It's High Time for an International Environmental Court

By Murray Carroll | ICE Coalition | April 24, 2013

When I tell people I work for an organization that advocates the creation of an International Court for the Environment, they invariably say, "That sounds like a great idea!" followed more often than I'd like with, "If we can't create an effective climate change treaty, how are we going to agree on enforcing it in an international court?"

It is precisely when global problems appear intractable that we should expand our understanding of what is possible. People understand that international law should do a better job protecting the environment, and everyone intuitively recognizes that global problems require global solutions. People also intuitively understand that what is politically difficult at the national level is even more difficult at the global level. As a result, finding an equitable balance between the need for economic prosperity, environmental protection, and addressing the social needs of all global citizens is not easy.

While there are numerous systemic obstacles to global cooperation—different priorities for the developed and the developing; the anarchic nature of the world order and thus the perceived unenforceability of international law—these obstacles should not be viewed as insurmountable. Indeed, it is precisely when global problems appear intractable that we should expand our understanding of what is possible by reimagining the tools of international law.

My goal, after I explain how international law can work, is to turn that initial skepticism into an enthusiastic: "So, how are we going to make this work?"

AN INTERNATIONAL ENVIRONMENTAL COURT
So, how would it work?

To begin, we need a clear idea of what I mean by "an international environmental court." I don't mean prosecutors looking to persuade a judge to punish polluters. That would be more in line with a criminal court, and while the International Criminal Court doesn't currently hear such cases, others are working on the idea.

I'm referring to the more common process of states negotiating treaties that agree to international standards, and when those standards are not met, disputes are settled between states in an international forum. The goal then is to elevate behavior in line with mutually agreed standards, rather than to punish.

My proposal for an international court for the environment looks at how this new venue would work in comparison to the current international legal order, and how providing greater environmental accountability could serve to rebalance the world order for people and planet.

First, we need an international court that provides subject matter expertise for cases that include substantial environmental concern. If judges don't understand the scientific evidence before them, they are unlikely to make decisions based on the merits of that evidence. For a complex subject matter you need a specialized court.

Second, both state and non-state actors should have standing (be able to initiate cases) before the court. The International Court of Justice and the World Trade Organization, for example, do not offer standing to non-state actors.

Third, states should be bound by the decisions of the court (what is called compulsory jurisdiction). States that allow environmental degradation in contravention of mutually agreed international standards should be held accountable.

For a complex subject matter you need a specialized court.

Fourth, the court should rely on clear, precise, and enforceable language, to be found in a new era of international environmental laws. Aspirational treaty language is insufficient to protect the environment.

The fourth proposal is the most difficult and the most crucial. International environmental law is notorious for using weakened language, crafted by national delegates desperate to finalize an agreement in the waning hours of a summit. As a result, many environmental treaties resemble wish lists more than firm contracts. They reflect lowest common denominator politics, precisely because forward-looking global regulations, in the absence of strong political will, are so difficult to create. This is the fundamental weakness of the environmental regime, but this, too, is not insurmountable.
As issues of climate change and resource scarcity rise in importance relative to competing concerns for economy and security, the need for deeper cooperation between states will necessitate stronger, legally binding language and enforcement provisions. Indeed, this is increasingly likely to happen as environmental, economic, and security threats converge.

For example, as transboundary glaciers, lakes, rivers, and aquifers recede, economic conflicts over equitable use of the remaining resources will act as a multiplier effect for questions of international peace and security. Therefore, as currently conflicting interests converge on shared threats, obstacles to addressing those threats will be easier to overcome.

The third proposal, that an environmental court hold states accountable, might seem overly optimistic, particularly as only 66 countries agree to the compulsory jurisdiction of the International Court of Justice. However, we can look to the effectiveness of the Dispute Settlement Body at the World Trade Organization, and arbitration under the international investment regime, to see that compulsory jurisdiction is possible when the costs of non-compliance are deemed to be sufficiently high. The European Court of Human Rights, similarly, has demonstrated that compulsory jurisdiction can work for equitable public interest.

The second proposal—standing for non-state actors—is increasingly established in international law. International investment disputes are routinely arbitrated between state and non-state actors, and non-state actors initiate the vast majority of cases heard before the European Court of Human Rights. In fact, in a G-Zero world where states are less likely to take on leadership roles in enforcing global standards, empowering non-state actors to lead may serve to change the politics of transnational adjudication.

And the first proposal—for a specialized court—follows the precedence of virtually every new international court or tribunal since the end of the Second World War and the creation of the modern international legal order. The various international criminal, trade, and human rights courts and tribunals all provide much needed specialized subject matter expertise.

WHY IS THERE NO ENVIRONMENT COURT?

Mostly it is because environmental degradation, including climate change and resource scarcity, does not produce sufficient political concern, at least not yet. For policymakers, these issues are rarely as important as making sure the global economy doesn't tank while they are in office. As a result, states routinely refuse to be bound by clear, precise, and enforceable environmental agreements that necessitate immediate costs for future benefits.

Critics are quick to point out that there are very few purely environmental cases.

Moreover, states simply do not want a non-state actor, or international judge or arbitrator to dictate their domestic policy. To allow this, they argue, would fundamentally threaten their state sovereignty.

There is also the question of creating an international court for the environment, which seems to ignore the polycentric nature of environmental disputes. Generally only one party to a case thinks it is fundamentally environmental, while the other argues it is essentially economic. Both parties inevitably raise legitimate ethical issues: equity considerations for those who will suffer without economic development, or for the people whose air, water, and land will be contaminated as a result.

Critics of an international environmental court are quick to point out that if there are very few purely "environmental" cases, why then should a court that is predisposed to addressing environmental issues decide cases of wider consideration? You may want to ask this of the more than 360 local, regional, and national environmental courts around the world, but it does raise a reasonable question.
DEFINING THE SCOPE: ENVIRONMENTAL VS. ECONOMIC

Who should decide which subject matter expertise is the most important in a polycentric dispute?

States work very hard to negotiate free trade agreements, and there is considerable evidence that globalization under free trade has seen massive global benefits. Brookings suggests that 500 million people have been pulled out of poverty at least in part as a result of global free trade (at the expense of the environment, to be sure, but those really are impressive numbers).

The language used in these treaties is clear, precise, and enforceable, and requires that parties submit to the compulsory jurisdiction of an arbitration panel for any disputes arising under specific terms of the treaty. The language, notably, is fundamentally contractual rather than aspirational.

Investment treaties are then negotiated in the shadow of the free trade treaties, and they serve to crystallize many of the same economic norms. These norms, however, can and often do conflict with weaker environmental norms. One example is the definition of expropriation. When investment capital flows from the developed world to the developing, historically the concern has been that in situations of political upheaval a populist politician might expropriate (nationalize) that capital. As a result, rules have to be put in place to provide protections for foreign investors.

While this risk still exists, the definition of expropriation has been considerably expanded to include the creation of environmental regulations, subsequent to the initial treaty, which might threaten the projected profitability of the investment. In other words, if a new regulation reduces profit, corporations may claim that regulators are attempting to steal (expropriate) their profits.

The persistence of strong trade laws and weak environmental laws is at the root of imbalances in the global system.

There are, of course, examples of countries regulating in bad faith, but reasonable environmental regulations designed to approach developed world standards are routinely challenged under this expanded definition. As such, there is significant concern that the expanded scope is causing a regulatory chill, even in developed countries.

Developing countries, who cannot afford to spend their scarce resources on international arbitration or on the huge settlements being awarded to corporations by investment arbitration tribunals, are having their domestic policy dictated by foreign non-state actors. Part of the reason for these large settlements is that the arbitration panels have
overwhelmingly economic rather than environmental subject matter expertise.

In other words, non-state actors are litigating against states in cases with polycentric issues, in specialized tribunals, under compulsory jurisdiction. You will have no doubt noticed that my own proposal for a strengthened international environmental regime follows the model provided by the flourishing international trade and investment regime.

SUSTAINABLE DEVELOPMENT AS A GLOBAL REBALANCER

The concept of sustainable development suggests that there is a middle ground to be found between the three separate but interconnected pillars of economic, environmental, and social issues. But as this article suggests, the current system has not found nor is it sufficiently seeking the middle ground. It is geared toward economic interests in a manner that all but guarantees we will continue the inevitable march toward climate change and resource scarcity, with all of their ensuing economic and social impacts.

The persistence of strong trade laws and weak environmental laws is at the root of the systemic imbalance. That they echo the current priorities of policymakers is accurate, but as those interests shift due to high-impact climate or scarcity events, the chasm between these laws will need to be filled and filled quickly. Unless we have working models for those new laws and institutions, that transition is likely to be chaotic.

The model provided by the trade regime changes how we look at international law. It need not be anarchic and it need not be unenforceable. The effectiveness of the trade regime is possible precisely because of the salient nature of the global economy, vigorous enforcement by non-state actors, and specialized tribunals. And while the economic and social benefits of economic globalization are staggering, so are the environmental and social costs of an unbalanced system.

As environmental, economic, and security threats converge, there will be increasing calls for a rebalancing of the global system to sufficiently address the environmental pillar. The crucial question is how will that rebalancing be achieved?

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AN ENVIRONMENTAL COURT AS A GLOBAL REBALANCER

One option is to immediately create an international tribunal for the environment, for parties consenting to its jurisdiction, using existing trade and environmental laws to decide cases. While this option doesn't fundamentally rebalance the
system, it does ensure that the gravity of complex scientific and social evidence will be properly considered. This is a crucial first step.

A second option would be an international court for the environment born of a new era of international environmental laws. Institutional reform could conceivably follow the ideal model presented at the top of this paper: vigorously enforced mutually agreed obligations in a specialized court. Clearly this second option goes considerably further than the first by providing a legal and institutional framework to counterbalance the trade regime.∗

A third option is to push for the world trade regime to codify and enforce the norm of sustainable development: to “green” their core treaties and institutions so that they give equal scope to environmental concerns. Furthermore, just as greater stewardship of natural resources will be increasingly necessary for economic prosperity, trade restrictions may well be necessary to dissuade unsustainable resource use. Therefore, a stronger international environmental regime must not only be accompanied by reform of the trade regime, they should be synergistic.

THE NEED TO MODEL NEW ENVIRONMENTAL LAWS AND INSTITUTIONS

What needs to be done, however, in the continued absence of fundamental reform by the trade regime, and in anticipation of a increasing call for a stronger environmental regime, is to build a model of what those international environmental laws would entail; to provide a template for finding the sustainable middle ground between economic and environmental priorities; and to create a framework for how we could enforce mutually agreed standards in the most legitimate and equitable manner possible.

Moreover, while we can learn a great deal from the effectiveness of the trade regime, we should be wary of allowing it to dictate the viability of international environmental standards. As such, an international court for the environment would be a better forum initially to address the norm primacy of an unbalanced global order, interpret and crystallize emerging environmental norms, and ultimately to facilitate the coordination of the two regimes.

In order to do that, we need to reconsider what is possible from global governance; we need to reevaluate the potential of international environmental law to overcome global cooperation and enforcement problems; and we need to reimagine the benefits that an international court for the environment would provide.

* There is room for a number of models between the first and second options. For a very detailed consideration of how some might work, I encourage you to read a recent proposal by my colleagues at the ICE Coalition. [Keep reading]
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