

# The Role of International Law and Arbitration in Enforcing the Paris Agreement

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The Paris Agreement does not include an enforcement mechanism. However, trends show that different actors have been innovative in using different legal mechanisms to address environmental and climate change issues. As noted by the Stockholm Chamber of Commerce in this respect, “[g]reen investors have resorted to international arbitration to resolve disputes related to, among others, incentives and government failures to enforce environmental laws.” Meanwhile, we have been witnessing an increase in climate change litigation brought in domestic courts.

### Questions of climate change come to the fore in Arbitration

On 21 November the arbitral community, policy-makers, representatives of governments, the private sector, NGOs and academics, met in Stockholm at a conference whose focus concerned fundamental questions posed by such trends, namely: *How can existing legal norms be used to address questions about climate change? What role do International Law and arbitration have in the climate change issue?* Entitled “Bridging the Climate Change Policy Gap: The Role of International Law and Arbitration”, the one-day conference was jointly organized by the Stockholm Chamber of Commerce, the Permanent Court of Arbitration, the International Chamber of Commerce, and the International Bar Association.

The Conference in Stockholm could not have been more timely. Not only did the Paris Agreement

enter into force on 4 November 2016, but a major follow-up conference (COP22), the main objective of which was to establish a regulatory framework to enable countries to reach goals agreed upon in Paris, had just taken place in Marrakech from 7-18 November with no tangible results in the wake of uncertainties arising from a change of administration in the US.

With the Paris Agreement becoming binding for 113 jurisdictions, the Stockholm Conference brought to the fore its impact on arbitration.

### **Addressing climate change targets using existing legal mechanisms?**

A panel entitled “Addressing climate change targets using existing legal norms”, moderated by Martin Doe from the Permanent Court of Arbitration and comprised of Prof. Catherine Redgwell (University of Oxford), Freya Baetens (Leiden University), Justin Jacinto, Curtis, Mallet-Prevost, Colt & Mosle LLP and this author, addressed the role of international tribunals (including arbitral tribunals) in the enforcement of climate change goals. We were joined by Dennis van Berkel, from the Urgenda Foundation, who spoke on the use of domestic legal mechanisms. Urgenda is the organisation which together with 900 Dutch citizens, brought a case against the Dutch government ending with last year’s unprecedented ruling by The Hague District Court, ordering the Dutch government to cut greenhouse gas emissions by at least 25 per cent by 2020 (*Rechtbank Dan Haag* (2015) C/09/456689). The case, referred to as the “world’s first climate liability suit”, was primarily based on tort law, human rights law and international environmental law.

### **Towards Climate Change Justice in Arbitration?**

My presentation focused on the role of international arbitration, in particular investment arbitration, in enforcing the Paris Agreement State’s duties. Can arbitration, a method of dispute resolution whose great advantage is its swiftness, be of use in enforcing the Paris Agreement? Could international arbitration be used to safeguard the needed investment and enforce the global climate changes mitigation agenda? And in doing so, could international arbitration deal adequately with the human rights impact of it all? -were some of the key questions my presentation addressed. I proposed four main areas or gateways relevant to discuss enforceability of the Paris Agreement in relation to arbitration. First, the relevance of the Paris Agreement standards in adjudicating investment arbitration in the energy sector –by looking into “right to regulate” trends in recent case-law. Second, the convergence of forums such as arbitral tribunals and the European Court of Justice, in enforcing Paris Agreement goals. Third, the role of third party intervention in investment arbitration (by inter-governmental organisations and NGOs), bringing public law arguments (both on environmental law and human rights) to the attention of arbitral tribunals. Fourth, the possibility of moving towards the arbitrability of human rights claims not just against States, but also corporations (an initiative for an International Arbitration tribunal on Business and Human rights already existing).

### **A fundamental right to a stable climate**

Demands to resolve disputes arising from the adverse effects of climate change in the environment, affecting human beings, are on the increase. In that context I discussed the need for dispute settlement mechanisms (including arbitration) for climate change-related cases between private parties epitomized by a case currently being heard before a Regional Court in Germany: for the first time a person affected by the hazards of climate change is suing a corporation in Europe to get redress. A Peruvian farmer is suing the Energy Company RWE before the Regional Court of Essen. As reported, the man is claiming RWE’s –allegedly “one of Europe’s biggest historical emitters according to a 2013 report in the journal Climatic Change”-liability in glacial melting in Huaraz, in Peru’s Cordillera Blanca, which is affecting his home. Whilst claims like this are an uphill battle as discussed here, the burning question underlying such attempts for justice was best encapsulated by the

Peruvian farmer himself when he approached the German jurist behind the claim: 'Do you think it is correct that polluters never own up to their responsibility?'

Another important precedent –mentioned during our discussion- was a ground-breaking constitutional climate lawsuit against President Obama, numerous federal agencies and the fossil fuel industry. A recent US District Court of Oregon ruling rejected a motion to dismiss the case. In the ruling, the District Court stated that “the right to a climate system capable of sustaining human life is *fundamental* to a free and ordered society” (US District Court of Oregon Case No 6:15-cv-01517-TC. Emphasis added). In said decision the Court further stated: “This Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.”

The need for dispute resolution forums (including in the international arena) in the area of climate justice has been also acknowledged in a recent report by the IBA entitled “Achieving Justice and Human Rights in an Era of Climate Disruption”, one of its recommendations being, the setting up of an International Tribunal for the Environment. In making such a proposal, the IBA notes that “[a]n International Tribunal for the Environment could ascertain and clarify environmental legal obligations of governments and businesses, facilitate harmonisation of and complement existing legislative and judicial systems”. In his closing address of the Stockholm conference, David W Rivkin, President of the IBA, referred to such proposals.

### **Paris Agreement enabling legislation: “Reasonable and foreseeable”**

A key conclusion from my own contribution to the panel on which I sat, aptly picked by Lena Johansson Secretary General of International Chamber of Commerce Sweden at the close of the conference, is that the Paris Agreement will give rise to regulatory changes which are “reasonable and foreseeable” -in the language of the Charanne Tribunal- and which ought to fall within the “legitimate expectations” of investors in the energy sector.

After all, investment arbitration is not to reflect a dystopian international law world where investor protection trumps relevant binding obligations by States under international law. Harmonization is possible under the rules of the Vienna Convention on the Law of Treaties. And as the Charanne, and more recently the RREEF tribunal (jurisdiction) have emphasized, “an arbitral tribunal not only has the power, but the duty” to apply relevant international law to a dispute, not existing “disharmony or conflict” (in the words of the RREEF tribunal) between different international law regimes (§ 82).

### **It all comes together in Stockholm on climate change**

A visit to the Moderna **Museets** or Museum of Modern Art in Stockholm could have not been most fitting as an end to my trip. There I saw Acclimatize, climatic conversations by artists: Art as a strong emotional conveyor of climate debate. A geoengineering performance such as Rescue Blanket for Kebnekaise (the placing of a giant reflecting blanket at the top of Sweden’s tallest mountain, Mount Kebnekaise -an attempt to raise awareness about the rapid melting of the South peak of the Kebnekaise) echoed the commonality of issues I had just been engaged with, concerning glacier melting in the Cordillera Blanca in Peru.

Olafur Eliasson, an artist who made an installation in a public space in Paris during COP21 (Ice Watch) questioned himself: *Where does climate action come from?* –raising doubts that it could come from

intellectual knowledge alone, but of physical experience. Maybe the legal battles on climate justice that have started to take place, are making, in their own way, the effects of climate change around the world *tangible, visible*, forcing us to face up to them. To take Eliasson's view, after all, all the human progress behind industrialization that led to the climate crisis, has the power to invent, create, and come up with the solutions, including legal solutions, to it.