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International Environmental Dispute Resolution: Why We Need a Global Approach

A briefing from the World Federalist Movement & the International NGO Task Group on Legal and Institutional Matters

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Background

Over the past thirty years, there has been enormous growth in the realm of environmental laws – locally, nationally and internationally. And particularly since Rio, the number of international treaties and conventions and related bodies has increased exponentially. While there has been some progress in this regard, international law has not caught up with the growing inclusion of individuals, civil society, private sector and other non-state entities as participants in the global process.

Traditionally, only states have been the subjects of international law, and treaties are binding only among countries. Accordingly, all present dispute settlement mechanisms allow only for participation by state representatives. Yet, due to the global nature of environmental degradation affecting all participants in the international community, WFM/INTGLIM believes that current international environmental dispute mechanisms are inadequate to protect the rights of individuals and the environment in the 21st century and beyond. It is imperative that the international community continues to expand and crystallize the body of international environmental law and establish a cohesive global environmental regime, which allows access and participation beyond governments.

Existing International Environmental Dispute Settlement Mechanisms

During the last two decades, many international and regional institutions emerged as players in resolving global disputes. These include the International Court of Justice, various human rights tribunals, and internal dispute mechanisms established within multilateral treaties, such as dispute settlement procedures established by the World Trade Organization (WTO). In addition, multilateral environmental agreements (MEAs) established in the past decade, such as the United Nations Convention on the Law of the Sea (UNCLOS) and the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), have included dispute settlement mechanisms within their provisions. Yet, despite this array of alternatives, each of these fall short of providing an appropriate forum for individuals whose environmental and human rights have been detrimentally affected.

A number of fora also exist in the United Nations (UN) and regional enforcement systems that address international disputes, and increasingly, international environmental disputes. Among these are the International Court of Justice (ICJ), the Permanent Court of Arbitration, and the European Court of Justice. The United Nations and regional human rights fora have also begun to consider whether certain environmental claims amount to human rights violations. These fora include the UN's Human Rights Committee, the European Court of Human Rights, and the Inter-American Court for Human Rights. The competence and jurisdiction of these courts vary greatly, but all may consider

environmental disputes. Although there is a trend to allow participation by non-state actors, such as seen in the World Bank Inspection Panel and various human rights tribunals, for the most part, most environmental forum do not assign individual liability to defendants, generate enforceable remedies, or provide victims with a justiciable forum.

Why Existing Fora Are Not Adequate

International Court of Justice

The International Court of Justice (ICJ) or "World Court" acts under the auspices of the United Nations. Jurisdiction of the ICJ over a dispute depends upon whether two or more States have consented to its jurisdiction. Thus, while the ICJ may accept cases that are environmentally related, only states have standing. In this regards, state interest do not always coincide with that of its citizens, particularly in relation to economic priorities. For instance, states themselves may commit or tolerate environmental degradation. For example, in the case oil exploration in Ecuador and Nigeria, both of these governments supported and approved TNCs in their environmentally harmful activities. Moreover, NGOs – often the most ardent supporters of environmental interests, or other private parties directly affected by environmental standards, do not have direct access to the ICJ.

In 1993, the ICJ established a Chamber of the Court for Environmental Matters (CEM). But as of last year, no single country had submitted a dispute to the ICJ's environmental chamber. This may be because state parties to a dispute have little to gain in bringing a case to the CEM rather than the full court of the ICJ, because parties to the ICJ may always choose to form an ad hoc chamber, and arguably, members of the CEM do not have any greater expertise in environmental matters than their colleagues that are non-members. While the ICJ has established a special chamber for environmental matters, its significance is negligible.

European Court of Justice

The European Court of Justice (ECJ) is the judicial arm of the European Union. Since 1980, the European Commission has brought more than fifty cases to the ECJ involving the failure of a member state to comply with environmental regulations. However, its jurisdiction is regional and extends to disputes only among states.

Arbitral Tribunals

The Permanent Court of Arbitration (PCA) was established at The Hague by intergovernmental agreement in 1899 and is the oldest institution dedicated to resolving international disputes. The PCA, however, lacks compulsory jurisdiction, thereby allowing states and private parties to choose whether to participate in the PCA's resolution process. In addition, there is little transparency in the PCA's resolution process because its decisions are not made available to public inspection. Most important, the PCA cannot be a forum for disputes between two private entities, such as between victims of environmental hazards and transnational corporations (TNCs), since at least one party may be a state.

The International Court of Environmental Arbitration and Conciliation (ICEAC) was formed in 1994 with permanent seats in Spain and Mexico. As a form of institutionalized arbitration, this Court settles disputes that are submitted by states, private parties, or NGOs. While the ICEAC allows natural or private parties to submit disputes, parties to the dispute must agree to ICEAC jurisdictions. Any party may choose not to participate. Despite its drawbacks, it does allow individuals, NGOs, and other private entities to bring disputes on equal footing with governments.

Human Rights Tribunals

Although the human right to a healthy environment exists in principle, it is debatable as to whether it has crystallized to the level of customary international law. Many human rights treaties contain provisions that recognize emerging environmental rights, but no consensus exists as to what that right entails. Without legal recognition of the right to a healthy environment, such rights are not binding and international tribunals do not have the jurisdiction to hear a claim based on violations of such rights. Enforcement basically requires the combined cooperation of the individual suffering harm, the state, public and private organizations, as well as the international community. Absent an international treaty on international environmental rights, or the recognition of the human right to a healthy environment as customary international law, the human right to healthy environment remains nonjusticiable throughout most of the world.

In the past decade, however, the international legal community has begun to slowly embrace the concept of environmental law as a corollary to human rights. Numerous conventions and declarations, as well as state declarations, contain provisions on environmental rights. At present, however, the provisions of these conventions only apply to ratifying states; non-ratifying states and non-state actors, such as TNCs, escape their purview.

International human rights committees and tribunals have increasingly extended the application of the fundamental right to a healthy environment to situation concerning life-threatening risks. Significantly, some human rights tribunals have even allowed individuals and NGOs to bring complaints directly to an international body. But limitations remain -- most of these fora do not provide enforceable remedies to the victim, and complaints may only be brought against states that are parties to the relevant international or regional convention. Once again, private actors such as TNCs, escape their reach.

With respect to adjudicative fora within the UN, only a few bodies created to enforce international human rights agreements may hear claims from individuals, and these are only available for human rights complaints against states. One such body is the Human Rights Committee, established by the Optional Protocol to the International Convention on Civil and Political Rights (ICCPR). The problem is that very few countries have ratified the Optional Protocol. In addition, the Committee is not an adjudicatory body, and is limited to forwarding its views to the individual and government concerned. While the ICCPR may find states in violation of human rights, corporations and other non-state actors remain outside the parameters of its review. Similar drawbacks also occur with the Inter-American Court for Human Rights and the European Court of Human Rights.

Clearly, human rights law can plan an essential role protecting individuals from a government's political processes, but have certain limitations – namely, (i) enforcement capabilities are generally limited to making recommendations, and (ii) international human rights bodies ignore the role of non-state actors. Due to these limitations, human rights tribunals can be viewed as only one aspect of bringing violations to light and applying public pressure to governments.

Multilateral Environmental Agreements

The explosion of multilateral environmental agreements over the last decades includes some with dispute settlement provisions within their framework (i.e., Montreal Protocol, UN Convention on Law of the Sea). While these treaties address a range of environmental concerns and signify acceptance of environmental ideals (if not on a universal basis, at least by signatory states), MEAs cannot solely ensure an effective international environmental legal system. The reasons are many.

- Treaty ratification is **voluntary**. Even where a majority of states agree to a specific environmental principle, a minority of nations may make reservations to the same principle.
- MEAs are negotiated, ratified, and **binding only among nations**, and disallow standing for non-state or private entities.

- Most MEA secretariats **do not have enforcement authority**. Those that do are significantly limited by lack of funding, institutional capacity and international jurisdiction in which to enforce their decisions. In addition, UNEP often lacks the jurisdiction required to enforce their decisions. With no centralized regulatory body to enforce MEAs, the effectiveness of international agreements depends to a great extent on voluntary compliance. Compliance with a particular commitment that is contrary to a nation's interest is less likely to be enforced by that nation. In addition, many developing nations lack the financial and technological capacity to meaningfully enforce environmental obligations.
- Within MEAs, **enforcement provisions**, which are a necessary element to ensure compliance with international obligations, are used infrequently and inconsistently.
- Dispute settlement procedures within MEAs require nations to relinquish **sovereignty**, which many nations are hesitant to do.
- MEAs provide little, if any, guidance on **liability**. While liability for environmental injury most often takes the form of money damages, under international law, the duties of signatory states are often too broadly stated to impost liability. Instead, states' noncompliance with treaty provisions are often addressed by sanctions – geared toward facilitating compliance with treaty provisions, rather than promoting good environmental practices.

Lastly, the vast number of international environmental dispute resolution mechanisms raises the issue of which treaty regime will have jurisdiction over a particular environmental issue – but rarely is a dispute limited to environmental issues. This inherent problem has been witnessed time and time again in MEA-World Trade Organization conflicts. Recent WTO decisions reflect the WTO's anti-environmental bias and place significant limits on a country's environmental regulations.

The WTO's decisions illustrate that environmental problems of a transboundary or global nature are better addressed by an international environmental organization and related court, which promotes uniform environmental standards and a body of legal decisions, as well as global enforcement.

Potential Benefits of an International Environmental Court

For some time, proposals have circulated regarding the establishment of an international environmental court, under the auspices of the UN, or a world environment organization that could coordinate the efforts of various agencies, as well as states and environmental NGOs. Potential benefits of an International Environmental Court could include:

- centralized system that is accessible to a range of participants
- transparency in proceedings
- a mechanism to avoid forum shopping
- application of the precautionary principle
- development of a body of law regarding international environmental issues
- consistency in judicial resolution of international environmental disputes
- expeditious resolution
- scientific body to assess technical issues
- global environmental standards of care
- facilitation and enforcement of international environmental treaties

Towards a World Environment Organization

The evolving recognition that international law should govern actions and allow for participation by private parties – not just governments -- is evident in the establishment of the International Criminal Court (ICC), which could bring to justice, not nation-states, but individuals and TNCs who commit the most serious crimes of concern to the international community. The International Criminal Court (ICC) is a harbinger of what is ahead – the global expansion and crystallization of environmental and human rights, access to justice, and universal application of the rule of law.

As discussed above, a variety of international and regional courts, tribunals, and MEA dispute settlement mechanisms already exist to adjudicate and arbitrate international environmental disputes. However, only in the rare instance are non-state actors allowed to participate. Even in those cases, at least one party must be a state. The current international environmental governance regime is deeply fragmented, requiring a multitude of UN organizations and agencies within the UN, along with regional and national and local governments, MEA secretariats, and civil society to coordinate with each other to avoid duplication of efforts. Clearly, there is a need for a single international regime that can provide uniformity among environmental laws and access to environmental information from a global perspective, congregate compliance, enforcement and dispute settlement mechanisms, and allow a forum for non-state actors as well as states.

We call on governments and civil society to:

- **Support the universal recognition of environmental rights**, in both domestic and international endeavors. The formal recognition of the human right to a healthy environment is crucial, particularly because the assertion of established human rights has proven to be one of the most successful means to protect the environment and victims of environmental abuse. It is the first step toward providing environmental justice to individuals harmed by the tortuous and sometimes criminal conduct of large multinational corporations.
- **Call for an international convention on corporate accountability**
- **Initiate discussions on the establishment of a world environment organization and/or International Environmental Court**

Without an enforceable legal system with adequate requirements, it is unrealistic to expect private actors, such as TNCs, to voluntarily take preventive measures to protect the environment. Severe environmental abuses by private and corporate actors will only subside if there are universally recognized environmental rights and obligations for private entities, and a coordinated international architecture to enforce those rights.

For a comprehensive and footnoted discussion of these issues, see P. Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", 12 Col. J. of Int'l Env. L. & Pol. 191 (2001).
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***The International NGO Task Group on Legal and Institutional Matters (INTGLIM)** was formed as a legal and institutional issues caucus in 1991 at the end of the second Preparatory Committee (PrepCom) meeting for the UN Conference on Environment and Development (UNCED). During the 1992 Earth Summit, the task group served as the primary NGO caucus that developed the proposal, and generated support for, the establishment of a UN Commission on Sustainable Development (CSD). Since 1992, INTGLIM has continued to operate as an informal network and convened meetings and briefings on legal and institutional issues, and on related topics in the CSD and general UN reform processes. INTGLIM is co-chaired by the International Secretariat of the World Federalist Movement (WFM) and the Center for Development of International Law (CDIL).*