FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 9, N°1, 2011, pp. 19 - 33

Scientific Review, Debate

NATIONAL JUDICIAL CONTROL OF THE PERFORMANCE OF SOME OBLIGATIONS ACCEPTED FROM THE UN FRAMEWORK CONVENTION ON CLIMATE CHANGE*

UDC 502.14:347.4

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Abstract. *If Serbia failed to perform its obligations based on the UN Framework Convention on Climate Change and if an individual in Serbia suffered some damage for this, would a court award a compensation for damages? This issue includes some hypothetical questions such as, for instance, the fact that the change of climate in Serbia causes damage to some individuals and that, by failing to perform its obligations, Serbia has contributed to the climate change and individual damages that have arisen. The question is whether the performance of obligations defined in the Convention is suitable for national judicial control? The change of climate is a complex process, caused by a variety of factors, many of which are beyond the control of the given state. Some crucial obligations established by the Convention and the Kyoto Protocol are defined very flexibly, leaving the contracting parties with a broad area to provide different implementation arrangements. Therefore, the possibility of national judicial control of the performance of obligations accepted from the UN Framework Convention on Climate Change is a complex question.*

The Framework Convention on Climate Change belongs to international treaties with the most contracting parties – 195. However, only two of them have accepted international judicial competence for possible mutual disputes with regard to the interpretation and implementation of the Convention. States do not want external judicial control of the performance of obligations they have accepted based on the Framework Convention. Can internal judicial control compensate for the lack of external control and contribute to better effects of the Convention?

Key words: *climate change, judicial control, the Framework Convention.*

Received May 17, 2011 / Accepted May 30, 2011
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* The paper is part of the project "Biomedicine, Environmental Protection and Law" No. 179079, now financed by the Ministry of Education and Science of the Republic of Serbia

INTRODUCTION

The UN Framework Convention on Climate Change (hereinafter: the Convention) was open for signature on 9 May 1992 in New York and entered into force on 21 March 1994. The Convention is binding for 195 contracting parties.[1] It is open to UN member states, parties of the Statute of the International Court, specialized UN Agency for Regional Economic Integration. Serbia has been a contracting party since 10 June 2001. At its third session held in Kyoto on 11 December 1997 the conference of contracting parties adopted a Protocol to the Convention specifying some regulations from the Convention. The Protocol (hereinafter: the Kyoto Protocol) entered into force on 16 February 2005 and is binding for 192 contracting parties. Serbia has been a party in the Kyoto Protocol since 17 January 2008.

The objective for which the Convention was concluded can be found in its Article 2. The goal of the Convention is, therefore, to achieve:

> *"stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."*

The parties to this Convention started from the fact that the industrialization process, based on the combustion of coal and oil, causes an increase in the concentration of greenhouse gas in the atmosphere, which is a factor most likely influencing climate change. The first objective is, therefore, that the contracting parties should implement activities agreed on so as to control greenhouse gas concentrations in the atmosphere by reducing the emission of such gases on the one hand and increase natural purification capacities, i.e. absorption of these gases from the atmosphere on the other. This way the *"dangerous interference with the climate system"* would stop. The next fact that the contracting parties started from is that the *"dangerous anthropogenic interference with the climate system"* accelerates climate change, which questions the capacity of ecosystems to naturally accommodate to the climate change, to ensure the production of enough food and further economic development. The objective is, therefore, that parties undertake timely action so as to prevent the anthropogenic interference from accelerating this change, which would jeopardize ecosystems, a large number of plant and animal species, agriculture, and economic growth.

Developed countries, hosting 20% of the world's population, caused 46% of total global greenhouse gas emission in 2004.[2] Clearly, not all of these countries and world regions are equally responsible for the greenhouse effect. It is also clear that all countries have not been nor will be equally affected by climate change. Partial melting of polar ice caps and thermal expansion of seawater can increase sea water level for a couple of meters in a longer time-frame. This would cause significant changes along the shores,

[1] http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXVII~7&chapter=27&Temp=mtdsg3&lang=en , visited in March 2001.

[2] IPCC Fourth Assessment Report: Climate Change 2007, Synthesis Report, 2.1. Emissions of long-lived GHGs available at http://ipcc.ch/publications_and_data/ar4/syr/en/main.html. Visited in March 2011.

flooding lowlands, and would impact entire deltas and low islands. In October 2009 the Government of Maldives held an underwater session appealing to members of the Conference of the Parties of the Convention, which were holding a meeting in Copenhagen at the time, to reach an agreement on measures against climate change. If the increase of temperature on Earth results in the melting of ice caps on the poles, which is a process that has already started, the ocean level will rise for a couple of meters so that a group of low Maldive islands in the Indian Ocean may be completely flooded. In other areas deserts may expand, the regime and amount of precipitation may change, droughts may appear, etc. In the initial report submitted by the Republic of Serbia to the Conference of the Parties of the UN Framework Convention on Climate Change it is stated that Serbia is located in a region already affected by climate change.[3] Climate change is a global process causing global effects. This implies that international interdependence is growing since no country can successfully fight climate change on its own. It also reveals intergenerational interdependence since, beginning with the period of industrialization, generations of humankind have influenced climate change and, thus, the living conditions for future generations.

The principle of fairness and interdependence is, therefore, the first principle that the Convention is based on. In accordance with Article 3 (1) of the Convention, the parties should protect the climate system for the benefit of present and future generations of humankind. They should do so on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. The responsibilities are common, but not equal. During the industrialization process, developed countries significantly contributed to the excessive concentration of harmful gas in the atmosphere. Additionally, economic capacities of developed countries to reduce the emission of harmful gas are incomparably bigger than the capacities of developing countries. On the other hand, all countries may be affected by the change of climate. However, it is not likely that all of them would be affected in the equal extent or in an equal way. Thus the responsibilities are common, but not equal. The principle of fairness suggests that all contracting parties should become involved commensurate with their responsibilities. Therefore, in the last sentence of Article 3 (1) of the Convention, it is stated that the developed country parties should take the lead in combating climate change and the adverse effects thereof. In the same context, Paragraph 2 of the same Article stresses that full consideration should be given to the specific needs and special circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those that would have to bear a disproportionate or abnormal burden under the Convention. This principle has been made concrete in the different obligations of developed and developing country parties. All parties, i.e. both developing and developed countries, have taken over an equal number of obligations. However, only developed countries have taken over obligations related to reducing the emission of greenhouse gas. The Kyoto Protocol has established a clean development mechanism enabling investment from developed countries into developing countries. On its basis, the latter should achieve

[3] Initial National Communication of the Republic of Serbia under the United Nations Convention on Climate Change, Belgrade, 2010, p. 88. Available at http://unfccc.int/resource/docs/natc/srbnc1.pdf Visited in March 2011.

sustainable growth, and the former should become able to more easily fulfill their obligations in terms of the reduction of greenhouse gas emission.

Meanwhile, industrialization process in some developing countries, such as China or India, has progressed considerably. It is now an open question whether, upon the expiry of the Kyoto Protocol, a global action for the reduction of greenhouse gas emission would be efficient without the participation of those developing countries that have started to produce large quantities of these gases, such as China and India. [4]

Article 14 of the Convention defines a mechanism to resolve disputes between contracting parties in terms of the interpretation and implementation of the Convention. The contracting state may issue a unilateral statement accepting the jurisdiction of the International Court and/or arbitration in disputes arising from the interpretation or implementation of the Convention. The Netherlands has accepted the jurisdiction of the International Court and arbitration. Solomon Islands have accepted arbitration. Hence, out of 195 contracting parties only two have accepted a mandatory procedure for settling disputes related to the interpretation or implementation of the Convention. And these two countries had a strong interest in doing so. This piece of data suggests that there is a single, universal acknowledgment of the importance of this problem, but also that states are not ready to accept mutual judicial control of their performance of agreed obligations. To this, the fact should be added that the United States have not ratified the Kyoto Protocol, i.e. they have not accepted a concrete international obligation to reduce the emission of greenhouse gas.

Climate change is already influencing and will likely influence international relations even more in the future. However, the influence of climate change will not be limited to international relations. Climate change has and will have consequences in the territory of each individual country, it will become a factor influencing national development and internal affairs. Therefore, the national activities of states, whether in compliance of international obligations or unrelated to international obligations, are of crucial importance.

RELEVANT REGULATIONS IN THE LAW OF THE REPUBLIC OF SERBIA

The question of the national judicial control of performance of some obligations taken over from the Convention will be studied in the context of the legal system of the Republic of Serbia.

The right to a healthy environment is guaranteed in Article 74 of the Constitution, as follows:

> *"Everyone shall have the right to a healthy environment and the right to timely and full information about the state of the environment.*
> *Everyone, especially the Republic of Serbia and autonomous provinces, shall be accountable for the protection of the environment…"*

[4] A. Schatz, Foreword: Beyond Kyoto – The Developing World and Climate Change, *Georgetown International Environmental Law Review*, Vol. 20, 2007-2008, p. 531.

Article 1 of the Environmental Protection Act[5] defines that this Act "*.... shall regulate the integral system of environmental protection which shall ensure the human right to live and develop in healthy environment as well as balanced growth of the economy and protection of the environment in the Republic."* The Act defines the natural environment as *"a set of natural and man-made values whose complex mutual relations make up the environment, i.e. area and conditions for life."* Article 24 of the Act defines that *"measures of air protection shall ensure overall atmosphere preservation with all the processes and climate characteristics thereof."* The climate characteristics are therefore incorporated into environmental protection and their quality is an integrative part of the right to a healthy environment. Damages caused by the change of climate could be incorporated in the concept of "*degradation of environment*", which is defined by the Act in the following way: "*degradation of environment is a process of degradation of environment quality caused either by natural or human activity or which occurs as a consequence of non-performance of measures for the elimination of causes of degradation of quality or damage towards the environment, natural or any man-made values…"* The Act acknowledges rehabilitation, or *"remediation"* and defines it as a "*process of undertaking measures in order to halt pollution and further degradation of environment up to the safe level for future use of the location including also arrangement of the area, revitalization and recultivation thereof...*" The Act also accepts the prevention and precautionary principle, and reads: "*The absence of full scientific reliability cannot be the reason for nonperformance of measures for the prevention of environmental degradation in case of possible or existent significant impacts on the environment.*" The Act established the Environmental Protection Fund. Article 93 of the Act defines that "*the Fund's finances shall be used for financing action and rehabilitation plans in accordance with the National Program, in particular for 1) protection, preservation and improvement of the quality of air, water, soil and forests, mitigation of climate changes and ozone layer protection…"* Article 107 of the Act ensures that damages shall be reimbursed to everyone who has suffered damage. Request for compensation is submitted to the polluter or insurer, i.e. financial guarantor of the polluter. If a number of polluters have caused the damage and the share of each of them cannot be determined, the damage shall be reimbursed by all of them, jointly and individually.

The right to a healthy environment includes the right to protection from the degradation of the environment caused by climate change, i.e. the right to rehabilitation when the degradation occurs. The Act defines entities which are obliged to ensure rehabilitation. The Government is due to adopt a rehabilitation plan in instances such as environmental degradation caused by climate change. The right to the compensation of the damages guaranteed by the Act is not of much use in case of damage caused by climate change, since immediate polluters are obliged to provide compensation.

In the context of our research the question is whether the state can bear responsibility for the compensation of damages which have occurred due to the state's failure to act. Article 35 (2) of the Constitution can help here. It reads: "*Everyone shall have the right to compensation of material or non-material damage inflicted on them by unlawful or irregular work of a state body, entities exercising public powers, bodies of the autonomous province or lo-*

[5] Official Bulletin of the Republic of Serbia, No. 135/2004.

cal self-government." One should also add that Article 22 of the Constitution ensures the *"right to judicial protection when any of their human or minority rights guaranteed by the Constitution have been violated or denied, they shall also have the right to the elimination of consequences arising from the violation*". In the context of the present study this would not only comprise the obligation to reimburse the damages and rehabilitate, but also the obligation for the state to conscientiously perform its commitments based on the Convention. The general subsidiary legal remedy has been ensured in Article 170 of the Constitution, in the form of a constitutional appeal: "*A constitutional appeal may be lodged against individual general acts or actions performed by state bodies or organizations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified.*" One should add to this Paragraph 3 of Article 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus on 25 June 1998, obligatory for Serbia since 2009, obliging contracting parties to ensure that members of the public should have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

In accordance with Article 16 of the Constitution of the Republic of Serbia, ratified international treaties are part of the legal system of the Republic of Serbia and shall be applied directly. The UN Framework Convention on Climate Change and the Kyoto Protocol are, therefore, part of the legal system of the Republic of Serbia and are directly applied. Thus the first condition for national judicial control of the implementation of commitments taken over by ratifying the Convention has been met.

In a large number of cases the European Court of Human Rights has found that states have violated certain human rights by failing to perform their obligations in the environmental domain. By such omissions they have, for instance, violated the right to life[6] or right to respect for private and family life.[7]

AN OVERVIEW OF OBLIGATIONS DEFINED IN THE FRAMEWORK CONVENTION ON CLIMATE CHANGE AND THE KYOTO PROTOCOL

Starting from the principle of fairness and common but different responsibilities, the Convention defines commitments equal for all contracting parties and specific commitments of developed countries. Therefore there is a difference between the obligations of developing and developed countries, to which some "countries transitioning to market economy" have been added, including some former Yugoslav republics and some eastern European countries. The principal obligations are given in Article 4 of the Convention, where in the first paragraph obligations of all parties, and in the second the obligations of developed countries are defined.

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[6] *Öneryıldız v. Turkey*, (application no. 48939/99), judgment of 30 November 2004.

[7] *Moreno Gómez v. Spain*, (application no. 4143/02), judgment of 16 November 2004, *Fadeyeva v. Russia*, (application no. 55723/00), judgment of 9 June 2005, more detail in Michael Geistlinger, Impacts of the European System of Human Rights Protection on the Law of Environment, in *European System for the Protection of Human Rights (Европски систем заштите људских права)*, Nis, 2005, p. 15.

The general determinant of the commitments of all parties is given in Article 4, Paragraph 4, Clause 1, reading: "*All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities…"* This is a general legal provision for performing obligations defined in Article 4, Paragraph 1 of the Convention, that is the obligations applying to all parties, making national and regional developmental priorities relevant to the national and regional implementation of the said obligations. Article 4, Paragraph 2, defining the obligations of developed countries, does not contain such a provision.

One of the crucial and general obligations of all contracting parties is formulated in Article 4 (1b) of the Convention, and it reads: "*All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change*". The contents of this obligation are, to an extent, harmonized with the obligations of developed countries, i.e. countries from the Convention's Annex I. According to Article 4 (2a) of the Convention "*each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs."* It is, therefore, clear that the obligation of all contracting parties from Article 4 (1b) of the Convention, "to formulate and implement programs containing measures for mitigating climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases", does not include the obligation to limit the emission of those gases. The measures in question are among the most difficult and most expensive. All contracting parties are obliged to undertake other measures, but not these most expensive ones, which should be the commitment of only developed countries. In accordance with Article 4 (1d) of the Convention they are due to "*promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems.*" Some particular obligations of these contracting parties in terms of the accommodation to the influences of climate change are defined in Article 4 (1e) of the Convention. It is mandatory for all parties to "*cooperate in preparing for adaptation to the impacts of climate change*". They are also obliged to "*develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods*." In accordance with the Convention's Article 4 (1f), all contracting parties shall be committed to take into account climate change considerations in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.

The said regulations define some particular obligations for contracting parties, such as the obligation to develop applicable integrated plans for the management of water re-

sources and agriculture, and for the implementation and rehabilitation of areas struck by drought, the expanding of deserts, or floods. This includes the obligation for all contracting parties (Article 4 (1a) of the Convention) to develop, periodically update, publish and make available to the Conference of the parties national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases using the methodologies agreed on by the Conference of the Parties. A general obligation has been determined to adopt and implement programs containing measures for mitigating climate change by acting upon anthropogenic emissions by sources and removals by sinks of all greenhouse gases, including measures to facilitate appropriate accommodation to climate change. Some general determinants of these commitments have been defined, such as the acknowledgment of specific national and regional development priorities, objectives and circumstances, the principle of proportionality, stating that measures taken to mitigate climate change or accommodate to it should not overburden the economy or cause major harm to social policies. The principle of precaution has also been added in Article 3 (3) of the Convention. In accordance with this principle, the parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. "*Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures…*"

As stated above, the obligations of developed countries are defined in Article 4, Paragraph 2 of the Convention. Article 4 (2a) of the Convention states the obligation of developed countries to limit anthropogenic emission of greenhouse gases. Further, this regulation reads that the policies and measures that developed countries adopt will demonstrate that they are taking the lead in modifying longer-term trends in anthropogenic emissions and recognize that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases would contribute to such modification. Therefore, they will take into account the differences in these parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions to the global effort regarding that objective. Article 4 (2b) defines that the aim is for developed countries to jointly or individually reduce the anthropogenic emissions to their 1990 levels. These countries have committed themselves to submitting detailed periodic information on the policies and measures they are undertaking in order to achieve this goal, which will be periodically discussed by the Conference of the Parties. A new aim is defined in Article 3 (1) of the Kyoto Protocol: developed countries have committed themselves to reducing the overall emission of greenhouse gases to the level which is at least 5% below 1990 levels in the commitment period 2008 to 2012.

Article 12 of the Kyoto Protocol establishes a *"clean development mechanism*" which should help developing countries to achieve sustainable development. Its goal is also to help developed countries achieve the predefined rates for reducing the emission of greenhouse gases in the following way: the reduction of the emission of these gasses will be included in the quota for the developed country which has implemented the project. Article 2 (1) of the Kyoto Protocol defines particular measures that developed countries can take in order to achieve the aim so defined. In order to achieve its quantified emission limitation and promote sustainable development, each country should implement and further develop policies and measures, in accordance with national circumstances, such as: en-

hancement of energy efficiency, promotion of sustainable management of forests, promotion of sustainable forms of agriculture in the light of climate change or limitation or reduction of greenhouse gas emission in the domain of transportation.

SUITABILITY OF OBLIGATIONS DEFINED IN THE CONVENTION FOR NATIONAL JUDICIAL CONTROL

The question here pertains to the regulations from the Convention which have constituted "positive" obligations, requiring national measures for implementation. In principle, these characteristics do not make such regulations inappropriate for direct implementation before national courts. The opinion has been long abandoned that only "negative" obligations are suitable for judicial control, such as those of refraining, in which the state was due to conduct its activities in such a way that it should not violate human rights. The state violates a negative obligation when it conducts and act forbidden by the law. It violates a positive obligation when it fails to perform an act required by the law, i.e. in case of an omission of action or wrong action. The European Court of Human Rights has developed a conception of positive obligations of contracting parties, where these states are obliged to do everything reasonably possible to ensure the exercise of human rights on their territories.[8] By interpreting the right to life, guaranteed in Article 2 of the Convention – *"Everyone's right to life shall be protected by law. No one shall be deprived of his life..."* the European Court of Human Rights finds that the said article implies a positive obligation for all contracting parties to take steps in order to protect the lives of those under their jurisdictions.[9] The Court has found that Turkey is accountable for the loss of 39 lives of members of a Romani colony located by a landfill near Istanbul because the authorities were aware of the possibility of a methane explosion but failed to take any measures so as to prevent the tragedy.[10] They could have timely installed a gas extraction system, which would have prevented the explosion, and this would have been a reasonable measure given the options that Turkey had.[11] Therefore, positive obligations, including those leaving some discretion to the state in terms of means that it can use in order to achieve an aim, are not unsuitable for the courts to control their implementation.

It has been mentioned above that Article 16 of the Constitution of the Republic of Serbia reads that ratified international treaties are part of the legal system of the Republic of Serbia and, as such, they shall be directly implemented. Is this provision also valid for treaties requiring implementation by national measures, i.e. the adoption of national measures with the purpose of executing provisions from contracts? Article 16 of the Constitution does not separate international treaties requiring national implementation from the domain of direct application. Indeed, the fact that a provision of an international treaty requires that this treaty should be rendered more concrete in the process of national implementation does not have to preclude its possible direct implementation in the relation-

[8] A.R. Mowbray, T*he Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, 2004.
[9] *L.C.B. v. The United Kingdom*, (application No. 23413/94), judgment of 9 June 1998, Para. 36, *Osman v. The United Kingdom*, (application No. 23452/94), judgment of 28 October 1998, Para. 116.
[10] *Öneryıldız v. Turkey*, (application No. 48939/99*)*, judgment of 30 November 2004. Para. 110.
[11] *Ibid*. Para.107.

ship between the state and the citizen *a priori*. We have seen that the Court of Justice of the European Union has accepted the direct effect of directives, which, by definition, require national implementation, in order for citizens not to suffer because the state has not implemented these regulations in time.[12]

The regulation from Article 16 of the Serbian Constitution provides the first prerequisite for direct implementation of international treaties, but it cannot ensure this for provisions from contracts which are not suitable for direct implementation. An Italian court asked the Court of Justice of the European Union to supply opinion on whether the General Agreement on Tariffs and Trade and the Fourth Convention between the European Economic Community and countries of Africa, the Caribbean and the Pacific contain regulations transferring rights to individuals, which can then be achieved over national courts.[13] The Court of Justice of the European Union started from the fact that the General Agreement on Tariffs and Trade is based on reciprocal and mutually beneficial arrangements, as defined in its preamble, and that it is characterized by a great flexibility of regulations, in particular those concerning the possibility of derogation, and measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties. In certain cases, when producers suffer major damage or when such damage is likely, Article XIX of the General Agreement leaves the contracting party power to unilaterally suspend the obligation and to withdraw or modify the concession. Due to such high flexibility and possibility of derogation, the provision of the General Agreement on Tariffs and Trade largely depends on the particular decisions of contracting parties. Therefore, regulations from this agreement are not a suitable legal basis for the emergence of strictly defined rights and obligations of enterprises in international trade. Having in mind the said characteristics of the General Agreement on Tariffs and Trade, the Court of Justice of the European Union has concluded that they do not allow an individual to call upon them before national courts in order to challenge the implementation of national regulations prescribing the contrary.[14] The Court of Justice of the European Union has noted that conventions that the European Economic Community concluded with the countries of Africa, the Caribbean and the Pacific are not characterized by such vagueness pertaining to contractual obligations. The aim of these conventions is to promote the economic and social development of countries of Africa, the Caribbean and the Pacific through improved conditions for exporting their products to the common EEC market. These conventions typically introduce major imbalance in terms of obligations imposed on the contracting parties, to the benefit of non-member states. The imbalance in contractual obligations is not a fact which can question the direct implementation of the contract's provisions, so the European Court of Justice has concluded that the Fourth Convention between the European Economic Community and countries of Africa, the Caribbean, and the Pacific may contain regulations providing individuals with rights that they can call upon before national courts.

The European Court of Justice has used the terms "direct" application of the regulations of an international treaty and "direct" effect of an international treaty as synonyms,

[12] Application No. 41-74, *Yvonne van Duyn v Home Office*, judgment of 4 December 1974.
[13] Application No. C-469/93, *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA*., judgment of 12 December 1995.
[14] *Ibid*. par. 26-29.

taking them to mean that the regulation shall produce a direct legal effect in relations between the state and the private subject and that it shall create individual rights that the national courts must recognize.[15] Naturally, creating individual (subjective) rights is one form of the legal effect of regulations. But, the legal effect of regulations does not have to consist only in creating an individual right for one party and a corresponding obligation for the other. Whether or not a legal regulation is applied by the state may influence the interests or rights of another party protected by the right. The question is whether a national court could apply a regulation from the Convention or the Kyoto Protocol to the relation between an individual and the state, so that, based on this regulation, it should recognize some concrete rights of the individual as opposed to the state. The Convention and the Kyoto Protocol have been concluded so they could serve the interests of not only states but also humankind, the present and future generations. In terms of the reasons and goals for which they have been concluded, these treaties transcend the fixed domain of relations between states and pertain to the humankind, i.e. to all individuals. However, regulations of the Convention or the Kyoto Protocol are formulated in such a way that, from them, one cannot easily and reliably derive particular rights of individuals on the one hand, and corresponding obligations for the state, on the other. Let us take, for instance, the regulation from Article 4 (1a) of the Convention where contracting parties have agreed to develop, periodically update, publish and make available to the Conference of the Parties national inventories of anthropogenic emissions by sources and removals by sinks of greenhouse gases. Based on this regulation, would a national court recognize the right of an individual to be informed of the national inventory of anthropogenic emissions of greenhouse gases? Or would a national court be more inclined to accept that by failing to perform this obligation the state has violated the right of the individual to be fully informed of the condition of the natural environment, which in turn is an element of the right to a healthy environment, guaranteed by the Constitution? The following regulation from the same Article 4 (1b) of the Convention leaves much less room for any dilemmas with regard to this issue. According to this provision the contracting parties have agreed to "*formulate, implement, publish and regularly update… programs containing measures to mitigate climate change ... and measures to facilitate adequate adaptation to climate change.*" It would be very difficult to derive a concrete right of an individual from this regulation, except perhaps the right to be informed of the programs. However, if a country fails to perform this obligation, it may cause concrete damage to an individual, violate some of his or her rights, such as the right to a healthy environment or the right to property. Hence, a failure to execute this regulation or an improper execution thereof may produce a legal effect in the relationship of the state and an individual on which a national court could decide. The same applies to regulations containing concrete obligations, such as the one from Article 4 (1e) of the Convention, according to which contracting parties shall *develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas ... affected by drought and desertification, as well as floods.* Some regulations, such as those related to "*clean development mechanisms*" from the Kyoto Protocol, are not suit-

[15] J.A. Winter, "Direct Applicability and Direct Effects, Two Distinct and Different Concepts in Community Law", *Common Market Law Review,* 9, 1972, p. 438.

able for direct application or direct effect because their nature is facultative, i.e. states may, but do not have to, use such possibilities and their use depends on contracts between the states.

We do not see valid argumentation against the direct effect of regulations from the Convention and the Kyoto Protocol. It is therefore undeniable that there can be judicial control of the performance of international obligations defined in these regulations. It is undeniable, however, in situations in which the state has fully failed to perform its obligations. In such cases, the violation is clear and evident. The matter becomes more complex if the state has taken some steps, if it has done something to perform the obligation. Then the question is posed if the state has done everything it was obliged to, i.e. if its acts of doing have been accorded with its obligations. The first question, whether the state has fully performed its obligation, is found in some general formulations of obligations. Thus, for instance, we have already mentioned the obligation from Article 4 (1b) of the Convention, in terms of the formulation, implementation, publishing and regular update of programs containing measures for mitigating climate change and measures for facilitating adequate accommodation to climate change. The Convention and the Kyoto Protocol themselves list some of these measures, but this enumeration is not exhaustive. They define some measures contracting parties need to take, but not all measures. Quite clearly, when developing countries are in question, these measures do not include the reduction of greenhouse gas emission. Therefore, here we are faced with a somewhat vague obligation. The Convention has established some general guidelines that contracting parties are obliged to follow when adopting measures. The introductory sentence in Article 4 (1) suggests that, in deciding on these measures, the contracting parties shall take into account their particular national and regional priorities for development, goals and circumstances. In Article 4 (1f) of the Convention the parties have agreed to take care of the proportionality principle, i.e. to take measures contributing to the goals of the Convention while minimizing adverse affects on the economy. In spite of these provisions, the area of vagueness remains and causes further disputes on whether the state has taken all measures in its power to achieve the set goals. An individual could claim before a national court that the state has taken some measures, but failed to take some other important measures, for which reason he or she is now suffering damage. This dispute is not beyond the scope of judicial decisions as the court could solve it by applying the principle of reasonableness upon listening to the opinions of experts. In terms of particular obligations such as the aforementioned obligation of contracting parties – to develop appropriate plans for the management of coastal zones, water resources and agriculture, and to protect and rehabilitate areas affected by drought and desertification as well as floods – this problem is not present. The obligation is formulated concretely enough. With regard to this obligation the question may arise whether plans adopted by the state are such that they produce required results, and this can again be controlled by the principle of reasonableness and expert opinion.

The next vexed issue is that of defining the causal link between the failure of the state to perform its obligations based on the Convention and the Kyoto Protocol, the climate change, and the damage suffered by an individual. Climate change is a global process partially most likely caused by the anthropogenic emission of greenhouse gases. The emission of greenhouse gases in Serbia is a part of the total global emission – certainly a small part so that the responsibility of Serbia for climate change is proportional to that

part. In this century, the change of climate in Serbia will most likely manifest itself through floods and droughts stronger in intensity than those from earlier periods.[16] However, floods and droughts have happened before. How can one make a difference between "ordinary" floods and droughts and those more intensive ones, caused by the change of climate? It would not be easy for a plaintiff to prove that his or her estate has suffered by the flood caused by the change of climate, for which Serbia is responsible because it has failed to perform its obligations based on the Convention and the Kyoto Protocol.

However, encouraging instances of judicial practice have now appeared. In the case *Massachusetts v. EPA*, the Supreme Court of the United States of America acknowledged the legal relevance of climate change.[17] Twelve American federal states, joined by American Samoa, District of Columbia, the cities of New York and Baltimore and a group of non-governmental organizations filed a lawsuit to the Supreme Court of the United States against the Federal Environmental Protection Agency asking from the Court to order that the Agency should adopt a regulation restricting the emission of greenhouse gases, including carbon dioxide, based on the Clear Air Act. In fact, this Act had obliged the Agency to set standards for the emission of air pollutants for every class of motor vehicles that could be reasonably assumed to hinder public health and welfare. The Act defined that 'welfare' included action affecting the weather and climate. The sued Agency and those who joined it argued that, given the global emission of carbon dioxide, the regulation of this matter on the level of the United States alone would be useless.[18] The Agency also argued that a regulation pertaining to the automobile industry alone made no sense since it is but one source of pollution in the sea of others, and also that the plaintiffs do not have a legal interest in this matter.[19] With a majority of one vote (5:4) the Supreme Court accepted the suit as allowed and grounded. The Court asserted that global warming is a fact and that it can cause particular damage to the plaintiffs and that its verdict could reduce such damage. It accepted the reports of experts on raised sea level and the sinking of the state of Massachusetts. The Court did not accept the argument of the Agency that federal regulation of this matter would have no effects, having in mind the increase of emission of these gases in developing countries, in particular China and India. The Court asserted that federal regulation could slow down the warming process even if China and India continued increasing their own emissions, which would reduce the risk that the plaintiffs are exposed to.[20] Some indeterminacies found in the case did not pose an obstacle to making a judicial decision. It is very hard to decide to what extent the failure of the Agency to live up to its commitment for defining greenhouse gas emission standards for each class of new motor vehicles has influenced climate change and opened up the way for harmful effects harming the plaintiffs, for instance, the rise of the sea level and sinking of the shores of federal states. For the Court it was decisive that setting up these standards

[16] Initial National Communication of the Republic of Serbia under the United Nations Convention on Climate Change, Belgrade, 2010, p. 76.
[17] D. Shelton, Equitable utilization of the atmosphere: a rights-based approach to climate change? In *Human Rights and Climate Change*, ed. S. Humphrey, Cambridge, 2010, p. 103.
[18] *Ibid*. p. 104.
[19] *Ibid*. p. 105.
[20] *Ibid*. p. 109.

would have slowed down the warming process and reduced the risk that the plaintiffs have been exposed to.[21]

In Serbia's case, one should stress that the contracting parties of the Convention and the Kyoto Protocol are due to adopt measures not only for mitigating climate change but also for facilitating adequate accommodation to climate change. Our Nature Conservation Act discusses the mitigation of climate change, i.e. it says that resources from the Nature Conservation Fund shall be used, among other things, for mitigating climate change. However, particularly important for Serbia are measures for facilitating adequate accommodation to the change of climate. In the context of these measures, Serbia's contribution to anthropogenic emission in the climate change process is not decisively important. Climate change seems to be a global process which can be slowed down but not stopped. This is the crucial reason why such measures should be timely taken.

As for the causal link between climate change and damage arising from floods and droughts, both the Constitution and the Convention know of the principle of precaution, i.e. they do not require strong evidence but are satisfied with high probability. One should notice here that in its Initial Report submitted to the Conference of the Parties of the Convention Serbia has said that it expects floods and droughts of higher intensity and longer duration.

CONCLUDING REMARKS

Having in mind the relevant regulations from the Constitution and the Environmental Protection Act of the Republic of Serbia, the practice of the European Court of Human Rights, and the adjudication of the US Supreme Court in the case *Massachusetts v. EPA*, we can conclude that conditions may arise for courts in Serbia to control the performance of obligations defined by the Convention and the Kyoto Protocol, thus offering protection to individuals, natural and legal persons that may suffer from the harmful effects of climate change. Although these are international obligations which should be rendered more concrete in the national implementation process, they are not deprived of direct effect, i.e. they do not evade judicial control by national courts whose purpose would be to decide whether the state, by not performing them, partly performing them, or wrongly performing them, has contributed to the damage suffered by particular subjects, i.e. whether the state has not prevented the occurrence of such damage in the first place. Judicial findings of the responsibility of the state for the damage that has arisen would certainly imply the obligation for the state to start fully and rightly performing the international obligations that it has accepted, so as to prevent any future damage.

The national judicial control of the performance of obligations taken over by the Convention and the Kyoto Protocol could to an extent be a substitute for the non-existent or unaccepted international judicial control of the performance of these obligations. If the national legislation could ensure that the Government fully and appropriately complies with its international commitments accepted through the Convention and the Kyoto Protocol, this would result in one possible effect of international legislation. It is less likely,

[21] On possible effects on this judgment on the legal regulation of greenhouse gas emission in the United States, see T. Skodvin, S. Andersen, An agenda for change in U.S. climate policies? Presidential ambitions and congressional powers, *International Environmental Agreements*, 2009, Vol. 9, p. 270.

however, that the national legislation could replace international legislation in compensating for the damages arising from the violation of the said international commitments outside the boundaries of the national territory.

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NACIONALNA SUDSKA KONTROLA IZVRŠAVANJA NEKIH OBAVEZA PREUZETIH OKVIRNOM KONVENCIJOM UN O PROMENI KLIME

Rodoljub Etinski

Ukoliko Srbija ne bi izvršavala svoju obavezu na osnovu Okvirne konvencije UN o promeni klime (dalje: Konvencija) i ako bi neki pojedinac u Srbiji zbog toga pretrpeo štetu, da li bi mu domaći sud dosudio naknadu štete? Ovo pitanje uključuje neka hipotetička pitanja, kao što je, na primer, da promena klime uzrokuje štete u Srbiji koje pogađaju neke pojedince i da je Srbija neizvršavanjem svojih obaveza doprinela promeni klime i nastanku konkretne štete.

Da li pravo na zdravu životnu sredinu, priznato Ustavom Republike Srbije, uključuje pravo na klimatske uslove pogodne za život i privredne aktivnosti? Ukoliko Srbija ne bi izvršavala svoje obaveze na osnovu Konvencije i time pogoršala životnu sredinu, da li bi time kršila pravo na zdravu životnu sredinu i da li pogođeni imaju na raspolaganju delotvorno pravno sredstvo, odnosno mogućnost da se obrate sudu te da ovaj obaveže Srbiju da izvršava svoje obaveze?

Okvirna konvencija UN o promeni klime spada u međunarodne ugovore sa najvećim brojem ugovornica – 195. Samo dve su, međutim, prihvatile međunarodnu sudsku nadležnost za eventualne međusobne sporove u vezi tumačenja i primene Konvencije. Države ne žele spoljnu sudsku kontrolu nad izvršavanjem svojih obaveza koje su prihvatile Okvirnom konvencijom. Da li unutrašnja sudska kontrola može da kompenzira odsustvo spoljne kontrole i doprinese boljem učinku Konvencije?

Ključne reči: *klimatske promene, Okvirna konvencija UN o promeni klime, unutrašnja i spoljna sudska kontrola, izvršavanje ugovorenih obaveza.*