

## **WHY DO WE NEED A NEW INTERNATIONAL ENVIRONMENTAL COURT?**

A lecture by Stephen Hockman QC setting out the history of the proposals for such an institution as well as exploring how the idea might be taken forward. The lecture will also address other contemporary themes comprising the relevant context.

Ashley Building, Middle Temple

6pm, 29 March 2017

### **INTRODUCTION**

I would like to thank everyone for coming here today and especially to express my gratitude to a number of you who have collaborated with me on this project for perhaps rather more years than we would care to remember. I would like in particular to thank three younger members of the audience for their input into this lecture, namely Stuart Bruce,<sup>1</sup> Mark Davies and Ana Kantzelis. I should record my thanks to the London and South East branch of the United Nations Association, both for inviting me to become their president in succession to Philippe Sands QC, and also for kindly agreeing to sponsor the reception which will follow. I should also express my thanks to Middle Temple for kindly authorising the use of this splendid Library building for the lecture. Although Middle Temple has enjoyed the benefit of a library for many centuries, the present building dates back to 1958 when it was formally opened by Her Majesty the Queen Mother, who, at the time, was our Royal Bencher, a position currently occupied by HRH Prince William.

I plan to speak for 30-40 minutes and then I hope there will be some comments and questions before thirst overcomes us and we move across the corridor for a drink. I should make it clear that I am of course expressing my personal views as an environmental lawyer with a keen interest in the development of legal institutions, both domestic and international, though I do not hold myself out as a specialist in public international law. In very broad terms, I shall

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<sup>1</sup> I have drawn heavily on his excellent chapter in "Conciliation in International Law", published this year by Brill Nijhoff.

consider my topic under the following headings, the need for a Court, the Proposals for meeting that need, and the benefits which will flow from those Proposals.

## **NEED**

My starting point is the recognition that the natural environment is an incredibly important resource for humanity, if not the most important. It is a resource whose importance has only gradually become apparent, even to developed countries, let alone to developing or underdeveloped countries.

When I started my career as a lawyer 45 years ago, not only was there no such subject as environmental law. I don't think the phrase 'the environment' tripped off our lips very often. I guess it was used in a more general sense as being the place where you happened to be, but the concept that the environment, especially the natural environment, is important to us and that its prosperity depends very largely on the way that we behave was simply not something that most of us ever thought about. No doubt there were some visionary scientists and others who were already thinking along those lines 50 years ago but I think the average person, and certainly the average lawyer, never thought about such things.

Now, however, we know that if we do not adjust our behaviour then catastrophic climate change and other difficulties will make life infinitely worse for large parts of humanity and virtually no one is going to remain immune from the effects of environmental degradation. We must do something to solve that problem. I can't imagine there are very many people who seriously believe that we can't improve things if we learn how to adjust our behaviour. Therefore, everything depends on the mechanisms available to us to adjust our behaviour.

I see the solution as being twin-tracked and would readily acknowledge that by far the most important of the two tracks is attitude and culture; a greening of social practice if you will. Around the world, and not least in the developed world, people must learn how to moderate their behaviour voluntarily and a new and more respectful culture towards the environment must develop.

But there is another track, and I think that in many, if not all, cases of fundamental social change, what you tend to see is an interaction between changes in attitude and changes in law and regulation and in government policy. An excellent example of this are the changing attitudes towards tobacco smoking. 50 years ago, it was still extremely fashionable to smoke and many, many people did; however very few people understood the dangers of doing so. That picture has completely changed during my professional lifetime, and for most of you in the audience smoking may never have been fashionable. This can primarily be attributed to the first track – the change in attitude. But it should also, significantly, be attributed to government policy, government regulation and changes brought about by certain important pieces of litigation.

In other words, litigation brought against tobacco companies, though it has not always been 100% successful, has succeeded in drawing out pieces of information about the way that tobacco companies have dealt with this, including what tobacco companies knew about the addictive qualities of nicotine and when they knew about these things. So undoubtedly the law, litigation – therefore judges and lawyers – have had a role to play in interacting with the development of public attitudes, in encouraging the development of public attitudes, and then in turn in their decision making reflecting those developments. That's why I call it a twin-track approach.

It is my opinion that we need an International Environmental Court (ICE), as part of the second track, to complement the changing attitudes in the first track, if we are to tackle climate change and environmental damage.

Then one might ask, why does this involve working on the international as well as the domestic or municipal level? Although doubtful about an ICE, the late Sir Robert Jennings, sometime President of the International Court of Justice (ICJ), 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”*.

The need for compulsory jurisdiction in the international legal system generally was emphasised by the late Lord Bingham of Cornhill, sometime Chief Justice of England and Wales, who observed 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”*.

It is fair to say that Jennings and Bingham were clearly thinking in terms of international law itself, and no doubt primarily in terms of international treaties which are in some ways the equivalent of domestic legislation in laying down rules binding on those over whom the law has jurisdiction. But as Lord Bingham mentioned, the existence of a system of rules necessarily requires the correlative existence of institutions and mechanisms of implementation and enforcement of those rules, and hence an appropriate and effective court system is no less important for the attainment of the rule of law than the legal rules themselves.

A number of recent events have moreover highlighted the truth of the proposition that legal rules alone will be insufficient to address the environmental problems that we face. The President of the United States stated during his election campaign that he wants to *‘dismantle the Paris Agreement’* and that he *‘doesn’t accept [that] the scientific evidence that climate change is real’*, whilst leaving the EU will present problems for the UK, whose environmental law is largely derived from or directly attributable to EU law.

The recent House of Lords paper, *‘Brexit: Environment and Climate Change’*<sup>2</sup> contained many opinions from worried respondents who fear back-sliding on environmental standards post-Brexit. One commentator noted that, *“the main driver behind [the Government’s] new air quality plan was not the Supreme Court order from the UK in 2015, but the threat of being infringed by the Commission.”* The Wildlife Trust in its response stated that, *“serious consideration [should be] given to the creation of a specialist forum for environmental cases.”*

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<sup>2</sup> <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/109/109.pdf>

Another issue which illustrates the inadequacy of contemporary international rules concerns the question of migration, which is the subject of so much topical debate. As temperatures and sea levels rise, governments around the world will face massive and unprecedented human displacement that international law currently has no mechanism to address. In addition to losing their homes, climate change migrants, under current law, will encounter a refugee system governed by a decades-old Refugee Convention that offers neither protection nor the right to resettle in a more habitable place.

As long ago as 1945, Sir Hersch Lauterpacht, the then Whewell Professor of International Law at Cambridge, published his proposals for an International Bill of the Rights of Man, one of whose provisions was that the right of emigration must not be denied (his work on this topic has recently been republished by the Oxford University Press with an introduction by Philippe Sands, and I am indebted to Anthony Speaight, who is here tonight, for drawing this to my attention). But it is clear that in a world in which climate change has become a significant issue, international law needs to evolve significantly beyond establishing a right of emigration. On this issue I have to disagree strongly with what our present Prime Minister, Theresa May, told the United Nations General Assembly in September 2016, which was that, *“we must help ensure that refugees claim asylum in the first safe country they reach.”* It is clear to me that a much more sophisticated international legal regime will be required once climate change induced migration starts to make its impact.

All these issues show on the one hand the importance of the international legal regime but also the difficulty which we have experienced to date in developing that regime to meet contemporary problems, and my argument is in part that an ICE would play a key role in the development of the law in some of these areas.

### **MEETING THE NEED**

The question may be posed whether some or all of the issues I have highlighted are capable of being dealt with, or dealt with much more easily, at the domestic or municipal level. It is true that in a number of jurisdictions around the world litigation relating to the environmental impact of climate change and other comparable issues has been initiated and in one or two cases there have been notable successes. Probably the best known example is the case of

*Urgenda*<sup>3</sup> in which a Dutch court at first instance made an unprecedented mandatory order against the Dutch government relating to greenhouse gas emissions, but this case was characterised by some striking concessions on the part of the government, and in any event the first instance decision is subject to appeal.

In general those cases at the domestic level in which success has been achieved have been exclusively in the field of public law involving what we would call judicial review of governmental action. Perhaps the case most familiar to my present audience will be the judicial review proceedings (in which I myself played, in the early stages, a modest role) initiated by ClientEarth, and by my friend, its CEO, James Thornton, who is here, against the UK Government, arising from the Government's admitted non-compliance with European air quality regulations. However, even in this case, widely regarded as an illustration of the positive potential of domestic environmental litigation, it is to be noted that, firstly, there was no dispute as to the existence of the relevant environmental obligation or as to the breach of it by the defendant in the litigation, namely the UK Government. It is also to be noted that, secondly, the domestic courts up to Court of Appeal level refused to grant a remedy, and it was only upon a reference by the UK Supreme Court to the Court of Justice in Luxembourg that it was held that it was open to our courts to grant a mandatory order against the Government to undertake stronger measures. After Brexit even this measure of success will presumably cease to be attainable, so I would say that, if anything, the history of the ClientEarth case is supportive of my argument.

There is in any event a wider and more general point, which is that it will be appreciated that the few successful cases to which I have referred are cases in which the relevant national government was the defendant. Moreover, in order to succeed in such cases it has to be possible to establish an obligation binding upon the relevant national government under its own domestic law. One might expect that by now it would be commonplace for governments to acknowledge a general duty to secure a safe and healthy environment but this is far from being the case. As is well known there is no such right under the European Convention on Human Rights, and in those cases where an environmental complaint has succeeded the

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<sup>3</sup> <http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf>

decision has been based on a violation of Article 8 of the Convention, namely the right to respect for private and family life, or perhaps on violation of Article 1, Protocol 1 on the Protection of Property. None of the current wave of domestic climate change cases will go anywhere near to confirming or developing international principles relating to transboundary harm, let alone principles relating to justification or reasonable excuse based on economic or social necessity.

I would also add that few if any private law cases have been successful, and the reasons for this are partly the inherent transboundary nature of environmental problems, and partly the difficulty of establishing that any identifiable breach of duty was causative of loss. As was accepted in an interesting note relating to climate change litigation published by Lexis Nexis on the 16th August 2016, *“the complex, trans-boundary and diffuse nature of climate change as an environmental problem poses unique barriers for claimants who suffer loss and damage as a result of its effects. These challenges arise from the fact that climate change is occurring primarily as a result of the accumulation of greenhouse gases in the earth’s atmosphere produced by a large number of sources over a long period of time.”* Thus in November 2015, Peruvian farmer Saul Luciano Lliuya filed a lawsuit at the Essen regional court, supported by the NGO Germanwatch, against the German utility RWE as Europe’s *“largest emitter”*. He argued that RWE’s actions had exacerbated the melting of a glacier above his home and was seeking US\$29,000 to finance safety measures. The court dismissed Lliuya’s requests for declaratory and injunctive relief, as well as his request for damages. The court noted that it could not provide Lliuya with effective redress (Lliuya’s situation would not change, the court said, even if RWE ceased emitting), and that no *“linear causal chain”* could be discerned amid the complex components of the causal relationship between particular greenhouse gas emissions and particular climate change impacts.

Another example demonstrating the limits of domestic litigation arises from the recent English case law relating to the liability of a parent company based here for the allegedly wrongful actions of its overseas subsidiary. This issue has been explored in a series of cases<sup>4</sup>

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<sup>4</sup> *Lungowe & Ors v Vedanta Resources Plc & Anor* [2016] EWHC 975 (TCC); *HRH Emere Godwin Bebe Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2017] EWHC 89 (TCC); and *AAA & Ors v Unilever Plc & Anors* [2017] EWHC 371 (QB).

and in only one of those cases have the claimants succeeded, though appeals are pending. The legal and logistical difficulties involved in suing for a legal wrong perpetrated in and causing damage in Country A through the courts of Country B probably need relatively little emphasis.

I hope to by now have persuaded you that the idea of a new international court is at least worthy of consideration: so let me next summarise the work of those who have pioneered such proposals.

## **PROPOSALS**

I should begin this historical recap by stressing that our group was by no means the first to think of this idea. Since the Second World War, every now and then, somebody has popped up with such an idea.

In 1989 Amedeo Postiglione proposed an idea for an ICE at a conference in Rome hosted by the Congress on a More Efficient International Law on the Environment and Establishing an International Court for the Environment (not, it must be admitted, the catchiest of names). In 1992 his International Court for the Environment Foundation (ICEF) published a draft statute for such a court. That draft statute was eventually presented at a conference in Washington in 1999, albeit in a somewhat watered down form. So far as I am aware the ICEF project is ongoing but no great progress has been made. In addition, in 1994 the International Court of Environmental Arbitration and Conciliation (ICEAC) was founded in Mexico by a group of international lawyers. The ICEAC would allow for cases to be brought by states, legal and natural persons.

In this country, the person who most clearly articulated the idea, and who led me to start thinking about it, was the former Labour environment minister, Michael Meacher MP, who sadly died in October 2015. He gave a speech many years ago in which he said he thought a new international environmental court was needed. I followed up on that. Our present project really started in 2009 when a group of us held a well-attended meeting at the British Library in which we talked about how we might go about it. And what has happened in the intervening time has been a process of speaking and writing about the concept, developing

the thinking and trying to spread the word. Although at the outset the reaction that we received from various parties was largely negative, in more recent times there has been an increasing acceptance that it is something that is bound to happen in time.

Aside from the specific projects that have attempted to establish an ICE, the first international tribunal that one can say has had the remit to deal with environmental cases is the Permanent Court of Arbitration, established at The Hague in 1899 by inter-governmental agreement. In 2001 the Permanent Court of Arbitration adopted optional rules for disputes relating to the environment and/or natural resources. However, to bring a dispute in the Permanent Court at least one party must be a state consenting to be bound, and its remit is to that extent limited.

The International Court of Justice (ICJ) was established in 1945 and may also resolve environmental disputes. However, only states have standing in the ICJ and this likewise limits those environmental claims which may be brought there. To its credit, the ICJ actually established a distinct 'Chamber for Environmental Disputes' in 1993 but abandoned it in 2006. In the 13 years of its existence the specialist Chamber did not have a single dispute referred to it.

However, to say that the ICJ has not assisted the development of environmental law would be to do it a disservice. Its 1996 Nuclear Weapons Advisory Opinion highlighted the potential, catastrophic effects of nuclear weapons on the natural environment and recognised that, "*the environment [...] represents the living space, the quality of life and the very health of human beings, including generations unborn.*"<sup>5</sup> This Opinion was followed up with the seminal cases of *Gabcikovo and Pulp Mills*. In the former the ICJ recognised the principle of "*ecological necessity*" and that environmental matters could count as an "*essential interest*" to a state. In the latter, *Pulp Mills*, the ICJ recognised that, as part of customary international law, states are under an obligation to undertake environmental impact assessments where the,

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<sup>5</sup> <http://www.icj-cij.org/docket/files/95/7495.pdf>

*“proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”<sup>6</sup>*

Other established bodies which could, arguably, fulfil the function of an ICE are the World Trade Organisation (WTO), founded by inter-governmental conference in 1994, or the International Tribunal on the Law of the Sea (ITLOS), established under the United Nations Convention on the Law of the Sea in 1996. There are however clear issues with both courts: the WTO is driven, eponymously, towards disputes of a primarily trade-based nature whilst ITLOS focusses on marine environmental damage. Therefore neither, in my opinion, provides a satisfactory solution to the ICE problem.

In 2014, the IBA’s Climate Change Justice and Human Rights Task force made numerous recommendations. In a report published by the IBA entitled, ‘Achieving Justice and Human Rights in an Era of Climate Change’, authors David Estrin and Helena Kennedy recommended support for *“the gradual development of an ad hoc arbitral body [ITE] which would build towards a permanent formal institution [ICE]”*.

In September 2015 the Dickson Poon School of Law at King’s College London organised an important conference on Climate Change and the Rule of Law: adjudicating the Future in International Law. In the course of this conference, Philippe Sands QC of University College London gave a lecture at the UK Supreme Court on 17 September 2015. In this lecture Professor Sands pointed out that the International Court of Justice along with other international courts and tribunals can and do play a useful role in developing the law and contributing to a change of consciousness, and that these developments can in turn catalyse new and needed actions by states, by international organisations, by the private sector, by NGOs and by individuals. A clear statement by a body such as the ICJ as to what is or is not required by the law may itself contribute to changes in attitudes and behaviour. He discussed in detail the potential role of the ICJ and of ITLOS in dealing with environmental matters, whether in a contentious case or in an advisory opinion. He pointed out, significantly, that it may be that states now have a duty under general international law to act in such a way as to

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<sup>6</sup> <http://www.icj-cij.org/docket/files/135/15877.pdf>

prevent climate change or climate change beyond a particular threshold. He envisaged that the ICJ could be asked to confirm that a two-degree Celsius target for the rise of global temperatures above pre-industrial levels now reflects an obligation under international law, and that its implementation imposes obligations to reduce emissions, including if necessary phasing out altogether certain emissions of carbon dioxide and other greenhouse gases. He added, equally significantly, that there is no reason why the court could not, within its rules of procedure, allow not only states and international organisations, but other actors that are stakeholders, including corporations and NGOs, to participate in a hearing by some effective means. He pointed out that, as stated in the 1941 House of Lords case of *Liversidge v Anderson*, Lord Atkin had noted that in England, “*amidst the clash of arms, the laws are not silent,*”<sup>7</sup> and suggested that today, amidst the warming of the atmosphere, the melting of the ice and the rising of the seas, international courts should likewise not be silent.

## **CHARACTER**

Now let me try to describe the essential character of an ICE as we have envisaged it. A limitation, as you will have gathered, of any body like the ICJ, is that it can only adjudicate on disputes between states, each of whom has accepted its jurisdiction. We see a crying need for a different sort of institution, an institution which would be able to adjudicate not only between states but also between states and non-state actors such as NGOs and corporations, an institution which could apply international environmental law or domestic environmental law when appropriate. We also see the absolute necessity for a body that could receive and, if necessary, examine in great detail evidence about the environmental problem that had arisen and allow the members of the court or tribunal to give a judgement on the evidence as to compliance or non-compliance with legal rules and legal principles.

Above all we see the need for such a tribunal to start to develop the principles underlying the law more proactively. One of the things we have seen in recent years, especially in various domestic supreme courts around the world, including our own, is that courts don't just recite methodically and rigidly the existing legal framework but, in order to arrive at a just adjudication, the courts identify broad principles and then apply those principles to the facts

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<sup>7</sup> *Liversidge v Anderson* [1942] A.C. 206

of a case. A particular example is that in the case of industrial or commercial activity which has an impact on the environment, inevitably a balance has to be struck between the benefits of that activity on the one hand and the potential disadvantages on the other. In a domestic context, for instance in the context of deciding cases about what we call environmental nuisance – nuisance by noise, by odour, by dust – domestic courts have developed techniques for and approaches which enable that balance to be struck. At the international level however there is as yet very little jurisprudence in which that balance is struck. We see a role in the medium term for a body such as an ICE to develop the principles underlying the law as well as to adjudicate on cases.

The ICE Coalition have in recent months come to the conclusion that there should be some form of bridging mechanism before a distinct, effective ICE can be established. To that end we are proposing first the establishment of an expert group which would be able to advise governments, NGOs and/or courts, both domestic and international, around the world on environmental legal challenges.

An example of a situation that such an expert group might advise on arose recently. On 4 March 2017, a little under four weeks ago, the Caledonian Sky, a cruise ship owned by the British company Noble Caledonia veered off course during a bird watching tour and ran aground in Indonesia causing huge damage to a pristine coral reef. Not only did the Caledonian Sky cause great damage to the reef but it has also damaged the livelihoods of those living there who rely on the reef for diving tourism. The expert group we propose could be called upon to advise either the Government of Indonesia or those affected locally about the legal position. The establishment of this group could help to achieve a joining of the dots between various groups of environmental lawyers and climate change litigators across the globe. We feel this will be an important stepping stone to the eventual establishment of an ICE.

As a second stage, much could be achieved by the creation of a voluntary tribunal, an idea which was the subject of an important paper in 2013 by my colleagues Philip Riches and Stuart

Bruce.<sup>8</sup> There is an encouraging precedent for such a proposal in the form of the International Monsanto Tribunal, set up by a Dutch foundation to consider certain allegations against Monsanto, which my colleague Frances Lawson drew to my attention. The Tribunal is chaired by a former member of the European Court of Human Rights called Judge Tulkens and, after two days of hearings in the Hague in October 2016, the Tribunal will present its conclusions and legal recommendations on 18 April 2017. The Tribunal is a voluntary one and has acknowledged that its role cannot be to give judgment but merely to provide an advisory opinion. Monsanto, an American agrochemical and agricultural biotechnology corporation, was invited to participate in the process but declined to do so.

Finally, it is important to distinguish a potential ICE from the International Criminal Court (ICC), set up in 2002 under the Treaty of Rome. The role of this court is to facilitate the prosecution of individuals for grave international crimes such as genocide and other crimes against humanity. According to a new policy paper on case selection and prioritisation published by the ICC in September 2016, the court intends to prioritise the prosecution of cases involving the destruction of natural resources and land grabbing, though it is unclear whether such cases would in fact fall within the court's jurisdiction. My friend and former barrister Polly Higgins has conducted a high-profile campaign to add what she calls 'Ecocide' to the list of crimes which are within the jurisdiction of the court. Even if, however, this were to happen the court's remit relates to the prosecution of particular individuals in extremely grave cases, it does not have power to adjudicate upon wider issues, whether involving individuals, corporates or national governments. I would see an ICE operating alongside and in parallel with the ICC and neither one is a substitute for the other.

## **BENEFITS**

The argument in favour of an ICE stems in part from the limitations in the constitution and/or practice of existing bodies in addressing environmental issues. Two key points are:

- (i) Existing tribunals can be inflexible in dealing with complex, technical and scientific environmental data, even though their rules may allow the appointment of experts (although the ICJ has progressed considerably on this front since its

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<sup>8</sup> [http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1006&context=cgs\\_issue\\_brief\\_series](http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1006&context=cgs_issue_brief_series)

decision in *Pulp Mills on the River Uruguay* in 2010, evidenced by its handling of the *Whaling in the Antarctic*<sup>9</sup> case in 2014 and the *Construction of a Road in Costa Rica*<sup>10</sup> case in 2015, as have some ISDS tribunals, in the recent *Perenco*<sup>11</sup> case).

- (ii) Non-state actors are increasingly either contributors to transboundary environmental harm, for example through burning fossil fuels that contribute to climate change, or victims of it, such as those affected by catastrophic but infrequent accidents such as the Bento Rodrigues dam disaster. However, non-state actors generally cannot bring claims or be sued under international law and do not have standing before international adjudicative bodies.

There are moreover many positive potential benefits of an international environmental court. First, the court could provide a centralised system of dispute settlement that is accessible to a range of actors, including individuals, corporations and civil society. Second, a pool of dedicated scientific experts could assist the judges and arbitrators. Third, it would strive to clarify legal obligations, harmonise international law related to the environment and complement existing regimes, thereby increasing legal certainty and predictability. Fourth, it could encourage the use of preventative and, where necessary, injunctive measures to minimise ongoing environmental damage. Fifth, it could become the standard compliance and dispute settlement mechanism for environmental treaties (of which over 500 exist), such as the UN Framework Convention on Climate Change, the Paris Accords and the Convention on Biological Diversity, thereby reducing the financial and human resources burden associated with the proliferation of treaty bodies. Sixth, it could help to build trust among states, individuals and the business community through the provision of workable solutions to modern environmental concerns.

While the classical conception of international law provides only states with international personality and standing before international courts, as discussed above, transboundary harm is increasingly a product of non-state actor activities. Additionally, whereas certain non-

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<sup>9</sup> ICJ, *Whaling in the Antarctic (Australia v. Japan)*, Judgment, 31 March 2014, ICJ Reports 2014, 226

<sup>10</sup> ICJ, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015

<sup>11</sup> *Perenco Ecuador Ltd v. Ecuador*, Interim Decision on the Environmental Counterclaim, 11 August 2015, ICSID Case No. ARB/08/6

state actors are granted access to enforce their property and economic rights before international investment and commercial arbitration tribunals, persons harmed by non-state actors (e.g. individuals and indigenous populations) do not have standing to bring international claims.

In addition, if an ICE were to enable more plaintiffs to bring suits, 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 mean a corresponding reduction of environmental catastrophes, and increased compliance with applicable laws.

In disputes brought before the WTO, trade restrictive environmental measures must be shown to be compatible with the basic WTO legal norms or else fall within the WTO's environmental exemptions, which are strictly interpreted in ways that maximize their compatibility with trade norms. If it can be established that a measure falls within the Article XX exemptions, it must also be shown that it is necessary to protect the environment, that it is the least trade restrictive measure compared to any alternatives, and that it does not arbitrarily discriminate against any WTO member or constitute a disguised form of protection for local industry.

It has been suggested that one benefit of an ICE would be as a review body to arbitrate in cases of conflict or tension between the requirements of the WTO regime and those of relevant international environmental treaties.

Another developing issue which is attracting growing international attention concerns climate related financial disclosure. This was the subject of a seminal report in December 2016 by the so-called Task Force on Climate Related Financial Disclosures, headed by the former Mayor of New York, Michael Bloomberg. The Task Force was set up by the Financial Stability Board of the Bank for International Settlement, a body which, as the name implies, provides an opportunity for international collaboration in the task of maintaining financial stability in the aftermath of the financial crisis. The Financial Stability Board is chaired by the Governor of

our own Bank of England, Mark Carney. In its report the Task Force made a number of recommendations as to the disclosure which companies should make in their financial reporting regarding the potential impact of climate change upon their activity. The Task Force believes that climate related risks are material for many organisations, and indeed this is an issue which is already the subject of potential litigation by state authorities in the US against more than one oil company, the most prominent being Exxon. These developments raise the question whether the international obligation identified by Philippe Sands to avoid the transboundary impact of climate change extends to a consequential disclosure obligation to be imposed on relevant businesses. The kind of disclosure obligation suggested by the Task Force is an issue which would be ripe for consideration by an ICE.

## **ISSUES**

There are various issues that we face in progressing the idea of an ICE. I will briefly highlight some of these now, before finishing, in the hope that they might prompt and inform the question and answer session.

### **Legitimacy**

Legitimacy is a big issue and one which we have sought to address by what you might call a staged approach. In other words we have taken the view that a court or tribunal would have to start off by adjudicating on those disputes which were brought to it, ideally with the consent of the defendant, but possibly in certain cases (like the Monsanto Tribunal) be willing to proceed in the absence of the defendant and give the best ruling that it could. What we had envisaged was the initial establishment of a tribunal of some sort which would not need to be set up through the UN or even with the consent of any particular national government, although the support of some national governments would be extremely welcome. It would operate to a large extent virtually – it would not need, at the beginning at least, very expensive premises, and it would receive and hear and adjudicate upon such disputes as were brought to it and which it felt it could appropriately adjudicate upon. And if our basic concept is right, and if such a body through its method of adjudication and through the clarity and cogency of its judgements were increasingly thought to have an important role to play, then gradually it would prove itself, and international organisations and major jurisdictions would start to see that it would be of real value to have such an institution.

**Enforcement**

Nobody is suggesting that the court itself could literally enforce its own decisions. In the end, any legal system depends on the acceptance by the community it serves of its rulings. There is a famous story in the US about a ruling given in one of the southern states in the 1950s, I think it may have been Arkansas, and Eisenhower who was the president at the time was very worried that this decision might not be accepted and that the court system would be threatened. I think it was a decision in favour of desegregation. The story goes that he very cleverly arranged for a detachment of members of a parachute regiment which had fought on the beaches of Normandy to go down to the city where it was feared the court's judgement would be disregarded and ignored. So he arranged for these troops, who had a very high reputation even in the south, to stand parade when the desegregating school opened its doors, and in that way avoided the clash, and everything proceeded smoothly. Now Eisenhower was lucky because he had a detachment of paratroopers to call on in that situation, and an ICE would not have its own army, at least to begin with. But I think what the story shows is that if you have a body representing society which has the respect of the members of the society which it serves, then its decisions will be accepted – that's the crucial point. And our view is that a body like this, if it's necessary to set it up, will gradually gain the respect of the society it serves.

Alternatively, the very process of seeking to set it up will persuade existing institutions to take over the job which it is designed to do, and make the whole task unnecessary, and that would be a welcome outcome to this whole process – we're not engaged in this in order to be able to say we ourselves have achieved the creation of some new institution, what we want is for there to be suitable institutions to fill the gap.

**Resources**

I believe that an ICE does not depend at least in its initial form, as a voluntary tribunal, on having its basis in an international treaty – I think that is probably still quite some way ahead, although things are developing very fast. It needs some resources, not vast but it undoubtedly needs some resources, and it needs a somewhat greater acceptance than it has hitherto had by the official, legal and academic communities. So, in other words we need to be more

persuasive, and to keep the idea alive, until someone comes along with sufficient resources to make it happen and with sufficient support from those communities to enable it to come about.

### **Choice of Law**

As I have already mentioned, it is contemplated that an ICE would apply either domestic or public international law as appropriate, and just as in private international law cases where the courts sometimes have to decide upon the “*proper law of the tort*” (a decision which involves a value judgment as to the most relevant and appropriate system of law to be applied) the choice of law would be a matter for argument before and decision by the adjudicating body.

### **CONCLUSION**

The need for an ICE has never been greater. The prospect of leaving the EU has thrown into sharp relief the fragility of legal environmental protection. The time to press for the establishment of an ICE has never been better; the Paris Agreement demonstrates international appetite for strong environmental regulation. What we require now are individuals, organisations and states with the drive and vision to take the project forwards.

As expressed by Alfred Rest in 2004:

*“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”.*<sup>12</sup>

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<sup>12</sup> 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, at [285].