

Editorial

1 Interconnectedness and Transnational Cooperation

Recent times have brought a new awareness of the fact that the world is an interconnected one. Such a description is true in a variety of ways. By their very nature, viruses respect no political or geographical boundaries, and, as is becoming better understood, they often do not recognize borders between the human species and other animal species. This is a salient reminder that micro and macro ecosystems are all physically connected. The years 2020–2021 show that, for people to cope with the COVID-19 pandemic, and maintain at least a modicum of normality, myriad international meetings and literally billions of human communications have taken place only via electronic means. These virtual platforms have become vital for all types of meetings, but especially when many of them cannot take place physically. An underlying theme of each of the Conferences of the Parties and meetings discussed below is that the world's governments, as well as UN and other intergovernmental organisations and non-government bodies, must now, more than ever, factor the awareness of interconnectedness into their decisions, especially when drafting globally applicable policies and laws on the environment. This means that all members of the international community should put aside their political, economic, and cultural differences in a renewed spirit of transnational environmental cooperation for the good of all life on the planet.

2 UN Water and SDG 6 (Clean Water and Sanitation)

In its role of providing support to UN Member States for the sustainable management of water and sanitation, UN Water held its 34th meeting in mid-March of this year. Drawing together more than 120 representatives (Members, Partners, Observers), the meeting examined various means and methods for advancing progress of Sustainable Development Goal (SDG) 6 on clean water and sanitation in this context. It canvassed a range of actions undertaken to date on the key areas recognised by the SDG 6 Global Acceleration Framework: financing, data and information, capacity development, innovation, and

governance. The participants also engaged in future planning for high-level events and global campaigns leading up to the 2023 Conference on the Midterm Review of the Water Action Decade 2018–2028. As UN-Water Chair Gilbert HOUNGBO observed, this will be the first UN conference on water since the 1970s. The 2023 Conference will be informed and assisted by the Integrating Monitoring Initiative on SDG 6, which produced a report at this UN Water meeting – Summary Progress Update 2021 on SDG 6. Using the most recent data on each of SDG 6 target indicators, the report drew attention to the large amount of work still required to achieve SDG 6 by 2030. Other key interim events discussed included an agreement for the theme of ‘groundwater’ for World Water Day and World Toilet Day in 2022. Throughout the second day of the 34th UN Water meeting, participants engaged in small group interactions, sharing current experiences and strategies, and discussing future challenges and opportunities for meeting SDG 6 aspirations on clean water and sanitation.¹

A High-level Meeting on the Implementation of the Water-related Goals and Targets of the 2030 Agenda was held on the day immediately following the end of UN-Water’s meeting, under the theme of scaling-up ‘multilateral cooperation and accelerate concrete actions to meet the water-related goals and targets of the 2030 Agenda for Sustainable Development’.² In his opening statement, Volkan BOZKIR, President of the UN General Assembly, pointed out that this ‘discussion is long overdue’ as water ‘is both an economic good and an SDG accelerator, facilitating progress on each of the other SDGs’. Without further action, delivering on SDG 6 is growing increasingly unlikely. Therefore, BOZKIR proposes, the international community ‘must see the recovery from COVID-19 as an inflection point in the International Decade for Action, “Water for Sustainable Development”, and re-focus our efforts on sustainable and integrated water management.’³

1 See further UN Water, *34th UN-Water Meeting* <https://www.unwater.org/34th-un-water-meeting/>; Earth Negotiations Bulletin, *UN-Water Briefing Note* (19 March 2021) <https://enb.iisd.org/events/34th-un-water-meeting/summary-report-15-17-march-2021>.

2 Remarks by His Excellency Mr Volkan BOZKIR, President of the 75th session of the United Nations General Assembly (18 March 2021), <https://www.un.org/pga/75/2021/03/18/high-level-meeting-on-the-implementation-of-the-water-related-goals-and-targets-of-the-2030-agenda/>.

3 *ibid.*

3 Biodiversity COP 15

After several delays from the original date in 2020 because of the pandemic, the Conference of the Parties to the Convention of Biological Diversity (CBD COP 15) is now planned to occur between 11–24 October 2021, in Kunming, Yunnan Province, China. The conference theme will be Ecological Civilization: Building a Shared Future for All Life on Earth, a title that raises the issue of human and ecosystem connectedness.⁴ As noted by the IISD, ‘CBD COP 15 will review the achievement and delivery of the CBD’s Strategic Plan for Biodiversity 2011–2020’. Moreover, it is also anticipated that ‘the final decision on the post-2020 global biodiversity framework will be taken, together with decisions on related topics including capacity building and resource mobilization.’⁵ There is also little doubt that the question of global biodiversity strategies of how to reduce the incidence of future pandemics by much improved governance of the natural environment will be an undercurrent of COP 15.

4 UK COP26 Climate, Development, and COVID-19

Under the auspices of the current UK Presidency, numerous pre-COP actions are considering the ways in which future action on climate change can be secured to ‘deliver a global green and resilient recovery from COVID-19’.⁶ On 31 March 2021, a large group of representatives (States, international and regional banks/financial institutions, the OECD, Indigenous and youth) attended a ‘Climate and Development Ministerial’, convened by the UK COP26 Presidency.⁷ A notable feature of this meeting was the recognition given to the impacts of COVID-19 on global finances and climate change: ‘fiscal pressures have been exacerbated by the pandemic, impacting countries’ abilities to pursue their development priorities, including the increasingly urgent and evident

4 China to host COP15 meeting on biodiversity in October http://www.china.org.cn/china/2021-03/20/content_77330643.htm. See also Convention on Biological Diversity, <https://www.cbd.int/meetings/COP-15>.

5 IISD SDG Knowledge Hub, UN Biodiversity Conference (CBD COP 15) <http://sdg.iisd.org/events/2020-un-biodiversity-conference/>; the Provisional Agenda for COP 15 can be found at Convention on Biological Diversity, <https://www.cbd.int/meetings/COP-15>.

6 UK COP 26, Climate & Development Ministerial, *Chair’s Summary* (1 April 2021) <https://ukcop26.org/climate-development-ministerial-chairs-summary/>.

7 *ibid.*

issues of climate change and biodiversity loss'.⁸ Even so, it was also acknowledged that 'the mobilisation of finance is essential for implementation of the Paris Agreement'; that this must be tackled 'head on alongside the intertwined issue of recovery from the pandemic'.⁹

5 USA President Biden's Leaders' Summit on Climate

The positive approach to climate change coming from the US under the new Biden Presidency is a welcome turn of events. In addition to re-joining the Paris Agreement, President Biden convened a virtual Leaders' Summit on Climate (22 and 23 April). At the outset of this meeting, President Biden made it clear that the USA 'is back' and stepping up to deal with the existential threat of climate change, announcing a new emissions reduction target of 50–52 percent by 2030 compared to 2005 levels. President Biden noted that the whole international community, especially the major economies, 'must do more to bend the curve on global emissions so as to keep a 1.5 degree [Celsius] limit on global average temperature rise within reach'. As part of the USA's 'commitment to leading a clean energy revolution', President Biden drew attention to the future economic benefits that will flow to those 'countries that take decisive action now'.¹⁰ Through the convening of this Leaders' Summit on Climate, President Biden has secured similar responses from other States. As a consequence, 'more than half of the world's economy is now committed to the pace of action we need to limit warming to 1.5 degree C And this coalition is growing'.¹¹ How this plays out leading up to and at the COP26 will be interesting indeed.

6 SDG7 and the 2021 Energy Summit

In addition to preparations for the 26th UN Climate Change Conference of the Parties (COP26), to be held in Glasgow, UK, between 1–12 November 2021,¹²

8 *ibid.*

9 *ibid.*

10 The White House, *Fact Sheet: President Biden's Leaders' Summit on Climate* (23 April 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/>.

11 *ibid.*

12 See further UN Climate Change Conference UK (COP26) <https://ukcop26.org/climate-development-ministerial-chairs-summary/>.

another interesting development worth drawing our readers' attention to is the September 2021 High-level Dialogue on Energy (Energy Summit), convened by the UN Secretary-General.¹³ Focusing on the critical role of the energy sector in transitioning to net-zero emissions, this is the first UN meeting of its kind since the 1981 UN Conference on New and Renewable Sources of Energy.¹⁴ This High-Level Dialogue on Energy has a five-theme framework: (i) energy access; (ii) energy transition; (iii) enabling SDGs through inclusive, just energy transitions; (iv) innovation, technology and data; and (v) finance and investment. The overarching objects include promoting the 'implementation of the energy-related goals and targets of the 2030 Agenda for Sustainable Development and its Sustainable Development Goals and the Paris Agreement on climate change, as well as to accelerate ambition towards the achievement of SDG 7 (affordable and clean energy)'.¹⁵ In preparation for the September 2021 Energy Summit, five multi-stakeholder, Energy Technical Working Groups met throughout February-April 2021. Updates on current and future work and reports of these groups can be found on the UN Energy website. Information and updates on the importance of SDG 7 – Affordable and Clean Energy for All – and the establishment of an international Energy Compacts¹⁶ are also part of this dialogue.

7 Groundbreaking Jurisprudential Developments

A recent case from the Supreme Court of Pakistan *DG Khan Cement Company Ltd v Government of Punjab*, by Justice Mansoor ALI SHAH, has excited a good deal of interest in the global environmental lawyers' community.¹⁷ The case upholds a notification from the province of Punjab which stresses the importance of several well-established as well as emerging principles of international

13 UN Energy, *High-level Dialogue on Energy* <https://www.un.org/en/conferences/energy2021>.

14 UN General Assembly Resolution 35/204, UN Conference on New and Renewable Sources of Energy (16 December 1980) UN Doc A/RES/35/204 <https://digitallibrary.un.org/record/18939?ln=en>.

15 UN Energy (n 11).

16 *ibid.* See also UN Energy, *Energy Compacts Flyer* https://www.un.org/sites/un2.un.org/files/i_updated_flyer_v_8_april.pdf.

17 C.P.1290-L/2019, Supreme Court of Pakistan, 20210415_13410_judgment.pdf. This summary draws on a commentary provided to the editors by CJEL International Advisory Board member, Prof Nicholas ROBINSON (Pace University) and Prof Erin DALY (Widener University Delaware Law School).

environmental law, including *in dubio pro natura*¹⁸ and *in dubio pro aqua*,¹⁹ the legal personhood of nature, water justice and climate justice, intergenerational equity, environmental rule of law, and climate democracy. This landmark opinion makes several contributions, not only in terms of advancing environmental jurisprudence for Pakistan, but also globally for the implementation of the environmental rule of law. ‘The well-presented application of inter-generational justice is extraordinary and welcome. A powerful norm is given effect in a practical setting.’²⁰ Referring to Pakistan’s Constitution and the importance of climate democracy to saving the planet and future generations from being ‘colonized at the hands of climate change’, the judgement underlines the points made in the first paragraph of this editorial with respect to interconnectedness. The court draws attention to the need to:

... learn from nature’s 3.8 billion years of evolution. How is it that other species have learned to survive and thrive for 10,000 generations or more? Well, it’s by taking care of the place that would take care of their offspring, by living within the ecosystem in which they are embedded, by knowing not to foul the nest. We must restore and repair and care for the planetary home that will take care of our offspring. For our children, and our children’s children, and all those yet to come, we must love our

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- 18 Concerning *in dubio pro natura*, the case draws on the wording of Principle 5 in the IUCN Declaration on the Environmental Rule of Law 2016: ‘in cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom.’ <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/wcel-important-documentation/environmental-rule-law>.
- 19 Concerning *in dubio pro aqua*, the case draws on the wording of Principle 6 of the Brasilia Declaration of Judges on Water Justice: ‘Consistent with the principle *in dubio pro natura*, in case of uncertainty, water and environmental controversies before the courts should be resolved, and the applicable laws interpreted, in a way most likely to protect and conserve water resources and related ecosystems’. World Commission on Environmental Law, <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/wcel-important-documentation/brasilian-declaration-judges-water-justice#:~:text=The%20Bras%C3%ADlia%20Declaration%20was%20a,and%20protection%20of%20freshwater%20resources>.
- 20 ROBINSON and DALY (n 17) see also Parvez HASSAN (CJEL International Advisory Board member), ‘The D.G. Khan Cement Case: Pakistan judiciary again leads the way’; <https://www.iucn.org/news/world-commission-environmental-law/202104/dg-khan-cement-case-pakistan-judiciary-again-leads-way>.

rivers and mountains and reconnect with the long and life-giving cycles of nature.’²¹

The judgment goes on to note:

The tragedy is that tomorrow’s generations aren’t here to challenge this pillaging of their inheritance. The great silent majority of future generations is rendered powerless and needs a voice. This Court should be mindful that its decisions also adjudicate upon the rights of the future generations of this country. It is important to question ourselves; how will the future generations look back on us and what legacy we leave for them?²²

This ruling not only advances environmental jurisprudence for Pakistan, but also provides impetus for the implementation of the emerging principles of the environmental rule of law globally.

On 5 April 2019, Friends of the Earth Netherlands (‘Milieudefensie’), together with several other organizations, brought an action against the global oil company Royal Dutch Shell, headquartered in the city of The Hague, Netherlands. On 26 May 2021, the District Court in The Hague delivered its judgment. The Court agreed with the claimants that Royal Dutch Shell is doing too little to reduce greenhouse gas emissions and prevent serious climate damage. In the view of the Court, Shell is thereby acting unlawfully, and must significantly reduce its greenhouse gas emissions, to bring its policy into line with the global climate goals of the Paris Agreement. The Court found that Shell has an obligation, arising from an ‘unwritten duty of care’, to mitigate adverse human rights impacts arising from climate change, by reducing its scope 1 to 3 emissions. It ordered Shell and its associated companies and legal entities, due to the business operations and sold energy-carrying products of the Shell group, to limit or cause to be limited the aggregate annual volume of all greenhouse gas emissions into the atmosphere to such an extent that this volume will have reduced by at least net 45% by 2030, relative to 2019 levels.²³ Coincidentally, one day later (27 May 2021), the Federal Court of Australia delivered its judgment in the case of *Sharma v Minister for the Environment*. This was a class action brought

21 C.P. 1290-L/2019 (n 17) para 19.

22 *ibid.*

23 The ruling is available as District Court The Hague, Netherlands, ruling of 26 May 2021, case nr. C/09/571932 / HA ZA 19-379 (English version), available at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2021:5339>. All the documents relating to the case are available at <https://en.milieudefensie.nl/climate-case-shell>.

a group of teenagers concerning the question of approval of expansion of a coal mine. The Court found, drawing on the law of negligence, that the federal Minister for the Environment has a novel duty of care to protect Australian children from the harms of climate change when exercising her powers under the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

These decisions are important additions to the growing list of cases that are placing obligations on governments as well as private sector with respect to the effects of climate change and the goals of the 2015 Paris Agreement.

8 This Issue of CJEL

This issue contains three research articles, one focusing on India, one on Afghanistan and one on China.

The article prepared by Stellina JOLLY and Siddharth SINGH looks critically at the compatibility of Indian domestic and international environmental law with regard to a proposed new regulation, which seeks to revise Environmental Impact Assessment procedures in India. It introduces the reader to the Environmental Impact Assessment Draft Notification, proposed in March 2020 by the Ministry of Environment and Forests and Climate Change of India. It explains that, generally, Environment Impact Assessments (EIAs) purport to identify, predict, and evaluate the environmental effects of proposed actions and projects. To avoid harm done to the environment, but also to protect social and human rights standards, an EIA is normally undertaken before a decision is made to go ahead with a specific project or activity. However, the Indian Draft EIA appears to call for *ex post facto* clearance, which would allow a project to begin without prior environmental clearance. To show the very real danger of such a changed process, the authors refer to the recent ecological catastrophe in the Visakhapatnam styrene gas leak case where the entity was operating without the necessary environmental clearance for some years. Another contentious issue is that the Draft does not give much room for public participation. Many categories of projects – such as building, construction, offshore gas, and irrigations projects – do not require such participation at all. Also, the Draft makes it difficult for local communities to be fully aware of the details of proposed projects. A final criticism is that it does not say much about possible transboundary impacts of projects. In fact, projects situated within 100 km of the Indian border are exempt from public consultation. This, it is argued in the article, is in breach of various norms and principles of both domestic and international environmental law, such as the precautionary

principle. The authors thus encourage a reconsideration of some provisions in the Draft before it is promulgated.

The second article is a contribution on Afghanistan by Ikramuddin KAMIL. It is entitled 'Afghanistan, the Amu Darya Basin and Regional Treaties'. The author explains that Afghanistan has a significant amount of freshwater from precipitation in its high mountains of Hindu Kush. Afghanistan uses 35 percent of the total surface water, which comes from five main river basins, including the Amu Darya Basin, with four of the five rivers being transboundary. Kamil notes that the water of the Amu Darya is mostly used for agriculture, and its allocation among the four Central Asian Republics is a legacy of the policies of the former Union of Soviet Socialist Republics (USSR), but that Afghanistan was excluded from the regional agreements. The article explores the possible legal implications under international law when an upper riparian state is excluded from a regional water treaty, and questions why Afghanistan was excluded from these arrangements. He asks whether Afghanistan has any rights or is subject to any obligations notwithstanding that it is not a party to these agreements. If so, he asks, what are the legal implications of a third-party creating rights and obligations under international law?

The third article, by LI Feiyue, looks at the developments and limitations of China's understanding of fairness. The concept of 'fairness' refers to the fair allocation of responsibilities in global efforts to combat climate change and mitigate its adverse effects. It is very important to look at what different countries consider to be fair, because only if individual countries perceive an allocation of responsibilities as fair, will they voluntarily accept and comply with the allocation of responsibilities based on that particular conception of fairness. The article argues that, generally, the concept of 'fairness' has been among the most contentious issues in international climate change negotiations due to the diverse and self-serving interpretations of fair allocation of responsibilities. The article notes that at the present, China is the second-largest economy in the world, and the largest emitter of greenhouse gases. Thus, China's actions on climate change are critical for the global response to climate change, and its perceptions of the fairness of responsibility allocation significantly influences its attitudes toward its international climate responsibilities. This makes it worthy to investigate these attitudes in detail, as is done in this article. The author points out that China's fairness discourses on the allocation of responsibilities focus on the factors of historically accumulated emissions, per capita emissions, and the capability of individual countries to take measures today. China's fairness discourses have evolved throughout different phases of international climate change negotiations, and this evolution

is described in the article. The author notes that in present times, that China has shifted its position on climate responsibilities from a strict differentiation approach to a position accepting the universal responsibility system under an enhanced supervisory mechanism applicable to all States. The author concludes positively and with optimism that China's pre-2030 commitments represent a significant development of its contributions to the global response to climate change in terms of its overall capability and abatement costs. However, the author also adds some words of both caution and encouragement. In the author's view, the new realities of climate change and its recently embraced treaty obligations require China to take greater actions to achieve the long-term temperature goals and to reflect the highest ambitions in its international commitments. The author thus recommends that China might scale up its next NDC targets and tighten its energy policies on coal energy.

Our Notes on Recent Developments includes a contribution by Grita Anindarini WIDYANINGSIH and Raynaldo SEMBIRING 'The Future of Environmental Protection in Indonesia after the Job Creation Law: An Analysis on Fulfilment of Right of Access to Participation, Information, and Justice'. Readers will note some of the restrictions that have been imposed recently by the newly enacted Job Creation Law in Indonesia with regard to the curbing of participation processes in EIA in that country mirror the reduction of public participation processes in the Indian EIA Draft Notification discussed in the article by JOLLY and SINGH, above.

This issue also contains a review prepared by Nicola PAIN of the book by Ceri WARNOCK, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy*.

Finally, we are very pleased to report that the Chinese Journal of Environmental Law has been accepted for the Web of Science, Emerging Sources Citation Index. This is a significant milestone for our Journal, and augurs well for its continuing success. But that success is dependent on the work of many people. In this regard, as always, we thank our contributors, reviewers, readers, members of our editorial team, our editorial board members and international advisory board members, as well as the professional work of Marie Sheldon and Christina Sargent, and their team at Brill for their continuing support.

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