



CHAPTER FIVE

COURTS, TRIBUNALS, & LIABILITY

INTRODUCTION

This chapter introduces a selection of the best literature on the role of courts and tribunals in enforcing environmental law and promoting sustainable development. By interpreting law, enforcing rights, and providing a forum for dispute resolution, courts and other tribunals that adjudicate claims play a central role in enforcement and compliance. These institutions operate at many levels, possess jurisdiction over different parties and issues, draw on various sources of law, and enforce their judgments in assorted ways. Yet all are engaged in similar work – judging environmental disputes and giving force to national or international environmental laws.

Domestic courts are the main enforcers of environmental law, principally because they have jurisdiction over the firms whose behavior is the target of most environmental regulation. States have pursued a variety of paths in empowering their domestic courts to enforce environmental law. In the United States, for instance, “environmental disputes continue to be decided by courts of general jurisdiction applying principles of general and administrative law.”¹ New Zealand has taken a very different approach. As Bret Birdsong describes in the first article in this chapter, New Zealand has created a specialized court composed of judges and technical experts that is focused exclusively on resolving environmental disputes; the Environment Court is “the primary arbiter of whether activities and policies affecting the environment meet New Zealand’s standard of sustainability.”² New Zealand’s experience with its innovative approach to domestic environmental adjudication offers lessons – both positive and negative – to other States that have similar mechanisms or that are simply exploring their own domestic systems.

¹ Bret C. Birdsong, *Adjudicating Sustainability: New Zealand’s Environment Court*, 29 *ECOLOGY L.Q.* 1, 4-5 (2000).

² *Id.* at 4.



Domestic courts also have an important role to play in implementing international environmental law. As Mary Ellen O'Connell describes in the second excerpt in this chapter, the most common way domestic courts enforce international environmental law is by enforcing domestic laws that implement international law.³ Some domestic legal systems also permit domestic courts to enforce international law directly, without implementing legislation. But as O'Connell explains, direct enforcement efforts often run into significant barriers, including sovereign immunity, standing, and *forum non conveniens*.

Daniel Bodansky and Jutta Brunnée, in the third excerpt in this chapter, present further analysis of the role that domestic courts play in implementing international environmental law, highlighting the crucial role of judicial attitudes towards international law in determining the extent to which international environmental law enters the domestic sphere as an aid to interpretation of domestic law or as a source of persuasive rather than legal authority.⁴

Many domestic legal systems have internalized international environmental norms by incorporating provisions within their constitutions, such as the right to a clean and healthy environment. By giving force to these constitutional provisions, domestic courts can improve environmental governance, strengthen the judiciary, address issues of environmental and participatory rights, empower civil society, and foster sustainable development and environmental implementation and enforcement. In the fourth excerpt in this chapter, Carl Bruch, Wole Coker, and Chris VanArsdale review the various ways that judiciaries around the world have interpreted and applied the right to a healthy environment and the duty to protect it, with an eye to exploring the implications for African States with such constitutional provisions.⁵

³ Mary Ellen O'Connell, *Symposium: Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEG. STUD. 47, 57-64 (1995). For further information on compliance with multilateral environmental agreements, see, Chapter Three: Multilateral Environmental Agreements in Action.

⁴ Daniel Bodansky & Jutta Brunnée, *The Role of National Courts in the Field of International Environmental Law*, 7(1) RECIEL, 11 (1998). This issue of RECIEL is a special issue containing numerous articles about the role of domestic and international courts in international environmental law. The table of contents for this issue can be found at <http://www.ingentaconnect.com/content/bpl/reel/1998/00000007/00000001>.

⁵ Carl Bruch *et al.*, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131 (2001). See also Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281 (1999).



Since firms and other domestic non-state actors are frequent environmental polluters, and domestic courts are the primary adjudicatory bodies with control over these polluters, domestic courts are starting to encounter cases that seek to affix at least partial liability for international environmental problems on domestic actors. For instance, in the United States, eight state attorneys general and the city of New York filed a public nuisance suit in 2004 against the five largest American electric utilities, seeking abatement of their climate-changing emissions.⁶ The fifth excerpt in this chapter, by David Grossman, explores tort-based climate change liability suits, concluding that public nuisance claims are indeed legally viable.⁷ The article illustrates how common law courts can help solve international environmental problems. Domestic courts' receptiveness to these and other similar efforts will determine how successful liability and compensation mechanisms will be in recovering the cost of environmental damage and acting as a deterrent to domestic behavior that has transboundary or global effects.

Liability and compensation, however, are not solely domestic concerns. The EU has recently adopted an environmental liability directive to implement the "polluter pays" principle and sustainable development, by making responsible parties liable for clean-up, relying on the deterrent effect of such liability.⁸ Increasingly, international liability and compensation regimes have also been incorporated into MEAs, enabling a finding of "liability of any legal or natural person under the rules of national law adopted pursuant to international treaty obligations...."⁹

⁶ For a description of this case and other cases around the world addressing climate change, see the homepage of the Climate Justice Programme, at <http://climatelaw.org/>.

⁷ David Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003).

⁸ See Directive 2004/35/CE of the European Parliament and of the Council of April 21, 2004 on environmental liability with regard to the prevention and remedying of environmental damage, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_143/l_14320040430en00560075.pdf.

⁹ Anne Daniel, *Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?*, 12(3) RECIEL 225 (2003) (quoting P. SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 629 (1995)). "International civil liability" reflects an evolution in thinking about liability for international environmental harms, from a focus on the unitary State reflected in the core principle of State responsibility for transboundary harm, to a disaggregation of the State reflected in liability for particular domestic actors. For more on the principle of state responsibility, see Peter H. Sand, *Sanctions in case of non-compliance and state responsibility: pacta sunt servanda — or else?*, 7th INECE Conference Proceedings (forthcoming 2005) (discussing the UN International Law Commission's 2001 Draft Articles on State Responsibility) [excerpted in Chapter Three: *Multilateral Environmental Agreements in Action*]. See also *Trail Smelter ...Case* (United
continued



Of course, these MEA liability regimes – few of which are in force – must be implemented domestically to have any effect, once again implicating the role of domestic courts. Anne Daniel, in the sixth excerpt in this chapter, reviews the recent civil liability developments in MEAs and considers the implications of this experience for the desirability of such international liability regimes, finding that negotiation and implementation of such regimes is time-consuming, resource-intensive, and complex.¹⁰

The nexus between domestic and international courts is not limited to their shared concerns regarding liability and compensation for environmental harms. Courts at all levels around the world – domestic, international, and supranational – are increasingly connecting with one another in the course of their judging. This transjudicial communication, documented by Anne-Marie Slaughter in the seventh excerpt in this chapter, occurs both horizontally (with increasing cross-citation and cross-fertilization of ideas among courts of the same status) and vertically (between national and supranational courts) across borders.¹¹ As her article describes, the increase in global judicial networking can empower domestic and supranational tribunals, can reassure States that other States are enforcing international law, and can promote dissemination of ideas among legal systems.¹²

The vertical communication in particular has proven critical to the effectiveness of supranational tribunals in Europe. As Slaughter and Lawrence Helfer note in the eighth excerpt in this chapter, the success of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) has depended on their ability to secure compliance by convincing domestic courts to use their power on its behalf.¹³ Drawing from the experience of these two supranational tribunals, Helfer and

States v. Canada), Arbitral Tribunal, 3 UN Rep. Int'l Arb. Awards (1941); Stockholm Declaration, Declaration of the United Nations Conference on the Human Environment, Principle 21, 21st plenary meeting, June 16, 1972; Rio Declaration on Environment and Development, Principle 2, adopted at the United Nations Conference on Environment and Development (UNCED), June 14, 1992 (state responsibility for transboundary environmental harm).

¹⁰ Daniel, *supra* note 9.

¹¹ Anne-Marie Slaughter, *Human Rights International Law Symposium: A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

¹² For more discussion on networks, see *infra*, Chapter Twelve: Transgovernmental Networks.

¹³ Lawrence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).



Slaughter attempt to universalize the model by developing a “checklist” of factors for effective supranational adjudication.

With an increasing number of international and supranational tribunals capable of hearing environmental cases, some have argued that these efforts should be focused into the creation of one international environmental court.¹⁴ In the final excerpt in this chapter, Phillippe Sands reviews the debate about creating such a court, concluding that “[t]he possibility of an international environmental court should be kept on our radar screens, but the time is clearly not ripe to establish such a body.”¹⁵

Courts and other tribunals are thus key actors in enforcing environmental law and promoting sustainable development at the domestic, international, and supranational levels. As the articles in this chapter make clear, this is a role with great potential for expansion and increased effectiveness, particularly as judiciaries across regions and the globe increasingly consult and share legal decisions in the broad area of sustainable development.

¹⁴ See, e.g., A. Postiglione, *Instruments for the Resolution of Environmental Disputes at the Global Level*, in *TOWARDS THE WORLD GOVERNING OF THE ENVIRONMENT* 34 (1996); Alfred Rest, *The Indispensability of an International Environmental Court*, 7(1) *RECIEL*, 63 (1998).

¹⁵ Phillippe Sands, *International Environmental Litigation & Its Future*, 32 *U. RICH. L. REV.* 1619, 1640 (1999).

