



AN INTERNATIONAL COURT FOR THE ENVIRONMENT

Introduction

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, 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”*. 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 2nd 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 2006, and, yet again, cases brought on the basis of the common law tort of public nuisance by a

number of claimants against the five biggest US power companies were likewise dismissed. The argument for the plaintiffs had been that the carbon emissions from the defendants' power plants (contributing approximately 10% of all carbon dioxide emissions from human activities in the United States) were a public nuisance, in that they were causing injury or threat of injury by contributing to global warming and giving rise to a substantial and unreasonable interference with public rights.

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 Sir 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 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.

Dispute resolution

The oldest legal institution dedicated to resolving international disputes is the Permanent Court of Arbitration, 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. 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 made available for public inspection.

The International Court of Justice 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

International Court of Justice may accept cases that are environmentally related, only states have standing. The International Court of Justice 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.

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 a significant weakness.

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 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. Moreover, the Aarhus Convention of course only applies to its signatory states. There is no global equivalent.

A new proposal

In these circumstances, it may be thought that the establishment of an International Court for the Environment 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, such a Court would be compulsory and 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.

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.

A particular issue currently calling for international adjudication is as follows. Consider the carbon emissions by China. The full extent of the west's responsibility for Chinese emissions of greenhouse gases has been revealed, according to recent press reports, by a new study. The report shows that half of the recent rise in China's carbon dioxide pollution is caused by the manufacturing of goods for other countries – particularly developed nations such as the UK. In 2008, China officially overtook the US as the world's biggest CO₂ emitter. But the new research shows that about a third of all Chinese carbon emissions are the result of producing goods for export. The research, due to be published in the scientific journal *Geophysical Research Letters*, underlines “offshore emissions” as a key unresolved issue in the run up to this year's crucial Copenhagen summit, at which world leaders will attempt to thrash out a deal to replace the Kyoto protocol.

Developing countries have been under pressure to commit to binding emissions cuts at the Copenhagen UNFCCC and Kyoto meeting. But China has been resistant, partly because it does not accept responsibility for the emissions involved in producing goods for foreign markets. Under Kyoto, emissions are allocated to the country where they are produced. By these rules, the UK can claim to have reduced emissions by about 18% since 1990 – more than sufficient to meet its Kyoto target. But research published in 2008 by the Stockholm Environment Institute (SEI) suggests that, once imports, exports and international transport are accounted for, the real change for the UK has been a rise in emissions of more than 20%.

As Professor Lord Giddens predicted in his recent book, *The Politics of Climate Change* (published by Polity Press), the results of the Copenhagen meeting have been “anodyne”. Only a high-level international arbitral body would be able to convert the genuine aspirations of many of the participants into more specific obligations on the ground. Indeed, there were calls at Copenhagen in December 2009 for precisely such an international environmental court.

Moreover, 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
- (vi) facilitation and enforcement of international environmental treaties.

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.

To those who doubt the feasibility of any such proposal, an encouraging precedent is the establishment, after sustained pressure by NGOs and others of the International Criminal Court.

Set out below are specifics for the proposal for an ICE, the establishment of which is the aim of the ICE Coalition.



The early stage ICE

Introduction

The ICE Coalition acknowledges 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 secure sufficient support.

There are two points to make in this regard. 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.

Cooperation with allies

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.

Interim approaches

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.

Possible characteristics of an ICE arbitral tribunal

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.

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 *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. The problem with this is that, as discussed earlier, the ICJ only allows 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 filling this gap in the legal architecture of the climate change agreements, including any successor agreement reached at Copenhagen or subsequently.

Furthermore, the advantage of the ICE over any ICJ or other mechanism envisaged is that it provides a vital opportunity for non-state actors to play a part in the development of environmental law. Whether it be a climate change agreement or any other agreement where the ICE is chosen to be the dispute resolution institution, there will be an opportunity for the signatories to that agreement (e.g. states) to permit non-signatories (e.g. NGOs, businesses, individuals) to bring references to the ICE. The remedies obtainable by those non-signatory parties may possibly be limited to mere declarations so as to ensure states agree to permit this eventuality. Nevertheless, the value for an NGO of obtaining even a declaration against a state, will of course be great, particularly in terms of that NGO's media campaign and in terms of popular opinion in the state in question, possibly resulting in a change of policy by that state.

This role becomes even more important if the ICE is permitted to extend its remit, as it is envisaged it should be, into the field of compliance under international environmental agreements. For example, at present, compliance under the Kyoto Protocol is enforced purely through the Compliance Committee's Enforcement Branch. This results in a politicised process of compliance and a mechanism which is

limited by the time and resources available to the Enforcement Branch. Far better, surely, to permit compliance to be enforced privately, by interested parties, by way of action brought before the ICE. This option would unleash the full energy of those interested in environmental matters, be they NGOs, associations of states, businesses or individuals, who are at present not permitted a say in compliance. It would also free up the Enforcement Branch to focus on the most serious cases of non-compliance. As with dispute resolution generally, concerns by larger states that such a mechanism open to all interested parties might permit politicised “ganging up” on large emitters might be allayed by ensuring that non-state parties would only be permitted to obtain declaratory non-binding remedies, and no more. Such limitation on remedies would remove the serious concern amongst large emitting states of punitive claims against them, but it would nevertheless provide non-state actors with a valuable means of participating in the process and of obtaining leverage over those states in the media and with popular opinion in those states.

It is normal in arbitration for the proceedings to be confidential. It is suggested here that parties which agree to use this arbitral tribunal version of the ICE would agree where at all possible, to proceedings, materials and final rulings being made public.

Advantages and disadvantages of the arbitral tribunal approach

Given its respected judiciary and scientific support, and given the flexible nature of the dispute resolution facilities it would offer, it is envisaged the ICE in this interim form could become the default institution for dispute resolution in international environmental matters both for international agreements between states and also for agreements between private parties where environmental issues might arise, for example agreements involving extractive industries. A positive point to take from this approach, therefore, is that simply by existing and performing the function described above, the ICE would, it is hoped, act as an advertisement for the benefits to be offered by the ICE. This is particularly so with non-state actors. Thus, even if national governments do not sign up, the ICE would be able to offer its services to lower level actors such as provincial governments (note, for example, how individual New England and other US states have unilaterally developed policies which adopt Kyoto targets, even though the USA has not ratified the Protocol), businesses, NGOs and

even individuals. By participating in the ICE, these players can have a significant impact on national governmental policy.

However, clearly, there are limits to this approach, particularly that it is consensual and that without the involvement of the big national (or quasi-national) players – the EU, China, India and the USA – the campaign for an ICE in the true, internationally mandated sense of the idea, will always be hobbled.

As a result, while it is suggested that the interim approach is adopted and progressed, the ultimate focus should be on a campaign for an international treaty.

The ultimate goal

Ultimately, it is envisaged that the ICE will be mandated as the international environmental tribunal. On the basis that the ICE will, on the interim approach set out above, relatively rapidly 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 possibly not be an overly controversial step. 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 may well be that the preparatory effect of an “interim” ICE is minimal.

The ICE, as an international court, would 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 COPs 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 would 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 would 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. This consolidated treaty might also incorporate elements of the emerging Green/Wild law jurisprudence.

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 in 2010 under the UNFCCC and Kyoto processes; the WTO; the IFC and its interpretation of the Equator Principles.

A possible additional feature of the ICE would be the establishment of specialist panels – e.g. 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 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 EC Environmental Liability Directive, sanctions of restoration and rehabilitation of damaged habitats. The ICE could also 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 could produce a half-yearly or annual report listing its activities and 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. This dovetails with the increasing recent calls for the establishment of a World Environment Organisation which would provide institutional support for an ICE – e.g. by President Sarkozy in December 2009.

Recent steps

The proposals set out above have been the subject of considerable academic 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 6 Pump Court – the Chambers of Stephen Hockman QC (with speakers including Nigel Griffiths MP and Oliver Tickell, author of the well known publication “Kyoto2”), meetings at the Houses of Parliament in 2009 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 LSE in November 2009. Most recently, the ICE Coalition has met with the UN Legal Counsel to the Secretary General in New York in November 2009 and received a favourable response to the proposal. It also lobbied and made a presentation at COP 15 at Copenhagen in December 2009 and is now pushing forward on having specific reference to the ICE included in the text to be agreed at the COPs in 2010.

Additional work of the ICE Coalition

In addition to the long-term aim of establishing the ICE, and the aim prior to that of providing an arbitral tribunal, it is very important to work on what is achievable and practicable in the short run, in particular, at the national level. The ICE Coalition is also looking to fundraise for test cases at the national level where environmental cases might not otherwise have been brought, due to lack of funds. For example, the English courts are sometimes willing to exert “long-arm” jurisdiction and to apply English law to “foreign” cases, including environmental cases. A serious and rapid impact could be achieved on the environmental practices of international corporations if they could be held to account in England (with its strong and enforceable penalties) for wrongs committed in developing countries.

Overall conclusion

As set out above, the ICE Coalition has been pushing forward the proposal for the establishment of an ICE. For further details, please see www.environmentcourt.com. It is to be hoped that support will be forthcoming. At stake is our very survival.

ICE Coalition

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