

# The Role of International Tribunals in Natural Resource Disputes in Latin America

*C. Leah Granger\**

*This Comment explores the role played by various types of international tribunals in resolving natural resources disputes. After an examination of four disputes in Latin America, the Comment concludes that the current international system, in which multiple tribunals may have jurisdiction over the same issue, is a net benefit for the environment and society.*

|  |      |
|--|------|
| Introduction .....   | 1298 |
| I. Contemporary Understanding of the Function of Tribunals .....     | 1303 |
| II. The Disputes .....   | 1305 |
| A. Tribunals Provide Impartial and Equitable Analysis .....          | 1306 |
| 1. Honduras-Nicaragua Caribbean Sea Maritime Border<br>Dispute ..... | 1306 |
| 2. Maritime Delimitation—Nicaragua, Honduras, &<br>Colombia .....    | 1309 |
| a. Proceedings before the Central American Court of<br>Justice ..... | 1310 |
| b. Proceedings before the World Trade Organization                   | 1312 |
| c. Proceedings before the ICJ .....                                  | 1313 |

---

Copyright © 2007 by the Regents of the University of California.

\* University of California, Berkeley, Boalt Hall School of Law, J.D., 2007; New College of Florida, B.A. 1999. This paper was awarded the Ellis J. Harmon Environmental Law Writing Award in 2007 by a panel composed of Boalt Hall's environmental law faculty and practitioners.

I wish to thank the environmental law faculty for honoring me with this award. I am indebted to Andrew Guzman, Marci Hoffman, and Cymie Payne for providing the tools for this endeavor. I owe special thanks to Orman Granger and David Colson for their valuable feedback; and to Christopher Yates for generously providing me a copy of his thesis. I am grateful to the editors and members of ELQ, whose hard work and dedication brought this project to fruition. Eternal thanks to my friends and family, especially Casey Roberts, Logan Granger, and FiveL. All errors are mine alone.

|  |      |
|--|------|
| 3. Function of the International Tribunals in this<br>Dispute.....   | 1316 |
| B. Tribunals Frame Issues Differently, in Accordance with<br>Their Unique Mandate .....  | 1318 |
| 1. The Chile-EC Swordfish Dispute .....  | 1318 |
| a. Europe Files a Complaint with the WTO.....  | 1320 |
| b. Chile Responds by Initiating Proceedings with<br>ITLOS.....   | 1320 |
| c. Political Resolution of the Dispute .....   | 1322 |
| 2. Function of the International Tribunals in this<br>Dispute.....   | 1322 |
| C. Tribunals Allow Increased Participation by Nonstate<br>Actors.....  | 1324 |
| 1. Oil Production Versus Indigenous Rights in Ecuador ..   | 1324 |
| a. Indigenous Community Sues Ecuador for Human<br>Rights Violations .....  | 1326 |
| b. Occidental Sues Ecuador for Violation of Bilateral<br>Investment Treaty .....   | 1328 |
| 2. Function of the International Tribunals in this<br>Dispute.....   | 1333 |
| D. Tribunals Increase Public Awareness and Scrutiny of<br>Disputes .....   | 1334 |
| 1. Use of the Uruguay River—Dispute between<br>Argentina and Uruguay.....  | 1334 |
| a. Project Review by the International Finance<br>Corporation and Multilateral Insurance<br>Guarantee Association Ombudsman..... | 1337 |
| b. Argentina Asks for Help from the ICJ.....   | 1340 |
| c. Uruguay Asks for Help from Mercosur.....  | 1342 |
| 2. Future of the Mills? .....  | 1344 |
| Conclusion.....  | 1345 |

#### INTRODUCTION

With the proliferation and reinvigoration of international tribunals over the past fifteen years, international forums are increasingly exercising jurisdiction over natural resource disputes previously handled by local courts or resolved through purely diplomatic methods. The conventional wisdom among international legal theorists is that the existence of tribunals with overlapping jurisdictions and the concomitant potential for issuing conflicting decisions will lead to instability, distrust,

and gaming of the international legal system.<sup>1</sup> However, individual tribunals approach disputes from a unique perspective, focusing on different aspects of the issue under review. An examination in this Comment of four disputes in Latin America, each one heard by multiple tribunals, reveals that having access to myriad forums actually fosters greater participation and transparency in the process. Utilization of particular tribunals is what is often most important to parties and, as the case studies show, simply bringing a case to a particular forum sometimes creates sufficient leverage for a party that a dispute may be resolved almost immediately.

Each tribunal operates within a unique legal framework, based on its founding documents, and brings a particular perspective and expertise to any given dispute. Use of multiple tribunals provides the opportunity for the consideration of varied stakeholder interests. Tribunals can be used by participants as signaling devices—to show resolve, create leverage, and balance power. A positive public purpose is served through the simple generation of information and greater public awareness of disputes generated through the use of multiple international tribunals. When tribunals are used in this manner in international environmental disputes, natural resource utilization may be determined in a more participatory manner.

Latin America contains a wealth of natural resources, many of which are shared between neighboring states, and all of which are facing serious development pressures.<sup>2</sup> A comprehensive survey of land use and natural

---

1. Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze*, 3 MELB. J. INT'L L. 453, 454 (2002) ("The establishment of new fora for third party dispute settlement is undoubtedly one of the more striking international legal developments in recent years."); Thoman Buergenthal, *The Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); David Davenport, *The Proliferation of International Courts and Tribunals: What Does It Mean?*, 9 BRIEFLY—PERSPECTIVES ON LEGISLATION, REGULATION, AND LITIGATION 5 (May 2005); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Problem?*, 31 N.Y.U. J. INT'L L. POL. 679 (1999).

2. UNITED NATIONS ENVIRONMENT PROGRAM, *GLOBAL ENVIRONMENT OUTLOOK GEO 4* (2007)

Latin America and the Caribbean holds 22 per cent of the world's hydropower potential, 14 per cent of the capacity of the geothermal power systems installed worldwide, 11 per cent of global petroleum reserves, 6 per cent of natural gas and 1.6 per cent of coal. . . . Latin America and the Caribbean represents about 15 per cent of the world's total land area, yet it holds the largest variety of WWF [World Wide Fund for Nature] defined ecoregions, harbouring examples of all biomes, except tundra and taiga (although alpine tundra occurs in isolated spots). It also has the largest species diversity of the world's regions . . . and hosts several of the world's greatest river basins, including the Amazon, Orinoco, Paraná, Tocantins, São Francisco and Grijalva-Usumacinta. . . . Regionalization and globalization have triggered an increase in oil and gas extraction, expanded the use of arable land for monoculture exports and intensified tourism in the Caribbean. . . . Drivers and pressures seldom act in isolation.

resource disputes in the Americas heard by international tribunals during the past decade reveals several examples where stakeholders brought the same dispute to multiple tribunals.<sup>3</sup> The cases include disputes over territorial boundaries, access to fisheries, mining of oil and gas, and industrial development. The region is ideal for a comparative study of the function tribunals are playing in resolving natural resource disputes, as well as how the interplay between multiple tribunals affects dispute outcomes. This analysis is conducted through an examination of four natural resource disputes in Latin America.

The four disputes discussed in this Comment involve: a maritime border between Honduras and Nicaragua; fisheries off the coast of Chile; oil exploration in Ecuador; and proposed pulp mills in Uruguay along the Argentinean border. These disputes share many common characteristics. Each dispute has occurred within the past ten years, involves at least one Latin American country, and concerns the proper utilization of natural resources. While the subject matter and participating stakeholders in each dispute are different, the disputant states share a number of institutional and structural similarities. For instance, each of the state parties belongs to numerous treaty regimes with dispute settlement provisions,<sup>4</sup> and lie within the medium development range, according to the U.N. Human Development Index.<sup>5</sup>

---

They tend to interact in synergistic ways, and their impacts on biodiversity are more than the sum of the effects of the individual drivers and pressures themselves. . . . For example, sediments from deforestation in the headwaters of the Orinoco River, deep in South America, have impacts far out in the Wider Caribbean Sea basin, changing the nutrient availability and turbidity of the waters. . . . This immense biodiversity is under threat due to habitat loss, land degradation, land-use change, deforestation and marine pollution. Eleven per cent of the region is currently under formal protection. Of 178 ecoregions recognized in the region by the World Wide Fund for Nature (WWF), only eight are relatively intact, 27 are relatively stable, 31 are critically endangered, 51 are endangered, 55 are vulnerable, and the remaining six are unclassified. Around one-sixth of the world's endemic plants and vertebrates are threatened by habitat loss in seven regional "hot spots."

*Id.* at 167, 240–42, 245 (internal citations omitted).

3. In preparing this Comment, I compiled a list of all the active regional and international courts available to Latin American countries. I mainly relied on the Project on International Courts and Tribunals and various United Nations Programs to identify viable courts and pressing natural resource issues. Once I had compiled a comprehensive list, I reviewed the individual cases heard by each of those courts during the previous ten years. I began by searching for disputes involving natural resource utilization, and then identified those disputes being heard by multiple tribunals.

4. See Table 1.

5. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2006, at 283–86 (2006), available at <http://hdr.undp.org/en/media/hdr06-complete.pdf>. Human development is a measure of people's health, literacy, political participation, etc. According to the UNDP:

Human development is about much more than the rise or fall of national incomes. It is about creating an environment in which people can develop their full potential and

2007] *NATURAL RESOURCE DISPUTES IN LATIN AMERICA* 1301**Table 1: Tribunals Available to Countries Involved in the Disputes and Year Joined**

|   | Argentina         | Chile                                | Colombia          | Ecuador           | Honduras          | Nicaragua                            | Uruguay                     |
|---|-------------------|--------------------------------------|-------------------|-------------------|-------------------|--------------------------------------|-----------------------------|
| Inter-American Court of Human Rights (IACHR) (founded 1959)   | 1984              | 1969 <sup>a</sup> /<br>1999          | 1973/<br>1994     | 1977              | 1977              | 1969 <sup>a</sup> /<br>1979/<br>1994 | 1969 <sup>a</sup> /<br>1984 |
| Central American Court of Justice (CACJ) (revitalized 1991)   |                   |                                      |                   |                   | 1994              | 1994                                 |                             |
| World Trade Organization (WTO) (founded 1994)   | 1995              | 1995                                 | 1995              | 1996              | 1995              | 1995                                 | 1995                        |
| Central America Free Trade Agreement (CAFTA) (founded 2005)   |                   |                                      |                   |                   | 2005              | 2005                                 |                             |
| Southern Common Market (Mercosur) (founded 1991)  | 1991              | 1996 <sup>b</sup>                    | 2004 <sup>b</sup> | 2004 <sup>b</sup> |                   |                                      | 1991                        |
| Andean Community of Nations (CAN) Court of Justice of the Andean Community (TJAC) (founded 1969)  | 2005              | 1969;<br>1976 <sup>d</sup> ;<br>2006 | 1969              | 1969              |                   |                                      | 2005                        |
| International Court of Justice (ICJ) (founded 1945)   | 1945              | 1945                                 | 1945              | 1945              | 1986 <sup>e</sup> | 1929 <sup>e</sup>                    | 1921 <sup>e</sup>           |
| International Criminal Court (ICC) (treaty entered into force 2002)   | 2000              |                                      | 2002              | 2002              | 2002              |                                      | 2002                        |
| International Tribunal for the Law of the Sea (ITLOS) (operational 1996)  | 1995 <sup>f</sup> | 1997 <sup>f</sup>                    |                   |                   | 2003 <sup>f</sup> | 2000 <sup>f</sup>                    | 1992                        |
| Permanent Court of Arbitration (PCA) (revised 1907)   | 1907              | 1907/<br>1998                        | 1907/<br>1997     | 1907              | 1961/<br>1962     | 1907/<br>1910                        | 1907                        |
| International Center for the Settlement of Investment Disputes (ICSID) (1965)   | 1994              | 1991                                 | 1997              | 1986              | 1989              | 1995                                 | 2000                        |
| International Finance Corporation (founded 1956)<br>Multilateral Investment Guarantee Company (MIGA) (founded 1985)<br>IFC-MIGA Compliance Advisor/Ombudsman (CAO) (created in 1999)  | 1959              | 1955                                 | 1955              | 1955              | 1955              | 1955                                 | 1968                        |
| <sup>a</sup> Signed but did not ratify the Convention, thus were not subject to the IACHR's jurisdiction. <sup>d</sup> Observer Country of CAN.<br><sup>b</sup> Associate Members of Mercosur. <sup>e</sup> Accepts Mandatory Jurisdiction of the ICJ.<br><sup>c</sup> Associate Members of CAN. <sup>f</sup> Agreed to implement Section XI of ITLOS Treaty. |                   |                                      |                   |                   |                   |                                      |                             |

**Source:** When available, data taken from the United Nations Official Depository or from other official treaty depositories.

lead productive, creative lives in accord with their needs and interests. People are the real wealth of nations. Development is thus about expanding the choices people have to lead lives that they value. . . . Fundamental to enlarging these choices is building human capabilities—the range of things that people can do or be in life. The most basic capabilities for human development are to lead long and healthy lives, to be knowledgeable, to have access to the resources needed for a decent standard of living and to be able to participate in the life of the community. Without these, many choices are simply not available, and many opportunities in life remain inaccessible. Human development and human rights are mutually reinforcing, helping to secure the well-being and dignity of all people, building self-respect and the respect of others.

United Nations Development Programme, The Human Development Concept, <http://hdr.undp.org/en/humandev/> (last visited Jan. 21, 2008).

As seen in Table 1, the tribunals accessed in these disputes include the Inter-American Court of Human Rights,<sup>6</sup> part of the Organization of American States; the Central American Court of Justice,<sup>7</sup> part of the Central American integration movement; the Dispute Settlement Body of the World Trade Organization<sup>8</sup>; the arbitration body for Mercosur,<sup>9</sup> the Southern Common Market; the International Court of Justice,<sup>10</sup> the judicial arm of the United Nations system; the International Tribunal on the Law of the Sea,<sup>11</sup> part of the United Nations Convention on the Law of the Sea; the International Centre for the Settlement of Investment Disputes,<sup>12</sup> an independent settlement body associated with the World Bank; and World Bank Group's Office of the Compliance Advisor/Ombudsman for the International Finance Corporation and Multilateral Insurance Guarantee Agency.<sup>13</sup>

All the disputing states in this study have the domestic institutional capacity to address natural resource issues, coupled with a strong tradition of using international dispute mechanisms.<sup>14</sup> As a result, the adequacy of internal institutional capacity and development are not serious factors when examining these states' recourse to international tribunals and will not be addressed in this Comment. Additionally, the primary focus of this Comment is not on the "enforceability" or "bindingness" of the various tribunals' decisions, but rather it is on the

---

6. See *infra* notes 139–140 and accompanying text.

7. See *infra* notes 50–54 and accompanying text.

8. See *infra* note 69.

9. See *infra* note 243.

10. See *infra* notes 74–77 and accompanying text.

11. See *infra* notes 114–117 and accompanying text.

12. See *infra* notes 169–176 and accompanying text.

13. See *infra* note 212.

14. Beth A. Simmons, *Territorial Disputes and Their Resolution: The Case of Ecuador and Peru*, PEACEWORKS, April 1999, available at <http://www.usip.org/pubs/peaceworks/pwks27.pdf>. Simmons states:

[T]here have been some twenty-two instances of legally binding third-party arbitrations or adjudications with respect to sovereignty over territory in Latin America. By comparison, similar rulings apply to only one small case in continental Europe (thirty-six acres between Belgium and the Netherlands); two among independent states in Africa; two in the Middle East; and three in Asia, the Far East, and the Pacific. Certainly, more than any other region on the globe, the Latin Western Hemisphere has a relatively strong tradition of using formal legal procedures to resolve disputes over contested territory. Arbitration was an especially popular form of dispute settlement in Latin America around and shortly after the turn of the century. Several recent cases indicate continuing interest in this form of dispute settlement, including El Salvador and Honduras's recent use of the ICJ in 1992, and Chile and Argentina's use of arbitration to settle their contested border in the Laguna del Desierto region in 1994.

*Id.* at 6–7.

political and social interplay caused by multiple tribunals hearing a single dispute.

I. CONTEMPORARY UNDERSTANDING OF THE FUNCTION OF TRIBUNALS

Tribunals are not all created equally. A tribunal's character is largely determined by its constitutive document, most often a treaty. The composition, functional capacity, scope of authority, accessibility by stakeholders, procedural flexibility, and transparency of process all affect a tribunal's character.<sup>15</sup> At a conceptual level, tribunals share many of the same characteristics as domestic courts—a neutral arbiter assisting disputing parties to reach a resolution. For the tribunal to successfully arbitrate a dispute, each party must trust in the process and be willing to abide by the decision, even if it is unfavorable. The disputants must trust in the fairness of the judge and the process and have an expectation that upon repeated use, they will win approximately half of the time.<sup>16</sup> Unlike domestic courts, which are incorporated into the state machinery and the other branches of the government, making court decisions enforceable,<sup>17</sup> at the international level tribunals are rarely part of a larger infrastructure with coercive power, which can result in decisions with limited enforceability.<sup>18</sup>

One of the foundational tenets of international law is respect for state sovereignty.<sup>19</sup> This respect requires international judicial organs to find alternative methods to encourage utilization of tribunals and compliance with decisions since coercive state power is unavailable. Basing tribunal opinions on treaty law can provide evidence of judicial impartiality and encourage widespread participation by states.<sup>20</sup>

---

15. OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, INTERNATIONAL FINANCE CORPORATION/MULTILATERAL INVESTMENT GUARANTEE AGENCY, ANNUAL REPORT (2005–06); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 300–08 (1997).

16. See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE APPROACH* (2008); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

17. SHAPIRO, *supra* note 16, at 22–27.

18. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422, 426 (2000); Jenny S. Martinez, *Enforcing the Decisions of International Tribunals in the U.S. Legal System*, 45 SANTA CLARA L. REV. 877 (2005); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. INT'L L. & POL. 709, 714 n.25 (1999); Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397 (2007).

19. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 7 (2d ed. 2006); HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 202–40 (1933).

20. HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1934).

With the proliferation and reinvigoration of international tribunals since the end of the Cold War, states and organizations have developed a number of special purpose institutions that perform similar functions to traditional tribunals. For instance, public international banks, such as the World Bank Group, have developed and instituted internal review mechanisms mirroring many of the functions of independent tribunals, allowing stakeholders to bring disputes with bank-funded developers to an independent review body. Similarly, the ombudsman for the International Finance Corporation provides many of the same functions as the International Court of Justice, although the two bodies serve different constituencies and have adopted different forms. As another example, many countries from around the world worked through United Nations mechanisms to develop a codified set of laws and an attendant tribunal for the laws of the sea.

Recent academic literature has noted the growth of these special purpose tribunals and has sought to develop analytical tools to aid in qualitative analysis and comparison.<sup>21</sup> Laurence Helfer and Anne-Marie Slaughter have developed a checklist of factors influencing the character, and effectiveness of special purpose tribunals.<sup>22</sup> These factors are: for member states—composition of the tribunal, its caseload and functional capacity, whether it possesses independent fact-finding capacity, and the formal authority of the instruments that the tribunal interprets; for judges—awareness of audience, neutrality and demonstrated autonomy from political interests, incrementalism, quality of legal reasoning, judicial cross-fertilization and dialogue, and form of opinions; and independent factors—nature of violations, autonomous domestic institutions committed to the rule of law and responsive to citizen interests, and the relative cultural and political homogeneity of states subject to a supranational tribunal.<sup>23</sup>

While there is considerable debate regarding the relative importance of the factors and how the factors should be measured, the checklist is nonetheless a useful tool when comparing tribunals like the International Court of Justice (ICJ) and quasi-tribunals like the ombudsman for the International Financial Corporation (IFC). For instance, the ICJ is composed of a panel of judges chosen by all member states of the United

---

21. Brown, *supra* note 1, at 453–54 (2002) (“The establishment of new fora for third party dispute settlement is undoubtedly one of the more striking international legal developments in recent years.”); Buergenthal, *supra* note 1; Davenport, *supra* note 1; Helfer & Slaughter, *supra* note 15; Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 910 (2005) (“Within the past decade the world has witnessed an explosion of international adjudication.”); Kingsbury, *supra* note 1.

22. Helfer & Slaughter, *supra* note 15.

23. *See id.* at 298–337.

Nations with an emphasis on balancing representation from each of the continents and major legal traditions.<sup>24</sup> In contrast, the IFC ombudsman is chosen by the director of the IFC and serves for a set term.<sup>25</sup> The budget for the ICJ is voted on by the membership and has generally been quite stable from year to year.<sup>26</sup> The budget of the IFC ombudsman, on the other hand, is set by the IFC, and the scope of the ombudsman's review is by necessity limited by the allocation of resources from the IFC director.<sup>27</sup> Because of these institutional differences, decisions issued by the ICJ will always carry a different weight than recommendations issued by the IFC ombudsman. The composition of a tribunal, its location, and transparency of process all subtly affect the adjudication and resolution of the dispute. Rather than viewing these differences as a negative, they can be seen as giving stakeholders greater flexibility and choice in the type of dispute settlement mechanisms utilized.

## II. THE DISPUTES

Each dispute examined in this Comment takes place within a complex political fabric. The international tribunals accessed are just some of the players, and their participation does not guarantee an apolitical or "fair" outcome to the dispute. Recourse to multiple tribunals must affect the outcome, or at least the stakeholders must believe that it will affect the outcome of the dispute, or they would not utilize them.<sup>28</sup> The scope of jurisdiction and governing law is one explanation for why parties seek redress from multiple tribunals. Clearly, parties want to be heard in a sympathetic forum. However, in many instances, the tribunal issues no formal decision. If the tribunal's effectiveness is not necessarily tied to written formal opinions, parties must benefit from the increased

---

24. Statute of the International Court of Justice arts. 2–15, June 26, 1945, 59 Stat. 1031 [hereinafter ICJ Statute]. The Statute says judges are to be elected "from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." *Id.* art. 2. While judges do not represent their country of origin on the court, the rules provide that no more than one person from a single country may sit on the court at a time. Further, the court provides for the possibility of ad hoc judges joining the court on a case-by-case basis if a case involves a party not represented by the current panel of judges. *Id.* arts. 3, 31.

25. CENTER FOR INTERNATIONAL LAW, A HANDBOOK ON THE OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN OF THE INTERNATIONAL FINANCE CORPORATION AND MULTILATERAL INVESTMENT GUARANTEE ASSOCIATION 4 (Discussion Draft September 2000), available at <http://www.ciel.org/Publications/CAOhandbook.pdf>.

26. INTERNATIONAL COURT OF JUSTICE, THE INTERNATIONAL COURT OF JUSTICE 36 (5th ed. 2004).

27. *Cf.* OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, INTERNATIONAL FINANCE CORPORATION/MULTILATERAL INVESTMENT GUARANTEE AGENCY, ANNUAL REPORT (2005–2006).

28. GUZMAN, *supra* note 16.

public awareness and dissemination of information resulting from filing a case.

Each of the four disputes exemplifies a different function that tribunals may serve and shows how the use of various tribunals may affect the outcome of a dispute. It is important to bear in mind that the right to access tribunals—in fact the very existence of tribunals—is not guaranteed. The international system described in this Comment is a snapshot of an ever-evolving system. Proponents of a democratic and inclusive system must be ever vigilant to preserve and strengthen those features in international tribunals.

#### *A. Tribunals Provide Impartial and Equitable Analysis*

One of the most important and basic functions of any tribunal is to provide a fair and unbiased forum. The qualifications of the judges, the applicable law, and the right of affected parties to intervene all change a disputant's perspective on the fairness of a tribunal, ultimately influencing whether it is likely to comply with tribunal decrees.

##### *1. Honduras-Nicaragua Caribbean Sea Maritime Border Dispute*

The Honduras-Nicaragua Caribbean Sea maritime border dispute provides an excellent example of how states were unable to solve a dispute until the parties found a forum they could both respect and agree to be bound by. For the past several decades, Nicaragua and Honduras have been wrangling over land and maritime borders.<sup>29</sup> For much of this time, the two states have had ideologically opposed political systems.<sup>30</sup> From colonial times when land was titled and allocated by the king of Spain without regard to local considerations, through the ideological conflicts of the 1980s,<sup>31</sup> Central American states have struggled for autonomy, independence, and self-identity. While the inhabitants of the two countries share considerable culture and history, there has been significant tension along the borders at times and frequent low-level

---

29. El Salvador and Honduras brought a case to the ICJ in the 1980s. Nicaragua and Honduras also brought a previous dispute to the ICJ in the 1980s. *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69 (Dec. 20); *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 1989 I.C.J. 162 (Dec. 13).

30. CENTRAL INTELLIGENCE AGENCY, *WORLD FACTBOOK*, <https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html> & <https://www.cia.gov/library/publications/the-world-factbook/geos/ho.html> (last visited Jan. 21, 2008).

31. According to the CIA World Factbook, Honduras was a haven for U.S.-sponsored anti-Sandinista contras fighting the Marxist Nicaraguan government during the 1980s. The Sandanistas lost political power in the 1990s, but returned to power in the 2006 elections. *Id.*

military skirmishes.<sup>32</sup> Both Honduras and Nicaragua have a long history of utilizing the ICJ, beginning in the 1950s and '60s when the ICJ satisfactorily decided a long-running territorial land dispute between Honduras and Nicaragua.<sup>33</sup> The dispute discussed here involved Honduras and Nicaragua's shared maritime border on the Caribbean Sea. Nicaragua's territorial sovereignty was severely limited by a 1928 treaty between Honduras and Colombia dividing most of the Caribbean Sea between them.<sup>34</sup> Nicaragua needed to gain bargaining power and wanted to reach a recognized and respected border agreement.

The Coco River forms the land boundary between Honduras and Nicaragua on the Caribbean Sea. The two countries disagreed about the proper angle the maritime border should follow as it extends out from the mouth of the river into the Caribbean Sea. At stake are the rights to utilize fishing and oil resources.<sup>35</sup> The disputed area has some of the richest lobstering grounds in the Caribbean, harvesting between 6,000 and 8,000 tonnes of lobster annually.<sup>36</sup> This impasse is the most distinct state-to-state dispute of the four case studies.

---

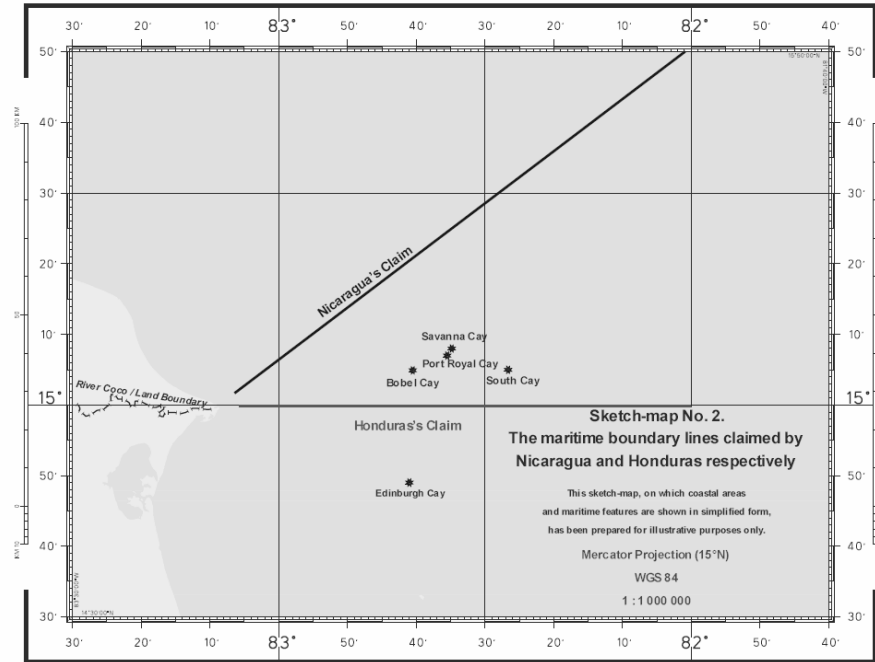
32. *An Uneasy Border: Honduran-Nicaraguan Incidents*, N.Y. TIMES, Mar. 18, 1988, at A8 (detailing a number of border skirmishes and the responses by Honduras and the United States in 1985).

33. Arbitral Award Made by the King of Spain on 23 Dec. 1906 (Hond. v. Nicar.), 1960 I.C.J. 192; see also Charles G. Fenwick, *The Honduras-Nicaragua Boundary Dispute*, 51 AM. J. INT'L L. 761 (1957); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69 (Dec. 20).

34. See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 I.C.J. 120 (Oct. 8) [hereinafter Nicaragua-Honduras Maritime Dispute Judgment] (discussing the Barcenas-Esguerra Treaty of 1928 between Colombia and Nicaragua), available at <http://www.icj-cij.org/docket/files/120/14075.pdf>.

35. Christopher E. Yates, *Fisheries Depletion and Conflict: The Case of the Honduras-Nicaragua Maritime Boundary Dispute* (2001) (unpublished master's thesis, University of Florida) (on file with author). Fishery products are the second largest export earner for Nicaragua with lobster being one of the most valuable exports at an estimated annual value of US \$23 million. Banco Central de Nicaragua, *Anuario de Estadísticas Económicas 2001-2006*, available at <http://www.bcn.gob.ni/publicaciones/anuario/anuario2006.pdf>. Lobster exported from Honduras have an export value of US \$20-30 million annually. Banco Central de Honduras, *Honduras: Comercio Exterior de Mercancías Generales* (2007), available at [http://www.bch.hn/download/comex/comex2007/informe\\_comex01\\_112007.pdf](http://www.bch.hn/download/comex/comex2007/informe_comex01_112007.pdf)

36. WESTERN CENTRAL ATLANTIC FISHERY COMM'N, FAO Fisheries Report No. 619, REPORT ON THE FAO/DANIDA/CFRAMP/WCAFC REGIONAL WORKSHOPS ON THE ASSESSMENT OF THE CARIBBEAN SPINY LOBSTER (*PANULIRUS ARGUS*) 12-13 (2001), available at <ftp://ftp.fao.org/docrep/fao/006/x9186e/x9186e01.pdf>.

**Figure 1: Maritime Boundary Claimed by Nicaragua and Honduras**

**Source:** ICJ Judgment of October 8, 2007. Courtesy of the International Court of Justice.

Throughout the 1990s, Honduran and Nicaraguan fishermen complained about poaching and encroachment from the other side. On multiple occasions, Nicaraguan coast guard vessels seized Honduran fishing vessels in areas claimed by Nicaragua. A 2001 study of the region's spiny lobster fishing economy found that the taking of undersized lobsters, lack of enforcement of existing regulations, and illegal fishing were contributing to the overexploitation of the resource.<sup>37</sup> The study found tension between large-scale commercial fishermen in Honduras using traps and artisan fishers in Nicaragua who rely primarily on diving.<sup>38</sup> Trap fishermen are able to catch more lobsters than divers, but divers are able to hunt for lobsters in deeper water—each accuse the other of causing the lobsters' decline. Like most of the commercially fished regions in the world, this area has witnessed a dramatic decline in the size and quantity of its catch.<sup>39</sup> Inspectors at processing facilities report that greater than 20 percent of the lobster being processed are below

37. Yates, *supra* note 35, at vi.

38. *Id.*

39. *Id.*

reproductive size and fishermen report that they only harvest 2,500–3,500 pounds in a two-week trip when they used to harvest 10,000 pounds in that same period of time.<sup>40</sup> Adding to the tension, many of the divers are members of indigenous communities who have traditionally maintained a separate cultural identity.<sup>41</sup> Honduras wants to maximize its territory in order to support its commercial fishing fleet and minimize the regional influence of Nicaragua. Likewise, Nicaragua wants to maximize its territory in order to protect the livelihood of its indigenous people, develop its commercial fishing fleet, and strengthen its regional presence.

## 2. *Maritime Delimitation—Nicaragua, Honduras, & Colombia*

Tensions between Nicaragua and Honduras increased in 1999 when Honduras ratified a maritime treaty with Colombia recognizing Honduras' claim over territory claimed by Nicaragua. The treaty allocated this oceanic region to Honduras for its exclusive economic development.<sup>42</sup>

Immediately following Honduras' ratification of the treaty, Nicaragua initiated proceedings in several forums seeking recognition of its claimed maritime border. Nicaragua first filed a petition against Honduras with the Central American Court of Justice (CACJ), requesting the court to declare Honduras in violation of its regional community integration obligations.<sup>43</sup> Honduras objected to the jurisdiction of the court,<sup>44</sup> and within a week of the initial treaty signing,

---

40. *Id.* at 29.

41. *Id.* at 26.

42. Honduras ratified the "Maritime Delimitation with Colombia Treaty of August 2, 1986" on December 1, 1999. Maritime Delimitation between the Republic of Colombia and the Republic of Honduras, Colom.-Hondur., Dec. 21, 1999, 2093 U.N.T.S. 295 (I-36360); Memorial of Nicaragua, Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Mar. 21, 2001), available at <http://www.icj-cij.org/docket/files/120/13719.pdf>; see also David Colson, *The Legal Regime of Maritime Boundary Agreements*, in 1 INTERNATIONAL MARITIME BOUNDARIES 66 (Jonathan I. Charney & Lewis M. Alexander eds., 1993); Thomas Andrew O'Keefe, *The Central American Integration System (S.I.C.A.) at the Dawn of a New Century: Will the Central American Isthmus Finally Be Able to Achieve Economic and Political Unity?*, 13 FLA. J. INT'L L. 243, 254 (2001).

43. 5 GACETA OFICIAL CORTE CENTROAMERICANA DE JUSTICIA 7–10 (Mar. 1, 2000), available at <http://www.ccj.org.ni/press/gacetas/GacetaNo10.pdf>; O'Keefe, *supra* note 42, at 254–55.

44. Corte Centroamericana de Justicia, Demanda por violación de normativa del y principios comunitarios centroamericanos del Sistema de la Integración Centroamericana (SICA) (Nov. 27, 2001), available at <http://www.ccj.org.ni/resolnes/94-05/Resol25.pdf> [hereinafter CACJ Resolution 25]; Corte Centroamericana de Justicia, Demanda de revocación de disposiciones legales, actos administrativos y actuaciones de hecho adoptadas por la República de Nicaragua que afectan y violan la Normativa Jurídica y el funcionamiento del Sistema de Integración Centroamericana, available at <http://www.ccj.org.ni/resolnes/94-05/Resol26.pdf>.

Nicaragua responded by filing a petition against Honduras with the ICJ.<sup>45</sup> Additionally, Nicaragua engaged in extrajudicial measures, imposing import tariffs on a number of Colombian and Honduran imports. In response to the tariffs, Colombia and Honduras initiated proceedings against Nicaragua at the WTO in June 2000.<sup>46</sup> The WTO proceedings were suspended pending resolution of the real matter in interest—the maritime border—at the ICJ.<sup>47</sup> Nicaragua filed a petition, similar to the one filed against Honduras in 1999, against Colombia with the ICJ in 2001.<sup>48</sup>

*a. Proceedings before the Central American Court of Justice*

While the economic aspects of integration continue to move forward in Central America, judicial integration has been hindered by the limited participation of Central American Integration System (“SICA”) members<sup>49</sup> in the Central American Court of Justice. The Central American countries have been experimenting with a regional court of justice since at least 1907; the current iteration of the CACJ came about in 1991 with the signing of the Protocol of Tegucigalpa.<sup>50</sup> The Protocol reformed SICA within the Organization of Central American States and revived the CACJ. The mission of the Court is to help integrate its members and establish a more democratic and peaceful region.<sup>51</sup> The CACJ Statute reads, “It has been a strong and lasting desire of the states of the Central American Isthmus that they be recognized as one nation, as this recognition would accord their peoples the full attainment of

---

45. Application Instituting Proceedings, Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nic. v. Hond.), 1999 I.C.J. Pleadings 120 (Dec. 8, 1999), available at <http://www.icj-cij.org/docket/files/120/7083.pdf>.

46. Request for Consultations by Colombia, *Nicaragua—Measures Affecting Imports From Honduras and Colombia*, WT/DS188/1 (Jan. 20, 2000); Request for Consultations by Honduras, *Nicaragua—Measures Affecting Imports From Honduras and Colombia*, WTO/DS201/1 (Jun. 13, 2000).

47. Request for Consultations by Colombia, *supra* note 46; Request for Consultations by Honduras, *supra* note 46.

48. Application Instituting Proceedings, Territorial and Maritime Dispute (Nicar. v. Colom.), 2001 I.C.J. Pleadings 124 (Dec. 6, 2001), available at <http://www.icj-cij.org/docket/files/124/7079.pdf>.

49. SICA’s members are El Salvador, Guatemala, Honduras, and Nicaragua. Costa Rica and Panama do not participate. O’Keefe, *supra* note 42, at 247.

50. Protocol of Tegucigalpa to the Charter of 12 December 1962 art. 122, July 23, 1992, 1695 U.N.T.S. 382, No.A-8048. Only El Salvador, Honduras, and Nicaragua ratified the protocol by adopting the Statute of the Central American Court of Justice, Dec. 10, 1992, 34 I.L.M. 921, 923 [hereinafter CACJ Statute].

51. World Legal Information Institute, Project on International Courts and Tribunals (PICT) Resources, <http://www.worldlii.org/int/other/PICTRes/2003/14.html> (last visited Feb. 3, 2008).

justice, legal security and general welfare.”<sup>52</sup> The jurisdiction language of the Statute reads quite strongly, stating that the CACJ views itself as having “exclusive jurisdiction over the states of the Isthmus . . . [and that t]he court has absolute competence which excludes every other Tribunal.” The decisions of the court are binding on the parties only.<sup>53</sup> The Court’s jurisdiction is expansive in that Article 35 of the Statute actually requires that Central American states bring any interstate treaty or agreement dispute affecting Central American economic integration to the CACJ.<sup>54</sup> But with only El Salvador, Honduras, and Nicaragua accepting the jurisdiction of the court, the CACJ has struggled to establish its viability and hears few cases.<sup>55</sup>

Almost immediately after receiving notification from Honduras that the country intended to sign the maritime treaty with Colombia, Nicaragua filed a petition with the CACJ against Honduras for violation of community norms of Central American integration and cooperation.<sup>56</sup> Upon receiving Nicaragua’s petition, the CACJ immediately accepted the case even though Honduras did not agree to submit the matter to the Court.<sup>57</sup> Honduras’ repudiation of jurisdiction was a problem for the CACJ because it made it less likely that Honduras would comply with any subsequent ruling. However, on November 30, 1999, just one day after Nicaragua’s initial petition, the CACJ issued a preliminary order calling on Honduras to suspend ratification of the treaty with Colombia.<sup>58</sup> Honduras refused, and the Court responded by authorizing SICA members to take appropriate measures to ensure Honduras’s compliance with its order requiring suspension of ratification.<sup>59</sup> Nicaragua implemented a 35 percent duty on Honduran and Colombian imports,<sup>60</sup> and in response Honduras filed a counter-petition with the CACJ

---

52. CACJ Statute, *supra* note 50, (“History”).

53. *Id.* (“A Jurisdictional Power for the Central American States”).

54. O’Keefe, *supra* note 42, at 251.

55. The Court is currently composed of one permanent judge (and one alternate) from each member country. CACJ Statute, *supra* note 50, art. 8 (providing for the court to be “composed of one or more Magistrates from each state. Each Magistrate shall have an alternate”). Since only El Salvador, Nicaragua and Honduras have thus far accepted the binding jurisdiction of the court, only those three countries have representatives. Each national Supreme Court elects a representative to serve on the CACJ for a ten-year term. *Id.* arts. 10–11.

56. GACETA OFICIAL CORTE CENTROAMERICANA DE JUSTICIA, *supra* note 43, at 7–10; O’Keefe, *supra* note 42, at 254–55.

57. Nicaragua-Honduras Maritime Dispute Judgment, *supra* note 34; O’Keefe, *supra* note 42, at 254–55. Nicaragua relied on Article 36(1)–(2) of the Statute of the Court and Article XXXI of the Pact of Bogota. CACJ Statute, *supra* note 50; American Treaty on Pacific Settlement (“Pact of Bogota”) art. XXXI, Apr. 30, 1948, 30 U.N.T.S. 55 [hereinafter Pact of Bogota].

58. CACJ Resolution 25, *supra* note 44, at 25.

59. O’Keefe, *supra* note 42, at 255.

60. GACETA OFICIAL CORTE CENTROAMERICANA DE JUSTICIA, *supra* note 43, at 9.

claiming this duty violated regional integration principles.<sup>61</sup> The CACJ agreed with Honduras and ordered Nicaragua to suspend the tariff on Honduran goods. Nicaragua refused.<sup>62</sup>

Strategically, Nicaragua's utilization of the CACJ makes sense. Colombia had no recourse at the CACJ to Nicaragua's application of a 35 percent import tariff because it is not a member of SICA. Nicaragua had a strong voice on the CACJ, since it appointed one of the three judges, and likely thought it would receive favorable treatment from a regional court whose mission is to integrate its members. The CACJ's loyalty lies with member states, so the Court would likely issue a decision that would favor and strengthen member states over nonmember states.

However, the effectiveness of the CACJ was limited by the lack of compliance by both parties when decisions were unfavorable to their side. Honduras ignored the Court when it ordered suspension of the treaty ratification process. Nicaragua, in turn, ignored the Court when it ordered suspension of the import tariff on Honduran goods. The CACJ's effectiveness was also limited by a split decision of the court. The judge from Honduras strongly dissented from the CACJ's decision to hear Nicaragua's claim on the basis that Article 22 of the CACJ Statute prohibits the court from resolving a territorial dispute unless all the affected members agreed to the Court's jurisdiction.<sup>63</sup> Further, while in theory the Court could hear the maritime or tariff dispute between Nicaragua and Colombia, Colombia would likely never submit to the jurisdiction of a court in which it had no part in forming and had no judicial representative. After a flurry of initial filings, the Central American Court of Justice was unable to definitively settle this dispute because it ultimately lacked the requisite credibility with both Honduras and Nicaragua. In all likelihood, Nicaragua's utilization of the CACJ was more about getting Honduras' attention—a way to begin the discussion. Bringing the dispute first to the CACJ and later implementing tariffs against Honduras signaled to Honduras that Nicaragua was serious about settling the maritime boundary.

*b. Proceedings before the World Trade Organization*

Nicaragua's imposition of import tariffs on Honduran and Colombian goods violated the parties' agreement as members of the WTO. In January 2000, following WTO procedures, Colombia requested consultations with Nicaragua regarding the new import taxes being levied

---

61. CACJ Resolution 25, *supra* note 44, at 33.

62. O'Keefe, *supra* note 42, at 255.

63. CACJ Statute, *supra* note 50, art. 22.

on Colombian goods and services.<sup>64</sup> Colombia claimed these duties violated Articles I and II of GATT 1994.<sup>65</sup> In June 2000, Honduras submitted a similar request for consultations and institution of proceedings to the WTO.<sup>66</sup> Nicaragua defended its actions to the WTO members claiming the tariffs were legal based on GATT Article XXI, which allows states to value some treaty obligations above trade obligations.<sup>67</sup> Consultations having failed to resolve the dispute, Colombia requested an arbitral panel be established in May 2000.<sup>68</sup> The WTO membership, meeting as the Dispute Settlement Body (WTO DSB),<sup>69</sup> granted Colombia's request to constitute an ad hoc panel while at the same time strongly registering their preference for Colombia, Honduras, and Nicaragua to solve their dispute either informally or in a more appropriate forum.<sup>70</sup>

After considerable behind-the-scenes diplomacy by several influential countries, Nicaragua and Honduras agreed to submit their territorial dispute to the ICJ, rather than constitute the WTO panel.<sup>71</sup> The parties acknowledged that the real issue at dispute was territorial and that the WTO DSB would not have the jurisdiction or institutional ability to properly settle the real issue.<sup>72</sup> The parties ultimately chose to have the ICJ, a court of general jurisdiction with significant experience settling border disputes, settle the dispute. Nicaragua suspended the 35 percent tariff pending resolution of the dispute at the ICJ.<sup>73</sup>

*c. Proceedings before the ICJ*

The International Court of Justice became operational in 1946 as the judicial body of the United Nations. It is organized as a court of general

---

64. Request for Consultations by Colombia, *supra* note 46.

65. The General Agreement on Tariffs and Trade, GATT, is an annex to the agreement creating the World Trade Organization. General Agreement on Tariffs and Trade, WTO Agreement, Annex 1A, arts. I, II, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT 1994].

66. Request for Consultations by Honduras, *supra* note 46.

67. Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1304 (2003).

68. Request for Establishment of a Panel by Colombia, *Nicaragua—Measures Affecting Imports From Honduras and Colombia*, WT/DS188/2/Corr.1 (May 5, 2000).

69. Agreement Establishing the World Trade Organization, Annex 2, art. 2, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1226 (establishing the Dispute Settlement Body).

70. Lindsay, *supra* note 67, at 1304 (“Using a potential procedural impairment, the U.S. representative suggested that the request for a panel be delayed and that ‘the parties to the dispute could use this additional time to try to solve the dispute.’ Similarly, the Japanese representative ‘strongly urged the parties to seek any possible means in an effort to settle this dispute in other fora outside the WTO.’”).

71. *Id.* at 1305.

72. *See id.*

73. LAW LIBRARY OF CONGRESS, WORLD LAW BULLETIN (March 2003), available at <http://www.fas.org/sgp/othergov/wlb/200303.pdf>.

jurisdiction, settling disputes between member states and giving advisory opinions to authorized U.N. agencies and organs.<sup>74</sup> The purpose of the ICJ, as the judicial arm of the United Nations, is to bring about the settlement of disputes by peaceful means and in conformity with the principles of justice and international law.<sup>75</sup> The Court is authorized to issue “interim” or “provisional measures”<sup>76</sup> at the outset of a case when immediate action is required to preserve the substantial interest of one of the disputing parties.<sup>77</sup> While the Court’s final judgment in a particular case is only binding on the parties to the dispute, decisions have significant precedential impact and are considered highly relevant and persuasive in future international tribunal adjudications.

Nicaragua brought two separate cases to the ICJ. First, Nicaragua filed a claim against Honduras asking the ICJ to determine the Caribbean maritime border and ownership of several islands between Nicaragua and Honduras.<sup>78</sup> Second, Nicaragua filed a claim against Colombia asking the ICJ to determine the Caribbean maritime border between Nicaragua and Colombia.<sup>79</sup>

Nicaragua filed its case against Honduras with the ICJ on December 8, 1999 while proceedings were still ongoing before the CACJ.<sup>80</sup> By filing a case with the ICJ while the dispute was still ongoing with the CACJ, Nicaragua implicitly acknowledged that the CACJ would be unable to successfully resolve the dispute. Nicaragua requested the ICJ

determine the course of the single maritime boundary between areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary.<sup>81</sup>

---

74. ICJ Statute, *supra* note 24, arts. 34–38.

75. U.N. Charter, art. 1, 59 Stat. 1031. The Court can make recommendations to the Security Council upon conclusion of a case. ICJ Statute, *supra* note 24, art. 41. The Court is composed of fifteen members, who are elected to nine-year terms by the General Assembly and the Security Council of the United Nations. *Id.* arts. 2–15. Judges must satisfy the requirements of their home state for service in the highest judicial position of their country or be widely recognized as particularly competent in international law. Generally, the Court seeks to have jurists representing the main forms of civilization and the major legal systems of the world. INTERNATIONAL COURT OF JUSTICE, *supra* note 26, at 52.

76. Interim or provision measures are orders of the court, similar to a temporary injunction, used to protect the interest of parties prior to resolution of the dispute.

77. INTERNATIONAL COURT OF JUSTICE, *supra* note 26, at 64.

78. Application Instituting Proceedings, *supra* note 45.

79. *Id.*

80. *Id.*

81. *Id.* ¶ 6.

Nicaragua indicated that it would potentially seek compensation for seizure of fishing vessels as well as any past or future extraction of natural resources within the disputed territory.<sup>82</sup>

The first hurdle facing a petitioner to the ICJ is the satisfactory demonstration of the ICJ's jurisdiction. Jurisdiction may be established in one of several ways: a state may grant the Court universal jurisdiction; may grant jurisdiction in a certain area as specified by a treaty; or two states may negotiate to bring a specific dispute before the Court.<sup>83</sup> Requiring prior consent both respects state sovereignty and makes it more likely that states will comply with the Court's ruling. In most instances the Court relies on a state's prior consent to jurisdiction and respect for the legal institution to ensure compliance with its ruling.<sup>84</sup> To establish ICJ jurisdiction, Nicaragua invoked Article XXXI of the American Treaty on Pacific Settlement ("Pact of Bogota"),<sup>85</sup> signed by both countries in 1948. Under this treaty they accepted the compulsory jurisdiction of the Court.<sup>86</sup> Unlike the referral to the Central American Court of Justice, Honduras did not dispute the jurisdiction of the ICJ<sup>87</sup> even though there were valid jurisdictional challenges that could have easily been raised.<sup>88</sup> Both countries have had a number of positive experiences bringing cases to the ICJ and the court has a well-established track record for resolving border disputes fairly and successfully.<sup>89</sup> Also the previous proceedings at the CACJ had created the necessary political conditions such that if Honduras challenged the ICJ's jurisdiction, it would have reflected poorly on Honduras both domestically and internationally.

Oral arguments on the merits of the Honduras-Nicaragua case were heard in March 2007.<sup>90</sup> Since none of the permanent judges were from either state, both parties exercised their right under the ICJ Statute to

---

82. *Id.* ¶ 7.

83. ICJ Statute, *supra* note 24, art. 36.

84. *See* CONSTANZE SHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004).

85. Pact of Bogota, *supra* note 57.

86. Application Instituting Proceedings, *supra* note 45. This was just one of three possible avenues the states could have chosen. *See* ICJ Statute, *supra* note 24, art. 36.

87. Press Release, Int'l Court of Justice, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Dec. 8, 1999), *available at* <http://www.icj-cij.org/docket/index.php?pr=537&p1=3&p2=1&case=120&p3=6>.

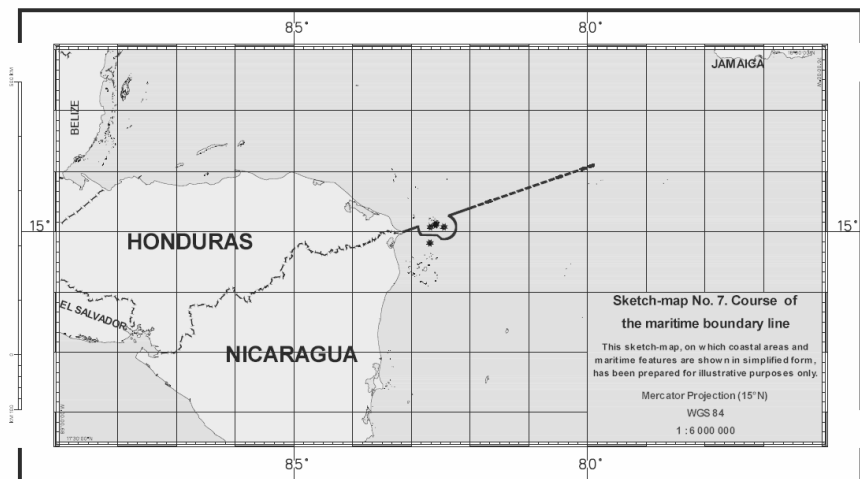
88. Counter-Memorial of Honduras, Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Mar. 21, 2000), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=14&case=120&code=nh&p3=1>.

89. *See generally* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (2006).

90. Press Release, Int'l Court of Justice, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (July 19, 2006), *available at* <http://www.icj-cij.org/docket/index.php?pr=1030&code=nh&p1=3&p2=3&p3=6&case=120&k=14>.

have ad hoc judges from their respective countries.<sup>91</sup> The ICJ issued its opinion on October 8, 2007. The Court determined that no traditional maritime boundary existed between Nicaragua and Honduras, and then applied international law as codified by the Law of the Sea Convention and previous ICJ delimitation decisions to reach a decision on the proper boundary line.<sup>92</sup> The Court ultimately rejected both Nicaragua's and Honduras's suggested borders, instead utilizing a bisector method that, perhaps coincidentally, divides the disputed maritime area equally between the two countries. Nicaragua and Honduras have both embraced the ICJ's decision.<sup>93</sup>

**Figure 2: ICJ-Determined Maritime Border between Honduras and Nicaragua**



**Source:** ICJ Judgment of October 8, 2007. Courtesy of the International Court of Justice.

### 3. *Function of the International Tribunals in this Dispute*

In this dispute between Honduras and Nicaragua, the ICJ provided reliability and neutrality to the disputing parties. This case is a classic state-to-state dispute and an area in which the ICJ has considerable experience.<sup>94</sup> Possibly even more importantly, the ICJ successfully resolved a territorial land dispute between Honduras and Nicaragua in

91. ICJ Statute, *supra* note 24, arts. 9, 31.

92. Nicaragua-Honduras Maritime Dispute Judgment, *supra* note 34.

93. Associated Press, *U.N. Draws Honduras-Nicaragua Sea Border*, N.Y. TIMES, Oct. 9, 2007, at A6.

94. CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004).

the 1960s.<sup>95</sup> The parties knew before beginning their latest proceedings that the Court had treated them fairly on a previous occasion and that all parties concerned would likely comply with the ultimate decision of the Court. This assurance allowed the parties to trust in the ICJ process, something they clearly couldn't do with the CACJ.

Why then, if the disputants knew the ICJ was a good forum and had success there previously, did they first go to the CACJ and the WTO?<sup>96</sup> While Nicaragua has not made clear its purpose for first bringing the case to the CACJ, the nearby location of the court, and the speediness with which the CACJ was able to address the dispute may be reasons why the CACJ appealed to Nicaragua as a court of first resort. Additionally, Nicaragua may have wanted to remind Honduras of its commitment to regional integration. Bringing such an important issue to the CACJ also had the potential to increase the Court's prestige, if it had been able to resolve the dispute successfully. One explanation for Nicaragua's action may be it thought a "home grown" institution such as the CACJ would be more sympathetic to its claims. However, Nicaragua's favorable treatment by the CACJ did not solve its problem because Honduras continued to recognize its treaty with Colombia.<sup>97</sup>

All attempts at political negotiations having failed,<sup>98</sup> and trade retaliation removed as a diplomatic option by membership in the WTO, Nicaragua had few options short of armed warfare. Nicaragua's retaliatory trade actions against Honduras and Colombia were effectively curtailed by Colombia bringing the illegal tariff action to the WTO. By airing this grievance before the entire membership of the WTO, sitting as the Dispute Settlement Body, Colombia elevated the dispute's importance and was able to rally support against Nicaragua for taking unilateral action.

After exhausting these other options, Nicaragua turned to a reliable and neutral forum—the ICJ. This tribunal allowed all the state parties to be heard. The ICJ's credibility with all parties, based on the ICJ's track record, provided the needed assurance that the dispute would be settled fairly. The result reinforces the credibility of the court and promotes the ICJ's value in the international community.

---

95. Arbitral Award Made by the King of Spain, *supra* note 33.

96. The parties could not bring the case to ITLOS because at the time of the dispute, both parties had not submitted to the jurisdiction of that tribunal.

97. Nicaragua-Honduras Maritime Dispute Judgment, *supra* note 34.

98. *Id.*

*B. Tribunals Frame Issues Differently, in Accordance with  
Their Unique Mandate*

The Nicaragua-Honduras dispute provides an example of how a state may use multiple tribunals, each looking at a different aspect of the dispute, to elevate the importance of a dispute. By understanding that tribunals are influenced by their constitutive documents, by the scope of their authoritative law, and by the experiences of the judges hearing the cases, disputing states can gain strategic ground by bringing their dispute to the most sympathetic forum where key points might get a better hearing. Nicaragua attempted this by first bringing its dispute to the CACJ. This strategy largely failed because the Court lacked respect in the regional and global community, with only three countries having accepted its jurisdiction.<sup>99</sup> Neither Nicaragua nor Honduras was willing to “buy into” the authority of the Central American Court of Justice when the outcome was not in its favor.

The Chile-European Community (EC) swordfish dispute provides an example where both parties were heavily invested in the success of and respected the authority of the two tribunals chosen—the International Tribunal for the Law of the Sea (ITLOS) and the WTO.

*1. The Chile-EC Swordfish Dispute*

Because of global currents, the South Pacific—specifically the area off the coast of Chile—has some of the richest fisheries in the world.<sup>100</sup> Beginning in 1990, commercial fishermen from Europe, Japan, and Chile increasingly focused their fishing activities in the Southeast Pacific high seas area.<sup>101</sup> By international law, the high seas may be used by any country.<sup>102</sup> In direct proportion to the increased catch from this high seas area, Chile observed a decrease in the catch from within its exclusive economic zone<sup>103</sup> and a collapse of the artisan driftnet fishing economy.<sup>104</sup>

---

99. See *supra* note 50.

100. Food and Agriculture Organization of the United Nations, Fisheries Country Profile: The Republic of Chile (2000), <http://www.fao.org/fi/fcp/en/CHL/profile.htm> (last visited Feb. 3, 2007).

101. Marcos A. Orellana, *The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO*, 71 NORDIC J. INT'L L. 55, 58 (2002).

102. United Nations Convention on the Law of the Sea Annex VI, art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397, 561 [hereinafter ITLOS Statute].

103. S.N. Nandan, *The Exclusive Economic Zone: A Historical Perspective*, in THE LAW AND THE SEA: ESSAYS IN MEMORY OF JEAN CARROZ 171 (1987), available at <http://www.fao.org/docrep/s5280T/s5280t0p.htm>.

The concept of the exclusive economic zone is one of the most important pillars of the 1982 Convention on the Law of the Sea. The regime of the exclusive economic zone is perhaps the most complex and multifaceted in the whole Convention. The

While there was debate among the stakeholders as to whom to blame, everyone agreed the swordfish stock was rapidly declining and faced collapse.<sup>105</sup> In 1990 Chile began enacting laws aimed at limiting swordfish catches.<sup>106</sup> It established a number of limitations on fishermen and prohibited the “landing in Chilean ports of captures obtained in contravention to these measures.”<sup>107</sup> Chile’s law caused hardship for European fishing interests who did not comply and who were therefore unable to offload their catch in Chilean ports for packaging and shipment to the United States and Europe. Unable to reach an arrangement on their own, Chile and the EC finally raised the issue of access to ports and fish stock management with two different international tribunals—the WTO Dispute Settlement Body and ITLOS.<sup>108</sup>

---

accommodation of diverse issues contributed substantially to the acceptance of the concept and to the Convention as a whole. . . .

The larger package consists of: a twelve-nautical-mile territorial sea; an exclusive economic zone of up to 200 nautical miles in which coastal states have preeminent economic rights and which obviates the need for a territorial sea of 200 nautical miles claimed by some states; extension of the continental shelf regime to the margin, with revenue-sharing obligations beyond the exclusive economic zone; a regime for transit passage through straits used for international navigation and for archipelagic sea-lanes passage; guaranteed access to and from the sea for land-locked states; a regime for the administration and development of the common heritage resources of the international sea-bed area; protection and preservation of the marine environment; and adequate mechanisms for settlement of disputes concerning the interpretation and application of the provisions of the Convention.

Within this larger package are many smaller packages of which the exclusive economic zone is one of the most interesting examples. The provisions contained in articles 55 and 75 reflect an array of interests: the sovereign rights of coastal states to manage the zone in good faith; the regard for the economic interests of third states; regulation of certain activities in the zone, such as marine scientific research, protection and preservation of the marine environment, and the establishment and use of artificial islands, installations and structures; freedom of navigation and overflight; the freedom to lay submarine cables and pipelines; military and strategic uses of the zone; and the issue of residual rights in the zone.

*Id.*

104. Driftnet fishers operate closer to shore and much of the catch is consumed domestically. Orellana, *supra* note 101.

105. *Id.* at 58–59.

106. *Id.* at 59.

107. *Id.* at 59–60.

108. ITLOS has authority to hear cases pertaining to “the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone and the high seas.” ITLOS Statute, *supra* note 102, arts. 21–23. Part XV of the U.N. Convention on the Law of the Sea (UNCLOS) establishes a comprehensive system for the settlement of disputes pertaining to the interpretation and application of the Convention. If parties are unable to resolve a dispute on their own, they are required to submit to compulsory dispute settlement procedures. However, in practice, a number of other forums are available to disputants. Parties can choose the forum for the compulsory dispute settlement: ITLOS, the ICJ, or an arbitral body constituted specifically to settle the particular dispute. *Id.* arts. 280, 287. If the parties to a particular dispute have not accepted the same settlement procedures, then the dispute may only be submitted to a

a. *Europe Files a Complaint with the WTO*

In April 2000, the EC initiated proceedings in the WTO against Chile for its domestic law prohibiting foreign vessels from unloading swordfish in Chilean ports for the purpose of storage or shipment.<sup>109</sup> Specifically, the EC challenged the application of Article 165 of the 1991 Chilean Fisheries Law, which grants Chile the authority to regulate fish stocks within its exclusive economic zone as well as de facto regulation of the high seas.<sup>110</sup> The contested Chilean law required all commercial fishing vessels wishing to dock at a Chilean port to implement a number of conservation measures regardless of where the fish were caught, including: allowing Chilean scientific officers to board and inspect fishing vessels, carrying of on-board monitoring equipment, and reporting of activities to the Chilean Navy.<sup>111</sup> The EC claimed Chile's regulation of swordfish unloading was a substantive violation of WTO obligations under GATT 1994 Articles V "Freedom of Transit" and XI "General Elimination of Quantitative Restrictions."<sup>112</sup>

The WTO DSB approved establishment of a panel to hear the dispute in December 2000 after initial consultations between the parties failed to resolve the dispute.<sup>113</sup>

b. *Chile Responds by Initiating Proceedings with ITLOS*

In December 2000 Chile submitted a petition to the International Tribunal for the Law of the Sea for consideration regarding the conservation of swordfish stocks by Chile and the EC. ITLOS is the judicial body created by the United Nations Convention on the Law of the Sea.<sup>114</sup> The Convention establishes a legal framework to regulate all

---

UNCLOS Annex VII arbitration process unless the parties specifically agree otherwise. *Id.* art. 287.5.

109. Request for Consultations by the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS 193/1 (Apr. 19, 2000), available at <http://docsonline.wto.org/DDFDocuments/t/G/L/367.DOC>.

110. *Id.*

111. Orellana, *supra*, note 101, at 59–61.

112. Request for Consultations by the European Communities, *supra* note 109; GATT 1994, *supra* note 65, arts. V, XI. Article XI refers to the commonly known "non-tariff barriers." See World Trade Organization, Dispute Settlement: Dispute 193, Summary of the Dispute to Date, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds193\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm) (last visited Feb. 6, 2008).

113. World Trade Organization, *supra* note 112; Request for the Establishment of a Panel by the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/2 (Nov. 7, 2000), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/193-2.doc>.

114. United Nations Convention on the Law of the Sea Part XV, Dec. 12, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 3 [hereinafter UNCLOS]. The Statute of the International Tribunal for the Law of the Sea is attached to the Convention as Annex VI. ITLOS Statute, *supra* note 102.

ocean space, its uses, and resources.<sup>115</sup> An action can be initiated through an application to the tribunal or through submission of a special agreement.<sup>116</sup> The judgment of the tribunal is final and binding. The tribunal may also interpret a previously issued judgment upon request or issue provisional measures in order to preserve the rights of the parties to the dispute, or to prevent serious harm to the marine environment, pending the final decision.<sup>117</sup>

Chile requested, with the EC's consent, that ITLOS form a Special Chamber to deal with their dispute.<sup>118</sup> Both Chile and the EC raised Law of the Sea Convention compliance questions with the tribunal, involving whether Chile could limit access to its fisheries and whether the EC's actions were depleting swordfish stocks.<sup>119</sup>

115. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 24 (3d ed. 1999) (UNCLOS "provides a framework within which most uses of the seas are located" however, there is "no single text containing the whole of that law.").

116. ITLOS Statute, *supra* note 102, art. 24. Once the Tribunal's jurisdiction has been established the parties make written submissions and then there are oral proceedings. *Id.* art. 26.

117. *Id.* arts. 25, 33; UNCLOS, *supra* note 114, art. 290.

118. Abstract of ITLOS: Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) (Order on Constitution of Chamber) 40 I.L.M. 474 (2001). A Special Chamber is a subgroup of the tribunal selected to hear a dispute, so that the entire tribunal does not have to sit together to resolve a dispute. ITLOS Statute, *supra* note 102, art. 15.

119. Chile raised these questions:

(a) whether the European Community has complied with its obligations under the Convention . . . to ensure conservation of swordfish . . . in the high seas adjacent to Chile's exclusive economic zone;

(b) whether the European Community has complied with its obligations under the Convention . . . to co-operate directly with Chile as a coastal State for the conservation of swordfish in the high seas adjacent to Chile's exclusive economic zone as also to report its catches and other information relevant to this fishery to the competent international organization and to the coastal State;

(c) in relation to the foregoing, whether the European Community has challenged the sovereign right and duty of Chile, as a coastal State, to prescribe measures within its national jurisdiction for the conservation of swordfish and to ensure their implementation in its ports, in a non-discriminatory manner, as well as the measures themselves, and whether such challenge would be compatible with the Convention;

(d) whether the obligations arising under articles 300 and 297, paragraph 1 (b), of the Convention, as also the general thrust of the Convention in that regard, have been fulfilled in this case by the European Community.

The European Community raised these questions:

(e) whether the Chilean Decree 598 which purports to apply Chile's unilateral conservation measures relating to swordfish on the high seas is in breach of, *inter alia*, articles 87, 89 and 116 to 119 of the Convention;

(f) whether the "Galapagos Agreement" . . . was negotiated into in keeping with the provisions of the Convention and whether its substantive provisions are in consonance with, *inter alia*, articles 64 and 116 to 119 of the Convention;

*c. Political Resolution of the Dispute*

Neither the WTO panel nor the ITLOS panel began substantive review of the issue before the parties reached a political resolution. After a series of high level meetings, the EC and Chile reached a provisional resolution<sup>120</sup> to their dispute in late January 2001, just a month after they had filed claims at ITLOS and the WTO.<sup>121</sup> Then in March 2001, they announced indefinite suspension of the WTO DSB process as the parties had reached an amicable agreement.<sup>122</sup> The parties also notified the ITLOS Special Chamber that they had reached a provisional agreement and requested to suspend the proceedings.<sup>123</sup> Each party reserved the right to revive the proceedings in the future and have since maintained timely extensions of that right.<sup>124</sup>

In its provisional agreement, Chile agreed to provide limited port access for EC fishing boats, and both countries agreed to coordinate scientific and technical conservation efforts by establishing a multilateral framework for the conservation and management of swordfish in the Southeastern Pacific Ocean.<sup>125</sup>

*2. Function of the International Tribunals in this Dispute*

While Chile and the EC reached a tentative settlement before either tribunal issued a formal ruling, the dispute shows how opposing parties

(g) whether Chile's actions concerning the conservation of swordfish are in conformity with article 300 of the Convention and whether Chile and the European Community remain under a duty to negotiate an agreement on cooperation under article 64 of the Convention . . . .

Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. E.C.), Order 2000/3 (Int'l Trib. L. of the Sea 2000), *available at* [http://www.itlos.org/case\\_documents/2001/document\\_en\\_100.doc](http://www.itlos.org/case_documents/2001/document_en_100.doc).

120. Press Release, European Commission Directorate-General for Fisheries and Maritime Affairs Unit for Information and Communication, EU and Chile reach an amicable settlement to end WTO/ITLOS swordfish dispute (Jan. 25, 2001), *available at* [http://ec.europa.eu/fisheries/press\\_corner/press\\_releases/archives/com01/com01\\_05\\_en.htm](http://ec.europa.eu/fisheries/press_corner/press_releases/archives/com01/com01_05_en.htm); John Shamsey, *ITLOS vs. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 513, 538 (2002).

121. Orellana, *supra* note 101, at 68.

122. Arrangement between the European Communities and Chile, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/3 (Apr. 6, 2001), *available at* <http://docsonline.wto.org/DDFDocuments/t/WT/DS/193-3.doc>.

123. Press Release, International Tribunal of the Law of the Sea, Provisional Agreement Reached between Parties, (Mar. 21 2001), *available at* [http://www.itlos.org/news/press\\_release/2001/press\\_release\\_45\\_en.pdf](http://www.itlos.org/news/press_release/2001/press_release_45_en.pdf).

124. *Id.*

125. DUNCAN BRACK, ROYAL INST. OF INT'L AFFAIRS, INTERNATIONAL ENVIRONMENTAL DISPUTES: INTERNATIONAL FORUMS FOR NON-COMPLIANCE AND DISPUTE SETTLEMENT IN ENVIRONMENT-RELATED CASES 8 (2001), [http://www.chathamhouse.org.uk/publications/papers/download/-/id/28/file/3671\\_envdisputes.pdf](http://www.chathamhouse.org.uk/publications/papers/download/-/id/28/file/3671_envdisputes.pdf).

and the different tribunals framed the issue and how this shaped the outcome. The EC appealed to the WTO and framed its complaint in terms of denial of port access for its fishing vessels.<sup>126</sup> The EC contended this denial was a substantive violation of WTO obligations under GATT Articles V and XI (freedom of transit and elimination of nontariff barriers).<sup>127</sup> In contrast, Chile framed the dispute in conservation terms, invoking the need for sustainable fishing practices.<sup>128</sup> Having an international tribunal, such as ITLOS, whose constitutive documents expressly place high value on the conservation of fish stocks, allowed Chile to reframe the issue. The two tribunals together provided a more complete picture of the competing interests at play. Without ITLOS, Chile would not have been able to generate the same kind of international credibility for its restrictive domestic fishing laws. The final agreement between the parties takes into account the issues presented in both dispute forums. The EC agreed to on-board monitoring and sharing of information, and Chile granted access to its ports.<sup>129</sup>

The tribunals in this dispute acted less as decisionmakers and more as “signaling” devices. Chile was able to signal to the EC that its government took the swordfish issue seriously, giving the nation greater leverage in negotiations. Invoking the conservation and sustainability clauses of the Law of the Sea Convention added credibility to Chile’s domestic laws, because Chile could argue that it was acting in accordance with an international mandate.<sup>130</sup> In Europe, powerful domestic conservation and environmental protection constituencies made it difficult for the government to openly disregard a treaty as important as the Law of the Sea Convention. The EC was able to signal, through its recourse to the WTO, that discriminatory protectionist measures would not be tolerated under the guise of conservation. Chile, with its strong commitment to free and open markets, could not ignore its WTO obligations. Additionally, Chile was in the final phases of negotiating a broad free trade agreement with the EC, and the swordfish issue needed to be settled.<sup>131</sup>

The tribunals played another role in this dispute—providing political cover for the disputants. The EC and Chile were able to appease their respective domestic fishing constituencies by making a good faith show of attempting to maximize their access to the fishing stock by bringing their complaints to the international tribunals.

---

126. Orellana, *supra* note 101, at 56.

127. GATT 1994, *supra* note 65, arts. V, XI.

128. Orellana, *supra* note 101, at 56.

129. *Id.* at 69–71.

130. Shamsy, *supra* note 120, at 538–39.

131. James Langman, *Rapid Progress on Free Trade Accord by EU, Chile Could Lead to Signing in May*, 18 Int’l Trade Rep (BNA) 1996 (Dec. 13, 2001).

Speedy resolution of this seemingly intractable dispute was largely possible because Chile and the EC were in the final negotiations of a free trade agreement, and neither side wanted the trade agreement to fail because of the swordfish dispute.<sup>132</sup> Without the Law of the Sea Convention and the opportunity to file a claim with ITLOS, one can easily imagine Chile lacking any real negotiating leverage over the more powerful EC, a much larger trading partner. ITLOS bolstered and validated Chile's conservation concerns by providing a legal framework which emphasizes sustainability and cooperation, thereby strengthening its bargaining position in the political resolution of the dispute. Bringing a claim to this internationally prominent tribunal also helped raise awareness within Europe of the EC's practices overseas. The compromises by both sides in the final agreement reflect the equalized bargaining positions of the two parties.

### *C. Tribunals Allow Increased Participation by Nonstate Actors*

In the maritime border dispute and in the swordfish dispute, the real parties in interest—the commercial and artisan fishermen directly affected by the outcome of the dispute—had to advocate for their positions through government intermediaries. A stakeholder's position may be strengthened or weakened by having to act through a government representative. Increasingly, stakeholders can access some forums directly if their government cannot or does not adequately represent their position. Nonstate actors in international courts may be able to change the internal political landscape of a country by increasing international awareness of a domestic practice or policy. International forums may also give traditionally underrepresented domestic constituencies an opportunity to air their grievances, without needing to first gain the support of the domestic government. Additionally, countries may have greater flexibility in their international relations if they are not required to "take sides" between competing domestic constituencies or interests. The disputes surrounding oil production and indigenous peoples' rights in the Ecuadorian Amazon provide a striking example of how nonstate actors can affect state behavior with the use of international tribunals.

#### *1. Oil Production Versus Indigenous Rights in Ecuador*

Among the richest oil fields in Latin America, Ecuadorian oil fields contain an estimated 5 billion barrels of oil, and current operations account for nearly half of its annual export revenue and one-third of its

---

132. *Id.*; Orellana, *supra* note 101, at 69.

annual tax revenues.<sup>133</sup> Most of the oil is located on the eastern side of the Andes in lowland rainforest areas inhabited predominantly by indigenous communities. Ecuador produces 2 percent of the total oil consumed by the United States annually, making it the eighth largest foreign supplier.<sup>134</sup> For decades, oil companies and indigenous communities have feuded. In recent years, the parties have sought recourse from international tribunals.

Two separate, but interconnected oil disputes are currently being litigated at the Inter-American Court of Human Rights (IACHR) and the International Centre for the Settlement of Investment Disputes (ICSID). First, the Sarayaku indigenous community has filed a claim against Ecuador in the IACHR, alleging that operations by oil companies in Sarayaku territory are violating their human rights.<sup>135</sup> The Ecuadorian Constitution obligates the government to protect indigenous peoples and their way of life.<sup>136</sup> Second, Occidental Petroleum, which produces 20 percent of Ecuador's oil,<sup>137</sup> has filed a claim against Ecuador with ICSID for Ecuador's suspension of Occidental's contract rights and seizure of \$1 billion of assets, against the backdrop of anti-Occidental indigenous

---

133. CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK, <http://www.cia.gov/library/publications/the-world-factbook/geos/ec.html> (last visited Jan. 21, 2008). Ecuador has the 24th largest supply of oil in the world. Only Venezuela, Mexico, and Brazil have larger proven reserves in Latin America. Ecuador is South America's fifth largest producer of oil and the region's second biggest exporter of crude oil to the United States in the region. Hal Weitzman, *Dollars and roses preoccupy voters on way to Ecuador's poll*, FIN. TIMES, Oct. 14, 2006, at 9.

134. Christopher Palmeri & Geri Smith, *The Heat On Oxy In Ecuador*, BUS. WK., Apr. 24, 2006, at 46.

135. See *Kichwa Peoples of the Sarayaku Community v. Ecuador*, Petition 167/03, Inter-Am. C.H.R., Report No. 62/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, at 308 (2004), available at <http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm>.

136. *Id.*

With respect to the Ecuadorian State's affirmation that the administrative disputes remedy, rather than the constitutional remedy of amparo, was the appropriate remedy to resolve the alleged infringement of a legal right, the petitioners state that the Ecuadorian State, in its argument, fails to recognize the imminence and severity of harm to human and constitutional rights to which members of the Sarayaku indigenous people were exposed due to acts and omissions by the State and the oil companies operating in their territory, in other words, the main elements that distinguish constitutional amparo from the administrative disputes remedy. Moreover, they added that the State fails to recognize that the Sarayaku indigenous community's main purpose in filing a constitutional amparo suit was not to request the annulment of the contractual concession signed by the State and the oil company, but rather to put an end to the non-consulted and unconstitutional incursion into their legal and ancestral territory which violated their rights enshrined in the Ecuadorian Constitution and in international treaties, including the American Convention.

*Id.* ¶ 33.

137. *Ecuador Oil Move Prompts US Ire*, BBC NEWS, May 17, 2006, <http://news.bbc.co.uk/2/hi/americas/4988624.stm>.

activism.<sup>138</sup> While in a strict sense these are two separate cases, in practice the two cases represent different sides of the same problem for the Ecuadorian government—how to have a functional and sustainable economy while protecting human rights.

*a. Indigenous Community Sues Ecuador for Human Rights Violations*

Following on the success of the Awas Tingni indigenous community in its land use claim against Nicaragua, in which the IACHR for the first time recognized the rights of a community to stay together and to maintain and manage traditional territory,<sup>139</sup> the Sarayaku indigenous community filed a claim against Ecuador with the IACHR.

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights were both created by the Organization of American States with the 1969 signing of the American Convention on Human Rights.<sup>140</sup> The purpose of the Convention is to safeguard essential human rights, with the Court applying and interpreting the Convention to ensure compliance with its obligations by member states.<sup>141</sup> The Inter-American Human Rights System utilizes an intermediary body, the

---

138. Occidental Petroleum Corp. v. Ecuador, No. ARB/06/11 (Int'l Ctr. Settlement Inv. Disputes July 13, 2006).

139. The landmark case in the IACHR—Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R., (Ser. C) No. 79 (Aug. 31, 2001)—was the first time the Court recognized the collective right of indigenous peoples to their land and resources, based on Article 21 of the American Convention on Human Rights. The Court ordered Nicaragua to

adopt forthwith all necessary measures to protect the use and enjoyment of the property of the lands belonging to the Mayagna Awas Tingni Community and the natural resources that exist therein and, specifically, measures aimed at avoiding immediate and irreparable damage resulting from the activities of third parties who had settled in the Community's territory or who were exploiting the natural resources that exist therein, until the final delimitation and demarcation of the lands and the award of title ordered by the Court have been carried out; to allow the petitioners to take part in the planning and implementation of the measures and, in general, to keep them informed on the status of the measures ordered by the Inter-American Court.

INTER-AMERICAN COURT OF HUMAN RIGHTS, 2002 ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 30–31, available at <http://www1.umn.edu/humanrts/iachr/Annuals/annual-02.pdf>. Since then, land use and natural resource cases have regularly and successfully been heard by the court. INTER-AMERICAN COURT OF HUMAN RIGHTS, 2006 ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS [hereinafter IACHR 2006 Annual Report], available at <http://www1.umn.edu/humanrts/iachr/Annuals/annual-06.pdf>. The court has occasionally relied on jurisprudence developed in the European Human Rights Courts in rendering its opinions.

140. American Convention on Human Rights “Pact of San Jose de Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99. The Court became operational in 1978 when the Convention received enough signatures to enter into force. INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2005, available at <http://www.cidh.org/annualrep/2005eng/toc.htm>.

141. American Convention on Human Rights, *supra* note 140, art. 62.

Commission, to screen potential cases before they reach the Court.<sup>142</sup> One of the ways in which the Court fulfills its core mission of upholding respect for human rights is through adjudication of contentious cases involving situations where a state is alleged to have violated a person's human rights. In such instances, the IACHR's goal is to determine whether a state has incurred international responsibility by violating any of the rights embodied or established in the Convention. The decisions of the Court are final and binding upon the parties. The Court regularly monitors states to make sure they comply with judgments and can reopen cases if necessary.

The Commission forwarded the *Sarayaku* case to the Court in 2004, and in July 2004, the Court ordered Ecuador to take action to effectively protect the lives and personal integrity (i.e. no incarceration or forced relocation) of indigenous community members.<sup>143</sup> Provisional measures issued by the Court in June 2005 reiterated that the Ecuadorian government should enable the Sarayaku to:

carry out their activities and use the natural resources that exist in the territory where they are settled; specifically, the State must adopt those measures tending to avoid immediate and irreparable damage to their lives and personal integrity as a result of the activities of third parties . . . who exploit the natural resources within the community.<sup>144</sup>

The Court further ordered the Ecuadorian government to immediately remove several tons of explosive material left in the Sarayaku territory by an oil company seeking to begin oil exploration in the area.<sup>145</sup>

In deciding the prior *Awás Tingni* case, the court relied on broad principles of fundamental human rights. The Court noted, "Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."<sup>146</sup> This understanding has been incorporated into the Court's jurisprudence.

In issuing the provisional measures in the *Sarayaku* case, the tribunal relied exclusively on the Human Rights Convention and on previous

---

142. *Id.* art. 61 ("Only the States Parties and the Commission shall have the right to submit a case to the Court" in accordance with articles 48–50.).

143. See *Kichwa Peoples of the Sarayaku Community v. Ecuador*, Petition 167/03, Inter-Am. C.H.R., Report No. 62/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, at 308 (2004).

144. IACHR 2006 Annual Report, *supra* note 139, at 16.

145. *Kichwa Peoples of the Sarayaku Community*, Inter-Am. C.H.R., Report No. 62/04 (2004).

146. *Id.*

IACHR cases.<sup>147</sup> At a minimum, this decision shows a growing body of jurisprudence by the Court and may also signal an increased confidence of the judiciary to issue decisions based solely on prior decisions and the Human Rights Convention. Specifically the tribunal referenced the *Community of Peace of San Jose de Apartado* case (Colombia)<sup>148</sup> as particularly influential in extending the exercise of provisional measures to an entire community to avoid irreparable harm, rather than limiting provisional measures as only applicable to single identified individuals.<sup>149</sup> In a concurring opinion, Justice Cancado-Trindade relied on broad international concepts of human rights, arguing that the basic protections of the individual are represented across many different treaties.<sup>150</sup> While he did not explicitly say that these basic rights are customary international law,<sup>151</sup> he argued as much. He says the state has an obligation to protect the entire community in order to protect individual rights.<sup>152</sup>

Initially, the order of provisional measures was treated with considerable hostility by the Ecuadorian government. However, in 2007 a new government was elected with the strong support of the indigenous population, suggesting it may treat the decision of the IACHR with more respect. The IACHR provisional measures potentially provide the Ecuadorian government with strong justification for any future potential conservation measures, without the government having to adopt an explicitly conservationist stance. The government can claim that its conservation measures are obligated by compliance with the IACHR orders.

*b. Occidental Sues Ecuador for Violation of Bilateral Investment Treaty*

U.S.-based Occidental Petroleum is Ecuador's largest privately operated oil company. In May 2006, Ecuador cancelled Occidental's contract to exploit a large oil field.<sup>153</sup> The official reason offered by the

---

147. See *Indigenous Community of Sarayaku v. Ecuador*, 2004 Inter.-Am. Ct. H.R. (ser. E) (July 6, 2004).

148. *Community of Peace of San José de Apartado Case*, 2002 Inter.-Am. Ct. H.R. (Ser. E) (Oct. 9, 2000).

149. *Indigenous Community of Sarayaku*, 2004 Inter.-Am. Ct. H.R. (ser. E) (July 6, 2004) (Garcia-Ramirez, J., concurring).

150. *Id.* (Cancado-Trindade, J., concurring).

151. Customary international law refers to those norms which are seen as so inviolable that all states follow them whether they are codified into a treaty or not. See JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW NORMS, ACTORS, PROCESS* 35-37 (2d ed. 2006).

152. *Indigenous Community of Sarayaku*, 2004 Inter.-Am. Ct. H.R. (ser. E) (July 6, 2004) (Cancado-Trindade, J., concurring).

153. Ken Purchase, *Canada: The Occidental Touris— Expropriation Claim Tests BIT Efficacy*, *Int'l Trade Bull* (Blakes) (July 2006), available at <http://www.blakes.com/english/>

government was that Occidental had violated the terms of the contract by selling a portion of the contract to a Canadian company without notifying or seeking the approval of the government.<sup>154</sup> However, this alleged contract violation may have simply provided cover to evict an oil company in a tense relationship with the government. Indigenous communities have been protesting Occidental since the company's arrival in 1985, demanding the cessation of oil extraction in their traditional homelands.<sup>155</sup> The indigenous activists have become increasingly coordinated and politically active, at times bringing the entire country to a halt with massive protests.<sup>156</sup>

Under the direction of then-Finance Minister Raphael Correa, Ecuador changed its policy concerning imposition of a 12 percent value added tax on items procured in association with oil production in mid-2006.<sup>157</sup> The oil companies, including Occidental, fought the tax in Ecuador's domestic courts,<sup>158</sup> but Ecuador refused to return the revenue it had already collected.<sup>159</sup> Concurrently, Occidental brought an arbitration case against Ecuador under the Ecuador-United States Bilateral Investment Treaty, invoking UNCITRAL<sup>160</sup> rules.<sup>161</sup> After much wrangling, Ecuador and Occidental agreed to have the dispute heard by the London Court of International Arbitration, a private not-for-profit commercial arbitration body,<sup>162</sup> as a neutral forum.<sup>163</sup> The Court ruled in

---

view\_disc.asp?ID=220; see also Gerald Toth, *Ecuador vs Occidental*, *ADBUSTERS: THE MAGAZINE*, Sept.-Oct. 2006, available at [http://adbusters.org/the\\_magazine/67/Ecuador\\_vs\\_Occidental.html](http://adbusters.org/the_magazine/67/Ecuador_vs_Occidental.html) ("The US petroleum company Occidental, accused of 42 legal violations, including environmental destruction and spying on protesters, was—to the shock of the company, the US government, and a pleasantly surprised Ecuadorian populace—refused a contract renewal for exploration and exploitation of Ecuadorian natural resources. The move was not a capricious expropriation on the part of Ecuador, rather the legal conclusion to a long saga of dispute with the company. Occidental first arrived to Ecuador in 1982, taking over 200,000 hectares of protected areas for oil exploration, while inducing the Ecuadorian government to pay all of the company's investment costs for exploration and set-up.").

154. Toth, *supra* note 153.

155. Michael Lettieri, *Ecuador Breaks with Washington over Occidental Petroleum*, *COUNCIL ON HEMISPHERIC AFF.*, May 19, 2006, <http://www.coha.org/2006/05/19/ecuador-breaks-with-washington-over-occidental-petroleum>; Cristiano Morsolin, *Ecuador: resistencia popular en contra de las petroleras*, *VOLTAIRENET.ORG*, Sept. 12, 2005, <http://www.voltairenet.org/article127827.html>.

156. Cyril Mychalejko, *Ecuador on the Edge: A Tale of Two Presidential Candidates*, *ZNET*, Nov. 6, 2006, <http://www.zmag.org/content/showarticle.cfm?ItemID=11360>.

157. *Occidental Exploration & Prod. Co. v. Ecuador*, [2006] EWHC 345 (Comm), available at [http://www.iisd.org/pdf/2006/itn\\_ecuador\\_occidental.pdf](http://www.iisd.org/pdf/2006/itn_ecuador_occidental.pdf).

158. Some cases have been resolved, some are still pending.

159. *Occidental Exploration*, [2006] EWHC 345 (Comm).

160. United Nations Commission on International Trade Law.

161. Purchase, *supra* note 153.

162. The London Court of International Arbitration is a commercial dispute resolution institution. Parties may choose to utilize the court to settle commercial disputes. See London Court of International Arbitration, <http://www.lcia-arbitration.com/> (last visited Feb. 6, 2008).

Occidental's favor, ordering a return of the taxes.<sup>164</sup> The United Kingdom High Court of Justice upheld the decision on appeal in March 2006.<sup>165</sup> Shortly thereafter, Ecuador implemented a 50 percent tax on "extraordinary profits" earned by foreign investors.<sup>166</sup> Ecuador claimed that Occidental overproduced many of the wells and did not fulfill investment obligations in its drilling areas.<sup>167</sup> The government took control of Occidental's oil production on May 15, 2006, allegedly seizing \$1 billion of assets.<sup>168</sup>

Occidental filed a new claim against Ecuador with the International Centre for the Settlement of Investment Disputes<sup>169</sup> in May 2006<sup>170</sup> under the arbitration provisions in the Ecuador–United States bilateral investment treaty, for the cancellation of the project and seizure of assets.<sup>171</sup> ICSID is the primary dispute settlement mechanism for conflicts arising between states and foreign private investors. Unlike the ICJ, whose creation was driven by the entire community of nations, ICSID was the brain-child of another international organization—the World Bank Group. The World Bank's reasons for sponsorship of the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of other States were twofold: (1) the Bank staff sought to remove themselves from the direct mediation of investment disputes; and (2) the Bank believed that a specialized institution for settlement of investment disputes would encourage direct foreign investment in developing countries.<sup>172</sup> While officially an autonomous international organization, the Centre continues to maintain close ties to the Bank. For example, the Chairman of the World Bank sits on the governing board of

---

163. Luke Eric Peterson, *Ecuador fails in bid to overturn Occidental award, but appeal in the works*, Investment Treaty News (Int'l Inst. for Sustainable Dev.) 2 (March 14, 2006), available at [http://www.iisd.org/pdf/2006/itn\\_mar14\\_2006.pdf](http://www.iisd.org/pdf/2006/itn_mar14_2006.pdf).

164. Occidental Exploration & Prod. Co. v. Ecuador, [2006] EWHC 345 (Comm); Purchase, *supra* note 153.

165. *Occidental Exploration*, [2006] EWHC 345 (Comm); see also *United Kingdom High Court of Justice—Queen's Bench Division (Commercial Court): The Republic of Ecuador v. Occidental Exploration & Production Co. (March 2, 2006)*, AM. SOC'Y INT'L L., Apr. 28, 2006, <http://www.asil.org/ilib/2006/04/ilib060428.htm#j4>.

166. Reformatoria a la Ley de Hidrocarburos, Ley 2006-42 (Ecuador). Hal Weitzman, *THE AMERICAS: Dollars and roses preoccupy voters on way to Ecuador's poll*, FIN. TIMES, Oct. 14, 2006.

167. David Biller, *Petroecuador rejects Oxy proposal to end legal dispute—Ecuador*, BUS. NEWS AM., Mar. 20, 2006, [http://www.bilaterals.org/article.php3?id\\_article=4176&var\\_recherche=Occidental](http://www.bilaterals.org/article.php3?id_article=4176&var_recherche=Occidental).

168. *Ecuador oil move prompts US ire*, *supra* note 137.

169. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

170. Occidental Petroleum Corp. v. Ecuador, No. ARB/06/11 (ICSID July 13, 2006).

171. Purchase, *supra* note 153.

172. Elihu Lauterpacht, *Foreword* to CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, at xi (2001).

ICSID.<sup>173</sup> ICSID was the first international tribunal to provide a system for nonstate actors (i.e. corporations and individuals) to sue states directly.<sup>174</sup> Most commonly, referral to ICSID arbitration is found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in about twenty investment laws and in over 900 bilateral investment treaties.<sup>175</sup> Having adjudicators whose backgrounds are not primarily legal sets ICSID apart from most other international tribunals, like the ICJ, IACHR, and ITLOS.<sup>176</sup>

In response to Occidental's ICSID claim, Ecuador claimed the arbitration clause of the bilateral investment treaty does not apply to cancelled projects.<sup>177</sup> In August 2007 the panel<sup>178</sup> denied Occidental's

---

173. ICSID Convention, *supra* note 172, art. 5.

174. Lauterpacht, *supra* note 172. Additionally the ICSID Convention limited state immunity, nullified the customary international law rule that local remedies had to be exhausted first, and made the tribunal's award "directly enforceable within the territories of the States parties." *Id.* In settling disputes, ICSID arbiters primarily apply and interpret treaties and agreements submitted to them by disputing parties. SCHREUER, *supra* note 172, at 549–643.

175. ICSID Convention, *supra* note 169, art. 25; SCHREUER, *supra* note 172, at 83–344. Additionally, settlement under ICSID is one of the main mechanisms provided for in the North American Free Trade Agreement, the Dominican Republic–Central America Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur. While in theory states may bring claims against investors, a private investor typically initiates ICSID proceedings. *See* ICSID Convention, *supra* note 169, arts. 28, 36; SCHREUER, *supra* note 172, at 415. Dispute Settlement under the ICSID Convention is conducted by ad hoc arbitral panels composed specifically to hear a particular dispute. ICSID Convention, *supra* note 169, arts. 37–40; SCHREUER, *supra* note 172, at 467–519. Arbiters are selected from a pool of 509 persons who have been previously designated by the contracting states and the chairman of the World Bank Group. ICSID Convention, *supra* note 172, arts. 37–40.

176. The Centre is supported by an Administrative Council and a Secretariat. *See* P.F. Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 INT'L & COMP. L.Q. 367 (1979). The budget for the ICSID Secretariat is paid out of the Bank's budget, although the costs of individual proceedings are borne by the parties involved. Further financial information is available in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID ANNUAL REPORT 2006, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2006\\_Eng](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2006_Eng).

177. Mercedes Alvaro, *U.S. Arbitration Court to look into Occidental Ecuador case*, MARKETWATCH, May 6, 2007, <http://www.marketwatch.com/news/story/us-arbitration-court-look-occidental/story.aspx?guid=%7BAED54FCB%2D06C9%2D46F8%2DA1E4%2D4CC091CED085%7D> ("Ecuador contends the ICSID isn't the appropriate forum for arbitrating the dispute, as Occidental agreed when first contracting with Ecuador to abide by the country's local laws. Occidental, however, contends an international investment protection treaty signed between the U.S. and Ecuador supersedes the Andean country's local laws."); *see also* Toth, *supra* note 153 ("Occidental executives, meanwhile, responded with a \$1 billion arbitration claim to be heard by the World Bank's international trade tribunal in Washington DC, which is itself a contradiction of the terms of the Bilateral Investment Treaty signed by Ecuador and the US. 'We have not seized or confiscated the assets of the company; we have only fulfilled the law,' said Ecuador's Energy and Mines minister Ivan Rodriguez.").

request for provisional measures to stop all oil production in the contested area until settlement of the dispute.<sup>179</sup> While the general consensus is that Occidental will likely win this arbitration,<sup>180</sup> it is uncertain whether Ecuador will pay.<sup>181</sup> As of publication of this Comment, Ecuador continued to refuse to accept ICSID's jurisdiction to conduct binding arbitration of this matter.<sup>182</sup>

Many commentators attribute Ecuador's actions against Occidental as the direct result of massive and sustained indigenous protests, which effectively shut down the country for several months in 2006 and had officials fearing for their political survival.<sup>183</sup> In response to the cancellation of Occidental's Ecuadorian contract, the United States suspended all trade negotiations with Ecuador.<sup>184</sup> Even with U.S. pressure, it is quite possible that Ecuador will not compromise with Occidental because Ecuador's growing economic alliances with China and other Latin American countries make it less dependent on the goodwill of the United States.

If the London arbitration is any guide, it is unlikely the ICSID arbiters will consider the approximately forty allegations of environmental misconduct by Occidental as grounds for cancellation of the contract. The arbiters will also likely not consider the interests and concerns of the indigenous population—whose protests forced the Ecuadorian government to act—in reaching their decision. Investor-state dispute resolution bodies, like the ICSID, have thus far interpreted their

---

178. The ICSID Tribunal is composed of L. Yves Fortier, Brigitte Stern, and David A.R. Williams. *See Occidental Petroleum Corp. v. Ecuador*, No. ARB/06/11 (Int'l Ctr. Settlement Inv. Disputes July 13, 2006) (Decision on Provisional Measures), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&ocId=DC661\\_En&caseId=C80](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&ocId=DC661_En&caseId=C80).

179. *Id.* at 46.

180. *Cf. Ecuador rejects IMF recommendations in Occidental Petroleum suit*, INT'L HERALD TRIB., Oct. 7, 2006, [http://www.iht.com/articles/ap/2006/10/07/america/LA\\_GEN\\_Ecuador\\_IMF\\_Occidental\\_Petroleum.php](http://www.iht.com/articles/ap/2006/10/07/america/LA_GEN_Ecuador_IMF_Occidental_Petroleum.php).

181. David Biller, *Legal consultant: ICSID could be just the start of Oxy battle—Ecuador*, BUS. NEWS AM., Oct. 20, 2006, <http://www.bnamericas.com/story.jsp?sector=9&idioma=I&noticia=370284>.

182. Mercedes Alvaro, *Ecuador Won't Allow World Bank Arbitration in Disputes*, DOW JONES NEWSWIRES, Oct. 9, 2007.

183. Cyril Mychalejko, *Ecuador on the Edge: A Tale of Two Presidential Candidates*, ZNET, Nov. 6, 2006, <http://www.zmag.org/content/showarticle.cfm?ItemID=11360>.

184. Toth, *supra* note 153 (“The entire incident is a case study in the relative power of corporations over nations, a ‘legal’ system in which a foreign corporation, denied a contract renewal on the grounds of its blatant violation, can in turn sue the nation for nearly two percent of its GDP, while the corporation’s home government, which happens to represent the world’s most powerful economy, simultaneously slaps it with a ‘deep freeze’ on all other trade agreements, the effects of which could crush the economy of a small developing nation such as Ecuador.”). Ecuador President Raphael Correa has said that Ecuador will not renew the U.S. military’s lease of a base in Ecuador if favorable trade terms for Ecuadorian exports are not extended as well. *Id.*

role as adjudicators very narrowly, focusing on discreet treaty language completely apart from treaty negotiation history or the reality “on the ground.” The ICSID panel’s decision will likely turn on a close reading of the contracts between Occidental and Ecuador and the bilateral investment treaty between the United States and Ecuador. Regardless of the ICSID panel’s final decision, if a sufficient number of other countries are willing to provide economic support to Ecuador, the decision may have little practical impact on Occidental’s future operations in Ecuador.

## 2. *Function of the International Tribunals in this Dispute*

The Ecuador–Occidental Petroleum dispute is distinguished from the maritime border and swordfish disputes because in this dispute nonstate stakeholders are utilizing international tribunals in an attempt to shape government policy. Occidental is marshalling the authority of the Ecuador–United States bilateral investment treaty and, by invoking ICSID arbitration, also putting the World Bank Group on notice of questionable investment and financial practices in Ecuador. The World Bank could potentially put pressure on the Ecuadorian government to resolve the dispute in Occidental’s favor by threatening to downgrade its lending status among international lenders. The U.S. government suspended all free trade negotiations with Ecuador shortly after Occidental filed its complaint—a testament to the effectiveness of this strategy.<sup>185</sup> The World Bank has also exerted pressure on Ecuador, stating explicitly that Ecuador needs to put money aside to pay the judgment of the eventual decision, intimating that Ecuador will ultimately lose the case.<sup>186</sup> Future Bank funding could be negatively affected if Ecuador does not comply with the eventual ICSID decision.

The indigenous community, by pursuing a claim with the IACHR, has been able to rally support of its own. International human rights organizations (many of which are based in the United States and can exert domestic pressure on the U.S. government) and domestic support from other indigenous groups have strengthened the position of the indigenous community.<sup>187</sup> Perhaps most importantly, the IACHR has issued a decision mandating the Ecuadorian government to treat its

---

185. Scott Miller, U.S. Dep’tment of State, Bureau of International Information Programs, United States Suspends Trade Negotiations with Ecuador (May 17, 2006), <http://usinfo.state.gov/wh/Archive/2006/May/17-371072.html>.

186. SARAH ANDERSON, INSTITUTE FOR POLICY STUDIES & SARA GRUSKY, FOOD AND WATER WATCH, CHALLENGING CORPORATE INVESTOR RULE 7, *available at* <http://www.ips-dc.org/reports/070430-challengingcorporatinvestorrule.pdf>.

187. For instance Friends of the Earth, Amazon Watch, Natural Resources Defense Council, Cultural Survival, Sierra Club, and Rainforest Action Network all have programs to raise awareness of environmental threats in Ecuador or maintain active ties with Ecuadorian activists.

citizens in accordance with international human rights law and the protective principles articulated in the Ecuadorian Constitution.<sup>188</sup>

If domestic politicians are interested in changing the relationship between oil companies, the indigenous communities, and the state, the IACHR opinion could provide political coverage to a government interested in revoking or renegotiating oil contracts. For instance, in May 2007 the Ecuadorian government, under the guidance of President Raphael Correa, stated that it would comply with the 2005 IACHR *Sarayaku* decision and take measures to protect the indigenous community and the ecologically sensitive area.<sup>189</sup> The declarations and provisional measures by the IACHR in the *Sarayaku* case could provide Ecuador with further political cover if it chooses not to comply with an adverse ruling from the ICSID panel. The government can argue that it is bound by the IACHR decision, and the Ecuadorian Constitution, to respect the indigenous community's rights to maintain its traditional way of life, which also means protecting the natural environment.

#### *D. Tribunals Increase Public Awareness and Scrutiny of Disputes*

Possibly one of the most important functions served by international tribunals is the raising of public awareness. Nonstate actors in particular may use international tribunals to raise awareness of a dispute in the larger global community. A dispute between Argentina and Uruguay over the building of two pulp mills along the Uruguay River provides an example of the increased publicity international tribunals can bring to a dispute.

##### *1. Use of the Uruguay River—Dispute between Argentina and Uruguay*

Shared resources often lead to conflicts because different countries have different environmental values and economic needs. The Argentina-Uruguay dispute over the construction of two pulp mills on the Uruguay River, which forms the boundary between the two countries, provides one example of such a conflict. Argentina and Uruguay have had a formal agreement to co-manage the Uruguay River since the 1975 signing of the Statute of the River Uruguay.<sup>190</sup>

While Argentina and Uruguay have had a number of disputes over proper management of the shared waterway, this particular dispute began

---

188. Indigenous Community of Sarayaku v. Ecuador, 2004 Inter.-Am. Ct. H.R. (ser. E) (July 6, 2004).

189. Sarayaku, Minister of Energy and Mines announces withdrawal of explosives in Sarayaku (May 24, 2007), <http://www.sarayacu.com/oil/news070524.html#eng>.

190. Statute of the River Uruguay, Uru.-Arg., Feb. 26, 1975, 1982 U.N.T.S. 339.

when Uruguay announced plans to build two large pulp mills on its side of the river.<sup>191</sup> The two mills, one to be built and operated by Botnia of Finland and the other by Empresa Nacional de Celulosa de España (ENCE) of Spain, will have combined construction costs of \$2 billion and will be among the largest pulp mills in the world.<sup>192</sup> The mills also represent the largest foreign investment in Uruguay's history and are expected to create 2,500 local jobs.<sup>193</sup> Over half a billion dollars are being invested by World Bank Group sources.<sup>194</sup> A World Bank cumulative impact study of the project estimates the economic benefit of the mills over each of their forty years of production will be equal to about 2.5 percent of Uruguay's 2004 GDP.<sup>195</sup>

The proposed mills are to be located in a sparsely populated area and in close proximity to an internationally protected wetland.<sup>196</sup> Local environmentalists on both sides of the border are concerned that discharge from the mills will pollute protected wetlands and harm wildlife.<sup>197</sup> The pulp mills will take trees from nearby tree farms, shredding, cooking, and bleaching the trees until a paper pulp is produced. This process uses caustic chemicals, including chlorine, and results in significant air and water pollution. One of the reasons Botnia and ENCE are choosing to build mills in Uruguay is that the cheaper chlorine-bleaching method of pulp production has been outlawed in Europe—the firms are moving overseas rather than upgrading their European plants.<sup>198</sup> Environmentalists are also concerned that unhealthy

---

191. Press Release, Int'l Court of Justice, Pulp Mills on the River Uruguay (May 4, 2006), available at <http://www.icj-cij.org/docket/index.php?pr=1010&code=au&p1=3&p2=1&p3=6&case=135&k=88>.

192. Tito Drago, *Argentina-Uruguay: Pulp Mill Conflict Takes on Int'l Dimension*, INTER PRESS SERVICE NEWS AGENCY, Feb 23, 2006, <http://ipsnews.net/news.asp?idnews=32277>.

193. INTERNATIONAL FINANCE CORPORATION, CUMULATIVE IMPACT STUDY: URUGUAY PULP MILLS 1.4 (Sept. 2006), available at [http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay\\_Pulp\\_Mills\\_CIS\\_Final](http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_Pulp_Mills_CIS_Final) [hereinafter Cumulative Impact Study]; Press Release, International Finance Corporation, IFC and MIGA Board Approves Orion Pulp Mill in Uruguay (Nov. 21, 2006), available at <http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=F76F15A5FE7735918525722D0058F472>.

194. The International Financial Corporation is investing \$170 million and the Multilateral Investment Guarantee Association has guaranteed an additional \$350 million. *Id.*

195. Cumulative Impact Study, *supra* note 193, at ES.xxiv tbl. ES-5; David Haskel, *Finland to Facilitate, 'Not Mediate' Uruguay-Argentina Pulp Mill Dispute*, 29 INT'L ENV'T REP. (BNA) 646 (Sept. 6, 2006).

196. Center for Human Rights and Environment (CEDHA), Emissions from ENCE and Botnia Pulp Mills to Reach Uruguayan Ramsar Site, [http://www.cedha.org.ar/en/more\\_information/botnia-fails-safety-requirements.php#content](http://www.cedha.org.ar/en/more_information/botnia-fails-safety-requirements.php#content) (last visited Jan. 21, 2008) [hereinafter Emissions reach Uruguayan Site].

197. A study from the National University of Uruguay raises concerns about pulp mill emissions that contain compounds similar to fish hormones, which have been associated with reproductive and endocrine system damage. *Id.*

198.

stress may be placed on nearby surrounding native forests, since the current and projected timber plantations are insufficient to meet the needs of the two giant mills.<sup>199</sup> Argentina is concerned that the pulp mills will pollute its water, land, and air as well as hurt its local tourism-based economy.<sup>200</sup>

Residents on both sides of the border near the proposed sites have staged massive<sup>201</sup> and continuous protests, blocking many bridges that cross the river and serve as the main arteries to the coastal region.<sup>202</sup> During the summer holiday season of 2005–06 when the coastal area is typically flooded with tourists, local residents blocked passage across the bridges between Argentina and Uruguay for forty-five days.<sup>203</sup> In addition to protests, local residents have filed lawsuits against the two companies and state permitting agencies in Argentinean and Uruguayan courts.<sup>204</sup> Civic organizations, represented by the Center for Human Rights and the Environment, have also targeted private commercial banks and the Inter-American Commission on Human Rights.<sup>205</sup> Citizen groups and

---

The plants will use second-rate technology, currently phased out in Europe, applying chlorine that, combined with other toxins used in the milling process, results in discharges of carbon monoxide, sulfur dioxide, and chlorine dioxide (which in turn emit dioxins and absorbable halogen dioxins), into water and into the atmosphere. The production of pulp will also result in the accumulation of lead, cadmium, chrome, and arsenic in the soil around the plant, all of which have been shown to produce numerous illnesses, including genetic defects, cancer, respiratory problems, and skin disease.

CEDHA, BOTNIA AND ENCE PULP PAPER MILLS URUGUAY 3 [hereinafter Briefing Paper for Investors], *available at* <http://www.cedha.org.ar/docs/press-kit-celulosa.doc>.

199. The mills will “require 300,000 hectares of plantation timber within a 200km radius to feed the mills, whereas Uruguay is only able to cultivate timber in an area 44% of that size.” Emissions reach Uruguayan Site, *supra* note 196.

200. Drago, *supra* note 192.

201. CEDHA claims over 100,000 people have marched in a single protest. CEDHA, 100,000 march peacefully against Uruguayan Papermills, [http://www.cedha.org.ar/en/more\\_information/100000-march-uruguay.php](http://www.cedha.org.ar/en/more_information/100000-march-uruguay.php) (last visited Jan. 6, 2008).

202. The bridges are Uruguay’s main connection to Argentina, Bolivia, Chile, Paraguay, and Peru. The Chamber of International Automotive Land Transportation of Uruguay is planning to take legal action against Argentina because its trucks have suffered serious losses from not being able to cross the border. Drago, *supra* note 192.

203. Cumulative Impact Study, *supra* note 193, (1.6).

204. Letter from CEDHA, to Michel Tilmant, CEO of ING of the Netherlands et al. (undated) (Complaint regarding ING Loan Consideration to Botnia and/or ENCE for paper pulp mill production in Uruguay), *available at* [http://www.cedha.org.ar/en/initiatives/paper\\_pulp\\_mills/complaint-letter-to-ing-eng.pdf](http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/complaint-letter-to-ing-eng.pdf).

205. *Id.* Specifically, CEDHA alleges violation of:

- Articles 1(1), 2, 4, 5, 19, 25, 26 of the *American Convention on Human Rights*
- Articles 1, 10, 11 of the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* “*Protocol of San Salvador*”

Argentina filed complaints with the Compliance Advisor/Ombudsman of the IFC.<sup>206</sup> Additionally, Argentina has exerted political pressure, in closed-door meetings, on World Bank Group officials and other potential commercial lenders.<sup>207</sup> It has also sought relief from the ICJ in the form of provisional measures to stop construction of the mills.<sup>208</sup>

Uruguay has also sought the assistance of international bodies to resolve this conflict. The Uruguayan government sent representatives to the Organization of American States to express its “utmost concern” over Argentina’s failure to ensure the free circulation of persons, as guaranteed by Article 22 of the Inter-American Convention on Human Rights.<sup>209</sup> Uruguay also registered a complaint with Mercosur,<sup>210</sup> the South American economic integration organization, over the bridge blockades.

*a. Project Review by the International Finance Corporation and Multilateral Insurance Guarantee Association Ombudsman*

Both the Botnia and ENCE mills are being largely funded by the International Finance Corporation and insured by the Multilateral Investment Guarantee Company (MIGA).<sup>211</sup> In response to considerable popular pressure in the 1990s accusing World Bank Group lenders of being insensitive to local consideration, the World Bank and its close associates IFC and MIGA refashioned their commitment to environmentally responsible development and created an ombudsman position in 1999 to review bank funded projects for compliance. The Office of the Compliance Officer/Ombudsman (CAO) reports directly to the President of the World Bank Group and makes recommendations, based on its independent findings, as to how the IFC and MIGA can

- 
- Articles I, VII, XI of the *American Declaration of Rights and Duties of Man*.

206. Briefing Paper for Investors, *supra* note 198, at 2.

207. Cumulative Impact Study, *supra* note 193, (1.7). Argentina’s economy is twelve times larger than Uruguay’s. Argentina’s threat to change its financial policies in order to express its displeasure with the World Bank and private lenders is a significant threat.

208. Press Release, Int’l Court of Justice, Pulp Mills on the River Uruguay (Jan. 23, 2007), available at <http://www.icj-cij.org/docket/index.php?pr=1891&code=au&p1=3&p2=1&p3=6&case=135&k=88>.

209. Drago, *supra* note 192.

210. See *infra* note 243.

211. Briefing Paper for Investors, *supra* note 198 (The Botnia project is worth about \$US 1.2 billion, with \$200 million sought from the IFC. The ENCE project is worth about \$US 660 million, also with \$200 million sought from IFC.).

better comply with its internal policies, including environmental policies.<sup>212</sup>

Local citizen input<sup>213</sup> and concerns expressed by the Argentinean government affected the scope of the proposed mills and led to greater assessment of the proposed projects. At the outset of the project, Botnia and ENCE both prepared environmental and social assessments describing the expected impacts of the mills and outlined proposed mitigation and enhancement measures to manage those impacts.<sup>214</sup> There was strong local opposition to these initial plans as insufficiently comprehensive or accurate.<sup>215</sup> Massive local protests, including the aforementioned demonstrations, and political pressure from Argentina caused IFC/MIGA to seek further assessment before agreeing to fund the mills.<sup>216</sup> A number of private commercial banks withdrew funding completely.<sup>217</sup> Argentina asked the World Bank to withhold financing assistance until a binational environmental impact study could be completed.<sup>218</sup>

The Center for Human Rights and the Environment (CEDHA), an organization representing local Uruguayan and Argentinean citizens,<sup>219</sup> filed a complaint with the CAO charging that IFC violated a number of internal practices and guidelines. For instance CEDHA claimed the IFC failed to properly plan for the protection of sensitive wetlands and waterways; failed to conduct proper environmental assessments or meet

---

212. INTERNATIONAL FINANCE CORP. & MULTILATERAL INVESTMENT GUARANTEE AGENCY, OFFICE OF THE COMPLIANCE OFFICER/OMBUDSMAN, 2006-07 ANNUAL REPORT 1, 5 (2007), available at [http://www.cao-ombudsman.org/documents/CAO\\_AR0607\\_Eng.pdf](http://www.cao-ombudsman.org/documents/CAO_AR0607_Eng.pdf).

213. According to the IFC ombudsman, over 39,000 people in Argentina and Uruguay signed a complaint submitted to IFC and MIGA alleging that the proposed mills posed serious environmental and social risks and violated the internal investing policies of the World Bank Group. INTERNATIONAL FINANCE CORPORATION, MULTILATERAL INVESTMENT GUARANTEE AGENCY, OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, 2005-06 ANNUAL REPORT, available at <http://www.cao-ombudsman.org/documents/CAOAnnualReport2005-06English.pdf>

214. Cumulative Impact Study, *supra* note 193, (pmb1.).

215. CEDHA, 10 Reasons to Oppose Botnia Pulp Mill Project, [http://www.cedha.org.ar/en/initiatives/paper\\_pulp\\_mills/10-reasons-oppose-botnia-pulp-mil.pdf](http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/10-reasons-oppose-botnia-pulp-mil.pdf).

216. International Finance Corporation, Frequently Asked Questions: Uruguayan Pulp Mills at [http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay\\_PulpMills\\_FAQ](http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_PulpMills_FAQ); see also *Argentina, Uruguay At Loggerheads Over Pulp Mills on Shared River*, ENV'T NEWS SERVICE, May 9, 2006, <http://www.ens-newswire.com/ens/may2006/2006-05-09-04.asp> (reporting on Uruguay President Vasquez' meeting with World Bank President Wolfowitz in an effort to get Bank and IFC/MIGA approval for funding of the mills).

217. CEDHA, ING Group of Netherlands Pulls out of controversial papermill while World Bank postpones loans following critical review of environmental impact studies (Apr. 12, 2006), [http://www.cedha.org.ar/en/more\\_information/ing-postpones-loans.php](http://www.cedha.org.ar/en/more_information/ing-postpones-loans.php).

218. Marcela Valente, *Argentina-Uruguay: Pulp Mill Agreement Eases Tension, Not Residents' Fears*, INTER PRESS SERVICE NEWS AGENCY, July 25, 2006, <http://ipsnews.net/news.asp?idnews=29632>.

219. For a description of CEDHA's activities, see [http://www.cedha.org.ar/en/general\\_information](http://www.cedha.org.ar/en/general_information) (last visited Feb. 7, 2008).

with affected stakeholders; and failed to mandate the project use the least environmentally damaging technology.<sup>220</sup>

In response to these complaints and subsequent investigations by the CAO, the IFC commissioned a Cumulative Impact Study (CIS) of the “construction and operations of the two pulp mills and their respective raw material sourcing.”<sup>221</sup> While the CIS was ongoing, the massive protests and mobilization by local tourist and environmental groups led ENCE to relocate its planned facility downriver at a site mutually agreeable to both Argentineans and Uruguayans.<sup>222</sup>

Upon completion of the CIS, the IFC allowed for a period of public comment on the report and commissioned a panel of independent experts to review the existing project documentation and all the public comments.<sup>223</sup> The results of the review were then published with a list of additional information and analysis that the panel felt was required for a complete environmental assessment of the two mills.<sup>224</sup> The IFC then commissioned additional experts to revise the draft CIS in response to the recommendations of the independent experts and public comments.<sup>225</sup> Upon completion and release of the final CIS, IFC/MIGA approved funding for the Botnia mill.<sup>226</sup>

While review by the CAO did not result in an outright rejection of the project, it did result in substantial revisions to the proposed projects,

---

220. CEDHA charged IFC with violating:

- IFC Operational Policy OP7.50 Projects on International Waterways;
- IFC Operational Policy OP4.01 Environmental Assessment;
- IFC Disclosure Policy;
- International, bilateral and national laws in the assessment, planning, and implementation of the projects;
- Specific environmental, social and disclosure policy considerations for Category A projects;
- Requirements to adopt the least environmentally damaging technology mandated by the World Bank Pollution Prevention and Abatement Handbook (Pulp and Paper mills);
- Consideration of the likely grave social, economic, and environmental harm that the projects will have on local residents in both Uruguay and Argentina

Letter from Jorge Daniel Taillant, Executive Director, CEDHA, to International Finance Corporation, Compliance Advisor/Ombudsman (undated), *available at* [http://www.cedha.org.ar/en/initiatives/paper\\_pulp\\_mills/cao-complaint-letter.doc](http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/cao-complaint-letter.doc).

221. Cumulative Impact Study, *supra* note 193, (1.1).

222. International Finance Corporation, FAQs: Uruguayan Pulp Mills, [http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay\\_PulpMills\\_FAQ](http://www.ifc.org/ifcext/lac.nsf/Content/Uruguay_PulpMills_FAQ) (last visited Jan. 21, 2008). After ENCE decided to relocate its mill to the Rio Plata, IFC suspended funding pending a review of the impacts of the mill at the new site. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

with some increased environmental protections such as recycling of water, higher level treatment of effluent, and a two-stage bleaching process to reduce the production of dioxin.<sup>227</sup>

*b. Argentina Asks for Help from the ICJ*

In May 2006, Argentina filed a claim<sup>228</sup> against Uruguay with the ICJ claiming Uruguay breached its obligations under the 1975 Statute of the River Uruguay Treaty,<sup>229</sup> which requires the two countries to manage the shared river together.<sup>230</sup> Argentina contends Uruguay “unilaterally authorized” the construction of the pulp mills without prior notification or consent.<sup>231</sup> Further, Argentina claims the mills will “damage the environment of the River Uruguay and its area of influence zone,” affecting over 300,000 residents, and posing “significant risks of pollution of the river, deterioration of biodiversity, harmful effects on health and damage to fisheries resources,” and “extremely serious consequences for tourism and other economic interests.”<sup>232</sup>

Argentina asked the Court to rule that Uruguay had violated the treaty and asked that it require Uruguay to take measures to comply with its international obligations.<sup>233</sup> The Court is in the process of accepting

---

227. Cumulative Impact Study, *supra* note 193, (ES.vii–viii).

228. Pulp Mills on the River Uruguay (Application Instituting Proceedings,) (May 4, 2006) [hereinafter Pulp Mills Application], *available at* <http://www.icj-cij.org/docket/files/135/10779.pdf>.

229. Statute of the River Uruguay, Uru.-Arg., Feb. 26, 1975, 1982 U.N.T.S. 339.

230. The statute’s purpose is “to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay.” *Id.* art. 1. The statute governs, *inter alia*, the conservation, utilization and development of natural resources and the prevention of pollution. *Id.* chs. IX, X; *see also* Press Release, Int’l Court of Justice, *supra* note 191.

231. Press Release, Int’l Court of Justice, *supra* note 191 (quoting translation of Pulp Mills Application, *supra* note 228).

232. *Id.* (quoting translation of Pulp Mills Application, *supra* note 228).

233. *Id.* Specifically, Argentina asked the court to “to adjudge and declare”:

1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that Statute refers, including but not exclusively:

(a) the obligation to take all necessary measures for the optimum and rational use of the River Uruguay;

(b) the obligation of prior notification to CARU and to Argentina;

(c) the obligation to comply with the procedures laid down in Chapter II of the 1975 Statute;

(d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full, objective study on environmental impact;

(e) the obligation to co-operate in regard to the prevention of pollution and the protection of biodiversity and fisheries; and

submissions from the two parties with a decision likely to be rendered within a year or two, depending on how contentious the submittal process is.

At the same time, Argentina filed a request for the application of provisional measures by the ICJ to halt construction of the two mills.<sup>234</sup> Argentina claimed “continued construction of the works in question under present conditions will significantly aggravate their harmful economic and social impact,” and that the River Uruguay environment and surrounding inhabitants would be “seriously and irreversibly compromise[d]” if the mills were commissioned prior to a final decision of the Court.<sup>235</sup> Following oral arguments in June 2006, the ICJ denied the request for provisional measures, holding that the Statute of the River Uruguay did not require provisional measures under the circumstances.<sup>236</sup> In reaching its conclusion, the Court cited to previous ICJ decisions in which it had emphasized the importance of protecting the natural environment. However it found that Uruguay’s decision to authorize construction posed no imminent threat of damage to the environment, the economy, or social interests of Argentineans who live along the river.<sup>237</sup> Argentina must again file for provisional measures once

---

2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;

3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and

4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.

*Id.* (quoting translation of Pulp Mills Application, *supra* note 228, at 10).

234. Pulp Mills on the River Uruguay (Req. for Provisional Measures by Arg.) (May 4, 2006), *available at* <http://www.icj-cij.org/docket/files/135/10781.pdf>; *see also* Press Release, Int’l Court of Justice, *supra* note 191.

235. Press Release, Int’l Court of Justice, *supra* note 191 (quoting translated Request for Provisional Measures by Argentina, *supra* note 234).

236. Pulp Mills on the River Uruguay at 21 (Req. for Provisional Measures by Arg.) (Order of July 13, 2006), *available at* <http://www.icj-cij.org/docket/files/135/11235.pdf> [hereinafter Argentina Provisional Measures Order]; *see also* Int’l Court of Justice, Summary of the Order of 13 July 2006, Pulp Mills on the River Uruguay, <http://www.icj-cij.org/docket/index.php?sum=661&code=au&p1=3&p2=3&case=135&k=88&p3=5>. Article 41 of the ICJ Statute states that provisional measures are appropriate when necessary to preserve the rights of a party. ICJ Statute, *supra* note 24, art. 41. In this case, the Court warned Uruguay that it continued construction of the Botnia mill at its own risk and that the court might order the mill to cease operation in its final decision. This possibility was considered sufficient grounds to preserve Argentina’s rights. Press Release, Int’l Court of Justice, Pulp Mills on the River Uruguay (July 13, 2006), *available at* <http://www.icj-cij.org/docket/index.php?pr=1023&code=au&p1=3&p2=1&p3=6&case=135&k=88>.

237.

Whereas the power of the Court to indicate provisional measures to maintain the respective rights of the parties is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision.

operation of the mills is about to begin and the threat to the environment is truly imminent. While the Court is being almost painfully literalist in its application of provisional measures, it did go on to state that “Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make” and that the construction of the mills at the current site cannot be deemed to create a *fait accompli*.<sup>238</sup>

In November 2006, Uruguay submitted its own request to the ICJ asking the Court to issue provisional measures requiring Argentina to take appropriate measures to end the roadblocks and ensure the free movement of people, which the ICJ denied.<sup>239</sup> While the Court did conclude that it had sufficient jurisdiction to hear Uruguay’s request,<sup>240</sup> it decided that there was no “imminent risk of irreparable prejudice to the rights of Uruguay.”<sup>241</sup>

*c. Uruguay Asks for Help from Mercosur*

Argentina and Uruguay are both active members of the Southern Common Market, also known as Mercosur, and are heavily invested in its legitimacy and continued viability. Shortly after Argentina filed its claim with the ICJ, Uruguay sent a letter to Mercosur requesting the formal start of direct negotiations under the dispute settlement provisions of Mercosur.<sup>242</sup> The dispute settlement system established for Mercosur by the Olivos Protocol is binding on the member states for all disputes raising issues covered by the Treaty of Asunción or related Protocols.<sup>243</sup>

---

Argentina Provisional Measures Order, *supra* note 236, ¶ 62 (citing *Passage through the Great Belt (Fin. v. Den.)*, 1991 I.C.J. 17; *Certain Criminal Proceedings in France (Congo v. Fr.)*, 2003 I.C.J. 107); *see also id.* ¶ 72.

238. *Id.* ¶ 78.

239. *Pulp Mills on the River Uruguay (Req. for the Indication of Provisional Measures by Uru.)* (Nov. 30, 2006), *available at* <http://www.icj-cij.org/docket/files/135/13485.pdf>; Press Release, Int’l Court of Justice, *Pulp Mills on the River Uruguay* (Nov. 29, 2006), *available at* <http://www.icj-cij.org/presscom/index.php?pr=1886&pt=1&p1=6&p2=1>.

240. *Pulp Mills on the River Uruguay (Req. for Provisional Measures)* (Order of Jan. 23, 2007) [hereinafter *Uruguay Provisional Measures Order*], *available at* <http://www.icj-cij.org/docket/files/135/13615.pdf>. The Court found that it could exercise jurisdiction if it chose to do so, but also remarked that Uruguay had already sought a decision on the roadblocks from Mercosur and received one. The Court noted that under Mercosur rules, once remedy has been sought through Mercosur, neither party can seek a ruling from another court or tribunal. In so many words, the Court reprimanded Uruguay for seeking a more “enforceable” decision from the ICJ than it received from Mercosur. *Id.*; *see also* Int’l Court of Justice, *Summary of the Order of 27 January 2007, Pulp Mills on the River Uruguay*, <http://www.icj-cij.org/docket/index.php?sum=666&code=au&p1=3&p2=3&case=135&k=88&p3=5>.

241. *Uruguay Provisional Measures Order*, *supra* note 240, ¶ 50.

242. *Drago*, *supra* note 192.

243. Established in 1991 by Argentina, Brazil, Uruguay, and Paraguay with the signing of the Treaty of Asunción, Mercosur’s purpose is to establish a common market and eliminate trade barriers among the parties. Treaty of Asunción, Mar. 26, 1991, 30 I.L.M. 1041. While the Treaty does not provide for dispute settlement, several corollary protocols established a system

A Mercosur arbitration panel first looks to the Treaty of Asunción for authority, but may also draw upon the decisions of the Common Market Council, the resolutions of the Common Market Group, or principles and norms of international law. Only state parties may submit cases directly to Mercosur courts; individual entities and persons, with a complaint against a member state, must file their claims with their national chapter of the Common Market Group. Ad hoc arbitration panels are composed of three arbitrators, selected from a preapproved pool of qualified persons. Parties submit formal written arguments to the arbitration panel and make presentations to the panel. The panel is authorized to issue provisional measures if an urgent situation exists.<sup>244</sup>

Mercosur granted Uruguay's request for an arbitration panel. The panel directly addressed the competing interests of (1) a commitment to free and open movement of goods and people across borders, and (2) a respect for human rights and the right of freedom of expression.<sup>245</sup> The panel struggled to reach a conclusion on how best to balance these two important principles when they are in tension.<sup>246</sup> Ultimately, it ruled against Argentina, concluding the roadblocks on the Uruguay River bridges violated Mercosur commitments.<sup>247</sup> While the panel acknowledged that a state can only be partially responsible for the actions of its protesting citizens, and that a commitment to nonviolent government action is to be supported and respected, the panel concluded that too much inaction on the part of the state can be seen as tacit support for the protestors and therefore a violation of its commitment to open commerce.<sup>248</sup> The panel stated that the government's inaction was not compatible with its commitment to the free flow of goods and services.<sup>249</sup> However, the panel softened its decision by not placing

---

of ad hoc arbitral panels. Additional Protocol to the Treaty of Asunción on the Institutional Structure of Mercosur ("Protocol of Ouro Preto"), Dec. 17, 1994, 34 I.L.M. 1244; Protocol of Brasilia for the Settlement of Disputes, December 17, 1991, 36 I.L.M. 691. In 2002, the Olivos Protocol replaced the Brasilia Protocol with a new structure and institution. Protocol of Olivos, Feb. 18, 2002, 42 I.L.M. 2. While many of the features of the Brasilia Protocol are continued in the Olivos Protocol, a few new developments are of note. First, a Permanent Court of Review was created to hear appeals from decisions of the ad hoc tribunals on issues of law. Protocol of Olivos, *supra*, art. 1. The new protocol also seeks to clarify issues of jurisdiction, introducing a provision allowing the state initiating the dispute to choose the arbitral forum. Protocol of Olivos, *supra*, art. 1, § 2.

244. Protocol of Olivos, *supra* note 243, art. 15.

245. *Argentina v. Uruguay* (Mercosur Arbitration Panel Decision Sept. 6, 2006) [hereinafter Mercosur Decision], available at [http://www.mercosur.int/msweb/SM/es/Controversias/TPR/TPR\\_Tribunal%20AdHoc\\_Laudo%20Libre%20Circulacion\\_ES.pdf](http://www.mercosur.int/msweb/SM/es/Controversias/TPR/TPR_Tribunal%20AdHoc_Laudo%20Libre%20Circulacion_ES.pdf).

246. *Id.* ¶¶ 124–40.

247. *Id.* pt. IV; see also David Haskel, *Mercosur Arbitration Panel Condemns Argentine Roadblocks in Uruguay Row*, 29 INT'L ENV'T REP. (BNA) 691, Sept. 20, 2006.

248. See Mercosur Decision, *supra* note 245, ¶¶ 115–23.

249. See Haskel, *supra* note 247.

specific requirements on Argentina to ensure blockade cessation, stating that it had no reason to believe that Argentina had “wrongful intent.”<sup>250</sup> Much to Uruguay’s dismay, the roadblocks continued after the Mercosur decision, and the Argentinean government made minimal attempts to keep the roads open.

## 2. *Future of the Mills?*

For now, the future of the mills is uncertain. Already the ENCE mill relocated to a site agreeable to both Argentines and Uruguayans. Some major funding sources have decided to withdraw support for the projects because of the international controversy.<sup>251</sup> Protests on both sides of the border are continuing, and Uruguay has sent troops to protect the partially constructed Botnia mill from potential sabotage.<sup>252</sup> The decisions from the ICJ and the Mercosur arbiter have not been very different from each other so far.

The residents along the river who oppose the mill must rely on Argentina to represent their interests in front of the ICJ. In 1945 when the United Nations created the ICJ, the founding members viewed international relations as the exclusive domain of nation-states. As such, only states may submit or be parties in cases before the court.<sup>253</sup> The ICJ may be taking a conservative approach to this case because it has a strong institutional respect for state sovereignty. In any case, the ICJ decision may be moot if financial support for the mills disappears.

The multiple tribunals involved in this Uruguay River dispute are providing an important opportunity for different stakeholders—the governments, residents, nongovernmental organizations (NGOs), companies, and investors—to have their concerns considered. In particular, the IFC/MIGA CAO review provided the local people with a focal point for directing advocacy and an opportunity to share their concerns about the project. Filing petitions with the IACHR and the ICJ, while useful legally, was also an effective strategic move for the opponents of the mills because image conscious investors are wary about getting involved in an unpopular or controversial project. Regardless of the final outcome of all the litigation, the availability of tribunals has already made the project more ecologically sensitive by requiring upgrades to the plant construction, and has put the mills and the

---

250. *Id.*

251. Network Vlaanderen, ING Group of Netherlands Pulls out of controversial papermill while World Bank postpones loans (Apr. 12, 2006), [http://www.netwerkvlaanderen.be/en/index.php?option=com\\_content&task=view&id=246&Itemid=37](http://www.netwerkvlaanderen.be/en/index.php?option=com_content&task=view&id=246&Itemid=37).

252. See CEDHA, Opposition to Pulp Mill Mounting in Uruguay (Oct. 8, 2007), [http://www.cedha.org.ar/en/more\\_information/opposition.php](http://www.cedha.org.ar/en/more_information/opposition.php).

253. ICJ Statute, *supra* note 24, arts. 34, 59.

government on notice that the local population will not allow its natural resources to be polluted or mismanaged.

#### CONCLUSION

Multiple tribunals are beneficial to the promotion of global democracy in a global economy. By increasing the number of available tribunals over the past decade, stakeholders with different perspectives have been able to participate in the decisionmaking process regarding how natural resources should be utilized. The disputes heard by international tribunals do not occur in a political vacuum. States and private investors are responsive to the perspectives of international jurists and their decisions, even if not “enforceable” in the traditional domestic sense, because the decisions carry significant political and public power. The governments of Honduras and Nicaragua were both willing to abide by a decision of the ICJ as to their maritime border when all other negotiations failed. Chile and the EC were able to reach a compromise agreement acceptable to both countries’ citizens. The Ecuadorian people are using international tribunals to pressure foreign corporations to change their business practices. The owners of the proposed ENCE pulp mill in Uruguay decided to relocate the mill to avoid a potentially adverse decision by an international court.

While international tribunals must decide only the questions they are asked and stay within the governing jurisdictional framework and scope of law, a number of other political and policy considerations enter into their decisions. The anticipation of the kind of ruling a tribunal is likely to issue can be sufficient to alter the relative strength of particular viewpoints, as evidenced by the Chile-EC swordfish dispute. Chile and the EC could each anticipate the rulings of ITLSO and the WTO and were therefore able to reach a political settlement taking those anticipated rulings into account.

Public perception of what an issue is “really about” can also shape the outcome as demonstrated by the pulp mills dispute and the fight by indigenous Ecuadorians to protect their way of life and environment. A stakeholder can help “frame” an issue in a particular way through its written petition to a particular (sympathetic) tribunal and invoking particular legal obligations or principles, as Nicaragua did by first seeking redress from the CACJ—an institution focused on regional integration. The increased public scrutiny associated with bringing claims before certain international tribunals can also affect the outcome. This is most clearly evidenced in the pulp mills dispute with the relocation of the ENCE mill, but was also likely a factor in the Chile-EC swordfish dispute.

Based on the lessons of these four disputes, the expansion of international judicial forums would be a positive development for the environment. Environmental protections are strengthened when local populations and conservation groups have input into and participate in determining how resources are used. The economic tribunals provide a counterbalance to the human rights tribunals—helping to ensure the concerns of all affected groups will be considered in the ultimate resolution to the dispute. In this sense, tribunals like the WTO Dispute Settlement Body and International Centre for the Settlement of Investment Disputes provide a counterpoint to the Inter-American Court of Human Rights.

While the increasing number of forums is providing governments, NGOs, private corporations, and individual citizens with more choices for redressing concerns, there exists a real concern regarding incompatible rulings by multiple forums. Thus far, this problem has largely been avoided through political maneuvering and negotiation. Rather than the proliferation of tribunals being of such concern, the trend that should give us pause is that of new limitations being placed on parties in agreements such as the North America Free Trade Agreement and the Dominican Republic–Central America Free Trade Agreement, which both require litigants to give up their potential legal remedies in other forums before proceeding with an arbitration.<sup>254</sup> If this practice spreads to other trade and investment treaties, many of the tribunals examined in this paper will become inaccessible to states and NGOs. There is also concern a two-tiered complaint system will develop, where citizens are only allowed redress to “informative” tribunals like the IFC ombudsman and the environmental side-agreement to NAFTA, while private corporations are allowed access to “enforcement” tribunals with the power to impose monetary penalties. A two-tier system among “classes” of stakeholders should be avoided. In other words, nonstate actors should have equal access to international tribunals, without discrimination between corporations, NGOs, and individuals. The instances where tribunals have had the largest measurable effect on a dispute are those where the tribunal served to generate and disseminate information to the public.

International tribunals have become an integral and dynamic part of our international and local discourse. Recognizing their ability to strengthen and protect democratic institutions and decisionmaking is key to understanding their role in the global political and economic framework. Understanding the important functions being carried out by

---

254. North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, Dec. 8–17, 1992, 32 I.L.M. 605, 639–49; *see also* William S. Dodge, *Waste Management, Inc. v. Mexico*, 95 AM. J.INT'L L. 186 (2001).

2007] *NATURAL RESOURCE DISPUTES IN LATIN AMERICA* 1347

tribunals can help shape the institutional framework for future tribunals and ensure current tribunals continue to flourish and continue to be properly utilized.

1348

*ECOLOGY LAW QUARTERLY*

[Vol. 34:1297