

The role of arbitration in promoting compliance to climate change law

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Abstract. This study aims to review arbitration as a forum to settle the dispute in a case regarding the environment and climate change which possible to play the role of promoting conformity with the international climate change law. This issue arises from the fact that the international climate change law has entered the new phase. However, in regard to the substance point, this new instrument is bereft of a binding and coercive compliance system which makes the treaty is difficult to be implemented since there is no enforcement mechanism. Meanwhile, the number of disputes related to the environment and climate change have increased lately. The lacuna of law enforcement mechanism within the Paris Agreement will lead the new problems. The result of the research shows that arbitration as one of dispute settlement means becomes an alternative solution to address this matter. Arbitration has the role to create predictability and certainty so that this forum could be purposed to promote the compliance over the international climate change law. This is a normative legal research using secondary data, included primary, secondary, and tertiary legal materials. The data were collected using library research which subsequently adopts a legal interpretation method to analyze data.

1. Introduction

The consciousness of the international community regarding climate change phenomenon was started at the end of the 1980s [1]. This phenomenon was marked by the commencement of negotiation which initiated the preparation of international convention as collective efforts in order to preserve and protect the environment toward the human kind interest. The increase of global temperature which has occurred over the past twentieth century resulting in the increment of greenhouse gas emission [2] which brought an extraordinary impact on the lives of human and its environments, such as the raising of sea level, loss of ecosystem, flood and many more [3]. However, in fact, no state has been succeeding to avoid the effect of climate change. The international community will lead into consciousness which recently raising to arrange the universal regime for environmental protection including holistically approach [1].

The latest climate change regime has been arranged. The accomplishment of the Paris Agreement marks the long process of conducting the latest regime. The agreement is marking a new era of the climate action at all levels: from global cooperation to local action on the ground, involving citizens and costumers, in a way that could connect intergovernmental decision-making and mobilization of non-state actors to support and enhance the ambition embodied in Nationally Determined



Contributions (NDCs) [4]. However, the crucial factor that would affect the effectivity of the Paris Agreement is states parties implementation of its provisions and compliances with the obligations. The Paris Agreement lacks sanctions and binding targets which makes the agreement is less-effective to be implemented since there are no punishments as such. Therefore, this paper focuses on the role of arbitration in promoting compliance with the latest climate change law.

2. Literature review

2.1 *The development of climate change law*

Climate change is a complex regime [5] due to its multilevel, multiscale [6] and multipolar [7] regulatory framework. Climate change is multilevel and multiscale regulatory framework due to the involvement of multiple institutions which governing the regulation at national, regional and international level whereas certainly a multipolar regulatory framework includes multiple actors which play a significant role in climate change, embarking from International administrative bodies to private institutions and the national courts to any tribunals to International economic [8]. Due to its complexity, the regime has the most important role to address climate change. Therefore, experts are now conducting further research regarding this issue.

According to Vadi, *lex climatica* or the primary climate change regime an interface area which has a conflict of interest characteristic between industrialized and developing countries in one hand, and between public and private actors in another hand [8]. The contrasting between developed and developing countries taken place when the developing countries argue that they did not have much contribution to the bulk of greenhouse gas emissions since their main focus is on developmental needs while the developed countries argue that imposing climate change regulations could decrease their industrial competitiveness. Meanwhile, private actors have contested climate change regulations affecting their economic interest.

Broadly et al. [9] review climate change from international law perspective which later recognized as climate change law. In his opinion, international climate change law is “not only encompassed set of United Nations regimes, but also rules; principles of general international law related to climate change; norms developed by other treaty regimes and international bodies; regulations; policies; and institutions at the regional, national, and sub-national levels; and judicial decisions of national, regional, and international courts” [9]. However, Bodansky has been affirmed that the international climate change law is not self-supporting law, but precisely is a part of the international environmental regime in particular and international law generally [9].

2.2 *The interface between climate change and international disputes*

According to Spain, “while we cannot predict exactly how climate change will impact the future world order, we do know that it will” [10]. This statement indicates the relation between the climate change and conflict, which further brought into the adjudication process. Conflict arises due to climate change which resulted in significant changes in the supply and distribution of the world’s natural resources. It was occasioned by the rapid population growth resulted in a scarcity of natural resources due to disruption allocations. The scarcity could lead into the lack of access to natural resources which end up creating a dispute.

Historically, the dispute occurred due to a clash of countries in utilizing and controlling national resources [11]. For the example, the dispute between countries which lead into International dispute settled by the International Court of Justice. One of the most popular cases is the case concerning the Burkina Faso-Mali [12]. In addition, the domestic lack of natural resources would lead into expansion to another state to fulfill domestic needs, which in turn possible to increase potential armed conflict as populations migrate across the national border [13].

3. Result and discussion

3.1 *The compliance of international climate change law*

The successful of any international agreement depends on whether the parties implement the agreement through national legislation and comply with the agreement's obligation. Generally, compliance can be understood as referring to whether parties adhere to treaty obligations [14]. In multilateral environmental agreement perspective, compliance can be defined as "the fulfillment of obligations raising from the agreement conducted by the parties under a multilateral environmental agreement and any amendment to such agreement" [15]. Often, states comply with their international obligations out of national interest: they comply because the advantages of compliance outweigh the benefits of non-compliance [16]. At other times, these states may be unwilling to comply or, as is the case for many developing countries, they may be unable to comply due to a lack of resources or technical capacity [16]. For these reasons, multilateral environmental agreements frequently include provisions for enforcement, including deterrence and sanctions-based penalties and other measures levied against violators, as well as provisions to facilitate compliance through capacity building, technology transfer, education, and other "carrots" [17].

Moreover, the state's compliance with treaty obligations is closely related to the implementation [18]. Implementation is defined as "all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/to take to meet their obligations under a multilateral environmental agreement" [19]. In general, states implement treaty obligations in three levels; first, by adopting national implementing measures; second, by ensuring that the implementing measures as are complied with by subjects under the state's jurisdiction and control; and third, by reporting to the treaty regime on the implementation measures [20]. Taking implementation measures will often be a prerequisite for complying with an obligation. However, the fact that an obligation has implemented does not necessarily mean that the requirement of the treaty obligation is fulfilled [21]. A state can adopt necessary domestic laws, but then fail to enforce these. Compliance does consequently refer to whether countries, in fact, fulfill treaty obligations and can in this regard be seen as a broader concept than implementation [22].

Article 15 of the Paris Agreement provides an implementation and compliance mechanism for the international climate change law. Such mechanism serves to contribute the more effective implementation and compliance by enhancing parties' capacity and performance under the Agreement in order to create better cooperation among the parties. Furthermore, it may also prevent "free-riding" by establishing measures to promote compliance under the Agreement's legal obligations.

3.2 *The role of arbitration in promoting the compliance to the international climate change law*

Nowadays, arbitration is an appropriate mechanism to settle the environmental dispute, especially in cross-border climate change case. This is inseparable from the hallmarks of arbitration as noted in the 1899 Hague Convention: (1) it offer a procedure to which all parties consent to submit their dispute; (2) it has final and binding settlement; (3) it has neutral decision makers of the parties' choice; (4) who decide in accordance with law; and (5) who apply a procedure that is flexible to fit the need of the parties and the particular dispute [23].

The dispute could arise related to the climate change law and in this context, Article 14 of UNFCCC provides the legal basis to solve the matter. Article 14 envisages that if the State Parties dispute the question of the interpretation and application of the Treaty, arbitration may be chosen as an appropriate form of dispute settlement. Article 14 (1) allows Parties to settle the dispute through any means that they choose (which could include ad hoc arbitration). Then, Article 14 (2) provides expressly for arbitration as a form of dispute settlement and envisages that States Parties will agree on an annex for arbitration, which will set out the rules of procedure. The same provisions are mirrored in Article 24 of the Paris Agreement.

Practically, many climate change cases have been settled by arbitration as has been conducted by the Permanent Court of Arbitration. The important pillar of the Kyoto Protocol is the mitigation of

greenhouse gas emissions. Each developed country has an “Assigned Amount” of emissions reductions that should be met within a certain period of commitment [24]. In order to achieve this aim, the Kyoto Protocol establishes many flexible mechanisms. “Clean Development Mechanism” (CDM), a mechanism where developed countries agree to defray a project in developing countries that will help reduce emissions in return, the developed country gets credits (called Certified Emission Reduction credits, or “CERs”) for the carbon tonnage that might otherwise be emitted into the atmosphere. The other mechanism provided by the Kyoto Protocol is “Joint Implementation” (JI) which similar scheme of CDM projects except that it is done between developed countries listed in Annex I of the Kyoto Protocol. The credits that are generated are called Emissions Reduction Units, or “ERUs”. Disputes related to CDM and JI protection have been resolved through arbitration including under arbitration clauses based on the International Emissions Trading Association’s Model Emissions Trading Agreements [25], which recommended to use the PCA Environmental Rules. The PCA has also administered CDM disputes under arbitration clauses which refer to the UNCITRAL Rules arbitration.

In regard to the Paris Agreement, mitigation still to be an important key. “Nationally Determined Contributions” (NDC) and REDD+ are mechanisms similar to those under the Kyoto Protocol, may also lead to legal arrangements featuring arbitration clauses [26]. The Paris Agreement also provides transparency provisions that will allow for monitoring of action conducted by States towards complying with their NDC. It also deals with technology and capacity-building and adaptation [27], which refers to strategies to reduce the vulnerability, particularly of developing countries, to the impacts of climate change [28].

A more controversial aspect of the Paris Agreement is loss and damage [29] which was intended to deal with climate change impacts for which it is impossible to adapt. Rising sea level or a severe natural disaster are some examples of this matters. Developed countries might assist climate-threatened developing countries, such as through funding and support to the projects relating to early warning systems, energy preparedness, risk insurance facilities, and building resilience of communities, livelihoods, and ecosystems. The accompanying decision text adopting the Paris Agreement, however, makes clear that nothing in Article 8 involves or provides “a basis for any liability or compensation” [30]. Nevertheless, the web of cross-border legal relationships in projects that could sprout up in the implementation of all these new provisions of the Paris Agreement might well entail the adoption of arbitration clauses as the preferred neutral, certain and binding means of resolving disputes.

Arbitration has a significant role of compliance of financial matter under the Paris Agreement. Finance has been becoming one of the critical issues where there are tangible examples of climate change-related to the arbitration agreement. “Green Climate Fund” (GCF) is the main financial body in the context of UNFCCC and many kinds of different legal instruments govern GCF related to the financial flows included the contribution agreement between State and GCF for transferring money to support adaptation process, mitigation, and other climate change projects. The arbitration clause from Norway’s agreement to contribute 1.6 billion Krona, for example, provides for arbitration under the PCA’s 2012 Rules in Seoul, Korea (where the GCF is located). The interim trustee arrangement between the GCF and the World Bank, acting as the Trustee, also contains an arbitration clause referring to the Permanent Court of Arbitration (PCA). The PCA’s Arbitration Rules are particularly useful under such arrangements because the PCA has experience administering disputes involving inter-governmental organizations and its Rules contain provisions for the special features of such disputes. Finally, model arbitration clauses have also been suggested for the future arrangements governing the allocation of finance for the projects themselves.

4. Conclusion

Arbitration has already been used to resolve a number of climate change-related disputes. From many cases have resolved by arbitration, it showed that arbitration could be an effective tool to enforce states’ commitments and provide sanction for non-compliance.

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