Resolving Climate Change-Related Disputes Through Alternative Modes of Dispute Resolution.

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Introduction

In his Address to the 66th United Nations (UN) General Assembly in 2011, former UN Secretary General Ban Ki-moon stated that -

"[w]e must connect the dots between climate change, water scarcity, energy shortages, global health, food security and women's empowerment. Solutions to one problem must be solutions for all."[1]

This statement encapsulates the 'interconnected' nature of the issue of climate change as it relates to other social issues. A co-related factor is the undeniable necessity of devising concrete actions and interdisciplinary approaches to address this issue. The continuing threat of climate change and its associated risks necessitate rapid transitions in activities having an environmental impact in order to contribute to the reduction of global temperatures by cutting down greenhouse gas emissions. This involves (inter alia) promoting renewable energy systems, achieving energy efficiency in business, industries and households, and the strict implementation of environmental regulations. Responsibility for addressing climate change must trickle down from State level to all key stakeholders in order to achieve the climate change goal set by the Paris Agreement 2015: to limit the increase in global temperature to below two degrees Celsius by comparison with pre-industrial levels through "nationally determined voluntary contributions" of State parties.

Based on the 2018 Global Sustainable Investment Review, sustainable investments in the major markets stood at US$30.7 trillion globally at the start of 2018, a 34% increase in two years.[2] Furthermore, even general investments and activities having environmental impacts are increasingly subjected to environmental regulations in a variety of jurisdictions that have enacted domestic laws to comply with their commitment under the Paris Agreement. The transition is also expected to have an impact on general commercial contracts in the sectors of energy, infrastructure, transport, agriculture and other land use and food production, as well as industry, including manufacturing and processing.[3] The Grantham Research Institute on Climate Change and the Environment reports that 2,252

climate laws and policies have been adopted so far by States and regional groupings worldwide.[4] These include laws providing incentives for renewable energy production in the form of feed-in tariffs and which regulate air and water quality and land use. These laws and policies can also require compliance with environmental standards that affect businesses and contracts.

With regard to investor-State dispute settlement, the inclusion of environmental language in international investment agreements, both bilateral and multilateral, is also gaining traction. The most progressive example of this is the Bilateral Investment Treaty (BIT) between Morocco and Nigeria,[5] which makes express reference to the right of State parties to regulate and introduce new measures relating to investments in their respective territories in order to address environmental concerns. The model BITs of the United States[6] and the Netherlands[7] likewise make reference to the reservation of regulatory rights of host States, showing an increasing awareness of the importance of environmental protection in international investments.

Dispute resolution mechanisms and climate change-related disputes

In light of increasing awareness of and efforts expended toward addressing climate change, appropriate dispute resolution mechanisms to resolve cases that may arise both from these initiatives and from activities related to the climate change agenda must inevitably be considered. In this regard, the ICC Commission Report[8] has identified the following sources from which climate change-related disputes may arise:

(1) contracts relating to the implementation of energy or other systems transition, mitigation or adaptation measures, in line with commitments under the Paris Agreement;

(2) contracts without any specific climate-related purpose or subject-matter, but under which a dispute involves or gives rise to a climate or related environmental issue; and

(3) submission or other specific agreements entered into to resolve existing climate change or related environmental disputes potentially involving impacted groups or populations.[9]

Admittedly, disputes arising under commercial contracts and investment treaty obligations are not the only possible forms of 'climate change-related dispute', since this term should be broadly interpreted and understood. It therefore includes cases that may arise from the

violation of domestic laws and regulations intended to address climate change, and their co-relative State-level criminal and civil penalties against persons, both natural and juridical. These cases will still have to go through the respective litigation systems of each State. Questions on the validity and constitutionality of certain governmental actions, even in relation to commercial contracts, can only be resolved through court litigation, given that nullification of public laws and regulations is within the exclusive jurisdiction of State courts.

These types of climate change-related dispute should not, however, diminish the promise of alternative modes of dispute resolution in relation to commercial contracts, both international and domestic, which are the more prevalent sources of disputes. Alternative dispute resolution (ADR) may be the most acceptable and practical mechanism for resolving climate change-related disputes between parties who have shown a preference for a process in lieu of litigation. There is, therefore, greater reason for promoting ADR in resolving such disputes, particularly those arising under investment and cross-border commercial contracts.

In summary, the foregoing discussion confirms three main points with regard to climate change-related disputes.

Climate change is a multi-faceted issue that remains a pressing concern for States. As such, there is also a global expectation that States will contribute to addressing it.

Increasing awareness of the necessity of addressing climate change is expected to bring about (i) an upward trend in green investments and commercial contracts intended to comply with State commitments under the Paris Agreement, and (ii) an increase in the regulation of industries and activities having environmental and climate change impacts.

Climate change-related disputes will most likely stem from those investments and contracts having the greatest impacts, thus advancing climate change alleviation efforts, in addition to promoting domestic legal enforcement of laws and policies that are reserved exclusively to litigation, albeit within in a narrower scope.

While litigation remains a mode of resolving specific types of climate change-related dispute, including those cases enumerated by the ICC Commission Report, it may not be acceptable for many parties since it is incorporated within a national framework. This becomes an issue if one of the parties is a national, a domestic corporation or the State itself in the place where

the litigation is conducted. In addition to the issue of possible partiality, delays in litigation and the lack of expertise of national judges in technical and commercial matters, particularly in emerging economies, may also be reasons why parties shy away from litigation.

In any event, alternative modes of dispute resolution arguably fare worse than litigation in creating norm-setting pronouncements that may apply even to non-parties in cases falling within a specific national framework. The best example of this is the Urgenda case, in which the Netherlands Supreme Court ruled that the Dutch government was obliged to take measures to prevent climate change and to reduce its greenhouse gas emissions.[10] However, even the judgment of a court in a case such as this still necessitates the adoption of specific strategies, such as encouraging investments and commercial activities that could result in types of climate change-related dispute being better addressed by ADR. In other words, the promise of litigation in relation to climate change-related disputes remains at a more ideal- and policy-based level when compared with the real and practical impact of ADR mechanisms. There is, therefore, sufficient room for ADR in resolving a wide range of climate change-related disputes.

Arbitration

In particular, arbitration as a private form of litigation remains a preferred mode of ADR worldwide. This mode has enjoyed increasing global acceptance and preference among States and private entities, particularly in cross-border matters. As early as 2015, the International Bar Association (IBA) Subcommittee on Arbitration reported that there had been a rise in the use of arbitration as a dispute resolution mechanism in all regions.[11] More recently, the 2021 International Arbitration Survey[12] has shown that international arbitration remains the preferred mode of dispute resolution, either on a stand-alone basis or in conjunction with other alternative modes of dispute resolution. In relation to sectors or industries that may be the source of climate change-related disputes, the ICC Commission Report stated in 2019 that arbitration and ADR are well-established in resolving environmental disputes and that, since 2007, an average of three new environmental protection cases per year had been registered with the ICC, with up to six in some years.[13] It is also mentions that other arbitral institutions had published similar statistics.[14] Further, insofar as international investment agreements are concerned, the OECD Working Papers on International Investment 2012/02 reported that international arbitration had become a common feature of investment treaties, with only 6.5% of the treaties in their

sample not having provided for international arbitration.[15] It is likewise expected that this level of popularity and acceptance will be replicated at the domestic level, owing to the promise and advantages of arbitration per se, particularly in developing countries with uncertain litigation frameworks.

The worldwide acceptability of arbitration as a mode of dispute resolution is mainly due to its flexibility. Parties are free to choose their arbitrators and may also opt to appoint experts in a specific climate change-related field. In this regard, the Permanent Court of Arbitration maintains a list of environmental experts from which parties may choose their arbitrators.[16] This may not be the case in litigation, where judges are mainly 'generalists' and so may need training or the help of a neutral expert to understand technical matters and issues in order to resolve these cases properly. The flexibility of arbitration also extends to the ability of the parties to choose (inter alia) the seat, the procedure to be applied and the governing law(s).

Notably, arbitral institutions have also considered the increasing number of environment-related disputes and are working to maximise the availability of arbitration in resolving them. It should be noted that arbitration has a reputation for providing neutral arbitrators who are insulated from political pressure when compared with judges, who work within a governmental framework.

Arbitration generally seeks the prompt resolution of disputes by comparison with litigation, which may take more time as a result of procedural requirements and congested court dockets, particularly in developing countries. Arbitration likewise provides for urgent relief by way of interim measures of protection and emergency arbitration, which can address the need for time-sensitive resolution of a matter in a climate change-related dispute. Finally, it should be emphasised that foreign arbitral awards obtain recognition and enforcement in the 169 jurisdictions that have so far acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This remains the most widely accepted instrument of its kind by comparison with the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019.

Mediation

Mediation is also an alternative but non-judicial mode of dispute resolution that can be utilised in addressing climate change-related disputes. It can be a more flexible mode of

resolving such disputes. Parties may opt to appoint a mediator who is an expert on the specific matter involved in the dispute in order better to facilitate a mutually acceptable settlement agreement between and among the parties involved. The biggest obstacle, however, remains the willingness of parties to undergo this process, since they would most likely opt not to compromise once a dispute has arisen.

Mediation can be included, along with arbitration, as part of a multi-tiered dispute resolution mechanism. Currently, parties remain likely to submit mediated settlement agreements to an arbitral tribunal in order to enforce them as arbitral awards. This is primarily because awards are more widely recognised and enforced under the New York Convention, as previously discussed. This is, however, a matter which the Singapore Mediation Convention 2018 seeks to address by providing for the direct enforceability of mediated settlement agreements along broadly similar lines to awards.[17]

The suitability of ADR

All this is not to say, however, that ADR is a panacea for all climate change-related disputes. It is recognised that costs and delays have sometimes been considered to be factors militating against arbitration, particularly when pitted against the litigation systems of developed nations. Furthermore, the confidentiality of arbitral and mediation proceedings has also been used to demonstrate lack of transparency compared to the publicised decisions of courts in litigation. This feature may, however, be viewed in a different perspective because it is in fact one of the reasons why parties prefer to arbitrate and mediate - that is, to control public disclosures. The applicability of and general preference of parties for ADR in commercial and investment contracts - particularly in the fields of energy, infrastructure, land use and the various industries in which climate change- related disputes would most likely arise - should be utilised and promoted.

Conclusion

The foregoing discussion shows the promise of ADR in addressing climate change-related disputes. While litigation has its own advantages and disadvantages, the use of ADR should be maximised, particularly in areas in which it is currently widely accepted. Efforts should be made to promote and enhance its acceptability with the aim of efficiently and effectively resolving such disputes.

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[6] 2012 US Model BIT, available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.
[7] Netherlands Draft Model BIT; available at https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf.
[8] Note 3 above.
[9] Ibid, p 8.
[10] State of the Netherlands v Urgenda Foundation, Case No 19/00135 (20 December 2019), available at https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Nieuws/Paginas/Dutch-State-to-reduce-greenhouse-gas-emissions-by-25-by-the-end-of-2020.aspx.
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[13] ICC Commission Report (note 3 above), p 16.
[14] Ibid.
[15] Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, OECD Working Papers on International Investment 2012/02, Dispute Settlement Provisions in International Investment Agreements, p 11, available at https://www.oecd.org/daf/inv/investment-policy/wp-2012_2.pdf.

[16] List of Specialized Panel of Arbitrators of the Permanent Court of Arbitration, available at https://pca-cpa.org/en/about/panels/panels-of-arbitrators-and-experts-for-environmental-disputes/.
[17] United Nations (Singapore) Convention on International Settlement Agreements Resulting from Mediation 2018 (effective 12 September 2020).