International Environmental Court

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A. Introduction and Background

1 International environmental law has experienced notable development over recent years. Simultaneously with the development of a growing body of substantive content, and as a result of ever-increasing awareness of the centrality of the discipline, the international community has delved into the pressing question of how best to address the challenges of international environmental protection (→ Environment, International Protection).

2 Four and a half decades after the landmark United Nations Conference on the Human Environment held in Stockholm in 1972, there is sufficient accumulated experience to assess the effectiveness of the efforts to incorporate the environmental agenda into international discussion forums. This has led to the perception that addressing international environmental issues in a casuistic, ad hoc, fashion is less than ideal, and that a greater degree of coordination is needed.

3 Of all proposed measures to improve environmental governance at a global scale, two approaches have gathered the most attention: the creation of a new central authority, that is, an international organization dedicated to the environment, and the establishment of an international environmental court (‘IEC’). The latter, which is the subject matter of this article, has been prescribed either as an adjudicatory arm of a central environmental organization or as a stand-alone institution.

B. Proposals for an International Environmental Court

4 The particularities of environmental protection, arguably one of today’s most crucial global issues, justify an endeavour to study it as an independent object: most notably, it is planetary in scope and so are the harms it entails. Redressing these harms goes beyond matters of localized damages; there is an impending need for solutions that suitably address their diffuse and fluid nature. Consequently, even though domestic courts have been increasingly called upon to adjudicate environmental disputes, factors such as variations in the level of environmental protection awarded by each country’s legislations, difficulties in enforcing sanctions against transnational parties, and the questionable effectiveness of dealing with an international problem on a local level raise doubts about said courts’ aptitude to adequately and effectively perform this task.

5 What makes an environmental matter global? As Speth and Haas observe (2006, at 15), several scenarios come to mind: abuse of common resources, transboundary pollution, activities that affect large areas encompassing several states, and local but widely shared issues (because they happen simultaneously in various countries or due to general interest in addressing them).

6 The characteristics of international protection of the environment can lead to situations in which there is cross-border damage—the high-profile bi-national disputes adjudicated by the → International Court of Justice (ICJ), for instance—or there is a violation of an erga omnes obligation (→ Obligations erga omnes) from which a cause of action would arise even though there is no immediate material damage to a specific state or non-state actor—as is the case with the highly diffuse harm emanating from climate change.

7 Although no single international court with universal jurisdiction is dedicated solely to environmental issues, a panoply of political, diplomatic, quasi-judicial, and judicial means is available for the resolution of environmental disputes (→ Environmental Dispute Settlement). Nevertheless, such means have been consistently criticized (for an overview of their deficiencies, see generally Stephens, 2009; and Lehmen, 2015), as not being adequately equipped, at least in their current form, to deal with the particularities of international environmental protection. An effective dispute resolution system would have
to take into consideration the nature of the very rights it aims at protecting—something an international court with specific jurisdiction over environmental matters, its proponents advocate, could provide.

8 Several proposals for an IEC have been presented, mainly by scholars, over the years. These proposals can be grouped into, chiefly, two approaches: (i) reform of existing institutions or (ii) creation of a new entity. The main proposals brought forth under either category will be analysed below, with an emphasis on procedural aspects and an assessment of their strengths and shortcomings.

1. Reform Proposals

(a) The International Court of Justice as an Environmental Appellate Tribunal

9 One of the reform proposals voiced over the years (see generally Avgerinopoulou, 2003, 15) is the conversion of the ICJ into an appellate body that would issue a final decision on environmental cases adjudicated by other international courts.

10 The ICJ, the main judicial body of the United Nations (‘UN’), is a standing court with full competence over all matters of international law, including environmental law, and all UN members are bound by its decisions in cases to which they are a party. According to Article 94 (2) Charter of the United Nations, failure to comply entitles the victorious party to refer the matter to the United Nations Security Council (‘UNSC’) (→ United Nations, Security Council), which may then make recommendations or decide upon measures to give effect to the judgment.

11 In spite of those inherently positive features, the environmental jurisprudence of the ICJ is scarce. In 1993, the Court established a specific chamber to deal with environmental issues, comprising seven of its 15 judges, aiming at building a body of specific expertise. The chamber was, however, ultimately abolished in 2006 without having been sought to adjudicate a single case, as disputes with environmental implications continued to be brought before the full court.

12 In one of the ICJ’s most relevant decisions on the subject, issued in 1997 in the → Gabčikovo-Nagymaros Case (Hungary/Slovakia) (Gabčikovo-Nagymaros Project, Hungary v Slovakia, 1997), the Court, albeit in dictum, contributed to the establishment of the concept of sustainable development by setting forth that states should take environmental norms into consideration when planning new activities as well as when carrying on activities initiated in the past. The notion of sustainable development, however, was not central to the decision; rather, it was an argument to reinforce the Court’s justification of its decision. In a famous dissenting opinion, Judge Weeramantry acknowledged sustainable development as a principle of international environmental law (Gabčikovo-Nagymaros Project, Hungary v Slovakia, Dissenting opinion of Judge Weeramantry, 1997). In the majority vote, however, sustainable development remained a largely undefined concept, as the Court did not expand on the significance of the idea and wasted a valuable opportunity to advance its environmental jurisprudence.

13 Similarly, in the → Pulp Mills on the River Uruguay (Argentina v Uruguay) case (Pulp Mills on the River Uruguay, Argentina v Uruguay, 2010), brought by Argentina against Uruguay under a compulsory adjudication clause (Article 60 Statute of the River Uruguay, 1975), although the ICJ recognized the need to perform environmental impact assessments prior to the development of projects that might entail transboundary harm, the very important element of public consultation was not addressed, and neither were other
complaints that were deemed to be outside the scope of adjudication, such as air pollution, noise, and odours.

14 In the Whaling in the Antarctic case (Whaling in the Antarctic Case (Australia v Japan; New Zealand intervening), 2014), the main issue in discussion before the ICJ was whether the whaling activities under the second phase of the Japanese Whale Research Programme under Special Permit in the Antarctic (‘JARPA II’) were carried out for purposes of scientific research, as permitted by Article VIII, paragraph 1, International Convention for the Regulation of Whaling (1946). Even though the ICJ ruled that JARPA II was not for the purposes of scientific research, it chose not to directly enter into the question of what would qualify as commercial whaling in disguise and, as such, as an abuse of right; nor did it prevent Japan from conducting further scientific research. As a result of the judgment, Japan dropped JARPA II and launched the very similar NEWREP-A and NEWREP-NP programs (Brierley and Clapham, 2016).

15 The examples above illustrate that, despite the above-mentioned universal competence over environmental matters—and regardless of the welcome developments such as the first award of compensation for environmental damages, in early 2018, in the Costa Rica v Nicaragua case (Certain Activities carried out by Nicaragua in the Border Area, Costa Rica v Nicaragua, 2018)—the ICJ does not effectively play the role of an international environmental court to its full potential. This may be due to several reasons: the want of a deeper technical understanding of environmental questions (often treated only incidentally) and of a permanent legal and scientific body specialized in environmental matters; the impossibility of access of private parties; and the considerable delays in the adjudication process.

(b) The United Nations Security Council as an Enforcing Body

16 To resolve the issue of enforcement of international environmental law—which, as is the case with international law as a whole, is largely non-hierarchical and voluntary—scholars and policy makers have posited that, due to its enforcement powers, the UNSC could act as an international environmental authority and → quasi-judicial body (see generally Avgerinopoulou, 2003, 15), impose conflict-specific sanctions on the depletion of natural resources (Mrema, Bruch, and Diamond, 2009, 33), or oversee a permanent body implemented under either its auspices or that of the United Nations General Assembly (‘UNGA’) (→ United Nations, General Assembly) in order to monitor violations and address compensation for environmental damage (Mrema, Bruch, and Diamond, 2009, 53).

17 The proposals suggest either (i) the amendment of the → United Nations Charter (‘UN Charter’) so as to explicitly attribute such powers to the UNSC; (ii) a broader interpretation of the notions of peace and security so as to legitimize UNSC intervention in environmental issues; (iii) the issuance of a resolution modelled after United Nations Security Council Resolution 1820 (2008) on acts of sexual violence against civilians in armed conflicts (UNSC Resolution 1820), considering such acts as potentially equivalent to → war crimes, → crimes against humanity, or a constitutive act with respect to → genocide; (iv) the imposition of sanctions under Chapter VII UN Charter whenever natural resources are exploited in connection with armed conflict, for instance in order to finance armed groups; (v) the recommendation of sanctions under Chapter VI UN Charter; or (vi) the creation of a separate IEC by the UNSC, similar to the establishment of the Rwanda and Former Yugoslavia tribunals (→ International Criminal Tribunal for Rwanda (ICTR); → International Criminal Tribunal for the Former Yugoslavia (ICTY)).
Although the UN’s inherent legitimacy is appealing, it should be taken into consideration that representation in the UNSC is considerably more restricted than in the UNGA. The difficulties of passing either an amendment to the UN Charter or a resolution are therefore likely to be significant. The same applies to broadening interpretations of the concepts of peace and security, and beyond likely procedural hindrances lies the fact that, for the sake of the system’s cohesion and stability it may be undesirable to excessively build on any of its fundamental concepts—as is the case with those of peace and security.

(c) The World Trade Organization Dispute Resolution System as an Environmental Court

The World Trade Organization (‘WTO’) dispute resolution system (→ World Trade Organization, Dispute Settlement) is remarkably active, often lauded for its effectiveness, and undoubtedly relevant to the development of international law. As such, it has been singled out (see generally Watson, 2013, 229) as a possible venue for international environmental dispute resolution by means of an amendment to its Understanding on Rules and Procedures Governing the Settlement of Disputes (‘DSU’) in order to explicitly grant the Dispute Settlement Body (‘DSB’) such a mandate.

The DSU most certainly has several, chiefly procedural, upsides, namely: compulsory jurisdiction; expedited decisions (at least in principle) by comparison to most international and domestic courts; prompt and wide publicity to the decisions; ability to consult with specialists which is often exercised especially in matters involving the environment and public health; an active Appellate Body (→ Appellate Body: Dispute settlement of the World Trade Organization (WTO)); one single dispute resolution system for all WTO agreements; and a sensibility to the need of interpreting WTO agreements in light of international law.

It is not, however, a panacea apt to solve all law application problems to be found in the environmental domain. Indeed, from a procedural standpoint, one of its most notable shortcomings—one that would significantly impair its transposition to the environmental domain—is the absence of provisional measures. More crucial, however, is the fact that protection of the environment often constrains the free deployment of goods and of common resources, and consequently free trade—whose defence is the primary objective of the WTO. The tension resulting from the asymmetry between the two goals is, in principle, irreconcilable by the WTO precisely because of its institutional mission.

(d) Human Rights and International Criminal Law Courts as Environmental Courts

Framing the right to a clean environment as a human right, ie greening human rights in order to broaden the landscape of adjudicatory institutions operating in the environmental field, is an approach that has been proposed by academics and policy makers as grounds to bring environmental claims before established human rights international and regional dispute resolution bodies.

Although the → European Court of Human Rights (ECtHR), the → African Court on Human and Peoples’ Rights (ACtHPR), and the → Inter-American Court of Human Rights (IACtHR) are not, by definition, universal in reach, they offer a potential alternative for access of individuals to environmental adjudication (direct in the former two and through the → Inter-American Commission on Human Rights (IACommHR) in the latter) and could therefore create a rich strain of jurisprudence that would advance the development of international environmental law.
Extrapolation of the inherently rights-based language from the human rights arena to the environmental domain, however, may not always prove feasible. The African Charter on Human and Peoples’ Rights (1981) (‘Banjul Charter’ or ‘AChHPR’) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) explicitly recognize a human right to a satisfactory environment. Neither the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (‘European Convention on Human Rights’), however, nor its Protocols set forth a human right to a clean environment and this has somewhat restrained the ECtHR’s environmental adjudication activities. The ECtHR has adjudicated environmental cases based on a broad interpretation of Article 8 European Convention on Human Rights on the right to privacy—which would include a right to a safe environment—but this approach does not warrant limitless application. Nevertheless, from the standpoint of the adequacy of the transposition of the human rights vocabulary to the environmental field, Stephens points out that in spite of legitimate concerns regarding the appropriateness of the anthropocentric terminology of human rights, safeguarding the latter and preserving the environment are often complementary objectives (2009, at 47).

Perhaps the most notable recent development of this approach happened in the arena of humanitarian law. On 15 September 2016, the International Criminal Court (ICC) announced that it would work to prosecute and adjudicate environmental crimes. In a policy paper setting out guidelines for the selection and prioritization of cases for investigation and prosecution (Office of the Prosecutor: Policy Paper on Case Selection and Prioritization), the Office of the Prosecutor stated it would give particular consideration to crimes involving the destruction of the environment, the illegal exploitation of natural resources, or the illegal dispossession of land.

In accordance with the Rome Statute of the International Criminal Court (‘Rome Statute’), the ICC has a mandate to prosecute and try crimes of genocide, crimes against humanity, war crimes, and, starting on 17 July 2018, crimes of aggression. The expansion of its focus to include environmental crimes among prioritized cases signals that the international community is able to rely on a permanent international court to try, albeit non-exclusively and subject to certain limitations, environmental crimes.

The ICC announcement is a relevant advancement with regard to these issues. Indeed, it opens the door for the prosecution of crimes that affect whole communities, such as land grabbing, as well as of crimes which are transboundary in nature and affect the global population as a whole, such as those related to climate change. Given, however, that these crimes are often committed by legal entities, the ICC mandate has a notable shortcoming inasmuch as, under the principle of individual criminal responsibility set forth in Article 25 Rome Statute, legal entities are not subject to its jurisdiction. It should also be noted that the ICC may take action if the crime happens in any of the countries that have ratified the Rome Statute, and the notable absence of greenhouse gas emitters such as the United States, China, India, and Russia entails an important limitation with regard to climate change-related crimes. Furthermore, to fall under ICC jurisdiction, crimes must have taken place after the Rome Statute came into force on 1 July 2002, which limits the court’s ability to prosecute crimes related to historical emissions.

These constraints aside, the main significance of the ICC announcement may lie not in a practical aspect, but in the reinforcement of the notion that there exists a human right to a healthy environment; that norms aiming at its protection are ius cogens; and that the obligations to comply with and enforce such norms are erga omnes. This conclusion is drawn from the fact that the ICC policy paper did not include a new competence under the Rome Statute: the announced prioritization of environmental crimes unfolds from the previously existing competence to prosecute and adjudicate crimes against humanity. It
remains to be evidenced that such crimes will be adjudicated outside the context of an armed conflict, but the theoretical possibility stands, based on the systematic interpretation of Article 5 Rome Statute, establishing that the court has jurisdiction over ‘the most serious crimes of concern to the international community as a whole’; Article 7 Rome Statute, which does not establish a need for ‘widespread or systematic attack’ to happen during armed conflict; and, finally, Article 8 Rome Statute, which, differently from the other two Articles, does specify a context of war.

2. Proposals for a New Entity

(a) International Court of the Environment Foundation

The International Court of the Environment Foundation (‘ICEF’) was created in Rome in 1989, in an effort led by Italian Supreme Court Justice Amedeo Postiglione. In the wake of an international campaign launched by the Foundation for presentation of a ‘Draft Statute of the International Environmental Agency and the International Court of the Environment’ (1992) at the United Nations Conference on Environment and Development (‘UNCED’) in Rio de Janeiro in June 1992, ICEF’s project became a widely known proposal for the creation of an IEC. After winning the support of the European Communities, which issued a resolution for discussion of its proposal at UNCED, ICEF experienced a setback at the conference as, ultimately, the draft was not discussed. Soon thereafter, however, the now extinct United Nations Commission on Sustainable Development lent its support to the project.

From an institutional standpoint, the court is intended to be a permanent organ with global jurisdiction, financed by the UN and composed of 15 independent judges elected by the UNGA. The UNSC would be tasked with enforcement of the awards. The possibility of determining provisional measures to preserve the rights of the parties to the controversy or to prevent grave damage to the environment is expressly provided for and replicates an important feature of the → International Tribunal for the Law of the Sea (ITLOS), established under the auspices of the United Nations Convention on the Law of the Sea ([Montego Bay Convention] [‘UNCLOS’]), which is explicitly equipped with this capacity (Article 290 (1) UNCLOS; Article 25 (1) Statute of the International Tribunal for the Law of the Sea). Other important procedural features include the court’s ability to carry out investigations and inspections—even ex officio, in urgent cases—and to respond to consultation requests.

According to its draft statute, the court would recognize the standing of individuals, → non-governmental organizations (‘NGOs’), states, supranational organizations, international organizations in the UN system, and the individual organs of the UN. As for sanctions, the statute foresees that payment of general damages shall be made in favour of a world environmental fund, while any claim for residual individual damage may only be brought before the relevant national courts.

The project lost traction in the following decades, although it was resubmitted in the Rio+20 United Nations Conference on Sustainable Development. The main shortcomings of ICEF’s proposal have common features with those of other projects advocating the creation of a new entity and will be jointly analysed below in Section C.

(b) International Court for the Environment Coalition

The International Court for the Environment Coalition (‘ICE Coalition’) is an NGO established in 2009 by Stephen Hockman, former Chairman of the Bar of England and Wales, which congregates stakeholders from the legal, business, academic, and NGO communities. The ICE Coalition’s proposal (see ICE Coalition website) aims at the creation of an IEC that would serve as the default forum for resolution of disputes concerning
international environmental law. Its main features would comprise subject matter expertise in international law and an advisory panel with specific expertise; compulsory jurisdiction and reliance on treaty obligations, supplemented by customary or general principles of law; and jurisdiction over both inter-state disputes and those brought by non-state actors, directed at their own state or others, with an appropriate de minimis threshold.

34 Its proponents aim at providing different templates for a possible IEC, under the two guiding principles that a specialized judiciary is more likely to understand and apply scientific evidence effectively, and that not only states but also non-state actors should be given standing to bring cases before the court.

35 The court would be initially established as a voluntary dispute resolution forum, serve as the chamber for all multilateral environmental agreements (‘MEAs’) referencing Article 33 (1) UN Charter—which encourages peaceful dispute resolution—and function as the adjudicatory arm of a world environmental organization.

36 The proposal aims at the creation of a system of international courts through agreements of cooperation, according to which—and similarly to the practice among national courts—international courts would defer cases originally submitted to them to a more appropriate venue. Additionally, the court would be competent, similarly to the European Court of Justice, to respond to requests of preliminary rulings (→ Preliminary ruling) by national courts.

(c) International Bar Association

37 The 2014 International Bar Association (‘IBA’) Report on Achieving Justice and Human Rights in an Era of Climate Disruption supports the creation of an IEC as a long-term, gradual development. The IBA proposes an ad hoc arbitral body which would gradually build towards a permanent formal adjudicatory institution before which state and non-state actors alike would have standing. Despite recognizing that getting states to submit to compulsory jurisdiction might take considerable time, political effort, and/or a pressing incentive such as a worsening of climate change effects, if an IEC does come to fruition the IBA recommends the standardization of MEAs to incorporate the court into the agreements’ dispute resolution processes.

38 Until the necessary level of institutionalization for the creation of an IEC is reached, the IBA’s proposal recommends that states accept the jurisdiction of international judicial bodies such as the ICJ or ITLOS over environmental disputes, as well as, where states have determined to pursue climate-related disputes in arbitral fora, the adoption of the Permanent Court of Arbitration 2001 Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (‘Optional Rules’) (→ Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources: Permanent Court of Arbitration (PCA)) as a preferred interim set of rules for environmental and climate change-related disputes. These Optional Rules were drafted by a working group and committee of experts in environmental law and arbitration and were adopted in 2001. The Optional Rules are based on the 1976 United Nations Commission on International Trade Law Arbitration Rules but were adapted to reflect the characteristics of disputes relating to the environment. The Optional Rules provide the parties with a list of expert arbitrators in the subject matter of the dispute and include provisions for the resolution of disputes that do not reference an applicable treaty or convention.
The IBA’s stated reasons for the interim adoption of the Optional Rules of the → *Permanent Court of Arbitration (PCA)* include the fact that in addition to the power to resolve disputes between states the PCA is equipped to administer dispute resolution procedures between states and private parties, as well as those involving intergovernmental organizations as long as there is mutual agreement between the parties to submit the dispute to the Court. This is not the first time the standardization of environmental dispute resolution by means of arbitration is suggested: a pioneering venue for institutional arbitration of environmental matters—the International Court of Environmental Arbitration and Conciliation—was established in 1994, with seats in Mexico and Spain. Its roster of 28 members from 22 nations originally included jurists Alexandre Charles Kiss, Michel Prieur, and ICEF’s Amedeo Postiglione.

In sum, the IBA’s proposal is a gradualist one: in the short term, it encourages states to accept the jurisdiction of international judicial bodies such as the ICJ or ITLOS, or, where an arbitral solution is called for, to hold the arbitration before the PCA pursuant to the Optional Rules. In the medium term, it encourages states to make use of the United Nations Framework Convention on Climate Change (‘UNFCCC’) dispute resolution system (Article 14.2(b) UNFCCC, which also provides for arbitration) in conjunction with the PCA. Finally, in the long term, the IBA supports the gradual development of an ad-hoc arbitral body (ICE Tribunal) which would build towards a permanent formal judicial institution (ICE).

**(d) Rights of Mother Earth Conference in Bolivia**

A proposal for the establishment of a new Climate and Environmental Justice Tribunal emerged in Bolivia during the World People’s Conference on Climate Change and the Rights of Mother Earth held in Cochabamba in 2010.

With a focus on climate harms, the proposed court would try those accountable for historic emissions and establish a legal mechanism to enforce the collection of climate debts. The proposal advocates that the environmental impact of intra- and inter-generational economic inequity creates a moral and a legal obligation for developed states to pay compensation to developing states, setting an initial target for repayment of climate debt at 6 per cent of developed world GNP. Reparations would be distributed so as to fund climate adaptation and mitigation actions, technology transfer, and capacity building.

In February 2015, Bolivia’s bid for an IEC resurfaced as it proposed the inclusion of a climate tribunal in the negotiating text to be finalized at the United Nations Climate Change Conference held in Paris later that year (Carroll, 2016, 120), but its efforts to create a court to enforce an asymmetrical set of obligations for developed and developing countries were not contemplated in the final text of the agreement.

**C. Criticism and Challenges**

Despite their many merits and overall procedural adequacy to adjudicate environmental matters, no proposal advocating the creation of an IEC has been implemented to date. The reasons why such proposals are, at least for the time being, to be found in the roster of → *failed international courts and tribunals* are manifold, ranging from a perceived lack of autonomy of international environmental law, to the contention that a specialized court would be ill-advised due to the transversality of environmental matters, to issues that could be better adjudicated by a court with a general mandate. Nevertheless, the central cause of failure might be a circumstance that synthesizes the IEC project’s political and legal hurdles: international law is, albeit not exclusively, largely voluntary in nature.
This assertion means that, even though there is a considerable degree of consensus about the shortcomings of current international environmental institutions, and it is mostly clear at this point that it is imperative that environmental challenges are effectively tackled, implementation of an IEC must provide actors with adequate incentives for adhesion. Indeed, with the exception of *ius cogens*, international law lacks an inherent hierarchy of its rules. Jurisdiction of an international court must be explicitly agreed upon. This circumstance makes consent—to be bound by substantive obligations and by a tribunal’s interpretation of said obligations—the crux of the matter.

Consent to submit sovereignty to an adjudicatory authority is often hindered by concerns about costly obligations, regulatory imprecision, ineffective enforcement, or domestic opposition. When implementing and complying with international environmental protection standards, state and non-state actors alike are often confronted with the contradiction between their short-term interests and the long-term stability of the environment. Also to be highlighted is the problem of free riders: much of the burden of implementation is borne by those countries most willing to meet the commitments, while those who are defaulters, and even those who are not parties to the instrument, enjoy the benefits of collective action without undertaking the corresponding effort.

Indeed, an extraordinary amount of political effort would be required to build the necessary consent for implementation of the IEC, and the prospect of monetary sanctions may hinder the process of gathering the support of some countries, especially those that have faced significant defeats in the WTO.

Beyond the political and legal aspects concerning the need for consent, creation of the IEC depends largely on financial resources. Fundraising depends on the court’s ability to be positively perceived by the international community; that is, it must present itself as a robust entity capable of effectively contributing to the development of international protection of the environment. Consequently, the effort to create binding and enforceable obligations for a majority of states shall not be dissociated from that of devising incentives to overcome the dilemma of consent. Failure to take into consideration the willingness to engage and bear political and economic costs, even if the arrangement is suitable from a normative, ethical, and scientific standpoint, will likely result in the inability to affect the behaviour of international actors.

Another momentous challenge to the effectiveness of global environmental governance is the fact that, despite their growing importance as subjects of international law (see generally Hale and Held, 2011, 211, who posit that private-actor voluntary regulations are perhaps the most common type of innovative transnational governance institution, influencing almost every sector of the global economy), non-state actors generally do not have standing before international courts. This is a pressing problem with massive policy implications: databases of climate change case law compiled by the Columbia Law School Sabin Center for Climate Change Law, for instance show that the vast majority of climate change litigation unfolds before domestic rather than international courts.

The absence of a provision granting standing to non-state actors has been largely criticized in other systems of dispute resolution. In the context of the WTO, for instance, inadequate rules for participation, namely the limitation of access of private parties to the dispute settlement system, have translated into an inconvenient incentive for lobbying activities. Inadequate rules for participation result in undesirable incentives for parties to seek access by means other than the official channels set forth in the rules. Ryu and Stone posit that although it is normally assumed that the disputants before the WTO are states, in most cases the real parties to the disputes are multinational business firms which use states
as proxies to pursue their claims by lobbying their own government to initiate disputes and the government of the defendant state to adopt policies to their benefit (2017, at 32).

51 Furthermore, although the subject of granting non-state actors access to international dispute resolution as plaintiffs has been given some attention, the concept of who could be a defendant in that arena is a pressing issue as well. The UN has aptly posited in the United Nations Plan of Implementation of the World Summit on Sustainable Development that globalization has added a new dimension to these challenges. Indeed, in the globalized world non-state actors are ubiquitous and more likely than ever to harm the environment internationally and in places where they cannot necessarily be reached by domestic justice.

52 Even if an environmental claim can be successfully brought before a human rights court, claims are typically filed against states—an approach that may not always be effective. For instance, a 2013 report indicates that the United Nations Stabilization Mission in Haiti inadvertently caused a deadly cholera epidemic by contaminating the Artibonite river, the largest in Haiti and one of the country’s main water sources (Transnational Development Clinic, Jerome N. Frank Legal Services Organization, Yale Law School, Global Health Justice Partnership of the Yale Law School and the Yale School of Public Health, and Association Haïtienne de Droit de L'Environnement). Moral constraints aside, should this entail a legal obligation to redress the harm? Although the UN is an intergovernmental organization and the harm was more localized than diffuse, this example illustrates the potentially countless situations in which it could be desirable that non-state actors such as corporations and NGOs are tried for acts that impact the environment internationally—something traditional diplomatic methods, existing international courts, and domestic courts have not been able, and maybe are not equipped, to address properly. Could a claimant bring an international claim against the main polluter instead of—or alongside with—the state? Private parties may appear before certain international courts as long as they are assisted by their state of origin, but what if the non-state actor would want to file a claim against its own country? A fundamental mission of a successful IEC is to provide satisfactory answers to these questions. The establishment of such a court seems to be a valuable opportunity to overcome this serious shortcoming while setting a standard to be followed in other domains.

53 As seen in previous sections, IEC projects have encompassed provisions to the effect that the new venue would be tasked with adjudicating disputes brought by state and non-state actors alike. However, to date they have not succeeded in gathering the necessary consent, thus the court has not yet materialized. It is important to point out that several IEC proposals establish the court as the adjudicatory arm of a central environmental authority. However, even if the courts themselves deal with the issue of non-state actor access, proposals for a world environmental organization still revolve largely around states—possibly as the result of an outlook of global environmental governance which mainly takes into account classic state-centric, intergovernmental arrangements—thus replicating the participation deficit issues found in current international organizations.

54 In the setting of traditional diplomatic relations, notably when it comes to international protection of the environment, this participation deficit is aggravated by the absence of a checks and balances system, which ultimately lends itself to poor accountability. The interests of the several relevant actors have become increasingly multifaceted and sometimes incoherent which, added to the extreme diversity among local scenarios and the marked inequality that characterizes power relations, has resulted in the inadequacy of
traditional representation channels to include the relevant stakeholders in the decision-making process.

D. Perspectives for a Future International Environmental Court

55 When projecting the future of an IEC, however, it is possible to draw from experiences with characteristics that could be mimicked by the proposed court and translated into a successful model. The experience of the → North American Agreement on Environmental Cooperation (1993) (‘NAAEC’) is relevant to these purposes because of its ability to provide answers to the two main conundrums discussed above: the dilemma of consent and the lack of access of non-state actors.

56 A number of environmental treaties provide for mechanisms to address failure by States Parties to comply with their obligations under the instrument. Dispute settlement mechanisms exist primarily to deal with disputes among states with regard to their obligations under particular international agreements. Non-compliance procedures exist in several MEAs where a party’s failure to comply with the obligations set forth in the agreements harms the integrity and success of the regime. Examples include: the Montreal Protocol on Substances that Deplete the Ozone Layer (1987); the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (1991); the Convention for the Protection of the Marine Environment of the North-East Atlantic (1992); the Kyoto Protocol to the 1992 Framework Convention on Climate Change (1997); the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) (‘Aarhus Convention’); the Convention on Environmental Impact Assessment in a Transboundary Context (‘Espoo Convention’); and the NAAEC.

57 The NAAEC, which entered into force simultaneously with, and has the same States Parties as, the → North American Free Trade Agreement (1992) (‘NAFTA’), is singled out because it may provide a valid model to overcome some of the hurdles the creation of an IEC has unsuccessfully faced thus far. Of particular interest is its dual process of enforcement: one is a traditional intergovernmental mechanism that subjects the violator to sanctions; the other is a procedure largely inclusive of multiple sets of actors, based on transparency and civil society initiatives.

58 The Commission for Environmental Cooperation (‘CEC’) is a trilateral international organization headquartered in Montreal and comprising a Council, a Secretariat, and a Joint Public Advisory Committee. Its mission is to ensure that NAAEC members—the United States, Canada, and Mexico—do not violate their own environmental regulations. Article 5 (1) NAAEC sets forth that each party shall effectively enforce its environmental laws and regulations through appropriate governmental action. It does not, therefore, create new obligations for the parties but simply requests them to follow their own existing rules. Unusual or innocuous as it may seem, the provision has the merit of transforming the issue of enforcement of domestic environmental rules into a matter of international interest.

59 The first relevant mechanism set forth in the NAAEC is based on the dispute resolution procedure established in Articles 22–36 NAAEC, according to which, if a member identifies a persistent pattern of failure by another party to effectively enforce its environmental law, it may request before the Secretariat a consultation with the member held as non-compliant. If the matter remains unresolved, it then proceeds to Council → mediation and, if still undecided, to the consideration of a technical arbitral panel composed of experts. This panel has authority to determine whether there was a violation and to recommend solutions. If the party at fault does not abide by the recommendation, the panel may then
impose pecuniary sanctions consisting of monetary enforcement assessments that, if unpaid, subject the party to retaliatory tariffs of equivalent amount.

60 The second mechanism is a process of Submission on Enforcement Matters (‘SEM’) by citizens of the three States Parties. Such a claim triggers a process of independent review that culminates in a factual record on the Member State’s conduct in the matter. Even though it is not coercive, the record aims at publicizing the conduct and thus exerting pressure on the country to correct its conduct and enhance its environmental performance.

61 Per Article 14 NAAEC, any organization or individual in North America may submit an SEM before the Secretariat, asserting that a Party is failing to effectively enforce its environmental regulations. The Secretariat then determines whether the claimant has first-hand knowledge of, and is negatively affected by, the violation, and whether the case is consistent with the NAAEC’s goals. If so, the Member State held as non-compliant is granted 30 working days to respond. If the matter is subject to a pending judicial or administrative proceeding in the country of origin, the SEM is closed. If the Secretariat considers that the SEM warrants developing a factual record, the matter is submitted to the Council—which is composed of the Ministers of the Environment of the three States Parties—for a decision by a two-thirds vote on whether the record shall be drafted. In preparing the factual record, the Secretariat takes into consideration inputs from multiple sources: publicly available information and materials submitted by the parties, interested NGOs or non-governmental persons, CEC bodies, and independent experts. The Council then decides, again by a majority decision, whether the factual report shall be publicized and the process concludes, normally within two and a half years of the SEM being filed.

62 This mechanism, based essentially on recognition of the accountability of a member, is known as an info-court because it follows several procedural rules typical of international adjudication but substitutes coerciveness with transparency. As would happen before a court, the party seeks a decision; the difference lies however in that the decision issued under this mechanism does not directly compel the defaulting party to comply. The CEC relies instead on soft transparency-generated sanctions as a means to incentivize members to reconsider the question, while providing civil society with documental support to their demands.

63 The first mechanism may seem on the face of it more robust, as the public submission procedure requires claimants to be able to show that the demand has merit. Still, there are political implications to the majority vote required in order for a report to be publicized, given especially that members of the CEC are not independent but rather appointed by NAAEC States Parties. Another shortcoming is that the report merely enunciates the facts of the case without making a finding as to whether a violation occurred or not. Finally, there is the issue of access of non-state actors: even if citizens may initiate an SEM, which is commendable, the respondent is necessarily a State Party as the mechanism does not foresee the possibility of analysing cases of non-compliance by private parties.

64 In spite of these limitations, a comparison of the number of cases filed under each NAAEC mechanism shows ample preference for public submission: as of this writing, 91 cases had been initiated while, up until February 2018, no request had been submitted under the traditional intergovernmental mechanism (Commission for Environmental Cooperation, Submissions on Enforcement Matters).
Even so, there is no consensus as to whether the naming and shaming process of publicizing a violation under the public submission mechanism is enough to compel a party to enhance its environmental practices. Dorn notes that, although publicity was not properly effective in determining the cessation of violations, it did compel legislatures and companies to adopt corrective measures before publication of the report (2007, at 155)—that is, although they might have not resulted in enforcement, they did promote compliance. Hale’s conclusions, however, are encouraging as to the effectiveness of the public submission: the author notes that two-thirds of the investigations conducted by the CEC have led to some type of change in the environmental regulation scenario (2011, at 121). Mestral posits that the CEC is gradually becoming the advocate of the North American environment and potentially the acknowledged guardian thereof (2003, at 297). Whether its work will be affected by a shifting NAFTA scenario remains to be seen.

In sum, with regard to the challenge of access of non-state actors to the IEC, this could therefore unfold under at least three modalities: (i) as amici curiae, in which case the IEC would either actively request or accept voluntary submissions of information by the various stakeholders; (ii) as parties seeking a report such as the factual record foreseen in the NAAEC info-court; and/or (iii) as parties seeking a binding decision. These modalities could coexist or be implemented progressively, as the system matures and wins the trust of the international community. As for consent, and perhaps more importantly, an info-court feature could potentially constitute a viable instrument to overcome resistance to submit to an IEC, providing an adequate set of incentives while achieving a higher degree of institutionalization.

E. Concluding Remarks

The fundamental tasks at hand for contemporary international environmental law are to assess the effectiveness of existing international adjudication forums with regard to environmental issues, as well as to consider and actively design new alternatives to foster environmental protection.

The notable development of international environmental law over recent decades, the importance of environmental protection at a global scale, and the need for an institutional architecture that enhances cohesion and effectiveness of environmental regimes in the fragmented and multifaceted globalized world are factors that have been propelling the discussion around the creation of an international court exclusively dedicated to environmental matters. Considering the shortcomings of the adjudicatory institutions currently operating in the environmental domain in devising models to overcome the obstacles that have thus far hindered implementation of the IEC, it is an endeavour worth pursuing.

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