Tarragona International Environmental Law Colloquium

IV TARRAGONA INTERNATIONAL ENVIRONMENTAL LAW COLLOQUIUM

NEW TRENDS IN ENVIRONMENTAL LITIGATION: ISSUES OF THEORY AND PRACTICE

ABSTRACT PROCEEDINGS

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ABOUT THE COLLOQUIUM

IV TARRAGONA INTERNATIONAL ENVIRONMENTAL LAW COLLOQUIUM

NEW TRENDS IN ENVIRONMENTAL LITIGATION: ISSUES OF THEORY AND PRACTICE

Due to the complexity of environmental conflicts – cross-cutting issues with far-reaching impacts -, the institutional responses given by governance mechanisms of seem to be limited, inefficient and unable to solve them without putting aside relevant justice matters. In light of this situation, for some time now, litigation, that is to say the appeal to the judiciary, has become a relevant tool for different actors, who somehow have been excluded from the decision-making process, to obtain a justice-focused solution to these conflicts.

Litigation is constantly evolving to meet the new challenges brought about by environmental conflicts. On one hand, owing to the ingenuity and sagacity of litigants and judiciaries, innovative theories, tools and strategies are rising which at the same time are facing difficult challenges and questions. In this sense, new approaches to classical procedural institutions, as standing, proof, causation and justiciability, among others, are being developed and tested around the world. On the other hand, environmental litigation networks are being built by reframing litigation as something else than a procedural law issue: a real social movement under development.

ABOUT THE ORGANIZERS

The IV Tarragona International Environmental Law Colloquium (TIEC) jointly organized by the Tarragona Centre for Environmental Law Studies (CEDAT-URV) and the Tarragona Environmental Law Students Association (AAEDAT) will be held on 28 – 29 June 2019 at the Faculty of Legal Sciences of the Universitat Rovira i Virgili, in Tarragona, Spain.

The CEDAT has gradually become a reference point for environmental law in Spain and Europe. Its objectives are to generate and socialize knowledge in the field of environmental law. In 2014, it hosted the 12th edition of the Annual Colloquium of the IUCN Academy of Environmental Law, which gathered researchers and academics from 56 countries across all regions of the world. At present, the CEDAT is involved in several national and international research projects.

The AAEDAT is an association founded in 2009 by students and ex-students of the LL.M. of environmental law in Rovira i Virgili University. It promotes activities within the university community in order to further environmental and social values and create spaces for debate, reflection and exchange with other universities and research groups.

The IV TIEC aims to provide a forum for junior and early-career researchers with different backgrounds in which to present and discuss their research and works-in-progress. In addition, this event seeks to create a friendly environment for meeting fellow students and colleagues that share a common interest for environmental law.

The IV TIEC is an activity carried out under research project 'Constitución Climática Global: Gobernanza y Derecho en un Contexto Complejo' funded by the Spanish Ministry for Economy and Competitivity (DER2016-80011-P).

KEYNOTE SPEAKERS

Randall S. Abate

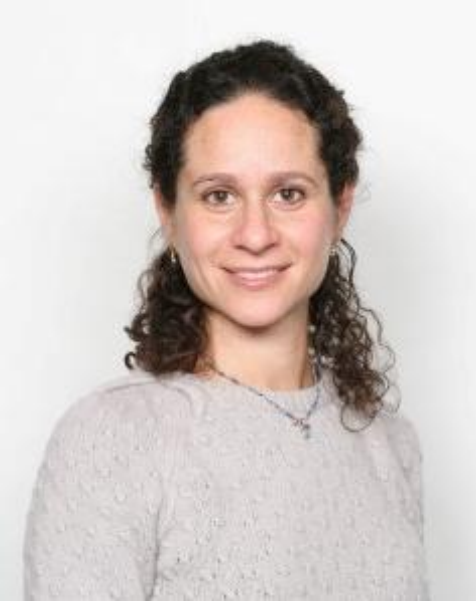
Professor Abate is the inaugural Rechnitz Family/Urban Coast Institute Endowed Chair in Marine and Environmental Law and Policy, and a Professor in the Department of Political Science and Sociology, at Monmouth University in West Long Branch, New Jersey. He teaches courses in domestic and international environmental law, constitutional law, and animal law. Professor Abate joined the Monmouth faculty in 2018 with 24 years of full-time law teaching experience at six U.S. law schools.

Professor Abate has taught international and comparative law courses—and delivered invited lectures—on environmental and animal law topics in Argentina, Australia, Brazil, Canada, Cayman Islands, China, Colombia, India, Indonesia, Kenya, Kyrgyzstan, Norway, Qatar, South Africa, South Korea, Spain, Ukraine, the United Kingdom, and Vanuatu. Professor Abate has delivered invited lectures at several of the leading law schools in the world including Yale, Harvard, Cambridge, Oxford, King's College London, the University of Sydney, the University of Pennsylvania, and Seoul National University.

CLIMATE JUSTICE AND INTERGENERATIONAL EQUITY: A COMPARATIVE ANALYSIS OF LITIGATION STRATEGIES. Randall S. Abate, Monmouth University.

The common law has been a valuable tool to protect future generations on environmental matters. The protection of future generations began with stewardship of certain environmental resources and then shifted to protection of the climate in the Anthropocene era through stewardship-focused and rights-based theories. This presentation first reviews foundations for the protection of future generations in international law and then considers intergenerational equity case studies in the Philippines, the United States, and Colombia. It first examines the Minors Oposa case in the Philippines from the early 1990s as the foundation of this legal theory in domestic courts. Twenty-five years later, the focus on protection of future generations has taken center stage once again, this time in the context of climate justice litigation. The presentation examines atmospheric trust litigation in the landmark Juliana case in the U.S. and reviews how variations of this intergenerational equity theory have been pursued in climate justice litigation in several other countries, with an especially promising recent outcome in Colombia.

Joana Setzer



Joana Setzer is an environmental lawyer and climate policy researcher at the Grantham Research Institute on Climate Change and the Environment. She holds a PhD and a MSc in Environment and Development from the London School of Economics and Political Science (LSE) and a Masters in Environmental Science from the University of Sao Paulo. Joana was a British Academy Postdoctoral Research Fellow at the LSE, investigating trends in climate litigation. She has also worked as the external affairs coordinator of the nrg4SD, a network that represents subnational governments at the international level in the field of sustainable development, and for eight years she acted as an environmental lawyer in Brazil.

CLIMATE CHANGE IN THE COURTS: TRENDS AND CONSIDERATIONS ABOUT THE ROLE OF CLIMATE LITIGATION AS A GOVERNANCE TOOL. Joana Setzer, Grantham Research Institute on Climate Change and the Environment.

Over the past 20 years, courts around the world have been increasingly engaged in debates about the causes and consequences of climate change. In this presentation I will discuss new trends and key questions regarding climate change litigation.

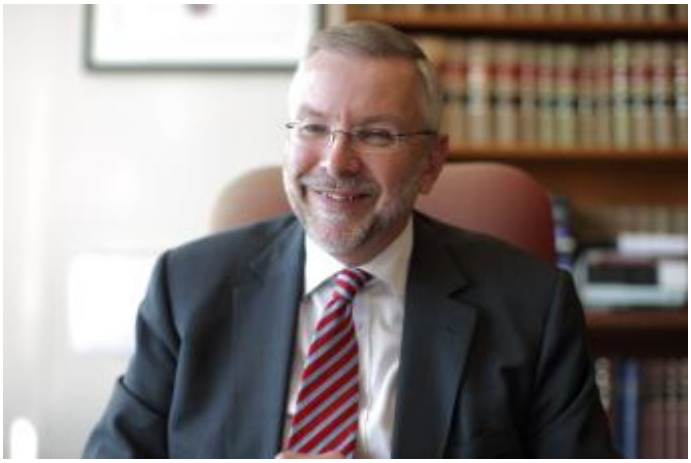
First, I will discuss the history and future prospects of private climate litigation, which seeks to hold private entities legally accountable for climate change-related damage or threats of damage. Following failed attempts to clear judicial thresholds with regard to standing, proof of harm and causation, a new wave of private climate change lawsuits can be identified. A rapidly evolving scientific, discursive and constitutional context generates new opportunities for judges to rethink the interpretation of existing legal and evidentiary requirements and apply them in a way that will enhance the accountability of major private carbon producers.

The second part of the presentation will focus on the emergence of climate litigation in the Global South. While the majority of climate litigation has occurred in the US and in other developed countries, cases in the Global South are growing both in terms of quantity and the quality of their regulatory outcomes. I will identify factors that are contributing to this increased activity, as well as challenges faced by litigators in highly vulnerable countries.

Finally, I will problematise the use of climate litigation as a governance tool. To a certain extent, litigation can strengthen climate governance. By mobilising civil society around this issue, it contributes to changing the expectations of firms and investors regarding

the political and legal risks of inaction. Litigation may also lead to new legal rules redefining responsibilities and liability in the context of globalized externalities that are unequally generated and have unequal impacts across and within borders. But, under some conditions, the adjudication of climate change may also undermine governance efforts and provoke a judicial or popular backlash.

Brian J. Preston



Brian J. Preston is the Chief Judge of the Land and Environment Court of New South Wales. Prior to being appointed in November 2005, he was a senior counsel practising primarily in New South Wales in environmental, planning, administrative and property law. He has lectured in post-graduate environmental law for nearly 30 years. He is the author of Australia's first book on environmental litigation and 128 articles, book chapters and reviews on environmental law, administrative and criminal law. He holds numerous editorial positions in environmental law publications and has been involved in a number of international environmental consultancies and capacity-building programs, including for judiciaries throughout Asia.

Justice Preston is an Official Member of the Judicial Commission of NSW, Fellow of the Australian Academy of Law, Fellow of the Royal Society of NSW, Honorary Fellow of the Environment Institute of the Australia and New Zealand and also a member of various international environmental law committees and advisory boards. He is currently an Adjunct Professor at the University of Sydney, Western Sydney University and at Southern Cross University.

THE IMPACT OF THE PARIS AGREEMENT ON CLIMATE CHANGE LITIGATION. Brian J. Preston, Chief Judge of the Land and Environment Court of New South Wales.

The Paris Agreement is the first universal climate change agreement requiring all parties to communicate ambitious greenhouse gas (GHG) reduction targets to achieve a long-term global temperature goal. What has been the impact of the Paris Agreement on litigation to improve mitigation of and adaptation to climate change?

The presentation will first examine how the Paris Agreement has influenced the courts' interpretation of societal values, norms and customs. These include recognition of the globalisation and universality of the problem of climate change and solutions to the problem (every party contributes to the problem and bears responsibility (common but

differentiated) for solving the problem); the maximum permissible global temperature rise considered acceptable; the need for zero emissions after 2050 to achieve this long-term temperature goal; the use of a carbon budget approach to achieve the long-term temperature goal; and the relevance of climate change and its consequences as matters to be considered in administrative and judicial decision-making.

Secondly, the presentation will explore how the Paris Agreement has altered the factual considerations of anthropogenic climate change. The Paris Agreement assists in establishing causation in litigation because it demonstrates global consensus on key issues, including that the increasing GHG emissions are causing climate change; climate change is largely caused by humans (by increasing sources and removing sinks of GHGs); all anthropogenic GHG emissions (both direct and indirect) cumulatively contribute to climate change; and climate change is causing dire consequences for the planet and its people.

Thirdly, the presentation will note the ripple effect that climate change litigation in one country, influenced by the Paris Agreement, has on litigation in other countries. This ripple effect is evident in the courts' decisions in the Netherlands (Urgenda Foundation v Netherlands), the United States (including Juliana v United States) and Australia (Gloucester Resources Limited v Minister for Planning).

ORAL PRESENTATIONS

PANEL I. CLIMATE CHANGE LITIGATION: EMERGING AND ALTERNATIVE PERSPECTIVES

WHAT MIGHT IT MEAN TO BE CLIMATE CONSCIOUS?. Kim Bouwer, European University Institute

This paper makes some suggestions for how lawyers can deal with climate change. As the study and practice of climate litigation enters its second decade, there is ample space for reflection as to how litigation trends may influence not only climate policy and public perceptions, but the very content and structure of the law itself. Prominent writers in this field have suggested that considerations about climate change could alter the shape of the common law; this raises all sorts of questions as to how and whether practising, adjudicating and academic lawyers can approach climate change issues in a climate conscious way. To propose one answer to this question, this paper does two main things. The first, descriptive section examines the deep structure of the common law, questioning whether the basis of our law is also the basis of the societal conditions that cause or contribute to climate change. The second, normative section questions whether deliberate 'practices' of disorienting and dismantling the law is the only manner in which climate conscious approaches can affect the law's structure. It questions the extent to which practitioners, lawmakers and judges can exercise agency in resisting the law's structure, when it comes to climate consciousness.

INTERPRETING STATES' GENERAL OBLIGATIONS ON CLIMATE CHANGE MITIGATION: A METHODOLOGICAL REVIEW, Benoit Mayer, The Chinese University of Hong Kong.

A variety of norms in international and domestic law imply that States have a general obligation to mitigate climate change (e.g. no-harm principle, obligation to protection human rights, public trust doctrine). Yet a major methodological difficulty is faced when interpreting this general mitigation obligation: how to determine the requisite level of mitigation action? This article identifies and discusses various methods for the interpretation of States' general mitigation obligation in light of domestic cases. On the one hand, a top-down approach seeks to determine a State's requisite mitigation action in the light of a global objective on climate change mitigation and of effort-sharing criteria. On the other hand, bottom-up methods put emphasis on the demand for internal consistency, on the obligation for a State not to downplay its contribution to environmental impacts unfolding beyond its territory, and on various emerging transnational standards. The article argues that the top-down and bottom-up approaches enable a sound interpretation of States' general mitigation obligations especially when these approaches are used in combination.

THE RECOGNITION OF A RIGHT TO A HEALTHY ENVIRONMENT IN CLIMATE LITIGATION AND ITS POTENTIAL IN BROADENING ENVIRONMENTAL JUSTICE IN THE ANTHROPOCENE. Pau Vilchez, Universitat de les Illes Balears.

In recent years, there has been a growing understanding of the impacts of human activity on the natural world. From the concept of planetary boundaries to the notion of Anthropocene, it has become clear that we now live in an era where natural equilibria are being disrupted not only by natural phenomena but also, and increasingly, by the intervention of humans, especially through certain consumption and production patterns and the use of several technologies associated with them.

One of the clearest examples of such a disruptive impact of human action on the environment is climate change. However, a key distinctive element of climate change vis à vis other manifestations of current human-driven global change, consists on the fact that there is presently a fairly widespread understanding of the consequences it will have on the lives and welfare of the human community, which has in turn allowed for a remarkable mobilisation of human, financial, political and legal resources by different stakeholders to try to prevent the harmful effects of global warming.

Among the several tools deployed, one that has been gathering increased attention and significant success in recent years is litigation. For the last two decades, but especially since 2015, climate change litigation has been used by individuals and NGOs around the globe to demand more ambitious climate policies from their governments, based on a duty of care of the States that derives, depending on each legal system, from different legal grounds such as human and fundamental rights, the public trust doctrine or tort law. And courts, despite strong opposition by States, fundamentally based on the notion of the separation of powers, not only seem to increasingly consider this as a justiciable issue but, even more, have started to issue rulings in favour of the plaintiffs' claims.

The object of the present study will not be to analyse all those cases, as there are already several works on the subject, but rather to explore how climate litigation has contributed to the evolution and strengthening of environmental justice, especially through the recognition of a fundamental right to a healthy environment and, furthermore, how through such an anthropocentric approach to the protection of Nature (it is relevant as far as it affects the well-being of humans) might emerge a broader understanding of the environment as a whole that may be relevant in addressing some of the other aforementioned environmental challenges, therefore contributing to the indispensable reformulation of law in the age of the Anthropocene.

PANEL II. RETHINKING LITIGATION STRATEGIES IN ENVIRONMENTAL CLAIMS

PRIVATE LAW CLAIMS AS A VEHICLE FOR THE PROTECTION IN COURTS OF THE CLIMATE.

Carlos Vittorio Giabardo, Universitat de Girona.

Climate change litigation is a complex legal phenomenon. It encompasses a different range of various legal practices, having in common the (very general and vague) feature that the judicial process is in some ways related to climate change. In attempting to "narrow down" this huge topic, I will focus my attention on a quite overlooked aspect in climate change litigation discourses, that is the role of private law in protecting the environment. There is here a contradiction: how can private law (i.e., a body of laws designed to protect individual rights and interests) be suitable to protect the environment (i.e., a concept that is inherently public)? This is the crucial theoretical question my contribution aims to tackle.

First, I will argue that the "Paris Agreement" - by facilitating the accountability in courts of national policies - creates new spaces and possibilities for climate change litigation [Carnwath, 2016]. Then, criticizing the tendency to focus on public law and administrative law considerations, I will claim that private law, and especially tort law, can have a huge unexplored potential in protecting our climate [Bouwer, 2018]. In doing so, this article will consider both the theoretical and practical side. On the one hand (1) it will engage in the debate on "instrumentalism" of private law and the capacity of private law concepts (such as duty of care, negligence, liability, damage and so on) to implement wider social goals. On the other hand (2) it will bring some examples drawn from case law on how private law claims can help shaping climate regulation and raise public and social awareness on climate warming (as the "unsuccessful" English private law case Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy clearly shows).

References

- Robert Carnwath, Climate Change Adjudication After Paris: A Reflection (2016) 28 *Journal of Environmental Law* 5.
- Kim Bouwer, The Unsexy Future of Climate Change Litigation (2018) 30 *Journal of Environmental Law* 483.

TOWARDS EFFECTIVE CLIMATE LITIGATION IN LATIN AMERICA: THE CASE FOR CONSIDERING IMPACTS ON CLIMATE IN ENVIRONMENTAL IMPACT ASSESSMENTS AND DECISION-MAKING PROCESSES.

Gastón Médici, Universitat Rovira I Virgili.

While climate litigation around the world is extensive and diversified, only a handful of cases has been identified in Latin America. In this sense, new cases are expected to arise in the next few years, as social awareness increases in the region. This paper argues that several reasons exist to focus new litigation efforts on environmental impact

assessments (EIA) of allegedly climate-disrupting projects. This strategy, without being a "magic bullet", is identified not only as necessary and urgent, but also as potentially effective. Legal grounds for this statement include precedents of the Inter American Court of Human Rights — specially its celebrated Advisory Opinion OC-23/17 —, international law principles and obligations, and constitutional provisions, among others. Furthermore, relevant lessons can be extracted from litigation experiences around the world. In particular, this paper discusses three main questions which have been set out to judicial appraisal: (a) whether climate impacts must be considered in EIA; (b) to what extent — Scope 3 emissions —; and (c) what implications could climate impacts have for decision-making outcomes. While the last issue deals with the discretional power of public authorities and its answer seems to be unsettled, there are good arguments to be made about the chances of obtaining positive outcomes in the region regarding the first and the second. In turn, the increasing development of climate-disrupting projects, e.g. Vaca Muerta in Argentina, justify the urgency and necessity of this strategy. In this way, the findings of this paper, besides its theoretical interest, represent a call to civil society, specifically NGOs, to take this path urgently.

THE (LIMITS OF) TRANSFERABILITY OF CLIMATE CHANGE LITIGATION AMONG JURISDICTIONS. Sine Rosvig Sørensen and Katerina Mitkidis, Aarhus Universitet.

Climate change (CC) litigation has been spreading globally. CC litigation may aim to, e.g., challenge CC laws and/or push decision-makers towards more ambitious CC policies. A prominent example of CC litigation is the Urgenda case, where both the district (2015) and appeal (2018) courts ruled in favour of the plaintiff, who challenged the inadequacy of Dutch CC policy. Another example is an Austrian case concerning the approval of construction of a third runway at Vienna's airport and its negative CC impacts, where the Constitutional court has ruled (2017) in favour of the state. The CC litigation trend has sparked a discussion about the transferability of the parties' legal arguments in CC cases to other jurisdictions. Our paper fits in this discourse, exploring the transferability of legal arguments from the Urgenda and Austrian cases to the Danish context. The Danish government has not been challenged in court on its CC policy yet. Actually, Denmark has been at the front of the EU climate action ambition. Yet, the country pursues some policies and decisions that may be controversial from the CC perspective. One such decision is to host highly energy-demanding international data centres (of e.g. Facebook). This could potentially undermine the achievement of the Danish 2030 CC policy goals and provide grounds for bringing a CC case. Taking the decision on data centres as a starting point, we explore the transferability of legal arguments from the Urgenda and Austrian cases to the Danish context, focusing i.a. on procedural rules and the questions of justiciability. Our analysis confirms concerns expressed by others that the potential of legal win in CC litigation might be overstated. Instead, we see the largest potential of CC litigation in its otherthan-legal effects, particularly in mobilising CC action at different levels and raising awareness about CC causes and impacts.

PANEL III. EXPLORING THE ROLE OF COURTS IN PROTECTING THE ENVIRONMENT

THE ROLE OF NATIONAL JUDGES IN THE PRIVATE ENFORCEMENT OF AIR QUALITY LEGISLATION: LIMITATIONS TO THE SUBSTANTIVE REVIEW AND REMEDIES. Kendro Pedrosa, Universiteit Hasselt.

Despite the progress made in the last thirty years under the influence of EU-legislation such as Directive 2008/50/EC, which is at present the most important instrument regulating air pollution, many Member States still fail to meet EU air quality standards. This is apparent from the large amount of infringement proceedings which the Commission has started against Member States, as well as from citizen's initiatives that measure local air quality and suggest that the situation may be considerably worse than the officially reported data and infringement cases would lead us to believe. Studies also indicate a growing public awareness concerning the negative effects of air pollution on human health. Accordingly, NGO's and individuals are increasingly turning to litigation in national courts as a means to ensure Member States' compliance with air quality standards, to provide an alternative for the enforcement by the Commission, which is not always efficient and effective. While access to justice remains a problem in some Member States, this paper will only approach the subject from a substantive point of view. Therefore, it will focus on the exact boundaries of these actions and the role of the judge in terms of the substantive review of the case and the possible remedies, in the light of both the case law of the CJEU and the separation of powers. Regarding the case law of the CJEU, possible future developments and clarifications that may follow from cases that are currently still pending, such as the preliminary ruling in the case of ClientEarth v. the Brussels regional government, will also be discussed. Recent and interesting national case law to illustrate some of the difficulties will also be touched upon. Finally, I will end with a brief look into the future: how useful can this tool be, and what should be its role?

SCIENTIFIC KNOWLEDGE IN CHILEAN ENVIRONMENTAL JURISPRUDENCE. Carolina Riquelme, Tercer Tribunal Ambiental de Chile.

Environmental Law in Chile had an important development through the implementation of a new Environmental Institutionality established by the Law that creates the Ministry, the Service of Environmental Assessment and the Environmental Superintendency, and Law which creates the Environmental Courts.

In this scenario, the Environmental Courts were created in 2012, understood as "special jurisdictional bodies, supervised by the Supreme Court," whose function, in general, consists in "resolve environmental disputes and other matters that the law submits to his knowledge" (Article 1. Law 20.600/2012 of June 28, which creates the Environmental Courts).

In Chile, currently, there are 3 Environmental Courts in full operation. Each of them is composed of three members called "Ministers", two of them are lawyers, and the third

one is an expert in the field of science with specialization in environmental matters (Article 2. Law 20.600/2012 of June 28, which creates the Environmental Courts)
The reason for this integration is that environmental issues are in a highly specialized but also uncertain knowledge field, so it is not only reasonable that discrepancies can be resolved by legal judges, but also those who have another specialization that contributes to a reasonable decision of environmental matters (Article 2. Law 20.600/2012 of June 28, which creates the Environmental Courts).

As a closure rule that allows to consider effectively and adequately the scientifically complex facts, article 33 of Law No. 20.600/2012, provides that the assessment of the test will be done according to the rules of sound judgment. Consequently, the assessment of the evidence must be carried out in accordance with the rules of logic, the maxims of the experiences and the consolidated scientific knowledge.

Based on this context, we propose to analyze the jurisprudence of the Environmental Courts and the Supreme Court of the last 7 years, in order to establish how they have interpreted the concept of "scientific knowledge", how they have pondered the scientific proof, and thus be able to verify if it has had any impact respect to the enforcement of the right to an adequate environment, established in the Chilean Constitution.

ENVIRONMENTAL PROTECTION AND THE ENFORCEMENT OF EU LAW: THE INTERIM MEASURES IN THE BIAŁOWIEŻA CASE. Ana Gascón Marcén, Universidad de Zaragoza.

The EU has created a rich legal framework for the protection of the environment, nevertheless, one of the challenges the EU faces is the reluctance of some member States to enforce these rules. The European Commission can start an infringement procedure against the State that does not fulfil its obligations before the Court of Justice of the EU, but the decision in such kind of cases can be duly delayed even if in environmental cases the time may be of the essence. To avoid irreparable damages there is the possibility to ask for interim measures, but this is a mechanism that the Commission rarely uses for political reasons, yet sometimes it is unavoidable like in the case of the Białowieża forest as it could had disappeared by the time the Court adopted a final decision. This paper will focus in the imaginative interpretation accepted by the Court of article 279 TFEU in the case C-441/17 R, ordering Poland to pay at least €100 000 per day if itfailed to respect the directionsset out in the interim measures order and stop cutting the trees of this protected forest. This possibility was not foreseen neither in the Treaties nor in the Rules of procedure of the court as such measures where only considered for recalcitrant member States liable of an infringement stablished by the Court judgement but not for interim measures. However, the Court deemed this interpretation necessary to ensure that the final decision would be fully effective. Thisis a huge step in the enforcement of EU Law with potential consequences not only for environmental protection but also for any other branch of EU Law although it also poses some questions related to EU rule of law.

PANEL IV. TRANSFORMATIVE FACTORS OF INTERNATIONAL ENVIRONMENTAL LAW

MOBILISING AGAINST PLAUMANN ENGOS AND THE CJEU: A JUDICIAL Q&A. Mario Pagano, European University Institute.

Since decades, the 'Plaumann test' is considered as the main obstacle hindering access to justice of ENGOs in direct actions before the EU judiciary. Although the topic of access to justice in environmental matters in the EU has broadly been discussed in legal scholarship, very little has been written on legal argumentations and judicial reasoning in the CJEU environmental case law under Article 263(4) TFEU. In this regard, this paper makes use of the vast literature on both, legal mobilisation in the EU and judicial reasoning of the CJEU. This to try to describe and critically analyse - on the one hand - the evolution of legal arguments brought by ENGOs in order to overcome the Plaumann test, and - on the other hand - the Court's answers and the reasoning embedded. This paper argues that the entry into force of the Aarhus Convention has deeply influenced both i) the way ENGOs have framed their questions before the Court (and, as a consequence, the latter's reasoning); ii) the kind of remedies used by ENGOs to contest the validity of EU environmental measures. Furthermore, this paper argues that the current climate litigation trend started by the Dutch foundation Urgenda has also significantly affected ENGOs' arguments in environmental litigation cases at the EU level with regard to the Plaumann test. Finally, this paper will try to show what ENGOs have actually achieved by litigating before EU courts under Article 263(4) TFEU and international compliance bodies.

FROM STATE SOVEREIGNTY TO COMMUNITY INTEREST – HOW CLIMATE CHANGE LITIGATION CHANGES THE CONCEPT OF INTERNATIONAL ENVIRONMENTAL LAW. Manuela Niehaus, Universität Hamburg/Macquarie University.

International law in the traditional Westphalian sense has always been about State sovereignty. Accordingly, non-State actors such as NGOs and individuals were not supposed to participate to law-making or enforcement. Since there is no central juridical body and States seek refuge in non-binding environmental agreements, international environmental law (IEL) is particularly "soft". Principles such as intergenerational equity are too vague and not legally enforceable, their implementation left to the goodwill of States. However, this has been considered ineffective in the face of transboundary crises such as climate change or loss of biodiversity. Instead, members of the global civil society successfully sue their own governments in domestic courts to spur climate action (see cases such Urgenda/Netherlands, Asghar Leghari/Pakistan or Colombian Youth). These cases have in common that while they deal with different consequences of climate change taking place in different areas of the world, they all refer to the principle of intergenerational equity. It will be argued that non-State actors (with the help of national judges) interpret principles of international environmental law through the lenses of human rights law and constitutional law. Against the backdrop of the on-going constitutionalisation debate, focussing on community interest, it will be demonstrated

that non-State actors, despite their status, contribute to shape the content of these "soft" principles and make them enforceable. Courts have been willing to accept claims made by the litigators on behalf of future generations. And while constitutionalism (yet) seems to be an academic intellectual game, there are national judges in the "disaggregated State" (E. Posner) who seem to promote the idea of ecological integrity or an ecological grundnorm (K. Bosselmann) at the top of a constitutionalist global order against actual government policy. As a result, climate change litigation helps to shape a constitutionalist environmental order.

CLIMATE LITIGATION AND LOSS AND DAMAGE: A SEPARATION OF POWERS?. Patrick Toussaint, University of Eastern Finland, Institute for Advanced Sustainability Studies Potsdam.

As the climate targets pledged by countries under the Paris Agreement are currently insufficient to keep global warming below 2°C (let alone 1.5°C), adverse climate impacts will be unavoidable and already manifest today. While the topic of loss and damage from climate change has already gained greater currency following Paris, it remains one of the most contentious issues in the climate negotiations, and the question of liability and compensation appears to be off the table. At the same time, significant strides have been made in the field of climate litigation both domestically and internationally. This paper aims to shed light on the evolving relationship of climate cases and the climate negotiations in order to determine what contribution litigation can make to strengthening the international policy response on loss and damage. It sets out with a comparative genealogy of loss and damage and climate litigation with respect to key milestones under the climate regime, relying on doctrinal research and expert interviews. The paper then considers their relationship in the present moment of climate governance after Paris by assessing the degree of cross-pollination between both processes. Finally, the paper analyses the advantages and limitations of climate cases as a tool for strengthening loss and damage policy and provides recommendations on how this can be further improved. The paper finds that both processes are caught in a Catch-22: The climate regime has effectively outsourced the discussion on liability and compensation to the courts but absent a sufficiently strong legal basis, the prospects of successful loss and damage cases remain bleak. While litigation on climate loss and damage is still in the early stages, the continued interplay of these two processes will prove critical to advancing the work on loss and damage under the United Nations Framework Convention on Climate Change (UNFCCC).

POSTER PRESENTATIONS

TOWARDS EU ENFORCEMENT POWERS IN ENVIRONMENTAL MATTERS?. Anna Vanhellemont, Hasselt University.

During more than 40 years of EU environmental law many positive strides have been taken and EU environmental legislation has helped majorly in limiting pollution and assessing environmental issues. However, many criticisms have already been voiced on the state of EU environmental law, causing a lack of effectiveness (e.g. due to its haphazard development, fragmentation, extensive amount of acts, incoherencies and gaps). To counter these issues, several important initiatives have been introduced to review EU environmental legislation (e.g. the Commission's REFIT programme as part of the Better Regulation Agenda, which, amongst other things, assesses the effectiveness of EU legislation).

Although this is a positive evolution, several problems can also be attributed to the lack of transparency from Member States on data concerning environmental topics. What really happens in the Member States is largely unknown; how is EU environmental legislation enforced and how many breaches of EU environmental legislation actually occur? In order to positively review EU environmental law, this data is very necessary. Without sufficient knowledge on enforcement at Member State level, any revisions on paper will stay just that. They will, most likely, not adequately improve effectiveness of EU environmental legislation. A more radical change seems necessary.

The question then rises, which systematic changes can be pursued in order to actually improve the enforcement of EU environmental law? In this contribution, the option of awarding enforcement powers to the EU level in the field of environmental law is scrutinized. Such powers are already available in other EU domains (e.g. the competition policy and concerning food safety), and entail that the Commission becomes the principal enforcer of EU legislation. Since environmental law requires a transboundary approach, it seems only logical to award these powers to the EU level. The US Environmental Protection Agency can also offer inspiration in this regard.

THE OBLIGATION TO CARRY OUT A TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT BEFORE THE COURTS OF JUSTICE. Juan Pablo Aristegui Sierra, Ministerio de Relaciones Exteriores, Chile.

The obligation to carry out a transboundary environmental impact assessment is customary international law as confirmed by the International Court of Justice (Pulp Mill, 2010). In the European context, it is also a treaty obligation under the Espoo Convention. The existence of a treaty on the subject allows for increased clarity regarding the content and scope of the obligation, as compared to customary international law. In both scenarios, it is equally relevant to find out how this obligation has been invoked in courts, both domestic and international.

In the first place, it is necessary to clarify i) the content and scope of the norm, ii) its relationship with the rule of no harm, and iii) the (in)dependence that exists between both obligations (the so-called functional link). It is also relevant to clarify if the obligation has direct effect in domestic courts or if its domestic application requires a law or some other mechanism of domestic implementation. Finally, given the customary nature of this procedural rule in the Latin American context, and bearing in mind that investment projects in the region are increasingly having potentially transboundary effects without necessarily legislative coordination between neighboring States, it is pertinent and necessary to establish the minimum standard that international jurisprudence demands in this respect, in the light of some real cases.

THE HORIZONS OF SUSTAINABLE URBAN DEVELOPMENT IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE AND OF THE EUROPEAN COURT OF HUMAN RIGHTS. Simona Fanni, Università di Cagliari/Universidad de Sevilla.

Sustainable urbanization has become a fundamental challenge, and the Council of Europe (COE) and the European Union (EU) have not neglected the importance of urban management. The EU has adopted an articulated framework that is embodied in such instruments as the New Urban Agenda for the EU and in some sources of secondary law, as Directive 2008/50/EC on urban waste water treatment and Council Directive 91/271/EEC on ambient air quality, and both organizations have actively participated in regional and global cooperation for the promotion of sustainable urbanization. Moreover, both the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have provided judicial protection in relation to environmental quality in the city. The ECJ has elucidated the scope of the measures to be adopted by Member States in order to comply with their environmental duties arising from EU law, and the ECtHR has ensured the protection of several human rights in the city, in relation to health, property, private life and effective remedies. The purpose of this study is to explore the trends in the jurisprudence of the ECJ and the ECtHR and their possible evolution, by focusing on the Courts' significant decisions as European Commission v. Republic of Bulgaria and Cordella and Others v. Italy. Subsequently, several paths are advanced for enhancing the results achieved, as judicial cross-fertilization between the Courts' jurisprudence, which may help to define the content of States' environmental duties in relation to sustainable cities under the ECHR and may foster a human rights-based approach in the ECJ case law, by also concurring to define the scope of the programmatic provision enshrined in Article 37 of the Charter of Fundamental Rights of the European Union, according to Article 52(3) thereof and to Article 6(3) of the Treaty on the European Union.

GOVERNANCE IN PROTECTED NATURAL AREAS, ECOLOGICALDISTRIBUTIVE CONFLICTS AND RISKS IN A MIDDLE CITY OF MEXICO. Carlos Francisco Ortiz Paniagua, Stephanie Ascencio and Gloria Huerta, Universidad Michoacana de San Nicolás de Hidalgo/Universitat Rovira i Virgili.

For more than 80 years, Natural Protected Areas (NPA) have been the main protection tool for management of strategic natural resources to ensure ecosystem services

supply in Mexico. But there is an increasing pression over natural services that provide these NPAs, particularly, due to closeness to urban areas in continuous expansion. In the State of Michoacán, the NPA "La Mintzita" is located at the urban area of Morelia city and consists of 419 hectares, having a regional jurisdiction. This NPA, declared a wetland Ramsar site, it supplies with spring water to a third of the population of Morelia. Yet the lack of governance has begun to generate ecological-distributive conflicts, both for the use of spring water and for the illegal change of land use. The aim of the present study is carries out a governance analysis of the NPA management and of the applicable environmental regulations (eight federal regulations, five state regulations and one municipal) in order to demonstrate the inconsistencies and incompatibility between the different jurisdiction levels and government functions and potentials risk of this. The results show that there are contradictions in the existing decree, which prevents the efficient management and governance of the NPA. In addition, free raiders and economical interest groups have taken advantage of this poor governability to extract water in trucks and sale at high prices. In the same vein, the real state agents are changing the land use without legal implications. Finally, it shows that if this continues, there are two latent risks: a) shortage of water on a large part of the city and b) exacerbation of socio-environmental conflicts due to exploitation of “Minzita” wetland that could end up in courts.

ECOLOGICAL JUSTICE AND THE RIGHTS OF NATURE IN THE DECISION THAT RECOGNIZES THE COLOMBIAN AMAZON AS A SUBJECT OF RIGHT. Tônia Andrea Horbatiuk Dutra, Universidade Federal de Santa Catarina.

The urgency of a civilizing change is becoming increasingly evident in the Anthropocene and, with it, the need to provide legal instruments that correspond to it. Theorists such as Low and Gleeson, Baxter and Schlosberg address the idea of Ecological Justice and the courts of some countries recognize nature as a subject of rights. This is the case of the decision on the Colombian Amazon, where an application of a "Justice with the Nature" was identified and which contents still expresses a clear climatic and intergenerational notion of justice. Is Ecological Justice present in the decision? What are the criteria? Is it possible to do Ecological Justice without recognizing nature as a subject of rights? The authors who work with the subject tend to relate the recognition of the intrinsic value of nonhuman beings and the ecocentric perspective to the postulation of the recognition of nature as subject of rights. In an approach about ecology, ethics and law, authors as Jonas, Rolston and Ost understand that the language of rights is not the most appropriate for nature, suggesting other paths. The political recognition, however, becomes indispensable. In addition, it seems primordial to consider the ecologizing of the idea of justice, since in addition to providing a distribution of benefits and losses with equity between humans and nature, it should also be guided by criteria that reflect the ecological paradigm (pluralism, ecocentrism, relational character, interdependence, care, cooperation) and as such embrace the conception of Ecological Justice not restricted to nature. Bosselman contributes to this thought. It can be inferred that the concept is not consolidated but it has repercussions in the jurisprudence and must be problematized, to do Ecological Justice in its complexity it is necessary to ecologize the law that supports it under new constituent bases.

A CRITICAL REVIEW OF THE CHILEAN´S ENVIRONMENTAL COURTS. Ximena Insunza Corvalán, Universidad de Chile.

According to the currently information, there are over 50 Environmental Courts and Environmental Tribunals across the world. Since 2012, in Chile, Act N° 20,600 came into force creating three environmental courts. After almost 7 years of its setting-up, it is feasible to make an assessment about their integration, functioning and competences. In the first place, it is necessary to indicate that in Chile there is no general administrative contentious court. On the contrary, the administrative litigation has been atomized in several fields. First, it was established to address antitrust, then taxes and customs, intellectual property, public purchase and, finally, environment. There are relevant matters in this institutional design that have been highlighted by the academy and the incumbents. This presentation focuses on the independence as an institutional, substantive and procedural principle.

Independence has several ways to deploy itself. The decision to create environmental courts as a judicial body is far from the administrative tribunal response. It is also important to consider the appointment system of the judges, which must guarantee full independence. Finally, the recursive system is crucial to achieve the institutional design goal, that in the case of study is contested. Environmental courts act as a sole instance, the remedy of cassation is limited and resolve by Supreme Court, compound by generalist judges.

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