ICE Coalition
International Court
for the Environment

THE CASE FOR AN INTERNATIONAL COURT FOR THE ENVIRONMENT

1. Introduction

There is a story, probably apocryphal, about an occasion when George Bernard Shaw was asked to deliver a lecture about English Literature – a subject upon which he was no doubt eminently well qualified to opine. When he enquired how long he would have to give his talk, his hosts replied: "*you have approximately 7 minutes*". Shaw responded angrily: "*how on earth do you expect me to say all I know about English literature in 7 minutes*", to which the response was "*well you'll just have to speak very slowly"*. The implicit suggestion that the invited speaker is not wholly qualified to speak on his chosen subject might with rather better justification be directed at your speaker this afternoon. It is true that I underwent a one-year intensive course in International Law whilst a Cambridge undergraduate in about 1966. But I cannot claim to have had an extensive international law practice and, as in the case of our esteemed Lord Chancellor and Minister of Justice, the verdict on me would probably be (as it famously was on him in the words of Elizabeth Wilmshurst at the Chilcot Inquiry) "*he is not an international lawyer*".

I have nonetheless become involved over the last year or so in a developing movement for the establishment of an International Court for the Environment (ICE), and I greatly welcome the opportunity to explain why.

2. 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.

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1. Sands, P., 2003. *Principles of International Environmental Law*. 2nd Edition. Cambridge University Press. Page 187

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 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 a 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'[2] lamented the fact that the compulsory jurisdiction of the ICJ is accepted by only a minority of member 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*".

3. Definitions

Before an audience comprising both lawyers (international and otherwise) and non-lawyers, it may be appropriate to begin with some definitions. As regards international law itself, Professor Anthony Aust provides a very succint explanation: " *International law differs from domestic law in that it is not always that easy to find out what the law is on a particular matter. Domestic law is reasonably certain and found mostly in legislation and judgements of a hierarchy of courts. In contrast, international law is not so accessible, coherent or certain. There is no global legislature (the UN General Assembly does not equate to a*

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2. Bingham, T., 2010. *The Rule Of Law.* Allen Lane. Pages 128-9.

national legislature), and no formal hierarchy of international courts and tribunals. As with the (mainly unwritten) British Constitution, an initial pointer to the international law on a given topic is often best found in the textbooks. They will explain that international law is derived from various sources, which are authoritatively listed in Article 38(1) of the Statute of the International Court of Justice (annexed to the UN Charter) as:

> *(a) International conventions, whether general or particular, establishing rules expressly recognised by the contracting states;*
> *(b) International custom, as evidence of a general practice accepted as law;*
> *(c) The general principles of law recognised by civilised nations;*
> *(d) Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".*[3]

Another concept, the meaning of which is debated, at least in international law textbooks, is 'the environment'. The concept of the environment has been described by the distinguished international environmental lawyer Professor Catherine Redgewell as "*an amorphous term that has thus far proved incapable of precise legal definition, save in particular contexts"*[4]. As Professor Aust reminds us, however, it is from a legal point of view quite a new concept. He points out that just as according to the poet Philip Larkin, in *High Windows,* "*sexual intercourse began in 1963*", so also could one say something similar about the environment and the 1970s. There are now a number of seminal textbooks on international environmental law, including one by Professor Philippe Sands QC and another by Professor Redgewell and Professor Alan Boyle. Among the many insights which I have derived personally from a study of these works is that it seems to be common ground that although some of the principles of international environmental law are clear, many others remain to be developed and articulated. In her chapter on International Environmental Law in 'International Law', Professor Redgewell confirms that "*it remains the case that there is not yet any general customary or treaty law obligation on states to protect and preserve the environment per se"*[5]. Professor Sands in his work[6]says that "*whether a state has in the absence of a specific treaty right… a general legal interest in the protection of the environment in areas beyond its national jurisdiction, such as to allow it to exercise rights of legal protection on behalf of the international community as a whole… is a question which remains difficult to answer…"*. It seems to me that one of the advantages of establishing an International Environmental Court is that, like those highly regarded national and regional supreme courts, or courts of last resort around the globe (our own included), an International Environmental Court could develop jurisprudence in relation to some of these fundamental underlying concepts.

4. **<u>Dispute Resolution Systems</u>**

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3. Aust, A., 2005. *Handbook of International Law.* Cambridge University Press. Page 5
4. Redgewell. C., 2006. *International Environmental Law*. In M. D. Evans, ed. International Law. 2nd Edition. Oxford University Press. Page 658
5. *ibid.*
6. Sands, P., 2003. *Principles of International Environmental Law*. 2nd Edition. Cambridge University Press. Page 187

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 case has been fully argued (with British Counsel on either side) and a decision is awaited.

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'[7], 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.

5. 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

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7. Birnie, P., A. Boyle, and C. Redgwell, 2009. *International Law and the Environment*. 3rd Edition. Oxford University Press. Page 79

(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'[8] 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. Fourthly, 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 particular issue which I suggest will never be resolved without institutional reform is as follows. Consider the carbon emissions of the People's Republic of China. The full extent of the west's responsibility for Chinese emissions of greenhouse gases has recently been revealed 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 CO_2 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, published in the scientific journal Geophysical Research Letters[9], underlines "offshore emissions" as a key unresolved issue. Developing countries were under great pressure to commit to binding emissions cuts at the Copenhagen UNFCCC meeting. But China was 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

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8. Hugon, P., 2010. *The Need for an International Environmental Agency* . IRIS. Available at:http://www.atlantic-community.org/index/items/view/
The_Need_for_an_International_Environmental_Agency_

9. Guan, D., G. P. Peters, C. L. Weber, and K. Hubacek. 2009. *Journey to world top emitter: An analysis of the driving forces of China's recent CO2 emissions surge.* Geophysical Research Letters. 36, L04709. doi:10.1029/2008GL036540

to meet its Kyoto target. But further research published by the Stockholm Environment Institute[10] 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%.

6. 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.

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10. Baiocchi, G., and Minx, J., 2009. *Understanding Changes in the UK's CO2 Emissions: A Global Perspective. Environmental Science and Technology*. 44(4): 1177-1184.

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.

7. 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[11]. "*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,*

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11. Starke, J. G., 1963. *An Introduction to International Law.* 5th Edition. Butterworths. Pages 28-29

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".

8. 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 being 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 be speaking at an ICEF event in Rome in May this year, 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.

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 encourage states to agree to permit this eventuality. Nevertheless, the value for an NGO of obtaining even a mere declaration against a state will of course be great, particularly in terms of that NGO's profile 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 "vertical" mechanism which is limited by the time and resources available to the Enforcement Branch. Far better, surely, to permit compliance also to be enforced "laterally", by interested parties, by way of action brought before an 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 be permitted to obtain only declaratory non-binding remedies, and no more. Such a 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.

It is not uncommon in arbitration for the proceedings to be confidential. It is suggested 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.

Given judicial 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 one day 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 here, 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 might have a significant impact on national governmental policy.

However, clearly, there are limits to this approach, particularly that it is consensual, and 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 never come to fruition.

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

9. 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 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 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.

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.

10. 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. Most 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, and is now pushing forward to try to have specific reference to the ICE included in the text to be agreed at the COPs in 2010. A draft Protocol setting out the "constitutional rules" of an ICE is in the course of preparation.

11. 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. It is to be hoped that support will be forthcoming. At stake is our very survival.

STEPHEN HOCKMAN QC
April 2010