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Litigating the Environment: Process and Procedure Before International Courts and Tribunals

By Justine Bendel

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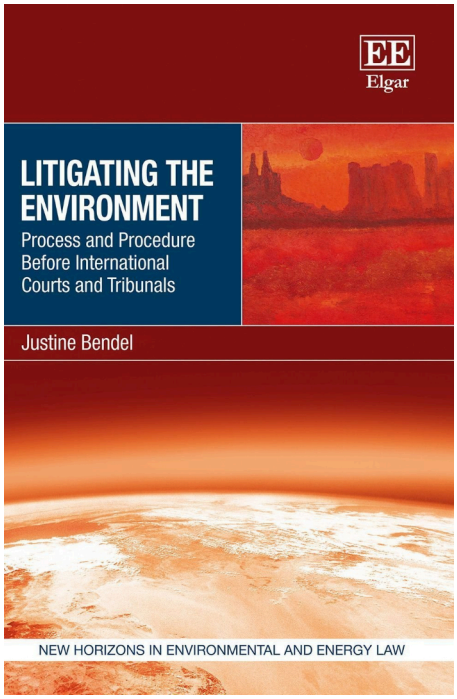

International environmental law has grown in leaps and bounds since the 1972 UN Conference on the Human Environment held in Stockholm, Sweden. Fifty years after that conference, evaluating the progress made and the challenges that lie ahead is a critical and timely endeavour. One such area is that of enforcement through the reliance of international dispute resolution mechanisms. It discusses procedural innovations to enhance the utilization of international courts and tribunals, deliver environmental justice and improve governance. The justification for the book by Justine Bendel is the recognition of the importance of the judiciary in promoting sustainable development worldwide, first encapsulated in the Judicial Symposium on the sidelines of the World Summit on Sustainable Development in 2002.

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The book is divided into eight chapters, six being substantive, preceded with an introduction and a concluding chapter at the end. The introduction narrows down the scope of the book to a response to the criticism that inter-state judicial settlement mechanisms are ill-suited to deal with modern developments in international environmental law. It discusses procedural innovations and adjustments that enable courts and tribunals to better address international environmental disputes. By doing so, the author makes the point that procedural hurdles should not be an inhibitor for international courts and tribunals to respond to new and emerging challenges in the field of international environmental law, since procedures for these courts are by nature flexible and adaptable. She points out areas of improvement to enable greater delivery of environmental justice by these courts and tribunals without the need for formal reform of the judicial institutions. In her words, 'procedural rules as they stand can be interpreted and used in a favourable way for judging environmental disputes in a coherent manner' (p. 15).

Chapter two provides the context for the analysis in the book by discussing the functions of international dispute resolution within the context of international environmental law. It stipulates that while Article 38 of the Statute of the International Court of Justice provides that the main function of international courts is to settle disputes,

there are related functions that flow from this, including that of law-making and resolving public interest cases. The full scope of the role is dependent on several factors including the context in which jurisdiction is granted, the nature of the jurisdiction granted by law, the nature of international law as a system, the domestic political context and the nature of the obligations in question. The author argues that these factors justify her call for judicial bodies to be flexible in how they interpret and apply their jurisdiction in addressing environmental disputes. This requires careful balance to ensure harmony. The author argues that international courts have been more successful in some of those roles than in others, highlighting clarification of the law as one of the more successful functions while in enforcement and dispute resolution the results has been more mixed.

One of the most contentious procedural issues in environmental dispute resolution has been that of *locus standi*. Standing determines access and thus the ability to ventilate issues before a court or tribunal and for the dispute resolution body to provide appropriate remedies. **Chapter three** demonstrates that there has been progress away from treating environmental disputes away from a purely bilateral affair to one that involves the public interest. Relying on the concept of public interest litigation provides a powerful tool for improving judicial enforcement in the environmental field at the global level, factors supported by reliance on such concepts as common concern of making and areas beyond national jurisdiction. The reliance of public interest is supposed to be supplementary to and not instead of bilateral. It will also support the move away from the traditional position that views states as the only subjects of international law, what the author calls a vertical view to a more nuanced, and in the author's categorization, a horizontal view focusing on application of the rule of law beyond states only. The chapter calls for a focus on multi-stakeholder recognition and adjustment of state sovereignty interpretation towards responsibility by categorizing international environmental obligations as reciprocal, interdependent or integral obligations and using this approach to influence judicial treatment of the question of standing.

Chapter four explores how international courts and tribunals deal with scientific evidence in resolving environmental disputes. While facts have not traditionally been the point of contestation or determination, the chapter seeks to demonstrate their importance and justify the need for focus and required procedural innovations by international courts and tribunals to help deal with the uncertainty of scientific facts. The rationale for this, as the author correctly points out, is due to the close nexus between international environmental rules and scientific facts. The adoption and application of the precautionary principle was predicated on the need to balance scientific uncertainty and legal obligations. Courts have to be flexible and adapt the application of their procedural rules in the fact-finding process so as to address the uncertainty and necessity of scientific evidence in environmental dispute resolution. Questions about the kind of evidence required, who collects and presents it, what weight it is given by the court, and the questions of burden and standard of proof are discussed. Also important is what standards courts and international tribunals should apply in reviewing evidence, including a discussion of the concept of best available scientific knowledge. The author posits that the standard to be applied in review is not settled. This provides room for variations and innovations which should finally lead to the development of a law of evidence attuned to what the author calls a 'shifting reality of scientific facts' (p. 147).

Continuing the theme of procedural innovations, **chapter five** discusses how international courts and tribunals can depart from the traditional criticisms of not being suited to prevent international harm effectively and in a timely manner to the environment. It discusses the use of provisional measures, highlighting their importance, preconditions for their exercise, the types of measures available and how to ensure that the measures once issued are enforced and complied with. This discussion builds onto that of remedies in chapter six. The chapter proceeds from the standpoint that although the power of international courts and tribunals to provide remedies is settled, the extent and effectiveness of the exercise of that power is subject of debate. The central argument of the chapter is that courts have discretion in awarding remedies and that applied effectively the power can enable courts to overcome procedural strictures including the question of state responsibility and how it can be modified in environmental disputes, the debate about the purpose of remedies in environmental cases, and the nature and options of remedies in international environmental field.

The **final chapter** explores the availability of non-compliance procedures and ways of creating linkages with judicial procedures to ensure that the two approaches are reinforcing each other and not mutually exclusive. The author argues that cooperation will strengthen judicial bodies to ensure that they are not side-stepped or watered down by politically induced decisions that may come from non-compliance measures.

The book is an important contribution to international environmental governance as it details how one of the major criticisms and limitations of international environmental law, being that of ineffective enforcement and compliance can be addressed. By capturing several innovations to the interpretation and application of procedural rules to the dispute resolution arena, the author confirms that international courts and tribunals are an important actor in the quest for sustainable environmental management growth of international environmental law. It is important to note though that a key lingering question is what other reforms are necessary to ensure that the obtaining situation captured by the author that there 'there is no binding decision from an international court or tribunal that relates solely to environmental law' (p. 3) does not subsist for long. Debates such as whether it is necessary to have an international court or tribunal solely focused on international environmental disputes will not go away despite the very erudite contributions by this book.


INTRODUCTION
BIOPIRACY AND BENEFIT-SHARING RULES
ENVIRONMENTAL IMPACT ASSESSMENT
ENVIRONMENTAL LAW
BIODIVERSITY
BIOSECURITY
Access and with travel rights