The International Judiciary:

Policy Compliance and Environmental Adjudication

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Abstract

This paper intends to examine the adjudication of environmental disputes by the international system of courts and tribunals. It offers international courts can be used as an effective venue for policy enforcement. Calls for the development of an international court for the environment are prominent in international environmental governance literature. The creation of an international court for the environment or reform of the current system of international courts and tribunals should not be undertaken without a full understanding of the current system as it relates to environmental adjudication. This paper studies the international court system through detailed analysis of the special treatment required by environmental disputes. The goal of this paper is to analyze the current system while providing attainable goals for the establishment or improvement of environmental mechanisms within the courts.

Key words: Environment, International Courts, Policy Compliance

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ACHR	African Court of Human and Peoples Rights
BEA	Bilateral Environmental Agreements
CFI	Court of First Instance of the Court of Justice of the European Communities
COMESA	Court of Justice of the Common Market for Eastern and Southern Africa
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Communities
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICE	International Court for the Environment
ICJ	International Court of Justice
IEG	International Environmental Governance
IGO	Intergovernmental Organization
IR	International Relations
ITLOS	International Tribunal for the Law of the Sea
MEA	Multilateral Environmental Agreement
MNC	Multinational Corporation
NGO	Non-governmental Organization
OAPEC	Judicial Tribunal of the Organization of Arab Petroleum-Exporting Countries
OHADA	Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa
PCA	Permanent Court of Arbitration
PICT	Project on International Courts and Tribunals
UN	United Nations
UNEP	United Nations Environment Program
WTO	World Trade Organization

Introduction

Environmental degradation, such as desertification, deforestation, depletion of water resources and pollution has persisted and in many cases intensified, despite on-going efforts by the international community to protect the environment. Proliferation of environmental protection regulations and agreements has resulted in over 1,100 multilateral environmental agreements (MEAs), 1500 bilateral environmental agreements (BEAs), and 250 other environmental agreements (Mitchell, 2012). These agreements are the basis for international environmental law. One of the challenges environmental policy makers must grapple with is designing a system that encourages commitment compliance by states (Stephens, 2009).

The role of international courts and tribunals in international environmental governance is multifaceted. These courts serve to protect the environment by "enhancing the legitimacy of international environment concerns" (Sands, 2008, p. 2) and reinforcing global rules. Additionally, These courts identify customary norms and provide clarification of international environmental law (Sands, 2008). International courts and tribunals also have the capacity to respond to breaches of international law and enact penalties. Therefore, one of the primary functions of the courts is to promote compliance through enforcement of environmental protection policies. The growing number of environmental disputes has revealed an "awareness of the need for institutions that can promote compliance with international environmental standards" (Stephens, 2009, p. 7).

The failures and gaps in the capacity of the international system have resulted in calls for the establishment of an international court for the environment (ICE). Political and scholarly

debates of various proposals for an ICE are currently underway. However, there has been little progress in making these proposals a reality. There are several reasons for these proposals stalling including the lack of political will of States, the immense cost of funding this new institution, and concern over how another court could fragment the existing system.

This paper proposes that proposals for a new court may be premature, as there has not been real analysis of the international courts and tribunals as they relate to the environment. Currently there is no clear picture of how environmental cases are handles and if the system is truly not functioning as needed. It may be possible to reform the existing courts by adapting some of the arguments for an international environment court. This study provides both a classification of the current system as well as a theoretical analysis of the special treatment required of environmental disputes. The goal of this paper is to identify trends within the current system, while examining attainable goals for increasing the capability of the courts.

This paper begins by identifying the problem, then examining related theory and finally using a study to achieve the goal of understanding the current state of the international court system as it relates to environmental adjudication. The first section, literature review, provides a discussion of using international courts as enforcement mechanisms to ensure policy compliance. The managerialist and new institutionalist approaches are outlined. This section then reviews the debate over the creation of an international environment court. The conceptual framework outlines the underlying theory used to construct the study. This includes adopting the new institutionalist approach of using judicial institutions as venues for policy enforcement, a key aspect in compliance. The framework outlines evidence for adapting judicial mechanisms for the special needs of environment adjudication. The methodology section establishes the foundations

for the included study. This section explains the criteria and institutions selected for the study. The findings section is an explanation of the criteria, how it relates to the environment, and the results of the study.

Literature Review

Policy Compliance and the Role of the Courts

Managerialist and new institutionalist are the two primary theoretical approaches to the role of the judiciary in the enforcement of international law. Stephens (2009) summarizes these approaches in his book *International Courts and Environmental Protection*. He states the increasing gap between environmental objectives and actual performance has placed enforcement of policy in the scope of international courts. International relations (IR) scholarship often criticizes achieving compliance through adjudication and is the perspective found in the Managerialist critique. The New Institutionalists, who see international courts as an effective venue for compliance, the Managerialists make counter arguments.

Managerialists believe compliance with international commitments is due to three factors. First, states act rationally and it is in their interest to comply with agreed rules. Second, bureaucracies run on efficiency, therefore it is cost and labor effective to comply. Third, norms created by treaties or agreements carry legal obligations, which obligate states. Intent to comply with agreements is implicit as evidenced by the time, effort, and resources used to develop policies (Raustiala & Slaughter, 2002). The Managerialist approach argues that adjudication is unsuited to compliance because it is costly, essentially contentious, and slow. Adjudication is a reactive method of compliance and therefore is not effective in enforcement. It is better to rely on complementary institutions that encourage policy participation and enforcement through inspections, transparency, and performance measuring. Furthermore, managerialism suggests that non-compliance by state actors is an issue not of intent but of oversight. Errors in compliance are due to the incapacity (i.e. resource scarcity), misinterpretation, or delayed

implementation of policies. Due to this belief managerial theory is essentially "no fault" when considering non-compliance (Raustiala & Slaughter, 2002).

New Institutionalists, on the other hand, believe institutions "both involve persistent and connected sets of rules (formal or informal) that prescribe behavioral roles, constrain activity, and shape expectations" (Keohane, International Institutions: Two Approaches, 1988, p. 383). These institutions constrain actors in world politics by "providing for predictable and enforceable conducts", essentially global behavioral norms (Keohane, International Institutions: Two Approaches, 1988, p. 385). New Institutionalists argue international courts operate in a similar manner to domestic courts. Courts ensure enforcement by deterring violations and identifying breaches. These courts have the authority and legitimacy given by states to enforce law. It is through the threat of judicial proceedings and pressure of other state actors that states are encouraged to comply with environmental responsibilities. Additionally, these courts have the ability to clarify legal principles, which set expectations for compliance.

It is not enough however, to expect that any court can handle enforcement of policies in the system. These courts must have the expertise and ability to meet the needs of any case brought before them. When considering environmental cases and policy enforcement, there have been concerns raised that the current system of international courts and tribunals are incapable or unqualified. The belief that the international judicial system is failing to meet the needs of environmental adjudication has lead to proposals for an international court for the environment.

The Debate on an International Environment Court

The arguments for an international environment court were first proposed in the late 1980s when reviews of the United Nations systems called for "new institutional authority"

(Hinde, 2004). This was also the beginning of the discourse on environmental rights, a concept which was developed at the 1989 *Congress on a More Efficient International Law on the Environment and Setting Up an International Court for the Environment within the United Nations*. Participants in this conference called for a convention that would create the right to a healthy environment, and urged the establishment of a world commission on the environment (Hinde, 2004). By defining a right to a healthy environment, and an international body to examine violations of this right, the creation of a world court of the environment would be possible. Proposals for the design and functions of this court were put forward during the 1990s. However, in 1999 United Nations Environment Director (UNEP) Shaqfat Kakahel rejected these proposals. Kakahel believed it would be unreasonable to expect UNEP to impose "moral sanctions" on violators, and that it was UNEP's function to evaluate violations and to provide policy advice to resolve these issues (Lama, 1999). Despite the objections from UNEP the proponents, notably ICE Coalition that believes institutional reform is required to improve accountability (ICE Coalition, 2012), continue to argue the benefits of creating a new court.

The case for an international environment court. In "The Indispensability of an International Environmental Court," author Rest asks if the "existing dispute-settlement mechanisms and institutions already meet the aim of protecting the environment and the legal interest of states and non-state actors sufficiently, in particular the interests of the threatened or harmed individual" (2001, p. 63). The current state practice has a huge deficiency in implementation and enforcement mechanisms. The judicial system is indispensable, although this solution still relies on the will of the states. Just as a state may choose not to fulfill its duties under a treaty, it also may choose not to participate in the judicial process.

Rest explains courts in the international system have deficiencies including limited access and jurisdiction. For example, the International Tribunal for the Law of the Sea (ITLOS) has yet to clearly define its scope, access, and its authority is questionable. Other courts have similar limitations that prevent them from being an ideal venue for international environmental protection. The Court of Justice of the European Communities (ECJ) has an extensive case history of environmental court cases however its limited scope to Europe prevents it from being the ideal venue. The European Court on Human Rights (ECHR) has similar limitations. The issue of direct access to the ECHR is considerable since procedure requires individuals to exhaust all local remedies and present the case to the Commission on Human Rights before the case can be heard (Rest, 2001).

Rest argues that currently enforcement should take place in the Permanent Court of Arbitration (PCA). Established by the Convention for the Pacific Settlement of International Disputes in 1899, it is one of the oldest institutions for international dispute settlement. Rest (2001) suggests the PCA is the most appropriate venue for environmental case because it has four methods of dispute resolution: enquiry, mediation, conciliation, and arbitration. These methods allow additional flexibility when trying to resolve a case and the court allows individuals to have standing. The financial realities of creating a new court are daunting and since the PCA is financed by the UN budget, costs of arbitration are born by the parties. Finally, the PCA has the ability to hear a case in the place it occurred rather than just the location of the court. Rest does note however, the PCA court still operates as an organ of the state, and therefore is under political pressure, which may be in conflict with what is best for the environment. The PCA also does not provide access to non-State actors; a concern since literature on access to

justice strongly suggests access rights in environmental governance. Using the PCA for environmental disputes is only a temporary fix and that an international court for the environment is essential for the future. Although Rest argues the importance of an environmental court, he ends with an emphasis on the political will of the states. Without the political support for environment dispute settlement mechanisms, an international institution cannot be established (Rest, 2001).

One of the more prominent proponents of an international court for the environment is the International Court for the Environment Coalition (ICE Coalition). The Coalition proposes that a new court could solve several of the issues that are present in the current system. It offers that the new court could increase the capacity of judges and other participants in environmental disputes. Since environmental issues are often complex and scientific in nature, the ICE Coalition believes that special training and skills are required. A specialized court for the environment could be structured to increase access to the decision-making process. The court would be able to provide advisory opinions and declarations of incompatibility; it would be consensual in nature and continue the development of international environmental law. The ICE Coalition argues the court would be a unifying chamber for a majority of the MEAs currently in the system and would provide clarification in international environmental law.

The case against an international environment court. The arguments against an international environment court point out that a new environment court is not a guarantee for overcoming the failings of the current court system. The limitations of the current system are partly due to political hurdles that would need addressing in the development of an international court. It could be argued the environment would be better served by reforming the current

system. The proposal for a new court would depend on the political backing of the international community, both for participation and funding. The creation of another court could increase the possibility of "forum shopping." Forum shopping is a term used to define the practice of seeking a sympathetic court, which the plaintiff feels their case will receive the most favorable outcome (Hinde, 2004). Due to the broad scope of environmental issues, cases are rarely limited to only an environmental classification. Many cases are complex and deal with trade, labor, sovereignty and other issues that could be beyond the scope of only an environmental court. Because of the wide scope and the transboundary nature of environmental cases at the international level, disputes often fall under the jurisdiction of many forums. One of the largest problems of forum shopping is the potential for duplicate judgments. The plaintiff could receive an unfavorable outcome in one venue and then seek redress in another, allowing for conflicting settlements. This breaks down the effectiveness of the international court system, since there is no method for determining which judgment stands (Hinde, 2004). Philippa Webb identifies a current trend in international law which tries to limit forum shopping by evoking *forum non conveniens*, where a court can refuse to hear a case if the forum is considered inappropriate (as cited in Stephens, 2009).

The arguments for and against the creation of an international court for the environment are successful in identifying some of the problems with the current system of international courts and tribunals. They also provide many possible solutions for resolving gaps in the system not just by the creation of a court but also by recognizing individual elements that will contribute to the better enforcement of international environmental law. What this discussion is missing is underlying support and evidence for the arguments. The assumption is made that using the

international courts or creating an international court for environmental adjudication will increase policy compliance. Additionally, the proponents argue for the creation of a new court without evidence the current system is not functioning. They have made an observation and developed a solution yet have failed to perform the necessary analysis to support their conclusions. Developing a solution for environmental policy enforcement by the courts requires developing a conceptual framework, to fully understand, identify, and develop the argument.

Conceptual Framework

The argument for improving environmental policy compliance through the judicial system requires conceptual and theoretical support. The solutions discussed in the previous chapters make two assumptions, first, enforcement is improved through adjudication and second, the environment requires special treatment different from other fields. An essential step in exploring environmental policy compliance through adjudication is supporting the connection between the two.

Adjudication as Enforcement

When violations or non-compliance has been identified, there is the question of who is responsible for taking action and how that action should be enforced. The question arises, does enforcement equal compliance? Enforcement of international agreements and norms can be achieved in several ways, including inspections, transparency, and performance measuring. This is the prevailing approach for compliance by the United Nations. However, it is becoming increasingly evident, despite the best efforts of the United Nations Environment Programme (UNEP). States continue to have gaps in policy compliance. These failures of the "managerialist" approach have resulted in growing literature and faith in the "institutionalist" school. The fear of nonconformity with international norms and the threat of exposure to the judicial process enforce the need to fulfill obligations. This is not to say that environmental governance should abandon the current system and seek enforcement through the courts only. The system needs to work to incorporate a multi-level approach to policy enforcement. One of the ways to achieve this goal is by strengthening the institutions that identify non-compliance and enforce policies implementation.

Because there are penalties that actors seek to avoid, it would be easy to assume policy compliance increases when policies are enforced. . However that statement ignores other variables. As previously discussed, the creation and acceptance of international agreements signify an underlying willingness to comply with the policy. Self-interest, pressure from the international community and obligations to participate as a functioning member of a greater society, which contains rules and norms, are all motivations for actors to comply with international law. None of these factors are enforcement tools, but they do have a managing effect. These factors increase the "compliance-pull" which obligates an actor to comply and accept international norm (Alter, 2003). This "compliance-pull" combined with the legal process in international courts is essentially the foundation for a system which encourages compliance. While international courts may not be mechanisms which ensure compliance, they are a necessary part of a system that demands compliance. Judicial proceedings enforce international law by responding to illegal behavior. Failing to respond to non-compliance would "…encourage further violations, thus undermining and eroding the very relevance, authority and applicability of the violated rule and of international law in general" (The United Nations, 1996, p. 14).

With the connection between policy compliance and adjudication supported, the next step is to examine the argument for why the environment requires special treatment in judicial systems.

Specialized Judicial Treatment for the Environment

With the understanding that the international court system can assist in the compliance of environmental policy through the enforcement of obligations, the next step is to understand the

needs of adjudicating environmental cases. Many of the arguments for an international environmental court claim that the complex and often technical nature of environmental cases requires specialized treatment, which the current system cannot provide. This argument is also used to justify creating optional protocols for the treatment of environmental cases in existing courts.

A primary goal for establishing specialized judicial treatment for the environment is to ensure that expertise in environmental matters is present. This is achieved by seeking judges and decision-makers who have the technical expertise to understand the complexities and principles of environmental law (Pring, George W; Pring, Catherine; Access Initiative, 2009). The inclusion of technical experts as third party participants allows for fuller exploration of the environment concerns pertaining to the case.

The development of specialized courts or protocols is a continuing trend at the national level, thus evidence of the growing political will to recognize the importance of properly handling environment issues. However, there has been some evidence that at the international level these specialized courts will not be used. Specifically, the International Court of Justice established a Chamber for Environmental Matters in 1993; the Chamber was disbanded in 2006. No cases were ever brought before the court, this may partially be due to nature of international disputes, rarely are they strictly related to one issue (Sands, 2008). This brings to question if an international court for the environment would be an ideal choice for settling disputes. Certainly the environmental expertise which would be present in the court could be essential to the acceptability of the venue however, it would be limited to only environmental specialization.

In this context, specialized treatment for environmental cases offers many benefits and can facilitate the peaceful resolution of environmental disputes. Concerns such as access, jurisdiction, scope, location, and costs, argued by proponents of the international environment court can be resolved by incorporating specialized environmental treatment in existing courts.

Having established the support for using adjudication for environmental policy enforcement and requiring specialized treatment for environmental cases, the problem of establishing that the current system is ineffective still exists. The arguments for a court for the environment have suggested problems in the current system, but they have not supported these statements. The solution of a new court identifies certain criteria or abilities that this new institution could include. However, there has been no evidence provided that the current courts in the system do not have these capabilities. To resolve this issue, the status of the existing system should be examined. The purpose of rest of this paper is to provide an analysis of the existing system by identifying elements which are essential to environmental adjudication.

Methodology

Analysis for this study is an evaluation matrix that examines characteristics of international courts and tribunals as they pertain to environmental needs. The range of international courts and tribunals has been placed in three broad categories: universal scope, regional human rights courts, and judicial bodies of regional economic integration/supranational organizations. The categorization for these bodies was established by the Project on International Courts and Tribunals (PICT), which "focuses primarily on the systemic issues associated with the sharp rise in the number of international courts and tribunals since the early 1990s and the parallel increase in their powers" (2012).

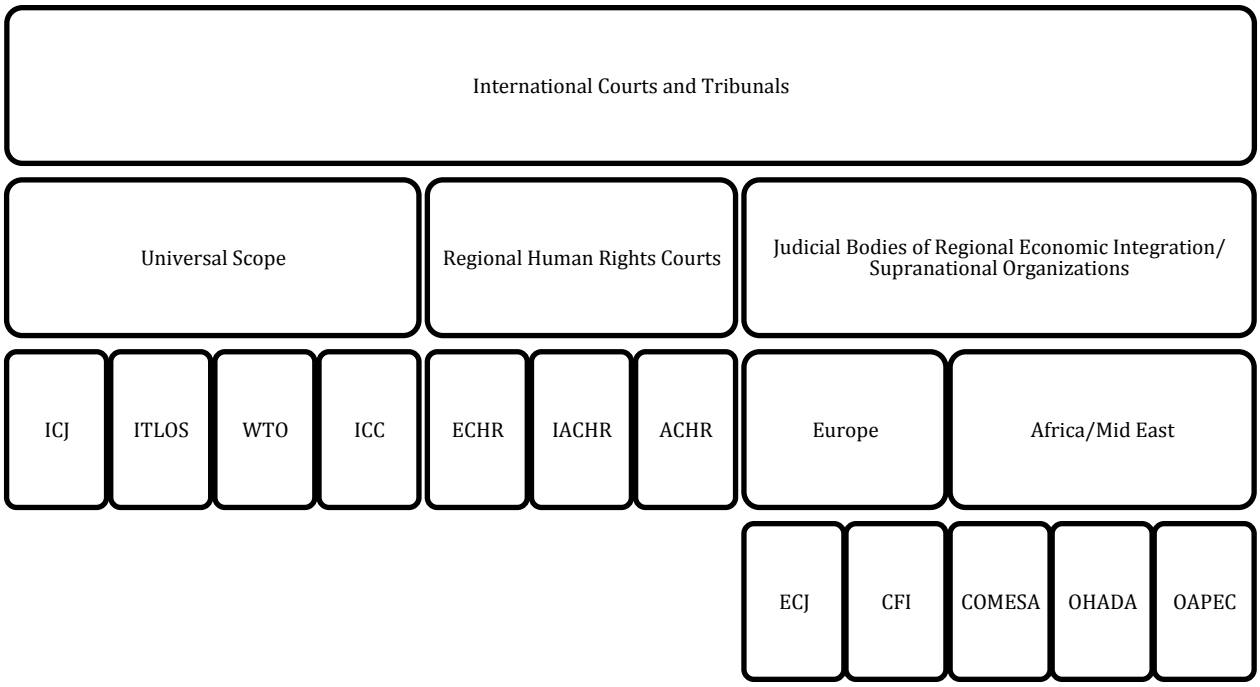

Figure 1. **Classification of International Courts and Tribunals**

The courts and tribunals that fall under these categories are assigned numerical ratings based on their characteristics as they apply to environmental cases. For the purposes of this study

only permanent courts and tribunals are evaluated. This restriction has excluded several international dispute settlement options which can be established on an ad hoc basis. This was done for a number of reasons, primarily because the attempt is to draw comparison of similar institutions to identify trends. An ad hoc tribunal does not fit the criteria for this study. Additionally, in the scope of the environment, expediency in the adjudication process is essential.

To gain insight into the current trends in international courts and tribunals, this study uses several criteria that are theoretically significant in environmental adjudication. Each of the identified criteria could have an impact on the decisions of the court and the overall outcome of the case. The characteristics used for evaluating individual courts were selected by analysis of current literature on adjudicating environmental disputes. A study of environment cases in national courts, "Greening Justice," is one of the foundations for these characteristics. The authors established twelve critical design elements which influence environmental adjudication and public access. This paper incorporates this structure but also includes criteria identified by the Project on International Courts and Tribunals and a review of literature on the adjudication of environmental disputes.

The study criteria are geographic scope, permanency, independent judges, binding outcomes, predetermined rules of procedure, standing, jurisdiction, sources of cases, amicus curiae, financial assistance fund, hearings, and interim measures. The following section is a brief description of each criterion.

The geographic scope of an international court is dependent on the given consent of states. This consent can be implicit due to membership in an international organization or treaty

where the court is the judicial organ. However, reservations and special clauses made by members may limit this consent. Other courts do not have defined territories; these courts operate where consent is given in a specific circumstance and is often limited to a defined territorial scope in the declaration of jurisdiction (Project on International Courts and Tribunals, 2012). In this study, the geographic scope could be identified as accepted or implied, limited or unlimited, and global or regional.

Using the PICT definition, a judicial body is classified as having independent judges "if the bench is composed (at least in its majority) by judges who have not been appointed ad hoc by the parties but have been chosen through an impartial mechanism before any given case" (Project on International Courts and Tribunals, 2012). For this criterion, courts were deemed either independent or not.

Binding outcome refers to the legal and enforceable status of decisions made in contentious cases. The courts examined in this study either have binding or non-binding status.

The predetermined rules of procedure are a set series of events which must occur as part of the judicial process such as an initial settlement conference, completion of any discovery, filing of motions, submission of stipulated facts and evidence; a date for trial (Shelton, Dinah; Kiss, Alexandre Charles; Weeramantry, C G; UNEP; UNEP. Environmental Law Branch, 2005). The courts considered could have either set rules or not. In some courts, the participating parties are able to modify these rules; this option was not measured.

Standing refers to the qualifications required of parties to bring an action or participate in a case. This criterion includes six types of standing: States, natural persons, legal persons

(including non-governmental organizations), international bodies or organizations, state courts, and the prosecutor of the court. Courts determine which parties have standing.

The jurisdiction criterion refers to the type of cases a court can hear. The category of jurisdiction divides into several types including: Contentious; Appellate; Advisory; and Preliminary. Contentious jurisdiction requires consent by the member states. This type of jurisdiction may be implicit or explicit depending on the rules of the court and the agreements made by participating states. Appellate jurisdiction refers to the judicial body's ability to hear appeals. These appeals are usually heard by a special chamber and are limited to point of law judgments. Advisory jurisdiction is when an interested party, which is not involved in adversarial proceedings, requests an international court decision. Advisory opinions are not legally binding and they provide guidance on laws or regulations to states. Preliminary jurisdiction allows international judiciaries to interpret and clarify law at the request of national courts. In this type of jurisdiction, commonly found in regional economic integration agreements, the ruling of the international court is legally binding at the national level (Project on International Courts and Tribunals, 2012). It is possible for courts to have only one type of jurisdiction, or all of them.

The source of cases refers to how cases are brought before a court. It can be in one of two manners, exogenous or endogenous. Exogenous cases are acted upon by the request of a party with standing. Endogenous cases are initiated from within the court itself.

Amicus curiae are an option in some courts. Amicus briefs can be submitted for consideration by the court regarding a case. These briefs are prepared by entities not party to the proceedings. The briefs can provide essential information that the parties participating have failed to include in arguments.

Some courts offer financial assistance through a fund for less financially capable parties to participate in cases. This assistance includes hiring legal aid, or providing technical support (Project on International Courts and Tribunals, 2012).

Hearings can be either public or closed in the international court system. In some cases the courts with public hearings are held “in camera” which limits the accessibility, usually due to the sensitive nature of the case. In closed cases only the participants and the judges are allow to attend.

Interim measures, in courts that allow, provide steps to discontinue activities that cause harm until a decision is made. This can occur either at the request of one of the parties or by the courts own initiative.

The classification system for the design criteria was taken from a similar list of criteria established by PICT. The PICT criteria are categorized (see fig. 2) as: Introductory Criteria, Core Criteria, Access, Management, and Legal and Procedural Aspects.

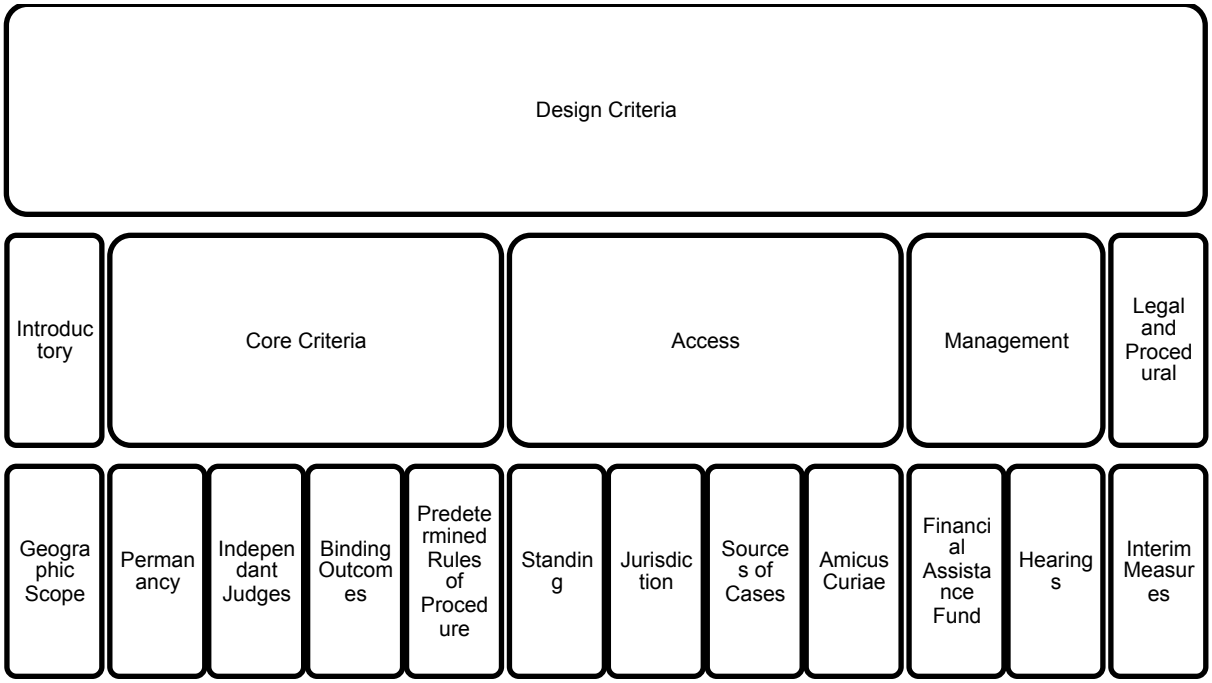

Figure 2. **Classification of Design Criteria**

Based on these criteria the individual courts receive scores. The courts and tribunals could theoretically achieve a total score of 25. This score would be possible if a court/tribunal had achieved full marks on all the desired characteristics. The lowest possible score on any of the criteria is 0. The purpose of this matrix is to compare the courts/tribunals on a theoretical scale; therefore score of 25 would be the theoretical ideal for a court that hears environmental cases.

The data used to form the analysis is available in the appendix. This data does not score based on the results of actual environmental cases heard by these courts/tribunals. The findings were used to examine trends within the international court system, as well as to highlight the gaps in the criteria that are considered essential to deciding environmental disputes. The trends and how they relate to environmental adjudication are discussed in the next section.

Study Findings

Environmental adjudication is one part of an environment management system that encourages policy compliance. The current management system is under scrutiny, there is growing belief the system needs significant reform. The study described above is meant to begin the analysis of the current state of the system. The findings from this study can provide insight into what possible design gaps are present. The information gathered in this study identifies several trends. The international courts and tribunals meet several of the design criteria universally; this shows conformity to certain design standards at the international level. This is especially true in the core criteria category. However, this study also shows variation in access, management, and legal and procedural criteria. Along with identifying trends, the study findings expand on the importance of each design criteria as it relates to the environment.

Introductory Criteria

Geographic scope. Environmental harm may occur in a relatively small geographic area but the effects could extend globally. The geographic scope of a court or tribunal can play a significant role in deciding which court is most appropriate for a given case. A court that has jurisdictional consent over a larger geographic area may be better suited to transboundary cases.

When considering geographic scope the WTO and ICC scored the highest. Both of these courts have geographic jurisdiction over states and territories that have elected to recognize the authority of the courts. In the case of the ICC the court has geographic jurisdiction over states that have ratified the Rome Statute as well as states that have not, if they accept the court's jurisdiction on an ad hoc basis. Furthermore, these courts are unlimited in geographic scope,

meaning that once jurisdiction has been established all territories governed by that state are included in the scope of the court. The WTO agreement does not have geographic scope defined therefore the scope of the court is implied and includes the full territory of the state. A few states have listed exceptions when signing the agreement. Finally, both of these courts are classified as global since their membership is not limited to one region

The regional human rights courts each received a score of one. No discernible trend was identified. The ECHR has implied jurisdiction, but its scope is limited since each state must declare its extended territories as falling under the agreement prior to the court having jurisdiction. The IACHR and the ACHR require the states to accept the jurisdiction of the court in addition to membership in larger organization. Once the jurisdiction of the court is accepted, all territories managed by the states are subject to the court.

The courts of the judicial bodies of regional economic integration/supranational organizations have mixed geographic scope. COMESA, OHADA, and OAPEC each scored two. These courts have implied acceptance of judicial jurisdiction and the scope of the court is unlimited, except by the regional nature of the court. The ECJ and CFI, each scoring 1, have implied jurisdiction under their membership agreements, however certain territories identified in the European Community treaty are excluded which limits the scope of the court.

It would be difficult to place any type of value judgment on the courts based on geographical scope alone. The nature of environmental cases means that no case is exactly alike, when considering the geographic areas involved. Having a selection of courts, which may have jurisdiction over the dispute, could have its benefits as well as drawbacks. However, in combination with other criteria, one particular court could be more advantageous.

Core Criteria

The courts included in the study meet the three criteria that make up the Core category universally. They are independent judges, binding outcomes, and established rules of procedure. Each of these criteria is found to exist in the courts. The only caveat is the WTO dispute settlement panels in which judicial seats are established by a nomination process and are chosen by member states. However, the appellate body of the WTO does meet the qualifications for independence.

Independent Judges. Ensuring independent judges in environmental adjudication relieves political pressure from appointing bodies, therefore promoting fair and unbiased decision-making. Courts insulated from the political will of a nation or a group of nations are more open to individuals and groups (Keohane, Moravcsik, & Slaughter, Legalized Dispute Resolution: Interstate and Transnational, 2011).

All of the courts in this study were found to have independent judges. However, the nature of the international court system presents a problem when considering what independence means. Since there is no oversight or unifying judicial theory behind the system, each court has constructed its own definition of judicial independence. Some courts have more restrictions on judges' behaviors and activities. Even when considering the most restrictive courts, these bodies are controlled by the states that constitute them, which in turn can place indirect pressures on judges.

Binding. Although international court decisions are considered to be legally binding, there is still a problem of enforcement. It could be assumed that accepting the court's jurisdiction would imply that parties would adhere to the courts decisions, but in most cases there is no

mechanism to ensure compliance. The importance of the national courts recognizing international customary law as domestic law, ties into recognizing the decisions made by international courts. Therefore, it is important to note although all of these courts have binding decisions in contentious cases, the decisions may not be enforced. In select courts, mechanisms to ensure compliance are present, violators may be tasked with developing compliance plans or showing proof that remediation has been paid (Shelton, Dinah; Kiss, Alexandre Charles; Weeramantry, C G; UNEP; UNEP. Environmental Law Branch, 2005). Since international law and the judiciary are relatively new, the task of ensuring compliance with decisions is developing.

Rules of procedure. The rules of procedure were a standard element of the design of the courts in this study. While each court may have individually designed procedure, the set structure is a universal trend. The goal of the rules of procedure is to provide "a just, speedy and inexpensive determination of every action" (Shelton, D., 2005, 50). Having established procedure is important in environmental cases because of the possibility individuals or groups without legal expertise maybe participating in the dispute. A clear set of rules and steps to the legal process provides transparency and improves access.

Access Criteria

Standing. Environmental conflicts arise between many actors and involve a wide array of stakeholders. While states are the primary actors in global environmental politics, there are many non-state actors who contribute to IEG discourse and establish legitimacy to the IEG regime. Inclusion of civil society in enforcement enhances compliance and further establishes

credibility (United Nations Environment Programme, 2006, p. 455). Empowering actors such as citizens, NGOs, and others by providing them with legal standing in the international sphere allows these participants to become enforcers of environmental law (United Nations Environment Programme, 2006, p. 455).

Intergovernmental organizations (IGOs) establish the global agenda and coordinate state interaction. NGOs influence the framing of environmental issues and help shape policy. Multinational corporations (MNCs) influence policy and their activities have direct environmental implications. Sub-national actors, such as cities, provinces, and states implement national policies to conform to environmental agreements. Multilateral financial institutions enable the execution of environmental programs and initiatives in nations. Regional and multilateral organizations participate in the regulation and management of transnational resources and environmental issues. Each of these actors participates in the IEG process in different aspects and each pursues it own goals, which leads to conflict and impedes policy effectiveness (Conca & Dabelko, 2010). Populations, which are vulnerable due to poverty, gender, age, minority status, or disability, are also important stakeholders in IEG reform and regime establishment. These populations are the most at risk from failures or violations of environmental law, and therefore, inclusion in protection mechanisms is needed in order to legitimize the IEG regime (Conca & Dabelko, 2010).

Public participation is encouraged throughout international agreements, such as the 1992 Rio Declaration on Environment and Development and Agenda 21. These agreements set precedence for inclusion of non-state actors at all levels of governance and decision-making. Section III of the Agenda 21 Plan of Action calls for the inclusion of “women, youth, indigenous and local

populations, non-governmental organizations, local authorities, workers, business and industry, scientists, and farmers. It calls for public participation in environmental impact assessment procedures and participation in decisions, particularly those that potentially affect the communities in which individuals and identified groups live and work" (Shelton, Dinah; Kiss, Alexandre Charles; Weeramantry, C G; UNEP; UNEP. Environmental Law Branch, 2005, p. 29).

When considering the standing criteria no prevailing trend is discernible. The groups with standing before the courts vary widely and when grouped by court classification the scores do not show consensus on design. Of the groups with standing states and international bodies/organizations have standing in the majority of the courts. The only court that does not give standing to states is the ICC, which only gives standing to the prosecutor and natural persons (who are the accused). International bodies/organizations have standing in all but the WTO and ICC. In the case of the WTO, states are the only group to have standing.

In the courts of the judicial bodies of regional economic integration/supranational organizations, natural and legal persons are given standing in the majority of the courts. The only exception is OAPEC, which does not allow natural persons to have standing. Of these court the ECJ, COMESA, and OHADA each gives standing to national courts as well.

NGOs are only given standing in two of the courts; ECHR and ACHR, both are classified as regional human rights courts.

Jurisdiction. There appears to be no universal trend for jurisdiction across the courts. When considering each of the types of jurisdiction individually, trends are more identifiable. In terms of contentious jurisdiction, the majority of the courts have implicit jurisdiction. Consent to this

type of jurisdiction must be given only in the ICJ, ITLOS, and IACHR. In the ACHR only interstate cases have implicit contentious jurisdiction, and access for other types of cases is decided on a case-by-case basis. One concern with non-implicit access to contentious jurisdiction is the delay in the judicial process. When a grievance is presented to the court, significant delays can occur when negotiating the terms of judicial jurisdiction on an ad hoc basis. States that are under the obligations of implicit jurisdiction must participate under the proceedings.

When considering appellate and advisory jurisdiction, there are no trends identified. Each court has its own rules and there is no consensus by court classification. The only notable court is OHADA, it operates as a court of cassation, hearing appeals which have originated from the national level. The majority of the courts do have advisory jurisdiction.

None of the courts in the global or regional human rights classification have preliminary or administrative jurisdiction. The ACHR may in the future have administrative jurisdiction but its rules have yet to be determined on this issue. The ECJ, CFI, and COMESA have both preliminary and administrative jurisdictions.

Sources of cases. Cases that stem from a party's request are exogenous; in the international court system this is the most prevalent method. The court itself initiates endogenous cases; in rare circumstances the Prosecutor of the court can investigate a case (Project on International Courts and Tribunals, 2012). All of the courts have exogenous sources of cases. In these courts, it is the standard for cases to be brought before the court by a state. In the ICJ, states submit cases for contentious jurisdiction while cases submitted by international organizations are advisory in nature. It is not clear at this time which courts allow other parties with standing to bring cases. The only court with endogenous sourcing is the ICC. The prosecutor of the ICC is

able to open an investigation, which can act as a source for a case. These investigations can be initiated by the UN Security Council or by a state party to the Rome Treaty.

Amicus curiae. In the case of the environment, often-complex scientific issues need to be considered. Arguments made by the parties may include conflicting evidence and it is the duty of the court to ensure full examination of all scientific evidence is both applicable and accurate (Shelton, Dinah; Kiss, Alexandre Charles; Weeramantry, C G; UNEP; UNEP. Environmental Law Branch, 2005, p. xxi). Allowing the submission of amicus briefs expands the role of private actors in the adjudication process. These briefs can provide important information that balances the influence of political will or corporate interests (Stephens, 2009).

Of the courts in the global classification, only the ICC has yet to determine if they will accept outside input on cases. The ICJ, ITLOS, and the WTO each have rules that allow submission of this information. However, in the case of ITLOS only intra-governmental organizations are permitted to participate in this manner. Both the ECHR and the IACHR accept amicus curiae submissions, as of yet the ACHR has not determined if it will. None of the courts of the judicial bodies of regional economic integration/supranational organizations currently supports the submission of amicus briefs.

Management

Financial assistance fund. Only four of the courts offer specific financial assistance. The ICJ, ECHR, ECJ, and CFI, each provides some funding supporting less endowed nations when participating in case. The WTO offers some technical or legal support to developing countries

through the WTO technical cooperation service. COMESA also provides legal assistance to aid in participation of a party.

Hearings. Only the WTO operates under closed hearings, only the participating states are given access. All of the other courts operated in a public hearing setting. Parties may request in some courts (ICJ, ITLOS, ICC, ECHR, ACHR, COMESA) to have the proceedings made private. This is often due to the nature of the case being heard, to protect one or more of the parties. In these circumstances, the court operates "in camera" and the proceedings may or may not be published.

Legal and Procedural

Interim measures. These measures are not always binding and often require the willing participation of the offending state to enact (Project on International Courts and Tribunals, 2012). These measures are intended to prevent harm "where there is a constitutional or legislative obligation to protect the environment." However, the party requesting these orders or the court itself must prove the action prevents irreparable harm, is taken in the absence of other remedies, considers threats to public health, and does not have a considerable financial effect on the defendant (Shelton, Dinah; Kiss, Alexandre Charles; Weeramantry, C G; UNEP; UNEP. Environmental Law Branch, 2005, p. 54).

There is no discernible trend when considering interim measures. A majority of the courts considered do use these orders, however the extent to which they are used and if they are binding vary. The WTO does not provide for the usage of interim measures, however, in extreme cases there is an accelerated hearing process to limit potential harm. OHADA does not use these

measures and the ACHR has yet to determine if they will. Of the courts of the judicial bodies of regional economic integration/supranational organizations all of the courts except OHADA, have accepted the use of interim measures. In the ECJ, CFI, and COMESA the measures are binding, OAPEC has yet to determine if these measures are binding.

The ICJ, ITLOS, ICC, ECHR, and IACHR each utilize interim measures, however the ECHR orders are non-binding and the ICJ has not clarified the whether their mandate allows of binding judicial orders.

Conclusions and Recommendations

International environmental governance, environment management, and environmental adjudication are inter-related fields which are rapidly growing and expanding. As policy makers and academics seek new methods for preventing environmental harm, the system becomes increasingly complex. The international system of courts and tribunals is an essential element of policy enforcement. Improving the handling of environmental adjudication in international courts or tribunals should be a goal for the international community. While proposals for reforming the current courts or creating a specialized court for the environment are striving to achieve this goal, they neglect the necessary background research on the status of the system. The research done for this paper determined the courts in this study have the capability to hear environmental cases. This is based on the presence of the selected design criteria, which could have a significant influence on the handling of environmental cases. Although not all of the criteria were present in all of the courts, none of the courts was so lacking as to be considered inadequate.

The design criteria represent only a selection of elements that are involved in the process of adjudicating environmental disputes. The size and scope of this study was limited and therefore is only a brief introduction to the issues at hand. Each of the categories, introductory, core, access, management, and legal and procedural could be broken into individual studies of their own to provide more in depth information about the structure of the courts in the international system. Furthermore, the nature of this study was purely theoretical and cannot represent how well the courts utilize each of the criteria.

Introducing a new court into the international judiciary could prove beneficial for environmental adjudication; it may also do more harm than good. Without a real understanding of how the international system of courts and tribunals operate, and how environmental cases are handled, any new court or reforms to the system may make the same mistakes as currently exist. If the international system is determined to meet the needs of environmental adjudication and policy enforcement, the addition of a new court may be superfluous.

It would be prudent to continue evaluating the international system in terms of environmental adjudication. Further study into the realities of the system could prove useful for determining how to refine and improve environmental governance and management. A court-by-court analysis of environmental cases would be enlightening. Determining what design criteria are used could provide insights into the needs of the parties involved in environmental disputes. Examination of what kinds of cases, purely environmental or complex multi-subject, come before the court would reveal if a new environmental court were needed. Gathering information on who participates in environmental cases as well as collecting information about from where these cases originate would inform any developments in environmental adjudication. Essentially, the problem of environmental adjudication and policy enforcement requires a complete audit of the international judiciary before any reforms of the system can take place.

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Appendix A. Courts by Design Criteria: Universal Scope

Design Criteria		Court or Tribunal			
		ICJ	**ITLOS**	**WTO**	**ICC**
Introductory	**Geographic Scope**	1	1	3*	4
Core	**Independent Judges**	1	1	1*	1
	Binding Outcome	1	1	1	1
	Predetermined Rules of Procedure	1	1	1	1
Access	**Standing**	2	4	1	2*
	Jurisdiction	2	2	3	3
	Sources of Cases	1	1	1	2
	Amicus Curiae	1	1	1	TBD
Management	**Financial Assistance Fund**	1	0	0	TBD
	Hearings	1	1	0	1
Legal and Procedural	**Interim Measures**	1*	2	0	2
Totals (25)		14*	16	12*	17*

***Data is incomplete or has additional qualifications**

Appendix B. Courts by Design Criteria: Regional Human Rights Courts

Design Criteria		Courts or Tribunals		
		ECHR	**IACHR**	**ACHR**
Introductory	**Geographic Scope**	1*	1	1
Core	**Independent Judges**	1	1	1
	Binding Outcome	1	1	1
	Predetermined Rules of Procedure	1	1	1
Access	**Standing**	5	2	4
	Jurisdiction	3	2	3*
	Sources of Cases	1	1	1
	Amicus Curiae	1	1	TBD
Management	**Financial Assistance Fund**	1	0	TBD
	Hearings	1	1	1
Legal and Procedural	**Interim Measures**	1	1	TBD
Totals (25)		18*	13	14*

***Data is incomplete or has additional qualifications**

Appendix C. Courts by Design Criteria: Judicial Bodies of Regional Economic Integration/Supranational Organizations

		Courts or Tribunals				
		Europe			Africa/Middle East	
Design Criteria		ECJ	CFI	COMESA	OHADA	OAPEC
Introductory	Geographic Scope	1	1	2	2	2
Core	Independent Judges	1	1	1	1	1
	Binding Outcome	1	1	1	1	1
	Predetermined Rules of Procedure	1	1	1	1	1
Access	Standing	5	4	5	5	3
	Jurisdiction	6	4	5	4*	3*
	Sources of Cases	1	1	1	1	1
	Amicus Curiae	0	0	0	0	0
Management	Financial Assistance Fund	1	1	0	0	0
	Hearings	1	1	1	1	1
Legal and Procedural	Interim Measures	2	2	2	0	1
Totals (25)		21	18	20	17*	15*

*** Data is incomplete or has additional qualifications**