The call for an International Court for the Environment

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The Intergovernmental Panel on Climate Change has determined it unequivocal that global warming is occurring, and it very likely that human activity has contributed to, and continues to exacerbate, climate change.

Despite considerable political dialogue over two decades, and billions of dollars spent on research and adaptation, there remains no international judicial or arbitral body with general environmental competence to hear, determine and advise on disputes arising from the climate change regime, including those contributing to the abovementioned problems. While the Compliance Committee was established under the Marrakesh Accords to facilitate and enforce domestic implementation of Kyoto Protocol obligations, its competence and powers are circumscribed. The work of these committees could readily be subsumed within the remit of an International Court for the Environment (ICE), which could settle environmental disputes, provide access to justice, and galvanise environmental governance.

Environmental dispute resolution

International mechanisms to address and resolve disputes arising from international environmental obligations are notoriously underdeveloped. In fact, debate over the nomenclature of “breach” or “non-compliance” of obligations continues. It is because of the dynamic and political nature of environmental matters, that certain innovative non-compliance and dispute settlement procedures have been developed, such as those of the Montreal Protocol. However, such mechanisms are specific to a particular environmental treaty and may even contribute to dispute settlement fragmentation.

Regrettably, few avenues exist for cross-pollination and concerted, harmonised development of international environmental law jurisprudence. This is one reason why it is important that a dedicated international environmental judicial or arbitral institution be established. Another is that existing dispute resolution bodies are inadequately equipped to receive, interpret and manage scientific and environmental evidence. This may lead to a disconnection between legal decision-making and its practical impacts. For example, a lawyer and scientist may have differing views on the meaning of “precaution” as it applies to the climate change regime.

Should an institution like an ICE exist, which may commence as an informal arbitral tribunal, it could independently and impartially make decisions by judges, arbitrators and experts who understand the interface between science and law. This is surely an imperative for advancing climate change jurisprudence. Indeed, international judicial assistance has recently been sought through an Advisory Opinion on climate change from the International Court of Justice. This opinion will come from the ICJ’s general chamber, not its environmental chamber, which was disbanded for lack of use by states.

Access to justice

An ongoing impediment to effective environmental dispute resolution is a lack of standing in courts for non-state actors. This class of actors includes individuals (both natural and legal), communities and non-governmental organisations. Because international law has historically governed the legal relations between states, it has provided few avenues of redress for individuals harmed by state or state sanctioned activities. However, this has slowly changed over time, especially as protection of human and economic rights has gained prominence. Unfortunately, such evolution is less apparent in relation to harm caused by climate change and environmental degradation. Access to justice, to a remedy, and to participation in environmental decision-making remains underdeveloped at the international level. This is particularly problematic because it is often those who are most affected by climate change, such as the poor, that are without an international voice or remedy. While the Aarhus Convention does seek to improve access to justice, it is limited by its geographical scope of application. An ICE, however, could have global application and would allow any aggrieved person the right to bring a complaint, much like in domestic courts.

International environmental governance

The idea of an ICE is not new. Indeed support for such a body has ebbed and flowed in recent history. As international awareness and understanding of climate change increases, so does the need for more effective national and international environmental dispute settlement systems. This was tacitly highlighted at the 2012 United Nations Conference on Sustainable Development, and expressly endorsed by the 2012 World Congress on Justice, Governance and Law for Environmental Sustainability. Accordingly, an ICE can provide a crucial piece of the international environmental governance puzzle. There is no legal obstacle to its coming into existence, only political. The time is ripe for its arrival.

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