

CLIMATE CHANGE LITIGATION AND THE FUTURE OF THE INTERNATIONAL CLIMATE CHANGE REGIME*

This panel was convened at 11:00 a.m., Thursday, June 25, by its moderator, Francesco Sindico of the University of Strathclyde Law School, who introduced the panelists: Hari Osofsky, Dean of Penn State Law and the Penn State School of International Affairs; Jolene Lin, Director of the Asia-Pacific Centre for Environmental Law at the National University of Singapore; Daniel Magraw, former Director of the International Environmental Law Office at the U.S. EPA and President Emeritus of the Center for International Environmental Law; and Laura Shay Lynes, President at The Resilience Institute (TRI) in Canada.

THE WORLD IS OPEN TO CLIMATE CHANGE LITIGATION

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*By Francesco Sindico***

There is no doubt that the discourse around climate change has matured over the years and has become one of the central features of international relations. We all know of the international legal regime that has developed to deal with climate change, starting from the United Nations Framework Convention on Climate Change¹ and finishing with the Paris Agreement.² Climate change is also either at the core or on the fringes of many other international debates, from international security³ to international economic relations.⁴ In 2018, the Intergovernmental Panel on Climate Change released a (yet again) stark warning alerting to the risks of not moving towards a 1.5 degrees goal,⁵ rather than a 2.0 degrees as the Paris Agreement seems to be suggesting. The truth is that the trend countries are moving toward with their pledges in their nationally determined contributions is not going to meet the 2.0 objective, let alone the 1.5 degrees objective.⁶ Against this background, it is not surprising that sectors of society interested in pursuing stronger climate change policies have explored multiple governance routes to take forward their agenda. This has

* This piece builds on: Francesco Sindico & Kathryn McKenzie, *Climate Change Litigation: Recent Trends, the Global South, Human Rights and Rights of Nature*, 11 SCELG DIALOGUE (July 2020), at <https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/latestoutcomesfromourwork/scelgdialogues>.

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¹ United Nations Framework Convention on Climate Change, May 9, 1992, 31 ILM 822.

² Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, TIAS No. 16-1104.

³ CLIMATE CHANGE AND THE UN SECURITY COUNCIL (Shirley V. Scott & Charlotte Ku eds., 2018).

⁴ Michael A. Mehling, Harro van Asselt, Kasturi Das, Susanne Droege & Cleo Verkuijl, *Designing Border Carbon Adjustments for Enhanced Climate Action*, 113 AJIL 433 (2019).

⁵ IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty, Summary for Policymakers.

⁶ UNEP Emissions Gap Report 2019, at <https://www.unenvironment.org/interactive/emissions-gap-report/2019>.

led to the emergence of a polycentric and multilevel governance in the field of climate change.⁷ It is within this greater picture that climate change litigation has become a key facet in the fight against climate change.⁸

Any discussion on climate change litigation in 2020 needs to be framed in the context of three important overriding themes: the political and legal consequences of declaring a global climate emergency; questions about the future legitimacy of the Paris Agreement as a meaningful driver of global climate action; and whether countries will include climate action in post-COVID-19 economic recovery actions. First, over the past few years climate change terminology has changed and a lot of it is due to the youth climate movement. We do not talk of climate change, but of climate emergency and climate breakdown.⁹ These are not just media snippets, but also the object of political declarations of cities and communities worldwide. The extent to which this change of terminology is meaningful from a legal perspective and from a climate litigation perspective is yet to be seen.

Second, the Paris Agreement has been hailed as a hallmark of international cooperation over climate change when it was agreed back in 2015.¹⁰ The extent to which the Paris Agreement is still considered the gold standard of climate multilateralism after COP25 in Madrid is an open question.¹¹ It is important that COP26 in Glasgow brings back the lost momentum. The relationship between international and domestic climate change litigation and the international climate change legal regime is an important facet of the climate change litigation debate.¹²

Third, 2020 will be remembered as the COVID-19 year. Many countries are developing post-COVID-19 recovery packages, some of which have strong green credentials.¹³ Global civil society will scrutinize whether the climate promises present in such recovery packages will be met. The extent to which litigation can be used successfully to keep countries accountable to their post-COVID-19 promises will be an interesting facet of climate litigation in the near future.

Against this overall background, I asked the panelists to consider the impact different legal systems have on the outcomes of climate litigation and to elaborate on the conditions needed for climate litigation to serve as an effective tool in strengthening climate governance and provide pathways to positive climate action. My own conclusion is that “the world is open to climate change litigation.” Climate-change-related court decisions come in many languages from many jurisdictions and this is an opportunity—a richness—that we should all embrace as we come together to advance climate change litigation and continue to move the levers of the complex global system of climate change governance.¹⁴

⁷ Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE LAW 395 (2011); GERD WINTER, MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE (2006).

⁸ Hari Osofsky, *The Geography of Emerging Global South Climate Change Litigation*, 114 AJIL UNBOUND 61 (2020); Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AJIL 679 (2019); Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, WIREs CLIMATE CHANGE (2019).

⁹ Emily Beament, *World Spins Towards Climate Breakdown*, ECOLOGIST (Mar. 10, 2020), at <https://theecologist.org/2020/mar/10/world-spins-towards-climate-breakdown>.

¹⁰ Charlotte Streck, Paul Keenlyside & Moritz von Unger, *The Paris Agreement: A New Beginning*, 13 J. EUR. ENVTL. & PLANNING L. 3 (2016).

¹¹ Aruna Chandrasekhar, *The UN Climate Talks Ended in Deadlock. Is this Really the Best the World Can Manage?*, GUARDIAN (Dec. 21, 2019).

¹² Lennart Wegener, *Can the Paris Agreement Help Climate Change Litigation and Vice Versa?*, 9 TRANSNAT'L ENVTL. L. 17 (2020).

¹³ Joel Jaeger, *Europe Charts a Course for Sustainable Recovery from COVID-19*, WORLD RES. INST. (June 2, 2020).

¹⁴ COMPARATIVE CLIMATE CHANGE LITIGATION: BEYOND THE USUAL SUSPECTS (Francesco Sindico & Makane Moïse Mbengue eds., 2021).