CLIMATE CHANGE
The Problem and Cravings for a Collective Response

Ashok Vardhan Adipudi*

[**Abstract –** *Environmental and climate change law has undergone substantial changes starting from the early 1970s Stockholm Conference, successful ozone layer rebuilding in the late 1980s, to the very recent 1992 Rio and 1992 UN Framework Convention on Climate Change. Behind all these agreements lies the multi-state, politically-supported international law mechanism that facilitates them. Nonetheless, the implementation of these agreements has lacked considerably among the state parties with most of them barely taking up any obligations and implementing them. This work starts with a glance of the climate change problem, its cause-effect relationship and how this affects state responsibility under the climate change regime. Further, the work examines extant dispute resolution for pertaining to this problem with an eye on the role of states and how international politics manifests in the adjudicatory process. The work realises that despite environment-centred arguments having been made in disputes of disparate subject matter, the core problem of an ineffective environmental adjudication has not been resolved. The central argument of this work, however, lies in how states empowered by political power derived from the people, manoeuvre globally for an ironically liberal climate change regime which would only bring peril upon the state. Hence, an appropriate allocation and manifestation of political power by the states is the need of the hour. This work, in its concluding remarks, argues for a collective response from the international community with states politically backing the cause of climate change mitigation and adopting measures centred around the individual. In its substance, this work examines how the incumbent climate change control framework has itself constantly defined by supra-legal obligations of the state parties*.]

INTRODUCTION

Climate change, with its antecedent human activity and its manifestation affecting human lives, has become prominent in the 21st century human existence. The nature of climate change is determined by the ecosystem we are living in, leading to a remote cause-effect relationship unique to this problem. Ever since the industrial era, greenhouse gas emissions have only risen without a remedy that could possibly eradicate the problem. This nonetheless does not include other forms of environmental harm occurred by other man-made accidents and disasters. Standalone events such as the Chernobyl and Fukushima-Nagasaki have their own contribution to climate change.

Given the number of climate change lawsuits and petitions filed, and the rate at which change is taking place as compared to industrial or pre-industrial periods it is clear that this field is only in its youth.[1] This is further evident when seen in light of climate change petitions that seek to hold

* Final Year Student of LL.B. (Hons.) at *Indian Institute of Technology, Kharagpur* | Email – adipudiav@iitkgp.ac.in.

1 Siri Gloppen&Asuncion Lera St. Clair, CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE, 189-196 (Oliver C. Ruppel et al. eds., 1st ed., 2013).

governments to account.[2] Further, an inference as to the sufficiency of conducive political will and larger public perception to bring about changes that inhibit or at least control climate change is yet to come. Debates originating from climate science and seeking control over the greenhouse gas emissions by industries and subsequent discharge of their liability as a retribution for the environmental harm caused have only increased in recent times.[3] This primarily pushes the conventional fuel-based industries to remap their obligations towards the society in the long run while they continuously adapt to and lobby for a favourable regulation of greenhouse gas emissions.

Having observed the importance of litigation in this regard, literature points primarily to domestic fora and adjudicatory bodies therein as playing a crucial role as against the international fora despite the global reach of this menace.[4] The petition before the Inter-American Commission on Human Rights filed by the Inuit[5] could perhaps be considered an instance of international adjudication on the issue despite the localised nature of the adjudicatory body. Further, petitions before the UNESCO's World Heritage Committee to safeguard sites endangered by climate change. Despite the fact that domestic fora are the ones being pushed by environmentalists to act on climate change, they remain disadvantaged in terms of their reach *i.e.* the global nature of the problem.[6] Thus, the international community's role and efforts at controlling climate change undertaken by the subjects therein play a crucial role at both the domestic and the international levels.[7] In its attempts at bringing the states together on the cause of climate change mitigation, the United Nations has on multiple occasions attempted a collective solution to the problem.

Efforts towards taking remedial action against climate change was initiated with the advent of the United Nations Framework Convention on Climate Change in 1992,[8] post which, Kyoto protocol in 1997[9] through the Conferences of the Parties ('COPs') convened to review the

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2 Jolene Lin, *Climate Change and the Courts*, 32 LEGAL STUD. 35(2012).

3 *See* Shibani Ghosh, *Reforming the Liability Regime for Air Pollution in India*, 4 ENVTL. L. &PRAC. REV. 125 (2015).

4 *Supra* note 2, 37-39.

5 Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (submitted December 7, 2005)*available at* –https://climate-laws.org/cclow/geographies/australia/litigation_cases/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states-inter-american-commission-on-human-rights-2005 (last visited on September 30, 2020).

6 Hari M. Osofsky, *Is Climate Change "International": Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585 (2009).

7 Connecticut v. Am. Elec. Power Co., F. Supp. 2d 265 (S.D.N.Y. 2005). This case serves as a classic example of how the domestic adjudicatory authorities are handicapped to address the climate change problem in the absence of a strong legislative and executive policy presence.

8 United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 ('UNFCCC').

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 11, 1997, 2303 U.N.T.S. 162.

implementation of the convention. The Paris Agreement[10] was another opportunity for the states to adopt any decisions to further work towards this cause.[11]

This would set the basic premises of this work, which would explore how the problem of climate change is different from other disputes in the international arena and thereby discuss various facets of the jurisdiction of a prospective adjudicatory body, perhaps the International Court of Justice ('the ICJ') or other fora wherein a remedy to a problem of this nature can be pursued. In the backdrop of this entire discussion lies the international law mechanism run by state consent and larger will of the masses of each individual state *i.e.,* international politics. Hence, it is only pertinent that one discusses international politics in conjunction with international legal obligations of the states involved. A brief conclusion bringing together aspects of climate change, political power, and mechanism of international law and how they can be aligned to deliver a collective response to the problem is deliberated.

NATURE OF THE DISPUTE

A climate change dispute between two parties is one of the most unique disputes one can come across due to a multitude of reasons. Such a conflict could be classified into the following three broad categories: a conflict between the interests of a corporate and the local individuals or a regional public, a conflict between acts of government of a state (in the international law sense of the word) and the public interest, and a conflict between two or more states in respect of climate change or such environmental disputes that emanate from another's territory.

In this regard, it would be apt to point out that much understanding has only been in terms of regional climate change disputes and policy considerations in a territory or a comparative understanding of legal and policy implications as between multiple jurisdictions as opposed to a global climate change litigation scenario,[12] where the dispute would not remain specific to the environmental damage in a specific context but on lack of measures to mitigate climate change. This could also be seen as an implication of lack of an international consensus as regards the measures and obligations of the state parties*vis à vis* the international comity.[13]

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10 Paris Agreement, December 12, 2015, 55 I.L.M. 743 (2016).

11 The latest COP-25 being primarily focused on the implementation of Article 7 of the Paris Agreement and by extension giving effect to the goals of Article 2 thereof. *See* Conference of the Parties serving as the meeting of the Parties to the Paris Agreement Second session, UN Doc.FCCC/PA/CMA/2019/1/Add.1 (November 26, 2019).

12 Cinnamon Carlarne, CLIMATE CHANGE LAW AND POLICY 3-21 (2010).

13 Although the Kyoto Protocol and the subsequent COPs have been taking place one after the other, the accountability mechanism and last mile delivery of the benefits to an individual in any country on the planet seems to be rather bleak. *See* Achala Abeysinghe et. al., THE PARIS AGREEMENT AND THE LDCS ANALYSING COP21 OUTCOMES FROM LDC POSITIONS 7 (International Institute for Environment and Development, 2016). Further, the outcomes of COP-6 and COP-7, immediately after the Kyoto Protocol have been argued to be *ultra vires* the Climate Change Convention. *See* Eric C. Beetelheim&Gilonned'Origny, *Carbon sinks and emissions trading under the Kyoto Protocol: a legal analysis*, 360 PHIL. TRANS. R. SOC. LOND. 1827, at 1833, 1837-1841 (2002) (discussing implications on the parties to the Kyoto Protocol, followed by the implications of the COP-6 and how the emissions trading mechanism is *ultra vires* the climate change convention and its purposes, objectives).

This has prompted two-fold implications: primarily the academic debate has moved in a direction that would lead to a consideration of global governance systems for the Anthropocene[14] and secondly, the lack of consensus inadvertently brings in the aspect of international politics and consensus generated thereby as a crucial factor in addressing this problem. Having understood this prelude, it brings us to the specifics of the conflict.

Elements of the Dispute

A dispute in the traditional sense has certain elements ingrained in it that made for it to be adjudicated upon in a predetermined framework for its resolution. A chronological order of events of a dispute would be: arising of a dispute[15] as between parties by their acts or omissions, presentation of the dispute to the adjudicating authority, adjudication of the dispute and finally enforcement of the dispute as between the parties.[16] This flow does not place forms of resolution as negotiation and mediation as they are more flexible for both the parties to arrive at a conclusion at an expedited pace, at least in most cases and does not involve a formal adjudicatory-determinative process.

Going by the above process, one first needs to identify prospective parties to the dispute. A basic account of stakeholders in the climate change dispute leads us to the following players: the states, NGOs, corporate bodies, individual citizens and finally international organisations. Hence, a cause of action and subsequently the dispute could emanate from acts of any of these players. Being party to a climate change dispute has remained a very contentious issue.[17] At the domestic level, in many jurisdictions, more or less there is no restraint on who can bring an action for environmental issues faced by the people in the said jurisdiction.[18] Both at the national and international levels, a persistent void of bodies that can exercise powers in a wider manner and with state consent for enforcement continues. This seals the discussion on the nature of a generic dispute and parties thereto, whereas the nature of the dispute based on its cause-effect relationship and other factors will be probed hereafter.

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14 *See generally* Louis Kotzé, *A Global Environmental Constitution for the Anthropocene?*, 8 TRANSNAT'L. ENVTL. L. 11 (2019); Louis Kotzé, *Fragmentation Revisited in the Context of Global Environmental Law and Governance*, 131 S. AFRICAN L.J. 548 (2014).

15 Mavrommatis Palestine Concessions (*Greece* v. *Gr. Brit.*), 1924, P.C.I.J. (ser. A) No. 2, 11. The PCIJ in this case defined a dispute to be: "a disagreement on a point of law or fact, a conflict of legal views or of interests".

16 Specific to the ICJ, *see* J.G.Merrills, INTERNATIONAL DISPUTE SETTLEMENT 127-76 (2005).

17 At the ICJ, it has been decided beyond a question that it is only the States party to the statute that can be a party in a dispute before the Court. *See* Statute of the International Court of Justice Art. 34, ¶ 1, April 18, 1946, 33 U.N.T.S. 993; *id.*, 128.

18 In India, the Public Interest Litigation has been read under the ambit of Articles 32 and 226 of the Constitution. *See* SP Gupta v. Union of India, AIR 1982 SC 149. In the context of environmental litigation, Rural Litigation and Entitlement Litigation Kendra v. State of UP, 1985 SCR (3) 169 started off petitions from Non-Governmental Organisations (NGOs). Although the means for securing effective relief in environmental and climate change matter in the domestic fora have been evolving for a long time. The legal strategies adopted in two of the largest democracies are only the starting point. *See* Arindam Basu, *Climate Change Litigation in India: Seeking New Approach Through the Application of Common Law Principles*, 1 ENVTL. L. &PRAC. REV. 35 (2011).

Global nature of the problem and the state

The climate change problem is known to have spread across the globe not from a concentrated source but from every possible human activity harming the environment. In such a situation, when presented with a dispute as regards the responsibility of a party towards climate change, it would be very difficult to distinguish the contribution of one party to the problem from that of another's. This is solidified as both the parties are involved in some activity or the other which takes a toll on the environment. It remains to be seen as to how it is that an adjudicatory body would distinguish the responsibility of both the parties to make an award.[19]

On the flip side, if the nature of the problem were to be very pointed and specific - both in terms of the geographical spread of the source of the problem and the manifestation of the problem, even and especially when the problem is trans-border, it would be possible for the parties to present evidence and much easier for the adjudicating authority to examine the same and make an award. In this regard, consider the Trail Smelter arbitration proceedings,[20] which further led to the framing of Principles 21 and 2 of the Stockholm and Rio Declarations respectively on state obligations as regards use of their territory. The principle embodied therein and the words of the arbitrators that led to this principle can be put together to make an observation that although the states are obligated to not let (any part of) their territory be used for any purpose that would cause injury in another's, the bounds of such territory and the harmed caused therein would have to be strictly demarcated to be "established by clear and convincing evidence". This is the case when act(s) of a state affect the environment in general but specific to a geographical space of another state and not as diffused as climate change.

When the dispute is regarding climate change manifesting in the territory of the party bringing the action, how can one pin-point the source of the cause of climate change? It would be an impossibility to apportion certain amounts of harm to each opposite party, let alone treat every such party on an equal footing.[21] Further, another point to be noted is that each and every party involved in this sort of litigation is in one way or another a victim of climate change, may be by its own actions or by another's. This difficulty or rather the impossibility of demarcating a cause-effect relationship between acts of the parties and its manifestation would lead to great difficulties in the course of adjudication for both the parties and the adjudicatory body.

Common but differentiated responsibilities

Being unable to distinguish amongst the causal forces of climate change and to remedy the earlier and higher levels of climate change causing activity of the global north, the UNFCCC introduced the concept of common but differentiated responsibilities, which manifested in the words of Principle 7 of the Rio Declaration.[22] Such a differentiation in terms of responsibility of states as observed in the international normative structure, based on broader interpretation of

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19 Michael Burger et al., *The Law and Science of Climate Change Attribution*, 45(1) COL. J. ENVTL. L. 57, 147-215 (2020) (although not on an international scale, they discuss a deep classification into the attribution aspect in climate change litigation).

20 Trail Smelter Arbitration (U.S. v. Can.), 1938 and 1941 3 R.I.A.A. 1905 (April 16 and March 11).

21 A demarcation based on objective criteria is yet in the making. Annex B to the Kyoto Protocol is one such objective demarcation that could lead to a standing to sue such state therein if they do not meet the targets. For litigation and classification of parties under the Kyoto protocol regime, *see generally* Peggy Rodgers Kalas& Alexia Herwig, *Dispute Resolution under Kyoto Protocol*, 27 ECOLOGY L.Q. 53 (2000-01).

22 Rio Declaration on Environment and Development princ. 7, Jun. 14, 1992, 31 I.L.M. 874 (1992).

treaty provisions, had been classified into two categories: "differential norm" and "contextual norm".[23] Although it has been argued that such provisions provide an incentive for developing states to enter into international agreements as regards their environmental obligations,[24] it does not mean that developing countries, comprising the majority of the global south, can or should throw caution to wind.[25] This is primarily a yield of the obligations under the said principle[26] and the hovering uncertainty as regards treaty interpretation as is observed above. Further, the enforcement aspect of such responsibilities would have to be by states of lower political capital as against states which are better placed in their international political power. This would not only go against the idea of sovereign equality on which premise the entire structure of international law is based but can also put the developed states in a tussle as to their standards of enforcement of these obligations within their jurisdictions.

Dispute and the response

The international climate change litigation unlike other disputes of localised nature has its origins and manifesting effects in a very broad territory. This in itself presents a challenging task for litigants and adjudicatory bodies to decide a possible case. Further, the interpretation of international treaty provisions and their certainty/uncertainty adds to the problem. Specifically, in the domain of state obligations towards climate change mitigation, the obligations in themselves are capable of presenting myriad challenges to the states both locally and internationally, let alone conflicts as regards non-enforcement of those obligations. Thus, the nature of the climate change problem, which is reflected in its dispute resolution, sets the requirement for a collective response across states. In the absence of this collective character, so far, the dispute resolution in the subject matter and by extension the progress in solving the problem is negligible.

IS AN INTERNATIONAL FORUM THE ANSWER?

Exploring options of climate change litigation at the ICJ becomes important primarily due to the nature of the dispute in question, as exposited above. Further, the ICJ stands to be a premier international organ which has jurisdiction, even in a fluid manner, over every nation in the world at this point in time. From a judicial certainty perspective, a ruling by the ICJ as regards state obligations on climate change could help clarify the full extent to which states are required to act as per the international law mandate. There is sufficient literature as regards who could be a prospective party to an international climate change litigation specifically under the current international climate change regime.[27]

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23 D.B. Magraw, *Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms*, 1 COL. J. INT'L ENVTL. L. &POL'Y 69 (1990).

24 Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT'L & COMP. L.Q. 35, 46 (2000).

25 Arunav Kaul, *India's Stand at the International Climate Summits: Copenhagen, Cancun, Durban*, 8 NALSAR STUD. L. REV. 160, 179-182 (2013).

26 Michael Weisslitz, *Rethinking the Equitable Principle of Common but Differentiated Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 COLO. J. INT'L ENVTL. L. &POL'Y 473 (2002).

27 *See generally* Andrew L. Strauss, *Climate Change Litigation: Opening the Door to the International Court of Justice*, SCHOOL OF LAW FACULTY PUBLICATIONS 334, 338-39 (2009), *available at* – https://ecommons.udayton.edu/law_fac_pub/3/; MERRILLS, *supra* note 16.

Proposition to take a Broader Interpretation of the ICJ Statute/ UN-Charter

Jurisdiction of the ICJ can be secured by an aggrieved party under Article 36 of the statute by any of these three means: where both the parties refer the dispute by mutual agreement, where the dispute resolution clause of a treaty or under the UN Charter as between the parties provides for ICJ to be the agreed platform (both the means are secured under Article 36(1)), and finally through a declaration made by both the parties as to the resolution of a dispute by the ICJ *at any time* under Article 36(2).Thus, it is amply clear that the jurisdiction of the ICJ as to any dispute between parties to the statute has state consent as its cornerstone, above anything else.

This leads us to a point where we can examine the possibility of a liberal consideration of state consent in matters relating to climate change litigation before the ICJ. Probably a great start for this would be the prospects, duties and origin of the UN and the UN Charter, so as to ensure a possible jurisdiction of the ICJ under the second part of Article 36(1) - "matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Keeping apart the conventions made in this regard by the parties,[28] what could be much broader in its ambit would be an application of the UN Charter.

The UN Charter in its recitals,[29] relies on the last mile individual and fundamental human rights and dignity of the human person, which include the right to a healthy environment and safe habitat for survival, subsequently arriving at the social and economic development of human society.[30] This could be read to realise that the Charter in its very purpose has its intent in maintaining peace, harmony and thereby provides people with fundamental human rights and for these ends, intends for the deployment of international machinery in achieving social and economic development. Thus, the Charter bases itself on fundamental human rights before it goes on to reiterate that it seeks to achieve development. In international environmental jurisprudence, it would be of prime importance to be able to reason as such for a broader reading of the Charter itself to resolve environmental disputes and thereby mitigate climate change in the world as one of the many sequiturs.

This broader reading of the Charter would have to be fulfilled by the member states under Article 2(2); which mandates the states while enjoying such (environmental) rights to fulfil their obligations under the Charter. This reading would be in consonance with the obligatory "shall" nature of the provision, thus, leading to an implied responsibility of the state parties to act in a pro-environment manner to secure the fundamental human rights and only thereafter secure any economic development in its broadest sense.

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28 The same has already been examined in a comparison between the Friendship, Commerce and Navigation (FCN) treaties leading to a jurisdiction and prospective global warming based disputes using similar generic treaty provisions. *See* Strauss, SCHOOL OF LAW FACULTY PUBLICATIONS 334 (2009), *available at* – https://ecommons.udayton.edu/law_fac_pub/3/.

29 Vienna Convention on the Law of Treaties Art. 31, May 23, 1969, 1155 U.N.T.S. 331 (which provides for the recitals to be a source of interpretation).

30 With the advent of multiple international environmental instruments, domestic legal authorities and rulings, soft law instruments in regional blocs as Europe, nations have to recognise the right to a healthy environment in the modern day. *See* Lynda Collins, *Are We There Yet? The Right to Environment in International and European Law*, 3 MCGILL INT'L J. SUST. DEV. L. &POL'Y 119 (2007).

But there is a prime obstruction to these means in the statute itself. Through any of the said means, it is "only states"[31] which can be parties in a case before the Court. Although paragraphs (2) and (3) of the said Article carve out exceptions which the Court can exercise in its discretion, a party before it does not become any wider than it earlier was,[32] especially when seen with the wider scope for parties to present a *list before* domestic adjudicatory bodies in mind.

Discussion on the Nuclear Weapons Advisory Opinion

The *Nuclear Weapons Advisory Opinion*[33]presented before the ICJ a consideration of the environmental implications while deliberating threat or use of force, which in itself does not contemplate such an interface with the law of armed conflict. Here the ICJ had also recognised the presence of an international corpus of environmental laws which oblige the states to act in a manner favourable to many an unborn generation of this plant.[34] The ICJ, however, balanced both these considerations in a rather ineffective manner, restricting the environmental considerations obligatory on a state to a strategic and deliberative stage while freeing the act of aggression from any environmental concerns.[35]

Per contra, it is understandable why the ICJ did not make specific reference to environmental considerations and chose to carve out the environmental obligations of a state so clearly out of its acts. By doing so, the ICJ can be said to have acknowledged a very high threshold for restricting state prerogative over its acts despite the broader obligations of the state under the UN Charter. Thus, state consent as to its obligations and adjudication thereunder, by virtue of sovereignty remains sacrosanct and for the states to decide. Nonetheless there has been tacit adjudication of environmental matters thereby making some positive impact on climate change and bringing states out of the shell of state responsibility.

How environmental concerns creep in the midst of disparate disputes?

Two prime instances where environmental impacts were inadvertently brought in to decide the dispute at hand are the *Gabčikovo-Nagymaros Project case*[36]of the ICJ and South China Sea dispute of the PCA.[37] While the former case ran parallel to transboundary environmental harm, the latter was a dispute for lush environmental resources in the region from expanding sovereignty of a party to the dispute.[38] The common thread running these cases is that neither of these was a case solely and completely based on environmental breach or lack of action on

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31 Statute of the International Court of Justice, *supra* note 17.

32 A considerable portion of the environmental disputes fail to reach the ICJ primarily due to the larger nature of the interests involved in the dispute or those that play a passive role in the cause or sustenance of the dispute. *See* E Valencia-Ospina, *The International Court of Justice and International Environmental Law*, in ASIAN YEARBOOK OF INTERNATIONAL LAW2 (Sik Ko Swan, J.J.G. Syatauw, & M.C.W. Pinto eds., 1992).

33 Legality of the Threat or use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226.

34 *Id.*, ¶ 29.

35 *Id.*, ¶ 30.

36 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7.

37 In the Matter of the South China Sea Arbitration (*Phil.* v. *China*), PCA Case No. 2013-19, Jul. 12, 2016, *available at* –https://pca-cpa.org/en/cases/7/ (last visited on September 10, 2020).

38 *Id.*, ¶ 809, 894, 992-93.

climate change. Further, in *Costa Rica - Nicaragua case*,[39] the ICJ possibly for the first time adjudicated almost completely on acts pertaining to environmental damage and state responsibility in conducting environmental impact assessments.[40] In dealing with state responsibility, the court took a broader stance and left ample space for nations to be held liable for possible breach of international environmental principles.[41] The court reasoned that although a breach ceased to exist, the responsibility of the state survives and cannot be extinguished, thus, holding the state liable for its actions despite having remedied the damage caused to the environment in act or in fact.

This goes on to say that although clear cut disputes of environmental harm or climate change inaction by nations might not emerge, especially on the international fora as the ICJ or the Permanent Court of Arbitration (PCA), these issues have inadvertently been figuring in cases such as these. Thus, the larger debate on environmental obligations of the states — be it the obligation to prevent transboundary harm or the obligation to act to mitigate climate change and not cause further global warming, will certainly crop up in ancillary discourses in international law as environmental harm and subsequent environmental damages start moving towards that point of irreversibility.[42]

ALTERNATIVE REMEDIAL FORA

As has been the highlight of the previous sections of this work, the prime reason as to why the ICJ is not the ultimate means to the ends of jurisdiction and a subsequent compliance of the award/decision by the nations involved is its foundations in the importance given by the comity to the sovereign equality of every nation.[43] This inflexibility cannot be cured except by the provisions of the Charter and the statute of the ICJ.

As has been discussed early on in section II of this work, there are certain means of dispute resolution which fall out of the 4-pronged flow that adjudicatory bodies take. These are distinguished from adjudicatory bodies by virtue of the inherent willingness of the parties to undergo those proceedings as opposed to the compulsory nature of the jurisdiction that was discussed earlier as being a mandatory for a proper implementation of the award.

Negotiations, Diplomacy and an Antecedent Link to International Politics

Consider the South China Sea dispute. Before the case in the PCA, the dispute was handled like any other mismatch of views by the diplomatic channels and intense negotiations, which unfortunately are dragging on till date.[44] Chronologically speaking, these routes are undertaken

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39 Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica* v. *Nicar.*) and Construction of a Road in Costa Rica along the San Juan River (*Nicar*. v. *Costa Rica*), 2015 I.C.J. 665.

40 *Id.*, ¶ 100-05, 173.

41 *Id.*, ¶ 126.

42 K.J. Arrow & A.C. Fisher, *Environmental preservation, uncertainty, and irreversibility*, 88 Q. J. ECON. 312 (1974).

43 *See* UN Charter Art. 2, ¶ 2.

44 Tan Hui Yee, *South China Sea negotiations between Asean and China cross key milestone*, THE STRAITS TIMES (Jul. 31, 2019) *available at* –https://www.straitstimes.com/asia/se-asia/south-china-sea-negotiations-between-asean-and-china-cross-key-milestone (last visited on September 30, 2020).

as a primary measure by the countries. In an aggravated stage, the countries approach an adjudicatory body, in this case the PCA, as parties to the dispute. In a case like this where one party is very dominant in terms of its international power and might, non-implementation of the award is a very likely scenario, let alone non-participation in the proceedings. The party being dominated undertakes such proceedings in vain *vis à vis* an outcome, in this case as a declaration of its righteousness.

Some of international law's most renowned cases, from the ICJ, have emerged from situations where the parties were not symmetrical in terms of their negotiating powers or their international standing in general.[45] This is not restricted to general disputes in international law, climate change disputes and any dispute arising from the treaty or conventions have also been prescribed negotiations.[46] This would put international politics and the negotiations based thereon on a higher pedestal than they are usually perceived to be especially in scenarios where the parties have an asymmetrical distribution of political power.

Tilting towards an Administrative Body

A prime drawback of the dispute settlement mechanisms that we have discussed till now is that they do not permit individual members or communities to approach them as they are seen to be lacking *locus standi* against nation states. These states are the ones to form the basic units of international law and undertake multilateral agreements to safeguard our environment and prevent climate change. Economic activity in these states is regulated from exceeding the agreed to levels of emissions and environmental harm primarily in the form of an environmental clearance (and other statutory/bureaucratic means for vehicular emissions) arrived at by performing an environmental impact assessment. These procedures,[47] in the *ex-ante* phase, provide for participation of communities possibly-affected by the presence of the industry in the locality. In the renewal of the environmental clearance comes the auditing, the *ex-post* phase, of the emissions and the effects thereof.

Climate change litigation is predominantly occupied with questions as to a matter of fact rather than one on the law. Breaching emission targets or abiding by them has only remained a question of fact[48] thanks to the solid structure of international comity that created the corpus of international environmental law as we see it now. Further, litigation has also been focussed on whether or not a policy stance adopted by the executive is in consonance with the possibility of meeting the emission reduction promises made to the international society by the state.[49]

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45 *See* Military and Parliamentary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14.

46 Article 14 of the UNFCCC, which provides first under ¶ 1 that parties can jointly seek settlement of their dispute "though negotiation or any other peaceful means of their own choice".

47 N Krisch& B Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, at 7-13 (2006) (discussing the limits of a global administrative law and how the current structure of international law could be evolved into a more accountable platform).

48 This is more so when provisional measures alone can play a crucial role in the litigation, it would be invaluable for communities to present their case before a powerful authority limited to a jurisdiction, let alone cross-territorial. *See* Duncan French, *Environmental Dispute Settlement: The First (Hesitant) Signs of Spring?*, in 19 THE HAGUE YEARBOOK OF INTERNATIONAL LAW (A.Ch. Kiss et al. eds., 2006).

49 The latest petition, yet to be decided, on inadequate policy stances of the Executive could be seen in Germany's Higher Administrative Court of Berlin and Brandenburg. *See* Media Release, Client Earth, Germany sued over major national air pollution failures (May 26, 2020) *available at* –https://www.clientearth.org/press/germany-

Given the predominant factual nature of climate change adjudication in the absence of law dealing with specific aspects of climate change in the society, it would indeed benefit from fora which are more accessible to civil society and can provide remedy across state borders. This was sought to be bridged by proposals of grievance redressal schema[50] which are typical of institutions in the world, such as the World Bank or a national *i.e.*, local ombudsman.[51] These bodies, if set up, are being portrayed as a possible alternative for the citizenry to approach as against the international fora where they would obviously lack standing. Thus, a forum characteristic of its administrative reach could help resolve more claims from a wider public all the while dealing with the basic instrument of environmental clearance.

Discussion on the Obligation of States in General

The nature of obligation that is proposed in the UNFCCC, and subsequent conferences and international instruments has been studied under the headers of common and differentiated responsibilities.[52] An examination of a common responsibility *e.g.* listed in Article 7 of the Paris Agreement with wordings "global goal",[53] "global challenge faced by all with local, subnational, national, regional and international dimensions"[54] indicates that the parties to the Agreement recognise the nature of the problem *i.e.* climate change and mitigation thereof to be one of *erga omnes* character as regards a party's duty to act in accordance with the Agreement in implementing the global goal at the state-level by taking appropriate stakeholders into confidence,[55] which is further bolstered by the existence-threatening nature of the climate change problem in the first place. As can be seen, this obligation is the broadest possible obligation of a party to the Agreement with its said*ergaomnes*character. Further, the deficit of responsibility in the common but differentiated responsibilities as regards the developed and developing states can be attributed to the *ergaomnespartes*obligations of the developed states to the developing or under-developed states as a means of balancing out their earlier and higher carbon emissions at a time when the latter group was out of the picture.

This nature of the obligation's points to a scenario where the obligation is owed by a state to the whole world, the action needs to be taken at the ground/state level and in some cases, at an even local level (district/county level) with federal support. Hence, enforcement, dispute or a grievance stem from the ground level and the redressal/relief that is sought in many cases has to do with the national implementation of these obligations.[56] This would imply that the

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sued-over-major-national-air-pollution-failures/?utm_source=twitter&utm_medium=social (last visited on September 11, 2020).

50 Duncan French & Richard Kirkham, International Law and Dispute Settlement 63-82 (Duncan French et al. eds., 2010).

51 *See* the International Ombudsman Institute Home Page, https://www.theioi.org/the-i-o-i (last visited on September 11, 2020).

52 *See supra* note 23 and accompanying text.

53 *Supra* note 10, Art. 7, ¶ 1.

54 *Id.*, ¶ 2.

55 The same can also be read pursuant to Art. 7, ¶ 5 of the Agreement.

56 In many infrastructure and conservation projects in addition to Environmental Impact Assessment and a subsequent environmental clearance, the diversity of population in the region also face many problems. Consider the situation of hundreds of displaced tribes of Madhya Pradesh who could not be relocated with appropriate compensation despite statutory safeguards. Such communities suffering the consequences of climate change threatening actions in a territory could perhaps find a voice in the grievance redressal mechanisms. *See* Reuters, *India urged stop evicting tribes from 'Jungle Book' tiger reserve*, (Jan. 15, 2015) *available at* –

international disputes as regards non-implementation or inadequate implementation of treaty obligations by a state have to be taken up with either the conventional fora at the international level or with such grievance redressal fora which have jurisdiction over both the territories in a cross-jurisdictional dispute. Going ahead, either way would require a harmonised collective response from the states to take the first step in recognising the authenticity of such a forum to tackle this menace.

ROLE OF INTERNATIONAL POLITICS IN THE ULTIMATE SOLUTION

For long, development of international law has been seen to be the coming together of international comity in pursuit of peace, harmony and justice. "And yet, no central authority exists in international politics that is capable of enforcing rules, legal or otherwise"[57] as has been rightly observed by Haywood. This lack of central authority for enforcement has its impact on the global scale when one nation in its compromise of sovereignty enforces the same internationally negotiated norms that another nation conveniently side-lines in its agenda - either domestically or internationally. This not only dilutes the entire fabric of international law but also disincentives politically weaker parties from agreeing to any obligations on the international scale that would impact their states and stakeholders.

In coming together, the nation states have made certain compromises to the nature of their ultimate sovereignty. The problem of climate change and global warming is also a problem that has its roots in the sovereignty of states and their belief that sovereign actions cannot be questioned by any actor other than its electorate.

History stands testimony to the fact that public human-will would always outweigh oppressive regimes, dictators, and autocrats the moment there is no incentive for the subjects of the regime to continue with it. The 1789 French Revolution, the 1917 Bolshevik Revolution, and similarly the 1920 Non-Cooperation Movement in India were all led by factors such as oppression, hatred, inequality, unavailability of basic amenities, and most importantly lack of empathy that outweigh the best of features that stand out in favour of a given regime. Commentators and academics have observed that revolutions as these are the pathway to a new world order that signifies willingness of the public to have a change in *status quo.*[58]The same, albeit in a sense of inducing and incentivising willingness of the states, applies to the problem of dispute resolution in international environmental law and implementation of treaty provisions.

The climate change problem requires a collective response from the international community. This necessity stems from a cause that is universally accepted and locally resolved, and is to be confronted with solidarity for the entire community.[59] This triggers a mechanism that starts with political will from the grassroots and transforms into one that affects legal mechanisms for enforcement of political will. Undertaking an examination of the negotiations under the

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https://in.reuters.com/article/us-india-landrights/india-urged-stop-evicting-tribes-from-jungle-book-tiger-reserve-idINKBN0KO0TL20150115 (last visited on September 30, 2020).

57 Andrew Haywood, GLOBAL POLITICS 331 (2011).

58 *Id.*, 25, 156-160.

59 *SeePaulSpicker*, THINKING COLLECTIVELY: SOCIAL POLICY, COLLECTIVE ACTION AND THE COMMON GOOD 88-92 (2019).

UNFCCC and the nature of changes that are considered therein would help us understand what it is that the parties are weighing. Consider the negotiating text of Ad hoc Working Group on the Durban Platform for Enhanced Action('ADP')[60] as regards broadness of the negotiation in question. Despite being years into the Paris Agreement and more than a decade into UNFCCC, the negotiation does not in any manner enter the finer details of implementation and state responsibility. Any paragraph or its options of the draft Protocol for negotiation only stay so broad for a party to be *pursued* by it and not strict enough for a party to apply, implement or bring into effect measures *in accordance* with the previous Agreements; these failures, thus, compound to appear as the failure of the global political powers to decide the "extent" of climate change measures in their respective jurisdictions.[61] This can be observed in not just the quoted ADP and its work but in many such instances noted post-Paris Agreement.[62]

One can without a doubt realise that current international environmental dispute resolution mechanism is not conducive for facilitating remedies even at a level that would not disrupt development to a considerable extent.*Ex facie,* contemplation of alternative administrative fora for environmental adjudication should be a cue from the literature that present state-centred dispute resolution mechanisms have failed the environment. This indicates that the current environmental law's development on the international stage, its deficiencies and their visibility are pointing to the fact that the threshold for solidarity for this cause, an extraordinary change in the implementation of environmental policies are yet to come. Clearly, there are factors that imply this non-conducive nature: lack of state consent, lack of implementation even to the extent the states have obligated themselves, a clear lack of scrutiny and a subsequent penalty as regards non-implementation being the prime pointers. As discussed earlier in the previous section, this does not mean that environmental factors did not figure in disputes (specifically those with non-environmental subject matter) between two parties.

Politics by its nature is the allocation of political power to various needs of a jurisdiction.[63] It is very much clear that the political capital, and subsequently the financial leeway that states have been allocating for climate policy fall short by miles. This only incentivises the global shift towards a diluted sovereignty and highly monitored shift towards the governance of earth's environment.

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60 Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, Work of the Contact Group on Item 3 (February 12, 2015)*available at* – https://unfccc.int/sites/default/files/negotiating_text_12022015%402200.pdf (last visited on September 30, 2020).

61 Evan Luard, THE GLOBALIZATION OF POLITICS - THE CHANGING FOCUS OF POLITICAL ACTION IN THE MODERN WORLD 78 (1990).

62 *See* Subsidiary Body for Scientific and Technological Advice, Modalities for the accounting of financial resources provided and mobilised through public interventions in accordance with Article 9, paragraph 7 of the Paris Agreement, *available at* – https://unfccc.int/sites/default/files/resource/Draft%20Conclusions_SBSTA%2048.2_SBSTA%20item%2013%20%2B%20annex_8Sept_2256H.pdf (last visited on September 30, 2020); Ad Hoc Working Group on the Paris Agreement, Sixth part of the first session, Additional tool under item 4 of the agenda, U.N. Doc. APA1.6.Informal.1.Add.2.*available at* – https://unfccc.int/sites/default/files/resource/APA1.6.Informal.1.%20Add.2.pdf (last visited on September 30, 2020).

63 *See generally, supra* note 61, 1-5.

CONCLUSION

It is very well known that international law came to where it stands today primarily due to the agreement of every state party as regards any step being taken *i.e.* state consent. When a similar framework is applied to the problem of international environmental adjudication and climate change litigation, it falls short of a reasonable solution. This is primarily due to the vested interest of every state in its own development and subsequent economic and political capital as opposed to the greater good of the international community.

Analysis of this point has to be considered in three facets of the climate change problem facing the states: nature of the problem, dispute resolution under the subject matter of the problem, and state responsibility emanating from political power. As a part of the broader picture, we have observed from the previous sections of the work *why* the present institutional structure needs to evolve into a collective response necessary from the perspective of each of these facets.This brings us to the transition to a collective response *how* made.

The nature of the problem-with its disparate geographical cause-effect relationship, involvement of multiple state parties and their distinct responsibilities culminating in a common goal-requires us to deliver both a grassroots response involving the individual and also a global response in terms of cohesive effects to steps taken by multiple state parties. Litigation at various fora empowers the individuals struggling to put in motion a procedure to safeguard our climate. In essence, these fora (when effective in terms of their implementation of awards to prevent climate change) are a means to the collective response that an individual at the grassroots has to deliver.

As is very clear from the analysis of these factors (nature of the problem and litigation on the subject matter), the more one tries to get to the root of the problem, the faster one realises the necessity of political will. Thus, the responsibility of a state emanating from the political power of its citizenry has to be in line with a *pro-climate stance.* This stance is made necessary and inadvertent: primarily, in order to secure its own territory and people from the perilous implications of an extreme climate change scenario and secondarily, in order to discharge its obligations *erga omnes vis à vis* other states, as discussed earlier. In theory, the broadest interpretation of this stance would be strictly safeguarding the environment and keeping our ecological balance. What would logically follow is for states to turn into an interface between the grassroots community, and the international community to considerably reduce its role as a facilitator, with regard to the climate change problem; the state until now has only served to insulate individuals of the state from its global obligations. This is possible when the governments return maximum political capital back to the individuals in matters of climate change and environment., this implies that a state no longer

(i) relies on another party to discharge its responsibilities before it makes a move or
(ii) prevents its climate policy from advancing further than its due obligations or
(iii) consenting to the jurisdiction of a multi-state adjudicatory body for judicial oversight.

In all these cases, with successive implementation of global obligations by state parties, individuals would be the ones reaping the benefits.

This would also mean treating the problem according to its nature and not according to the incumbent global governance structure. Given that climate change, lack of a healthy environment, displacement and relocation of thousands if not millions of people are problems faced by an individual of the state, there would be a point in time where the state parties would

have to be more sensitive to that individual. That would mark the consensus of the international comity as regards its will to fight climate change and similar international environmental problems, which are in the interest of the global community to challenge.