8. Climate Change Litigation

International Climate Change and Energy Law
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Climate Change Litigation

• Claimants appeal to a court to enforce or clarify existing climate change laws
• Different levels: citizens, corporations, states (see Brunnee et al., Overview of Legal Issues relevant to Climate Change)
• Purpose:
  – Reduce emissions/stop pollution (Massachusetts vs. EPA) or/and adaptation
  – Compensation for damages (Inuit Petition)
  – Cessation of Human Rights violation (Inuit, Maldives)
  – Challenge climate laws/regulations (Aviation case)
Hypothetical case

Cook Islands - a self governing State since 1965 - comprises of 15 small islands scattered over the South-south Pacific. The low lying islands have a height range above mean sea level of five to nine meters. The Cook Islands are engaged in international tourism activities and receive 37% of their annual GDP from the tourism sector. Beach holidays are the major attraction (plus coral reef diving and sea turtle nesting). For the purposes of this case, a community on the island Rarotonga wishes to lease a coastal property to a company which develops and builds tourism sites. (see: www.ck/invest.htm)

The site is only 3 meter above mean sea level. The area already relies heavily on the tourism sector for income generation. In the sale negotiation the developer informs the governing council of the community that it wishes to reduce the estimated price by 30% to take account of the risk of sea level rise in the next decade. It is argued that local sea level rise would both lead to high insurance premiums on the property (storm and tidal wave insurance) and lower the possibility of using the property long-term should the sea encroach on the beaches and property become uninsurable. Moreover, should tidal waves hit the island with greater frequency, transport and supplies would not be guaranteed and the intrusion of salt water could threaten the freshwater supply. An expert team agreed about the fact that the market value of the site has decreased significantly due to the projected changes (sea level rise) in the region.

The Government of the Cook Islands on behalf of the local community wants to claim compensation for the incurred losses based on the risk of sea level rise due to anthropogenic climate change. It wants to take action against the major greenhouse gas emitters. As a first step, the Cook Islands seeks redress from the Australian Government by bringing a claim before the International Court of Justice.

For the purpose of this case it is assumed that scientific studies exist that indicate the increased risk posed to the coastal site due to anthropogenic climate change (if not prove the causal relationship between human activities and sea level rise). Estimates have been made that project loss of coastal land on Rarotonga, even under low warming scenarios, well in the 21st century (IPCC AR4). Further, the jurisdiction of the ICJ is assumed.
Climate Change and State Responsibility

- Internationally wrongful act (primary responsibility)
  » Treaty: UNFCCC
    • Duty to prevent climate change damages?
    • Art. 2, Art. 4.2
    • Art. 18 VCLT
  » Custom: No-harm rule (prohibition of transboundary harm)
    • What is prohibited: harmful activities or harm as such?
    • Qualification: significant

- Attributability to state
  » Act of state organs?
  » Failing to act with due diligence: state’s duty of control/standard of care determined by a state’s means and capacities
  » Minimizing risk
    • Opportunity to act
    • Foreseeability
    • Proportionality
Climate Change and State Responsibility

– Causation
  » General
  » Specific (P: attributability of emissions of a state to a certain damage)

– Legal consequences
  » Cessation
  » Performance
  » Reparation (compensation), ecological damages?
  » Apportioning of responsibility/allocation of costs
Advantages (A. Strauss)

- ICJs status and visibility – favourable ruling would be conducive to creating a political environment for the furtherance of a meaningful climate treaty
- ICJ ruling could provide an authoritatively sanctioned reference point (for public opinion)
- Ruling could alter the dynamics of negotiations (backs the claims of vulnerable countries)
- Creating pressure by corporations (negative exposure)
- Could put pressure on countries to comply with their obligations
Challenges

• Jurisdiction of the ICJ (based on state consent)
  – Mutual agreement, Art. 36(1) ICJ Statute
  – Optional clause (Art. 36 (2) ICJ Statute
  – Acceptance of jurisdiction in a treaty (36 (1))
• Standing (individual interest), *erga omnes*?
• Primary norm?
• Specific causation
• Assessing damages from climate change
• Attributability to any specific country
Palau
Student assignments

