



**Environmental Institutions
for the 21st Century:
An International Court for
the Environment**

ICE Coalition

February 2011



ABOUT SDG2012

Sdg2012 is Stakeholder Forum's Programme on Sustainable Development Governance towards the UN Conference on Sustainable Development in 2012 (UNCSD), also known as 'Rio+20' and 'Earth Summit 2012'. The programme consists of the following activities:

Thought Leadership – writing and commissioning think pieces on issues relating to sustainable development governance, to stimulate and inform discussion on this issue towards Rio+20

Sustainable Development Governance 2012 Network (SDG2012 Network) – co-ordinating a multi-stakeholder network of experts to produce and peer review think pieces, discuss and exchange on issues relating to the institutional framework for sustainable development, and align with policy positions where appropriate

Information and Resources – publishing informative guides and briefings and hosting an online clearing-house of information and updates on international environmental and sustainable development governance – 'SDG dossier'

Submissions – making official submissions to the Rio+20 process based on think pieces and dialogue.

ABOUT STAKEHOLDER FORUM

Stakeholder Forum is an international organisation working to advance sustainable development and promote stakeholder democracy at a global level. Our work aims to enhance open, accountable and participatory international decision-making on sustainable development.

Stakeholder Forum works across four key areas: Global Policy and Advocacy; Stakeholder Engagement; Media and Communications; and Capacity Building. Our SDG2012 programme sits within our work on Global Policy and Advocacy.

MORE INFORMATION

If you would like to provide feedback on this paper, get involved in Stakeholder Forum's SDG2012 programme, or put yourself forward to write a paper, please contact Hannah Stoddart, Head of Policy and Advocacy at Stakeholder Forum - hstoddart@stakeholderforum.org

For more information on SDG2012 please visit www.stakeholderforum.org and www.earthsummit2012.org

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EXECUTIVE SUMMARY

Damage to the global environment is now at the forefront of public awareness. The causes and consequences of irreversible harm to our planet are the subject of unprecedented attention, especially on the subject of climate change and threats to biodiversity. Responsibility for the health of the planet is shared between nation states which have tried to develop legal and institutional tools to address the environmental challenge.

International law provides the mechanisms for regulating the impact of states on the environment, in the form of Multilateral Environmental Agreements (MEAs). However, because of their slow and restrained emergence, their fragmented nature and their lack of implementation in many cases, MEAs have faced significant challenges in to developing, implementing and enforcing international environmental law.

Moreover, a number of international courts, tribunals and arbitral bodies have been created to decide on states' obligations and responsibilities under international environmental law. But the current system does not deliver sufficient access to justice for non-state actors or provide a forum that is suitable to hear very technical scientific evidence common to environmental cases.

It is the current deficit in these two areas that drive the case for an International Court for the Environment (ICE). It is envisaged that the ICE would become the principal court dealing with international environmental law, helping to clarify existing treaties and other international environmental obligations for states and for all other parties including trans-national corporations. It would do this through dispute resolution, advisory opinions, and the adjudication of contentious issues presently unclear or unresolved.

As sustainable development is about guaranteeing "the needs of the present without compromising the ability of future generations to meet their needs"¹, the need to address current and future environmental degradation could be carried out by an ICE.

¹ Brundtland Commission on Environment and Development, 1987

CONTEXT

In 1972, the United Nations Conference on the Human Environment in Stockholm was the UN's first major conference on international environmental issues. It marked a turning point in the development of international environmental politics² and is widely recognized as the beginning of modern political and public awareness of global environmental issues. It provided the impetus for new national, regional and international legislation worldwide.

In the subsequent two decades, a proliferation of environmental conferences and conventions addressed various environmental issues, including conserving endangered species, controlling the movement of hazardous wastes, and reversing the depletion of the ozone layer. The most successful and well-known convention from this period was the 1987 Montreal Protocol of the Vienna Convention for the Protection of the Ozone Layer, an example of international environmental cooperation whose inspiration reverberates to this day.

Furthermore, the United Nations Environment Programme (UNEP) was established after the 1972 conference as "a global body to act as the environmental conscience of the UN system"³.

The 20th anniversary of the Stockholm conference took place in 1992 in Rio de Janeiro. The UN Conference on Environment and Development, the "Earth Summit" gathered representatives from 176 States and several thousand non-governmental organisations. The Earth Summit resulted in a number of new agreements such as the two major conventions: the Convention on Biological Diversity (UNCBD) and the Framework Convention on Climate Change (UNFCCC). It also gave birth to the so-called 'Agenda 21' which reaffirms the concept of sustainable development by drawing an action plan for the 21st century. Significantly the Conference created the UN Commission on Sustainable Development.

These institutional developments were complemented by the Rio Declaration on Environment and Development, which outlines a range of principles intended to guide the implementation of sustainable development around the world. Some of these principles address the enforcement of MEAs, something which remains one of the critical unfulfilled conditions for the effective realization of international environmental and sustainable development law.

For example, Principle 10 of the Declaration provides that: "States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".

Principle 13 establishes that "States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control of areas beyond their jurisdiction".

² John Baylis, Steve Smith, 2005, *The Globalization of World Politics* (3rd ed.), Oxford, Oxford University Press, pp 454-455

³ UNEP, Organization Profile, <http://www.unep.org/PDF/UNEPOrganizationProfile.pdf>

And Principle 26 states that: "States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations".

The Rio Declaration also famously paved the way for the Kyoto protocol signed in Japan on 11th December 1997. This Protocol, for the first time, contained international obligations requiring countries to reduce their greenhouse gas emissions below specified levels. It had been agreed that the Kyoto Protocol would only come into force when countries emitting 55% of the world's carbon dioxide had proceeded to ratification. The 55% trigger was finally met in February 2005 after ratification by Russia. However, constraints upon enforcement remain a significant weakness.

Over the past 40 years the scientific community has arrived at an increasingly clear consensus: we are inflicting devastating damage on the natural environment and our human activity is destabilizing our climate. Scientists are providing the evidence that suggests that we need global laws that govern and regulate human behavior to avoid damaging and irreversible changes to our planet. Yet the existing institutions which carry out and promote sustainable development have not been able to bring accountability to the international system.

THE NEED FOR AN INTERNATIONAL COURT FOR THE ENVIRONMENT

Bringing trust to the current institutional system

All States are economic actors who are hesitant to protect the global environment at the expense of their economy. States also have an obligation to protect the national interest and may be reluctant to adhere to global agreements which may appear to come into conflict with that national interest. As a result, the vast majority of Multilateral Environmental Agreements are declaratory initiatives, rather than legally binding treaties with strong compliance and enforcement mechanisms.

If a compelling model for compliance and enforcement is created, it could encourage States to buy into global environmental protection standards with the assurance that all States will be held to that standard. In other words, States will operate within a 'level playing field'.

The need for scientific expertise at the International Judicial level

There is no international court which offers a specialized environmental chamber with judges knowledgeable on matters of environmental science, supported by independent scientific advisors.

It is crucial that any court that hears environmental cases has judges that fully understand the

science behind the case they are dealing with, as their decisions will inevitably influence future State practice and the creation of customary international law.

The need for providing access to justice to both State and non-state actors

Only States are allowed to bring cases before the existing International Court of Justice, and regrettably States do not always protect their people from environmental degradation.

Non-state actors must have the ability to bring cases against States and other non-state actors. This will ensure that individuals are able to bring attention to environmental degradation ignored for too long by their own national governments.

The need for harmonising and completing the fragmented network of MEAs

The global environmental governance regime is a collection of different organizations and MEA secretariats which work together to create a cohesive system. The current state of the environment and the continued advance of climate change suggests that this system could benefit from institutional reform. It is necessary to integrate the decentralized environmental governance regime and provide an enforcement mechanism that holds States and non-state actors to account.

There is steady support for a World Environment Organization which would provide a centralized hub for compliance and monitoring, and clearer coordination between all of the separate MEA secretariats and international organizations. The International Court for the Environment would provide an ideal dispute resolution/enforcement mechanism for a WEO.

ICE AT THE FOREFRONT OF GLOBAL INSTITUTIONAL REFORM

There is no doubt that the notion of international reform and restructuring is now beginning to gather momentum. Even before the recent Copenhagen Climate Change Summit, Chancellor Merkel of Germany and President Sarkozy of France, in a letter to the U.N. Secretary General, called for an overhaul of environmental governance, and asked for the Copenhagen climate talks to progress the creation of a World Environmental Organisation (WEO). More recently, ministers and officials from more than 135 nations convened in Bali for the United Nations Environment Program (UNEP) annual Governing Council in 2010. At this time UNEP Executive Director, Achim Steiner, stated that environmental governance reform was a key part of the discussions at this annual meeting and that governments raised the possibility of a World Environment Organisation (WEO). He said that a high level ministerial group had been established to continue the process with greater focus and urgency and that "the status quo is no longer an option".

As Philippe Hugon has said in his paper 'After Copenhagen: An International Environmental Agency Needed'⁴, a WEO could unite four parties in its drive to advance environmental objectives: scientists, entrepreneurs, governments, and environmental organisations. Firstly, the scientific community needs a forum where it can voice its concerns and recommendations. Secondly, participation by business enterprises is equally important since they have to put into practice the recommendations made by the scientists. A third party at the conference table would consist of the respective governments which have to put in place the requisite legislative and tax-related measures to protect the environment. Finally, a WEO would also do well to integrate existing environmental organisations, which have done much to promote environmentally progressive policy worldwide.

Those who support the case for an ICE do not in any way exclude the notion that an ICE could sit alongside or be part of a WEO. Mr Steiner said that a WEO could be modelled on the WTO which has its own dispute resolution mechanisms. The same point was made some months ago by former Euro-Commissioner Lord (Leon) Brittan. A WEO might be granted jurisdiction to refer cases to an ICE.

A NEW PROPOSAL

An International Court for the Environment (ICE) is a valuable goal that would add to the body of jurisprudence in international environmental law and provide a forum both for states and for non-state entities. Ideally, as explained in more detail below, the arrangements for such a Court would include (i) an international convention on the right to a healthy environment, with broad coverage; (ii) direct access by NGO's and private parties as well as states; (iii) transparency in proceedings; and (iv) a scientific body to assess technical issues.

This is not a wholly new idea. Such a proposal was mooted as long ago as 1999 at a conference in Washington sponsored by a foundation which had been set up to investigate the establishment of an international court for the environment. The proposals then defined the functions of the Court as including:

- i. adjudicating upon significant environmental disputes involving the responsibility of members of the international community
- ii. adjudicating upon disputes between private and public parties with an appreciable magnitude (at the discretion of the President of the Court)
- iii. ordering emergency, injunctive and preventative measures as necessary
- iv. mediating and arbitrating environmental disputes

⁴ Hugon, P., 2010. *The Need for an International Environmental Agency*. IRIS. Available at: http://www.atlantic-community.org/index/items/view/The_Need_for_an_International_Environmental_Agency

- v. instituting investigations, where necessary, to address environmental problems of international significance.

Moreover, it may be thought that the potential benefits of an ICE would include:
a centralised system accessible to a range of actors

- i. the enhancement of the body of law regarding international environmental issues
- ii. consistency in judicial resolution of international environmental disputes
- iii. increased focus on preventative measures
- iv. global environmental standards of care
- v. facilitation and enforcement of international environmental treaties.

The establishment of such a Court might be thought particularly appropriate at the present time, just as the public generally are becoming much more aware of environmental problems and of the culpability of those who cause them. As Michael Mason has said, "it is the intersection of individual rights and responsibilities with inter-State obligations that offers concrete possibilities for citizen participation in global decision making."⁵

Such a Court could also influence the the global corporate community to develop risk management programmes and improve present practices which would produce a corresponding reduction in the risk of environmental catastrophe.

As to the feasibility of any such proposal, an encouraging precedent is the establishment of the International Criminal Court, after sustained pressure by NGOs and other actors

The Early Stage

Establishing a court at the international level will be a difficult task which will almost certainly require an international treaty. Achieving that is likely to require a dedicated campaign over a number of years. To that end the ICE Coalition has been established, to which many enthusiasts and experts, young and old, have already lent their support.

There are two important points to emphasise in relation to this first stage of the effort. The first relates to the work already done in this field; the second relates to how, ahead of reaching the ultimate goal of a court, the ICE proposal might be advanced in the meantime.

As to the first point, it is worth taking note of the considerable work already done in this field by other organisations with aims broadly similar to or consistent with the ICE Coalition. For example, an organisation called ICEF (International Court for the Environment Foundation), in Rome, has for a number of years been looking at the possibility of creating an ICE. It is hoped

⁵ Mason, M, 2006. *Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law*. *Global Governance* 12 (2006) 283-303.

that cooperation with organisations such as ICEF and with other sympathetic bodies will enable the ICE campaign to move forward swiftly.

As to the second point, it is possible that, en route to the ultimate goal, the ICE is could be constituted as something less than a fully mandated international court, more akin to an arbitrating/arbitral tribunal, providing declaratory relief and dispute resolution services to those who agree to submit to its jurisdiction. States, NGOs, corporations and individuals would all be able to agree to use and have access to the ICE. This role requires no international treaty; it merely requires the establishment of the body, it being proffered to potentially interested parties as means of resolving disputes in environmental matters, and their agreement to use it. The ICE might well sit at a number of different locations.

It is also envisaged that this straightforward arbitral tribunal model would be able to perform a valuable role as the dispute resolution institution of choice under specific international agreements. For example, Article 14 of the UNFCCC, adopted also for the Kyoto Protocol, provides that dispute resolution shall be undertaken by way of reference to the International Court of Justice (ICJ) or by arbitration by a procedure to be agreed by the Parties. An identified problem is, as discussed earlier, that the ICJ recognises only States as entitled to bring cases. As to the arbitration option under Article 14, there has been no agreement as to what the arbitration procedure should be. An ICE could fill this gap in the legal architecture of the climate change agreements, including any successor agreement reached in the UNFCCC.

The Ultimate Goal

Ultimately, it is envisaged that the ICE would be mandated as the international environmental tribunal. By offering its services to a wide cross-section of the international governmental, non-governmental and business communities through the interim approach outlined, this would create a positive response to possibilities afforded by an ICE. The ultimate goal of mandating the ICE as the international environmental tribunal could therefore become more feasible through this graduated approach. It is hoped that by this stage the ICE may have already become the default port of call for the resolution of international environmental issues.

FUNCTIONING OF THE COURT

The ICE could sit above and adjudicate on disputes arising out of the UN "environmental" treaties, including the UN Convention on Biological Diversity (UNCBD), the UN Framework Convention on Climate Change (UNFCCC), and the Kyoto Protocol, as well as any other applicable UN environmental law or customary international law. It would be well placed to incorporate the work of existing tribunals that function under UN environment treaties (e.g. the Kyoto Protocol Enforcement Branch).

Whilst initially the role and mandate of the ICE could be ring-fenced - so as to prevent overlap with these existing bodies - ultimately the aim would be to achieve one single court dealing with all UN environmental law. The additional aim would be for the consolidation of the various environment-related treaties to be incorporated into one single document, the interpretation of

which would be within the ICE's jurisdiction.

It is also envisaged that the ICE could provide a judicial review function in respect of environmental decisions made by bodies involved in the interpretation of international environmental obligations – e.g. the Kyoto Enforcement Branch, or any successor or replacement institution established by the COPs under the UNFCCC Kyoto process; the WTO; and the International Finance Corporation (IFC) and its interpretation of the Equator Principles⁶.

Additional features

A possible additional feature of the ICE would be the establishment of specialist panels of environmental experts – e.g. relating to aviation or shipping or extractive industries. This feature could be present in both the interim (arbitral tribunal) version and in the more comprehensive manifestation the ICE.

Depending on the views of signatory states, there might be a restriction to investigate only the “most serious” breaches – in line with a similar restriction upon the International Criminal Court's jurisdiction. Equally, there might well be a restriction of the remedies available to non-State actors to purely declaratory relief.

Sanctions

The sanctions imposed could include declaratory relief, fines and sanctions of restoration and rehabilitation of damaged habitats (along the lines of the EU Environmental Liability Directive). The ICE could also be empowered to issue declarations of incompatibility where Signatory State legislation conflicts with international environmental law. In addition it could sanction Signatory States for failures to permit enforcement of judgements. There could also be provision for interim measures, specifically, injunctions, enforceable in Signatory States.

CONCLUSION

In 2002, over 120 senior Judges from 60 countries around the world - including 32 Chief Justices - met in Johannesburg on the eve of the World Summit on Sustainable Development to discuss the role of the judiciary in promoting governance and the rule of law in the field of environmental and sustainable development. The outcome of the Symposium was a unanimous recognition of the crucial role that the judiciary plays in enhancing environmental governance and the rule of law through the interpretation, development, implementation and enforcement of environmental law in the context of sustainable development. They also concluded that:

⁶ See Kingsbury, B. and others, 2005. *The Emergence of Global Administrative Law*

- An independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law;
- The fragile state of the global environment requires the Judiciary to implement and enforce applicable international and national laws, which will assist in alleviating poverty, while also ensuring that the inherent rights and interests of succeeding generations are not compromised;
- The people most affected by environmental degradation are the poor. Therefore, there is an urgent need to strengthen the capacity of the poor and their representatives to defend environmental rights, in order to ensure that the weaker sections of society are able to enjoy their right to live in a social and physical environment that respects and promotes their dignity;
- The Judiciary plays a critical role in the enhancement of the public interest in a healthy and secure environment;
- The rapid evolution of multilateral environmental agreements, national constitutions, and statutes concerning the protection of the environment increasingly requires the courts to interpret and apply new legal instruments in keeping with the principles of sustainable development;
- The deficiency in the knowledge, relevant skills, and information in regard to environmental law contributes to the lack of effective implementation, development, and enforcement of environmental law;
- The Judiciary - informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the implementation, development, and enforcement of laws, regulations, and international agreements relating to sustainable development - plays a critical role in the enhancement of the public interest in a healthy and secure environment;
- There is an urgent need to strengthen the capacity of judges, prosecutors, legislators, and all persons who play a critical role at the national level in the process of implementation, development, and enforcement of environmental law, including multilateral environmental agreements.

By promoting the establishment of a judicial body such as an International Court for the Environment, the international community would effectively respond to the challenge – and also exciting opportunity – of how States and non-state actors can actively partake in ensuring compliance to globally agreed commitments on sustainable development.



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