

**International climate change litigation and the negotiation process
- Working paper -¹**

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I. Introduction

At the 13th Meeting of the Conference of the Parties (COP13) to the United Nations Framework Convention on Climate Change (UNFCCC) in 2007 in Bali a timeline for a new post-2012 climate change regime was agreed. Since then a constant stream of international negotiations has taken place. The process temporarily peaked at COP15 in December 2009 in Copenhagen which was attended by 120 heads of State and government, 10,500 delegates, 13,500 observers and more than 3,000 media representatives.² To date, however, the negotiations have not resulted in a new legally binding international agreement on climate change.

At the Bonn Climate Change Talks in June 2010 the new and the outgoing executive secretary of UNFCCC were both rather pessimistic about the possibility of achieving ambitious emission reductions and adopting a new legal framework in the short term.³ During and in the aftermath of the climate change summit in Copenhagen many high ranking officials felt that it would take up to 5 years to finally come to a binding deal.⁴ As a result billions of extra tonnes of CO₂ will be released into the atmosphere before the world agrees on how to keep global warming below a certain threshold. At present the negotiation process is bogged down by various stumbling blocks including new emission reductions targets and the provision of adequate financial resources.

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, reparations for forced labour, an alleged case of unfair dismissal or a divorce settlement, negotiations are regularly accompanied by some form of contentious legal action or the threat thereof.⁵ 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.⁶ Such litigation can expedite the creation of new rules and obviate the need for further litigation.

This paper aims to investigate if and to what extent litigation under public international law may help to address climate change and possibly facilitate a positive and timely outcome of the current negotiation process. It provides a snapshot analysis of the current legal discourse, and tries to ascertain whether the threat or pursuit of litigation provides a credible legal option. For this purpose it outlines the substantive law and the relevant procedural means for its implementation. Finally, it offers some observations on the potential impacts of contentious legal action on the negotiation process.

² According to the website of the UNFCCC Secretariat:
http://unfccc.int/meetings/cop_15/items/5257.php accessed 5 August 2010.

³ 32nd session of the subsidiary bodies of the UNFCCC, 12th session of the AWG-KP and 10th session of the AWG-LCA.

⁴ For example: Mike McCarthy and Ben Ferguson, *Hopes of global emissions deal at Copenhagen begin to fade*, The Independent, London, 14 December 2009.

⁵ For example: Anita Ramasastry, *Corporate complicity from Nurnberg to Rangoon*, Berkeley Journal of International Law 91, 2002, p.91.

⁶ Tim Josling, Longyue Zhao, Jeronimo Carcelen and Kaush Arha, *Implications of WTO Litigation for the WTO Agricultural Negotiations*, International Food and Agricultural Trade Policy Council (IPC) Issue Brief, March 2006.

II. Litigation under public international law

Contentious litigation is a standard legal tool in most jurisdictions. In comparison, the settlement of disputes between States through judicial or adversarial procedures is relatively rare. In order to address problem issues on the international plane, governments tend instead to rely on a variety of political means such as bilateral negotiations, discussions in international organisations or mediation by third parties. While domestic law often provides a fairly well defined body of law that governs a particular relationship, public international law is a more flexible concept. It is subject to a constant tension between established rules and the pressure to make changes within a system.⁷ Legality and power are closely entwined and often operate on an equal footing. Public international law largely overlaps with international politics, and governments often fundamentally disagree about what constitutes the relevant law in a particular case.

1. Public international law

Traditionally public international law is described as a system of rules and principles that govern the relationship between States and other subjects of international law (e.g. the United Nations or the European Community). The main primary sources of international law are treaties and customary law.⁸ Treaties only bind parties to them and are interpreted through different means. These include the intention of the parties at the time the treaty was concluded and the subsequent practice of the parties in its application.⁹ Customary international law is derived from the consistent practice of States accompanied by *opinio juris* - the conviction of States that this practice is required by a legal obligation.¹⁰ In addition to State behaviour, judgments of international courts and academic research are traditionally used as persuasive sources for evidencing customary international law.¹¹ International policy documents such as the 1992 Declaration of the UN Conference on Environment and Development in Rio (Rio Declaration) are often referred to as soft law and do not have binding force. However, they can accelerate the formation of customary law as well as provide evidence of *opinio juris*.¹²

2. The existing literature

Climate change litigation has been described as the next big target for lawyers after tobacco, asbestos and food.¹³ Legal cases related to the effects of climate change have been filed against public and private entities in a number of jurisdictions. In 2004 in the United States, a group made up of a number of State governments, the city of New York and some non-governmental organisations (NGOs) filed a suit against major electricity producers alleging that, on the basis of nuisance law, they

⁷ Malcolm N Shaw, *International Law*, 4th ed., Cambridge 1997, pp.36-40.

⁸ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) (ICJ Statute) Article 38(1).

⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (VCLT) Article 31.

¹⁰ ICJ Statute, Article 38(1)(b).

¹¹ ICJ Statute, Article 38(1)(d); Martin Dixon, *Textbook on International Law*, 3rd ed., London 1996, pp.27 & 39.

¹² Martin Dixon, p.44.

¹³ Michael Harrison, *World's top firms fail to tackle climate change challenge*, The Independent, London, 15 September 2005.

had a responsibility to reduce their contribution to climate change.¹⁴ In the same year in Germany, two NGOs brought a case to compel the government to disclose the impact of projects funded by Germany's export credit agency on climate change.¹⁵ In Nigeria, communities from the Niger Delta sought an order from the Federal High Court of Nigeria in 2005 that Shell, and a number of other oil majors, desist from the practice of gas flaring.¹⁶

There have been many other climate-related cases in the domestic context. As a consequence, legal scholars increasingly contemplate whether there could be a basis in public international law for legal action on climate change between States. This paper provides an overview of the current discourse in this regard and seeks to ascertain whether inter-State litigation constitutes a viable option. For this purpose, peer-reviewed articles including the following have been taken into account:

Jay Austin, 'Case Note: Massachusetts v. Environmental Protection Agency: Global Warming, Standing and the US Supreme Court', *Review of European Community and International Environmental Law*, Vol. 16 Issue 3, 2007, pp.368-371;
William C. G. Burns, 'Climate Justice: the Prospects for Climate Change Litigation', *American Society of International Law Proceedings*, Vol. 98, 2004, p.223;¹⁷
William C. G. Burns, 'Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention', *McGill International Journal of Sustainable Development Law & Policy* Vol. 2, 2006, p.27;¹⁸
William C. G. Burns, 'Potential Causes of Action for Climate Change Impacts under the United Nations Fish Stocks Agreement', *Sustainable Development Law & Policy* Vol. 7 No. 2, 2007, pp.34-41;¹⁹
Joyeeta Gupta, 'Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change', *Review of European Community and International Environmental Law* Vol. 16 Issue 1, 2007, pp.76-86;²⁰
Rebecca E. Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice', *Pacific Rim Law & Policy Journal*, Vol. 14, 2005, p.103;
Timo Koivurova, 'International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects', *Journal of Environmental Law & Litigation* Vol. 22, 2007, p.267;²¹
Hari M. Osofsky, 'Climate Change Litigation as Pluralist Legal Dialogue', *Stanford Journal of International Law*, Vol. 43, 2007, p.181;²²
Julia Schatz, 'Climate Change Litigation in Canada and the USA', *Review of European Community and International Environmental Law*, Vol. 18 Issue 2, 2009, pp.129-138; and

¹⁴ *Connecticut et. al. v. American Electric Power Company Inc. et. al.*, 04 Civ. 5669 & 5670 (S.D. N.Y. 2005) p.19. In dismissing the actions, the court held that they "present non-justiciable political questions that are consigned to the political branches, not the Judiciary". For a broad overview on cases and regular updates see <http://www.climatelaw.org/>.

¹⁵ *Bund für Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V. v. the Federal Republic of Germany*, *Verwaltungsgericht Berlin VG 10 A 215.04*, Order of 10 January 2006.

¹⁶ See <http://www.climatelaw.org/cases/country/nigeria/gasflares/>.

¹⁷ Introductory paper from discussion panel on the subject.

¹⁸ Examination of potential use of UNCLOS for climate change litigation with reference to the UNFCCC and Kyoto Protocol.

¹⁹ Brief examination of potential use of UNFSA for climate change litigation.

²⁰ Assessment of existing and potential climate change litigation in domestic jurisdictions.

²¹ Review of the international legal avenues to address climate change and assessment of the Inuit petition.

²² Analysis of US cases which includes review of the extent to which they can be considered lawmaking on an international level.

Christina Voigt, 'State Responsibility for Climate Change Damages', *Nordic Journal of International Law*, Vol. 77 Nos. 1-2, 2008, pp. 1-22.²³

The paper has also taken the following publications into consideration:

Amsterdam International Law Clinic & M. G. Faure & A Nolkaemper, 'Analyses of Issues to be Addressed: Climate Change Litigation Cases', *Friends of the Earth Netherlands – Milieudefensie*, 2007;²⁴

Joy-Dee Davis, 'State Responsibility for Global Climate Change – the case of the Maldives', doctoral thesis, April 2005;²⁵

Akiko Okamatsu, 'Problems and Prospects of International Legal Disputes on Climate Change', Berlin Conference on the Human Rights Dimensions of Global Environmental Change, 2005;²⁶

Joseph Smith & David Shearman, 'Climate Change Litigation: Analysing the law, scientific evidence, & impacts on the environment, health & property', *Presidian*, Adelaide 2006, pp.44-55;²⁷

Roda Verheyen, 'Climate Change Damage and International Law', Nijhoff Publishers, Leiden 2005;

Richard Tol & Roda Verheyen, 'Liability and Compensation for Climate Change Damages – A Legal and Economic Assessment', 15 September 2001;²⁸ and

Roda Verheyen and Peter Roderick, 'Beyond Adaptation: The legal duty to pay compensation for climate change damage', *WWF-UK*, 2008.²⁹

In addition, there is an ever increasing body of literature on the relationship between human rights and climate change.³⁰ Global warming impairs and undermines the social, economic and political rights of people all over the world. In this connection, human rights litigation can be a powerful tool in generating public pressure on governments to act. However, the focus of this paper (and the publications listed above), is the relationship between States and their mutual rights and obligations. It does not cover State obligations vis-à-vis individual rights-holders.

The writers who have addressed the question of if, and to what extent, there may be a basis for inter-State legal action on climate change appear to agree that, in general, international law is ill-equipped to deal with a complex situation such as global warming. The primary legal rules are vague and the majority of harm is yet to occur. There is a multiplicity of actors involved in the failure to reduce greenhouse gases,

²³ Sets out how to frame a claim for climate change damages under the international law on State responsibility.

²⁴ Analysis of domestic and international law climate change claims (including under UNESCO, the Inuit and potential Tuvalu actions) for their utility as precedents in the Netherlands. Available at <http://www1.milieudefensie.nl/english/publications/Climate%20Litigation.pdf>.

²⁵ Doctoral thesis examining the extent to which the Maldives could bring a claim for climate change.

²⁶ A review of the obstacles likely to be faced by Tuvalu were it to sue the US/Australia as threatened. Available at <http://www.sprep.org/att/irc/ecopies/countries/tuvalu/47.pdf>.

²⁷ Excerpt from a book on climate change litigation (with a particular focus on the US) which deals with the position under international environmental law.

²⁸ Brief legal assessment of how State responsibility for climate change may be invoked, accompanied by an economic assessment of climate change damage. Available at <http://www.uni-hamburg.de/Wiss/FB/15/Sustainability/liability.pdf>.

²⁹ Legal assessment which advocates the advent of a treaty framework for climate change compensation as opposed to litigation.

³⁰ Oxfam, *Climate Wrongs and Human Rights*, September 2008 available at <http://www.oxfam.org/en/policy/bp117-climate-wrongs-and-human-rights>; International Council on Human Rights Policy, *Climate Change and Human Rights A Rough Guide*, 2008 available at <http://www.ichrp.org/en/projects/136>; Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, *Harvard Environmental Law Review* Vol. 33, 2009, p.439; Marilyn Averill, *Linking Climate Litigation and Human Rights*, *Review of European Community and International Environmental Law*, Vol. 18 Issue 2, 2009, p.139.

and different types of damages and non-linear causation all pose significant challenges to the traditional rules on inter-State claims. However, while the details remain in dispute, a general line of argument in favour of a violation of substantive rights appears to emerge.

III. The substantive legal argument under public international law

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 criteria and terminology employed in this connection differ, and there are major uncertainties related to the legal and factual underpinning of any potential climate change case. However, based on the analysis of the current literature, including reference to existing precedent of international courts and tribunals, the following may provide the basic framework for an inter-State climate change case under public international law:

1. Breach of obligation under international law

The breach of an international obligation can be derived from international treaty or customary law, and may be committed through an act or omission.³¹ 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) 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.³² 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.³³ 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.

³¹ International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR)*, Articles 1-3 & 12-15, in Report of the ILC on the Work of its 53rd Session available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

³² Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd ed., Oxford 2009, p.143.

³³ *Trail Smelter Arbitration: United States v Canada* (1931–1941) 3 UNRIAA, vol. III, p.1965: “[U]nder the principles of international law, ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.”

The no-harm rule has subsequently been confirmed by different decisions of international courts and tribunals.³⁴ It has also been incorporated in various international law and policy documents.³⁵ Principle 21 of the Stockholm Declaration provides that “[s]tates 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”.³⁶

The UN Office for the Coordination of Humanitarian Affairs has estimated that in 2008 over 20 million people were displaced by sudden-onset climate-related disasters.³⁷ A recent report of the Global Humanitarian Forum states 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.³⁸ In June 2010, the Adaptation Fund established under the UNFCCC approved its first four projects for funding. The projects aim to tackle sea level rise and extreme weather events in the Solomon Islands and the coastal areas of Senegal, flooding from glacier lakes in Pakistan and improve watersheds better to deal with droughts and floods in Nicaragua.³⁹

Thus, 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. A growing body of economic research quantifies the harm caused by climate change in monetary terms.⁴⁰ 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.⁴¹ Thus the no-harm rule is not only a general obligation to prevent significant transboundary harm, but also to minimise the risk of such harm.⁴²

The 2007 Intergovernmental Panel on Climate Change (IPCC) report stated that if green house gas emissions continued at their current trajectory, the earth’s

³⁴ International Court of Justice (ICJ), *Corfu Channel case (Merits) (United Kingdom v. Albania)*, ICJ Reports 1949; Advisory Opinion on the Threat or Use of Nuclear Weapons ICJ Reports 1996, p.226 para.29: “The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States ... is now part of the corpus of international law relating to the environment”; *Case concerning the Gabčíkovo-Nagymaros Dam*, (Hungary v. Slovakia) ICJ Reports 1997.

³⁵ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) (UNCLOS) Article 194(2); UN Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, not yet in force) Article 7; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) (UNFCCC), preamble, recital 8; Convention on Biological Diversity, Art.3.

³⁶ Declaration of the United Nations Conference on the Human Environment (*Stockholm Declaration*), adopted 16 June 1972, Principle 21.

³⁷ United Nations Office for the Coordination of Humanitarian Affairs, Internal Displacement Monitoring Centre, *Natural disasters and forced displacement in the context of climate change*, September 2009.

³⁸ Global Humanitarian Forum, *Human Impact Report: Climate Change – The Anatomy of a Silent Crisis*, May 2009, available at http://www.preventionweb.net/files/9668_humanimpactreport1.pdf.

³⁹ For a description of these and other projects, see the website of the Adaptation Fund: <http://www.adaptation-fund.org/projectprogrammeproposals>.

⁴⁰ For example: Ramón Bueno, Cornelia Herzfeld et al, *The Caribbean and Climate Change: The costs of Inaction*, Stockholm Environment Institute—US Center and Global Development and Environment Institute, Tufts University, May 2008; Nicholas Stern, *Stern Review on the Economics of Climate Change*, 2006.

⁴¹ Roda Verheyen and Peter Roderick, ‘Beyond Adaptation: The legal duty to pay compensation for climate change damage’, WWF-UK, 2008.

⁴² *Trail Smelter Arbitration*.

temperature would be likely to rise by between 1.8 and 4 degrees Celsius over the coming century, with an outside chance of the increase reaching 6 degrees.⁴³ The report indicated that some regions will be more affected by climate change than others. These include the Arctic, sub-Saharan Africa, small islands and Asian megadeltas. With regard to Africa for example, it is projected that by 2020, between 75 and 250 million people will be exposed to increased water stress due to climate change. The report also underlines that the negative effects of climate change gradually increase with a rise in temperature. In April 2007, the UN Security Council addressed climate change, implicitly recognising its relevance to world security.

More recent scientific assessments have suggested that emissions are now rising so fast that the earth is firmly on track to hit the 6C rise if action is not taken. Disastrous consequences for the environment and society would include widespread increases in droughts and floods, greater stress on water resources, increase in tropical cyclone intensity and more extinction of wild species.⁴⁴

b) Other relevant international norms

Under the UNFCCC, the parties agreed to secure the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.⁴⁵ For that purpose, developed country parties have committed themselves to undertake mitigation and other measures.⁴⁶ Some authors therefore argue that this reflects an obligation of conduct whose breach could amount to an international wrong.⁴⁷ However, the predominant view in the literature appears to be that, in this respect, the UNFCCC does not stipulate enforceable primary legal norms of international law. Rather, it provides a general framework whose rules lack specificity and are subject to the treaty's compliance procedures only.⁴⁸

UNCLOS explicitly states that the parties to it “*shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention*”.⁴⁹ Pollution is defined as “*the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities*”.

In the literature the parties' commitment to the preservation of the marine environment has been mainly interpreted as an obligation to minimise pollution and

⁴³ IPCC, Fourth Assessment Report, (AR4), 2007, available at http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm#1.

⁴⁴ Corinne Le Quéré, Michael R. Raupach, Josep G. Canadell et al., *Trends in the sources and sinks of carbon dioxide*, Nature Geoscience 2, 2009, pp.831 – 836.

⁴⁵ United Nations Framework Convention on Climate Change (UNFCCC), Art.2.

⁴⁶ UNFCCC, Article 4(2).

⁴⁷ Christina Voigt, 'State Responsibility for Climate Change Damages', Nordic Journal of International Law, Vol. 77 Nos. 1-2, 2008.

⁴⁸ Richard Tol & Roda Verheyen, *Liability and Compensation for Climate Change Damages – A Legal and Economic Assessment*, 15 September 2001, p.8.

⁴⁹ UNCLOS, Art.194(2).

to act with appropriate care.⁵⁰ With regard to the “*measures necessary*”, UNCLOS itself further specifies that States shall use the best practicable means at their disposal and in accordance with their capabilities.⁵¹ The provisions of UNCLOS were not drafted with greenhouse gas emissions in mind and allow parties a wide discretion. However, UNCLOS is a living instrument that must be interpreted in the light of the present day conditions.⁵²

Green house gas emissions contribute to the warming of the oceans, their acidification and a reduction in subsurface oxygen levels (affecting the growth of marine phytoplankton, coral reefs, fish stocks, etc).⁵³ Recent research indicates that sea levels may rise three times faster than the IPCC predicted. Due to the expansion of increasingly warmer oceans, the melting of mountain glaciers and polar ice-sheets, global average sea levels may rise between 75cm and 190 cm by 2100. A 1.9 metre increase will occur if greenhouse gas emissions continue to increase on their present trajectory. This could wipe out low lying island nations, affect cost lines and exclusive economic zones, and make large parts of Bangladesh uninhabitable. It would also increase the chances of storm surges flooding major coastal cities such as London or New York.⁵⁴

2. Responsibility for a wrongful act

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 green house gas (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.⁵⁵ By approving activities that result in GHG emissions, or by failing to put restrictions into place that prevent harm to other countries, its organs are responsible for the resulting transboundary pollution and non-compliance with the no-harm rule.

Whether the breach of an international obligation needs to be accompanied by a degree of negligence or fault on the part of the State or its organ(s) in order to amount to a wrongful act is disputed. Some writers have argued that States are strictly liable for environmental harm. However, in the context of climate change it may seem unfair to make States accountable for activities whose long term implications have only been gradually understood. Other scholars therefore hold that the relevant organs must have violated a certain standard of care.⁵⁶ In particular, if the focus of the State’s conduct is on an omission (to curb GHG emissions) the need to act must have been clear to a diligent government.

⁵⁰ William C. G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, McGill International Journal of Sustainable Development Law & Policy Vol. 2, 2006, p.27.

⁵¹ UNCLOS, Art.194(1).

⁵² Christoph Schwarte, *Environmental Concerns in the Adjudication of the International Tribunal for the Law of the Sea*, Georgetown International Environmental Law Review Vol.16, 2004, p.421.

⁵³ Ove Hoegh-Guldberg and John F. Bruno, *The Impact of Climate Change on the World’s Marine Ecosystems*, Science (Ocean Change) Vol. 328. no. 5985, 18 June 2010, pp. 1523–1528.

⁵⁴ Martin Vermeer and Stefan Rahmstor, *Global sea level linked to global temperature*, Proceedings of the National Academy of Sciences of the United States of America Vol. 106 No. 51, 22 December 2009, pp.21527-21532.

⁵⁵ *Trail Smelter Case*: “A State owes at all times the duty to protect other States against injurious acts by individuals within its jurisdiction”; *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”.

⁵⁶ Birnie, Boyle and Redgwell, pp. 143-152.

In much of the literature the precise scope and features of the no-harm rule have therefore been defined by reference to the requirement of due diligence.⁵⁷ 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.⁵⁸

Many developed countries have had an opportunity to reduce the risk of transboundary pollution by limiting their emissions of green house gases 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 CO₂ on the earth's heat balance and the consequent 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. In view of the risks related to global warming early actions taken to limit emissions, even at the expense of economic growth and prosperity in already affluent societies, seem only proportionate. Some Annex I governments might, however, vehemently disagree.

3. Causation and liability

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 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.⁵⁹ Over the last few year scientists have also improved their capacity to analyse the role of human-induced climate change on specific extreme weather events. Hence, complex climate modelling may eventually help to determine the extent to which climate change is to blame for the floods in Pakistan and the heatwave in Russia; or desertification in Mongolia.⁶⁰

The legal literature is mainly concerned with the impossibility of attributing emissions of a particular country to specific damages. The problem with damage from climate change is that it is diffuse and hard to trace back to any one particular State's actions. Due to the complex and synergetic effect of the diverse pollutants and polluters involved, and the non-linearity of climate change, it may be difficult to establish a chain of causation.⁶¹ Contributory factors may intervene, and the complexity of the climate system can almost always be relied upon to assert a possible break in the chain.

Hence, the standard of proof applied in respect of causation may be crucial. The international jurisprudence in this respect differs and the test applied has ranged from "*clear and convincing*" to "*on the balance of probabilities*".⁶² The precautionary principle has been used as a procedural tool to lower the standard of proof in

⁵⁷ *ibid.*

⁵⁸ Verheyen and Roderick, p.20.

⁵⁹ AR4.

⁶⁰ Anil Ananthaswamy, *Time to blame climate change for extreme weather*, New Scientist, 25 August 2010.

⁶¹ Christina Voigt, p.10.

⁶² *Trail Smelter Case* and *Corfu Channel Case*.

situations where the complexity of scientific facts leads to a degree of uncertainty.⁶³ In the existing jurisprudence, partial causation has also been considered sufficient to establish liability.⁶⁴

There exist relatively clear estimates of different countries' relative contributions to the absolute tonnes of GHG emitted globally. It has therefore been suggested that, because of the cumulative causation of climate change, each actor should only be held responsible for its share of the overall wrong.⁶⁵

The general rule under international law, however, appears to be that States that are jointly responsible for a wrongful act are jointly and severally liable.⁶⁶ Thus each State is separately responsible. As a matter of principle this responsibility is not reduced by the fact that other States are responsible for the same wrongful act.⁶⁷ A State already suffering from the impacts or an increased exposure to global warming could rely on a growing body of scientific research to substantiate the imputation of cause and effect (flooding, drought, extreme weather events etc.). While a perpetrator of an international legal wrong could be fully accountable, the resulting legal obligations may remain subject to the principle of proportionality. Liability for the entirety of damages (maybe with a burden to then seek contributions from others) would not necessarily result in an obligation to make full reparation.⁶⁸

4. Justification

Under international law, there are a number of circumstances which preclude the wrongfulness of an act and which may therefore be asserted by a State seeking to justify its actions. These are: consent of the injured State, lawful countermeasures, force majeure, distress, necessity, compliance with peremptory norms and self-defence.⁶⁹ In relation to the latter justification, although the circumstances in which a State may legitimately act in self-defence may exist, it does not follow that all actions taken in self-defence by that State will be lawful. The provisions of international humanitarian law and international human rights law will still apply. Notably, addressing whether an action can be considered in accordance with a right to self-defence, the International Court of Justice (ICJ) opined that “[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality”.⁷⁰

In the context of climate change, the argument which a State can be easily envisaged to deploy is necessity. For instance, a rapidly developing State might argue that its emissions are justifiable because of the urgent need for development to lift its population from poverty. There would, however, be obstacles to such an argument. For necessity to be invoked a State could have to demonstrate that the

⁶³ Simon Marr, *The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources*, 11 *European J. Int'l Law*, 2000, p.815; Alexander Yankov, in Myron H. Nordquist & John Norton Moore (eds.), *Current Fisheries Disputes and the International Tribunal for the Law of the Sea*, Current Marine Environment Issues and the International Tribunal for the Law of the Sea, 2001, p.223.

⁶⁴ *Trail Smelter Case*.

⁶⁵ Verheyen and Roderick.

⁶⁶ Convention on International Liability for Damage Caused by Space Objects (adopted 29 November 1971, entered into force 1 September 1972) Article IV; UNCLOS Article 139(2).

⁶⁷ International Law Commission, *Draft Article on State Responsibility*, Art.47; Ian Brownlie, *Principles of International Law*, 7th ed., Oxford University Press, 2008, p.458.

⁶⁸ See below section IV on legal consequences.

⁶⁹ ILC, *Draft Articles*, Art.20-26.

⁷⁰ ICJ, *Nuclear Weapons Advisory Opinion*, paragraph 30.

act in question is the only way for the State to safeguard an essential interest against a grave and imminent peril, and does not seriously impair an essential interest of the international community as a whole.⁷¹ Under traditional international public law state sovereignty and territorial integrity are supreme principles. It may therefore be difficult to argue that the need for development could outweigh the physical existence or the inundation of coastal areas of another State.

Another justification which a State might use is consent or waiver.⁷² Consent arises before or during the act complained of and precludes wrongfulness. Waiver or acquiescence arises after the act is completed and leads to the loss of the right of the complaining State to invoke the responsibility of the perpetrator. The history of States' tolerance of GHG emissions could be relied upon to argue either that they had consented to those emissions, or had waived any claim arising from the damage the emissions had caused. Whether an assertion of consent or waiver would succeed on the backdrop of new and evolving data on the negative impacts of GHG emissions is questionable, and would largely depend on the previous conduct of a litigant.

IV. Legal consequences

If a State is found responsible for committing an unlawful act under international law, it is obliged to discontinue the wrongful act, offer guarantees of non-repetition and provide full reparation for the consequences of the breach it has committed. The purpose of reparation is to wipe out, as far as possible, all the consequences of the illegal act and re-establish the situation, which would, in all probability, have existed if the act had not been committed.⁷³ This can take the form of restitution in kind or, if this is not possible, payment of damages, satisfaction or any combination of the three. The claim for reparation may be limited by the requirement of proportionality of measures – their reasonableness and equitability.

1. Cessation and non-repetition

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 and to provide assurance or a guarantee of non-repetition. In the case of a hostile occupation, for example, this would mean the immediate and unconditional withdrawal of troops and abstention from any further military action.⁷⁴ Depending on the context it could also entail 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 and theft of property.⁷⁵

The demand for cessation is usually accompanied by a request for assurances or guarantees concerned with other potential breaches in the future. Whereas

⁷¹ ILC Draft Articles, Article 25(1)(a)-(b).

⁷² ILC Draft Articles, Article 45; VCLT, Article 45.

⁷³ ICJ, *Gabcikovo-Nagymaros*.

⁷⁴ *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), ICJ Reports 2002, p. 303.

⁷⁵ For example: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v Russian Federation), 2008. ICJ cases can be accessed through <http://www.icj-cij.org/docket/index.php?p1=3>.

satisfaction and reparation focus on the breach, assurances and guarantees deal with the continuation of the affected relationship. Assurances are normally given verbally, while guarantees require something more. For example, a guarantee may involve preventative measures being taken by the responsible State designed to avoid repetition of the breach.

On 31 March 2008, Ecuador filed a dispute at the 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. Accordingly Ecuador, amongst other things, requested the Court to 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.”⁷⁶

On 31 May 2010, Australia instituted proceedings before the ICJ against the Government of Japan, alleging that Japan’s pursuit of a scientific whaling programme constituted a breach of the International Convention for the Regulation of Whaling and other international obligations for the preservation of marine mammals and marine environment.⁷⁷ In its application, Australia requested the Court to declare that Japan was in breach of its international obligations, and order that Japan cease the implementation of its programme, and revoke any authorisations, permits or licences allowing whaling activities. Furthermore, Japan should provide assurances and guarantees that it will not take any further action under its scientific whaling, or any other similar, programme.

These two ICJ cases are still in the early stages and, recent international judgments illustrate the reluctance of international judicial bodies to find in favour of environmental protection claims.⁷⁸ However, both applications reflect the general principle that if an international obligation has been breached, the first and foremost legal consequence is the discontinuation of the wrongful act. Cessation of a breach is the first step towards eliminating the consequences of the wrongful act.

In the case of transboundary pollution it has been questioned, however, whether this would entail the immediate and unconditional stop of the unlawful environmental interference. In practice States have often been given a reasonable timeframe to modify or terminate the polluting activities.⁷⁹ This may also be considered a question of proportionality between the significance of the international legal wrong and the redress owed. The legal doctrine is divided as to whether cessation is considered part of the reparation for a wrongful act or the resumption of compliance with the original obligation. Unlike the concept of restitution, the need for cessation of a breach may not be limited by the principle of proportionality.⁸⁰

⁷⁶ Application instituting proceedings, para.38(C) sub-para.(ii) and (iii).

⁷⁷ See <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=aj&case=148&k=64> for up-to-date detail on the case.

⁷⁸ ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay) ICJ judgment of April 2010; ITLOS, *The MOX Plant Case* (Ireland v. United Kingdom), Provisional Measures, 2001.

⁷⁹ René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, Kluwer Law, The Hague, 1996, p.129.

⁸⁰ ILC, *Draft Articles on State Responsibility*, Art.30 para.7

2. Reparation

Restitution in kind is the most ideal form of reparation and comes closest to the general principle that a State must wipe out the consequences of its wrongful act by re-establishing the situation which would have existed if that act had not been committed. Obvious means of achieving restitution would, for example, be to return or repair property.

If restitution, in full or in part, is no longer possible (e.g. property has been permanently destroyed, become valueless or restoration is highly impracticable), compensation would be the next available remedy to consider. In certain cases, full reparation may be disproportionate as far as the responsible State is concerned. Therefore, reparation would be limited to proportionate reparation, i.e. to the extent that it is reasonable and equitable. In general, the injured State is able to choose amongst the different forms of reparation and indicate a preference.⁸¹

In practice damages are frequently sought and awarded because of the practical difficulties in effecting restitution in kind. Compensation may be sought for any damage not made good by restitution. The remedy should be commensurate with the loss. Compensation is usually calculated by reference to a depreciation of the economic value of the damaged item. Thus, assessing adequate compensation for damage to the environment poses a variety of challenges.

3. Satisfaction

Satisfaction is the remedy for those injuries not financially assessable, such as moral or legal damages, which amount to an affront to the State. Such injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences. The appropriate form of satisfaction would depend on the circumstances. It can take the form of an acknowledgement of the breach, an expression of regret or a formal apology. A declaration of wrongfulness of the act by an international court or tribunal is usually considered sufficient.

4. Other legal consequences

Once an internationally wrongful act has been committed, a new legal relationship between the injured State and the responsible State comes into existence. A wrongful act does not usually affect the pre-existing relationship and the continuous duty of the wrong-doing State to perform the obligation it has breached. However, in some circumstances the breach of the obligation may put an end to the obligation itself, or allow the injured State to terminate the pre-existing relationship (and thereby the continuous obligation).

An injured State may also take countermeasures such as economic sanctions, which would otherwise be contrary to international law. Countermeasures are not intended as punishment, but as an instrument of achieving compliance. They are only permissible in response to a previous international wrongful act of another State and

⁸¹ Permanent Court of International Justice (PCIJ), *Factory at Chorzów, Jurisdiction*, 1927, PCIJ Series A No. 9 p.17.

must be directed against that State.⁸² If, subsequently, the allegedly wrongful act is found to be lawful, the countermeasures result in State liability.⁸³ Countermeasures usually take the form of non-performance of an obligation, and are temporary in nature. They should be discontinued if the responsible State complies with its obligation of cessation and reparation. States are to choose countermeasures that are proportionate to the wrongful act and, as far as possible, reversible.⁸⁴

Certain breaches of international law may be considered so grave that they require multilateral cooperation to bring them to an end. This may be the case for breaches of rules accepted and recognised by the international community as norms from which no derogation is permitted.⁸⁵ Possible examples include the right to self-determination or the prohibition of aggression.⁸⁶ In order to merit an international response, breaches also have to be serious, i.e. gross or systematic.⁸⁷ The legal position as to whether there is a positive duty on non-affected States to cooperate is unclear. In practice, serious breaches are likely to be addressed through the UN Security Council and the General Assembly, and sanctions are one form of multilateral cooperation.

Usually, an injured State must actively give notice to the responsible State that it seeks cessation and reparation.⁸⁸ This could take the form of an unofficial or confidential reminder of the need to fulfil an obligation. In any event, the injured State must give notice of its claim to the State which is in breach. If the injured State is aware of the breach, failure to do so - in part (e.g. omitting to claim interest) or in full - may eventually preclude it from invoking State responsibility by reason of waiver or acquiescence.⁸⁹ States are in general also under an obligation not to recognise or sustain the unlawful situation arising from a serious breach of a peremptory obligation.⁹⁰

V. Procedural avenues for international litigation

Even where a State can convincingly show that one or more other States are responsible for the violation of a primary international legal obligation that forms part of their mutual relationship, there are limited judicial avenues through which redress can be sought. While the substantive law may provide a clear basis for a claim, there are often no procedural means to pursue it further and enforce compliance under public international law. There is no governing authority that automatically addresses the legality of an act or situation at the international level. Unlike in domestic law, the formal process of dispute settlement between parties depends essentially on their consent. This reflects the fundamental principle of international relations that States are sovereign and free to choose the methods of resolving their disputes. In practice,

⁸² ICJ, *Gabcikovo-Nagymaros*, p.55 paragraph 83.

⁸³ *Case concerning the Air Services Agreement of 27 March 1946* (United States v. France), UNRIAA, vol. XVIII, 1979, pp. 416-453

⁸⁴ ICJ, *Gabcikovo-Nagymaros*.

⁸⁵ VCLT, Article 53.

⁸⁶ ICJ, *Case concerning East Timor* (Portugal v. Australia), Judgment, ICJ Reports 1995 p. 90; *Militarv and Puramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Merits, ICJ Reports, 1986 p.14.

⁸⁷ European Court of Human Rights (ECHR), *Ireland v United Kingdom*, Judgement of 18 January 1978, ECHR Series A No. 25 in the context of human rights.

⁸⁸ VCLT, Article 65.

⁸⁹ *Russian Indemnity case* (Russia v. Turkey) decision of 11 November 1912, UNRIAA, Vol.XI p.421.

⁹⁰ ICJ, *Legal Consequences for Sates of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p.16.

political pressure and diplomatic negotiations remain the primary tools in the international arena to influence State conduct.

1. Exclusivity of the UNFCCC regime

The UNFCCC is the main international climate change forum and provides parties with an independent dispute settlement process.⁹¹ In relation to international efforts to curb GHG emissions, the UNFCCC could therefore be perceived as a special “self-contained” regime that precludes parties from seeking legal redress outside the Convention process. Under the Convention, parties are encouraged to approve the submission of a dispute to the ICJ or arbitration in accordance with an annex to be adopted by the Conference of the Parties.⁹² To date, no such annex has been adopted, and only the Netherlands has accepted binding dispute settlement (in this regard) through the ICJ.⁹³

The literature predominantly considers that the parties’ primary obligations under the UNFCCC are too vague to exclude the application of general international law on state responsibility.⁹⁴ The preamble of the UNFCCC emphasises that the no-harm rule forms part of the international law surrounding climate change, and continues to govern the relationship between parties to the Convention.⁹⁵ In addition, the robustness of the compliance systems established under the UNFCCC and the Kyoto Protocol is limited. While the UNFCCC envisages the establishment of a consultative process for the resolution of questions regarding its implementation, to date, efforts to do so have not been successful.⁹⁶ In relation to the Kyoto Protocol, the Marrakech Accord has created a comprehensive system of reporting, monitoring and compliance that also contains a significant element of enforcement. However, the Kyoto Protocol stipulates that that any binding consequences shall be adopted through an amendment to its text. In this respect, no further decision has yet been taken.⁹⁷

There is also little support in the practice of States for the assumption that the UNFCCC process constitutes a self-contained regime which would prevent the parties from seeking solutions elsewhere. Important discussions and negotiations have 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. Following the Copenhagen summit, the UN Secretary General Ban Ki-moon also established a High-Level Advisory Group on Climate Change Financing (co-chaired by the prime ministers of Ethiopia and Norway). Hence, in view of the limited

⁹¹ UNFCCC, Article 14.

⁹² *ibid.*

⁹³ See Declarations by Parties to the UNFCCC at http://unfccc.int/essential_background/convention/items/5410.php; the Solomon Islands and Tuvalu have accepted compulsory arbitration in accordance with procedures to be adopted by the Conference of the Parties.

⁹⁴ Christina Voigt, *supra.*, pp.3-4; Roda Verheyen and Peter Roderick, *supra.* 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.

⁹⁵ UNFCCC, preamble, recital 8; Roda Verheyen, *Climate Change Damage and International Law*, Nijhoff Publishers, Leiden 2005, p.234.

⁹⁶ UNFCCC, Art.13; Ad Hoc Group in Conference of the Parties, Multilateral Consultative Process, UNFCCC Dec. 10/CP.4, UNFCCCOR, 4th Sess., UN Doc. No. FCCC/CP/1998/16/Add.1, 1998, p.42 (parties could not agree on the terms of reference).

⁹⁷ In decision CMP7 parties considered an amendment to the Protocol in respect of procedures and mechanisms relating to compliance in terms of Article 18.

justiciability of the UNFCCC, weaknesses in the compliance system, and subsequent State practice, it appears difficult to consider the Convention process a closed system that would exclude recourse to other means of dispute settlement.

2. Litigation before the International Court of Justice

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.⁹⁸ It may hear contentious disputes concerning an alleged breach of an international obligation if (and to the extent) the States concerned have accepted its jurisdiction. A State may accept the ICJ's jurisdiction in three different ways: by special agreement, through an international treaty which contains a clause providing for acceptance, or by a unilateral declaration.⁹⁹ The mechanism of the unilateral declaration (recognising the jurisdiction of the Court as binding with respect to any other State also accepting it as binding) has led to the creation of a group of States which have accepted the ICJ's jurisdiction to settle any dispute that might arise between them in future. In principle, any State in this group is entitled to bring one or more other States in the group before the Court.

Countries that have made a unilateral declaration accepting the ICJ's compulsory jurisdiction to date are:

Australia, Austria, Barbados, Belgium, Botswana, Bulgaria, Cambodia, Cameroon, Canada, Costa Rica, Cote d'Ivoire, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Commonwealth of Dominica, Dominican Republic, Egypt, Estonia, Finland, Gambia, Georgia, Germany, Greece, Republic of Guinea, Guinea-Bissau, Haiti, Honduras, Hungary, India, Japan, Kenya, Lesotho, Liberia, Liechtenstein, Luxembourg, Madagascar, Malawi, Malta, Mauritius, Mexico, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Senegal, Slovakia, Somalia, Spain, Sudan, Suriname, Swaziland, Sweden, Switzerland, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, Uruguay

Many declarations, however, 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".¹⁰⁰ If applicable, the latter reservation is likely to be invoked by a respondent to argue that the dispute settlement procedures agreed under the UNFCCC limit the jurisdiction of the ICJ. However, where it can be established that prior negotiations have been unsuccessful in the absence of an Annex on UNFCCC arbitration, there is no 'other' method to settle the dispute.¹⁰¹

⁹⁸ *Charter of the United Nations*, 1945, Art.92; Separate Opinion of Judge Lachs in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992 p.26.

⁹⁹ ICJ Statute, Art.36.

¹⁰⁰ The full text of all declarations is available from the website of the ICJ at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&PHPSESSID=3c2978b961f80246f716640886e8c375>.

¹⁰¹ See also above on the UNFCCC as a special or self-contained regime.

3. Provisional measures

Contentious cases brought before the ICJ can take several years from the filing of the case to the reading of the judgment on the merits. Under Articles 41 of the ICJ Statute, and Article 73 of its Rules, the ICJ can order provisional measures if it considers that circumstances so require.¹⁰² 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.¹⁰³

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 such measures does not prejudice the case's final outcome. Thus, the court cannot make definitive findings of fact or imputability. The right of each party to dispute facts and responsibility, and to submit arguments in respect of the merits, must remain unaffected by the decision. Provisional measures are only justified if there is urgency in the sense of an imminent risk that irreparable damages may be caused to the subject matter of the disputed rights.¹⁰⁴ However, it is disputed whether provisional measures ordered by the ICJ pursuant to Article 41 of its Statute are binding.¹⁰⁵ In practice, the record of compliance with provisional measures is not encouraging.

Following Russia's occupation of South Ossetia in August 2008, Georgia requested the ICJ to order provisional measures to prevent irreparable injury to the right of return of ethnic Georgians (under Article 5 of the Convention on Racial Discrimination) pending the Court's determination of the case on the merits. In its Order of October 2008, the ICJ, *inter alia*, indicated that both parties should refrain from any act of racial discrimination; abstain from sponsoring, defending or supporting racial discrimination; and do all in their power to ensure security of persons, freedom of movement and residence and the protection of property in the region.¹⁰⁶

In the Pulp Mills case (Argentina v. Uruguay), Argentina claimed that by unilaterally authorising the construction of a pulp mill whose operation would damage the environment of the river Uruguay, Uruguay was in breach of a bilateral obligation of prior notification and consultation in respect of actions which may potentially cause transboundary harm. It requested provisional measures including the suspension of all building works. However, the Court dismissed the application (and, in April 2010, to a large extent, the case on the merits), as even if there was a violation of

¹⁰² ICJ Statute; Rules of Court (adopted 14 April 1978, entered into force 1 July 1978) available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0&PHPSESSID=5c407&lang=en&PHPSESSID=5c407>.

¹⁰³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, ICJ Reports 1993 p.3 para.34; *Land and Maritime Boundary between Cameroon and Nigeria*, Provisional Measures, Order of 15 March 1996, ICJ Reports 1996, p.13, para.35.

¹⁰⁴ ICJ, *Passage through the Great Belt* (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p.12, para.23; *Certain Criminal Proceedings in France* (Republic of the Congo v France), Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, p.102, para.22; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, ICJ Reports 2007, p.3, para.32.

¹⁰⁵ Antonios Tzanakopoulos, *Provisional Measures Indicated by International Courts: Emergence of a General Principle of International Law*, *Revue Hellenique de Droit International* Vol. 57 Issue 1, 2004, p.53.

¹⁰⁶ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v Russian Federation), Provisional Measures, Order of 15 October 2008.

international law, the mills could eventually be modified or dismantled.¹⁰⁷ In the Court's view, the construction of the mills would not create a 'fait accompli' and would not render the current siting of the mills irreversible.

The Intergovernmental Panel on Climate Change (IPCC) has not indicated a specific temperature threshold for 'dangerous' anthropogenic interference with the climate system. The international discussion is currently converging around a 2°C (3.6°F) target (corresponding to a concentration of greenhouse gases in the atmosphere of approximately 450 ppm CO₂-eq) compared to pre-industrial times to avoid unmanageable climate risks. In this connection, the date of the peak of emissions is vital. The UK Met Office's Hadley Centre for Climate Prediction and Research found that if global emissions peaked in 2016, and then started to decline at an annual rate of 4 per cent, there would be a 50:50 chance of keeping the rise in temperature to 2°C. For every year that the peak was delayed, the Hadley Centre said the world would be committed to another 0.5°C of warming.¹⁰⁸

Economists and climate change experts at Price Waterhouse Coopers found that one fifth of the world's carbon budget for 2000-2050 required to limit temperature rise to 2°C had been used up by 2008. Hence the world was already 10% off the necessary trajectory to hit the target. If it stays on this course the entire global carbon budget for 2000-2050 will be used up by 2034.¹⁰⁹ Recent research also indicates that there has been a 29% increase in global CO₂ emissions from fossil fuels between 2000 and 2008.¹¹⁰ There was an annual increase in emissions of 3% during that period compared with an annual increase of 1% between 1990 and 2000. In total, CO₂ emissions from the burning of fossil fuels have increased by 41% between 1990 and 2008.

Consequently, some scientists argue that the world is already on course for the worst-case scenario (outlined by the IPCC) in terms of climate change with average global temperatures rising by up to 6°C by the end of the century. Such a rise would have irreversible consequences for the earth making parts of the planet uninhabitable and threatening the basis of some societies. There is also evidence that the natural carbon sinks that have absorbed CO₂ over previous decades on land or sea are beginning to fail as a result of rising global temperatures.¹¹¹

4. Litigation under UNCLOS

The substantive provisions of UNCLOS may be of potential relevance in connection with possible climate change litigation efforts (see above). The Convention also contains an elaborate system for the peaceful settlement of disputes between its parties. When a dispute concerning the interpretation and application of the Convention arises – for example on the mutual obligations to prevent harm to the environment of States under Article 193 - they are obliged to exchange views on its settlement expeditiously.¹¹² Unless they have already agreed on a process in

¹⁰⁷ ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, p.113; *Passage through the Great Belt*, Order of 29 July 1991, para.31.

¹⁰⁸ Mike McCarthy, *Only 50/50 chance that 2C climate target will be met*, *The Independent*, London 10 December 2009.

¹⁰⁹ *Low Carbon Economy Index*, Price Waterhouse Coopers, December 2009

¹¹⁰ Corinne Le Quééré, Michael R. Raupach, Josep G. Canadell, Gregg Marland *et al.*, 'Trends in the sources and sinks of carbon dioxide' *Nature Geoscience* 2, 2009, pp.831-836.

¹¹¹ Steve Connor and Michael McCarthy, *World on course for catastrophic 6 ° rise, reveal scientists*, *The Independent*, London 18 November 2009.

¹¹² United Nations Convention on the Law of the Sea, Art.283(1).

advance, parties must then proceed to settle the dispute by means of their own choice – for example further negotiations, conciliation or judicial procedures.

If parties fail to reach a solution in this way, any dispute must be submitted to UNCLOS settlement procedures leading to a binding decision.¹¹³ Possible fora include the ICJ, the International Tribunal for the Law of the Sea (ITLOS) or an arbitral tribunal. To which body the dispute goes depends on the choice of the parties on or after signature of the Convention. Where the parties have not accepted the same procedure, it goes to arbitration.¹¹⁴ At present, 160 States are subject to compulsory dispute settlement under UNCLOS. This includes all major emitters except the US.

A court or arbitral tribunal to which the dispute has been submitted may also order provisional measures. If the case is heard by an arbitral tribunal that has not been constituted yet, ITLOS has jurisdiction to prescribe provisional measures.¹¹⁵ Such measures may be ordered to preserve the rights of the parties, or to prevent serious harm to the marine environment.¹¹⁶ The Convention explicitly states that parties shall comply promptly with provisional measures.¹¹⁷ Such measures are binding. However, the jurisdiction of ITLOS is confined to ordering measures “*pending the constitution of an arbitral tribunal*”. The Tribunal has interpreted this caveat to imply an additional requirement of urgency.¹¹⁸ Based on the existing jurisprudence, a claimant would need to convince the court that the effects of climate change in the short period – maybe as little as a couple weeks - until the arbitral tribunal has been constituted would amount to serious or possibly irreparable damage or harm.¹¹⁹

VI. Nexus between litigation and negotiations

The above sections illustrate that, under certain circumstances, countries seriously affected or exposed to climate change impacts may argue a violation of their substantive rights under international law. Whether there are also procedural avenues to assert these rights depends on the relationship between the claimant and respondent, and their respective legal commitments. In the case of a lawsuit, lawyers representing the respondent would be able to raise a multitude of objections. In any event, setting to one side the complex legal wrangling that forms part of any dispute resolution efforts 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?

1. Benefits

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

¹¹³ *Ibid*, Article 286.

¹¹⁴ *Ibid*, Article 287.

¹¹⁵ *Ibid*, Article 290(5).

¹¹⁶ *Ibid*, Article 290(1).

¹¹⁷ *Ibid*, Article 290(6).

¹¹⁸ International Tribunal for the Law of the Sea (ITLOS), *Southern Bluefin Tuna Cases*, Request for Provisional Measures, Order of 27 August 1999.

¹¹⁹ ITLOS, *MOX Plant Case* (Ireland v. UK), Request for Provisional Measures, Order of 3 December 2001, para.81; Separate Opinions of Judge Anderson, Judge Mensah, and Judge Wolfrum.

existing framework.¹²⁰ Litigation or the threat thereof would emphasise the urgency of the need to agree binding commitments on climate change and would 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.

Nuclear Weapons Advisory Opinion

In May 1992, an international campaign was launched in Geneva by several non-governmental organisations (NGOs) in relation to the proliferation of nuclear weapons. It soon gained global momentum among NGOs and States and resulted in a request to the ICJ for an advisory opinion on the legality of nuclear weapons: “*Is the threat or use of nuclear weapons in any circumstance permitted under international law?*” Written statements were submitted to the Court by States, and the ICJ also accepted citizens’ submissions.

In its Advisory Opinion¹²¹ of July 1996, the Court found “*that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current State of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.*”¹²²

The Court conducted a thorough survey of the relevant principles of international humanitarian law and pronounced on the “intransgressibility” of many of its norms. The opinion, and its accompanying declarations and dissenting opinions, contain a wealth of considerations, legal assessments and arguments.¹²³ Many commentators at the time, however, felt that the Court had missed a historic opportunity to declare that the threat or use of nuclear weapons was unlawful in all circumstances, and consequently to resolve a one of the biggest threat to humankind. Others argued that, because the Court had addressed one of the most important legal and political questions of its time, its opinion represented a victory for the rule of law in international relations.¹²⁴

Following the Opinion, the International Red Cross made a Statement to the United Nations General Assembly endorsing many of the ICJ’s findings. In 1995, pending the ICJ decision, parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) opted to renew it indefinitely and to institute a five-yearly review process for the commitments made under it. At that point the five permanent Security Council

¹²⁰ See International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008, p.59, available at <http://www.ichrp.org/en/projects/136>.

¹²¹ ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996.

¹²² *Ibid*, dispositive paragraph 2(E).

¹²³ Yves Sandoz, *Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons*, International Review of the Red Cross no 316, 1997, p.6.

¹²⁴ Manfred Mohr, *Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons - A few thoughts on its strengths and weaknesses*, International Review of the Red Cross no. 316, 1997, pp.92-102.

members also pledged not to use nuclear weapons against parties to the treaty that did not possess nuclear weapons (except in self-defence).¹²⁵ With hindsight, the judicial process may be considered a crucial ingredient in the negotiation process in respect of nuclear weapons.

2. Barriers

Traditionally, international courts and tribunals have been very cautious in interpreting international obligations, forcing a particular conduct upon States and interfering in their domestic affairs. They are often perceived as just another forum for international diplomacy and rarely issue hard hitting judgements. In general, complex scientific questions that are disputed between the parties are also not decided. Hence, unless a defendant country accepts its responsibility for the climate change impacts in question – their causation, avoidability etc – litigation could fail. This would possibly deflect from the urgency of finding solutions to climate change and be counter-productive for the negotiation process.

The IPCC scenarios and other more recent research suggests that in order to stay below a 2⁰C temperature rise nations must make radical commitments and sacrifice economic growth. However, it is, for example, extremely unlikely that an Annex I country would be ordered to peak emissions by around 2012, to achieve at least 60% reduction in emissions from energy by 2020 and fully to decarbonise their energy systems by 2030 at the latest. It is equally unlikely that a court or tribunal would prescribe a series of concrete measures to reduce emissions such as the closing down of coal-fired power stations, a ban on gas flaring or the installation of offshore wind turbines.

‘Switching off’ certain industries and lifestyle choices may be the only effective remedy to cease the continued violations of international law, prevent human suffering and the disappearance of States. But a variety of concerns related *inter alia* to the admissibility and proportionality of such measures, their subsequent implementation, and a court’s standing within the international community are likely to prevent any type of ‘biting’ findings and decisions.

3. Opportunities

However, if a sufficiently strong case supported by expert opinions and evidence is presented, an international court or tribunal may be willing to engage creatively with the process of settling the dispute in question. To the extent it finds it has jurisdiction to entertain the case, it would probably at least encourage the parties to continue their best efforts to find solutions and underline the importance of further negotiations and collaborative activities.¹²⁶ While such an outcome alone would hardly justify litigation, in addition, the dispute settlement body could also determine specific procedural measures such as time-lines, deadlines, the establishment of an expert commission or other organs to facilitate the success of further negotiations between the parties.¹²⁷

¹²⁵ François Bugnion, *The International Committee of the Red Cross and nuclear weapons: From Hiroshima to the dawn of the 21st century*, International Review of the Red Cross No. 859, 2005, pp.511-524.

¹²⁶ ITLOS, *Southern Bluefin Tuna Cases*, Order of 27 August 1999.

¹²⁷ *Ibid* and ITLOS, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v Singapore), Request for Provisional Measures, Order of 3 December 2001.

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.¹²⁸ 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. A more radical application of their prerogative in determining provisional measures, for example, based on the precautionary principle could lead to wide ranging and surprising outcomes. The precautionary principle (or approach) provides a tool to prevent environmental degradation on the backdrop of scientific uncertainty.¹²⁹ To varying degrees, it usually puts the burden of proof that an activity is harmless on the party wishing to carry out that activity.

A judicial decision would only apply in relation to the parties to the proceedings. This could involve a significant number of countries but realistically would exclude several of the main players.¹³⁰ 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 whole international community. A complete refusal by countries not directly affected by a judicial decision to engage with new meaningful attempts to bridge the rift between parties to the UNFCCC may be politically difficult to justify.

VII. Conclusion

The issue of climate change is urgent and, to date, the measures necessary to combat its effects have largely not been taken by the global community. While the failure to act in time will have catastrophic consequences in many parts of the world, the States bearing the greatest historic responsibility for it also have the greatest capacity to adapt. In that context, the prospect of holding those States to account in an international court or tribunal is appealing.

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 case secure their survival). In a limited number of possible scenarios there are also the 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. A lack of progress following the abject failure of the conference in Copenhagen may help to persuade a potential litigant.

¹²⁸ ICJ, Rules of Court, Art.75(2); ITLOS, Rules of the Tribunal (adopted 28 October 1997) Article 89; ITLOS, *The MOX Plant Case*, Order, paragraph 83.

¹²⁹ Birnie, Boyle and Redgwell, p.152; Philippe Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge, 2003, p.273.

¹³⁰ See above for States that have accepted the compulsory jurisdiction of the ICJ.

An independent judicial forum that represents the legal systems of the world may be 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, international judges should be able to take decisions that primarily reflect the need to protect the world's ecosystem and its 7 billion inhabitants as a whole. The world's population demands what the world's science indicates: real and rapid cuts enforced against any nation that endangers us all. A judicial body that is given the opportunity to act and seizes it could make an invaluable contribution.