Judicial Application of Environmental Standards under the Law of the Sea Convention

Bernard H. Oxman

What do judges do? And not do? What is their role in the system of governance? What are the constraints on that role?

These are abiding constitutive questions in the administration of a political order. They go to the heart of the structure of that order. They arise in many different ways. And they generate a rich tapestry of responses in different contexts at different times.

The international system traditionally accorded at most a very limited role to judges. That is now changing. Two developments that have propelled the change may be singled out. One is the expansion in the substantive reach of international law. The other is the expansion in the acceptance of adjudication and arbitration by States.

Multilateral treaties have played a key role in both developments. The United Nations Convention on the Law of the Sea\(^1\) is a good example. To be sure, the system of governance at sea has been a principal object of international law from its inception. But we now have a comprehensive constitutive treaty that is globally ratified and respected, that addresses a wide variety of issues, and that brings within its orbit an impressive and expanding array of more specialized instruments.

Nowhere is the change in the substantive reach of the law of the sea more evident than in the Law of the Sea Convention's provisions on the protection and preservation of the marine environment. Nowhere is the change in the acceptance of adjudication and arbitration by States more evident than in the Convention's compromissory clauses regarding disputes concerning its interpretation and application. And nowhere is the combination of the two developments more evident than in the Convention's prohibition on reservations.\(^2\)

---

1 1833 UNTS 3.
2 By way of contrast, the instruments adopted at the first conference on the law of the sea in 1958 divided the topic into four separate conventions and an optional protocol on dispute settlement, allowed reservations, contained only a few provisions of limited scope on pollution of the marine environment, and made limited headway in addressing emerging problems of conservation of living resources.
The system of governance set forth in the Convention is itself based on the prevailing international system of governance. That system relies principally on States acting individually and cooperatively. Much of the Convention is devoted to allocation of general powers of governance to flag States, coastal States, and port States. That includes elaborate constraints on those powers, including duties to exercise those powers to protect and preserve the marine environment.

Some of those duties are performed by participating in international regulatory institutions and giving effect to the rules that are adopted through such mechanisms. But the State remains central to the process. It is instructive that in its first advisory opinion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) focused on the governance duties of individual States with respect to the mining operations that they sponsor in the international seabed Area. It is also instructive that in the full Tribunal’s first advisory opinion, which addressed areas where fishing is regulated by coastal States, the Tribunal emphasized the duties of the flag State to take measures to ensure that its fishing vessels respect the regulatory constraints imposed by the coastal States.

It can be useful to think of the relationship between an international tribunal and a State in an environmental case as analogous in some ways to the relationship in municipal law between an administrative tribunal and the state organ entrusted with the relevant administrative functions. In this regard, it is interesting to note that the Convention draws on well-known principles of municipal administrative law in spelling out the relationship between the Seabed Disputes Chamber of ITLOS and the International Seabed Authority. Article 189 provides:

The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. . . . [T]he Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any

---

3 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion of 1 February 2011.

4 Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal), Case No. 21, Advisory Opinion of 4 April 2015.