EMERGING ISSUES IN INTERNATIONAL AND TRANSNATIONAL LAW RELATED TO CLIMATE CHANGE

INTERNATIONAL ENVIRONMENTAL LAW CONSULTATION WORKSHOP

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CONFERENCE REPORT

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ACRONYMS

CDM	Clean Development Mechanism
CIGI	Centre for International Governance Innovation
COP	Conference of the Parties
ETS	emissions trading scheme
FLEGT	Forest Law Enforcement, Governance and Trade
GHG	greenhouse gas
ICJ	International Court of Justice
ILRP	International Law Research Program
INDC	intended nationally determined contributions
IP	intellectual property
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
REDD	Reducing Emissions from Deforestation and Forest Degradation
SDSN	Sustainable Development Solutions Network
UNFCCC	United Nations Framework Convention on Climate Change
VPA	voluntary partnership agreement
WRI	World Resources Institute

CONFERENCE REPORT

By Oonagh Fitzgerald, Patrícia Galvão Ferreira and Kent Howe

INTRODUCTION

The International Law Research Program (ILRP) of the Centre for International Governance Innovation (CIGI) held its first multi-stakeholder international environmental law consultation workshop on February 18, 2015. Under Chatham House Rule, in a round table format, there were 29 participants, with 19 making introductory comments. Participants represented the following stakeholder groups: think tanks, private legal practice, public sector (municipal, provincial and federal), non-governmental organizations (NGOs), Canadian and foreign university faculties of law and other relevant faculties, private sector and scholarship students.

SUMMARY OF RECOMMENDED AREAS OF FUTURE INTERNATIONAL LAW RESEARCH

- supporting the United Nations Framework Convention on Climate Change (UNFCCC) global framework
- methods for domestic and transnational implementation
- regulation of geo-engineering
- post-Paris strategies
- compliance and performance management
- mechanisms to reduce forest-related emissions
- national discussion on Canada's intended nationally determined contributions (INDCs)
- climate governance issues and role of subnationals
- relative merits of a carbon tax and other market mechanisms
- climate change risk assessment and management best practices
- legal recourse mechanisms for mitigation and adaptation and to compensate for loss and damage
- human rights and climate change
- eco-innovation and technology transfer

Research should focus on **supporting the UNFCCC global framework** and only support private and subnational initiatives that ultimately strengthen the global framework. To the extent possible, research should explain how existing international trade, human rights and environmental law can be interpreted as complementary and not opposed to climate change law. It would be useful to develop short information pieces (primers) on key elements of the UNFCCC infrastructure. Researchers could work with global partners to gather examples and develop best practices regarding **methods for domestic and transnational implementation**. Research could focus on challenges. Longer-term research could consider how international key elements of the emerging draft agreement and the related implementation **regulation of geo-engineering** could be accomplished using existing and new mechanisms (for example, developing a research registry or clearing house to improve transparency about research undertaken and results achieved), and consider **post-Paris strategies** and even contemplate the successor to the UNFCCC.

Research could focus on the role of international law in the design of a Paris agreement that addresses **compliance and performance management** and encourages linkage and coordination among INDCs, in particular those dealing with regional, national and subnational emissions trading mechanisms, including design options to connect non-state actors, public actors and the UNFCCC to strengthen transparency, compliance and verification of states' performance. Research could focus on global regulatory **mechanisms to reduce forest-related emissions** in developing countries (for example, comparing the efficacy of Reducing Emissions from Deforestation and Forest Degradation [REDD] and Forest Law Enforcement, Governance and Trade [FLEGT] in strengthening climate change-related forestry governance).

Research could contribute to a **national discussion on Canada's INDCs** and adopting the goal of "net zero" (phasing out carbon emissions) by 2050, already supported by many countries. Such research should link to other researchers in Europe, the United States and India (for example, World Resources Institute [WRI], Belfour, Harvard University and Arizona State University) for exchange and leveraging of ideas. Following the release of the United Nations' spring 2015 report from its Deep Decarbonization Pathways Project, researchers could examine how international and transnational law can assist in achieving deep decarbonization for Canada. Research could consider whether allocation of the right to extract fossil fuels may be a feature of future climate change law.

Research could examine **climate governance** issues: how dynamics of centralized authority, voluntary compliance, like-minded "clubs" and international rivalries contribute to or detract from achieving an effective global climate change framework agreement; how international norms can be used as litigation tools as well as political mobilization tools; and how voluntary regimes can mature into ones that legally bind (for example, the New York Declaration on Forests —

released at the 2014 UN Climate Summit — is an initiative by private-sector interested actors that could evolve from soft law to more binding norms). Research could consider the **role of subnationals** (provinces and municipalities) in mitigation and adaptation, and how they contribute to international discourse. The Ontario government's Pan-American Climate Summit (Toronto 2015) would be an excellent opportunity to do so. Researchers could prepare a submission in response to *Ontario's Climate Change Discussion Paper 2015*.

Researchers could convene an international and subnational discussion to examine **relative merits of a carbon tax and other market mechanisms** (cap and trade), including discussion on fraud and verification. Research could focus on how domestic and foreign subnational and national carbon markets integrate and link to international markets. Research could address how to design carbon emissions trading schemes (ETSs) that are resistant to manipulation and criminality.

In the short term, research on the linkages among developing national climate change risk assessment and management best practices; existing international, transnational and national **legal recourse mechanisms; and loss and damage** under the Warsaw International Mechanism, could contribute to the June 2015 meeting in Bonn to help dissipate the logjam between developed and developing states (and NGOs) regarding inclusion of loss and damage in the Paris text. The aim would be to deepen research into climate change risk assessment, study how existing legal recourse, dispute settlement and adjudication mechanisms can be used to support mitigation and adaptation and compensate for loss and damage and propose additional solutions (for example, an international environmental court). There could be an event with small island and Arctic states and other key negotiators interested in these questions.

Research could further elaborate how securities reporting regulations, the Ruggie Principles,[1] John Knox's analysis of **human rights and climate change** and such standards as the Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises are resulting in adoption of improved environmental responsibility and more accurate and measurable transparency in the extractive industry, other heavy greenhouse gas (GHG)-emitting industries, forestry, agriculture, transportation and the insurance underwriting business. Researchers could explore the intersection between the UNFCCC process and the establishment of the post-2015 sustainable development agenda and how international law can help to operationalize those sustainable development goals relevant to human rights, development and climate change. Researchers could explore how to strengthen administrative and human rights law related to the administration of the Clean Development Mechanism (CDM) and the Green Climate Fund, and consider how measures to suppress peaceful protest for alleged security reasons could interfere with mobilizing concerned citizens.

Research could focus on how existing multilateral, regional and bilateral trade agreements, bilateral cooperation and policy experiments can facilitate **eco-innovation and technology transfer** to support climate change mitigation and adaptation, and engage with the International Centre for Trade and Sustainable Development to develop international policy approaches to promote climate-friendly technologies.

In conducting international law research on climate change, the CIGI ILRP will lead and produce practical, balanced research that reflects the highest standards of international law expertise and draws on the knowledge and experience of public sector, private sector and academic experts. In order to pursue its research agenda, the ILRP will build partnerships with individuals and institutions with interest and expertise on these issues. This first consultation workshop was an excellent first step in identifying the salient themes and experts. A working group will be created to shape the research agenda. The ILRP welcomes feedback about working group membership and work plan.

OBSERVATIONS FROM THE CONSULTATION WORKSHOP

The objective of the consultation was to receive guidance on whether and how the CIGI ILRP can make a significant contribution, leveraging the expertise and efforts of others who are active on climate change domestically and internationally.

There was discussion of the February 2015 meeting of the UNFCC in Geneva; it was the last negotiating opportunity before the meeting that will work on the draft text for Paris 2015. The text is essentially the same as that agreed at the Conference of the Parties (COP) 20 in Lima, albeit expanded, including references to human rights as proposed by Chile. The key expectation is that developed countries such as Canada will be bringing forward their INDCs by March 31, 2015. Between now and June there will be informal subsidiary body meetings, at the discretion of the organizers (for example, a meeting in Lima, March 21-22, was focused on adaptation and loss and damage).

Referring to an observation made by the World Bank, *Ontario's Climate Change Discussion Paper 2015* notes that after 20 years of international negotiations we are using more energy, burning more fossil fuels and producing more GHG emissions than at any time in history (World Bank 2013). Workshop participants were asked to advise how the ILRP and its research partners can contribute to the UNFCCC process and other processes to deal with climate change in an effective and timely way.

1 The United Nations Guiding Principles on Business and Human Rights are informally known as the Ruggie Principles due to their authorship by Harvard professor John Ruggie, the UN Special Representative for Business and Human Rights, who conceived them and led the process for their consultation and implementation.

A workshop participant noted that the INDCs are currently under discussion. One helpful initiative is Open Book, released by the Washington-based WRI: "Open Book is a WRI initiative to enhance transparency of the INDCs, and will develop a comprehensive list of information for countries to provide when communicating their INDCs in 2015" (WRI 2015). It appears that Canada has not yet confirmed participation, but countries such as New Zealand and the United States have already indicated they will join. The text includes some reference to sanctions against those that do not submit their INDCs, although the language is vague.

Session 1: International, Transnational, National and Private Law Frameworks Relevant to Climate Change

A participant noted a helpful paper by the Harvard Project on Climate Agreements that proposes that negotiators should focus on common definitions of key terms (Bodansky et al. 2014). There is also work being done on provision for registry and tracking mechanisms, and ongoing discussions on how to monitor and assess INDCs, including the role of non-state actors and the private sector in contributing to compliance mechanisms. The WRI initiative could facilitate comparison of performance. Non-state actors such as WRI and Germanwatch can contribute to building a compliance process, especially if we risk losing the opportunity to create a centralized, top-down compliance system. Germanwatch ranks Canada 58th out of 61 countries, among the lowest performers in terms of climate change performance and "the worst performer of all industrialised countries"(Burck, Martin and Bals 2014, 6). Canada is behind in its Copenhagen commitments and has not yet embraced the net zero concept.

A workshop participant said that at the Geneva meetings of the UNFCCC, carbon markets were an important subject of negotiations, but the conclusion was that markets did not necessarily have to be mentioned in the Paris agreement text in order to facilitate access to international trading regimes. References to trade sanctions were included in the text, but with constructive ambiguity. There is recognition that whatever comes out of the UNFCCC will have trade implications and therefore affect "common but differentiated responsibilities." Negotiations moved away from preoccupation with binding agreements and formal international compliance mechanisms. If done right, establishment, implementation and monitoring of the INDCs can be just as compelling as internationally predetermined targets. They can ensure as much transparency and allow as much peer pressure as an international compliance mechanism. Stakeholders will be able to assess whether publicly proposed INDCs are seriously implemented. For some it may seem like regression to go from the reporting compliance mechanisms of Kyoto to "sunshine methods" of transparency and peer pressure. However, non-state actors are demonstrating how they can help hold states to account in climate peer review. The climate regime is embracing these more informal linkages — for example, on the UNFCCC website there are linkages to the bulletin of the International Institute for Sustainable Development, a non-state actor think tank; the bulletin reports on the state of negotiations. Another example is the NGO Traffic, which verifies state compliance with the Convention on International Trade in Endangered Species.

REDD was identified as an example of how private and public actors can generate learning and governance experimentation in climate change despite the absence of a global framework. With REDD, states were encouraged to move forward with national project experimentation, and the global rules are being discussed along the way, informed by experience. There were no deforestation-related targets. In contrast, the CDM created top-down rules, adopted during COP negotiations, and later these rules faced implementation problems, negative implications and ineffective schemes that required adjustment of the rules. Efforts to improve design for CDM rules are ongoing.

There are interesting questions about how to conceptualize the evolving global climate change framework agreement. Michael Greenstone, professor of energy policy at the University of Chicago, recently wrote a *New York Times* article on the voluntary versus binding nature of climate agreements, noting that motivation to comply or not is more important than the specific form of the agreements (Greenstone 2015).

It was noted that margin discussions at Geneva revolved around what would be the big deliverables from Paris. France seemed particularly interested in innovative suggestions about emissions accounting in the land sector. It would be worthwhile considering the relevance to Canada, as this could be one of the main Paris contributions.

Jeffrey Sachs (with the Sustainable Development Solutions Network [SDSN]) and Laurence Tubiana (with the Institute for Sustainable Development and International Relations) released an interim report in 2014 (UN 2014) and will be releasing the UN *Pathways to Deep Decarbonization* report in spring 2015 to demonstrate how countries can contribute to achieving the globally agreed target of limiting global temperature rise to below two degrees. The SDSN press release states:

> The 15 national pathways all demonstrate the importance of three pillars for the deep decarbonization of energy systems: (i) greatly increased energy efficiency and energy conservation in all energy end-use sectors (including buildings, transport and industry); (ii) the decarbonization of electricity, achieved by harnessing renewable energy sources such as wind and solar, as well as nuclear power, and/or the capture and sequestration of carbon emissions from fossil-fuel burning; and (iii) replacing the fossil fuels that drive transport, heating and industrial processes with a mix of low-carbon electricity, sustainable biofuels and hydrogen. Countries have several options to achieve deep decarbonization,

based on differences in the resource base and public preferences. (SDSN 2014)

A workshop participant suggested that preventing or regulating extraction may be the most effective way to control this problem, but this is antithetical to the usual approach to environmental problems.[2] Another participant noted that there has been considerable focus on the production aspect of carbon-heavy fuels, but it is also important to consider the aspect of consumption. Demand for fossil fuels is increasing with global economic and population growth. There was a query whether frameworks for controlling production should also address the appetite for consumption. Doing so might facilitate the creation of mechanisms to trigger accountability.

A participant commented that climate change has the four attributes of a "super wicked problem" (Lazarus 2009): it is urgent and time is running out (despite 20 years, we are still using more energy); the people trying to solve the problem are those creating the problem (consumption is crucial); there is no central authority (UNFCCC is weak on compliance and enforcement) and international relations rivalries will factor into the process; and policy responses discount the problem irrationally (postponement aggravates the problem). Slowing climate change and facilitating adaptation may give us more time and will prevent us from resorting to geo-engineering. Abundance of fossil fuels is a key aspect of the issue, so frameworks to keep fossil fuels in the ground must be a priority in terms of policy response. The legal framework should be modified to remove subsidies that encourage extraction and use of fossil fuels. The focus should be on slowing down climate change, as this will also ease the adaptation agenda. Consideration could be given to a global auction of rights to extract fossil fuels.

Because the Canadian government is not playing a leadership role, one cannot have high expectations for positively impacting the Paris UNFCCC process. It might be useful to develop alternative approaches and focus on areas where Canada has more credibility, for example: studying climate change and Arctic governance; developing a legal framework for geo-engineering to manage enthusiasm for scientific fixes (developing a regulatory approach would add value because the potential consequences of geo-engineering are incalculable and there is no regime to govern even small-scale experiments); studying climate governance and trade rules; and, finally, drawing on Canadian financial expertise to create public and private systems of incentives and disincentives to assist the developing world to make the transition to a low-carbon economy.

Session 2: Contribution of Subnational Entities

A workshop participant noted that at Lima, COP 20 municipalities were given a stronger voice and it was evident that in the Americas there has been at least as much, if not more, leadership on addressing climate change at the subnational level as at national levels. Municipal and other subnational climate change initiatives have been among the most effective in the last 20 years. This is because the impact of climate change is felt municipally (for example, at the level of infrastructure for roads and stormwater systems), and the crucial policy levers (such as urban planning, transit, building codes and energy generation) are at the municipal level. There is already a pool of organizations around the world aggregating these local initiatives to strengthen their voices, both in Canada and worldwide. The Federation of Canadian Municipalities Partners for Climate Protection initiative is more than 15 years old. Ontario is an interesting test case to study how to link domestic and foreign subnationals and integrate them into a global legal framework.

With more national and subnational carbon-pricing regimes, national governments will have to consider promulgating border adjustment mechanisms to level the playing field between domestic and foreign industries. There is a way to do this that is consistent with international trade and investment commitments, specifically the requirement to give national treatment. Similarly, incentives to develop a green economy have to be consistent with international trade and investment law. Reference was made to trade disputes concerning Ontario's green energy program and Quebec's ban on fracking. Since coal is the worst source of GHGs it would make sense to develop trading rules that facilitate coal users converting to cleaner sources of fuel.

Ontario has already undertaken perhaps the largest single action in Canada (perhaps the world) in reducing emissions by phasing out coal-fired electricity generation. This is a way of driving transformation in the economy. Globally, however, coal remains a huge challenge to overcome. In the developing world, electricity is needed to lift people out of poverty and 80 percent of electricity generation around the world is from coal. Even within Canada there are significant differences of viewpoint and interest regarding continued extraction of fossil fuels. In Ontario, where we live and how we work determine 80 percent of our emissions, with 34 percent of emissions now coming from transportation. A query was raised as to whether Ontario needs a carbon-trading system to remain competitive. Another question was raised as to whether decentralized electricity generation and provision on the one hand, a globally connected grid based on solar and wind power on the other, or a combination of the two, is the better approach to creating sustainable prosperity.

2 For support of the idea of extraction regulation, see George Monbiot writing in *The Guardian*: www.theguardian.com/theenvironment/2015/mar/10/keep-fossil-fuels-in-the-ground-to-stop-climate-change.

Session 3: Role of Civil Society and Indigenous Peoples

There are many aspects of climate change and land use planning (agriculture, forestry, resource extraction or energy infrastructure projects) that give rise to the need for prior informed consultation and consent of indigenous peoples. Workshop participants agreed that it made sense to collaborate with other organizations actively engaged in researching these issues (for example, the Centre for International Sustainable Development Law, the Centre for International Forestry Research and the International Centre for Trade and Sustainable Development).

A participant observed that there is enthusiasm about framing climate change as a human rights challenge and thereby contributing to the UNFCCC negotiations. Human rights law offers authoritative norms and an existing institutional framework. The Inuit experience before the Inter-American court was disappointing and there is little evidence that it led to any change in perception among the Inuit about the issue of climate change or their rights. Human rights could be useful to tailor climate change mechanisms such as REDD in a way that respects human rights in general and indigenous rights in particular. For example, human rights activists' mobilization around REDD led Indonesia to advance indigenous rights more than any other scheme specifically designed to protect indigenous rights. Thus, climate change mechanisms may provide top-down (World Bank and multilateral development banks) and bottom-up (activist) opportunities to persuade governments to take human rights and indigenous rights seriously. Contrary to some expectations, the carbon marketplace itself also favoured REDD projects that protected human rights.

REDD entered the climate negotiations because deforestation and land degradation are significant sources of GHG emissions in many developing countries with weak domestic governance systems. The international community needed to find effective ways to help developing countries promote domestic governance reform and make realizable international pledges to reduce forest-related emissions. Despite billions invested in governance reform initiatives using bilateral and multilateral development agreements (for example, the Canadian International Development Agency, the United States Agency for International Development and the World Bank), improvements in governance indicators have been negligible. REDD was originally designed using financial incentives to drive behavioural change: private actors would directly give financial incentives to those local actors engaged in projects to reduce deforestation, and they would only pay based on proven environment services performed. After 10 years of REDD, there are 58 countries still building the minimum domestic capacity to make them ready for REDD, i.e., to allow them to enter carbon markets to finance forest conservation efforts in the future. It is not clear that the economic experiment is working. An alternative approach is the European Union's FLEGT, under which European countries use trade incentives to lure forest-rich developing countries into signing voluntary partnership agreements (VPAs) as part of bilateral trade agreements. By signing VPAs, developing countries agree to create domestic governance systems (including multi-stakeholder committees and independent verification of compliance) in the forestry sector to impede illegal timber from entering European markets. Research comparing the efficacy of REDD and FLEGT would be useful in strengthening forestry governance related to climate change.

It was noted that the issue of loss and damage (the Warsaw International Mechanism) is a source of disagreement between developed countries, which view this as a matter of adaptation, and developing countries, which view it as a matter of reparation. This disagreement is unlikely to be resolved by COP 21. To achieve climate justice at the international level, there is a need to adopt some kind of compensation fund/mechanism. Even if some kind of mechanism is included in the Paris text there are details of funding, transparency, accountability, participation and due process to be addressed. It was suggested that because there are already references to loss and damage in the draft convention that will be legally binding if the convention is adopted in Paris, it might be prudent to avoid a fight that could prove to be a deal-breaker.

The current discussions about the post-2015 sustainable development agenda will set the trajectory for sustainable development efforts for many years to come. The development agenda presents opportunities (such as including human rights and indigenous perspectives) and risks (such as the co-option of funding by business interests masquerading as climate change projects), and should be carefully monitored.

Working Lunch

Participants considered that the ILRP should do the following: tap into activities being led internationally by the UNFCCC and locally by the Province of Ontario to add useful research, such as on the advantages and disadvantages of a carbon tax and other market mechanisms; aim to bridge the academic and practical worlds by providing easily digestible information on key international law issues related to climate change; and do research on how the issue of loss and damage could impact Canada and Ontario, considering what interim steps could support the development of a loss-and-damage mechanism in the future. Participants considered it important to try to address the international embarrassment arising from Canada's positions on climate change.

Session 4: Role of Business and Industry

A workshop participant observed that securities regulation by the Ontario Securities Commission and the US Securities Exchange Commission requires listed corporations to disclose material events and trends, including direct and indirect effects (including GHG emissions) and potential impacts

of extreme weather. In the United Kingdom, since 2013, corporations have to report on climate change. Hong Kong requires sustainability reporting. Listed companies already disclose all their oil deposits, but state-owned corporations may not be listed and thereby avoid reporting requirements. As investors become more interested in carbon divestment and stranded carbon assets, there is a pressing need to strengthen regulatory cooperation and data collection so that standards and measurements can be compared internationally.

The Ruggie Principles, which are broader than securities regulations, are not so much about disclosure to investors, but about disclosure to and engagement with relevant stakeholders. Ruggie's three pillars are: that states should protect human rights; that business should respect human rights; and that the state and business should provide judicial and non-judicial remedies. These have been incorporated into the OECD Guidelines on Multinational Enterprises (revised in 2011 to explicitly reflect this), the International Finance Corporation performance standards on environmental sustainability and the Global Reporting Initiative. John Knox, the first independent expert appointed by the UN in 2012, is characterizing environmental rights as human rights, relating to the enjoyment of a safe, clean, healthy and sustainable environment. Business has a role to play in addressing human rights and climate change.[3]

Session 5: Green Transition, Innovation and Resilience

A workshop participant suggested that a comparative study of different forms of carbon pricing (carbon tax, cap and trade, sectoral regulation) was needed and should consider feasibility, complexity, efficiency, effectiveness, overall societal costs, implementation costs, distributional impacts and fairness. Carbon taxes have major strengths — economy-wide impact, highly efficient (at least when compared to a cap-and-trade regime), administratively feasible (relatively easy to integrate) — but their weakness is their visibility to voters.

Cap and trade is less visible than a carbon tax, with costs left to final emitters and embedded in prices. Its complexity allows for adaptability of different interests, but no one has yet designed an ETS that works as intended: carbon prices keep collapsing, and impacts are limited to the sectors targeted (i.e., big final emitters). It was noted that Quebec is anxious to have a partner in the carbon-trade regime, and may lobby Ontario to adopt a grand bargain, in exchange for access to hydro imports from Quebec. Sectoral regulation has a high certainty of outcomes and compliance but its weakness is that it is limited to the target sector, and can generate regional and sectoral regulatory conflict.

Nobel Prize-winning political economist Elinor Ostrom suggested that grassroots leadership was needed to get political support for sustainable growth.[4] She became convinced that cities were the answer for sustainable development. Moises Naim's book *The End of Power* discusses the diffusion of power. Cities are emerging as important players and, despite governance challenges, they are well placed to address climate change. Large cities can have emissions cap-and-trade systems, and can trade with each other if the markets are connected. The World Bank is working on this. There was some skepticism about the risk of fraud and graft, as city governments have been susceptible to corruption. The suggestion is that the inventory of GHG emissions is highly knowable within a city as compared to an international market but this does not address the risks of trading between foreign cities. It was proposed that six major international cities should try this. To count the city's GHG emissions, "scopes" were developed by WRI and World Business Council Sustainable Development to avoid double counting: Scope 1 includes all emissions in Toronto; Scope 2 includes emissions generated in Toronto but used outside; and Scope 3 includes embodied emissions imported and used in the city. It was noted that integrating markets is complex, and even though Quebec and California have the same standards, integration of their markets is taking years. It would be best if the international negotiations yielded common standards for municipalities that all cities could follow to facilitate intercity trading.

Climate engineering or geo-engineering involves deliberate large-scale manipulation of the environment to mitigate climate change and raises complex international governance and ethical issues. Specifically, the hypotheses of CO_2 removal and solar radiation management are now being tested in field experiments and impacts are being measured. Climate engineering creates moral hazard in that it can be seen as the technological solution to a problem caused by technology, but it should not be seen as a replacement for adaptation and mitigation. It may be a necessary adjunct. It will be important to develop an international legal framework, perhaps building on the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972), to ensure environmental protection and international oversight. Private corporate interests in this experimentation need to be disclosed.

3 See the IBA report on climate justice: www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx.

4 Ostrom (1990) identified eight design principles of stable local common pool resource management: clearly defined boundaries (effective exclusion of external un-entitled parties); rules regarding the appropriation and provision of common resources that are adapted to local conditions; collective-choice arrangements that allow most resource appropriators to participate in the decision-making process; effective monitoring by monitors who are part of or accountable to the appropriators; a scale of graduated sanctions for resource appropriators who violate community rules; mechanisms of conflict resolution that are cheap and of easy access; self-determination of the community recognized by higher-level authorities; and, in the case of larger common-pool resources, organization in the form of multiple layers of nested enterprises, with small local common pool resources at the base level.

Session 6: Courts, Remedies and Adjudication

The idea of an international environmental court or tribunal is not new, and there are no legal impediments to its creation, but there could be political impediments. The UNFCCC has not ruled out arbitration and judicial dispute settlements. Article 14 lists modalities of dispute resolution, application and interpretation of convention. It allows for parties to use existing courts. When parties join the convention they can opt to submit conflicts to the International Court of Justice (ICJ) or other dispute settlement mechanisms, including arbitration. There is an open door to explore these procedures, including adopting conciliation procedures. Actual mechanisms are open to discussion.

Many bodies have already had to deal with disputes related to environmental issues (for example, the *Chevron v. Ecuador* arbitration dealt with important climate justice issues). Considerations that arise in such cases are standing (i.e., who has the right to bring a claim or otherwise participate in a proceeding), competence of some of these bodies, and the level of skill and knowledge of members in areas other than trade and investment law. The International Court of Arbitration now has a specific unit for settling environmental disputes. The Stockholm Chamber of Commerce is interested in the question of transboundary harms in the context of investment disputes. The United Nations Conference on Trade and Development is actively considering how to improve the next generation of bilateral investment treaties and how to modernize or reform international investment dispute settlement mechanisms. One proposal it is exploring is the creation of an international investment court or appeals court. In the past the ICJ has not proven amenable to settlement of environmental disputes. A workshop participant suggested that with the deep integration of global environment and global economy, the time is right to start laying the foundation for an international environmental court to resolve disputes on the plethora of existing international environmental treaties and regimes, help to harmonize existing legal regimes at the national and international level, and enhance access to justice where there are gaps. A question was posed as to whether it would be useful to frame a request for an advisory opinion from the ICJ to start to develop international climate change jurisprudence.

There are many similarities between shared water law and climate change law. The main difference is that usually in water disputes there is equality between the states involved. Climate change is different, with specific recognition of differentiated responsibilities. Water law is governed by two principles — equitable and reasonable utilization, and no significant harm — with the second principle being subsidiary to the first, requiring due diligence obligation only. UN bodies have subjected the no significant harm principle to equitable and reasonable utilization. If a state causes significant harm that is not justified by equitable and reasonable utilization, the affected state can seek adaptation, mitigation, resolution and even compensation. States have agreed to compensate for environmental harm in this area, so it is conceptually possible to do the same with climate change harm.

Flooding caused when municipalities are not prepared for extreme weather is a potential source of class action litigation (for example, cases involving Thunder Bay, Mississauga and Chicago). Corporations need to take into consideration the environmental impacts of their decisions.[5]

BACKGROUND ON THE CIGI ILRP

Globalization and the increased interaction and integration of governments, peoples, environments, businesses, technologies, products and ideas present new governance challenges that call for a reassessment, revision and reinforcement of the international rule of law. As a multicultural and multilingual nation of indigenous peoples and immigrants, defined by good governance, rule of law and respect for human rights, Canada is well positioned to exercise global leadership in improving the international rule of law. With its global and regional networks of influence and an advanced economy reliant on trade and investment, information technology and innovation, and with actual or potential competitive advantage in finance, energy, extractive industries and the environment, Canada has much to contribute and much to gain through improving the globalized rule of law.

The CIGI ILRP is unique in being a non-partisan research program straddling and leveraging academic, business and governmental perspectives, and focused on understanding and improving international law for better global governance. With funding from the Province of Ontario and a private donation, the ILRP is located at the award-winning CIGI Campus in Waterloo, Ontario.

The ILRP's vision is to strive to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The ILRP's mission is to seek to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world. The ILRP will focus on the areas of international law that are most important to global innovation, prosperity, sustainability and security.

5 *BCE Inc. v. 1976 Debentureholders*, [2008] 3 SCR 560, 2008 SCC 69 (CanLII), http://canlii.ca/t/21xpk.

Through the ILRP, CIGI will provide opportunities for stakeholders in the public and private sectors to collaborate in advancing their knowledge and understanding of international law, and in exploring theoretical approaches to international law and testing them in practice. Benefitting from CIGI's multidisciplinary research environment, the ILRP will endeavour to find innovative and creative ways for international law to improve global governance. ILRP research will contribute to multidisciplinary work across CIGI's other programs, for example, providing international law support to CIGI research on Internet governance, Arctic governance and climate change governance.

The ILRP will develop concentric circles of knowledge and influence, from local and provincial to national and international spheres, connecting all with cutting-edge, relevant and practical international law research and policy advice. As appropriate to further its research agenda, the ILRP will engage individual international law experts from academia, the public and private sectors, law faculties and other relevant academic institutions, professional organizations, all levels of government, international governmental organizations, NGOs and other international institutions.

Through its networks of influence the ILRP will produce world-class workshops, conferences, reports and policy briefs. It will become an established and internationally recognized international law research program and centre of excellence focused on global governance. The ILRP envisions employing up to 19 senior fellow full-time equivalents as research, consulting and mentoring experts. Complementing this will be a cohort of research fellows and post-doctoral researchers, and up to 10 student researcher/practitioners and 20 graduate scholarship recipients. CIGI Campus residency requirements for all graduate scholarship recipients and post-doctoral fellows will deepen and widen future international law research networks.

In consultation with public, private and academic sector experts in international and transnational law, the ILRP has developed a strategic plan focused on advancing knowledge and understanding in three vital areas of international law, detailed below: international economic law, international intellectual property (IP) law and international environmental law.

International Economic Law

International economic law is a vast field, which for purposes of research focus has been subdivided into three key areas. Within each there are many potential avenues to explore:

- international and transnational governance and regulation of cross-border insolvency and sovereign debt;
- multilateral harmonization of local regulations in the global value chain, including developments in private international law and adoption of the Ruggie Principles on business and human rights; and
- emerging issues in international trade and investment law, in particular: governance of multilateral and preferential trade agreements; and assessing use of investor state arbitration in diverse contexts (case studies).

International IP Law

The ILRP's study of international IP law will initially focus on five key aspects, but will evolve with the pace of innovation and related international law governance challenges:

- green/clean technology;
- adaptation of international IP law frameworks for innovation and collaboration;
- evaluating international IP rules and the advantages and disadvantages of multilateral versus like-minded or regional IP instruments (case studies);
- protecting IP rights while unlocking and commercializing IP; and
- disseminating functional international IP knowledge to innovators.

International Environmental Law

The ILRP's research on international environmental law issues aims to advance effective use of science-based international, transnational and national law to protect the environment, reverse climate change and achieve sustainable prosperity:

- assessing the efficacy of bilateral or regional environmental agreements versus multilateral environmental agreements;
- international or transnational governance and regulation of the extractive industry and energy sector, including the UN Office of the High Commissioner for Human Rights (John Knox) concept of environmental protection as a human right; and
- assessing international, transnational and local law-based and market-based approaches to reversing climate change (case studies).

Interdisciplinary and Integrated Methodology

In pursuing its research work, the ILRP will employ interdisciplinary and integrated methodology to explore practical approaches, empirical case studies, analysis of the efficacy of international law regimes and interdisciplinary research that considers the impacts on human security, rights and development. Furthermore, the ILRP will incorporate international law research of indigenous issues that cross-cut the three areas of primary focus, for example:

- reconciling the protection and development of traditional knowledge with international IP law frameworks;
- environmental protection, benefit sharing and prior informed indigenous consultation and consent in respect to energy and extractive industry developments in Aboriginal territory; and
- Arctic governance to find effective international and transnational legal mechanisms to address emerging environmental, maritime, human security, economic, political and developmental issues in the North.

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AGENDA

February 18, 2015 — 8:00 a.m.–9:00 p.m.

8:00 a.m. — Continental Breakfast

- Location: Boardroom, Main Mezzanine, Royal York Hotel, 100 Front Street West, Toronto, Ontario

9:00–9:15 a.m. — Welcome and Introduction

9:15–10:15 a.m — Session 1: International, transnational, national and private law frameworks relevant to climate change

- Governance challenges and opportunities to limit global warming in the UNFCCC process; multilateralism and volunteer "climate clubs"
- What should be the process for determining the content, monitoring, follow-up and future revision of INDCs?

10:15–11:15 a.m. — Session 2: Contribution of subnational entities

- Provincial initiatives, or joint initiatives by provinces and foreign subnationals, for example, Ontario/Quebec/BC and California Partnership on Climate Change
- Initiatives by major cities, for example, C-40 Cities Climate Leadership Group

11:15–11:30 a.m. — Health Break

11:30–12:30 p.m. — Session 3: Role of civil society and indigenous peoples

- Procedural due process, respect for human (including indigenous) rights in development and execution of projects financed by climate change funds, as well as assuring benefit to, and not further degradation of, local ecosystems and communities
- Equity, transparency, fairness and human rights in climate change related funding

12:30–1:45 p.m. — Working lunch (thematic discussion) and networking

- Strategies to raise awareness of and engagement on the issues

1:45–2:45 p.m. — Session 4: Role of business and industry

- Evolving and required roles and expectations for business and industry re: climate change and carbon limits, measurement, reporting and mitigation
- Ruggie Principles and further environmental and climate change obligations identified by the UN independent expert on human rights and the environment, John Knox, in their application to the extractive industry and forestry, including use of forest preservation incentives
- Public and private governance related to climate change in a global supply chain

2:45–3:00 p.m. — Health Break

3:00–4:00 p.m. — Session 5: Green transition, innovation and resilience

- Facilitating clean technology transfer to address climate change
- The role and functioning of carbon taxes, cap-and-trade policies and climate change fund
- A precautionary legal framework for geo-engineering research

4:00–5:00 p.m. — Session 6: Courts, remedies and adjudication

- Legal recourse and remedies for climate change

5:00–5:30 p.m. — Wrap-up

6:00–8:30 p.m. — Dinner for continuation of informal discussion

- Opportunities to have impact
- Organization of further research and collaboration

8:30–9:00 p.m. — Adjournment/departures

ABOUT CIGI

The Centre for International Governance Innovation is an independent, non-partisan think tank on international governance. Led by experienced practitioners and distinguished academics, CIGI supports research, forms networks, advances policy debate and generates ideas for multilateral governance improvements. Conducting an active agenda of research, events and publications, CIGI's interdisciplinary work includes collaboration with policy, business and academic communities around the world.

CIGI's current research programs focus on three themes: the global economy; global security & politics; and international law.

CIGI was founded in 2001 by Jim Balsillie, then co-CEO of Research In Motion (BlackBerry), and collaborates with and gratefully acknowledges support from a number of strategic partners, in particular the Government of Canada and the Government of Ontario.

Le CIGI a été fondé en 2001 par Jim Balsillie, qui était alors co-chef de la direction de Research In Motion (BlackBerry). Il collabore avec de nombreux partenaires stratégiques et exprime sa reconnaissance du soutien reçu de ceux-ci, notamment de l'appui reçu du gouvernement du Canada et de celui du gouvernement de l'Ontario.

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