

## Law 271.72 - International Tribunals and the Environment (Fall 2006)

Instructor: Cymie Payne

Units: 2

Meeting Time: Mondays, 2:20-4:10 pm

Meeting Location: Room 121

War, climate change, commercial fishing and technological development, all have impacts on the environment at a global scale. The international system has evolved a multiplicity of courts, tribunals, commissions and other types of dispute-settlement bodies, but are they well-suited to environmental disputes? The International Court of Justice, the Permanent Court of Arbitration, World Trade Organization and NAFTA panels and specialized bodies like the UN Compensation Commission have addressed disputes relating to the environment. This course takes a practical look at how they accept, review and decide disputes, looking at recent cases. Topics that may be considered include: transparency of international courts and tribunals, excessive proliferation of courts, and the ethics and independence of international courts and tribunals.

Reading materials will be available on the course website.

### Syllabus (subject to change)

#### **Class 1 - August 21, 2006**

Overview of the institutional framework; Class logistics

- Georges Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks," 31 New York University Journal of International Law and Politics 843 (1999).
- Benedict Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?," 31 New York University Journal of International Law and Politics 679 (1999)
- Hersch Lauterpacht, Development of International Law, chapter 1, pp. 1-24 (1934).
- Barry E. Carter, David D. Caron, Frieder Roessler, Marguerite S. Millhauser, Teresa E. Dawson, Reporter, "Comparative Analysis of International Dispute Resolution Institutions," 85 Am. Soc'y Int'l L. Proc. 64 (1991)

#### **Class 2 - August 28, 2006**

Part 1 – Finding International Law: Research Tools, Guest: Marci Hoffman, Associate Director, Boalt Hall Law Library; International & Foreign Law Librarian

Part 2 - Introduction to International Court of Justice and Sources of International Law:

- The Court at a Glance
- United Nations Charter: Articles 92-96
- Statute of the International Court of Justice  
Identify the relevant Articles to answer these questions:  
Who are the actors?  
What is the organic document that created the institution?  
What is the subject matter jurisdiction of the court?  
What is the court's jurisdiction over potential parties?  
What kind of remedy can the court provide?  
How are the court's judgments enforced?

### **Class 3 - September 11, 2006**

Part 1 - Guest: Professor David Caron

- David D. Caron, International Dispute Resolution: Comparing the Roles Accorded the Parties and the Broader Community, Annual Meeting of the American Society of International Law (Washington, D.C. April 18, 1991)

Part 2 - International Court of Justice (continued) – Contentious Cases: Gabčíkovo-Nagymaros (Hungary/Slovakia):

- Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports  
Read the 3 orders in the case, paying attention to the procedures (special agreement, party filings, site visit). Read the judgment, paying attention to the basic facts of the case, the questions posed to the Court by the parties, the 1969 Vienna Convention on the Law of Treaties as a source of law, the Court's handling of the environmental principles raised by Hungary.  
Order of 14 July 1993 - Fixes Time-Limits for the Filing by Each of the Parties of a Memorial (2 May 1994) and Counter-Memorial (5 December 1994); Order of 20 December 1994 - Fixes Time-Limits for the Filing by Each of the Parties of a Reply (20 June 1995); Order of 5 February 1997; Judgment of September 1997 – Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)
- 1969 Vienna Convention on the Law of Treaties: Read the following articles of the 1969 Vienna Convention on the Law of Treaties: Articles 1, 2, 4, 26, 31, 42-45, 54, 60-62, 64, 67
- Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Read Principle 21 of the Stockholm Declaration.

### **Class 4 - September 18, 2006**

#### Paper topics due

Part I – Guest: Professor Antonia Handler Chayes, Fletcher School of Law and Diplomacy on compliance

Part II - International Court of Justice – Contentious Cases: Gabčíkovo-Nagymaros (Hungary/Slovakia) (continued):

This reading and the next one provide some context to the Gabčíkovo-Nagymaros case.

- Schwabach Gabčíkovo-Nagymaros article
- first3 GABCIKOVO article
- UNCLOS Please read: UNCLOS – Part XV, Annex VI

Please hand in before the next class a brief response to the following questions, providing a brief reference to the source for your reply. Your answers may be informal, as in the example:

*What is the constitutive document(s)?*

*The UN Convention on the Law of the Sea, Annex VI.*

Who created the Tribunal?

Who are the Actors?

What is the competence of the Tribunal?

What remedy is available? or What result can be expected?

What are primary sources of law for the Tribunal? Other sources that may be used?

**Class 5 - September 25, 2006** International Tribunal for the Law of the Sea - The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures

Please read the Order, Joint Declaration and Separate Opinions. You may find it interesting to refer to the ITLOS web site where you will find the party submissions, verbatim records of the oral proceedings and additional separate opinions (not required reading for class). Read the Treves article, which was written before this case came to the Tribunal, and reflects on the complications raised for prospective parties by the dispute settlement mechanisms prescribed by the UN Convention on the Law of the Sea:

- Order - 3 Dec 2001; Joint Declaration; Separate Opinion of Judge Mensah; Separate Opinion of Judge *ad hoc* Szekely;
- Tullio Treves, Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice, 31 N.Y.U. J. INT'L L. & POL. 809 (1999)

**Class 6 - October 9, 2006** Permanent Court of Arbitration – European Court of Justice - The MOX Plant Case (Ireland v. United Kingdom), Competing Jurisdictions of International Courts and **Tribunals**

- MOX Rules of Procedure
- PCA - Introduction to the Basic Documents (by Tjaco T. van den Hout, Secretary-General PCA, January 2005)
- 2005 Annual Report, Annex 2, Cases Submitted to Arbitration before the Permanent ...
- The MOX Plant Case - Order No. 3
- The MOX Plant Case - Order No. 4
- Notice in Official Journal of the European Union – Judgment of the Court (Grand Chamber) of 30 May 2006 — Commission of the European Communities v Ireland (Case C-459/03)
- Judgment of the Court (Grand Chamber) of 30 May 2006 — Commission of the European Communities v Ireland (Case C-459/03)
- Permanent Court of Arbitration web site  
Article 1(3) of the Rules of Procedure for the MOX Plant case Annex VII arbitral tribunal indicates that the PCA shall serve as the Registry for the arbitration. I encourage you to become familiar with the resources on the PCA web site. You can find the orders, pleadings and hearing transcripts for this case on the web site, if you are interested in reading more deeply than the assigned materials.
- The website of the Court of Justice of the European Communities.

**Class 7 - October 16, 2006**

Part I - Addendum to Provisional Measures: Southern Bluefin Tuna Cases

- SOUTHERN BLUEFIN TUNA CASES (NEW ZEALAND v. JAPAN; AUSTRALIA v. JAPAN), Requests for provisional measures - ORDER

Consider whether the International Tribunal for the Law of the Sea handles this request for provisional measures in the same way it approached the MOX Plant case, and why.

Part II - International Court of Justice - Advisory Opinions - Legality of the Threat or Use of Nuclear Weapons (1994-1996); Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1993-1996)

- Statute of the Court; sections relevant to Advisory Opinions.
- Rules of the Court, section IV.
- Legality of the Threat or Use of Nuclear Weapons (1996)
- Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1996)

**Class 8 - October 23, 2006**

Part I - Judicial Independence

These readings present very different views on judicial independence/bias. Which views make sense to you? Where do the authors agree, where do they differ? How would you remedy the problems that are described? What kind of bias might affect international judges differently from a national court judge? In what ways do the Burgh House Principles seem to you to be responsive to the concerns of Lauterpacht and Posner - or not?

- H. Lauterpacht, The Impartiality of International Tribunals
- Eric A. Posner & Miguel de Figueiredo, Is the International Court of Justice Biased? (The University of Chicago Law School John M. Olin Program in Law & Economics Working Papers, 2d Series, Working Paper No. 234, 2004)
- Rosalyn Higgins, REMARKS, 99 Am. Soc'y Int'l L. Proc. 135 (2005)

- The Burgh House Principles on the Independence of the International Judiciary
- Part II - Class Presentations

### **Class 9 - October 30, 2006**

#### Part I - World Trade Organization – Introduction

This class is an introduction to dispute settlement at the World Trade Organization.

Please look at the following texts to identify the key institutional elements (see class 4 assignment):

- WTO Basic Legal Texts: Agreement Establishing the World Trade Organization ("WTO Agreement"), 1994, Articles III-IV; WTO Agreement, Annex 2 -Understanding on Rules and Procedures Governing the Settlement of Disputes
- World Trade Organization Background - If you aren't familiar with the WTO and its website, the information on this webpage provides useful background

#### Part II - Class Presentations

### **Class 10 - November 6, 2006**

#### Part I - World Trade Organization

This class looks at two WTO cases, one from 1998 and one recent ("Beef Hormones" and "Biotech"), and the use of experts in addressing the technical issues presented in the disputes. Compare the approach used by the panels, compared to the approach provided for in the DSU.

- WTO - EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R  
Please read the following excerpts from "EC Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R; WT/DS48/AB/R; (98-0099); AB-1997-4; 1998 WTO DS LEXIS 5 (16 January 1998): para 17, 37, 56, 70, 71, 96, 110, 146-149
- WTO - European Communities — Measures affecting the approval and marketing of biotech products (DS291, DS292 and DS293); Please read the following excerpts from the report (given the extreme length of the report, this is an exception to our custom of reading the entire decision): pp. 1-5, sections I-III; - pp. 1067-1087, section VIII; - p. 3, para 1.17; In Third Written Submission of the EC: p. 186; - pp. 285-290, paras 7.12-7.36; see generally, Annexes H and I.

#### Part II - Class Presentations

**Class 11 - November 13, 2006** World Trade Organization - Risk, uncertainty and the precautionary principle in the context of the Biotech case

- SPS Agreement; Read articles 1-5 and 8
- WTO - European Communities — Measures affecting the approval and marketing of biotech products (DS291, DS292 and DS293) Consider how the experts advising the Panel may have contributed. Please read: VII. FINDINGS - F. EC MEMBER STATE SAFEGUARD MEASURES - 1. Introduction (pp. 868-872); VII. FINDINGS - F. 2. Analysis of the safeguard measures in the light of the SPS Agreement, (a) Applicability of the SPS Agreement, (i) General (pp. 872-876); VII. FINDINGS - F. 2.(a)(ii) Austria – T25 maize (pp. 876-883); VII. FINDINGS - F. 2.(c)Consistency with Article 5.1 of the SPS Agreement (initial assessment), (ii) Austria – T25 maize (pp. 964-973)
- Peter Sand, "The Precautionary Principle: A European Perspective," in Transnational Environmental Law: Lessons in Global Change (1999)
- Amicus Curiae Brief - Busch, Grove-White, Jasanoff, Winickoff and Wynne (April 30, 2004)  
This brief was submitted to the Biotech case Panel by five scholars.  
Do you agree with their view of the Panel's substantive versus procedural review of risk assessments?  
Which type of review did this Panel perform?

**Class 12 - November 20, 2006** United Nations Compensation Commission - Environmental Claims

The United Nations Compensation Commission was established at the end of the 1990-91 Gulf War, to provide compensation for losses that resulted from Iraq's invasion and occupation of Kuwait. It is an ad hoc, so-called "quasi-judicial" commission, with a fixed life span, which distinguishes it from the other courts and tribunals that have been covered so far in this class.

- Report of the Secretary-General pursuant to Paragraph 19 of Security Council Resolution 687 (1991)
- Governing Council Decision 1, Criteria for Expedited Processing of Urgent Claims (S/AC.26/1991/1)
- Governing Council decision 7, Criteria for Additional Categories of Claims (S/AC.26/1991/7/Rev.1) section III.
- REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE THIRD INSTALMENT OF "F4" CLAIMS (S/AC.26/2003/31); Please read the following sections: Section I – Overview; Section II.D. - Monitoring and Assessment Data; Section III - Legal Framework; Section V - CLAIMS OF THE STATE OF KUWAIT, A. Overview and B. Claim No. 5000256 – Damage to groundwater resources; Section VI - CLAIMS OF THE KINGDOM OF SAUDI ARABIA, A. Claim No. 5000451 – Damage to coastal resources
- Governing Council Decision 212, Decision concerning the third instalment of "F4" claims ... (S/AC.26/Dec.212 (2003))

### **Class 13 - November 27, 2003** Global Administrative Law

This class takes a look at "global administrative law", looking at familiar cases and tribunals in a different light. Is this a better explanation of ITLOS and WTO/DSB than setting them in a hierarchy of alternative means of dispute settlement? Can the institutions we have been studying perform the role that global administrative law, if such a thing exists, would demand of them?

- Kingsbury, Krisch, Stewart, Wiener, "THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW: FOREWORD," 68 Law & Contemp. Prob. 1 (2005)
- Cassese, "ADMINISTRATIVE LAW WITHOUT THE STATE? THE CHALLENGE OF GLOBAL REGULATION," 37 N.Y.U. J. Int'l L. & Pol. 663 (2005)
- Shapiro, M., ""DELIBERATIVE," "INDEPENDENT" TECHNOCRACY V. DEMOCRATIC POLITICS: WILL THE GLOBE ECHO THE E.U.?" 68 Law & Contemp. Prob. 341 (2005)

### **Class 14 - December 4, 2006**

Roundtable discussion: What is the effect of the diversity of international courts and tribunals, particularly with respect to environmental disputes?

- Charles H. Koch, Jr., "Envisioning a Global Legal Culture," 25 Mich. J. Int'l L. 1

Final papers due