Florida's Scarlet Letter Repealed: A Retrospective Analysis of the Constitutionality of the Florida Adoption Notification Provision and a Commentary on the Future of the Right to Privacy

Nicholas Ciappetta

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Recommended Citation


Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol32/iss2/4
NOTE

THE INTERNATIONAL ENVIRONMENTAL COURT: ITS BROAD JURISDICTION AS A POSSIBLE FATAL FLAW

I. INTRODUCTION

As evidence mounts that the planet is increasingly experiencing serious environmental consequences caused by a history of human activity, a call has been made to introduce a new international judicial body to the existing international courts and tribunals: an International Environmental Court ("IEC"). Advocates of the new court cite uncertain environmental jurisdiction in existing courts and tribunals to address serious international environmental harm, and a deficiency in the environmental expertise of judges in the existing courts. Under most proposals, such a court would possess powers akin to that which the World Trade Organization ("WTO") possesses over international trade.

The purpose of this Note is twofold: (1) to evaluate the specific problem of the jurisdiction of an IEC; and (2) to analyze the practice of
international forum shopping and its particular effect on the operation of an IEC.

The current trend in international decisionmaking is toward specialized subject matter courts and some significant relinquishment of sovereignty of states subject to jurisdiction of those specialized courts. To address serious international environmental harms, the introduction of an IEC may prove more difficult than the current courts and tribunals. International environmental law is a particularly broad subject matter that affects many fields, such as labor, trade, energy, sovereignty, international fisheries law, health, international treaty law, and human rights. While existing courts and tribunals may not deal effectively with serious international environmental problems, the establishment of this new court arguably will lead to inconsistent judgments among the many courts able to adjudicate the same environmental problems, as well as a fragmentation of international environmental law, and exacerbate the problem of forum shopping.

This Note argues that the IEC may function best, if at all, as an institution limited exclusively to filling existing gaps in international environmental dispute adjudications of other international courts and tribunals. This limited scope of jurisdiction for an IEC also would reduce the serious problem of forum shopping, and advance the goals of the proponents for an establishment of an IEC.

Part II of this Note discusses the proposed structures of an IEC. Part III analyzes proposals for the IEC while considering current global environmental problems and problems in international courts and tribunals, and suggests that limited jurisdiction of an IEC will be necessary to combat the problem of forum shopping. If the world is to act responsibly in creating a new international court for the environment, these problems need to be solved before the creation of such a court.

4. See Rinceau, supra note 1, at 175-76 (commenting that “[t]he recognition of such a jurisdiction would mean a further limitation on state sovereignty. But the task of environmental protection is of such tremendous importance that it requires a partial sacrifice of sovereignty”).

5. See, e.g., Jeffrey L. Dunoff, Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes, 15 Mich. J. Int’l L. 1043, 1044 (1993); Hey, supra note 2, at 6; Philippe Sands, International Environmental Litigation and Its Future, 32 U. Rich. L. Rev. 1619, 1638 (1999) (arguing that an inherent problem with the creation of such a court is that its jurisdiction would touch other substantive areas of law as well, such as “trade agreements in the WTO context, human rights norms . . . and issues of general, international law”). In fact, it has been proposed that “no two states will agree that a given dispute is essentially ‘environmental.’” Id.
II. PROPOSALS FOR AN INTERNATIONAL ENVIRONMENTAL COURT AND POTENTIAL STRUCTURES

In August 2002, the United Nations Environment Programme (UNEP) hosted the three-day World Summit on Sustainable Development in Johannesburg with the world’s top judges. It tackled enforcement of international environmental laws, and stated that “[t]he fragile state of the global environment requires the judiciary, as the primary guardian of the rule of law, to boldly and fearlessly implement and enforce international and national laws.” Environmental crimes such as illegal timber trade, endangered species trade, and the handling of hazardous wastes were discussed. Suggestions ranging from training programs for domestic and international judges in environmental science and policy to the establishment of a new international court for the environment were discussed as solutions to the difficult problem of coordinating and enforcing the more than five hundred environmental agreements and agencies.

The Executive Director of UNEP, Klaus Toepfer, emphasized the importance of enforcing environmental regulations. Toepfer stated that “[t]his is an issue affecting billions of people who are effectively being denied their rights and one of not only national but regional and global concern.” To address this problem, arguments were made that a stronger judiciary with “the teeth to implement environmental laws” is necessary.

This conference of judges in August 2002 was not the first discussion of an IEC. The idea was perhaps first proposed in 1988, when

---

8. See id.; see also World Judges Discuss, supra note 7.
10. See id.; see also World Judges Discuss, supra note 7.
11. Top Judges, supra note 6 (quoting UNEP Executive Director Klaus Toepfer).
12. World Judges Discuss, supra note 7.

---
the suggestion was evaluated by a Committee in Rome.\textsuperscript{13} Proposals for a "new institutional authority" within the United Nations system were advanced as early as 1989 by the Hague Declaration on the Environment.\textsuperscript{14} It was proposed that this body would specifically address the problem of global warming, and that it would have decision making and enforcement powers.\textsuperscript{15}

Also in 1989, a conference entitled \textit{Congress on a More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations} took place in Rome.\textsuperscript{16} This conference called for a convention to establish a right to a healthy environment, and suggested that a permanent world commission on the environment be established to examine violations against affecting this right.\textsuperscript{17} These violations would then be judged before an international court for the environment.\textsuperscript{18} Problems cited to be remedied by this world commission included exploitation of the Antarctic, increasing world population, and the greenhouse effect.\textsuperscript{19}

More debate on this subject was heard in 1991 at a conference in Florence, when the basic rules of procedure of this court were discussed.\textsuperscript{20} In 1999, proposals for an IEC were rejected by UNEP’s then executive director Shaqfat Kakakhel.\textsuperscript{21} In evaluating the proposal, Kakakhel specifically rejected an IEC that would be able to mandate moral sanctions against governments that do not enforce compliance with environmental laws, as well as against corporations that violate these laws.\textsuperscript{22} Current non-governmental organizations, such as the International Court of the Environment Foundation headed by Judge

\begin{itemize}
  \item See International Court of the Environment Foundation, \textit{supra} note 1. The ICEF notes that this Committee did not yet know whether the International Court for the Environment would use moral sanctions, or whether it would be a permanent institution. See \textit{id}.
  \item See \textit{id}.
  \item See Dehan, \textit{supra} note 1, at 51.
  \item See \textit{id}. at 51-52.
  \item See \textit{id}. at 52.
  \item See \textit{id}.
  \item See International Court of the Environment Foundation, \textit{supra} note 1.
  \item See \textit{id}.
\end{itemize}
Amedeo Postiglione, support the adoption of an International Environment Court.23

The proponents of an IEC have varying ideas of how such a court should be organized and use various models when explaining how the court could be structured. The Conference at the National Academy of Lincei in Rome produced one such model and proposal, which is discussed in the next section of this Note. Alternatively, the United Nations Compensation Commission has also been suggested as a model, and is discussed in the second following section. Other sources use general guidelines to develop what they believe is necessary in an international court for the environment, which are discussed in the third section.

A. Conference at the National Academy of Lincei in Rome Leading to the 1999 Draft Treaty

One of the earliest and most detailed proposals for an IEC was created at the 1989 conference at the National Academy of Lincei in Rome, with experts from thirty countries in attendance.24 The court proposed by this conference would be governed by a “convention on the environment and human rights establishing an individual right to the environment,”25 or by proposed declarations similar to the United Nations Draft Principles on Human Rights and the Environment.26 The court would have jurisdiction for disputes arising under these governing conventions or declarations.27

This proposal led to a Draft Convention, presented in 1992, suggesting that “States would be ‘legally responsible to the entire International Community for acts that cause substantial damage to the environment in their own territory, in that of other States or in areas beyond the limits of national jurisdiction and shall adopt all measures to prevent such damage.’”28 Individual rights under this Draft Treaty include:

(i) the fundamental right to the environment; (ii) the right of access to environmental information, along with the duty to provide such information; (iii) the right to participate in procedures involving the

23. See International Court of the Environment Foundation, supra note 1 (stating the objectives and initiatives of this NGO).
24. See Kalas, supra note 14, at 232.
25. Id.
26. See id.
27. See id.
28. Id. at 233 (quoting the Draft Convention).
environment; and (iv) the right of the private sector . . . to take legal action in order to prevent activities that are harmful to the environment and to seek compensation for any environmental damage.29

Duties of states in the Draft Treaty include: (i) to treat natural resources with care, as regards waste reduction and consumption; (ii) to be “held responsible for severe environmental damage—even within their own boundaries”; (iii) “to prohibit all activities that may cause irreversible damage to ecosystems”; (iv) to “prevent military action that procures irreversible environmental damage”; and (v) to “adopt environmental standards that have been recommended at an international level.”30

This Draft Convention was then made into a “Draft Treaty for the Establishment of an International Court for the Environment (Draft Treaty)” in 1999.31 In 1992, drafters of the Convention separated this proposal for an International Court for the Environment from the aspects of the Convention relating to an individual’s right to the environment, and the establishment of an international agency for the environment, perhaps knowing that it would be unlikely that many states would ratify such a “broad-based” convention.32 The proposed court would be able to serve such functions as:

(i) adjudicating significant environmental disputes involving the responsibility of members of the international community; (ii) adjudicating disputes between private and public parties with an appreciable magnitude . . . ; (iii) ordering emergency, injunctive and preventative measures as necessary; (iv) mediating and arbitrating environmental disputes; and (v) instituting investigations, when necessary, to address environmental problems of international significance.33

The 1999 Draft Treaty for the IEC set forth a proposed structure as regards the composition, the functions, the standing, the jurisdiction, the applicable law, and the financing of this proposed court.34 It is suggested that the International Court for the Environment be either an independent entity, an affiliate of the United Nations, or an adjunct to another international adjudicatory body, like the Permanent Court of Arbitration.35 The Secretary General of the UN would compose a list of

29. Id. at 234.
30. Id. at 233-34.
31. See id. at 234 n.183.
32. See id. at 234.
33. Id. at 236.
34. See id. at 235-37.
35. See id. at 235.
candidates, from which the UN would choose fifteen to serve, for a period of seven years, as judges for the International Court for the Environment. Judges would be eligible for re-election. Much like the International Criminal Court, the International Court for the Environment would be complementary to national judicial systems. The Court would be available to resolve international environmental disputes by the processes of mediation, arbitration, and judicial decision.

B. United Nations Compensation Commission

The United Nations Compensation Commission (UNCC) is another potential model for an IEC. This organization rules on “claims [for damages] arising from the 1990-91 Persian Gulf conflict.” The advocates of this model admit that such a court would have a far broader scope of jurisdiction than the UNCC. Just as the UNCC’s laws were defined by a working group, it would be necessary for an IEC to identify its own sources of law, taking into account the environmental language contained in a working group’s report. The IEC would also purportedly reflect the liberal approach of the UNCC in evaluating claims, using “equity and justice’ rather than strict requirements of proof” to determine disputes.

Using the model of the UNCC, the proposed IEC could classify disputes based on types of claims and parties to the dispute. Similarly to the UNCC, the environmental court could use a number of administrative panels among which to divide its responsibilities. This “assures that the specialized groups will be appropriately qualified to carry out their roles.” The Working Group report may prove useful to the proposed court for guidance in developing categories of damages;

36. See id.
37. See id. at 235-36.
38. See id.
39. See id.
41. See Kalas, *supra* note 14, at 236. While the UNCC’s jurisdiction is limited to claims for damages arising out of the Persian Gulf Conflict, the IEC would presumably have jurisdiction over environmental crimes as well as any civil disputes relating to transnational and international disputes. See Juni, *supra* note 40, at 53.
42. See Juni, *supra* note 40, at 61.
43. See id. at 68 (citation omitted).
44. See id. at 59.
45. See id. at 60-61.
46. Id. at 61.
these categories would likely assign damages to restore the environment, replace resources, or compensate for some permanent losses.\footnote{7}

The IEC could also use the UNCC’s method of calculating damages, using use and non-use values.\footnote{8} Market price, appraisal value, and hedonic pricing are all useful in determining use value.\footnote{9} Non-use value would be more problematic to calculate, using contingent valuation surveys.\footnote{0} As for collecting claims, a bond system will ensure that, at a minimum, some funds will be accessible to injured plaintiffs.\footnote{1} Funding and enforcement mechanisms are issues to be considered using this model.\footnote{2}

C. Miscellaneous Proposals

A range of other proposals for an international court for the environment exist in varying forms. Although these additional proposals may suggest ideas similar to those expressed previously in this Note, they lack strategies for implementing their goals. One such plan for an IEC agrees with the Draft Treaty for the Establishment of an International Court for the Environment, in that there needs to exist a “clear mission statement on the fundamental need for an IEC to protect and preserve certain inalienable human rights, to protect the environment itself, and to enrich and expand customary environmental law.”\footnote{3}

These other proposals for an IEC call for such things as broad jurisdiction, the power of the court to develop its own body of international law, and the ability to expand international law through its application.\footnote{4} The court’s jurisdiction could be both voluntary and compulsory, and the court could function as inquisitor and fact finder,

\footnote{47. See id. at 66-67.}
\footnote{48. See id. at 69-72. “The use value of an environmental or natural resource ‘is the value it has for actual physical use by individuals.’” Id. at 70 (quoting Christine Cartwright, Note, Natural Resource Damage Assessment: The Exxon Valdez Oil Spill and Its Implications, 17 RUTGERS COMPUTER & TECH. L.J. 451, 472 (1991)). Non-use value is a different concept. It is the existence value of a natural resource to the public of the continuing existence of that resource. The value continues to exist even if the resource is not used. See id. at 71.}
\footnote{49. See id.}
\footnote{50. See id. at 72. A poll is taken of the population to discover how much the majority would pay for the natural resource to continue to exist. See id. at 71-72. This is problematic because respondents to such a poll tend to overestimate the value, by failing to balance the assigned value against social and public services. See id. at 72.}
\footnote{51. See id. at 73.}
\footnote{52. See id.}
\footnote{53. Conference on International Environmental Dispute Resolutions, supra note 10, at 330.}
\footnote{54. See id.}
mediator, conciliator, and arbitrator. Remedies ranging from emergency and preventative injunctions to the issuance of public reports could be available. Other remedies include the ability to economically sanction a losing party using a reduction in access to investment assistance, or a reduction in eligibility for governmental contracts.

Standing is also a major concern for most proponents of an IEC, and most would allow actors ranging from states, NGOs, corporations, and individuals to have standing to appear before the court. A screening process would be necessary for states to be assured that frivolous claims would be dismissed.

Some commentators recommend treating certain war crimes as environmental crimes, such as dumping oil into the Persian Gulf to contaminate the Kuwait water supply. An international tribunal able to handle these crimes would find jurisdiction in the “transboundary nature of environmental violence, together with the pernicious effects on the global commons.” This international tribunal should also have a complementary relationship with national courts.

One scheme recommends that such a court be created under U.N. auspices, calling it the “Universal Court of Environment.” This plan endorses the creation of three chambers within the Universal Court of Environment, each representing the “three media”: air, water, and soil. Seven judges would sit on each chamber, each representing a continent of the world. States, non-governmental organizations, corporations, and international organizations could each be represented in cases going before the Universal Court of the Environment. Any of these parties claiming “severe environmental harm” could bring suit before the Universal Court of the Environment. Goals of this court might include halting environmental damage, ending the extinction of biodiversity, and

See id.
See id. at 331.
See id.
See id. at 330.
See id.
Id. at 144.
See id.
See Rinceanu, supra note 1, at 175.
See id.
See id.
See id.
Id.
establishing “a medial, vital, causal, and integrative environmental protection mechanism.”69

This proposal recommends that alongside the creation of the Universal Court of Environment, an environmental expert group also be created.70 This group would advise states and NGOs before they go to the Universal Court of Environment.71 However, this proposal also recommends that the states would each have discretionary authority to enforce judgments made by this new court on a national level.72 This would likely produce the same enforcement problems that treaties encounter.73

III. ANALYSIS OF THE PROPOSALS FOR AN INTERNATIONAL ENVIRONMENTAL COURT

This section seeks to analyze the proposals for an IEC, taking into consideration the mounting global environmental crises facing the world today, as well as the existing problems in international courts and tribunals noted by advocates of an IEC. Lastly, it suggests that overlapping international jurisdiction creates a severe forum shopping problem that can be remedied by ensuring that the new international court would only be created as a court of limited jurisdiction to fill any existing gaps.

A. The Global Environment Is Under Increasing Stress Due to Mankind’s Activities

The international environmental community correctly observes that immediate steps need to be taken to protect the planet against environmental harms. Global warming is at the forefront of the crisis as one of the most serious threats to the environment today, and is affecting both plant and animal life globally.74 Ozone depletion persists.75

69. See id.
70. See id.
71. See id.
72. See id.
73. See infra notes 99-109 and accompanying text.
74. See Evidence Mounts, supra note 3, at 6.

It is estimated that by the end of the next century the rise of greenhouse gases in the atmosphere could cause warming in the range of two to five degrees Celsius. A warmer climate would, in turn, cause a rising sea level that would lead to inundation of coastal lands and islands, flooding forests and wetlands, and causing the extinction of species. Rinceau, supra note 1, at 147 n.2.
Biodiversity continues to decrease as numerous species of plants and animals are threatened with extinction by human exploitation and industrial activity.\textsuperscript{76} Acid rain, deforestation,\textsuperscript{77} and water resource pollution pose serious threats.\textsuperscript{78} In fact, "[t]he earth more and more is thought of as a single, interconnected body under stress, in a weakened condition, and with a limited ability to sustain injury."\textsuperscript{79}

\textsuperscript{75} See Brendan McWilliams, Antarctic Ozone Hole is Smaller than Usual, IRISH TIMES, Nov. 6, 2002, at P32 (noting that although the ozone hole has decreased in 2002, ozone depletion still exists).

\textsuperscript{76} See, e.g., Matthew Mok, A Global Experience with Agri-Biotech, NEW STRAITS TIMES, Nov. 6, 2002, at 17, available at 2002 WL 102301213 (defining the fundamental "threat to biodiversity" as the "destruction of native habitat, primarily caused by the expansion of human populations and human activities").

\textsuperscript{77} See, e.g., Deforestation Is Now Major Global Problem, SAN ANTONIO EXPRESS-NEWS, Aug. 26, 2002, at 4B (suggesting that "[i]f deforestation continues at its current pace, the entire planet will pay dearly in terms of soil erosion, drought and loss of species").

\textsuperscript{78} See Dehan, supra note 1, at 57. In the United States, the Adirondacks are particularly affected by acid rain, which has already killed "more than 500 lakes and ponds...while killing off high-elevation forests at an alarming rate." Ken Moran, 'Tis the Season to Join Fight Against Acid Rain, N. Y. POST, Dec. 1, 2002, at 73.

\textsuperscript{79} James E. Hickey, Jr., The Globalization of Domestic Environmental Law, 14 ENVTL. L. SEC. J., 15 (1994). It is accepted that the planet is warming, though there is controversy as to how much it will continue to warm. See id. Scientists believe that natural variations in global temperatures, which have been recorded for 150 years and gathered from reading tree rings and ocean coral for one thousand years, cannot explain the huge rise in temperature the globe has experienced over the past fifty years. See Bruce Lieberman, Global Warming Problems 'Enormous,' Scientists Warn, SAN DIEGO UNION-TRIB., Feb. 17, 2003 at A3. It is projected that global climate temperatures could increase by four to eight degrees Fahrenheit over the next one hundred years, with the global poles increasing by sixteen to twenty degrees during the winter. See id. The global warming phenomenon is caused by the emission of greenhouse gases such as carbon dioxide into the atmosphere. Greenhouse gases are gases that become trapped in the Earth's atmosphere, causing Earth to retain heat, and thus causing a warming of the planet. See Paul Recer, Study Shows Global Warming May Hurt, Not Help, Plants, STAR LEDGER, Dec. 6, 2002, at 43. Carbon dioxide is particularly serious, as each carbon molecule stays in the atmosphere for ninety to one hundred years. The next one hundred years are supposed to see a tripling of carbon dioxide emissions. See Lieberman, supra. An increase in average global temperature of this magnitude could have serious environmental consequences. See Recer, supra. Changing temperature can cause a significant change in the weather, including such phenomena as intense rainfall, severe drought, floods, hurricanes, and cyclones. See Michael Meacher, End of the World Nigh—It's Official, GUARDIAN, Feb. 14, 2003, at http://www.guardian.co.uk/print/0,3858,4605494-103677,00.html. These weather changes could bring about serious consequences. For example, melting sea ice could cause a rise in sea level of up to three feet, submerging large portions of such countries as Bangladesh, Egypt, and China. See id. Warming temperatures could cause a worldwide rise in infectious diseases, including malaria and cholera, brought about by a rise in the tick and fly population. Biodiversity is also deteriorating as major portions of the coral reefs die off. See Lieberman, supra. Species around the world will be forced to reacclimatize as their habitats change. See Press Release, Voice of America, Camille Pamesan/Global Warming, Jan. 2, 2003, available at 2003 WL 2063204. One million species could become extinct because they cannot survive in changing climates. See Vanessa Houlder, Over 1M Species 'Face Extinction,' FIN. TIMES, Jan. 8, 2004, at 7.
This is just the beginning of a long list of global environmental problems that are in dire need of solutions. International environmental law is still in its early stages of growth at a time when nations, such as the United States, are reluctant to trade sovereignty for better development of international law.\(^8\) While these global environmental problems are increasing, the body of international environmental law has grown in response to domestic law becoming more “internationalized.”\(^8\) This growth of international environmental law, coupled with increasing global environmental stress, shows that the introduction of an IEC to the global adjudicatory scene is justified, and possibly necessary.

Advocates of the IEC assert that the many difficulties that plague existing international courts and tribunals can be solved, or, at a minimum, ameliorated, by creating a new international judicial body.\(^8\) They cite a growing recognition of the interconnectedness of sovereign nations in the environmental community as exhibiting a willingness to submit to an IEC.\(^8\) For many years, states have recognized the economic interdependence among nations. However, ecological interdependence is just beginning to emerge,\(^8\) perhaps making it more likely that an international court of this nature could be adopted.

Other benefits an IEC would provide to the international community include: accessibility for a variety of actors; the formation of a consistent body of international environmental law; faster resolutions of problems and disputes; lower costs of litigating international environmental disputes; and better enforcement of environmental treaties.\(^8\) This court may enable more plaintiffs to bring suit, such as non-state entities currently barred from being a party at the International Court of Justice (“ICJ”),\(^8\) resulting in the encouragement of global “environmentally sound practices.”\(^8\)

To protect and preserve the world environment, international cooperation is undoubtedly needed.\(^8\) The proponents proclaim that an international court for the environment needs to be created because

\(^{80.}\) See Three-Minute Summary, GLOBE & MAIL (Toronto), July 1, 2002, at A2 (discussing the United States’ reluctance to join the International Criminal Court).

\(^{81.}\) See Hickey, supra note 79, at 16.

\(^{82.}\) See, e.g., Dehan, supra note 1, at 31; Postiglione, supra note 1, at 323; Rinceanu, supra note 1, at 175; International Court of the Environment Foundation, supra note 1.

\(^{83.}\) See Esty, supra note 10.

\(^{84.}\) See id.

\(^{85.}\) See Kalas, supra note 14, at 229-30.

\(^{86.}\) See id. at 230.

\(^{87.}\) Id.

\(^{88.}\) See Dehan, supra note 1, at 31.
existing international courts and tribunals are not adequately prepared to deal with valid environmental harms. Advocates of such a court cite the “need for a single international regime that can coordinate uniformity among [domestic and international] environmental laws, provide access to environmental information from a global perspective, and provide a forum for non-State actors as well as State entities.”

Problems with existing courts and tribunals include “lack of resources, the difficulties of turning international treaties into national laws, and lack of awareness.” These problems are most notably acute in developing nations. A new world environment organization would also alleviate shortcomings such as “deficiencies in the coordination of distinct policy arenas, deficiencies in the process of capacity-building in developing countries, and deficiencies in the implementation and further development of international environmental standards.”

Advocates of this new court believe several issues in current international environmental law will be solved by creating an IEC. These include: (1) deficiencies in judicial environmental expertise, awareness, and resources; (2) issues of efficiency; (3) an absence of clearly defined precedent in international environmental law; (4) problems with accessibility for some entities in current courts and tribunals; and (5) a lack of enforcement and jurisdiction.

1. Deficiencies in Environmental Expertise, Awareness, and Resources

It is asserted that existing tribunals are not adequately perceptive of international environmental law to make decisions sensitive to global environmental needs. A certain level of expertise of international environmental law is required among judges and arbitrators to be able to make environmentally satisfying decisions. Competing scientific claims necessitate an international tribunal or court to decide the merits
of each differing scientific argument, an exercise for which they may or may not be adequately prepared. The need for expertise was testified to at the World Summit on Sustainable Development, where it was proposed that training programs for judges in environmental science and policy were needed. Judicial bodies, such as the WTO, can be “weighted far too much in favor of trade and investment, and not enough in the direction of environmental protection.”

The international Congress on a More Efficient International Law on the Environment and Setting Up an International Court for the Environment within the United Nations determined that the United Nations is not adequately equipped to protect the environment. Deficiencies have also been cited in national courts when they are faced with resolving international environmental issues. For example, national courts may contain unique procedural problems that are not conducive to the resolution of a complicated international environmental issue.

Critics of the current international courts and tribunals concerned with environmental issues may also cite that a single, comprehensive global environmental policy does not exist, and that a global organization will be able to solve this.

2. Efficiency Issues

Efficiency is another concern among proponents of an environmental court on the international scale. In fact, “[t]he view is commonly voiced that the existing international organizations are too cumbersome, that they need to become leaner and to have more efficient procedures.” Supporters of an international court for the environment also express that the existing courts and tribunals decide cases much too slowly.

Some might say that environmental problems could be solved in a state’s own national courts; however, this has also been a proven difficulty for environmental harms on an international scale. For

96. See Sands, supra note 5, at 1638.
97. See World Judges Discuss, supra note 7.
98. Murphy, supra note 94, at 343.
99. See Postiglione, supra note 1, at 321.
100. See Murphy, supra note 94, at 347.
101. See id.
102. See Biermann & Simonis, supra note 10, at 2.
103. Id.
104. See Murphy, supra note 94, at 346.
example, transnational litigation in national courts can experience difficulties with obtaining jurisdiction over a foreign defendant, there can be significant costs of litigating abroad, and enforcement of foreign judgments may also prove difficult. For example, transnational environmental claims in a national court can, therefore, be shown to be inefficient.

Advocates of the international court for the environment note that treaties are an inefficient way to solve pressing environmental problems. For example, the Montreal Protocol was developed to combat the effects on the ozone of damaging CFCs and other chemicals. The Montreal Protocol was the result of twenty years of debate about whether ozone depletion really was taking place. During those twenty years, extensive damage was done to the layer of the ozone which was the subject of the Protocol’s protective measures. If there had been an IEC available, it is likely that a decision would have been made long before twenty years had passed to combat the effects of excessive CFC use, and thus much damage could have been avoided. In this regard, treaties are an inefficient way of dealing with pressing environmental problems.

3. Where to Find Clearly Defined International Environmental Law

One of the many difficulties facing existing international courts and tribunals is the struggle to determine which law will apply, and how to apply it. The existing international adjudicatory system is hindered by an underdeveloped body of international environmental law. “[C]ustomary international environmental law is in an embryonic state of development, and although treaties are numerous, they provide only islands of rules in a sea of vague general principles and custom.”

105. See id. at 342.
106. See, e.g., Dehan, supra note 1, at 45-46.
108. See id.
109. See id.
110. "[A]n obligation to protect the environment exist[s] in international law, but...its content [is] not established." Dunoff, supra note 5, at 1094 (citation omitted) (alterations in original).
111. See id. at 1093.
Advocates of an IEC propose that a comprehensive and clear body of law may be developed at a convention before the court's inception, to be used by the court upon inception.\textsuperscript{113} It is important that international law is coherent, for "the maintenance of a peaceful and beneficial international legal system."\textsuperscript{114} It has been noted that, "[b]ecause international society is becoming more decentralized, the need to identify the basic governing principles of international law becomes more evident since it is this element that ensures its integration and coherence."\textsuperscript{115}

The body of international law is certainly hard to define for existing courts and tribunals, who often look to customary international law or rules found in existing international treaties for guidance when making decisions.\textsuperscript{116} Customary international law is often broken down into two important components. One component is the "general practice of States."\textsuperscript{117} Both affirmative acts and non-acts of the state are considered "practice" in this view.\textsuperscript{118} While this appears to include only state action, private action may also be helpful in the determination of customary international law.\textsuperscript{119} The action or practice must also be "general."\textsuperscript{120} The second component of customary international law is "the acceptance of the general practice as law."\textsuperscript{121}
Customarily, international law has been defined as, "a body of norms emanating from general and consistent practices of states that states follow out of a sense of legal obligation." Unanimity in the norms is not necessary for the norm to become a universal custom. Customary international law does not necessarily need the persistence of a norm over many years to produce an addition to international law. It is even unlikely and unclear whether the Precautionary Principle, a fundamental notion that "the absence of clear scientific proof should not preclude restrictive actions," is customary law. It has been suggested that the Precautionary Principle needs to be much more predictable, as well as applicable to many different environmental situations, in order to be useful.

Multilateral treaties, for example, may be able to develop customary international law. Treaties present an equally vague set of rules and principles that oblige "an international court [to] face[] a situation of real difficulty when asked to apply the law to the particular facts of a case." Many nations are now recognizing that there is a "universal right to a clean environment." It is difficult to determine how and whether to assert this right on an international scale when consideration is given to the sovereign right of nations "to exploit their own resources pursuant to their own environmental policies."

At the United Nations Conference on the Human Environment in 1972, a significant principle was adopted that leads the

---

122. McCallion & Sharma, supra note 107, at 354.
123. See id. at 355.
124. See id. at 354.
126. See Hickey & Walker, supra note 125, at 426.
128. Sands, supra note 5, at 1637.
129. Dehan, supra note 1, at 32. This principle has almost certainly not yet reached the level of customary international law. See Kalas, supra note 14, at 214.
131. See Dehan, supra note 1, at 37.
international community in developing international environmental law, Principle 21. Principle 21 declares:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction. Principle 21 is considered customary international environmental law. Principle 21 reflects a standard that has been applied for many years in domestic property law: sic utero tuo ut alienum non laedas. This rule "prohibits the use of one's property in any manner that injures another's property." States that are responsible for harming an adjacent state with their own polluting acts are held legally accountable under this principle.

Uniformity among environmental laws is a necessary component to effective international environmental adjudication. This necessity advocates for a single international court, such as the IEC, to adjudicate and develop international environmental law.

132. See id. at 33.
134. See Dehan, supra note 1, at 33.
135. See id. at 41.
136. Id. This principle is also reflected in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, where states are compelled to "ensure that activities within [their] jurisdiction . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (1987). Similarly, it has been stated that "international law prohibits transboundary environmental pollution." Sands, supra note 5, at 1622. The Trail Smelter case acknowledged this principle by requiring Canada to pay the United States for damage arising from transboundary activity. See McCallion & Sharma, supra note 107, at 356; see also THE ENERGY LAW GROUP, supra note 127, at 5-19 to 5-21.
137. See Hickey & Walker, supra note 125, at 427. States have been held accountable under this principle for acts such as contamination of a river and international pollution of the shared air. See id. at 427-28.
138. See Kalas, supra note 14, at 229; see also McCallion & Sharma, supra note 107, at 361 ("Internationally a need exists for an IEC and related organizations to establish legal uniformity and maximize access to environmental database information from a global judicial perspective."). For example, the ICJ was introduced to respond to the need for one international court able to identify one body of international rules that would be met with universal international interpretation. See Dupuy, supra note 115, at 791-92.
4. Problems with Accessibility in Current Fora

A major concern among those supporting an IEC is that the current courts and tribunals do not allow sufficient access and participation to non-state entities. Rather than amend the statutes of these fora, like the ICJ, that do not allow participation by non-state entities, advocates of the new court would rather an entirely new court be set up that could allow for this access, stating that amending the ICJ’s charter would be unrealistic.

The ICJ has jurisdiction over environmental disputes, but is limited to advisory opinions and disputes between state parties. Individuals, corporations, and nongovernmental organizations do not have access to the ICJ. Proponents of the IEC believe this is a particularly vexing problem, as the interests of a nation may be far different from the interests of an individual citizen. Nongovernmental organizations may be the most committed supporters of environmental causes, and yet they do not have standing before the ICJ.

“Similarly, the European Court of Human Rights is [jurisdictionally limited to] cases involving the responsibility of a State for widespread or multiple violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms.” A legal entity or natural person can only bring an action in the European Court of Human Rights (“ECHR”) to “review the legality of certain acts of the EC Council and Commission if the act concerned is a decision addressed to that person or is of direct concern to it.”

The jurisdiction of the International Criminal Court, meanwhile, is limited to claims against natural persons. It is virtually impossible, therefore, to find an organization or state liable for environmental crimes in connection with claims brought in this court.

139. See Murphy, supra note 94, at 346. However, “international judicial bodies that grant standing to non-state entities far outnumber judicial bodies whose jurisdiction is limited to disputes between sovereign states.” Cesare P.R. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 N.Y.U. J. INT’L L. & POL. 709, 710 (1999).

140. See McCallon & Sharma, supra note 107, at 359.

141. See id.

142. See id.

143. See Kalas, supra note 14, at 208. Kalas notes that a state, itself, may endure pollution or commit environmental degradation. See id.

144. See id.

145. Id. at 219.

146. Id. at 209-10 n.74.

147. See Drumbl, supra note 60, at 149.

148. See id. at 149-50.
Ad hoc international tribunals only provide for states as participants that have unequivocally agreed to the ad hoc international tribunal before it came into existence. 149 Though the procedure governing an ad hoc international tribunal is likely to be more flexible (states are able to choose judges, the particular procedure applied, and the law that will be applied), it is not a simple task to have two states agree to the creation of such an international tribunal. 150

5. Enforcement and Jurisdictional Issues

One of the biggest criticisms of the ICJ, a body able to hear international environmental disputes, is that both parties need to agree to its jurisdiction before it will hear the case. 151 This is unlike the Permanent Court of Arbitration, where both states and individuals may bring a dispute to resolution. 152 Furthermore, the Permanent Court of Arbitration does not possess compulsory jurisdiction. 153 Another court that is available to settle disputes among states, individuals, and NGOs is the International Court of Environmental Arbitration. However, the International Court of Environmental Arbitration also requires that parties to the dispute agree to its jurisdiction, which is something parties are often reluctant to do. 154 Proponents of the IEC stress that mandatory jurisdiction is necessary to ensure adequate adjudication of environmental issues. 155

Various national courts are equipped to rule on environmental disputes in individual countries. 156 However, because states are legally equivalent on the international level, it is “not acceptable in principle to place a coequal state in the diminished position of being subjected to the courts of another coequal state.” 157 This, therefore, makes it difficult for any state to enforce a judgment as against any other state on an international level.

Proponents of an IEC might think that treaties are unable to satisfy the need for enforceability. Most multilateral environmental treaties 158

149. See Rinceanu, supra note 1, at 155.
150. See id.
151. See Kalas, supra note 14, at 207-08.
152. See id. at 213.
153. See id. at 212.
154. See id. at 214.
155. See id.
156. See Postiglione, supra note 1, at 325.
157. Rinceanu, supra note 1, at 154.
158. The multitude of environmental treaties that have been instituted internationally shows a change in the environmental outlook of many nations. Indeed, such treaties “reflect the global and
do not have enforcement authority against those that violate the treaty. The value of such treaties rests, therefore, on voluntary compliance. It is unlikely a nation will voluntarily comply with a commitment contrary to its economic or sociopolitical interests. Elected state officials given the task of enforcing such international environmental treaties are likely to be more concerned with their state’s image on an international scale and how that image could suffer if it does not enforce the treaties the same way as the rest of the world. Simply because a country ratifies an agreement does not ensure that the country will enforce it properly, since these agreements are of a voluntary nature.

Without an enforcement mechanism, the ratification of an environmental agreement may mean the state will perform according to the provisions of the agreement, or it may mean that the state will choose to ignore it. Therefore, a major weakness of international environmental treaties is that they do not possess effective enforcement mechanisms that would induce a state to follow the terms of the agreement. It is possible, and likely, that a difference could exist between the terms of the treaty and the actual practice of the parties to the treaty.

Enforcement provisions are often absent from a treaty because nations are less likely to sign a treaty with strict terms for enforcement. However, these “enforcement mechanisms are indispensable tools for ensuring compliance with international environmental agreements.” Objectivity and impartiality, tools found in enforcement mechanisms, are necessary when monitoring prospective violations of international treaties. For example, trading emissions vouchers under the Kyoto Protocol to the United Nations Framework Convention on
Climate Change is a practice in need of an independent reviewing body to be sure that the Protocol is enforced in a just and fair manner.\textsuperscript{169}

Developing nations pose an especially thorny problem when it comes to enforcement of environmental obligations. Economically unstable nations may not possess the financial or technological capacity to be able to enforce these obligations which even developed nations may have trouble enforcing.\textsuperscript{170}

\textbf{B. Limited Jurisdiction of the International Environmental Court Is Necessary Because Overlapping Jurisdiction Creates a Severe Forum Shopping Problem}

These current proposals all assume a broad-based court of general jurisdiction. However, environmental law is undoubtedly a broad area of law, and therefore, will present unique problems and complexities if the court is introduced into the existing international judicial scene as a broad-based court of general jurisdiction. An IEC may pose problems as it relates to existing bodies, such as the ICJ, the Appellate Body of the WTO, the Tribunal for the Law of the Sea ("ITLOS"), the International Criminal Court, the ECHR, ad hoc international tribunals, and domestic environmental courts, who all could potentially decide environmentally-related issues.\textsuperscript{171} For example, judgments have been issued in disputes involving the protection of the environment on a global level from the ICJ, the Appellate Body of the WTO, and the ITLOS.\textsuperscript{172}

Decisions made on a matter identified as an "environmental"\textsuperscript{173} issue may have major effects in numerous different fields, such as international trade law, international human rights law, international labor law, criminal law, sovereignty, international fisheries law, international water law, and international treaty law.\textsuperscript{174} In fact, "environmental claims are rarely, if ever, raised in isolation of other

\begin{footnotesize}
169. See id. at 361-62.
170. See Kalas, supra note 14, at 223.
171. Because there are no hierarchical relations between the international courts and tribunals, there is a problem of conflicting jurisdiction. For example, conflicts might exist between the ITLOS and the ICJ. See Dupuy, supra note 115, at 797; see also Rinceanu, supra note 1, at 154.
172. See HEY, supra note 2, at 1.
173. "The cases that have been ruled on by international courts and tribunals illustrate the difficulties involved in defining an international environmental dispute." Id. at 6.
174. See, e.g., id.; Drumbl, supra note 60, at 122; Dunoff, supra note 5, at 1044; Sands, supra note 5, at 1638.
\end{footnotesize}
The resolution of most global environmental issues will "often [have] vast spillover effects."  

For example, it is simple to see the intersection between trade law and environmental law in the WTO's Tuna-Dolphin and Shrimp-Turtle decisions. The Tuna-Dolphin dispute arose after the United States imposed a ban on imported Mexican tuna because of incidental dolphin killing during tuna harvesting. The Shrimp-Turtle dispute was prompted again by a United States ban on the import of shrimp that were harvested without using "sea-turtle friendly" methods of capturing shrimp. The WTO determined that both bans violated international trade rules. These decisions dealt with, at a minimum, two types of law: international trade law and environmental law. The issue itself is inherently a combination of the two. Because the WTO is essentially a trade organization, it decided the dispute based on international trade law. An IEC, if established, might be able to determine the same dispute based on international environmental law.

As previously discussed, environmental law is a field of law that touches and concerns many other types of law. Because there already exists international adjudicatory bodies able to decide such issues as international trade law and international human rights law, it is possible that these courts are determining issues that an IEC might be able to hear under the "environmental" issue classification. The addition of the proposed IEC to the international adjudicatory scene may provoke problems by weakening the authority of those existing courts and tribunals, as well as possibly weakening the substantive law.

At the regional level of international law, there already exists divergent jurisprudence that deals with the same rules and legal notions. For example, the ECHR and the ICJ have reached differing results regarding the opposability of reservations. The introduction of a new body, also capable to decide issues using the same rules and legal notions, could lead to an abundance of divergent rulings between the regional courts and the IEC. Nations and individuals are then faced with
two decisions on the same issue, like the issue of opposability of reservations, and neither controls.\textsuperscript{183} This could lead to a weakening of the authority of the adjudicatory mechanisms already in place.\textsuperscript{184}

The new international court for the environment would likely increase the "competition among law based forums for dispute settlement"\textsuperscript{185} leading to the fragmentation of international law\textsuperscript{186} and potentially inconsistent judgments.\textsuperscript{187} Because the IEC would possess unquestionably broad jurisdiction that would lead to competition and fragmentation, it might also "provoke more 'experimentation and exploration' than the system can accommodate."\textsuperscript{188} As no international court is designated as the ultimate authority on an issue, multiple conflicting judgments on a single issue may be reached. Therefore, complete uniformity of decisions may not be possible on an international scale.\textsuperscript{189} More specialized tribunals and courts such as the IEC may damage the coherence of the international legal system by contributing to different variations in each court's determination of international law.\textsuperscript{190} Thus, the establishment of an IEC would do more to fragment international environmental law than to unify it.\textsuperscript{191} For example, the Appellate Body of the WTO could hypothetically decide an issue that reaches into both trade law and environmental law with the focus on trade. Later, the same issue could be decided by the proposed IEC as an environmental issue. The two judgments could potentially conflict and diverge in implementation.

Any judge, when rendering a judgment in an international court or tribunal, is "contributing to the development of an overarching

\textsuperscript{183} "[S]uch situations create dissatisfaction for the States concerned because they introduce a measure of legal insecurity. This should be avoided as much as possible." Dupuy, supra note 115, at 798.

\textsuperscript{184} It is also hypothesized that decisions on multi-state issues made by an international court or tribunal are considered "less just and less wise" than decisions made for single state issues. See Arthur Taylor von Mehren, Comment, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 HARV. L. REV. 347, 350 (1974). However, this Note aims to focus on issues of a multi-state nature.

\textsuperscript{185} HEY, supra note 2, at 14.

\textsuperscript{186} See id.

\textsuperscript{187} An even greater amount of proliferation of international courts and tribunals could lead to a greater number of divergent rulings on international law. See Morgan, supra note 125, at 544.

\textsuperscript{188} HEY, supra note 2, at 14.

\textsuperscript{189} See Charney, supra note 114, at 699. Without an international hierarchical system, which would generate ultimate judgments on issues of differing international law norms, uniformity of decisions will not be possible. See id.

\textsuperscript{190} See id. at 705-06.

\textsuperscript{191} See HEY, supra note 2, at 9.
international legal order.” A community of international law, “much larger than the parties to the action,” is affected by rendering these decisions.

Since so many of the international courts and tribunals are able to rule on environmental issues and there is not a superior authority to which the other courts must yield, forum shopping may be a concern. The problem of forum shopping, while not entirely restricted to this situation, is highly likely given the very broad subject matter of environmental law. Very often environmental law is interrelated with issues of sovereignty, human rights, and especially trade. When a court makes an environmental law decision, it is often forced to make a decision that has ramifications in other fields.

Forum shopping, in its broadest sense, is the “exercise of the plaintiff’s option to bring a lawsuit in one of several different courts.” Forum shopping can also be defined as the attempt “to have [an] action tried in a particular court or jurisdiction where [one] feels [one] will receive the most favorable judgment or verdict.” This favorable

---

192. Romano, supra note 139, at 751.
193. Id.
194. See, e.g., Dunoff, supra note 5, at 1086 (stating “[t]he ICJ is competent to decide environmental disputes”).
196. Id. at 583 (footnote omitted). Another scholar has noted how the treatment of forum shopping in the United States may be different than that found in other countries. See Friedrich K. Juenger, Forum Shopping, Domestic and International, 63 TUL. L. REV. 553, 564 (1989). “Compared to the United States Supreme Court, some foreign tribunals positively welcome forum shoppers.” Id. This same scholar believes not all forum shopping is bad, and that forum shopping can have positive effects such as the assured protection of one injured by international activities, and to help scholars learn more about the role of the conflict of laws on an international scale. See id. at 570-72.
197. See HEY, supra note 2, at 6; Drumbl, supra note 60, at 122; Dunoff, supra note 5, at 1044; Sands, supra note 5, at 1638.
judgment or verdict can be the result of choosing the most sympathetic substantive law or set of procedural rules. The phrase "forum shopping" is used by attorneys, judges, and scholars to denote a plaintiff who has "unfairly exploit[ed] jurisdictional or venue rules to affect the outcome of a lawsuit."

The plaintiff's choice of court may depend on which court he is most familiar with or which court might gain him a great procedural advantage. A litigant also might be interested in the court or tribunal that offers the defendant the greatest procedural disadvantage. Other factors that a litigant might take into account include the court's reputation for justness or fairness, efficiency or pro-plaintiff bias, or even what is referred to as the "legal climate." The establishment of an IEC among existing judicial institutions would allow for more choice among forums.

The concept of forum shopping is preferably avoided in the American judicial system. Two Supreme Court decisions criticize the practice of forum shopping: Erie Railroad v. Tompkins and Hanna v. Plumer. It is primarily condemned as "violating fair play by allowing parties to circumvent fate." Another contention is that forum shopping violates three goals of the legal system: "[E]thical representation of one's client, efficiency, and community control over law." Forum shopping has also been described as "offensive to our sense of evenhanded, impersonal justice."

In international or domestic forum shopping, the party bringing the lawsuit will most likely choose the court in which to litigate. That party will consider various factors in making a decision, including his expectations of how a court will handle a given controversy. It is suggested that "permitting one party, after a controversy has arisen, to

200. See id. at 1678.
201. Juenger, supra note 195, at 553.
202. See id. at 573.
203. See id.
204. Id. at 573-74 (citation omitted). The "legal climate" is a circumstance named by Henry de Vries. The legal climate is said to "var[y] from country to country, and may even vary, within a given state or nation." Id. at 574. For example, differences might exist between a court in a rural town in Nigeria and a court found in New York City.
205. 304 U.S. 64 (1938).
206. 380 U.S. 460 (1965); see Forum Shopping Reconsidered, supra note 199, at 1680.
207. Forum Shopping Reconsidered, supra note 199, at 1688.
208. Id. at 1689.
209. Mehren, supra note 184, at 353.
210. See id. at 350.
211. See id.
INTERNATIONAL ENVIRONMENTAL COURT

select the law more favorable to his position runs counter to ideas of equality that are basic to Western views of justice.\footnote{212} It might be more just to apply two specific objectives to the principles that direct these multi-state issues.\footnote{213} One objective is to "provid[e] a solution which, from the perspective of the legal order in question, is the most appropriate . . . regulation for the situation that has arisen."\footnote{214} This means that the case would be less likely to simply fall on the court most likely to effect a judgment for the plaintiff. More important would be the appropriate regulation for the conflict. A second objective to take into account is the "vices associated with forum shopping."\footnote{215} This is taken into account when it is possible that the assorted adjudicatory bodies might come to divergent judgments.\footnote{216}

These same abuses of the American judicial system could be equally applicable to law on an international scale. If potential litigants were able to choose between the existing fora and yet another international court for the environment, they would certainly choose the one most likely to effect a favorable outcome for their position on the issue. Additionally, when a litigant receives an unfavorable judgment from one court, they would be able to take it to another court for a second chance at a beneficial decision. With no international appellate court or tribunal, one case could be adjudicated numerous ways: in the interest of trade by the WTO, in the interest of human rights by the ECHR, or in the interest of the environment by the proposed IEC. Forums might begin competing for cases to advance their subject matter interests. One scholar suggests that reaching international uniformity through international law is the only way to prevent transnational or international forum shopping.\footnote{217}

The addition of an IEC to the international adjudicatory arena will add to what has already been termed a "proliferation" of international courts and tribunals,\footnote{218} which may encourage forum shopping.\footnote{219} Even if explicitly contradictory judgments do not occur regularly, "litigants well

\footnotesize{212. Id.} \footnotesize{213. See id.} \footnotesize{214. Id.} \footnotesize{215. Id.} \footnotesize{216. See id.} \footnotesize{217. See Thomas O. McGarity, International Regulation of Deliberate Release Biotechnologies, 26 TEX. INT’L L.J. 423, 437 (1991). "The ability of multinational corporations to shop for ‘pollution havens’ creates an incentive for countries to seek out the ‘lowest common denominator’ of regulations in protecting their citizens and environment." Id.} \footnotesize{218. See, e.g., Morgan, supra note 125, at 544.} \footnotesize{219. See id. at 548.}
may conclude that substantially different outcomes could be reached from differing precedents and directives, and choose a forum accordingly.”

International forum shopping already exists in the international human rights adjudicatory arena. Individuals suffering from human rights violations have increasingly been afforded the opportunity to “vindicate their rights internationally” by the introduction of such bodies as the ECHR; the Inter-American Court of Human Rights; the European, Inter-American, and African Commissions of Human Rights; and various United Nations treaty bodies such as the Human Rights Committee, the Committee Against Torture, and the Committee on the Elimination of Racial Discrimination. The existence of multiple human rights tribunals allows individuals to forum shop for a court or tribunal most likely to effect a favorable decision. Incentives for claimants to seek out a favorable human rights ruling using forum shopping are considerable. When several conflicting decisions are issued regarding the same human right, incentives are created for plaintiffs to forum shop for the court or tribunal that embraces the most rights-protective standard.

Much like international environmental law, international human rights law is not found in one extensive human rights code. Furthermore, as in international environmental law, there is no one authority on human rights law. Each separate human rights court or tribunal is empowered to interpret the agreement that created the court or tribunal, and does not interact formally with its counterparts.

Forum shopping in these human rights cases is “not limited to an individual petitioner’s strategic choice to litigate her claims in one of several available adjudicatory fora.” Forum shopping in these cases also includes the “choices engendered by the concurrent overlapping jurisdiction of human rights treaties and tribunals, including attempts by

220. Id.
222. Id. at 288-89.
223. See id. at 290.
224. See id. at 291.
225. See id. at 308.
226. See id. at 296.
227. See id. at 301.
228. See id.
229. Id. at 290. In fact, international human rights law is “enshrine[d]...in a complex web of overlapping global, regional, and specialized agreements, many of which contain identical, related, or even conflicting substantive standards.” Id. at 296.
petitioners to litigate identical or related claims in multiple fora at the same time, and attempts to engage in sequential litigation of claims.\textsuperscript{230} There are three types of forum shopping. The first type of forum shopping is referred to as "choice of tribunal forum shopping," the second is called "simultaneous petition forum shopping," and the third is referred to as "successive petition forum shopping."\textsuperscript{231}

Simultaneous or successive petition forum shopping in the international human rights field has been viewed as "a danger to be suppressed."\textsuperscript{232} In particular, "they have argued that allowing more than one tribunal to examine the same individual's petition wastes scarce resources, creates a risk of divergent or conflicting rulings, and threatens to undermine the authority of international tribunals and the jurists who serve on them."\textsuperscript{233}

While some scholars may argue that forum shopping is a healthy competition among international fora that will increase the development of international law, limiting forum shopping promotes legitimate goals. For example, the discouragement of forum shopping can encourage the efficient use of resources, by not allowing the same claim to be tried in more than one court or tribunal.\textsuperscript{234} An end to forum shopping would advance the finality of litigation, by not permitting the same claim to be tried more than once.\textsuperscript{235} A check on forum shopping also "limits the possibilities for inconsistent outcomes or relief in the same case."\textsuperscript{236}

Avoidance of forum shopping has frequently been an objective pursued by theories of international law.\textsuperscript{237} Different restrictions have been suggested to reach this objective. For example, limitations on choice of law or on the adjudicatory jurisdiction have been suggested.\textsuperscript{238} States could agree that only one adjudicatory body would be able to have jurisdiction over certain types of multi-state controversies.\textsuperscript{239} The IEC

\begin{thebibliography}{9}
\bibitem{230} Id. at 290 (emphasis omitted).
\bibitem{231} Id.
\bibitem{232} Id. at 292.
\bibitem{233} Id.
\bibitem{234} See id. at 292.
\bibitem{235} See id. at 291.
\bibitem{236} Id.
\bibitem{237} See, e.g., id. at 292 (discussing the material benefits of limiting forum shopping).
\bibitem{238} See, e.g., id. at 304 & n.59 (stating that "parties might have simply prohibited all forum shopping" and stating, as an example, that pursuant to the Council's Committee of Ministers State that are parties to the European Convention and the International Covenant on Civil and Political Rights "normally will litigate claims relating to rights and freedoms protected by both treaties only before the ECHR and the European Commission of Human Rights (European Commission), rather than the UNHRC").
\bibitem{239} See id.
\end{thebibliography}
needs to be a court of very limited jurisdiction in order to remedy these faults as well as to avoid the problems associated with forum shopping and weakening of international law.

The advocates for an IEC have presented numerous valid faults found in the existing international adjudicatory system, with regard to environmental law. If there truly is a need, as demonstrated by these faults, for an international court to determine international environmental issues, it should only fill the void that has compelled its presence, and nothing more. The IEC may be well-suited to decide environmental cases that are not able to be heard in any other international court, whether that be because of a lack of standing in another court for a potential litigant, or because of another court’s limited subject matter jurisdiction, or because of a lack of adequate enforcement procedures. If an IEC is to be established, its jurisdiction should be limited in a way that does not encourage forum shopping, does not weaken existing international courts and international substantive law, and in a way that properly fills the legal vacuum that has required its existence.

IV. CONCLUSION

In conclusion, an IEC is justified by facts, law, and history. However, if it is to become a reality, and a successful court, the problems with the scope of jurisdiction and the related problem of forum shopping must be addressed. Current proposals are unlikely to result in the establishment of an IEC that will be accepted by states in any foreseeable time frame because they do not address these related problems. Alterations to the current proposals are necessary to reflect a substantial limitation on the scope of jurisdiction, in order to minimize the serious criticisms of the establishment of an IEC. The most significant issues of concern are overlapping jurisdiction with other already existing domestic and international courts and the problem of forum shopping. The solution is an IEC of limited jurisdiction, addressing only the gaps in current jurisdictions of existing courts, that will curtail forum shopping, not encroach on existing courts, and will address international environmental harms. Such a court of limited

240. See supra Part IIIA.
International Environmental Court's jurisdiction is more likely to become a reality than the current broad-based proposals for a court of general jurisdiction.

Susan M. Hinde*

* I would like to express my gratitude first to Professor James E. Hickey, Jr., for his guidance and suggestions throughout the process of the development of this Note. Secondly, I would like to thank the entire staff and editorial board of the Hofstra Law Review, especially Corey Delaney, for their dedication in editing this Note. I extend a special thanks to Dinetah Kilburn for her contributions to this Note, and for her friendship and support. Finally, I thank my parents, W. Michael and Jill Hinde, my aunt, Joan Petersen, and my fiance, Matthew Perry, for their unending love, support, and encouragement throughout my law school career.