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Second Thoughts? The International Adjudication of Environmental Disputes 30 Years Later

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Abstract

The role of international adjudication with respect to environmental disputes has been a matter of significant debate, particularly since the late 1980s. Scepticism about the creation of an international environmental court, the lack of use of specialised environmental chambers and the rise of non-compliance procedures largely supported the view that international adjudication had a limited role to play in this context. This conventional view is today being reconsidered. This is due in part to the surge in domestic climate litigation but also, as argued in this brief contribution, to the potential of international adjudication to address the challenges that had once supported arguments against it, namely (1) the ambiguity and indeterminacy of substantive provisions in multilateral environmental treaties; (2) States' own capacity limitations to discharge their duties under such treaties, and (3) the need for treaty regimes to accommodate changing social, economic, political and, of course, environmental circumstances.

Keywords

environmental disputes – international adjudication – climate litigation

1 Introduction*

Writing in 1992, at the time he was President of the International Court of Justice (ICJ), Sir Robert Jennings famously expressed scepticism regarding the role of a specialised international environmental court:

There is, however, sometimes a tendency to suppose that a new and particular branch of international law might be better served by a new and particular tribunal of specialists or 'experts'. In some types of disputes that might well be so. But, as I have already mentioned, one lesson that emerges very clearly from the Conference [the 1992 Rio Conference on Environment and Development] is that the necessary legal syllabus is no specialist affair at all. It ranges over the whole field of public international law. Already in this brief comment we have come across crucial environmental questions involving the technical rules of the law governing the conclusion, interpretation and application of treaties, and the nature and rules of the formation of general customary law. This need to see specialised law in the context of the general law is indeed a truth familiar to practising lawyers in the domestic State scene. However esoteric one's professed speciality may be, it is the common experience that, faced with particular problems, one is often at a loss unless one has a mastery of the elements of the ordinary everyday law.¹

The idea of such a specialised court had been put forward, most prominently, by Amedeo Postiglione, a judge of the Italian *Corte di Cassazione*.²

The debate concerned in part the desirability of a "specialised" court, comparable to the regional courts focusing on human rights or other specialised tribunals. But there were broader considerations at play regarding the suitability of international adjudication to environmental disputes. Part of the complexity came from the challenges involving the inadequacy of judicially-ordered reparation for irreversible and non-linear environmental

* The text of this contribution is a revised and updated version of the notes for the lecture delivered by the author to open the conference "La tutela giurisdizionale dell'ambiente nel diritto internazionale ed europeo" held in Rome in December 2022. Any opinions expressed in this contribution are in the author's sole academic capacity.

1 JENNINGS, "The role of the International Court of Justice in the Development of International Environment Protection law", *Review of European, Comparative & International Environmental Law*, 1992, p. 242.

2 POSTIGLIONE, "A More Efficient International Law on the Environment and Setting up an International Court for the Environment within the United Nations", *Environmental Law*, 1990, p. 321.

damage, its *ex post facto* approach, the very possibility of characterising a dispute as an “environmental dispute” and, more generally, the relevance of the underlying theory of compliance.³

The latter issue was perhaps the one with most traction at the time, as well as that which, in my view, deserves reconsideration today. In this brief introductory contribution to the symposium, I would like to contrast the view at the time with the role of international adjudication of environmental disputes that is emerging today, on second thoughts. My goal is to place the examples, indeed the trend, discussed in the contributions to this symposium in the wider light of options to pursue compliance with international rules of environmental protection, whether in treaties, custom or EU secondary legislation.

2 “Managing Compliance” Rather than “Adjudicating”

In an influential book published in 1995, A. Chayes and A. Handler Chayes sought to describe, distil and theorise a practice that had built up in a number of treaties with respect to ensuring a certain level of compliance.⁴ The basic tenet of the book was that considerations of efficiency, interest and normativity explain a general propensity by States to comply with the international obligations they undertake. This, rather than the cynical *Realpolitik* expectation that States only comply with a treaty when they want, is the organisational assumption of what the authors call the “managerial model” by contrast to a simplistic “enforcement model”.

From a managerial model perspective, compliance is not well served, as a rule, by the means relied upon in the enforcement model, such as military and economic sanctions. This is because, as a general matter, the reasons underlying non-compliance are seldom those advanced by realists:

If a state’s decision whether or not to conform to a treaty is the result of a calculation of costs and benefits, as the realists assert, the implication is that noncompliance is a premeditated and deliberate violation of

³ For an overview of these and other considerations see DUPUY and VIÑUALES, *International Environmental Law*, 2nd ed., Cambridge, 2018, p. 293 ff.

⁴ CHAYES and CHAYES, *The New Sovereignty, Compliance with International Regulatory Agreements*, Cambridge, MA, 1995. A collection of studies specifically on compliance with international environmental agreements was published a few years later in a volume edited by BROWN WEISS and JACOBSON (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, Cambridge, 1998.

a treaty obligation. Clearly some of the most worrisome cases of non-compliance take that form ... [a] passing familiarity with foreign affairs, however, suggests that such cases are the exception rather than the rule. Only infrequently does a treaty violation fall into the category of a wilful flouting of legal obligation. Yet enough questions remain about noncompliance and incomplete compliance with significant treaty obligations to warrant analysis of the methods by which international systems can bring deviant behavior into conformity with treaty norms. The analysis must begin with a diagnosis of the reasons for observed noncompliance. If the violations are not deliberate, what explains this behavior? We identify three circumstances, infrequently recognized in discussions of compliance, that in our view often lie at the root of much of the behavior that may seem to violate treaty requirements: (1) ambiguity and indeterminacy of treaty language, (2) limitations on the capacity of parties to carry out their undertakings, and (3) the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.⁵

These observations are intended to reflect the diplomatic practice emerging from different treaty areas, from disarmament to trade to environmental governance. The place of international adjudication within this overall picture is played down as somewhat over-rigid:

Despite the fixation of international lawyers on the virtues of binding adjudication (preferably in the International Court of Justice, but if not, then by a specialized tribunal or arbitral panel), most treaty regimes turn to a variety of relatively informal mediative processes if the disputants are unable to resolve the issues among themselves. Authoritative interpretation of controverted provisions, either by the plenary body of the regime, the secretariat, or a designated interpretative organ, is common, perhaps surprisingly so. It is less contentious than conventional dispute resolution procedures, and in many cases it has a preventive or anticipatory value. On the whole, it has not seemed to matter whether the dispute settlement procedure is legally required or the decision is legally binding, so long as the outcome is treated as authoritative.⁶

With the benefit of hindsight, as I will discuss later, this observation is not an accurate depiction of the role played by international adjudication

⁵ CHAYES and CHAYES, *cit. supra* note 5, pp. 9–10.

⁶ *Ibid.*, p. 24.

on environmental matters. But, in the early 1990s, it was a perceptive contemporaneous analysis of the practice regarding the implementation mechanisms of international environmental agreements.

Indeed, binding international adjudication, understood as the obligation (rather than the possibility) to submit a dispute arising under a given treaty to an international court or tribunal was – and remains – exceptional. With the exception of Part XV, Section 2, of the 1982 UN Convention on the Law of the Sea (UNCLOS),⁷ none of the major multilateral environmental agreements contains a mandatory judicial settlement clause. Aside from some occasional references to conciliation or fact-finding (e.g. in UNCLOS but also in the 1997 UN Convention on the Non-navigational uses of international watercourses,⁸ the Convention on Biological Diversity⁹ or the UN Framework Convention on Climate Change (UNFCCC)¹⁰), the main approach, starting from the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,¹¹ has been to manage non-compliance through non-compliance procedures and, upstream, through monitoring/reporting and compliance facilitation (e.g. through financial assistance, technology transfer and capacity-building).¹²

Yet, despite the persisting scepticism regarding the creation of a specialised environmental court, the international adjudication of environmental disputes has, since then, flourished in a range of “borrowed fora”, i.e. in courts and tribunals with general competence or with specialised competence in areas other than environmental matters.¹³ Today, the three requests for

7 United Nations Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994, particularly Article 286.

8 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, entered into force 17 August 2014, Article 33.

9 Convention on Biological Diversity, 5 June 1992, entered into force 29 December 1993, Article 27(4).

10 See United Nations Framework Convention on Climate Change, 9 May 1992, entered into force 21 March 1994, Article 14(6). The relevant annex was never developed. Recently, the International Council for Commercial Arbitration (ICCA) convened a Panel of Experts to develop a conciliation annex. The only concrete use of these different conciliation mechanisms so far has been the conciliation between Timor-Leste and Australia under UNCLOS. See LE MOLI, VIÑUALES, “A Foundational Experiment: The Timor Leste-Australia Conciliation”, in TOMUSCHAT and KOHEN (eds.), *Flexibility in International Dispute Settlement: Conciliation Revisited*, Leiden, 2020, p. 156 ff.

11 Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, entered into force 1 January 1989, Article 8.

12 See generally VIÑUALES, “Managing Abidance by Standards for the Protection of the Environment”, in CASSESE (ed.) *Realizing Utopia. The Future of International Law*, Oxford, 2012, p. 326 ff.

13 DUPUY and VIÑUALES, *International Environmental Law*, cit. supra note 4, pp. 304–309.

advisory opinions in relation to climate change pending before the ICJ,¹⁴ the ITLOS¹⁵ and the Inter-American Court of Human Rights,¹⁶ emphasise, in many ways, the opposite view of what Chayes and Handler Chayes thought would be the limited fate of this “fixation of international lawyers”. In fairness, the international adjudication of environmental disputes only started to pick up the pace from the early to the mid-1990s onwards.¹⁷ Moreover, the reasoning underlying the diplomatic practice that this strand of scholarship sought to describe remains relevant from an analytical standpoint. The very reasons why they thought adjudication was ill-suited to manage non-compliance with environmental norms can guide the analysis of why, on second thoughts, international adjudication may have much to contribute.

3 Beyond a “Fixation of International Lawyers”: the Evolving Role of Adjudication in the Compliance Process

Chayes and Handler Chayes had pointed to three main reasons why international adjudication may be too rigid an approach to manage compliance with multilateral environmental agreements (MEAs), namely (1) the “ambiguity

14 *Obligations of States in respect of climate change*, ICJ Request for Advisory Opinion, 12 April 2022, available at: <https://www.icj-cij.org/case/187>.

15 International Tribunal for the Law of the Sea, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, 12 December 2022, available at: <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>.

16 Corte Interamericana de Derechos Humanos, *Solicitud de Opinión Consultiva presentada por Colombia y Chile*, 9 January 2023, available at: https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634.

17 Two indicators of this trend are provided by the beginning of the environmental cases in the ICJ docket, as perceived by the Court itself, and by the leading case opening the environmental case law of the European Court of Human Rights. The catalyst was the 1992 Rio Conference on Environment and Development. On these two items see: RANJEVA, *L'environnement, la Cour internationale de justice et sa chambre spéciale pour les questions d'environnement*, 1994, p. 40; *Annuaire français de droit international*, p. 433 (the Court established a Chamber on Environmental Matters in the light of the growing environmental case-load, represented at the time by three main cases: *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment of 26 June 1992, ICJ Reports, 1992, p. 240; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Request for Advisory Opinion, 8 July 1996, p. 226; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, ICJ Reports, 1997, p. 7; European Court of Human Rights, *Lopez Ostra v. Spain*, Application No. 16798/90, Judgment of 9 December 1994.

and indeterminacy” of substantive provisions in MEAs, (2) States’ own capacity limitations to discharge their duties under such treaties, and (3) the evolving nature of the treaty regimes, which had to accommodate changing social, economic and political circumstances (and indeed environmental change as such). But the role of international adjudication has adapted to these challenges, in ways that have turned international courts and tribunals into key players of a “regulatory”, not merely a responsibility-based approach. To explain my point, I will briefly review some illustrative developments under each of these three challenges.

3.1 *Resort to Adjudication to Dissipate “Ambiguity” and “Indeterminacy”*

Whereas the “ambiguity” and “indeterminacy” of international law became somewhat of a mantra in some – then – fashionable circles of international legal scholarship, reality requires a more nuanced view. It is true that some provisions in some MEAs, particularly those designed as “framework” conventions or agreements, are broadly formulated or heavily caveated. But that does not mean that they are unsuitable for adjudication or “non-judiciable”.

Article 192 of the UNCLOS is a case in point. It is stated in very simply but very broad language: “States have the obligation to protect and preserve the marine environment”. There was at the time of its adoption some debate as to whether this provision was “binding” (in the misleading meaning of judiciable, i.e. capable of being used to judge the conformity of a certain conduct with it). The very broad formulation retained would be a typical example of “ambiguity” or “indeterminacy”. Yet, the question is now moot, after the ITLOS,¹⁸ some arbitral tribunals¹⁹ and the ICJ itself²⁰ made clear that it is simply a norm, to be interpreted and applied to the circumstances of the case, sometimes with the result that the relevant conduct is inconsistent with it.

Another important nuance to the assertion that environmental norms are too broad and indeterminate to be judiciable is, of course, that many norms

18 International Tribunal for the Law of Sea, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Case No. 17, Advisory Opinion, 1 February 2011, para. 97; International Tribunal for the Law of Sea, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, Advisory Opinion, 2 April 2015, paras. 111, 120, 124, 136, 180, 216; International Tribunal for the Law of Sea, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Case no. 23, Order, 25 April 2015, paras. 68–73.

19 Permanent Court of Arbitration, *Republic of the Philippines v. People’s Republic of China*, Case No. 2013–19, 12 July 2016, paras. 950–966.

20 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment of 21 April 2022, ICJ Reports, 2022, para. 95.

are very precise. One could think of the phase out/down obligations in Articles 2A to 2J of the Montreal Protocol, or of the prior informed consent and export prohibition obligations in Articles 4(2)(e)-(g), 4(5), 4(6) and 6 of the Basel Convention²¹ or, still, of trade restriction obligations arising from Articles III to V the CITES.²² Many obligations in a range of other areas (or even in domestic law) are less specific than the substantive and procedural obligations arising from these treaties.

But, perhaps, the main point underlying the way in which the managerial approach to compliance understands “ambiguity” and “indeterminacy” lies in norms that, in practice, have had limited traction. The main illustration is Article 4(1) and (2) of the UNFCCC, which has largely failed to push States to reduce their emissions of greenhouse gases. But that should not be equated with unsuitability for judicial decision-making. The request for an advisory opinion on climate change pending before the ICJ specifically entrusts the Court with the task of identifying, fleshing out and applying this and other broad obligations that govern the conduct driving climate change. Interestingly, it is precisely because of the broad and indeterminate character of such norms that international adjudication has a major role to play, which could not be suitably performed by political organs or non-compliance procedures. The purpose of the request is to receive judicial clarification of the relevant obligations²³ with a level of granularity that would allow the Court to assess the conformity of the conduct with such obligations and derive the relevant legal consequences.²⁴

3.2 *Adjudication to Discipline Capacity*

The issue of States’ own capacity limitations to discharge their duties remains relevant, but even in this context, it would be inaccurate to conclude that adjudication has no role to play regarding the issue of capacity.

21 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, entered into force 5 May 1992.

22 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, United Nations, entered into force 1 July 1975.

23 UN General Assembly, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change* (Resolution 77/276). The first question put to the Court in the operative part of the request is: “What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations”.

24 The second question put to the Court concerns such consequences: “What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment [...]”.

A good example is provided by the advisory opinion of the ITLOS Seabed Chamber on the Area. The broad context of this opinion is well-known. It concerns the use of “States of convenience” or, more specifically, the possibility for a company to register in certain developing countries to benefit from certain facilities enjoyed by such countries under the UNCLOS as well as of lower levels of regulation/enforcement to pursue activities relating to the potential or actual exploitation of the resources of the Area. One key question that was put to the chamber was whether, due to their different capacities, developing States were subject to lower standards under the UNCLOS. The opinion had been sought by small island developing nations to assess their legal exposure in case of sponsoring activities by private companies in the Area. Only an authoritative legal opinion would offer sufficient clarity and security. The chamber provided a long and detailed opinion. On the point of “States of convenience”, it did not shy away from calling out the risk and affirming that the same standard applied to all States:

none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State ‘specifically provides’ for according preferential treatment to sponsoring States that are developing States. As observed above, there is no provision requiring the consideration of such interests and needs beyond what is specifically stated in Part responsibilities XI. It may therefore be concluded that the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed. Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States ‘of convenience’ would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.²⁵

In the present context, this example is interesting because it suggests that although differences in capacity to discharge certain obligations do exist, the role of adjudication remains central to ensure that the principle or core

²⁵ *Responsibilities in the Area*, *cit. supra* note 19, paras. 158–159.

content of an obligation is not diluted or curtailed by reference to matters of capacity.

Another important role played by adjudication in this context concerns the provision of financial assistance, technology transfer or capacity-building. Of course, courts do not have resources that they can themselves mobilise or provide. But they do have a role to play when treaty obligations concerning these matters are not being discharged, as it will be discussed under the next heading.

3.3 *Adjudication and Regime Evolution*

Finally, the need for MEAs and, particularly, framework conventions to adapt over time to changing social, economic, political and environmental conditions does not, as such, deprive international adjudication from playing an important role.

This is particularly the case when the policy process is underperforming. In such a context, litigation can perform (and is performing) a regulatory function, understood as controlling, ordering or influencing the behaviour of governments and companies in a specific area.²⁶ As explained by Osofsky and Peel, climate litigation can have both direct and indirect impacts of a regulatory nature:

Direct impacts are instances of formal legal change as a result of the litigation. These may manifest as the advent of targeted rules, policies, or decision-making procedures that are mandated by a judgment or arise out of the legal interpretation developed by the court in the litigation. Indirect impacts are more diffuse and describe pathways flowing from litigation that arise due to the incentives that judgments provide for behavioural change by governmental and non-governmental actors.²⁷

A similar trend in the strategic use of climate litigation is now unfolding at the international level, with the specific purpose of legally compelling States to do more than what the so far process-focused approach, mired in social, economic and mostly political complexities, has achieved. An illustration can, once again, be derived from the pending request for an advisory opinion on climate change from the ICJ. Some preambular paragraphs show that part of what is being sought through adjudication is the discharge, by developed countries, of

²⁶ PEEL and OSOFSKY, "Litigation as a Climate Regulatory tool", in VOIGT (ed.), *International Judicial Practice on the Environment*, Cambridge, 2019, p. 311 ff.

²⁷ *Ibid.*, p. 323.

their acknowledged duties, including duties of financial assistance, technology transfer and capacity-building under the UNFCCC and the Paris Agreement. The relevant paragraphs of UN General Assembly Resolution 77/276 “emphasise” or “express serious concern” regarding the compliance deficit:

Emphasizing the urgency of scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, as well as for averting, minimizing and addressing loss and damage associated with those effects in developing countries that are particularly vulnerable to these effects, *Expressing serious concern* that the goal of developed countries to mobilize jointly USD 100 billion per year by 2020 in the context of meaningful mitigation actions and transparency on implementation has not yet been met, and urging developed countries to meet the goal.

Much like domestic climate litigation, faced with underwhelming political action and protracted negotiations, compliance with the basic adaptive components of a regulatory regime is now sought through international adjudication.

4 Second Thoughts?

To conclude this brief introductory piece, the scepticism surrounding the suitability of international adjudication to address environmental disputes and, more generally, environmental problems, must be reconsidered. Adjudication, both domestic and international, can perform and has performed important roles in relation to those very areas for which a managerial focus on compliance deemed it unsuitable. This is not to say that adjudication alone can do most of the heavy-lifting relating to compliance. But it provides solid grounds to dispel the impression that a focus on adjudication and legality is a mere “fixation of international lawyers” with little to offer in terms of compliance with the regulatory regimes of MEAs. The contributions in this special issue capture this role in different contexts and from different perspectives.