Problems and Prospects of International Legal Disputes on Climate Change

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Introduction

Tuvalu, whose territory is in peril of sinking beneath the waves as sea levels rise because of global warming, recently made the news with its decision to sue corporations in the United States and Australia that produce greenhouse gases, the cause of global warming. The litigation would seek damages and demand implementation of proper countermeasures.

Hitherto, international environmental disputes have primarily assumed the form of litigation filed by countries seeking damages, compensation, or other forms of ex post facto relief for transfrontier pollution from neighboring states.[1] There has never before been a legal dispute between sovereign states over the question of liability for global warming; the case in question has for that reason garnered much attention. The present paper examines attempts to resolve the dispute in both international and domestic courts. Since the case has not yet been filed, no written statement of Tuvalu's claim is presently available; here, therefore, discussion will focus on several questions of international law that may conceivably arise with respect to Tuvalu's suit.

I. Background and Circumstances of the Case

1. Tuvalu's Present Predicament

Tuvalu is a coral atoll consisting of nine islands located in the South Pacific. Formerly a British protectorate, it achieved independence in 1978 and joined the United Nations in 2000. Because the country is so low lying — with an average elevation above sea level of roughly two meters — it has been

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[1] An example is the Trail Smelter Case, a precedent-setting case in the area of international environment disputes. 3 *R.I.A.A.*, pp. 1906-1982.

seriously affected by rising sea levels attributed to global warming, and it stands in peril of being swallowed up by the waves within fifty years.[2] The population is therefore left with little choice but to emigrate abroad. For that reason the government has formulated a plan to move the whole population, of approximately 11,000, off the islands over a roughly thirty-year period starting in 2002, and it has asked the neighboring countries of New Zealand and Australia to open their doors to the migrants. As of the present date, New Zealand has agreed to take in 116 "labor immigrants" a year, but Australia has refused to accommodate Tuvalu's request.[3]

2. The Lead-up to the Suit

Tuvalu is preparing to sue the United States and Australia, neither of which has ratified the Kyoto Protocol, in the International Court of Justice (ICJ) on the grounds that the rising sea levels that threaten it are caused by global warming. Any case filed with the ICJ, however, is likely to take several years before reaching a verdict, especially because extensive preparations will be required to demonstrate that the two prospective defendants have breached their obligations under international law and that, moreover, a cause-and-effect relationship exists between that breach and the rise in sea levels.[4]

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[2] The UN Intergovernmental Panel on Climate Change (IPCC) has forecast that by 2100 global temperatures will rise by 1.4-5.8° and sea levels will rise by 9-88 cm. "Changes in Sea Level," in IPCC, *Climate Change: The Scientific Basis* (Cambridge University Press: 2001), p. 671. Already some 30 percent of Tuvalu's territory becomes submerged during the rainy season.

[3] The government of New Zealand has stipulated several conditions for taking in labor immigrants, to wit: (1) the maximum allowed in will be 116 a year; (2) they must be aged 18-45; (3) they must be able to speak English; and (4) they must be able to find work. The concept of "eco-refugees" propounded by Tuvalu has yet to achieve widespread acceptance; but if it does, new questions are sure to arise, including that of whether members of the international community have an obligation to accommodate such refugees, and the issue of easing requirements for their acceptance as immigrants. Tuvalu claims to be a whole nation of eco-refugees.

[4] In the face of the impending crisis, therefore, Tuvalu has set its sights for now on major U.S. and Australian corporations in such sectors as petroleum, automobiles, weapons, and tobacco. It has evidently decided to take such companies to court in their own respective countries, seeking to have their failure to implement aggressive measures deemed illegal and demanding damages in consequence (the case would thus assume the form of civil litigation between a sovereign

II. Referral to the International Court of Justice

1. International Judicial Procedures

Any state that is a member of the United Nations has an obligation to settle all international disputes by peaceful means.[5] Specifically, parties to a dispute may seek to resolve the issue through diplomatic negotiations or international arbitration, or by submitting the matter to international judicial settlement.[6]

Before international judicial procedures can commence, it must be determined that the dispute in question lies within the competence of the international court. In other words, the court must have jurisdiction over the matter, and that in turn requires the consent of the parties to the dispute.[7] The details of the dispute are then worked out: the legal standing of the disputants, the governing legislation, the legal interests of the injured state, the exact nature of the matter under contention — in a word, the admissibility of the case. Judicial procedures can now begin.[8]

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nation — Tuvalu — and private firms). The possibility is also being considered of suing companies from countries other than the United States and Australia as well, although no other countries have yet been named. A domestic suit would involve Tuvalu's seeking implementation of measures by the defendant firms to combat global warming and claiming damages from them. The losses that Tuvalu claims to have suffered, however, stem from activities by U.S. and Australian corporations that are legal under domestic law in their home countries. Those losses, moreover, involve a great deal of scientific uncertainty, manifesting themselves only after a long period of accumulation, and it will be extraordinarily difficult to find specific corporations responsible for pollution that arises from so many different sources. What is more, suing for damages in this manner may provide Tuvalu with immediate redress, but it will also absolve the defendant companies of any further responsibility once they pay up; hence it will not guarantee implementation of measures to combat global warming over the long term. A fundamental solution to the problem can only be sought in the international arena. It should be added that Tuvalu is reportedly planning to file the suit jointly with Kiribati, its neighbor, and the Maldives, which faces a similar threat.

[5] Charter of the United Nations, Article 2.3.

[6] Charter of the United Nations, Article 33. International litigation differs from domestic litigation in that the agreement of all parties to the dispute is required, although the verdict is still binding. On the binding force of ICJ decisions, see Statute of the International Court of Justice, Article 59, and Charter of the United Nations, Article 94.

[7] Statute of the International Court of Justice, Article 36.1.

[8] Brownlie, Ian, System of the Law of Nations; State Responsibility Part I (1983), pp. 53-54.

2. Tuvalu's Causes of Action

Before the dispute can be submitted to judicial settlement, then, the causes of action of the plaintiff (the aggrieved state) must be established, and it must be determined that legislation exists that is applicable to the matter at hand. The purpose of the plaintiff's action is then classified, and the conditions under which international law applies are defined.

(i) Governing Legislation

It appears that Tuvalu originally meant to file suit with the ICJ on the grounds of a breach of general obligations under the United Nations Framework Convention on Climate Change (UNFCCC). Its argument is that the United States and Australia, by taking only half-hearted measures to combat global warming — as evidenced by their refusing to ratify the Kyoto Protocol and giving priority instead to pursuing domestic political agendas and protecting domestic industries — have violated their general obligations, as prescribed in the UNFCCC, to stabilize greenhouse gas concentrations (Article 2), take precautionary measures (Article 3), engage in various forms of international cooperation (Articles 3-6), and so forth.

(ii) Purpose of Action

The purpose of an action generally falls into one of two categories: to seek ex post facto relief for an international illegal act; and to dispute the opposability of a unilateral act by another state under international law. Tuvalu appears to be seeking ex post facto relief for a violation of its legal interests — the submersion of its territory and the damages consequent therefrom — resulting from international illegal acts on the part of the United States and Australia, which acts stem from their violation of their obligations under the UNFCCC.

3. Admissibility of the Case: Tuvalu's Legal Standing

Another serious question is whether Tuvalu will be recognized as having legal standing as plaintiff (according to the ICJ, this is determined in light of the admissibility of the case). It is not enough for Tuvalu to demonstrate that it has suffered actual losses as a result of a breach of general obligations under the UNFCCC; it must demonstrate that it has suffered a violation of its legal rights in particular. The question then arises of whether the obligations imposed by the UNFCCC are of such a nature as to provide grounds for compensation if breached. To put the issue of legal standing another way, even if a breach of obligations can be proved, the decision to hear the complaint will be predicated on whether that breach can automatically be deemed a violation of Tuvalu's legal rights.[9]

4. Demonstrating a Breach of Obligations

Emissions of carbon dioxide and other greenhouse gases are due in the most part to the activities of private individuals; they are not attributable ipso facto to the state. In order to demonstrate a breach of obligations on the part of a state, therefore, it is not enough to show that there has been a substantial breach of obligations under general international law; it must be shown that the state has a specific obligation to regulate the activities of private individuals in this regard.

The UNFCCC, however, takes the form a framework agreement couched in terms of abstract concepts and general principles, merely setting out a shared vision of the common goals and interests of the international community. The signatory states are left with a good deal of discretion to define specific rights and obligations and establish standards. Thus the UNFCCC contains no specific provisions on reduction targets and methods; these are stipulated instead in the

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[9] A similar question became a thorn of contention in the 1966 decision on the South West Africa Case (Second Phase). In the end the legal rights of Ethiopia and Liberia were not recognized. *I.C.J. Reports*, 1966, pp. 32-33, 47.

Kyoto Protocol, which was concluded later — and even then it is left up to individual countries to decide how to go about the task of implementation.

It is a well-known fact that the United States and Australia have refused to ratify the Kyoto Protocol. No agreement therefore today exists on specific rights and obligations and on established standards; that being the case, it will be difficult to identify specific violations on the part of either country solely on the basis of the general obligations enshrined in the UNFCCC. But unless that can be done, Tuvalu will be unable to establish its legal interest in the case. And if it can establish no legal interest, it will find it difficult to achieve legal standing as plaintiff. Furthermore, since the causal relationship between the alleged cause (greenhouse-gas emissions by the United States and Australia) and effect (the sinking of Tuvalu) has not been scientifically proved, it will be difficult to argue that the two countries are in violation of their general obligations under the UNFCCC. At the present time, then, many obstacles remain to be overcome if Tuvalu is to have its day in court.

III. Revising the Traditional Principles Governing International Law

It is uncertain when exactly the case will be brought to court, or indeed whether it will actually be brought to court at all. But even if it is, there is at the present stage not much prospect that, whatever of the above formats the litigation takes, Tuvalu will emerge victorious — that is, achieve recognition of its demands for immediate measures to combat global warming and payment of damages.

Nonetheless, a long-term perspective on the kinds of disputes over global warming that could conceivably arise in the future compels one to consider the development of a system that would establish the liability, if not of private companies engaged in activities that are legal under domestic law, then at least of sovereign states by enabling litigation between them. In other words, a systemic framework needs to be designed that would enable parties to claim violations of obligations under general international law, which have been

expanding as international environmental law evolves. The following paragraphs discuss how the principles governing international law may need to be revised to that end.

1. Expansion of Legal Standing

As more and more problems arise that cannot be effectively dealt with in the framework of existing international law — one case in point being demonstration of the seriousness and cause of damages that cannot be predicted because of scientific uncertainty; another, the issue of losses arising from legal activities —the scope of obligations that sovereign states bear is expanding under international environmental law. Specifically, there is a move afoot to makes states responsible for maintaining control over their own territory not merely vis-à-vis adjacent states, on a bilateral basis, but vis-à-vis all other states as well.[10] As for the question of legal standing, the ICJ ruled in its decision on the Barcelona Traction Case that all states have a legal interest in violations of obligations erga omnes — obligations that exist vis-à-vis the whole international community.[11] Similarly, the set of draft articles on state responsibility drawn up by the International Law Commission included, at one point, a section to the effect that a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas,[12] constitutes an "international crime," the injured parties being "all other States" that make up the international community.[13] This would in certain cases result in all states being deemed injured parties having legal standing as plaintiffs.

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[10] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Principle 21.
[11] *I.C.J. Reports*, 1970, p. 32.
[12] Draft Articles on State Responsibility, Article 19.3(d) (deleted from the final draft).
[13] Draft Articles on State Responsibility, Article 40.3, Article 52.

2. Enhancing States' Obligations

The concept of the "Common Heritage of Mankind" that emerged in the course of compilation of the United Nations Convention on the Law of the Sea adumbrates the obligation of states to protect the human environment; so too does Principle 2 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration). Defining and enhancing states' international obligations has thus come to be seen as a key task. Given the critical state of the global environment, the principle of prevention is gradually taking root in the environment field, where damages are unpredictable and cannot be redressed by ex post facto measures. Once this principle becomes firmly established in general international law, states will assume responsibility for regulating all corporate activities that take place on their territory, whether legal or not, and the international obligations they bear will become stricter in light of it.

But as the Kyoto Protocol illustrates, this enhancement or strengthening of obligations may raise the hurdle to states' participation in a treaty framework. It will therefore be necessary build a wide range of incentives into new treaties, along with various disincentives for failure to sign on.[14]

3. Easing the Burden of Proof for Demonstrating Causality

When it comes to establishing cause and effect, instead of requiring strict proof, it would be wiser to ease the burden of proof or shift it elsewhere. A series of such precedents has already accumulated in the field of domestic litigation. Where a large number of players are involved, there is debate, even with respect to domestic law, as to whether to apply the yardstick of degree of contribution or that of proportionate liability. Further discussion of such fine points will be needed in future.

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[14] The Kyoto Protocol, for example, includes such incentives as joint implementation (JI), a clean development mechanism (CDM), access to emissions trading, and disbursement of funding. Wolfrum, Rüdiger, "Means of Ensuring Compliance with and Enforcement of International Environmental Law," *RdC*, T. 272 (1998), pp. 117-135.

IV. Conclusion

In the field of international environmental law and of international law in general, these principles are of course still in the process of evolution; repeated implementation will be needed to establish them as general principles of international law. If international treaties on the environment are to be implemented in good faith and the global environment is to be stabilized, the traditional principles governing international law will need to undergo an overhaul. And that, of course, will require fostering the perception that conserving the global environment serves the international public interest.