

# Spotlight on International Arbitration as a Means of Settling Disputes Arising from Climate Change

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### **Introduction**

*"Essentially what is at stake at this climate conference is peace".*

Those were the words uttered by French President François Hollande to signify the importance of COP21 – the 21st Conference of Parties to the United Nations Framework Convention on Climate Change (**UNFCC**) held in Paris to address climate change in December 2015. Indeed, a study by the Pew Research Centre in the run up to COP21 found that climate change is considered to be the greatest threat to humanity by some distance. In a bid to address this threat, negotiators from 195 countries succeeded in adopting a universal, comprehensive climate agreement at COP21 (**Paris Agreement**).

However, the President of the International Bar Association (**IBA**), David W Rivkin said, *"One of the greatest challenges for the negotiators is to persuade stakeholders that commitments will be enforceable beyond COP21"*. It has been suggested that arbitration can help with the enforcement of states' obligations to reduce their carbon emissions and resolve other disputes arising from climate change. An International Court for the Environment has also been mooted especially to deal with complaints from climate-vulnerable people who may not be parties to an arbitration agreement. This includes people affected by rising sea level who may lose their homes, for example in Bangladesh or in the Maldives. In this note, the authors examine the extent to which arbitration can be an effective tool to settle disputes arising from climate change.

### **Arbitration to fill the enforcement lacuna**

Recognising that commitments arising from the UNFCC may not be enforceable, Mr David W Rivkin suggested that this 'lacuna' could be filled by consensual international arbitration. He alluded to the IBA's report on *Achieving Justice and Human Rights in the Era of Climate Disruption* (**IBA Report**) published in 2014, which recommended the use of arbitration as a means of settling disputes arising from climate change.

National courts are not a viable forum for climate change related disputes involving parties from multiple jurisdictions, because of the potential for political fall-out as a state may not recognise

judgments handed down by another state's courts. International forums are better equipped to 'arbitrate' such disputes, for example, the Permanent Court of Arbitration (**PCA**), which is discussed further below.

The UNFCCC as it currently stands does not specifically endorse arbitration or any international forum as a means of resolving disputes arising from climate change. In article 14, the UNFCCC says that "*parties shall seek a settlement through negotiation or any other peaceful means of their own choice*". Negotiation has been the key feature in achieving a climate change agreement and arbitration could be a "*peaceful means*" of settling disputes. Indeed, arbitration was used as a means of finding a peaceful solution to the civil war between the Government of Sudan and the Sudanese People's Liberation Movement/Army (the *Abyei Arbitration*).

### **Arbitration and climate justice**

Arbitration is an attractive proposition because of the range of stakeholders and the types of disputes that it can accommodate. In the same way that investment treaty arbitrations are helping to create a uniform standard of sovereign behaviour towards investors, arbitration could also develop similar standards to help vulnerable communities impacted by rising sea level and other extreme weather events.

By way of example, it has been reported that without mitigation, Bangladesh could lose around 17% of its land by 2050 due to rising sea level, which may affect as many as 20 million people. A significant number of those affected are likely to be impoverished victims of climate change. Such victims are at the heart of the concept of 'climate justice' as highlighted by the IBA Report:

"...climate justice is a concept that recognises climate change will disproportionately affect people who have less ability to prevent, adapt or otherwise respond to increasingly extreme weather events, rising sea levels and new resource constraints... Climate justice seeks to combine the climate change discussion with human rights in a way that is equitable for the most climate-vulnerable groups."

Climate change impacts and the human rights of some of the world's most marginalised populations go hand in hand. Human Rights Watch (**HRW**) recently highlighted the case of the climate-vulnerable people of Turkana, Kenya, whose basic human rights including the rights to water, food and health are threatened by climate change events such as severe droughts. HRW also reported on the increasing number of child marriages in Bangladesh among farmers who are securing husbands for their daughters before they lose their land.

Arbitration could be an effective means to enforce international human rights standards in the context of disputes arising from climate change. Affected populations could participate in the arbitral process provided that they are permitted to do so pursuant to the arbitration rules or agreement. Non-parties may, in exceptional cases, participate in arbitration at the invitation of tribunals or as witnesses or observers. The role of NGOs and civil society organisations will be important in representing the interests of climate-vulnerable populations.

### **The Permanent Court of Arbitration**

Among the key advantages of using arbitration is that parties can choose arbitrators who have specific experience or expertise in climate change issues. The PCA, as an institution has developed significant experience in handling environmental/climate change related disputes. In 2001, the PCA released *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the*

*Environment.* The IBA Report recommends the PCA as the preferred institution to handle international environmental disputes.

In the *Arctic Sunrise* case brought by the Netherlands against Russia, the PCA ordered Russia to pay compensation for its detention of Greenpeace activists who were protesting against oil drilling in the Arctic. The Russian authorities confiscated the Dutch-flagged Arctic Sunrise, which had 30 people on board. The PCA held that the Netherlands was entitled to compensation for damage to the Arctic Sunrise and that Russia had breached its obligations under the UN Convention on the Law of the Sea (**UNCLOS**).

The PCA administered the *Bay of Bengal Arbitration* brought by Bangladesh against India under UNCLOS. The maritime boundary dispute concerned an area in the Bay of Bengal that will be affected by sea level rise. The PCA awarded more than three-quarters of the disputed area to Bangladesh.

Other than disputes between states, the PCA also handles cases brought by investors against states. The PCA is currently administering a case brought by a Canadian investor Peter Allard against Barbados under the Canada-Barbados Bilateral Investment Treaty. Allard alleges that Barbados failed to implement its own domestic environmental laws, which has spoilt the environment leading to a loss of revenue from his eco-tourist facility.

Further, the PCA Senior Legal Counsel, Judith Levine, stated at a side-event in Paris during the COP21 that the PCA handled nine contract cases arising from the 1997 Kyoto Protocol to reduce greenhouse gas emissions of developed countries. These cases are confidential. Confidentiality is another feature of arbitration which may encourage parties, particularly businesses, to opt into it.

## **International Court for the Environment**

Despite the PCA's successes in handling environmental disputes, there still remains a gap where climate-vulnerable populations who are non-parties may not be able to hold states and non-state actors accountable for environmental harm. Other international forums such as the International Court of Justice and the International Tribunal for the Law of the Sea also do not address this problem. This is why the idea of setting up an International Court for the Environment (**ICE**) has recently garnered attention.

The idea of a dedicated court with specific jurisdiction for hearing environmental claims has been proposed in recent decades, but met with various obstacles. However, providing climate-vulnerable people with a means of seeking justice at an international level has become a pressing need with extreme weather events becoming an ever increasing reality.

The IBA Report recommends that "*developing focused scientific and technical expertise within an ICE could more efficiently and effectively address the pronounced challenges of climate change litigation*". In the long term, the IBA Report recommends the creation of an ad hoc International Tribunal for the Environment which would build towards a permanent ICE. It suggests that the ICE could be modelled on the best practices of existing arbitral institutions such as the LCIA and the ICC.

## **Conclusion**

The Paris Agreement is a landmark deal, because it brings together the entire international community for the first time to reach a comprehensive agreement to address climate change. Arbitration could be an effective tool to enforce states' commitments and provide sanctions for non-compliance. Arbitration has already been used to resolve a number of environmental/climate change related disputes especially under the auspices of the PCA. The major shortcoming in the PCA and other international forums is that they cannot usually handle cases involving non-parties. An

International Court for the Environment could provide such individuals with a means of seeking redress.