

University of Massachusetts Boston

ScholarWorks at UMass Boston

Governance and Sustainability Issue Brief
Series

Center for Governance and Sustainability

1-2013

Brief 7: Building an International Court for the Environment: A Conceptual Framework

Philip Riches
ICE Coalition

Stuart A. Bruce
ICI Coalition

Follow this and additional works at: https://scholarworks.umb.edu/cgs_issue_brief_series



Part of the [Dispute Resolution and Arbitration Commons](#), [Environmental Health and Protection Commons](#), and the [Environmental Policy Commons](#)

Recommended Citation

Riches, Philip and Bruce, Stuart A., "Brief 7: Building an International Court for the Environment: A Conceptual Framework" (2013). *Governance and Sustainability Issue Brief Series*. 7.
https://scholarworks.umb.edu/cgs_issue_brief_series/7

This Occasional Paper is brought to you for free and open access by the Center for Governance and Sustainability at ScholarWorks at UMass Boston. It has been accepted for inclusion in Governance and Sustainability Issue Brief Series by an authorized administrator of ScholarWorks at UMass Boston. For more information, please contact scholarworks@umb.edu.

Building an International Court for the Environment: A Conceptual Blueprint

by Philip Riches and Stuart A. Bruce

This Issue Brief considers the role and nature of existing and potential international dispute resolution fora in relation to international environmental law. It addresses impediments at the international level, such as limited access to justice by non-state actors and the lack of technical and scientific capability. As a conceptual paper, it highlights two possible remedial options: an International Environmental Tribunal and an International Environmental Court.

“[An] ICE Tribunal or Court could become the ultimate environmental dispute settlement body, whose jurisprudence could filter down into national environmental courts.”

Context of International Environmental Dispute Resolution

Since the Stockholm Conference in 1972, regional and multilateral environmental agreements (MEAs) covering a broad subject matter have proliferated.¹ Common to many MEAs are endogenous mechanisms that facilitate advancement of treaty objectives. These include institutional structures such as Conference of the Parties supervisory bodies and monitoring, reporting, and verification obligations.² Failure to implement treaty obligations domestically, or non-compliance with related conventional or customary obligations, may trigger state responsibility by the malefactor and permit an injured state to bring a claim under international law.³

Enforcement for treaty non-compliance may be pursued through various diplomatic and legal means, which are often expressly articulated in the text of a treaty, ranging from negotiation through to arbitration and formal adjudication. Certain treaties may even provide for binding dispute resolution procedures.⁴ Although international courts and specialist tribunals increasingly address environmental matters, they have limitations: standing to bring a claim is generally restricted to states, jurisdictions may overlap and contribute to fragmentation, and pronouncements are often of modest significance.

Another approach to managing compliance and enforcement issues is through the use of treaty-based non-compliance procedures. Non-compliance procedures are a relatively modern creation that are designed, among other things, to allow states to fail to comply with an international treaty without having to publicly “break” or “violate” a specific obligation. States generally wish to be seen as complying with international law and “non-compliance” is perceptually preferable to “breaking” or “violating” a treaty. The differences may be more in nomenclature than legal import, but many in the international legal community argue that non-compliance procedures are better to induce conformity with treaty obligations than orthodox “penalties.”⁵ Because high levels of treaty conformity, compliance and participation are required to effectively address regional and global environmental matters, non-compliance procedures have become important managerial tools and are found in treaties such as the Montreal Protocol to the Ozone Convention, the Aarhus Convention, and the Kyoto Protocol. While the legal community heralds non-compliance procedures as innovative mechanisms that may allow public participation, they are not systemically integrated into the broader corpus of general international law where international environmental law is situated.⁶

This brief contributes to the ongoing “experimentation and exploration”⁷ of environmental dispute settlement mechanism thinking. It conceptually examines why a new legal institution with open standing rules may be necessary and what it may look like. In particular, it attempts to sketch a conceptual blueprint outlining the need, purpose, operation and modes of creating an International Court for the Environment (ICE), both as an ad hoc arbitral body and a formal judicial institution. This concept is not new and has mixed support.⁸ But, given the increasing global environmental consciousness, the time may well be ripe to push this conversation along.

Why a New International Dispute Resolution Institution?

No dispute resolution body exists at the international level with exclusive jurisdiction or specialized subject matter expertise to hear and determine environmental matters. Although the ICJ established a Chamber of Environmental Matters in 1993, it was never used and closed in 2006.⁹ While other specialized judicial bodies such as the International Tribunal of the Law of the Sea, for example, play a role in environmental dispute resolution, they are often limited in jurisdiction and subject matter competence.¹⁰ In addition, access to international courts and tribunals is limited to states while contributions to and consequences from environmental harm spread to non-state actors. For instance, the effects of climate change now being felt are primarily the consequence of private or state-endorsed (energy-generating) activities. Mechanisms to determine liability for damage are underdeveloped, but progress has begun through a new loss and damage mechanism.¹¹ An ICE could help infuse the rule of law into a system deeply plagued by politics.

Inadequate Environmental and Scientific Knowledge in International Courts and Tribunals

While the ICJ can appoint technical advisers to a case, including scientists, it has failed to do so in seminal cases such as 2006 *Pulp Mills* suit, which involved Argentina bringing a claim against Uruguay for breaching a long-standing bilateral agreement by permitting the construction of two water-polluting pulp mills on the Uruguay River.

This deficit was observed in the joint dissenting opinion of ICJ Judges Al-Khasawneh and Simma (Simma being one of the most illustrious international judges), who noted a number of inadequacies in the judgment, including: (1) the manner in which the ICJ evaluated scientific evidence was flawed, (2) the Court should have appointed scientific experts, (3) overall the Court missed a “golden opportunity” to “demonstrate its ability to approach scientifically complex disputes in a state-of-the-art manner.”¹² Poignantly, they stated that the Court:

...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.

It is beyond doubt that the ICJ plays a pivotal role in international jurisprudence, but it has limitations. Other specialized judicial bodies such as the International Tribunal of the Law of the Sea also play a role, which is limited in jurisdiction and subject matter competence to issues arising out of the United Nations Convention on the Law of the Sea.¹³ But there is no

specialized international dispute resolution body with competence and expertise over environmental law matters. An International Court for the Environment could fill this gap. Such an institution could be constituted as an informal Tribunal or a formalized Court and would be able to remedy many of the abovementioned issues.

Restricted Access to International Courts and Tribunals

Under the historical classical conception of international law, only states had international legal personality, and therefore it was only states that had access to international courts and tribunals such as International Court of Justice (ICJ) and the Dispute Settlement Body of the WTO. This conception is predicated upon various notions such as state sovereignty and that international legal obligations were exclusively the province of states. Since the early 20th century this notion has been challenged, and it is now widely recognized that many non-state actors, including natural and legal persons, have rights under international law backed by international responsibility.

Currently, the international environmental regime lacks judicial fora accessible by individuals and civil society, among others, to keep states and non-state actors accountable for environmental harm. This inadequacy was highlighted in the 1997 *Gabcikovo-Nagymaros* case, a dispute over the construction of hydroelectric power stations on the Danube River. Judge Weeramantry, in his separate opinion, recognized the ICJ's limitations and stated that international law needs to evolve beyond state-state dispute resolution to hear matters of “global concern of humanity as a whole.”¹⁴ While some progress has occurred in a regional context through the Aarhus Convention,¹⁵ that progress is limited by its geographic scope of application and membership.

Non-State Actor Contribution to Environmental Harm

There is an increasing awareness that activities of non-state actors, such as generation of carbon emissions, toxic waste and oil pollution, have considerable trans-boundary and global consequences. Accordingly, non-state actors responsible for international environmental harm must be held to account. The first mechanisms for doing so are domestic legal and administrative systems. However, many domestic courts have an uneasy relationship with international law, whether it manifests through national legislation or is directly applicable through custom or constitutional convention. Similarly, technical competence to adequately address and pronounce on environmental law disputes varies between countries. To overcome these shortcomings, a necessary second line of defense is access to judicial and arbitral support at the international level, especially for globally significant environmental disputes.



“An ICE could help infuse the rule of law into a system deeply plagued by politics.”

The Purpose of an ICE

Local environmental practices often have global consequences. It may not be possible to address the wide range of international environmental issues without mandatory international standards and enforcement measures. To this end, the goals of an ICE, among other things, would be to: (1) clarify and ascertain environmental legal obligations of disputing parties, (2) facilitate harmonization of and complement existing legislative and judicial systems, (3) provide access to justice to a broad range of actors through open standing rules, (4) provide workable solutions to modern environmental concerns, and (5) build trust among the international community.

These goals and the operation of an ICE will benefit multiple stakeholders, including states, businesses and civil society. But while there are no legal obstacles to creating an ICE, the concept may face resistance in certain quarters, particularly in politics and business. Resistance is likely to be driven by fear of litigation, scrutiny and accountability—much-needed aspects of responsible international environmental governance. But an ICE could actually provide useful clarity for governments and businesses regarding international environmental issues.

For example, the legal content of the principle of sustainable development is equivocal and has not been judicially determined, but as a concept it has influence over both international and domestic law and policy. An ICE could assist to determine the legal meaning of this concept and provide states and businesses with clarity of their obligations. Determinations could then contribute to enhancing ecologically responsible international practices and standards and may assist in reducing the likelihood of human-caused environmental catastrophes. By addressing such significant matters, over time an ICE would become the preeminent global center of excellence for environmental law and jurisprudence. It would improve harmonization across international environmental regimes and coherently cultivate the global environmental law system of governance, preventing situations like *Pulp Mills*. What could an ICE look like, and how could it function? The following sections examine two possible manifestations: a Tribunal and a Court. The Tribunal would be a specialized, ad hoc dispute resolution body requiring consent of both parties, whereas the Court would be a formal international court system similar to the ICJ.

An ICE Tribunal Conceptual Overview Structure and Operations

A new ICE Tribunal could provide an informal, ad hoc body with specialized environmental science and law subject matter expertise. While it could be modeled on the best practices of arbitration institutions such as the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC), it would operate only in a restricted issue area. This factor distinguishes ICE from existing arbitration bodies such as the Permanent Court of Arbitration, and will ensure its credibility and reliability in resolving environmental disputes.

An ICE Tribunal could mirror many existing rules, procedures and enforcement authority, with necessary modifications as required. For instance, the LCIA and ICC have predetermined rules for resolving disputes submitted to them, derived from best practice over time or parties can determine rules of procedure and evidence to apply.¹⁶ ICE, like the LCIA and ICC, could have a standing panel of arbitrators, which consists of environmental law experts, or pure environmental science experts, or panelists with any expertise required for the environmental matter. Parties could then choose their preferred arbitrator, with confidence that any arbitrator would be equipped to deal with the subject matter.

Jurisdiction and Choice of Law

Parties would need to agree if the Tribunal’s jurisdiction is exclusive or non-exclusive (it is more common that other bodies can also hear the dispute). If exclusive jurisdiction is agreed upon, the parties would need to agree what subject matter the jurisdiction applies to; for example, that the dispute raises questions of or relating to international environmental law. If non-exclusive jurisdiction is agreed, subject matter jurisdiction is less of a question, especially if one party prefers to submit the matter to another body. Additionally, practice shows that when parties agree to non-exclusive jurisdiction, reference of the matter to the non-exclusive court or tribunal by one party will lead to the other party agreeing to have the matter dealt with by that court or tribunal. This may also occur if one party unilaterally submits a matter to the ICE Tribunal. If the other party does not join, a decision will have no legal effect beyond normative influence and reputational damage, both of which have significantly advanced environmental awareness and practices.

Alternatively, the ICE Tribunal may itself predetermine its subject matter, temporal and geographic jurisdiction and basic minimum threshold for a matter to fall within its scope. Should this occur, parties could agree in advance to submit disputes covering the entire scope, or a smaller subcategory (for example, matters related to oil transportation but not drilling).

In addition to jurisdiction, the choice of law application to a dispute will also need to be determined (e.g., international, regional, national law, or a combination). Parties may choose to determine the applicable law in any agreement between them, but it is likely that the ICE Tribunal would reserve the right for international law to prevail over any other conflicting law. A “default option” that provides certainty and consistency, as well as filling any legal gaps, is for the ICE Tribunal rules to provide for the application of international environmental law as it stands at the time the matter is heard.

Access and Remedies

Importantly, like the LCIA and ICC, an ICE Tribunal, in accordance with the parties’ agreement, offers the flexibility of being constituted anywhere in the world, with appropriate facilities.

In determining the location, parties may wish to bear in mind that tribunal decisions are likely to be subject to overall (but limited depending on the relevant arbitration legislation)¹⁷ supervision by superior courts in the jurisdiction where the arbitration seat is located. Providing that the arbitration seat is in a country that is a party to the New York Convention on the Recognition and Enforcement of International Arbitral Awards 1957 (which applies to almost all developed and most emerging economies), the default position would be that ICE Tribunal decisions will be binding between the parties and enforceable as a judgment in any other country that is also party to the Convention.¹⁸

Parties may otherwise agree that decisions are not binding but subject only to a declaratory judgment. This would enable action against future behavior inconsistent with the declaration. If none of this were agreed, the only consequence of non-compliance would be reputational. This may be amplified if the Tribunal panel is highly regarded and should not be underestimated. Some of the most influential tribunal decisions are underwritten by the reputation and facility of its arbitrators.¹⁹

Funding

A number of options exist to fund an ICE Tribunal. First, all costs could be borne by the parties. An LCIA case presently costs £1,500 to commence, plus the arbitrators' fees on an hourly basis, usually around £300–£500 per hour. Second, state parties to an agreement that establishes the ICE Tribunal could fund the institution through fees based on a predetermined formula, such as the UN contribution model. Third, corporations may provide long-term grants, in return for access by its corporate entities as needed. This may also create positive public perception benefits for those entities, by demonstrating a commitment to good environmental practice. Should the ICE Tribunal not have permanent infrastructure, but operate as an ad hoc body, establishment and operational expenses would be minimal.

Establishing and Using the ICE Tribunal

The quickest, cheapest and easiest way to establish an ICE Tribunal is by mutual agreement between parties (be they states, corporations, NGOs, international organizations or individuals). This may occur either before or after a dispute arises. If parties to an agreement find that an actual dispute has arisen, but the agreement either does not provide for dispute settlement procedures or permits party discretion, they may agree to refer the matter to the ICE Tribunal. Such ad hoc referral might be helpful for parties who had not expected to have a relationship with each other (e.g., a community which suffers by reason of an unexpected polluting incident).

Alternatively, parties could agree in advance that certain issues that arise between them will be mandatorily referred to the ICE Tribunal. This can be achieved by inserting an ICE

Tribunal clause into any agreement (a standard form would be created).²⁰ Similarly, MEAs or intergovernmental organizations could use the ICE Tribunal as a joint alternative to, or replacement of, their own tribunals or non-compliance procedures, or apply their rules to its proceedings (thus introducing some coherence into global environmental arbitration).

An ICE Court Conceptual Overview Structure and Operations

In theory, if the ICE Tribunal worked well enough, an ICE Court may never be required, since every possible entity (every state, corporation, NGO, etc.) would sign up and be subject to its authority. But this is an unlikely scenario. Accordingly, an independent judicial institution may be required as the primary forum for resolving environmental disputes arising from customary and treaty-based obligations.

Once established, the operations and daily functioning of the court will be determined in the first instance by its constitution, which sets out, among other things, matters relating to jurisdiction, the types of evidence that can be relied upon, procedure, subject matter scope and standing provisions. As a permanent international court, these rules will be established at the outset; however, they may be revised over time, and would not provide the flexibility of an ICE Tribunal.

In practice, however, an ICE Tribunal would provide the conceptual template for how a Court could work in terms of decision-making, procedure and, above all, the application of a corpus of well-reasoned international environmental law. Therefore, in some sense, few differences exist between the ICE Tribunal and Court.

Jurisdiction

The most significant differences between the Tribunal and Court are the means by which parties would agree to use the ICE Court and how it would exercise its jurisdiction. In the Tribunal model, parties agree to use it. In the Court model, states would agree that the Court will have jurisdiction in their territories, covering a state's own acts and the acts of corporations, NGOs, individuals and other domiciled entities. Accordingly, the jurisdiction of the Court would be permanent — representing a symbol of environmental stewardship — and adjudication could be compulsory for certain matters.

This represents a shift from consent-based jurisdiction, where parties agree to a matter being heard by an international Court. This approach is necessary because many domestic causes of environmental harm have international consequences, such as emitting unsustainable levels of carbon dioxide into the atmosphere. Real progress in addressing international environmental harm and degradation will be stifled without mandatory adjudication measures.



“[W]hile there are no legal obstacles to creating an ICE, the concept may face resistance in certain quarters, particularly in politics and business. But an ICE could actually provide useful clarity for government and business.”

Of course, in light of the above goals, it is possible that an ICE Court would have jurisdiction, rules and procedures that vary from the ICE Tribunal. For instance, to ensure that it is not overrun by casework, the Court’s jurisdiction may be restricted to only the “most serious” breaches of international environmental law such as the Exxon Valdez oil spill, in line with a similar restriction at the International Criminal Court.²¹

Standard-Setting Legal Body

Over time, an ICE Court may determine environmental matters relating to customary international law and subsume the role of existing environmental treaty-based enforcement bodies. This could include those established, for example, under the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Convention on Biological Diversity. To the extent that such incorporation is not possible, there could be a “carve out” of the ICE Court’s jurisdiction to prevent overlap with existing bodies. Alternatively, the Court could provide a judicial review-like function of legal decisions made by these bodies and those of subsequent treaty supervisory bodies (should ICE not become the designated body). For instance, the Court may need to determine whether a decision of the Conference of the Parties to a treaty has legal effect for States to that treaty. This may also be facilitated through ICE Court advisory opinions.

Access and Remedies

Importantly, the Court will have broad standing rules that provide direct access to all parties, will have transparency in its proceedings and decision-making and will receive technical and scientific information. This may necessitate the development of innovative remedies to address the environmental issues in question. For example, the Court may issue declaratory relief, fines and sanctions of restoration and rehabilitation of damaged habitats akin to those in the European Community Environmental Liability Directive.²² The ICE Court could also be empowered to hand down declarations of incompatibility of Signatory State legislation when it conflicts with MEA rules. There would also be provision for interim measures, specifically, injunctions to preserve environmental evidence and state of affairs as found in most domestic and international courts. In addition, while it could sanction Signatory States for failure to enforce judgments (e.g., naming and shaming wrongdoers), Court judgments would lack mandatory enforcement powers, as does the ICJ.²³ Yet ICJ judgments are highly regarded and provide considerable political and public pressure for compliance. So too could an ICE Court.

Finally, the judgments of an ICE Court would be well reasoned and demonstrate a deep appreciation of the interrelationship between law, science, the environment and other technical matters. Accordingly, only judges that have a broader knowledge of environmental law than those of extant courts will

be appointed. Additionally, specialist technical panels could assist judicial decision-making and would be mandated in most, if not all, cases.

Establishing and Using the ICE Court

Bringing an ICE Tribunal into existence is conceptually more straightforward than bringing to life an ICE Court. The primary reason is that a permanent ICE Court would have to be established through an international treaty, which is then transposed into national law. This process could start by a recommendation at an international conference, supported by a UN General Assembly resolution authorizing the commencement of negotiations. Accordingly, funding would most likely be based on the UN contribution model.

While a draft constitution has already been prepared for the Court,²⁴ it is likely that negotiations would ensue informally for some time and culminate in an international conference where State delegates formally agree to the constitution text. After agreement of the text, a predetermined number of States will need to sign and ratify the treaty before the ICE Court officially comes into being.

Recently, the most appropriate forum for such a process was the 2012 United Nations Conference on Sustainable Development, which did not address this point.²⁵ It seems that for the moment, there is limited political space at the international level to commence the preparatory work for an ICE Court. This is not to say that conversations are not occurring,²⁶ but the massive drive that catalyzed the formation of the International Criminal Court is presently lacking in the environment space. Many reasons exist for this, including disenchantment with global governance.

Conclusion

At a general level, an ICE Tribunal or Court could become the primary forum for environmental disputes that are currently being referred to disparate ad hoc tribunals and courts. The ICE Tribunal is envisaged as an informal institution that can be set up quickly and cheaply in the interim and which can serve as a working advertisement for the benefits that a formal ICE Court could bring in the future. These fora will be able to receive scientific and technical evidence and be constituted by panelists and judges proficient in matters of international law and natural sciences. Additionally, they could, in theory, reduce the need for ad hoc MEA dispute settlement bodies, thus avoiding unnecessary costs. Moreover, an ICE Tribunal or Court could become the ultimate environmental dispute settlement body, whose jurisprudence could filter down into national environmental courts.²⁷ Given the low probability that all states would initially sign up to an ICE Court (akin to the formation of the International Criminal Court), it is likely that there would still be a role for an ICE Tribunal.

Box 1. Example of ICE Arbitration Clause

“The parties agree that any issue between them arising out of or relating to this agreement shall/may [depending on exclusive/non-exclusive jurisdiction] be resolved by one/three arbitrators pursuant to the ICE tribunal rules/by the ICE tribunal sitting in [location].”

And

“A party can commence such a reference by making a request for arbitration to the ICE tribunal. The parties agree that the issue between them shall be addressed and/or determined by the ICE tribunal in accordance with the ICE tribunal rules.”

Or

“A party can commence such a reference by appointing its arbitrator and giving notice to the other party of this, upon the receipt of which notice the other party shall have 28 days to appoint its arbitrator. The commencing party shall inform ICE of its appointment and upon appointment of the second arbitrator, those two shall appoint a chairman from a list supplied by ICE. The ICE tribunal so constituted shall address and/or determine the issue referred to it in accordance with the ICE tribunal rules.”

Table 1. Comparison of relative benefits between ICE Tribunal and Court models

Tribunal and Court Similarities
Fair trial: Independence and impartiality.
Credibility: Authority, expertise and ability to receive scientific and technical evidence. Reliable quality of dispute resolution, contrasted with some existing options.
Integration: Ability to address issues arising across multiple environmental law regimes — national, regional, trade-body related, etc.
Unilateral action: Where a party unilaterally wants a declaration on a point, which will be respected and noted internationally. There are no real options for that party at present.
Access to justice: Anyone could bring a matter before the ICE Tribunal or Court.
Tribunal and Court Differences
Choice: Tribunal may be used if there is no obvious dispute settlement forum for the matter in question or if there are too many competing jurisdictions. Court would seek to minimize “forum shopping” by its status as the “primary” environmental dispute settlement body.
Expense: A tribunal is inexpensive. A Court, especially if it has a permanent physical location, will have capital and ongoing operational expenses.
Speed: The ICE Tribunal, because of its simplicity and flexibility would be able to deal with matters quickly. In particular, the Tribunal “expands” by way of appointment of arbitrators, to deal with an expanded caseload. There could therefore never be a backlog of cases. A Court would inherently be slower, especially if it had a large workload.
Permanence: As a full-time permanent body, the Court may have a strong symbolic presence in addition to its regular development of environmental jurisprudence.
Confidentiality: Arbitration is usually confidential, as could be the ICE Tribunal hearings. However, if confidentiality were to be adopted, it would negate part of the aim of the ICE concept, which is to develop international environmental law and to publicize case reports, articles and other materials. Confidentiality should therefore only be permitted in exceptional circumstances, by agreement between the parties. An ICE Court will be an open and transparent public body, with judgments/decisions published and freely available.



Note

We thank the two peer reviewers and Michael Denney, Maria Ivanova, and Tse Yang Lim of the Center for Governance and Sustainability for their constructive feedback on an earlier draft of this article. The views expressed in this article are those of the authors.

Bibliography

- Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep 226.
- Arbitration Act* 1996 (UK).
- Bernie, P., A. Boyle, and C. Redgwell. (2009). *International Law and the Environment*. Oxford, Oxford University Press.
- Bodansky, D., J. Brunnee, and E. Hey, eds. (2007). *The Oxford Handbook of International Environmental Law*. Oxford, Oxford University Press.
- Bruce, S.A. (18 June 2012). "Towards an International Green Court." *China Dialogue*.
- Business and Human Rights Resource Centre, 'Case profile: Texaco/Chevron lawsuits (re Ecuador)' (11 September 2012).
- Charter of the United Nations*.
- 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).
- 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.
- Hey, E. (2000). *Reflections on an International Environmental Court*. The Hague, Kluwer Law International.
- Hockman QC, S. (8 March 2010). "The Case for an International Court for the Environment" (8th Ruth Steinkraus-Cohen International Law Lecture, Centre for International Studies and Diplomacy, School of Oriental and African Studies).
- International Institute for Sustainable Development. (22 June 2012). "Summary of the World Congress on Justice, Governance and Law for Environmental Sustainability: 17–20 June 2012." *United Nations Environment Programme World Congress Bulletin* 203(1).
- Jennings, R. (1995). "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers," *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*. American Society of International Law Bulletin Number 9.
- Pring, G., and C. Pring. (2010). "Increase in Environmental Courts and Tribunals Prompts New Global Institute." *Journal of Court Innovation* 3(1): 11.
- Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, 120 [2]–[3], [12][28] (Judges Al-Khasawneh and Simma).
- Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001).
- Riches, P. (18 June 2012). "China Should Back Eco Justice." *China Dialogue*
- 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).
- Sands, P. and J. Peel, eds. (2012). *Principles of International Environmental Law*. Cambridge, Cambridge University Press.
- United Nations Conference on Sustainable Development, *The Future We Want*, UN Doc A/66/L.56 (24 July 2012).

Endnotes

- ¹ See generally, Sands and Peel; Bernie, Boyle and Redgwell; Bodansky, Brunnee and Hey.
- ² See generally, Geir Ulfstein, 'Treaty Bodies' and Jorgen Wettestad, 'Monitoring and Verification' in Bodansky, Jutta and Hey.
- ³ *Responsibility of States for Internationally Wrongful Acts*, annex. If a treaty creates obligations owed to the entire international community, any State that is not directly injured may also bring a claim: at art 48. Cf *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996).
- ⁴ See, for example, *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 288.
- ⁵ Bernie, Boyle and Redgwell, p. 247.
- ⁶ Jennings, p. 5.
- ⁷ See generally, Cesare P R Romano, 'International Dispute Settlement' in Bodansky, Brunnee and Hey.
- ⁸ See generally, Hey; Bernie, Boyle and Redgwell, pp. 255–257.
- ⁹ International Court of Justice, 'Chambers and Committees' www.icj-cij.org/court/index.php accessed 9 September 2012.
- ¹⁰ *United Nations Convention on the Law of the Sea*, open for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) Annex VI, Statute of the International Tribunal of the Law of the Sea.
- ¹¹ Pearce, Fred, "Should Polluting Nations Be Liable for Climate Damages?" *Yale Environment* 360, January 14, 2013, http://e360.yale.edu/feature/should_polluting_nations_be_liable_for_climate_damages/2609/.
- ¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*.
- ¹³ *United Nations Convention on the Law of the Sea*, open for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) Annex VI, Statute of the International Tribunal of the Law of the Sea.
- ¹⁴ *Gabcikovo (Judgment)* [1997] ICJ Rep 88, 118 (Vice-President Weeramantry).

¹⁵ *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).

¹⁶ These rules are under regular review to take account of changes in practice. See present LCIA Arbitration Rules at www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx and ICC Rules of Arbitration at www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/.

¹⁷ See, for example, the limited rules for court intervention in England, *Arbitration Act 1996* (UK).

¹⁸ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art III.

¹⁹ See, for example, *Texaco Overseas Petroleum Company v Libyan Arab Republic* (1977) 53 ILR 389, per Arbitrator Dupuy; *Iron Rhine Arbitration (Kingdom of Belgium v Kingdom of the Netherlands)* PCA (2005) per Judge Rosalyn Higgins, Professor Guy Schrans, Judge Bruno Simma, Professor Alfred H A Soons and Judge Peter Tomka.

²⁰ See Box 1 for example clauses.

²¹ *Rome Statute of the International Criminal Court*, preamble, arts 1, 5(1).

²² Directive 2004/35/CE; Directive 2009/31/EC.

²³ See, for example, *Charter of the United Nations*, art 94. Referrals for consideration by the Security Council for non-compliance are also a possibility.

²⁴ See www.icecoalition.org.

²⁵ See United Nations Conference on Sustainable Development.

²⁶ International Institute for Sustainable Development.

²⁷ Cf Pring and Pring.

Citation information

Please use the following citation for this brief:

Riches, Philip and Bruce, Stuart A. (2013). "Building an International Court for the Environment: A Conceptual Blueprint." Governance and Sustainability Issue Brief Series: Brief 7. Center for Governance and Sustainability. University of Massachusetts Boston.

Center for Governance and Sustainability

The Center for Governance and Sustainability seeks to bring academic rigor to real-world policy challenges in environment, development, and sustainability governance. It serves as information hub, brutal analyst, and honest broker among scholars, students, and practitioners. Views expressed in the Governance and Sustainability Issue Brief Series are solely those of the authors and do not necessarily represent the views of the Center for Governance and Sustainability or the University of Massachusetts Boston.

About the authors



Philip Riches is a director of the ICE Coalition and a practicing barrister in international commercial dispute resolution at Stone Chambers, Gray's Inn, London.



Stuart A. Bruce is a member of the ICE Coalition Steering Committee. He is currently an intern with the UN Climate Change Secretariat and previously practiced in commercial litigation in Australia. He has a Master of Laws (International Law) from University College London, specializing in energy, environment, climate change and international law and policy.

Center for Governance and Sustainability

Maria Ivanova and Craig Murphy, co-directors

John W. McCormack Graduate School of Policy
and Global Studies

University of Massachusetts Boston

100 Morrissey Boulevard

Boston, MA 02125

cgs@umb.edu

www.umb.edu/cgs

www.environmentalgovernance.org

Governance and Sustainability Issue Brief Series

Series Editor: Prof. Maria Ivanova

maria.ivanova@umb.edu

Managing Editor: Michael Denney

michael@environmentalgovernance.org

Editorial Intern: Christian Hoover

christian.hoover001@umb.edu



A copy of this publication is available in alternative format upon request.
Please go to www.ada.umb.edu.