

1999

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Recommended Citation

Philippe Sands, *International Environmental Litigation and Its Future*, 32 U. Rich. L. Rev. 1619 (1999).

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INTERNATIONAL ENVIRONMENTAL LITIGATION AND ITS FUTURE

*Philippe Sands**

I.

The subject of international environmental law is relatively new. The subject was certainly not taught when the University of Richmond School of Law was established in 1870, even if early international law texts before that period did indicate a nascent concern for the issues of fisheries conservation and the use of international rivers.¹ The late part of the last century and the early part of this one recognized a world in which international law could be divided, rather simply, between the law of peace and the law of war. It was a world with few international courts and tribunals in which international litigation was truly exceptional. By 1945, the International Court of Justice had succeeded the Permanent Court, and the Permanent Court of Arbitration was already well beyond its golden period. The European Court of Human Rights was yet to be established, as was the European Court of Justice.² In short, there

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I would like to thank the family and friends of George E. Allen for making possible my visit to the University of Richmond School of Law; Dean John Pagan for inviting and welcoming me; and Professor Joel Eisen for serving as an excellent host and guide. I also would like to thank Virginie Barral and Gábor Baranyai for research assistance on this article.

1. See, e.g., Convention for the Protection of Birds Useful to Agriculture, Mar. 19, 1902, in 4 *International Protection of the Environment: Treaties and Related Documents* 1615 (Bernd Rüster et al. eds., 1981); Convention Establishing Uniform Regulations Concerning Fishing in the Rhine Between Constance and Basel, Dec. 9, 1869, in 9 *INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES AND RELATED DOCUMENTS* 4695; *Convention Between France and Great Britain Relative to Fisheries*, Nov. 11, 1867, in 21 *INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES AND RELATED DOCUMENTS* 1.

2. The Permanent Court of Arbitration (PCA) was established by the July 29, 1899 signing of the Hague Convention for the Pacific Settlement of International

was virtually no international environmental law, and there was little international environmental litigation.

I say "little" because it would not be entirely accurate to say that there was no international environmental litigation. As early as 1893, an ad hoc arbitration resolved an international dispute between the United States and the United Kingdom concerning efforts by the United States to conserve Pacific fur seals.³ Although born in the United States, the seals opted for a migratory existence, heading for the uninhabited Pribilof Is-

Disputes. See HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 41 (James Brown Scott ed., 1915). The PCA consists of a panel of persons nominated by the contracting parties. When contracting states wish to go to arbitration they are entitled to choose members of the tribunal from the panel. Until the mid 1930s, some twenty disputes went through the PCA procedure, but since then only about three cases have been heard.

The International Court of Justice (ICJ) was established in 1945 as the principal judicial organ of the United Nations (UN), with its statute annexed to the UN charter. See 15 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 355 (1945). The ICJ is composed of fifteen judges elected by the UN General Assembly and the Security Council. The ICJ hears cases from UN members and, subject to conditions, non-UN members alike. The ICJ exercises compulsory jurisdiction only if a state specifically recognizes the general jurisdiction of the court. Many cases reach the ICJ by way of a *compromis*, an arbitration agreement between the parties to the dispute. The ICJ may hear contentious cases and deliver advisory opinions.

The European Court of Justice (ECJ), created by the Treaty of Rome in 1957, is the judicial institution of the European Community (EC). See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. The primary task of the ECJ is to ensure the observance and uniform application of EC law throughout the European Community. The ECJ hears infringement cases brought by the European Commission against member states under Article 169 of the Treaty. The ECJ may review the legality of certain acts of European Community institutions (Article 173 procedures). Moreover, upon motion by the judicial organs of the member states, the ECJ gives rulings on points of Community law (preliminary reference procedure under Article 177). The ECJ, unlike the ICJ, exercises compulsory jurisdiction over the member states.

The European Court of Human Rights (ECHR) was established by the European Convention on Human Rights and Fundamental Freedoms, which was adopted under the auspices of the Council of Europe in 1950. See Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. The ECHR hears complaints of individuals concerning the violation of their rights under the Convention by national authorities. The ECHR can only accept cases if the state concerned has consented to its jurisdiction (so far all parties have done so) and all available national remedies have been exhausted by the complainant. Where a violation of human rights has been established, the ECHR may order compensation to the victim.

3. See Behring Sea Fur Seals Fisheries Arbitration (Gr. Brit. v. U.S.), Moore's International Arbitration Awards 755 (1893); 2A DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 881 (Philippe Sands et al. eds., 1994) [hereinafter DOCUMENTS].

lands.⁴ Before reaching these islands, most of the fur seals were caught by British fishing vessels, transported back to the east end of London, and turned into hats and gloves. Concerned that the fur seals would be extinguished altogether, the United States intervened, arguing that it alone possessed the power of preserving seals, that it was acting as trustee for the benefit of humankind, and that it should be permitted to discharge that trust without hindrance even on the high seas. The trust argument was illustrated in the following way:

The coffee of Central America and Arabia is not the exclusive property of those two nations; the tea of China, the rubber of South America, are not the exclusive property of those nations where it is grown; they are, so far as not needed by the nations which enjoy the possession, the common property of mankind; and if nations which have trust to them withdraw them, they are failing in their trust, and other nations have a right to interfere and secure their share.⁵

The British defense based on high seas freedoms prevailed.⁶ The United Kingdom successfully argued that it was entitled under international law to exploit the Pacific fur seals until they had been entirely exhausted because they lay outside any nation's territory and, therefore, any nation's jurisdiction or control. The Arbitral Tribunal, however, proposed international regulations for the parties to follow, which they did.⁷ Those regulations marked the beginning of international environmental law as we know it today.

Some fifty years later, in 1941, Arbitral Tribunal handed down its infamous award in the *Trail Smelter* case.⁸ This case

4. The Pribilof Islands, belonging to the United States, are located in the Bering Sea off the coast of Alaska.

5. *Behring Sea Fur Seals Fisheries Arbitration*, *supra* note 3, at 853.

6. The freedom of the high seas has traditionally meant that all parts of the sea including all of its resources, except for territorial waters, are open to use by every nation, and that no state can acquire sovereignty or exercise rights over any part of it. For a recent authoritative restatement of the freedom of the high seas, see United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 87, 21 I.L.M. 1261, 1286-87.

7. See PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 416-17 (1995) [hereinafter *PRINCIPLES*]; *DOCUMENTS*, *supra* note 3, at 885-87.

8. *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1907 (1935); see *DOCU-*

concerned a dispute between the United States and Canada in which the United States argued that Canada was required, under applicable international law, to prevent harmful levels of sulphur fumes from entering the territory of the United States. The United States prevailed on almost all aspects of the argument, and the case has sometimes been cited as standing for the proposition that international law prohibits transboundary environmental pollution. In fact, it did nothing of the sort. If the award is read carefully, it will be noted that the Arbitral Tribunal actually rejected the only argument relating to pure environmental law which was made, namely that damages could be recovered for harm to the Columbia River.⁹

It was only after the establishment of the United Nations in 1945 that the international community really began to address issues of environment and conservation. In 1947, the United Nations, by resolution of the Economic and Social Council,¹⁰ convened its first international conference on the conservation of natural resources.¹¹ This conference was the predecessor to the much more widely known 1972 Stockholm Conference,¹² which itself was followed by the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro.¹³ The 1949 United Nations Scientific Conference on the Conservation and Utilization of Resources (UNSCCUR) sowed the seeds for the development of legislation to address international environmental issues, giving rise to the possibility of

MENTS, *supra* note 3, at 85.

9. See *Trail Smelter Arbitration*, 3 R.I.A.A. at 1931-33; see also PRINCIPLES, *supra* note 7, at 641-42. The claim was rejected on a rather narrow interpretation of the arbitration *compromis*. The tribunal found that the relevant provisions of the *compromis* regarded "damage" as a general term and thus damage caused by waste sludge discharged to the river was not excluded. The preamble to the *compromis*, however, made specific reference to "damage caused by fumes" and on this basis the tribunal concluded that any other types of damage fell outside the intended scope of investigation. See *Trail Smelter Arbitral Tribunal*, 33 AM. J. INT'L L. 182, 206-07 (1939).

10. See E.S.C. Res. 32(IV), 1 U.N. ECOSOR, 4th Sess. (1947).

11. See United Nations Scientific Conference on the Conservation and Utilization of Resources (UNSCCUR), Aug. 17-Sept. 6, 1949, 1948-49 U.N.Y.B. 481-82; see also PRINCIPLES, *supra* note 7, at 30-31.

12. United Nations Conference on the Human Environment, June 5-16, 1972; 11 I.L.M. 1416; see also DOCUMENTS, *supra* note 3, at 7.

13. United Nations Conference on Environment and Development (UNCED), June 3-14, 1992, 31 I.L.M. 874; see also DOCUMENTS, *supra* note 3, at 49.

environmental issues being litigated internationally amongst the various members of the international community.¹⁴

Over the next four decades or so, matters developed incrementally. There were new laws, and there were new tribunals. Regional and global legislation was adopted on a wide range of matters including: oil pollution and water damage in the 1950s and 1960s;¹⁵ wetlands,¹⁶ endangered species,¹⁷ the marine environment,¹⁸ and transboundary air pollution¹⁹ in the 1970s; ozone depletion²⁰ and fisheries conservation²¹ in

14. See, e.g., Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285; Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82; Food and Agriculture Organization International Plant Protection Convention, Dec. 6, 1951, 150 U.N.T.S. 67; International Convention for the Protection of Birds, Oct. 18, 1950, 638 U.N.T.S. 185; DOCUMENTS, *supra* note 3, at 732; see also, e.g., Interim Convention on Conservation of North Pacific Fur Seals, Feb. 9, 1957, 314 U.N.T.S. 105; International Convention for High Seas Fisheries of the North Pacific Oceans, May 9, 1952, 205 U.N.T.S. 65; DOCUMENTS, *supra* note 3, at 890.

15. See, e.g., International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3; International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3.

16. See, e.g., Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention), Feb. 2, 1971, 996 U.N.T.S. 245.

17. See, e.g., *Convention on the Conservation of European Wildlife and Natural Habitats* (last modified Nov. 21, 1997) <http://www.ecnc.nl/doc/europe/legislat/bernconv.html> (an example of regional legislation); Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 11; Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]; Fisheries Jurisdictions (U.K. v. Ice.), 1974 I.C.J. 3 (July 25).

18. See, e.g., International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319; International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3.

19. See, e.g., Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 18 I.L.M. 1442.

20. See, e.g., Vienna Convention on the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1516.

21. See, e.g., Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries, Nov. 18, 1980, 1285 U.N.T.S. 130; Convention for the Conservation of Salmon in the North Atlantic Area, *opened for signature* Mar. 2, 1982, 35 U.S.T. 2284.

the 1980s; and climate change,²² biodiversity²³ and desertification²⁴ in the 1990s. This list names but a few of the principal regional and global developments.

Perhaps even more significant was the integration of environmental considerations into mainstream international economic law in the late 1980s. The World Bank was called to account for its disastrous failure to apply environmental safeguards in infrastructure projects.²⁵ And in the early 1990s, two General Agreement on Tariffs and Trade (GATT) Panels,²⁶ in the Tuna Dolphin cases, raised squarely the question of whether environmental considerations could justify import prohibitions under GATT law.²⁷

New tribunals were established at which environmental issues could potentially be litigated. Alongside the International Court of Justice,²⁸ there arrived the European Commission,²⁹ the European Court of Human Rights,³⁰ the European Court of

22. See, e.g., Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

23. See, e.g., United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 822.

24. See, e.g., United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, June 17, 1994, 33 I.L.M. 1328; United Nations Conference on Environment and Development: Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, June 13, 1992, U.N. Doc. A/CONF. 151/6/Rev.1, reprinted in 31 I.L.M. 881 [hereinafter Forest Principles].

25. See PRINCIPLES, *supra* note 7, at 39, 593-94.

26. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 1103, 1105 (6), 55 U.N.T.S. 188 [hereinafter GATT].

27. See General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594; United States Restrictions of Imports of Tuna, May 20, 1994, 33 I.L.M. 842; see also PRINCIPLES, *supra* note 7, at 694-98. The panels in both cases found that the restrictions imposed on the imports of tuna and tuna products by the United States under the 1972 Marine Mammals Protection Act were incompatible with GATT nondiscrimination rules of Article III and the prohibition on quantitative restrictions in Article XI. The panels found that these restrictions aimed by the United States at reducing dolphin mortality did not qualify for the "environmental" exemptions of Article XX(b) and (g). The panels ruled that the United States law could not be applied "extrajurisdictionally." See General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, *supra*, at 1623; United States Restrictions of Imports of Tuna, *supra*, at 898-99.

28. See PRINCIPLES, *supra* note 7, at 47.

29. See *id.* at 67, 541-42.

30. See *id.* at 175.

Justice established by the Treaty of Rome,³¹ the Inter-American Commission and Court of Human Rights,³² the International Centre for the Settlement of Investment Disputes,³³ and the Panel System established under the GATT. By the early 1990s, those bodies established an embryonic framework within which issues of international environmental law could be raised in the context of international litigation. Those bodies indicated how international environmental litigation would involve different actors: classic inter-state disputes, cases between individuals and their own governments, and claims brought by private investors against host states.

Were the traditional institutions up to the task? Back in 1994, I was invited to contribute a chapter to a book edited by my colleague Jacob Werksman entitled *Greening International Institutions*.³⁴ I was asked to consider the extent to which the practice of international courts indicated that they had been "greened." I focused on two bodies, the International Court of Justice (ICJ) and the European Court of Justice (ECJ), and asked three questions. First, had these two courts shown a willingness to recognize the place of environmental objectives in the international legal order in respect of which they had competence to adjudicate? Second, had they shown a willingness to give environmental protection objectives precedence over other societal objectives? Third, had they appreciated the particular characteristics of environmental issues?

With regard to the ICJ, I concluded that it "is yet to make a really significant contribution to the development of international environmental law, as opposed to simply confirming that environmental obligations exist."³⁵ For this institution, answers to the three questions were unclear in 1994. On the basis of the very limited case law of the ICJ,³⁶ it simply was not possi-

31. *See id.* at 68.

32. *See* American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673.

33. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

34. Philippe Sands, *The International Court of Justice and the European Court of Justice*, in *GREENING INTERNATIONAL INSTITUTIONS* 219-35 (Jacob Werksman ed., 1996).

35. *Id.* at 221.

36. *See, e.g.*, Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20); Nuclear Tests (Aust. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Fisheries Jurisdiction (U.K. v. Ice.), 1974

ble to reach conclusions as to the likely direction that the court would take, even if the establishment by the ICJ of an Environmental Chamber in 1993³⁷ indicated the Court's recognition of the growing political importance of the environment in international relations. The decision to establish the Environmental Chamber may indeed have been motivated by the desire to preempt the establishment of a specialized international environmental court, a topic to which I return below.

In contrast to the ICJ, by 1995, the European Court of Justice had an established environmental case load of over 150 cases. I concluded then that

the ECJ has recognised the place environmental protection has in the community legal order. It has given (on occasion) environmental protection objectives an equal (or occasionally greater) weight over entrenched economic and trade objectives. It has demonstrated a willingness to recognise and act upon some of the special characteristics of environmental issues.³⁸

I think it is fair to say that the ECJ has been the principal driving force in developing European Community (EC) environmental law. It recognized that environmental protection was an "essential objective" of EC law as far back as 1985.³⁹ At that time, and in contrast with the situation in EC law, the conclusion with regards to the practice of GATT panels would have been less rosy, at least from an environmental perspective. The GATT system remained firmly entrenched within the closed world of trade lawyers and diplomats. The two Tuna Dolphin cases of 1991⁴⁰ and 1994⁴¹ scarcely addressed the means whereby environmental considerations could be introduced into the process of reasoning of those panels.

I.C.J. 3 (July 25); Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

37. See ARTHUR EYFFINGER, *THE INTERNATIONAL COURT OF JUSTICE* 358, 365 (1996).

38. Sands, *supra* note 34, at 227.

39. See Case 240/83, *Procureur de la Republique v. Association de Défense des Brûleurs d'Huiles Usagées*, 1985 E.C.R. 531, 549.

40. See *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, *supra* note 27, at 1594.

41. See *United States Restrictions on Imports of Tuna*, *supra* note 27, at 839.

Since 1994, developments at the ICJ have become more interesting. The Court has had the opportunity to address environmental issues in no less than three cases.⁴² I had the privilege of serving as counsel in each, so I have a first hand impression.⁴³ In September 1995, the International Court declined on jurisdictional grounds to accede to New Zealand's request to consider the legality of the resumption by France of underground nuclear testing.⁴⁴ Nevertheless, the Court ruled that its order was "without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instant reaffirmed their commitment."⁴⁵

These words may seem innocuous, but apparently they were fought over bitterly. What was the court referring to? By referring back to the pleadings of France and New Zealand, as well as the five states which sought to intervene—and they're not easy to find because they have not yet been published—the pleadings suggest that the Court may have based its decision, at least in part, on Principle 21 of the 1972 Stockholm Declaration⁴⁶ and Principle 2 of the 1992 Rio Declaration.⁴⁷ These declarations provide that states must avoid causing significant transboundary environmental harm.⁴⁸ The Court was at least

42. See Judgment in Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 3 (Sept. 25), *reprinted in* 37 I.L.M. 162 (1998); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), *reprinted in* 35 I.L.M. 809 (1996) [hereinafter Advisory Opinion]; Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22).

43. With all that implies for objectivity!

44. See Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.) 1995 I.C.J. 288 (Sept. 22).

45. *Id.* at 306.

46. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, princ. 21, U.N. Doc. A/CONF.48/14 and Corr. 1, *reprinted in* 11 I.L.M. 1416, 1420 (1972) [hereinafter Stockholm Declaration]; see also DOCUMENTS, *supra* note 3, at 7.

47. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, princ. 2, UNCED Doc. A/CONF.151/Rev.1, *reprinted in* 31 I.L.M. 874, 876 [hereinafter Rio Declaration]; see also DOCUMENTS, *supra* note 3, at 49.

48. See Philippe Sands, *L'Affaire des Essais Nucléaires II (Nouvelles-Zélande c. France): Contribution de l'Instance au Droit International de l'Environnement*, R.G.D.I.P. 447, 459-63 (1997).

conscious that it had to say something on environmental matters, even if it was not strictly required to do so.

In October 1995, oral arguments opened in the requests for advisory opinions from the World Health Organization and the United Nations General Assembly on the legality of the use of nuclear weapons. In the nuclear weapons proceedings, there was considerable argument on a range of environmental issues, albeit within the narrower confines of the relationship between environmental law and the *jus in bello* (international humanitarian law governing conduct in armed conflicts). The Court advised that, in general, the use of nuclear weapons would be contrary to international law, although in certain circumstances where the survival of the state was at stake, such use might not necessarily be illegal.⁴⁹ Nevertheless, the Court took the opportunity—again not strictly necessary and by way of obiter dicta—to advise that “the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”⁵⁰ The Court went on to conclude that although international environmental law “does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.”⁵¹

Again, lest one might conclude that this was a self-evident statement of the law, a number of judges considered that the statement went too far.⁵² Moreover, the Court declined to give answers to a range of more specific questions over which the battle had been joined by states participating in the proceedings. For example, the Court declined to address such basic issues as the applicability in times of armed conflict of multilateral environmental agreements and the meaning and effect of various conventional rules of the *jus in bello* relating to the

49. See Advisory Opinion, *supra* note 42.

50. *Id.* at 242.

51. *Id.* at 243.

52. Judge Guillaume believed that the Court dealt “too quickly with complex questions which should have received fuller and more balanced treatment, for example with respect to environmental law.” *Id.* at 287.

protection of the environment.⁵³ Difficult questions were side-stepped.⁵⁴ Of course, the Court concluded that environmental considerations alone were not sufficient to make the use of nuclear weapons unlawful in all circumstances.⁵⁵ The law, in other words, did not necessarily prohibit the destruction of the planet.

The third and most recent case presented the Court with an opportunity to immerse itself fully in the details of environmental law. In September 1997, the Court rendered judgment in the case involving Hungary and Slovakia concerning the Gabčíkovo-Nagymaros Project.⁵⁶ This case concerned a dispute over whether or not to build certain barrages on the Danube River shared by Hungary and Czechoslovakia.

The two countries had agreed to build two barrages in 1977.⁵⁷ Construction began in the early 1980s and proceeded slowly. In the mid-1980s, political opposition in Hungary focused on the environmental aspects of the barrages as a means of achieving broader political change.⁵⁸ In May 1989, public pressure led Hungary to suspend work on large parts of the project. The two countries tried to reach an agreement as to how to proceed, but both were intransigent. Czechoslovakia took the view that the barrages posed no threat to the environment, but Hungary was certain that they would.⁵⁹

53. See 6 Y.B. INT'L ENVTL. L. 538-40 (G. Handl ed., 1995).

54. See *id.* at 531-36.

55. See Advisory Opinion, *supra* note 42, at 310.

56. *Gabčíkovo-Nagymaros Judgment* 1997 I.C.J. at 3, 37 I.L.M. at 162.

57. See Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, Sept. 16, 1977, Czech.-Hung., 1109 U.N.T.S. 235, *reprinted in* 32 I.L.M. 1247 (1993) [hereinafter *Gabčíkovo-Nagymaros Treaty*].

58. From the mid-1980s, the dam project, which if completed would have resulted in the destruction of some of the country's primary natural areas, see *infra* note 59, was increasingly viewed in Hungary as the symbol of the oppressive communist regime. Thus, the resumption of the already halted works in 1988, triggered various hitherto inconceivable public actions (demonstrations, campaigns, etc.) that the political authorities were unable to control. As a result of the public pressure, in May 1989, the government suspended the project. The success of the anti-dam movement accelerated the transition of the country into political democracy and eventually paved the way to the first free parliamentary elections in 1990.

59. Hungary claimed that as a consequence of the operation of the upper dam at Gabčíkovo, the level of groundwater would fall and its quality would be seriously impaired. As to surface waters, the dam was expected to bring about eutrophication, and in the absence of a sufficient supply of water, the region's unique flora and fau-

Absent an agreed upon resolution of the problem, Czechoslovakia decided to proceed unilaterally with a provisional solution referred to as "Variant C," comprising a single barrage on the Czechoslovakian side, but requiring the diversion of 80 percent of the shared water of the Danube River onto its territory. Czechoslovakia argued that this was justified by the 1977 Treaty, which in effect gave it rights over the water. As "Variant C" proceeded in late 1991 and early 1992, Hungary believed that it had no option but to terminate the 1977 Treaty, which provided the sole basis upon which Czechoslovakia could construct. Nevertheless, in October 1992, Czechoslovakia dammed the Danube and diverted over 80 percent of the waters of the Danube into a bypass canal on Slovak territory. An already complicated situation became even more complicated in January 1993, when Czechoslovakia split into two countries: the Czech Republic and Slovakia. The velvet divorce did not extend to the barrages, and Slovakia took over the rights to and responsibilities for the project.

In April 1993, largely under the pressure of the Commission of the European Communities, Hungary and Slovakia agreed to refer the dispute to the International Court of Justice.⁶⁰ The Court had an opportunity to address a wide range of international legal issues, including the law of treaties, the law of state responsibility, the law of the environment, and the relationships between these three areas. Of course, the Court had a golden opportunity to demonstrate its ability to master the legal and factual elements in a comprehensive and thoroughly modern manner.

What did the Court rule? To begin with, it found that Hungary was not entitled, in 1989, to suspend or terminate work on the joint project solely on environmental grounds.⁶¹ The Court

na would be threatened. As a result of the operation of the Gabčíkovo barrage since October 1992, there has been considerable damage to the region's biodiversity. As for the lower dam at Nagymaros, Hungary claimed that serious erosion of the downstream riverbed would have jeopardized the yield of the bank-filtered wells that supply Budapest with drinking water. See *Gabčíkovo-Nagymaros Judgment*, 1997 I.C.J. at 30, 37 I.L.M. at 182.

60. Hungary-Slovak & Republic: Special Agreement for Submission to the International Court of Justice of Differences Between Them Concerning the Gabčíkovo-Nagymaros Project, Apr. 7, 1993, 32 I.L.M. 1293.

61. See *Gabčíkovo-Nagymaros Judgment*, 1997 I.C.J. at 70, 37 I.L.M. at 202.

went on to find that Czechoslovakia, and subsequently Slovakia, was not entitled to a unilateral solution diverting the Danube beginning in October 1992 without the agreement of Hungary. The Court ruled, however, that construction prior to operation was not unlawful.⁶² Finally, the Court held that Hungary was not entitled to terminate the 1977 Treaty in May 1992.⁶³ As to the future, the Court indicated the basis for cooperation and agreement, which it hoped the parties might pursue, suggesting that the preservation of the status quo—one barrage not two, jointly operated—would be an appropriate solution.⁶⁴

I think all those who participated in the case would probably agree that the judgment fell short of the detailed exposition, which some may have wished for on various aspects of the law, including environmental law. The judgment may, however, represent a coming of age for international environmental law, particularly in that part which relates to the basis for future cooperation. The Court was plainly unpersuaded by the merits of Hungary's environmental concerns in 1989. The Court, nevertheless, accepted that there existed a principle of "ecological necessity" whereby a state may seek to preclude responsibility for otherwise wrongful acts by invoking the law of state responsibility.⁶⁵ The Court also accepted that concerns for the natural environment represent an "essential interest" of the state, indicating that the test to be applied in determining whether a state of "ecological necessity" exists is that there must be proven a real, grave, and imminent peril at the time it is invoked, and that the measures taken are the only possible response to avoid that peril.⁶⁶ It is noticeable that the Court did not take an opportunity to integrate into its test the precautionary principle,⁶⁷ which emerged in the late 1960s and on which there

62. *See id.*

63. *See id.* at 71, 37 I.L.M. at 203.

64. *See id.* at 68, 37 I.L.M. at 201.

65. *See id.* at 33-35, 37 I.L.M. at 184-85.

66. *See id.* at 34, 37 I.L.M. at 184-85.

67. The precautionary principle concerns the role of scientific uncertainty in the environmental decision making. The core of the principle is reflected in Principle 15 that provides "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Rio Declaration, *supra* note 47, at 879; *see* PRINCIPLES, *supra* note 7, at 208-13. An example of forward-looking application of the principle can be found in Article 6 of the United Nations Conference on the Con-

was a large measure of agreement between the parties. With respect to the illegality of the unilateral assumption by Czechoslovakia of control of a part of the Danube, a shared resource, the Court justified its conclusion principally by referring to the law of international water courses. The Court only made a passing mention of the adverse environmental consequences of the seizure.⁶⁸ Finally, in relation to treaty termination, the Court addressed the relationship between a treaty and subsequent norms of environmental law, noting that these are "relevant for the implementation" of the treaty, that they could be incorporated into the treaty, and that they had to be taken into consideration in implementing the treaty.⁶⁹

It is in relation to future cooperation that the Court came closest to grappling with the nuts and bolts of environmental law. It explained that "[w]hat might have been a correct application of the law in 1989 or 1992 . . . could be a miscarriage of justice if prescribed in 1997."⁷⁰ This indicates, at the very least, a recognition of one feature of environmental law: its propensity to evolve rapidly. Accordingly, the Court stated that "the project's impact upon, and its implications for, the environment are of necessity a key issue."⁷¹ In evaluating environmental risk, "current standards must be taken into consideration."⁷² The Court recognizes that new environmental norms and standards have been developed and that they have to be taken into consideration and given proper weight not only when states contemplate new activities, but also when addressing ongoing activities begun in the past. These words are potentially of great significance, possibly even radical significance.⁷³ But

servation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. See United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 34 I.L.M. 1542, 1551-52 (*opened for signature* Dec. 4, 1995).

68. See *Gabčíkovo-Nagymaros Judgment*, 1997 I.C.J. at 45-46, 37 I.L.M. at 190. On the law of international watercourses, see PRINCIPLES, *supra* note 7, at 346-67; see also United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700.

69. *Gabčíkovo-Nagymaros Judgment*, 1997 I.C.J. at 57, 37 I.L.M. at 196.

70. *Id.* at 65, 37 I.L.M. at 200.

71. *Id.* at 66, 37 I.L.M. at 200.

72. *Id.*

73. See *id.* It must be pointed out that by this statement, the Court appears to

the Court was unwilling to trespass into detail, and it refused to use the words "environmental impact assessment." Instead, the Court simply called on the parties to "look afresh at the effects on the environment of the operation of the . . . Power Plant."⁷⁴ Invoking the "concept of sustainable development," and possibly implying that it has a legal component, the Court did not offer any legal standards or explain its opinion in practical terms.⁷⁵

In sum, the question arises as to whether the ICJ has missed an opportunity to indicate a real willingness to show its environmental credentials? This is not to say that environmental concerns should have trumped all others. Certainly the Court demonstrated an understanding of the unique difficulties presented by environmental issues, of the existence of various standards to be applied, and of an indication as to how these could be applied to the facts. And certainly the three decisions of the ICJ have taken a step toward bringing environmental considerations into the mainstream of international law. The decisions, however, do not completely fill the gaps left by treaty negotiators and do not contribute to the much needed development of the law by way of judicial insight. No doubt, the latest judgment will lead to renewed calls for the creation of a specialized international environmental tribunal.

II.

Before turning to the question of whether such a specialized tribunal is necessary or desirable, it is useful to consider the practice in other international courts and tribunals over the

imply no less than that the special and growing importance of the environment induces a continuous updating and adjusting obligation upon the states, that is to say, the application of current environmental standards to past operations.

74. *Id.* at 67, 37 I.L.M. at 201.

75. *Id.* The Court's treatment of sustainable development may trigger the emergence of some new legal obligations. In spite of being in the core of "soft" environmental law since the Rio Declaration, the potential practical implications of the concept of sustainable development are controversial and remain widely debated. The debate is fueled in part by the constraints the principle may impose on one economic development model in favor of another. By invoking sustainable development in relation to particular environmental obligations, the Court has indicated that, at the very least, the concept may have legal consequences and that it may be subject to further judicial clarification.

last two or three years. Beyond the tribunals already mentioned, others either already have or most likely will address environmental issues. The panel system and the Appellate Body of the World Trade Organization (WTO),⁷⁶ the International Tribunal for the Law of the Sea in Hamburg,⁷⁷ the World Bank Inspection Panel,⁷⁸ and the noncompliance procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer⁷⁹ are all new bodies with a role to play in environmental issues.

Existing institutions also have a growing role to play. The International Centre for the Settlement of Investment Disputes (ICSID) hosts arbitrations to resolve disputes between investors and states that are alleged to have interfered with investments.⁸⁰ A number of arbitrations currently before ICSID raise serious issues of international environmental law, including whether environmental legislation can constitute a form of expropriation and whether full compensation must be paid where a taking is for environmental reasons.⁸¹ Indeed, the WTO Appellate Body and panels have already been faced with a number of cases involving environmental issues.⁸²

Principal among these cases is the recently adopted WTO Appellate Body decision regarding whether the United States is entitled to ban the import of shrimp from certain south Asian

76. See Debra P. Steger & Susan M. Hainsworth, *New Directions in International Trade Law: WTO Dispute Settlement*, in *DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION* 28, 36 (James Cameron & Karen Campbell eds., 1998).

77. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 330-39 (1988).

78. See The World Bank Inspection Panel, International Bank for Reconstruction and Development Res. 93-10 and International Development Association Res. I.D.A. 93-6, Sept. 22, 1993, 34 I.L.M. 503, 520-23; see generally I. SHIHATA, *THE WORLD BANK INSPECTION PANEL* (1994).

79. See *PRINCIPLES*, *supra* note 7, at 167-68.

80. See MOSCHE HIRSCH, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES* 17 (1993).

81. See, e.g., *Canada to Pay \$13 Million to Settle Import Dispute*, *FIN. TIMES*, July 21, 1998, at 6.

82. See, e.g., United States—Standards for Reformulated and Conventional Gasoline, Panel Report WT/DS2/R, Jan. 29, 1996 & Appellate Body Report WT/DS2/AB/R, May 20, 1996, *WTO Dispute Settlements* (visited Nov. 22, 1998) <<http://www.sice.oas.org/dispute/wtorepe.stm#pan>>; EC Measures Concerning Meat and Meat Products (Hormones), Panel Report WT/DS26/R/US, WT/DS48/R/CAN, Aug. 18, 1997 & Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, Jan. 5, 1998, *WTO Dispute Settlements* (visited Nov. 22, 1998) <<http://www.sice.oas.org/DISPUTE/wtorepe.stm#pan>>.

countries, where the capture of those shrimp leads to a high rate of mortality for certain species of turtles.⁸³ In 1996, the United States imposed a worldwide import ban on shrimp and shrimp products caught in ways that adversely affect sea turtles.⁸⁴ The environmental issue arises because these turtles are listed by various international conventions as endangered and subject to requirements of protection.⁸⁵

The Appellate Body had to decide whether this unilateral ban⁸⁶ could be justified under the exceptions set out in Article XX (b) and (g) of the GATT. This article provides that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (b) necessary to protect human, animal or plant life or health . . . (g) relating to the conservation of exhaustible natural resources."⁸⁷ Article XX, thus, has the potential of addressing environmental issues. It is important to note that its chapeau provides that such measures can be adopted, provided that they are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."⁸⁸

The Appellate Body ruled that the United States's measures were legitimate. On the basis of the chapeau to Article XX, however, the Appellate Body found that the United States' measures were contrary to Article XX because they were applied in a discriminatory and arbitrary manner and, therefore, could not be justified under WTO law.⁸⁹

Indeed, the Appellate Body appears to have already taken steps toward integrating environmental considerations into

83. See *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report WT/DS58/R, May 15, 1998, 37 I.L.M. 832, 857; Appellate Body Report WT/DS58/AB/R, Oct. 12, 1998, 38 I.L.M. 118, 175.

84. See *Sea Turtles Conservation*, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037-38 (1989).

85. See, e.g., *CITES*, *supra* note 17.

86. The ban was *prima facie* incompatible with Article XI of the GATT that provides for the elimination of quantitative restrictions.

87. Text of the General Agreement, Mar. 1969, GATT B.I.S.D. at 37-38 (1969).

88. *Id.* at 37.

89. See *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report WT/DS58/AB/R, Oct. 12, 1998, 38 I.L.M. 118, 160-75.

WTO law, most notably in its January 1998 decision in the beef hormones case.⁹⁰ The Appellate Body considered the relevance of the precautionary principle on the basis of arguments put forth by the European Community. The Appellate Body referred to the findings of the ICJ in the *Gabcíkovo-Nagymaros* case, which recognized that new norms and standards of international environmental law had been adopted and that they should be taken into consideration. The Appellate Body, however, noted that the ICJ did not, in that case, identify the precautionary principle as such a norm.⁹¹

The World Bank Inspection Panel has received a number of applications from nongovernmental organizations that raise issues of general international environmental law, in particular environmental impact assessment.⁹² In a number of recent judgments, the European Court of Human Rights sought (or not) to integrate environmental considerations into the definitions of various human rights norms, such as the right to privacy and the right to an independent tribunal.⁹³

III.

There are more international environmental laws and more international courts and tribunals with competence to address environmental issues. Furthermore, there is a growing willingness among states and other international actors to litigate internationally. In this context, proponents of a dedicated international environmental court or tribunal argue that existing bodies lack the requisite expertise, that the absence of a single body will lead to a fragmentation in the application of environmental standards, and that the failure of the ICJ to play an adequate role leaves a major gap. These views are reflected in the views of Judge Postiglione.⁹⁴ All of this suggests that the

90. See EC Measures Concerning Meat and Meat Products (Hormones), Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, Jan. 16, 1998, *WTO Dispute Settlements* (visited Nov. 22, 1998) <<http://www.sice.oas.org/DISPUTE/wtorepe.stm#pan>> [hereinafter EC Measures Appellate Report].

91. See *id.*

92. For examples of cases, see *World Bank Inspection Panel* (visited Nov. 14, 1998) <<http://www.worldbank.org>>.

93. See *Ostra v. Spain*, 303-C Eur. Ct. H.R. (Ser. A) (1994); *Bahlmer-Schafroth v. Switzerland*, 43 Eur. Ct. H.R. (Ser. A) (1997).

94. See A. Postiglione, *Instruments for the Resolution of Environmental Disputes at*

international community is poised on the threshold of a new era of international environmental litigation. I turn now to the third part of this paper in which I examine whether we need an international environmental court.

Before addressing this issue, it is necessary to determine the proper function of an international adjudication. There is a range of views about this, taking two basic approaches. The first, which might be called the "minimalist" view, claims that the function of an international court is to settle only the narrow issues presented by a given dispute. In other words, the proper function is to bring the parties to a solution that is effective and sustainable over the long term without necessarily paying regard to the broader policy implications of any judgment for the development of the law.⁹⁵ This approach appears to be dominant among the majority of the current ICJ, for example. The second view is that the function of an international court is not only to assist in resolving the matter before it, but also to contribute to the development of the law more generally. Thus, an international environmental court would take the opportunity to assist the international community by filling legislative gaps. This more policy-oriented approach is reflected in the overall practice of the European Court of Justice.⁹⁶ Between these two views come a range of other perspectives.

In the environmental field, international courts and tribunals are faced with a particular, but by no means unique, difficulty: the development of international environmental law is largely a result of international treaties that inevitably involve a high degree of compromise, or "fudge." In other words, the legislative body has presented the international judiciary with a set of rules and principles that are, frankly, rather vague. Called upon to interpret vague norms, an international court faces a situation of real difficulty when asked to apply the law to the particular facts of a case. This is not an easy task, as the ICJ recognized in the *Gabcikovo-Nagymaros* case, and one can un-

the Global Level, in TOWARDS THE WORLD GOVERNING OF THE ENVIRONMENT 34 (1996). In Judge Postiglione's view, the need for an international court for the environment is justified by practical and theoretical considerations.

95. See, e.g., Sands, *supra* note 34, at 227.

96. See *id.* at 230-32.

derstand the Court's reluctance to descend into detail if to do so is to adjudicate upon a dispute that has a broader context and that might lead to changes that the court is legislating.

This is not, however, the only problem faced by international courts in the environmental domain. A second problem is that environmental issues invariably raise competing scientific claims.⁹⁷ A court will often be called upon to adjudicate on two sharply differing views, in which mountains of scientific arguments—over 5000 pages in the *Gabcikovo-Nagymaros* case—are presented in an equally compelling manner. Unlike many national systems that provide for environmental or scientific assessors to join panels and assist in deciphering technical information, the international judge likely will be in no better position than you or I to decide on the relative merits of a scientific claim. Again, this problem is not unique to the environmental field, but it calls for a specialized approach.

A third distinguishing feature of environmental law—and this is a legal rather than factual characteristic—is that environmental claims are rarely, if ever, raised in isolation of other international legal arguments. In other words, the environmental law arguments will almost always involve arguments about other substantive areas of the law. Such other areas include trade agreements in the WTO context, human rights norms before human rights courts, and issues of general international law, such as the relationships between treaty and custom, or the law of the environment and the law of state responsibility. This combination suggests most strongly that an international tribunal composed solely of experts in international environmental law might not fare well in attracting cases. Therefore, what is needed is a body of judges with a mix of general and specialized expertise. This also explains why no cases thus far have been presented to the ICJ's Environment Chamber, and in my view, why none may ever do so: no two states will agree that a given dispute is essentially "environmental."

97. See, e.g., Judgment in Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 3, 27, 29-31 (Sept. 25), reprinted in 37 I.L.M. 162, 181-83 (referencing the conflicting and inconclusive scientific arguments in the *Gabcikovo-Nagymaros* litigation); see also EC Measures Appellate Report, *supra* note 90 (discussing the extensive treatment of scientific arguments in the beef hormones case).

A fourth distinguishing feature, relating more to issues raised before global bodies than regional bodies, is that the international community does not yet have a common appreciation of where environmental objectives stand in the general legal and political hierarchy. There are understandable differences of view between developed and developing countries as to what the priorities should be, and it seems clear that those differences will also extend to the bench.⁹⁸ There are equally sharp differences of opinion between different regions, and even between developed countries. For example, the current debate over genetically modified organisms indicates that a German judge is more likely to be risk averse and "precautionary" than an American judge.⁹⁹

There is a fifth factor that must be mentioned: states are not clamoring to establish an international environmental court. As described above, if states want international adjudicatory mechanisms, they do not seem to want those that apply a contentious and conflictual procedure to environmental matters. So, for example, in the field of ozone depletion, and soon also in other areas such as climate change and sulphur pollution,

98. Examples include the rather weak protection of tropical forests, essential to halting climate change, where developed countries with no forests permanently seek to limit logging in developing countries short of other resources. As a consequence of this difference in priority, no global agreement was adopted at Rio, only some rather vague principles, the so-called Forest Principles, were declared. See Forest Principles, *supra* note 24. The main international instrument concerned with tropical forests is aimed primarily at exploitation rather than conservation. The collision of interests was eloquently illustrated in the negotiation of the 1992 Biodiversity Convention. See Convention on Biological Diversity, *opened for signature* June 5, 1997, 31 I.L.M. 818. The dispute over issues such as the fair distribution of the benefits from genetic resources (favored by developing countries) versus the uncompromised protection of intellectual property rights (advanced by the developed states) or means of provision of financial resources eventually led to the United States not signing the Biodiversity Convention. See Melinda Chandler, *The Biodiversity Convention: Selected Issues of Interest to the International Lawyer*, 4 COLO. J. INT'L ENVTL. L. & POLY 141 (1993).

99. The precautionary principle evolved out of the German socio-legal concept of the *Vorsorgeprinzip* in the early 1930s. This concept, which is broader than the modern formulations of the precautionary principle, see *supra* note 68, requiring careful planning and responsibility, has been relied on widely in (West) German social and economic legislative activity and judicial practice. See Timothy O'Riordan & James Cameron, *The History and Contemporary Significance of the Precautionary Principle*, in INTERPRETING THE PRECAUTIONARY PRINCIPLE 12 (Timothy O'Riordan & James Cameron eds., 1994); Sonja Boehmer-Christiansen, *The Precautionary Principle in Germany—Enabling Government*, in INTERPRETING THE PRECAUTIONARY PRINCIPLE 31 (Timothy O'Riordan & James Cameron eds., 1994).

states are putting in place noncontentious procedures that are characterized by having more of an administrative function. This system exists as a sort of international alternative dispute resolution. The noncompliance procedure of the Montreal Protocol on Substances That Deplete the Ozone Layer has established an implementation committee that requires states alleged to be in noncompliance to explain why they have reached that situation and what they intend to do about it. The committee has the power to impose sanctions, as well as the task of bringing the state into compliance.¹⁰⁰ For those who have watched the evolution of the early GATT panel systems into the quasi-judicial function of the Appellate Body of the WTO, the picture will be a familiar one.

IV.

So where does all of this leave us? With more international environmental obligations on the horizon, now is certainly the time to start thinking about the arrangements we wish to have in place in the next century to help resolve the disputes that will inevitably arise, as well as to enhance compliance. The possibility of an international environmental court should be kept on our radar screens, but the time is clearly not ripe to establish such a body. The very fear of its creation may serve as an inducement for various courts to demonstrate their ability to address environmental issues. No doubt the creation of an Environmental Chamber and its obiter dicta in the nuclear weapons advisory opinion by the ICJ were, at least in part, efforts to head off the establishment of a new body.

In the meantime, the international community should consider strengthening the noncompliance procedures that are being established in various multilateral environmental agreements, and finding ways to fold them into a single body with overarching functions. There is a need to think about using the facilities of the Permanent Court of Arbitration to establish a panel of individuals—with legal or scientific expertise—to serve as arbitrators and conciliators when disputes arise under environmental agreements that do not provide the means for amica-

100. See PRINCIPLES, *supra* note 7, at 167-68.

ble settlement.¹⁰¹ There should be encouragement for new and existing bodies such as the Hamburg Tribunal, the Hague Court, and the Geneva Appellate Body, to think more actively about how they could integrate scientific and environmental expertise into this decision making process.

Finally, the international community should encourage those players most directly affected by environmental issues, including individuals, NGOs and companies, and the non-state sector, to continue their efforts to litigate international environmental issues before human rights bodies, the ICSID and other arbitrators, and the World Bank Inspection panel. The time will no doubt come when these players will gain enhanced access to the more traditional bodies, such as the ICJ, whether as parties, third parties, or persons entitled to file amicus briefs.

A few years from now the body of case law will probably require us to address how to maintain coherence among the various fora at which international environmental issues are litigated. The steady increase in international environmental litigation will continue. As environmental concerns become more acute, and as environmental interests become ever more closely related to economic interests, these trends will be enhanced. Moreover, the growing presence and power of non-state interests, whether corporate, individual, or NGO, will increase pressure on states to assume clearly defined positions on environmental issues of the day. It is inevitable, therefore, that international disputes will occur ever more frequently, and we will be forced to rethink traditional litigation and its alternatives. But that is for another day.

101. See, e.g., Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 18 I.L.M. 1442, 1448; Framework Convention on Climate Change, *supra* note 22; International Tropical Timber Agreement, Jan. 26, 1994, 33 I.L.M. 1014, 1035.

