Redefining the role for international environmental law in addressing climate change

By:

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Setting the Stage

The role of international law in human societies is to promote wellbeing and orderliness, either through maintaining the *status quo* or by creating a framework that promotes the desired change in the existing system. Hence, international law has been a significant instrument for fostering global cooperation towards addressing many of the most complex transboundary human development challenges in the modern world. One area where such complex transboundary development challenges exist is in the protection of the environment from pollution linked to anthropogenic factors. In relation to the problem of global warming, since the 19th century especially, international environmental law has been poised to perform three key functions, namely: to prevent dangerous anthropogenic interference with the climate system; achieve this within a time-frame sufficient to allow ecosystems to adapt

naturally to the changing climate; and enable economic development to proceed in a sustainable manner. The global negotiations of international climate change governance and other environmental protection issues during the mid-19th century occurred against a backdrop of competing demands for development and environmental sustainability on the one hand, and a dire need to ensure an equitable outcome which would enhance the legitimacy of the proposed solutions. In line with this, foreign direct investments (FDI) in renewable energy could potentially foster a technology leap for clean energy transitions to meet the development needs of emerging economies.

Law follows where Science leads

In addressing climate change governance, international, regional, national and local legal systems have historically employed a mix of regulatory instruments, liability and market-based mechanisms, and technologies, geared towards promoting behavioural changes for a reduction in greenhouse gas emissions from business as usual levels to a scientifically determined acceptable limit.

The milestones in the international environmental law regime for climate change governance in particular have however largely followed, rather than led, developments in climate change science mainly synthesized by the Intergovernmental Panel on Climate Change (IPCC). The First Assessment Report of the IPCC led to the negotiation of the United Nations Framework Convention on Climate Change - the main international law instrument for climate change governance. The Second Assessment Report (1995) influenced the negotiation and terms of the Kyoto Protocol. The Third Assessment Report (2001) emphasized climate change impacts the need for adaptation. The Fourth Assessment Report (2007) and the Fifth Assessment Report (2013-2014) underscored the need to keep emissions to a 2˚C limit with reference to pre-industrial levels. These assessments strongly influenced the negotiation of the Paris Agreement that is similarly aimed at: “keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.” In the process of mostly reinforcing climate change science, essential legal principles such as equity, common but differentiated responsibility and sustainable development have become relegated to the level of add-ons in the international climate change governance discourse, at best.

The rationale behind the dominance of science in global effort to tackle adverse climate change impacts is that climate change is predominantly a scientific problem (global warming from the emission of greenhouse gases) exacerbated by market failure which requires socio-legal and economic mechanisms to curb anthropogenic greenhouse emissions to the acceptable level for economic, social and environmental sustainability. Indications of the advances made towards achieving the binding climate and energy targets of the European Union - 20% reduction in greenhouse gas emissions from 1990 levels, 20% increase in renewable energy production, and 20% improvement in energy efficiency - support the argument that international environmental law can and does indeed plays an important role in climate change governance. Conversely, the inability of international environmental law mechanisms to secure the commitment of unwilling superpowers, such as the United States, greenhouse gas emissions reductions is also indicative of the limits of legal approaches to climate change governance particularly given the contribution of the United States to historic greenhouse gas emissions and its current contributions through the exploitation and production of shale oil and gas, for instance.

Glove in Hands, Towards a Sustainable Future

In a scenario where legal mechanisms for climate change governance appear to be effective only against the 'willing', or appear to permit the 'rich' to continue emitting greenhouse gases based on their ability to pay the related penalties, the legitimacy of the law becomes inevitably questionable. This is especially germane in the context of fossil-fuel rich developing countries who are either dependent on rents from their fossil-fuel resources and/or require these fuels for their industrialization and economic activities because the continued relevance of fossil-fuels in low carbon transitions is doubtful. Moreover, these countries are equally required to make a contribution to greenhouse gas emissions through Nationally Determined Contributions (NDCs).

In the context of Africa, the continent has contributed the smallest share, 3.8%, to global greenhouse gas emissions, is the most vulnerable to adverse climate change impacts, and exerts little or no influence in the international climate change negotiations. Moreover, the continent contributes 1.1% only to global science products and it is therefore questionable whether the current body of

climate change science which largely informs climate change governance sufficiently reflects the impacts of climate change as well as adaptation and mitigation options in Africa.

Hence, there is a need for the international community to be circumspect in eliciting commitments for greenhouse gas emissions and other forms of climate change adaptation and mitigation targets from African countries, without a holistic assessment of how the process of achieving these commitments will affect the development trajectory of the continent. In addition to galvanising greater international support for FDI in renewables for country's such as Nigeria with significant potential for renewable energy generation for domestic consumption, it is imperative that the proposed energy mix is affordable and suited to the local development needs. There is also the need to alter the dynamics of the interactions between climate change science and international environmental law mechanisms for climate change governance, in a way that fosters the mainstreaming of historical liability, equity and livelihoods. This would require a transdisciplinary approach to the process of producing the scientific assessments to inform the design of legal mechanisms for inclusive, equitable and just outcomes from climate change governance.

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