

2. Кожен громадянин має право вимагати від держави дій на захист і покращення довкілля.

У суспільстві часто виникають протиріччя між важливими цінностями, інтересами. Важливо знайти шляхи гармонізації різноманіття з унікальністю, використання свободи з суспільним благом, короткотермінових завдань з довгостроковими цілями. Кожна особа, сім'я, організація, і громада повинні відігравати життєво важливу роль. Мистецтво, наука, релігія, освіта, засоби масової інформації, ділові кола, неурядові організації та уряди – всі ці ланки суспільства істотно для запровадження в життя ефективного екологічного законодавства як на національних, так і на міжнародному рівнях.

Література

1. Дерябо С.Д., Ясвин В.А. Экологическая педагогика. – Ростов на Дону: Феникс, 1996
2. Леопольд А. Альманах "Сэнд Каунти"// Экологическая Анталогия. – Москва-Бостон, 1992
3. Туніця Ю.Ю. Екологія і церква// Первоцвіт. Літературно-мистецький альманах. – Випуск другий. – Львів, вид-во "Край", 2001- С. 5-10
4. Nash, Roderick. The Rights of Nature. Madison, University of Wisconsin Press, 1989

УДК 630*587

Prof. Dr. Dieter Blumenwitz – Würzburg

THE SETTLEMENT OF INTERNATIONAL DISPUTES RELATING TO THE ENVIRONMENT – THE INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL ARBITRATION

The historical roots, statute and activity mechanisms of the International Justice Court in the field of environmental law described in the paper. Analytical review of environmental arbitration practice and environmental disputes have been analyzed.

Проф. Дітер Блюменвіц – м. Вюрцбург

Регулювання міжнародних конфліктів щодо довкілля – міжнародний суд справедливості та міжнародний арбітраж

Висвітлено історію виникнення, статутні положення і механізми діяльності у сфері міжнародного екологічного права Міжнародного Суду Справедливості. Здійснено аналітичний огляд правової практики міжнародного арбітражу екологічних конфліктів.

The last two or three decades of world's history have seen an increase of awareness for ecological problems and, at the same time, a worsening of the state of certain ecosystems or the environment in many respects. Although there had been some earlier activities and documents, it was basically during the same period that a meanwhile vast body of international law relating to the protection and preservation of the environment has been developed. The 1992 Final Declaration of the UN Conference on Environment and Development in Rio de Janeiro has been a landmark event for both environmental law and policy-making. Principle 26 of the Rio Declaration on Environment and Development stresses:

"States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations."

This is only a reaffirmation of the general duty of states to resolve their disputes peacefully, laid down as a principle of the UN Charter in Article 2, para. 3, and elaborated upon by listing appropriate methods of dispute settlement in Article 33, para. 1, of the Charter, including conciliation, arbitration and judicial settlement.

The International Court of Justice (ICJ), the principal judicial organ of the UN, was for a long time the only available *forum* for judicial settlement in disputes relating to ecological problems. Article 92 of the UN Charter states that the Court

"shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

The Statute regulates the organization of the Court and its competence, and contains the basic provisions for the procedure both in contentious cases and requests for an advisory opinion. It is completed by the 1978 Rules of Court¹, which contain more detailed rules on the members and subdivisions of the Court, the registry, and in particular on procedural aspects.

Even though formally adopted in 1945 at the San Francisco Conference, the Statute of the ICJ was actually drafted in 1920 as the Statute of the Permanent Court of International Justice. It was only slightly altered and adapted in order to make it compatible with the UN Charter. The new scientific knowledge about the natural environment and its conditions, modern developments in the law, and the changing face of the international community have led to doubts whether the statute of the Court still allows an appropriate handling of cases relating to the environment. Severe criticism of the existing mechanisms was expressed by scholars and policy-makers, in particular with respect to the ICJ. Some remedy could be found in altering or amending the Court's Statute. There is, however, little prospect of such a change in the near future, and, in fact, no restriction or hindrance to the work of the Court inherent in the Statute. The ICJ is already well equipped to handle cases with an ecological impact and to take into account pertinent considerations; and it has recently proven to be able to do so. Furthermore, with international arbitration, states and other actors on the international scene have a similarly effective but more flexible means to resolve their disputes without possible restrictions in the Statute.

The Feasibility of an Amendment of the Statute

An alteration of or amendment of the Statute is unlikely to succeed in the current international political climate. The procedure for altering or amending the Statute is the same as the amendment of the UN Charter.² Leaving aside the possibility to call a General Conference for reviewing that instrument, an amendment to

¹ As amended on 5 December 2000; available at <http://www.icj-cij.org> (visited April 2002).

² Article 69 of the Statute. See generally and on one fruitless attempt to amend the statute *Shabtai Rosenne*, *The Law and Practice of the International Court 1920-1996*, vol. I, 1997, § 1.20, p. 95 et seq.

the Charter requires the adoption by an affirmative vote of two-thirds of the members of the General Assembly and its ratification by two-thirds of the UN Members, including the permanent members of the Security Council.¹

The General Assembly's Sixth (Legal) Committee has set up a Special Committee on the Charter of the United Nations with the task, *inter alia*, to examine suggestions and proposals regarding alterations of the Charter and the Statute of the ICJ. The Committee is the competent body for a first discussion of every proposal for a change of the constitutional instruments, and an issue rejected in this body is not likely to be pursued further.

The very high threshold for any change, however, makes it unlikely that proposals for an environmentally streamlining amendment to the Statute – and indeed the Charter – will be adopted in the near future. In the current international political climate, particularly in the UN, it is difficult to imagine a consensus amongst member states with respect to an issue like this. The veto power of the permanent members of the Security Council will prevent any amendment that is conceived to somehow restrict the achievement of the policy goals of these states. Given the current stance of the United States with regard to international environmental regimes in particular and the reservations to international supervisory mechanisms in general, there does not seem to be much chance for a project like this. In addition, if the statute – and possibly the UN charter at the same time – is opened for amendments, many more hotly contested issues will be on the agenda. This might in particular extend even to the reform of powers and composition of the Security Council. It is doubtful whether proposals to include environment-related provisions into the statute could survive the then unavoidable political bargain. States are well aware of the risky, lengthy and complex work a reform of the Charter or the Statute would require, and are only willing to support a proposal the gains of which would outweigh the risks and efforts put into such a project.² In the absence of a consensus amongst members, no further action will be taken.

The provisions of the Statute

While there are political factors that hinder a significant amendment to the Statute, there are, in fact, no compelling reasons why the ICJ could not deal with, or would not appropriately handle, cases with ecological relevance. Its competence *ratione materiae* is not restricted and there are sufficient provisions in the Statute that allow the proper treatment of this type of cases.

The basic norm for the jurisdiction of the court is Article 36 of the Statute, stating the principle of consensus as the fundamental requirement for every action of the court. According to Article 36, para. 1, the Court has jurisdiction where the parties have agreed to submit their case to it, and where treaties or conventions in force provide for such jurisdiction. Para. 2 of the same provision opens the possibility for a state to unilaterally recognise the jurisdiction of the Court with respect to any or certain disputes "in relation to any other State accepting the same obligati-

on". Notwithstanding the enumerative list of aspects of how to categorise international legal disputes, Article 36, para. 2, does not contain any substantive restriction to the type of conflict amenable to settlement by the Court. The most general reference in sub-paragraph (b) to "any question of international law" makes this very clear. Perhaps, however, the way of seizing the Court by way of agreement, provided for in para. 1 – being the same mechanism as with the *compromis* in international arbitration¹ – clarifies even better, that given the consensus of the parties, every issue may be brought to the Court. As long as the Court can find that a "legal dispute between the parties" exists², there is no further restriction *ratione materiae*. No type of a – legal – dispute is excluded from the competence of the Court. Every dispute touching on any aspect of international law may be brought to the court, and hence also those that concern the environment or relate to an impact on any part of the ecosystem.

While the Court can potentially deal with every dispute, it has tried to make itself more attractive for the settlement of disputes relating to ecological issues. In 1993, the Court established a standing seven-member Chamber for Environmental Matters.³ In order to seize that special chamber, a case would have to be referred to it by agreements of the parties.⁴ The court thus puts at the disposal of the parties a specialised body consisting of judges with an increased interest and expertise in international environmental law. It thereby meets the common criticism on existing international *fora* that existing bodies would lack sufficient expertise in environmental law matters⁵. However, the chamber has never been used, and it is not very likely that it ever will be, for the implicit qualification of a dispute as an environmental one would always meet the objection of the party that does not see the issue at dispute as one governed by environmental considerations.

The Court is not only competent to deal with environmental disputes, it has also pertinent rules of procedure. It may not only request the parties to produce evidence or additional explanations, but can, on its own initiative, seek any other information, including inviting expert witnesses⁶, and commission an inquiry or expert opinion.⁷ Furthermore, although it has never done so, it could appoint assessors to sit on the bench in order to provide the Court with expert knowledge in an *e.g.* technically complex matter.⁸

Thus, in theory, the Court is well equipped to handle even the most complex cases involving highly technical issues, as may often be the case in environmental disputes.

¹ Cf. *Rosenne*, § II. 175, p. 663.

² See Article 36, para. 2 of the Statute.

³ The legal authority for this derives from Article 26, para. 1, of the Statute, which enables the Court to set up chambers for particular categories of cases.

⁴ Cf. *Philippe Sands et al.* (ed.), *Manual on International Courts and Tribunals*, 1999, para. 1.10.

⁵ See *Ellen Hey*, *Reflections on an International Environmental Court*, in: *International Bureau of the Permanent Court of Arbitration* (eds.), *International Investments and Protection of the Environment*, p. 274.

⁶ Article 62 of the Rules of Court; *Sands et al.*, para. 1.13.

⁷ Article 50 of the Statute.

⁸ Article 30, para. 2, of the Statute, Article 9 of the Rules of Court; cf. *Sands et al.*, para. 1.13.

¹ Articles 109 and 108 UN Charter respectively.

² See, for example, the summary of statements on the last proposal for a reform of the ICJ statute – Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, General Assembly, Official Records, Fifty-fourth Session, Suppl. No. 33 (A/54/33), p. 19, para. 114.

The Practice of the International Court of Justice

Disputes relating to the environment or concerning ecological aspects have been dealt with by the ICJ in several instances. There are sufficient examples of pronouncements on environmental issues.

Already the *Nuclear Test* cases, brought in May 1973 by New Zealand and Australia respectively against France, concerned, in essence, the question of a possible negative environmental impact of the tests namely, by radioactive fall-out. However, the Court avoided to pronounce on the issue, for it found that the respective claims no longer had any object, and that it therefore was not called to give a decision thereon. Likewise, the *Fisheries Jurisdiction* cases brought by the United Kingdom and Germany against Iceland in 1972 dealt with the unilateral extension of exclusive fishing rights of the latter. The Court, in dealing with the justification of preferential fishing rights, did also refer to the need of some system of catch-limitation in order to preserve the fish stocks.¹

Both cases suffered from the non-participation of the respondent in the proceedings, and the Court avoided to take into account or apply norms of international environmental law. This changed only in the mid-nineties when the Court, in an attempted re-opening of the *Nuclear Test* cases referred to the "obligations of States to respect and protect the natural environment".² Shortly thereafter, in the much disputed Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court held:

*"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..."*³

It also took into account other international norms and principles relating to the environment, concluding that

*"... existing international law relating to the protection and safeguarding of the environment ... 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"*⁴.

Of even more relevance for the application and reconfirmation of certain rules of international environmental law is the case between Hungary and Slovakia concerning the *Gabcikovo-Nagymaros Project*. This dispute, arising out of a bilateral project to build a system of locks and the subsequent unilateral termination of the treaty and the suspension and abandonment of works on the project, was sub-

mitted to the Court by Special Agreement of the parties in 1993. In its decision, the ICJ pointed out

*"that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty."*¹

And further, albeit with a different emphasis:

*"In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Article 15 and 19, but even prescribed, to the extent that these articles impose a continuing – and necessary evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature. ... Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, ... Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development"*².

In resolving the conflict between environmental law concerns and the law of treaties, the ICJ did not issue a definite ruling. It noted, referring to the *North Sea Continental Shelf* cases, that it was for the parties to negotiate a solution having looked afresh at the effects on the environment, and not for itself "to determine what shall be the final result of these negotiations" – a solution which would have to be, in any event, "within the co-operative context of the Treaty".³

This judgment, however, failed to resolve the dispute and the case is pending anew before the Court. But this cannot be considered to be the result of deficiencies in the Statute. On the contrary, the Court went beyond the functions of traditional judicial dispute settlement. It avoided to rule on the disputed issue and basically sent the parties back with some general advice – an innovative but not successful method for an international court. But this makes clear the great flexibility the court may act with – not being restricted by the Statute or any other document.

Specific Restrictions in the Statute

According to the Statute, the Court may deal with every type of international legal dispute, and its jurisprudence shows that it has indeed dealt with several cases relating to the environment or ecological questions. However, critical remarks remain with respect to the capability of the Court to deal properly with disputes of this kind in several other respects.

Such criticism from an environmental perspective has centred on the lack of *locus standi* for international organisations, the bar for participation, in any

¹ Fisheries Jurisdiction Case (United Kingdom v. Iceland), Judgement of 25 July 1974, ICJ Rep. 1974, p. 1, at para. 60.

² Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's judgement of 20 December 1974 in the Nuclear Test (New Zealand v. France) Case (Order of 22 September 1995), ICJ Rep. 1995, p. 306, at para. 64.

³ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996), ICJ Rep. 1996, p. 225, at para. 29.

⁴ Id., para. 33.

¹ Case concerning the Gabcikovo-Nagymaros Project (Judgement of 25 September 1997), ICJ Rep. 1997, para. 112.

² Id. para. 140.

³ Id. paras. 141-2.

form, of private groups and individuals, and the lack of means to represent the common interest in the environment in the procedure.¹

The first two aspects concern issues of general interest, *i.e.* they do not represent a specific environmental problem. The clear wording of Article 34 of the Statute prevents an International Organisation from becoming a party in a contentious case before the Court. In the view of the advent of international integration organisations exercising many classical state functions – reference is made to the European Community / European Union – there appears actually to be the need for an amendment of the Statute. To the extent organisations of this type act like states and fulfil their tasks, a need for international dispute settlement *fora* exists. The newer instrument establishing the International Tribunal for the Law of the Sea (ITLOS) provides for the participation of an international organisation in proceedings before that tribunal.² And in the context of the WTO Dispute Settlement System, it is also the EC, and not any of its member states, that is party to the disputes in that framework. In the cases concerning the air strikes against former Yugoslavia, the true respondent would have been NATO as an international organisation, which commanded – and was ultimately responsible for – the military activities. Instead, the application named ten member States, and thus initiated ten different and separate cases.

Objections to reform proposals in that respect have been too strong. A detailed proposal for an amendment of the Statute in order to extend the competence of the Court to disputes between States and International Organisations was already rejected in the Charter Committee, because there was said to be neither consensus nor need for such a reform, which would also not be politically feasible.³ Whether this was a prudent decision with respect to the ICJ may be doubted, since there is actually a *lacuna* in the statute making the Court unsuitable for certain disputes.

International Organisations currently play a minor role even in contentious cases before the court. The Statute provides for certain participation rights. According to Article 34, para. 2, an Organisation may, on its own initiative, present to the Court a memorial with its views on the matter at dispute.⁴ The court may request additional information from that organisation, or it can *proprio motu*, or upon application of any party, request any International Organisation to submit information – irrespective of whether this organisation has previously contacted the court.⁵

A further point of criticism concerns the lack of standing of NGOs, private groups or individuals before the Court. But there is no willingness to change the very character of the ICJ and allow private parties to become a party in a contentious case. This would leave the classical concept of the ICJ as an international interstate court. The pressure by those groups for access as *amici curiae* is more likely

to yield results in general. Again, as the behaviour of member States in the WTO has shown, there is no political consensus to adopt a reform along those lines. It is submitted, however, that the Court would be free to accept private statements within the framework of the Statute, if it wished to do so.¹

The last concern voiced, *i.e.* that there is no provision that would ensure that the Court takes into account the common interest in the environment, presents a specific demand from environmentalists. The then Vice-President of the ICJ *Weeramantry*, in his Separate Opinion to the *Gabcikovo* Judgement, questioned whether it was appropriate to use the rules of *inter partes* litigation to determine *erga omnes* obligations. In his opinion, the procedure of the Court, aimed at providing justice and fairness between the parties, scarcely does justice to rights and obligations in relation to the rest of the world – "least of all in cases involving environmental damage of a far and irreversible nature".² Principles of general international law such as *estoppel* for the regulation of bilateral relations may be appropriate in matters which are of concern not merely to the parties, but to many or all states.

Even though it is framed as a general proposition, it appears to be nothing else than the quest for participation rights of private groups or NGOs claiming to represent these interests. Leaving aside the difficult question of legitimacy, it may be noted that the Court has occasionally stressed "the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind ...".³ And there are instances, where individual states have argued not only with respect to their own individual rights, but also to common goods. In the *Nuclear Test* case, for example, Australia explicitly claimed that "the interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radio-active fall-out, constitute infringements of the freedom of the high seas".⁴

The problems outlined in this section are common to many international dispute settlement *fora*. While the access by international organisations is accepted, as shown, in the more modern mechanisms, the situation with regard to the participation of private groups is more or less the same everywhere, which shows the general reluctance of states to accept such proposals. Before ITLOS, private parties may appear, but only in very specific cases, special to the regime of the UN Convention on the Law of the Sea (UNCLOS). In the WTO dispute settlement mechanism, a rather restricted way of dealing with unsolicited private statements has been developed.

None of these mechanisms provides for any institutionalised guarantee for taking into account *erga omnes* interests. The very concept of a dispute and its settlement was modelled on a bilateral relationship: a dispute is said to exist where

¹ Cf. Hey, p. 274.

² Article 20, para.1, ITLOS Statute (Annex VI to UNCLOS) gives access to the tribunal to entities other than states. The Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean concerned a dispute between Chile and the European Community (available at <http://www.itlos.org>; visited April 2002).

³ Report of the Special Committee on the Charter of the United Nations ...pp. 18 et seq., paras. 109 – 116.

⁴ See also Article 69, para. 2 of the Rules.

⁵ ICJ Rules, Article 69, para.1. See generally *Sands et al.*, para. 1.34.

¹ Reportedly, the ICJ, in the *Gabcikovo-Nagymaros* case, had received unofficially written statements – see the "Decision on petitions from third persons to intervene as 'amici curiae'" of 15 January 2001 of the Arbitral Tribunal established under Chapter 11 of NAFTA and the UNCITRAL arbitration rules in the case *Methanex Corporation v. United States of America* (V.V. Veeder, Chairman), para. 34 (available at <http://www.naftaclaims.com>; visited April 2002).

² Case concerning the *Gabcikovo-Nagymaros* Project, Judgement of 25 September 1997, Separate Opinion of Vice-President Weeramantry, ICJ Rep. 1997, sub. C. (c).

³ Case concerning the *Gabcikovo-Nagymaros* Project, Judgement of 25 September 1997, ICJ Rep. 1997, para. 53.

⁴ ICJ, *Nuclear Tests Case* (Australia v. France), Order of 22 June 1973, ICJ Rep. 1973, p. 99, at para. 22.

"the claim of one party is positively opposed by the other".¹ Any proposal to amend the Statute in this direction would not only prompt a debate on the whole concept, but also meet considerable objections by a majority of the states.

International Arbitration and Environmental Disputes

If States are unlikely to agree on changes of the rules in the emphasised institutionalised contexts, it might be worthwhile to focus on alternative dispute resolution methods. The closest to adjudication is arbitration, which is equally recognised in Article 33 of the UN Charter as a means of peaceful settlement of disputes.

In international law in general, and in particular where it related to the environment, arbitration has always played an important role in the settlement of specific disputes. The development of the law in that field has profited to a great extent from this jurisprudence. The *Behring Sea Fur Seal* arbitration between the United States and the United Kingdom was probably the first case where specific environmental issues were at stake, namely the protection and preservation of fur seals, the killing, capturing or pursuing of which was severely restricted in the award.² The famous *Trail Smelter* case, decided in 1941/42, and the *Lac Lanoux* arbitration are other well-known examples of the important contribution of international arbitration to the application and development of international law relating to the environment.

As in litigation. The reasons for the choice of arbitration in the treaty negotiations have been different, namely the great flexibility of this mechanism and the greater influence of the parties on the procedure and even the composition of the tribunal. Perhaps the most striking advantage of arbitration in comparison with the ICJ has been the significant speed with which arbitral tribunals have handled their cases. This is particularly important where matters of some urgency are concerned, as may often be the case in disputes concerning exhaustible or otherwise threatened natural resources.

The flip side of the flexibility, however, is, among other things, uncertainty about the applicable procedural rules, what may result in delays in constituting the tribunal and rendering the award. In the view of this, the Permanent Court of Arbitration (PCA), set up by the Hague Conventions on the Peaceful Settlement of Disputes of 1899 and 1907 and tasked to facilitate legal and political procedures for international dispute settlement, has adopted a set of "Optional rules for arbitration of disputes relating to natural resources and/or the environment".³ These rules are based on the UNCITRAL rules for international commercial arbitration,⁴ but adapted to reflect, *inter alia*, "the public international law element which pertains to disputes which may involve States ...".⁵ They may be used by every arbitral tribu-

nal in any proceeding involving States, international organisations, private entities or individuals, provided that the parties have agreed in writing that the rules would be applied. Thus, inter-state cases of the type handled by the ICJ would perfectly fall within the scope of application envisaged by the drafters of these rules. Other cases involving non-state actors could also be dealt with under the auspices of the PCA and by reference to the environmental rules.

Arbitration in general, and the application of the PCA environmental rules in particular, are not restricted to strict inter-state disputes. The flexibility of that mechanism does not apply to procedural questions only, but also to the constellation of parties to a dispute. As long as the rights and interests of third parties are not prejudiced, any two or more parties – be it a state, an international organisation, a multinational co-operation, a non-governmental organisation, or a private group or individual – may agree to submit a dispute to arbitration. Thus, one of the concerns identified above is overcome, since the problem of restricted *locus standi* is alien to international arbitration.

More problematic, though, is the question of intervention by a third party. In arbitration, any interference from an outside party would require the consent of the parties. In the framework of adjudication, this might be dispensable because of generally applicable provisions like Articles 62 and 63 of the Statute of the ICJ that provide for a opportunity to intervene for any other Member State affected by the possible decision. The PCA environmental rules contain some adaptations to multiparty proceedings,¹ but there is no access granted for any other party to intervene. The only limit to this is the so-called *Monetary Gold principle*, meaning that no award may be rendered the very subject matter of which would be the rights or duties of a State which is not a party to the proceedings.²

Arbitration is to a wide extent subject to utmost party control, and usually conducted in confidentiality. The PCA environmental rules stress the latter point, and have established an innovative and very elaborated mechanism to safeguard the interests of the parties in securing the confidentiality of certain information by establishing the institute of a confidentiality advisor who would have access to the information and report on it to the tribunal.³ However, access for private groups or NGOs to a proceeding as *amici curiae* will, in general, not be granted except where the parties agree on it.⁴

Surprisingly enough, the rules contain only one provision with an essentially ecological/ environmentalist character – the one dealing with interim measures of protection. The tribunal may, in the absence of any other agreement,

"take any interim measures including provisional orders with respect to the subject matter of the dispute it deems necessary to preserve the rights of any party"

¹ South West Africa Case, Preliminary Objections, Judgement, ICJ Rep. 1962, p. 328.

² Award of the Tribunal constituted under the Treaty concluded at Washington, the 29th of February, 1892, reprinted in: 6 AJIL (1912), pp. 233 – 241.

³ Available at <http://www.pca-cpa.org/RPC> (visited April 2002). See the introduction by Dane P. Ratliff, The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, forthcoming in: Leiden Journal of International Law.

⁴ These rules have been applied successfully by international tribunals like the Iran-US Claims Tribunal and have proven to be highly useful procedural provisions for international arbitration.

⁵ Introduction (i).

¹ See Article 7, para. 4.

² Cf. the recent arbitration *Larsen v. Hawaiian Kingdom*, paras. 11.8 et seq. (available at <http://www.pca-cpa.org/RPC>; visited April 2002), where the tribunal reaffirmed the principle developed by the ICJ in the *Monetary Gold* case and confirmed in the *East-Timor* decision.

³ Article 15, paras. 4 to 6.

⁴ Note, however, the "Decision on petitions from third persons to intervene as 'amici curiae'" of 15 January 2001 of the Arbitral Tribunal in the *Methanex* case, para. 47. The tribunal held that it had the power to accept written petitions by the parties under Article 15 of the UNCITRAL rules.

or to prevent serious harm to the environment falling within the subject matter of the dispute.”¹

This norm is modelled on the UNCLOS provision on provisional measures. It reflects the specific situation of an arbitration in adding that, even though serious harm to the environment not being a violation of a party's right can justify the indication of provisional measures, this may only be done where it relates to the subject matter of the dispute. The tribunal is thus called upon to take into account matters of interest *erga omnes*, although only in the context of provisional measures.

The other innovative feature of the environmental rules are two rosters of eminent experts, administered by the Secretary-General of the PCA: one of international environmental law experts to be available as arbitrators, and the second – the true innovation – of international technical experts in the field of the environment.² Obviously, this is only an administrative provision authorizing the Secretary-General to receive nominations by member states of the PCA and to compile the pertinent lists. It is not likely that parties will stop soliciting their own experts. But if a tribunal wishes to do so, it is now in a much stronger position to proceed independently and appoint an expert.³ It is still the tribunal that ultimately has to assess the expert opinion and render the final award, but the permanent availability of previously nominated experts could facilitate recourse to independent expertise and thus contribute to a sound scientific basis of a decision.

All other provisions of the Rules are merely of a facilitative character for an effective and swift arbitration procedure taking into account specific needs of typical participants in those proceedings.

Conclusion

A reform of the ICJ Statute is neither politically feasible nor, in fact, needed for the Court to properly deal with environmental disputes. It is not advisable to go beyond this, for one should be careful to load procedural instruments like the Statute, that are supposed to be impartial and unbiased, with norms of a rather substantive character, which can be perceived to be slanted towards one party. Rules or provisions to reflect ecological concerns would, in almost all situations, be of advantage to one, and to the detriment of the other party. The PCA environmental rules, like, to some extent, the Statute of ITLOS, are a good example that there cannot much be added to the rules.

There is, however, no real need for a general reform of the Statute. Certain deficiencies of the ICJ, which may particularly concern environmentalists' interests, could be remedied within the current system. With regard to the problem of duration, the Court has recently taken far-reaching measures to shorten the average time in which a case is decided. Likewise, it is within the discretion of the Court to accept private statements from *amici curiae* if it should consider it useful. The demands for an amendment of the Statute, and likewise the recent proposals to estab-

lish a new International Environmental Court¹, fail to take into account the reform potential of the existing law and institutions and, as with arbitration under the new PCA environmental rules, turn a blind eye on available alternatives, while they are politically unfeasible. As a highly flexible mechanism, international arbitration using appropriate rules can fill a perceived gap and provide for a means for all states to comply with the request for the peaceful settlement of disputes relating to the environment in Principle 26 of the Rio Declaration.

Prof. Dr. Geert Van Hoorick – Professor in Administrative and Environmental Law, Faculty of Law, Ghent University

THE PRINCIPLE OF COMMON HERITAGE OF MANKIND AS BASIS FOR A WORLD ECOLOGICAL CONSTITUTION

The sources of international law, rights and duties of states in relation in the paper. The principle of common heritage of mankind regarded as one of cornerstones of World Ecological Constitution.

Проф. Герд Ван Хорік – Гентський університет

Принцип спільної спадщини людства як основа для Екологічної Конституції Землі

Висвітлено джерела міжнародного законодавства, права і обов'язки держави стосовно природних ресурсів. Розкрито сутність принципу спільної спадщини людства як наріжного каменя створення Екологічної Конституції Землі.

1. Introduction

1. In this contribution we want to show that the principle of common heritage of mankind² (further: principle of common heritage) must be regarded as one of the cornerstones of a world ecological constitution. Firstly we will briefly mention the sources of international law. Then we will discuss the rights and duties of states in relation to natural resources. Afterwards we will come to the 'piece the resistance' about the principle of common heritage. Finally we will give a brief conclusion.

2. Sources of international law

2. In international law we regard international customary law, international general legal principles, and treaties as the sources of law. In legal doctrine there is no uniform vision on the hierarchy between these sources of law. It may be assumed that the principles of international customary law come first and that all other sources of law are equal.

¹ See in general on the discussion of this proposal *Ellen Hey*, Reflections on an International Environmental Court, in: International Bureau of the Permanent Court of Arbitration (eds.), International Investments and Protection of the Environment, p. 271-301.

² See K. BASLAR, *The Concept of the Common Heritage of Mankind in International Law*, The Hague-Boston-London, Martinus Nijhoff Publishers, 1998, XXVII + 427 p.

¹ Article 26, para.1.

² There have been nominations by 30 member states as of February 2002 (out of then 95).

³ Article 27, para. 1.