Context of climate justice

There is now no serious scientific dispute about the basic cause and consequence of climate change. The very nature of climate change exacerbates the inequities in terms of contribution to the causes and sufferings from the consequences. Climate change impact and vulnerability, particularly current extreme weather events, bring up the serious legal question of liability for the damage caused, based on proportional contribution to climate change.

Causal liability shifts the burden to the industrialised countries to take entire responsibility for mitigation, adaptation and the consequences of the measures to respond to climate change. In terms of mitigation, rigorous emission limits should be set by the developed countries to avoid dangerous climate change. From the adaptation perspective, the developed countries should take responsibility to react to consequences and prevent further deterioration. Technological and financial resources should be provided, based on proportional contribution to climate change and respective capacity of the states.

On the other hand, least developed countries, which are the most vulnerable, should utilise the support available through ensuring good governance to protect their own citizens. Climate change is an issue that is inherently global in nature, and the dynamics of the climate system are globally integrated. Therefore, an international and integrated climate governance regime is needed to ensure coordinated efforts and global cooperation.

Climate governance regime

Climate change appeared as a distinct issue in the international legal regime in 1992, when the global community negotiated a United Nations Framework Convention on Climate Change (UNFCCC). UNFCCC was supplemented by the Kyoto Protocol in 1997. These two international treaties have been elaborated through decisions adopted by the Conference of the Parties (COP), the highest decision-making body of UNFCCC, on the basis of developments in science and politics. Eventually, the Parties of the Convention adopted the Bali Action Plan in 2007 to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012 in order to reach an agreement. As such, an Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA) was established under the Convention to work on the said plan and to adopt a decision in Copenhagen 2009. On the other hand, the Ad Hoc Working Group on Further Commitments from Annex I Parties under the Kyoto Protocol (AWG-KP) was formed in 2005 to work to set targets for Annex I Parties for the next commitment period in Copenhagen 2009.

Therefore, in accordance with the mandates of these dual track negotiations, expected outcomes of the Copenhagen deal were amendment or amendments of the Convention and the Protocol, or a new Protocol to adopt new policy direction in the climate regime. Instead of any agreed outcomes from dual track negotiations COP 15 mandates completion of their work by COP 16, to be held in Mexico City this month. Failure of the Copenhagen climate conference and the Copenhagen Accord, an unconventional upshot of the said conference, raises serious concerns over ongoing negotiations. Moreover, the China UNFCCC pre-session ended on October 9, with huge frustration at the lack of progress, and particularly the threats by rich countries of abandoning their existing legal commitments under the Kyoto Protocol.

The United States, one of the largest global polluters, prefers new flexible instruments instead of ratifying and advancing the second commitment period of the Kyoto Protocol. Moreover, some of the signatory countries to the Protocol are reluctant to meet their reduction commitments. The existing international legal regime, in the context of the autonomy of nations and jurisdictional limitations, cannot compel sovereign states to reduce carbon emissions. Therefore, political wisdom and voluntary compliance mechanism of international law make it risky to rely on ongoing climate negotiations to adopt a legally binding agreement. Consequently, the global legal community, instead of exclusive reliance on the political branches, is exploring legal avenues to seek relief from the judicial organs.

Background of climate litigation

In response to demands for broad, system-changing solutions to the climate crisis, the law is invoking different legal theories. Advocacy groups, public authorities, communities and individuals are coming up before the judiciary to seek compensation from and punishment for those thought to be contributing to climate change. Judicial decisions also have begun to come up through different judicial forums as a means of compelling decision makers to address the issues for future action and to make liable for harm caused to the climatic system. These legal