

# International climate change litigation and the negotiation process<sup>1</sup>

There is little progress in the current climate change negotiations. Could inter-State litigation under public international law help to break the deadlock? This paper outlines a possible legal argument and offers some observations on the potential impacts of bringing a case before an international court or tribunal.

## I Negotiations and litigation

Since 2008 a constant stream of international negotiations on climate change has taken place. The process temporarily peaked with the 15th Conference of the Parties (COP15) to the United Nations Framework Convention on Climate Change (UNFCCC) in Copenhagen in December 2009. To date, however, the negotiations have not resulted in a new global deal, and the prospect of reaching an agreement in time that provides for adequate measures to avoid dangerous climate change remains uncertain.

In the aftermath of the climate change summit in Copenhagen many high ranking officials felt that it would take up to five years to finally come to a legally binding agreement.<sup>2</sup> At the Bonn Climate Change Talks in June 2010 the new and the outgoing executive secretary of the UNFCCC were equally pessimistic about the possibility of achieving ambitious emission reductions and adopting a new legal framework in the short term.<sup>3</sup>

In a domestic, private or business environment there are often close links between negotiations and litigation. If individuals or corporate entities cannot settle disputes to their satisfaction through negotiation, relief may be sought from the courts or through other dispute settlement mechanisms. Regardless of whether such disputes concern wide ranging claims against the tobacco industry or an alleged case of unfair dismissal, negotiations

are regularly accompanied by some form of contentious legal action or the threat thereof.

In the international context, under the umbrella of the World Trade Organisation (WTO) litigation has similarly been strategically employed by governments to influence negotiations and clarify State obligations.<sup>4</sup> Such litigation can expedite the creation of new rules and obviate the need for further law suits. So could litigation under public international law help to address climate change and possibly facilitate a positive and timely outcome of the current negotiation process?

## II Litigation

### - a credible option?

Climate change litigation has been described as the next big target for lawyers after tobacco, asbestos and food.<sup>5</sup> Legal cases related to the effects of climate change have been filed against public and private entities in several jurisdictions, and legal scholars increasingly contemplate whether there could also be a basis in public international law for action on climate change between States. We have produced a longer paper which provides a list of the relevant literature and - based on the current discourse - ascertains if and to what extent inter-State litigation constitutes a viable option. The full paper is available through <http://www.field.org.uk>. In addition we have created a wiki version on <http://climate-change-litigation.wikispaces.com>

to allow others to input into the discussion and either strengthen or critique the arguments.

Writers generally agree that international law is ill-equipped to deal with a complex situation such as global warming. There is a multiplicity of actors involved in the failure to reduce greenhouse gases, the majority of harm is yet to occur and its causation non-linear.<sup>6</sup> While domestic law often provides a reasonably well defined body of law that governs a particular relationship, public international law is subject to a constant tension between established rules and the pressure to make changes within a system.<sup>7</sup> It largely overlaps with international politics and governments can fundamentally disagree about what constitutes the relevant law in a particular case. Nevertheless, while the details remain in dispute, a general line of argument in favour of a violation of substantive rights emerges.

### 1. The substantive legal argument

In most cases, the basis for contentious litigation between States would be the alleged breach of an international obligation. The unjustified breach of such an obligation - usually described as the commission of a "wrongful act" - between the States concerned results in "State responsibility" (or liability) under international law. In order to successfully raise an inter-State claim, the wrongful act must be attributable to the accused State and causally linked to any occurring damage.

The breach of an international obligation can be derived from international treaty or customary law, and may be committed through an act or omission.<sup>8</sup> Depending on the States involved in an international litigation on climate change, treaty law relevant in this connection may include the UNFCCC and the Kyoto Protocol, the United Nations Convention on the Law of the Sea (UNCLOS) or other multi- or bilateral agreements. The current literature, however, predominantly suggests that a violation of international law could be based on the so called “no-harm rule”.

### a) The no harm rule

The no-harm rule is a widely recognised principle of customary international law whereby a State is duty-bound to prevent, reduce and control the risk of environmental harm to other States.<sup>9</sup> The legal precedent usually cited in this connection concerns a Canadian smelter whose sulphur dioxide emissions had caused air pollution damages across the border in the US.<sup>10</sup> The arbitral tribunal in that case determined that the government of Canada had to pay the United States compensation for damage that the smelter had caused primarily to land along the Columbia River valley in the US.

The no-harm rule has subsequently been confirmed by different decisions of international courts and tribunals.<sup>11</sup> It has also been incorporated in various international law and policy documents.<sup>12</sup> Principle 21 of the 1972 Stockholm Declaration provides that “*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*”.

A recent report of the Global Humanitarian Forum estimates that per year climate change already causes 300,000 deaths throughout the world, seriously impacts on the lives of 325 million people, and costs USD125 billion globally.<sup>13</sup> As a result of climate change many countries may already be able to show a certain degree of harm - whether this is the loss of territory, crops or biodiversity.

However, according to the majority opinion amongst writers, the actual occurrence of harm is not a precondition for a violation of the no-harm rule. It is sufficient to show that a State's conduct will cause significant damage for its responsibility to be engaged.<sup>14</sup> Thus the no-harm rule is not only a general obligation to prevent transboundary

harm, but also to minimise the risk of such harm.<sup>15</sup>

In much of the literature the precise scope and features of the no-harm rule has been defined by reference to the requirement of due diligence. Due diligence is said to comprise at least the following elements: the opportunity to act or prevent; foreseeability or knowledge that a certain activity could lead to transboundary damage; and proportionality in the choice of measures required to prevent harm or minimise risk. If, despite the foreseeability of events, proportionate measures which are capable of protecting the environment of other States were not taken, a State can be considered careless and held responsible for a wrongful act.<sup>16</sup>

Many developed countries have had an opportunity to reduce the risk of transboundary pollution by limiting their emissions of greenhouse gases (GHG) through, for example, stricter regulations and control measures, the introduction of renewable energies or changes in lifestyle of their populations. They have known of the effects of increasing atmospheric concentration of CO<sub>2</sub> on the earth's heat balance and the subsequent risk of damage for decades. At least since 1992, when the UNFCCC was put in place to stabilise greenhouse gas emissions, parties to that agreement have explicitly acknowledged this link.

### b) The resulting liability

A State can only be held responsible for the breach of an international obligation if this can be attributed to an act or omission of one (or more) of its organs. In most industrialised countries, the majority of GHG emissions have been generated by private entities. In international relations, however, a State remains accountable for activities on its territory and under its effective control.<sup>17</sup> By approving activities that result in GHG emissions, or by failing to put restrictions into place that prevent harm to other countries, governments are responsible for the resulting transboundary pollution and non-compliance with the no-harm rule.

To date, the discourse in the academic literature on State responsibility for climate change has very much focused on the question of compensation for damages. However, if the responsibility of a State for an unlawful act under international law has been established, the primary obligation that arises is to cease the wrongful act. Depending on the context this could mean the unconditional withdrawal of troops and abstention from any further military action, the immediate release of hostages and prisoners, ending existing

discriminations or disturbances to the internal order of a country, or taking necessary measures to prevent the destruction or theft of property.<sup>18</sup>

On 31 March 2008, Ecuador filed a dispute at the International Court of Justice (ICJ) concerning the aerial spraying by Colombia of toxic herbicides at locations near, at, and across its border with Ecuador. Ecuador alleged that the spraying causes serious damage to people, crops, animals and the natural environment on the Ecuadorian side of the border, and poses a grave risk of further damage over time. Amongst other things Ecuador requested that the Court declare that Colombia has violated its obligations under international law and shall “...take all steps necessary to prevent, on any part of its territory, the use of any toxic herbicides in such a way that they could be deposited onto the territory of Ecuador; and (iii) prohibit the use, by means of aerial dispersion, of such herbicides in Ecuador, or on or near any part of its border with Ecuador.”<sup>19</sup>

In order to raise a claim of State responsibility, it is further necessary to establish that there is a causal link between the activities complained of and the harm in question. In 2007, the International Panel on Climate Change (IPCC) found that there is a better than nine in ten chance that global warming can be attributed to emissions from industry, transport, deforestation and other human activities. Scientists have also improved their capacity to determine the extent to which climate change is to blame for specific extreme weather events - for example the floods in Pakistan or heatwave in Russia.<sup>20</sup> The general rule under international law appears to be that States that are jointly responsible for a wrongful act are jointly and severally liable.<sup>21</sup> As a matter of principle, a State's liability is not reduced by the fact that other States are also responsible for the same wrongful act.<sup>22</sup>

The wrongful act can be justified due to special circumstances - for example consent or necessity. A State might, for example, argue that its emissions are justifiable because of the urgent need for development. This, however, has to be balanced against the interest of the complainant and possibly the international community as a whole.<sup>23</sup> The need for proportionality may also have a limiting effect on the measure that can be requested in response to a wrongful act.

## 2 Procedural avenues for international litigation?

While the substantive law may provide a basis for a claim, there are often no procedural means to pursue it further and enforce compliance under

public international law. The ICJ in The Hague is the principal judicial organ of the United Nations and has been described as the guardian of the international legal community as a whole. It may hear contentious disputes concerning an alleged breach of an international obligation if (and to the extent) the States concerned have accepted.<sup>24</sup> To date 66 countries have made a unilateral declaration accepting the ICJ's compulsory jurisdiction to settle any dispute that might arise between them in the future.<sup>25</sup>

Many declarations contain reservations limiting their duration or excluding certain categories of dispute. This means that the ICJ will only have jurisdiction to the extent that the declarations of all parties to a dispute coincide and do not exclude the type of dispute raised. Individual countries have, for example, excluded disputes which concern the delimitation of maritime zones, originate in armed conflict or "*where the parties have agreed on other settlement methods*".<sup>26</sup> The UNFCCC provides parties with an independent dispute settlement process.<sup>27</sup> At present it also represents the main international forum for the international efforts to curb GHG emissions. The UNFCCC framework could therefore be perceived as a special or "self contained" regime that precludes parties from seeking legal redress outside the Convention process.

To date, however, the additional arbitration procedures envisaged by the Convention have not been adopted. The literature predominantly considers that the parties' primary obligations under the UNFCCC are too vague and the compliance system under the UNFCCC and the Kyoto Protocol too weak to exclude the application of general international law on state responsibility.<sup>28</sup> There is also little support in the practice of States for the assumption that the UNFCCC process may constitute a self-contained regime. Important climate talks have also taken place outside the UNFCCC, for example at G8 or G20 summits. Even during COP15 in Copenhagen, talks were conducted by a select group of leaders (resulting in the Copenhagen Accord) in parallel with the official negotiations.

### 3 Provisional measures

Contentious cases brought before the ICJ can take several years from the filing of the case to the reading of the judgement on the merits. Consequently, the Court can order provisional measures if it considers that circumstances so require.<sup>29</sup> The objective of provisional measures is to preserve the respective rights of the parties, pending a decision of the Court on the merits. A link must therefore be established between the provisional measures requested and the rights

which are the subject of the proceedings before the Court as to the merits.<sup>30</sup>

Provisional measures will only be granted if the majority of judges believe that there are good grounds for the underlying application, and the content and effect of these measures does not prejudice the case's final outcome. Provisional measures are only justified if there is a sense of urgency such as an imminent risk that irreparable damages may be caused to the subject matter of the dispute.<sup>31</sup> It is disputed whether provisional measures ordered by the ICJ are binding, and in practice, the record of compliance with provisional measures is not always encouraging.<sup>32</sup>

## III Nexus between litigation and negotiations

In the case of a lawsuit, lawyers representing the respondent State would be able to raise a multitude of objections. But setting to one side the complex legal wrangling that forms part of any dispute resolution effort before an international court or tribunal: How useful can litigation between States be where the overall objective remains to combat climate change and find globally acceptable solutions?

A judicial decision on State responsibilities related to climate change may provide guidance to the negotiation process. Clear and authoritative findings in relation to the applicable principles reached as a result of argument and analysis could be useful in creating parameters for future negotiation and highlighting gaps in the existing framework.<sup>33</sup> Litigation or the threat thereof would emphasise the urgency of the need to agree binding commitments on climate change and put additional pressure on the negotiations process. Negotiators may feel more of a responsibility vis-à-vis the international community and have an additional lever in relation to their national governments. A high-profile court case would also engage a variety of actors in the debate and provide new momentum to find consensual solutions inside and outside the UNFCCC talks.<sup>34</sup>

Traditionally, however, international courts and tribunals have been very cautious in interpreting international obligations, forcing a specific performance upon States and interfering in their domestic affairs.<sup>35</sup> They are often perceived as just another forum for international diplomacy and rarely issue hard hitting judgements. It is therefore unlikely that an international judicial organ would prescribe concrete measures such as the closing down of coal-fired power stations, a ban on gas flaring or the installation of offshore

wind turbines; or order Annex I countries to, for example, peak emissions by around 2012, achieve at least 60% reduction in emissions from energy by 2020 and fully decarbonise their energy systems by 2030 at the latest.

International courts and tribunals also rarely decide on complex scientific questions that are disputed between parties. Hence unless a defendant country accepts its responsibility for the climate change impacts in question - their causation, avoidability etc. - litigation might fail. This could deflect from the urgency of finding solutions and be counter-productive for the negotiation process.

If, however, a sufficiently strong case supported by expert opinions and evidence is presented, an international court or tribunal may be willing to creatively engage with the process of settling the dispute in question. To the extent it has jurisdiction to entertain the case, it would probably at least encourage the parties to find solutions and underline the importance of further serious negotiations and other collaborative activities.<sup>36</sup> In this connection it could determine specific procedural measures such as time-lines or the establishment of an expert commission to facilitate the success of further negotiations between the parties.<sup>37</sup>

In relation to provisional measures, international courts and tribunals have claimed a wide discretion and the right to prescribe measures that are in whole or in part different from those requested.<sup>38</sup> Their orders often provide an interpretation of the existing international obligations and general policy advice inspired by the judges' assumption of what would practically work. In this connection the application of a precautionary approach (putting the burden of proof that an activity is harmless to some extent on the party wishing to carry out that activity) could help to prevent environmental degradation on the backdrop of scientific uncertainty.<sup>39</sup>

A judicial decision would only apply in relation to the parties to the proceedings. This could involve a significant number of countries but realistically exclude several of the main players. However, depending on the content of such a decision, the parties bound by it could be compelled to take leadership within or outside the current negotiation process. The definition of necessary measures to reach a climate change deal before it is too late from the perspective of an independent third party would also send a strong signal to the entire international community. A complete refusal by countries not directly affected by a judicial decision to engage in new meaningful attempts to bridge the rift between parties to the UNFCCC may be politically difficult to justify.

## IV Conclusion

The current literature suggests that, in relation to climate change, a credible case for a legal wrong can be made. Affected countries may have a substantive right to demand the cessation of a certain amount of CO2 emissions in order to limit further harm (and in some cases secure their survival). In a limited number of possible scenarios there are also procedural means to pursue an inter-State litigation before an

international judicial forum - in particular the ICJ.

Inter-State climate change litigation may help to create the political pressure and third-party guidance required to re-invigorate the international negotiations, within or outside the UNFCCC. The understandable reluctance of developing country governments to challenge any of the big donor nations in court may change once the impacts of climate change become even more visible and an adequate agreement remains wanting.

An independent judicial forum that represents the legal systems of the world is in a good position to determine some of the cornerstones necessary to reach a global deal in time. While political leaders depend on their national electorate, corporate interests and party machinery, an international court or tribunal may be able to take decisions that primarily reflect the need to protect the world's ecosystem and its 7 billion inhabitants as a whole.

## Notes

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- 11 International Court of Justice (ICJ), *Corfu Channel case (Merits)* (United Kingdom v. Albania), 1949; *Advisory Opinion on the Threat or Use of Nuclear Weapons*, 1996; *Case concerning the Gabcikovo-Nagymaros Dam (Hungary v. Slovakia)*, 1997. ICJ cases and advisory opinions can be accessed through <http://www.icj-cij.org>.
- 12 UNCLOS Art.194 para.2; Convention on Biological Diversity, Art.3; UNFCCC preamble, recital 8.
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- 17 *Trail Smelter Case; Corfu Channel Case: A State is under an obligation not to "knowingly allow its territory to be used for acts contrary to the rights of other States"*.
- 18 *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, 2002; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, 2008.
- 19 Application instituting proceedings, para.38(C) sub-para. (ii) and (iii).
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- 21 Convention on International Liability for Damage Caused by Space Objects, 1971, Art.IV; UNCLOS Article 139(2).
- 22 ILC, DASR, Art.47; Ian Brownlie, Principles of International Law, 7th ed., 2008, p.458.
- 23 ILC, DASR, Art.25.
- 24 ICJ Statute, Article 36.
- 25 A list of States is available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.
- 26 The full text of all declarations can be accessed through the website of the ICJ at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.
- 27 UNFCCC, Art.14.
- 28 Explicit reservations as to the non-exclusion of general law on state responsibility were made by States including Nauru, Tuvalu, Fiji, Papua New Guinea upon conclusion of the UNFCCC.
- 29 ICJ Statute, Art.41; Rules of the Court, Art.73.
- 30 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia v Serbia Montenegro), Provisional Measures Order, 1993; *Land and Maritime Boundary between Cameroon and Nigeria*, Provisional Measures Order, 1996.
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- 34 The ICJ's *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) was an important element in the campaign against proliferation and use of nuclear weapons.
- 35 ICJ, *Pulp Mills on the River Uruguay*; or the International Tribunal for the Law of the Sea (ITLOS), *MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, 2001. ITLOS cases can be accessed through [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html).
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- 37 ITLOS, *Southern Bluefin Tuna Cases*, and *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, 2003.
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