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The Project for an International Environmental Court

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I. Introduction

Disputes involving the natural environment date back to the *Pacific Fur Seal Arbitration* in the late 19th Century, which concerned the United States' interference with British fishing activities on the high seas.¹ By mid-20th Century, two other notable environmental arbitration cases – *Trail Smelter* and *Lac Lanoux* – considered transboundary pollution and the use of shared international waters.² Beyond those cases, the environment was scarcely considered in international adjudication. In recent decades, a spectrum of compliance and enforcement mechanisms has emerged to facilitate and manage concerns regarding the environment.³ While binding dispute resolution has generally received less favour within environmental law regimes than other domains of international law, international courts and tribunals are increasingly hearing matters involving the environment.⁴ Yet few, if any, of those bodies are well-equipped to resolve and advance environmental concerns. This is particularly so given

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¹ *United States of America v. United Kingdom*, Award, 15 August 1893, reproduced in: Volume XXVIII (2007) *Reports of International Arbitral Awards* 263-276.

² *United States of America v. Canada*, Award, 15 April 1935, reproduced in: Volume III (2006) *Reports of International Arbitral Awards* 1905-1982; *France v. Spain*, Award, 19 November 1956, reproduced in: Volume XII (2006) *Reports of International Arbitral Awards* 281-317.

³ See generally Daniel Bodansky *et al* (eds.), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) Part VII; Patricia Birnie *et al*, *International Law and the Environment* (Oxford: Oxford University Press, 2009) Ch 4; Philippe Sands and Jacqueline Peel (eds.), *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 3rd ed, 2012) Ch 5; Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (Cambridge: Cambridge University Press, 2015) Chs 8-9.

⁴ For historical analysis see Cesare Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (The Hague: Kluwer, 2000).

the polycentric character of environmental disputes,⁵ which produces coordination challenges for adjudication, including jurisdictional overlap, uncertainty regarding applicable law, and risks of forum shopping and fragmentation.⁶

In the light of modern concerns about the natural environment, efforts should be made to improve the capability of the existing, distributed system of international courts and tribunals to address environmental matters, and, to the extent that existing bodies cannot be sufficiently improved, explore options to create new institutions specifically deigned to consider environmental matters.⁷ While specialist domestic environmental courts have proliferated, there is no dedicated international court or tribunal with competence over environmental matters.

Intellectual and political support for the establishment of a specialised International Tribunal for the Environment (“ITE”) or International Court for the Environment (“ICE”) has ebbed and flowed since its first conception in the late 1980s,⁸ and appears to be increasing hesitantly again, buoyed by scientific consensus of anthropocentric climate change and the risks to humanity from environmental harm. Even if the project for an international environmental court or tribunal

⁵ Birnie *et al* (*supra* note 3) 255; Ole W. Pedersen, ‘An International Environmental Court and International Legalism’ 24(3) (2012) *Journal of Environmental Law* 551; Fransisco Orego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (Cambridge: Cambridge University Press, 2004) 83-84.

⁶ Susan M. Hinde, ‘The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw’, 32 (2003-2004) *Hofstra Law Review* 727; Tim Stephens, *International Courts and Environmental Protection* (Oxford: Oxford University Press, 2009) 61; Ellen Hey, *Reflections on an International Environmental Court* (The Hague: Kluwer Law International, 2000) 4-9.

⁷ Hinde (*supra* note 6) 728; Joost Pauwelyn, ‘Judicial Mechanisms: Is there a Need for a World Environment Court’ in W. Bradnee Chambers and Jessica F. Green (eds.), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press, 2005) 159; Alfred Rest, ‘Enhanced Implementation and Enforcement of International Environmental Laws by the Judiciary’ in Adrian Bradbrook *et al*, *The Law of Energy for Sustainable Development* (Cambridge: Cambridge University Press) ch 17.

⁸ For discussion and critique of the general project see Stephens (*supra* note 6) 56-62. See generally, Robert Jennings, ‘Need for an Environmental Court’, 20 (1992) *Environmental Policy and Law* 312-314; Audra E. Dehan, ‘An International Environmental Court: Should There Be One?’, 3 (1992) *Touro Journal of Transnational Law* 31-58; Jeffrey L. Dunoff, ‘Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes’, 15 (1993-1994) *Michigan Journal of International Law* 1043-1128; Philippe Sands, ‘International Environmental Litigation and its Future’, 32 (1998-1999) *University of Richmond Law Review* 1619-1641; Sean D. Murphy, ‘Does the World need a new International Environmental Court’, 32 (1999-2000) *George Washington Journal of International Law and Economics* 333-349; Kenneth F. McCallion and H. Rajan Sharma, ‘Environmental Justice Without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights’, 32 (2000) *George Washington Journal of International Law and Economics* 351, 352; Hey (*supra* note 6); Hinde (*supra* note 6) 727-757; Pauwelyn (*supra* note 7) 150-177; Birnie *et al* (*supra* note 3) 255-257; Pedersen (*supra* note 5) 547; Cathrin Zengerling, *Greening International Jurisprudence: Environmental NGOs before International Courts, Tribunals and Compliance Committees* (Leiden: Martinus Nijhoff, 2013); Alan Boyle and James Harrison, ‘Judicial Settlement of International Environmental Disputes: Current Problems’, 4(2) (2013) *Journal of International Dispute Settlement* 245-276.

ultimately succeeds, which will depend on the values of society, national or political self-interest and the influence of decision-makers,⁹ its realisation will be a long-term endeavour.

This chapter considers the case and options for creating an ITE or ICE (collectively referred to as the “ITE/ICE system”). It invites reflection on the adequacy of existing international institutions and structures to address modern disputes impacting the environment and contemplates how a new, carefully designed, specialised adjudicative body for the environment might function within, and complement, the global dispute settlement system. This chapter argues that the fact that practical and legal technical challenges would need to be overcome to form an ITE/ICE system is not a sufficient reason to discourage its consideration,¹⁰ nor is it sufficient that the system would add institutional complexity and be markedly different to any existing international or domestic judicial institutions.¹¹ As Sands observes, “*any comparison with national courts would be misplaced, since [national courts] have often had centuries to mature*”.¹² Law, as a human-made construction, is subject to modification and development to accommodate evolving imperatives. It is the job of international lawyers to devise creative and meaningful solutions to real-world problems and to make the pieces of international law work as a system.

Part II of this chapter identifies the existing international courts and tribunals that are able to hear disputes with an environmental dimension. Part III considers the shortcomings of those fora and analyses whether there is a resulting need for an international environmental dispute resolution body. Part IV provides an overview of various former and current proposals for an ITE or ICE. Part V explains the purposes and benefits of such a body. Parts VI and VII consider the possible contours and elements of the ITE/ICE system. Part VIII comments on the role of conciliation within an ITE/ICE system and Part IX offers concluding observations.

II. The international disputes system and environmental matters

⁹ For a commentary on the international relations theory underpinning the design of an ICE, see Murray Carroll, ‘The Geopolitics of Climate Justice: Collective Interest or *Raison de Système*?’ 34(1) (2016) *Journal of Energy & Natural Resources Law* 109-125. See also Dunoff (*supra* note 8) 1088-1093. See also generally Jack Goldsmith and Eric Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).

¹⁰ Dupuy and Viñuales, (*supra* note 3) 246.

¹¹ Stephens (*supra* note 6) 60-61.

¹² Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’, public lecture, United Kingdom Supreme Court, 17 September 2015, transcript, 8.

Immediate issues that hinder the classification of disputes before international courts and tribunals as 'environmental' include the absence of agreed definitions, political aversion to review of sovereign actions regarding natural resources and disagreement between states (and society generally) about the priority of environmental objectives compared to others such as economic development.¹³ These issues are likely to remain a crucial point of difference between states until they are systematically addressed. For the purposes of this chapter, 'international environmental disputes' are defined as disputes that impact upon the natural environment or involve substantive or procedural legal rights and obligations of states and non-state actors in relation to international environmental laws.¹⁴

Although doubtful about an ICE, Sir Robert Jennings has acknowledged the "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".¹⁵ The primary international bodies that currently hear international environmental disputes, within their general or specialised jurisdiction, include the International Court of Justice ("ICJ"), the International Tribunal for the Law of the Sea ("ITLOS"), the World Trade Organization ("WTO"), human rights bodies and investment arbitration tribunals, about which brief remarks are made below.¹⁶ Although conciliation is provided for under numerous environmental treaties,¹⁷ it has not been frequently utilised to date, despite its potential to resolve moderate-to-low level political differences regarding environmental matters.

¹³ Birnie *et al* (*supra* note 3) 255; Sands, 'International Environmental Litigation and its Future' (*supra* note 8) 1639.

¹⁴ See Boyle and Harrison (*supra* note 8) 247-250, for possible approaches and definitions of international environmental disputes.

¹⁵ Philippe Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2nd ed, 2003) xv. This textbook, and others, examines the substantive content of international environmental law, which is beyond the scope of this chapter.

¹⁶ For detailed consideration see Stephens (*supra* note 6). See also James Harrison, 'Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental Law', 25(2) (2013) *Journal of Environmental Law* 501-514.

¹⁷ See e.g. *United Nations Convention on the Law of the Sea*, open for signature 10 December 1982, 1833 *UNTS* 3 (entered into force 16 November 1994) ("UNCLOS"), art. 284, Annex V; *Vienna Convention for the Protection of the Ozone Layer*, open for signature 22 March 1985, 1513 *UNTS* 323 (entered into force 22 September 1998) ("Ozone Convention"), art. 11(4)-(5); *Stockholm Convention on Persistent Organic Pollutants*, open for signature 22 May 2001, 2256 *UNTS* 119 (entered into force 17 May 2004), art. 18(6), Annex G. For a successful example of this method of dispute resolution, see Ulf Linderfalk's discussion on the Jan Mayen Island delimitation.

The ICJ, with its unlimited competence over international law matters, is the most obvious forum to hear environmental disputes. The ICJ established a Chamber of Environmental Matters in 1993, but it was never used and closed in 2006. While the ICJ has adjudicated numerous natural resources and boundary disputes, few contentious or advisory proceedings have specifically focused on the environment or international environmental law,¹⁸ and of those that did many were discontinued, such as *Nuclear Tests I* and *Certain Phosphate Lands in Nauru*.¹⁹ But in a small number of cases the ICJ has clarified the concept and content of certain environmental laws,²⁰ and its jurisprudence has cautiously evolved from restraint to selected environmental norm development.²¹

The ICJ's keystone moment in recognising the significance of environmental concerns and attendant legal obligations was its 1996 *Nuclear Weapons* Advisory Opinion, which highlighted the potential catastrophic impact of nuclear weapons on the natural environment and emphasised that "*the environment [...] represents the living space, the quality of life and the very health of human beings, including generations unborn*".²² Remarkably, that opinion applied the *Corfu Channel* 'no harm' principle to the environment, recognising that states had obligations to ensure that no transboundary environmental harm occurred from activities within their jurisdiction or control.

¹⁸ See Malgosia Fitzmaurice, 'The International Court of Justice and Environmental Disputes' in Duncan French *et al* (eds.), *International Law and Dispute Settlement: New Problems and Techniques* (Oxford: Hart Publishing, 2010) 17-56. Note that the recent dispute between Ecuador and Colombia regarding transboundary harm for aerial spraying was settled and withdrawn: *Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia)*, Order, 13 September 2013, ICJ Reports 2013, 278.

¹⁹ *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, 253 and *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, 457 did not result in an operative decision, as both Australia and New Zealand no longer had an objection when France discontinued its nuclear testing programme after interim measures were awarded. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Order of 13 September 1993, ICJ Reports 1993, 322 was settled after Nauru alleged that Australian mining operations degraded Nauru's ecosystem and requested rehabilitation of those lands.

²⁰ *In Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, ICJ Reports 1995, 288 the ICJ acknowledged the existence of international environmental law in international litigation but declined to reopen the case as requested.

²¹ Malgosia Fitzmaurice, 'The International Court of Justice and International Environmental Law' in Christian Tams and James Sloan, *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) 353-375.

²² ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 226, para. 29.

In *Gabčíkovo*, the ICJ showed some ‘coming of age’.²³ It accepted, among other things, the existence of the principle of “*ecological necessity*”, that environmental concerns could qualify as an “*essential interest*” of the state which when faced with real, grave and imminent peril could preclude international wrongfulness, and classified sustainable development as a “*concept*” (without articulating its legal standard or content).²⁴ In *Pulp Mills*, the ICJ held as customary international law the obligation for states to undertake environmental impact assessments where a “*proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource*”, though it did not elaborate on the content of such an assessment, thereby requiring states to make that decision independently.²⁵

After years of relative conservatism, the ICJ has recently evidenced a newfound openness and technical ability to deal with the complexities that accompany international environmental disputes, while also pronouncing more broadly on the substance of environmental obligations.²⁶ In the *Whaling in the Antarctic* case, the ICJ quite unusually conducted a comprehensive inquiry into the technical and scientific evidence submitted by the parties and put its own questions to the party-appointed experts, who were also cross-examined.²⁷ In *Construction of a Road in Costa Rica*, the ICJ extended the *Pulp Mills* ruling, finding it an obligation to undertake an environmental impact assessment in respect of all, not only industrial, activities that create significant risks of transboundary harm. Again, the ICJ did not clarify when those circumstances would exist or the required content of the assessment.

Inter-state disputes before the Permanent Court of Arbitration increasingly consider disputes involving environmental considerations. These have included the *Indus Waters Kishenganga* arbitration, which concerned the impact of an Indian

²³ Sands, ‘International Environmental Litigation and its Future’ (*supra* note 8) 1631.

²⁴ ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports 88 (“*Gabčíkovo*”), paras. 53, 140.

²⁵ ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010 (“*Pulp Mills*”), 14, para. 204.

²⁶ Sands, ‘Climate Change and the Rule of Law’ (*supra* note 12) 3, 18: noting that the ICJ’s potential role on climate change in particular has evolved, due to the combination of factors, including changes in public opinion, Pope Francis’ encyclical letter, robust scientific evidence, and increasing government and domestic court action.

²⁷ ICJ, *Whaling in the Antarctic (Australia v. Japan)*, Judgment, 31 March 2014, ICJ Reports 2014, 226, paras. 20-21, 98-242.

hydroelectric dam on water supplies for communities downstream,²⁸ and the *Iron Rhine* arbitration, which considered restrictions on Belgium's right to free transport over a railway track pursuant to environmental legislation.²⁹

ITLOS has heard disputes involving a range of environmental matters,³⁰ including the conservation of particular species, the development of a nuclear facility, land reclamation activities, environmental obligations regarding exploration and exploitation of the deep seabed.³¹ ITLOS has repeatedly utilised the precautionary approach, given the sensitivity of the world's oceans, requiring states to undertake measures that reduce the risks of environmental harm even where there is scientific certainty as to the likely occurrence of harm.³² Recently, ITLOS confirmed that it had jurisdiction to provide advisory opinions in plenary and in so doing commented extensively on coastal and flag state obligations regarding sustainable fishing and illegal, unreported and unregulated fishing rights and obligations,³³ among other things. This opinion, and a recent UNCLOS arbitration award,³⁴ may lead to subsequent opinions on a broader range of issues related to protection and preservation of the marine environment, including climate change, and movement towards an ITLOS with general environmental competence.

²⁸ *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Final Award, 20 December 2013, PCA Case No. 2011-01.

²⁹ *Belgium v. The Netherlands*, Award, 24 May 2005, reproduced in: Volume XXVII (2005) *Reports of International Arbitral Awards* 35-125. See generally Judith Levine, 'Information About the Activities of the Permanent Court of Arbitration in Environmental Disputes in the Context of Energy Projects' (PCA, September 2014) <http://voldgiftsinstitutet.dk/wp-content/uploads/2015/01/levine_-_pca_environment__26_energy_activities.pdf> accessed 1 May 2016.

³⁰ See UNCLOS, Annex VI, Annex VII and Annex VIII.

³¹ ITLOS, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999; ITLOS, *The MOX Plant Case (Ireland v. United Kingdom)*, Order of 3 December 2001; ITLOS, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Order of 8 September 2003; ITLOS, *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (2011), Seabed Disputes Chamber, 1 February 2011 ("*Seabed Opinion*"). French suggests that the Seabed Opinion provides the most comprehensive treatment of international environmental law by any international court or tribunal: Duncan French, 'From the Depths: the Seabed Disputes Chamber's 2011 Advisory Opinion', 26 (2011) *International Journal of Marine and Coastal Law* 525.

³² Most recently in *Dispute concerning maritime boundary in the Atlantic Ocean (Ghana v. Cote d'Ivoire)*, Order for provisional measures, 25 April 2015. See also, Seabed Opinion (*supra* note 31) para 131 where the precautionary principle was treated as "*an integral part of the general obligation of due diligence*".

³³ ITLOS, *Advisory Opinion relating to the Questions Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, paras. 110-114, 120.

³⁴ Ad hoc Tribunal, *Chagos Marine Protected Area Arbitration*, Award, 18 March 2015; James Harrison, 'Significant International Environmental Law Cases: 2014-15', 27(3) (2015) *Journal of Environmental Law* 541-554.

In the trade context, the WTO dispute settlement bodies have confronted environmental issues through the use by states of GATT Articles XX (b) and (g), where measures taken were asserted to be necessary to protect human, animal or plant life or health or related to the conservation of exhaustible natural resources. While there is evidence of improved integration of relevant environmental obligations into the reasoning of WTO disputes bodies, unsurprisingly their frame of reference remains on economic liberalisation.³⁵ The North American Agreement on Environmental Cooperation that accompanies the North American Free Trade Agreement also attempts to balance environmental and economic imperatives through a review process.³⁶

Other bodies dealing with disputes involving the environment include the World Bank's Inspection Panel, which assesses compliance of the Bank's projects with the Bank's environmental policies and standards (and increasingly takes international standards into account),³⁷ the World Heritage Commission, where listings are requested to persevere the natural environment, and the United Nations Compensation Commission, which determines claims for environmental and other damages arising out of the 1991 Gulf War.³⁸ Importantly, human rights bodies readily accept the importance of the environment and increasingly assess how environmental issues affect the primary rights over which they have competence.³⁹ The European Court of Justice also hears complaints regarding environmental regulation.

³⁵ GATT, *United States–Restrictions on Imports of Tuna*, 16 August 1991, reproduced in: 30 (1991) *International Legal Materials* 1594; cf. WTO DSB, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, 6 November 1998. See also WTO Appellate Body, *EC–Measures Concerning Meat and Meat Products*, 16 January 1998; WTO Appellate Body, *EC–Measures Affecting Asbestos*, 12 March 2001; WTO Panel, *EC–Measures Affecting Approval and Marketing of Biotech Products*, 29 September 2006; WTO Panel, *Measures Related to the Exportation of Rare Earths*, 26 March 2014; WTO Appellate Body, *Measures Prohibiting the Importation and Marketing of Seal Products*, 22 May 2014. See more generally, Hinde (*supra* note 6) 749.

³⁶ *North American Agreement on Environmental Cooperation*, open for signature 14 September 1993, 32 *ILM* 1480 (entered into force 1 January 1994).

³⁷ Despite some relevant, well-received jurisprudence, it is not a binding decision-making body and remains somewhat inward-looking. See e.g. Alix Gowlland Gaultieri, 'The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel', 72 (2001) *British Yearbook of International Law* 213.

³⁸ See especially Robin L. Juni, 'The United Nations Compensation Commission as a Model for an International Environmental Court', 7 (2000) *The Environmental Lawyer* 53-73.

³⁹ In relation to the Inter-American Commission on Human Rights, see e.g. *San Mateo de Huanchor v. Peru*, Admissibility, 15 October 2014, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, 487; *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005. In relation to the African Commission on Human and Peoples' Rights, see e.g. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No.155/96. For relevant cases before the European Court of Human Rights, see e.g. *Fredin v. Sweden*, App.

Investor-state dispute resolution (investment arbitrations) is a particularly modern phenomenon that is increasingly called on to address environmental issues.⁴⁰ For instance, in *Parenco (France) v. Ecuador*, Ecuador filed an environmental counterclaim before the International Centre for Settlement of Investment Disputes (“ICSID”). In August 2015, the Tribunal held, *inter alia*, that there was “some contamination” for which Parenco would likely be held liable (although a final ruling on this was deferred),⁴¹ while also finding several other procedural failures.⁴² Another example is *Peter Allard (Canada) v. Barbados*,⁴³ where the claimant alleged that the Barbados government failed to enforce its domestic environmental laws and, as a result, that his eco-tourist resort was harmed, in breach of Barbados’ investment protection obligations.⁴⁴ While the prevalence of environmental issues is increasing in frequency in investment arbitration awards, they may not be adequately addressed in awards where tribunals lack specialised subject-matter knowledge or are disposed to apply international economic law with minimal regard for international environmental norms.⁴⁵ Additionally, due to perceived inadequacies in the global investment regime,

12033/86, Judgment, 18 February 1991, para. 48; *Lopez-Ostra v. Spain*, 303/C Eur. Ct. H.R. (ser. A) (1994); *Guerra and Others v. Italy*, Apps 116/1996/735/932, Judgment, 19 February 1998; *Kyrtatos v. Greece*, App. 41666/98, Judgment 22 May 2003; *Budayeva and Others v. Russia*, Apps. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment, 20 March 2008; *Mangouras v. Spain*, App 12050/04, Judgment, 28 September 2010. On the development of substantive rights see generally Donald Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge: Cambridge University Press, 2011). See also Peggy Rodger Kalas, ‘International Environmental Dispute Resolution and the Need for Access by Non-State Entities’, 12 (2001) *Colorado Journal of International Environmental Law* 191, 214-221.

⁴⁰ See e.g. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (“*Metalclad*”); *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04; Tribunal Constituted under the Energy Charter Treaty, *The PV Investors v. Spain* (registered November 2011); *Charanne B.V. and Construction Investments S.à.r.l v. Kingdom of Spain*, Final Award, 21 January 2016, Arbitration No. 062/2012. See generally Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge: Cambridge University Press, 2012).

⁴¹ *Perenco Ecuador Ltd v. Ecuador*, Interim Decision on the Environmental Counterclaim, 11 August 2015, ICSID Case No. ARB/08/6, paras. 582-586.

⁴² *Ibid*, para. 447.

⁴³ *Peter A. Allard (Canada) v. The Government of Barbados*, PCA Case No. 2012-06. This case is still pending and no decisions have been rendered to date.

⁴⁴ Other examples include the tribunal constituted under the bilateral investment treaty between Germany and Costa Rica, *Marion Unglaube v. Costa Rica*, Award, 16 May 2012, Case No. ARB/08/1; *Marvin Roy Feldman Karpa v. Mexico*, Award, 16 December 2002, Case No. ARB(AF)/99/1.

⁴⁵ See e.g. *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, Final Award, 17 February 2000, Case No. ARB/96/1; *Metalclad*, discussed in Philippe Sands, ‘Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law’, (2008) *OECD Global Forum on International Investment* 9-10.

and states' reluctance to enact and enforce environmental standards,⁴⁶ a process of modernisation is underway which, among other things, will likely better preserve states' regulatory competence over environmental issues.⁴⁷

Finally, domestic courts are increasingly hearing environmental and climate change cases. Although few in number, such cases may begin to shape environmental standards and liability for breaches of domestic law,⁴⁸ whether or not informed by international law.⁴⁹

While existing international courts and tribunal are more regularly hearing environmental disputes, they have shortcomings, explored next.

III. Is there a need for an international environmental disputes body?

Three often-cited reasons for not creating an ITE or ICE include the following: (i) the apparent reluctance of states to label a dispute as environmental, either because of differing value-based characterisations or concern to preserve sovereign policies;⁵⁰ (ii) the infrequency with which factual and legal issues in dispute pertain exclusively to the environment rather than traversing multiple bodies of international law;⁵¹ and

⁴⁶ Freya Baetens, 'The Kyoto Protocol in Investor-State Arbitration: Reconciling Climate Change and Investment Protection Objectives' in Marie-Claire Cordonier Segger *et al* (eds.), *Sustainable Development in World Investment Law* (Alphen: Kluwer Law International, 2011) 683, 695-696.

⁴⁷ See e.g. Karl P. Sauvant, *The Evolving Investment Law and Policy Regime: Ways Forward* (Geneva: International Centre for Trade and Sustainable Development, 2016) 7; Åsa Romson, *Environmental Policy Space and International Investment Law* (Stockholm: Acta Universitatis Stockholmiensis, 2012) 283-348.

⁴⁸ See e.g. Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge: Cambridge University Press, 2015); Aleksy P. Anisimov and Anatoly Y. Ryzhenkov, 'Environmental Courts in Russia: To be or not to be?', 47(3) (2013) *The International Lawyer* 441, 442, 449; cf. Eric A. Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal', 155 (2007) *University of Pennsylvania Law Review* 1925; Anna Huggins, 'Is Climate Change Litigation an Effective Strategy for Promoting Greater Action to Address Climate Change? What Other Legal Mechanisms Might be Appropriate?', 13 (2008) *Local Government Law Journal* 184. See also Brian J Preston, 'Climate Change Litigation (Part I)', 1 (2011) *Carbon Climate Law Review* 3; Brian J Preston, 'Climate Change Litigation (Part II)', 2 (2011) *Carbon Climate Law Review* 244.

⁴⁹ See e.g. *Urgenda Foundation v. the State of the Netherlands (Ministry of Infrastructure and the Environment)*, 24 June 2015, C/09/456689 / HA ZA, 13-1396, at 5.1. See also *Ashgar Leghari v. Federation of Pakistan*, 14 September 2015, Case No. W.P. No. 25501/2015. Other recent developments include the investigation of large corporate entities' contribution to climate change or misrepresentation as to their contribution. See e.g. Justin Gillis and Clifford Krauss, 'Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General, 5 November 2015 <<http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html>> accessed 1 May 2016.

⁵⁰ Dupuy and Viñuales (*supra* note 3), 244-245, 247.

⁵¹ See e.g. *Gabčíkovo* (*supra* note 24). In addition to environmental matters, the ICJ also dealt with various issues pertaining to treaty law and state responsibility. See also Sands, 'Litigating

(iii) that international environmental law is neither adequately self-contained nor clearly codified or understood to be suitable for application by a specialised tribunal.⁵²

Due to this, it has been argued, the better fora for hearing disputes that involve the environment are generalist courts such as the ICJ or specialised bodies such as ITLOS,⁵³ which has reasonably broad competence over environmental issues.⁵⁴ Undoubtedly the ICJ and ITLOS, and other bodies, make important contributions to environmental dispute resolution.⁵⁵ Despite advancements in the international dispute settlement system, the following deficiencies are likely to inhibit adequate resolution of future environmental disputes within existing fora.⁵⁶

Environmental and scientific capability

Environmental disputes frequently rely on complex, technical, scientific information. Practical experience shows that the required competence and flexibility to properly consider and address such information is generally not found within existing courts and tribunals,⁵⁷ though should be one of the most important functions.⁵⁸ As Sands observes:

*“unlike many national systems that provide for environmental or scientific assessors to join panels and assist in deciphering technical information, the international judge will likely be in no better position than you or I to decide on the relative merits of a scientific claim”.*⁵⁹

For instance, even though the ICJ may appoint independent technical experts and scientists, it seldom does. In *Pulp Mills*, instead of having independent experts who could submit reports and be cross-examined, experts were part of the counsel

Environmental Disputes' (*supra* note 45) 4; cf. ICJ, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015.

⁵² Birnie *et al* (*supra* note 3) 255.

⁵³ Phoebe N. Okowa, 'Environmental Dispute Settlement: Some Reflections on Recent Developments' in Malcolm Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Oxford: Hart Publishing, 1998) 157-172; Birnie *et al* (*supra* note 3) 255.

⁵⁴ UNCLOS, Part XII.

⁵⁵ See generally Jorge E. Viñuales, 'Contribution of International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment', 32(1) (2008) *Fordham International Law Journal* 232.

⁵⁶ A point acknowledged by both proponents and critics of an ICE. See e.g. Murphy (*supra* note 8) 343-347; Hey (*supra* note 6) 1-6; Hinde (*supra* note 6) 739-740.

⁵⁷ See generally Murphy (*supra* note 8); Hinde (*supra* note 6) 739-740.

⁵⁸ Sands, 'Climate Change and the Rule of Law' (*supra* note 12) 14-15.

⁵⁹ Sands, 'International Environmental Litigation and its Future' (*supra* note 8) 1638.

teams, inhibiting a robust interrogation of the scientific information. Without independent expert assistance, the court was required to assess some 5,000 pages of technical information.⁶⁰ In their joint dissenting opinion Judges Al-Khasawneh and Simma noted: (i) that the manner in which the ICJ evaluated scientific evidence was flawed methodologically; (ii) the ICJ should have appointed scientific experts; and (iii) overall, the ICJ missed a “golden opportunity” to “demonstrate its ability to approach scientifically complex disputes in a state-of-the-art manner”.⁶¹ They observed that the ICJ:

“...had before it a case on international environmental law of an exemplary nature—a textbook example, so to speak, of alleged transfrontier pollution—yet, the Court has approached it in a way that will increase doubts in the international legal community whether it, as an institution, is well-placed to tackle complex scientific questions”.⁶²

Fortunately, the ICJ has taken steps to better its practices, as seen in the *Whaling in the Antarctic* case, discussed above.

Similar criticisms have been made about various WTO dispute settlement panels that have not consulted experts when it was thought beneficial to do so and have dealt inadequately with scientific issues and evidence.⁶³ While the rules and procedures of courts and tribunals often permit the appointment of scientific experts on an ad hoc basis,⁶⁴ those powers are underutilised, and in practice generally do not lend themselves to live witness evidence, particularly among international courts with a practice of asking few, selected questions upon the conclusion of oral submissions. As a result, specialist training coupled with greater levels of support from engineers,

⁶⁰ Ibid, 1638.

⁶¹ *Pulp Mills* (*supra* note 45) paras. 2-3, 12-13 (Judges Al-Khasawneh and Simma).

⁶² *Pulp Mills* (*supra* note 45) para. 3 (Judges Al-Khasawneh and Simma).

⁶³ *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, adopted on 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995), Annex 2 [Dispute Settlement Rules: Understanding on Rules and Procedure Governing the Settlement of Disputes] (“DSU Rules”), article 13(2). See e.g. Diane Desierto, ‘Evidence in Environmental/Scientific Exceptions: Some Contrasts between the WTO Panel Report in China-Rare Earths and the ICJ Judgment in Whaling in the Antarctic’, *EJIL Analysis* (7 April 2014) <<http://www.ejiltalk.org/evidence-in-environmentalscientific-exceptions-some-contrasts-between-the-wto-panel-report-in-china-rare-earths-and-the-icj-judgment-in-whaling-in-the-antarctic/>> accessed 1 May 2016.

⁶⁴ See e.g. UN GA Res 68/109, 16 December 2013 [Arbitration Rules of the United Nations Commission on International Trade Law] (“UNCITRAL Arbitration Rules 2013”), art. 29; Singapore International Arbitration Centre, Arbitration Rules 2013, Rule 23; London Court of International Arbitration, Arbitration Rules 2014, art. 21; International Chamber of Commerce, Rules of Arbitration 2012, art. 25; Permanent Court of Arbitration, Arbitration Rules 2012, art. 29; *UNCLOS*, art. 289; ICJ, Rules of Court (1978), art. 63; ICSID Arbitration Rules, Rules 35-36.

environmental scientists and other disciplines is required to improve the ability of international judges and arbitrators to effectively engage with environmental and scientific evidence and issues during proceedings and in written decisions.⁶⁵

Harm caused by non-state actors

The actions of non-state actors can contribute significantly to transboundary and global harm, be it from ongoing emission of greenhouse gases that cumulatively contribute to climate change or catastrophic but infrequent accidents such as the recent Bento Rodrigues dam disaster.⁶⁶ Yet standing and other procedural rules of most international dispute resolution bodies generally do not enable non-state actors to be held to account. Accordingly, non-state actors and their host states are seldom liable for causing international harm.⁶⁷ Without accountability, international responsibility and the rule of law remain hollow notions.

The most appropriate mechanisms for holding non-state actors (namely corporations and individuals) to account are domestic legal and administrative systems, including tribunals with specialised subject-matter expertise relevant to environmental disputes.⁶⁸ As of 2009, approximately 350 specialised environmental domestic courts, tribunals or other legal bodies existed within 41 different states.⁶⁹ The vast majority of those bodies apply domestic laws, and rightly so.

⁶⁵ Stephen Hockman, 'The Case for an International Court for the Environment', 14 (2011) *Effectius Newsletter* 1, 2; Dunoff (*supra* note 8) 1052-1066, 1079-1085.

⁶⁶ McCallion and Sharma (*supra* note 8) 354.

⁶⁷ Kalas (*supra* note 39) 193-196. On mechanisms for institutional accountability see generally P. T. Muchlinski, *Multinational Enterprises and the Law* (Oxford: Oxford University Press, 2nd ed, 2007), Chs 3, 13- 14; 'Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises', U.N. Doc. E/CN.4/Sub.2/2002/XX/Add.2.

⁶⁸ John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations relating to the Enjoyment of a safe, Clean and Sustainable Environment: Compilation of Good Practices* (Human Rights Council, 3 February 2015), para. 57; Catherine Pring and George Pring, 'Specialized Environmental Courts and Tribunals: The Explosion of New Institutions to Adjudicate Climate Change and Other Complex Environmental Issues' presented at the 2nd Global Conference on Environmental Governance and Democracy (17-19 September 2010) <http://conference.unitar.org/yale/sites/conference.unitar.org.yale/files/Pring_Paper.pdf> accessed 1 May 2016.

⁶⁹ Catherine Pring and George Pring, 'Greening Justice: Creating and Improving Environmental Courts and Tribunals', (2009) *The Access Initiative* <http://www.accessinitiative.org/sites/default/files/Greening%20Justice%20Final_31399_WRI_0.pdf> accessed 1 May 2016, Appendix 1. For country specific examples see Anisimov and Ryzhenkov (*supra* note 48) 447; Gitanjal Nain Gill, 'A Green Tribunal for India', 22(3) (2010) *Journal of Environmental Law* 461-474; Richard Macrory, 'The Long and Winding Road – Towards an Environmental Court in England and Wales', 25(3) (2013) *Journal of Environmental Law* 371-381.

However, domestic laws, rules and procedures are generally not well-suited to grapple with transboundary or global environmental issues, particularly climate change.⁷⁰ Moreover, many domestic courts have an uneasy relationship with international law, whether international law is manifested through national legislation, is directly applicable through constitutional convention, or not applicable at all.⁷¹ In circumstances where domestic mechanisms are inadequate to bring non-state actors to account, a second line of defence in the form of international judicial and arbitral support may be beneficial, especially for globally significant environmental disputes. As put by Rest:

*“alongside national courts and tribunals, international judicial control is indispensable for the proper protection of the environment on a regional and global level, as well as for the proper protection of the global commons and the human rights of those individuals that are threatened or injured in cases of transnational pollution... [it] is also strongly needed to control the activities of states, to remind them of their collective responsibility for the protection of the environment and to guarantee the implementation and application of international environmental agreements”.*⁷²

Analogous examples of such mechanisms, with complementarity-based jurisdictions in the context of serious international crimes and human rights violations, are found in both the International Criminal Court and regional human rights bodies such as the European Court of Human Rights.

Restricted access to international courts and tribunals

Restrictions on standing, participation and access to international courts and tribunals are considered to be among the most pressing issues in relation to international adjudication of environmental disputes.⁷³ While the classical conception of international law provides only states with international personality and standing

⁷⁰ Preston (Parts I and II) (*supra* note 48); Rest (*supra* note 7) 264-265. See generally *Compendium of Summaries of Judicial Decisions in Environmental Related Cases* (UNEP, revised 2nd ed (draft reference document) 2015).

⁷¹ Rest (*supra* note 7) 266; UNEP, Decision 27/9: ‘Advancing justice, governance and law for environmental sustainability’, UNEP/GC.27/17 (12 March 2013). See generally UNEP Report, ‘Advancing justice, governance and law for environmental sustainability: Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditors General’ (UNEP, 2012).

⁷² Rest (*supra* note 7) 285.

⁷³ Hinde (*supra* note 6) 745; Murphy (*supra* note 8) 346; see generally Zengerling (*supra* note 8).

before international courts,⁷⁴ as discussed above, transboundary harm is increasingly a product of non-state actor activities. Additionally, whereas certain non-state actors are granted access to enforce their property and economic rights before international investment and commercial arbitration tribunals,⁷⁵ persons harmed by non-state actors (e.g. individuals and indigenous populations) do not have standing to bring international claims.⁷⁶ The result amounts to a systemic prioritisation of corporate economic interests over individual and collective environmental rights and issues at the international level, rather than some semblance of balancing those interests.⁷⁷ Similar limitations on enforcing environmental obligations are found in other specialist tribunals.⁷⁸

To better reflect modern interests in international environmental disputes, it is argued that all non-state actors (corporations, injured individuals or communities, and civil society as independent providers of information and expertise) should have standing and access to international courts and tribunals that hear environmental disputes.⁷⁹ This much has been acknowledged by Judge Weeramantry, who

⁷⁴ *Charter of the United Nations*, open for signature 26 June 1945, 1 UNTS XVI (entered into force 23 October 1945) (“*UN Charter*”), Annex [*Statute of the International Court of Justice*] (“*ICJ Statute*”), arts. 34, 65. See also Jacqueline Peel, ‘Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization’, 12 (1) (2001) *Colorado Journal of International Environmental Law* 47-76. See generally Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge: Cambridge University Press, 2013).

⁷⁵ Permanent Court of Arbitration Optional Rules for Arbitrating a Dispute between Two Parties of which Only One is a State (1993); Permanent Court of Arbitration Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment (2001) (“Optional Arbitration Rules”).

⁷⁶ Hinde (*supra* note 6) 745; Murphy (*supra* note 8) 346. In international human rights litigation, where access is granted, few substantive rights directly involve the environment. See generally Kalas.

⁷⁷ Zengerling (*supra* note 8) 349. See also e.g. *Antonie Biloune v. Ghana Investment Centre*, Award on Jurisdiction and Liability, 27 October 1989, paras. 202-203.

⁷⁸ With regard to the World Trade Organization, see McCallion and Sharma (*supra* note 8) 364; Dunoff (*supra* note 8) 1063. More generally see Dupuy and Viñuales (*supra* note 3) 247, 248-252; International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law’ (2006), para. 488. Boyle and Harrison highlight favourably the WTO’s experience of including non-governmental organisations in proceedings: (*supra* note 8) 265-266.

⁷⁹ Daniel Magraw, *UNEP/PCA Advisory Group on Dispute Avoidance and Settlement concerning Environmental Issues: Annex V (Transparency and Public Participation in Dispute Avoidance and Settlement)*, convened on 2-3 November 2006, 18; Institut de Droit International, Session de Strasbourg, ‘Resolution on Environment’ (4 September 1997), 76(2) (1998) *Annuaire IDI*; ‘Resolution on Responsibility and Liability under International Law for Environmental Damage’ (4 September 1997), 76(2) (1998) *Annuaire IDI*.

recognized the need for international law to evolve beyond inter-state dispute resolution so as to hear matters of “*global concern of humanity as a whole*”.⁸⁰

Another reason for broadening standing and access rules is that *actio popularis* is presently, in the words of the ICJ, “*not known to international law*”.⁸¹ At the ICJ and ITLOS, even though a state may intervene as of right when the interpretation or application of the treaty to which they are party is in question,⁸² intervention in relation to customary law issues is only permissible when states’ legal interests are ‘affected’ by a decision. Because the relevant judicial body determines interventions,⁸³ states may be unable to intervene, even if the dispute pertains to obligations owed *erga omnes*.⁸⁴ In arbitration, third party intervention is seldom allowed, although some tribunals are, subject to certain conditions, permitted to receive *amicus curiae* briefs from non-state actors.⁸⁵ Such rules make it harder for disputes to properly consider broader issues including environmental considerations.

For decades there have been calls for better public and open participation in international disputes, including those related to the environment: from the Rio Declaration (Principle 10),⁸⁶ the regional Aarhus Convention⁸⁷ and the United Nations Conference on Sustainable Development.⁸⁸ An ITE/ICE system could help to fill this gap.

⁸⁰ *Gabčíkovo* (*supra* note 24) 118 (Vice-President Weeramantry).

⁸¹ ICJ, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment, 18 July 1996, 1996 ICJ Reports, 6, para. 88.

⁸² *ICJ Statute*, art. 63; *UNCLOS*, Annex VI [*Statute of the International Tribunal for the Law of the Sea*] (“*ITLOS Statute*”), art. 32. Note that consensual proceeding at ITLOS can have broader access rights, permitting the involvement of international organisations, civil society and individuals.

⁸³ *ICJ Statute*, art. 62; *ITLOS Statute*, art. 31.

⁸⁴ For an extensive discussion of the emergence of public interest litigation and its possible role as an alternative to non-compliance procedures see Boyle and Harrison (*supra* note 8) 256-266.

⁸⁵ See e.g. ICSID Arbitration Rules, Rule 37(2); UNCITRAL Arbitration Rules 2013, art. 4.

⁸⁶ 1992 Rio Declaration on Environment and Development, adopted 14 June 1992, reproduced in (1992) 31 *ILM* 874. Principle 13 (“*States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control of areas beyond their jurisdiction*”) and Principle 26 (“*States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations*”) also support international environmental adjudication.

⁸⁷ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, open for signature 25 June 1998, 2161 *UNTS* 447 (entered into force 30 October 2001).

⁸⁸ United Nations Conference on Sustainable Development, *The Future We Want*, UN Doc. A/66/L.56 (24 July 2012), paras. 10, 43, 76, 89-90.

Implementation and enforcement limitations

Since the 1972 United Nations Conference on the Human Environment, multilateral environmental agreements (“MEAs”) have proliferated and now number in excess of 500.⁸⁹ While the doctrine of *pacta sunt servanda* requires that international obligations be kept in good faith, the majority of MEAs are inadequately implemented and enforced, for a broad range of reasons including the following: (i) the sheer volume of MEAs necessarily requires considerable dedicated financial and human resources that many states do not have;⁹⁰ (ii) MEAs can be deliberately vague or open textured, providing both uncertainty as to their content and low enforceability (also risking juridical activism); (iii) they are addressed to states rather than non-state actors (limiting the range of persons who may be interested in or able to bring international claims); (iv) few clear causes of action exist or can be established; (v) proving causation can be problematic (for example, this is often a hurdle to successful climate change litigation);⁹¹ and (vi) states may preference acting in their national and economic self-interest rather than the global collective interest.

Given those (and other) challenges, in certain MEAs states have created special non-binding political and administrative processes to encourage adherence with international obligations, such as conferences of the parties and non-compliance procedures, which operate in addition to traditional non-binding forms of dispute resolution such as negotiation, mediation and conciliation.⁹² Non-compliance

⁸⁹ Ivar Baste *et al*, ‘Global Environment Outlook 5: Environment for the Future We Want’ (United Nations Environment Programme, 2012) 457, 464.

⁹⁰ Dupuy and Viñuales (*supra* note 3) 270-271.

⁹¹ Stephen Humphreys, ‘Climate Change and International Human Rights Law’ in Rosemary Rayfuse and Shirley V. Scott (eds.), *International Law in the Era of Climate Change* (Massachusetts: Edward Elgar, 2012) 31; Catherine Pring and George Pring (*supra* note 69) 13; Jacqueline Peel, ‘Issues in Climate Change Litigation’, 1 (2011) *Climate Change Law Review* 15; Richard Lord *et al* (eds.), *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2012). Sands, ‘Climate Change and the Rule of Law’ (*supra* note 12) 6, notes that the Fifth Assessment Report by the Intergovernmental Panel on Climate Change (2014) provides clear and unambiguous evidence of the human influence on the natural climate system “*well beyond the classical standards on the burden of legal proof, whether it be balance of probabilities, or beyond reasonable doubt*”.

⁹² See generally, Geir Ulfstein, ‘Treaty Bodies’ in Bodansky *et al* (*supra* note 3) 877-892; Jorgen Wettestad, ‘Monitoring and Verification’ in Bodansky *et al* (*supra* note 3) 974-994. See e.g. *Convention on Long-range Transboundary Air Pollution*, open for signature 13 November 1979, 1302 UNTS 216 (entered into force 16 March 1983), art. 9; *Ozone Convention*, art. 11; *United Nations Framework Convention on Climate Change*, open for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994 (“UNFCCC”), art. 14; *Convention on Biological Diversity*, open for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), art 27; *Convention to Combat Desertification*, open for signature 14 October 1994, 1954 UNTS 3 (entered

procedures, examples of which are found in the Montreal Protocol and Kyoto Protocol,⁹³ involve the creation of subsidiary bodies that are empowered to receive submissions by any party concerned about another state's compliance with MEA obligations, assess information from various sources and, if necessary, issue a range of measures to encourage compliance with those MEA obligations. Non-compliance procedures are lauded as innovative, adaptable mechanisms to manage or facilitate compliance, but their use is not always successful and 'disputes' often remain unresolved. As evidenced by Canada's withdrawal from the Kyoto Protocol and the historically stagnated climate change negotiations, despite best intentions, non-compliance procedures and MEA political processes do not always lead to meaningful action in relation to the underlying environmental concerns.⁹⁴ Binding enforcement mechanisms such as arbitration and adjudication are usually either voluntary or entirely absent from MEAs (unlike economic treaties, which often provide compulsory adjudication),⁹⁵ potentially prejudicing the ability for states to bring international claims, even when international responsibility is triggered.⁹⁶

These are but some of the reasons that high-ranking representatives of the judicial, legal and auditing professions have called for "*more effective [...] international dispute settlement bodies for resolving [environmental] conflicts*".⁹⁷

into force 26 December 1996), art. 28; *Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on Further Reduction of Sulphur Emissions*, open for signature 14 June 1994, 2030 UNTS 122 (entered into force 5 August 1998), art. 9.

⁹³ Sands and Peel (*supra* note 3) 163-166.

⁹⁴ Alan Boyle, 'Saving the World? Implementation and enforcement of international environmental law through international institutions', 3(2) (1991) *Journal of Environmental Law* 229; Lawrence Susskind and Connie Ozawa, 'Negotiating More Effective International Environmental Agreements' in Andrew Hurrell and Benedict Kingsbury (eds.), *The International Politics of the Environment: Actors, Interests and Institutions* (New York: Oxford University Press, 1992), 143. See also Johanna Rinceanu, 'Enforcement Mechanism in International Environmental Law: Quo Vadunt?', 15 (2000) *Journal of Environmental Law and Litigation* 147-177.

⁹⁵ Birnie *et al* (*supra* note 3) 251. But *cf.* *Protocol on Environmental Protection to the Antarctic Treaty*, open for signature 4 October 1991 (entered into force 14 January 1998) reproduced in 30 (1991) *ILM* 1455, art. 19(5); *International Convention for the Prevention of Pollution from Ships*, adopted 2 November 1973, 1340 UNTS 184 (entered into force 2 October 1983), art. 10.

⁹⁶ UN GA Res 56/83, 12 December 2001, Annex, art. 48 [*Responsibility of States for Internationally Wrongful Acts*]. If a treaty creates obligations *erga omnes*, those owed to the entire international community, a state that is not directly injured may also bring a claim. *Cf.* ICJ, *South West Africa Cases*, (*supra* note 81).

⁹⁷ United Nations Conference on Sustainable Development, 'Declaration on Justice, Governance and Law for Environmental Sustainability', Principle I, para. 4, <http://www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf> accessed 1 May 2016.

IV. Proposals for an international environmental court

There have been three major projects calling for an ITE or ICE. The first was instigated by Justice Postiglione of the Italian Court of Cassation who, in 1989, coordinated an international 'Congress' in which twenty-seven states participated to consider new global environmental institutions. He supported the development of "*new legal State liability rules and, consequently, compulsory and efficient conflict regulation procedures supported by a permanent, international authority*".⁹⁸ Justice Postiglione's proposed model entailed the creation of an ICE that would adjudicate environmental matters to ensure respect by states and individuals, while also compelling repair of ecological damage where necessary. In 1992, he funded the International Court of the Environment Foundation ("ICEF"), which attended the UN Conference on Environment and Development and presented a draft statute for consideration, which ultimately was not removed from the conference agenda.⁹⁹ According to the statute, the ICE would have broad functions:

- a) to protect the environment as a fundamental human right in the name of the International Community;*
- b) to decide any international environmental disputes involving the responsibility of States [...] which has not been settled through conciliation or arbitration within a period of 18 months;*
- c) to decide any disputes concerning environmental damage, caused by private or public parties [...] where it is presumed that, due to its size, characteristics and kind, this damage affects interests that are fundamental for safeguarding and protecting the human environment on earth;*
- d) to adopt urgent and precautionary measures when any environmental disaster concerning the International Community is involved;*
- e) to provide, at the request of the organs of the United Nations and other members of the International Community, advisory opinions on important questions regarding the environment on a global level;*
- f) to arbitrate, upon request, without prejudice to its judicial role;*

⁹⁸ Amedeo Postiglione, 'A More Efficient International Law on the Environment and Setting up an International Court for the Environment within the United Nations', 20 (1990) *Environmental Law* 321, 323-325; see e.g. Amedeo Postiglione, *Global Environmental Governance: The need for an International Environmental Agency and an International Court of the Environment* (Brussels: Bruylant, 2010).

⁹⁹ Dunoff (*supra* note 8) 1107.

g) to carry out, upon request, investigations and inspections with the assistance of independent technical and scientific bodies when there is environmental risk or damage and, ex officio, when considered necessary and urgent.”

The ICE would also have broad standing rules and remedies, and could issue preliminary rulings following a request from a national court.¹⁰⁰ In 1999, ICEF presented a revamped version of its draft statute to accommodate feedback that the earlier version was too ambitious.¹⁰¹ Having identified a vast range of environmental, economic, legal, societal, political, ethical, cultural and scientific reasons that support its proposal, ICEF continues to promote its ideas.¹⁰²

The second project was established in 1994, as the International Court of Environmental Arbitration and Conciliation (“ICEAC”), a private initiative originating from Mexico with judges and lawyers working voluntarily that aims to provide a forum for, among other things, conciliation of environmental disputes (which have constituted the majority of its applications).¹⁰³ In the ICEAC model, while all parties to a dispute must agree to the ICEAC’s jurisdiction, states, private parties and NGOs may submit disputes. The ICEAC is also permitted to give relevant consultative opinions “*at the request of any natural or legal person, whether public or private, national or international.*”¹⁰⁴ To date, the impact of ICEAC has been minimal.

The third project commenced in 2009, under the auspices of the International Court for the Environment Coalition (“ICE Coalition”). Under the leadership of Stephen Hockman QC, various lawyers, public servants, academics and civil society professionals sought to reactivate consideration of an ITE or ICE, given the then burgeoning awareness of environmental problems.¹⁰⁵ The ICE Coalition considers

¹⁰⁰ Draft Statute of the International Environmental Agency and the International Court of the Environment, art 10, <<http://www.icef-court.org>> accessed 1 May 2016.

¹⁰¹ Ibid, arts. 7-8.

¹⁰² For ICEF’s involvement in other fora, see Deirdre Exell Pirro, ‘Project for an International Court of the Environment – Origins and Development’ in Thomas Greiber (ed.), *Judges and the Rule of Law: Creating the Links – Environment, Human Rights and Poverty* (Cambridge/Gland: International Union for Conservation of Nature and Natural Resources, 2006) 13-20; ICEF, ‘Call for Actions by the Participating States of the Rio+20 Conference’, 4 June 2012 <www.uncsd2012.org/content/documents/120icef.pdf> accessed 1 May 2016.

¹⁰³ See Eckard Reh binder and Demetrio Loperena, ‘Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation’, 31 (2001) *Environmental Policy and Law* 282.

¹⁰⁴ ICEAC, Regulations (1994), art. 49.

¹⁰⁵ For a critical view of this initiative, see Pedersen (*supra* note 5).

judicial mediation of international environmental issues, and climate change in particular, crucial.¹⁰⁶ In 2014, the IBA's Climate Change Justice and Human Rights Task Force made numerous short-, medium- and long-term recommendations, amongst which it supported "*the gradual development of an ad hoc arbitral body [ITE] which would build towards a permanent formal institution [ICE].*"¹⁰⁷

In the short term, however, the IBA suggests using and enhancing existing arbitral and judicial institutions that may hear environmental disputes, while also recognising their limitations.¹⁰⁸ In particular, it identifies the PCA as the preferred arbitral forum, having taken note of its innovative Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources (2001) ("Optional Arbitration Rules") which, *inter alia*, empower a tribunal to order interim measures to prevent serious environmental harm and to request non-technical summaries of "*scientific, technical or other specialized information*".¹⁰⁹ It also endorsed access to the PCA's financial assistance fund, which helps states in need to meet the costs of dispute resolution proceedings, the possibility for non-state entities to bring or participate in claims and for the PCA to maintain lists of experts and specialised arbitrators.¹¹⁰ To date those rules have been infrequently utilised.

The IBA has encouraged all other arbitral institutions to develop appropriate rules, procedures and expertise amenable to environmental issues.¹¹¹ In this regard, the PCA's Optional Arbitration Rules as well as its Optional Rules for Conciliation of Disputes Relating to the Environment and/or Natural Resources ("Optional Conciliation Rules"),¹¹² which provide for consensual participation by any domestic or international actors, as well as multiparty participation, merit attention.¹¹³

¹⁰⁶ See generally Stephen Hockman, 'Opinion: An International Court for the Environment', 11 (2009) *Environmental Law Review* 1-4.

¹⁰⁷ David Estrin and Helena Kennedy, 'Achieving Justice and Human Rights in an Era of Climate Change' (London: International Bar Association, 2014) ("IBA Climate Justice Report"), 28.

¹⁰⁸ *Ibid*, 142.

¹⁰⁹ Optional Arbitration Rules (*supra* note 75) arts. 24(4), 26(1). See generally M Vespa, 'An Alternative to an International Environmental Court? The PCA's Optional Arbitration Rules for Natural Resources and/or the Environment', 2 (2003) *The Law and Practice of International Courts and Tribunals* 295.

¹¹⁰ IBA Climate Justice Report, 13.

¹¹¹ *Ibid*, 14.

¹¹² The PCA has also created Optional Conciliation Rules for general disputes, Optional Rules for Arbitration Between International Organizations and States (1996) and Optional Rules for Arbitration Between International Organizations and Private Parties (1996), potentially providing the PCA with broad jurisdiction.

¹¹³ The Optional Arbitration Rules were modeled on the 1976 UNCITRAL Arbitration Rules, which have been superseded.

Until recently, it was thought that the age of international court-building had passed, but there are signs that institutional innovation may still be possible. In 2015, EU Trade Commissioner Cecilia Malmström proposed the creation of a world Investment Court System as the dispute settlement body for the Transatlantic Trade and Investment Partnership,¹¹⁴ a version of which was accepted in the most recent Comprehensive Economic and Trade Agreement text, along with support for conciliation.¹¹⁵ If that political will can be harnessed in the context of environmental concerns, such that states (and relevant non-state actors) perceive there to be greater benefits from participation in an ITE/ICE system rather than maintenance of the status quo (discussed below), perhaps an adjudicative institution dedicated to the environment may not be as fanciful as once thought. To date, states, who would be the primary creators and users of an ICE, have not evinced such enthusiasm.

V. Potential benefits of an international environmental disputes body

Part II above provided a brief survey of existing international courts and tribunals with competence to hear environmental disputes. But as shown in Part III above, those bodies are presently not optimised to deal with the range of issues, interests and complexity that accompanies environmental disputes. Over time, those shortcomings could be addressed incrementally through enhancements to existing bodies,¹¹⁶ and by creating a well-designed ITE/ICE system. Kalas notes a number of other benefits that an ITE/ICE system could bring to states, communities, individuals and businesses:

“(i) a centralized system that is accessible to a range of actors; (ii) establishment of a body of law regarding international environmental issues; (iii) consistency in judicial resolution of international environmental disputes ... (vi) increased focus on preventive measures; (vii) global environmental standards of care; and (viii) facilitation and enforcement of

¹¹⁴ Transatlantic Trade and Investment Partnership, ‘Investment’, Draft (EU Commission), Section 3 - Resolution of Investment Disputes and Investment Court System <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 1 May 2016. See generally Catharine Titi, ‘The European Commission’s Approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment Standards and International Investment Court System’, (2015) *Transnational Dispute Management* 6.

¹¹⁵ Comprehensive Economic and Trade Agreement between Canada and the European Union <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 1 May 2016, Section F, arts. 23.11, 24.16.

¹¹⁶ For selected proposals see Boyle and Harrison (*supra* note 8) 273-276.

*international environmental treaties. In addition, if an International Environmental Court were to enable more plaintiffs to bring suit, corporations and other private entities might be more inclined to engage in environmentally sound practices abroad. Such a Court could influence the business community to develop risk management programs, improve present practices, and make cost-benefit analyses prior to undertaking large development projects, which would have a corresponding reduction of environmental catastrophes, and increased compliance with applicable laws”.*¹¹⁷

Ultimately, an ITE/ICE system could help to build trust among states and non-state actors through the provision of workable solutions to environmental disputes. In the context of risk management, an ITE/ICE system could even assist with interpreting and implementing new global initiatives aimed at disaster reduction.¹¹⁸

On one view, eventually the ITE/ICE system could become the preeminent global centre of excellence for environmental law and jurisprudence,¹¹⁹ cultivating coherence between international environmental law regimes and integration with other specialised areas of law,¹²⁰ and provide complementary assistance to legislative and judicial systems.

Practically, this aspirational objective could be achieved by the ITE/ICE system, and its conciliation arm, becoming the standard compliance and dispute settlement mechanisms for MEAs.¹²¹ Similarly, institutions or regional bodies created under MEAs could use the ITE/ICE system as a joint alternative or complement to, or replacement of, their own tribunals or non-compliance procedures.¹²² For example,

¹¹⁷ Kalas (*supra* note 39) 239-230.

¹¹⁸ UN GA Res. 70/1, 21 October 2015 [Transforming our World: the 2030 Agenda for Sustainable Development], 14; International Monetary Fund, ‘Financing for Development: Revisiting the Monterrey Consensus’, July 2015, 24; Report of the Secretary-General, *Implementation of General Assembly Resolution 67/226 on the Quadrennial Comprehensive Policy Review of Operational Activities for Development of the United Nations System*, UN Doc. A/71/63-E/2016/8 (31 December 2015), paras. 2, 105, 154; World Conference on Disaster Reduction, 16 March 2005, Resolution 2 [Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters], paras. 3, 4, 11, 16, 19.

¹¹⁹ See e.g. McCallion and Sharma (*supra* note 8) 361.

¹²⁰ Alessandra Lehmen, ‘The Case for the Creation of an International Environmental Court: Non-State Actors and International Environmental Dispute Resolution’, 26(2) (2015) *Colorado Natural Resources, Energy and Environmental Law Review* 180, 182-183.

¹²¹ IBA Climate Justice Report, 145-156. Pauwelyn endorses the politically difficult proposal of expanding the ICJ’s jurisdiction to encompass MEAs, and as second-best solution for an ICE to fulfill this role under a World Environment Agency that coordinates all MEAs, (*supra* note 7) 159.

¹²² For example, *UNFCCC*, art. 14 provides for an Annex regarding arbitration that is yet to materialise; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, open for signature 11 December 1997, 2303 *UNTS* 148 (entered into force 16 February 2006), art.

through Article 20 of the Kyoto Protocol the ITE/ICE system could be empowered as an independent enforcement branch, which could go some way to overcoming the inherent limitations of the compliance committee as a quasi-judicial body that is susceptible to political influence. Other environmental regimes could follow suit. Referral to the ITE/ICE system could be achieved by amending, creating protocols to, or passing resolutions under existing MEAs.

Such a proposal is neither unprecedented nor futile. For example, at least 11 MEAs reference the PCA as either the arbitral forum or appointing authority for disputes¹²³ and, as mentioned above, the PCA increasingly administers disputes that include an environmental dimension. Additionally, the PCA's Optional Arbitration Rules and Optional Conciliation Rules are referred to, either wholesale or in modified form, in a various other instruments touching upon environmental regulation.¹²⁴

Should the ITE/ICE system become the dispute resolution system of choice, it is hoped that by virtue of the above-mentioned benefits, and the possible consequences of international action, participating states could gently be encouraged to display positive behavioural change and to increasingly comply with international environmental obligations.¹²⁵

VI. Contours of an International Environmental Tribunal and Court

This Part considers the broad parameters, architecture and framework of the two proposed alternative and complementary models of environmental adjudication: an ITE and an ICE. It is envisioned that the former would serve as a precursor to the latter; to the extent the latter remains necessary over time.¹²⁶ This section does not resolve the numerous thorny issues accompanying the creation of such bodies. Rather, it canvasses several of the difficulties faced and makes proposals to advance the

19; UNFCCC, Draft decision 1/CP.21, FCCC/CP/2015/L.9/Rev.1 [Paris Agreement], art 24. But see Zengerling (*supra* note 8) 317.

¹²³ Permanent Court of Arbitration, 'Environmental Dispute Resolution' <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution>> accessed 1 May 2016.

¹²⁴ Including the *Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters*, adopted 21 May 2003 (not yet in force), art. 14; the Gold Standard Foundation certification appeals process; various Kyoto Protocol Clean Development Mechanism agreements; and Green Climate Fund related instruments. See Permanent Court of Arbitration, 'Environmental Dispute Resolution' <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution>> accessed 1 May 2016.

¹²⁵ See generally Carroll (*supra* note 9) 112-114.

¹²⁶ Stephen Hockman, 'The Case for an International Court for the Environment', 3(1) (2010) *Journal of Court Innovation* 215, 228.

scholastic log-jam in favour of practicable solutions in relation to their establishment and performance, jurisdiction, applicable law, transparency, competence and enforcement.

Creation, structure and operations

The quickest, cheapest and easiest way to establish an ITE would be by mutual agreement between parties to an international environmental dispute (be they states, international organisations, corporations, NGOs or individuals) to (i) submit the dispute to the jurisdiction of an ITE and (ii) to be bound by its constitution and award. Standing consent could be provided in advance through an arbitration agreement in contracts or treaties or by agreement after disputes arise.

By comparison, an ICE would be established through an international treaty, either within or outside the UN system, with agreed ratification requirements and transposition into domestic law. This process could start by a recommendation at an international conference, supported by a UN General Assembly resolution authorising the commencement of negotiations. An appropriate recent forum to instigate preparatory work would have been the 2012 United Nations Conference on Sustainable Development, but the idea was not addressed.

When creating an ITE or ICE, careful consideration of its constituent parts, structure and operations will be required.

First, *the institutional position*: whether an ITE/ICE would be more environmentally effective as a standalone adjudicative body or by sitting within or alongside an eventual world environment organization (or within the present formulation of UNEP).

Second, *the form of the founding instrument*: whether a constitutive, procedural framework treaty setting out its competence, operations and powers, modelled on the ICJ Statute, the ICSID Convention or best-practice arbitration rules (UNCITRAL, LCIA, ICC, SCC, SIAC), or a new substantive convention on environmental rights or protections that includes the above as well as enunciating guiding principles and substantive legal obligations, akin to the Rome Statute, by which the parties will be bound. In principle, an ICE statute and rules would likely provide less flexibility than that associated with party-choice inherent in an ITE. In practice, however, an ITE would provide the conceptual template for how an ICE

could work in terms of jurisdiction, applicable law, decision-making and procedure. Therefore, on certain measures few differences would exist between the ITE and ICE.

Third, *scope of the mandate*: whether the function of an ITE/ICE should be limited to any of facilitating implementation and compliance of MEAs through judicial review, undertaking of risk assessments, operation of MEA non-compliance mechanism and enforcement of obligations via inter-state dispute resolution,¹²⁷ or a broader mandate where disputes may be brought by non-state actors and the ITE/ICE may even extend to a form of guardianship over the natural environment. Pauwelyn notes the limited benefit of establishing a tribunal by consent that simply facilitates the “*settlement of environmental disputes broadly defined*”¹²⁸ that could presently be heard before the PCA, ICEAC, the ICJ or similar bodies. Whatever the mandate, the preponderance of opinion emphasises that a politically amenable mandate is one that trespasses lightly on state sovereignty and minimises jurisdictional overlaps with existing bodies.¹²⁹ Indeed, states prefer granting compulsory jurisdiction to specialised bodies empowered to enforce certain treaty-specific claims, as seen in UNCLOS and the WTO.¹³⁰ But at present, no international tribunal has jurisdiction over all MEAs, potentially offering fertile ground for development.

Fourth, *panel composition*: in any model, an ITE/ICE would best be served by panels composed of both specialist international environmental law and generalist public international law experts, legislators or diplomats, supported by expert technical, scientific, engineering and other panels as required to address a particular matter.¹³¹ Separate chambers could also be established to focus on thematic areas (i.e. biodiversity, air pollution, climate change, wildlife, forests, etc). Such expertise would allow judgments that demonstrate an appreciation of the interrelationship between law, science, the environment and other technical matters, encourage greater systemic integration of international law (regardless of a restricted subject-matter jurisdiction). These benefits may distinguish an ITE/ICE as an attractive option to

¹²⁷ Sands, ‘International Environmental Litigation and its Future’ (*supra* note 8) 1640: “*the international community should consider strengthening the noncompliance procedures that are being established in various multilateral environmental agreements, and finding ways to fold them into a single body with overarching functions*”.

¹²⁸ Pauwelyn (*supra* note 7) 158-159.

¹²⁹ Hinde (*supra* note 6) 728, 748-756.

¹³⁰ Pauwelyn (*supra* note 7) 159.

¹³¹ Sands, ‘Litigating Environmental Disputes’ (*supra* note 45) 4.

prospective disputing parties.¹³² Independent fact-finding, site visits and commissioned studies could also enable better understanding of the issues in dispute, though not all states may support national fact-finding missions. In both models the parties would have confidence that the adjudicators are well equipped to deal with the subject-matter, even though only an ITE model would allow parties to choose their preferred arbitrators from standing lists or by agreed appointment, maintaining some party autonomy.¹³³

Fifth, *funding and costs*: a number of options exist to fund and operate an ITE or ICE. Funding could be provided by states parties based on a pre-agreed formula, such as the UN contribution model. Parties could bear their own costs or costs could be event-based or determined according to harm or principles such as 'polluter pays'.¹³⁴ Corporations could even provide long-term grants or annual fees in return for access by its entities that are often involved in disputes involving environmental concerns, such as mining companies. This may also create positive public perception benefits for those entities, by demonstrating a commitment to good environmental practice. Should the ITE not have permanent infrastructure, but operate as an *ad hoc* body, establishment and operating expenses could be minimal. Like the PCA's fund for developing states, an ITE/ICE could provide open-access funding for indigenous persons and other vulnerable, affected persons or entities that would otherwise encounter difficulties in participating in proceedings.

Jurisdiction and applicable law

Carefully designing the jurisdiction *ratione personae, materiae* and applicable law for the ITE and ICE will undoubtedly be the most challenging aspects of the project, and those most susceptible to criticism, but vital to minimise forum-shopping.¹³⁵

Turning first to personal jurisdiction. As canvassed above, in the context of an ITE it is assumed that jurisdiction *ratione voluntatis* would be present. Without

¹³² Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', 25 (2003-2004) *Michigan Journal of International Law* 903, 915-916; Stephens (*supra* note 6) 51.

¹³³ *Cf.* the ECE Conciliation Court structure that requires choice from standing lists only.

¹³⁴ Pauwelyn (*supra* note 7) 168.

¹³⁵ Boyle and Harrison propose the development of "a protocol reforming the present haphazard provision for dispute settlement in environmental treaties" than the radical idea of an ITE or ICE: (*supra* note 8) 275.

consent, proceedings would be frustrated. Whose consent is required would depend on the model of an ITE/ICE (i.e. narrow or broad mandate). If the purpose of the project is to enforce states' obligations under international law (or breaches of obligations due to acts or omissions by persons under its jurisdiction), a tribunal need only have jurisdiction over states, which could be provided in MEAs or by agreement. Individuals, corporations and NGOs could then bring claims (standing for claimants is discussed below under 'access, remedies and enforcement'). If private parties (or international organisations) wish to bring disputes *inter se* the tribunal will be required to consider, based on the doctrine of competence-competence, whether jurisdiction *ratione personae* may be established through contractual or other arbitration agreements, and whether it has exclusive jurisdiction. Of course, procedures involving multiple defendants (and consideration of multiple treaties) would likely be necessary given the environmental subject matter.

In the ICE model, at one extreme end, state parties could agree that the ICE has complementary compulsory jurisdiction over persons or entities domiciled within or governed by the law of their territory, covering the state and its organs, corporations, NGOs, individuals and other structures, which could be especially necessary if environmental crimes are established.¹³⁶ The need for compulsory jurisdiction in the international legal system generally has been emphasised by Lord Bingham of Cornhill, who observes that "*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*".¹³⁷ Permanent jurisdiction of an ICE would additionally provide, at minimum, a symbol of environmental stewardship, which could even be advanced by an independent commissioner or public prosecutor, linked to a world environment organisation or UNEP.¹³⁸

¹³⁶ See Kalas (*supra* note 39) 210-212.

¹³⁷ Thomas Bingham, *The Rule of Law* (Penguin Books, 2010) 129, cited in Hockman, 'The Case for an International Court for the Environment' (*supra* note 126) 216.

¹³⁸ Durwood Zaelke and James Cameron, 'Global Warming and Climate Change – An Overview of the International Process', 5 (1990) *American University Journal of International Law and Policy* 285. In a similar context, see the *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 *UNTS* 3 (entered into force 1 January 1989), art. 8, Decisions of the Meetings of the Parties to the Montreal Protocol Tenth Meeting of the Parties (Cairo, 23-24 November 1998) Annex II: Non-compliance procedure, which permits its secretariat to activate an Implementation Committee.

Over time, as international obligations and responsibility for international organisations mature, personal jurisdiction of an ITE/ICE could be amended, for example, to review conduct and decision-making compatibility with international environmental law, perhaps reducing the need for extant bodies such as the World Bank Inspection Panel.

Jurisdiction *ratione materiae* will be a central design concern for the ITE/ICE system. In response to the concerns of Hey and others about the difficulty of defining an environmental dispute and related disagreements between disputing parties, a pragmatic proposal provides for subject matter jurisdiction by reference to MEAs rather than “*disputes arising under international environmental law*” or “*disputes on the protection of the environment*”.¹³⁹ Those MEAs could be articulated in the ITE/ICE statute or be referenced as the ‘covered agreements’ within the scope and mandate of a future world environment organisation, borrowing from the WTO system. Incorporating MEAs by reference, with carve-outs as necessary, would assist delineate between the jurisdiction of ITE/ICE and other international fora.

Additionally, an ICE in particular could provide a judicial review-like function of legal decisions made by other treaty compliance and supervisory bodies (should the ICE not become the designated body). For instance, the ICE may need to determine whether a decision of the Conference of the Parties to a treaty has legal effect for its state parties. Discharge of such duties could also be facilitated through consultative or advisory opinions on questions of environmental law or legal aspects of the use or protection of aspects of the natural environment. Equally, an ITE/ICE should be able to refer to the judgments of other institutions for guidance, and request opinions or advice from international organisations and scientific bodies of sound repute on factual matters (i.e. from the Intergovernmental Panel on Climate Change, the International Energy Agency, the European Union etc).

One difficulty for an ITE or ICE would be to identify and apply the relevant applicable law. It is argued that “*customary international environmental law is in an embryonic state of development, and although treaties are numerous, they provide only islands of rules in a sea of vague general principles and custom*”.¹⁴⁰ Yet vague

¹³⁹ Pauwelyn (*supra* note 7) 161.

¹⁴⁰ See Catherine A. Cooper, ‘The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms’, 24 (1986) *Canadian Year Book of International Law* 247, 252. For consideration of the crystallisation of environmental rights see McCallion and Sharma (*supra* note 8) 354-359.

laws have not prevented the proliferation of cases in other domains such international investment protection law, and should not prevent the project's continuation.

The particular applicable law would depend on whether the ITE/ICE has a broad or narrow mandate. On one conception, the law and guiding principles for an ITE/ICE would be predicated upon its founding convention on the right to a healthy environment or similar,¹⁴¹ or the consolidation of existing environmental treaties into a single international charter or constitution, which could encourage integration and coherence within international law rather than fragmentation and disunity.¹⁴² While those approaches develop, existing international laws will apply as relevant to the issues in dispute.¹⁴³

Otherwise, for an ITE, it would be for the parties to determine the applicable law in any arbitration agreement between them or to rely on established procedures to do so, in the absence of which by default international law would apply and prevail over any other conflicting law. For an ICE, it seems sensible for the applicable law to be MEAs and other rules beyond international environmental law that are binding on the parties, in addition to general and customary international law which would assist with interpretation and application of substantive obligations.¹⁴⁴ Indeed, arbitrators and judges of the ITE/ICE system could incrementally provide clarity, predictability and certainty to treaty law and customary norms, environmental rights and responsibilities, including on matters such as state responsibility for environmental harm from non-state entity conduct.¹⁴⁵ This could perhaps be among its greatest roles and advance two functions of the system: a "*retrospective function*" in resolving immediate disputes between parties, and a "*prospective function in articulating legal principles applicable in the future*".¹⁴⁶ In so doing, arbitrators and judges could raise

¹⁴¹ Hinde (*supra* note 6) 749-756. See also IBA Climate Justice Report, 118-126 which recommends the clarification of human rights obligations relating to climate change and in the long-term the possible creation of a "*free-standing human right to a safe, clean, healthy and sustainable environment*". See also ICEF proposals.

¹⁴² Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 (1999) *New York University Journal of International Law and Policy* 791, 798-99. But *cf.* Hey (*supra* note 6) 9-14 who notes the creation of a specialist environmental court made may have the unwarranted side effect of contributing to further fragmentation of international law.

¹⁴³ Boyle and Harrison caution against an expansive view of applicable law, which may dissuade states from participating or accepting compulsory jurisdiction: (*supra* note 8) 255.

¹⁴⁴ Pauwelyn (*supra* note 7) 164.

¹⁴⁵ See e.g. Hinde (*supra* note 6) 741-744.

¹⁴⁶ Vaughan Lowe, 'The Function of Litigation in the International Community', Annual lecture: UCL Centre for International Courts and Tribunals, Middle Temple Hall, 13 June 11, transcript, 6.

public consciousness about environmental protection and its integration with other modern objectives.¹⁴⁷

Coupled with compulsory jurisdiction, the ITE/ICE system could encourage greater implementation by all participants of their obligations, else risk international enforcement, the reciprocal assurance for which would foster a 'level playing field' in which excuses or options for free-riding are reduced.¹⁴⁸ Where necessary, questions of general international law could be referred to the ICJ. Domestic law, as within other international courts, would be treated as a fact in either model.

Access, remedies and enforcement

In the spirit of Principle 10 of the Rio Declaration, the Aarhus Convention, the growing movement of transparency in international arbitration, and continual calls for access to justice for those affected by environmental harm, it is anticipated that both an ITE and ICE would have broad standing and participation rules.

As for standing in an ITE, any persons or entities could bring claims by consent. In an ICE, defendant and signatory states, international organisations and non-state actors could seek advisory opinions to identify and describe the law in relation to particular issues. If the system were truly open, access to justice would be provided to all actors through rights to bring claims (singularly or with multiple claimants) either directly or under complementarity jurisdiction, which on one level may assist to facilitate enforcement of obligations *erga omnes* when global commons resources are harmed, for example. In reality, it is unlikely that all states would support access to justice, have capacity to provide it or would risk censure from a non-state accountability mechanism. But as commented by Judge Jessup long ago, "*it would be folly to provide for the settlement of disputes under environmental treaties without opening the tribunal or administrative body to those entities which will be as much concerned with enforcement of the new standards as will governments of state*".¹⁴⁹ Others warn that providing non-states with a cause of action

¹⁴⁷ Sands, 'Climate Change and the Rule of Law' (*supra* note 12) 8.

¹⁴⁸ But cf Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge: Cambridge University Press, 2014) for a new perspective on why states may eschew such developments.

¹⁴⁹ P. C. Jessup, 'Do New Problems Need New Courts?', 65 (1971) *Proceedings of the American Society of International Law* 261, 265.

may undermine the democratic legitimacy of international environmental law.¹⁵⁰ This multifaceted concern warrants further exploration elsewhere.

Various controls should exist to balance openness with perceived or actual risks to participating entities and the system itself, which could include any of the following requirements: individual or group harm, admissibility conditions to prevent frivolous claims and acceptance of only the 'most serious' breaches and issues (if a broad model is adopted), and exhaustion of local remedies. Such measures could emulate certain safeguards built into the International Criminal Court and the European Court of Human Rights.¹⁵¹ Controls for adjudication or arbitration would limit matters to those such as the Exxon Valdez or Deepwater Horizon oil spills, the Indian water arsenic poisoning and the toxic mud incident in Brazil, which, it is hoped, would also maximise the ITE/ICE system's potential for contributing to the prevention of and response to major environmental harm. Conciliation could be commenced in relation to less serious breaches or less severe environmental issues.

As for participation, both models could benefit by allowing *amicus curiae* briefs and expert testimony from NGOs representative of the issues. Like other ad hoc bodies, an ITE could be constituted anywhere in the world with appropriate facilities, potentially bringing (affordable) participation closer to the victims.

Innovative and flexible remedies would be particularly necessary given the subject matter. At one end, an ITE and ICE may only be empowered to offer declarations of incompatibility of signatory states' legislation with MEAs and other declaratory judgments, thereby enabling additional action against future behaviour inconsistent with a declaration. At the other end, an ICE could issue fines and require compensation, order restoration and rehabilitation of damaged habitat, akin to those in the European Community Environmental Liability Directive.¹⁵² Importantly, provisions should be made for interim measures, in particular to preserve environmental evidence, as found in most domestic and international courts, and to prevent environmental harm. If environmental crimes were ever to be recognised,

¹⁵⁰ Pauwelyn (*supra* note 7) 162.

¹⁵¹ *Rome Statute of the International Criminal Court*, open for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), preamble, arts. 1, 5(1); ECHR, art. 34; European Court of Human Rights, Rules of Court, Rules 46, 47.

¹⁵² Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004, L 143/56 EN OJ; Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009, L 140/114 EN OJ.

over which an ICE may have jurisdiction, penalties could include punitive fines and imprisonment.

If any of the remedies were not binding, then only normative pressure and reputational consequences could follow. Assuming they are binding, interim and final awards that are dispositive of an issues could be enforced either under the New York Convention (assuming the ITE is seated in a member state territory)¹⁵³ or pursuant to an internal enforcement obligation within the ITE's or ICE's statute, akin to either the ICSID Convention or the ICJ Statute.¹⁵⁴ ICJ judgments in particular are highly regarded and provide considerable political and public pressure for compliance; it is hoped that so too would ICE decisions.

VIII. Conciliation within the ITE/ ICE system

It is beyond the scope of this chapter to review in detail the merits of conciliation or the types of disputes for which it is amenable, of which there are many. As suggested elsewhere in this book, environmental issues which thus far have tended not to imperil territorial integrity, threaten peace or result in war—for example disputes relating to transboundary water, air, land and noise pollution, global greenhouse gas emissions, breach of treaty obligations and maritime delimitation—are suitable for determination through conciliation. As discussed above, conciliation is included as a mode of dispute resolution in many MEAs, though its practical application is limited. Within the frame of an ITE/ICE system conciliation could operate as a mode of dispute settlement alongside adjudication in inter-state and mixed disputes.¹⁵⁵ For example, the ITE/ICE system could operate as the conciliation commission envisaged under Article 14(6)-(7) of the UNFCCC.

The current draft statute of the ICE contemplates conciliation as a mandatory requirement before commencement of judicial proceedings.¹⁵⁶ The aim of this precondition is to encourage time- and cost-effective resolution of disputes. Under the

¹⁵³ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, open for signature 10 June 1958, 330 *UNTS* 3 (entered into force 7 June 1959), art. III.

¹⁵⁴ ICSID Convention, Article 54. Note the ICJ does not have mandatory enforcement power: *UN Charter* (*supra* note 74) art. 94. Referrals to the Security Council for consideration of non-compliance is also a possibility.

¹⁵⁵ See generally, Jean-Perre Cot, 'Conciliation', (2006) *Max Planck Encyclopedia of Public International Law* (OUP).

¹⁵⁶ Article 7 (manuscript with the author).

ICE model, conciliation would be initiated with the administrative support of the Court's Secretariat, who, in consultation with the members of the Court, would appoint a Commission capable of dealing with the legal and factual issues arising from the particular environmental dispute.¹⁵⁷ The procedures common to conciliation would otherwise operate, resulting in a proposal for the settlement of the dispute being made to the parties, which is discussed with and considered by the parties separately and jointly.¹⁵⁸ The rules could default towards confidentiality unless the parties agreed otherwise, although a short report summarising the case and solution would be made publicly available, unless opposed by one of the parties. This position is aligned with the ICSID Arbitration Rules.¹⁵⁹ Nonetheless, in light of recent developments to improve transparency in investment arbitration and the public interest aspect of environmental disputes,¹⁶⁰ future drafters may wish to consider adopting rules that would not render proceedings and publications confidential. Still, the benefit of such rules would have to be weighed against the risks of deterring conciliation in preference for other modes of dispute resolution.

In many respects, it is quite possible that the ICE conciliation rules, when fully developed, would be similar to the PCA's Optional Conciliation Rules (themselves modelled on the PCA Conciliation Rules and UNCITRAL Conciliation Rules), with allowances for modernisation in the context of international disputes generally. While procedurally these sets of rules would have similarities, a primary differentiating factor would be the subject-matter knowledge and specific environmental dispute experience possessed and developed over time by the ITE or ICE. This factor would also distinguish an ICE from the general subject-matter competence of the OSCE's Court of Conciliation and Arbitration.

¹⁵⁷ Ibid, Article 7(2)-(3).

¹⁵⁸ Ibid, Article 9(2).

¹⁵⁹ ICSID, Administrative and Financial Regulations, Regulation 22; ICSID Arbitration Rules, Rule 48(4).

¹⁶⁰ UNCITRAL Arbitration Rules 2013 (*supra* note 64); See e.g. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (New York: United Nations, 2014); United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted on 10 December 2014 by resolution 69/116 during the sixty-ninth session of the General Assembly of the United Nations.

IX. Conclusions

There are many reasons to question the practicality and feasibility of an ITE or ICE, as surveyed in this chapter. But even detractors acknowledge the merit in probing the boundaries of the practically possible, the “*quixotic*”¹⁶¹ or the presently improbable, to advance discussions globally about solutions to address environmental harm and collective action.¹⁶² Those discussions may encourage the creation of open mechanisms to remedy environmental harm occasioned to persons and humankind or gradual movement towards a centralised system of environmental dispute resolution. On the verge of the 1992 Rio Conference and agreement to the UNFCCC it was said that the “*generalized political will for change is affecting the international legal process as consciousness evolves and as new meaning and purpose are given to international law in a newly conceived international society*”.¹⁶³ By 2016, our consciousness has again resurged. Whether it is sufficient to goad political action to evolve the international legal process will be known only in time.

That international law and its component parts is presently insufficiently clear, underdeveloped or undesirable to resolve issues related to international environmental disputes should not preclude contemplation about progressive development of the international legal system so as to accommodate modern challenges. Indeed, in the domestic context, the IBA’s project on a Model Statute on Remedies for Climate Change will be required to confront new frontier issues of causation, standing and burden of proof, among others, to recommend practical solutions to modern climate change litigation. Lessons and findings from that project could be instructive for legal developments relating to *international* environmental dispute resolution, as will many of the IBA’s other recommendations.

This chapter does not posit that an ITE or ICE is *the* solution to environmental governance and dispute resolution matters. For the reasons identified, adjudication may never mature to become the primary means of resolving global environmental issues.¹⁶⁴ It simply commends reconsideration of the existing institutional architecture and opportunities for modernisation in the light of political and legal realities.

¹⁶¹ Stephens (*supra* note 6) 60.

¹⁶² Pedersen (*supra* note 5) 557-558, borrowing from John Rawls.

¹⁶³ Zaelke and Cameron (*supra* note 138), 285.

¹⁶⁴ Dunoff (*supra* note 8) 1100-1009.

Eventually, an ITE/ICE system “could provide an important engine for the further development and refinement of international environmental law, including coordination between its composite elements and its relationship to other norms of international law”.¹⁶⁵ The increased recognition of the natural environment’s exhaustibility, the irreversibility of certain environmental harm, the growing urgency for coordinated MEA implementation and enforcement efforts and the proper resolution of international environmental disputes require such a reappraisal for the benefit of disputing parties and for society at large.

Final version available at: S Bruce, “The Project for an International Environmental Court”, in C Tomuschat, RP Mazzeschi and D Thürer (eds), Conciliation in International Law: The OSCE Court of Conciliation and Arbitration (Brill, 2016).

¹⁶⁵ Pauwelyn (*supra* note 7) 169.