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Agora

International litigation in public interest: the case of climate change

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International climate litigation as a case of international litigation in public interest

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(A) INTRODUCTION

The works that make up this agora are the result, fundamentally, of the International Seminar on *International Litigation in the Public Interest: The Case of Climate Change*, held at the Pompeu Fabra University on November 28, 2024. The organization of this seminar therefore had a double affiliation. On the one hand, it was proposed and organized by the Editorial Board of the *Spanish Yearbook of International Law* as an agora; that is, as a set of research works in which, from different perspectives, different aspects of a subject, topic or problem are addressed. In this case, an attempt was made to address in a monographic way a highly topical issue such as international (and internal) litigation in the field of climate change.[3] On the other hand, it was another research activity in the area of Public International Law and International Relations of the Pompeu Fabra University, which is part of the research project of the Ministry of Science and Innovation on 'Public Interest Norms in the 21st Century', which is being carried out by its members in three specific material areas: climate change, cyberspace and international migration.[4]

The objectives of the International Seminar were threefold. The first was to provide a state of the art on international climate litigation, in particular on its possibilities and also on its limitations. The second was to examine the conceptual, political and procedural particularities that international climate litigation presents both in the different international courts and in the material areas in which it is raised: law of the sea, human rights, investments, etc. And the third objective was to identify and

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[3] There is no definition accepted by international law doctrine on climate litigation, as noted by K. McKenzie, G. Medici-Colombo, L. Wegener and F. Sindico, "Climate change litigation: on definition to rule them all…?", in F. Sindico, K. McKenzie, G. Medici-Colombo and L. Wegener (eds.), *Research Handbook on Climate Change Litigation*, Cheltenham, Edward Elgar, 2024. These authors propose a broad definition of climate litigation based on four terms: litigation, understood in a broad sense; climate change; it includes domestic cases that include national, federal or smaller disputes; and international (pp. 9-11).

[4] The Concept Paper for this project can be viewed at A.J. Rodrigo and C. García Segura, *Las normas de interés público en el siglo XXI*, ORBIS WorkingPapers, 2024, Nº 11, pp. 1-47.

explore the performance of some of the responses offered by international climate litigation.

The subject of study of the International Seminar, 'international climate litigation', constitutes a type of dispute that is part of a broader current trend that can be called 'international litigation in the public interest'. Therefore, before presenting the structure and content of the agora, it seems appropriate to contextualize this topic within the framework of the evolution of international law towards a genuine *Public* International Law as a result of the incorporation of concepts, norms, obligations, institutions and procedures that constitute its public dimension.

(B) INTERNATIONAL LITIGATION IN THE PUBLIC INTEREST AS A MANIFESTATION OF THE PUBLIC DIMENSION OF INTERNATIONAL LAW

The legal means of resolving disputes in International Law have a bilateral structure. However, the growing practice in the last decade that has sought to protect collective interests goes beyond the limits of said bilateral architecture. This practice, which can be called 'international litigation in the public interest', has revealed the significant difficulties that its activation, operation and possibilities of success have within the framework of the aforementioned bilateral architecture of the legal means of resolving international disputes.

(1) The bilateral architecture of legal means of peaceful settlement of international disputes

Legal means of settlement of international disputes (arbitration and judicial settlement) generally reflected and reinforced the traditional bilateral structure of classical International Law. Within the institutional and procedural framework of such means, international disputes had a bilateral character; the obligations in dispute also had a bilateral structure based on reciprocity (*do ut des*); and the parties to such disputes were, in general, two, whether State against State, company against State, or individual against State.

However, the practice followed in and before different international courts has exceeded this bilateral structure. There have been an increasing number of cases with different characteristics that have strained the seams of such means. This is a practice in which claims have been filed not only by injured States but also by non-injured States, non-state actors or indigenous peoples. These seek to protect different collective interests such as the protection of whales, nuclear disarmament, self-determination of peoples, the prevention and punishment of genocide, the fight against torture, tackling climate change, and the rights of indigenous peoples, among others. In addition, the violation of public interest norms is invoked. These cases are heard either in contentious jurisdiction, where there has been a kind of rediscovery of the compromissory clauses of multilateral treaties for the protection of general interests, or through an increase in requests for advisory opinions in the different international courts. This practice can be called 'international litigation in the public interest'.

(2) Concept and characteristics of international litigation in the public interest

Yura Suedi and Justine Bendel have proposed the expression 'public interest litigation' to describe the practice mentioned above for several reasons:

> "First, the term "public" indicates a stemming beyond the terms "common interests" or "community interests" which are strongly associated with, and limited to, states. We wish to emphasize, through this more all-encompassing term, that in international law, litigation for the public will arguably impact all actors beyond states. Second, the term "public" also reinforces the public nature (as opposed to private) of the matter connecting the beneficiaries in question, as discussed already, underscoring the "quality of publicness" inherent to international law. Third, in the context of international law where the practice is questioned, contested and sparsely used, the term "public interest litigation" places emphasis on the legitimacy of preserving the interests of the public."[5]

Taking this notion as a starting point, this paper tentatively proposes the following definition of international litigation in the public interest. This definition is aimed at defending the global public interest, in any of its manifestations, in which the application of public interest norms is invoked and in which the extension of the *ius standi* to present international claims is possible.

From this provisional definition, several characteristics of international litigation in the public interest can be identified. The first is its international character. Such claims can be presented in the different international legal means of resolving disputes in international law, whether they are the various international courts (the International Court of Justice, the Tribunal for the Law of the Sea), the courts for the protection of human rights or, even, in the International Criminal Court), in arbitration courts (international or mixed), or in the Dispute Settlement Body of the World Trade Organization. The second is that these disputes concern one of the various manifestations of the global public interest, be it the *Global Commons*, the *Global Public Goods* (such as the climate system) or one of the shared global values, whether fundamental (the prohibition of genocide or torture) or not.[6] The third feature is that the potential beneficiaries of these claims, the 'public', may be not only individual States or groups of States but also certain communities within a State (the Rohingya within Myanmar, for example, or indigenous peoples), individuals or even the international community as a whole. The fourth is that the substantive norms whose violation is alleged are norms of public interest, whether of ordinary legal authority (the majority) or of enhanced legal authority such as peremptory norms of general international law (*ius cogens*).[7] Public interest norms

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5 Y. Suedi y J. Bendel, "Public Interest Litigation: A Pipe Dream or the Future of International Litigation?", in J. Bendel and Y. Suedi (eds), *Public Interest Litigation in International Law*, London, Routledge, 2024, pp. 34-72, in particular, p. 46.

6 A.J. Rodrigo, "Las normas de interés público en el Derecho internacional", *Cursos de Derecho internacional y Relaciones Internacionales de Vitoria-Gasteiz 2024*, Valencia, Tirant lo Blanch, 2025 (in press), section 2 on the global public interest.

7 A.J. Rodrigo, "Las normas de interés público en el Derecho internacional", *op. cit.*, 2025, Section 3 on 'public interest norms'. These norms can be defined as "those international legal norms that aim to regulate and protect either the collective interests of a group of States or persons or the general

may create interdependent obligations, such as the obligation to negotiate nuclear disarmament (Article VI of the Nuclear Non-Proliferation Treaty) invoked in the case brought by the Marshall Islands,[8] or obligations of an integral structure that are *erga omnes partes* (derived from conventional norms contained in multilateral treaties) such as the obligations to prevent and punish the crime of genocide,[9] the obligation to punish the crime of torture,[10] or *erga omnes* obligations such as those derived from the norms of *ius cogens* that recognize the right to self-determination of peoples.[11] And the fifth characteristic of international litigation in the public interest is that it is the result of the extension of *ius standi* to present international claims. Thus, the international legal system allows and practice shows that *ius standi* may be held not only by the injured State (Article 42 ARSIWA) but also by States other than the injured State (Article 48 ARSIWA); international organizations in the case of advisory opinions; certain non-state actors, if they meet certain requirements, in the area of human rights protection; and the requirement of being a victim has been relaxed in the case of individuals in order to have *ius standi* in some international jurisdictions for the protection of human rights.[12]

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interests of the international community (in short, the global public interest), from which collective obligations are derived that are either interdependent or have an integral structure and that have a vocation for universality".

8 Judge Tomka, in his separate opinion on the case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgement of 5 October 2016, said that:
"In other words, the performance of the obligation by a State is conditional on the performance of the same obligation by the other States. In the field of nuclear disarmament, it is unrealistic to expect that a State will disarm unilaterally. International law does not impose such an obligation. It rather provides for achieving that goal through negotiations in good faith, through the co-operation of all States" (para. 35).
This same judge recognizes that:
"The issues raised in the present proceedings are not of a bilateral nature between the Marshall Islands and the United Kingdom. I am convinced that the Court cannot meaningfully engage in a consideration of the United Kingdom's conduct when other States whose conduct would necessarily also be at issue are not present before the Court to explain their positions and actions (para. 40).
This case illustrates the limits of the Court's function, resulting from the fact that it has evolved from international arbitration, which is traditionally focused on bilateral disputes. The Statute of the Court is expressly based on the Statute of its predecessor, the Permanent Court of International Justice…" (para 41)

9 Order on Provisional Measures of 23 January 2020 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)*, para. 41; also, the judgment on preliminary objections of 22 July 2022 in the same case, in which it stated that:
" The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*. Responsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim. For these reasons, Myanmar's purported distinction between the entitlement to invoke responsibility under the Genocide Convention and standing to pursue a claim for this purpose before the Court has no basis in law". (para. 108)

10 Judgment of 20 July de 2012 in the case on *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil* 2012, páras. 68-69

11 Advisory opinion of 19 July 2024 on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, paras. 232-233.

12 Cfr. the work of Enrique Martínez Pérez, "The Relaxation (if Not Exclusion) of Victim Status before the ECtHR in Climate Litigation" in this Agora.

(3) The difficulties of international litigation in the public interest within the framework of the bilateral architecture of legal means of dispute resolution

This growing practice of international litigation in the public interest has to face various types of resistance, reservations, difficulties and criticisms. Y. Suedi and J. Bendel identify three: conceptual reservations about the very idea of public interest; political reservations about the motives behind litigation in the public interest; and procedural reservations justified because the structure of international courts is not designed to accommodate this type of litigation.[13]

Conceptual reservations affect the very notion of public interest because this notion is questioned due to its difficulty in explaining the aggregation of individuals or States within International Law.[14] These authors defend the public interest within the framework of International Law because it is possible for an aggregation of individuals or States to both share interests and reformulate them within this legal system. They also identify who the potential beneficiaries of public interest litigation may be: a community of individuals within a nation, a group of States party to a multilateral treaty, the international community of States, or the international community beyond States.

Political reservations are argued around the criticism of the strategic use of public interest litigation because the courts are used as 'forms of protest' to promote structural change, which may provoke a rejection in international judicial institutions.[15] Y. Suedi and J. Bendel defend public interest litigation on three grounds: because it balances the positions of the parties in disputes; because it offers new opportunities to international courts to reaffirm their legitimacy; and because it benefits the courts' own relevance within the international legal order.[16]

Procedural reservations are explained because international courts, institutionally designed to hear bilateral disputes, have difficulties in procedurally accommodating public interest litigation. The main procedural limits arise, firstly, in matters of access to the courts, both due to difficulties affecting the jurisdiction of the courts (consent of States to this specific type of dispute and the *Monetary Gold* principle) and those relating to *ius standi*.[17] Public interest litigation challenges and expands the classic rules, but in any case, it is not equivalent to the *actio popularis*. Secondly, there are also procedural limits on participation, since traditional mechanisms need to be made more flexible and adapted to facilitate the intervention of third parties and the participation of civil

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13 Y. Suedi and J. Bendel, *op. cit.*, 2024, pp. 35-63.

14 M. Esnault, "On the Pertinence of 'Public Interest' for International Litigation", in Y. Suedi and J. Bendel, *op. cit.*, 2024, pp. 9-33.

15 K. Casper, L. Fournier, R. Harvey, M. Jomnker-Argueta, K. Valente and A. Sharma, "Breaking the mould in the strategic design and implementation of climate change", in F. Sindico, K. McKenzie, G. Medici-Colombo and L. Wegener (eds.), *op. cit.*, 2024, pp. 37-56. These authors propose "that 'strategic' litigation comprises cases where the individual claimants are motivated by an aim to bring about broader societal shifts beyond their own concerns. In climate litigation, claimants are living the experience of climate impacts. What is strategic is also inextricable from the visions of success and justice of those on the frontlines of climate change" (p. 39).

16 Y. Suedi and J. Bendel, *op. cit.*, 2024, pp. 46-51.

17 Cfr. also the work of Sergio Salinas, "Procedural Challenges: *Ius Standi* and Causality" in this Agora.

society. And finally, the limitations also affect enforcement in areas such as remedies and the application of court decisions, since they are only binding on the litigating parties.[18]

These authors, after identifying the difficulties, conclude that such reservations and limitations are surmountable because the concepts must be clarified, the procedures must be adjusted, made more flexible or adapted and politics is inevitable and inherent to international law. Therefore, they affirm, litigation in the public interest is more than a pipe dream and will increase in the coming years.[19]

(C) STRUCTURE AND CONTENT OF THE AGORA ON INTERNATIONAL CLIMATE LITIGATION

The works resulting from the International Seminar on International Climate Litigation that make up this agora examine and identify both the possibilities and the limitations that arise in international courts. To address the object of study, the agora is structured in four parts.

The first section groups contributions that enrich the understanding of the current state of climate litigation, as well as its potentialities and restrictions. Along these lines, Professor Enrique Martínez Pérez, in his work entitled "The Relaxation (if Not Exclusion) of Victim Status before the ECtHR in Climate Litigation", analyses the evolution of victim status before the European Court of Human Rights (ECHR), arguing that, although certain requirements for organizations to access climate justice have been relaxed, the conditions for individuals to be considered victims have become stricter. This could limit access to justice for those suffering the consequences of climate change, while recognizing the complexity of the phenomenon and the need to address collective claims.

Next, Susana Borràs Pentinat, in her contribution "Promises of Climate Litigation for Climate Justice", argues that for a climate lawsuit to effectively contribute to climate justice, it is essential to address the "triple injustices" associated with climate change, which involve the unequal distribution of its effects, disproportionate responsibility and the unequal costs of mitigation and adaptation to this phenomenon. This implies conceiving climate change as a justice dilemma that disproportionately affects the most vulnerable populations, who are the least responsible for greenhouse gas emissions.

Subsequently, in "Identifying the Limits of International Climate Litigation," Xavier Farré Fabregat concludes that, in order to understand the evolving phenomenon of climate litigation, it is essential to analyze the international legal framework and recognize the structural limitations of international law that hinder the ability of these disputes to generate significant changes. Three limitations stand out: the primacy of international investment law, which restricts the application of environmental principles; the clear division between North and South in climate litigation, which hinders global cooperation; and the limited capacity of climate litigation to produce positive results, often attenuated by socioeconomic and regulatory factors.

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[18] Y. Suedi and J. Bendel, *op. cit.*, 2024, pp. 51-63.

[19] *Ibid*, p. 64.

The second part is composed of contributions that analyze international obligations related to climate change, as well as their identification and interpretation by international courts. Professor Eulalia W. Petit de Gabriel raises a question in her contribution "He Who Laughs Last Laughs Best? Climate Change Obligations in the Request of the Advisory Opinion of the ICJ", suggesting that climate change represents a significant challenge for the international community and law, and that the International Court of Justice (ICJ) should consider obligations related to this phenomenon in its advisory opinion, taking into account both interactions between States and the rights of individuals and future generations. In this regard, the need for the ICJ to adopt a bold but cautious approach is emphasized, considering the complexities and implications of public interest litigation in the framework of climate obligations that combine environmental and human rights norms.

Gastón Medici-Colombo, in his analysis "Mapping Climate Change Obligations in the Request of the Advisory Opinion of the Inter-American Court of Human Rights", presents a study on climate-related human rights obligations from the perspective of the Inter-American Human Rights System (IAHRS), anticipating the advisory opinion to be issued by the Inter-American Court of Human Rights (IACtHR) in 2025. The author suggests that, given the breadth of the request submitted by Chile and Colombia, as well as the flexibility of the IACtHR in its advisory role, it is necessary to resort to the Court's previous jurisprudence to offer a useful and informed approach. The IACtHR is expected to complement general climate-related obligations with specific obligations for vulnerable groups and to apply, in answering the request, the "Inter-American framework on environment-related obligations" to climate change. Furthermore, the author contends that the peculiar features of the recognized right to a healthy environment will significantly influence the definition and scope of the climate-related obligations.

Finally, Eduardo Jiménez Pineda, in his work "The UNCLOS as a Legal Living Instrument to Combat Climate Change and Its Deleterious Effects: The Specific Obligations of State Parties According to the Interpretation of ITLOS", argues that the advisory opinion issued by the International Tribunal for the Law of the Sea on 21 May 2024 represents a significant contribution to the interpretation of international maritime law in the context of climate change. Although not binding, this unanimous decision of the Tribunal clearly sets out the specific obligations of States Parties under the United Nations Convention on the Law of the Sea (UNCLOS) in relation to the prevention of marine pollution and the protection of the marine environment from the effects of climate change.

The third part brings together works that address the possibilities and limitations of international law in the field of climate change, in the context of international human rights protection bodies. This section includes Professor Sergio Salinas' research on "Procedural Challenges: Ius Standi and Causality", where he concludes that, despite the complexities and obstacles that climate change presents in the context of human rights litigation, international human rights protection bodies adopt a proactive approach that allows individuals to present their claims. Although there are limitations in access to courts, it is postulated that it is possible to overcome the challenges related to causality through a normative approach that emphasizes the positive obligations of States.

For Corina Heri, in her analysis "The ECtHR's *KlimaSeniorinnen* Judgment: A Cautious Model for Strategic Climate Litigation", the *KlimaSeniorinnen* judgment of the European Court of Human Rights represents "A Cautious Model" for future climate litigation, despite its limitations, such as the lack of recognition of the right to a healthy environment.

Finally, Pau de Vilchez Moragues, in "Judicial Review of Climate Plans. A Growing Consensus", discusses the diversity of the climate litigation phenomenon in terms of actors and legal arguments, arguing that courts no longer view climate change as a taboo subject and that they recognize the importance of establishing and implementing appropriate climate plans.

Finally, the fourth part includes papers that offer a Private International Law perspective, although they were not presented at the international seminar, thus complementing the analysis of the topic in the agora. Among them is "Climate Change Litigation through the Prism of Private International Law" by Eduardo Álvarez-Armas, who examines the European Union rules on international jurisdiction and choice of law in relation to damages associated with climate change.

Furthermore, Ana Crespo Hernández, in her work "International Climate Litigation against Companies: Issues of Applicable Law", concludes that international climate litigation is on the rise and is not a passing trend, suggesting that the situation could improve with the new Due Diligence Directive.

Following that line, Professor Lorena Sales Pallarés, in "What We Talk about When We Talk about…Corporate Sustainability Due Diligence (CSDD) and Climate Change Litigation", argues that the principle of due diligence has evolved towards international human rights standards, becoming a valuable tool to hold companies and States accountable for their environmental and social impacts.

(D) FINAL REFLECTIONS

This agora offers a current and varied panoramic view of the current situation of climate litigation (international and, to a certain extent, also domestic). The different works that comprise it confirm both the difficulties that were pointed out lines above and the possibility of overcoming them. Some of the most recent cases can be interpreted and assessed in this direction.

One of the main ideas that can be extracted from the set of works is that, although climate litigation (international and also domestic) may not be the ideal strategy for the fight against climate change, it can be much more productive than skeptics imagine. Practice shows that climate litigation is another tool to deal with climate change that has, at least, two types of positive consequences. Some, perhaps the most obvious, are those derived from the direct objective of the controversies themselves. But there are also other types of consequences derived from climate litigation such as the activation of other legal, political and economic options and the mobilization of material and ideational resources with the same objective. These indirect effects can often be more effective than the climate litigation itself.

We therefore believe that the objective of the International Seminar and that of the agora itself have been largely achieved. Furthermore, the Seminar held at the Pompeu Fabra University provided a space for oral presentations, debate and even controversy in an environment of cordial disagreement that contributed to improving the results of the individual works.

Finally, we would like to sincerely thank all the participants and attendees at the seminar for their collaboration, effort and availability.