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REVIEW ESSAY

International Dispute Settlement and Environmental Protection: Ontological, Methodological and Processual Issues

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Abstract

The steadily growing reliance on international dispute settlement as environmental protection means is not uncontroversial, raising three sets of issues regarding: (i) the nature of adjudicative fora (ontological issues); (ii) wider assumptions and frameworks (methodological issues); and (iii) processes for creating and implementing environmental obligations (processual issues). Accordingly, this review essay is threefold. Despite a trend towards greater reliance on international dispute settlement fora, Part I discusses whether their presumably inherent 'anthropocentric' orientation hinders their suitability and assesses the feasibility of solutions advocated in judicial discourses. Having observed inconsistencies between the law-ascertainment methods deployed by adjudicative fora and the general regimes on law-ascertainment, Part II contends, international law-based environmental protection risks becoming overly "judge-centric", despite international law-making's state-centric nature. Part III concludes considering various reversals of perspective, potentially countering the shortcomings of overly "judge-centric" environmental protection, in addition to factors such as enforceability, plausibly justifying greater reliance on arbitral fora.

Keywords: general international law; regime interaction; sources of international law; international obligations; international arbitration; international human rights

The environment's protection is not only undisputably vital but also increasingly urgent. Yet, steadily growing reliance on international dispute settlement as environmental protection means is not uncontroversial, raising three distinct sets of issues regarding: the nature of adjudicative fora and the environment, as determinant of the former's suitability to protect the latter (ontological issues); wider assumptions and frameworks, notably concerning law-making and law-ascertainment (methodological issues); and processes for creating and implementing environmental obligations under general and particular regimes of international law, in turn influenced by the forecited ontological and methodological stances (processual issues).

These issues lie at the core of unsettled debates in scholarly literature, as seen in the works reviewed in this essay, on international dispute settlement's suitability for environmental protection: Sobenes, Mead, and Samson's edited volume, entitled *The Environment Through the Lens of International Courts and Tribunals*, and Bendel's monograph, entitled

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Litigating the Environment: Process and Procedure Before International Courts and Tribunals.[1] Since the works reviewed in this essay appeared, various international courts and tribunals have issued, in the exercise of their advisory or contentious jurisdiction, major pronouncements specifically addressing climate change, including, most prominently, the United Nations (UN) International Court of Justice (ICJ),[2] the International Tribunal for the Law of the Sea (ITLOS),[3] the Grand Chamber of the European Court of Human Rights (ECtHR),[4] and the Inter-American Court of Human Rights (IACtHR).[5] Although climate change is but one among the many environmental challenges addressed by the reviewed works, these judicial developments lend even further credence to the significance of the reviewed works' central theme, showing international dispute settlement is assuming an increasingly more prominent role in the ways the international community seeks to tackle the world's gravest environmental challenges.

The remainder of this essay comprises three major parts, dealing with each of the three sets of issues identified above, followed by some conclusory reflections.

I. Ontological issues

The very questions of what the environment and international dispute settlement "are" underpin debates about the latter's suitability for environmental protection. The presumably inherent "anthropocentric" character of international law and, by extension, of international dispute settlement, is widely regarded as determining whether and, if so, to what extent, international dispute settlement fora can protect the environment.

The ontological conceptions undergirding international dispute settlement involve competing anthropocentric[6] and eco-centric approaches that, despite being abstract and arguably "ideological",[7] can determine rather "technical" outcomes, like compensation for damages.[8]

The ways disputing parties formulate their disputes are arguably anthropocentric: insofar as they determine how adjudicative fora frame their jurisdiction over, and the law applicable to, those disputes,[9] they may subordinate environmental interests to anthropocentric

[1] Edgardo SOBENES, Sarah MEAD, and Benjamin SAMSON, eds., *The Environment Through the Lens of International Courts and Tribunals* (The Hague: T.M.C. Asser Press and Springer, 2022); Justine BENDEL, *Litigating the Environment: Process and Procedure Before International Courts and Tribunals* (Cheltenham: Edward Elgar Publishing, 2023).

[2] *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025 (hereinafter "ICJ AO 2025"), online: https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf.

[3] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024 (hereinafter "ITLOS AO 2024"), online: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_corr.pdf.

[4] *Verein Klimaseniorinnen Schweiz and Others v. Switzerland (Application no. 53600/20)*, Judgment of 9 April 2024, online: https://hudoc.echr.coe.int/eng?i=001-233206.

[5] *Climate Emergency and Human Rights*, Advisory Opinion AO-32/25 of 29 May 2025 (hereinafter "AO-32/25"), online: https://www.corteidh.or.cr/docs/opiniones/seriea_32_en.pdf.

[6] Stephanie SWITZER, "The World Trade Organization Dispute Settlement Mechanism" in Sobenes, Mead, and Samson, eds., *supra* note 1, 121 at 146 (arguing an "*anthropocentric* approach" is "the underpinning *ideological* stance" in WTO, *Brazil—Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, 3 December 2007, WT/DS332/AB/R; emphasis added).

[7] Bendel, *supra* note 1 at 205 (arguing compensation relies "on *ideological positions*" determining "*what is considered* [...] the environment"; emphasis added).

[8] *Ibid*., at 205–6 (discussing *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations Judgment, [2022] I.C.J. Gen List No. 116, para. 279, and arguing "*anthropocentric* versus ecological *understandings* of environmental harm" directly impact compensation's calculation; emphasis added).

[9] *Ibid*., at 55 (referring to their "jurisdictions *ratione materiae*").

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ones.[10] This subordination, however, is not confined to ad hoc fora. Under Article 8(2)(b)(iv) of the Statute of the International Criminal Court (ICC), the environment is arguably neglected, with environmental harm still being conceptualised as warfare's "unfortunate bi-product".[11] In turn, the ICC would be ill suited for prosecuting environmentally harmful conduct: intentional environmental destruction is criminalised only if civilians, as opposed to the environment, are targeted.[12] Similarly, since the European Convention on Human Rights (ECHR) only protects "living" persons, the ECtHR would presumably prove unsuitable as an environmental protection forum.[13]

The root of, yet preeminent means to overcome, anthropocentrism arguably lies in treaty interpretation.[14] Such reliance is understandable for, as the ICJ has recently recalled, "when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations".[15] A hermeneutical shift can prove decisive, as exemplified by recent pronouncements of the IACtHR,[16] notably its "Advisory Opinion on Environment and Human Rights" (AO 23).[17] However, AO 23 should not be overestimated, lest other regional human rights courts' seminal role be neglected: indeed, AO 23 arguably drew inspiration from the African Court of Human and Peoples' Rights' decision in *CERAC and CESR v. Nigeria*.[18] And, while AO 23 features among other "pioneering" judicial pronouncements reversing the anthropocentrism often ascribed to international human rights regimes,[19] such reversal is perhaps more evident in *ANAW v. Tanzania*,[20] in which the East African Court of Justice (EACJ) first upheld an "obligation to *protect the environment per se*".[21]

Granting legal personality to nature, which alternatively addresses anthropocentrism, has ontological implications, refashioning both legal personhood and nature, by according the latter to the former, as seen in the IACtHR's practice.[22]

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[10] Antonio CARDESA-SALZMANN, "Reflections on International Environmental Adjudication: International Adjudication Versus Compliance Mechanisms in Multilateral Environmental Agreements" in Sobenes, Mead, and Samson, eds., *supra* note 1, 581 at 585 (neglecting "ecosystems' integrity").

[11] Steven FREELAND, "Crimes Against the Environment: What Role for the International Criminal Court?" in Sobenes, Mead, and Samson, eds., *supra* note 1, 159 at 177–9.

[12] *Ibid*., at 177 (commenting on ICTY Appeals Chamber, *Prosecutor v. Kunarac and Others*, Judgment, 12 June 2002, Case No. IT-96-23 and IT-96-23/1-A, and arguing crimes against humanity cannot be proven "where it is the *environment* (as opposed to the *civilians*) that is deliberately targeted"; emphasis added).

[13] Birgit PETERS, "The European Court of Human Rights and the Environment" in Sobenes, Mead, and Samson, eds., *supra* note 1, 189 at 200 (critiquing the EChHR's "primarily *anthropocentric character*"; emphasis added).

[14] *Ibid*., at 191 (arguing that, "[u]nless the ECtHR *interprets* the Convention in a different, *less anthropocentric* [...] manner", the ECtHR would remain "ill-suited" as an environmental protection forum; emphasis added).

[15] ICJ AO 2025, *supra* note 2, at para. 165.

[16] Monica FERIA-TINTA, "Inter-American Court of Human Rights" in Sobenes, Mead, and Samson, eds., *supra* note 1, 249 at 251.

[17] *Ibid*., at 275 (arguing AO 23 is "*the most significant ruling* on environmental issues of any international court or tribunal *to date*", as "the *first legal pronouncement* [...] with a true focus on *environmental law as a systemic whole*"; emphasis added).

[18] Makane Moïse MBENGUE, "The Protection of the Environment Before African Regional Courts and Tribunals" in Sobenes, Mead, and Samson, eds., *supra* note 1, 289 at 304–7 (commenting on ACtHPR, *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria*, 27 October 2001, No. 155/96, known as the "Ogoni case").

[19] *Ibid*., at 307.

[20] EACJ, *Africa Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania*, Appeal Judgment No. 3, [2012], discussed in Mbengue, *supra* note 13 at 317–22.

[21] Mbengue, *supra* note 18 at 317 ("without any link whatsoever to securing the right to a healthy environment of a given community"; emphasis added).

[22] AO-32/25, *supra* note 5, at para 279 ("[r]ecognition of Nature's right to conserve its essential ecological processes contributes to strengthening a truly sustainable development model"); Peters, *supra* note 13 at 194 (referring to "the *rights of nature as individual legal personalities*"). For an analysis of the notion of rights of

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The nature of international dispute settlement fora, notably whether they need be *third-party, adjudicative*, and, more precisely, *judicial* to be suitable for environmental protection, raises vexed issues.

Third-party international dispute settlement comprises *non-adjudicative* fora, paramount among which is the UN Security Council (UNSC).[23] The UNSC, exercising its UN Charter Chapter VII powers, has addressed environmental issues, notably by creating the UN Compensation Commission (UNCC), to repair those injured by Iraq's invasion and occupation of Kuwait.[24]

Turning to *adjudicative* fora, while the ICJ is typically portrayed as their epitome, other adjudicative fora exist "beyond the Great Hall of Justice".[25] In this vein, whether all international courts and tribunals need be "judicial" raises separate, more controversial, issues. Yet, Bendel suggests, adjudicative fora need be "judicial": referring to "*interstate tribunals*, namely the ICJ, the ITLOS, *or arbitration*", Bendel argues, "that states accept the character of *such entities as judicial organs*, and [...] that *judicial bodies* have inherent powers [...], is critical for the success of the *international judiciary*".[26] Bendel's narrow characterisation of adjudicative fora, however, is problematic: arbitral, like judicial, bodies exhibit qualities Bendel confines to judicial ones, notably inherent powers.

II. Methodological issues

The methods for identifying and interpreting environmental rules, as well as for implementing obligations arising thereunder,[27] raise issues concerning a forum's suitability for environmental protection.

These issues first and foremost revolve around the sources of environmental rules, given, as McGarry notes, "the difficulty of *systematizing the sources of law* classified in Article 38(1) of the ICJ Statute".[28] McGarry's remark implies that provision's classification of sources is applicable *qua* treaty in settings beyond the ICJ.[29] Yet, the general applicability of the rules reflected in ICJ Statute Article 38(1) should not be uncritically assumed but seen in light of their use in general practice – arguably accepted as law and, thus, *qua* general custom.[30]

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nature as developed within particular regimes of international law on human rights, see, among others, Malgosia FITZMAURICE, "Human Right to Clean Environment and the Rights of Nature in the Anthropocene" (2022) 42 Polish Yearbook of International Law 155 at 155 et seq.

[23] Paul M. ROMITA and Eran STHOEGER, "A Growing Role for the UN Security Council?" in Sobenes, Mead, and Samson, eds., *supra* note 1 at 649–83.

[24] *Ibid*., at 679–80.

[25] Brian MCGARRY, "The Protection of the Environment Through Inter-State Arbitration" in Sobenes, Mead, and Samson, eds., *supra* note 1, 99 at 100.

[26] Bendel, *supra* note 1 at 11.

[27] ICJ AO 2025, *supra* note 2 at para. 100 (setting out its task as "identifying the existing obligations of States under international law to ensure the protection of the climate system and other parts of the environment [...] and clarifying the relationship between obligations arising from various sources of international law"). Of course, the ascertainment of regime interactions is distinct from the ability to implement them, each adjudicator having jurisdiction to implement the regime vesting that jurisdiction only. *Klimaseniorinnen v. Switzerland, supra* note 4 at para. 18(a) ("while it must take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties [...] it does not have authority to ensure respect for international treaties or obligations other than the Convention").

[28] McGarry, *supra* note 25 at 113 (discussing *Arbitration Regarding the Iron Rhine Railway (Belgium/Netherlands)*, Interpretation of the Award of the Arbitral Tribunal, 20 September 2005, PCA Case No. 2003-02, paras 1–2).

[29] Bendel, *supra* note 1 at 19–20 (stating "*[i]nternational courts and tribunals* [...] use the different *sources of international law* [...] *as outlined in Article 38(1) of the ICJ Statute*").

[30] *Prosecutor v. Vlastimir Đorđević*, Appeals Chamber Judgement (27 January 2014), IT-05–87/1-A, para. 33 note 117 (stating "Article 38(1) of the Statute of the International Court of Justice ... *is regarded as customary international*

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The role of international "pronouncements", a category encompassing arbitral or judicial decisions and (judicial, yet non-binding) advisory opinions, raises various controversies germane to a forum's suitability for environmental protection. The relevance of international pronouncements to the methodological issues considered in this part mainly stems from the ways they are relied on to identify, interpret, and apply environmental rules. This section, thus, is not concerned with international dispute settlement's output, notably the bearing of (un)enforceability of arbitral and judicial decisions on the (un)suitability of international dispute settlement fora for environmental protection, in terms of their (in)effectiveness (a matter to which Part III turns); instead, it focuses on the "methods" employed in international adjudicative processes and, in particular, whether and to what extent international adjudicators (can) validly rely on international pronouncements as they set out to identify, interpret, and apply environmental rules. As discussed below, the ways international pronouncements tend to be relied on to articulate the ascertainment of certain environmental principles or rules, which arguably lack a legal basis (or bases) in treaty, custom, or general principles of law, may lead to the contestation of the law-ascertainment methods at issue and, ultimately, culminate in challenges to the suitability of international adjudicative fora on "methodological" grounds.

Various rights invoked for environmental protection purposes, despite lacking an expressly recognised treaty-based status, are often asserted to have such status exclusively based on international pronouncements. Despite acknowledging that, like other treaties and non-binding instruments, the American Convention on Human Rights does not include environmental rights, Feria-Tinta affirms, a "remedy" for such omission lies in the IACtHR's judgment in *Lhaka Honhat v Argentina*,[31] which, Feria-Tinta asserts, "*[d]oubtlessly* [...] will be followed by other such decisions".[32] However, Feria-Tinta's assessment unwarrantedly assumes the *Lhaka Honhat* judgment will necessarily be upheld in future IACtHR decisions, uncritically neglecting its weaknesses: the IACtHR's approach is based on "the *pro homine* principle", a (curiously anthropocentric) maxim that establishes "the scope of a right *which has already been recognized*, but does not extend to providing a legal basis for that right's recognition";[33] also, the majority supporting it "prevailed by virtue of the Court's incumbent president's casting vote".[34]

The customary status of certain rules is likewise often grounded on an exaggerated, if not exclusive, reliance on international decisions. While "*State practice and* the consideration given by *ICTs* suggest that the [precautionary] principle is slowly gaining wider *recognition* [...] *as* [...] *customary* international law", Sobenes and Devaney argue, "[i]f this trend continues, it may not take long for *ICTs to recognise* the principle as a *customary rule*".[35]

law"; emphasis added). See Diego MEJÍA-LEMOS, "Custom and the Regulation of 'the Sources of International Law'" in Panos MERKOURIS, Jörg KAMMERHOFER, and Noora ARAJÄRVI, eds., *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge: Cambridge University Press, 2022), 137 at 137 et seq.

[31] Feria-Tinta, *supra* note 16 at 283 ("the first [...] contentious case *making* [...] *justiciable*" that right; emphasis added).

[32] *Ibid*., at 284 (emphasis added).

[33] Julieta ROSSI and Victor ABRAMOVICH, "La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos" (2007) 9 Estudios Socio-Jurídicos 34 at 47–9, discussed in Diego MEJÍA-LEMOS, "The Right to a Healthy Environment and Its Justiciability Before the Inter-American Court of Human Rights: A Critical Appraisal of the *Lhaka Honhat v Argentina* Judgement" (2022) 31(2) Review of European Comparative and International Environmental Law 317 at 323.

[34] Mejía-Lemos, *supra* note 24 at 323.

[35] Edgardo SOBENES and John DEVANEY, "The Principles of International Environmental Law Through the Lens of International Courts and Tribunals" in Sobenes, Mead, and Samson, eds., *supra* note 1, 543 at 563 (emphasis added).

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Their argument implies international courts and tribunals' recognition of that trend suffices, independently of states' acceptance thereof as law. Likewise, Atapattu submits, the ICJ's "*advisory opinion* on the *Legality of Nuclear Weapons consolidated the customary status* of Principle 21".[36] These approaches not only overlook the absence of a *stare decisis* doctrine in international law but also are inconsistent with the "two-element approach" to custom-identification, insofar as neither general practice attributable to, nor acceptance as law by, states are established.[37] Yet, as Bodansky and Nguyen respectively observe, international court and tribunals' proclivity 'to pay lip-service to environmental principles'[38] may lead to cementing "ideas often considered part of customary international law but which *do not reflect state practice*".[39]

General principles of law are often neglected, despite the above inconsistencies in customary international law-identification. For instance, Atapattu ponders whether Principle 21's legal status can be justified without resorting to custom. Despite arguing Principle 21 originates "in the common law principle of *sic utere tuo ut alienum non laedus*",[40] Atapattu does not consider whether it could be a general principle of law. Sobenes and Devaney equally neglect general principles of law. Indeed, their assessment of the "common but differentiated responsibility" principle simply concludes that, "though this principle [...] has featured in *environmental litigation at the national level* – [...] which has, *international* transboundary *implications* – it is virtually *unaddressed* in the *jurisprudence of the ICTs*".[41] Their analysis not only reinstates their almost exclusive reliance on international decisions but also exemplifies how potentially relevant state practice, arising in connection with national litigation, whether accepted as customary law or recognised as a general principle of law, is often neglected.

General principles of law, however, should not be overlooked. In *ANAW*, the EACJ considered general international law relating to an environmental dispute arising under the Treaty establishing the East African Community (EAC Treaty).[42] The EACJ held EAC Treaty Article 130(1) enables "compliance with other international commitments than those contained in the EAC Treaty".[43] The EACJ's Appellate Division considered such non-EAC Treaty, yet treaty-based, principles "as reflecting *general principles of law* in the meaning of Article 38.1c) of the Statute of the ICJ".[44]

General principles of law are often portrayed as performing a purely "gap-filling" role, as a source of law applicable only by default, absent specific applicable treaty-based or

[36] Sumudu ATAPATTU, "Emergence of International Environmental Law: A Brief History from the Stockholm Conference to Agenda 2030" in Sobenes, Mead, and Samson, eds., *supra* note 1, 1 at 11 (emphasis added).

[37] ICJ Statute Article 38(1)(b). For a discussion of this approach and related practice and literature, see Diego MEJÍA-LEMOS, "The Identification of Customary International Law and International Investment Law and Arbitration: State Practice in Connection with Investor-State Proceedings" in Panos MERKOURIS, Andreas KULICK, José Manuel ÁLVAREZ-ZARATE, and Maciej ŻENKIEWICZ, eds., *Custom and Its Interpretation in International Investment Law* (Cambridge: Cambridge University Press, 2024), 46 at 48.

[38] Lan Ngoc NGUYEN, "International Tribunal for the Law of the Sea" in Sobenes, Mead, and Samson, eds., *supra* note 1, 71 at 95.

[39] Daniel M. BODANSKY, "Customary (and Not So Customary) International Environmental Law" (1995) 3 Indiana Journal of Global Legal Studies 105 at 105, quoted in Nguyen, *supra* note 32 at 95 (emphasis added).

[40] Atapattu, *supra* note 36 at 11.

[41] Sobenes and Devaney, *supra* note 35 at 575.

[42] Mbengue, *supra* note 18 at 319.

[43] *Ibid*.

[44] *Ibid*., at 319 note 131 (emphasis added).

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custom-based law.[45] Yet, general principles of law may arguably also operate as sources of obligation.[46]

The distinction between source of law and source of obligation may shed light on formal sources' diverse roles in environmental protection.[47] Bendel, for instance, correctly states "international courts and tribunals *cannot legislate*" yet considers they "*make law*, especially when dealing with inevitable gaps".[48] Bendel distinguishes between "*general law-making in the legislative sense* and creating a *rule applicable to the parties* to a *particular dispute*".[49] This statement not only relies on an artificial, somewhat tautological subcategory of law-making that is "legislative" but also fails to recognise international decisions apply existing legal rules, instead of creating new ones. Indeed, as Bendel observes, international courts and tribunals' power "is shaped by the specific circumstances under dispute and at the parties' request", and "judicial law-making", after all, "cannot be conceived *a priori*".[50] Hence, Bendel concludes, "judicial decisions are *not a formal source of law*".[51] Yet, Bendel's conclusion might neglect international decisions' role as formal sources of obligation, creating concrete legal relations for disputing parties, while applying the applicable law to a given dispute. Indeed, as Bendel's analysis of potential interactions between compliance committees under multilateral environmental treaties and the ICJ shows, ICJ judgments may operate as sources of obligations, with compliance committees serving as "*enforcers of the operative part of a judgment*".[52]

The very distinction between jurisdiction and applicable law also raises methodological issues, as illustrated by Hébert's analysis.[53] Yet, far from clarifying, Hébert's analysis proves confusing. Hébert defines "norms *related to jurisdiction* as 'norms of jurisdiction', and [...] norms that a particular tribunal *may apply* as 'norms of applicable law'".[54] This definition neglects that, in ascertaining its jurisdiction, a tribunal applies the (applicable) law governing its jurisdiction. Hébert further states "norms found in a treaty on the basis of which the jurisdiction of a court [...] would be established are [...] norms of jurisdiction".[55] This statement risks conflating source of jurisdiction and source of obligation. This is perhaps due to the usual (albeit not necessary) confluence of both sources in the same instrument, notably a treaty creating obligations *and* conferring jurisdictional powers (possibly, though not necessarily, confining jurisdiction to disputes involving breaches of that treaty's obligations). Yet, a treaty may incorporate sources of obligation external to that treaty, most notably via its most-favoured-nation clause, and grant jurisdictional power over breaches of such extra-treaty obligations.

[45] McGarry, *supra* note 25 at 114 (noting the "gap-filling function of general legal principles" in interstate arbitral decisions).

[46] ILC, "Third Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur", UN Doc A/CN.4/753 (18 April 2022), 16 para. 39 (noting general principles of law's "other, more specific, functions [...], such as serving as a *direct source of rights and obligations*"; emphasis added).

[47] Interestingly, Bendel draws a similar distinction, between "the *precision of the rule* in question, and the *degree of obligation* contained in it". Bendel, *supra* note 1 at 35 (referring to "factors" determining "the roles of international courts and tribunals in an environmental context"; emphasis added).

[48] *Ibid*., at 28 (emphasis added).

[49] *Ibid*., at 28–9 (emphasis added).

[50] *Ibid*., at 29 (emphasis added).

[51] *Ibid*., at 32 (emphasis added).

[52] *Ibid*., at 198 (emphasis added).

[53] Jessica Joly HÉBERT, "Jurisdiction and Applicable Law (*Jurisdiction Ratione Materiae*)" in Sobenes, Mead, and Samson, eds., *supra* note 1, 383 at 385.

[54] *Ibid*. (emphasis added).

[55] *Ibid*.

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III. Processual issues

The processes for creating and implementing international environmental protection obligations involve a wide array of regimes of international law, general and particular,[56] and participants, ranging from states and international organisations to non-governmental organisations and (increasingly) individuals, ultimately affected by environmental degradation.[57]

State consent, however, remains essential for creating (those) international obligations and vesting jurisdiction in international adjudicative fora, whether arbitral or judicial.[58] Against this background, Spijkers explores "world law tradition[s]" as a means of justifying non-consensual environmental obligations.[59] World-law traditions arguably empower "*judges* [...] to use their *authority* [...] to claim a *degree of independence from the will of States* when identifying, interpreting and applying [...] international law".[60] While such "world-law traditions" raise the spectre of "'dikastocracy' [...], [...] a world ruled by judges",[61] reliance on separate opinions as focal points for "[t]he scholarly community [...] to rally round", without "causing reputational damage to 'their' court", would arguably address dikastocracy's perils.[62]

The above tendency towards predominantly, if not exclusively, grounding customary international law-identification on international (mostly judicial) pronouncements (an issue among other methodological problems examined above) calls for a reversal, so as to properly account for states' position (and, to varying, albeit limited, degrees, that of international organisations in whom law-making powers are vested) in law-making processes, as law-makers.[63] Such a reversal is offered by Mead's and Maxwell's contribution, refreshingly defending an approach that "departs from the focus [...] on international courts and tribunals and looks instead at [...] *national* courts",[64] since "international courts and tribunals are by no means the only *site of international law activity*".[65] Indeed, "[n]ational courts play a dual role", for they "enforce" and "are [...] 'agents of development' of international law".[66] The latter role, in turn, stems from the place "domestic jurisprudence" has in the "*development of custom*":[67] under ICJ Statute Article 38(1)(b), "domestic judgments can be evidence of State practice and/or *opinio juris*".[68]

Whether and to what extent an adjudicative forum allows for participation by non-state or non-disputing parties is increasingly portrayed as conditioning that forum's suitability

[56] ITLOS AO 2024, *supra* note 3, at para 134 ("[t]he rules of reference contained in Part XII of the Convention and article 237 of the Convention demonstrate the openness of Part XII to *other treaty regimes*"; emphasis added).

[57] In this vein, as Bendel notes, "the *process* through which norms are created impacts the way in which international courts and tribunals come to a decision". Bendel, *supra* note 1 at 35 (emphasis added).

[58] *Ibid*., at 54 ("[t]he whole international judicial system is based on the consent of states").

[59] Otto SPIJKERS, "Application of World Law by International Courts and Tribunals to Protect the Environment" in Sobenes, Mead, and Samson, eds., *supra* note 1, 685 at 685.

[60] *Ibid*. (emphasis added).

[61] *Ibid*., at 703.

[62] *Ibid*., at 704.

[63] Bendel, *supra* note 1 at 3 (arguing "judicial power is, at least in theory, clearly distinct from law-making power" since the "latter power is for the states, or any other institutions states confer the powers to, but not judicial institutions").

[64] Sarah MEAD and Lucy MAXWELL, "Climate Change Litigation: National Courts as Agents of International Law Development" in Sobenes, Mead, and Samson, eds., *supra* note 1, 617 at 618.

[65] *Ibid*. (emphasis added).

[66] *Ibid*., at 621.

[67] *Ibid*. (emphasis added).

[68] *Ibid*.

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for environmental protection. Indeed, granting procedural rights to redress limited access to adjudicative fora has been widely advocated, mostly within regional regimes.[69]

The "public law dimension" of disputes with environmental elements arguably justifies such greater access to adjudicative fora.[70] In this vein, the benefits of arbitral over judicial fora, notably investor-state dispute settlement (ISDS), have increasingly garnered attention.[71] Unlike existing interstate adjudicative fora, international arbitration can allow for non-state participants.[72] In particular, ISDS proves more suitable than some forms of interstate arbitration, as exemplified by United Nations Convention on the Law of the Sea (UNCLOS) Annex VII arbitral tribunals, which have addressed issues of "access and participation by non-parties" in marine environment protection disputes.[73] By contrast to those UNCLOS Annex VII tribunals' reluctance to admit unsolicited *amicus curiae* submissions,[74] ISDS has displayed openness to non-disputing party participation.[75] ISDS arbitral tribunals' proclivity towards non-disputing party participation may arguably be due to not only contextual factors, notably the "backlash" against ISDS's "lack of transparency and legitimacy",[76] but also ISDS's very nature.[77] Of course, ISDS's benefits do not detract from its limitations: for instance, the fact that disputing parties are "directly responsible for funding" can arguably impair ISDS's public interest role.[78]

The debates on access to adjudicative fora raise an important issue concerning the relationship between the nature of an adjudicative forum, as a procedural feature of a particular (substantive law) regime, and that particular regime's suitability to implement environmental obligations.[79]

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[69] Olivier PEIFFERT, "European Union Court System and the Protection of the Environment" in Sobenes, Mead, and Samson, eds., *supra* note 1, 219 at 220 (arguing that, since the environment has "*no legal personality*, [...] access to justice in environmental matters lies in the establishment of procedural rights for individuals or NGOs").

[70] Vladyslav LANOVOY, "Access to and Participation in Proceedings Before International Courts and Tribunals" in Sobenes, Mead, and Samson, eds., *supra* note 1, 415 at 416.

[71] Desierto also argues "investor-State arbitration may not be the *court of first resort* to achieve environmental protection, but it is also not the *court of last resort*". Desierto's statement, however, inaccurately suggests a forum stands in a hierarchical relationship with other fora, where only that forum's suitability for environmental protection is discussed. Diane A. DESIERTO, "Environmental Protection in International Investment Arbitration: From Defences to Counterclaims" in Sobenes, Mead, and Samson, eds., *supra* note 1, 325 at 346–7 (emphasis added).

[72] Bendel, *supra* note 1 at 86.

[73] Lanovoy, *supra* note 70 at 419.

[74] *Ibid*., at 420 (discussing ITLOS, *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Procedural Order No. 3, 8 October 2014, PCA Case No 2014-2, 2). See also Bendel, *supra* note 1 at 91.

[75] *Ibid*., at 420, 440.

[76] Lanovoy, *supra* note 70 at 441.

[77] *Ibid*., at 442 (also referring to the raison d'être of human rights regimes).

[78] Bendel, *supra* note 1 at 86.

[79] Bendel, *supra* note 1 at 17 (arguing the roles of adjudicative fora "vary according to [...] the nature of the legal obligations to be implemented"). Along similar lines, the interaction between particular regimes in otherwise separate fields of regulation has been noted: most notably, as the ICJ has recently recalled, "the application of international human rights law in relation to the adverse effects of climate change has been addressed in decisions of regional human rights courts". ICJ AO 2025, *supra* note 2 at para. 385. For a discussion of this interaction between particular regimes for the purposes of environmental protection, see, among others, Diego MEJÍA-LEMOS, "The Protection of the Environment through International Human Rights Litigation: Taking Stock of Challenges and Opportunities in the Inter-American System" (2022) 22 Human Rights Law Review 1 at 1 et seq.; Jenny HALL and Louis KOEN, "Taking Stock of the Scholarship on the Relationship between International Investment Law and the Need for Raised Climate Ambition" (2022) 14(1) Climate Law 95 at 95 et seq.; Tracy SMITH-CARRIER and Kathleen MANION, "Bringing It All Together: Leveraging Social Movements and the Courts to Advance Substantive Human Rights and Climate Justice" (2022) 23 Human Rights Review 551 at 551 et seq.; and Sheng ZHANG and Ni LI, "The Application of International Climate Change Law in International Investment Arbitration: Addressing the Deficiencies" (2025) 20(1) Asian Journal of WTO and International Health Law and Policy 1 at 1 et seq.

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In particular, adjudicative fora within the particular regimes on human rights and foreign investment (ISDS) have features other than greater procedural access rendering them particularly suitable for environmental protection. In this sense, the distinction between inward-oriented and outward-oriented obligations, originally developed by an International Law Association (ILA) study group, may prove pertinent.[80] Indeed, by contrast to international law's traditional interstate dimension, which implied "norms were generally 'outward-looking'", the increasing international regulation of "affairs [...] *within* the domestic legal order" has resulted in a "corresponding rise in 'inward-looking' international norms".[81] Inward-looking obligations arise under not only "human rights law which imposes obligations on States with respect to individuals within their jurisdiction, but [...] also [...] international environmental law".[82] Likewise, investment treaties create "inward-looking" obligations for host states vis-à-vis foreign investors and their investments within their territories, whose "environmental impacts" may be subject to ISDS.[83]

Other processual aspects also involve particular regime interactions, such as issues concerning evidentiary burdens under specific treaty-based liability regimes.[84] General regimes, for their part, also interact with particular regimes,[85] notably by framing the operation of such particular regimes to varying, though at some point indispensable, degrees.[86] The law of international responsibility, codified in the Articles on Responsibility of States for Internationally Wrongful Acts,[87] is paramount among those general regimes,[88] alongside the law of treaties, as codified in the Vienna Convention on the Law of Treaties.[89]

[80] ILA Study Group on Principles on the Engagement of Domestic Courts with International Law, *Final Report: Mapping the Engagement of Domestic Courts with International Law* (London: ILA, 2016).

[81] Mead and Maxwell, *supra* note 64 at 619.

[82] *Ibid*., at 619–20.

[83] Cicely O. PARSEGHIAN and Benjamin K. GUTHRIE, "Provisional Measures" in Sobenes, Mead, and Samson, eds., *supra* note 1, 447 at 450.

[84] Yuri PARKHOMENKO, Nour NICOLAS, and Benjamin Salas KANTOR, "Proving Environmental Harm Before International Courts and Tribunals" in Sobenes, Mead, and Samson, eds., *supra* note 1, 483 at 493.

[85] This interaction is sometimes framed as one between rules internal to a particular regime and "external rules", coming from other regimes, whether general or particular. ITLOS AO 2024, *supra* note 3, at para. 130 ("coordination and harmonization between the Convention and external rules are important to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument").

[86] Since the particular regime on climate change does not exclude other regimes on environmental protection, a fortiori it should not exclude the general regimes on matters such as sources and international responsibility. ICJ AO 2025, *supra* note 2, at para. 171 (concluding that "the argument according to which the climate change treaties constitute the only relevant applicable law cannot be upheld" for "the principle of *lex specialis* does not lead to a general exclusion by the climate change treaties of other rules of international law"). And, more generally, particular regimes, notably those treaty-based, do not operate entirely "in isolation" from certain general regimes. ITLOS AO 2024, *supra* note 3, at para. 135 (citing ICJ decisions and concluding that, since "article 31, paragraph 3(c), of the VCLT [...] requires that account be taken [...] of any relevant rules of international law applicable in the relations between the parties [...] treaties do not operate in isolation but are 'interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'").

[87] UN Doc. A/RES/56/83 (2001), 53 UN GAOR Supp. (No. 10) at 43, Supp. (No. 10) A/56/10 (IV.E.1).

[88] ICJ AO 2025, *supra* note 2, at para. 420 ("responsibility for breaches of obligations under the climate change treaties, and in relation to the loss and damage associated with the adverse effects of climate change, is to be determined by applying the well-established rules on State responsibility under customary international law"); Anne COULON, "The International Court of Justice and the Protection of the Environment" in Sobenes, Mead, and Samson, eds., *supra* note 1, 37 at 59 (arguing "necessity as a ground for precluding wrongfulness will not be altered by the environmental aim" of state conduct).

[89] 1155 U.N.T.S. 331 (entered into force 27 January 1980) [VCLT].

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Yet, whether and to what extent the law of international responsibility allows for adequately remedying environmental harm raises questions as to the suitability of (probably all international) adjudicative fora. Fitzmaurice contends that, while the ICJ has "ascertained that damage to the environment itself is compensable",[90] its restrictive approach to compensation has "focused only on one form of repairing environmental harm".[91] More generally, Fitzmaurice submits, the law of international responsibility's role to remedy "transboundary harm is currently limited" since "non-quantifiable, non-individual harm to the environment [...] cannot be remedied based on available methods of reparation".[92] And, more fundamentally, basic "components of international responsibility" may prove ill suited to address "environmental harm".[93]

The implementation of international obligations through international dispute settlement culminates in the enforcement of international decisions, whether arbitral or judicial. Hence, last, but by all means not least, *enforceability* is an important, distinctly processual feature determining an adjudicative forum's suitability for environmental protection (as anticipated in Part II's analysis of related "methodological" issues). In this vein, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[94] creates a procedural regime suitable for environmental protection,[95] given the "ease of enforceability" of arbitral awards thereunder,[96] by contrast to various limitations for enforcing international judicial (and interstate) arbitral decisions. The NYC performs not only a "facilitative" role but also a "preventive" one. In its facilitative capacity, the NYC "imposes a general obligation on State courts to recognize and enforce international arbitral awards",[97] rendering their enforceability the "most valuable characteristic" of arbitral fora and, more pertinently, "an important benefit in [...] environmental disputes".[98] In its preventive capacity, the NYC may preclude the enforcement of arbitral awards jeopardising environmental protection.[99] Indeed, although such a situation may be "highly unlikely", the "enforcement of such an award could be refused [...] on the ground of public policy" under the NYC.[100]

IV. Conclusion

This essay has provided a critical review of recent scholarship on international dispute settlement's suitability for environmental protection, notably in terms of commonly faced ontological, methodological and processual issues.

[90] Malgosia FITZMAURICE, "State Responsibility and Liability" in Sobenes, Mead, and Samson, eds., *supra* note 1, 515 at 534 (discussing *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Compensation Judgment, [2018] I.C.J. Rep.).

[91] *Ibid*., at 535.

[92] Fitzmaurice, *supra* note 90 at 532.

[93] Philippe Couvreur, "General Conclusions" in Sobenes, Mead, and Samson, eds., *supra* note 1, 709 at 714 ("environmental harm does not *per se* presuppose or generate a wrongful act").

[94] 330 U.N.T.S. 3 (entered into force 7 June 1959) [NYC].

[95] Kirsten ODYNSKI and Héloïse BROC, "Commercial Arbitration" in Sobenes, Mead, and Samson, eds., *supra* note 1, 351 at 356–8.

[96] *Ibid*., at 367.

[97] *Ibid*., at 356.

[98] *Ibid*., at 357.

[99] *Ibid*., at 358 (considering whether the NYC "could operate to allow the enforcement of arbitral awards that violate environmental regulations and objectives").

[100] *Ibid*. See also Couvreur, *supra* note 93 at 738 (noting under the NYC "arbitral awards are broadly [...] enforced [...] with the exception of awards [...] contrary to public policy [...] to which environmental regulations may belong").

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Part I has considered ontological issues and shown that, despite a trend towards submitting disputes with environmental elements to various international courts and tribunals, the main obstacle for those adjudicative fora to provide effective means for environmental protection lies in their presumably inherent "anthropocentric" orientation. Solutions to these limitations range from hermeneutic adaptation to legal fictions, notably granting nature legal personality. The feasibility of these solutions, for now adopted regionally, remains to be seen.

Part II has turned to methodological issues and revealed glaring inconsistencies between law-ascertainment methods advocated by the scholarship reviewed and the general regimes on law-ascertainment. More fundamentally, it has rendered tangible another ontological issue: more than being "anthropocentric", international law is assumed or asserted to be primordially "judge-made", raising the spectre of "dikastocracy", despite its preeminently state-centric nature. This conundrum, in turn, raises the wider question of whether the judiciary, national or international, should be the focal point of or catalyst for solutions requiring engagement by public and private entities, at all levels, globally and locally.

Part III has examined processual issues, concerning the processes for creating and implementing international environmental protection obligations. It has considered interactions among participants in such processes and among relevant general and particular international law regimes. It has notably focused on schools of thought advocating various reversals of perspective that promisingly address some of the paradoxes observed in Parts I and II: notably, a shift of focus away from judicial to arbitral fora (the latter allowing for (greater) non-state or non-disputing party participation and enforceability of international decisions) and from purported "judge-made" law to law-making processes and law-ascertainment methods properly accounting for states' general practice, primarily as developed in domestic national environmental litigation, accepted as law by states, as (customary) law-makers proper. It has lastly considered implementation processes and emphasised the greater enforceability of arbitral awards over that of other (international) judicial decisions, as a crucial processual factor determining an adjudicative forum's suitability for environmental protection.

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