Introduction to the Special Issue: The State of Climate Law, 2014

David Freestone and Alexander Zahar

We are delighted to be re-launching Climate Law, now published under the Brill imprint, with this Special Issue that collects together the views of a number of leading scholars on the state of climate law twenty years after the coming into force of the 1992 United Nations Framework Convention on Climate Change.

The first issue of Climate Law was put together during the Copenhagen Conference of the Parties at the end of 2009 and was published shortly thereafter. Altogether, three volumes (10 issues) of the journal were published in the 2010–2012 period by IOS Press.

Although the journal was well received in academic circles, it never realized its full potential, and so, in 2013, discussions were held to transfer the publication to Brill—a more established legal publisher. In parallel, the journal’s Editorial Board was restructured and revitalized. In addition to the Editorial Board, it was decided to establish an Editorial Advisory Committee, to be chaired by Professor Robert Glicksman of George Washington University Law School. He recruited a group of highly distinguished legal scholars to add to the already distinguished board. The task of the Advisory Committee is to advise the Editor at a more strategic level. This Special Issue is the first fruit of the work of the Advisory Committee, and we look forward to continuing to draw on the experience and enthusiasm of its members in the years ahead.

Although now bearing the imprint of a new publisher, the aim of the journal has not changed: It is to provide an international audience with the best peer-reviewed research and thinking about climate change law in the English language.

It has to be admitted that, as an academic specialization, climate change law is still finding its bearings. While there is a very rich and vibrant climate-policy debate, the legal dimension has tended to be something of a poor relation. At the international level, the UN Framework Convention establishes an obligation to prevent dangerous climate change. In pursuance of this aim, wealthy states, collectively, are legally obliged to reduce their greenhouse
gas emissions and support less wealthy nations, through the provision of necessary resources, to engage in adaptation and mitigation actions. But one is hard-pressed to name any other substantive rules that are distinctively international ‘climate law’. Individual state mitigation obligations under the Convention itself, as opposed to the Kyoto Protocol, remain largely inchoate.

In the domestic sphere, although the obligations developed by the European Union are crucially important, it is true that elsewhere there are vast jurisdictional expanses (like the United States at the federal level, and notwithstanding the Obama administration’s determined efforts under Clean Air Act) that could be described as largely ‘climate-law-free’. The greatest number of countries (that is, the great majority of non-Annex I parties to the Convention) have no climate mitigation laws at all; statutes dealing explicitly with adaptation are more common, but still rare.

Even where highly elaborate domestic climate laws have been developed, they do not necessarily have any normative traction; which is to say that the law can be dismantled, as is happening now with Australia’s barely-implemented climate laws, from one year to the next, following a change of government. Many climate laws of Annex I parties to the Convention are only potential engines of change, idling in place while they await a breakthrough at the international level to power them into action.

The major part of the international regime for climate law comes of course from the Convention, its Kyoto Protocol, and all the decisions emanating from twenty years of COPS and a decade of COP/MOPS. We have seen the establishment of a number of new institutions through this process, including, most recently the Green Climate Fund with its base in Incheon, South Korea. What eludes the parties, however, is the comprehensive multilateral agreement first scheduled for Copenhagen in 2009 and now for Paris in 2015. In the meantime, commentators will be following the 2014 Lima COP anxiously to assess the likelihood of a major breakthrough in the negotiations. Unfortunately at this point, such a breakthrough, while earnestly to be wished, does not seem more likely than it did to those who followed the evolution (or convolution) of the negotiating text in the lead-up to the Copenhagen conference in 2009. The impact of politics on climate law is still much larger than it is on settled areas of the law—even other environmental law.

Undoubtedly some will have a different take on the current state of climate law. One could reasonably defend a position that there is more climate law (or less of it) than we have suggested here, and entertain a different degree of optimism about the expected Paris Agreement, but few would take issue with the statement that this is a developing area of both international and domestic law.