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**International Court for the Environment:
The Road Ahead to Opening its Doors**

**- Stuart A Bruce -**

**1. Background to the modern international environmental legal order**

Since the UN Conference on the Human Environment in 1972[[1]](#footnote-2) regional and Multilateral Environmental Agreements have proliferated. The subject matter scope of such treaties has evolved over time to include atmospheric pollution,[[2]](#footnote-3) marine environment,[[3]](#footnote-4) toxic substances,[[4]](#footnote-5) nuclear energy,[[5]](#footnote-6) international watercourses,[[6]](#footnote-7) species protection,[[7]](#footnote-8) biodiversity conservation[[8]](#footnote-9) and climate change.[[9]](#footnote-10) The general aims of environmental treaties include conservation, management, protection and development of the natural environment.[[10]](#footnote-11)

Progress towards achieving treaty aims is facilitated through numerous State-agreed mechanisms including reporting, monitoring, verification and certain non-compliance procedures,[[11]](#footnote-12) with varying degrees of success. Compliance with treaty obligations remains inconsistent and undermines their spirit and purpose. Greater compliance with treaty obligations requires effective enforcement and better judicial dispute resolution.

**2. Purpose of the International Court for the Environment**

The current international environmental law regime presents a mismatch between global interdependence and global inter-governance.[[12]](#footnote-13) What is lacking is a specialised international judicial body to hear and determine transboundary environmental matters and to provide greater coherence to the currently fragmented international environmental governance regime. Strengthening international environmental law mechanisms are essential to, among other things, securing sustainable development and combating climate change.

The purpose of the International Court for the Environment (“ICE”) is to build trust among the international community, to clarity ascertain legal obligations, to harmonise and complement existing legal regimes, to provide access to justice to a broader range of actors than traditional institutions provide and to create workable solutions to modern environmental concerns.

In particular, ICE would provide the primary forum for the resolution of disputes arising from customary and treaty-based environmental law obligations owed by States to other States or to non-State actors. The multimodal offering will ensure cost-sensitive and flexible dispute resolution avenues, including non-bindings negotiation, mediation and conciliation and binding arbitration and judicial determination, as well as judicial advisory opinions. Importantly, ICE will be accessible to individuals, corporations and civil society.

ICE will also subsume the role of existing environmental treaty-based enforcement bodies, including those established, for example, under the Convention on Biological Diversity 1992,[[13]](#footnote-14) the United Nations Framework Convention on Climate Change 1992[[14]](#footnote-15) and the Kyoto Protocol.[[15]](#footnote-16)

**3. Bringing the International Court for the Environment into effect in practice**

In practice, there are two major pathways to forming the ICE: mutual agreement or by treaty. After formation, the operation of ICE will be governed by its constitution.

Formation

*3.1 Mutual agreement*

The quickest, cheapest and easiest way to establish the ICE is by mutual agreement. In practice, parties to a dispute would simply need to agree and consent to submit their dispute to the jurisdiction of an ICE tribunal and to be bound to its constitution, which includes the tribunals jurisdiction, substantive rules, grounds for standing. This is akin to existing processes in international law to establishing private ad hoc arbitral tribunals.

The court as a tribunal established without a treaty could be set up very quickly, within 2 years. This would then provide a working example of what the court can achieve and help to encourage adoption of a UN treaty to mandate a permanent ICE.

*3.2 Treaty*

The more involved mechanism to establish the ICE is through an international treaty. This process could start by a recommendation at an international conference, such as Rio+20, supported by a UN General Assembly resolution authorising the commencement of negotiations. While a draft constitution has already been prepared, it is likely that negotiations would ensue informally for some time and culminate in an international conference where delegates of states formally agree to the final version of the constitution text – all of which has an effect on the timeframe for establishing the court.

After agreement of the text, a pre-determined number of states will need to sign and ratify the treaty before the ICE officially comes into being as a new stand alone international tribunal. A prototype for this process is the establishment of the International Criminal Court that is founded on negotiations of the Rome Statute.

Operation

Once ICE is established, the operations and daily functioning of the court (or tribunal) will be determined in the first instance by its constitution, which sets outs, among other things, matters relating to jurisdiction, the types of evidence that can be relied upon, procedure, subject matter scope and standing provisions.

If the court operates more akin to an arbitration tribunal, the parties to a dispute may have a certain degree of freedom to consensually choose the rules of evidence and procedure of the tribunal, akin to the International Centre for Settlement of Investment Disputes, in addition to relying on scientific evidence and arbitrators with subject-matter expertise.

**4. Supporters, constituencies and end-users**

Many stakeholders and groups have an interest in establishing ICE.

*4.1 Civil society and individuals*

Historically only states had standing to seek judicial settlement on the international plane, such as through the International Court of Justice (“ICJ”). Accordingly, most of the people who suffer from international environmental problems have no access to justice.

The broad standing rules of ICE will ensure that those affected by environmental problems have a direct right of access – this will often be NGOs, civil society and affected communities or individuals. This will enable groups to bring attention to environmental degradation that their own national governments have been unable or unwilling to address and go some way to implementing the pillars of the Aarhus Convention.[[16]](#footnote-17)

*4.2 Business community*

A vital constituency is that of the global business community. ICE will provide businesses with the independent assessment of obligation violations, legal certainty and predictability so that long-term investment risk may be effectively managed. ICE could also influence the world business community to improve environmental standards and practices which would produce a corresponding reduction in the risk of environmental catastrophe. An example of a current international dispute well suited to ICE is that of *Chevron v Ecuador*, which has been plagued by allegations of judicial imprudence and award enforcement complexity. As a legitimate and globally recognised body, ICE would overcome many of these challenges.

*4.3 States*

ICE will supplementing traditional international dispute resolution fora by providing a body that is able to receive technical and scientific evidence and is populated by judges educated in environmental law matters – a lingering lacuna in extant international courts and tribunals. This will provide similar benefits for states as it does the business community and assist in clarifying and progressively developing international environmental law.

The need for a forum providing in-depth consideration of independent science has been reaffirmed recently with the ICJ’s judgment in *Argentina v Uruguay* (*Pulp Mills*), in which the dissenting judgment regretted the ICJ missing “what can aptly be called a golden opportunity to demonstrate to the international community its ability, and preparedness, to approach scientifically complex disputes in a state-of-the-art manner” (Awn Shawkat Al-Khasawheh and Bruno Simma, 20 April 2010). The ICJ is a valuable institution but it is not capable of providing the adaptability, consideration of science and access to justice for non-State actors required in environmental disputes. Indeed, in 1993 the ICJ established a specialised environmental chamber but later decommissioned it.

*4.4 International community*

ICE will benefit the international community of states (and non-state actors) in at least four ways: harmonising the fragmented system of international environmental law; serving as the Chamber for all MEAs which reference art 33(1) UN Charter; resolving conflicting international law obligations, such as those between WTO rules and UNFCCC or Kyoto Protocol obligations; providing interpretive guidance and judicial support to any new international environmental governance body, such as a World Environment Organisation.

**5. Driving the process forward – what next?**

To make the ICE a reality, greater international support and proactive state sponsorship is required, as is environmental leadership from the business community. How long it takes to open the doors and the method by which ICE is established depends on the abovementioned variables.

Many actors have publicly acknowledged their support for an ICE of some type, including the United Nations Department of Public Information, European Parliament, Northern Alliance for Sustainability and The Access Initiative. ICE is possible, but requires more support.

1. Declaration of the United Nations Conference on the Human Environment (Stockholm), UN Doc. A/CONF/48/14/REV.I. [↑](#footnote-ref-2)
2. Eg, Convention on Long-Range Transboundary Air Pollution (Geneva), 18 ILM (1979) 1442. [↑](#footnote-ref-3)
3. United Nations Convention on the Law of the Sea (Montego Bay), 21 ILM (1982) 1261. [↑](#footnote-ref-4)
4. Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam), 38 ILM (1999); UNECE Convention on Persistent Organic Pollutants (Stockholm), 37 ILM (1998) 505. [↑](#footnote-ref-5)
5. Treaty on the Non-Proliferation of Nuclear Weapons, 7 ILM (1968) 809. [↑](#footnote-ref-6)
6. Convention on the Law of Non-Navigational Uses of International Watercourses, 36 ILM (1997) 719. [↑](#footnote-ref-7)
7. Convention on International Trade in Endangered Species of Wild Flora and Fauna (Washington), 993 UNTS 243. [↑](#footnote-ref-8)
8. Convention on Biological Diversity, 31 ILM (1992) 818 (“Biodiversity Convention”). [↑](#footnote-ref-9)
9. Framework Convention on Climate Change, 31 ILM (1992) 851 (“UNFCCC”); Protocol to the Framework Convention on Climate Change (Kyoto), 37 ILM (1998J) 22 (“KP”). [↑](#footnote-ref-10)
10. Patricia Bernie, Alan Boyle and Catherine Redgwell, *International Law & The* Environment (2009) pp.7-8. [↑](#footnote-ref-11)
11. See, eg, Protocol on Substances that Deplete the Ozone Layer (Montreal), UKTS 19 (1990) MC. 9777, for a very successful non-compliance mechanism. [↑](#footnote-ref-12)
12. Lord Anthony Giddens, International Court for the Environment presentation at the London School of Economics (Press Release, 24 November 2009, http://www.environmentcourt.com/siteimg/1260458555LSE\_Nov\_09\_release.pdf). [↑](#footnote-ref-13)
13. Biodiversity Convention. [↑](#footnote-ref-14)
14. UNFCCC. [↑](#footnote-ref-15)
15. KP. [↑](#footnote-ref-16)
16. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 38 ILM (1999) 515. [↑](#footnote-ref-17)