The Fire Next Time: International Economic Law and the Existential Politics of Climate Change

By:

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Human beings are more often than not their own worst enemy. James Baldwin famously illustrated this point, focusing on race relations. Everywhere one looks, it seems like humankind is lurching from one crisis to the next. Many of the crises are of our own making. Arguably, the ongoing forest fires in California are the latest illustration. This blog article examines the worsening climate change crisis and the nature and scope of the challenges in responding to the crisis.

While it may be tempting to conclude that the devastating forest fires - in Australia earlier in the year, and California recently - represent the onset of global climate, this cannot be further from the truth. Climate change has been a slow onset event. Ask any long-term observers of climate change and they will point to the decades-long struggle to deal with more frequent and

intensifying famines in the Horn of Africa, or the rising sea levels swallowing up atoll (island) nations. Climate change has been raging for decades, and it is only getting worse. The science on climate change is clear.

In effect, the increasing intensity and frequency of forest fires marks the penultimate ecological frontier of global climate change. The last frontier, as scientists have warned, might be large-scale ecological collapse: the Green Barrier Reef being a case *par excellence.*

The Metastasis of Climate Change

Initial attempts to address global climate change focused on developing specific regimes. Starting with the United Nations Framework Convention on Climate Change (UNFCCC), countries sought to develop international legal instruments to deal with the challenge. The Kyoto Protocol was adopted in 1997, but it was stillborn as it did not cover all the major emitters. Subsequent attempts sought to develop a universally-applicable instrument, which would be based on nationally-determined pledges. The Paris Agreement embodied this logic, and it was concluded in 2015 and rapidly adopted by almost all countries in record-time.

What is remarkable in the transformation of the global efforts to address climate change was the shift in understanding climate change, from a singular to a cross-cutting problem. By implication, it became evident that any effective global response would have to go over and beyond the climate change regime. Climate law has become an inadequate response. The climate change problem was metastasising: a super-wicked problem. In tandem, concomitant remedies evolved from an integrated to regime complex for climate change.

The Existential Politics of Climate Change

As the forest fires continue to rage in California, debates on their link to climate change have intensified. Scrutiny has focused on the denial of climate science especially by politicians. Yet the debate on the political and economic costs of responding to climate change remains underexplored. Political scientists (especially International Relations scholars) have started taking note.

Denial of climate science is often used as a cover for the impacts of the distributive effects of climate action. Climate change denial has been most prominent in countries whose economies are heavily reliant on fossil fuels, and domestic interest groups have significant political influence. It is a story of winners and losers.

It is time for international economic law to start paying serious attention. Law and politics have a complementary role in addressing the growing climate change crisis. Law has to pay attention to its antecedent: politics. As the preeminent scholar of international politics, E. H. Carr, poignantly captured the relationship between politics and law:

> 'There must be a clear recognition of that play of political forces which is antecedent to all law. Only when these forces are in stable equilibrium can law perform its social function without becoming a tool in the hands of the defenders of the *status quo*' (p. 176, emphasis in original)''

Following Carr's dictum, international economic law has to pay serious attention to the existential politics of climate change. Law can either be used as a tool to maintain the climate-forcing status quo, or as a tool for climate action. But what is this so-called 'existential politics to climate change'? Green at al. (2019) offer a succinct definition:

> 'Beyond "politics as usual," climate politics are becoming existential: varying interests are fighting for the survival of their way of life. This is forcing governments to confront the enormous economic implications of a changing climate and altering the nature of climate politics.'

Climate politics has shifted to the domestic level, as the political responses to the challenge reveal. The Paris Agreement on Climate Change marked a decisive turn to this logic. But it is clear that international economic law is lagging behind this rapidly changing nature of climate politics. For both scholars of international politics and law, business as usual in the age of existential politics of climate change is untenable.

What Role for International Economic Law?

International climate change law is necessary but insufficient in responding to the climate change challenge. Other areas of law, especially international economic law, are becoming more relevant. *Greater dialogue between law and politics will be crucial, since politics is antecedent to all law*. If and when politics change, law has to follow suit. Enhanced dialogue between scholars of politics and law will be important, especially when tackling the existential politics of climate change.

There are encouraging movements towards this direction. Lawyers are examining the role of trade policy in global climate governance. Border Carbon Adjustments (BCAs) have (re)emerged as an attractive legal tool to addressing global climate change, but their politically contested nature over decades indicates it is not a panacea. Consider the vigorous opposition to the EU's proposed BCA mechanism. Other lawyers have also examined the impact of investment law, especially the investor-state dispute settlement and its 'chilling effect' on climate action. These developments are encouraging, but inadequate.

Conclusion

Enhanced collaboration amongst scholars of politics and law, under the aegis of the existential politics of climate change, is a promising and highly valuable research avenue. As climate politics become more complex and seemingly intractable, creative legal responses will be needed, now more than ever.

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