Reflections on an International Environmental Court

Introduction

International law governing the settlement of disputes through law-based forums, such as courts, tribunals and arbitral tribunals, is fraught with limitations that are becoming especially apparent with respect to disputes that involve the protection of the environment.[1] The limitations concern, in particular, the non-compulsory nature and the inter-state character of the procedures that are available. However, these limitations are not only becoming apparent in disputes involving international environmental law, but also in disputes involving other areas of international law.[2]

Despite the deficiencies of the law, international courts and tribunals have issued judgements in disputes involving the protection of the environment. At the global level the International Court of Justice (ICJ),[3] the Appellate Body of the World Trade Organization (WTO)[4] and the Tribunal for the Law of the Sea (ITLOS)[5] have handed down decisions in relevant cases.

[1] Agenda 21, para. 39.10, identifies the need to make more effective, *inter alia*, procedures for the settlement of disputes, UN Doc. A/CONF.151/26 (Vol. III), 1992.

[2] Francisco Orrego Vicuña and Christopher Pinto, *The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century*, Report Prepared for the 1999 Centennial of the First International Peace Conference, 1999. The authors analyze both the shortcomings of the present system for the settlement of disputes and various proposals for amending that system. The commentaries on the report illustrate significant divergences of opinion as to the way forward. Both the report and the commentaries are available from http://www.minbuza.nl/english/conferences/c_peace_docs.html.

[3] The ICJ, on 8 July 1996, at the request of the United Nations General Assembly, delivered the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (*Nuclear Weapons*), ICJ Reports 1996, and, on 25 September 1997, it issued the Judgement in the case *Concerning the Gabčikovo-Nagymaros Project* (Hungary v. Slovakia) (*Gabčikovo-Nagymaros*), ICJ Reports 1997. The cases of the ICJ are also available from http://www.icj-cij.org.

[4] Among the relevant rulings by the Appellate Body of the WTO are *European Community – Measures Concerning Meat and Meat Products* (*Hormones*) cases (United States v. EC and Canada v. EC), 16 January 1998, WT/DS26/AB/R and WT/DS48/AB/R and *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* (*Shrimp – Turtle*) case (India, Malaysia, Pakistan and Thailand v. U.S.), 12 October 1998, WTO Doc. WT/DS58/AB/R. The rulings of WTO panels and the Appellate Body are available from http://www.wto.org.

[5] ITLOS, on 27 August 1999, delivered the Order for Provisional Measures in the *Southern Bluefin Tuna* cases (New Zealand v. Japan (case no. 3); Australia v. Japan (case no. 4)) (hereinafter *Southern Bluefin* cases PM). ITLOS orders and judgements are available from http://www.un.org/Depts/los/ITLOS.

Other legal forums also could be called upon to decide, and some have decided, cases involving international environmental law. Such forums include the Environmental Chamber established by the International Court of Justice in 1993[6] and the Permanent Court of Arbitration (PCA) under its general facilities and under the Environmental Facility that it is planning to establish.[7] Other arbitral procedures also are available to settle disputes involving international environmental law[8] and special bodies, such as the United Nations Compensation Commission (UNCC),[9] may decide on cases involving international environmental law. Moreover, regional forums such as the European Court of Human Rights (ECHR),[10] the Inter-American Court of Human Rights[11] and the Court of Justice of the European Community (ECJ)[12] have

[6] Press Release 93/20, ICJ, 19 July 1993. The Environmental Chamber was established on the basis of article 26(1) of the Statute of the Court. Seven judges of the ICJ constitute the Chamber. To date no cases have been brought before the Environmental Chamber.

[7] *99th Annual Report of the Permanent Court of Arbitration*, 1999, paras. 80-81(on environmental facility), available from http://www.pac-cpa.org. Philippe Sands, *Environmental Disputes and the Permanent Court of Arbitration: Issues for Consideration*, Background Paper for the Secretary-General of the PCA, March 1996 and Philippe Sands and Ruth Mackenzie, *Settlement of Disputes under International Environmental Agreements: A Potential Role for the Permanent Court of Arbitration*, Background Paper for the Bureau of the PCA, July 1997.

[8] Relevant examples are arbitral tribunals and special arbitral tribunals constituted in accordance with, respectively, Annex VII and Annex VIII of the United Nations Convention on the Law of the Sea (LOS Convention), 10 December 1982, 21 ILM 1261 (1982), arbitral tribunals under the provisions of specific environmental treaties, such as article 27(3)(a) of the Convention on Biological Diversity, June 5, 1992, 31 ILM 849 (1992), and the International Centre for the Settlement of Investment Disputes (ICSID); for further information see http://www.worldbank.org/icsid.

[9] Security Council Resolution 687 (1991), 8 April 1991, (30 ILM 846 (1991)), para. 16, provides that "Iraq … is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources … as a result of Iraq's unlawful invasion of Kuwait.' The UNCC has classified claims related to environmental damage as category F4 claims. To date no category F4 claims have been decided by the UNCC. Luan Low and David Hodgkinson, "Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War," 35 *Virginia Journal of International Law* 1995, pp. 405-483.

[10] See, for example, the decision of the ECHR in case No. 16798/90 *López Ostra v. Spain*, 9 December 1994, Series A, vol. 303-C. For examples of other relevant cases decided by the ECHR see Menno Kamminga, "The Precautionary Approach in International Human Rights Law: How It Can Benefit the Environment," David Freestone and Ellen Hey (eds.), *The Precautionary Principle and International Law, the Challenge of Implementation*, Kluwer Law International, 1996, pp. 171-186; Dinah Shelton, "Human Rights and the Environment," in *Yearbook of International Environmental Law*, volume 10, 1999, pp. 131-137.

[11] Shelton, *ibid*.

[12] See, for example, the decision of the ECJ in case C-406/92 [1993] ECR I-6133 (*Mondiet*). For examples of other relevant cases decided by the ECJ and the role of the ECJ in implementing international environmental law in the European Community see Ellen Hey, "The European Community's Courts and International Environmental Agreements," 7 *RECIEL* 1998, pp. 4-10.

ruled on cases involving international environmental law.

Despite these developments, calls for the establishment of an international environmental court at the global level persist.[13] Several arguments have been advanced to justify the establishment of an international environmental court.[14] These arguments include the following: the very many pressing environmental problems that we are faced with and the need for a bench consisting of experts in international environmental to consider these problems, the need for individuals and groups to have access to environmental justice at the international level, the need for international organizations to be able to be parties to disputes related to the protection of the environment and the need for dispute settlement procedures that enable the common interest in the environment to be addressed. Each of these arguments has merit. Whether they justify the establishment of an international environmental court remains to be seen.

Arguments against the establishment of an international environmental court have been advanced as well.[15] These arguments include the following: proliferation of international courts and tribunals would result in the fragmentation of international law, existing courts and tribunals are, or can be, well equipped to consider cases involving environmental issues and disputes involving international environmental law also involve other aspects of international law. Each of these arguments has merit. Whether they justify the retention of the *status quo* also remains to be seen.

In this essay I will explore the arguments for and against the establishment of an international environmental court. My conclusion will be that the establishment of an international environmental court is not the most desirable option. I suggest that it might be more fruitful if we consider developments in environmental law, as well

[13] For example, the Dutch Minister of Housing, Spatial Planning and the Environment, J.P. Pronk, expressed support for the establishment of an international environmental court at the 2nd International Lawyers' Seminar entitled *International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms*, organized by the PCA, May 17, 2000, The Hague.

[14] See, among other articles by the same authors, Alfred Rest, "Enhanced Implementation of the Biological Diversity Convention by Judicial Control," 29 *Environmental Policy and Law* 1999, pp. 32-42; Alfred Rest, "The Indispensability of an International Environmental Court," 7 *RECIEL* 1998, pp. 63-67; Alfred Rest, "Need for an International Court for the Environment?," 24 *Environmental Policy and Law* 1994, pp. 173-187; Amedeo Postiglione, "An International Court for the Environment?," 23 *Environmental Policy and Law* 1993, pp. 73-78. Also see the web-site of the International Court of the Environment Foundation *http://www.greenchannel.com/icef/*.

[15] See, for example, Sir Robert Jennings, then President of the ICJ, in a speech entitled "The role of the ICJ in the development of international environmental protection law," delivered at the United Nations Conference on Environment and Development, reproduced under the title "Need for an Environmental Court?," 20 *Environmental Policy and Law* 1992, pp. 312-314.

as in other relevant areas of international law, from a different perspective, namely, that of administrative law and reassess the relationship between international and national law. This approach is warranted if, *inter alia*, viable means for resolving disputes that may arise are to be identified.

In this essay I will consider the following topics: the definition of an international environmental dispute and the concomitant expertise required on the bench, fragmentation and its root causes, access to justice and the representation of community interests. I will conclude by suggesting routes that might be pursued both in terms of further research and in practice.

The definition of an international environmental dispute and the concomitant expertise required on the bench

It is beyond doubt that we are facing pressing environmental problems. To name but a few examples: seriously polluted river and ocean waters, grave shortages of water in some areas of the world and overwhelming amounts of water in others, increasing greenhouse gas emissions and diminishing biological diversity.[16] Most, if not all, of these problems are certainly best dealt with through negotiations resulting in preventive and precautionary measures and procedures and conciliatory methods of dispute settlement.[17] However, if disputes do arise and these measures and methods do not provide the desired result, as recent cases have illustrated, international courts and arbitral tribunals do have a role to play.

A question that arises is what types of disputes would be encompassed *ratione materae* by the jurisdiction of an international environmental court. A relatively simple means of defining an international environmental dispute might be as follows. An international environmental dispute is a dispute that involves what is generally considered to be an environmental treaty as apparent from, for example, the object and purpose of the treaty in question. Besides the well-known problems involved in determining the 'object and purpose' of a treaty,[18] several other problems emerge immediately. First, most, if not all, contemporary multilateral environmental

[16] Report of the United Nations Secretary-General, *We the Peoples, The Role of the United Nations in the 21st Century*, prepared for the Millennium Summit, 2000, pp. 55-65, available from http://www.un.org.

[17] Jutta Brunnée and Stephen Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building," 91 *American Journal of International Law* 1997, pp. 26-59, esp. pp. 44-47.

[18] Isabelle Buffard and Karl Zemanek, "The 'Object and Purpose' of a Treaty: An Enigma?," 3 *Austrian Review of International Law & European Law* 1998, pp. 311-343; Jan Klabbers, "Some Problems Regarding the Object and Purpose of Treaties," 8 *Finnish Yearbook of International Law* 1997, pp. 138-160.

agreements aim to foster sustainable development. They thereby explicitly incorporate international development law into the agreement.[19] Second, the operative provisions or additional protocols of multilateral environmental agreements often provide for trade-related instruments to be implemented[20] or for the interests or rights of particular groups, such as indigenous peoples,[21] to be given special consideration. Do these provisions make these agreements into instruments of international trade law or international human rights law? Moreover, how can it be guaranteed that an international environmental court would have the expertise required to consider such trade or human rights aspects? Third, many of the potential disputes that may arise under a treaty that focuses primarily on the protection of the environment also can be defined in terms of a dispute under other treaties. Relevant examples are the United Nations Convention on the Law of the Sea[22] (LOS Convention) and the different treaties annexed to the Agreement Establishing the World Trade Organization.[23]

[19] See, for example, the 16th and 19th paragraphs of the Preamble to the Convention on Biological Diversity, June 5, 1992, and the 20th and 21st paragraphs of the Preamble to the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), 22 March 1989, 28 ILM 657 (1989). Also see Jennings, *supra* note 15.

[20] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, 12 ILM 1088 (1973); Basel Convention; Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer, respectively, 16 September 1987 and 22 March 1985, 26 ILM 1541 (1987) and 26 ILM 1529 (1987); Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), respectively, December 10, 1997 and May 22, 1992, 37 ILM 22 (1998) and 31 ILM 849 (1992); Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, *http://www.biodiv.org*. Neither the Kyoto Protocol nor the Cartagena Protocol have entered into force.

[21] See, for example, 12th paragraph of the Preamble and article 8(j) of the Convention on Biological Diversity.

[22] For example, a dispute related to the emission of land-based sources of marine pollution in the North Eastern Atlantic Ocean under the Paris Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, 8 *International Journal of Marine and Coastal Law* 1993, p. 50, could probably be defined in terms of the LOS Convention. In addition, if the pollution originated in a river, such as the Rhine, the dispute could probably also be defined in terms of a convention for the reduction of emissions into that river. In the case of the Rhine this would be the Convention on the Protection against Chemical Pollution, 3 December 1976, 16 ILM 242 (1977) and, when it enters into force, the Convention on the Protection of the Rhine, 12 April 1999, http://home.att.net.

[23] For example, a dispute related to trade in greenhouse gas emission reduction units under the Kyoto Protocol could probably also be defined as a dispute under the General Agreement on Tariffs and Trade or General Agreement on Trade in Services, both 15 April 1994, 33 ILM 1125 (1994). Likewise a dispute related to trade in biologically modified organisms under the Cartagena Protocol could probably be defined in terms of the Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, http://www.wto.org. For a discussion of the latter possibility see Peter-Tobias Stoll, "Controlling Genetically Modified Organisms: The Cartagena Protocol on Biosafety and the SPS Agreement," 10 *Yearbook of International Environmental Law* 1999, pp. 82-119.

The cases that have been ruled on by international courts and tribunals illustrate the difficulties involved in defining an international environmental dispute. While these cases can all be defined in terms of environmental law and thus potentially could have been brought before an international environmental court, if it had existed, they have another common element. The cases in question also can and have been defined in terms of several other areas of international law. Areas of international law that come to mind are international water law,[24] international human rights law,[25] international fisheries law,[26] international trade law,[27] international law related to the threat or use of force,[28] the law of state succession[29] and international treaty law.[30]

Of interest in this context is a case that Spain brought before the International Court of Justice against Canada.[31] The controversy concerned the conservation and management of fish stocks in the north-western Atlantic Ocean, in which Canada, the European Community and several of its Member States, including Spain, were involved. Canada arrested a Spanish fishing vessel on the high seas based on the argument that the vessel was fishing illegally in that area, contrary to Canadian law and international fisheries conservation obligations applicable to the European Community and therefore to Spain. Canada alleged, *inter alia*, that, as a result of these fishing activities, marine biological diversity was being threatened. The position of the European Community and Spain was that the international conservation obligations did not apply to the fishing activities in question and that Canada had acted illegally when arresting the vessel. Was this a dispute involving international natural resources law, international fisheries law, international environmental law or international law related to the conservation of biological diversity? Spain presented the case to the Court primarily as a dispute involving an infringement of its rights as

[24] *Gabčikovo-Nagymaros* case, ICJ.

[25] *López-Ostra* case, ECHR.

[26] *Fisheries Jurisdiction* case (*Spain v. Canada*), Jurisdiction of the Court, ICJ, 4 December 1998; *Southern Bluefin Tuna* cases PM, ITLOS.

[27] See WTO Appellate Body cases referred to in *supra* note 4.

[28] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ.

[29] *Gabčikovo-Nagymaros* case, ICJ.

[30] *Gabčikovo-Nagymaros* case, ICJ; *Southern Bluefin Tuna* cases PM, ITLOS.

[31] *Fisheries Jurisdiction* case (*Spain v. Canada*), ICJ. For information on the dispute see David Freestone, "Canada – European Union / Canada and the EU Reach Agreement to Settle the *Estai* Dispute," 10 *International Journal of Marine and Coastal Law* 1995, pp. 397-411.

a flag state[32] – undoubtedly an aspect that was also part of the overall dispute. However, it also is beyond doubt that all of the aforementioned areas of international law would have played a role in deciding the dispute, if the Court had found that it had jurisdiction to consider the merits of the case.

A similar argument can be made with respect to the *Southern Bluefin Tuna* cases PM, between Australia and New Zealand, on the one hand, and Japan, on the other hand, involving the sustainability of fishing activities for southern bluefin tuna in the Pacific Ocean.[33] In this case the Tribunal for the Law of the Sea, on the basis of the LOS Convention, ordered provisional measures requiring Japan to stop an experimental fisheries program on precautionary grounds. The dispute was submitted to arbitration on the merits, administered through the International Centre for the Settlement of Investment Disputes (ICSID).[34] In that procedure Japan contested the jurisdiction of the arbitral tribunal based on the argument that this is not a dispute involving the LOS Convention but a dispute under the Convention for the Conservation of Southern Bluefin Tuna (CCSBT), which does not provide for compulsory dispute settlement.[35] The arbitral tribunal, while not accepting Japan's argument, found that it did not have jurisdiction over the dispute because the dispute settlement procedures in the CCSBT intended to exclude the application of the compulsory dispute settlement provisions of the LOS Convention.[36] Was this a case concerning the law of treaties, fisheries law or environmental law? Furthermore, if the case is defined in terms of environmental law, should we be more precise and determine that it relates to marine environmental law or the conservation of marine biological diversity? Issue involving international fisheries law, (marine) environmental law, the law on the conservation of (marine) biological diversity and broader issues of the law of the sea and of international law generally, including the law of treaties, are obviously at stake,

[32] ICJ Press Release No. 95/8, 25 March 1995.

[33] *Supra* note 5. For information on the case see "Symposium: *Southern Bluefin Tuna* Cases Preliminary Measures," 10 *Yearbook of International Environmental Law* 1999, with contributions by Brunnée and Hey, Malcolm D. Evans, Adriana Fabra, David Freestone, Douglas M. Johnston and Francisco Orrego Vicuña, pp. 3-47 and the Report on the decision by Ted McDorman, *ibid.*, pp. 632-635.

[34] ICSID Press Release, May 7, 2000, http://www.worldbank.org/icsid.

[35] Government of Japan, Memorial on Jurisdiction, http:/www.worldbank.org/icsid. The CCBST was concluded on 10 May 1993, http://www.home.aone.net.au. Article 16 and the Annex to the CCBST relate to dispute settlement. Article 16 provides that all parties to a dispute have to agree for a dispute to be submitted either to arbitration or the ICJ.

[36] See press release and text of the decision, dated August 7, 2000, are available from http:/www.worldbank.org/icsid.

regardless of the forum that considers the dispute. Would an international environmental court have had jurisdiction to consider this dispute, in addition to the various dispute settlement forums referred to in the LOS Convention? According to the LOS Convention, provided the parties to the dispute agreed thereto, an environmental court indeed would have had jurisdiction to consider the case.[37] Would the composition of the bench of an international environmental court guarantee the availability of sufficient expertise in international fisheries law, the law of the sea and the law of treaties for the proper consideration of the case?

Assuming that an international environmental court had been established at the time, would that have meant that the *Gabčikovo-Nagymaros* case,[38] decided by the International Court of Justice, could have been considered by that international environmental court? It probably could have been, given the fact that the sustainable use of the waters of the Danube river, among other issues, was at stake in the case. However, how can we be assured that an international environmental court would have had sufficient expertise to consider the issues of international water law, the law of state succession and the law of treaties, which also were involved in the case?

It also has been argued that, for example, the *Beef Hormones* case[39] and the *Shrimp/Turtle* case,[40] decided by the Appellate Body of the WTO and defined in terms of international trade law, could have been defined, respectively, in terms of international environmental law and the law of the sea[41] and submitted to an international

[37] Article 289, LOS Convention provides that Part XV, on the settlement of disputes, does not impair the right of the parties 'to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice'. On the LOS Convention provisions for dispute settlement see E.D. Brown, "Dispute Settlement and the Law of the Sea: the UN Convention Regime," 21 *Marine Policy* 1997, pp. 17-43.

[38] *Supra* note 3. For information on the case see "Symposium: The *Case Concerning the Gabčikovo-Nagymaros Project*," 8 *Yearbook of International Environmental Law* 1997, with contributions by Jutta Brunnée and Ellen Hey, Charles B. Bourne, A.E. Boyle, Paulo Canelas de Castro, Jan Klabbers and Stephan Stec and Gabriel Eckstein, pp. 3-50 and the report on the case by Philippe Sands, *ibid.*, pp. 443-452.

[39] *Supra* note 4. For reflections on the case see Ellen Hey, "Considerations Regarding the *Hormones Case*, the Precautionary Principle and International Dispute Settlement Procedures," *Leiden Journal of International Law* 2000, in press. The article suggests, *inter alia*, that this case may also have been defined in terms of health law.

[40] *Supra* note 4. For further information on the case see "Symposium: The *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* Case," 9 *Yearbook of International Environmental Law* 1998, with contributions by Jutta Brunnée and Ellen Hey, Jeffery Attik, Duncan Brack, Jeffrey F. Dunoff, Howard Mann, Thomas J. Schoenbaum and David A. Wirth, pp. 3-47 and the report on the case by Frederick M. Abbott, *ibid.*, pp. 330-332.

[41] See Layla Hughes, "Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision," 10 *Georgetown International Environmental Law Review* 1998, pp. 915-942. Hughes suggests that the WTO DSU does not provide the proper forums for settling disputes involving environmental

environmental court, if it had existed, and the ITLOS. How could we be sure that such an international environmental court and the ITLOS would be well equipped to deal with the trade law aspects of these cases?

Another relevant consideration in this perspective is the integration principle. It has been incorporated into numerous international instruments, both those related primarily to environmental issues and those primarily related to other issues.[42] The integration principle prescribes that environmental considerations are to be incorporated into all other relevant policy areas. Must this be taken to imply that all disputes that arise under such instruments and that have an environmental aspect are to be defined as environmental disputes and therefore are to be submitted to an international environmental court, if it were to exist?

I come to the conclusion that the special character of environmental disputes and the expertise required on the bench to consider such cases do not convincingly argue in favor of the establishment of an international environmental court. The reason is that a dispute that has an environmental aspect also will involve other aspects of international law and vice-versa. The argument that appropriate policies for the composition of the bench of an international environmental court could guarantee the availability of sufficient expertise in other areas of international law has merit, but it is not convincing either. Why not reverse the argument? It should be ensured that existing legal dispute settlement forums are so composed that sufficient expertise in international environmental law is available on their benches.

Fragmentation and its root causes

Several international judges have warned that the proliferation of international courts and tribunals, in the absence of an hierarchy among these forums, risks fragmentation

aspects, such as the Hormones case, and that alternative forums should be established. The author does find that a forum that could consider both environmental and trade aspects of a case would be preferable. Richard J. McLaughlin, "Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or WTO?" 10 *Georgetown International Environmental Law Review* 1997, pp. 29-96. McLaughlin suggests that there may be advantages, for a state seeking conservation measures, to bringing disputes regarding the conservation of marine living resources, including those involving unilateral measures such as the *Shrimp/Turtle* case, before the dispute settlement bodies available under the LOS Convention, rather than submitting such disputes to WTO dispute settlement procedures.

[42] Examples of relevant instruments are the Convention on Biological Diversity (art. 6(b)), the UNFCCC (art. 3(4)), the Treaty Establishing the European Community, as amended on October 2, 1997, (art. 6), 37 ILM 56 (1998), the Rio Declaration on Environment and Development (Principle 4), 31 ILM 874 (1992), and, in a somewhat different version, the Agreement Establishing the World Trade Organization (1st para. Preamble), 33 ILM 1125 (1994).