

The Judiciary Function of Environmental Governance

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The group came to the following conclusions:

General Considerations

1. The role of the judiciary in strengthening the rule of law

The role of the judiciary is linked to the role of the rule of law. Strengthening the judiciary means strengthening of the rule of law.

2. Definition of judiciary and its functions

It is important to define the role of the judiciary in the international context by listing its functions, which may be broader than in the national context.

3. Conflict between the different levels of legislative systems

The national and international legal systems are not always harmonized (as they should be) and may even conflict with each other.

4. Separation of judiciary functions?

Can we separate the judiciary function with regard to the environment from other related and conflicting issues? Dispute settlement mechanisms that also deal with environmental problem are often centered on another issue, such as investments or trade, among others.

5. Who has standing in court?

It is crucial for an effective judiciary to give a legal standing to affected communities and/or NGOs.

Functions of the Judiciary

1. Strengthening the rule of law
2. Interpreting rules and provisions
2. Creating formal law by acknowledging customary law
3. Moving from written principles to applied principles to law (acting as “midwife” of law by crossing the threshold from theory to practice)
4. Defining public interest by interpreting and applying law

5. Arbitration and dispute settlement
6. Acting as state attorney/public prosecutor
7. Strengthening compliance with law through the strengthening of the system of liabilities
8. Strengthening compliance through building trust and incentives which have a priori effects of compliance enforcement
9. Ensuring compliance and the translation of international agreements into domestic law
10. Providing access to justice
11. Ensuring environmental justice
12. Defining of pre-existing rights (such as indigenous rights which may be raised on the international level and thus influence domestic courts and legislative systems)

Who is Performing the Functions and How Are They Being Performed?

1. There are no specific dispute settlement mechanisms in Multilateral Environment Agreements. However, the Montreal Protocol and the Kyoto Protocol (among others) include compliance mechanisms. The Montreal Protocol compliance mechanism in particular, which is based on consultations and joint solution finding rather than on punishment, has been described as very successful.
2. Most decisions that have implications for the environment have been made in other areas, in general, in the context of settlement procedures in the area of economic cooperation, bilateral investment treaties and the WTO.

However, despite the influence that these decisions have on international environmental policy, many of these settlements are “arbitration in camera,” in which the proceedings are held confidentially. In addition, these dispute settlement processes are often:

- ⇒ based on systems ill-equipped to judge environmental matters, as they lack the infrastructure and resources to deal adequately with environmental matters;
 - ⇒ lacking the relevant knowledge, because arbitrators and staff do not possess the necessary environmental expertise;
 - ⇒ a “byproduct,” as the arbitration award itself deals with the main issue at stake.
3. The International Tribunal on the Law of the Sea performs some of the functions of the judiciary and may serve as a good example. The Law of the Sea Convention established the court and its responsibilities have increased over time. However, there is no body of environmental law that could be compared to the body of the Law of the Sea.
 4. The Environmental Department of the International Court of Justice, in which no cases have been decided thus far.

5. The Permanent Court of Arbitration in The Hague
6. Regional mechanisms, such as the NAFTA dispute settlement mechanism
7. The Inspection Panel of the World Bank
8. The Dispute Settlement Mechanism of the WTO
9. Other functions are fulfilled by the media, NGOs, and International Organizations

Gaps and Obstacles

1. The main obstacle is a lack of knowledge, capacity, training and expertise in the systems that (potentially or already today) deal with the interpretation of environmental rules.
2. Institutional gaps, internationally and nationally.
3. Environmental law is fragmented and limited:
4. Environmental law is characterized by its nascent nature: Principles such as those included in the Rio Principles need to be operationalized and interpreted.
5. Compliance mechanisms are sketchy.
6. No effective system of enforcement exists.
7. The 'pure' environmental case does not exist.
8. Expenses: Affordable access should be granted.
9. Multilateral Environmental Agreements do not provide justice to affected stakeholders: Insufficient access to justice.
10. Lack of clear responsibilities and harmony among different court decisions leads to the problem of forum shopping or picking the 'court of choice.'
11. Lack of harmonization among domestic, regional and international courts.

The Way Forward: Reform of the Existing System

1. Priority: Creating and disseminating knowledge

There is a need for increased knowledge in order to ensure (i) an effective translation of international agreements into domestic law, (ii) compliance with national, supranational and international law, (iii) adoption of effective and efficient decisions, (iv) fair process.

2. Priority: Defining and creating a body of law

One of the most important functions of a judiciary is to foster the creation of a body of environmental law. This includes the definition of the implications of the Rio Principles and their integration into the larger body of environmental law. The judiciary can help to strengthen the system of environmental liabilities and to incorporate the environmental dimension into decision-making.

3. Allocate rights and broaden the standing in court

4. Create and support a unified and efficient dispute settlement mechanism

So far the only dispute settlement mechanisms in place are either restricted to governments (ICJ) or to the parties that submit themselves to a specific system of arbitration.

5. Linking of national courts to the international system of environmental system

6. Include other mechanisms to hold entities accountable (media, NGOs)

7. Creating an environmental appeal body

(a) Considering the creation of a body that can be called upon if “principles of universal applicability” are affected. This appeal should be restricted to the most important principles of international environmental law, however, it should be open to affected communities and individuals.

or

(b) Considering the creation of a body to review the decisions of other dispute settlement mechanisms. This body would focus on the review of the part of the decision dealing with the (global) environment. This may include the idea of an Environmental Supreme Court.

8. Creating a consultative body on environmental law

Creating a body open for requests open to all courts and decision making bodies. This body would only have an advisory function. It would help to enhance the knowledge and to harmonize the decision making, eventually enhancing the consistency of the whole system of environmental law.

And we should also not forget to be always careful in judging!