„Climate before Profit!“ says … what?

Article Review of

„Compliance with Climate Change Standards as a Justification to Violations of International Investment Treaty Obligations—an Analysis“ by Marcus Liew COMPLETE_V3_I2-05-Liew-Climate.pdf (imgix.net)

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review by Gisela Toussaint, Advocate, Germany

Marcus Liew is an Advocate and Solicitor of Singapore and a legal associate in The Arbitration Chambers. His practice involves a wide range of complex international arbitration matters dealing with investment treaty related disputes, commercial disputes in energy, financial services, technology sectors and marine disputes. He completed his practice training at a top law firm in Singapore, graduated with an LL.B. (Hons) from the National University of Singapore and received multiple accolades in both academic and international moot competitions during his studies.

‚Competing with the Best‘ he most brilliantly puts into practise in this groundbreaking – even epochal - analysis about different international law instruments to clear the relations between climate change standards implementation as a ‚global community interest‘ and private investment and profit protection within free trade and investment agreements (FTA).

‚Competing with the Best‘ does not only mean competing with the best lawyers of the fossil industry, rather it means competing with the lawyers of the International Law Commission (ILC), the highest law commission on earth. And as will later be presented, he most elegantly and convincingly beats them with their own early findings - to save mankind from a climate catastrophe.

Thus, this is no mere ‚academic‘ analysis. Marcus Liew is very accurately searching through treaty obligations, international norms, international law enforcement instruments, jurisdiction, academic literature and ILC codifications to find international supreme norms which are as well equipped to enforce climate change standards in practice.

In his introduction (Part I) he points out that climate change is a

> „genuine global concern worthy of serious attention“ and „consideration“.

> „With the increase in global warming comes ‚severe, pervasive and irreversable impacts for people and ecosystem'".

But up to now states, as the international investment regime have just „lukewarm" responded.

His thesis for a solution and an urgently needed much more adeqaute performance to avoid climate change is

> „Providing states with climate change standards as a justification to violations of investment treaty obligations might provide the catalyst for change".

His starting thesis seems to regard the investment treaty as the solid base to be served in the interest of the investors, while climate change measures by states, an example being canceling fossil production permissions, are seen as (exceptional) violations of the treaty, needing a legal legitimation or justification.

Marcus Liew's paper then proceeds as follows: Part II begins with presenting climate change as a global community interest. Part III reviews the status of climate change recognition in international investment jurisprudence. Part IV concludes by discussing the implication of the jurisprudence and potential avenues for climate change standards to operate as a justification to the violation of international investment treaty obligations.

In Part II Marcus Liew focuses on international law standards to fight climate change as a

> ‚global community interest',

as there are the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement. He discusses their relevance for mankind in relation to investment protection interests. He proceeds by stating:

> „Indeed, climate change considerations should precede investment protection as an important value of the international community in the hierarchy of international norms. Such community values ascribe precedence in international law as reflected by the notion of *jus cogens* in international law."

Here he has skipped from ‚global community interest' to the official international law notion of ‚jus cogens' - whithout having introduced it already. The proof of the climate change standards being a ‚jus cogens', which is the center part of this whole analysis, will be presented in Part IV.

This may be a hint that within his work on the analysis he himself advanced to a higher understanding that climate change standards are not only an exceptional justification but a clear, vast and even institutional precedence against investment protection obligations. It is clear that he aims to inform the reader from the beginning about this ‚jus cogens' notion as well as his own advanced point of view:

> „Given the imperative and urgent necessities to humanity and the international community presented by climate change, this paper advances the notion that confronting climate change should take precedence over investment protection."

In Part III he gives an overview to the past jurisdiction and presents an accurate and comprehensive picture of the development of climate change recognition within international investment jurisprudence, from ignoring to slight recognition. Here Marcus Liew shows his deep knowledge and experience of the matter as well as his secure overview over the worldwide court decisions and their implications.

In Part IV he finally offers the way forward, on the basis of a profound and detailed analysis about the different cases and potential international law avenues for climate change standards to operate as justifications.

Here he again starts by pointing out

> „… that climate change presents such a human catastrophe that it must be given greater prominence than investment protection which serves only immediate interests of foreign investors."

And furthermore stresses:

> „However, more needs to be done to establish climate change as preceding investment protection by, at its highest, making it an independent factor that must be elevated in the hierarchy of precedence of norms to the highest position displacing investment protection as a value by far."

In practise of the investment regime the climate change standards often are only found in the preamble of an investment treaty (FIPA), as „promotion of sustanable development" (Japan Swizzerland FTA) or as a „recalling the UNFCCC" (Energy Charter Treaty), which is

> „inadequate … to form an independent justification for violating the treaty."

The Singapore-Indonesia BIT „affirms the party's right to regulate environmental concerns".

The Pan-African Investment Code provides an entire article (Art. 37), which mandates not only states but also

> „ investors to comply with environmental legislation and to ‚performe their activities, protect the environment and where such activities cause damages tot he environment, take reasonable steps to restore it as far as possible‘“.

The Morocco-Nigeria BIT acknowledges climate protection measures of states in a similar way, as well as investors obligations to adhere to environmental legislation. Separately, Art. 44 even

> „establishes a Joint Committee to monitor the implementation and execution of the BIT“.

In all these cases,

> „climate change would have to appear as an exception in an international agreement, … modeled after Art. XX of the General Agreements on Tariffs and Trade (GATT), which would place climate change as an exception ...“

Here the analysis could have gone much further. It is exactly the wrong role model of Art. XX GATT, which fixes climate change protective measures in more or less all investment treaties just as exceptions (exceptional justifications for opposing and rejecting codificated rights of investors) and not as the new dominant standard rule of world economy and trade agreements as it is urgently needed for the „transformation of world economy“ and for the survival of mankind.

The analysis continues to ask which public international law principles deal with conflicting international rules. Here he examines the ‚jus cogens‘, defined in Art. 53 Vienna Convention on the Law of Treaties (VCLT), and - in its absence - the right to life, protected by the UN-Charta.

So are the climate change protection notions of UNFCCC, Kyoto Protocol and Paris Agreement ‚jus cogens‘ norms?

He argues

> „It is a trite rule that *jus cogen* norms prevail over all other rules of international law if inconsistent“,

but only mentions the much stronger effect of ‚jus cogens‘ norms on inconsistent other rules, their invalidation, in the footnote and does not further discuss it. This may be because ‚prevailing‘ already offers the justification needed in this analysis.

> „However, beyond the minimum accepted core of ‚jus cogens' as prohibition of genocide, aggression and slavery, there is no clear consensus on which norms qualify as ‚jus cogens'.

So to examine whether international environmental protection norms are also a ‚jus cogens' he uses its 4 characteristics, posited by Dr. Eva Kornicker Uhlmann in her essential work ‚State Community Interests, Jus Cogens and Protection of the Global Environment' already in 1998:

1. The object and purpose of the norm must be the protection of a state community interest.
2. The norm must have a foundation in morality.
3. The norm must be of an absolute nature.
4. The vast majority of states must agree to the peremptory nature of the international norm.

While the characteristics 1, 2 and 4 can be affirmed without any doubts, a most convincing proof from the highest level can also be presented for characteristic 3.

But as he will be well informed about the ILC's massive attempts since 2014 to

- impede the applicability of any ‚jus cogens' by „helpful" ‚conclusions on jus cogens', though sharply rejected by many states, even

- impede to call the International Court of Justice for conflict decision,

- refuse the acknowledgement of environmental protection as ‚jus cogens', and the Paris Agreement as ‚new jus cogens'

- further manifest this by ‚draft guidelines on the protection of the atmosphere'

he most elegantly reports about and quotes the ILC's most positive fundamental findings in its 22. Session on State Responsibility in 1970:

> „Third, the most convincing indication that the general norm of prohibiting environmental damage that implicates the international community is of an absolute character is encapsulated in the ILC Draft Articles on State Responsibility.
>
> The Commission categorised "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere" as an international crime.
>
> Despite the unclear relationship between international crimes and *jus cogens*, it is widely recognised that "an obligation whose breach is considered an international crime will usually be of a peremptory character."

Furthermore, climate change and the preservation of biological diversity has been declared as common concerns of mankind.“

It is quite honorable that Marcus Liew does not mention and even not go into detail about the currant absolute disastrous international law violating attempts of the ILC to prevent the Paris Agreement (as well as the protection of the environment, Human Rights and UN-Charta) to be recognized as ‚jus cogens‘.

But as the ILC has stated in 1970 that a massive pollution of the atmosphere is an international crime and so the duty to protect the atmosphere is a ‚jus cogens‘, their work today should have been to point out and fix, that

- the Paris Agreement is a ‚new ius cogens‘ and
- the duty to comply this ‚new ius cogens‘ is oblidged to members of governments as well as leaders of industry and finance and even everybody on earth,
- Art. 15 Paris Agreement is invalid as it prohibits any penalty in case of massive non compliance of states with the duties of the Paris Agreement, as further massive polluting the atmosphere
- massive non-compliance with the Paris Agreement is an international crime as genocide, crime against humanity and ecocide
- offenders of these crimes can be members of governments as well as leaders of industry and finance, as ‚ius cogens‘ norms are in legal force for all and on every legal level.

But the ILC has done exactly the opposite, again fixing the prohibition of any penalties against states which greatly pollute the atmosphere through the ‚draft guidelines on the protection of the atmosphere‘ in 2021.

Marcus Liew has evidently tried to offer the ILC a way out by paying it the highest honour to have already in 1970 made the planetary crucial statement to empower environmental and atmospheric protection as ‚jus cogens‘ and to name and shame its massive non-compliance as an international crime.

This may have been to help them find their way back to serve mankind and to support – not prevent – the survival of humanity on earth.

After all it is his unique success to, as the academic expert he is, have defined and acknowledged the Paris Agreement as a ‚jus cogens‘ for the public.

His expertise is the start for many more academic studies as well as most practical implementations of his fundamental findings on all legal and economic levels.

Marcus Liew closes his brilliant and epochal analysis with last but as well ground-shaking findings concerning the investors non-existing rights of compensation:

> „For example, in *Methanex*, the tribunal found that environmental regulations had been foreseeable by the investor. Hence, it is submitted that the investor, being aware of the possibility of the state taking action to reduce harmful environmental impacts and enforcing measures necessary to protect the climate, cannot allege that it had legitimate expectations that the state would not interfere in such a way with its investment. Rather, the regulatory measures by the state would come as no surprise to the claimant and as a result, no legitimate expectations can arise."

As if this were not defining enough for the fossil industry, Marcus Liew even starts to discuss the legal possibility of counterclaims of states against the fossil industry:

> „Given the advent of *Burlington* and *Urbaser*, tribunals seem more willing to find that investors are obligated to adhere to certain norms or standards at international law or encapsulated in the domestic framework. Both tribunals stated that the investors were liable for environmental harm under the domestic framework designed to fulfil a state's obligation to comply with its international treaty obligations."
>
> „Essentially, both tribunals found the investors liable for their failure to comply with international standards, even though it was not explicitly stated."

Rarely has anyone advocated so excellently and brilliantly for the universal demand of ‚climate before profit' as Marcus Liew has.

And as his article did not disappear in the drawer but has been closely examined, awarded as finalist and published by the ITA, his clear, courageous analysis and findings to tackle the climate catastrophe by two most effective international law enforcement mechanism are officially supported even by parts of the international arbitration industry.

As dispite all urgent appeals of UN-Secretary General António Guterres to most immediately fullfill and implement the Paris Agreement on all legal levels and in all economic areas, the governments reactions are still poor while CO2 emmissions, fossil production and prosperous arbitration cases of the fossil industry for compansation against climate protection measures of states are skyrocketting.

The Paris Agreement - and so as well the survival of humanity – is about to irreversibly fail!

So it is quite unusual, that it is not the UN and not the NGOs which call for activating the existing much stronger international law mechanism against the fossil industry and ‚lazy' governments - as ‚jus cogens' precedence and international crime punishments - and even declare fossil compensations unlawful (!), to very soon push through the full global implementation of the Paris Agreement.

It is the arbitration industry itself (against its own interest of high profits) to offer these epochal, most effective and absolutely crucial solutions to global public.

May be they know best, that the fossil industry's mere high profit greeding but atmosphere and mankind destroying agenda – if left without massive restrictions and criminal punishment and even strengthened by subsidies and high fossil compensations - is leading the entire mankind into a very soon global apocalyptic desaster without any survivors.

Now, advocates all over the world, lawyers in the law departments of UN-Organizations, national as well as local governments, the industry and finance as well as the WTO have to immediately activate the existing much stronger international law mechanism - as ‚jus cogens' precedence and international crime punishments – (and unlawfullness of fossil compensations) to finally push through the most immediate implementation of the Paris Agreement at all levels.

In practice this means immediately adapting the still highly inadequate and climate protection incompatible trade rules, international and national treaties, laws, fossil state subsidies, fossil compensations, fossil production permissions, investments etc. and changing in biggest scale to renewable energy to transform the currant world economy into a 100% climate protecting world economy, to – in last minute - save entire mankind from most cruel and irreversal extinction!

Karlsruhe, Germany, 2nd of June, 2022