

SYLLABUS

Environmental concerns transcend national boundaries, but present distinctly different issues to differing groups of countries in an area where in public international law terminology “soft” law closest to politics still predominates, but “hard” law governing state behavior now must be made to address pressing climate change needs. There is some existing international environmental law, but if you notice the weather lately, existing law does not seem to be adequate to resolve our problems. We shall study specific legal materials like international agreements under negotiation, existing treaties, reports and customary law sources, but climate science and economics also play a role, and things are changing fast.

The not-so-hidden message is that international environmental law is about global and local issues at the same time, and it intertwines with economic and development concerns. So you can run but you cannot hide longer term. This course looks generally at the nature of the international law process in this area (with its limited number of treaty and customary law principles), economic and other perspectives on natural resource usage, state sovereignty and abiding tensions between industrialized and developing countries concerning environmental issues (beyond prohibitions, to technology transfer and the “who pays” question). There is also a growing overlap between traditionally distinct legal areas like international trade and international environmental law to be aware of in a technical sense.

Meeting Times & Places

The course is scheduled to meet regularly 4:20–6:30 pm Mondays in Law School Room 204. Class sessions should be recorded and available on panopto, but that is only for review purposes. I shall hold scheduled Room 320 office hours Monday and Wednesday 12:30 to 2:30 pm. On request, beyond those times we can schedule a meeting at any mutually available time (via WhatsApp, Zoom, or we just meet physically at the Law School; my e-mail for scheduling an appointment is davidkeithlinnan@yahoo.com). Just email me, or otherwise just catch me in class to schedule a meeting outside office hours.

Assessment and Attendance

This is a 2/3 credit course. Grading in the two-credit version of the course will be based largely on your performance on the repeated written work in your groups (working over approximately half the term on the Charleston Problem, although I still have to confirm outsiders’ repeat participation this year). Class participation will be taken into account in letting you move individually up to ½ grade (e.g., from a B to a B+, etc.). The CALI will be awarded on a group basis to the team that does the best job on the Charleston Problem.

There is also an option to take the course for three credit hours, including writing a 30+-page paper structured to satisfy the Law School’s graduation legal writing requirement, as set forth in the Law Student Handbook. In that case you participate in the Charleston Problem group work, plus

complete your individual paper, but your grade will be determined primarily by your grade on your graduation writing requirement paper. Students wishing to write a research paper should talk early and often with the instructor. Satisfaction of the graduation writing requirement means that you will be required to choose a topic in consultation with the instructor, produce an outline, followed by a first draft and then a final version of the paper. Note that you must confer with the instructor at least three times in the process: to choose a topic cooperatively, to review your writing outline together, and then for comments between your first draft and the final paper version. I sincerely hope you are done in two drafts, but that largely is dependent upon you putting the necessary effort into your first draft. We shall also organize a help session with the reference librarians to introduce you to international environmental law and climate change sources, as a way to help you get started.

You will also be required to prepare other problems and projects for class in groups, where we shall employ a self-grading process within groups (meaning your colleagues indicate whether you did your fair share of the work). The concept is that we rotate responsibility for preparing presentations of group problems, so you presumably have one to prepare every 2-3 weeks in your group during the semester. Your grade will also reflect self-grading within your groups on the margin (basically, up or down a half letter grade in +/- terms, whether you take the course for two or for three credit hours).

The Law School, and ABA under its rules, care about your diligent pursuit of legal education, regardless of competing concerns. The standard Law School rules apply, so we shall take attendance. Regarding attendance, if you miss more than 25% of the classes you will be graded down regardless (and also would not be included in any group CALI award, should your group be the class winner). It is your responsibility to sign the attendance sheet, and if you come to class more than ten minutes late you are counted as absent and should not sign the attendance sheet. You may not sign the attendance sheet for anyone else.

Text and Approach

We shall save you the cost of a commercial law casebook in this course. The instructional materials are free online via email and on Blackboard. Parts are now dated, but if you are interested you can also access a now three year-old course website with materials generally at <https://uofsclawcourses.azurewebsites.net/courses/laws666-international-environmental-law/> You would see certain links to materials there anyway via the assignments, and if you like might follow some of the changes already within the past 2-3 years in a rapidly moving field.

The order of coverage from our online materials follows:

Unit 1	Introduction on Background
Unit 2	Customary Law as Basis for International Environmental Law
Unit 3	Human, Development & Other Rights-based Legal Approaches to International Environmental Law, Now Increasingly Domestic Public Law Litigation Too
Unit 4	Human Rights Views Differing: ATCA Then, Now Business & Human Rights Approaches Internationally (Customary Law Versus General Principles)
Unit 5	Private Sector Voluntary Codes & ESG (Market-Orientation & Litigation Safe Harbors?)
Unit 6	Treaty Interpretation and Treaty Process Approaches (Framework Conventions Versus the Package Deal Approach, plus Formal Interpretation or Dispute Settlement, starting with the UNFCCC)
Unit 7	Trade/Scientific Risk NTBs & Non-State Aspects (GMOs plus an excursion into the Convention on Biodiversity)
Unit 8	Trade & Environment (WTO & GATT Article XX(b)&(g) Exceptions & Jurisprudence)
Unit 9	Implementation & International Monitoring on the Example of Ozone (Methane Beyond the UNFCCC via the Montreal Protocol)
Unit 10	Climate Change as the Ultimate Test for the Framework Convention: Rio 1992, Kyoto 1998, Paris 2015, Now Paralleled on the Sustainable Development Side
Unit 11	Immovable Objects & Irresistible Forces in the UNFCCC Process (Follow the COPs)
Unit 12	Domestic Implications of International Treaty-Making: The Basel Convention & Hazardous Waste
Unit 13	1973 CITES Convention & Approaches to the Marine Environment: Science, Old Treaties & Regional Governance
Unit 14	1992 Biodiversity Convention, Sustainability & Indigenous Knowledge

This course is a specialized international law course. It is offered without prerequisites knowing that some students will have prior knowledge and training in public international law, while others may not. We shall try to address this via online resources and during office hours, but if all else fails, the public international law nutshell and similar black letter law summaries are helpful. Some of you may take the course for three credits to satisfy your graduation writing requirement. You could take as your paper subject any one of the six issues below under “Points to Keep in Mind While Reading,” or some other topic we mutually agree upon. There is so much material these days in international environmental law or climate change law, that you would not lack for interesting questions in any case.

Points to Keep in Mind Whenever Reading

There is quite a lot going on in international environmental law, and it is not a limited domestic body of law like property law or securities regulation. So candidly, its breadth may initially seem overwhelming. But there are certain repeat themes or questions to focus on as guidance in approaching most individual problems or readings:

1. To what extent is “international environmental law” about an existing body of law in the form of treaties and customary law, versus now being focused more on a law-making process addressed to problem-solving in the climate change context? And is that process already working (or not yet)? So what exactly is the difference between an international environmental law course and a course on climate change, and where do they overlap/interact? (Coincidentally, there is a parallel, often neglected biodiversity crisis which straddles climate change and international environmental law under the 1992 Convention on Biological Diversity.)
2. There is considerable on-going overlap and reordering of various sub-areas of international law tied to efforts to address climate change. Two leading examples are, firstly, that international trade law and international environmental law are somewhat growing together, meanwhile, secondly, within international efforts to address climate change there are competing approaches in the form of traditional treaty law on a multilateral state-to-state basis, versus a human rights approach perhaps as a matter of group rights. One of the most basic divisions in international environmental law and politics is whether it is better approached as a human rights problem close to politics, versus via multilateral treaty law to be negotiated in detail between states. That constitutes the most basic difference between NGO environmental activists, versus government representatives.

As example of the first, as part of the on-going EU Green Economy push, CBAMs or carbon border adjustment mechanisms as carbon levies addressing the amount of carbon generated in the creation of individual foreign products compared to an EU-origin product, were phased in by EU regulation October 1, 2023 for the import of iron and steel, cement, fertilizers, aluminum, electricity and hydrogen products-- the first EU CBAM report was due January 31, 2024, if you follow international affairs and business. The EU plans a further expansion of covered goods to include chemical and polymer products among others by 2026, and full coverage for the importation of all goods that would be covered by the EU’s Emission Trading System or ETS by 2030 (so effectively, levies to incorporate

them within coverage of the EU carbon-trading market). In response, some countries in the developing world aka Global South claim CBAMs represent illegal tariffs, foul protectionism and interference with their economic development envisioned under the WTO Agreement. Such claims were raised by the BASIC negotiating group consisting of Brazil, South Africa, India and China, or largely under the banner of the BRICS, which traditionally would be considered newly industrialized economies or NIEs in World Bank terminology. Meanwhile, since January 1, 2024 the BRICS now include not only Brazil, Russia, India, China and South Africa, but also Iran, the United Arab Emirates, Ethiopia and Egypt, meanwhile the BRICS grouping is still growing (so three major petroleum producers and two states that would not qualify as NIEs in traditional terms). Meanwhile, the BRICS cum BASIC group seems generally dissatisfied with the existing international system, separate and apart from the idea that all major fossil fuel producers have quite specific economic interests largely in opposition to any restraints on continued fossil fuel usage.

Technically speaking, at the international law level the immediate problem involves what should be governed by the 1994 WTO Agreement versus what should be governed by the 1992 UN Framework Convention on Climate Change or UNFCCC, as it is being extended progressively in periodic COP or Conference of the Parties meetings, like the most recent November 30-December 13, 2023 meeting in Dubai. Meanwhile, it is doubtful that NIEs or major petroleum-producing state interests are the same as those of least developed countries generally (LDCs) or small island developing states (SIDS), especially under the UNFCCC. There is a general question separately between international trade and environmental law of what now should count as a developing country after 30+ years of economic development. Under the international law concept of sovereign equality, all countries should be treated alike as a legal matter. However, states are free as under treaties to make special arrangements for different groups of states. As a practical matter, the relatively wealthy US or Japan are not in the same position as a relatively poor Sudan or Ethiopia, so the real argument is about the true NIEs like a China or a Brazil, but also in the climate context major petroleum producers like Iran or the UAE present special considerations.

As example of the second or competing legal approaches problem, there is a very basic question and parallel tracks dating back to the 1990s, but now converging in a practical sense, over whether the best way to address climate change and economic development, and to make necessary law, is to pursue the UNFCCC and COP process to make treaty law between states, versus pursuing the sustainable development agenda, or more human rights-oriented approaches within the UN System via such means as the 2015 UN Sustainable Development Goals or SDG, with implementation tracking added in 2017. Meanwhile, the UNFCCC treaty approach effectively represents traditional “hard law” controlled by states and the UN SDG or human rights-oriented approach represents something closer to politics or soft law, and is coincidentally accessible to other interested parties like NGOs and climate activists (think Greta Thunberg, who famously said the COP meetings were nothing but “talk-talk-talk”). So can you do international environmental law without substantial spillovers and overlaps in other areas of international law and

politics? Meanwhile how best to get to a sustainable yes on new law as climate change pressures grow?

3. How things look in the US versus in the rest of the world, both as a matter of their perceptions and the commercial reality that our private sector-business community (aka clients) do not do business only in the US? And it goes both ways, like does BMW Manufacturing in Greenville-Spartanburg care more about US regulation versus EU/German regulation, versus name your other jurisdiction, to which its conventional X and M vehicles are traditionally exported, and to which it will soon export X EVs on a worldwide basis? In 2022 BMW announced \$1.7 billion increased investment in SC facilities to produce batteries and EVs, meanwhile few locals understand that traditionally half or more of BMW Manufacturing Greenville-Spartanburg's production is exported? And Volkswagen Scout is building an EV manufacturing operation in Blythewood as the Columbia suburbs, which is scheduled to start production in 2026, without much of a position on which markets the SUVs TBA target. So South Carolina's private sector may have more skin in the game than you might think.
4. There recently has been considerable private sector movement in terms of ESG developments and the like that you presumably touched on in your business corporations courses. And climate finance is finally on the radar, despite certain actions late in the Trump Administration and continuing political opposition in Congress and at the state level to ESG (Most clients appear to embrace ESG and sustainability as a business matter, and bankers are already hard at work trying to make money off decarbonizing the economy, regardless what your state or federal government may say.) Meanwhile, there is a longstanding financial sector industry code called The Equator Principles targeting environmental and social impacts, including GHGs, in project finance, which some of you may run into in the Charlotte financial sector practice. In practical terms, this dictates legal approaches in infrastructure approaches as a matter of creditworthiness, and thus should affect greatly the whole renewables transition (estimated to cost circa \$100 trillion worldwide through 2050). Because creditworthiness is the lodestar, the bankers maintain that this is about loans being repaid, not about politics. But the private sector initiatives are not going in only one direction. Concerning the Equator Principles, in Spring 2024, four major US banks (Wells Fargo, JP Morgan Chase, Citibank and Bank of America) withdrew from the Equator Principles, probably as a result of a combination of a perception that the Equator Principles as standards formulated beyond individual banks' control were becoming increasingly prescriptive, linked with state-level, domestic political pressure in opposition to ESG generally.
5. The IPCC or Intergovernmental Panel on Climate Change (the international scientific body advising on climate change) Sixth Assessment Round Reports have now been published, meanwhile the climate change news is not particularly good in terms of what is happening on the mitigation and adaptation fronts. The stated 2015 Paris Agreement goal targets through 2030 a maximum temperature rise since industrialization commenced of a 2.0 degrees centigrade increase, with a goal of limiting temperature rise to as close as possible to maximum increase of 1.5 degrees centigrade. But the climate scientists are increasingly pessimistic that the 1.5 degree target will be achieved, not to mention whether the 2.0

degree ceiling still holds. Should IPCC opinion in climate science terms be enough to jumpstart the process? Meanwhile, 2030 lies only six years in the future.

6. Now that people begin to recognize that climate change is happening now, not just in the distant future, what is the plan to get something done? How precisely given sharply divergent political and economic interests? The hidden question is whether this is really more of a legal or an economic issue, or both equally, since to fix a wide variety of problems we presumably will have to remake economies in a practical sense (like substitute renewables for fossil fuels, involving enormous investments, and not just in the US, aka the renewables transition, to accomplish which reasonable investment estimates through 2050 are in the \$100+ trillion range worldwide). The good news is that financial sector lawyers may make out like bandits in doing legal work in areas like project finance successfully to build out the infrastructure necessary to implement that renewables transition.

Learning Outcomes

In this course we seek:

1. To introduce you to the broader topic of international environmental law alongside climate change, as one of the leading concerns of our time (and part of your professional futures, since class members presumably will be professionally active in 2030, and still in 2050, as major projected target dates for climate change);
2. To provide a technical introduction to sources of public international law as such, as applied to the specific specialized area of international environmental law, including the process of making new law in the area to address increasingly pressing problems;
3. To familiarize you with the attendant problems of balancing a variety of economic, political, development and negotiating problems in making international law among a wide variety of states, as opposed to the predominantly doctrinal approach in application that typically controls in most domestic law courses;
4. To improve your legal writing, judgment, analytical and advocacy skills through ordinary course outputs from all students working in teams on problems, as well as the experience of working in teams (as is often the case in law practice, so get used to it); and
5. To provide a more individualized experience in legal writing and legal analysis for students who choose to satisfy their graduation legal writing requirement under the three-credit option.