

We need a legal framework for collective climate action

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We do not have the luxury of time to leave contentious issues to protracted negotiations.

SUMMARY

- *It's critical to set obligations and rights so that we can stop action violative of global trade and climate laws*

Three international disputes on climate change raise critical questions on the rights and obligations of countries and human rights of individuals in relation to climate change. First is a case initiated by Vanuatu, a small Pacific island nation, pursuant to which the United Nations General Assembly (UNGA) passed a resolution in March, asking the International Court of Justice (ICJ) for an advisory ruling on obligations of states under international law to protect the climate system. The second is a request from the Commission of Small Island States on Climate Change and International Law, a group of nine island states, for an advisory opinion from the International Tribunal for Law of the Sea on whether climate change is a "threat to their survival". The third is a lawsuit by six Portuguese youth against 33 countries (European Union, Norway, Switzerland, UK, Turkey, Russia and Ukraine) at the European Court of Human Rights that their human rights have been violated by the lack of adequate climate action.

The outcome of these cases will have a profound impact on the legal interpretation of what countries need to do to address one of the biggest catastrophe of our times. Much like the coronavirus, climate change does not respect territorial boundaries. While solutions to address climate change exist, the political commitment for collective action through compliance with agreed principles, sadly, is missing.

The first “global stock-take” report from the United Nations since the Paris Agreement to the UN Framework Convention on Climate Change (UNFCCC) was signed in 2015 states the obvious—how we travel, eat and use energy needs transformation. That indeed is one of the mantras of the UN Sustainable Development Goals (SDGs) and is central to India’s LiFE (Lifestyles for Sustainable Development) initiative. The stock-take report released early September echoed the findings of the Intergovernmental Panel on Climate Change’s AR6 synthesis report published earlier this year, which warned of a rapidly closing window of opportunity to address climate change concerns and secure a sustainable future for all.

The recently-concluded G20 New Delhi Declaration, while emphasizing the need for “climate resilient and environmentally sustainable development pathways”, reminds of the basis of internationally-agreed principles of climate action, central to which is that developed countries have higher targets than developing countries, as is reflected in their nationally determined contributions (NDCs) agreed under the Paris Agreement. NDCs differ from country to country, premised in the UNFCCC’s foundational principle of “common but differentiated responsibility”, and that, in turn, is premised on the higher carbon space already occupied by developed countries, while developing countries need greater support to ensure that their path to development is green and sustainable.

Despite the glowing reiterations of agreed principles, compliance with climate obligations has been patchy. A 2009 commitment among UNFCCC members to mobilize \$100 billion per year—a fraction of what is needed—for developing countries by 2020 remains unfulfilled.

It is, therefore, ironical that unilateral climate measures such as EU’s Carbon Border Adjustment Mechanism (CBAM) mandate that imports into the EU will require the purchase of CBAM certificates, representing the difference in price of embedded emissions between the EU and the country of origin. This is effectively reverse-financing of EU’s climate targets by developing countries! While the obligation to purchase CBAM certificates begins on 1 January 2026, highly onerous reporting requirements are effective from 1 October 2023.

CBAM runs counter to World Trade Organization (WTO) principles, which do not differentiate products based on production-related emissions. It also runs afoul of the principles of differential NDCs. While raising a WTO dispute is a must, India’s government should also consider testing the dispute settlement provisions of the UNFCCC and Paris Agreement. The UNFCCC mandates that unilateral action to combat climate change mustn’t constitute a disguised restriction on international trade.

Both the UNFCCC and the Paris Agreement provide the option for conciliation, arbitration and the compulsory jurisdiction of the ICJ, based on the choice of a party. While neither EU nor India have opted for any of these mechanisms, referring a dispute to the ICJ would be possible if both parties agree to do so. Alternatively, as a member of the UN, it is open to India to seek an advisory opinion of the ICJ. It is this advisory jurisdiction that Vanuatu initiated. The UNGA resolution seeking the advisory opinion notes with concern the lack of

financial mobilization to address climate change, and raises questions as to the obligations of states to protect the climate system, and legal consequences of their acts and omissions. While ICJ's advisory opinions are non-binding, they can help clarify the balance of climate-related rights and obligations of countries.

Raising disputes are never the first best option to resolve differences. However, we do not have the luxury of time to leave contentious issues to protracted negotiations. Timely action to stem the tide of climate unilateralism is crucial to drive home the point that climate change can be addressed only when collective action for emission reduction is coupled with efforts to ensure green pathways for development for all.

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