I. Ascertaining Facts in International Relations

1. An Overview

Systems of inspection and external monitoring are part of a larger and crucial phenomenon in international relations, namely ascertaining facts, more commonly known as “fact finding”. These systems of ascertaining facts vary with their context. Facts matter in many respects. One of them is the question whether certain international obligations are complied with or whether international regimes are correctly implemented.1 Ascertaining these facts takes many different forms. Reporting systems play a major role as part of procedures to assess compliance with the rules of the regime.2 In these cases, the facts to be ascertained are furnished by the States themselves. Systems of inspection and external monitoring, whether they are independent or relate to a previous reporting, are different. In this case, the facts are collected by the international institution itself (external monitoring) and agents of the institution have the right to do so “on site” (inspection). The structure of these procedures is a vertical one. Reporting systems are bottom-up, external monitoring top-down. A clear example of this top-down approach was the inspection system established by the Security Council in Iraq.

The structure of these procedures for ascertaining facts is determined by their context. On the one hand, there is a relationship between a supervisory institution and a State which is subject to supervision, i.e. a vertical structure. On the other hand, there are fact-finding procedures of a different structure, which may also be part of an international regime, namely fact-finding

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within dispute settlement, in particular judicial procedures, i.e. horizontal systems.

2. Supervisory Procedures v. Dispute Settlement

Regulatory regimes in many fields of international law provide either for horizontal dispute settlement procedures or for vertical supervisory procedures (reporting systems or inspection procedures), or for both types of procedures. Dispute settlement procedures have their own fact-finding elements which, as a matter of principle, go across the entire array of judicial taking of evidence. Both in the field of environmental law and in that of arms control, the dispute settlement procedures are rarely used in practice.\(^3\) On the other hand, there are regimes where horizontal procedures, i.e. dispute settlement play a major practical role, for example, the WTO, and also the Law of the Sea Convention. The reason for this variation among regulatory regimes lies in the different structure of the conflicts which arise under the different systems. Both in the case of the WTO and the Law of the Sea Convention, conflicts essentially of a bilateral character are typical for the system. In the case of environmental and also arms control regimes, this is rather the exception than the rule. This is the reason for the different use of the dispute settlement or supervisory procedures and therefore also the different ways of ascertaining facts. But in the field of environmental law, too, bilateral conflicts occasionally do arise. An example is the inquiry procedure under the Espoo Convention\(^4\) and possibly the dispute settlement procedure under the Basel Convention.\(^5\) Within the framework of regimes where the typical conflict is that between the regime community and a particular State alleged to be in non-compliance, genuinely bilateral conflicts may arise. An example is the British-Irish controversy over the alleged pollution of the Irish Sea from the MOX-plant in Sellafield (Great Britain). Ireland raised issues of compliance with the OSPAR Convention in a bilateral dispute with the United Kingdom which was brought before the Permanent Court of Arbitration under Article 9 of the Convention.\(^6\) But it was also dealt with as a dispute arising under the

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\(^4\) (Espoo) Convention on Environmental Impact Assessment in a Transboundary Context, Art. 3 para. 7. This is an obligatory procedure. The dispute settlement procedure of the Convention is optional (Art. 15).

\(^5\) Art. 20 of the Basel Convention.