



INSTITUTE FOR ENVIRONMENTAL SECURITY

Feasibility Study for
**The Hague
Environmental
Law Facility**



Wybe Th. Douma | Leonardo Massai | Serge Bronkhorst | Wouter J. Veening

Volume One - Report

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VOLUME ONE - REPORT



T.M.C. ASSER INSTITUUT

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Preface

This study presents the findings of the research project “The Hague Espace for Environmental Global Governance”. The project was carried out by the Institute for Environmental Security and the T.M.C. Asser Institute with the support of The Netherlands Ministry of Foreign Affairs, the Ministry of Housing, Spatial Planning and the Environment and the City of The Hague. The main objective of the study is to investigate the usefulness and necessity of a facility in the field of environmental law in The Hague that would carry out services that have a policy and practical relevance, are based on the most recent international legal developments and would offer attainable and realistic solutions to identified problems. The facility should not carry out work that is already done elsewhere, and should be affiliated to one or more existing institutions in The Hague.

The result is a proposal for the establishment of The Hague Environmental Law Facility (HELFF) which would have two main functions: an advisory function with regards to facilitating access to justice aimed at directing parties with environmental problems or disputes to the appropriate (alternative) dispute resolution mechanism, which includes local and national procedures, and 2) an auxiliary training function aimed at improving the knowledge and skills of civil servants, diplomats and negotiators on issues of implementation, enforcement and compliance.

The HELFF will facilitate raising awareness on challenges of international environmental law, enhance its effectiveness, contribute to educate negotiators as to the ins and outs of highly complicated issues such as climate change and contribute to educate civil servants in the correct implementation and enforcement of existing and future international, regional and national environmental laws.

The Hague offers a unique base for a facility aimed at implementation, compliance and enforcement of international environmental law, due to the presence of a vast number of organisations and centres that deal with international dispute resolution and enforcement in practice (such as the International Court of Justice, the Permanent Court of Arbitrage, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court), and that of numerous other organisations and centres that can contribute to this expertise through their training facilities and/or their interest in environmental justice (Eurojust, Europol, Clingendael Institute, Institute for Social Studies, European Climate Foundation, T.M.C. Asser Institute and Institute for Environmental Security). This specific aspect of The Hague, being the City of Peace, Justice and Security, is unique in the world and can stimulate the development of a legal facility dealing with these issues. Logically, the next step to take would be deciding on the more detailed issues of the structure, methodology, composition and financing of The Hague Environmental Law Facility.

The study is presented in two volumes: the main report and the annexes with profiles of the organisations consulted and researched in the conduct of the study. Profiles of the organisations and links to other related initiatives, publications and web resources are also in the on-line EnviroSecurity Action Guide database: <http://www.envirosecurity.org/helf>

Executive Summary

Is it useful and necessary to create a facility in the field of environmental law in The Hague? This question was investigated against the background of the growing need for effectively tackling major global environmental challenges like climate change, water management and preserving biodiversity, and against the work already carried out in The Hague and in other centres of international law around the world.

It was highlighted that international environmental law (IEL) has developed about 500 multilateral environmental agreements (MEAs). The lack of synergy between these agreements as well as the need for more coordination and cooperation between the different MEA secretariats are a well known cause of concern. While international norm-setting still continues in order to cope with the latest environmental problems, improvements in the enforcement and compliance with the existing IEL are also of crucial importance. The same holds true for more trainings and assistance to civil servants and negotiators, especially from developing countries. Thus, the necessity of a legal facility was underlined.

Through desk research and numerous interviews, a clear picture was achieved of the wide range of organisations and centres in the city of The Hague focusing primarily on environmental law and policy or having a different primary focus but still containing links to environmental issues. It was concluded that together these institutions and their experts can form a firm basis for strengthening the position of The Hague in the area of IEL. In particular, The Hague could contribute to strengthening the effectiveness of IEL thanks to the multidisciplinary aspect of the present expertise, to its experience in the field of enforcement and compliance with IEL as well as in the field of providing trainings and educational activities.

Besides The Hague, Geneva and Bonn in particular are important centres of international law. The latter cities offer the seat to several MEA secretariats, international organisations and NGOs dealing with IEL issues. Challenges in these cities are related to the limited staff resources, the need for more assistance and coordination among different offices and the need for more training and information dissemination among experts.

Positive reactions to the idea of establishing a legal facility in The Hague with a focus on compliance and enforcement on IEL were reported by many interviewed, inside and outside of The Hague. It was concluded that indeed a legal facility based in The Hague would be useful and feasible both for IEL and for The Hague, enhancing considerably its role as City of Peace, Justice and Security / Legal Capital of the World, and would add to initiatives elsewhere. Two main focus points for a Hague based legal facility on IEL were identified.

The legal facility could be called the Hague Environmental Law Facility (HELFF) and would in the first place be aimed at investigating and addressing existing challenges in the field of enforcement and compliance with IEL. Besides an advisory function on access to justice, HELFF would have a training function aimed at improving implementation, enforcement and compliance with IEL and the shaping of new regimes.

1) Facilitating Access to Justice

The legal facility would assist public and private entities to find access to justice in IEL, notably by directing parties to the available and adequate means of solving their problem or dispute. The advice of the legal facility would be based on experts' reports including suggestions and recommendations on how to address a specific environmental problem.

2) Training for Diplomats, Negotiators and Civil Servants in IEL

As an auxiliary function, the legal facility would provide training on IEL to diplomats, negotiators and civil servants from developing countries focusing on the implementation and enforcement on the national level of existing environmental treaties as well as on negotiating new regimes.

In its advisory function on access to justice, The Hague Environmental Law Facility (HELFF) could be triggered by parties directly or indirectly affected by an environmental harm and should provide draft advises prepared by a roster of experts to be selected on a case-by-case basis. As to its auxiliary function, training courses directed to civil servants, diplomats and negotiators would be organised in cooperation with partners in The Hague and in accordance with available financial means. HELFF will consist of a board of representatives of sponsors and others, a director, a pool of experts and a secretariat. HELFF will be located at one of the existing The Hague based organisations. The secretariat will function as contact point for the experts and for the beneficiaries of the HELFF services.

1 Introduction

This study presents the findings of the research project “The Hague Espace for Environmental Global Governance”. The project was carried out by the Institute for Environmental Security and the T.M.C. Asser Institute with the support of the Dutch Ministry of Foreign Affairs, the Ministry of Housing, Spatial Planning and the Environment and the City of The Hague. The main objective of the study is to investigate the usefulness and necessity of a facility in the field of environmental law in The Hague that would carry out services that have a policy and practical relevance, are based on the most recent international legal developments and would offer attainable and realistic solutions to identified problems. The facility should not carry out work that is already done elsewhere, and should be affiliated to one or more existing institutions in The Hague.

In the past decades due to increasing gravity of environmental threats and worldwide problems, the strengthening of environmental protection and the promotion of sustainable development shifted to the forefront of international debates. Consequently, the role of international environmental law (IEL) and multilateral environmental agreements (MEAs) has also acquired substantial importance in the international arena.

The Hague as the “Legal Capital of the World” hosts a significant number of international legal institutions, many of which also carry out environmental law-related activities.

With the abruptly rising global significance of environmental law, this project aims at the preparation of a study to identify the potential contribution that The Hague could offer in terms of addressing IEL related issues. In particular, the study examined:

- The current infrastructure of The Hague (and its surroundings) in respect of international organisations and other centres operating with a competence on international environmental law;
- Potential existing gaps in the field of the enforcement of international environmental law;
- The possible added value the city of The Hague could offer as a platform / facility for international consultations on the development, compliance and enforcement of international environmental law;
- The actions to be undertaken to promote and support the city of The Hague as a platform / facility for international consultations on the development, compliance and enforcement of international environmental law.

The research for this study was conducted by means of desk research combined with interviews with representatives of selected organisations. The latter meetings were aided by, but not restricted to, a pre-defined set of questions (Annex 3 to this report). On the one hand, this questionnaire referred to the organisation itself: its composition, statute and working order. On the other hand, inquiries were made about the environmental law-related activities of the organisation. Finally, the representative was asked to provide his or her own point of view on current environmental

challenges, on the idea of establishing a facility on international environmental law and on the idea of establishing such a facility in The Hague.

The interviews were carried out in two phases: the scope of the study covers first and foremost the related activities of international organisations that are located in the city of The Hague. Their activities include in particular judgments, dispute settlements, advises, opinions, research activities, implementation of international and local projects in the field of international environmental law.

In the second phase of the project, experiences, opinions and suggestions were gathered from representatives of organisations outside of The Hague. This was important in order to find out what work was already carried out elsewhere as to avoid overlap with suggested activities in The Hague. The research team targeted in particular organisations of global environmental significance and certain MEA secretariats, notably those located in Bonn and Geneva.

The research was carried out between November 2007 and February 2009.

A list of all organisations interviewed in the framework of the project can be found below.

Lists of stakeholders interviewed in The Hague and abroad

The Hague:

- International Court of Justice (ICJ)
- Permanent Court of Arbitration (PCA)
- Dutch Supreme Court
- Eurojust
- Global Programme of Action for the Protection of Marine Environment (GPA/UNEP)
- Organisation for the Prohibition of Chemical Weapons (OPCW)
- City of The Hague
- Institute of Social Studies (ISS)
- T.M.C. Asser Instituut
- The Netherlands Institute of International Relations “Clingendael”
- Carnegie Foundation/Peace Palace Library
- Centre for Dignity and Rights (CEDAR)
- Institute for Environmental Security (IES)
- Unrepresented Nations and People Organisation (UNPO)
- The Hague Justice Portal
- European Climate Foundation

Abroad:

- IUCN (World Conservation Union) Academy of Environmental Law, Ottawa, Canada
- Center for International Environmental Law (CIEL), Washington, USA
- Institute for European Environmental Policy (IEEP), London, UK
- Food and Agriculture Organisation (FAO), Rome, Italy

- WTO Commission on Trade and Environment, Geneva, Switzerland
- UNITAR United Nations Institute for Training and Research, International Environment House (IEH) , Geneva, Switzerland
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Geneva, Switzerland
- Convention on the Transboundary Effects of Industrial Accidents, UNECE, Geneva, Switzerland
- Convention on Environmental Impact Assessment in a Transboundary Context Project (ESPOO Convention), UNECE, Geneva, Switzerland
- Convention on Long-range Transboundary Air Pollution, UNECE, Geneva, Switzerland
- Convention on the Protection and Use of Transboundary watercourses and international lakes, Geneva, Switzerland
- UNEP Regional Office for Europe, Geneva, Switzerland
- Stockholm Convention on Persistent Organic Pollutants (POPs Convention), UNECE, Geneva, Switzerland
- UNEP, Economics and Trade Branch, IEH, Geneva, Switzerland
- Convention on International Trade and in Endangered Species of Wild Fauna and Flora (CITES), UNECE, Geneva, Switzerland
- UNFCCC/Kyoto Protocol Secretariat, Bonn, Germany
- IUCN Environmental Law Centre, Bonn, Germany

In addition to the above listed organisations, desk research was conducted with regard to the following organisations:

Hague based:

- International Criminal Court (ICC)
- Dutch Council of State
- Europol
- International Association of Prosecutors (IAP)
- International Criminal Law Network (ICLN)
- Ministry of Environment (VROM)
- Province of Zuid-Holland
- Grotius Centre for International Legal Studies
- UNESCO-IHE Institute for Water Education
- The Netherlands Red Cross
- Unrepresented Nations and People Organisation (UNPO)
- Shell

Outside The Hague:

- INECE International Network for Environmental Compliance and Enforcement
- IMPEL Implementation and Enforcement of Environmental law Network

Detailed information with regard to these organisations can be found in the annexes 1 (in and near The Hague) and 2 (other organisations) of this study.

2 Identification of environmental challenges

2.1 Introduction

In this chapter first a brief overview of the challenges IEL has to deal with will be given, after which the methodology employed by the Institute for Environmental Security (IES) to approach these challenges in practice is summarised. The role of IEL in this methodology will be touched upon at times.

Most of the challenges are well-known and are at the top of the agendas of many, if not most countries, corporations and increasingly now also of the military and security sector.

2.2 Climate change

A central place is occupied by the problematique of climate change, resulting from the past, current and future emissions of greenhouse gases (GHGs) and aggravated by atmospheric pollution in the form of “black carbon”. Many other environmental problems such as droughts, floods, extreme weather events, forest fires, coral reef degradation and health problems such as the spread of infectious and vector-borne diseases (like malaria), are affected by climate change, while deforestation, forest degradation and changes in (agricultural) land use are also sources of GHGs. The demise of the forests is estimated to cause around 25% of global GHGs.

The deforestation on the islands of Borneo, Sumatra and Papua and of the Amazon makes Indonesia and Brazil the no. 3, respectively no. 4 emitter of GHGs in the world. Also, many forests sequester CO₂, the most prominent GHG, from the atmosphere, thus performing a global cooling function: they are the so-called ‘sinks’.

The situation with respect to the state of the climate, the causes of global warming and the response options in the fields of mitigation and adaptation are brought together by the IPCC, the Intergovernmental Panel on Climate Change, which won the Nobel Prize for Peace in 2007, together with Al Gore. Very worrisome is that the consensus strived for in the reports of the IPCC is almost by definition conservative and that many scientists fear that actual change may go faster than reported, also because of positive feedback loops. For example: a dramatic impact of climate change is the melting of the glaciers in ecological key areas of the world: the Tibetan Plateau with the Himalayas – the water tower for South, South-East and a part of East Asia (the Yang Tze) – the Andes and of course Antarctica and the Arctic. Another example is the higher temperatures that are beginning to melt the arctic permafrost, which could release hundreds of billions of tons of carbon and methane into the atmosphere. These are processes that reinforce themselves, and thus are vicious cycles.

Christopher Field, founding director of the Carnegie Institution's Department of Global Ecology at Stanford University on 14 February 2009 at the annual meeting of the American Association for the Advancement of Science: “We are basically looking now at a future climate that's beyond anything we've considered seriously in climate model simulations”

2.3 Water

Apart from the impact of climate change on the supply of sufficient fresh water of good quality for man and nature, many other factors call upon the existing reserves, affecting quality and availability elsewhere and in the future. Agriculture for a growing world population with changing, more water demanding diets (meat, milk, coffee, juices) and energy needs (biofuels, hydropower) are major factors in the water equation around the world, together with increasing urbanisation and industrialisation.

As 97.5% of the water on earth is in the seas and the oceans, claims on the existing 2.5% of fresh water will intensify and so will the push to increase the fresh water supply by desalination, which, however, is very energy-intensive.

While the climate factor in the fresh water availability can be dealt with on a global level, actual availability is very much determined by the management of regional or local water resources, such as contained in (transboundary) river basins or aquifers. These multiple levels of tackling the issue of water scarcity is of course a challenge for IEL in this field.

2.4 Oceans and seas

If climate change is the issue drawing most of the political attention, the situation of the seas and oceans is no less serious: pollution from the land, overfishing and also the impact of climate change are damaging the marine ecosystems in an (potentially irreversible) way.

A panel of the American Association for the Advancement of Science reported in February 2008 that climate change is rapidly transforming the world's oceans by increasing the temperature and acidity of seawater, with destructive impacts on coral reefs and the fish food chains. Together with the seemingly uncontrollable overfishing this bodes ill for the sustainability of the oceans as a source of food for a still growing world population.

Again, in the relation between climate and the oceans there may be a vicious circle at work: the impact of climate change on the oceans reduces the capacity of the oceans to absorb CO₂, the major GHG.

2.5 Forests

The crucial role of forests in stabilising the climate has already been highlighted above. They also play a major role in regulating water flows, providing livelihoods for local communities, serving as a repository for unique biodiversity – see below – maintaining soils and contributing to the protection against extreme weather events,

floods and sea level rise (mangrove forests). Forests also deliver goods and services for direct consumption or for markets: timber, medicinal plants, bush meat, wild life for exports, orchids, sites for eco-tourism, e.a.

The great commercial value of forests because of the income derived from the production and (inter)national marketing of timber and the profits to made if forests are converted into cash crop lands (soybean, oilpalm) or cattle pastures has so far politically overshadowed the public good aspect of forests just mentioned.

At the 13th Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC) in December 2007 in Bali a start was made with the recognition of forests in the mitigation of and the adaptation to climate change by initiating the REDD process (Reduction of Emissions by Deforestation and Degradation), which would reward developing countries with high deforestation for avoiding loss and degradation of forests, leaving countries with still standing forests which perform key services for the global climate, in the cold (so far).

Later in the report attention will be paid to the issues of designing a (legal) regime for forests, which up until now has relied to a great extent upon voluntary mechanisms as the FSC (Forest Stewardship Council) and the EU's FLEGT process (Forests Legislation, Governance and Trade), aimed at preventing the imports of illegal timber into the EU.

2.6 Biodiversity

Finally in this chapter, the loss of the diversity of ecosystems such as forests and wetlands, of species and of genetic variation within species, robs many local communities from their sources of livelihoods and medicines, their protection against pests, erosion, flooding and sea level rise (mangroves as breeding grounds for fish and as coastal defense systems) and the world from an essential source of crop varieties, pharmaceuticals, spiritual and physical recreation sites and from natural adaptation against inevitably occurring climate change.

The Convention on Biological Diversity (CBD) governs the conservation, sustainable use and equitable sharing of the benefits from using the biodiversity, but in comparison with the UNFCCC it is a weak convention, without strong financial or compliance mechanisms. In order to fill these lacunae recently a discussion has started to develop a so-called Green Development Mechanism for the CBD, analogous to the Clean Development Mechanism of the Kyoto Protocol, but the inherent and localised diversity of the object of the CBD, in contrast with the homogenous nature of the object of the UNFCCC, measured in units of CO₂ and of a limited amount of other GHGs, present a major obstacle for an effective global regime for biodiversity.

This summary refers to the environmental problems around the world in general, but for the application of IEL it is necessary to be as specific as possible. To this end the Institute for Environmental Security has employed and is further developing a methodology in which an important role is attributed to IEL, realising of course the "serious inherent problems" of IEL, described in the next chapter.

For IES the challenges briefly mentioned here are security issues in the sense that they first affect the basic needs of man and nature as to water, food and shelter, but in a second instance they may lead to competition over scarce natural resources thus contributing to conflicts, which under circumstances, may result in violent clashes between groups, regions or even nations.

Conversely, recognition of the (future) scarcity of a common resource, say a shared river basin, may lead to cooperation to try to overcome that scarcity or to an agreement in which an equitable sharing of the available resources is laid down. Transboundary “peace parks” can bring countries with otherwise also conflicting interests, together.

IES focuses on concrete situations in which first of all the environmental security risks are identified, using the best of assessment and monitoring technology available. Remote sensing is part of that technology and one of the partners of IES is the remote sensing organisation SarVision, affiliated with the Wageningen University, which is a global leader in using radar sensors to produce images and time-series of tropical rainforests. Together with field-based reporting by local (traditional) scientists or missions, the environmental risk in that particular situation is identified.

The next step is then to see which international legal norms apply to that situation, because they give a handle to identify those who are responsible to remedy the problem, those who bear the liability to shoulder the costs of that remedy and those who should be prosecuted for having committed an environmental crime. An example of the former is the overview of international norms applicable to the deforestation and forest fires on Kalimantan, the Indonesian part of Borneo causing enormous environmental risks on all levels: local, regional and global, commissioned by IES to the International Law Clinic of the University of Amsterdam. The matter of a possible environmental crime was for instance discussed in an IES report on the bombing of Lebanese oil tanks by the Israeli Air Force in July 2006.

A focus on solving concrete problems brings with it great interest in the compliance with and the enforcement of the applicable norms and the reputation of The Hague as “Legal Capital of the World” rests precisely on that part of the legal ‘chain’.

One may also argue that a solution to a problem in terms of the formal responsibilities and liabilities is more sustainable than an *ad hoc* arrangement, but whether there is a choice depends very much of course on the realities at hand.

This leads to the third step in the methodology which is an analysis in terms of the power and influence relations governing the situation under consideration, which very often of course are not in conformity with the formally defined context: in many cases ignorance, poverty, corruption, criminal/political violence determine environmental security, or the lack there-of, in practice and any solution has to deal with those realities.

Part of the approach discussed here, however, is the conviction that legal recourse against violators of environmental norms should be built up or used (if existing) as much as possible in the fourth step of the methodology, which is the choice of instruments to restore the environment and to prevent conflicts.

Financial instruments can provide effective incentives for adequate conservation and management of the environment at risk, if they are high enough to ward off destructive alternatives, reach the right actors, are seen as equitable and are guaranteed for the very long term. Much attention now is given to the development and application of the so-called payments for ecosystem services (PES) instrument, but this is not the place to elaborate on that concept and its operationalisation, except to say that an effective PES contract requires good monitoring, such as delivered by the remote sensing, mentioned above.

Ecological pressures on the world will intensify and, in all probability, faster than anticipated. In order to prevent these pressures from erupting into conflicts, especially of course violent conflicts, a body of effective international (environmental) law is indispensable to prevent or solve conflicts in a peaceful and equitable way. The challenges that these ecological pressures and risks pose to the current body of IEL are discussed in the next chapter.

3 Challenges for International Environmental Law

3.1 Introduction

This chapter will provide a brief overview of the main challenges that international environmental law currently faces. Outlining these problems aims at illustrating the specific topics that could and should be addressed by a potentially established legal facility in The Hague – pursuant to the recommendations of this study – with a focus on compliance and enforcement in the field of international environmental law. In particular, reasons for the decreasing growth in the number of multilateral environmental agreements will be examined. Also, certain problematic areas of international environmental law will be highlighted, such as climate change, forestry and liability issues as well as the effectiveness of their implementation, compliance and enforcement.

3.2 Challenges of international norm-setting

International environmental law encompasses about 500 multilateral environmental agreements (MEAs). This great number ensures that almost every environmental sector is being addressed. At the same time, this detailed and cumbersome regime has serious inherent problems.

Multilateral agreements in the field of the environment often focus on one single sector, or even only a segment thereof. These one-dimensional instruments co-exist besides each other without any form of synergy, making it very challenging to address complex issues that affect more than one environmental sector. Many initiatives were developed in the past decade with the aim to establish cooperation between international agreements, in particular in the field of enforcement and compliance: for instance by UNEP (United Nations Environmental Programme) or UNECE (United Nations Economic Commission for Europe). Specific COP (Conference of Parties) decisions of MEAs were also taken in this regard.

An international agreement that would govern the environmental field as a whole is however missing. Attempts made in the past to conclude a general environmental convention remained without result: sovereign states are reluctant to give consent to something general and abstract, offering a wide room for interpretation. Such a convention would be meaningless and in the best case symbolic, it is feared. Furthermore, the difficulties of treating problems related to environmental protection of a different nature in the same instrument should not be underestimated.

The lack of synergy between MEAs can be seen as a governance issue. A general environmental organisation that could address and resolve overlapping competency issues of MEAs would make a big difference. In 2007 the EU member states proposed to transform the function-wise constrained, geographically isolated and poorly funded UNEP into a United Nations Environmental Organisation (UNEO). However, many countries, in particular the USA, opposed the necessity of such an organisation, perhaps mainly because of economic interests in keeping environmental governance fragmented and thus regionally controllable.

After 2001 a significant decrease in the development of binding international environmental norm setting can be observed. Since multilateral negotiations are very burdensome and extremely long-lasting, states sought ways to abandon the old treaty-making procedures, being backed by implementation and enforcement difficulties with existing instruments, which needed to be tackled first.

One viable alternative for mandatory norm-setting has emerged: the creation of non-binding instruments, such as the *United Nations Food and Agriculture Organisation (FAO) Code of Conduct for Responsible Fisheries*. These non-binding instruments are easier to negotiate, do not require ratification and have an encouraging record of voluntary participation. Many international conventions were preceded by non-binding instruments, such as the *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, and the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* or the *International Treaty on Plant Genetic Resources*. The creating of voluntary organisations without any enforcement capabilities raises nonetheless legitimacy and accountability issues. In that respect, using these regimes as a stepping stone to legally binding regimes seems a wise approach.

3.3 Specific sectoral issues

Forestry

At the moment of writing, one of the rare environmental sectors without a binding international regulatory regime is forestry. The states with large forest surfaces prefer to keep the status quo, as long as they have control over the sector. The promoting activity of the *Collaborative Partnership of Forests (CPF)* – a voluntary arrangement of organisations and MEA secretariats – on political fora is important to mention. Initiated by Canada, the already existing draft text of an international forestry convention was prepared outside of existing arrangements such as the CPF and thus has a realistic chance to eliminate the current segmentation in the sector. One other option is to build forestry issues into the *Convention on Biological Diversity*. At the EU level, the 2003 Action Plan for Forest Law Enforcement Governance and Trade (FLEGT) aimed at the promotion of voluntary action to curb illegal logging is worth mentioning, as is the Commission proposal COM(2008)644 for a regulation cautiously setting out some binding obligations of operators who place timber and timber products on the market. Moreover, ongoing negotiations within the international climate regime have strongly facilitated a shift of forestry issues into the focus of the international community.

Liability

The current international environmental regime faces difficulties in addressing environmental liability cases. Many of the international liability conventions will probably never enter into force, as states are reluctant to agree to a system that can hold them financially accountable for environmental damage. Current negotiations on a biosafety liability protocol to the *Cartagena Protocol on Biosafety* encouragingly show a shift from civil liability issues to the administrative approach providing competence to the state to ensure that damage to biological diversity caused by private parties will be prevented, restored and compensated and thus put emphasis on

the state's obligations – including preventive measures – as opposed to merely the repair of existing damage in a civil procedure.

Liability litigation has very practical challenges: for some problems such as climate change or damage caused by acid rain the causal link is difficult or impossible to be established: these are inherently not suitable to be dealt with under a conventional liability mechanism. Moreover, potential claimants are often unaware of the options of legal forums where they can present liability cases and of the legal norms that could back their complaint. Advisory services on access to courts could bring about ameliorate this situation.

Environmental crimes

Environmental crimes are not properly addressed either by the existing body of environmental law or by the current practices of law enforcement bodies and their cross-border cooperation. This deficiency has multiple reasons: environmental crimes are not properly defined by domestic legislations either; enforcement authorities lack appropriate awareness and cooperate very little with environmental organisations and in many cases also not with each other. In general, prosecution of environmental crimes is not perceived as a transnational problem; hence the lack of international motivation. Moreover, private as well as public parties need advice on applicable norms and on how to seek for legal redress and environmental protection.

Climate change

Combating climate change is on the top of environmental challenges for the XXIst century, together with its most obvious symptoms, sea level rise and decreasing fresh water supplies. The growing number of climate change litigations is encouraging but the handling of these cases poses a challenge on judicial bodies with respect to establishing a causal link. In addition, climate change is regulated exclusively by the Kyoto protocol to the United Nations Framework Convention on Climate Change, which focuses a lot on technicalities. In order to tackle enforcement issues, several MEAs developed non-compliance procedures of varying success: the compliance regime of the Kyoto protocol is one of them. The necessary legal, administrative and other measures at the national level however are still not sufficiently established in the participating states. Further training could alleviate this situation. The effect of the Kyoto protocol however should not be underestimated: its flexible mechanisms represent unique and successful instruments to deal with the issue of climate change. Similar to the implementation challenges of the Kyoto protocol, the current negotiations with regard to a climate change regime for the period after 2012 do show that enhancing knowledge of negotiators and civil servants on technical and other details related to climate change issues would be an advantage.

3.4 Concluding remarks

International norm-setting, at a slower pace, continues. At the moment of writing, there are on-going negotiations on a mercury protocol under the Stockholm Convention on Persistent Organic Pollutants and on a biosafety liability protocol to the Cartagena Protocol on Biosafety. Creating an Access and Benefit-sharing (ABS) Protocol under the Convention on Biological Diversity and thus an international access and benefit-sharing regime is also in the pipeline. This is an important issue in particular for developing states: they declared that the conclusion of these

negotiations is elemental and forms a prerequisite to continue talks on marine environment protection. Then there is the issue of a post-2012 regime for climate change issues, which is to encompass forestry. Where existing IEL norms are concerned, improvements in enforcement and compliance are necessary in order to stop the continuing deterioration of the environment. Training of civil servants and diplomats/negotiators and enabling interested parties to receive information on the state of law, options for solving disputes, procedures and mechanisms would contribute to achieving this objective.

4 The Hague based organisations and International Environmental Law

4.1 Introduction

The Hague has established itself as the City of Peace, Justice and Security, or “legal capital of the United Nations” as former UN Secretary-General Boutros Boutros-Ghali put it. This reputation was deserved through the long-time presence of organisations such as the Permanent Court of Arbitration (PCA) and the International Court of Justice (ICJ), and the more recent arrival of organisations such as International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC). At the same time, it has been stressed by many that it would be beneficial to The Hague to further strengthen this position. One option to do so would be to strengthen the role of The Hague in the field of international environmental law (IEL). As explained in the previous chapters, this specific area of international law deals with some of the key challenges the world will be facing in the coming decades, notably where it concerns climate change and water management. As will be discussed further in the chapters below, the efforts in The Hague could contribute to strengthening the effectiveness of IEL and international law in the field of sustainable development, and in that way contribute to tackling those key environmental challenges.

This chapter will look at the question what expertise the organisations and centres based in or near The Hague possess with regard to IEL. First the organisations that have a primary focus on environmental policy and law will be discussed (2.2). After that, the organisations with a different primary focus will be scrutinised (2.3). Finally, some concluding remarks will be made (2.4). More detailed information on these organisations and centres can be found in Annex 1 to this study.

4.2 Organisation focusing on environmental issues

At the moment, only some of the organisations and centres in or near The Hague focus primarily on environmental law and policy issues. Examples of such organisations are the newly founded European Climate Foundation (ECF), the UNEP’s Global Programme of Action (GPA) Coordination Office for the Protection of the Marine Environment, the Red Cross/Red Crescent Centre on Climate Change and Disaster Preparedness, the Institute for Environmental Security (IES) and the Dutch Ministry of Housing, Spatial Planning and the Environment (VROM). Furthermore, there is the Delft based UNESCO-IHE Institute for Water Education founded in 2003.

The **ECF** aims at facilitating the reduction of greenhouse gas emissions in Europe through the re-granting of funds to activities and projects in a variety of areas. The ECF staff has extensive knowledge of policy and legal aspects of international and European climate change actions and the hurdles ahead where the shaping of a post-2012 climate change regime is concerned.

The **UNEP/GPA Coordination Office** supports states in the implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities. It develops conceptual and practical guidance for decision-makers at the national and/or regional level dealing with actions to prevent, reduce,

control and/or eliminate marine degradation from land-based activities. The legal officer deals with all aspects of IEL aiming at the implementation of UNEP's environmental programmes.

The **Red Cross/Red Crescent Centre on Climate Change and Disaster Preparedness** (RC/RC Climate Centre) promotes understanding of the risks of climate change, through programme coordination, technical advice and financial assistance provision and information and documentation dissemination.

As an international non-profit NGO, the **IES** aims at increasing political attention to environmental security and to contribute to solving environmental problems on field level and in conflict zones. The organisation carries out programmes mainstreaming environmental and sustainable development factors into European foreign and security policy.

The **UNESCO-IHE Institute for Water Education's** mandate is to strengthen and mobilise the global educational and knowledge base for integrated water resources management and contribute to meeting the water-related capacity building needs of developing countries and countries in transition. International water law ranks among the issues dealt with.

The **Ministry of Housing, Spatial Planning and the Environment (VROM)** is responsible for co-ordinating environmental policy at government level. VROM actively participates in the field of international environmental legal cooperation through several initiatives and programmes, for instance by providing assistance to Eastern European environmental projects or being among the first to adopt a formal strategy for the implementation of the Kyoto Protocol flexible mechanisms.

None of the organisations discussed in this paragraph deals exclusively with international environmental law, but each of them touches upon IEL in different ways. For all of the organisations mentioned above, there is valuable expertise present in or near The Hague where IEL and/or related issues of sustainable development are concerned.

4.3 Organisations not focusing primarily on environmental issues

Studying the statutes and other information on the remaining organisations and centres and talking to their representatives revealed that many Hague based organisations dealing primarily with issues ranging from war crimes to unrepresented nations and people, chemical weapons and international coordination of prosecution all deal with the environmental aspects of these topics to some extent. Some organisations carry out similar tasks. These will be presented under the headings judicial, education and research, criminal law, Dutch governmental organisations, other International Organisations, NGOs and others respectively.

Judicial

In the field of dispute settlement, The Hague in the first place is the seat of the **International Court of Justice (ICJ)**, the principal judicial organ of the United Nations. The ICJ produced many landmark judgments in the field of IEL, notably in the Nuclear Tests cases (Australia v. France and New Zealand v. France) and the case

concerning the Gabčíkovo-Nagymaros Project. The ICJ also established a seven-member Chamber for Environmental Matters in 1993, which was never called upon and therefore not reconstituted after 2006. At the moment, several environmental cases are pending before the ICJ, notably the paper mills on the river Uruguay dispute between Argentina and Uruguay and the aerial herbicide spraying dispute between Ecuador and Colombia.

The **Permanent Court of Arbitration** (PCA) promotes international arbitration as dispute settlement mechanism for – amongst other things - international environmental matters. Important cases of environmental nature were negotiated under the auspices of the PCA, such as the famous MOX Plant Case. Interestingly enough, the PCA also drafts dispute settlement clauses for environmental agreements – the negotiations of which are currently being facilitated by United Nations convention secretariats – as well as for emissions trading contracts.

The **International Criminal Court** (ICC) is a permanent tribunal to prosecute individuals for genocide, crimes against humanity, and war crimes. Although the Court is primarily of criminal law nature, crimes against humanity and war crimes sometimes have environmental implications. According to the Rome Statute the Court has jurisdiction over war crimes that cause “widespread, long-term and severe damage to the natural environment.” At the moment of writing, the ICC has not dealt with any case with an environmental protection component.

At the national level, the following two organisations were investigated. The Dutch **Council of State** is the constitutionally established advisory body to the government that needs to be consulted on proposed legislation, including also environmental legislation. It also encompasses the highest administrative court. In both functions, it frequently deals with matters of IEL and of European environmental law.

The **Supreme Court** of the Netherlands deals less frequently with IEL. It can examine whether environmental laws are properly applied by lower courts and in that respect issues of IEL sometimes can play a role. The president of the Supreme Court appoints judges on an ad-hoc basis to attend the meetings of the network of environmental law judges.

Education and research

The **Institute of Social Studies** (ISS) is an institute of higher education on social and economic change with focus on development processes. Its curriculum includes sustainable development issues, in which the Economics of Sustainable Development Staff Group has special competency.

The **T.M.C. Asser Instituut** is an independent academic and inter-university institute. It represents all law faculties in The Netherlands for international law. International law encompasses public international law, private international law and European Union law. Next to fundamental research and post-graduate education, it organises training courses and provides consultancy activities and facilitates scientific research on IEL issues.

The **Netherlands Institute of International Relations - 'Clingendael'** – is a non-profit foundation on international affairs and policy. The Clingendael International

Energy Programme (CIEP) is an independent forum for governments, non-governmental organisations, the private sector, the media, politicians and stakeholders on developments in the energy sector. CIEP supports these activities by organising events and training courses on energy issues, including environmental aspects such as climate change and energy and sustainable development. Then there is Clingendael European Studies Programme (CESP), which develops, unites and disseminates topical expertise on European Union policy issues, including its external relations. Also here numerous activities deal with environmental policy and law issues with a global dimension such as climate changes and chemicals.

The **Peace Palace Library**, operated by the **Carnegie Foundation**, has an extensive collection on international environmental law.

At the **Grotius Centre for International Legal Studies** a variety of activities and programs is offered dealing with all aspects of international law, including international environmental law and international law on sustainable development.

Criminal law

Environmental crime is one of the areas of competence of **Eurojust**, in line with the new approach of the European Union in the fight against environmental and maritime pollution. Nevertheless, the activity of Eurojust with regard to environmental crime so far has not been developed deeply. The only decision of Eurojust referring to environmental crime is the Prestige Case. This might change in the near future: according to the declaration of the Prosecutors General on the annual Eurojustice Conference, held in Slovenia on 25 and 26 October 2007, the fight against environmental crime is one of the future priorities of Eurojust.

Europol deals amongst other things with criminal aspects of environmental law, as the explicit mentioning of environmental crime in the 2006 EU Organised Crime Report clearly demonstrates. According to the report, illicit trafficking of illegal waste is the main source of organised environmental crime.

The **International Association of Prosecutors** has so far not dealt with issues of IEL or environmental crimes. Nonetheless, if The Hague becomes an international platform for environmental law, on account of the rising number of environmental crimes and due to the connections and the capacities the organisation enjoys, related activities may develop.

The **International Criminal Law Network** is not yet operating in the field of environmental crime but could benefit from The Hague as a platform for international and European environmental law and might get more involved in the field of environmental protection.

Other International Organisations

The **Organisation for the Prohibition of Chemical Weapons** (OPCW) is an independent international organisation that provides support and assistance to the destruction and non-proliferation of chemical weapons. The link between its objectives and environmental protection appears in several points of its statute. The OPCW has a database of national legislation on environmental issues.

Dutch governmental organisations

The Hague is the administrative capital of one of the largest provinces of the Netherlands, the **Province of Zuid-Holland**. Environmental considerations play a great role in the planning of the province's activities. It also participates in international projects related to the protection of environment, most recently in a regional initiative on the mitigation of greenhouse gas emissions at the regional level.

The **City of The Hague** actively promotes environmental protection, for instance as a participant of the Eurocities project or as a promoter of policies of selective waste collection and sustainable building and by taking measures to reduce pollution from traffic.

Various other organisations

CEDAR is an international forum for the implementation of economic, social and cultural rights and cooperates with development and human rights organisations in Africa, Asia and Latin America. CEDAR is a board member of the Alliance for the University of Peace (UPEACE), which supports several projects in environmental law.

The **Unrepresented Nations and People Organisation (UNPO)** is a democratic membership organisation aiming to protect its founding nations' human rights, preserve their environments and to find non-violent solutions to conflicts that affect them. UNPO's focus to date has been to campaign and raise awareness of environmental issues. Its activities frequently involve bringing international attention to instances where environmental law is being contravened or implemented ineffectively.

The **Hague Justice Portal** reports on activities of different international courts, institutions and organisations located in The Hague, and provides a calendar of related events. Although it has not yet been dealing with environmental law issues, due to its popularity (occasional 30,000 page views a day, from 157 connecting countries) it could be a useful tool to promote related activities.

Finally, the **Shell** group has one of its main offices in The Hague. A key player of energy markets worldwide, Shell also pays particular attention on sustainability issues and the protection of environment in relation to its activities. Such a commitment is confirmed by the periodical release of a Sustainability Report which highlights the company activities in the energy sector with a particular focus on sustainability. Shell also carries out projects aimed at the promotion of renewable energy.

4.4 Concluding remarks

In this chapter, the question which expertise the organisations and centres based in or near The Hague possess in the field of IEL has been addressed. It was first established that a number of organisations exists that deal primarily with international environmental policy and thus also with IEL. Secondly, other organisations were investigated which do not have environmental policy as their main focus. Several types of organisations were distinguished, notably dispute settlement bodies, education and research facilities, and organisations dealing with enforcement issues notably in the field of criminal law. It became apparent that almost all these

organisations deal with IEL at times. Of course, each organisation deals with IEL from its own perspective. The multidisciplinary aspect of the organisations and centres based in or near The Hague are in line with the overarching concept of sustainable development, which encompasses integrating environment and development policies.

The conducted interviews have shown that the potential of expertise in The Hague in the field of enforcement and compliance with international environmental law is very high. Courts, tribunals, organisations and regional agencies have been set up to avoid and solve dispute settlement and to regulate on relevant environmental matters. The complexity and technicality of the issues at stake is sometimes an obstacle for the communication among organisations and centres in The Hague. This holds true also for private and public entities which could benefit from the expertise in IEL in The Hague if assisted and supported correctly.

Another potential strength of The Hague which emerged from the interviews is the significant part of training and educational activities currently carried over by several institutes and centres. The Hague is a multicultural centre which hosts expertise and capacities in many fields of international law. This activity does not always reflect matters of IEL although the need and the potential for collaboration in this respect is essential.

Together, the multitude of existing organisations in and near The Hague, be it those focusing primarily on environmental law and policy or those with a different focus but with links to environmental issues, can form a firm basis for strengthening the position of The Hague in the area of IEL.

5 Other secretariats and centres and International Environmental Law

5.1 Introduction

Besides The Hague, several centres of international law exist. They are located around the world. Some of these contain a critical mass of IEL expertise. In Europe, in particular Geneva and Bonn host a great number of organisations with environmental mandates, MEA secretariats and international non-governmental organisations (NGOs) dealing with issues of IEL and international policy and law on sustainable development.

The big majority of such environmental expertise is covered by MEA secretariats and offices and agencies of international organisations. The United Nations is the most relevant organisation in this respect. Among those interviewed, there are the United Nations Institute for Training and Research (UNITAR), the UN Economic Commission for Europe (UNECE) and its conventions (Aarhus Convention, Convention on the Transboundary Effects of Industrial Accidents, Espoo Convention, Convention on Long-range Transboundary Air Pollution, Convention on the protection and use of transboundary watercourses and international lakes), the UNEP convention and offices (Regional Office for Europe, POPs, CITES and Basel Convention), and the UNFCCC secretariat.

This chapter will address the major challenges and needs in the field of compliance and enforcement of international environmental law as investigated and discussed with the interviewed organisations and centres located outside The Hague. In this way, it becomes clearer which issues are already covered in full outside of the Netherlands and for which issues additional activities could contribute to the development of IEL. A full overview of the organisations is presented in Annex 2 to this study.

5.2 Gaps and needs in centres and secretariats outside The Hague

Organisations, agencies and secretariats provide the institutional expertise in the different fields of environmental protection. These offices, often under staffed, are established in order to provide parties assistance and relevant information as to the implementation and fulfilment of the obligations and objectives of the different environmental treaties and laws. Given the complexity and the variety of environmental problems and issues addressed by the existing MEAs a strong need for assistance and information dissemination has been identified. In terms of enforcement and compliance, cooperation and mutual assistance is missing among the different organisations and secretariats. Non compliance bodies are often composed of external experts with limited time capacities and little support is provided from the main organisations and secretariats. All major MEAs are struggling with issues related with enforcement, compliance and dispute settlement and the need for coordination of these concerns in a common tool in order to assist the different secretariats is real.

In Geneva, where almost one hundred of these offices are located, a general liaison among the different environmental expertise is lacking. International environmental non-governmental organisations, as well as academic institutions are at present not contributing to fill this gap. The same happens in Bonn, although the number of

environmental organisations and centres is more limited. In Geneva the lack of coordination and information sharing in the field of IEL is partly remedied by the fact that UN and non-governmental organizations active in the field of environment and sustainable development are in some cases assembled together. This is for instance the scope of the International Environment House which is hosting the Geneva Environment Network (GEN) and gathering together several of those organisations. The Geneva Environment Network (GEN) is administered by UNEP and is a partnership of organizations dealing with IEL based in the International Environment House and elsewhere in Geneva. The aim of the GEN initiative is to enhance cooperation and networking among the most relevant organisations in Geneva and this is strived through the periodical organisation of meetings and roundtables, the establishment of an information centre and the publishing of an Environment House news service. Still, in spite of the physical vicinity and activities carried out at the International Environment House many of the interviewed representatives expressed the need for more synergy.

For the multilateral environmental agreements signed within the framework of the UNECE which share a seat in the Geneva UN buildings, the lack of coordination is even more evident. The staffs of the secretariats are limited and the need to share experiences on compliance and enforcement with IEL is a very sensitive matter since the non compliance regimes often contain different rules but share the same difficulties in ensuring the effectiveness of results.

Trainings to be offered to officials and representative of state parties active in the field of enforcement and compliance with IEL is another activity which could help to move forwards in this area. UNITAR is active in this respect, notably by providing trainings to member parties in different areas through distance learning, organisation of colloquiums and seminars or by providing capacity building and institutional support mainly to developing countries. These activities are focused on support in the implementation of conventions and IEL and in particular in the compliance with the obligations established by the different environmental regimes (i.e. in the case of climate change support is provided in respect of the design and preparation of the national action programmes for adaptation). Nevertheless, UNITAR depend to a large extend on financial support for specific training activities from UN members. This was stressed by the UNITAR representatives themselves and it also showed from the interviews convened with other representatives from MEAs who highlighted the need for further training facilities.

The interviews with the organisations and centres located outside The Hague and the desk research have shown that a pool of experts dealing with cases involving environmental harm at the global or regional level does not exist yet. The same holds true for a facility aimed at preparing *ad hoc* reports on the application of general principles and rules of IEL, and providing assistance to secretariats and private or public entities in finding their way to national and international dispute resolution facilities.

6 Options

6.1 Introduction

In the chapters above it was demonstrated that there exist environmental challenges that urgently need to be tackled and that IEL is not yet able to do so satisfactorily. Also, we concluded that existing centres around the world dealing with IEL leave room for further efforts at strengthening IEL and that The Hague could offer a basis for such efforts. In this chapter, options in this respect will be set out, notably based on the opinion of the representatives of the organisations and centres based in The Hague and abroad and on the elaboration of related desk research.

In general, the international organisations and centres interviewed in the course of the project had positive reactions to the idea of establishing a *legal facility* in The Hague with a focus on compliance and enforcement in the field of international environmental law (IEL). The necessity to develop IEL further, to increase its efficiency and stimulate enforcement and compliance were mentioned. In this respect, the idea of a legal facility which could contribute a more effective access to justice in IEL was stressed by many. Also, the importance of assisting and advising developing countries on how to adequately implement existing IEL on the national level was flagged, as well as the need for training of their negotiators involved in complex and challenging issues such as climate change. Particularly welcomed was the idea to create a centre of expertise which could help bringing the organisations and centres located in The Hague closer to each other and provide a platform for discussions and exchange of information, also for Multilateral Environmental Agreement (MEA) secretariats and organisations placed outside The Hague. These views coincide with our findings on environmental challenges and on challenges for IEL discussed above in chapters 2 and 3 respectively. In the upcoming chapters it will be discussed whether these issues are already dealt with in other places in the world, and whether it would be useful, necessary and feasible to strive for an environmental facility in The Hague.

In general, the *legal facility* should aim at the fulfilment of the following objectives:

- Highlight the role and position of The Hague in IEL;
- Rise the profile of the participating organisations and institutions;
- Contribute to raise awareness and provide expertise on issues related with enforcement and compliance of IEL;
- Assist and direct private and public entities to the adequate judiciary in IEL;
- Contribute to capacity building notably in developing countries in the field of IEL;
- Generate synergy among international organisations and other institutions dealing with IEL.

A selection of the most interesting suggestions is elaborated below.

Many interviewees suggested that the *legal facility* could facilitate access to justice in matters of IEL, notably by directing parties to the available means of solving their problem or dispute (including national means and alternative dispute resolution). It was pointed out that in many cases of environmental harm or threats, interested

parties could need some assistance in finding their way to solve their environmental problem or settle their dispute. The legal expertise available at the dispute resolution bodies located in The Hague could be mobilized to advise these parties.

Many interviewees also highlighted the need for capacity building of civil servants, notably in developing countries working in the field of IEL. The *legal facility* could deploy the expertise of The Hague based training institutions in assisting them during negotiations on new instruments or protocols to existing instruments, in the phase of drafting domestic environmental legislation and where it concerns enhancing effective enforcement in practice. It could also promote education and training in IEL. Indeed, at present negotiating highly technical new regimes such as the post-2012 climate change regime shows the urgent need for such training.

Another suggestion of the interviewees was to organize lectures and advices on international environmental law. They themselves could benefit from the existence of a centre of expertise on IEL in The Hague since staff resources are often limited and IEL is in many cases not within the main fields of activities or the primary focus of that organisation. In this sense, the *legal facility* could help the organisations in collecting and assessing relevant information on IEL. The *legal facility* could function as a reference centre and contribute to the improvement of research and carry out high level discussions on IEL. The *legal facility* could also increase the recourse to the judiciary bodies located in The Hague for potential cases in the field of IEL. Among the services provided by the *legal facility* there could also be ad-hoc general reports or advices in specific cases of environmental protection prepared by a reflection group composed of experts located in The Hague in addition to experts to be nominated on ad-hoc basis depending on the issue at stake. It could organize thematic seminars and gather together the local and international experts. Furthermore, the *legal facility* placed in The Hague could increase the visibility of the organisations located in The Hague in the field of IEL.

On the basis of the above chapters and on the results of our research this chapter will look at the three main options identified, notably facilitate access to justice (6.2), training for negotiators and civil servants in IEL (6.3) and enhance the synergy among MEAs (6.4).

6.2 Facilitating access to justice

The *legal facility* could assist parties (public or private entities) directly or indirectly concerned with an environmental problem/case to solve their problem or to avoid or settle their dispute by directing them to an adequate dispute resolution mechanism. The legal facility could advise on the means to use, such as mediation and arbitration or resort to a national or international court or tribunal.

The *legal facility* could make use of a roster of experts to be invited on call to participate and contribute on a particular case of (transboundary) environmental harm. The advice of the *legal facility* could include suggestions on which court or other dispute resolution mechanism to turn to or even on the substance of cases in order for the parties to settle disputes among themselves. It could “forward” information on potential cases to the specific judiciary which in this sense would benefit directly from this service. Therefore, the judiciaries will have an interest in making the *legal*

facility working properly, being sufficiently advertised and could provide their indirect support in its establishment.

The *legal facility* working as a facilitator in finding access to justice in this sense could be approached by all kinds of actors for all sorts of problems and disputes relating to IEL. The environmental problems caused by the ongoing forest fires at Kalimantan, Indonesia can serve as an example.

The forest fires on the island of Kalimantan, Indonesia of 1997-1998 made world headlines, destroying five million hectares of land (including one million acres of pristine forest), inflicting damages costing upwards of USD 4-10 billion, and emitting carbon dioxide at a volume that roughly equalled that of the whole of western Europe in the same time period. The reason for burning large areas of forest is to clear land for large commercial palm oil plantations. This issue also merits attention from a global perspective. Indonesia possesses the third largest rainforest in the world, and harbours a disproportionately high amount of biodiversity, including 12% of the world's mammal species (Matthew, 2001). The forests of Indonesia represent an invaluable carbon sink, and, when burned, release massive amounts of carbon dioxide into the atmosphere annually, contributing heavily to global climate change. Yet this problem persists, as burning remains the cheapest and easiest method of clearing land, and, until recently, carried minimal legal consequences. On 18 August 2004, the Jakarta Post reported as many as 102 potential forest fires in Kalimantan, concentrated in the easternmost province. This has occurred despite legislature passed to impose strict penalties on those who start fires. The resulting haze is causing severe economic, health, and environmental impacts not only for Indonesia, but for Malaysia, Singapore, and Brunei-Darussalam as well.

Recently, on 23 February 2009, the Singapore Institute of International Affairs issued a report indicating that haze from Indonesian forest fires is expected to reach Singapore soon. "Haze from forest fires in Indonesia's Riau islands is blowing towards Singapore, and the number of hot spots is rising although the situation is still far from the worst days of 2006. There were 59 fires burning in Riau on 18th Feb, up from 35 a day earlier, when the province's main airport was shut for about 1-1/2 hours because of poor visibility and four flights were diverted. In Sumatra, there were 160 hot spots. Most of them - 62 - were in Aceh, a fraction of the 8,000 hot spots recorded in 2006 during Singapore's worst haze period in recent years. The fires in Sumatra started after the government lifted a year-long moratorium on the use of peatland forests by palm oil companies, angering environmental groups which say the decision will contribute to global warming (...)"

In this example, there are several environmental issues at stake, all resulting from these forest fires on Indonesian islands: huge quantities of CO₂ emissions contribute to climate change; deforestation causes loss of biodiversity, wildlife preserves (global trust) being threatened and plant and animal species endemic to the region are threatened with extinction (i.e. orangutan); haze from forest fires causes damage to human health, economy (tourism, agriculture, travel), and the regional environment (acid rain, poor air quality, poorer visibility).

Apart from (neighbouring) States addressing the above mentioned issues at the inter-state level, there are many other injured or so called interested (non-state) parties

involved seeking for redress, restoration or compensation for damage resulting from the forest fires. The *legal facility* in The Hague could assist these parties in seeking justice: from the indigenous people being deported from their ancient lands to nature conservation groups trying to save the orang-utan, and from a local farmer finding his crops polluted by smog to the director of Singapore Changi Airport seeking for compensation for recurring closure of his airport as a result of poor visibility. All these parties may very well welcome the help offered by the *legal facility* in The Hague in directing them to a proper (alternative) dispute resolution mechanism.

In the future, the facility could also provide advice to parties on environmental legal expertise at local level and on obtaining the financial means to resolve disputes through mediation, arbitration or adjudication.

6.3 Training for diplomats, negotiators and civil servants in IEL

The suggestion that the *legal facility* could provide trainings on international environmental law to diplomats, negotiators and civil servants in particular from developing countries was raised by a great number of the interviewees. Training for civil servants would focus on using and implementing existing IEL regimes more effectively, training for diplomats and negotiators could concentrate on new regimes that are envisaged.

Climate change could be the theme which the *legal facility* could start with. The setting up of a training facility and permanent helpdesk for developing countries negotiators could contribute to the fight against climate change by enhancing capacity and providing assistance to developing countries in the climate change talks at the international level. Apart from a reduced number of highly educated and skilled chief negotiators, the majority of the G-77 civil servants and negotiators on IEL are unaware of the implications of climate change and undereducated to deal with the multitude and complexity of the different agenda items surrounding the international climate regime. The Hague could offer a *legal facility* aimed at educating negotiators and civil servants in developing countries. The facility shall provide indispensable services in the light of the ongoing climate change negotiations on a new international agreement. The helpdesk will be a permanent initiative and thus covering not only issues related to climate change but with the aim of expanding and including to different matters existing in IEL. It would ensure that the network collected by the training facility exists and remains effective on a long term basis.

Responding to the needs and questions from developing countries, and by using the expertise in the field of IEL present in The Hague and beyond, the *legal facility* could provide adequate (ad hoc) trainings for diplomats and negotiators from developing countries on various topics such as climate change (with a view to preparation for the international climate change talks and deadline of Copenhagen 2009 and beyond). Furthermore, the *legal facility* could facilitate training programmes for national civil servants responsible for the implementation of IEL and for enforcement officers dealing with enforcement and compliance issues.

6.4 Enhance synergy among MEAs

The need for more coordination among the different MEAs secretariats has been recognized by many experts already in the past. The old idea to create a general environmental convention dealing with all the existing ecological threats has failed and efforts in this direction would not seem to be leading to results in the near future. Environmental governance is fragmented and competences are very often overlapping. As highlighted in chapter 3, the idea to create a United Nations Environmental Organisation (UNEO) which could separate overlapping competences did not take off and this was mainly due to the opposition of many sovereign states. As a result, the creation of non-binding instrument is easier to be negotiated than complex MEAs and the number of agreements opened to voluntary participation has been rising. All major MEAs are often struggling with issues related to enforcement, compliance and dispute settlement and there is a clear need of more harmonization.

According to the interviews and further research, the proliferation of MEAs has not led so far to the development of a well functioning integrated system aimed at the harmonization of MEA responses to environmental harms and threats. MEAs have created several specific ad-hoc non compliance regimes designed in order to regulate potential conflicts for the failure to comply with the obligations created by a MEA. Too often, there is a lack of coordination among the different non-compliance regimes, both in the initial phase when rules of composition, procedure and triggering are decided and further in the phase of enforcement and implementation when the systems work in practice. The legal facility could provide useful means to share compliance and enforcement experiences among MEAs, as well as a set of common principles, especially since many are not very effective and this is partly due to their party-to-party triggering system.

7 Weighing the options

7.1 Introduction

In this final chapter, on the basis of the previous chapters and the findings with regard to (the interviews with representatives of) existing institutions and centres as laid down in Annexes I and II, the most viable option for the creation of a legal facility with regard to IEL is described and expanded upon. Attention is also paid to the reasons for choosing this option over the other options. Moreover, the question whether it would seem to be feasible to set up such a legal facility in The Hague is answered. Furthermore, some possible features of such a legal facility are described briefly. Finally the options for follow-up actions are indicated.

7.2 Tackling the challenges of IEL: the necessity of a facility

With the industrial revolution and the growing population of the world, in the second half of the 20th century humankind was faced with numerous negative environmental side-effects of its economic development. States endeavoured to tackle these challenges in the first place by setting up legal regimes for specific problems occurring with regard to individual environmental sectors. Only some other regimes also tackled more general issues such as environmental impact assessment, public participation and access to justice. Furthermore, the need for sustainable development gained ground, i.e. economic development which would ensure ecologically sound development also of future generations. In spite of the existence of these instruments and the concept of sustainable development, at the start of the 21st century the world faces numerous environmental challenges that are growing in urgency rather than diminishing and in the some cases (like climate change and water stress) even are forming potential threats to international security. Moreover, today it is often no longer the lack of norms that is causing problems – although streamlining remains an issue - it is the effective use, implementation and enforcement of existing environmental norms that needs to be strengthened.

Under these circumstances, the need for a more efficiently functioning system of international environmental law and the implementation of concrete steps in the direction of sustainable development are apparent. One option to contribute to such improvements that was identified in this study is stimulating the knowledge about IEL enforcement and access to justice. Another was training for negotiators and civil servants on developing and implementing IEL. Setting the lack of synergy between IEL instruments to rights formed the third option that was sketched in the previous chapter. Hereafter, the role of the different centres of IEL activities around the world is scrutinised in order to establish which option for setting up a legal facility on IEL would have the most added value.

7.3 Centres of IEL and the three options

1) *Access to justice*

In sum, the pros and cons of a legal facility in The Hague functioning as a facilitator to promote access to justice in IEL are indicated below. After that, the arguments will be expanded upon and conclusions drawn.

Pros:

- many, especially non-state actors lack the knowledge by which means and/or mechanisms their environmental problem or dispute could be solved;
- improving access to justice contributes to the effectiveness of IEL
- lot of potential because of the rising number of environmental problems;
- no similar structural initiatives undertaken so far;
- relatively low budget;
- fits perfectly to The Hague's function as legal capital and to the profile of The Hague as a pool of different judicial bodies;
- experts that can contribute to the Facility's work are based in and near The Hague

Cons:

- at times politically sensitive;
- necessity to keep a distance between the *legal facility* and the judicial bodies located in The Hague.

In and near The Hague, a considerable number of organisations deals either primarily or as part of their main tasks with issues of international environmental law and policy. Together they provide for a strong basis of valuable expertise in The Hague and its vicinity where IEL and its enforcement are concerned.

In other centres of international law around the world, there is only a limited amount of activities pertaining to the issues identified above. Secretariats of MEA's often do not have the manpower and resources to deal with other cross-cutting issues. Organisations with more general goals do pay attention to issues such as enhancing the efficiency and enforcement of IEL. The work of the latter organisations provides valuable input that can be of assistance when it comes to stimulating the efficiency, implementation and development of IEL. In practice, the need for expanding this type of activities is felt by many. The representatives of these organisations that were met in the course of this study themselves expressed that their impact is limited and welcomed the idea of additional facility, as long as such a facility would complement their work and overlaps would be avoided. Cooperation with the Secretariat of the Aarhus Convention is essential.

What makes this option stand out particularly is the fact that a legal facility promoting access to justice in concrete cases could make use of the unique position of The Hague where enforcement of international law is concerned and the fact that similar initiatives are lacking in other places.

The facility for access to justice could for instance consist of a pool of experts dealing with cases involving environmental harm at the global, regional or national level. It could prepare *ad hoc* reports advising private or public entities on options for dispute resolution and on obtaining the financial means to resolve their disputes. Such a facility could be linked to one or more existing institutions in The Hague that regularly provide legal policy advice or to an organisation like HAC.

2) Training facility

The pros and cons of a *legal facility* functioning as a training centre and helpdesk for negotiators and civil servants dealing with implementing and enforcing IEL are indicated in brief below. After that, the arguments are weighed and conclusions as to the feasibility of a Hague based facility offering training in IEL matters are drawn.

Pros:

- Clear need for additional training in order to improve the effective implementation and enforcement of existing IEL regimes and stimulate adoption of new IEL regimes
- Hot issue and potential for funding should be high;
- For enforcement issues the potential cooperation with organisations such as Europol and Eurojust forms an advantage;
- Availability in the The Hague based institutions of numerous legal experts in various fields of international law
- Presence of institutes like ISS, Clingendael, IES and T.M.C. Asser with a long history of providing training to developing countries representatives;
- Attractiveness of The Hague for legal experts;

Cons:

- competition, initiative already identified by others (i.e. UNITAR climate change programme, UNEP, IUCN, FIELD);
- sensitive issue and need for the support of high officials, notably in developing countries;
- high costs for participants;
- problem for negotiators to attend meetings (already overscheduled);
- best training for negotiators would be to participate directly in the negotiations or, alternatively, participate in negotiations simulations.

There exist several initiatives around the world where providing of training on IEL is concerned. In Canada, the IUCN Academy of IEL sets out to stimulate training of academics. In Bonn and Geneva, organisations like IUCN and UNITAR provide for training activities for civil servants and others. UNEP is providing these services at a global level. Still, there exists a clear need for further training on IEL, notably for civil servants and diplomats/negotiators involved in applying and enforcing existing norms and developing new norms respectively.

The Hague has a longstanding tradition in the training of academics, diplomats, negotiators and others, notably from developing countries. It houses numerous organisations that, especially if they would join forces on this topic in a legal facility, could provide for relevant expertise that could contribute to the training of such groups and in that way to raising awareness on IEL challenges, on means to put

existing IEL regimes to use more effectively and to train negotiators the ins and outs of highly complicated issues such as a new climate change regime. Of course it would be necessary to ensure that training programmes offered in The Hague do not duplicate activities already performed in other centres. Since the other centres have limited capacity and resources, The Hague could provide a valuable contribution to the work in these other centres.

Such a training facility could be linked to the HAC (The Hague Academic Coalition) or to one or more of its members already active in training (like Clingendael, Asser and/or ISS). Together with experts from the organisations based in The Hague and its vicinity, such a facility could offer more than the individual organisations, centres and experts can achieve at the moment.

From the arguments presented above it shows that a training facility in The Hague would be a viable option. However, when setting up a facility this function could and should be an auxiliary function of the legal facility, joined with the access to justice function described above.

3) MEA synergy

The idea of establishing a legal facility in The Hague aimed mainly at bridging the lack of synergy and coordination among MEAs, notably in the field of enforcement, has the following pro's and con's that are first summed up (starting with general factors and ending with The Hague related issues) and after that worked out in more detail before drawing a conclusion.

Pros:

- many MEA secretariats expressed their concern about the lack of coordination and dialogue with other secretariats;
- attractiveness of The Hague because of the presence of existing international organisations, notably in the field of dispute settlement but also where enforcement is concerned;
- attractiveness of The Hague for historic legal reasons;
- The Hague could be a bridge to Brussels and EU especially for the secretariats with limited staff and resources;

Cons:

- availability of well designed and informative websites for several MEAs;
- lack of time, resources and funding;
- lack of MEAs secretariats in The Hague;
- attendance by secretariat's staff to meetings of the *legal facility* is unlikely to be ensured;
- need for approval and decision by the MEA governing bodies;
- some MEAs do not have a non-compliance regime in place;
- similar initiatives have been already established (i.e. the UNEP Interlinkages Unit of the Division of Environmental Law and Conventions DELC);

- difficult to stimulate interests of staff in the MEA secretariats and convince them to participate.

From the discussions with representatives of MEA's and others, combined with desk research, it became clear that it would be useful to set up a facility aimed at bridging the lack of synergy and coordination among MEAs. Such a facility could build on good practices and aim at the establishment of a common set of principles to be shared among secretariats of MEAs. However, there already exist similar initiatives, and it is difficult to ensure the participation of MEA secretariats (especially those with limited resources) in meetings for which they would need to travel to The Hague. What is more, The Hague itself does not host such secretariats. Also, the secretariats would need to get formal approval before they could participate in such an initiative. For all of these reasons, this option was judged to be less feasible for The Hague.

7.4 The Hague base

Having established that there exists a need to stimulate the efficiency of IEL and its enforcement, and the need to set up a facility dealing with such issues, the next question is whether it would be feasible to establish such a facility in The Hague.

Both from the point of the choice of locating such a facility and from the point of further establishing The Hague as a centre of international law it turned out that a base in The Hague forms a viable alternative.

The Hague offers a unique base for a facility aimed at IEL enforcement and compliance mechanisms due to the presence of a number of organisations and centres that deal with international dispute resolution and enforcement in practice, and that of numerous other organisations and other centres that can contribute to this expertise through their training facilities. This specific aspect of the city of The Hague is unique in the world and can stimulate the development of a legal facility dealing with these issues.

In addition to these elements, The Hague offers many other advantages for a legal facility on IEL. The presence of the Peace Palace and the access that it offers to IEL documentation needs to be mentioned in this respect. Furthermore, the city's location means that it is easily accessible for foreign visitors arriving by public or private transport.

7.5 Follow-up

If the stakeholders agree to further the development of a legal facility on IEL enforcement in The Hague, the next step to take would be deciding on the more detailed issues of the structure, methodology, composition and financing of such a facility. Furthermore, organising a conference on the topic that the facility would deal with could bring up valuable ideas.

An option already hinted at above would be to assemble a group of experts from The Hague and its surroundings willing to provide their services when asked to do so in cases touching upon their fields of expertise. This group could then provide advice in ad hoc cases arising, or at their own initiative. What is more, where necessary this

group or a board could also initiate other activities on IEL such as training facilities, and thus at times also provide / organise services along the lines of the second alternative described above.

The legal facility on IEL enforcement would ensure that the position of The Hague as legal capital is strengthened. The issue of improvements in IEL enforcement is actual and of the utmost importance in order to stimulate sustainable development and avoid environmental degradation and environmental security threats.

8 Hague Environmental Law Facility (HELf)

In this final chapter, the characteristics of a legal facility dealing with dispute resolution and training in the field of IEL will be set out, notably where its functions, methodology, working plan and financing are concerned. In this way, a provisional outline of a facility that could be named Hague Environmental Law Facility (HELf) is presented.

8.1. Functions

The HELf would be aimed at investigating and addressing existing challenges in the field of enforcement and compliance with international environmental law with the goal of contributing to the more effective functioning of IEL. To this end, the facility would have two main functions:

1) an advisory function with regards to facilitating access to justice aimed at directing parties with environmental problems or disputes to the appropriate (alternative) dispute resolution mechanism, which includes local and national procedures. At a later stage, the HELf could also provide advisory services on the other sources of environmental legal expertise and on acquiring financial means aimed at facilitating dispute resolution (mediation and / or procedures at (national) courts and tribunals).

2) training as an auxiliary function of HELf aimed at improving the knowledge and skills of civil servants, diplomats and negotiators on issues of implementation, enforcement and compliance. Using the same pool of The Hague based experts as envisaged for facilitating access to justice, HELf could provide trainings on IEL to diplomats and negotiators (notably where new regimes are concerned) and civil servants (notably on implementation, enforcement and compliance issues regarding existing regimes) would match with the need for spreading knowledge on these issues in developing countries but also for others. It would also be in line with the longstanding tradition of The Hague in offering trainings for academics, diplomats, judges, negotiators and others in different fields of international law.

8.2. Work programme

1) Facilitating access to justice

In its advisory function with regard to directing affected parties to the appropriate dispute resolution mechanism, after deciding how many advices can be dealt with under the budget to be allocated to the facility and its experts contributing to concrete advices, a selection of potential clients would need to be made. The services of HELf could be triggered upon requests for advice, or at the initiative of members of the HELf. Instances of environmental harm could be identified by HELf and injured parties could directly or indirectly be approached and made aware of the services of HELf. Parties could also contact HELf on their own initiative, which may happen more often when HELf becomes a successful and respected facility. After selecting a case, the experts affiliated with HELf will be invited to contribute in cases touching upon their fields of expertise. Once the draft advice is ready, it could be circulated among the other experts associated to the facility. After receiving and where necessary incorporating their comments, the advice could be officially adopted.

The advices will direct interested parties to existing procedures and mechanisms (like mediation, arbitration, national courts, international tribunals etc). In the future, the HELF could expand its advisory activities to include recommendations on how to find (local) legal expertise on substance and how to raise finances/funds for law-suits, mediation procedures etc.

HELF is envisaged to work on 7 to 8 cases (reports) per year (see budget below).

2) Training

In its auxiliary function, the HELF would focus on initiating training sessions for civil servants (notably on implementation and enforcement issues) and diplomats and negotiators (notably where the negotiation of new regimes is concerned). Again, topics would need to be selected and target groups; this would need to be done in close cooperation with other organisations offering training services in the field of IEL. Besides the involvement of the experts associated to the facility as lecturers at concrete training events, the involvement of staff from The Hague based organisations and from other IEL experts could be envisaged. The practical arrangements for (a set of) courses could be taken care of by one or more existing organisations in or near The Hague. The number of training courses that could be organised would depend partly on the annual financial means of the facility, and partly on the availability of ad hoc funds for specific training sessions. Trainings should aim at raising awareness on IEL challenges, enhance the effectiveness of existing IEL regimes, contribute to educate negotiators as to the ins and outs of highly complicated issues such as climate change and contribute to educate civil servants in the correct implementation of existing and future international, regional and national environmental laws.

HELF is envisaged to coordinate the organisation of 1 course per year in the first two years and 2 courses in years 3, 4 and 5. Courses will last 1 week for 50 participants divided in two groups of 25.

8.3 Organization

The HELF would consist of a board with representatives of sponsors and others, a director, a pool of experts and a secretariat. The facility would be located at one of the existing The Hague based organisations with a room to spare for this purpose. The secretariat will have a permanent administrator and part-time support staff. The secretariat will function as contact point for both the group of experts and beneficiaries of the services of the legal facility. The secretariat will manage and collect the information related to the activities of the legal facility and will run the HELF website.

The work of the secretariat will be assisted by a pool of experts from The Hague and its surroundings in the field of international environmental law to be identified on call. The experts will be selected through open procedure on the basis of curriculum and years of experience. The experts will be classified according to the different areas of expertise and should indicate a minimum number of days available per year. The experts will be involved in the legal facility as auxiliary and independent entities.

8.4 Finance

A tentative budget for the HELF that would aim at fulfilling the functions set out above looks as follows:

	Year 1	Year 2	Year 3	Year 4	Year 5	Total
1 Management Personnel	50,000	60,000	70,000	80,000	90,000	350,000
2 Legal Experts	100,000	100,000	100,000	120,000	130,000	550,000
3 Courses	250,000	250,000	400,000	400,000	400,000	1,700,000
4 Information Activities	25,000	30,000	35,000	40,000	50,000	180,000
5 Other Direct Costs	25,000	30,000	35,000	40,000	50,000	180,000
Total Euros	450,000	470,000	640,000	680,000	720,000	2,960,000

Notes:

- 1 Management Personnel
Consists of a part-time director, administrator and other support staff
- 2 Legal Experts
Beginning with part-time secondment of the experts from other organisations in the first 2 years leading to engagement of dedicated expert(s) in years 3 to 5.
- 3 Courses
Each course is for 2 groups of 25 persons for 5 days and includes the costs of programme development, course materials, travel & accommodations, lecturers, and organisational costs. The chart suggests 1 course per year in the first 2 years and 2 courses in years 3,4 & 5.
- 4 Information Activities
Marketing and promotional materials and events, website and on-line interactive database(s), etc. including third party information and communications expertise.
- 5 Other direct costs
Secretariat rent and charges, communications costs, equipment and furniture, documents, supplies, financial and legal (financial management, banking, accounting, auditing, and insurances).



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