

[Home](#) > [The Bar](#)

THE BAR

Stars at the Bar: Pollution in the first degree

Author: Stephen Hockman QC

Published: 06/11/2008 02:03

[Email article](#) | [Comment on this article](#) | [Sign up to News Alerts](#)

An international court for the environment is needed to give some bite to well-intentioned climate change efforts, writes Stephen Hockman QC



"It is a trite observation that environmental problems, although they closely affect municipal laws, are essentially international; and that the main structure of control can therefore be no other than that of international law."

The above was written by Sir Robert Jennings QC, Whewell Professor of International Law at the University of Cambridge and former president of the International Court of Justice (ICJ), in his foreword to the first edition of Principles of International Environmental Law by Philippe Sands.

Jennings penned those words in 1995, many years

before the potential effects of climate change transformed public perceptions on this topic. And yet, even today, after all the many millions of words that have been written on the subject of climate change and its causes and consequences, many think we are hardly any further forward in establishing, in Jennings' words, a "structure of control".

No one doubts the scale of the problem. Back in 1995, environmental issues were perceived mostly in terms of major cases of environmental pollution, which were regarded as having potentially international implications. Perhaps the most infamous case of environmental liability on the part of a transnational corporation occurred on 2 December, 1983 in Bhopal, India, when Union Carbide, a multinational company incorporated in the US, released 40 tonnes of toxic methyl isocyanate from its plant, killing 3,500 people and affecting more than 200,000 others.

Having failed in proceedings brought in the US courts, the injured parties settled the ensuing litigation in the Indian courts for some \$470m (an average of about \$15,000 per deceased person). Scroll forward to 2006 and, yet again, an action brought against corporate polluters failed to yield rewards — cases brought simultaneously on the basis of the common law tort of public nuisance by a number of claimants against the five biggest US power companies were all dismissed. The (unsuccessful) argument for the plaintiffs had been that the carbon emissions from the defendants' power plants — contributing approximately 10% of all carbon dioxide emissions from human activities in the US — were a public nuisance, in the sense that they were causing injury or threat of injury by contributing to global warming and giving rise to a substantial and unreasonable interference with public rights.

The potential effects of climate change have been given an altogether new and critical focus by a number of recent developments, including reports by the Intergovernmental Panel on Climate Change and by Sir Nicholas Stern on behalf of the UK Government. Few now deny the urgency of finding a solution to these problems, though even fewer claim to have a serious and comprehensive set of solutions to hand. Statements emanating from international summits only confirm the limited practical progress being made.

In these circumstances, it seems timely to first review those international legal instruments which already exist and, secondly, to consider the creation of new instruments for international environmental law proceedings.

Dispute resolution

The oldest legal institution dedicated to resolving international disputes is the Permanent Court of Arbitration (PCA), established at The Hague by intergovernmental agreement in 1899. The PCA has jurisdiction over disputes when at least one party is a state (or an organisation of states) and when both parties to the dispute expressly agree to submit their dispute for resolution. It has been suggested in the past that the PCA might be an interim forum for resolving international environmental disputes. However, the court is limited by the requirement that at least one party to any dispute must be a state. In addition, the PCA has no compulsory jurisdiction and, importantly, its decisions are not made available for public inspection.

The ICJ was established in 1945 as a successor to the earlier Permanent Court of International Justice. Although

JOB OF THE WEEK

Head of Legal
CHARTERHOUSE PARTNERSHIP

Highly competitive expat package

JOB OF THE WEEK

Lipson Lloyd Jones
Legal Recruitment

Junior Commodities Lawyer - London

FIND YOUR NEXT JOB

SEARCH

> [Advanced Search](#)

How diverse is your firm?

IT WHITE PAPER SEARCH

SEARCH

[Outsourcing](#)

[Knowledge Management](#)

[Enterprise Search](#)

[CRM](#)

[More...](#)

[KnowledgeBank](#)

'Data Protection'
Time to put the house in order:
best practice tips

LATEST JOBS

Mid/senior Funds Associate, 4+pqe,...

the ICJ may accept disputes that are environmentally related, only states have standing. Jurisdiction depends on whether two or more states have consented to their cases being heard by the court. In 1993, the ICJ established a chamber within its structure to deal with environmental matters exclusively. However, no state has ever submitted a dispute to this chamber.

In 1992, representatives from 176 states and several thousand non-governmental organisations (NGOs) met in Brazil for the United Nations Conference on Environment and Development. At this conference, often referred to as the Earth Summit, the Rio Declaration on Environment and Development was adopted. Principle 10 of the Declaration provides that "States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be available".

The Rio Declaration (and accompanying Framework Convention on Climate Change) famously led on to the Kyoto Protocol, signed in Japan on 11 December, 1997. This Protocol, for the first time ever, contained international obligations requiring countries to reduce their greenhouse gas emissions below specified levels. It was agreed that the Kyoto Protocol would only come into force when countries emitting 55% of the world's carbon dioxide proceeded to ratification. The 55% trigger was finally met in February 2005, after ratification by Russia. In December 2007, the protocol was ratified by Australia, leaving the US as the only developed nation not to have signed up to the obligations. However, constraints upon enforcement remain a significant weakness.

The European Union (EU) has, for many years, legislated on environmental matters. Compliance with EU environmental law is regulated by the European Commission (EC), with disputes referable to the European Court of Justice in Luxembourg. In January 2005, an emissions trading scheme was launched within the EU. Significantly too, in 1998, EU states entered into the so-called 'AARHUS Convention on Information Public Participation in Decision-Making and Access to Justice in Environmental Matters', ratified by the UK in February 2005. Recent studies, including a report by a working group under the chairmanship of Sir Jeremy Sullivan, suggest that a number of member states within the EU may not be fully in compliance with AARHUS's requirements on access to justice.

A new proposal

Under the circumstances, the establishment of an international court for the environment appears to be a valuable goal, both as an addition to the body of jurisprudence in international environmental law, and to provide a common forum for states and non-state entities. Ideally, such a court would be compulsory, and would include the following: (i) an international convention on the right to a healthy environment; (ii) direct access by NGOs and private parties, as well as states; (iii) transparency in proceedings; (iv) a scientific body to assess technical issues; and (v) a mechanism (perhaps to be developed by the Court itself) to avoid forum shopping.

This is not an entirely new idea. Such a proposal was mooted as long ago as 1999 at a conference in Washington DC, sponsored by a foundation which had been set up to investigate the establishment of an international court for the environment. The conference defined the functions of the court to include: (i) adjudicating upon significant environmental disputes involving the responsibility of members of the international community; (ii) adjudicating upon disputes between private and public parties with an appreciable magnitude (at the discretion of the president of the Court); (iii) ordering emergency, injunctive and preventative measures as necessary; (iv) mediating and arbitrating environmental disputes; (v) instituting investigations, where necessary, to address environmental problems of international significance.

While acknowledging that regulation and sanctions can only be one component in an international solution to the problem of climate change, without such a component, the incentive for the countries of the world to address the problem, and to achieve solutions which are politically acceptable within their own jurisdictions, will be much reduced.

Moreover, the potential benefits of an international court for the environment, particularly for the global business community, would include: (i) a centralised system accessible to a range of actors; (ii) the enhancement of the body of law regarding international environmental issues; (iii) consistency in judicial resolution of international environmental disputes; (iv) increased focus on preventative measures; (v) global environmental standards of care; and, (vi) facilitation and enforcement of international environmental treaties.

Such a court could also influence the world business community to develop risk-management programmes and improve current practices, which would produce a corresponding reduction in the threat of environmental catastrophe.

The next few weeks hold an opportunity to initiate a debate on these issues. The next round of discussions, designed to work towards the successor to the Kyoto Protocol, will commence in December 2008, in Poznan, Poland. On 28 November at 4pm at the British Library in London, my chambers will be hosting a symposium on 'Climate Change and the New World Order'; the speakers will include Oliver Tickell, author of 'Kyoto2'. Please email alex.parkinson@hillgrovepr.com for an invitation.

Stephen Hockman QC is head of Six Pump Court chambers.

RELATED ARTICLES

- [Stars at the Bar: Future stars at the Bar](#)
- [Stars at the Bar: Long lunches are out](#)
- [Stars at the Bar: Inside the ivory tower](#)

LATEST JOBS

- [Mid/senior Funds Associate, 4+pqe, Dubai, to £130,000 Tax Free](#)
- [CORPORATE 5+ DUBAI](#)

CORPORATE 5+ DUBAI

ASSOCIATE VICE
PRESIDENT (AVP)
LEGAL...

ECGD In-House Dept. x2
roles



The latest
jobs @



SUBSCRIBE

Legal Week

- ASSOCIATE VICE PRESIDENT (AVP) LEGAL BUSINESS DEVELOPMENT
- ECGD In-House Dept. x2 roles

[About Us](#) | [Contact Us](#) | [Terms & Conditions](#) | [Privacy Policy](#) | [Advertise](#)

© Copyright and database rights legalweek.com 2008. Powered by: [Madgex Job Board Software](#)