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

Justine Bendel

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Amidst a heightened international commitment to address and tackle environmental issues sparked by the entry into force of the 2015 Paris Agreement, it is expected that international judicial bodies will be increasingly tasked to determine the law, and ensure the proper application of rules and enforcement of obligations under multilateral environmental treaties.[1] *Litigating the Environment: Process and Procedure Before International Courts and Tribunals*, authored by Justine Bendel, is a timely and insightful contribution that challenges the traditional assumption that interstate judicial settlement is 'old-fashioned and, therefore inadequate to respond to the new legal developments in international environmental law'.[2] Instead, Bendel's thesis is that international courts and tribunals can creatively adapt procedural rules to better cater to the needs of environmental dispute resolution.[3]

After canvassing the functions of international environmental litigation, Bendel takes readers through several procedural elements of the international dispute settlement system. She starts by discussing how the rules on standing could be adapted so that a state can commence proceedings before international courts and tribunals to enforce a rule in the public interest to protect the global environment. She then analyses the ways a court or tribunal could deal with scientific evidence that is inherently uncertain when evaluating a matter before them. Finally, she moves on to remedies and outcomes, including how a court or tribunal can make provisional measures to stop detrimental actions quickly before environmental damage becomes irreparable. The logical and chronological

[1] Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32(2) *Review of European, Comparative & International Environmental Law* 237, 238.

[2] Justine Bendel, *Litigating the Environment: Process and Procedure Before International Courts and Tribunals* (Edward Elgar Publishing, 2023) 2. The eBook version is priced from £20/$26 from eBook vendors while in print the book can be ordered from the Edward Elgar Publishing website.

[3] Ibid 12.

order in which the various procedural elements are discussed makes it easy for readers to follow.

Bendel also examines the relationship between the dispute settlement process and other non-compliance processes that are created by multilateral environmental agreements, considering the possible consequences of their interaction. For example, she describes how an international court could award remedies that involve deference to the treaty body which is capable of monitoring compliance with the judgment given by the court.[4] She thus argues that this form of cooperation and interaction can lead to outcomes that strengthen environmental protections.

The author acknowledges that there are numerous international courts and tribunals that deal with environmental rules, and refers to various decisions to illustrate that some approaches are more appropriate to the adjudication of environmental disputes than others. For example, she compares the approaches adopted by different courts and tribunals in the way they treat scientific evidence when making decisions on matters of law.[5] Similar to other authors,[6] she also argues that there is significant scope for 'cross-fertilization' in procedural innovations,[7] since international courts and tribunals have an inherent power to determine their own procedural rules to enable them to conduct proceedings effectively and efficiently. This allows them to adapt and adopt the best practices of each other.[8]

Bendel also appreciated the challenges that were peculiar to, or at least relatively frequently encountered during, environmental disputes. This led her to discuss only the most contentious procedural elements, having regard to the nature and context of environmental disputes. For example, Bendel considered that environmental obligations had a public interest character, which led her to discuss how the procedural rules regarding state responsibility for breaches of such obligations could be adapted to facilitate litigation in the public interest.[9] Bendel also argues that since

[4] Ibid 246–7.
[5] Ibid 142–4.
[6] See, eg, Alan Boyle and James Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4(2) *Journal of International Dispute Settlement* 245, 276.
[7] Bendel (n 2) 146.
[8] Caterina Milo, 'Tackling *Lacunae* in International Courts and Tribunals' Procedure: The Role of External Precedent' (2022) 2(2) *Italian Review of International and Comparative Law* 323.
[9] Bendel (n 2) 72.

environmental disputes often involve assessing evidence based on scientific facts and uncertainty, the rules on fact-finding can be more flexibly interpreted and applied to allow such evidence to be assessed by technical experts rather than judges alone, while still maintaining the proper administration of justice.[10] Furthermore, given that the subject of environmental disputes may cause ongoing, and at times, irreparable harm to the environment while the dispute is pending before the court or tribunal, Bendel argues that provisional measures are suitable to respond to the urgency and necessity to stop or take precaution against such harm.[11]

Bendel limited her discussion to 'international courts and tribunals that can apply international rules directly related to the protection of the environment, excluding rules that merely have a tangential relationship to the environment'.[12] She justifies this scope by pointing out that a dispute is considered environmental only if the core of the dispute concerns environmental obligations.[13] While understanding, this narrow lens of inquiry nevertheless results in her book largely ignoring the contemporary trend of environmental issues being brought before international courts and tribunals on the basis of non-environmental treaties, including those that deal with trade, investment and human rights.[14] Additionally, trends indicate that more rights-based litigation will likely be strategically instituted to drive further action on climate change in the near future.[15] The book would benefit from a discussion of those strategic litigation cases that did not concern purely environmental obligations.[16]

Overall, *Litigating the Environment* has persuasively shown how procedural aspects of adjudication can enable international courts and tribunals to achieve and enhance environmental protection, 'without the need for radical change within the judicial institutions themselves'.[17] It is

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[10] Ibid 110.
[11] Ibid 148.
[12] Ibid 5.
[13] Ibid 4.
[14] Benoit Mayer and Harro van Asselt, 'The Rise of International Climate Litigation' (2023) 32(2) *Review of European, Comparative & International Environmental Law* 175, 177–180.
[15] United Nations Environment Programme, *Global Climate Litigation Report: 2023 Status Review* (Report, 27 July 2023) 28–31.
[16] See, eg, Helen Keller and Abigail D Pershing, 'Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases' (2022) 3(1) *European Convention on Human Rights Law Review* 23.
[17] Bendel (n 2) 249.

an optimistic and innovative contribution that prepares international judicial institutions to respond to future international environmental litigation, offers a concise discussion of the key areas in which international procedural law could develop to better accommodate environmental disputes, and is written in an approachable and informative manner.

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Kate Cosgrove

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Finlay McKeown

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