



2015

The Limits of Judicial Mechanisms for Developing and Enforcing International Environmental Norms: Introductory Remarks

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Recommended Citation

Nienke Grossman & Jacqueline Peel, Introductory Remarks to The Limits of Judicial Mechanisms for Developing and Enforcing International Environmental Norms, 109 PROCEEDINGS OF THE ANN. MEETING (AM. SOC'Y OF INT'L L.) 189 (2015).

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THE LIMITS OF JUDICIAL MECHANISMS FOR DEVELOPING AND ENFORCING INTERNATIONAL ENVIRONMENTAL NORMS

This panel was convened at 9:00 p.m., Friday, April 10, by its moderators Nienke Grossman, of the University of Baltimore, and Jacqueline Peel, of the University of Melbourne, who introduced the panelists: Alan Boyle of the University of Edinburgh School of Law/Essex Court Chambers, London; Philippe Gautier of the International Tribunal for the Law of the Sea; Marcos Orellana of the Centre for International Environmental Law; and Cymie Payne of Rutgers University.

INTRODUCTORY REMARKS BY NIENKE GROSSMAN* AND JACQUELINE PEEL†

International courts and tribunals have played a key role in the development of principles and norms of international environmental law. Over the last two decades, such bodies have been asked to resolve a growing number of disputes that involve environmental issues. The types of issues considered by international courts and tribunals in environmental disputes have also expanded in scope and complexity. For instance, disputes concerning environmental matters may involve claims of state responsibility, law of the sea questions, human rights issues, or trade and investment aspects.

Focusing on judicial mechanisms, this session asked panelists to consider how international environmental norms develop and are applied where key states disengage from the available lawmaking processes or disagree on the substantive content of the norms. Given the apparent lack of commitment or consensus on norms in some cases, a central question raised was whether international courts and tribunals are equipped to develop and apply the law case-by-case.

The session also considered to what extent these bodies might impede, rather than advance, positive normative developments. In this regard the session canvassed promising alternatives and potential reforms to dispute resolution processes. The session, co-sponsored by the International Courts and Tribunals Interest Group (ICTIG) and the International Environmental Law Interest Group (IEnLIG), took a roundtable format where panel members were asked to respond to a series of questions put by co-moderators Nienke Grossman (University of Baltimore School of Law; co-chair ICTIG) and Jacqueline Peel (Melbourne Law School; co-chair IEnLIG).

Panelists were asked for their reflections on the benefits and potential limits of judicial mechanisms in developing and enforcing international environmental norms, and as part of the overall landscape of international environmental governance. Issues canvassed by the panel included:

- Whether it is possible to characterize a dispute as purely environmental in nature;
- Whether the proliferation of international courts and tribunals and other mechanisms for dispute resolution aids or hampers the development and enforcement of international environmental norms;

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- How international courts and tribunals fare in their consideration of technical and scientific material, which regularly features in environmental disputes; and
- What role non-state actors, particularly non-profit environmental organizations, should play in cases raising environmental issues.

Members of the panel were: Alan Boyle, Barrister and Professor of Public International Law, Edinburgh Law School; Philippe Gautier, Registrar, International Tribunal for the Law of the Sea; Marcos Orellana, Director, Human Rights and Environment Program, Center for International Environmental Law; and Cymie Payne, Assistant Professor, Department of Human Ecology and School of Law, Rutgers University. Remarks from each of the panelists follow.

THE ROLE OF INTERNATIONAL COURTS AND TRIBUNALS IN THE DEVELOPMENT OF ENVIRONMENTAL LAW

*By Philippe Gautier**

We may all agree that international environmental law has developed significantly over the last twenty years, an evolution which is reflected in the increased number of judicial decisions rendered in environmental cases. However, the role of international courts in the development of international law is rather limited. Their task is to apply the law to a specific situation in order to settle a dispute. By doing so, they may provide answers which ensure a consistent approach in the implementation of environmental law. It is from that limited perspective that judicial pronouncements may contribute to the development of international law.

In its jurisprudence, the International Tribunal for the Law of the Sea (Tribunal) has already dealt with a number of environmental cases, particularly in the context of proceedings relating to the prescription of provisional measures under Article 290 of the United Nations Convention on the Law of the Sea (Convention). The Tribunal is then competent, pending a decision on the merits, to prescribe provisional measures “to preserve the respective rights of the parties to the dispute,” as well as “to prevent serious harm to the marine environment.”

In this context, the first experience of the Tribunal in environmental matters took place in 1999 with the *Southern Bluefin Tuna* cases (*New Zealand v. Japan; Australia v. Japan*). New Zealand and Australia claimed that by conducting an experimental fishing program for Southern Bluefin Tuna, Japan was breaching its obligation, under Articles 64 and 116 to 119 of the Convention, to cooperate with a view to ensuring conservation of bluefin tuna species. They further contended that the experimental fishing program would endanger the existence of the stock. In its order of August 27, 1999, the Tribunal prescribed, as a provisional measure, that the three states concerned should “each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna” in excess of the total allowable catches last agreed by the parties. This case is particularly illustrative of the interest of provisional measures proceedings in environmental disputes. This may be expressed as follows:

- Provisional measures proceedings constitute a useful tool to preserve the marine environment against a risk of serious harm. The term “serious” should be here underlined. In other words, the threshold for determining the need for provisional

* Registrar for the International Tribunal for the Law of the Sea and a Professor at Catholic University of Louvain (Louvain-la-Neuve). The opinions are expressed by the author in his personal capacity.