

The UNFCCC: negotiating towards climate protection (substantive issues)

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Abstract (100 words)

This chapter discusses the trends in legal scholarship in the four key substantive parts comprising the international climate change legal regime: mitigation, adaptation, finance and technology transfer. Mitigation and adaptation have been the two areas that have attracted most attention in the literature. However, in the context of a Post 2015 climate change regime, climate finance and, potentially, technology transfer have become at least as relevant and important. The chapter will highlight clusters of legal scholarship for each one of the four parts of the international climate change legal regime, suggesting areas where more research is needed and work needs to be done.

Keywords

Mitigation, adaptation, finance, technology transfer

Contents

1. Introduction
2. Mitigation and adaptation
3. Climate Finance
4. Technology Transfer
5. Conclusion

Bibliography

1. Introduction

If climate change is to be dealt with effectively by the international community, greenhouse gas emissions worldwide need to be reduced dramatically over the next

three decades.¹ Mitigation, hence, should still be where key players in the international climate change arena invest most of their time and effort. However, the last two decades have shown us that the international community has not moved in the direction it needed to. Inevitably mitigation, which was at the forefront of the regime in its early years, has not always been on center stage of the negotiations. Adaptation is now very prominent, and any review of the literature on the substantive parts of the international climate change regime cannot escape this reality. In the United Nations Framework Convention on Climate Change (UNFCCC) itself mitigation and adaptation were just two of the four pillars underpinning the regime, the other two being finance and technology transfer. However, until recently the latter two had not received a great deal of attention both in the negotiations and in the scholarly debates. This has now changed, and after the outcome of the Copenhagen Conference of the Parties (COP) in 2009 the tide has slowly but steadily turned both for climate finance and for technology transfer.

This chapter will address this change by looking into the key debates present in the literature surrounding the four substantive parts of the international climate change legal regime. It will begin by tracing the key discussions around mitigation and adaptation and how they themselves have evolved over time. The chapter will then highlight the emerging debates around climate finance and technology transfer identifying possible areas for future research and work. In doing so the chapter will conclude suggesting areas of law (other than climate change law) that may need to be further explored to fully understand the four parts of the international climate change legal regime.

2. Mitigation and adaptation

With both the UNFCCC and the Kyoto Protocol built upon objectives that were based on the need to reduce greenhouse gas emissions,² mitigation was at the heart of the regime. The latter seems to have moved towards an approach in which countries are

¹ IPCC, Climate Change 2014 Synthesis Report - Summary for Policymakers (2014)

² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) (1992), 31 ILM 822 (UNFCCC), art. 2 and Kyoto Protocol to the 1992 Framework Convention on Climate Change (adopted 10 December 1997) (1998) 37 ILM 22 (Kyoto Protocol), art. 3.1.

given the freedom to pledge their own level of ambition, and to frame them in soft voluntary terms. The negotiations leading up to the Paris Agreement and the Intended Nationally Determined Contributions (INDCs) seem to confirm this shift from hard law to soft law. Against this background, it is not surprising that in the past ten years adaptation has received more attention than it had in the early stages of the regime. Adaptation is not only an option, it is a necessity now that the goal of tackling effectively (i.e. mitigating climate change) has been delayed, or missed altogether. Adaptation is now not only based on a set of provisions in the UNFCCC, but has been strengthened through the establishment of ad-hoc institutions and funding channels.

It is impossible to discuss and present all the legal scholarship on mitigation and adaptation that has featured in journals and books in the past twenty five years. What follows is an attempt to categorize for both mitigation and adaptation clusters of research that have taken place throughout the development of the international climate change legal regime. For mitigation four key areas can be identified: legal scholarship around the key sources of the international climate change legal regime; about one of the most important principles of the regime (the common but differentiated responsibilities and respective capabilities (CBDR-RC)); on compliance and its relationship with the emerging Monitoring, Reporting and Verification (MRV) system; and about the future regime that has been in the making for the last three years. For adaptation three key research clusters can be put forward: legal scholarship about the sources and institutions devoted to adaptation; the debate on whether migration can be seen as an adaptation policy; and the increasing debate about adaptation and loss and damage.

2.1. Legal scholarship on mitigation

The UNFCCC was one of the treaties stemming from the UN Conference on Environment and Development back in 1992. Authors like Bodansky provided clear accounts of the negotiations leading to the adoption of the treaty and detailed the architecture of the international climate change legal regime arising from the UNFCCC.³ This trend of legal scholarship aimed at discussing key moments of the

³ Bodansky (1992)

international climate change legal regime, but also to clarify what for the non-specialist in particular may appear to be a convoluted legal system, has continued throughout the years marking every key development of the regime itself. Authors like Yamin, Depledge and Grubb have helped us to understand the complexity of the Kyoto Protocol.⁴ The interesting aspect here is that this critical stream of literature has appeared not only for the key climate treaties, but also, and almost more so, for key COP Decisions, or package of COP Decisions, that have steered the direction of the regime throughout the years.⁵ This tells a lot of the importance of COP Decisions overall.⁶ Key international legal journals have even devoted a yearly space to a thorough account of the outcomes of each COP.⁷

The second cluster of mitigation related legal scholarship centers on one of the most important and most controversial principles underpinning the international climate change legal regime: the CBDR-RC principle.⁸ The leading author on this principle has been for many years Rajamani, who looked at it as a reflection of differential treatment in international environmental law, more generally.⁹ The literature on CBDR-RC has grown exponentially especially in the past few years, with most authors commenting whether a principle that stemmed from an intergovernmental process launched in the early nineties has still the same role to play in a world, which has experienced geopolitical tectonic shifts with the BRICS emerging as key players in the international climate regime.¹⁰ Interestingly Pauwelyn, through a comparative study of how differential treatment operates under the World Trade Organisation legal system, questions not the CBDR-RC principle per se, but whether we still live in a

⁴ Yamin and Depledge (2004), Depledge (2000) and Grubb et al. (1999)

⁵ Authors like Werksman (1998) and Grubb (1998) have discussed the Marrakech Accords, which have provided the rule book for the Kyoto Protocol flexible mechanisms. Massai (2010), Rajamani (2010), and Sindico (2010) have all analyzed the outcome of the Copenhagen COP, highlighting how the Copenhagen Accord provides a turning point from a legally binding to a soft law approach. The negotiation stream launched in Durban (Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP)) has also led to a significant amount of literature, Maljean-Dubois S and Wemaëre (2012) and Rajamani (2012), and the same will undoubtedly take place after Paris.

⁶ Brunnee (2002)

⁷ The International and Comparative Law Quarterly has featured articles from Lavanya Rajamani after each COP since 2009. Climate Policy has a similar feature, but with shorter pieces, from Michael Grubb.

⁸ UNFCCC, art. 3.2.

⁹ Rajamani (2006)

¹⁰ Deleil (2013) and Maguire (2013)

binary world of developed and developing countries, calling for a more nuanced approach, which calls for further differentiation based on clear criteria.¹¹

The third cluster of legal scholarship, which can be linked to mitigation, is about compliance and how it relates to the emerging MRV system. In a legally binding regime compliance to the international legal obligations provided for in the Kyoto Protocol was ensured by a compliance mechanism, framed around two branches: the Facilitative and the Enforcement Branch of the Compliance Committee. Authors like Urbinati have provided clear account of how the compliance system operated,¹² while Brunnee, Doelle and Rajamani have, amongst others, provided insightful analysis of the first years of operation of the Kyoto Protocol Compliance committee.¹³ However, the shift from a hard and legally binding system to a soft and voluntary one has led to a lively discussion as to whether a new compliance system, akin to the one present in the Kyoto Protocol, is even possible. Hence, the interest in the legal scholarship to follow and discuss the emergence of MRV as a more tailored enforcement mechanism.¹⁴

The fourth and final cluster of mitigation related climate change legal scholarship has focused on the efforts of the international community to devise a new international climate change legal regime as a result and outcome of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) negotiations. This has not just been an effort from individual researchers,¹⁵ but has been an ongoing project also by leading academic institutions, such as Harvard University with its Project on Climate Agreements.¹⁶ Discussions have been ongoing on the format that the Paris Agreement should take,¹⁷ and, more generally, on whether the current negotiations can indeed deliver an effective response to tackle climate change. In this stream of legal literature

¹¹ Pauwelyn (2013)

¹² Urbinati (2009); Wang and Wisner (2002)

¹³ Brunnee, Doelle and Rajamani (2012) ; Doelle (2010); Oberthur and Lefebvre (2010)

¹⁴ Duyck (2014)

¹⁵ Haites E, Yamin F and Höhne N. (2014)

¹⁶ The Harvard project on Climate Agreements can be found at http://belfercenter.ksg.harvard.edu/project/56/harvard_project_on_climate_agreements.html (last accessed on 13 August 2015).

¹⁷ Maljean-Dubois et al. (2015)

efforts to analyse the role of other international law fields to deal with climate change can be included, such as the work by Rayfuse and Scott and Van Asselt.¹⁸

2.2. Legal scholarship on adaptation

As previously mentioned there has been a burgeoning in legal literature on adaptation in the recent years, including a timely handbook on the topic directed by Verschuuren.¹⁹ This increase in legal analysis follows social science research on adaptation led by authors like Adger and O'Brien.²⁰

The first of the three streams of legal literature related to climate change adaptation includes work that tries to clarify and discuss the developments in how adaptation has been dealt with in the international climate change legal regime. This is where the edited collection by Verschuuren has been very useful, since the current legal and institutional landscape is, to put it mildly, quite complex.²¹ This includes new institutions, such as the Adaptation Committee and the Least Developed Countries Experts Group. The climate change adaptation landscape also includes the possibility to implement adaptation action through National Adaptation Plans and Programmes of Action. New institutions and new rules and guidelines stem directly from both the Nairobi Work Programme on impacts, vulnerability and adaptation to climate change²² and the Cancun Adaptation Framework.²³ Authors such as Craig,²⁴ Driessen,²⁵ and Flatt²⁶ have all helped in navigating this complex and evolving international climate change adaptation landscape.

The second stream of legal literature related to climate change adaptation considers the response to considering migration as policy to adapt to climate change. This

¹⁸ Rayfuse and Scott (2012) and Moncel and Van Asselt (2012)

¹⁹ Verschuuren (2013)

²⁰ Adger N, Lorenzini I and O'Brien K, (2011)

²¹ See also Bonyhady et al. (2010)

²² Decision 2/CP.11,

²³ Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, para 11-35.

²⁴ Craig RK (2010)

²⁵ Driessen PPJ and van-Rijswijk HFMW (2011)

²⁶ Flatt V. (2012)

option was discussed in the journal *Nature* and has sparked a lot of controversy.²⁷ In fact, if to adapt to climate change an affected individual is asked to migrate, this could be seen as a failure of the international community to deal effectively with climate change and its effects. Adaptation in this sense hinges on the brink of human rights and security legal discourses. On the one hand, if to adapt to climate change individuals are obliged to leave their homes, a number of human rights can be considered to be breached. Linking climate change and human rights has been on the agenda of the international community²⁸ and discussed by legal literature for some time,²⁹ but making the further link between climate change, human rights and adaptation has been less explored.³⁰ On the other hand, uncontrolled migration patterns due to adverse climatic conditions could, potentially, exacerbate already existing delicate cross border relations. Should this happen, the link between climate change effects and security concerns could rise further than what it already has. In the past decade or so, the UN Security Council has in several occasions “flirted” with the topic of climate change³¹ and several authors, including the author of this chapter, have discussed the pros and cons of considering climate change as an international security matter from a legal perspective.³² However, once again, a strong link to adaptation has been less explored in the literature.

The third and final stream of climate change related legal literature that will be discussed in this chapter relates to the concept and developing normative architecture of loss and damage. First established at the COP in Warsaw,³³ authors like Doelle and Burkett have discussed its development within the international climate change regime as a response to the most acute and immediate climate change effects affecting least developed countries.³⁴ In particular, the issue of compensation has become a

²⁷ Black R and others (2011)

²⁸ United Nations Human Rights Council, res. 7/23, Human rights and climate change (2008)

²⁹ Rajamani (2010). See also the chapter from Foster and Galizzi in this book.

³⁰ An initial exploration can be found in Humphreys (2012).

³¹ UN Department of Public Information, News and Media Division, Security Council Holds First-ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers, UN Doc. SC/9000, 17 April 2007.

³² Sindico (2005)

³³ Decision 3/CP.18,

³⁴ Doelle M, ‘The Birth of the Warsaw Loss & Damage Mechanism’ (2014) 8 *Carbon and Climate Law Review* 35; Burkett M, ‘Loss and Damage’ (2015) 4 *Climate Law*

stinging point both in the negotiations about loss and damage and in the academic commentary thereof.³⁵

3. Climate Finance

Climate change mitigation and, increasingly, adaptation come with a cost. Leveraging and mobilizing the resources needed to deal with climate change has become one of the key areas of the international climate change regime, both in the negotiations and in the literature. Climate finance, in the framework of the international climate change regime, refers to rules and institutions devoted to deploying the resources needed by developing countries to properly mitigate climate change and adapt thereto. However, as will be briefly discussed, climate finance can have a much wider understanding, that encompasses new areas of law and policy outside the traditional UNFCCC regime.

Starting with climate finance in the international climate change regime, the latter was present in the UNFCCC itself,³⁶ being one of the key pillars of the regime together with mitigation, adaptation and technology transfer. Similarly to the developments in the field of adaptation, climate finance was very much absent from the key debates until the Bali Road Map was agreed upon in 2007,³⁷ and the Copenhagen Accord in 2009.³⁸ There, an agreement to devote US\$100 billion per year to address climate change in developing countries was reached.³⁹ This sparked momentum in the climate finance realm and in the last five years a number of important normative and institutional developments took place, which have been analysed by an increasing number of scholars. Three discrete streams of climate finance literature can be outlined here.

Firstly, work has discussed and clarified the overall climate finance landscape, including its goals, legal sources and developing institutions. This has included work on the Standing Committee on Finance and on the emerging web of climate finance

³⁵ Mayer (2014). See also the chapter from Doelle in this book.

³⁶ UNFCCC, art. 3.3.

³⁷ Decision 1/CP.13, Bali Action Plan (2007)

³⁸ Decision 2/CP.15, Copenhagen Accord (

³⁹ Ibid

“funds”, such as those linked to the Global Environmental Facility, the Adaptation Fund and the more recent Green Climate Fund. Key resources within this stream are the book edited by Haites and the contribution coming from Stewart et al.⁴⁰

The second stream of literature zooms in on one of the challenges in implementing climate finance, which is its “additional” nature. In this field, additionality refers to the fact that the US\$100 billion per year should not be aid money relabeled as climate finance/aid, but should be budgeted by Annex I countries in “addition” to already existing aid funds. While technical in nature, this debate raises serious equity and fundamental North South debates.

The third stream of climate finance literature refers to the establishment and operationalization of the Green Climate Fund.⁴¹ This is one of the most recent new bodies established under the UNFCCC regime and has raised both political and international legal debates surrounding its location and work. One interesting aspect is whether the Green Climate Fund can learn from the lessons stemming from more than ten years of Clean Development Mechanisms in driving climate friendly investments in developing countries, despite the differences between the Fund and CDM. This is a comparative area of climate change legal literature that could benefit from further work.

Moving away from climate finance as it is usually considered within the international climate change regime, climate finance can have a wider understanding. If we agree that further “green” investments are required to drive the global economy towards a low carbon society, then the financial aspects of such investments can be considered as climate finance. Taking this broad approach, an emerging, but still rather under developed, area of legal literature can be highlighted. Socially responsible investing as discussed and explored by Richardson is emerging as an increasingly interesting avenue to tackle climate change.⁴² This is backed by popular and activist movements trying to lobby for further divestment from fossil fuels, which begs the question of the

⁴⁰ Haites (2013) and Stewart et al (2014)

⁴¹ Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, para 98-112.

⁴² Richardson (2014) and Richardson (2009)

role of law in divestment, an area of climate change legal scholarship that deserves further attention.⁴³

4. Technology Transfer

The final and fourth pillar of the international climate change regime is technology transfer. Just like the first three, including climate finance, technology transfer was present from the start in the landscape of the UNFCCC.⁴⁴ However, just as climate finance, it has been only in the last five years that technology transfer geared for the needs of developing countries has taken up speed. In fact, it was only in Cancun in 2010 that the Technology Mechanism was formally established,⁴⁵ after being proposed in the Copenhagen Accord.⁴⁶ The Technology Mechanism is constituted of two bodies: the Technology Executive Committee and the Climate Technology Centre and Network. The former constitutes the policy branch of climate change technology transfer with the latter operating as the implementing branch. However, their operation is still at an early stage, and there is relatively little legal scholarship on climate change technology transfer. This is the area of climate change that, compared to mitigation, adaptation, and even climate finance, requires more attention not just from negotiations, but also from researchers. An area that could and should be explored is research that provides an in depth and clear analysis and account of the developments of technology transfer in the current regime and the role it will play in a post Paris world. The work of Brown and Rimmer is a good step in this direction,⁴⁷ but more legal scholarship in this field is warranted.

Technology transfer in the field of climate change implies the need of discovering and identifying climate friendly technologies that can favor a move towards a low carbon society, especially for developing countries. Links with other international law fields devoted to technology and innovation become apparent and important to understand and study. Hence, another area of research that requires further attention is the

⁴³ See the Carbon Tracker Initiative at <http://www.carbontracker.org/>. See also the chapter from Ferrey on corporate social responsibility in this book.

⁴⁴ UNFCCC, art. 4.5

⁴⁵ Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, para 113-127.

⁴⁶ Decision 2/CP.15, Copenhagen Accord

⁴⁷ Brown (2013) and Rimmer (2011).

relationship between technology transfer in the climate change regime and the work of the World Intellectual Property Organisation (WIPO).⁴⁸ Furthermore, intellectual property can have trade implications and the relationship between climate change technology transfer and the World Trade Organisation Trade Related Intellectual Property Agreement needs to be further explored.⁴⁹

5. Conclusion

This chapter has presented the legal scholarship present in the four fields that constitute the four substantive pillars of the international climate change legal regime: mitigation, adaptation, finance and technology transfer. The first years of the regime, and until the COP in Copenhagen, saw a strong interest for mitigation, while in the last few years this has been accompanied by an emerging legal scholarship for climate change adaptation, finance and technology transfer. Still the two latter are underdeveloped and will benefit from further research.

A further conclusion from this overview of the existing literature is that, while research trying to dispel the complexity of the legal and institutional developments in each one of the four fields has its merit, more sophisticated research is needed in moving forward the scholarship agenda. Limiting work on the “traditional” UNFCCC setting would be counterproductive since opportunities and challenges for mitigation, adaptation, finance and technology transfer can be found in other regimes, some of which work closely with the international climate change regime, while others may seem to be in conflict. This is where research such as the one pursued by Van Asselt,⁵⁰ capable of bridging through different legal regimes (climate change, biodiversity and trade), but also between disciplines (international law and international relations), becomes very relevant. But this is also where new research on how, for example, climate change adaptation relates to human rights and security, or about the role of law in promoting further climate finance, and, finally, on the intersection between climate change related technology transfer and international trade, can open new valuable insights.

⁴⁸ See how the WIPO perceives its role in relationship to climate change at http://www.wipo.int/about-wipo/en/climate_change_conf_09.html (last accessed on 12 August 2015).

⁴⁹ Hutchinson (2006) has looked at the implications of such a relationship for developing countries.

⁵⁰ Van Asselt (2014)

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