The Climate Change Regime and Public International Law
PhD/Early Career Researcher Workshop

Monday, 12 December 2022

12:30-1:30 pm

Welcome

Opening and Objectives / Research Focus, by workshop organisers
Professor Margaret Young (Melbourne Law School) and
Associate Professor Markus Gehring (University of Cambridge)

1:30-3:30 pm

Panel 1: Climate Change and the COPs

Chair: Dr Markus Gehring
Discussant: Prof Christina Voigt (University of Oslo)

COPing with the COPs: International Environmental Lawyers as Communities of Practice
Tejas Rao (PhD candidate, University of Cambridge)

In a New World Order, Anne-Marie Slaughter argued the need to pull back the veil on international negotiations and re-examine our assumption of States as unitary actors in the international lawmaking process. In years past, the academic community has advanced this thesis, studying in greater detail both theoretically and empirically, the role of networks and network actors, particularly in shaping multilevel governance. For existential risks such as climate change, and the web of international legal instruments thereto, Conferences of the Parties (CoPs) have occupied a significant touchpoint for State actors to take stock of and update the agenda for the years to come. Alongside these formalized structures, the international environmental order has seen the emergence and embedding of informal networks in these CoP processes, working around the year and the intervening gap between CoPs to advance responses to the challenge & exert influence on where the agenda goes next. The role of international environmental lawyers, participating from both within and/or outside of the academy, has become increasingly evident. Despite this, owing to conflicting value-sets and belief systems, they are frequently excluded from studies about networks and communities of practice (COPs). This paper and presentation will query that thesis. It will re-examine the theoretical construction of COPs, and relying on observations and work from the UNFCCC CoP26 and the UNFCCC CoP27, suggest tentative conclusions and open questions.

At the Coalface: Legal Constraints on Coal Mining after the Paris Agreement
Ella Vines (PhD candidate, Melbourne Law School)*

Coal has been described as the substance that made the developed world. However, coal has also significantly contributed to the greenhouse gas emissions responsible for anthropogenic climate change. To avoid further impacts of dangerous climate change, the Intergovernmental Panel on Climate Change has indicated there must be no new unabated coal. Nevertheless, forecasts provided by the International Energy Agency indicate this science is not being heeded. Australia is a key component of this forecast as the largest exporter of coal in the world in terms of economic value, and a significant consumer of coal domestically.

This paper will examine a key reason for the continued reliance on coal despite its harmful impacts – the fact that no coherent international legal framework directly regulating coal currently exists. The paper argues that there is a non-regime in relation to coal at the international level, but that the Paris Agreement under the United Nations Framework Convention on Climate Change may be interacting with other regimes and domestic laws to create indirect pathways for the regulation of coal.

The paper focusses one indirect pathway for the regulation of coal: the influence of the Paris Agreement on the regulation of coal under Australia's environmental laws. Through an analysis of climate litigation brought in opposition to coal projects assessed under Australia's environmental laws, the paper will demonstrate the incremental influence the Paris Agreement has had to date on the regulation of coal in Australia.

A Legal Biography of COP 25 in Chile
Monserrat Madariaga (PhD Candidate, University College London)

This empirical research is part of a larger PhD project, a legal biography of Chilean climate actors on a single process: COP 25 (The 25th version of the Conference of Parties for the UN Climate Change Framework Convention). Through qualitative data collection methods, -political ethnography and semi-structured interviews- and using thematic analysis, I build the legal biography of this process as a form of collective story. This paper focuses specifically on the relationship between Chileans and the international regime. The central question to explore is what these experiences from different Chilean climate actors in relation to COP 25 can tell us about the UNFCCC regime. For the purposes of this research, 'climate actors' is understood as people working in climate change from different sectors of society: government officials, negotiators, the legislative, judges, academics, civil society and indigenous population, whose experiences at the COP 25 and the UNFCCC are object of analysis. The paper outlines the Chilean negotiation power within the complex UNFCCC negotiation dynamics (1); the challenge of presiding COP 25 for Chilean actors (2) and the breaches to Chilean civil society and indigenous population's rights to public participation in this single process (3). This will provide for a multi-actor assessment of COP 25 and the UNFCCC regime.

4:00-6:00 pm

Panel 2: Climate Change and other Regimes

Chair: Prof Margaret Young
Discussant: Dr Joanna Depledge (University of Cambridge)

Harnessing Synergy: Regional Economic Statecraft and Climate Governance
Dr Kennedy Mbeva (Postdoctoral Research Associate, University of Oxford)

Trade policy plays an important role in climate governance, from trade liberalisation in climate goods and services to the enforcement of climate policy. But it is the latter role that generated significant scholarly and policy debate. Central to the debates is whether and how trade border measures, such as sanctions, can be used as enforcement mechanisms. While important, these debates have overlooked other ways through which states use trade policy to enforce climate policy commitments. In this paper, I show that states have sought flexibility by using trade policy as an enforcement mechanism through various approaches. I first show that in the enforcement of environmental policy across the preferential trading regime of more than eight hundred PTAs, states have predominantly used coordination-based enforcement mechanisms. I then examine in detail a key regional economic integration agreement - the East African Community (EAC) PTA. Unlike the sanctions-based enforcement commonly used by some major trading powers, and which dominates the literature, the EAC PTA member states have developed a suite of coordination-based mechanisms to enforce climate policy commitments across the regions. In conclusion, this study shows the emerging role of regional economic statecraft in climate governance, and how the global economy can be aligned with climate policy goals.

COP27: What News for the Ocean?
Mitchell Lennan (Lecturer (Assistant Professor) in Energy & Environment Law, University of Aberdeen, Scotland)

Much has been said on the inclusiveness of the United Nations Convention on the Law of the Sea (UNCLOS) in integrating the UN climate treaties to address climate impacts on the ocean and coasts. In particular, the extent to which the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement inform the environmental provisions of UNCLOS as generally agreed international rules and standards. However, international climate law has been historically exclusionary of issues at the ocean/climate nexus in spite of mounting scientific evidence of the importance of the ocean within the climate system.

After nearly thirty years since the negotiation of the UNFCCC, and over ten years of advocacy to bring the ocean into the international climate policy discussion at the UNFCCC, the Glasgow Climate Pact, agreed at the twenty-sixth annual Conference of the Parties (COP26) in November 2021, brought the ocean firmly into the international climate fold. The Pact refers to "ocean-based action", but does not provide a definition of this term. It also invites UNFCCC programmes and bodies to consider how to integrate and strengthen ocean-based action into their existing mandates and workplans. Moreover, the Pact invites the Subsidiary Body for Scientific and Technological Advice (SBSTA) to hold an annual ocean and climate dialogue, starting at the fifty-sixth session in in June 2022. The annual dialogues are expected to strengthen ocean-based action (and perhaps provide an internationally agreed definition), and the SBSTA is to prepare an informal summary report which should provide guidance on key issues and priorities at the ocean/climate nexus to be addressed at future COPs, including COP 27 in Sharm el-Sheikh in November 2022.

This rapid response paper builds on previous work by the author on the recent inclusion of the ocean within the UNFCCC. With the ocean finally included in all areas of work under the UNFCCC, i.e., climate mitigation, adaptation and finance, what does this mean for the relationship between the ocean and climate change legal frameworks? Based on the outcome of the recently (at the time of presenting) agreed outcomes of COP27, this paper will examine key issues, impacts and shortfalls. including mitigation, adaptation, finance, biodiversity and human rights. It concludes with priority research areas moving forward, and where these are already being addressed.

Climate change, the right to water, and rights of water
Roanna McClelland (PhD candidate, Melbourne Law School)

In early 2022, the *Special thematic report on climate change and the human rights to water and sanitation* was released by the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation. The report is framed around the notion of a water crisis exacerbated by climate change. As water is being elevated in climate change discussions and decision-making, multi-scaled legal approaches relating to water – drawing on existing domestic laws as well as what have been termed "transnational water norms" – are emerging across the globe. Two of the more widely discussed transnational water norms are the Human Right to Water, and Rights for Rivers. With a focus on a contested water governance space in Katherine, Northern Territory, Australia, this paper considers the challenges and possibilities of using transnational water norms against a backdrop of climate change, and cautions for careful consideration in light of potential legal and institutional outcomes.

Tuesday, 13 December 2022

10:00 am-12:00 pm

Panel 3: Climate Change and Courts

Chair: Dr Markus Gehring
Discussant: Prof Jacqueline Peel (Melbourne Law School)

Climate Change, Sustainable Development, and Domestic Planning Policy
Alistair Mills (Fellow and College Assistant Professor in Law at Magdalene College, Cambridge)*

The National Planning Policy Framework is the primary expression of national government policy regarding planning applications in England. It provides guidance for the preparation of development plans by local planning authorities, and is a material consideration for the determination of planning applications. The correct interpretation of the NPPF is a matter of law, and it has given rise to a considerable body of case law.

The NPPF states that "[t]he purpose of the planning system is to contribute to the achievement of sustainable development" (para. 7). It refers to Resolution 42/187 of the United Nations General Assembly in stating that "the objective of sustainable development can be summarised as meeting the needs of the present without compromising the ability of future generations to meet their own needs". Likewise, the NPPF refers to the 17 goals in Transforming Our World: The 2030 Agenda for Sustainable Development. However, these concepts have not played an important part in planning litigation arising from the NPPF. The last time a planning case substantively discussed the Resolution 42/187 definition was a first instance decision in 2013, in which it was held that the claimant's approach to sustainable development, relying upon the Resolution, was misconceived. The 17 Global Goals have never been referred to in case law.

In decisions made under the Town and Country Planning Act 1990, climate change is not a specific factor which is required to be considered. The NPPF contains a "presumption in favour of sustainable development", but this does not directly apply the Resolution 42/187 definition. The presumption, as it relates to decision-making on specific applications, prioritises the provision of an adequate supply of housing, and the protection of specific sites or assets, rather than the climate itself. The presumption does indicate that when planning authorities formulate their plans, they

should seek to mitigate climate change. However, planning decision-makers are not bound to follow the contents of development plans.

There are relatively straightforward changes which could be made to the NPPF, such as would increase the significance of climate change considerations when decision-makers are considering whether to grant planning permission.

Human rights decisions of treaty bodies and national courts in climate litigation as a source of international law

Rebecca McMenamin (PhD candidate, University of Vienna, Austria)

Climate change litigation continues to rapidly grow at the domestic, regional and international levels, including in the human rights sphere. Most famous is *Urgenda Foundation v the Netherlands,* in which the Supreme Court held that the Dutch government's greenhouse gas emissions targets breached the claimants' rights to life and private and family life under the European Convention on Human Rights. There are ten contentious climate cases pending before the European Court of Human Rights, including *People v Arctic Oil,* a claim similar to *Urgenda* but rejected by the Supreme Court of Norway. In September 2022, the UN Human Rights Committee decided *Billy and others v Australia* in favour of the Torres Strait Islander claimants, one of a handful of cases brought at the international level in respect of human rights and climate change, and the first such case won by claimants.

On 29 November 2022, a coalition of states circulated a draft resolution before the UN General Assembly requesting an advisory opinion from the International Court of Justice. The proposed resolution asks for the International Court's legal opinion on the obligations of states in respect of climate change, including obligations under the International Covenant on Civil and Political Rights ("ICCPR") to ensure the protection of the climate system and the environment for present and future generations.

This paper analyses how the International Court of Justice could respond to that question. One element of that response will be an analysis of the extent to which climate change and human rights cases decided by UN human rights treaty bodies and national and regional courts are sources of law under art 38(1)(d) of the Statute of the International Court of Justice. This paper also draws out some of the principles from those cases that the International Court could apply in answering the question, focusing on the engagement and scope of the right to life, interpretation of human rights treaties in light of international climate treaties and international environmental law, burden-sharing, and the obligations of states.

What role for the climate regime in investor-State arbitration?

Camille Martini (PhD candidate at Aix-Marseille University and Laval University (cotutelle))

While many investor-state arbitrations based on bilateral investment treaties or investment chapters of free trade agreements have dealt, directly or incidentally, with environmental issues, State measures relating to the mitigation and adaptation to climate change have been subject to a surprisingly small number of investor claims, when compared to the overall number of climate change disputes. What is more, when the climate change emergency makes its way to the core of a given investment dispute, investor-State tribunals tend to consider the international climate regime as an element of context, dealt with succinctly in the factual section, rather than as a set of legal rules applicable to the dispute. In this context, the proposed contribution will seek to answer the following research question: should international investment tribunals give a greater deference to rights and obligations of states arising out of the international climate change regime?

The contribution will first explore the particularities of the international investment law regime, including jurisdictional hurdles, that explain why only a limited number of investor-State arbitrations have dealt, directly or incidentally, with the climate change emergency so far. Second, the contribution will explain that, despite the limited but growing number of investor-state arbitrations dealing with climate change, international investment law has the capacity to dramatically impact the trajectory of the climate regime for the years to come. An analysis of contemporary practice shows that ISDS is a double-edged sword: on the one hand, investment treaties can be used as tools to promote and protect certain categories of foreign private investment, including those advancing the mitigation and adaptation targets set by each Party to the Paris Agreement in their respective nationally determined contribution; on the other, the fear of investor-State claims may dissuade States from taking ambitious measures to tackle climate change, including when such efforts are mandated by international environmental treaties. In recent years, a growing number of investors have indeed used ISDS to challenge energy transition measures, often against global efforts to reduce greenhouse gas emissions. Finally, the contribution will explore, through an analysis of past and current disputes, how States may use the traditional tools of public international law to defend their efforts to mitigate and adapt to the adverse effects of climate change in investor-States proceedings. It will also seek to demonstrate that the climate regime, including the Paris Agreement, should be given greater consideration in investor-State disputes beyond its current (oft-limited) role as an element of context.

1:00-3:00 pm

Panel 4: Climate Change and Investment Law

Chair: Prof Margaret Young

Discussant: Prof Campbell McLachlan KC (Victoria University of Wellington and 2022–23 Arthur Goodhart Visiting Professor at the University of Cambridge)

The Climate Regime and International Investment Law

Veena Manikulam (PhD candidate, University of Zurich (UZH))

International investment law constitutes one of the central pillars of the global economy. It guarantees that multinational corporations are treated in accordance with a set of substantive standards. Should those standards be violated, investment agreements grant corporations unilateral access to international arbitration. As such, the predominant normative orientation of the discipline is to link economic growth with open markets and in particular, with the strong protection of property and contractual rights, on the one hand, and disciplines on state intervention, on the other hand.

This traditional orientation within international investment law is increasingly being challenged. Contemporary scholarship is more and more asking the following questions: How can investment law further global justice? More specifically, how can international investment law contribute to the fight against climate change?

Reform efforts have not remained a merely academically stimulating exercise. Instead, several investment treaties now include general exception clauses (mirroring Article XX of the GATT Agreement), and grant contracting states an express right to regulate. Such treaty reforms – laudable as they are – pragmatically focus on the state as the main actor in the fight against climate change. However, at the heart of international investment law lays the multinational corporation.

This inevitably begs the question: What is the role of multinational corporations in the fight against climate change? Are there consequences to environmental damages caused by multinational corporations in host states in investment arbitration?

The present research project focuses on precisely this question: Do international investment agreements incorporate investor accountability, inter alia, for violations of environmental law? As such, this project is situated within a line of research that scrutinises the role of international economic law not exclusively for economic growth, but for the furtherance of a sustainable economy.

Human Rights Due Diligence and the Public Interest Consideration of Foreign Investors in International Investment Law

Sek Lun Cheong (PhD Candidate, Melbourne Law School)*

International investment law ('IIL') increasingly features foreign investors' (as businesses) responsibility in non-economic policy areas, such as human rights and the environment. Recent developments suggest that these areas could extend to climate change. An important milestone in business regulation is the concept of human rights due diligence ('HRDD') of businesses under the United Nations Guiding Principles on Business and Human Rights ('UNGPs'). This HRDD responsibility entails identifying, preventing, mitigating, and accounting for the human rights risks and/or impacts of business activities to host state communities; it emphasises the public interest. Taking the UNGPs as a benchmark, I argue that IIL already integrates HRDD to a certain extent in some respects, while the public interest element of HRDD features in other respects. For example, recent international investment agreements have included HRDD indirectly or contained provisions featuring aspects that are operationally similar to HRDD, such as environmental and social impact assessments. Although arbitral tribunals have not articulated the responsibility of investors to conduct HRDD, the public interest has been a consideration for investors in investment treaty claims involving human rights and environmental counterclaims by host states. Other aspects of investment arbitration, such as the fair and equitable treatment standard of investment protection, could be interpreted to include a public interest dimension. Given the increasing recognition that climate change impacts human rights, the discussion on HRDD will necessarily incorporate climate change considerations in relation to the impacts of an investment. These aspects of IIL could thus serve as entry points for the climate change dimension of investors' responsibility in the international investment regime.

The concept of intergenerational equity and the Business and Human Rights Framework

Anna Katarina Damm (PhD candidate at the Georg-August-Universität, Göttingen)

It seems that, to our generation, intergenerational equity is more than a moral predicament: As science is equivocally pointing towards the severe consequences of climate change for future generations, civil societies' climate activism is pushing states to adopt adequate mitigation and adaptation policies ensuring the continuation of the human species. Yet, legally speaking, what do we owe the future? Since Edith Brown Weiss' major contribution to the conceptualization of intergenerational equity, courts and scholarship have not succeeded in shaping the notion beyond its existence as but one limp of sustainable development's environmental pillar. Questions regarding the delineation of the two concepts did not receive much scholarly attention. When it comes to the private sector commitments to future generations are equally vague: Various soft law instruments include contributions to sustainable development and 'sound environmental management'. While providing some degree of authority, these instruments do not substantiate corporate responsibilities vis-à-vis future generations. Yet, at the advent of transgressing planetary

boundaries, the notion of intergenerational equity needs to be at the forefront of international law. In the transformation to a zero-net economy, intergenerational equity can function as a catalyst; The paper argues that sine-qua-non to its catalyst function is its normativity: Future generations' right to inherit the planet in a condition at minimum as good as the present generation received it must be recognized as legally binding under international law. Against this backdrop, the paper aims to operationalize the concept of intergenerational equity under international law. It answers the questions: what is the scope and content of states' and corporations' intergenerational obligations and, how could a conceptualization of the Business and Human Rights Framework through the lens of intergenerational equity contribute to enhancing the transition to a zero-net economy by 2050. Next to doctrinal legal research, the paper uses the environmental economics concept of 'ecosystem services' to determine the needs of future generations and the concept of 'nature as a value' to implement their needs into the Business and Human Rights Framework.

3:30-5:00 pm

Panel 5: Climate Change and Decarbonisation

Chair: Prof. Sundhya Pahuja (ARC Kathleen Fitzpatrick Laureate Professor, Melbourne Law School and Leverhulme Visiting Professor at Cambridge)
Discussant: Prof. Marie-Claire Cordonier Segger (Affiliated Fellow, LCIL, Leverhulme Trust Visiting Professor, University of Cambridge and Full Professor of International Law, University of Waterloo, Canada)

Institutional forms of decarbonisation: the World Bank and lithium

Caitlin Murphy (PhD candidate, Melbourne Law School)*

The World Bank's 2020 report 'Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition' identifies the increased need for minerals engendered by the energy transition as an economic development opportunity for states in the Global South as long as they adopt a particular form of governance and strategy that the Bank terms 'Climate Smart Mining'. Part of this strategy involves supply chain management: the Bank envisages the supply chain as the key form that links mineral substances to the emergent infrastructure of the energy transition. This paper investigates this link with the supply chain and asks whether the Bank's regulation of lithium specifically can be understood separately from its work on logistics: a set of business techniques designed to maximise supply chain efficiency. In doing so, the paper traces a longer history of logistics practice through examining archival materials of the Logistics Management Institute, revealing particular social and legal effects of the form of organisation the Bank proposes to guide decarbonisation, and gesturing towards other possibilities.

ISDS and Economic Inefficiency: An Analysis of Junior Companies' Legitimate Expectations

Clara Lopez (PhD candidate, King's College London)*

In 2020 the World Bank published the 'Minerals for Climate Action Report' emphasising that the deployment of green technologies in the fight against climate change will entail a major increase in the demand of minerals. Hence, the expansive cycle of mineral extraction, developed over the last two decades due to China's demand for raw materials, can only be expected to continue in the future. One immediate result of increasing mineral extraction has been the explosion of social conflicts between foreign corporations, states and indigenous peoples. Disputes between foreign

corporations and states are being adjudicated primarily before arbitral tribunals under International Investment Agreements (IIA). While the breadth of the literature in law and social sciences has been focusing on the impact of investment arbitration in fossil fuel divestment, the effect of mining in local communities and the relationship between international law, capitalism and extractivism, less attention has been paid to the evolution of structural dynamics of the mining sector. The present paper contributes to this literature by questioning the microeconomic justification of IIA in the mining sector in light of the corporate structures that have been developed in the industry to solve obsolescing bargaining problems, i.e., junior mining corporations. To do so, the paper adopts the law and economics approach proposed by Bonnitcha, Poulsen and Waibel and adapts it to the mining sector to analyse whether investment treaties can solve hold-up problems and induce efficient investors decisions. The paper concludes that strict readings of IIA are more likely to solve obsolescing bargaining problems and induce efficient behaviour on investors.

5:00 pm

Wrap-up and Next Steps

Professor Margaret Young and Associate Professor Markus Gehring

5:30 pm – Close

* *Papers circulated in advance via Conference dropbox link*

This workshop is organised as part of the research partnership between
Melbourne Law School and Cambridge Faculty of Law
and hosted by the Lauterpacht Centre for International Law,
5 Cranmer Road, Cambridge, UK