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Climate Torts and Ecocide in the Context of Proposals for an International Environmental Court

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Abstract

This thesis is an exploration of two questions that are neither novel nor lacking in exploration: Is an International Environmental Court (IEC) needed? Is such a court feasible? Proposals for an IEC have a rich history, are well founded and numerous. On the issue of necessity, this thesis attempts to pull together historical and current information on two distinct areas of international environmental law and use these analyses to contextualize the need for an international environmental tribunal. Arguments for and against an IEC are presented within a discussion of environmental diplomacy.

This thesis begins with a legal discussion of potential climate change actions in current international fora. This section is an attempt to add a layer of context on what the international legal landscape looks like for environmental actions while presenting one of two broad areas of environmental redress: a civil action. The analysis then moves on to discuss an international cause of action debated and advocated for over the past half century: ecocide. The need for a singular cause of action to fit the particularities of intentional environmental harm inflicted upon peoples is used to present the second broad area of environmental redress necessitated by international affairs: a criminal action. The analysis then moves from necessity to feasibility, beginning with an overview of proposals for an international agreement to create an environmental tribunal adequate to address the needs presented in the preceding sections.

This analysis draws on international relations theory in its conclusion that such a tribunal is necessary and potential, dependent on legally cognizable factors working in tandem with considerable advocacy. The belief that the potentially catastrophic human ability to affect the global environment has existed at least since the reality of nuclear holocaust threatened during the Cold War, is currently at issue in relation to climate change, and is likely to be an ongoing reality in a quickly developing, technologically hyper-driven, globally interconnected, resource-scarce future underpins this analysis. The need to have international legal mechanisms to protect those at the fringes of these processes who are often the most harmed by environmental degradation lends urgency to the project of investigating the feasibility of creating an IEC tasked with ruling on agreed international environmental norms and rights.
(p. 3)

… **Environmental Diplomacy**

Environmental diplomacy is a relatively new area of diplomatic relations amongst States. An IEC would likely stem from a multilateral treaty dealing with environmental rights and norms, which would demand strong environmental diplomacy. Richard Benedick, the U.S. ambassador who was the delegate to the 1987 Montreal Protocol negotiations has written that, "At least five major factors distinguish the new environmental diplomacy: (1) the nature of the subject matter; (2) the role of science and scientists; (3) the complexity of the negotiations; (4) the unique equity issues involved; and (5) innovative features and approaches."171 These factors would be indispensable to the negotiation of an IEC convention.

The first two of Benedick's factors are inextricably connected to the international environmental law concept of the precautionary principle. The precautionary principle can broadly be understood as a State "duty to take precautionary action and to avoid risk,"172 when dealing with possible environmental harm. This principle has begun to solidify into customary international law; for example, the precautionary standards embodied within the Montreal and Kyoto Protocols support this development.
(pp. 72-73)

…**Benedick's fifth factor relies on both the strength of recognizing the precautionary principle and the advantages of multilateral diplomacy**. Innovation in increasingly complex environmental diplomatic negotiations will be essential because states will likely demand flexible mechanisms to achieve their goals. Innovative legal approaches may likely be the cornerstone of an IEC convention because of the breadth of parties involved and the fundamental nature of the problems a comprehensive subject matter and personal jurisdiction treaty presents. **Looking at the success of the Montreal Protocol and the heretofore lack of success of the Kyoto Protocol vis-à-vis the strength of each of their precautionary provisions** and the extent of the multilateral support they were able to achieve is helpful in understanding what innovations may be necessary to negotiate a treaty that would result in an IEC.

… A. History of the Protocols
(p. 74)

…B. The Precautionary Principle

First and foremost, the characteristic that distinguishes environmental diplomacy from other areas of diplomacy is the subject matter. The natural environment places constraints and responsibilities on States that are not present in economic negotiations, conflict diplomacy or human rights conferences. One of the primary differences in environmental diplomacy deals with a reliance on scientific data. However, when dealing with ecologies this data is not only often hard to record, it is often speculative. For this reason the precautionary principle has began to form in international law. Simply stated, it is necessary for States to avoid risk before scientific data can fully quantify that risk because after the harm has been done it may be irreparable.
(p. 78)

…Arguments against the precautionary principle range from "meaninglessness" to bad policy. The meaningless charge stems from the contention that the principle actually has no application to policy decisions because it is impossible to "identify safe options . . .when we are profoundly ignorant of the probable outcomes."190 This argument fails to take into account a conception of risk assessment that underlies the precautionary principle. **A more middling argument is exemplified in the decision of the WTO regarding the propriety of European Union regulations on genetically modified foods, which followed a precautionary principle. 191 In that case, the WTO found the EU precautionary principle policies to be overreaching and in conflict with WTO regulations. The WTO approach required a risk assessment only when there was scientific uncertainty as to cause and effect, magnitude or severity instead of merely insufficient scientific data.**

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189 A full discussion of this is found in James Cameron and Juli Abouchar's "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment." Boston College International and Comparative Law Review. Vol. 14. No. 1. 1991.
190 Whyte, Jamie. "Only a reckless mind could believe in safety first." The Times (London). 27 July, 2007. p. 17.
191 A full discussion of the case is found in Lawrence Kogan's "WTO Ruling on Biotech Foods Addresses 'Precautionary Principle'". Washington Legal Foundation: Legal

Backgrounder. Vol. 21. No. 38. 8 December 2006. Available at http://www.itssd.org/Publications/wto-biotech-foods-dec0806.pdf. Citing to *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Report of the Panel, WT/DS291/R, WT/DS292/R and WT/DS293/R, final report issued Sept. 29, 2006, at http://www.wto.org/english/news_e/news06_e/291r_e.htm.
(p. 80)

In a case of the latter, EU law would have been triggered by the precautionary principle. The WTO decision can be read as a rebuke of the solidification of the EU-recognized formulation of the precautionary principle as a standard of international customary law. The WTO ruling specifies that there has been no authoritative decision regarding the principle and no definitive legal definition of the principle.192

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192 Id. at 4.