UCL-KCL Postgraduate Environmental Law Symposium

Thursday 1 May 2014

Dickson Poon School of Law, KCL

Kindly sponsored by **Dickson Poon School of Law, UCL Institute for Sustainable Resources and UCL Centre for Law and the Environment**

About the Symposium

The Symposium aims to provide environmental law and governance research students the opportunity to meet, present and discuss their work in a supportive environment. The sessions will be chaired by academics from UCL, KCL and beyond, all of whom are experts in the area and have already expressed their wish to be on-hand at points during the day to continue discussions outside of sessions. The Symposium is made possible by generous funding from the **Dickson Poon School of Law, UCL Energy Institute** **Dickson Poon School of Law, UCL Energy Institute, UCL Faculty of Laws and the UCL Centre for Law and the Environment**

The Symposium is organised by: Emily Barritt, PhD Candidate, KCL Dickson Poon School of law (emily.barritt@kcl.ac.uk), Kim Bouwer, PhD Candidate, UCL Energy Institute (kim.bouwer.11@ucl.ac.uk) and Larissa Boratti, PhD Candidate, UCL Faculty of Laws (larissa.boratti.11@ucl.ac.uk)

Location: King's College London, Strand Campus, Strand, London WC2R 2LS

Want to attend? Please register here: http://environmentallawsymposium.eventbrite.co.uk

Research Community

The aim of the Symposium is not only to provide research students with an environmental law-specific presentation forum. We also wanted to simply provide an opportunity for us all to meet each other and discuss our work. We hope that you will meet others with similar research interests which in turn opens potential avenues for collaboration.

We have started a Facebook Group for Environmental Law Research Students (https://www.facebook.com/groups/410859782288937/); if you use Facebook, please feel free to add yourself to the group, invite others to join and to make whatever use of it you like. But Facebook can of course be non-inclusive, so we apologise for that in advance.

Symposium Programme (abstracts follow below)

<table>
<tr><td>09:30</td><td colspan="2">Coffee and registration

Welcome
Professor Maria Lee, UCL</td></tr>
<tr><td>10.00</td><td colspan="2">Plenary Session 1: Environmental Governance</td></tr>
<tr><td></td><td colspan="2">Chair: Professor Richard Macrory CBE, UCL

Chiara Feliziani, PhD in European and Comparative Administrative Law, University of Rome “La Sapienza”

Edoardo Berionni Berna, PhD researcher in Political Theory, LUISS Guido Carli University, Rome

Katrien Steenmans, PhD researcher, University of Surrey</td></tr>
<tr><td>11.30</td><td colspan="2">Break</td></tr>
<tr><td>12.00</td><td colspan="2">Parallel Sessions 1</td></tr>
<tr><td></td><td>1A: International Environmental Law</td><td>1B: Sustainable Resources</td></tr>
<tr><td></td><td>Chair: Dr Philippa Webb, KCL

Beatriz de Sousa Fernandes, PhD researcher, University of Edinburgh, School of Law

Stuart Bruce, Research Associate to Professor James Crawford AC SC, Lauterpacht Centre for International Law, University of Cambridge

Hamideh Barmakhshad, PhD researcher Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP)</td><td>Chair: Dr Carrie Bradshaw, York

Terfa Ashwe, LLM Student in International Economic Law, University of Strathclyde,

Jerneja Penca, PhD researcher, European University Institute

Joanne Hawkins, PhD researcher, University of Bristol</td></tr>
<tr><td>13.30</td><td colspan="2">Lunch</td></tr>
</table>

14.30	**Parallel Sessions 2**	
	2A: Rights and Participation	**2B: Climate Change and Energy Law**
	Chair: Prof Jane Holder, UCL Wei-Chung Lin, PhD researcher, School of Law, University of Nottingham Eghosa Osa Ekhator, PhD researcher, Law School, University of Hull Emily Barritt, PhD researcher, King's College London	**Chair: Dr Eloise Scotford, KCL** Kim Bouwer, PhD researcher, Energy Institute, UCL Ben Christman, PhD researcher, Queen's University Belfast Catherine Caine, PhD researcher, Newcastle University
16.00	**Break**	
16.30	**Plenary Session 4: EU Environmental Law**	
	Chair: Robert McCracken QC, Francis Taylor Building Olivia Hamlyn, PhD researcher, University College London Christopher Anderson, PhD researcher, University College London Ioanna Hadjiyianni, PhD researcher, King's College London	
18.00	**Concluding Remarks** **Dr Eloise Scotford, KCL** **Reception - drinks and canapés**	

Abstracts

Environmental Governance

Local Governments and Environmental Governance: The Case of the Public Service of Waste Management in Italy and Great Britain between Environment, Market and Principle of Good Administration

Chiara Feliziani

According to a widespread “prejudice”, efficient environmental governance can be granted only by supra-national authorities, such as the European Union. And, in effect, since the 1980s the environment has become one of the core topics of the EU policy so as to sensibly affect the Member States’ legal orders. Nevertheless, is always a supra-national policy the best way to regulate environmental issues? In order to solve the riddle, the paper analyses – by a comparative approach – the case of the public service of waste management in Italy and Great Britain. More specifically, the study investigates how the two sides of that service – the environmental and the administrative ones – have been changed in the above mentioned Countries in force of the provisions settled by the EU. Thus, especially taking into account the current financial crisis, the paper evaluates if the normative *status quo* is effectively capable to guarantee a right balance between environment, market and the principle of good administration. In so doing, this paper tries to develop some final considerations about the role played by local authorities in the time of economic austerity as far as the governance of services having an environmental impact is concerned.

Regionalizing environmental protection? Towards a regional governance: the cases of the EU and the ASEAN

Edoardo Berionni Berna

According to international observers, the climate negotiation process set in Warsaw 2013 has deliver modest and disappointing results. Environmental NGOs have decided to walk out of Warsaw climate talks and to re-shift their priorities working to address climate change at the regional and local level. This level-shift undertaken by social movements rekindles the debate on the most appropriate level of governance to better protect environment. This paper offers a survey on the most recent developments of regional environmental governance and the beginning of a process of so-called «regionalization of environmental protection». The main argument put forward is that this process is currently the best solution in response to existing global policy gridlock and pressing calls for action within Fifth IPCC 2013 Report guidelines. Thus, the paper explains the theoretical framework within which to articulate a reflection on the potential of regional policy in

relation to the global level. Finally, the work introduces two different cases of regional environmental governance: the EU and the ASEAN. The selected case-studies prove that regional organizations can really represent an interesting laboratory for environmental governance from which to start rethinking and looking for innovative and realistic responses to the most compelling challenge of our era.

Developing a Regulatory Framework for Symbiotic Networks
Katrien Steenmans

Symbiotic networks have been highlighted as one of the possible responses to some of the critical challenges facing the world today, including climate change, financial pressures and waste crises. A symbiotic network engages traditionally separate institutions in a collective approach involving physical exchange of materials, water, and by-products. This research considers how regulatory and governance theories, including new governance, risk-based regulation and smart regulation, can inform the development of a supportive regulatory framework for the implementation and sustainment of symbiotic networks. In particular, the focus is on encouraging the initiation of waste exchanges within these networks. Traditionally, a bottom-up approach has facilitated symbiotic waste exchanges in order to achieve economic, environmental and social benefits. According to some studies, however, these incentives are often no longer sufficient for institutions to initiate symbiotic waste exchanges themselves. As a result, the role of regulation has been increasingly recognised but not yet fully explored. The research also assesses the relationships and overlaps between the theories. In order to deduce some of the desired characteristics for a regulatory framework, case studies of existing symbiotic networks are considered. This framework is then able to inform both policy-makers and industry in incentivising further implementation of symbiosis networks.

International Environmental Law

Through non-navigated waters: how advances on marine protected areas (MPAs) can dictate a new legal order for the oceans and seas.
Beatriz de Sousa Fernandes

The nature and application of marine protected areas (MPAs) is undergoing a process of rapid changes in the last decade. MPAs are invading maritime zones historically conceived to enlarge the authority of states to explore and exploit areas of living and non-living marine resources, such as the economic exclusive zone, but also areas beyond states' jurisdiction, the high seas. If states' practice shows room for new interpretation of the law of the sea's provisions, compatibility of MPAs with the maritime freedoms are not so clear. Debates at international level, particularly at the United Nations General Assembly, have put forward the need to create a specific protocol to

regulate MPAs or the living resources in the high seas. My project intends to discuss how advances in marine conservation, through a more robust promotion of MPAs, may be supported and/or impact the current way that the oceans and seas are ruled. It aims to identify how international law responds to the changing circumstances and values of the international community in the approach to marine conservation. But how far can the authority of states to designate MPAs go when the law of the sea and international environmental law reveal their conflicting aspirations?

International Law and Renewable Energy: Facilitating Sustainable Energy for All?
Stuart Bruce

To eradicate energy poverty and avert dangerous climate change a global 'energy revolution' is necessary, which may be facilitated by the UN's Sustainable Energy for All initiative. This paper critiques the role, character and capacity of international law — 'soft' law instruments, binding obligations and international legal actors — to facilitate the initiative's goal of doubling renewable energy share in the global energy mix by 2030. It argues that enduring challenges to action — permanent sovereignty over natural resources and energy security — are false barriers, and analyses the recent proliferation and normative importance of renewable energy policy. Despite the support for environmentally sound energy, meaningful binding energy obligations are conspicuously absent at the international level — from the UNFCCC, Kyoto Protocol and Energy Charter Treaty. Early signs of influence are seen from IRENA, but ultimately, SE4ALL will depend on unprecedented international cooperation. Four legal vehicles may galvanize such cooperation: (1) an international energy convention; (2) an energy protocol to the UNFCCC; (3) a new protocol to the ECT; and (4) an international declaration on renewable energy principles. Whatever format might be politically possible, the age of sustainable energy has arrived, and the dynamism of international energy law is crucial to a global energy transition.

Current Trend in the Environment-Related Investment Disputes and the Way Forward
Hamideh Barmakhshad

Regardless of the international efforts to create effective environmental governance, the investment protection regime has potential unintended and unanticipated consequences for future environmental regulation. States might change or adopt new regulations in order to implement international environmental law obligations or to deal with their domestic environmental concerns. Nevertheless, the affected foreign investors might question the legitimacy of these measures to be against the investment protection provisions in a Bilateral Investment Treaty (BIT) signed between two countries. The argument is that the existing inconsistency would open a morass of uncertainty for governments and foreign investors alike. This paper, based on the environment-related investment disputes, attempts to demonstrate that it is mainly the invalid assumptions by foreign

investors and also the tribunals regarding the environmental regulations that have contributed to the inconsistencies. In this context, a relevant number of environmental problems involve a high degree of scientific uncertainty. Accordingly the challenge is for the Investor-state tribunals to make reasoned decisions that pay due attention to the potential environmental harm in every dispute, despite the absence of conclusive scientific evidence. It is crucial to understand whether investor-state tribunals are properly equipped and flexible enough to deal with cases when conclusive scientific evidence is lacking. This leads to the main question which is to what extent could the precautionary principle assist investment tribunals in approaching the new generation of the environment-related investment disputes.

Sustainable Resources

Natural Resource Governance in West Africa: Did the ECPF get it right?
Terfa Ashwe

West Africa has a long history of human insecurity caused by unstable governments and political crisis. Research shows that poor natural resource governance aggravated by poverty is at the centre of most armed conflicts in the region. The Economic Community of West African States-Conflict Prevention Framework (ECPF) was adopted by the Authority of Heads of States to create a policy framework of 15 components to address human security amongst member states; one of these components is 'natural resource governance'. Through critical analysis of the ECPF along with an examination of reports, research papers in conflict and natural resource governance in West Africa and a comparative examination of the ECPF and the Natural Resource Charter, the writer will examine the natural resource governance component of the ECPF, highlighting its strengths, weakness and the challenges in its implementation. This paper aims to reveal how the ECPF can be a relevant tool used to promote environmental sustainability in the region.

Depicting transnational environmental law: the case of Green Development Mechanism
Jerneja Penca

Significant global attention is being paid to biodiversity markets. They are acclaimed for their innovative regulatory approach that brings new opportunities for effective environmental governance. At the same time, concerns emanate from the associated social, environmental and economic conflicts. But from their emergence to their operation the actual mechanisms are little scrutinized by lawyers, with the exception of REDD. These novel regulatory tools bring significant changes and challenges to both positive and normative aspects of (international) environmental law, but all of these are poorly understood if the mechanisms are unaccounted for. This paper focuses on the Green Development Mechanism. In the first part, a rigorous description of the mechanism highlights those aspects that complement (and

complicate) existing approaches to environmental governance. Among them are the underlying institutional networks, the objectives, the relationship of law to markets and compatibility of international norms with the guiding principles of the mechanism. Some of the conclusions challenge certain obscured or even black---boxed ideas in international environmental law, for instance, transferability of regulatory ideas, institutional coalitions and the role of law in regulation. In the second part, the paper posits two competing views of these processes: as 'market mechanisms' within regulatory toolbox and as 'neoliberal conservation'. Framing the same occurrences in alternative ways enables thinking of transnational law in a way that extends rather than simply recycles legal debates in either domestic or international environmental law.

Fracking: The Regulatory Dilemma

Joanne Hawkins

Fracking, an extraction technique for unconventional oil and gas, has proved highly controversial in the UK with environmental and health impacts being a central concern. Although the topic has been widely debated, such debate has focussed on the pros and cons and little attention has been given to the current regulatory system. At present, uncertainty surrounds numerous aspects of the extraction technique and the government promotion of fracking in the UK is largely founded on the assumption that a strong regulatory system is in place to control any impacts. This paper will examine the current regulation and will highlight the gaps that are present within the existing EU and national controls and their connection to potential environmental and public health damage. Such an examination will consider legislation as well as the ability of UK regulators to act. By examining the current controls, this paper will show that at present the system governing fracking is far from satisfactory, and in light of this will consider the regulatory approaches now available. Such considerations are of central importance in considering if and how a shale gas industry should develop in the UK and how environmental regulation should shape this.

Climate Change and Energy

The Damage Done: Interrogating Conceptions of Harm in Tort and Environmental Law

Kim Bouwer

Policy initiatives devised for climate change mitigation, identified enormous potential in the decarbonisation of the high-emission built environment sector; consequently it is important that these initiatives be supported. The paper explores liability in negligence for energy performance problems in domestic buildings. It commences with anexamination of the application of the duty of care in negligence, to the energy performance problem, identifying the difficulties that would be encountered. Central to the paper is the understanding that tort remedies provide at best very

circumscribed protection for the environment; this tendency is amplified when the very particular problems of climate change are taken into account. In doing so it examines the foundational underpinnings of each discipline's notion of damage, exploring how the narrow range of interests protected by tortious remedies, even a wide reaching remedy such as negligence, can not properly take account of the kinds of harm encountered in an environmental context, and particularly not in the research context. The work questions recommendations made in broader climate law literature, for piecemeal amendments to the law of tort. It is asserted that the tendencies and limitations outlined above are deeply fundamental to the structure of tort, and that such awareness is best used to manage our expectations of tort claims in an environmental context.

Energy Poverty in the EU Energy-Climate *Acquis*: Left out in the Cold?

Ben Christman

The EU's energy-climate *acquis* has developed as a response to three major policy problems: a lack of security of supply of energy, climate change and issues of global competitiveness. Energy poverty (roughly defined as the inability to keep the home warm at an adequate cost) is a growing problem across the EU; causing unnecessary misery to tens of millions of citizens, excess greenhouse gas emissions and social unrest. Despite this, the EU energy-climate *acquis* shows a concerning neglect for the social dimension of energy governance. This paper will first examine the concept of energy poverty; considering the evidence on the extent, causes and impacts of energy poverty in the EU. It will second ask how the energy-climate *acquis* is currently being used to tackle energy poverty, scrutinising the obligations imposed on member states to tackle energy poverty in the major energy directives (IME3, energy efficiency and energy performance of buildings). It concludes that EU action to tackle energy poverty is at an embryonic stage. Energy poverty is little recognised in the EU energy-climate *acquis*, and the obligations imposed on member states to tackle energy poverty are limited, vague and fragmented. Several suggestions for reform are offered.

Renewable Energy Construction and Habitat Protection: A Study of the legal mechanisms employed in the construction of a renewable energy project and the extent to which they protect the existing environment

Catherine Caine

Climate change presents an imminent threat to the world which cannot be ignored. In order to combat this problem, many states including the United Kingdom have agreed to take measures to reduce their carbon emissions, including committing to increase renewable energy generation. However, married to the notion of installing a renewable energy project, is the need for land to develop on which is affected by a specific natural element. This locational need often means that the construction of a renewable energy project will need to take place in an environmentally

sensitive area in order to obtain an efficient energy output, thus causing a conflict between the environmental principle of carbon neutral energy production and the need to protect habitats and prevent biodiversity loss. This paper will discuss planned research that aims to explore the consistency between the legal mechanisms that are designed to protect the environment in construction projects, and understand what level of environmental protection they achieve. The paper will conclude with a discussion of the benefits and drawbacks of combining empirical and doctrinal data collection, as well as the use of case study examples.

Rights and Participation

Friends of the Environment? *Amicus Curiae* in Investor-State Arbitration

Wei-Chung Lin

The investor-state arbitration mechanism is traditionally modelled on private commercial arbitration rules, thus precluding non-disputing party participation. However, investor-state disputes may involve sensitive interests of the public, and the decisions would have impacts beyond those of the disputing parties. Since arbitrators may not be aware of the broader context of the disputes, and the parties may not provide the relevant information, *amicus curiae* becomes crucial in affording such knowledge, expertise, and perspectives in arbitral proceedings. The extent to which *amicus curiae* speaks for the people who are affected by the outcome of the disputes involving the environment, and brings environmental values to the dispute resolution is the issue this paper intends to discuss.

After the introduction, the following section illustrates the features of investment arbitration, and describes the practice and the relevant procedural development in permitting *amicus* intervention in investment arbitration. The third section then explores the inputs that *amici curiae* have brought into the settlement of environmentally-related disputes. Using three prominent disputes as case studies, this section examines the extent to which *amicus curiae* can truly represent and speak for the public, and the environmental arguments advanced in their submissions have been considered in determining the investment claims.

Environmental Protection in Nigeria: Whither the African Charter on Human and Peoples' Rights

Eghosa Osa Ekhator

The Niger Delta of Nigeria wherein the oil and gas industry is located plays host to many Multinational Corporations (MNCs). The Niger Delta has been beset by many environmental problems mainly occasioned by the activities of oil MNCs. Furthermore, regulation of the activities of the oil MNCs in the oil and gas sector in Nigeria has been ineffectual. This is due to a lot of reasons. For example, corruption, lack of political will of the central (federal) government, failure to implement or enforce laws and the deliberate acts of MNCs defying the extant laws. This paper will

highlight the impacts of the African Charter on Human and Peoples Rights (ACPHR) on environmental protection in Nigeria. Nigeria enacted the ACPHR into its municipal legal system in 1983 via the instrumentality of the African Charter on Human and People's Rights (Enforcement and Ratification) Act 1983.

Environmental Rights under the Aarhus Convention

Emily Barritt

The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') has been applauded as the clearest statement in international law of a fundamental right to a healthy environment.[1] However, this praise is preemptive as express pronouncements of a right to a healthy environment are contained only in the Convention's preamble.[2] The first part of Article 1, to which this fundamental right is attributed, reads as follows: 'In order to *contribute to the protection of the right* of every person of present and future generations to live in an environment adequate to his or her health and well-being ' Accordingly, it does not actually guarantee a fundamental right to a healthy environment. Rather it is a moral pronouncement that *presumes* the existence of the right. The Convention does, however, guarantee a number of procedural rights: access to information, public participation and access to justice in matters relating to the environment. This paper argues that these procedural rights should be interpreted in terms of the moral presumption of Article 1 so as to arrive at a quasi-substantive right to an environment adequate to human health and well-being. Not quite the clearest statement of a fundamental right to a healthy environment – but an important step in guaranteeing such a right in the international legal order.

EU Environmental Law

Pesticides regulation and space for non-scientific considerations

Olivia Hamlyn

European authorisation procedures governing products which pose risks to the environment tend to be based primarily on the results of scientific risk assessment. Despite this, the European Union has acknowledged a need, when authorising such "risky products", to consider non-scientific issues such as ethical concerns and their social and economic impacts. So far, however, the EU's acknowledgement has been confined to the realm of rhetoric, meaning there is a substantial gap between its words and its action.

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[1] Adriana Fabra Aguilar and Neil Popović, 'Lawmaking in the United Nations: The UN Study on Human Rights and The Environment' (1994) 3 Review of European Community & International Environmental Law 197; Sueli Giorgetta, 'The Right to a Healthy Environment, Human Rights and Sustainable Development' [2002] International Environmental Agreements: Politics, Law and Economics 173

[2] Paragraph 7 of the preamble

This paper will take the EU's pesticides regulatory regime as a case study to analyse the nature of this gap, focusing, in particular, on the Sustainable Use Directive (SUD) and the Plant Protection Product Regulation (PPPR). It will consider the potential provided by each instrument for incorporating non-scientific issues into pesticides regulation and the extent to which the instruments support each other's aims. It will argue that while the SUD represents progress by the EU in acknowledging the relevance of some non-scientific issues in pesticides regulation, the EU could have gone further and that such issues are still largely absent from the central, technical authorisation process contained in the PPPR.

The Precautionary Principle and Cost-Benefit Analysis as Legal Concepts in European Union and United States Law

Christopher Anderson

The precautionary principle and cost-benefit analysis have played outsized roles in debates over the proper nature and scope of environmental law and risk regulation, particularly in describing European versus American styles of regulation. Despite the substantial literature, however, relatively little attention has been paid to the nature of these concepts within each legal system (for example, whether each system treats them as legal rules, legal principles, or as outside the realm of law altogether). This gap in analysis has led to considerable misunderstanding in comparisons of the two systems. I attempt to clear up some of the confusion by examining the conceptions of precaution and cost-benefit analysis in the administrative law of the EU and US. I conclude that in the EU, these ideas have been developed largely within legal discourse. US law, by contrast, is generally agnostic on these ideas, treating them instead as questions of policy for political resolution. The differences in the way that precaution and cost-benefit analysis are treated in the two systems reflect larger differences in the role of law in defining and constituting the public interest. I suggest that understanding these differences may be helpful in facilitating interactions between the two regulatory systems.

The EU as a Green Leader through 'Internal Environmental Measures with Extraterritorial Implications'

Ioanna Hadjiyianni

EU internal environmental measures often regulate issues of transboundary nature. Increasingly, the EU is adopting *internal* environmental measures, which more explicitly pursue *external* environmental protection. Especially in situations where international environmental action is insufficient or non-existent, the EU is not willing to wait for international regimes to move forward but instead adopts internal environmental measures with extraterritorial implications (IEMEIs). These measures extend the reach of EU environmental law beyond EU borders and are usually of a unilateral nature, in that they are adopted in regulatory areas where multilateral action is

preferable and an international organisation is or should be regulating instead. These measures can have significant implications for the formulation of third country and international policies. This paper identifies this particular phenomenon of EU external environmental action and considers how they are increasingly prevalent in EU environmental law.

IEMEIs exist in various forms depending on their features and functions as well as on the issue regulated, and they can have different potential and actual effects. IEMEIs range from direct extraterritorial measures with compulsory elements to less direct, facilitative and enabling measures. In identifying the relevant legal elements for analysis of IEMEIs, this paper will consider recent examples of internal environmental legislation, including legislation on ship recycling, inclusion of aviation emissions in the EU Emissions Trading System, legislation on sustainable biofuels and regulation of imports of timber and timber products in the EU. This range of measures shows that there is an increasing legal phenomenon to be studied, and that, because there are multiple possible ways in which the process of IEMEIs can develop, the circumstances and results they can lead to are quite unpredictable legally. This paper aims to identify this particular legal activity of EU external environmental action and the legal issues pertinent to understanding and examining them as a supplementary mode of EU environmental leadership.