

National Peoples Tribunal on Climate Change

Alternative Means to Address Climate Change

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Existing Legal Framework to Stabilize Climate System

In the field of protecting climate system from getting destabilized, we find ascendancy of the community response in terms of controlling mitigation of greenhouse gases with the help of the United Nations Framework Convention on Climate Change (UNFCCC) 1992 and a protocol to the Convention called the Kyoto Protocol 1997 and the decisions taken at the COP meetings to operationalise the Protocol. In this approach, the entire responsibility of mitigation of green house gases is to be made by the developed country parties grounded in the principle of the common but differentiated responsibilities and respective capabilities. The developing countries obligations are contingent on the delivery of financial assistance to them by the developed country Parties. This approach is premised on the fact that it is extremely difficult to attribute liability of a particular state to a particular damage, which occurred as a result of some extreme weather events, and, also owing to the fact the developed country Parties having the financial means and technology should play the lead role.

Importance of Climate Change Litigation as Dialogue

This approach is not correct unarguably. Principle 21 of the Stockholm Declaration says that state should use its territory in such a manner which does not result in transboundary harm beyond its territory or areas beyond its national jurisdiction. The areas beyond its national jurisdiction may cover damage to the atmosphere as well. It is part of the customary norm that state is responsible for transboundary harm provided it is of serious nature and established with clinching evidence (Trail Smelter Arbitration Award 1939-41). It is important to note here that the past several years have seen an explosion of climate change litigation in sub-national, national, and supranational tribunals under a wide range of substantive approaches. On April 2, 2007, the U.S. Supreme Court issued a

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landmark ruling in *Massachusetts v. EPA*, a case challenging the U.S. Environmental Protection Agency's denial of a petition requesting that it regulate motor vehicles greenhouse gas emissions under the Clean Air Act. The petitioners Supreme Court brief in the case argues that greenhouse gases constitute pollutants because of their effect on the climate; petitioners further contend that the EPA erroneously interpreted the Clean Air Act based on ad hoc policy considerations. These arguments connect to traditional international lawmaking because the EPA helps to formulate federal policy on climate change. As a party to the UNFCCC, the United States has a good faith obligation to make policy aimed at stabilizing anthropogenic greenhouse gases in the atmosphere. The majority opinion's holding that Massachusetts has standing and that the EPA must provide better justification of its decision not to regulate motor vehicles' greenhouse gas emissions serves as an important step forward in the public dialogue over climate change. *Massachusetts v. EPA* will impact the many pending climate change cases in the United States directly as precedent. As a substantive matter, the Court's recognition of climate science and broad reading of Clean Air Act will provide useful precedent for pending and future cases.

The petitioners are approaching the World Heritage Committee about the dangers posed by the climate change induced disasters to the world heritage sites. There are lists made by them to be included in the heritage list. This is another scope which further strengthens the justification of standing of non-state entity.

All states are sovereign to do development using the natural resources at its disposal emanating from the principle of permanent sovereignty over natural resources. The dilemma is to achieve the goal of development, which requires extensive use of fossil fuel, without damaging climate system. The developing countries need finance and technology to switch over to low carbon development path. But a major share of responsibility to protect themselves from serious damage is to take place out of the finance and support of the developing countries themselves.

Building of Adaptive Capacity as National Goal

No matter how fast mitigation of greenhouse gases responsible for global warming takes place humankind is already committed to some degree of climate change to which societies will have to adapt. Adaptation is needed not only because the impacts of climate

change are already being felt in several parts of the world, but also because even with successful mitigation strategies there will be an inevitable rise in temperatures to which the world will have to adjust.

Available financing, current and projected, are substantially insufficient to meet the costs of adaptation, which of course includes food security challenges faced by the agriculture sector². Financing adaptation measures is highly contentious. There is still lack of precision on what actually constitutes adaptation. What measures will constitute adequate adaptations are not defined in the Convention? Article 4(1) (b) of the Climate Change Convention refers to taking of measures which will facilitate adequate adaptation. It is likely that the following factors-economic efficiency, environmental sustainability, technical feasibility, administrative, legal admissibility and social acceptability of measures-will play a role in the determination of adequacy of measures. Will adequate adaptation comprise broad development goals, primarily climate proofing of agriculture, water resources and coastal resources or those projects which are additional to any that would be financed in the absence of the said project? Drawing exact demarcation, which clearly makes distinction between development and adaptation, suffers from lack of clarity as to what stage development comes to an end and adaptation begins. What is crucial is the agreement as to what kinds of projects or funding of which components will qualify the test of additionality?

Adaptation Fund has become recently operational, ten projects have been submitted, two of which related to agriculture: (1) WFP submitted a project proposal, entitled an Integrated Approach to Building Climate Resilience in Uganda's Fragile Ecosystems characterized by relatively high agricultural productivity and (ii) UNEP submitted one on vulnerability of rice sub-sector to climate variability and projected climate change. There are two important meanings of the two projects: (1) India being a major producer of rice can gain from the experience of project design on vulnerability of rice sub-sector to climate variability and projected climate change; (2) Project proposal can be made directly through National Implementing Entity.

² According to Para 8 of the Copenhagen Accord "The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching U S D 30 billion for the period 2010-2012.

As climate change may actually be experienced as a change in the frequency and /or intensity of extreme weather events, disaster preparedness is an important component of climate change action. Understanding vulnerability to present-day climate extremes such as cyclones would provide useful insights about the adaptive capacity of a region. Adaptation measures taken in anticipation of climate change can and actually should be harmonized with responses to current extreme climate events. However, human activities are not always as well adapted to the current extreme events as one would want them to be. The losses suffered due to climate extremes can be ascribed to the events alone because of lack of appropriate human adaptation and sometimes maladaptation.

There is general agreement that the cyclones' devastating impacts were worsened significantly on the east coast of Orissa in 1999. Satellite pictures show that 2.5 km of mangrove forests make ideal places for conversion into ponds for shrimp farming, and India is one of the top four shrimp exporters in the world, with production growing by 15 percent a year³. The Integrated Coastal Zone Management is a response to meet the disaster in response to extreme weather events.

Possibility of Compensating Victims and Punishing Wrongdoers

Is it possible to place the costs of accidents caused by global climate change on fossil fuel companies? Depending upon one's views of the facts of climate change, the behaviour of these parties appears to meet Learned Hand's definition of negligence. According to this definition, a party is negligent if the expected costs of accidents, discounted by the likelihood that the accident will occur, are greater than the costs of avoiding those accidents. Can a party be held negligent if the expected costs of accidents, discounted by the likelihood that the accident will occur, are greater than the costs of avoiding those accidents?

Evidence of the negligence on the part of fossil fuel companies can be found by an analysis of the historical role that they have played in thwarting efforts to increase the use of alternative energy sources and in impeding efforts to improve efficiency in energy use. Assuming that global climate change is a real threat, these companies have placed the balance of the planet into jeopardy. Despite a growing scientific consensus that the

³ K. S. Kavi Kumar and S. Tholkappian, "Relative Vulnerability of Indian Coastal Districts to Sea-Level Rise and Climate Extremes" *International Review for Environmental Strategies*, vol.6, no.1, p.19.

continued reliance on fossil fuels is putting the stability of the environment at serious risk, they have attempted to block efforts at reducing the growth of carbon dioxide emissions in order to protect their profits. By taking some action to reduce fossil fuel consumption, the fossil fuel companies could reduce the actual costs associated with harms caused by climate change. The failure of the fossil fuel companies to take any action to reduce the risk of global climate change amounts to an assertion that the appropriate level of expenditure to avoid climate change is zero⁴. Thus, if it can be shown that there is any risk that costs will result from climate change, the behaviour of the fossil fuel companies would appear to meet the Learned Hand definition of negligence⁵. That is, assuming that there will be some costs of climate change, refusal of fossil fuel companies to spend any money to reduce the risk of such harm amounts to a failure to show due care⁶.

Role of Clean Development Mechanism (CDM) in the Building of Adaptive Capacity

The Clean Development Mechanism provides for Annex I Parties to implement projects that: reduce emissions in non-Annex I Parties; or absorb carbon through afforestation or reforestation activities, in return for certified emission reductions. The CDM projects are not attractive to the investors from developing countries. The CDM AR projects win either temporary credits (tCER) or long-term (ICERs). The tCERs can only be used for compliance or traded in the Kyoto Protocol commitment period during which they were certified, their life-term is limited for five years, after which they will have to be recertified, which in turn increases transactions costs. Consequently, their economic attractiveness is limited. ICERs may be valid up to 60 years but re-verification is due every five years. There is inherent project risk of losing (parts of) the carbon sequestered falls back to the credits owner on re-verification every five years. This mechanism is less attractiveness when it is considered to be useful for agroforestry projects. Agroforestry refers to systems of mixing agricultural or horticultural crops and /or livestock with wood perennials. Integrating trees on farms into the wider agricultural landscape can improve

⁴ Eduardo M. Penalver, "Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change" *Natural Resources Journal*, vol.38, no.4, 1998, p. 577.

⁵ *Ibid.*

⁶ *Ibid.*

the balance between food production, poverty alleviation and environmental management.

Conclusion

The traditional nation-state approaches to international law-making failed to produce reductions of greenhouse gas emissions sufficient to forestall anthropogenic climate change. The solution to this problem is not simply to fight harder for better treaty regimes, but also to search for holistic solutions that become mired in the fights over formal international law. In the making of international law, role of non-state entities is also there. The non-state entities are networked throughout the world. They are shaping the policy on climate change to an extent. By placing individual at the centre-stage rather than nation-state, one can find better solution.