



UiO : PluriCourts – The Legitimacy of the International Judiciary
University of Oslo

Climate change litigation

Ole Kristian Fauchald

8 March 2018



**PLURI
COURTS**

Established by
the Research Council
of Norway

 Norwegian
Centre of
Excellence

Purpose

- Responding to the issues of «implementation» and «enforcement» in the learning requirements
- Some notes on use of the ICJ and international courts and tribunals
- Focus on the role of national courts, taking the Urgenda case as a starting point – what can we learn from the Urgenda case and other cases regarding states' implementation of emission reduction obligations and associated enforcement issues?
- Not UNFCCC/Kyoto/Paris compliance and implementation

Bringing cases to the ICJ

- Contentious case
 - Jurisdiction – article 36 of the ICJ Statute, art. 14(2) of the UNFCCC or bilateral treaty
 - State responsibility
 - Legal bases – treaty and customary law
 - Enforcement
- Advisory opinion
 - Jurisdiction – article 96 of the UN Charter, unclear relationship to jurisdiction in contentious cases
 - Legal duty to respect?
- Cases have so far not been brought before the ICJ

Other options

- International courts and tribunals
 - WTO dispute settlement
 - Investment treaty arbitration
- The human rights treaty bodies have been attempted
 - [Inuit petition](#) to the Inter-American Commission (2005) (dismissed)
 - [Arctic Athabaskan Council petition](#) to the Inter-American Commission (2013) (not successful so far)
- Other options
 - [Montreal Protocol non-compliance procedures](#)
 - [Aarhus Convention Compliance Committee](#)
 - [Classification of World Heritage Sites as «in danger»](#)

The Urgenda case – status

- NGO suing the Dutch state for not complying with their emission reduction obligations
- The appeal case is scheduled before the Hague Court of Appeal May 28 2018
- Urgenda reports that the Netherlands has not acted according to the ruling



Parallels to the Urgenda case in other countries

- Norway (exploration of petroleum in new areas)
- Switzerland (adequacy of Swiss policies)
- Ukraine (order authorities to take action)
- South Africa (coal fired power plant)
- Pakistan (failure to carry out national policy)
- New Zealand (challenge to GHG emission target)
- Canada (breach of Kyoto obligations)
- Belgium (failure to implement policies)
- Australia (a range of coal-related cases)

Parallels in the US (see p. 2-3 of the Climate Change Litigation Chart)

- Not all cases mentioned are court litigation
- First: 2002 with Center for Biological Diversity v. Abraham
- A number of cases to force the EPA to take measures (under the Clean Air Act)
- Some cases under other legislation against private parties
- Numerous cases regarding freedom of information issues
- Brought by state authorities, NGOs (even law students!) and corporations
- Many remain as notices of intent to sue
- Most have been dismissed

Non-compliance cases in the EU, some examples

- Directive 2003/87/EC on establishing the emission trading scheme
 - Latvia: C-267/11 P
 - Estonia: C-505/09 P
 - Poland: C-504/09 P
 - Italy: C-122/05
 - Finland: C-107/05
- Decision 280/2004/EC on establishing mechanisms for monitoring greenhouse gases
 - Luxembourg: C-61/07

Cases against governments – who can sue

- Varies significantly from based on legal rights to having general interest
- NGOs' rights to sue, being extended but do we see a pushback?
- The importance of Article 9 of the Aarhus Convention
 - Parallel in some human rights treaties – right to a fair trial
- New similar UNECLAC treaty recently signed

Cases against governments – who can be sued?

- Emission of greenhouse gases vs. production of fossil fuel
- International obligations and potential responsibility targeted at emission
- The problem of suing production countries like Norway, Saudi Arabia (wanting to produce nuclear power), ...

Cases against governments – legal bases 1

- International law
 - The legal status of international law in national jurisdictions; monism vs. dualism
 - The Netherlands as a monist system – the problem of the treaty being «self-executing»
 - UNFCCC, Kyoto and Paris – good faith and due diligence
 - Implications of flexibility mechanisms – e.g. Norway and REDD+
- Constitutional rights
 - Is the constitution regarded as «positive law»?
 - Does the constitution provide for environmental rights or duties?
 - The constitution vs. legislation to implement environmental rights and duties
 - The Norwegian case as an example

Cases against governments – legal bases 2

- Domestic legislation
 - Policy measures are economic rather than normative
 - Climate legislation sets objectives rather than clear rights or duties
 - Climate legislation leaves the choice of specific measures to be taken to public authorities
 - Climate legislation leaves the timing of measures to be taken and objectives to be achieved to public authorities, but increasingly defined in «climate acts»? The case of the UK
- International cases – the problem of state immunity

Cases against governments – formulating claims

- The problem courts formulating which measures should be taken and at what time – respecting the powers and knowledge of the executive
- Failure of taking measures needed to achieve a target (the Urgenda case) – order the government to come up with a plan
- The validity of permits to and initiation or planning of activities that will increase emissions (the Norwegian case)
- The duty to assess climate effects (the Norwegian case)
- The right of access to information

Cases against governments – judicial traditions

- The judiciary as the main or only institution controlling public authorities' compliance with international obligations
- The degree of independence of the judiciary vis-à-vis the parliament and the government
- The judiciary as the main or only institution controlling that the government respects parliamentary decisions
- The existence of constitutional courts

Civil cases – who can sue

- Those whose rights have been violated
- Those who have suffered economic loss
- Only reparative or also preventive?

Civil cases – who can be sued?

- The causal problem – Peruvian farmer suing German energy producer
- Suing collectives of actors or sectors of industries?
- Suing funders of activities
- Suing insurance companies

Civil cases – legal bases

- The basic problem of linking to international obligations
 - Main usefulness as interpretative arguments?
- General torts legislation
- Rights as «neighbours»
- Which country's legislation should be used when damage is suffered in another country?
 - The Nordic Environmental Protection Convention
- Which country's courts should be used when damage is suffered in another country? The Peruvian case

Civil cases – formulating claims

- Claim of compensation
- Claim that activities shall stop
- Claim regarding disclosure of information
- Claim that consequences shall be assessed

Conclusions

- 25 years of efforts have produced meager results
- We are seeing an increased use of litigation, but none involving the ICJ
- Litigation as focusing public attention and inducing political change