

Text of the Study Document of the European Community of 25 August 1993 (Directorate for Research - Directorate A - Social Affairs and Environmental Division): "The possibility of establishing an international environmental court - premises, opportunities and obstacles. The position of the European Community and initiatives it might adopt."

I. Introduction and genesis of the idea

In recent years the international community has been appalled by a series of environmental disasters (e.g., Seveso 1976, Amoco Cadiz 1978, Chernobyl 1986, Sandoz 1988, Exxon Valdez 1989, Haven 1991). The effects of these disasters and the interests involved in them reached beyond individual nations. It was then if not earlier that the idea of establishing some form of effective environmental protection began to take shape as a matter of international concern; it is an idea which sets the international community a long underestimated challenge. Air is polluted with waste gases, water is contaminated by toxins, flora and fauna are endangered. The constantly growing hole in the ozone layer, progressive forest die-back and enormous mountains of waste have given rise to growing environmental awareness in many quarters. A whole range of initiatives, not all of them confined to the national level, have been taken to try to remedy the situation. Since air knows no borders¹ and it is well known that water flows downhill², there has been an increasing demand for effective environmental protection through international law.³ The debate concentrates on three possible measures.

- There are those who seek to give the right to a healthy and whole environment the status of a fundamental right within the meaning of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

- In addition, it is advocated that an international environmental agency at the level of the United Nations should collect environmental data, conduct research and organise environmental initiatives.

- Above all, however, it is proposed that a court should be established with the status of a permanent body of the United Nations, to take special responsibility for environmental disputes, with the power to impose penalties in the event of environmental offences and to require compensation. Its remit would include monitoring compliance with the right to a healthy and whole environment which would have been created, instituting its own investigation, deciding on emergency measures at short notice and giving individuals as well as states or groups access to legal protection.

The idea of creating an international environmental court of this kind is already five years old. As early as February 1988 a committee was founded as a private initiative in Rome to examine the subject. At the time it was not certain whether the court would be based simply on moral sanctions, whether it would be set up as a permanent institution or whether it should be a combination of the two.

The committee organized an international conference in Rome from 21 to 24 April 1989 attended by experts from 30 countries. The organization of the committee received substantial support from Amedeo Postiglione, a judge at the Rome Supreme Court of Appeal, who has

since remained one of the foremost advocates of the establishment of an international environmental court. The Conference ended with a call for the creation of the fundamental right to a healthy environment, an international environmental agency and an environmental court at UN level. By then it had been agreed that the court should be a permanent institution along the lines of the European Court of Human Rights in Strasbourg to which both individuals and organisations would have access and which would ensure both that the new right to a healthy environment was upheld and that international agreements on environment and international law in general in this regard were observed.

The idea of setting up an international environmental court subsequently received support from the EC Environment Commissioner, Ripa di Meana, from various Italian government ministers and from a number of members of the European Parliament.

A second conference in Florence in May 1991 resulted in a much more thorough debate on the whole question of an environmental court. It was then that basic outlines of the court's rules of procedure were determined; they were more or less a combination of the ICJ Statute and the rules of procedure of the European Court of Human Rights.

After the Florence conference the idea of setting up an environmental court was the subject of several more international conferences. In the European Parliament two motions for resolutions were tabled in 1991 and 1992 calling for a Community initiative on the subject (B3-0718/91 and B3-0262/92).⁴ Nothing positive has resulted from them to date, however.

At the plenary session on 13 February 1992 a resolution was adopted⁵, stating that the EC should attend the UNCED conference in Rio in June 1992. The issue of an environmental court was to be discussed at the Earth Summit (paragraph 14 of the resolution called for the setting up of an international environmental court with worldwide jurisdiction, either at the International Court of Justice in The Hague or at the United Nations offices in New York).

This was taken into account in the Rio Declaration only in so far as the 27 principles agreed at the summit stressed the need for effective environmental legislation, including liability law (cf. principles 11 and 13) and called for more public involvement. Members of the public should in the future also be able to institute court proceedings in this area (principle 10). It was also decided to promote the work of the UN International Law Commission on defining environmental crimes within the framework of the Draft Code of Crimes against the Peace and Security of Mankind, without, however, pursuing the idea of an independent environmental court in concrete terms.⁶

Another environmental conference organized by the promoter's committee is to take place in Venice from 2 to 5 June 1994. One of the subjects it will look at will again be the idea of an international environmental court, this time with the aim of establishing the preconditions for such a court, its chances of success and the obstacles in its way.

As the aim of the initiative can in essence be described as an effort to establish an international court with responsibility for the environment (possibly in addition to other areas) to which individuals as well as others may have recourse it seemed sensible first to examine

whether systems of legal protection which already exist at the international level might be able to fulfil these criteria. The advantages and disadvantages of the various institutions concerned are looked at separately. It is thus possible to examine the extent to which it is really necessary for a new court with its own rules of procedure to be set up and the extent to which the existing courts are already in a position to provide sufficient legal protection. The position of the European Community on the initiative is then discussed. The concluding section attempts to demonstrate how the most popular option, the creation of an international environmental court within the framework of the United Nations, might be supported at the Community level. With regard to the position of the Community on the initiative discussed in the penultimate section, however, there are two points which have to be considered: there must be a majority in the Community in favour of support for the project; only then can consideration be given to what concrete measures might be taken to achieve the objective within the framework of the UN.

II. Detailed examination of the possibility of establishing an environmental court

1) The creation of an independent environmental court

Under the UN Charter the establishment of an independent court with special responsibilities is perfectly possible, since article 95 of the Charter does not prevent member states of the UN from submitting disputes to other courts for settlement under the terms of the agreement. What would be required, however, would be an agreement within the meaning of article 95 of the UN Charter between the member states. Such an agreement would also have to include the rules of procedure.⁷

The outlines of a set of rules of procedure were proposed at the conference in Florence from 10 to 12 May 1991. They combined elements of both the ICJ Statute and the rules of procedure of the European Court of Human Rights. This model is favoured by the promoters' committee in which Amedeo Postiglione has played a leading role.

- Independent judges would be elected by the General Assembly of the United Nations on the recommendation of the Secretary-General. The principles that the defendant should be heard and that hearings should be public would be guaranteed. The court would fulfil the following functions.

- a) It would protect the environment as a fundamental human right on behalf of the international community.
- b) It would adjudicate on all environmental disputes of an international nature, in so far as they involved the responsibility of members of the international community and in so far as they could not be settled by other means within eighteen months.
- c) It would adjudicate on all disputes between private and public parties (including states) concerning environmental damage, in so far as it was of such a scale as to affect the general interest in terms of a healthy environment.

- d) It would take emergency and preventive measures where appropriate.
- e) At the request of international bodies or member states of the UN it would draw up reports and provide advice on environmental issues of a significant, global nature.
- f) Where necessary it would act as a court of arbitration without prejudice to its judicial function.
- g) In the case of environmental damage it would, if specifically requested to do so, institute its own investigations, supported by independent technical or scientific experts. In emergencies it would do this on its own initiative.

- The following would have access to the court:

- natural persons;
- non-governmental environmental organisations;
- states;
- supranational organisations, such as the EC;
- international organisations affiliated to the UN and the individual agencies of the UN.

- Natural persons and non-governmental environmental organisations would receive legal protection only under the following conditions, however.

1. An application to a national court would have to have been rejected on the grounds that it was inadmissible or unfounded.

2. The question of law would have to be of international importance.

- As regards penalties, the court should be able to take all measures necessary to compensate for the infringement and the damage caused. Restitution for environmental damage affecting the international community at large would be made to the World Environment Fund. If an individual were to institute proceedings before the court in connection with damage affecting the international community at large, that individual could only request that his or her legal costs be paid by the environment court. Any compensation for damage to that individual would have to be taken up with the appropriate national courts.

Advantages

The setting up of an independent court at the level of the United Nations and the granting to individuals and organisations of full rights to institute proceedings has the advantage of providing comprehensive international legal protection. The planned limitation on the right of natural persons and environmental organisations to bring cases is an appropriate way of preventing the court being overwhelmed by actions of types where any member of the public is entitled to bring proceedings. The fact that the court would be responsible for environmental cases only would result in the specialised application of the law in this field (the

creation of a court of experts) which, given the complex nature of international law, must be seen as an advantage. With regard to the selection of possible penalties the plans are couched in somewhat general terms; it would appear to be possible, nevertheless, to incorporate provisions in accordance with article 94 of the UN Charter, under which the Security Council may, if it deems necessary, make recommendations or decide upon measures to give effect to the judgement (cf. article 94 II of the UN Charter).

Disadvantages

The creation of another independent court would make the system of international legal protection more complex and fragment jurisdictions. There is a particularly obvious overlap with the jurisdiction of the ICJ in so far as actions by states are concerned.

Under article 36 of the ICJ Statute the jurisdiction of the ICJ comprises all cases which the parties refer to it and, in accordance with article 36 II b, c, and of the Statute, any question of international law and breaches of international obligations, and it thus also comprises questions of international law concerning the environment.

2) The International Court of Justice in the Hague as the body to act in this capacity

a) General

In accordance with article 92 of the UN Charter the International Court of Justice is the principal judicial organ of the United Nations. Its duties are determined by the ICJ Statute. As stated above, the provisions on jurisdiction contained in article 36 of the Statute are couched in general terms but do cover adjudication in legal disputes concerning the environment. It would not therefore be necessary to charge the ICJ with this additional duty of amending its Statute.

The procedure would therefore adhere to the general lines laid down in articles 92-96 of the UN Charter and, where appropriate, the provisions of the ICJ Statute.

Advantages

It would not be necessary to set up a new court with all the disadvantages set out above that this would entail. The complex process of reaching an international agreement representing a consensus on the rules of procedure could thus be avoided. The ICJ has been carrying out its duties in their present form since 1945 and has become internationally accepted, something which a new court would first have to work at.

Above all, however, it should be remembered that as the principal judicial organ of the United Nations the ICJ plays a dual role: in addition to settling concrete legal disputes between states it is also responsible for developing and elaborating legal principles, i.e., producing judge-made law. In the field of international environmental law in particular, much of which is not codified, the ICJ should not therefore be underestimated as a source of law. In contrast to the creation of a special court of experts, having a general court which is responsible for environmental disputes as a "sideline" would enable general principles of

international law to be carried over into international environmental law as part of the process of the further development of caselaw; the result would be new, effective and efficient environmental law. The availability of such comprehensive knowledge of all aspects of international law would appear to have many advantages over the specialist knowledge of a purely expert body⁸.

Many of the principles of the rules of procedure put forward in Florence in 1991 were taken from the ICJ Statute. For example, members were to be elected by the General Assembly, the court was to be able where necessary to take provisional measures (article 41) and it was to be able at any time to require the submission of documents and information (article 49) and request expert opinions (article 50) by means of orders for the conduct of the case (article 48). The ICJ may also draw up a report on any issue of law at the request of a United Nations body (article 65; cf. also article 96 of the UN Charter).

Disadvantages

The jurisdiction of the ICJ in the settlement of legal disputes extends only to disputes between states (cf. article 34 I of the Statute). Individuals and specialist organisations or associations may not institute proceedings. This arrangement reflects the classical view of international law, which recognizes only states as enjoying legal rights.

In practice, the legal interests of an individual could be considered only indirectly, in so far as they were represented by the country of residence of that person⁹. However, the interests of the individual are as a rule represented by the state only if the state also regards itself as the injured party¹⁰.

It should also be borne in mind that despite their membership of the United Nations states are only subject to the jurisdiction of the ICJ on the grounds of a special act of submission. Such submission can result from a multilateral agreement between states, in which the competence of the ICJ is laid down, from a state's entering an appearance in an action before the ICJ without raising an objection (the "forum prorogatum") or from a unilateral declaration by a state in accordance with the option clause of article 36 II of the ICJ Statute. The effectiveness of the work of the ICJ is limited in that to date only 49 UN member states have recognised the ICJ in this way as having compulsory jurisdiction over them, and many of those have chosen the option of restricting their recognition either in terms of time or in terms of the substance of cases (article 36 III of the ICJ Statute). The fact that many states have adopted the reservation entered by the USA, in accordance with which the ICJ is not competent to examine disputes concerning domestic affairs and the USA alone may determine what is and what is not a domestic dispute (the Connally reservation) is a particular problem¹¹. The problem of sovereign freedom of action and territorial integrity plays a decisive part in general international environmental law especially. In this connection the Harmon doctrine should also be remembered, in accordance with which any state is entitled to use the resources available on its territory without any consideration for its neighbours¹². Even of this doctrine is now obsolete¹³, the issue of sovereignty in this area of general international law is still important.

b) *Special Aspect: the creation of a special chamber for environmental issues within the ICJ*

In accordance with article 26 I of the ICJ Statute the ICJ may at any time form one or more chambers composed of three or more judges (the exact number to be at the discretion of the Court), in order to deal with particular categories of cases. The examples given by the Statute are labour cases and cases relating to transit and communications. Under the terms of article 27 of the ICJ Statute a judgement given by a chamber should be considered as rendered by the Court.

Advantages

To proceed along these lines would represent a compromise between the establishment of an independent court with exclusive jurisdiction assigning the ICJ jurisdiction in environmental cases in addition to its other work¹⁴. The creation of a special chamber would to a certain extent facilitate the development of a court of experts, without it being necessary to create a new court and procedure. In particular, no further special international agreements would be necessary; the chamber could be formed immediately in accordance with article 26 I of the ICJ Statute and could begin its work without further ado.

Disadvantages

The same applies with regard to the ICJ itself (see above). The fact that individuals would have no access to the court is a particular disadvantage.

3) *The European Court of Human Rights in Strasbourg as the body to act in this capacity*

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 contains a catalogue of individual rights which serves to safeguard human rights and fundamental freedoms such as the right to life (article 2), the right to liberty and security of person (article 5), the right to a private life (article 8), the right to freedom of conscience and religion (article 9) and the right to freedom of expression (article 10). The European Commission of Human Rights and the European Court of Human Rights were established in order to guarantee these rights. Both states and individuals may make applications to the Commission in respect of violations of human rights. If an admissible application is accepted and the Commission fails to secure a friendly settlement, the case may under certain conditions proceed to the Court. If the right to a healthy and whole environment were incorporated in the catalogue of fundamental freedoms as planned, the European Court of Human Rights would thus be able to fulfil the function of an international environmental court.

Advantages

Here again provision could be made for bringing environmental matters before an international court simply by means of an amendment to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950; no special additional court would have to be created and thus fragmentation of jurisdictions could be avoided. The existing options would be insufficient, however, since the right to life contained in article 2 of the Convention appears to be too vague to ensure effective environmental protection.

Disadvantages

The catalogue of substantive rights contained in the Convention (supplemented as appropriate) appears at first sight to be impressive but it is already reservations permitted by the Convention within the domestic legal order; procedural deficiencies also reduce the effectiveness of the legal protection offered by the Convention. For example, it is often forgotten that individual applicants (natural persons) have no direct access to the Court (in contrast to the Commission). Only the Commission, a state party whose citizen's human rights have been violated and a state party against which a complaint has been lodged are competent to bring a case before the Court (article 48 of the Convention)¹⁵. In view of these clear limitations in terms of both procedure and substantive issues it would appear not to be possible to achieve greater legal protection in this way. The fact that only European states are party to the Convention should also be borne in mind; it would thus not be possible to achieve the global effect the international environment court project envisages.

4) The Court of Justice of the European Communities in Luxembourg as the body to act in this capacity

The function of the European Court of Justice is to ensure that the law is observed in the interpretation and application of Community Treaties (article 164 of the EEC Treaty). Contrary to what the wording of this article would suggest, both primary and secondary Community legislation are safeguarded by the Court. The European Court of Justice can thus fulfil the function of an international environmental court only in so far that primary or secondary legislation contains environmental provisions. The doubts which were at one time expressed concerning whether the EC was competent to pursue an environmental policy were eliminated - at the latest - once articles 130r-130t were inserted in the EEC Treaty.

Admittedly, the European Court of Justice is empowered to act only within the limits of a series of precisely defined individual jurisdictions. Depending on the participation of the parties to any dispute its procedures can be classified as constitutional, administrative and miscellaneous.

Constitutional procedures involve disputes between constitutional bodies of the European Communities, that is to say between Member States and Community Institutions. For example, a Member State has recourse to the Court if it believes that another Member State has failed to fulfil obligations arising from the Treaty (article 170 I of the EEC Treaty), perhaps because it has not implemented a directive on environmental protection within the set time limit.

Administrative procedures involve Community Institutions and individuals (natural and legal persons). In accordance with article 173 II of the EEC Treaty a natural or legal person may in this way also submit an application for a decision addressed to him or her to be declared void. This can also be done if the decision was addressed to another person but is of direct and individual concern to the applicant.

Other procedures include the preliminary ruling procedure, reviewing the legality of legislation and the official-liability procedure.¹⁶

As regards the development of law as envisaged in article 5 of the EEC Treaty the European Court of Justice has now gone so far as to award compensation to natural persons against Member States which fail to implement Community law on time¹⁷.

Advantages

Here too it can be said that a court, the European Court of Justice, already exists which at European level and subject to certain limitations could also serve to ensure that environmental protection is guaranteed.

Disadvantages

The Court's jurisdiction extends only to the twelve Member States of the European Community. In view of the exhaustive list of fields of jurisdiction the scope for adding environmental protection is limited. The primary concern of the Court is the failure of Member States properly to implement Community law (thus as a rule a legislative shortcoming), not the violation of legal provisions concerning environmental protection by individuals in the Member States. Thus neither natural nor legal persons nor indeed Member States may institute proceedings before the Court against a factory in a neighbouring Member State which is causing emissions. Such an action must be brought in the national courts.

It should also be remembered that because there are no direct coercive measures which the Community can take against a Member State, the effectiveness of the legal protection afforded by the Community is limited (cf. article 171 of the EEC Treaty). The Maastricht will allow a lump sum or penalty payment to be imposed providing certain procedures are followed.

5) Provisional conclusions

A comparison of the current bodies offering legal protection at international level reveals that, if one is prepared to put up with a fragmentation of jurisdictions and the possibly laborious and problematic negotiations leading to an international agreement, an independent, permanent environmental court in accordance with article 95 of the UN Charter is the quickest way of ensuring effective environmental protection. The decisive advantages appear to be not only that individuals too could have full rights of petition but also that a multitude of states would participate as member states of the UN. Above all, however, there is something to be said for charging a special court with international environmental issues which are increasingly becoming a matter of life or death, rather than handing them over as an additional task to a judicial body which already exists. After consideration of all the advantages and disadvantages, it can be concluded that the idea of setting up an international environment court in the form suggested by the promoter's committee should be supported.

Should this ambitious project fail to get off the ground, the need for comprehensive legal environmental protection would also be served if it were possible to amend article 34 of the ICJ Statute in such a way that individuals could also institute proceedings, as indeed advocated by the Rio Declaration in respect of the field of environmental protection. However, since states' right to bring cases is an elementary principle of international law

which is unlikely to ever to be given up, it seems probable that, at best, such a change could be only by creating "another tribunal", within the meaning of article 95 of the UN Charter, with its own rules of procedure.

III. The position of the European Community

The attitude which the European Community has so far adopted to the issue of setting up an international environmental court must be described as extremely reticent. Two motions for resolutions tabled in the European Parliament (13 June 1991, 40 members¹⁸, 10 April, 9 members¹⁹) had no tangible result.

The only success was resolution A-0363/91 of 13 February 1992²⁰, which called for the creation of an international environmental court and for the issue to be discussed at the Earth Summit in Rio. The Rio Declaration²¹ is not the least of the sources from which it may be gleaned that the international community sees the shortcomings in the field of environmental protection primarily as a matter of legislation and is in favour of procedural changes, if at all, only to enable individual citizens to make applications to the courts. In the sense of a "limited solution" within the framework of article 95 of the UN Charter, this would certainly represent an advance.

IV. Initiatives which might be adopted by the European Community.

Under the provisions of article 95 of the UN Charter an agreement by the member states of the United Nations would be required if the favoured option of an independent court were to be achieved. Such an agreement would then also establish the desired rules of procedure.

It should at this point be noted that the European Community may conclude international agreements with environmental objectives. In accordance with article 130r I IV of the Maastricht Treaty it is an objective of the Community to promote measures at the international level to deal with regional or worldwide environmental problems. In accordance with article 130r IV 1 of Maastricht (article V 1 of the pre-Maastricht EEC Treaty) the Community cooperates within its sphere of competence with other competent international organisations. The first step at Community level would be to form a consensus on the need to adopt an initiative to bring the aim of an independent court nearer by exploiting the opportunities provided by the European Parliament's Rules of Procedure (e.g. questions for oral answer with/without debate in accordance with Rule 58 and 59 of the Rules of Procedure; written declarations in accordance with Rule 65 of the Rules of Procedure; motions for resolutions in accordance with Rule 63 of the Rules of Procedure)²².

Aside from the competence of the Community to act as a unit there is another problem, namely that the Community is not a member of the United Nations within the meaning of article 95 of the UN Charter.

Resolution 3208 (XXIV) of 11 October 1974 gave the Community observer status at plenary sessions of the General Assembly and in committees; there is no restriction as regards the substantive issues concerned, for example a restriction to those fields in which the

Community has an external-policy competence. This observer status enables the European Community, through the Commission and in accordance with article 229 I of the EEC Treaty in fact concern only organisational relations with international organisations (exchanges of information, working contacts, granting of observer status)²³.

The functions of an observer are defined as follows in article 7 of the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character of 14 March 1975.

They include:

- a) ensuring the representation of the sending state and safeguarding its interests in relation to the organisation and maintaining liaison with it;
- b) ascertaining activities in the organisation and reporting thereon to the government of the sending state;
- c) promoting cooperation with the organisation and negotiating with it.

What exactly observer status will entail in practice depends however on the individual forum. For example, the principle is still maintained that observers may not be heard in general debates of the General Assembly in plenary session (cf. Doc A/33/PV.5 of 22 September 1978). However, it must be said that the types of participation permitted are becoming increasingly active. As long ago as 1974 the European Communities were invited to participate in sessions and the work of the General Assembly, though only in respect of certain subjects. Such participation does not however involve the right which would be required in this context, namely that of putting forward proposals²⁴.

While this means that the influence of the European Community at the United Nations level is limited, there is also the possibility of following the same course via the Member States, which are all member states of the United Nations. In European Political Cooperation (EPC) as envisaged by the Single European Act the ministers for foreign affairs of the Member States meet four times a year with a member of the Commission. In this way it is intended that Member States' foreign policy should be coordinated and a certain coherence achieved between foreign policy and Community policy. It must be said, however, that this does not mean that the Community can influence Member States to any extent and force them to support the idea of an environmental court. Member States are largely independent in the formulation of their policies at international level. For example, article 130r V 2 of the EEC Treaty stipulates that the competence of Member States to negotiate in international bodies and to conclude international agreements shall not be affected by the provisions of article 130r V 1 of the EEC Treaty.

Under certain circumstances another possibility would be to consider an action for failure to act within the meaning of article 175 III of the EEC Treaty. In order to achieve any of the various options, action would be required by the Commission or the Council in accordance with article 130r V 2 or article 228 of the EEC Treaty. If no action in the form of a decision on a sufficiently definable course of action²⁵ action were to be taken, an application would be possible under the limiting conditions of article 175 III of the EEC Treaty. The alleged lack of action would, however, have to violate Community law. With regard to the general terms in

which the objective of article 130r of the EEC Treaty is couched and the discretion allowed in the attainment thereof, this is scarcely likely in respect of actions to bring about the creation of an international environmental court at UN level.

V. Summary

The establishment of effective environmental protection at international level is a matter of increasingly urgent concern in view of the global effects of various environmental disasters in recent years in particular. It is not just a matter of creating a more watertight and effective range of environmental legal provisions; action must also be taken to ensure that a court exists with the most extensive international jurisdiction possible to penalise environmental crime, to take provisional preventive measures in emergencies and, where appropriate legal provisions are lacking, to create law itself if need be. It is also essential in this context that individuals and organisations should have the right to institute proceedings. The international environmental court at UN level proposed by the promoters' committee meets these criteria.

A comparison of the existing international courts reveals that either individuals and non-governmental organisations may not bring actions (e.g. the ICJ in the Hague or the European Court of Human Rights in Strasbourg) and/or only a limited number of states are subject to the court's jurisdiction (in the case of the European Court of Human Rights in Strasbourg only European states and in the case of the Court of Justice of the European Communities in Luxembourg only the Member States of the EC). Even within the UN the jurisdiction of the ICJ has to date been accepted by only 49 member states. With regard to the possibility of the Court of Justice of the EC fulfilling the function of an environmental court, it should be added that on account of the exhaustive nature of the list of fields of jurisdiction which it enjoys it may not take action against an individual on account of breaches of environmental law. Proceedings may only be brought against Member States or Institutions of the European Community.

Examination of the existing means of legal protection thus demonstrates that the project of an independent international court at UN level, with access for individuals as well as states, which is favoured by the promoters' committee, would provide more effective legal protection; this deserves the support of the European Community.

Attempts at action in this direction to date have had little success. Two motions for resolutions tabled by MEPs in 1991 and 1992 had little tangible effect. Further difficulties are to be feared in this connection in the future.

In the first instance a consensus on the need for an initiative to be taken in support of the project would have to be established by questions for oral answer with or without debate in accordance with Rules 58 and 59 of the Rules of Procedure of the European Parliament, by written declarations in accordance with Rule 65 or by further motions for resolutions in accordance with Rule 63.

However, even if such a consensus existed and the Commission or the Council decided upon appropriate action, the European Community has limited influence in the United

Nations. In accordance with the provisions of article 95 of the UN Charter an agreement by the member states of the UN would be required before a new independent tribunal could be set up. The European Community, however, cannot be regarded as a member state of the United Nations in this sense. It simply has the status of observer, which entitles it to "participate" but not to make proposals.

The influence of the European Community over the foreign policy of its Member States (which are also member states of the United Nations and as such could take steps towards an agreement within the meaning of article 95 of the UN Charter) is limited. European Political Cooperation as established in 1986 does not offer an appropriate set of instruments to influence the foreign policy of the Member States, which remains a matter of national sovereignty.

It may therefore be concluded that despite the urgent need for an international environmental court at UN level the scope for the European Community to provide effective support for the project is extremely limited.

¹ Cf. with regard to international air pollution, for example, Prittowitz, "Die Luft hat keine Grenzen" (The air knows no borders), in: Mayer-Tasch (publ.), *Die Luft hat keine Grenzen*, 1986, p. 61 ff.

² Bryde, "Wasser fließt bergab" (Water flows downhill), in Mayer-Tasch, loc. cit., p. 43 ff.

³ Cf., for example, Bryde, "Umweltschutz durch allgemeines Völkerrecht?" (Environmental protection through general international law?), in: *Archiv des Völkerrechts (International Law Archives)*, Vol. 31 (1993), p. 1 ff.

⁴ OJEC No. C 183, 15.7.91, p. 262, and OJEC No. C 125, 18.5.92, p. 262.

⁵ OJEC No. C 67, 16.3.92, p. 152.

⁶ At present priority is being given to the idea of an international criminal court. On 26 May 1993 the UN Security Council decided to set up an international war crimes tribunal, to have its seat in The Hague. The extent to which its jurisdiction might on an incidental basis include environmental crimes is as yet unclear.

⁷ In the past, two international administrative courts with special responsibilities have been created in this way: ILOAT, the International Labour Organisation Administrative Tribunal, and UNAT, the United Nations Administrative Tribunal.

⁸ Cf. in this context also the President of the ICJ, Jennings, "Need for an Environment Court?" in: *Environmental Policy and Law*, 22 May 1992, pp. 312 ff. (313).

⁹ Cf. for example ICJ Reports 1953, 10-24, *Ambatielos*; ICJ Reports 1970, 3-51, *Barcelona Traction (selection)*.

¹⁰ Cf. *United Nations Handbook*, 2nd ed. 1991, (43) marginal number 12.

¹¹ Cf. *United Nations Handbook*, (43) marginal number 13.

¹² Cf. for a current perspective Bryde, "Umweltschutz durch allgemeines Völkerrecht?" (Environmental protection through general international law?), loc. cit. pp. 2 ff., with much further evidence and a description of the development of the law.

¹³ The view now prevails that international law prohibits damage to the environment of other states, provided that it is serious enough; cf. the evidence for this dominant view in Bryde, loc. cit.

¹⁴ In respect of this option see also Jennings, loc. cit., p. 314; he prefers plenary sessions for normal cases, however.

¹⁵ See also Ipsen, "Völkerrecht" (*International Law*), 3rd edit., para. 45, marginal numbers 4 ff. (9, 10).

¹⁶ Cf. also Schweitzer/Hummer, "Europarecht" (*European Law*), para. 3 VIII 3.

¹⁷ Court of Justice of the European Communities NJW 1992, 165 = EuZW 1991, 758 (Francovich). This option could also play a major role in environmental protection.

¹⁸ OJEC No. C 183, 15.7.91, p. 262.

¹⁹ OJEC No. C 125, 18.5.92, p. 262.

²⁰ OJEC No. C 67, 16.3.92, p. 152.

²¹ Cf. also the introduction.

²² The possibility of an action for failure to act, pursuant to article 175 of the EEC Treaty (see also p. 16), might also be considered.

²³ Geiger, EG-Vertrag (EC Treaty), article 229, marginal number 4.

²⁴ Cf. *United Nations Handbook*, (8) marginal numbers 3 ff.

²⁵ Cf. Geiger, EG-Vertrag (EC Treaty), Article 175, marginal number 2.