

## **The relationship between the United Nations Framework Convention on Climate Change and other rules of public international law, in particular on States' responsibility for the adverse effects of climate change**

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### **1. Introduction**

In September 2011, the President of Palau made a statement to the UN General Assembly in which he asked the General Assembly to “*seek, on an urgent basis... an advisory opinion from the International Court of Justice on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States*”. The United Nations Framework Convention on Climate Change (UNFCCC) is the principal international legal instrument adopted by States to address climate change. In addition to its substantive provisions, it also includes procedures for the settlement of disputes between States parties. Given its scope and procedures, therefore, the UNFCCC could be viewed as establishing a ‘special regime’ which derogates from general international law and prevents parties to the Convention from seeking legal redress for the adverse effects of global warming outside of the Convention process. This paper analyses whether such contentions are warranted.

### **2. The UNFCCC and General International Law**

The analysis of the relationship between the UNFCCC and general international law can be subdivided into two questions based on the distinction often made between primary and secondary rules of State responsibility: the first comprising of the substantive obligations incumbent upon States under international law, violation of which may generate responsibility (and which vary from State to State, according to the obligations by which each is bound): the second setting out the general conditions for States to be considered internationally responsible for their internationally wrongful conduct and the legal consequences flowing therefrom.<sup>1</sup> These two questions are: (a) whether the UNFCCC derogates from general international law as regards State parties’ primary obligations to prevent transboundary environmental harm; and (b) whether it derogates from general international law as regards the secondary rules covering the legal consequences of breach of those primary obligations.

The answers to both questions are largely to be sought in the UNFCCC, interpreted by reference to the general international law rules on treaty interpretation, and in the relationship between treaty and custom in international law. In consequence, this paper will not go into any detail about the scope or applicability of the general international law rules on the prevention of transboundary environmental harm in the context of climate change, or about the general international law rules on

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<sup>1</sup> See International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, UN doc. A/56/210, Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, paras. 1-2.

State responsibility. Suffice to say that although States are under a general obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States,<sup>2</sup> the applicability of this general rule to specific contexts (such as climate change) is controversial.<sup>3</sup> As for the rules on State responsibility (in the narrow sense of the term), they are codified in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility).<sup>4</sup>

In general, States can derogate *inter se* from their obligations under customary international law by entering into treaties.<sup>5</sup> International law is a largely permissive system and, except in relation to issues governed by peremptory norms of general international law (norms of *jus cogens*),<sup>6</sup> States remain free to choose the rules which govern their mutual relations. What this means is that, as between the parties to a treaty, the treaty's provisions prevail over inconsistent rules of customary international law. Such a result does not derive from any hierarchy of norms in international law. Instead, it results from the application of two principles: *lex posterior derogat priori* (a later rule repeals an earlier one); and *lex specialis derogat legi generali* (a specific rule prevails over a more general one).<sup>7</sup>

The *lex specialis* principle is specifically referenced in Article 55 of the ILC Articles on State Responsibility, which provides that: "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."<sup>8</sup> The ILC Commentary to Article 55 states that: "It is not enough that the same subject matter is dealt with by the two provisions, there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other."<sup>9</sup>

Assuming, therefore, that relevant rules of general international law existed as of the date of adoption of the UNFCCC,<sup>10</sup> the decisive question is whether there exists any inconsistency between them and the Convention. Otherwise, the principle *lex posterior generalis non derogat priori speciali* (a later law, general in character, does not derogate from a more specific earlier one) would seem to apply.

### a) Analysing the UNFCCC: Does It Derogate from General International Law?

Examination of the UNFCCC reveals no inconsistency between the rules on State responsibility (in both the wide and narrow sense of the term: the general attribution of activities and liability for wrongful acts) therein and general international law. This is for the simple reason that the Convention avoids questions of States' responsibility (in both senses of the term) for the adverse effects of climate change, seeking, instead, to look forward and to focus on mitigation efforts.

<sup>2</sup> See, in particular, the statements of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996) 226, pp. 241-2; and *Case concerning the Gabčíkovo-Nagymaros Dam* (Hungary v Slovakia), Judgment, ICJ Reports (1997) 7, p. 41. See also the International Law Commission Articles on Liability for Injurious Consequences of Acts not Prohibited by International Law, ILC Report (2001) GAOR A/56/10, 366.

<sup>3</sup> For specific consideration of the legal issues, see Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (2005); Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic JIL* 1; and LRI Briefing Paper 42E, 'No harm' rule and climate change, 24 July 2012.

<sup>4</sup> Annex, GA res. 56/83: Responsibility of States for internationally wrongful acts (12 December 2001). See Daniel Bodansky and John R. Crook, 'Symposium: The ILC State Responsibility Articles: Introduction and Overview' (2002) 96 *AJIL* 773.

<sup>5</sup> See Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th ed.), § 620.

<sup>6</sup> See Article 53, Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).

<sup>7</sup> *Oppenheim*, op. cit. note 8, § 636.

<sup>8</sup> It might be noted that Article 55 does not make reference only to special rules of treaty law, thus allowing for the possibility that a rule of general international law might be displaced by a rule of local or regional custom.

<sup>9</sup> International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10., UN Doc. A/56/210, Commentary to Article 55 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, § 4.

<sup>10</sup> Which, although not addressed here, seems a safe assumption: see text to notes 5-7 above.

The Preamble to the UNFCCC provides, *inter alia*, that: “*Noting* that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries ...” and “*Acknowledging* that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”<sup>11</sup>

The use of the term ‘Noting’ in Recital 3 indicates clearly that what is referred to is a fact, not a value-judgment.<sup>12</sup> Importantly, there is no reference to developed countries’ responsibility for the adverse effects of climate change (although that would seem an easy inference to draw). The term ‘responsibilities’ does appear in Recital 6, but only in the context of all States’ common, albeit differentiated responsibilities. Such responsibilities are also linked to each State’s “capabilities and ... social and economic conditions”, suggesting that a State’s responsibilities might differ owing to its capacity to stabilize greenhouse gas emissions, rather than because of its (legal) responsibility for the adverse effects of climate change.<sup>13</sup>

Recital 8 of the preamble to the UNFCCC states that: “*Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction [...]*”

The phrasing is significant, particularly the use of the term ‘Recalling’, by which the States parties appear to be acknowledging an pre-existing situation. Indeed, Recital 8 largely reproduces the wording of Principle 21 of the Declaration of the 1972 United Nations Conference on the Human Environment (the Stockholm Declaration)<sup>14</sup> and mirrors the wording of Principle 2 of the 1992 Rio Declaration on Environment and Development.<sup>15</sup> Recital 8 makes a clear reference back to the general international law rules on State responsibility for transboundary harm. This at least suggests that those rules are relevant in the context of climate change.

Article 2 of the UNFCCC sets out the Convention’s ‘ultimate objective’, which is “*to achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”. As regards its objective, the UNFCCC consequently looks forward, seeking to encourage future efforts to mitigate climate change rather than determining responsibility for any already-existing adverse effects.

It might be argued that, although not specifically mentioned, Article 2 obliges States to make at least some effort to reduce their emissions, as otherwise the ‘ultimate objective’ of the Convention would be nullified. This could also be based on an interpretation in the light of the Convention’s object and purpose (itself set out in Article 2) and an application of the principle of *effet utile*.<sup>16</sup> Article 2,

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<sup>11</sup> Recitals 3 and 6, UNFCCC.

<sup>12</sup> See Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ ((1993) 18 *Yale JIL* 451, p. 498. Developing States had unsuccessfully sought inclusion of the idea that developed States bore the ‘main responsibility’ for climate change, and thus primary responsibility for combating its effects.

<sup>13</sup> In particular, by virtue of any secondary obligation to make reparation for breach of a primary obligation to not cause such damage: see Article 31(1) of the ILC Articles on State Responsibility: ‘The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.’

<sup>14</sup> See Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev.1 (1973), reprinted in (1973) 11 *ILM* 1416. Only the words ‘and developmental’ were added.

<sup>15</sup> Adopted on 14 June 1992: see Report of the United Nations Conference on Environment and Development, UN Doc. A7CONF.151/5/Rev.1 (1992), reprinted in (1992) 31 *ILM* 876. The UNFCCC was itself adopted on 9 May 1992 in New York and opened for signature at the Rio Conference.

<sup>16</sup> Although this does not appear as a rule of treaty interpretation in Articles 31 and 32 of the Vienna Convention on the Law of treaties.

however, is worded using declaratory and aspirational language,<sup>17</sup> and the ‘objective’ is not described as a legal commitment of the parties.<sup>18</sup> Indeed, use of the term ‘ultimate’ may have been an attempt to prevent ‘objective’ being assimilated with ‘object and purpose’ for the purposes of interpreting the UNFCCC.<sup>19</sup> In this context, arguments drawn from the UNFCCC’s object and purpose seem little more than ‘bootstrapping’.<sup>20</sup>

Article 3, on Principles by which “*the Parties shall be guided, inter alia*” (a very vague formulation), also makes reference to the Parties’ “*common but differentiated responsibilities and respective capacities*”. It continues by stating that: “*Accordingly, the developed countries should take the lead in combating climate change and the adverse effects thereof.*”<sup>21</sup> States’ responsibilities and capacities are thus again linked.<sup>22</sup>

Article 4 (Commitments) again refers to Parties’ “*common but differentiated responsibilities*”. Article 4(1) sets out general commitments, which apply to all Parties. Article 4(2) sets out specific commitments concerning the adoption of national policies and measures to limit greenhouse gas emissions and to enhance sources and sinks, which apply to Annex I Parties (then, OECD Member States and transition economies). Article 4(3) sets out specific commitments on financial resources and technology transfer, which apply to Annex II Parties (OECD Member States). These different obligations, consequently, are seen as arising through the application of the concept of common but differentiated responsibilities. However, there is no indication that the greater obligations placed on developed States arise as a result of their (legal) responsibility for adverse effects of climate change.

Article 4(2) also sets out a ‘quasi-target’ and ‘quasi-timetable’ for the reduction of greenhouse gas emissions.<sup>23</sup> This is couched in such vague language, however, that it is questionable to what extent it creates any legal obligations at all. Indeed, US President Bush’s domestic policy adviser stated that: “there is nothing in any of the language which constitutes a commitment to any specific level of emissions at any time.”<sup>24</sup> Consequently, it appears difficult to argue that the UNFCCC covers the issue of State responsibility for the adverse effects of climate change.

## **b) The UNFCCC and the Settlement of Disputes**

Article 13 of the UNFCCC provides that: “*The Conference of Parties shall ... consider the establishment of a multilateral consultative process, available to Parties at their request, for the resolution of questions regarding the implementation of the Convention.*” Such a process, given that it is explicitly said to be ‘consultative’ and only applicable at Parties’ request, would not seem a procedure for the settlement of disputes. In any case, no such process has, as yet, been established by the UNFCCC Conference of Parties.

Article 14 of the UNFCCC does deal with the settlement of disputes but only disputes between Parties “*concerning the interpretation or application of the Convention*”. It follows from this that, if the UNFCCC does not include any provisions concerning States’ responsibility for the adverse effects

<sup>17</sup> In particular, the second sentence begins ‘[s]uch a level should be achieved’, rather than using the language of obligation (‘shall’).

<sup>18</sup> It is stated to be the ‘ultimate objective of this Convention’, rather than the parties to it.

<sup>19</sup> Bodansky, *op. cit.* note 15, p. 500. Bodansky also points out that Article 2 was considerably ‘watered down’ during the negotiations, with some early drafts having phrased it as a collective commitment binding all parties to the Convention.

<sup>20</sup> It will be recalled that Article 31(1) of the Vienna Convention on the Law of Treaties provides that ‘[a] treaty shall be interpreted... in accordance with the ordinary meaning to be given to the terms of the treaty ... in the light of its object and purpose.’ The latter cannot trump the former.

<sup>21</sup> Article 3(1), UNFCCC (emphasis added).

<sup>22</sup> See Bodansky, *op. cit.* note 15, pp. 502-3. Developed States opposed the argument that they should take the lead because they bore the ‘main responsibility’ for climate change, claiming that their responsibility to do so arose out of their greater financial and technical capacities.

<sup>23</sup> Bodansky, *op. cit.*, note 15, p. 512.

<sup>24</sup> Letter from Mr Clayton Yeutter to Representative John Dingell, Chair of the US House of Representatives Energy and Commerce Committee, quoted in Bodansky, *op. cit.* note 15, p. 516.

of climate change, disputes concerning the issue cannot be covered by Article 14.<sup>25</sup> In addition, Article 14 simply sets out settlement procedures which must be used by Parties to the UNFCCC in cases of dispute. It cannot be read as establishing a *lex specialis* system governing the content or implementation of State responsibility for breaches of the UNFCCC, as such issues receive no coverage.<sup>26</sup>

### 3. Fiji's Declaration on Signing the UNFCCC

On signature of the UNFCCC, Fiji stated that: *"The Government of Fiji declares its understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law."* Declarations in similar terms were made, either on signature or ratification, by Kiribati, Nauru and Papua New Guinea.

The second limb of Fiji's declaration (*"that no provisions in the Convention can be interpreted as derogating from the principles of general international law"*) seems rather wide. However, it should be read in context; that is, by reference to the declaration's first limb (*"The Government of Fiji declares its understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change."*) The reference to *"the principles of general international law"*<sup>27</sup> would thus appear to be a reference to the general international law rules on State responsibility for the adverse effects of climate change. The question is consequently whether those rules (whatever their content) continue to apply as between the parties to the UNFCCC.

When referring to State responsibility, both Recital 8 to the UNFCCC Preamble and the declarations of Fiji *et al* use the term in a broad sense, so as to refer to the content, as well as the implementation, of States' responsibility for adverse transboundary effects of activities undertaken within their jurisdiction or under their control. In other words, the references ignore the distinction often made between primary and secondary rules of State responsibility.

The statements made by Fiji *et al* appear to be interpretative declarations. An interpretative declaration is *"a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions."*<sup>28</sup> No other State, in signing or ratifying the UNFCCC, made any declaration stating that they did not accept the interpretations put forward by Fiji *et al*. However, it would seem to go too far to say that silence in this context, means tacit acceptance, particularly given the context in which the statements were made (i.e. following the AOSIS's failure to have the provision included in the UNFCCC itself). Interpretative declarations are not binding (save to the extent that they might found an estoppel against a declarant). They simply state the declarant's opinion as to what the treaty, or certain of its provisions, means; an opinion which other parties are not obliged expressly to refute.

### 4. The Negotiating History of the UNFCCC

<sup>25</sup> It might be argued that in order to define States' obligations under general international law, it would be necessary to interpret the UNFCCC. This is true (although only if it was argued that the UNFCCC derogated from general international law) but such interpretation would only be incidental to the relevant tribunal's principal task.

<sup>26</sup> Although discussion of the Kyoto Protocol is beyond the scope of this Paper, it should be noted that there is a question as to whether its compliance mechanism displaces the rules of State responsibility (in the secondary rules sense).

<sup>27</sup> Which, in this context, would seem to refer to rules of customary international law of general, rather than merely of local or regional, scope.

<sup>28</sup> International Law Commission, Third report on reservations to treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/491/Add.4, para. 361.

Examination of the negotiating history of the UNFCCC indicates that the omission of any provision specifically concerning State responsibility for the adverse effects of climate change was deliberate. The text of the declarations made by Fiji *et al* had originally been put forward for inclusion in the UNFCCC by Vanuatu on behalf of the Alliance of Small Island States ('AOSIS').<sup>29</sup> However, the proposal was unsuccessful owing to a refusal by developed States to accept any provision on the subject in the Convention.<sup>30</sup>

## 5. Preliminary Conclusion

It can be concluded that there is no inconsistency between the UNFCCC and the general rules of public international law (both primary and secondary) on the responsibility of States for transboundary environmental harm. The reason for this is not that treaty and customary rules accord, but rather that there is not treaty that codifies the customary rules. The Convention does not contain provisions on the issue. Thus it cannot be argued that the UNFCCC, as adopted in 1992, has acted to 'freeze' the relevant customary rules. The applicable customary rules are the customary rules as they exist now, not excluding any developments since 1992.<sup>31</sup> The UNFCCC has not created a 'special regime' that would exclude or limit the application of the contemporary rules of general public international law amongst the Parties to the Convention.

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<sup>29</sup> Preparation of a Framework Convention on Climate Change: Set of informal papers provided by delegations, related to the preparation of a Framework Convention on Climate Change, UN doc. A/AC.237/Misc.1/Add.3 (18 June 1991), at 22.

<sup>30</sup> See Richard S.J. Tol and Roda Verheyen, 'State Responsibility and Compensation for Climate Change Damages: A Legal and Economic Assessment' (2004) 32 *Energy Policy* 1109, at 1114.

<sup>31</sup> This is not to say that the law on climate change has not developed since 1992. The UNFCCC does impose some obligations on its Parties, whilst binding commitments as regards greenhouse gas emissions were undertaken by those Annex I Parties which adhered to the Kyoto Protocol. Discussion of the Protocol is, however, beyond the scope of this paper.