



Has Paris Opened the Door for a UNSC Climate Court?

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Historically, permanent members of the UN Security Council have variously rejected the idea that it was the proper venue to address international cooperation on climate change. The notable cooperation between China and the United States to secure the Paris Agreement, however, may signal a greater openness to UNSC climate securitization, including the creation of a UNSC-enforced Climate Court.

Paris and Binding-Voluntary Climate Obligations

The UNFCCC was finalized at the 1992 Rio Summit amidst significant North/South contestation. The 1997 Kyoto Protocol codified this arrangement with legally binding obligations for the global North, and no clear schedule for obligations for the global South. The US Senate made it clear, however, that it would not agree to treaty obligations that exempted the emerging economies. This, coupled with the continued refusal by the developing world to accept legal obligations, produced an entrenched diplomatic gridlock.

Initiated by the voluntary 2009 Copenhagen Accord, the 2011 Durban Platform saw agreement on the need for obligations “applicable to all,” which framed the 2015 negotiations that culminated in Paris this past December.

Agreed by a consensus of 196 nations at the 21st Conference of the Parties to the UNFCCC, the Paris Agreement (COP 21) provides no legally binding emissions reduction obligations. However, it did produce a hybrid agreement (with a mix of voluntary and binding obligations) that is applicable to all parties

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(breaking the firewall between developed and developing states) for the post-Paris climate regime.

The architecture is remarkably simple; all states are asked to volunteer the emissions targets they are able to meet, and then agree to be bound by transparency obligations and to take stock of their commitments at regular intervals. These legal responsibilities provide a ratchet mechanism for states to increase ambition in the knowledge their competitors' commitments will also be monitored.

The Paris Agreement creates a solid foundation upon which to build a strong climate regime because it assumes that all states finally share an interest in participating in the reduction of global carbon emissions.

Frustration, Securitization, and the Judicial Route to Climate Obligations

In response to the frustration of many years of gridlock, norm entrepreneurs have argued that the security threat from climate change is sufficiently large that we should impose obligations on uncooperative polluters. The international community should, in other words, set aside traditional notions of sovereignty (not unlike the [Responsibility to Protect](#)) and impose international obligations on the domestic regulatory policies of nation states.

With multilateral negotiations unable to allocate a suitable distribution of climate rights and responsibilities, numerous proposals have argued that we should delegate that legislative authority to international courts.

Bolivia, for example, proposes a [Climate Justice Tribunal](#) that punishes climate criminals for their historic carbon emissions. It would strenuously enforce the “common but differentiated responsibilities” approach of the UNFCCC and the

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Kyoto Protocol. As such, China and the other high-emitting emerging economies would remain exempt from prosecution.

There are a number of groups calling for the **crime of Ecocide** to be included in the Rome Statute of the **ICC**. This mechanism would seek to prosecute individual corporations, and potentially states, for environmental damage and presumably excessive carbon emissions. Jurisdiction over corporations garners support for this initiative from many in the environmental movement, but as it would apply equally to state-owned enterprises in the developing world this amendment is unlikely to be ratified by two thirds of the ICC membership. Crucially, of course, the largest carbon emitters (the United States and China) are not parties to the ICC.

As an alternative to contentious cases, the **ICJ** may be called upon to provide advisory opinions at the request of the UN General Assembly. In theory, this route may offer valuable clarification of general principles of international law, but advisory opinions are not considered binding, perhaps especially on great powers.

The geopolitical reality ignored by these proposals is that, unless states consent to be bound, the only existing international institution with the power to impose binding obligations on all states and enforce them in a credible manner is the UNSC.

Climate Securitization and UNSC Legislation

While unable to force states to ratify entire treaties, the UNSC is able to impose binding obligations on the global community as a response to threats to international peace and security. This ability to act as a climate legislator offers

a solution to the horizontal nature of the international legal order, if the P-5 can agree to securitize climate obligations.

Much of the gridlock of climate diplomacy has been a result of the US and China disagreeing on an equitable distribution of responsibility for addressing climate mitigation. As such, the Paris Agreement represents considerable diplomatic efforts to overcome calcified negotiating positions between these major powers.

It is worth noting that Russia remains a UNSC *wild card on climate change*. Kyoto offered Russia an allocation far in excess of its post-Soviet needs and the recent Russian INDC voluntary pledge is to reduce carbon emission 30% below a 1990 baseline. A conservative assessment that they are currently at 35% below baseline suggests a weak commitment to mitigation.

However, Russian leadership in reducing the production of oil within the G-20 may become a necessary condition for similar coordination among OPEC states. *Credible coordination of global production quotas* is increasingly a high priority of Russian foreign policy, as it is for the future of the climate regime.

If the P-5 could agree on a suitable regulatory standard, obstacles to G-7 and NATO members accepting binding obligations would be greatly reduced. If the G-20 could be persuaded to voluntarily accept this proposed agreement, this would represent 76 percent of global carbon emissions and the combined market power of 85 percent of global GDP.

Forced to respond to an unanticipated climatic disaster the interests of the P-5 could align even further to initiate an institutional response to the crisis. *Although doing so may stretch its delegatory powers*, to increase the

legitimacy of any UNSC climate legislation, it could, and perhaps should, create a Climate Court to address non-compliance within the post-Paris climate regime.

A UNSC-enforced Climate Court

Created by the UNSC, a legitimate and effective Climate Court would benefit from (1) compulsory jurisdiction; (2) a specialized judiciary able to digest complex scientific evidence and supported by issue-area expert advisors; and (3) legal standing for both state and non-state actors to challenge the non-compliance of state obligations.

- Compulsory jurisdiction is rare in international law but in theory as the cost of legal obligations grow, so do incentives to shirk responsibility. States making good faith sacrifices to comply with specific obligations will only support strong enforcement mechanisms as long they see standards enforced on everyone. The UNSC has more tools than any other international institution to credibly ensure the enforcement of international legal obligations.
- When environmental disputes arise, a scientifically literate judiciary is better able to weigh the importance of scientific evidence among competing factors: economic, human rights, security, etc... In the same way that complex biotechnology litigation requires very specific judicial expertise, so will transboundary climate disputes.
- Regarding standing, the potential fallout from a weaker state pursuing litigation against a great power is significant. Allowing non-state actors standing to bring cases before an international court begins to address this problem, as long as there are minimum thresholds to prevent spurious litigation. Moreover, this “access to justice” approach supports the concept

of *erga omnes* obligations (“owed to all”). If all states have clear, specific, and actionable climate obligations, litigation needn’t be bilateral. Each state’s responsibility is owed to the international community.

Judicial determinations of willful non-compliance would be enforced by the UNSC acting in the interests of the international community to address a collective threat to international peace and security.

Conclusion

Historically, mirroring the firewall between developed and developing states in the UNFCCC negotiations, there has been considerable resistance within the P-5 to using the power of the UNSC to securitize the climate regime.

However, with increasing recognition of climate change as a significant human and systemic security threat multiplier, the likelihood of UNSC intervention in the enforcement of the climate regime may now be moving from impossibility to inevitability. The increased alignment within the P-5, as reflected in the Paris Agreement, may represent a clearer path to the UNSC acting as a climate legislator and creating a corresponding Climate Court.

The Paris Agreement, in other words, may have broken the UNSC climate firewall.

Image of closing ceremony of the twenty-first session of the UN Framework Convention on Climate Change, December 2015. Image by UN Photos.

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