THE CASE FOR AN INTERNATIONAL COURT FOR THE ENVIRONMENT

1. The Nature of the Problem

In his Foreword to the first edition of “Principles of International Environmental Law” by Philippe Sands, Sir Robert Jennings QC, sometime Whewell Professor of International Law in 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 many millions of words that have been 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”. Indeed, Jennings’ observation that the problem is mainly to be solved by legal means might now seem, not so much “trite”, 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 which were regarded as having potentially international implications. Perhaps the most infamous case of environmental liability on the part of a trans-national corporation occurred on 2\(^{nd}\) December 1983 in Bhopal, India, when Union Carbide, a multi-national company incorporated in the United States, released 40 tonnes of toxic methyl isocyanate from its plant, killing 3,500 people and affecting over 200,000 others. 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).

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 UK Government. Few now deny the urgency of a solution to these problems, though even fewer claim to have to 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 Robbie Jennings himself may have disclaimed 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 realisation in the contemporary global situation of the need to create a true international society. And if the inspiration of former President of the International Court of Justice 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 states of the United Nations, and by only one of the five permanent members of the Security Council (namely the United Kingdom). Lord Bingham states: “if 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”.

2. 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. The PCA has jurisdiction over disputes when at least one party is a state (or an organisation 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 Permanent Court of Arbitration might be an interim forum for resolving international environmental disputes. 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 inspection.

Turning to the ICJ, this was established (as a successor to the earlier Permanent Court of International Justice) in 1945. In this case, 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. The ICJ established within its structure in 1993 a Chamber specifically to deal with environmental matters. However, no state has ever submitted a dispute to that environmental Chamber and the Chamber has now been disbanded. 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, 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 jeopardise conservation of the river environment.

The dissenting opinion in the Pulp Mills case presented by Judges Al-Khasawneh and Simma argued that ‘the Court evaluated the scientific evidence before it in a methodologically flawed manner.’ They contended that by failing to ‘appoint its own [scientific] experts or having party-appointed experts subjected to cross-examination…the Court missed a golden opportunity to demonstrate its ability to approach scientifically complex disputes in a state-of-the-art manner.’

The conclusions of scientific experts, they reasoned, might be ‘indispensable in distilling the essence of what legal concepts such as “significance” of damage, “sufficiency”, “reasonable threshold” or

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“necessity” come to mean in a given case.’ Moreover they argued that by failing to appoint experts, ‘the evidence [was] not treated in a convincing manner to establish the verity or falsehood of the Parties claims.’

Unless the ICJ is willing to use experts to translate and explain complicated scientific evidence, the Court will be unable to provide reasoned opinions backed by a full understanding of the latest scientific evidence. Unless the ICJ is willing to hear environmental cases in a state-of-the-art manner, perhaps such cases should be heard by a specialized court.

In 1992, representatives from 176 States and several thousand NGO’s (non-governmental organisations) met in Brazil for the United Nations Conference on Environment and Development. 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”.

The Rio Declaration of 1992 (and accompanying Framework Convention on Climate Change) famously led on to the Kyoto protocol signed in Japan on 11th December 1997. This Protocol, for the first time, contained international obligations requiring countries to reduce their greenhouse gas emissions below specified levels. 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 played in inter-state cases by arbitration in the development of international environmental law. Also relevant is the ITLOS regime.

At the European level, the European Union has, for many years, legislated on environmental matters; and compliance with European environmental law is regulated by the European Commission, with disputes being referable to the European Court of Justice in Luxembourg. 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. 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. Recent studies (including for instance, a report by working group under the chairmanship of Sullivan J) 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 United Kingdom. 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 Organisation, 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 Boyle and Redgwell point out in ‘International Law and the Environment’\(^3\), 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 organisations and the WTO. 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. As the authors state, it might well make sense to link negotiations on trade issues with setting standards for reducing CO2 emissions and promoting energy efficiency, since it is far from obvious why a country which subsidises pollution by failing to take action on climate change should reap the benefits of free trade. In a fascinating lecture last Easter at the 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 Geneva, grapples with these issues. There is however, no provision for panels adjudicating on environmental cases to have specific environmental expertise, although there is a requirement that panels adjudicating on financial matters should have the necessary financial services expertise.

3. 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 UNFCCC, Chancellor Merkel of Germany, and President Sarkozy of France, in a letter to the U.N. Secretary General, called for an overhaul of environmental governance, and asked for the Copenhagen climate talks to progress the creation of a World Environmental Organisation (WEO). More recently, last month, 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 UN 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 World Environment Organisation. 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”. This ministerial group is chaired by representatives from Kenya and Italy.

As Philippe Hugon has said in ‘After Copenhagen: An International Environmental Agency Needed’\(^4\) a WEO might unite four parties in its drive to advance the environmental cause: scientists, entrepreneurs, governments, and environmental organisations. Firstly, the scientific community needs a forum where it can voice its concerns and recommendations. Secondly, 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. Thirdly, a WEO would also do well to integrate existing environmental organisations, which have done much to promote environmentally-conscious thinking worldwide.


Those of us who support the case for an 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 modelled on the WTO which as already mentioned, has its own dispute resolution mechanisms. 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 and indeed it might be provided that complaints intended to be referred to the ICE should first be referred to the WEO for consideration and investigation.

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.

4. A New Proposal

In these circumstances, it may be thought that the establishment of an International Court for the Environment (ICE) is a valuable goal that would add to the body of jurisprudence 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 NGO’s 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 at once that this is not a wholly new idea. Such a proposal was mooted as long ago as 1999 at a conference in Washington sponsored by a foundation which had been set up to investigate the establishment of an international court for the environment. The proposals then considered defined the functions of the Court as including:

(i) adjudicating upon significant environmental disputes involving the responsibility of members of the international community;
(ii) adjudicating upon 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 (see also below).

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 centralised 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 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 are becoming so much more aware of environmental problems and of the culpability of those who cause them. As Michael Mason has said, “it is the intersection of individual
rights and responsibilities with inter-State obligations that offers concrete possibilities for citizen participation in Global decision making.\textsuperscript{5}

Such a Court could also influence the world business community to develop risk management programmes 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.

5. **The Judicial Role**

Because environmental law is a comparatively new branch of law, the judiciary is well positioned actively to influence the law's normative development. As Judge Christopher Weeramantry, the former Vice-President of the International Court of Justice, stated in a UNEP ‘Judges Handbook on Environmental Law’, “It is often the judiciary that gives shape and direction to new concepts and procedures incorporated in national legislation. As more situations come before judges, these individual decisions initiate trends, which give the newly emerging discipline of environmental law the requisite conceptual framework and momentum for its development.”

Lord Woolf, the former Lord Chief Justice of England and Wales, has also underscored the transformation that has taken place regarding the role the judiciary and the process of judicial decision making. In a keynote address at the Thirteenth Commonwealth Law Conference held in Melbourne, Australia, in 2003, he explained,

> “Just as the common law has been evolving with increased rapidity, so has the role of the common law judge. The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the defendant or the prosecution and the defence. The role of the judiciary, individually and collectively, is to be proactive in the delivery of justice. To take on new responsibilities, so as to contribute to the quality of justice. At the forefront of these new responsibilities is achieving access to justice for those within the judge's jurisdiction.”

Earlier, in 2002, over 120 senior Judges from 60 countries around the world - including 32 Chief Justices - met in Johannesburg on the eve of the World Summit on Sustainable Development to discuss the role of the judiciary in promoting governance and the rule of law in the field of environmental and sustainable development. This Global Judges Symposium was chaired by the Chief Justice of South Africa, Hon. Arthur Chaskalson. The outcome of the Symposium was a unanimous recognition of the crucial role that the judiciary plays in enhancing environmental governance and the rule of law through the interpretation, development, implementation and enforcement of environmental law in the context of sustainable development. They also concluded that:

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* An independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law,
* The fragile state of the global environment requires the Judiciary to implement and enforce applicable international and national laws, which will assist in alleviating poverty, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.
* The people most affected by environmental degradation are the poor. Therefore, there is an urgent need to strengthen the capacity of the poor and their representatives to defend environmental rights, in order to ensure that the weaker sections of society are able to enjoy their right to live in a social and physical environment that respects and promotes their dignity.
* The Judiciary plays a critical role in the enhancement of the public interest in a healthy and secure environment.
* The rapid evolution of multilateral environmental agreements, national constitutions, and statutes concerning the protection of the environment increasingly requires the courts to interpret and apply new legal instruments in keeping with the principles of sustainable development.
* The deficiency in the knowledge, relevant skills, and information in regard to environmental law contributes to the lack of effective implementation, development, and enforcement of environmental law.
* The Judiciary, informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the implementation, development, and enforcement of laws, regulations, and international agreements relating to sustainable development - plays a critical role in the enhancement of the public interest in a healthy and secure environment.
* There is an urgent need to strengthen the capacity of judges, prosecutors, legislators, and all persons who play a critical role at the national level in the process of implementation, development, and enforcement of environmental law, including multilateral environmental agreements.

An example of the particular value of the judicial role arises from the following. States sometimes attempt to write highly detailed agreements to increase the strength of the relevant obligations. However writing complete and comprehensive agreements is extremely difficult, especially when negotiating terms for scenarios projecting many years into the future (such as commitments and actions up to and including 2020 or 2050). Legal documents can therefore use administrative and judicial institutions to interpret and extend the preliminary provisions of a legal text. The Treaty of Rome, for example, authorises the ECJ and the European Community's legislative institutions to elaborate and apply general regulations. And although many provisions of the European Convention on Human Rights, for example, are quite detailed, the European Court of Human Rights must still apply general standards in situations that could not have been anticipated when the Convention was drafted. Politically binding agreements can include non-judicial procedures for filling out incomplete aspects of participants' commitments. But legally binding agreements can rely on judicial or arbitral bodies, requiring them to follow agreed principles and act only on specific disputes and requests. This combination of attributes, along with the background rules and expectations of international law, can simultaneously constrain, and also legitimate the expansion of, commitments under a climate change agreement. This means that a legally binding outcome to the current UNFCCC discussions, albeit in itself incomplete, will secure the legitimate, authoritative and credible future expansion or development of the agreement’s provisions -
something of particular relevance to the current negotiations given the pace of development of the texts.6

A further illustration of the judicial role can be found in the first annual report of the UK Supreme Court, which observes that a key role for the Court is to educate as well as adjudicate, and that it has its own purpose built exhibition space with interactive displays for people to find out about the Court and the UK’s legal systems. The Court is unique in England, Wales, Scotland and Northern Ireland in that its proceedings can be and are routinely filmed and footage made available to broadcasters. A number of high profile judgements have been broadcast live, with summaries from members of the Court. The Court's website, www.supremecourt.gov.uk, has built up a wide audience and contains considerable information about the Court, its Justices and judgements. Since the Court came into existence, the website has recieved around 19,000 distinct visitors a month, from virtually every country in the world. Lord Phillips, President of the Court, said: 'This has been an exciting time for the Court. We have heard a number of interesting and important cases, some of which have attracted attention around the world. As Justices of the Court we are visible in a way that the Law Lords never were. I am pleased with the information that we now impart to schools, colleges, and the wider public. We have made important changes to the way we deliver judgements so that the public can readily understand what we have decided. While we are hearing cases the public seats are now almost always filled.' The Court's Chief Executive also said: 'The educational role of the Court is an important one and we are committed to building on our efforts so far in this area as much as possible in the coming months and years.'

6. Possible Objections

I would like next to discuss some of the objections to this proposal which have been raised in the course of discussions. I would classify these objections under three headings. Firstly the question is raised, what would be the law to be applied by such a body; secondly, why is it necessary for there to be a new body when existing juridical or dispute resolution institutions already exist to undertake the role envisage 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 issue, 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.7 “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”.

7.

The early stage ICE

I now turn to consider how one might move towards 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 be likely to 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 organisations with aims broadly similar to or consistent with the ICE Coalition. For example, an organisation called ICEF, in Rome, has for a number of years been looking at the possibility of creating an ICE. It is to be hoped that cooperation with organisations such as ICEF and with other sympathetic bodies will enable the ICE campaign to move forward swiftly. I shall shortly be speaking at an ICEF event in Rome, alongside the Rt Hon Lord Justice Robert Carnwath, perhaps our most distinguished environmental lawyer at judicial level.

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, on 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 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 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 as to 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.

8. **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. This is of course, however, 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 on disputes arising out of the UN “environmental” treaties, including the UN Convention on Biological Diversity 1992 and the UN Framework Convention on Climate Change 1992, 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), the UN Convention on the Law of the Sea 1982, any other applicable UN 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 UN 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 UN environmental law. The additional aim would be for the consolidation of the various environment-related treaties to be 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.8

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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 UN 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 the ICE has a panel of environmental experts to assist it.

9. **Recent steps**

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 LSE in November 2009. More recently, the ICE Coalition has met with the Legal Counsel to the UN Secretary General in New York. It has also lobbied and made a presentation at COP 15 at Copenhagen in December 2009. I have been fortunate enough to have the opportunity to talk about the project in the 8th Steinkraus Cohen lecture to the United Nations Association and in a presentation to the World Bar Conference at (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.

10. **Overall conclusion**

Many may feel that some of these ideas are very idealistic, but 100 years ago the same would have been said of the idea of the UN itself. For further details of the ICE Coalition, please see [www.environmentcourt.com](http://www.environmentcourt.com). It is to be hoped that support will be forthcoming. At stake is our very survival.

**STEPHEN HOCKMAN QC**

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