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Suing the United States for Climate Change Impacts

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It has now been 26 years since the United States signed the United Nations Framework Convention on Climate Change (UNFCCC) at the 1992 Earth Summit in Rio de Janeiro, 24 years since the UNFCCC went into effect after its ratification by the United States (and now 165 other countries) and 11 years since the U.S. Supreme Court held, in *Massachusetts* v. EPA, 549 U.S. 497 (2007), that the Environmental Protection Agency had an affirmative duty under the Clean Air Act to regulate carbon dioxide as a greenhouse gas (GHG) pollutant. Yet the United States has failed to implement *any* meaningful federal program to reduce its GHG emissions despite its UNFCCC treaty obligations, its Supreme Court ruling and increasing scientific certainty that our nation's GHG increasing emissions are already contributing to rapid changes in the earth's atmosphere and oceans and, as a result, significant impacts to human life and the environment in the United States and abroad. This column considers whether those nations most directly affected by U.S. inaction on climate change might have an enforceable legal remedy against the United States and, if so, what that remedy might be. Our focus will be on claims based on international law rather than U.S. domestic law.

Background

The fault for U.S. climate inaction rests with both Congress and the last four Presidents. Despite ratifying the UNFCCC with its call for developed countries to adopt national policies and measures intended to reduce their GHG emissions toward 1990 levels (that is, levels *before* the Rio Conference), no such measures were proposed or taken by the United States during the Bush I, Clinton or Bush II administrations. When the Clinton administration finally signed on to the 1997 Kyoto Protocol with specific GHG reduction targets for the United States and other developed countries, the Senate (by a vote of 97-0) urged the President not even to submit that agreement for ratification because it required no such reductions by China, India or other "emerging economies." When, following eight years of climate resistance by the Bush II administration, the House of Representatives in 2009 finally passed the Waxman-Markey bill designed to reduce GHG emissions through a complex "cap and trade" program, the companion Senate bill was permitted to die quietly by the Obama administration.

During his second term, President Obama entered into the non-binding Paris Agreement on climate change and EPA belatedly issued its Clean Power Plan and negotiated a voluntary agreement with U.S. automakers to reduce vehicle greenhouse gases through increased fuel efficiency. However, the Paris Agreement imposed no actual obligations on the United States and was in any case repudiated in a 2017 Trump speech that mischaracterized that Agreement as an infringement on U.S. sovereignty. The Clean Power Plan was then eviscerated by the Trump administration before it came into effect, after which EPA agreed with the auto industry to significantly unwind the earlier fuel efficiency agreement and recently proposed to dilute Obama administration requirements for methane-monitoring of natural gas facilities. As a result, there is *still* no meaningful federal program to reduce U.S. GHG emissions, which have increased substantially since 1992 and would have increased far more if "fracking" had not permitted natural gas to displace a substantial share of U.S. coal production.

While this failure is clearly awful policy, does it violate any international legal obligations that the United States owes to the international community in general or the developing countries most threatened by climate change? If so, who would have standing to assert such a claim

and in what court? And what might be a reasonable remedy for such a violation and how would that be enforced? Each of these issues is discussed briefly below.

U.S. Obligations Under the UNFCCC

The UNFCCC requires, in Article 4(2)(a) and (b), that each developed country party to that Convention "adopt national policies and take corresponding measures" to reduce its GHG emissions toward 1990 levels. As indicated above, the United States has taken no such measures. While the United States and others have long contended that the UNFCCC's failure to include specific emission reductions for parties makes the requirements of Article 4(2) essentially rhetorical and non-binding, I see no reason to accept that view. Many U.S. statutes impose similarly general obligations or prohibitions, and our courts have had little difficulty in enforcing those general statutory obligations in specific cases where it is clear that a party simply chose to ignore them. International treaty law also implies a duty of good faith in carrying out treaty obligations. In view of the protracted (and under Trump, accelerating) failure of the U.S. to put in place any meaningful federal efforts to reduce its GHG emissions, it is hard to see why that failure does not constitute a violation of our obligation to implement in good faith measures to reduce our national GHG emissions as contemplated by Article 4(2) of the UNFCCC.

U.S. Obligations Under Customary International Law

Even if the UNFCCC were not viewed as creating enforceable legal obligations, it would still play a central role in creating a body of customary international law—sometimes called the "law of nations"—to which the United States and all other countries are subject, even without a specific treaty or convention. The UNFCCC, after all, was signed by more than 150 countries in 1992 (now 165 countries) and itself reflected more than a decade of international discussion about the need to address climate change generally and GHG emissions by industrial countries in particular. That 1992 consensus was solidified and confirmed by the 1997 Kyoto Protocol setting specific emission reduction obligations for all developed countries, a document that the United States too signed before the Senate declined to withhold ratification. By the time of the Paris Agreement, the urgent need—and obligation—to reduce GHGs in order to slow atmospheric warming had become a nearly universal global consensus and thus almost certainly qualified as part of the body of customary international law that is binding on all nations.

The same is true of the United Nations Convention on the Law of the Sea (UNCLOS), which the United States also signed in 1982 but has thus far failed to ratify. UNCLOS nevertheless became effective in 1994, now includes approximately 157 countries and is widely regarded, even by the United States, as declarative of existing customary law. Article 192 of UNCLOS imposes on all states the "obligation to protect and preserve the marine environment," and Article 194 requires all states to "take all measures … necessary to prevent, reduce and control pollution of the marine environment from any source … .", including measures necessary to protect fragile ecosystems such as coral reefs and other marine habitats. Approximately 30 percent of GHGs end up not in the atmosphere but in the earth's oceans and are known to endanger coral reefs, increase ocean acidity in ways that threaten other marine species and contribute to sea level rise through both thermal expansion and the accelerated melting of land-based glaciers—all threats to both marine life and the global environment. Although not widely recognized, the U.S.'s failure to curb its GHG emissions thus likely violates its customary law obligation not to continue to pollute the oceans.

Customary international law also includes a "Good Neighbor" obligation on all countries not to permit their territories to be used for transboundary pollution of neighboring states. Historically, such claims have involved air or water pollution originating in one country that has clearly caused substantial impacts in a neighboring country and where the pollution is itself unlawful.. Until recently, it was hard to argue that GHG emissions from the United States or any other country were clearly the cause of substantial and identifiable impacts in another country or that those emissions were somehow unlawful. However, there is now a demonstrated international consensus that it is essential for all countries, particularly the largest emitters, to reduce their GHG emissions, as well as substantial improvement in climate change models and significant new data demonstrating the *current* impacts of climate change on heat waves, floods, draughts, coastal flooding and wild fires in specific countries. Where a major emitter, like the United States, fails over an extended period to rein in its GHG emissions, it may now be reasonable under the Good Neighbor principle of customary law to hold those countries accountable for at least a portion of the consequences of that failure in a particularly vulnerable country.

International Law Claims in U.S. Courts

If there is a viable claim against the United States for climate change impacts resulting from its failure to reduce GHGs, where might that claim be brought? Unfortunately, there is no effective dispute settlement mechanism under the UNFCCC (or the Paris Agreement). Nor is the International Court of Justice (ICJ) a viable option since the United States has withdrawn from the ICJ's compulsory jurisdiction. The World Trade Organization (WTO) does have a dispute settlement mechanism to which the United States is subject, but the U.S.'s failure to limit GHGs (as opposed to the legitimacy of other countries' trade sanctions on the United States because of that failure) is not the kind of trade-related dispute that fits neatly into any WTO procedure. In short, there does not now appear to be a viable international tribunal to adjudicate claims that the U.S. failure to reduce its GHGs violates either treaty (UNFCCC) or customary international law.

But there might still be a chance in the U.S. federal courts. Among its very first acts in 1789, Congress enacted the Alien Tort Statute, which reads in full as follows: "The federal courts shall have jurisdiction over claims in tort by aliens arising under treaties of the United States or the law of nations." During the last 20 years, there has been considerable litigation over the scope and meaning of this statute, much of it dealing with the actions abroad of multinational corporations accused of abetting gross human rights abuses by foreign governments. However, the court has made clear in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) that nationals of other countries do have the right to maintain an action against the United States for certain kinds of tortious actions arising under U.S. treaties or "the law of nations" (customary international law). That right was sharply limited in the more recent Supreme Court decision in *Kiobell v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), which held that the ATS does not permit alien tort claims where both the plaintiff and defendant are non-U.S. persons and the claim itself arose abroad. That, however, would not be the case for a tort claim against the United States for actions arising in the United States itself (failure to reduce GHGs) but with impacts abroad.

The more serious problem for an ATS claim based on climate change is the scope of the ATS as enunciated by Justice Souter in his majority opinion in *Sosa*. That opinion carefully limited the scope of the torts subject to that ATS to those reflect an international law consensus and specificity comparable to the violations of the law of nations as understood by Congress in 1789, such as, for example, piracy. Shortly after the *Sosa* decision, my colleague Jean M. McCarroll and I noted in this column that, while *Sosa* could now support a claim based on, for example, slavery or torture, it was unlikely that environmental claims could rise to the level of international status necessary to maintain an ATS claim under Justice David Souter's opinion. However, that conclusion may have changed in the 15 years since *Sosa* was decided as the international consensus with respect to climate change and the compelling need for all nations, especially the United States, to curb their GHG emissions in order to avoid major impacts to human life and habitation in all parts of the globe. In view of the demonstrated unwillingness or inability of both Congress and the Executive Branch, under both Democrats and Republicans, to permit the United States to live up to its international obligations in an increasingly urgent arena, it is just possible that the U.S. federal courts will entertain an ATS claim against the United States based on its tortious failure to curb GHG emissions as required by either the UNFCCC or customary international law.

In other circumstances, when it became clear that the U.S. political system was incapable of addressing school segregation (*Brown v. Board*), numerically equal voting districts (*Baker v. Carr*), abortion rights (*Roe v. Wade*) or, in fact, climate change (*Massachusetts v. EPA*), the courts have reached for new understandings of basic legal principles in order to address a compelling national need. Whether climate change will exert that kind of influence on judicial reasoning is not clear, but there is now a strong case for judicial recognition of the overwhelming international consensus that serious action is urgently needed to save future generations from unmanageable, and irreversible, threats to the air, water and land on which human life depends.

Judicial Remedies

If a U.S. federal court were to recognize an ATS tort claim against the United States for the consequences of its climate inaction on a plaintiff state or class of citizens, what kind of remedy could it impose? Since the impacts of climate change (including the effects of GHGs already in the atmosphere and oceans) will continue for many decades and, likely, centuries, it would be inappropriate to simply apportion a share of the cost of those impacts and require the United States to write a check to the plaintiff state or class for that amount. Rather, the courts could reasonably

require a share of that projected cost (possibly discounted for present value) to be paid into an appropriate court-approved trust fund or, alternatively, to an existing international institution such as the World Bank or the Green Climate Fund established under the UNFCCC. There would still be a considerable number of issues to resolve about the operation, reporting and accountability of such a trust or fund, including how it would disburse the trust revenue and corpus for climate adaptation or resiliency in the plaintiff state and the steps it would take to minimize the risk of corruption. These are important issues but not unprecedented for the federal courts, which have already wrestled with similarly complex issues in U.S. class actions related to future asbestos claims and the consequences of other major torts. There is no reason why our courts could not also rise to the challenge of assuring fair and effective use of the proceeds from a climate tort claim as well.

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