

Matters in practice

Lawyers supporting climate legislation in developing countries



Pascale Bird, Advice Coordinator for Legal Response International

At a glance

- Legal Response International (LRI) is an award winning pro bono project that relies on the support of a global network of lawyers.
- LRI has been assisting climate vulnerable developing countries in the UN climate negotiations since 2009.
- As developing countries need legal support to implement their climate plans, you can help and join the LRI network.

LRI background and model

The UN climate change negotiations are among the most complex multilateral law and policy-making processes ever. The last conference of the parties in Marrakesh in 2016 was attended by 25,900 participants.

Meetings are characterised by technical jargon, carefully crafted wording and references to international legal principles and obligations. The delegations of industrialised countries therefore include specialised experts, lawyers and other support staff.

Developing country negotiators who represent countries that are most vulnerable to the impacts of climate change can rarely rely on a similar backing. As a result, they are regularly 'outgunned' by the larger delegations of industrialised countries.

LRI was conceived in 2009 as a capacity building response to the unequal access to legal support between countries involved in the negotiations. To create a more level playing field between actors, LRI provides pro bono high quality real-time legal support to negotiation teams from poor and particularly climate vulnerable developing countries and civil society observer organisations during the negotiations.

This support is facilitated by a small team of mostly volunteer lawyers who attend the negotiation sessions and field legal queries (through the London based 'situation room') to expert advisers from a global network of over 170 lawyers from leading law firms, universities and barristers' chambers.

Advisers may, for example, provide an analysis of legal issues, comment on draft decision text or help turn policy positions into legal language text, free of charge. They may at any time recuse themselves if

they fear a conflict of interest. Subsequently, all advice is made publicly available, on an anonymous basis, through the LRI database. In addition, LRI aims to build long-term capacity and, to that end, provides legal training and introduces lawyers from developing countries to the international negotiations.

Ruel Yamuna, a Papua New Guinea diplomat who refers to LRI as his 'guardian angels', says 'For me as a negotiator, I sometimes get lost in translation, because everything is in abstract,' 'LRI definitely comes to the fore in terms of clarifying those different areas where I need a third party analysis of the context of documents.'

Paris Agreement and national legislation

In the lead-up to the Paris Agreement in 2015, LRI assisted the most climate vulnerable nations with around 100 legal opinions on the legal form and content of the new agreement, on a wide range of questions that included options for anchoring nationally determined contributions (NDCs) in the new agreement, linkages between the Kyoto Protocol and the agreement, suggesting legal language on the 5-year commitment cycles or options to include gender equality in the agreement. Legal experts contributed several hundred hours of pro bono support.

However, the Paris Agreement only provides a broad framework for further substantive decisions by the parties on its future operation, national implementation and administrative framework. How, for example, developing countries' adaptation efforts will be recognised or what new opportunities the new market mechanisms may offer is currently unclear.¹

In Marrakesh in 2016, governments, therefore, agreed to develop the necessary processes, methodologies and regulations without delay and to complete their work – the so called "rulebook" of the Paris Agreement – by 2018.² So LRI will continue to support countries at the international level.

In addition, states will also have to develop new policies, legislation and institutions to implement the Paris Agreement and their NDCs. As a result, an increasing number of legal queries LRI receives also concern the domestic implementation of international commitments and other climate plans.

At the last climate change conference in Bonn in May

2017, Patricia Espinosa, the Executive Secretary of the UNFCCC congratulated the small but growing number of countries that soon after Paris started drafting legislation in support of their nationally determined contributions.³

Seth Osafo, Legal adviser to the African Group in the negotiations, says: 'Unlike other multilateral environmental agreements the Paris Agreement provides parties with very limited guidance on national implementation. Additional support and input on legislative initiatives is therefore important to translate international promises into meaningful action on the ground.'

In practice, countries will have to develop new domestic policies, laws and regulations to implement their commitments. In some cases, comprehensive national strategies and policies may suffice to address climate change concerns and the adoption of formal legislation by parliament may at times hamper quick, efficient and flexible responses. However, only law locks countries in a policy direction that cannot be easily reversed, creates legal certainty, encourages coordination of different policy spheres across government agencies. Legal certainty and a robust legal framework are important components of economic stability, working markets and attracting investment.

Clearly, there is no 'one size fits all' solution and legislative approaches will be dictated by the specificities of particular legal systems and cultures. However, where there is a legislative vacuum, bespoke climate change legislation may be an obvious first step to mainstream climate concern across different areas of the law. This may take the guise of a specific

climate framework legislation to initiate and sustain this process. Several developing nations such as Kenya, Papua New Guinea and the Philippines have, therefore, adopted legislation which provides the framework to further develop law and policy (in line with different national priorities) and identifies or establishes the relevant institutions to do so.⁴

Climate change is an all-encompassing phenomenon which impacts on almost all sectors of society. Framework legislation, where it is adopted, will therefore need to be supplemented by sector specific approaches. A wide range of existing law and policy instruments may require review and revision and new rules and regulations may be needed to fill existing lacunas.

In this connection, law and policy makers need to consider a range of regulatory techniques. With regard to the mitigation of GHG emissions and pollution control these may take the form of, for example, quantitative targets, pricing emissions (taxes, cap and trade), command and control mechanisms, subsidies and tax incentives, as well as monitoring, reporting and verification (MRV).

At the same time, legislation should be flexible enough to accommodate the developments at the international level and allow countries to fully benefit from the Paris Agreement.

Get involved!

Good legislation also needs to be sensitive to the country and sub-national contexts.

Whilst national ownership of the process is essential and, ultimately, national specificities will determine



the adequate mix of laws, policies and different strategic approaches, gaps in local expertise mean that developing country law and policy makers will benefit from the experience and expertise of lawyers from other jurisdictions.

The rapid entry into force of the Paris Agreement increases the urgency for supporting developing countries in their legislative efforts to respond to climate change and implement their commitments under the Paris Agreement. In collaboration with UNEP, LRI is therefore offering governments and parliamentarians from developing nations support free of charge in the development and review of climate and climate relevant legislation to implement the Paris Agreement and nationally determined contributions.

For that purpose, both organisations entered into a memorandum of understanding in 2016. They are now preparing to launch a web-based portal to submit legal questions, track their progress, answers and feedback, to be launched at the next climate conference in Bonn in November.

Through its network of lawyers from law firms, barristers' chambers and universities, LRI will make high value and quality legal advice which would otherwise not be accessible to poor and climate vulnerable developing nations available for free. At the same time, LRI brokerage scheme will help law firms and other lawyers to meaningfully engage with new and emerging areas of the law. Experienced environmental lawyers who can contribute some of their expertise and time can make an important contribution to the fight against climate change.

Silke Goldberg, a partner at Herbert Smith Freehills and long term LRI expert adviser says 'As coordinator of our environmental pro bono work I currently have over 70 volunteers. The LRI work can range from a short textual proposal to capture an idea in clear legal language to comprehensive research assignments by a whole team of lawyers. For some of them it has been an eye opening experience.'

The time commitment will necessarily be variable, depending on the nature of the assignment. But whereas the assistance provided during negotiation sessions tends to require an immediate response, the support with review and development of domestic legislation will generally not have the same degree of urgency and allow greater flexibility as to the timing of the response.

If you are interested in joining our network or finding out more, please contact [Pascale Bird](#).

Pascale Bird coordinates LRI's advisory service. She is a qualified solicitor and previously worked as an Associate and PSL in the EU and Competition department of Simmons & Simmons.

The LRI team and a delegate from the Republic of the Congo, Bonn, May 2017

Endnotes

- 1 Paris Agreement, Art.7 para.3; Art.6 paras.4-7 (mechanism to support sustainable development).
- 2 Decision 1/CP.22, Preparations for the entry into force of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement in Report of the Conference of the Parties on its 22nd session, held in Marrakech from 7 to 18 November 2016, Addendum Part two: Action taken by the COP, FCCC/CP/2016/10/Add.1, 31 January 2017.
- 3 14 new laws and 33 new executive policies related to climate change have been introduced since Paris according to M. Nachmany – see PP presentation at Webinar on 'Climate Change Laws of the World – global trends in legislation and litigation', co-organised by the Grantham Research Institute on Climate Change and the Environment and the Sabin Center for Climate Change Law, 05.06.17. See also <https://www.youtube.com/watch?v=-AEhndiMcvQ&feature=youtu.be>
- 4 The Climate Change Act, Kenya, 2016; Climate Change (Management) Act 2015, Papua New Guinea; An act mainstreaming climate change into government policy formulations, establishing the framework strategy and program on climate change, creating for this purpose the climate change commission, and for other purposes (Republic Act No 9729), Philippines, 2009; respectively. Most relevant legislation can be easily accessed via the combined database of the Grantham Research Institute on Climate Change and the Environment and the Sabin Centre for Climate Change Law at: <http://www.lse.ac.uk/GranthamInstitute/legislation/the-global-climate-legislation-database/>.