Why we need to Recognize a Stable Climate as a Common Heritage?
Our Common Home is a Stable Climate

Climate Heritage of Humankind
The Task Force of Climate as a Common Heritage of Humankind

Coordination:

Institutional support:

Members:

ACP - Associação Comercial do Porto
Águas do Algarve
Águas do Tejo Atlântico
APIP – Associação Portuguesa da Indústria do Plástico
BMW Portugal
CES – Conselho Económico e Social
CNADS – Comissão Nacional do Ambiente a Desenvolvimento Sustentável
DECO – Associação Portuguesa de Defesa do Consumidor
EPAL – Águas Lisboa e Vale do Tejo
FNAJ – Federação Nacional Associações de Juventude
IBEREX / Faber Castell
ICNF – Instituto de Conservação da Natureza e das Florestas
REN – Redes Energéticas Nacionais
Telles de Abreu Associados
Turismo de Portugal
UCCLA – União das Cidades Capitais de língua Portuguesa
ZERO – Associação Sistema Terrestre Sustentável
Stable Climate: A Common Heritage of Humankind

After an initial impulse from Common Home of Humankind, a Recommendation from CNADS (National Commission for the Environment and the Sustainable Development), a petition that gathered more than 260 Portuguese academics, and a public petition with thousands of signatures, on November 5th, 2021, the Portuguese Parliament approved the Climate Law, which defined in its article 15th paragraph f), the diplomatic objective of recognition of the Stable Climate as a Common Heritage of Humankind by the United Nations.

This goal made Portugal a pioneer in the worldwide discussion on the legal status of climate - “What is Climate from a Legal standpoint?”. This is a still unanswered question that continues to conditioning climate negotiations and their results (or the lack of them). The undefined legal status of the Common Good Stable Climate, also means that the most basic structural condition for any human action to be possible - the existence of an adequate legal environment - is not yet present in the strategy to fight climate change.

After the 2021 report of the International Law Commission (ILC) stated that: “The atmosphere and the airspace are two different concepts, that must be distinguished”, a path was opened to autonomize the functional dimension of the Earth System in relation to the static territorial element of sovereignty. It is possible to answer this question, which we can say is an existential question. The current inability to legally portray the functional dynamics of the planet was at the origin of the rejection of Malta’s proposal of 09/1988, to recognize the Stable Climate as a Common Heritage of Humankind. The solution of 12/1988 was to address the problem - Climate Change is a Common Concern of Humankind - which is still the legal framework of Paris Agreement. This option limited the strategy of action to an attempt to mitigate the problem - avoid/reduce/neutralize emissions - omitting the vital need to promote the valuation, preservation and enhancement of the ecological services that ensure the provision and maintenance of a stable climate. By addressing only the problem, the good Climate has been left with undefined ownership. By not belonging to anyone, the “tragedy of commons” on a global scale has happened. Because the good Stable Climate is not legally recognized, it is impossible to internalize benefits that ecosystems perform on behalf of Climate, because they disappear into a global legal void. Today there is no system of incentives for performing negative emissions, nor is it possible to build an economy that actively maintains and/or restores Climate. The Intergovernmental Panel on Climate Change (IPCC) assumes that only through huge CO₂ removals from the atmosphere can the goals of the Paris Agreement be achieved. “Common Concern” has not only been in effective in the past, as it is inappropriate for our future.

Restoring the proper functioning of the Earth System, that corresponds to a Stable Climate, implies recognizing a common good that belongs to all - a Common Heritage of Humankind - to which congruent rules should be applied between appropriation and provision of this good (currently, not existing in the Paris Agreement), but which are structural to be possible the successful management of any common good.

Since everything, but really everything in our society is based on a Stable Climate, and the Planet Earth without a well-functioning Earth System (corresponding to a Stable Climate) does not serve as our Common Home, the goal of the Task Force for the Recognition of Climate as a Common Heritage of Humankind, is to launch a global discussion around the lack of a legal status for Climate, or the current option to consider climate change as a concern.

This report is an invitation to reflection and discussion.

The Task Force of Climate as a Common Heritage of Humankind
Stable Climate: A Common Heritage of Humankind

Why do we need to recognize the Stable Climate as a Common Heritage?

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ABSTRACT

What is Climate from a legal standpoint? This is an unanswered question continues to underly climate negotiations and the lack results. After the 2021 Int. Law Commission Report stated that “The atmosphere and the airspace are two different concepts, which must be distinguished”, the answer to this question become possible. The current inability to legally portray the “functional aspect” of the planet, was at the origin of the refusal of Malta’s proposal of 09/1988, to recognize the Stable Climate as a Common Heritage. The solution of 12/1988 was to tackle the problem - climate change is a Common Concern, which is still the legal framework of Paris Agreement. This option limited the strategy of action as an attempt to avoid/mitigate/neutralize emissions – omitting the vital need to encourage the preservation of ecological services and enhancement of negative emissions. By only addressing the problem, the common good stable climate, was left with undefined ownership, belonging to anyone, and tragedy of the commons on a global scale took place. Although doctrine claims by translation of the Common Concern in terms of rights and duties, neither the duties that should arise from depreciation, nor the rights that should result from the provision of a stable Climate, are recognized, once the only object from which these rights and obligations could emanate — the stable climate — does not exist from a legal standpoint. Today, there is no system of incentives to carry out negative emissions, nor is it possible to build an economy that actively cares for/restore the climate. The IPCC recognizes that only through massive removals of CO₂ from the atmosphere can we achieve the Paris goals. Portugal included in its Climate Law the objective of recognizing the climate as a Common Heritage of Humankind. This project aims to deepen the design of this new legal object, investigate consequences on the economy, international relations, global governance, and climate negotiations.

KEYWORDS

Climate Common Concern; Climate Common Heritage; Legal Innovation; Static Sovereignty vs functional Earth System; Intangible Natural Heritage; Portuguese Climate Law

Why We Need
1 - “Functional Aspect” of the Planet. The true Common Heritage of Humankind?

The latest report of the International Law Commission (ILC Report-A/76/10 2021) stated: “The atmosphere and airspace are two entirely different concepts, which should be distinguished. Airspace is a static and spatial-based institution over which the State, within its territory, has “complete and exclusive sovereignty”. On the other hand, the atmosphere, as an envelope of gases surrounding the Earth, is dynamic and fluctuating, with gases that constantly move without regard to territorial boundaries”(...) and the “functional aspect”, which involves the large-scale movement of air (...) The atmosphere is invisible, intangible and non-separable.”

Given that the preamble of this report also mentions “the close interaction between the atmosphere and the oceans” that is crucial for the Climate, which in turn has a close relationship with biodiversity (LENTON 2016), leads us to the conclusion that the “functional aspect” of the atmosphere referred to by the ILC, can only be addressed in the system in which it is integrated, the Earth System as a single complex system (STEFFEN 2016). Since the Stable Climate is a visible manifestation of an Earth System in a well-functioning state, which in turn depends on a functional and resilient biosphere (STEFFEN 2016), climate can be considered as the proxy for this functional aspect of the entire Earth System, including the atmosphere, oceans and biodiversity (MAGALHÃES 2022).

“The atmosphere and airspace are two different concepts, which must be distinguished. (...) The atmosphere as an “envelope of gases” surrounding the Earth, is dynamic and fluctuating, with gases that constantly move without regard to territorial boundaries. The atmosphere is invisible, intangible and indivisible.”

United Nations International Law Commission, 2021
By distinguishing the concepts of static vs. dynamic sovereign territory of the Earth System, a path is opened to autonomize the “functional” dimension (whose most visible emerging expression is Climate) from the territorial element, and to answer a question that has been waiting for an answer for decades: “What is Climate from a legal perspective?” The lack of a legal status for Climate, while still an omitted issue in climate negotiations, continues to condition the results (or the lack of them). After 6/9/1988 Malta presented the proposal to recognize climate as a Common Heritage of Humankind (A/43/24), the decision of 12/12/1988 was not to recognize the existence of Climate at all, but rather to recognize the existence of a problem - climate change is a Common Concern of Humankind (A/43/905) - which is still today the legal framework of the Paris Agreement. This refusal to recognize the Common Good Stable Climate as a new legal object has also meant the absence of a legal status concerning this functional, systemic and non-territorial dimension of the planet, and this fact has conditioned the entire strategy to combat climate change, limiting it to an agreement to mitigate/reduce/neutralize the causes and consequences of this problem. Climate as an emergent property of the dynamics of the whole Earth System, is a phenomenon that exists de facto in the natural world, but due to the fact that it is a functional phenomenon, and therefore intangible and indivisible, but whose way of functioning is depreciable and limited (and therefore a common good), it has not been recognized as a global common good that should be managed as such, nor has an adequate and necessary legal regime been created for the institutionalization of its management. By not being recognized as a common good, its ownership has become undefined, and therefore it belongs to no one. The insufficient delimitation of property rights, leads to the so-called Tragedy of the Commons, which translates into the over-exploitation of natural resources (HARDIN 1968), and naturally climate change is recognized as a tragedy of the commons on a global scale (ANSARI 2013).
The Common Good Stable Climate corresponds to a given functioning pattern of the whole earth system. Changes in that pattern - Climate Change - are a Tragedy of the Commons on a global scale.

As OSTROM (1999) explains, the first three structural conditions to avoid the fatality of the tragedy of the commons are: a) define and delimit the Common Good that is at stake, b) define a community of users/owners, willing to act as stewards of this resource, c) build a congruent system between the rules of provision and appropriation of the common good - none of these structural conditions are present in the Paris Agreement. The current inability to adequately portray the facts of the functional dynamics of the Earth System, which are distinct from the static character of sovereignty, has been at the root of the absence of any mechanism capable of making socially visible the vital value of the provision of the common good stable climate, i.e. the perform of negative emissions, ecosystem services that clean up and maintain the regular functioning of this functional dimension of the Earth System. Because the good Stable Climate is not legally recognized, it is impossible to internalize benefits that ecosystems perform in the Climate, because they disappear in a global legal void, so today it is not possible to build an economy that actively cares/restores the Climate. This fact has been a primary trigger in the current economic dynamics of producing emissions, and in the failure to combat climate change.

The fact that a common good exists in the natural world, and is not recognized as such within the organization of human societies, is a structural reason for the successive failures of decades of climate negotiations.
2 - The Mitigation Trap - A concern does not clear the atmosphere

From the moment of its conception, the experts who were at the genesis of the concept of concern, warned: “A Common Concern of Humankind remains a vague political formula, which could be used to legitimize the lack of concrete actions simply by declaring an environmental concern (…), and to overcome this risk, they pointed out the need to translate this concept into rights and duties” (TOLBA 1990). To this day, this challenge has not been overcome, and will even be an impossibility. The central issue is that by refusing to recognize the existence of the global common good Stable Climate, neither the duties that should emerge from the use/depreciation of the common good Climate - nor the rights that should result from the provision of a Stable Climate, can be recognized, since the only object from which these rights and obligations could emanate - the Stable Climate - does not exist from a legal standpoint. As KISS (1992) teaches us, “how can a good that belongs to no one be subject to a legal regime?” The possibility of collective action and successful management of a common good implies much more than a mere agreement to avoid or mitigate harm.

“The term Common Concern is still today considered, a vague and undefined concept, which from its origin raises problems of concreteness” Z. Ahmad, 2021

Overcoming the inevitability of the “tragedy of the commons” requires the duty to respect a good that in this case should belong to humanity, the duty to comply with rules of use and hold accountable those who damage its functioning state, and the right to be rewarded for the benefits performed in this common good. Because in the current model of Concern, making improvements to the climate is an “externality” because it is a benefit performed in a good that does not exists from a legal standpoint, the only way to obtain financial credits is by avoiding/reducing emissions or neutralizing them, that is on the side of mitigating the problem. This way you sell carbon credits that have not been used, but will be used by others, but nobody is compensated for removing excess CO₂ from the atmosphere in the interest of all humanity (negative emissions).
Perversely, to have “value”, there must be emissions coming from those who need to pay to neutralize their emissions, or have to buy the credits to be able to emit. The result is a negative or neutral sum game, and this factor has been determinant in the absence of results. The IPCC has already assumed in recent reports that only through huge CO₂ removals from the atmosphere can we achieve the Paris goals, and the Paris Agreement itself does not provide a legal framework for negative emissions to be possible. For this to be possible, the natural intangibles that support a stable climate and life will have inevitable to be considered as wealth creation in society, which in turn implies that there is a legal system that captures them, recognizes their existence, to make them visible in the economy. The “common concern” has not only been ineffective in the past, it is inappropriate for our future.

3 - A society based on an Intangible Good

“When we refer to the pattern of the relatively stable functional dynamics of the Earth System that corresponds to a Stable Climate, we are not referring to “matter” or the physical planet, but to the way matter and energy move and circulate around the planet. Matter is always changing through chemical reactions and physical processes - and, in the long term, through biological evolution. But the patterns and rates of these changes and their interactions that form higher-order structures, such as ecosystems, follow well-defined patterns of organization and stability. At the planetary scale, the ways in which matter and energy move around the planet, creating
Human societies have a long history of recognizing intangible goods (since 1710), such as the protection of intellectual property. Without the recognition of intangible goods, it was not possible to recognize the value of intellectual creation, and without this, the structural conditions necessary for the development of the knowledge society and technological innovation did not exist. In the same way that the value of ecosystem services is incomparably greater for humans, than the value obtained from the destruction of natural infrastructure (MAGALHÃES, STEFFEN & GALLI 2019), the possibility of this superior value being recognized as wealth creation in human societies, depends on the existence if a legal support capable of capturing these factors that today are considered “externalities” for the economy.
But the recognition of intangible goods did not stop at innovations and creations born from the human spirit, but has already extended to intangible natural phenomena in Space Law. Why can't we also recognize the existence of intangible goods on our planet? We know today that it is possible to perform an operation of abstract legal division of the geographic space of the oceans by creating borders and different maritime zones, or by dividing atmosphere into different airspaces through legal abstractions, which are absolutely valid and necessary for the organization of human communities; however, a similar operation of legal division, even in a purely abstract way, cannot be performed at the level of the biogeochemical composition of the atmosphere, the oceans, or the functional aspect of the Climate, which is depreciated through the chemical alteration of the atmosphere and the oceans, but which cannot be appropriated or divided. The way we value intangible goods determines the way we manage intangible goods. If to build the knowledge society we had to create an intangible legal solution to make visible the value of ideas, it is not the case that to build a sustainable society we will have to find a solution to make visible the intangible natural processes that support a stable climate and life on Earth?

4 - Why should Climate be a Common Heritage?

Today it is possible to identify the nine main controlling variables that determine its state of functioning by defining so-called planetary boundaries (ROCKSTROM & STEFFEN 2009/2015), which define a combination of variables, relationships and parameters that together describe the functioning of the Earth System and the limits to the degradation of these processes (LENTON & OIJEN 2002). In other words, they enable an understanding of the role of the interaction between chemical, biological and physical processes in maintaining a favorable state of functioning for humanity (i.e. the Holocene), as well as humanity’s role in pushing the System out of this stable and desirable state. In this way the favorable biogeoophysical state corresponding to an Earth System in a good functioning state can be defined qualitatively and quantitatively - the Safe Operating Space for Humankind. Within these limits, the system is resilient - that is, it has the capacity to absorb shocks while maintaining its way of functioning (FOLKE 2002).

By defining Humanity's Safe Operating Space, a non-territorial and intangible space, this common interest of humanity was "materialised" in a quantifiable and definable natural resource. The Common Intangible Heritage.
In this sense, the need to transmit to future generations the biogeophysical conditions that support this favorable mode of functioning of the Earth System, allows us to argue that the specific state of the Earth System corresponding to the geological period of the Holocene, carries the meaning of heritage as something we need to preserve in the interest of all. “Heritage is an idea. It is a philosophical idea, a legal concept, because it is something we need to preserve” (SOBRINO 2012). Today this idea is scientifically definable and measurable. Perhaps he main advantage of the possibility of defining the favorable mode of functioning, a new global common good with intangible functional character, is the possibility that opens up, and which is intended to be studied in this project, to capture and make economically visible the intangible natural processes that contributed to the emersion of the relatively stable climate of the Holocene period, That is, to be able to internalize the improvements that ecosystems make to the common good, stable climate. Currently, the positive consequences of individual decisions to deliver benefits in the common good, Stable Climate, do not fall on and are not compensated for by those who made the decision to do so.

Since these are spread over a common good that belongs to no one, no one is willing to compensate for the benefits that everyone enjoys, and therefore there is no economic rationale for cleaning up the atmosphere and ensuring the provision of Stable Climate. States and individuals driven by self-interest have no incentive to maintain and restore ecosystems once benefits are spread over a common good where no one can be excluded from accessing those benefits, and today there is no way to internalize those benefits.

**Since it is impossible that the benefits generated by ecosystems only benefit in the territories that enforce the provision of a stable climate, only through legal support and the creation of a compensatio system, is it possible to create an economy capable of restoring and maintaining a stable climate.**

This perpetuates the machine that is set up to destroy the foundations of life, because only through the extraction/destruction of natural resources, the creation of wealth in society is recognised. Changing this cycle of destruction implies representing/capturing and internalising the value of intangible services produced by tangible natural infrastructures in the economy. But this implies, that beforehand the common good is recognised from a legal point of view, so that it is possible for these benefits to become “existent” in that common heritage, to then be visible in the economy.

Portugal included the objective of recognizing the Climate as a Common Heritage of Humankind, in Art.15, f) in its Climate Law. This is only the first step in a project to build a regenerative economy, in which the vital value of providing the ecosystem services that support a stable climate and life on Earth is visible in the economy.
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