ratified. However, constraints upon enforcement remain, in the view of many, a significant weakness.

Another important method of dispute resolution is international arbitration. An environmental treaty can provide for the submission of disputes to arbitration by mutual consent of the relevant parties, and cases like the *Trail Smelter* case in 1935 reflect the historical importance of arbitration in inter-state cases in the development of international environmental law.[20] Also relevant is the International Tribunal for the Law of Sea (ITLOS) regime.

At the European level, the European Union has, for many years, legislated on environmental matters; compliance with European environmental law is regulated by the European Commission, with disputes being referable to the European Court of Justice in Luxembourg.[21] Within the European Union, there was established from January 2005 an emissions trading scheme, based on the allocation and trade of carbon allowances throughout the Union. [22] Significantly too, in 1998, a number of states, principally European, entered into the so-called "Aarhus Convention on Information, Public Participation in Decision-making and Access to Justice in Environmental Matters," ratified by the UK in February 2005.[23]

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19. Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Nov. 22, 2010).

20. Trail Smelter Case Parties United States of America and Canada, *Convention of Ottawa*, Apr. 15, 1935, *available at* http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

21. Implementation of Community Environmental Legislation, http://ec.eur-opa.eu/environment/legal/implementation_en.htm (last visited Nov. 22, 2010).

22. Emission Trading System, http://ec.europa.eu/environment/climat/emission/index_en.htm (last visited Nov. 22, 2010).

23. *See* Introducing the Aarhus Convention, http://www.unece.org/env/pp/ (last visited Nov. 22, 2010).

Recent studies (including, for instance, a report by a working group under the chairmanship of Jere Sullivan) suggest that a number of member states within the European Union may not be fully in compliance with Aarhus' requirements concerning access to justice. The Aarhus Compliance Committee has recently heard just such a complaint against the UK.[24] Moreover, the Aarhus Convention of course only applies to its signatory states. There is no global equivalent.

An important dispute resolution mechanism not directly relating to the environment arises under the procedures of the World Trade Organization (WTO), created by an inter-governmental conference in 1994 for the purpose of furthering free trade and facilitating implementation and operation of international trading agreements. Under these arrangements, difficult questions have arisen as to whether the WTO can regulate issues that do not themselves involve trade, but which have a direct impact on conditions of trade, for example, the establishment of health, safety or environmental standards for goods or agricultural produce traded internationally. As the authors point out in *International Law and the Environment*, in these areas, other international bodies with primary responsibility for international regulation already exist, and there are no hard and fast jurisdictional boundaries between these organizations and the WTO.[25] It is therefore possible, they say, to advance policy arguments both for and against the WTO taking on a more expansive role in regard to the regulation of such matters.[26] As the authors state, it might well make sense to link negotiations on trade issues with setting standards for reducing CO_2 emissions and promoting energy efficiency, since it is far from obvious why a country which subsidizes pollution by failing to take action on climate change should reap the benefits of free trade.[27] In a fascinating lecture at the Spring 2009 Commonwealth Law Conference in Hong Kong, Professor Gillian Triggs of the University of Sydney showed how the internal WTO dispute resolution mechanism, including its appellate body based in

24. Press Release, U.N. Econ. Comm'n for Europe, The Aarhus Convention's Compliance Committee receives 50th Communication (June 22, 2010) (*available at* http://www.unece.org/press/pr2010/10env_p19e.htm).

25. PATRICIA BIRNIE, ALLAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 79 (Oxford University Press 3d ed. 2009).

26. *Id.*

27. *Id.*

Geneva, grapples with these issues. There is, however, no provision for panels adjudicating environmental cases to have specific environmental expertise, although there is a requirement that panels adjudicating financial matters should have the necessary financial services expertise.

Institutional Reform

There is no doubt that the notion of international reform and restructuring is now beginning to gather momentum. Even before the recent Copenhagen Summit held under the United Nations Framework Convention on Climate Change (UNFCCC),[28] German Chancellor Angela Merkel, and French President Nicolas Sarkozy, in a letter to the U.N. secretary general, called for an overhaul of environmental governance, and asked for the Copenhagen climate talks to further the creation of a World Environmental Organization (WEO). More recently, in April 2010, ministers and officials from more than 135 nations converged on the Indonesian island of Bali for the United Nations Environment Program (UNEP) annual meeting. UNEP was established by the U.N. General Assembly in 1972, with headquarters in Nairobi, in order to enhance cooperation in environmental matters. Its Executive Director, Achim Steiner, has stated that environmental governance reform was a key part of the discussions at this annual meeting and that governments raised the possibility of a WEO. He said that a high level ministerial group had been established to continue the process with greater focus and urgency and that "the status quo. . . is no longer an option."[29] This ministerial group is chaired by representatives from Kenya and Italy.[30] The group's discussions were reflected in a co-chair's summary entitled: "Belgrade Process: Moving Forward with Developing a set of Options on International Environmental

28. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf.

29. Sunanda Creagh, *UN Meeting Moots WTO-style Environment Agency*, REUTERS, Feb. 26, 2010, *available at* http://uk.reuters.com/article/idUKJAK99428.

30. Governing Council of the U.N. Env't Programme, International environmental governance: outcome of the work of the consultative group of ministers or high-level representatives, U.N.E.P./GCSS.XI/4 (Dec. 2, 2009), *available at* www.unep.org/gc/gcss-x/download.asp?ID=1120.

Governance." [31]

As Philippe Hugon has said in *After Copenhagen: An International Environmental Agency Needed*, a WEO might unite four parties in its drive to advance the environmental cause: scientists, entrepreneurs, governments, and environmental organizations.[32] The scientific community needs a forum where it can voice its concerns and recommendations. Participation by business enterprises is equally important since they have to put into practice the recommendations made by the scientists. A third party at the conference table would obviously consist of the respective governments which have to put in place the requisite legislative and tax-related measures to protect the environment. Finally, a WEO would also do well to integrate existing environmental organizations, which have done much to promote environmentally-conscious thinking worldwide.

Those of us who support the case for an International Court for the Environment (ICE) do not in any way exclude the notion that an ICE could sit alongside or be part of a WEO. Mr. Steiner said that a WEO could be modeled on the WTO which, as already mentioned, has its own dispute resolution mechanisms.[33] The same point was made some months ago by former Euro-Commissioner Lord (Leon) Brittan**.** A WEO might be granted jurisdiction to refer cases to an ICE for consideration and investigation as a forum for resolution/enforcement mechanism for the WEO.

The topic of international governance arrangements in the environmental and sustainable development fields seems likely to feature strongly on the agenda for the forthcoming conference in 2012 "Rio +20" at which I hope the ICE coalition will be represented.

A New Proposal

In these circumstances, it may be thought that the establishment of ICE is a valuable goal that would add to the body of jurisprudence

31. Co-chair's Summary of the first meeting of the Consultative Group of Ministers or High-Level Representatives on International Environmental Governance, http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=7RzudGTFKRI%3D&tabid=341&language=en-US (last visited Nov. 6, 2010).

32. Philippe Hugon, *The Need for an International Environmental Agency*, IRIS, Feb. 2010, *available at* http://www.atlantic-community.org/index/items/view/The_Need_for_an_International_Environmental_Agency.

33. Sunanda Creagh, *UN Meeting Moots WTO-style Environment Agency*, REUTERS, Feb. 26, 2010, *available at* http://uk.reuters.com/article/idUKJAK99428.

in international environmental law and provide a forum both for states and for non-state entities. Ideally, as explained in more detail below, the arrangements for such a court would include (i) an international convention on the right to a healthy environment, with broad coverage; (ii) direct access by NGOs and private parties as well as states; (iii) transparency in proceedings; (iv) a scientific body to assess technical issues; and (v) a mechanism (perhaps to be developed by the court itself) to avoid forum shopping.

Let me acknowledge that this is not a wholly new idea. Such a proposal was mooted as long ago as 1999 at a conference in Washington, D.C., sponsored by a foundation which had been set up to investigate the establishment of an international court for the environment.[34] The proposals then considered defined the functions of the court as including:

> (i) adjudicating significant environmental disputes involving the responsibility of members of the international community;
> (ii) adjudicating disputes between private and public parties with an appreciable magnitude (at the discretion of the president of the court);
> (iii) ordering emergency, injunctive and preventative measures as necessary;
> (iv) mediating and arbitrating environmental disputes;
> (v) instituting investigations, where necessary, to address environmental problems of international significance.

A similar proposal has been under consideration by a foundation based in Rome.[35]

Moreover, it may be thought that the potential benefits of an international court for the environment, particularly for the global business community, would include:

> (i) a centralized system accessible to a range of actors;
> (ii) the enhancement of the body of law regarding international environmental issues;
> (iii)consistency in judicial resolution of international

34. George Washington Univ. & Int'l Court of the Env't Found., *"Is There a Need for a Body to Resolve International Environmental Disputes?,"* Washington, D.C., Apr. 15-17, 1999 (supported by the U.S. EPA).

35. *See generally* International Court of the Environment Foundation, http://www.icef-court.org/base.asp?co_id=15 (last visited Nov. 22, 2010).

environmental disputes;
(iv) increased focus on preventative measures;
(v) global environmental standards of care; and perhaps also
(vi) facilitation and enforcement of international environmental treaties.

The establishment of such a court might be thought particularly appropriate at the present time, just as the public generally is becoming so much more aware of environmental problems and of the culpability of those who cause them. As Michael Mason has said, "[I]t is the intersection of individual rights and responsibilities with inter-state obligations that offers concrete possibilities for citizen participation in global decision-making."[36]

Such a court could also influence the world business community to develop risk management programs and improve present practices which would produce a corresponding reduction in the risk of environmental catastrophe.

As to the feasibility of any such proposal, I will say more in a moment, but an encouraging precedent is surely the establishment, after sustained pressure by NGOs and others, of the International Criminal Court, different though that is from the notion of an ICE as we have been developing it to date.

36. Michael Mason, *Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law*, 12 GLOBAL GOVERNANCE 283 (2006).

Possible Objections

I would like next to discuss some of the objections to this proposal which have been raised in the course of this discussion reflecting the fact that "there is yet no international environmental court, and none is likely to emerge in the foreseeable future."[37] I would classify these objections under three headings. First, what law would be applied by such a body? Second, why is it necessary for there to be a new body when existing juridical or dispute resolution institutions already exist to undertake the role envisaged for an ICE? Thirdly, what would be the point of establishing a new international judicial body such as an ICE if it was unable to enforce its decisions?

As to the first question, my tentative submission would be that international law is already sufficiently developed to enable the court itself to decide upon the appropriate law to apply to a dispute. Clearly, if the dispute arises in an area to which a specific bilateral or multilateral treaty relates, then the terms of that treaty will be influential or decisive, but on other issues one might expect, and indeed hope, that the court itself would develop the law. I refer again to the approach to the future of international relations advocated by Sir Robert Jennings and by Lord Bingham, and venture to suggest that the objectives that they have identified are too important to be left solely to the grindingly slow process of inter-state discussion. As to the second issue, I do not in any way rule out the idea that one or more of the existing institutions grappling with some of these problems might enlarge its role. Indeed, as I have indicated, the WTO appellate body has moved in this direction. But it seems doubtful to me that any individual existing institution will be able to assume a role of the kind which we envisage for an ICE. Appropriately and understandably, an international institution such as the ICJ, with an established and hugely distinguished reputation, is content to rest upon its established jurisdictional limits and does not feel it necessary or appropriate to argue for or even consider a possible expansion of those limits.

As to the third issue, there is an interesting answer to this objection in the textbook which I used in Cambridge in 1966, called *An Introduction to International Law*, by J. G. Starke:

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37. SANDS, *supra* note 1, at 214.

> Assuming however that it be a fact that international law suffers from the complete absence of organised external force, would such circumstance necessarily derogate from its legal character? In this connection, there is a helpful comparison to be made between international law and the canon law, the law of the Catholic Church. The comparison is the more striking in the early history of the law of nations when the binding force of both systems was founded to some extent upon the concept of the "law of nature." The canon law is, like international law, unsupported by organised external force, although there are certain punishments for breach of its rules, for example, excommunication and the refusal of sacraments. But generally the canon law is obeyed because as a practical matter the Catholic society is agreeable to abide by its rules. This indicates that international law is not exceptional in its lack of organised external force. . .In other words the problem of the binding force of international law ultimately resolves itself into a problem no different from that of the obligatory character of law in general.[38]

The Early Stage ICE

I now turn to consider how one might move toward the establishment of an ICE. I acknowledge that establishing a court at the international level will be a difficult task which will almost certainly require an international treaty. To get to that stage will also likely require a campaign over a number of years. To that end, there has been established the ICE Coalition, a company limited by guarantee, to which many enthusiasts, young and old, have already lent their support.

There are two points, however, to make in relation to this first stage of the effort. The first is as to the work already done in this field; the second is as to how, ahead of reaching the ultimate goal of a court, the ICE proposal might be advanced in the meantime.

As to the first point, it is worth taking note of the considerable work already done in this field by other organizations with aims broadly similar to or consistent with the ICE Coalition. For example, an organization called the International Court for the Environment Foundation (ICEF), in Rome, has for a number of years been looking at the possibility of creating an ICE.[39] It is to be hoped that cooperation with organizations such as ICEF and with other sympathetic bodies

38. J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 28-29 (Butterworths 5th ed. 1963).

39. See *supra* note 35.

will enable the ICE campaign to move forward swiftly. I have recently spoken at an ICEF event in Rome – alongside the Rt Hon. Lord Justice Robert Carnwath, perhaps our most distinguished environmental lawyer at the judicial level – on this very subject.[40]

As to the second point, one possibility to consider is that, en route to the ultimate goal, the ICE is constituted as something less than a fully mandated international court, more akin to an arbitral tribunal, providing declaratory relief and dispute resolution services to those who agree to submit to its jurisdiction. It is envisaged that, with this approach, the ICE would from the outset be able to perform the role of an arbitral tribunal – providing declaratory clarification and adjudication and general dispute resolution to those who agree on an ad hoc basis, or by prior agreement, to submit to its jurisdiction. States, NGOs, corporations and individuals would all be able to agree to use and have access to the ICE. This role requires no international treaty; it merely requires the establishment of the body, it being proffered to potentially interested parties as a means of resolving disputes in environmental matters, and their agreement to use it. The ICE might well sit at a number of different locations.

It is also envisaged that this straightforward arbitral tribunal model would be able to perform a valuable role as the dispute resolution institution of choice under specific international agreements. For example, Article 14 of the UNFCCC, adopted also *mutatis mutandis* in the Kyoto Protocol, provides that dispute resolution is to be by way of reference of the dispute to the ICJ or by arbitration by a procedure to be agreed upon by the parties. A problem with this is that, as discussed earlier, the ICJ allows only states to have standing. As to the arbitration option under Article 14, there has been no agreement explaining what the arbitration procedure should be. The ICE Coalition envisages the ICE as being able to fill this gap in the legal architecture of the climate change agreements, including any successor agreement reached in Mexico or subsequently.

40. Stephen Hockman QC, Address at the ICEF Global Environmental Governance International Conference: The case for an International Court for the Environment (ICE) (May 20-21, 2010).

The Ultimate Goal

Ultimately, it is envisaged that the ICE might be mandated as the international environmental tribunal. On the basis that the ICE will, on the interim approach set out above, be offering its services to a wide cross-section of the international governmental, non-governmental and business communities, and on the basis that this creates a positive view of the ICE in the policy debate, the final step of mandating the ICE as the international environmental tribunal might not be so controversial a step as it would otherwise seem to be. It may indeed be that the ICE, by that stage, has become in any event, the default port of call for the resolution of international environmental issues requiring clarification or in dispute. However, this is of course a best case scenario, and it could be on the other hand, that the preparatory effect of an "interim" ICE is minimal.

The ICE, as an international court, could, on this longer term view, sit above and adjudicate disputes arising out of the U.N. "environmental" treaties, including the U.N. Convention on Biological Diversity 1992,[41] and the UNFCC 1992,[42] the Kyoto Protocol (and any successor text to Kyoto and addition or amendment to the UNFCCC that is agreed at the post-Copenhagen Conference of the Parties (COP) in 2010),[43] the U.N. Convention on the Law of the Sea 1982,[44] any other applicable U.N. environmental law and, in addition, customary international law. The aim might be for it to incorporate all of the work of the existing tribunals under the existing U.N. environment treaties (e.g. the Kyoto Protocol Enforcement Branch). However, to the extent that any such incorporation is not possible or not possible to start with, there could be a "carve out" of the ICE's jurisdiction so as to prevent overlap with these existing bodies. The aim would be, ultimately, to achieve one single court dealing with all U.N. environmental law. The additional aim would be for the consolidation of the various environment-related treaties to be

41. United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, *available at* http://www.cbd.int/convention/convention.shtml.

42. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf.

43. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22, *available at* http://unfccc.int/kyoto_protocol /items/2830.php.

44. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, *available at* http://www.un.org/Depts/los/index.htm.

incorporated into one single document, the interpretation of which would be within the ICE's jurisdiction.

In addition, it is envisaged that the ICE could provide a judicial review function in respect of environmental decisions made by bodies involved in the interpretation of international environmental obligations, e.g., the Kyoto Enforcement Branch, or any successor or replacement institution established by the COPs under the UNFCCC Kyoto processes; the WTO; and the International Finance Corporation (IFC) and its interpretation of the Equator Principles.[45]

A possible additional feature of the ICE might be the establishment of specialist panels, e.g., relating to aviation or shipping or extractive industries. This feature could be present in both the interim (arbitral tribunal) version and in the final version of the ICE.

Depending on the views of signatory states, there might be a restriction to investigate only the "most serious" breaches — in line with a similar restriction upon the International Criminal Court's jurisdiction. Equally, there might well be a restriction of the remedies available to non-state actors purely to declaratory relief.

The sanctions imposed could include declaratory relief, fines and, along the lines of the EU Environmental Liability Directive, sanctions of restoration and rehabilitation of damaged habitats. The ICE could also be empowered to hand down declarations of incompatibility as regards signatory state legislation where it conflicts with the U.N. environmental rules. In addition, it could sanction signatory states for failures to permit enforcement of judgments. There would also be provision for interim measures, specifically, injunctions, enforceable in signatory states.

It is suggested that the ICE would produce a half-yearly or annual report listing its activities and possibly naming and shaming wrongdoers (be they those who have breached the law or signatory states which permit failures to enforce judgments). It is also suggested that the ICE have a panel of environmental experts to assist it.

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45. Benedict Kingsbury, Nicole Kirsch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 69 LAW & CONTEMP. PROBS. 15 (2005), *available at* http://www.law.duke.edu/shell/cite.pl?68+Law+&+Contemp.+Probs.+15+(summer autumn+2005).

Conclusion

The proposals set out above have been the subject of considerable discussion over the past few years, including at a symposium on *Climate Change and the New World Order* in November 2008, at the British library, hosted by my chambers at 6 Pump Court, Temple – and a seminar on *A Case for an International Court for the Environment*, hosted by the ICE Coalition and Global Policy, and chaired by Lord Anthony Giddens at the London School of Economics in November 2009. More recently, the ICE Coalition has met with the legal counsel to the U.N. secretary general in New York. It has also lobbied and made a presentation at the 15th annual U.N. Climate Change Conference, also known as the 15th Conference of the Parties or COP 15 in Copenhagen in December 2009. I was fortunate enough to have the opportunity to talk about the project in the 8th Steinkraus Cohen lecture to the United Nations Association in London, UK on March 8, 2010, and in a presentation to the World Bar Conference in Sydney, Australia, on April 4, 2010 (where the proposal received the endorsement of Justice Brian Preston, chief judge of the Land and Environment Court of New South Wales). A draft protocol setting out the "constitutional rules" of an ICE is in the course of preparation.

Many may feel that some of these ideas are ultimately idealistic. Yet, one hundred years ago, the same would have been said of the idea of the U.N. itself. It is to be hoped that widespread and unequivocal support for this cause will be forthcoming. Indeed, the very survival of our species and our planet depends upon it.

For further details of the ICE Coalition, please see www.environmentcourt.com.