Wendy Miles QC  
3nd BIENNIAL DR. JS ARCHIBALD QC MEMORIAL LECTURE  
“BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes”  
19 November 2019  
BVI International Arbitration Centre

I’m gonna speak to the crowd  
I’m gonna teach peace to the conquered  
I’m gonna teach the proud.

Bob Dylan penned those words almost 20 years ago, in ‘Lonesome Day Blues’ (a song from his Love and Theft album released on 9/11/2001). More than 2000 years earlier, Virgil penned the original version as Aeneas’ father, from the underworld, instructed his son on how to rule the Roman Empire:

... yours will be the rulership of nations  
   Remember, Roman, these will be your arts;  
   To teach the ways of peace to those you conquer,  
   To spare defeated peoples, tame the proud.

In December 2015, more than 190 states acknowledged by entering into the Paris Agreement that we must decarbonise our systems of energy, industry, land use and infrastructure and transport. The carbon-driven industrial era is at an end; it must give way to a new, decarbonised future. The unlikely army that led to its demise is the scientific community. But make no mistake: the carbon age has been conquered and a low carbon future needs to forge its way forward and prosper.

For the duration of my professional career, my clients, peers and I have worked in and benefited from a carbon-driven industrial era and the progress it has heralded. Our success, our comforts, our rewards – be they our health, remuneration, holidays, houses, cars or pension plans – all have been borne from that. It is a system that we know and understand, are experts in and are masters at preserving, including through our most sacred rule of law. We are
all proud of our mastery of that system, our knowledge and understanding of it and our success as a consequence of it. That is so very hard to let go.

In practical terms, decarbonisation simply means producing less carbon and finding ways to remove any carbon that we continue to produce. At the same time, our contemporaneous sustainable development goals for humankind require that we produce more energy for an ever-growing population of ever-increasing prosperity.

There are many pathways to achieving these dual objectives; none is necessarily easy or straightforward because each requires us to change the only way we have known things to be. It is a new and a different future.

Where feasible we must shift electricity production to renewables, shift transportation to electric (i.e., EVs), develop new lower carbon energy sources for high abating industries such as hydrogen and biofuels, increase carbon capture and storage and use, improve energy efficiency and expand nature based solutions in the form of forests and other carbon sinks. It also means making fundamental changes to how we use land, produce food, build and live in our homes, offices, hospitals and schools.

This is indeed a global transition of epic proportion. In that respect, it is not without parallel in the founding of Rome. Transition is our odyssey.

The scientific imperative for transition to a low carbon future is no longer in dispute. States have confirmed this in public international law instruments, most recently in the 2015 Paris Agreement. States are actively implementing these international commitments under Paris into NDCs, national law, policy and regulatory frameworks. Investors and other non-state actors are monitoring, analysing and seeking to act in anticipation of and compliance with applicable national legal frameworks, divesting where benefits are removed and investing where they are introduced.

The devil, as always, is in the detail: how fast, how far and, just, how will transition occur?
The answer is much faster and much further than it is occurring now.

And that is the challenge facing all those who benefit from the existing system: we seem incapable of making the decisions and taking the steps that we know must be taken to avoid an existentialist crisis. So how do we move forward?

Consider again Anchises’ words to his son: learn to teach the proud.

Pride stems from the past – what we have achieved before to become what we are now. Our pride is built from what we believe to define us, or define our success. If individuals, communities, cities, states, corporations, believe that what they are now is under threat of destruction, they will resist and fight back. We see that every day in the global response to climate change. We see a reluctance to press on with transition, which might associate with pride.

So how to teach the proud? How to persuade one with certain beliefs or a sense of being that s/he must accept a new way? The answer has to be to ‘speak to the crowd’. To engage all stakeholders in order to persuade them that the only way forward is through universal global action. And in order to promote and stimulate that universal global action, we need to be able to work together, cooperate and leave behind apportionment of blame, criticism and attempts to discredit or silence any voices we don’t like, understand or agree with. We need together to move forward and forge the future.

In the years in which I have been involved in climate change issues, it has struck me how few members of our international law community are fully informed and engaged. For curious and clever people, I find that unusual. There are the environmental and human rights law activists, who dedicate their careers to protecting the earth and its inhabitants. They strive to promote those objectives in the context of climate change impacts. But they are a relatively small, if not fringe, segment of our legal community.

I am much more interested in why lawyers like myself are not more engaged. The lawyers who represent corporates in respect of their global investments.
The lawyers who assist those clients to manage, protect, de-risk, preserve and, where necessary, recover interests and investments, or damages to compensate for their loss. Or the states on the other side of those investments, as the case may be. As international commercial dispute resolution lawyers, our role is broader than acting as mere recovery vessels for distressed debt and assets. Our role is to assist clients to manage global investment risk, using legal tools to assist clients to strategise, protect interests and investments and even enhance value.

As trusted counsel to our international investment clients – be they banks, funds, insurers, OEMs, infrastructure companies or natural resource or energy companies – we are actors in the transition to a low carbon future. As lawyers, our role is absolutely central: transition to a low carbon future is all about the law. The global community’s commitment to transition was borne of a public international law framework, is being implemented through national regulatory frameworks, and will be facilitated through enforcement of private commercial contracts and, to some extent, bilateral and multilateral investment treaties. The law governs transition; and role of dispute resolution is to implement the law. We are not mere bystanders in this exercise: we are at its very heart.

Mark Carney, the Governor of the Bank of England, characterises the magnitude of transition as follows:

“Changes in climate policies, technologies and physical risks in the transition to a net zero world will prompt reassessments of the value of virtually every asset. The financial system will reward companies that adjust and punish those who don’t.”

Back in 2015, immediately prior to the Paris Agreement, Carney isolated three buckets of climate related risk for the insurance and financial markets: physical risk, transitional risk and liability risk. All have legal elements, some are almost entirely legal.
First, **physical risk**: it is the cost of the effects of climate change. These include loss of buildings and infrastructure to weather related effects, such as hurricanes, floods, wildfires, or sea level rise, to name a few. Basically where physical structures are no longer fit for purpose because of environmental effects of climate. An example of how great an impact physical risk can have is the Californian power utility company that went into bankruptcy when wildfires destroyed its wiring and infrastructure, and led to catastrophic collateral damage to homes and broader community infrastructure.

Secondly, **transition risk**: this is the cost of transition policy and regulatory change.

Transition risk is something that international investment arbitration lawyers understand well. For examples, emerging market governments tout their ‘emergence’ as a transition investment opportunity. They attract investors by implementing various benefits, subsidies and incentives, either through tax breaks or fixed feed in tariffs or similar. Emerging markets further seek to de-risk investor positions by putting in place favourable investment conditions. These often include through international instruments such as the New York Convention and ICSID Convention, bilateral and multilateral investment treaties, but also through a robust judiciary with proper deference to arbitration, a transparent and legitimate tax body, a sound financial system that enables free movement of capital and ready repatriation of funds.

Transition to a low carbon future will track many of the same patterns: states will endeavour to put in place the market mechanisms and incentives that are required to prompt investment in low carbon projects and transition away from high carbon emitting activities. It is important to recognise that here we are talking about net carbon: some industries will continue to emit high carbon for some time – aviation is an obvious example – but its net effect can be mitigated by improved efficiency and nature based solutions.

I think of transition as a whole as an emerging market. More than ever, our commercial clients need our legal advice as to how transition policies and regulatory frameworks might affect them, in terms of protection from
expropriation but also protection from or at least risk management of changes that might affect value.

Thirdly is **liability risk**: that is all legal. Carney identifies liability risk as litigation risk – the threat of lawsuit for climate related past or future harm. But it is not limited to the civil tort litigation we see mushrooming in the US at present against states and private entities, sounding in nuisance, negligence, product liability or similar. It extends also to reporting and disclosure risk and associated shareholder claims.

Carney has been a great advocate of improved disclosure and reporting of climate risk by private entities, in order that their investors may make fully informed decisions as to the carbon footprint of their portfolios. It is only through a robust reporting system that transition investment is possible. Carney is pressing hard for mandatory disclosure and the EU and UK have already signalled their intent to move toward that. Carney says:

> It’s time for every country to get involved because the world won’t get to net zero if the financial sector doesn’t know how our companies are responding. In order to watch we must be able to see.

Until every country gets involved, the financial sector is taking responsibility upon itself; current supporters for Climate-related Financial Disclosure through the now voluntary TCFD control balance sheets totalling $120 trillion, including the world’s top banks, asset managers, pension funds, insurers, credit rating agencies, accounting firms and shareholder advisory services.

One may well ask where are the international lawyers? Or indeed any lawyers?

Climate-related financial disclosure, if not taken seriously, opens up a whole new front of litigation risk in the form of securities fraud claims or negligence. And with the stakes as high as they are, we should expect the courts – and claimants – to take these claims seriously.
What does this mean for the BVI international arbitration centre?

It means an opportunity. You will appreciate by now that I am a fan of Mark Carney. He has taken his role as central bank leader and regulator of the fourth largest insurance market in the world, and made transition his issue. He has owned it, given it a voice and legitimacy in the financial markets and forced – and continues to force – action. He has become, and he has caused the Bank of England to become, a climate leader.

Now one of the things he spoke of in one of his earlier climate speeches – Tragedy on the Horizon – was the paradox of our response to climate change. He points out that the catastrophic impacts of climate change will only be felt beyond the horizons of most actors, imposing a cost on future generations that the current generation has no direct incentive to fix. The deeper paradox is that the earlier we take action, the less costly the adjustment, in financial and real terms.

In September 2015, Carney talked about financial horizons being, at most, 10 years. We apparently can’t think past 10 years in terms of investment decisions, and even less for political. For better or for worse, we are now there; we are inside that 10 year window for climate catastrophe. At least in as much as our ability to keep conditions at the necessary level to avoid almost inevitable catastrophe beyond that runs out within 10 years.

There is good news. In September this year, Carney surmised that:

A new, sustainable finance system is being built.

It is funding the initiatives and innovations of the private sector, it has the potential to amplify the effectiveness of the climate policies of your governments and it could accelerate the transition to a low carbon economy.

But the task is large, the window of opportunity is short and the risks are existential.
Consider with me if you will, the notion of initiatives and innovations of the private sector. Let me outline three reasons why, in my respectful view, I think the BVI international arbitration court and this very centre and community is uniquely placed to become a climate leader, to amplify the effect of climate policies.

First, there is no future paradox here: the catastrophic impacts of climate change are at your foreshore. Where many actors of our generation have no direct incentive to impose the cost to fix the problem, as small islands, the BVI faces real and present danger today. Not on your horizon. Now.

You do not need me to describe to you the devastating effects of climate change, on weather events, fisheries and livelihoods.

Nor do you need me to tell you of the frustration of being a small island territory that has no separate and independent voice within the UN. It was wonderful that the BVI’s Deputy Premier and Minister for Natural Resources and Labour attended COP 24 last December in Poland. But it was the first time that the UK Overseas Territories (UKOTs) were directly represented and formed part of the official UK delegation attending the annual COP. I don’t know if the BVI plans to have representatives at COP25 in Madrid in a couple of weeks, but I sincerely hope so. It should be front and centre next year at the UK COP without a doubt.

As your Minister said last year, “It is important for us as the OTs to continue to make our voices heard on all the devastating effects of climate change on us as small island development states. We will lobby forcefully for whatever financial help can be had from the Green Climate Fund.”

I cannot emphasise enough how important the small island state and territory voices are. The only way to deal with Carney’s paradox is to demonstrate loud and clear, and repeatedly, that climate catastrophe is real and it is here. Then and only then might the financial markets and industry and governments fully mobilise to the degree required. This is not lip service; it is everything.
At the COP last year, the OTs focus was to network internationally and create opportunities to attract green inward investment and offer themselves as pilot schemes for renewable energy, smart cities and sustainable development. I am all for this; there is an attractive sell for a global fund to be able to market itself as having transitioned an entire state – or territory – to net zero carbon. Even just a small state or territory. The OTs should certainly exploit the current appetite for impact investment from development and private funds, as well as the appetite for big announcements.

Because the big announcements matter. As another state or territory hits a net zero carbon target – adapting to its own unique climate challenges – that proves once again that it can be done. It puts a little more pressure on the other states to follow suit. And it encourages investors to direct their private funds in the direction of transition.

There is a TedTalk called ‘How to Start a Movement’. It talks about first movers and first followers. We already have our first movers of net zero carbon: 19 states, plus the EU and California have all drafted into law net zero emission targets. Bhutan is already in negative carbon emissions. If we are allowed to count California, why not count the BVI as well?

Climate ambition in the Caribbean should be among the highest in the world. Because you have more reason than any to get this moving now.

Second, the BVI International Arbitration Centre is a body for international dispute resolution. It is not the only one and it is certainly not the biggest, most established or most influential. But it is one of the few on an island that is highly susceptible to climate related extreme weather events. It is poignant that the BVI IAC became home to the BVI government and administration following the last major hurricane to devastate the island. Perhaps it could explore a greater role than a temporary physical home, and explore a role in driving climate leadership in the Caribbean, much like the ICC does from Paris.

The Centre’s mission statement is to become the International Arbitration Centre of choice to meet the rapidly evolving dispute resolution needs of arbitration users worldwide. It aims to become the go-to institution for all
forms of dispute resolution in the Caribbean, The Americas and beyond; as a
nerve centre for dispute resolution, thought leadership, seminars and trainings
as well as various other initiatives.

The objective of the BVI Arbitration Group is to support the Centre in
promoting dispute resolution in the BVI; to promote the use of arbitration and
other forms of alternative dispute resolution to legal and business people,
both locally, regionally and internationally. It is also to provide a forum for
members to exchange ideas.

All of these objectives are consistent with taking on a thought leadership,
facilitative and training role in respect of transition and climate leadership in
the region.

According to the 20\textsuperscript{th} century philosopher of enlightenment, Deutsche,
recently cited in Steven Pinker’s book \textit{Enlightenment Now}:

\begin{quote}
An optimistic civilization is open and not afraid to innovate, and is based
on traditions of criticism. Its institutions keep improving, and the most
important knowledge that they embody is knowledge of how to detect
and eliminate errors.
\end{quote}

The BVI IAC is an institution that will prosper through its ability to innovate and
improve. It responded pragmatically and practically to accommodate the state
architecture following one catastrophic climate related event; I invite it to find
other new and novel ways to continue to support the territory and region as a
whole in promoting understanding of and resolving disputes arising out of or
relating to climate change.

Because climate change related disputes are coming at every conceivable level
of the legal system.

- At public international law level, we are already seeing ITLOS, ICJ,
  International Criminal Court and UNHR Commission claims. We know
  that an inevitable consequence of climate change will be displaced
  populations. Already in PNG, Tuvalu and Kirabati (all in the Pacific)
  individuals and groups displaced by climate change are subject to
repatriation in other people’s territories. These are relatively small displaced populations so far; what happens when displaced persons reach the 10s or 100s of millions? Who resolves those disputes and where and how?

As these islands’ abundant and stunning resources become increasingly threatened, expect public international law disputes concerning maritime boundary issues, fisheries management, right to water, access to trade routes, and right to repatriate all to come to the fore of international dispute resolution. And where better to centre their resolution than right here.

An optimistic civilization is open and not afraid to innovate ... . Its institutions keep improving ... .

- At investment treaty dispute resolution level, as states grapple to regulate for transition and set and seek to implement net zero targets, they will create incentives to stimulate new investment, and introduce policies to disincentivise continued investment in others. That is the nature of transition – it is a move from one way of being to another. It is a process of taming the proud – the ways of old. And states will make mistakes. We need look no further than the 50-odd Spanish solar cases to see how wrong.

My own view is that those cases demonstrate the system working: they show that states need to take transformative action, but they need to do so in a transparent manner that does not create legitimate expectations that are then not met. Because transition needs private investment. There are various numbers in circulation, but my best count is that for every development dollar we need 30 private investment dollars to fund transition. Tens of trillions of private cash. Investors will not invest unless there is market certainty and the ability to manage risk. Investment treaty protection provides such securitization.
In addition to the Spanish solar cases, and closer to home, the Allard v Barbados investment treaty arbitration against the state for allegedly not meeting the hotel investor’s expectations in respect of the preservation of a marine reserve, demonstrates how treaty claims might police and enforce state commitments in respect of climate action.

It seems to me that in such disputes concerning island energy infrastructure, tourism, land use, fisheries, shipping etc, the only sensible place to resolve the dispute is on an island. Only then are the repercussions of the issues under review able to be put fully into context. Again, who better than this very centre?

- At an international commercial dispute resolution level, investment in the composite sectors at the heart of the energy, industrial, urban and transport and land use systems are already heavy users of international arbitration.

However, I am unconvinced, and this is the subject-matter of the ICC Report on Climate Change Related Disputes, which will be launched in Paris next week, that we understand the import of our role in relation to these disputes.

Again, there is room for thought leadership in terms of analysis of the types of disputes, where the disputes are arising, where the damages are falling, and whether it is consistent with the investment objectives of the underlying parties. For example, if a party’s mission statement is to transition to net zero, and it obtains funding and enters into contracts solely and exclusively for that purpose, should that not be a material factor in how disputes are resolved in respect of those contracts?

The more we understand, the more we can see, the more we can track transition and its challenges and successes in practice. This seems to be to be a unique opportunity for arbitral institutions, although perhaps more the ICC than the BVI just yet.
That said, there is also an important training role that is not limited to any single institution. Again, because of the BVI’s unique situation and circumstances, this centre is quite possibly better placed than any other to train arbitration counsel and arbitrators on climate change law and policy, and its role in the interpretation of contracts.

Having outlined the potential for climate leadership by the BVI and Caribbean, and by this centre, there is a third candidate I want to mention. Stakeholders and users of international arbitration: we international lawyers, arbitrators and jurists and international investors. Not only do these stakeholders know how to resolve disputes, we know how to use the law and dispute resolution mechanisms to innovate change.

I continue to believe that international lawyers, like the Governor of the Bank of England, can be champions for transition to a low carbon economy. If we are out looking for the drivers for transition, if we remain inquisitive and intellectually curious, we are more likely to raise transition facilitative issues with our clients. And we can do that in myriad ways.

First, through reason. We lawyers are trained in and led by reason:

... we insist that our answers are reasonable or justified or true and therefore other people ought to believe them too ... .

Like all enlightenment thinkers, as Pinker would call us,

... we energetically apply a standard of reason to understanding our world, and not fall back on generators of delusion like faith, dogma, revelation, authority, charisma, mysticism, divination, visions, gut feelings, or the hermeneutic parsing of sacred texts.

As dispute resolution lawyers, our role is to identify and analyse the applicable law, ascertain the facts and apply the law to them to derive the answer. We deploy the same process as arbitrators and judges. And each and every step of the way, we deploy reason.
The climate challenge requires reason. Objective and dispassionate reason. Sound and steady heads that do not attack or feel threatened by one another, but that are able to sit together and work through solutions.

Events like this, and our panel on Friday, are opportunities to develop our thinking and explore beyond our normal boundaries of thought.

Second, through resolution. After reason we have our training, experience, expertise in resolving disputes. We can see a way through when reason does not prevail and can bring opposing parties together in a way that enables them to move forward. As our global systems transition, there will be stumbles and falls, and those falls will inevitably invoke dispute resolution.

Third, through legal expertise. Anyone practices dispute resolution in the BVI is bound to have some corporate and financial services expertise. This is central to much of the legal business of the islands.

Let me tell you something exciting about legal expertise and transition. I learned yesterday that a Baker & McKenzie partner, Martin Wiljder, has just left his partnership to set up an advisory firm that plans to raise billions of dollars to invest in climate opportunities. I first met Martin when he came to speak at the ICC’s side event during COP21 in Paris, the ICC’s inaugural climate change disputes event. He is joined in this project by some of his Baker & McKenzie colleagues, a member of the Australian COP negotiation team, and the former head of Lazard in Sydney. They plan to offer breakthrough advisory law, policy and corporate services, merchant banking solutions, infrastructure investment platforms and funds. And while this is not the first time a lawyer has moved into fund management, it is the first example I have seen of a lawyer taking the lead in climate transition fund raising. And yet it is such a natural and intuitive role for the lawyer – transition is all about the law, international, domestic, statutory and contractual. It is all about the law and as international lawyers we have been too long missing in action.
And that, ladies and gentlemen, brings me to my conclusion for the BVI, the IAC, and the BVI-associated legal community. If teaching the proud – as I believe – is about persuading others that change is not defeat if you own it and become part of it, then let me offer you an idea.

Over the past 30 years, the BVI has established itself as a global leader in the provision of financial services, with pre-eminence in company incorporations. There has been significant growth in related areas of asset management, fiduciary services, fund administration and management together with captive insurance. Indeed, much of the Centre’s, and local court, work arises out of this.

Financial Services is a linchpin of the economy. But from 2009, according to McKinsey’s report on the state of the sector, new incorporations began to decline as a consequence of the global economic recession and the BVI’s limited success in value-added services. Concerns arose about the resilience of our long-term prosperity. The Government’s 2012 consultation process led to a strategic implementation plan for reinvigorating the Financial Services sector and ensuring its sustainable growth towards 2020 and beyond. The objectives were to: assess the BVI’s economic prospects; lay out a strategic framework and set of recommended initiatives to spur growth in the future; and develop an implementation plan to ensure that the BVI successfully implements these initiatives.

I scanned and word searched the McKinsey Financial Services strategic analysis and plan, and nowhere did I find the word climate, or green or transition.

But what I did find is a broad set of priority initiatives and recommendations that could easily accommodate a decarbonised mandate – a net zero carbon operational framework. Because although sustainability and ESG and CSR are all frightfully important, what I really care about right now is a low carbon future. And I respectfully suggest that if I lived on islands such as these, I would care about it a whole lot more.

The three McKinsey priorities are
Build best-in-class enabling mechanisms and enabling capabilities:

1. Establish a Delivery Unit. Build a world-class team reporting at the highest level of government, which is responsible for driving progress and delivering results across each priority Financial Services initiative.
2. Revamp the International Finance Center (IFC).
3. Strengthen the business development function.
4. Engage our population.
5. Strengthen BVIslander capability.

Remain a world leader in the core business of company incorporations:

6. Pursue tax initiatives.
7. Enhance Financial Services Commission customer service.

Expand into new value-added services:

8. Attract value-added services.
9. Reform immigration and labour.
10. Invest in infrastructure.

Allow a moment to imagine if the BVI were to do all of that in a manner that solely and exclusively promoted investment in climate opportunities. It would not mean refusing or turning away certain investment; it would just mean requiring it to meet certain criteria for transition to a low carbon future.

It would mean following the Mark Carney recommendations to the London financial and insurance markets, which are to embrace climate related financial disclosure, to improve understanding and management of climate related financial risks – and those should be most poignant here – and finally to recognise that sustainable investment is, according to Carney, “the new horizon that can bring enormous opportunities ranging from transforming energy to reinventing protein.”
You see, it is yours that could be “the rulership of nations”.

As the rest of the world – including all of those financial service providers that the BVI competes with for market share – continue to delay transition and the deployment of funds in the necessary direction, the BVI could come to the forefront as the thought leader and champion of climate and transition finance and associated dispute resolution. And then it could be you who are the ones:

To teach the ways of peace to those you conquer,
To spare defeated peoples, tame the proud.