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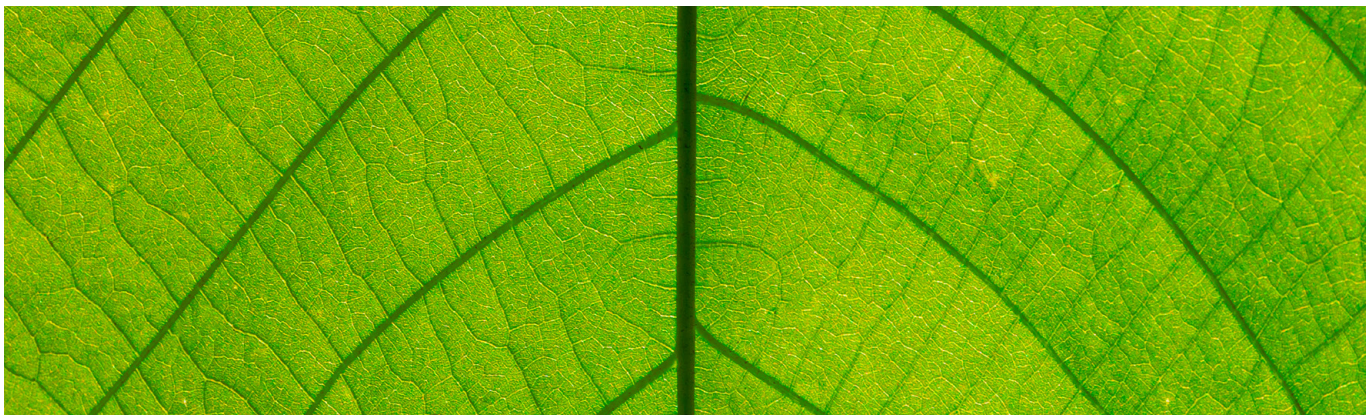

CLIMATE CHANGE LAW CONFERENCE

Session 2
Using International law in climate change cases

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INTERSTATE PROCEEDINGS BEFORE INTERNATIONAL COURTS AND TRIBUNALS

Amy Sanders considered the nature and effect of advisory opinions relating to climate change issued by international courts and tribunals.

There have been three advisory proceedings, all instituted between December 2022 and March 2023, where states have been able to make submissions on the questions posed:

1. **The Advisory Opinion before the International Tribunal on the Law of the Sea** requested by the recently established Commission of Small Island States in December 2022. The question submitted addressed the obligations of States Party of the United Nations Convention on the Law of the Sea with respect to climate change, ocean warming, sea level rise and ocean acidification.
2. **The Advisory Opinion before the Inter-American Court of Human Rights** requested by Chile and Colombia in January of this year. Chile and Columbia seek clarification of the scope of state obligations for responding to the climate emergency within the framework of international human rights law and particularly the American Convention on Human Rights. This request refers to a previous Advisory Opinion of the Inter-American Court Of Human Rights in 2017 and provides an example of how advisory opinions may inform one another.
3. **The Advisory Opinion before the International Court of Justice** requested by the UN General Assembly in its Resolution of 29 March 2023. The General Assembly seeks clarification of the obligations of states under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for states and for present and future generations. The key challenge here will be to ensure that focused and concrete submissions assist in the issuance of an opinion that is of genuine practical utility and which provides substantive hooks to meaningfully progress the global response to the climate change crisis.

INTERNATIONAL FORA

There are three relevant aspects of interstate activity:

1. **Interstate dialogue before UN treaty bodies.** Standing committees can play an important role in developing interstate dialogue on climate change. Standing committees are typically established by States Party to a convention and given a mandate to make comments or recommendations with respect to state obligations under that convention, including on climate change matters. In the course of drafting these comments and recommendations, states can make submissions. This provides a useful arena for dialogue.
2. **The work of the International Law Commission ("ILC").** The ILC was established by the UN General Assembly to initiate studies and make recommendations with respect to the development of international law. One of its current topics concerns the legal implications of sea level rise, including, what are the consequences for statehood under international law should the territory and population of the state disappear, and what protection do persons directly affected by sea level rise enjoy under international law? During the course of the ILC's work, the governments submit their comments. This serves as another useful example of how exchanges of information on climate change issues fit within the framework of international law.

3. **Resolutions of the UN General Assembly.** An instance from 28 July 2022 is the General Assembly Resolution 76/300 which recognised the right to a clean, healthy and sustainable environment as a human right, although notably certain states (UK and US) were careful to make clear that they did not accept that this has the status of a customary right. In addition, it was by a General Assembly Resolution that an advisory opinion was requested before the International Court of Justice.

Q: What is the benefit of legal opinions issued by courts and tribunals that are not binding on states?

A: The key answer is that the proof will be in the pudding. But at this stage, I can make three observations. First, simply the fact of state participation brings a certain focus within governments as to their international obligations and their current policies. Second, we all know advisory opinions are not legally binding but a well-reasoned advisory opinion can have legal effect in that it can (i) provide benchmark standards and meaningful tools in negotiation and decision-making; (ii) be of very practical utility in domestic law. Finally, meaningful cooperation between states in the form of information sharing and collaboration is central to meeting the challenge of climate change. "Non-contentious" activity may be better suited to that objective. As lawyers we sometimes gravitate to the sharp contours of contentious proceedings but actually that inevitably brings a hardening in strategic lines and perhaps in this context, at least in certain aspects, diplomacy and "non-contentious" dialogue is more helpful.

INVESTMENT ARBITRATION AND CLIMATE CHANGE

Alison MacDonald considered the ways in which investment arbitration may need to adapt to the climate crisis.

DEFINING THE CRISIS

International lawyers often talk about crises. The system of investment law in particular has been going through what many would term "a crisis of legitimacy" for about a decade or so. UNCTAD estimates that there are some 3000 bilateral investment treaties in existence along with core key multilateral investment protection instruments such as the Energy Charter Treaty. For some years, we have seen arguments from different voices in society to the effect that investment arbitration is a secretive process which puts the interests of big business above the interests of communities, the state and more latterly, the environment.

Climate change is a lightning rod for these concerns. The reality is that if the system of investment arbitration is perceived, rightly or wrongly, as tying states' hands in relation to their abilities to tackle the climate emergency then it will cease to exist in the form that we know it.

The Energy Charter Treaty provides an illustration of the direction of travel. The ECT was conceived as energy-source neutral. In other words, it builds in no preference for fossil fuels or renewables. Yet, the biggest users of the ECT so far have been renewable investors. Despite this, in the last year we have seen that European states are walking away from the ECT in large numbers due to a concern on the parts of governments that the ECT was not going to give states the latitude to tackle climate change as they saw fit without being on the hook for millions, potentially billions, in damages to investors.

This is a salutary lesson that where any treaty framework comes to be seen as tying states' hands on climate change, they will not support it.

IDENTIFYING THE SOLUTIONS

There are two possible solutions to the crisis in investment law which is compounded by the climate crisis.

1. **States can utilise existing treaties.** States can robustly defend claims for damages resulting from any response that they take to climate change using existing treaties. The language of the first-generation of bilateral investment treaties concluded is open-textured and capable of being interpreted to protect states from such damages claims. For example, the doctrine of legitimate expectations in the context of ISDS arbitration can be used to defend a claim from a possible investor; for what legitimate expectation could an investor have that a state would not introduce climate-related policies in a manner

which may affect their investment?

2. **States can amend existing treaties.** Potential amendments could make it clear that treaties do not prevent state regulation on climate issues. Treaty amendments play an important communicative role in making clear to the public that this is not a system that works against climate measures or that limits a states' ability to implement climate-friendly laws and policies.

Q: How should investment arbitration procedures be adapted to ensure that climate change cases can be heard effectively and fairly?

A: There are existing tools for this. The Permanent Court of Arbitration produced a set of model rules a number of years ago which it suggests could be used in environmental cases. There is also the possibility of a designated list of specialist arbitrators which could be nominated by states and could include climate experts who would be particularly qualified to be experts in climate-related cases. These existing rules should be coupled with a gradual move towards greater transparency and the potential of third-party intervention in appropriate cases.

THE PARIS AGREEMENT IN ENGLISH DOMESTIC LAW

Naomi Hart considered the role of the Paris Agreement in cases before English courts.

The Paris Agreement was signed by 196 states in 2015. It seeks to limit global temperature rise to 2° above pre-industrial levels while encouraging efforts to limit that figure to 1.5. The core obligation is for states to set and communicate so-called "nationally determined contributions". These are the actions that a state is willing and able to take to achieve the Paris Agreement's goals.

The Paris Agreement is binding on state parties, including the UK, as a matter of international law. But because the treaty has not been incorporated into domestic law, it is not a source of domestic legal rights or obligations.

This created a stumbling block in R (Plan B Earth) v Prime Minister [2021] EWHC 3469 (Admin). This was a challenge to the government's climate change policy including on the grounds that it failed to take practical and effective measures to align with the obligations in the Paris Agreement. Among the reasons why permission was not granted to proceed with the claim, the Court took the view that what the claimants were actually seeking was enforcement of the Paris Agreement as *if it were a source of legal obligations within the UK*. Which is it is not.

The main question which has been considered by the English courts thus far has been the extent to which public law decision-makers are obliged to consider the Paris Agreement and the UK's obligations in their decision-making. Three cases have considered this question.

1. R (Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52, [2021] 2 All ER 967. In this case, the Secretary of State for Transport had published a policy statement expressing an intention to build a third runway at Heathrow airport. The Claim was brought under sections 4 and 10 of the Planning Act 2008.
    - Section 5(8) requires the Secretary of State to explain how the policy statement *"takes account of government policy relating to the mitigation of and adaptation to climate change."* The Claimant argued that the Secretary had not taken such government policy into account, including because he had not considered the UK's obligations under the Paris Agreement. The Supreme Court disagreed. It construed the term *"government policy"* narrowly and held that the ratification of the Paris Agreement, while an effective act on the international plane, was not in itself a manifestation of government policy and did not create domestic obligations to perform the treaty in the UK.
    - Section 10 requires the Secretary of State to exercise his functions with the objective of contributing to the achievement of sustainable development and in particular to have regard to *"the desirability of mitigating and adapting to climate change."* The Supreme Court found that the UK's obligations under the Paris Agreement as an unincorporated treaty were a matter which the Secretary of State was permitted but not required to take into account in order to satisfy section 10. In any event, the Supreme

Court considered that the Secretary of State had taken into account the UK's obligations under the Paris Agreement and had lawfully exercised his discretion as to the weight to give to that consideration.

2. R (Packham) v Secretary of State for Transport [2020] EWCA Civ 1004, [2021] Env LR 10. The claimant sought permission to challenge the Secretary of State's decision to continue with the implementation of the HS2 project. The Court of Appeal found that the Secretary of State retained a discretion as to the weight, if any, to be given to the Paris Agreement. As such, they had not acted unlawfully.
3. R (Friends of the Earth Ltd) v Secretary of State for International Trade/UK Export Finance [2023] EWCA Civ 14. The Claimant challenged the government's approval of a $1.15 billion investment in a liquefied natural gas project in Mozambique including on the basis that this decision was incompatible with Article 2(1)(c) of the Paris Agreement which requires parties to make finance flows consistent with the pathway towards lower greenhouse gas emissions and climate resilient development. The Court of Appeal dismissed the challenge, holding that it was for the executive to determine precisely what the UK's obligations under the Paris Agreement are. The role of the courts was limited to deciding whether the government had formed its own view and whether that view was tenable. The Secretary of State was found to have formed a tenable view that funding the project in Mozambique was aligned with the UK's obligations under the Paris Agreement such that the Court could not and should not hold that they had made an error of law.

These three unsuccessful claims may create an impression that the Paris Agreement has limited potential to challenge a government's decision making. Two particular legal avenues may have greater potential for success:

1. Domestic legislation which has been enacted within the UK to give effect to the UK's obligations under the Paris Agreement is more likely to lead to successful challenges. This is demonstrated in R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin), [2023] 1 WLR which concerned a challenge to the net zero strategy implemented by the government. The legislative framework which underpins the government's net zero strategy requires the Secretary of State to (i) be appropriately briefed about the impact of policies and the likelihood of the Paris Agreement targets being met and (ii) provide sufficient explanations to Parliament regarding the government's strategy (sections 13 and 14 of the Climate Change Act 2008). The Claimants argued that the Secretary of State had not complied with these two statutory obligations. They were partially successful.
2. Unincorporated treaties can also play a role in the interpretation of legislation due to the presumption that UK legislation is intended to be compatible with the UK's international obligations, including in relation to unincorporated treaties. How this may work in the context of the Paris Agreement remains to be seen.

Q: Do you think that national courts are where the main action is going to be?

A: I would not rule out the possibility of meaningful action for international courts and tribunals but domestic courts are going to play a very important role. There are two key factors that are likely to determine how effective domestic courts will be in using international obligations to constrain government decision-making. The first is the constitutional structures of the state in question. There are many states where, unlike the UK, international treaties take automatic effect in domestic law. In those systems, an international treaty may have a more immediate domestic effect. The second is the extent to which the government in question has incorporated international obligations into its domestic law. This has been the stumbling block for many UK cases so far.

CLIMATE CHANGE AND INTERNATIONAL HUMAN RIGHTS LAW

Sam Hunter Jones, a Solicitor and Energy Systems Lead for Europe at the campaigning charity Client Earth, considered the role that international frameworks can

play in the climate crisis with reference to the case of Daniel Billy and others v Australia (Torres Strait Islanders Petition) CCPR/C/135/D/3624/2019.

"This is the first international finding of a legal obligation to pay compensation for what has been described as climate-related impacts."

The Torres Strait Islanders Petition provides a concrete example of how international frameworks might be used by communities in a way that protects their rights and effect the change which is required to address the effects of climate change where governments are otherwise failing to respond adequately to the climate crisis.

THE COMPLAINT

Torres Strait Islanders Petition was a complaint to the UN Human Rights Committee brought by eight Torres Strait Islanders on behalf of themselves and six of their children against the government of Australia alleging that it had failed in its response to climate change to guard against the particular risks that they faced as an indigenous community.

The Torres Strait Islands are a group of more than 200 islands located between Australia and Papua New Guinea, 16 of which are inhabited. The Claimants lived on four of them.

The issues that the Claimants faced related to:

1. Sea level rise which was causing their villages and homes to be flooded in increasing regularity, the destruction of their buildings and infrastructure, the washing away of sacred ancestral gravesites and erosion of their coastlines.
2. Loss of marine species due to coral bleaching arising from ocean acidification which was affecting the communities' access to the marine resources upon which their economy was built and upon which their ability to practice their culture relies.
3. Changes to seasonal patterns and weather which was preventing them from practising their culture and using their traditional gardens for growing food.
4. Loss of their ability to practice their culture.
5. The risk of dispossession from their lands and homes with the risk that they would be forced to be relocated to mainland Australia.

The complaint involved allegations of violations of three rights under the International Covenant on Civil and Political Rights, namely, the right to life (Article 6); the right to family, private life and home (Article 17); the right to minority culture (Article 27); and the rights of the child (Article 24.1).

There were two key aspects to their Complaint:

1. The first aspect centred on the Australian government's failure to put in place an adequate programme of measures to protect the communities from the effects of climate change including through failures to invest in infrastructure such as seawalls but also due to a lack of broader resilience measures that had been recommended by the government's own agencies.
2. The second aspect of the complaint related to Australia's emissions reduction policies; the insufficiency of the Australian government's target to reduce emissions and its failure to implement policies to deliver even that inadequate target.

The Claimants provided evidence to the Committee of the impacts of climate change. In terms of timing, they relied on scientific evidence which predicted that displacement would occur in the coming decades unless there was immediate action on two of the islands and action within the next 10 years on the other two islands.

In making those arguments, the Claimants emphasised the fundamentally intrinsic links between their unique millennial-old-culture and the physical environment of the islands, including how they would not be whole as people if they were forced to abandon their traditional sea and land and relocate to mainland Australia. The Claimants also emphasised that they had contributed the least to the problem of climate change but were suffering the most from its impacts.

THE DECISION

The Committee found violations of Articles 17 (the right to family, private life and home) and Article 17 (the right to minority culture). There are two parts of the Decision which are interesting to highlight as establishing important principles:

1. On Article 17, the Committee found that climate change impacts, including environmental degradation on traditional lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable, constitute foreseeable and serious violations of the right to private and family life and the home.
2. On Article 27, the Committee found that Australia's failure to implement adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, transmit to their children and future generations their culture, traditions and use of land and sea resources, disclosed a violation of Australia's positive obligation to protect the authors' rights to enjoy their minority culture.

Overall, the Committee found that Australia must implement measures necessary to secure the communities' continued safe existence on their respective islands with meaningful consultations with the communities themselves. The Committee also found that Australia was obligated to provide compensation to the Claimants for the harm that they had suffered.

ITS IMPACT

The Claimants' communication to the Committee and the Committee's Decision has provided a powerful means of increasing attention to the risks that their communities are facing and a clear and authoritative statement of Australia's obligations.

On a broader level, the statements about indigenous rights and environmental harm are particularly valuable given that indigenous people protect approximately 80% of the world's remaining biodiversity. There are many climate solutions and purported climate solutions, from carbon credits to nature-based solutions to biofuels for aviation, where one can imagine that these kinds of issues will also be raised and become relevant. In addition, this was the first international finding of a legal obligation to pay compensation for what has been described as climate-related impacts.

Q: Could you explain what the concept of mitigation is and do you think that this is an argument which might find a stronger foothold in further communications to the Committee?

While the majority of the Committee did not find against Australia on mitigation, it did find that the Claimants' arguments on mitigation were admissible on the basis that the size and scale of Australia's emissions and the fact of it being a highly developed and affluent country meant that Australia was under an obligation to take steps to prevent similar violations in the future. That implicitly means reducing emissions as soon as possible. This Decision therefore opens the door for further gains to be made in this area, but in this case, there was only a minority decision against Australia on mitigation.

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