

Session/Séance 7C: International Adjudication and Climate Change – Mock hearing / Arbitrage international et changements climatiques – simulation d’audience

Saturday, November 5, 2016

10:45-12:15

Judge

Marie-Claire Cordonier Segger, Sr Director at the Centre for International Sustainable Development Law (CISDL)

Speakers

Silvia Maciunas, Sr Research Fellow, Centre for International Governance Innovation (CIGI)
Kristin Casper, Legal Counsel, Campaigns & Actions, Greenpeace International
Richard Janda, Associate Professor, McGill University
Stephen Kurelek, Counsel, Department of Justice (Canada)

The panel consisted of a mock hearing of the International Court of Justice [ICJ]. The facts of the case and the terms of the debate were presented by the moderator, **Basil Ugochukwu**, post-doctoral fellow with CIGI’s International Law Research Program.

The applicant, the State of Bolanda, was described as a low-lying small island State whose economy relied on agriculture and tourism. It was recognized that the State of Bolanda had an extremely vulnerable ecosystem. However, due to climate change and the rising sea level, the islands were under threat of being submerged in the near future and evacuation would be required. Additionally, extreme weather events in September of 2017 resulted in significant loss of life, displacement, homelessness and material cost to the nation. It is Bolanda’s submission that these events result directly from climate change.

The respondent, Augmentia, was described as an industrialized nation. In recent years, it had undertaken to reduce its emissions of greenhouse gases. As such, it has signed the United Nations Framework Convention on Climate Change [UNFCCC] and set targets for emissions reductions. It has been calculated, however, that the nation is still responsible for approximately 10% of the production of greenhouse gases [GHG] emissions worldwide.

Bolanda has petitioned the ICJ for relief against Augmentia. The basis of the claim is that the State of Augmentia is responsible for the damages inflicted on the islands due to the latter’s significant contribution to climate change and its insufficient efforts to reduce its national GHG emissions. Accordingly, Bolanda submitted to the court that Augmentia has a duty to fully compensate the State of Bolanda for the harm that has been caused to the islands.

During the proceedings, Bolanda was represented by **Kristin Casper**, Legal Counsel at Greenpeace International and by **Richard Janda**, Associate Professor at McGill University. Augmentia was represented by **Stephen Kurelek**, Counsel at the federal Department of Justice of Canada, and by **Silvia Maciunas**, Senior Research Fellow at the Centre for International Governance Innovation. The hearing was presided by **Marie-Claire Cordonier Segger**, Senior Director at the Centre for International Sustainable Development Law.

The case revolved around four main issues upon which the parties made their arguments. Firstly, representations were made on whether the ICJ had the required jurisdiction to make a determination in the case. Secondly, the parties argued on whether the respondent's actions were a breach of its international obligations and commitments. Thirdly, contradicting evidence and arguments were presented on the existence of a chain of causation – and corresponding attributable responsibility - between the respondent's actions, climate change and the injury suffered by the applicant. As a final line of contention, two different propositions on how damages and compensation should be calculated were submitted to the court.

JURISDICTION OF THE COURT

The debate on jurisdiction focused mainly on whether there was a ground to authorize the ICJ to make a determination in the case.

Counsel for Augmentia submitted that only three grounds could give the court jurisdiction on the matter and submitted that they were absent in the present case. First, Article 36(2) of the Statute of the International Court of Justice would grant the court the ability to adjudicate the matter. However, counsel for Augmentia countered that it would be inappropriate to do so under the doctrine of *lex specialis*, whereas an existing, more specialised law or treaty, takes precedence over a more generic statute such as the Statute of the Court. This argument led to the second ground, whereas *the lex specialis* in question, the 1992 UNFCCC, already provides a mechanism at Article 14 for any disputes on the interpretation or application of the Convention. Specifically, Article 14 of the UNFCCC precludes litigation before the ICJ unless the parties have tried to settle the matter through arbitration beforehand. Since no arbitration had yet been attempted, the ICJ was not entitled to make a determination. Finally, the ICJ can adjudicate in the event that the parties consent to submit their dispute to the court. In this case, Augmentia did not consent to submit the matter to the court.

Bolanda, however, argued that the court should not be confined by the *lex specialis* under Article 14 of the 1992 UNFCCC. Bolanda responded that the court should set an example for the future. It pleaded that claims related to climate change would increase exponentially in the coming years and that it was an issue of foremost importance. Therefore, the Court would have the opportunity to set the law on the critical question of responsibility in the context of climate change.

As a subsidiary argument, counsel for Augmentia raised the argument that it would be inappropriate for the court to rule on the matter because it was a political rather than legal question. It was submitted that the court was presented with a controversial and disputed set of facts and not a question with a basis in international law.

BREACH OF INTERNATIONAL OBLIGATIONS AND DUTIES

Bolanda argued that the respondent is bound by its international commitments under the UNFCCC, the Kyoto Protocol, and the Paris Agreements. The applicant claimed that Augmentia had failed to respect those commitments and would henceforth be liable for the consequences suffered by other States due to its negligence. Counsel for Bolanda reminded the court that Augmentia pledged to reduce its GHG emissions to specific levels under the Kyoto Protocol, but failed to live up to its commitments and would therefore be liable.

Additionally, counsel for Bolanda argued that Augmentia failed to meet its customary duties to consult and assist under the principles of transboundary international law. To support its claim of an international customary rule, Bolanda relied on the arbitral decision in the Trail Smelter case (United States v Canada), the 1949 ICJ decision in Corfu Channel (United Kingdom v Albania) and the ICJ's Pulp Mills on the River Uruguay case (Argentina v Uruguay) and general commentary of the most highly qualified publicists of the various nations. Accordingly, Bolanda argued that the actions of Augmentia corresponded to the three prerequisites of transboundary harm, namely that there was a physical output from an originating State, that the effect of the harm was transboundary, that significant and substantial harm occurred and that there is a causal relationship between the harm and the physical output. In the circumstances, Bolanda claimed, Augmentia would have had the duty to consult with the impacted State and assist in the mitigation of the harm. By failing to do so, Augmentia was in breach of customary international law.

Bolanda submitted as a final and subsidiary argument that the respondent was in breach of its international human rights law obligations. Specifically, Augmentia is claimed to have breached its obligation not to infringe the right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Since the extreme weather events have resulted in significant loss of life, and since Augmentia is alleged to have contributed to those events by producing GHG emissions, the respondent has infringed its human rights law obligations.

Conversely, Augmentia argued that no liability arose from any agreements, treaties or conventions it was a party to. Firstly, counsel for Augmentia argued that the UNFCCC excludes liability for a failure to meet agreed targets for the reduction of GHG emissions. Augmentia notably referred to Article 8 of the Paris Agreement, which provides for the exclusion of liability of parties and does not include a right to compensation. Secondly, Augmentia submitted that,

while it has not met its goals, it respected the principles of the UNFCCC by undertaking concrete actions to reduce its GHG emissions and should not be penalized for its legitimate efforts to phase out polluting industries. Thirdly, as to the Paris Agreement, Augmentia countered that it was premature to state that it would not meet the agreed targets. Furthermore, the emissions reductions commitments are for 2020, and it is premature to conclude that the goals will not be met.

On the customary law argument, Augmentia agreed with Bolanda's claim of the existence of a customary duty not to cause harm to other States and not engage in transboundary harmful activity. However, the duty to do no harm applies differently in different contexts and case law supports the argument that the law of international environmental cooperation requires states to notify, share information and consult with states that will be potentially affected by other States' activities. Augmentia argued that it did engage in the required conduct and is thus blameless.

As to the breach of international human rights obligations, counsel for Augmentia responded by underscoring that Article 6 of the ICCPR protects against the arbitrary deprivation of life. However, climate change does not target specific populations. It even impacts the emitting State. Augmentia has not targeted Bolanda with its emissions, nor could it reasonably predict how the harm would manifest itself. Therefore, Augmentia is not liable on this ground.

CAUSATION

The point of contention of this ground was whether the damages suffered by the island could be attributed to the activities of Augmentia. In support of its argument, Bolanda cited the work of the foremost authority on climatology, the Intergovernmental Panel on Climate Change, which concludes that climate change was caused by human activity and the emission of carbon dioxide, one of several GHG emitted on Earth. Since GHG emissions are a cause of this climate phenomenon, and given that the respondent is a contributor of a tenth of those emissions, Augmentia would be at least partly responsible for the harm suffered by the applicant.

Augmentia agreed with the Applicant that the science on the existence of climate change was incontrovertible. Yet, counsel for Augmentia nuanced that various experts disagree on the causality between specific extreme weather events and climate change. Simply, it would be ill-advised to state that a specific and unusual hurricane or flood is caused by climate change rather than another cause. Moreover, it was argued that the extreme weather that struck Bolanda could not be directly attributed to the GHG emissions of Augmentia, since it is not yet possible to prove that specific emissions can be traced to a specific weather event.

COMPENSATION

The State of Bolanda contended that under the principles of *restitutio ad integrum*, Augmentia was liable for the entirety of the damages suffered due to climate change as well as

the future costs that would be incurred by the State in order to mitigate the continuing harm that was done to the islands. Accordingly, after the required calculations, Augmentia was liable for \$200M.

Augmentia, without admitting to any direct responsibility for the harm suffered by Bolanda, arrived at a much lower sum. Augmentia pointed out that the absence of language in treaties prohibiting the severance of damages meant that the ordinary understanding of the calculation of damages would mean that they should be apportioned according to each State's own specific contribution to the harm. It submitted a graph to the court which set out which part of the amount submitted would be Augmentia's responsibility. First, Augmentia is only responsible for 10% of global GHG emissions. Second, the amount should also be reduced due to the scientific consensus that only 60% of the cause climate change can be attributed to carbon dioxide and, of those carbon dioxide emissions, only 10% are contributed by the industrial activities of humans. Summarily, Augmentia would only be liable for \$1.2M rather than the \$200M claimed by Bolanda.

Bolanda responded that the apportionment of responsibility was not an appropriate method for calculating compensation. Firstly, it would be on Augmentia to seek relief from other tortfeasors, not Bolanda. The applicant has suffered the whole of the harm and, correspondingly, deserves full restitution.

CONCLUSION

The mock hearing concluded with a back-and-forth discussion between the audience and the panelists on the strength of the parties' arguments and the future of international law litigation related to climate change. Of note, there was a marked interest in the use of the Convention on the Law of the Sea, rather than the UNFCCC agreements, to bring claims of compensation before the ICJ, due to the existing science supporting a causal link between GHG emissions and ocean acidification. More generally, preoccupations were raised on the impact of climate change and the protection and legal empowerment of Indigenous peoples.