

# CLIMATE JUSTICE:

The international momentum towards climate litigation

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# EXECUTIVE SUMMARY

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The Paris Agreement is ground breaking yet contradictory. In an era of fractured multilateralism it achieved above and beyond what was considered politically possible – yet it stopped far short of what is necessary to stop dangerous climate change. In the Paris Agreement, countries agreed to pursue efforts to limit warming to 1.5C, yet the mitigation pledges on the table at Paris will result in roughly 3C of warming, with insufficient finance to implement those pledges. The Paris Agreement was widely acknowledged to signal the end of the fossil fuel era, yet it does not explicitly use the words ‘fossil fuels’ throughout the entire document, nor does it contain any binding requirements that governments commit to any concrete climate recovery steps.

Now, citizens and governments are beginning to seek redress in court with ground breaking cases emerging around the world, in a whole new area of litigation, some of which can be compared with the beginnings of - and based on some of the legal precedents set by - legal action against the tobacco industry. Other new strategies are focused not only on private industry but on the sovereign responsibility of governments to preserve constitutional and public trust rights to a stable climate and healthy atmosphere on behalf of both present and future generations. Climate litigation has spread beyond the US into new jurisdictions throughout Asia, the Pacific and Europe. Claimants are not only targeting the ‘Carbon Majors’, who are the world’s largest producers of oil, coal and gas, but are also targeting the governments around the world that are continuing to support and collude with the Carbon Majors by promoting, subsidising and approving a fossil-fuel based energy system, with the full knowledge of the catastrophic impacts of climate destabilization and ocean acidification that would result from continuing to burn fossil fuels. The Carbon Majors are responsible for two-thirds of the human-made carbon emissions in the atmosphere today. These corporations have made outrageous profits while outsourcing the true cost of their product upon the poor who are paying with their homes, ability to grow food and with their lives, as they begin to deal with the impacts that 1C of warming are wreaking on them. In addition, governments have allowed and encouraged this crisis to transpire, in many instances in violation of citizens’ fundamental rights.

In response to this travesty, the Philippines human rights commission is investigating fossil fuel corporations for their role in the human rights impacts of climate change. A Peruvian farmer is seeking \$21,000 in damages from German utility company RWE in German courts. State governments within the US are investigating fossil fuel corporations for allegedly lying to the public and investors over climate change. Efforts by individuals seeking damages from fossil fuel corporations are likely to increase over time, and will foreseeably be transnational in nature (i.e. plaintiffs may come from anywhere in the world and bring their cases in a wide range of jurisdictions).

At the same time, citizens, including children, are increasingly bringing climate litigation against their governments and are achieving successes. A Dutch court decided in the *Urgenda* case that the Dutch Government was not doing enough to address climate change, and ordered it to do more. A Pakistani judge has declared the government’s inaction on climate change offends the fundamental rights of its citizens, including constitutional and human rights. Youth in the US, supported by Our Children’s Trust, are seeking science-based CO2 emission reductions from their governments based on constitutional and public trust rights and have had major recent victories in Washington, New Mexico, and in a federal lawsuit (where they have survived motions to dismiss brought by the US government as defendant and massive fossil fuel industry trade groups as intervenor-defendants). A young Pakistani girl and other youth around the globe, also working with Our Children’s Trust, are seeking to replicate this sort of constitutional, intergenerational, public trust litigation within their countries. In addition,

the first immigration cases have been brought by citizens of Pacific Island nations seeking to migrate to New Zealand. One claimant was successful in securing an immigration permit based upon humanitarian grounds.

Rich, polluting countries have deliberately avoided the topic of liability and compensation for climate damages. Yet governments need to avoid repeating the disastrous history of asbestos litigation where the claims have crippled judicial systems at a time when the original defendants have ceased to exist or removed assets from the jurisdiction. Governments need to be held to their own affirmative fiduciary and constitutional responsibilities to their citizens to protect essential natural resources for the benefit of all present and future generations, and to pursue liability for fossil fuel corporations, starting with investigations recently launched in the Philippines and the US (as identified above). The importance of such efforts by governments could be explicitly recognised and actively encouraged in the international climate regime, just as it is in the international tobacco regime.

Without this shift to judicial recognition and enforcement of sovereign governmental obligations to protect shared natural resources, including a healthy atmosphere, ocean and climate system, in accordance with the best available science, as well as private liability, legislative and executive action on the global domestic and international levels will remain as ineffective in the future as it has been in the past.

***We recommend that governments:***

- 1. Remove the fossil fuel industry from the climate negotiations process and ban the industry from having a role or voice in setting climate change policy.*
- 2. Acknowledge and discharge governments' affirmative sovereign obligations to preserve essential natural resources, including a healthy atmosphere, ocean and climate system, in accordance with the best available science, for the benefit of all present and future generations, with comprehensive plans for emission reductions and protection and restoration of natural ecosystems.*
- 3. As well as making appropriate contributions in their own right (public climate finance), introduce a levy on fossil fuel producers to partly fund the International Mechanism for Loss and Damage, allowing for individuals and communities to directly access the funds made available through this process.*
- 4. Remove fossil fuel subsidies and couple this action with the carbon levy to ensure that governments recuperate the true and complete costs of climate change from industry.*
- 5. Introduce into international climate law a provision that recognises the role of private sector liability and encourages governments to take legislative action and legal actions under existing laws to deal with potential criminal and civil liability of the fossil fuel industry.*
- 6. Take legal action against the fossil fuel industry within national jurisdictions to establish liability, recuperate the costs of climate change and expose internal industry documents.*
- 7. Consider amending limitation periods if necessary to allow claimants to bring cases from the time that climate damages manifest.*
- 8. Implement strategies to ensure fossil fuel defendants do not take action to avoid liability (e.g. through shifting assets to alternative jurisdictions or splitting up their companies).*
- 9. Introduce legislation that specifically addresses climate liability if there is a need for clarification of the law or a need to change the law to make climate litigation feasible.*

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# INTRODUCTION

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The Paris Agreement is ground breaking yet contradictory. In an era of fractured multilateralism it achieved above and beyond what was considered politically possible – yet it stopped far short of what is necessary to prevent dangerous climate change. In the Paris Agreement countries agreed to pursue efforts to limit warming to 1.5C, yet the mitigation pledges on the table at Paris will result in roughly 3C of warming, with insufficient finance to implement those pledges. The Paris Agreement was widely acknowledged to signal the end of the fossil fuel era, yet it does not mention the need to phase out fossil fuels, nor does it contain any binding commitments to reduce carbon emissions or to implement science-based climate recovery policy.

Importantly, the preamble provides the first international recognition of the concept of climate justice. The Paris Agreement deals with climate loss and damage as a separate and stand-alone element, effectively adding a third pillar to the climate change regime alongside mitigation and adaptation, and acknowledging that climate change is already causing impacts that poor communities cannot adapt to. Yet the Decision states that Article 8 ‘does not involve or provide a basis for any liability or compensation’. These elements seem to simultaneously suggest a rejection by the international community of liability for climate loss and damage, yet also contribute to the growing momentum towards climate litigation. Part 1 of this report outlines these key aspects of the Paris Agreement, including the key question of whether the Paris Agreement excludes liability and compensation.

This vast gap between the best possible outcome from the Paris climate summit and the climate action necessary has resulted in many recognising that there needs to be a more comprehensive, systemic and binding approach. Climate litigation has become an increasingly popular topic of conversation amongst those who want to see science-based climate action. As 21 years of talks within the United Nations Framework Convention on Climate Change (UNFCCC) have resulted in inadequate climate action, it is not surprising that more and more individuals, communities, organizations and some countries are beginning to consider climate litigation.

This report seeks to provide an analysis of the Paris Agreement and its relationship to climate litigation. Climate litigation has been slowly developing for some time, but has seen tremendous progress recently. Early cases originated in the US where plaintiffs have sought compensation from companies for the impacts of climate change. Newer cases in the US and elsewhere are seeking to enforce the affirmative fiduciary and constitutional responsibilities of governments to preserve the health of our shared atmosphere and climate system, in accordance with science, for the benefit of all present and future generations. Furthermore, climate litigation has spread to new jurisdictions throughout Asia, the Pacific and Europe. Claimants are relying upon new theories of law and new approaches to theories of law, and these claimants are beginning to be successful in their efforts, particularly in their cases against governments with recent cases in the Netherlands, Pakistan and the US. Part 2 of the report provides an assessment of current and pending climate litigation across multiple jurisdictions, and offers analysis of whether these cases are replicable in other jurisdictions.

Part 3 of the report shifts focus to learn from the role of litigation in other sectors, including tobacco, asbestos and oil spills. These three areas of litigation have followed very different histories and had varying levels of success in contributing to broader societal goals of controlling the risks of harmful activities. Tobacco litigation has been pursued by both private claimants and governments. Asbestos litigation has proven to be a particularly difficult area, with serious consequences for judicial systems and governments. Oil spill litigation has had the support of international compensation schemes. Lessons are to be learned from each of these sectors at this critical point in history for government

efforts against the threat of climate change.

Part 4 explores the relationship between litigation, the climate negotiations and the fossil fuel industry. This section examines whether the Paris Agreement will contribute to a growth in climate litigation. Finally, it considers the options available to governments, both in relation to climate litigation and alternatives to litigation.

# 1. THE PARIS AGREEMENT

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## 1.0 Background

The Paris Climate Agreement<sup>1</sup> was hailed as an historic agreement, the culmination of 21 years of discussions and achieving more politically than most thought possible. Yet, despite its significance, the Paris Agreement makes clear the vast gap between the current politics of the UNFCCC, and the action necessary to prevent catastrophic climate change. A yawning chasm of empty ambition exists between the need to keep warming well below 1.5C<sup>2</sup> and the non-binding pledges made by the parties in Paris – forecast to lead to 3C of warming<sup>3</sup>. Even higher levels of warming are possible as many of the emission reduction pledges from poorer countries are contingent upon financing from rich countries – and this financing is currently inadequate for the task.

This against a background where climate impacts are real and happening. Temperature records are being smashed on a regular basis and sending shockwaves through the climate science community, and vulnerable people are experiencing extreme events – typhoons, floods, droughts - like never before.

Part 1 explores the background of climate justice and the UNFCCC, including the 'new' topic of loss and damage. It considers the implications of the Paris Agreement on loss and damage and on compensation and liability.

## 1.1 Towards climate justice

The Paris Agreement is the first international agreement to explicitly incorporate the concept 'climate justice'. The preamble notes: 'the importance for some of the concept of "climate justice", when taking action to address climate change'. This hard fought yet miserly acknowledgement is built upon a long standing history.

Initial considerations on 'justice' date back to Socrates and Plato's – *The Republic* and *Law* – which arose from dissatisfaction with the excessive individualism and political selfishness threatening the survival of Athens<sup>4</sup>. Over time, new theories concerning justice have expanded to include distributive

1 <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

2 Parties agreed at Paris (Article 2, Para 1(a)) to pursue efforts to limit the temperature increase to 1.5oC above pre industrial levels, as called for by the Climate Vulnerable Forum and the Association of Small Island States in order to limit impacts and damage from climate change. See: <http://aoasis.org/small-islands-propose-below-1-5%CB%9Ac-global-goal-for-paris-agreement/> and <http://www.1o5c.org/>.

3 Estimates vary from 2.7degrees to 3.7degrees, with an outlier at 5.2degrees. More on the estimates for global temperature increase, and the assumptions driving the differences is available here: <http://www.wri.org/blog/2015/11/insider-why-are-in-dc-studies-reaching-different-temperature-estimates>.

4 <http://www.iep.utm.edu/justwest/>.

justice concerning the just distribution of wealth, power, opportunities or property and on what basis, whether based on needs, rights or entitlements. Social justice and notions of fairness and equality of rights to basic liberties and arranging social and economic inequalities to the benefit of the least advantaged are core considerations. Retributive justice is also at the heart of the concept considering punishment for the purpose of deterrence, rehabilitation or security or restorative justice to assist recovery of victims of crime. Justice is defined by Rawls as the 'first virtue of social institutions'.<sup>5</sup>

One of the more recent concepts of justice is environmental justice, which is defined by the US Environmental Protection Agency (EPA) as<sup>6</sup>: 'The fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work'. Environmental justice has underpinned a global shift in legal theory, law making and litigation where injustices are being caused through environmental mismanagement, against people and communities with little power. In the US these have often been communities of colour.

It is not surprising that 'justice' increasingly takes a more central place in relation to climate change. Climate change is one of the greatest injustices to have confronted humanity. Wealthy countries and large multinational fossil fuel companies, have gained their wealth and security at the expense of billions of poor people living in highly vulnerable circumstances around the world, and have shown no intention to compensate for the harm caused and have little enthusiasm for mitigating the harm by reducing emissions. Climate change creates a huge intergenerational justice issue as the harms resulting from climate change will disproportionately burden youth and future generations relative to present generations.

Whilst various groups have put forward definitions of climate justice<sup>7</sup>, all of them have at their core the inherent unfairness that the people who have done the least to cause climate change are the ones who are facing the worst impacts. The voices of those calling for climate justice were amongst the first and loudest calling out the fossil fuel industry, and the governments and corrupt systems that entrench their power and their profits at the expense of the poorest and most vulnerable, whilst perpetuating false solutions to solve the climate crisis.

There are interconnected and complementary concepts of 'climate justice.' The concept is used to understand climate change as an ethical, legal and political issue, incorporating issues of environmental and social justice. Climate justice recognises that those who are least responsible for climate change suffer the gravest consequences, and that fair and just solutions must recognise issues of equality, human rights, collective rights and historical responsibility for climate change. 'Justice' also has a specific legal meaning, and the phrase climate justice can also be used to mean actual legal action on climate change issues, that draws from and aims to achieve these values.

There is some irony in the fact that all those years ago, Plato's theory of justice rejected previous theories that justice was 'the interests of the stronger' or 'might is right'. Plato's vision of justice speaks directly to the injustice at the heart of climate change.

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5 John Rawls' A Theory of Justice (1971).

6 <https://www3.epa.gov/environmentaljustice/>.

7 See the statements made at Durban Group for Climate Justice, Durban, October 2004, Climate Justice Now! Bali, 14 December 2007, Climate Justice Alliance, February 2010 "What does Climate Justice mean in Europe?", World People's Conference on Climate Change and the Rights of Mother Earth, Cochabamba, April 2010 all available here: <http://ccs.ukzn.ac.za/default.asp?4,80,5,2381>, and the Principles of Climate Justice from the Mary Robinson Foundation available: <http://www.mrfcj.org/principles-of-climate-justice/>.



Now that climate justice is enshrined as a concept in the Paris Agreement we must turn our efforts to achieve it.

## 1.3 Loss and damage

The injustice of climate change is most obvious in the issue of 'loss and damage'. Loss and damage is the term used in climate policy for the worst impacts of climate change - those that go beyond people's ability to cope and adapt<sup>8</sup>. Loss and damage includes extreme events, like droughts and tropical storms, and slow-onset events like sea-level rise, increasing temperatures, glacial retreat causing flooding and eventual drought, and desertification. Already, at one degree<sup>9</sup> of warming, the poorest and most vulnerable communities are paying for loss and damage - with their lives, their homes, or their ability to grow food. Three specific cases of loss and damage are outlined below.

In November 2013 Typhoon Haiyan (or Yolanda as it was called locally) devastated the Tacloban region of the Philippines.<sup>10</sup> As a country that has frequent typhoons and storms, the government and locals had many coping mechanisms in place. However, with sustained wind speeds up to 195mph (314kph), Typhoon Haiyan was the strongest ever tropical storm to make landfall. So traditional coping mechanisms were blown away. Typhoon Haiyan forced four million people from their homes, destroyed or damaged one million houses and killed 7,354 people. The International Disaster Database (EM-DAT) quantified the damage of Typhoon Haiyan at \$10 billion, of which very little - only USD \$300–700 million - was likely to be covered by insurance. The devastation of Typhoon Haiyan was a catalyst for a pioneering legal action against the fossil fuel industry [see Part 2.2.1].

The 6,000 people who live on the Carteret Islands<sup>11</sup> and three neighbouring island atolls, are finding their home increasingly untenable due to rising sea levels, and the resulting land loss, salt water inundation, and food insecurity as traditional crops won't grow. The community group Tulele Peisa (which means 'sailing the waves on our own') is working to relocate 50% of the population by 2020 and 'maintain our cultural identity and live sustainably wherever we are.' With the support of the Roman Catholic Church and the PNG Government, Tulele Peisa is slowly relocating Carteret Islanders to Bougainville. It was estimated by Tulele Peisa in a report by Displacement Solutions that USD \$5.3 million is required from 2009 to 2019 to ensure the basic needs for a successful resettlement are met - USD \$6,500 for land and housing for each family.<sup>12</sup>

Climate change poses an ongoing and serious threat to Kenya's economy.<sup>13</sup> Already, it accounts for

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8 Warner, K., van der Geest, K., Kreft, S., Huq, S., Harmeling, S., Kusters, K., De Sherbinin, A., 2012. Evidence from the frontlines of climate change: Loss and damage to communities despite coping and adaptation Loss and Damage in Vulnerable Countries Initiative. Policy Report. Report No. 9. United Nations University Institute for Environment and Human Security (UNU-EHS), Bonn <https://collections.unu.edu/eserv/UNU:1847/pdf10584.pdf>.

9 1°C of warming above pre industrial levels. Source: <http://public.wmo.int/en/media/press-release/state-of-climate-record-heat-and-weather-extremes>.

10 Jeff Masters, *Super Typhoon Haiyan: Strongest Landfalling Tropical Cyclone on Record* (2013) available at <http://www.wunderground.com/blog/JeffMasters/super-typhoon-haiyan--strongestlandfalling-tropical-cyclone-on-recor>; Mark Fishetti, *Was Typhoon Haiyan a Record Storm* (Scientific American, 12 November, 2013) available at <http://blogs.scientificamerican.com/observations/was-typhoon-haiyan-a-record-storm/>; Chad Hemenway, *AIR: Insured losses from Typhoon Haiyan up to \$700m* (Property Casualty, 18 November 2013) available at <http://www.propertycasualty360.com/2013/11/18/air-insured-lossesfrom-typhoon-haiyan-up-to-700m>.

11 A set of islands in Papua New Guinea.

12 Displacement Solutions, *The Bougainville Resettlement Initiative Meeting Report* (2008, Canberra, Australia) available at: <http://displacementsolutions.org/wp-content/uploads/BG.pdf>; Displacement Solutions, *Land Solutions to Climate Displacement* (2015) available at <http://displacementsolutions.org/ds-initiatives/land-solutionsto-climate-displacement/>; E Ferris, *Planned Relocations, Disasters and Climate Change. Prepared for Conference on Climate Change and Migration in the Asia-Pacific: Legal and Policy Responses* (2011, Australia) available at [http://www.brookings.edu/~media/research/files/papers/2011/11/10-relocation-disasterscc-ferris/1110\\_relocation\\_disasters\\_cc\\_ferris.pdf](http://www.brookings.edu/~media/research/files/papers/2011/11/10-relocation-disasterscc-ferris/1110_relocation_disasters_cc_ferris.pdf).

13 See UN Office for the Coordination of Humanitarian Affairs, *East Africa Drought Humanitarian Report No*

a loss of approximately US\$0.5 billion per year, which is equivalent to 2% of the country's GDP. This cost is expected to rise and could eventually claim 3% of Kenya's GDP by 2030. From 2008 to 2011 the Horn of Africa suffered the worst drought in 60 years. At its peak it left 13.3 million people with food shortages and led to a large number of people dying. Across the four year period of drought, the Government of Kenya estimated losses of \$12.1 billion in total. Major areas of loss included: agriculture \$1.5bn; livestock \$8.7bn; water and sanitation \$1.1bn; and other areas including agro-industry, fisheries, nutrition, health, education and energy. In Kenya, it was the poorest people who suffered the greatest losses. As the drought lasted more than four years, poverty increased in both qualitative and quantitative terms, and the Government of Kenya had to divert funds and significantly increase its efforts to reduce poverty in the medium- to long-term.

Loss and damage from climate change is more than economics – the non-economic costs are likely to be more significant than the economic costs<sup>14</sup>. For instance – if a low lying island nation is overwhelmed by rising sea levels they are at risk of losing their connection to their ancestral land and to where their ancestors are buried, their traditional way of life including access to their fisheries, their sense of community, their language and their sovereignty.

The more mitigation we undertake and the more adaptation finance is made available - the less loss and damage there will be. But at this stage loss and damage is unavoidable. And it is already costly.

A review of estimates of loss and damage allows a conservative estimate of USD \$50bn per year in the near term, increasing to USD \$70-\$100bn by 2050, for the group of 48 Least Developed Countries (LDCs). Loss and damage for all vulnerable developing countries can conservatively be estimated as at least double - USD \$100bn per year in the near term, increasing to at least USD \$200bn by 2050<sup>15</sup>. Climate Action Tracker, for Oxfam, estimate that loss and damage will cost all developing countries \$400bn per year by 2030 and over one trillion dollars each year by 2050.<sup>16</sup>

All of these estimates assume warming is kept below 2 degrees – costs will rise to be much higher if warming is greater. And we are currently on track for roughly 3 degrees of warming<sup>17</sup>.

## 1.4 Loss and damage and the Paris Climate Agreement

Loss and damage has long been one of the most contentious issues in the already highly political climate negotiations. Throughout the history of the negotiations rich countries have objected to including loss and damage. It is widely perceived that rich countries are driven by concerns about paying for loss and damage.<sup>18</sup> They have argued that loss and damage should form a part of

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3 (2011) available at <http://reliefweb.int/report/burundi/eastern-africa-drought-humanitarian-report-no-3>; Kenya Government, *Kenya Post-Disaster Needs Assessment (PDA) 2008-2911 Drought* (2012) available at [http://www.gfdr.org/sites/gfdr/files/Kenya\\_PDNA\\_Final.pdf](http://www.gfdr.org/sites/gfdr/files/Kenya_PDNA_Final.pdf).

14 UNFCCC. 2013. FCCC/TP/2013/2: Non-economic losses in the context of the work programme on loss and damage. Available: <http://unfccc.int/resource/docs/2013/tp/02.pdf>.

15 Julie-Anne Richards and Keely Boom, *Making a Killing: Who Pays the Real Costs of Big Oil, Coal and Gas?* (Climate Justice Programme, 2015) available at <http://climatejustice.org.au/making-a-killing/>.

16 <http://policy-practice.oxfam.org.uk/publications/impacts-of-low-aggregate-indcs-ambition-research-commissioned-by-oxfam-582427>

17 Estimates vary from 2.7degrees to 3.7degrees, with an outlier at 5.2degrees. More on the estimates for global temperature increase, and the assumptions driving the differences is available here: <http://www.wri.org/blog/2015/11/insider-why-are-in-dc-studies-reaching-different-temperature-estimates>.

18 As explored in Elisa Calliari, *Loss and Damage: a Critical Discourse Analysis*, 2014 (FEEM Working Paper No 084.2104) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2510785](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510785); the upcoming paper, Lisa Vanhala and Cecilie Hestbaek, 'Framing loss and damage in the UNFCCC negotiations: The struggle over meaning and the Warsaw International Mechanism' to be published in *Global Environmental Politics* late 2016. Also based on interviews with UNFCCC delegates by an author of this paper (Julie-Anne Richards).

adaptation – and therefore any funds should come from the extremely small amount of international finance provided for adaptation (currently \$3 to \$5 billion per year according to Oxfam<sup>19</sup>) or should fall within the disaster risk reduction area<sup>20</sup>. Whereas the countries on the front line of climate change – in particular the small island developing states and the least developed countries – have considered it essential that the international community support them as they face the worst impacts of climate change<sup>21</sup>. Especially as they had no significant part in causing the problem of climate change.

The history of ‘loss and damage’ negotiations stretches back to 1991, when the Alliance of Small Island States called for the establishment of an international insurance pool to compensate victims of sea-level rise.<sup>22</sup> However, such elements were left out of the UNFCCC. It and the Kyoto Protocol instead focusing on mitigation, or reducing emissions.

As global emissions have continued to increase<sup>23</sup> and the impacts of climate change have been increasingly felt, the international community has paid more attention to adaptation to climate change. In 2001 (at COP 7), countries agreed to begin work on the adverse effects of climate change on particularly vulnerable developing countries. From this work came Decision 1/CP.10 in 2004, which kicked off the Buenos Aires programme of work on adaptation<sup>24</sup> and adaptation became the ‘second pillar’ of the international climate negotiations alongside mitigation.

The UNFCCC negotiations began to seriously address the issue of loss and damage with the establishment of a work programme at the Cancun COP in December 2010. This work programme resulted in the Warsaw International Mechanism for Loss and Damage being agreed in November 2013, but it was still agreed ‘under’ the adaptation framework.

At Paris this conflict manifested itself in negotiations over whether to include loss and damage in the Paris Agreement *at all*<sup>25</sup>; whether to include it as a stand-alone element, or as a subset of adaptation; whether to articulate a need for loss and damage funding; and whether to create a new mechanism, entrench the Warsaw Mechanism, or not specify any institutional framework for loss and damage.

A large part of the tension is driven by the concern from the US and other developed countries that loss and damage would lead to liability and compensation – often referred by those countries to as a ‘blank check’<sup>26</sup>.

As the Paris negotiations were about establishing a new way forward for the international community to deal with climate change, it was essential that these opposing schools of thought be reconciled. The reconciliation came in the form of an agreement to treat loss and damage as a separate and stand-alone element of the Paris Agreement in Article 8 the ‘loss and damage article’ – see below for text.

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19 Oxfam, 2015. Game-Changers in the Paris Climate Deal: What is needed to ensure a new agreement helps those on the front lines of climate change. P4. Available: <http://policy-practice.oxfam.org.uk/publications/game-changers-in-the-paris-climate-deal-what-is-needed-to-ensure-a-new-agreemen-582554>.

20 Verheyen 2012 in Elisa Calliari, Loss and Damage: a Critical Discourse Analysis, 2014 (FEEM Working Paper No 084.2104) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2510785](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510785).

21 Hoffmaister, Juan, Malia Talakai, Patience Dampney, and Adao Soares Barbosa. 2014. Warsaw International Mechanism for loss and damage: Moving from polarizing discussions towards addressing the emerging challenges faced by developing countries. Available at [www.lossanddamage.net/4950](http://www.lossanddamage.net/4950).

22 Roda Verheyen and Peter Roderick, *Beyond Adaptation: The legal duty to pay compensation for climate change damage* (WWF-UK, Climate Change Programme discussion paper, 2008).

23 Olivier JGJ et al. (2015), Trends in global CO2 emissions; 2015 Report, The Hague: PBL Netherlands Environmental Assessment Agency; Ispra: European Commission, Joint Research Centre. Available: [http://edgar.jrc.ec.europa.eu/news\\_docs/jrc-2015-trends-in-global-co2-emissions-2015-report-98184.pdf](http://edgar.jrc.ec.europa.eu/news_docs/jrc-2015-trends-in-global-co2-emissions-2015-report-98184.pdf).

24 [http://unfccc.int/adaptation/workstreams/implementing\\_adaptation/items/2535.php](http://unfccc.int/adaptation/workstreams/implementing_adaptation/items/2535.php).

25 The initial position of developed countries was to not mention loss and damage in the Paris Agreement.

26 For instance see: <http://www.hks.harvard.edu/news-events/news/articles/assessing-lima-climate-talks>.

## ***Article 8 of the Paris Agreement***

1. Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

2. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

3. Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.

4. Accordingly, areas of cooperation and facilitation to enhance understanding, action and support may include:

(a) Early warning systems;

(b) Emergency preparedness;

(c) Slow onset events;

(d) Events that may involve irreversible and permanent loss and damage;

(e) Comprehensive risk assessment and management;

(f) Risk insurance facilities, climate risk pooling and other insurance solutions;

(g) Non-economic losses;

(h) Resilience of communities, livelihoods and ecosystems.

5. The Warsaw International Mechanism shall collaborate with existing bodies and expert groups under the Agreement, as well as relevant organizations and expert bodies outside the Agreement.

The effect was to add a 'third pillar' to the climate change regime alongside mitigation and adaptation. Within Article 8 countries agreed to provide support – which means finance, technology transfer and capacity building – for loss and damage. The international community also agreed to enshrine the Warsaw International Mechanism for Loss and Damage within the Paris Agreement, mandating that it address a range of loss and damage issues including irreversible and permanent loss and damage, non-economic loss, slow onset events, resilience, early warning systems and risk management (including, but not limited to, insurance). This significantly increases the institutional importance of the Warsaw International Mechanism. This was seen as groundbreaking and a significant achievement in favour of the vulnerable developing countries.

Complementarily, but separately within the COP Decision, a task force on displacement from climate change is to be established with the Paris mandate. During the Bonn intersessional held in April 2016, it was decided that a group of champions would continue to work intersessionally on the draft Terms of Reference for the task force.<sup>27</sup>

27 Executive Committee of the Warsaw International Mechanism, *Summary of decisions of the Excom: 26 – 29 April 2016* available at [http://unfccc.int/files/adaptation/groups\\_committees/loss\\_and\\_damage\\_executive\\_committee/application/pdf/decisions\\_all\\_summary\\_29\\_apr\\_clean.pdf](http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/decisions_all_summary_29_apr_clean.pdf).

## 1.5 Does the Paris Agreement exclude liability and compensation?

However, in addition to these positive moves to enhance and entrench action and support on loss and damage from climate change, developed countries insisted on including paragraph 51 of the Decision:

*51. Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation; (Decision 1/CP.21 Paragraphs 48–52 (FCCC/CP/2015/L.9/Rev.1.<sup>28</sup>)*

This disclaimer or waiver was demanded by the US, and other developed countries, as a condition of them accepting the inclusion of loss and damage in the Paris Agreement. The statement is contained within paragraph 51 of the Decision – a document that has a lesser status than the Paris Agreement<sup>29</sup>. It amounts to an interpretative provision, in that it provides context through which Paragraph 8 of the Paris Agreement can be interpreted, and gives guidance as to what countries were thinking when they made the Paris Agreement. This interpretation of the Paris Agreement, could conceivably be adjusted in future by another, different Decision and interpretation. It must also be viewed within the context of declarations made by the Marshall Islands, Nauru and Tuvalu that the Paris Agreement does not amount to a renunciation of any rights under other laws, including international law.<sup>30</sup>

The text of paragraph 51 does not specify whether the reference to liability encompasses state liability, private liability or both. Given that the history of the negotiations suggest opposition by the US and other developed countries in accepting *state* liability, it would appear that this is a reference to state liability and not private liability. Further, the UNFCCC agreements have only ever referred to states, which strongly indicates that the reference here is to state liability. Therefore, the language of Paragraph 51 clearly provides that the Parties' interpretation of Article 8 is that it does not provide a basis for liability or compensation, and thus could not be relied upon in the context of a legal dispute for this purpose, as long as paragraph 51 remains in place.

Paragraph 51 does not limit rights to liability or compensation for loss and damage that have already occurred. This interpretative text is limited to Article 8 and does not extend to other parts of the international climate regime or to other areas of international law. International law establishes clear obligations upon states not to cause harm to another state (the no harm rule). States are also bound by other areas of international law, including human rights law,<sup>31</sup> world heritage law<sup>32</sup> and the law of

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28 Conference of the Parties, *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015: Decisions adopted by the Conference of the Parties* available at <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

29 The Paris Agreement is expected to have a defining force as to how the international community deal with climate change for the foreseeable future – hence it has an element of permanency. Whereas COP Decisions are made annually and can be changed in the future. It is more likely that in a future COP countries might change the guidance provided by a Decision, than it is that they would make adjustments to the Paris Agreement.

30 The Declarations made by the Marshall Islands, Nauru and Tuvalu are available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=en). The Nauru Declaration also states that 'the Government of Nauru declares its understanding that Article 8 and decision 1/CP.21, paragraph 51 in no way limits the ability of Parties to UNFCCC or the Agreement to raise, discuss, or address any present or future concerns regarding the issues of liability and compensation.

31 United Nations Human Rights Office of the High Commissioner, *Human Rights and Climate Change* available at <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx>.

32 World Heritage Centre, *Climate Change and World Heritage* available at <http://whc.unesco.org/en/climatechange/>; Wil Burns, 'Belt and suspenders? The World Heritage Convention's role in confronting climate change' (2009) 18 *Review of European Community & International Environmental Law*.

the sea.<sup>33</sup> These are not diminished by paragraph 51.

### *Is the climate regime Lex Specialis?*

A related question is whether the UNFCCC and related international climate law have displaced customary international law rules, particularly the no harm rule and rules of State responsibility, to establish a *lex specialis*. The doctrine of *lex specialis* applies where there is a conflict in international law. The rule provides that where two rules of international law govern the same factual situation, the law governing a specific subject matter (*lex specialis*) will override the law which only governs general matters (*lex generalis*). There is no obvious conflict between the climate regime and the no harm rule and rules of State responsibility. The climate regime has as its objective established in the Convention to stabilise the greenhouse gas concentrations in the atmosphere in order to prevent dangerous anthropogenic interference with the climate system.

It could be argued that the Paris Agreement and the evolving body of climate law around loss and damage are a regime specifically negotiated to address damage to specific states resulting from climate change impacts. It may be that the parties to the Paris Agreement have an intention to develop the regime around climate loss and damage in such a way that becomes a *lex specialis* and displaces other international law to the extent of any inconsistency.

However, the text of Article 8 and paragraph 51 do not suggest that the climate law reflects an intention by Parties to waive or replace the rules of customary international law. Such a waiver or replacement of international law cannot be done in silence. Further, it is notable that the Parties to the Paris Agreement are simultaneously developing and discussing the impact of climate change upon other areas of international law (e.g. resolutions from the Human Rights Council on climate change).<sup>34</sup> Thus, Article 8 and paragraph 51 do not exclude liability and compensation for states against other states under international law. However, it would appear that a state seeking reparations in an interstate dispute would not be able to rely upon Article 8 of the Paris Agreement to establish liability or a right to compensation, without a new COP Decision providing different interpretation to over-ride paragraph 51.

There is widespread reluctance among states to pursue interstate claims for environmental liability of other states. Paragraph 51 pushes discussion of liability and compensation outside of the UNFCCC for now. It makes it clear that the proponents of paragraph 51 are unwilling to discuss liability and compensation for climate-change-related loss and damage. Given that the UNFCCC is the primary international arena in which to address climate change, and indeed began with discussions of compensation for disappearing islands, this is quite an indictment on wealthy countries.

Despite paragraph 51 'ruling out' compensation, Articles 8.3 and 8.4 of the Paris Agreement clearly specify that the international community will provide support for loss and damage. 'Support' is a term of art used in the international climate change negotiations and generally refers to finance, technology transfer and capacity building. As Article 8 is a stand-alone article, separate and distinct to the article on adaptation (Article 7), it can therefore be interpreted that loss and damage finance should be additional to adaptation finance. As outlined in Part 1.3 of this report it is clear that loss and damage will require finance beyond that which has been promised for adaptation to date.

To take a positive perspective on paragraph 51, it should diminish the highly charged politics around

33 Wil Burns, 'Potential causes of action for climate change damages in international fora: The Law of the Sea' (2006) 2(1) *International Journal of Sustainable Development Law & Policy*.

34 See e.g. UN Human Rights Council Resolution 7/23, A/HRC/7/L.21/Rev.1, March 2008. See also United Nations Office of the High Commissioner for Human Rights, *Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21<sup>st</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change* (2015) available at <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>.

loss and damage. Now that developed countries have 'ruled out' liability and compensation from Article 8 of the Paris Agreement, yet have specified that support will be provided for loss and damage, we can move to a more serious discussion about how to generate finance for loss and damage, and how to get this support to the most vulnerable countries and communities on the front line of the worst impacts of climate change.

Beyond these issues around state liability, the provision arguably does not in any way affect the responsibilities and potential liability of the fossil fuel industry. In fact, paragraph 51 implicitly suggests that it is time for the international community to shift focus to private liability and the fossil fuel industry. We expect this discussion will take many forms, we have proposed a Carbon Levy on fossil fuel extraction and to be paid into the loss and damage mechanism. This approach is supported by international law, exists in other fields (for example oil spills) and could raise \$50 billion initially, increasing over time. Given the responsibility of the fossil fuel industry for emissions, it is an appropriate future direction for the climate regime [see Part 4.3].

### ***Key findings: Paris Agreement***

- 1. The Paris Agreement is an historic agreement, signalling the end of fossil fuels, yet it does not mention fossil fuels or call for their phase out.*
- 2. The Paris Agreement does not contain any binding commitments by governments to reduce greenhouse gases or carbon emissions or to implement science-based climate recovery policy.*
- 3. There is a yawning chasm between the need to keep warming below 1.5C and non-binding pledges made by the parties in Paris.*
- 4. The Paris Agreement provides the first international recognition of the concept of climate justice.*
- 5. Article 8 of the Paris Agreement adds loss and damage as a third pillar to the climate regime alongside mitigation and adaptation.*
- 6. Paragraph 51 of the accompanying COP decision stated that Article 8 'does not involve or provide a basis for any liability or compensation'. This provision will prevent states from relying upon Article 8 to establish liability, unless a subsequent decision changes this position.*
- 7. Paragraph 51 does not act to prevent states from relying upon other parts of the Paris Agreement, the UNFCCC or other international law in establishing state liability for climate change;*
- 8. The Paris Agreement is silent on the liability of private actors, such as the fossil fuel industry.*

## **2. CLIMATE LITIGATION**

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### **2.1 Background**

Broadly, climate litigation refers to legal actions taken by claimants seeking a court to enforce or clarify the application of existing law to the problem of climate change. The focus of this section is upon climate lawsuits, where the claimants seek legal outcomes to either support climate action or redress for harm in some way. Claimants are generally citizens or governments. However, it is noted that a separate category of climate litigation involves actions against governments seeking to challenge the legitimacy of laws passed to address climate change, such as legal challenges to solar

power plants and wind farms. A recent example of such litigation would be the recent case where the US successfully challenged the legitimacy of India's solar energy laws due to domestic content requirements via the World Trade Organization.<sup>35</sup>

Shi-Ling Hsu, Professor at Florida State University College of Law, has argued that 'By targeting deep-pocketed private entities that actually emit greenhouse gases ... a civil litigation strategy, if successful, skips over the potentially cumbersome, time-consuming, and politically perilous route of pursuing legislation and regulation.'<sup>36</sup> Another avenue is being pursued to avoid this 'time-consuming' and 'politically perilous route' through strategic climate litigation in multiple jurisdictions around the globe seeking to enforce the sovereign obligations of governments to protect and preserve essential natural resources from excessive greenhouse gas emissions, in perpetuity on behalf of present and future generations.

The climate litigation addressed in this section includes cases where claimants seek compensation for climate damages. Second, it includes cases where claimants seek the development and implementation of comprehensive climate recovery plans to achieve more ambitious, science-based targets for climate mitigation, better implementation of existing laws or to force fossil fuels to remain in the ground. Third, it encompasses cases where claimants are seeking immigration permits to respond to their displacement due to climate impacts.

Some of the earliest climate litigation has occurred in the US where plaintiffs have sought compensation under traditional tort law,<sup>37</sup> much like tobacco and asbestos litigation. Plaintiffs have largely targeted American oil, power and coal companies. This stream of climate litigation [Part 2.2.3] has not yet provided plaintiffs with compensation, though it is likely that this will change in the foreseeable future. The early American climate litigation has paved the way for climate litigation around the world through inspiring plaintiffs and lawyers to bring claims in other jurisdictions. It has allowed ample space for the growth of a new and innovative form of climate litigation spearheaded by Our Children's Trust, a US-based non-profit organisation that is supporting young people around the world in asserting their constitutional and public trust rights to a stable climate system in legal actions seeking to enforce their governments' sovereign obligations and duty of care to their citizens. [Parts 2.3.4, 2.3.5]. There is an expectation that this growing body of climate litigation will build upon both losses and successes to become increasingly successful.

Analysis of climate litigation and the potential of climate cases has generally focused upon jurisdictions with civil law traditions (e.g. Brazil, Russia, Japan, Netherlands and Germany) or common law traditions (e.g. India, Pakistan, Fiji and the US).<sup>38</sup> Although the world's legal systems are far more complex than this simple dichotomy, this general approach is maintained in this report where applicable (particularly in relation to assessments as to the replicability of cases).

In recent years, there has been a steady growth in climate litigation across multiple jurisdictions. All of these cases have the potential to inspire similar actions in the same and different jurisdictions. Some of these cases [see Part 2.2.1 Philippines and Part 2.2.2 Germany] have targeted the 'Carbon Majors', who are the world's largest producers of industrial carbon dioxide, as identified by groundbreaking research into the attribution of carbon dioxide [see below]. Much of the litigation in Part 2.3 is

35 World Trade Organisation, *India – Certain measures relating to solar cells and solar modules* (Report circulated 24 February 2016) available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds456\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm).

36 Shi-Ling Hsu, 'A realistic evaluation of climate change litigation through the lens of a hypothetical judgment lawsuit' (2008) 79 *University of Colorado Law Review* 701, 716-717.

37 Tort law provides access to compensation and other remedies for victims aggrieved by the action or inaction of another party. Within the US, this includes a number of possible causes of action, such as private and public nuisance, product liability and negligence.

38 For a description of the legal system of each country in the world, see CIA, *The World Factbook: Legal System* available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>.



drawn together by a consistent theme of plaintiffs seeking to enforce their government's sovereign obligations and duty of care to its citizens to take greater, science-based action to avert catastrophic climate change. A further stream of climate litigation found in New Zealand [Part 2.4] have been cases where a family from Tuvalu, a low lying Pacific Island State, sought immigration permits on humanitarian grounds.

This Part 2 describes these climate cases and offers an assessment of the replicability of these legal actions. The full nature of the relationship between the international climate negotiations and the development of climate litigation is assessed in Part 4.

### ***The Carbon Majors***

*The 'Carbon Majors research' provided an account of carbon dioxide emissions from 1751- 2013 attributable to oil, coal and gas producers (the 'Carbon Majors'). These findings were published in 2013 in an article in the journal Climatic Change,<sup>39</sup> where researcher Richard Heede found that approximately 65% of carbon dioxide released by humans can be traced to the Carbon Majors. Furthermore, the study found that half of those emissions have occurred since 1986.*

*The research attributed 3.52% of carbon emissions to ChevronTexaco, 3.22% to ExxonMobil, 3.17% to Saudi Aramco, 2.47% to BP, 2.22% to Gazprom and 2.12% to Shell. Of the Carbon Majors, 56 of them are crude oil and natural gas producers, 37 are coal extractors (including subsidiaries of oil and gas companies), and 7 are cement producers. Of the entities still in existence, 54 are headquartered in Annex I countries, and 31 are in non-Annex I countries.*

*The cost of loss and damage of the 48 least developed countries is currently conservatively estimated to be USD\$50 billion annually, while the 13 biggest fossil fuel companies made more than \$100 billion in profits in 2014.<sup>40</sup> The top two Carbon Majors – Chevron and ExxonMobil – made more than \$50 billion between them.*

*It must also be remembered that governments around the world are continuing to support and collude with the Carbon Majors by promoting, subsidising and approving a fossil-fuel based energy system, with the full knowledge of the catastrophic impacts of climate destabilisation and ocean acidification that would result from continuing to burn fossil fuels.*

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39 Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' (2013) 122(1) *Climatic Change* 229. See also [www.carbonmajors.org](http://www.carbonmajors.org).

40 Julie-Anne Richards and Keely Boom, *Making a Killing: Who Pays the Real Costs of Big Oil, Coal and Gas?* (Climate Justice Programme, 2015) available at <http://climatejustice.org.au/making-a-killing/>. Loss and damage for all vulnerable countries can conservatively be estimated to be USD\$100 billion per year in the near term, increasing to at least USD\$200 billion by 2050. Climate Action Tracker estimates that loss and damage will cost all developing countries \$400 billion by 2030 and over one trillion dollars by 2050. See also Part 1.3.

## TABLE OF RECENT AND CURRENT CLIMATE LITIGATION

Name	Jurisdiction	Objective	Plaintiff/Investigator	Defendant/Respondent	Outcome/Progress	Future	Replicability
<b>Legal Actions Against Companies</b>							
Philippines investigation	Philippines	Determination as to whether investor-owned Carbon Majors have violated rights of Filipinos	Philippines civil society organisations and individuals / Philippines' Commission on Human Rights	Investor-owned Carbon Majors	Philippines' Commission on Human Rights announced investigation in December 2015	Ongoing investigation may include public inquiry during 2016 and perhaps beyond	Highly replicable. The majority of jurisdictions have national human rights institutions.
<i>Saul Luciano Lliuya v RWE</i>	Germany	Obtain US\$21,000 for costs associated with glacial lake flooding	Saul Luciano Lliuya, a Peruvian farmer	RWE, a German utility company and a Carbon Major	Commenced in German court	Ongoing	Highly replicable in EU jurisdictions. Replicable in other jurisdictions that allow transnational litigation (e.g. US, Australia and Canada).  Claimants could also seek damages in local courts (e.g. Brazil, Colombia and Mexico).
<i>American Electric Power Co v Connecticut</i> 131 S. Ct. 2527 (2011)	US	To seek an order requiring power companies to reduce emissions	US states and others	Electric power companies	Dismissed on the basis that the Clean Air Act displaces the federal common law public nuisance claim	N/A	Replicable in other jurisdictions and has clearly inspired other cases (e.g. case against RWE).
<i>Native Village of Kivalina v ExxonMobil Corp</i> 696 F. 3d 849 (9 <sup>th</sup> Cir. 2012)	US	To obtain damages of US\$400,000 to relocate Native Alaskan village	Kivalina, a Native Alaskan village	Oil, coal and power companies including ExxonMobil, BP, Chevron and Shell	Dismissed on the basis that the Clean Air Act displaces the federal common law public nuisance claim	N/A	Replicable in other jurisdictions and has clearly inspired other cases (e.g. case against RWE).
US state governments investigation	US	To determine whether ExxonMobil and others have violated laws relating to fraud and deception	US state governments	ExxonMobil and other oil companies	Ongoing	Ongoing	Replicable across the world. Additionally, many jurisdictions have laws that address organised crime that might apply (e.g. China, Italy, Hong Kong, Canada, New Zealand and Australia).

Legal Actions Against Governments							
<i>Urgenda Foundation v Kingdom of the Netherlands</i> [2015]	Netherlands	Court order for the Dutch government to take actual measures to reduce greenhouse gas emissions at a level necessary to fulfil the government's affirmative obligations	Urgenda Foundation (a non-profit organisation) and 900 Dutch citizens	Dutch government	Court found Dutch government breached obligations to protect the climate and ordered the Dutch government to meet its duty of care by reducing Dutch emissions	Decision appealed by Dutch government	Highly replicable in civil law jurisdictions (e.g. Botswana, Indonesia and South Africa). The case has already been replicated by a case filed in Belgium.
<i>Ashgar Leghari v Federation of Pakistan</i> (2015)	Pakistan	To order the Pakistani government to implement the government's existing national climate change policy	Ashgar Leghari, a Pakistani farmer	Pakistani government	Court found that inaction by the Pakistani government breached fundamental rights. Court established a Climate Change Commission and retained jurisdiction to ensure implementation of Pakistan's existing climate change policy, which includes significant expansion of coal in the Thar region.	Ongoing reporting to the court by Pakistani government and the Climate Change Commission on progress.	Replicable in jurisdictions with constitutional or human rights (e.g. India, Ireland, South Africa, Brazil, Colombia, Ecuador, Kenya and Mexico).
<i>VZW Klimaatzaak v Kingdom of Belgium</i>	Belgium	Court order for the Belgian government to do more on climate change	Klimaatzaak (a non-profit organisation) and 9,000 Belgian citizens	Belgian government	Filed	Hearing expected in late 2016.	Highly replicable in civil law jurisdictions (e.g. Botswana, Indonesia and South Africa). The case seeks to replicate the <i>Urgenda case</i> .
<i>Foster v Washington Department of Ecology</i>	Washington (US)	Order the state authority to commence a rulemaking process establishing emission reductions consistent with current science	Zoe and Stella Foster, with other youth	Washington Department of Ecology	State authority ordered to draft climate rule and to make recommendations to state legislature	N/A	Highly replicable in jurisdictions that recognise constitutional and public trust rights and obligations. The case has recently been replicated in Pakistan.

<i>Kelsey Juliana et al v The United States of America; Barack Obama</i>	US	Nationwide U.S. science-based Climate Recovery Plan to substantially reduce U.S. fossil fuel consumption and emissions to bring atmospheric carbon dioxide concentrations to below 350 ppm by the year 2100	Kelsey Juliana and other youth; Dr. Hansen for future generations	US government and President and multiple US agencies;  Fossil fuel industry trade groups have joined as intervenor-defendants	Motions to dismiss denied in full	Review of decision to deny motion to dismiss and trial	Highly replicable in jurisdictions that recognise constitutional and public trust rights and obligations, or where government has a corresponding duty to act to prevent harm to citizens. The case has recently been replicated in Pakistan.
<i>Kain et al. v. Massachusetts Department of Environmental Protection</i>	Massachusetts (US)	Order forcing the Department of Environmental Protection to enact regulations that would establish declining annual levels of greenhouse gas emissions	Four teenagers	Massachusetts Department of Environmental Protection	Court order that the Department of Environmental Protection produce and implement stronger and more expansive regulations, including greenhouse gas limits that decline on an annual basis	N/A	Highly replicable in jurisdictions that recognise constitutional and public trust rights and obligations. The case has recently been replicated in Pakistan.
<i>Rabab Ali v Federation of Pakistan and Province of Sindh</i>	Pakistan	Order for greater mitigation action by Pakistani government to protect youth rights and stop coal development in Thar region	Rabab Ali, a child	Pakistani government and Province of Sindh	Filed in April 2016	Ongoing	Highly replicable in jurisdictions that recognise the public trust doctrine and/or have constitutional rights. The case seeks to replicate cases brought by young people in the US.
<i>Sarah Thomson v Minister for Climate Change Issues</i>	New Zealand	Order that the Minister for Climate Change Issues has failed his ministerial duties by not setting science-based emissions targets	Sarah Thomson, a law graduate	Minister for Climate Change Issues, New Zealand	Filed in November 2015	Ongoing	There are many opportunities for citizens to bring cases against their governments for not setting science-based emissions targets.
<b>Immigration Cases</b>							
<i>In re: AD (Tuvalu) [2014]</i>	New Zealand	To secure immigration permits	Family from Tuvalu	New Zealand government	Immigration permits were granted on a humanitarian basis	N/A	Replicable in many countries where immigration permits are permitted on a humanitarian basis.

## 2.2 Legal actions against companies

### 2.2.1 Philippines: Human rights complaint against Carbon Majors

**Objective:** Determination as to whether investor-owned Carbon Majors have violated rights of Filipinos

**Plaintiffs:** Philippines civil society organisations and individuals

**Defendants:** Investor-owned Carbon Majors

**Outcome/Progress:** Philippines' Commission on Human Rights announced investigation in December 2015

**Future:** Ongoing investigation may include public inquiry during 2016 and perhaps beyond

In September 2015, the Philippine Reconstruction Movement and Greenpeace Southeast Asia filed a [Petition](#) with the [Philippines' Commission on Human Rights](#) (CHR or Commission) on behalf of 13 organisations and 20 individuals [requesting](#) that the Commission exercise its investigative powers into the role of the Carbon Majors in causing climate change and ocean acidification. During the Paris climate negotiations in December 2015, the Commissioner [announced](#) that the investigation would commence. The central legal question in the case is: 'whether or not the Respondent Carbon Majors must be held accountable ... for the human rights implications of climate change and ocean acidification.' The Commission's Chair Chito Gascon said that the Commission may hold a public inquiry, which would involve consulting all stakeholders and experts. The Petitioners have sought a range of remedies, including options for remediation (see below).

The Petition named the investor-owned Carbon Majors, including Chevron, ExxonMobil, Rio Tinto, Lukoil and Massey Coal. Ten of the named investor-owned companies have corporate branches in the Philippines, including the top 4 Carbon Majors. The Petition relies upon the Carbon Majors research. The 50 entities named in the Philippines Petition are responsible for about 22% of total industrial carbon dioxide.

The Philippines Petition alleged that the 50 companies have knowingly contributed to the root causes of climate change and ocean acidification, and have thereby violated the human rights of Filipinos suffering harms traceable to climate change and ocean acidification, including severe storms, changes to coral reefs and fisheries. The Petition asserts that the Carbon Majors should be held accountable for violations or threats of violations of Filipinos' rights (a) to life; (b) to the highest attainable standard of physical and mental health; (c) to food; (d) to water; (e) to sanitation; (f) to adequate housing; and (g) to self-determination resulting from the adverse impacts of climate change. The workers and workers' organisations also call upon investigation of the human rights implications of climate change upon workers' health, labour productivity, work environment and safety, and job protection.

In relation to jurisdiction, Article 17 of the Filipino Constitution 1987 establishes the Commission and charges its members with investigating alleged human rights violations and with recommending to the executive and legislative branches appropriate responses to identified violations. The Petition stated

that governments may act on 'transboundary matters like climate change, where harmful activity is taking place in one country, and the negative impacts are being suffered in another.' The Petition also relied upon the *Guiding Principles on Business and Human Rights*, which provides that corporations have a responsibility to respect human rights based upon a 'global standard of expected conduct applicable to all businesses in all situations.' The Petition further cited the [1987 Filipino Constitution](#), deliberations from the *1986 Constitutional Convention*, a [1993 Filipino case](#) which interprets rights under the Constitution, and the [Commission's rules](#).

## ELMA REYES PHILIPPINES

"We demand justice. Climate change has taken our homes and our loved ones. These powerful corporations must be called to account for the impact of their business activities."



The Petition further cites international law to support a finding of jurisdiction, including a [2008 UN Human Rights Council \(UNHCR\) resolution](#), a [letter from the UNHCR to the UN Framework Convention on Climate Change](#), and the [UNHCR's Guiding Principles on Business and Human Rights](#) as endorsed by a [2011 UNHCR resolution](#).

The Petition is primarily based upon international law and principles, noting that Article II of the Philippines' 1987 Constitution expressly 'adopts the generally accepted principles of international law as part of the law of the land.' The Petition cites the *Guiding Principles on Business and Human Rights* for substantive law, and argues that further support is provided by the *UN Declaration of Human Rights*, the *International*

*Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the International Labor Organisation's eight core conventions. The Petition alleges that the Carbon Majors are 'actively preventing' remedial action 'by denying science and running campaigns of confusion.' The Petition argues that the Carbon Majors hold a duty to undertake 'human rights due diligence', meaning that they are required to examine the impacts of their business activities on human rights and act upon the findings of their examination (see Guiding Principle 17).<sup>41</sup>

In relation to causation, the Petition states that 'while it is not possible to attribute a specific harm, or threat thereof, to carbon produced by a single Carbon Major, there is a substantial probability that the climate impacts experienced by Filipinos are made significantly worse as a result of the Carbon Majors' past and current activities.' The Petition also argues that the precautionary principle should apply to this case to allow a finding of causation even if each of the specific contribution of each Carbon Major is uncertain.

Beyond the responsibilities of the Carbon Majors, the Petition also argues that the states where these corporations base their headquarters are obliged to intervene and to mitigate the harms caused by the Carbon Majors. In this respect the Petition cites the no harm principle of international law found in the *Trail Smelter Arbitration* and the *Corfu Channel Case*.

The Petition seeks a number of remedies from the Commission. The primary remedy sought is an [investigation](#) into 'the human rights implications of climate change and ocean acidification and the

41 *Guiding Principles on Business and Human Rights*.

resulting rights violations in the Philippines’ and more specifically ‘whether the investor-owned Carbon Majors have breached their responsibilities to respect the rights of the Filipino people.’ As noted above, the Commission has now launched this investigation. The Petition requests that the Commission monitor the factual scenario and to take steps for remediation. The Petition asks the Commission to recommend that policymakers and legislators develop and adopt effective accountability mechanisms that victims of climate change can easily access in instances of violation or threat of violation. Furthermore, the Petition requests that the Commission recommend that the Philippines President call upon other States, especially where the investor-owned Carbon Majors are incorporated, to take steps to ‘prevent, remedy, or eliminate human rights violations or threats of violations resulting from the impacts of climate change, or seek a remedy before international mechanisms.’

*“The fossil fuel industry is what’s holding us back from achieving all of the aspirational goals (e.g. 1.5 long term temperature target). Litigation is a tool (yes, just a tool) to stop companies from lying, to keep the fossil fuels in the ground, and to force the rapid energy transition urgently needed.”*

— Kristin Casper, Litigation Counsel of the Climate Justice and Liability Project,  
Greenpeace Canada

**Replicability** – the Philippines Petition is a highly replicable legal initiative. The Petition provides an [innovative approach](#) to climate litigation through asserting responsibility for climate change to carbon producers, and by basing its legal claims upon human rights principles. One factor would be the applicability of international law in the alternative jurisdiction. International law gains enforceability within national jurisdictions through a variety of methods depending upon the country. Some jurisdictions may provide for the application of international law through its constitution, whereas other jurisdictions may require the international law to be codified in national laws and policies to gain enforceability.

Alternative jurisdictions would need to have a human rights body with a similar power of investigation as held by the Philippines Commission. The majority of jurisdictions have national human rights institutions.<sup>42</sup> There is an international network of national human rights commissions, the International Co-ordinating Committee of National Human Rights Institutions (ICC). There are regional networks within the ICC, which are the Network of African National Human Rights Institutions (NANHRI), the Asia Pacific Forum of National Human Rights Institutions (APF), the European Network of National Human Rights Institutions (ENNHRI) and the Network of National Institutions in the Americas. The most promising locations are likely to be those where the national human rights bodies are compliant with the *Principles relating to the Status of National Human Rights Institutions* (Paris Principles),<sup>43</sup> which were adopted by the United Nations Human Rights Commission in 1992 and by the UN General Assembly in 1993. The Paris Principles provide standards for the status and functioning of national human rights institutions. Institutions that are fully compliant with the Paris Principles have ‘A status’. Petitions could also be brought before national human rights institutions without ‘A status’. In addition, complaints may be

42 On the development and role of national human rights institutions, see Morten Kjaerum, *National Human Rights Institutions Implementing Human Rights* (Martinus Nijhoff Publishers, 2003) available at <http://www.nhri.net/pdf/NHRI-Implementing%20human%20rights.pdf>; Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions – the Role of the United Nations* (The Danish Institute for Human Rights, 2006) available at [http://www.nhri.net/pdf/Evolution\\_of\\_NHRIs.pdf](http://www.nhri.net/pdf/Evolution_of_NHRIs.pdf); Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (2010) available at [http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI\\_en.pdf](http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf).

43 The Principles relating to the status of national human rights institutions, reproduced in the appendix of GA Resolution 48/134 of 20 December 1993.

brought before regional human rights institutions [see also the Appendix for a list of other human rights institutions.]

<b>Network of African National Human Rights Institutions (NANHRI) members with full A status</b>	
<b>Country</b>	<b>Body</b>
Egypt	National Council for Human Rights (Egypt)
Ghana	Commission on Human Rights and Administrative Justice CHRAJ
Kenya	Kenya National Commission on Human Rights (KNCHR)
Malawi	Malawi Human Rights Commission
Mauritius	National Human Rights Commission (Mauritius)
Morocco	Human Rights Advisory Council (Morocco)
Namibia	Office of the Ombudsman (Namibia)
Niger	Nigerien National Commission on Human Rights and Fundamental Liberties
Rwanda	National Commission for Human Rights (Rwanda)
Senegal	Senegalese Committee for Human Rights
South Africa	South African Human Rights Commission (SAHRC)
Tanzania	Commission for Human Rights and Good Governance (Tanzania)
Togo	National Human Rights Commission (Togo)
Uganda	Uganda Human Rights Commission (UHRC)
Zambia	Permanent Human Rights Commission (Zambia)

<b>Asia Pacific Forum (APF) members with full A status</b>	
<b>Country</b>	<b>Body</b>
Afghanistan	Afghan Independent Human Rights Commission
Australia	Australian Human Rights Commission
India	National Human Rights Commission
Indonesia	National Commission on Human Rights (Komnas HAM)
Jordan	National Centre for Human Rights
Korea, Republic of	National Human Rights Commission of Korea
Malaysia	Human Rights Commission of Malaysia (SUHAKAM)
Mongolia	National Human Rights Commission
Nepal	National Human Rights Commission
New Zealand	Human Rights Commission
Palestine	The Independent Commission for Human Rights
Philippines	Commission on Human Rights (Philippines)
Qatar	National Committee for Human Rights
Thailand	National Human Rights Commission
Timor Leste	Office of the Provedor for Human Rights and Justice



<b>European Network of National Human Rights Institutions (ENNHRI) members with full A status</b>	
<b>Country</b>	<b>Body</b>
Albania	Avokati Popullit (People's Advocate)
Armenia	Human Rights Defender of the Republic of Armenia
Azerbaijan	Human Rights Commissioner
Bosnia and Herzegovina	Institution of Human Rights Ombudsmen of Bosnia and Herzegovina
Croatia	Ombudsman of the Republic of Croatia
Denmark	Danish Institute for Human Rights
Finland	National Human Rights Institution in Finland: Human Rights Centre and the Parliamentary Ombudsman
France	Commission Nationale Consultative des Droits de l'Homme
Georgia	Office of Public Defender (Ombudsman) of Georgia
Germany	Deutsches Institut für Menschenrechte
Great Britain	Equality and Human Rights Commission
Greece	Greek National Commission for Human Rights
Hungary	Office of the Commissioner for Fundamental Rights
Ireland	Irish Human Rights Commission
Luxembourg	Commission Consultative des Droits de L'homme du Grand-Duché de Luxembourg
Netherlands	Netherlands Institute for Human Rights
Northern Ireland	Northern Ireland Human Rights Commission
Poland	Human Rights Defender
Portugal	Provedor de Justicia
Scotland	Scottish Human Rights Commission
Serbia	The Protector of Citizens of the Republic of Serbia
Spain	El Defensor del Pueblo
Ukraine	Office of the Ukrainian Parliament Commissioner for Human Rights

<b>Network of National Institutions in the Americas members with full A status</b>	
<b>Country</b>	<b>Body</b>
Argentina	Defensoría del Pueblo de la Nación Argentina
Bolivia	Defensor del Pueblo
Canada	Canadian Human Rights Commission
Colombia	Ombudsman's Office of Colombia
Costa Rica	Defensoria de los Habitantes
Ecuador	Defensor del Pueblo de la República de Ecuador
El Salvador	Procuraduría de Defensa de los Derechos Humanos (El Salvador)
Guatemala	Procurador de los Derechos Humanos (Guatemala)

Honduras	Comisionado Nacional de los Derechos Humanos (Honduras)
Mexico	National Human Rights Commission (Mexico)
Nicaragua	Procuraduría para la Defensa de los Derechos Humanos de Nicaragua
Panama	Defensoría del Pueblo de la República de Panamá
Paraguay	Defensoría del Pueblo de la República del Paraguay
Peru	Defensoría del Pueblo - Ombudsman (Peru)
Venezuela	Defensoría del Pueblo

## 2.2.2 Germany: Peruvian farmer's transnational case against RWE

### SAUL LUCIANO LLIUYA v RWE

**Objective:** Obtain US\$21,000 for costs associated with glacial lake flooding

**Plaintiff:** Saul Luciano Lliuya, a Peruvian farmer

**Defendant:** RWE, a German utility company (Carbon Major)

**Outcome / Progress:** Commenced in German court

**Future:** Ongoing

In March 2015, Saul Luciano Lliuya, a farmer from the Andean region of Peru, issued a [letter of demand](#) on the German utility company RWE seeking a US\$21,000 financial contribution related to the costs of prevention of [glacial lake flooding](#), landslides and likely inundation of his village and destruction of his property.<sup>44</sup> Lliuya announced at the time of the Paris negotiations that proceedings would be commenced in Germany.<sup>45</sup>

The sum of US\$21,000 that Lliuya is demanding equates to 0.47% of the estimated cost of engineering projects that would protect against flooding of the glacial lake. The claim is based upon the Carbon Majors research, which found that 0.47% of carbon dioxide that has been emitted into the atmosphere during the industrial era can be traced back to RWE. While the sum claimed is small, a successful suit by Lliuya could open the pathway for similar claims to be made throughout European and other courts.

Lliuya's case is the first time that a plaintiff has sought damages from a European company for climate change impacts. The plaintiff's lawyer Roda Verheyen has said that the [lawsuit](#) will not be stopped by the '[political question doctrine](#)'<sup>46</sup> [see also Part 2.2.3]. 'Germany does not have a political doctrine, which was the basis for the rejection of all similar climate cases in the US,' Verheyen wrote in an email. 'In Germany, the court cannot reject a case on the basis of such a theory.'<sup>47</sup>

Instead, the key question in the litigation is likely to be whether German courts will allow claims for damages to property outside of German borders. RWE has [rejected](#) Lliuya's claim and cited the '[Waldsterben](#)' case, in which German courts denied that German companies emitting sulphur oxide

44 The Peruvian government announced in 2014 that climate change had reduced Peru's glaciers by 40% over the previous four decades: <http://www.reuters.com/article/2014/10/15/peru-climatechange-glacier-idUSL2N0SA39P20141015>.

45 Kristen French, 'A Peruvian farmer is suing an energy giant over climate change' (2 December 2015) *The Verge* available <http://www.theverge.com/2015/12/2/9821758/climate-change-lawsuit-un-rwe-energy-vs-peru-farmer>.

46 The political question doctrine requires a court to consider whether it has the authority to hear and determine a legal question. According to this doctrine, political questions are non-justiciable.

47 Kristen French, 'A Peruvian farmer is suing an energy giant over climate change' (2 December 2015) *The Verge* available <http://www.theverge.com/2015/12/2/9821758/climate-change-lawsuit-un-rwe-energy-vs-peru-farmer>.

were liable for damage caused to Swedish forests by acid rain. However, *Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Brussels Regulation) allows foreign nationals to bring a case before courts in an EU country regardless of where the events leading to the claim occurred.<sup>48</sup> A court would need to consider the application of Council Regulation of 2000 and whether it supersedes the *Waldsterben* case in the matter. In *Oruma v Royal Dutch Shell*,<sup>49</sup> the District Court of The Hague allowed Nigerian plaintiffs to bring a case against Royal Dutch Shell and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd for damages arising from an oil spill in Nigeria. It may also be possible that a court in an EU country would allow the substantive law of the country where the damage has occurred to apply in a climate case.<sup>50</sup>

**Replicability** – the case brought by Lliuya is potentially highly replicable, in particular throughout EU jurisdictions. Plaintiffs from anywhere in the world can bring litigation against companies domiciled in the EU. The laws applicable within each jurisdiction would vary depending upon the national laws, which would impact upon the prospects of success of any case. In 2005, the European Court of Justice found that the national courts of the EU did not have the power to halt proceedings on the

principle of *forum non conveniens*, which is a barrier in most common law countries (see discussion below), in relation to EU domiciled defendants.

## SAUL LUCIANO LLIUYA PERU

"Someone caused this, and those people have to be held responsible. It's not right to remain silent. The world belongs to all of us, not just the polluters."



Suing RWE (German energy company) for US\$21,000 damages.

The case could also be replicated in other jurisdictions that allow foreign nationals to bring cases in courts regarding damage that has occurred outside of the borders of that country. Such cases would allow people from developing countries to seek compensation for climate damages from Carbon Majors in the country that they are domiciled. It is possible that a climate case could be brought in the US under the Alien Tort Statute (28 U.S.C. § 1350; ATS), which is designed to allow claimants from outside the US to seek adjudication of international human rights violations.<sup>51</sup>

The position in other common law countries varies, but is generally more difficult due to the *forum*

48 Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (as amended), available at [http://eur-lex.europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_mat](http://eur-lex.europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_mat)

49 *Oruma v Royal Dutch Shell*, 330891/HA 09-579. An unofficial translated version of the decision on jurisdiction is available here: <https://milieudefensie.nl/publicaties/bezwaren-uitspraken/judgment-courtcase-shell-in-jurisdiction-motion-oruma/view>. Also see *Akpan v Royal Dutch Shell/Shell Nigeria*, C/09/337050/HA ZA 0 – 1580 (30 January 2013). An unofficial translated version of the decision is available here: <https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view>.

50 See Environmental Law Alliance Worldwide, *Holding Corporations Accountable for Damaging the Climate* (2014) available at <http://www.elaw.org/system/files/elaw.climate.litigation.report.pdf>.

51 See David Grossman, 'Warming up to a not-so-radical idea: Tort-based climate change litigation' (2003) 28 *Columbia Journal of Environmental Law* 1; Rosemary Reed, 'Rising seas and disappearing islands: Can island inhabitants seek redress under the Alien Tort Claims Act' (2002) 11 *Pacific Rim Law and Policy Journal* 399; Mini Kaur, 'Global warming litigation under the Alien Tort Claims Act: What *Sosa v. Alvarez Machain* and its progeny mean for Indigenous Arctic communities' (2006) 13(1) *Washington and Lee Journal of Civil Rights and Social Justice*.

*non conveniens* principle. The *forum non conveniens* principle provides that where a local court provides a 'more appropriate forum' for the matter, then it is within those courts that the matter should be brought. This principle acts to restrict the exercise of extra-territorial jurisdiction. For example, Canadian courts require a foreign claimant to show that there is not a 'clearly and distinctly more appropriate' forum.<sup>52</sup> The approach to extra-territorial jurisdiction and the principle of *forum non conveniens* within Australia is more favourable to claimants, with courts requiring that the defendant show that the Australian court is a 'clearly inappropriate forum', instead of having to show that the local court is a 'clearly more appropriate forum'.<sup>53</sup> Australian courts have also held that even if the law of a foreign country is to be applied to decide the case, Australia would not be a 'clearly inappropriate' forum for the matter.<sup>54</sup>

In addition, claimants could bring cases before their local courts seeking compensation. Civil law jurisdictions are more likely than common law jurisdictions to have a particular statute which could provide the basis of a lawsuit seeking compensation for climate damages.<sup>55</sup> Examples include Brazil, Colombia and Mexico.<sup>56</sup> As a common law country, India has shown adaptability to reshaping tort law for victims and may provide a viable option for Indian claimants.<sup>57</sup>

### 2.2.3 United States: Tort cases against fossil fuel and energy corporations

#### AMERICAN ELECTRIC POWER CO v CONNECTICUT 131 S. CT. 2527 (2011)

**Objective:** To seek an order requiring power companies to reduce emissions

**Plaintiffs:** US states and others

**Defendants:** Electric power companies

**Outcome/Progress:** Dismissed on the basis that the Clean Air Act displaced federal common law public nuisance claim seeking to reduce CO2 emissions from fossil-fuel power plants

**Future:** N/A

In 2004, a group of US states, including California, Connecticut and New York, and others, filed a lawsuit against electric power corporations, specifically the five largest emitters of carbon dioxide in the US. The case was the first climate lawsuit to use tort law. The plaintiffs brought a federal common law public nuisance claim and sought injunctive relief, specifically an order requiring the power corporations to reduce carbon dioxide emissions over a period of years. The case was initially dismissed but later reinstated by the Second Circuit of Appeals in 2009. In 2011, the US Supreme

52 *Recherches Internationales Quebec v Cambior Inc* [1998] QJ No 2554 (Superior Court of Quebec, Canada), dismissing a claim on the basis of the *forum non conveniens* principle; *Somji v Somji* 2001 ABQB, allowing a claim concerning a dispute over matrimonial property in Tanzania.

53 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

54 *Renault SA v Zhang* (2002) 210 CLR 491. For more on the barriers faced by foreign claimants, see Iman Prihandono, 'Barriers to transnational human rights litigation against transnational corporations (TNCs): The need for cooperation between home and host countries' (2011) 3(7) *Journal of Law and Conflict Resolution* 89 available at [http://www.academicjournals.org/article/article1379862240\\_Prihandono.pdf](http://www.academicjournals.org/article/article1379862240_Prihandono.pdf); Hon James Allsop, 'Incoherence in Australian private international laws' (2013) (based on a paper delivered at the Sydney Centre for International Law Conference, 'Facing Outwards: Australian Private International Law in the 21<sup>st</sup> Century' (Sydney Law School, 10 April 2013) available at <http://www.fedcourt.gov.au/publications/judges-speeches/chief-justice-allsop/allsop-cj-20130410>.

55 Environmental Law Alliance Worldwide, *Holding Corporations Accountable for Damaging the Climate* (2014) available at <http://www.elaw.org/system/files/elaw.climate.litigation.report.pdf>, 3.

56 Environmental Law Alliance Worldwide, *Holding Corporations Accountable for Damaging the Climate* (2014) available at <http://www.elaw.org/system/files/elaw.climate.litigation.report.pdf>.

57 *M.C. Mehta v. Kamal Nath* [2000] 6 SCC 213 available at <http://www.elaw.org/node/6920>.

Court found that the Clean Air Act legislatively displaced the case because Congress had delegated the regulatory power to the Environmental Protection Agency (EPA) to grant the same relief that the plaintiffs sought against the very same private power plants, so such claims must be brought under the Clean Air Act.

### **NATIVE VILLAGE OF KIVALINA V EXXONMOBIL CORP 696 F. 3D 849 (9<sup>TH</sup> CIR. 2012)**

**Objective:** To obtain damages of US\$400,000 to relocate Native Alaskan village

**Plaintiff:** Kivalina, a Native Alaskan village

**Defendants:** Oil, coal and power companies including ExxonMobil, BP, Chevron and Shell

**Outcome / Progress:** Dismissed on the basis that the Clean Air Act displaced *federal* common law public nuisance claim

**Future:** N/A

In 2008, the Native Alaskan village of Kivalina filed a federal lawsuit against oil, coal and power companies including ExxonMobil, BP, Chevron, ConocoPhillips, Peabody Energy and Shell. Kivalina alleged that the greenhouse gas contribution by the defendants caused a public nuisance by substantially and unreasonably interfering with their right to use and enjoy public and private property in Kivalina. The plaintiffs sought damages of US\$400 million, which was the cost of relocating the village. Kivalina further alleged that certain defendants had conspired to suppress public awareness of the science of climate change.

In response, the defendants filed a motion to dismiss the claim. In 2009, the US District Court for the Northern District of California granted the motion to dismiss on the basis that the plaintiffs lacked standing and that the case raised non-justiciable political questions [see also Part 2.2.2].

Kivalina appealed the district court's dismissal, and in 2012 the Ninth Circuit Court of Appeals dismissed the appeal. The Ninth Circuit found that federal common law claims for monetary damages are displaced by the Clean Air Act.<sup>58</sup> Kivalina requested that the appeals court rehear the matter *en banc* (the full panel of appeals court judges) but this application was denied. In 2013, Kivalina filed an appeal with the Supreme Court but that court declined to hear the appeal.<sup>59</sup>

**Replicability** – These pioneering US cases have clearly inspired cases in other jurisdictions, such as the case against RWE in Germany [see Part 2.2.2]. Climate litigation where plaintiffs seek compensation for climate damages would be well suited to common law jurisdictions. One jurisdiction that has been identified as particularly promising for such litigation is India, where the Supreme Court has been willing to reinterpret tort law to enable successful claims.<sup>60</sup> Claims for damages may be particularly well suited to jurisdictions where previous climate cases have been successful (e.g. Netherlands and Pakistan). One potential barrier to claimants in other jurisdictions would be where adverse costs orders are available for defendants who successfully defend the matter. For example, in Australia an unsuccessful tort case could result in a large award for adverse costs against a plaintiff who has brought the lawsuit.

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58 The viability of *state* public nuisance claims was not precluded or displaced. There were three other claims brought in the case that were not ruled on by the 9<sup>th</sup> Circuit: state public nuisance, conspiracy, and concert of action claims.

59 See Business & Human Rights Resource Centre, *Kivalina lawsuit (re global warming)* available at <http://business-human-rights.org/en/kivalina-lawsuit-re-global-warming>.

60 Environmental Law Alliance Worldwide, *Holding Corporations Accountable for Damaging the Climate* (2014) available at <http://www.elaw.org/system/files/elaw.climate.litigation.report.pdf>, 13. See *M.C. Mehta v Kamal Nath* [2000] 6 SCC 213.

## 2.2.4 United States: Investigations into climate deception by fossil fuel companies

**Objective:** To determine whether ExxonMobil and others have violated laws relating to fraud and deception

**Investigator:** US State governments

**Defendants:** ExxonMobil and other oil companies

**Outcome / Progress:** Ongoing

**Future:** Ongoing

State governments within the US are investigating whether fossil fuel companies including ExxonMobil may have violated laws pertaining to fraud and deception. Initially the NY Attorney General Eric [Schneiderman](#) subpoenaed ExxonMobil to explore whether the company lied to the public about climate change or to investors about the risks of climate change. The legal action was sparked by investigations<sup>61</sup> and [investigatory news articles](#) alleging that ExxonMobil knew about climate change from as early as 1977 and yet actively worked to undermine the science and legislation. More recently, California, Delaware, Illinois, Iowa, Maine, Minnesota, New Mexico, Oregon, Rhode Island, Washington and the District of Columbia announced their intention to [investigate](#) fossil fuel companies. New York, Massachusetts, California and the US Virgin Islands have started investigations already. It is possible that the investigations could trigger federal racketeering and organised crime law (RICO) that were used by the US Justice Department against tobacco companies [see Part 3.1].

In response to the investigations, the Committee on Science, Space, and Technology of Congress have launched a separate investigation into the attorneys general. Representative Lamar Smith, Republican of Texas, sent a letter on 18 May 2016 to the attorneys general demanding all communications since 2012 with climate change organisations, alleging an attempt to deprive companies of their First Amendment rights to fund and conduct research.<sup>62</sup>

*"If there are companies, whether they're utilities, whether they're fossil fuel companies, committing fraud in an effort to maximize their short-term profits at the expense of the people we represent, we want to find out about it. We want to expose it and want to pursue them to the fullest extent of the law"*<sup>63</sup>

*Eric Schneiderman, New York Attorney General*

*"What these attorneys general are doing is exceptionally important"*<sup>64</sup>

*Al Gore*

*"Evidence appears to suggest that the company worked since the 1980s to confuse the public about climate change's march, while simultaneously spending millions to fortify its own infrastructure against climate change's destructive consequences and track new exploration opportunities as the*

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61 See Kathy Mulvey and Seth Shulman, *The Climate Dossiers: Internal fossil fuel industry memos reveal decades of corporate disinformation* (2015, Union of Concerned Scientists) available at <http://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf>; more recent research includes documents uncovered by the Center for International Environmental Law (CIEL) available at <http://www.smokeandfumes.org/>.

62 John Schwartz, 'State officials investigated over their inquiry into Exxon Mobil's climate change research' *New York Times* (19 May 2016) available at [http://www.nytimes.com/2016/05/20/science/exxon-mobil-climate-change-global-warming.html?\\_r=1](http://www.nytimes.com/2016/05/20/science/exxon-mobil-climate-change-global-warming.html?_r=1).

63 <https://www.rt.com/usa/337698-exxonmobil-lawsuit-climate-change/>

64 <http://thinkprogress.org/climate/2016/03/29/3764399/climate-change-attorneys-general/>

Arctic's ice receded." <sup>65</sup>

Rockefeller Family Fund

## ERIC SCHNEIDERMAN UNITED STATES

"If there are companies, whether they're utilities, whether they're fossil fuel companies, committing fraud in an effort to maximize their short-term profits at the expense of the people we represent, we want to find out about it. We want to expose it and want to pursue them to the fullest extent of the law."



Investigating ExxonMobil and others for possible fraud.

**Replicability** – Investigations against fossil fuel companies could be initiated by governments across the world. In addition, many jurisdictions have laws that address organised crime, including China, Italy, Hong Kong, Canada, New Zealand and Australia.<sup>66</sup> It is possible that these laws could be applied to prosecute alleged fraud and deception by fossil fuel companies, depending upon their wording and interpretation.

## 2.3 Legal actions against governments

### 2.3.1 *Netherlands:*

#### *Negligence case against Dutch Government*

##### URGENDA FOUNDATION V. KINGDOM OF THE NETHERLANDS

##### DISTRICT COURT OF THE HAGUE [2015] HAZA C/09/00456689 (THE NETHERLANDS)

**Objective:** Court order for the Dutch government to take actual measures to reduce greenhouse gas emissions at a level necessary to fulfil the government's affirmative obligations

**Plaintiffs:** Urgenda (non-profit organisation) and 900 Dutch citizens

**Defendant:** Dutch government

**Outcome/Progress:** Court found Dutch government breached obligations to protect the climate and ordered the Dutch government to meet its duty of care by reducing Dutch emissions

**Future:** Decision was appealed by Dutch government

In June 2015, the District Court of The Hague [decided](#) in the *Urgenda* case that the Dutch Government was not doing enough to address climate change. The court ordered that the Dutch Government increase its ambition and do more. The case was brought by Urgenda, a Dutch environmental group, and approximately 900 plaintiffs. It was the first time that a judge has ordered that a government do more to address climate change for reasons other than statutory mandates, and was closely followed by a similar court ruling in Pakistan [see Part 2.3.2]. The case represents the

<sup>65</sup> <http://www.valleynewslive.com/home/headlines/States-team-up-to-take-on-the-fossil-fuel-industry-373911031.html>.

<sup>66</sup> For an assessment of these laws, see Parliament of Australia, 'Legislation Targeting Participation in an Organised Crime Group' in *Legislative arrangements to outlaw serious and organised crime groups* (2009) available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/acc/completed\\_inquiries/2008-10/laoscg/report/c04](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/acc/completed_inquiries/2008-10/laoscg/report/c04).

first time that tort law has been successfully relied upon to hold a state liable for failing to adequately mitigate climate change.<sup>67</sup> The Dutch Government has announced that it will appeal the decision.

In relation to standing, the court found that Urgenda (in its own right) could not rely upon the European Convention on Human Rights (ECHR). Article 34 of the ECHR requires a person to be a 'victim', which has a rich jurisprudence.<sup>68</sup> Generally, a direct victim is someone who is directly impacted by an alleged violation of the ECHR and able to demonstrate that the alleged violation had

## MARJAN MINNESMA THE NETHERLANDS

"Hopefully our case will give people the courage to do the same because they can see what a judge can do."



Sued Dutch government to protect citizens from climate change.

The District Court found that the state has a duty to take mitigation measures due to the 'severity of the consequences of climate change and the great risk of climate change occurring.'<sup>72</sup> The District Court did not stipulate how the Dutch government should meet the mitigation targets, but did provide suggestions including tax measures and emissions trading.

The decision was primarily based upon an interpretation of tort law,<sup>73</sup> with the court finding that the State has a duty of care to take measures to mitigate climate change. The court discussed the doctrine of hazardous negligence and found that several criteria can be derived from this doctrine to detail the concept of acting negligently towards society in the content of hazardous climate change.<sup>74</sup>

67 See Jolene Lin, 'The first successful climate negligence case: A comment on *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*' (University of Hong Kong Faculty of Law Research Paper No 2015/021). See also Roger Cox, 'The liability of European States for climate change' (2014) 30(78) *Utrecht Journal of International and European Law* 125; Berthy van den Broek and Liesbeth Enneking, 'Public interest litigation in the Netherlands: A multidimensional take on the promotion of environmental interests by private parties through the courts' (2014) 10(3) *Utrecht Law Review* 77. For a critique of the decision see Lucas Bergkamp, 'The Urgenda judgment: a "victory" for the climate that is likely to backfire' (9 September 2015) *Energy Post* available at <http://www.energypost.eu/urgenda-judgment-victory-climate-likely-backfire/>.

68 See e.g. *Ouardiri v Switzerland* (Application No. 65840/09) and *Ligue des Musulmans de Suisse and Others v Switzerland* (Application No. 66274/09).

69 Kevin Boyle, 'The European experience: The European Convention on Human Rights' (2009) 40(1) *Victoria University of Wellington Law Review* 165.

70 Para 4.9.

71 Para 4.46.

72 An English translation of the Decision is available here: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RB-DHA:2015:7196&keyword=klimaat>.

73 Relying upon the Dutch landmark 'cellar-hatch ruling' (*Kelderluik-arrest* HR 6 November 1965, NJ 1966/136).

74 Para 4.54.

a practical effect upon them. 'Indirect victims' have been granted standing in exceptional cases and there generally no scope for legal persons to bring public interest cases under the ECHR.<sup>69</sup> The court found that Urgenda had standing under the Dutch Civil Code,<sup>70</sup> and was able to rely upon the jurisprudence of the ECHR in its interpretation of the standard of care for the negligence claim.<sup>71</sup>

The District Court ordered the Netherlands to limit greenhouse gas emissions to 25% below 1990 levels by 2020, and found that the government's existing pledge to reduce emissions by 17% was insufficient to meet the Netherlands' contribution towards the UN goal of restricting global temperature increases to within 2°C.



The criteria adopted by the court were:

- i. *The nature and extent of the damage ensuing from climate change;*
- ii. *The knowledge and foreseeability of this damage;*
- iii. *The chance that hazardous climate change will occur;*
- iv. *The nature of the acts (or omissions of the State);*
- v. *The onerousness of taking precautionary measures;*
- vi. *The discretion of the state to execute its public duties – with due regard for the public law principles, all this in light of:*
  - *The latest scientific knowledge;*
  - *The available (technical) option to take security measures, and*
  - *The cost-benefit ratio of the security measures to be taken.*<sup>75</sup>

In its determination of criteria (i) and (iii), the court considered the IPCC's reports, the UNEP 'emissions gap' report of 2014, and a number of European reports on climate change. The court found that 'the chances of dangerous climate change should be considered as very high – and this with serious consequences for man and the environment, both in the Netherlands and abroad'.<sup>76</sup> In relation to foreseeability (criteria (ii)), the report found that the Netherlands 'had known since 1992, and certainly since 2007, about global warming and its associated risks'.<sup>77</sup>

In relation to criteria (iv), the court stated that excess greenhouse gas emissions in the Netherlands that will occur between 2015 and 2020 without further measures can be attributed to the state because the State has 'the power to issue rules or other measures, including community information, to promote the transition to a sustainable society and to reduce greenhouse gas emission in the Netherlands'.<sup>78</sup>

The court found that the 450 ppm scenario was the standard of care and that the Dutch government was obliged to implement measures in line with that scenario.<sup>79</sup> In considering whether the Dutch government had breached its duty of care, the court found that mitigation measures are the only truly precautionary measures to adopt.<sup>80</sup> The court discussed the fact that the Netherlands had previously adopted a more ambitious mitigation target that was changed in 2010 to a less ambitious target. The court found that there was no evidence that this decision was based upon cost considerations or difficulties in meeting the more ambitious target. These facts supported the view that a more ambitious mitigation target could not impose too onerous a burden on the Netherlands (criteria (v)).<sup>81</sup>

On the issue of causation, the court stated that 'climate change is a global problem and therefore requires global accountability'.<sup>82</sup> The threat of climate change compels all countries to implement the reduction measures to the fullest extent possible. The fact that the emissions contributed by the Netherlands is 'small compared to other countries does not affect the obligation to take precautionary measures in view of the State's obligation to exercise care.' The court took into account that the

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75 Para 4.63.

76 Para 4.65.

77 Para 4.65.

78 <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&keyword=klimaat>, para 4.87.

79 Para 4.83.

80 Para 4.71.

81 Para 4.70.

82 Para 4.79

Netherlands contribution to worldwide greenhouse gas emissions is currently 0.5% but that the Dutch per capita emissions are one of the highest in the world. The court did not refer to the 'but for' test or other tests of causation.

The District Court considered various other laws and policies, including Article 21 of the Dutch Constitution, EU emissions reduction targets, principles under the *European Convention on Human Rights*, the 'no harm' principle of international law, the doctrine of hazardous negligence, the principle of fairness, the precautionary principle and the principle of sustainability found in the UNFCCC, and the precautionary principle as found in European climate policy. In relation to Article 21 of the Dutch Constitution,<sup>83</sup> the court found that it imposed a duty of care but that it does 'not provide certainty about the manner in which this duty of care should be exercised nor about the outcome ... in case of conflicting stipulations. The manner in which this task should be carried out is covered by the government's own discretionary powers'.<sup>84</sup> The court did not rule on whether the Dutch government had breached Article 21.

Whilst the court considered a wide range of international law that applies to the problem of climate change, it found that the 'no harm' principle, the UNFCCC, the Kyoto Protocol and COP decisions 'do not have a binding force towards citizens (private individuals and legal persons)'.<sup>85</sup> A similar conclusion was reached in relation to EU law. However, the court did draw upon international law in its formulation and application of the duty of care it found under tort law.

The court specifically dealt with the question of separation of powers between the different branches of government. The decision provided that the court is responsible for the determination of disputes between parties, 'which it *must* do if requested to do so' (emphasis in original).<sup>86</sup> The court recognised that it must exercise restraint where its determination of a dispute is likely to impact upon third parties not party to the proceedings.<sup>87</sup> While the court stated that determining the impact of its intervention would be difficult to assess, it did not explain how this factor influenced its decision.<sup>88</sup>

**Replicability** – Tort law is found across legal systems around the world and known as the 'reasonable person test', or '*la notion de bon père de famille*' (French), '*el principio del buen padre de familia*' (Spanish) or '*bonus pater familias*' (Latin). As tort litigation in the US has not been successful to date [see Part 2.2.3], the *Urgenda* case demonstrates that tort law claimants may have an easier task in jurisdictions outside of the US. Common law jurisdictions (e.g. Belize, Dominica, Fiji and Canada) rely upon precedents, or the application of previous decisions in new similar cases, meaning that a claimant bringing a similar case in a different jurisdiction could cite the *Urgenda* case to support their claim. Although the *Urgenda* case would probably not be binding in alternative jurisdictions, it would provide persuasive force in common law jurisdictions.

Similarly, while civil law jurisdictions do not have a formal system of precedents, the *Urgenda* case would have persuasive force if a similar case was brought.<sup>89</sup> Civil law jurisdictions within Europe provide an obvious option for similar litigation. The case has already been replicated in Belgium (*VZW Klimaatzaak v Kingdom of Belgium et al (2015)*) where the plaintiff Klimaatzaak is seeking to force

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83 Article 21 of the Dutch Constitution provides: 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.' The Constitution of the Kingdom of the Netherlands 2008 available at [www.rijksoverheid.nl](http://www.rijksoverheid.nl).

84 Para 4.36.

85 Para 4.42.

86 Para 4.95.

87 Para 4.96.

88 Para 4.100.

89 Vincy Fon and Francesco Parisi, 'Judicial precedents in civil law systems: A dynamic analysis' (George Mason University School of Law: Law and Economics Research Paper No. 04-15) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=534504](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=534504).

the Belgian government to reduce greenhouse gas emissions by 40% below 1990 levels by 2020 and 87.5% below 1990 levels by 2050 [see Part 2.3.3 below]. The case may be particularly replicable in civil law jurisdictions that either rely upon the Dutch Civil Code or are otherwise influenced by Dutch civil law (e.g. Botswana, Indonesia and South Africa).

The case could also be replicated to bring negligence cases against the investor-owned Carbon Majors, particularly in the Netherlands but also in other jurisdictions with tort law. Many of the findings around the Dutch government's liability could be argued in cases against fossil fuel corporations. For example, if a similar duty and standard of care could be established, claimants could argue that the conduct of a defendant company is in breach of that duty if it is not consistent with the 450 ppm scenario.

### *2.3.2 Pakistan: Human rights case against Pakistani Government*

**ASHGAR LEGHARI V. FEDERATION OF PAKISTAN, W.P. No. 25501/2015**

**LAHORE HIGH COURT GREEN BENCH**

**Objective:** To order the Pakistani government to implement the government's existing climate change policy

**Plaintiff:** Ashgar Leghari, a Pakistani farmer

**Defendant:** Pakistani government

**Outcome/Progress:** Court found that inaction by the Pakistani government breached fundamental rights. Court established a Climate Change Commission and retained jurisdiction to ensure implementation of Pakistan's existing climate change policy, which includes significant expansion of coal in the Thar region.

**Future:** Ongoing reporting to the court by Pakistani government and the Climate Change Commission on progress

Ashgar Leghari, a Pakistani farmer, petitioned the Green Bench of the Lahore High Court asking it to order the Pakistani government to protect the citizens of Pakistan from climate change. Green benches were introduced in Pakistan by legislation to expedite environmental cases in response to the Bhurban Declaration 2012.<sup>90</sup> The Green Bench declared that the Pakistani government's 'delay and lethargy' in implementing the country's Framework for Implementation of Climate Change Policy 'offends the fundamental rights of the citizens which need to be safeguarded.' The Green Bench found that Pakistani officials had done little to implement adaptation measures to cope with a changing climate, with threats to food, water and energy security.

In its first order of 4 September 2015, the Green Bench stated that:

*'Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to*

<sup>90</sup> The declaration included 'A vow to establish "green benches" in courts for dispensation of environmental justice and to make necessary amendments or adjustments to the legal and regulatory structures to foster environmental justice.' Asian Development Bank, *South Asia Conference on Environmental Justice*, Bhurban, 24-25 March 2012 (2013) available at <http://www.adb.org/sites/default/files/publication/30433/south-asia-conference-environmental-justice.pdf>.

*approach this Court.'*

In relation to remedies, the Green Bench: 1) directed several government ministries to each nominate 'a climate change focal person' to help ensure the implementation of the Framework, and to prepare a list of adaptation measures from the Framework to be completed by 31 December 2015; and 2) created a Climate Change Commission with representatives of key ministries, non-government organisations, and technical experts. On 14 September, the Green Bench issued a supplemental decision naming 21 individuals to the Commission and vested it with various powers, and retained jurisdiction (continuing mandamus) to hear reports from representatives regarding progress. The decision recognised that for Pakistan,

*'Climate change is no longer a distant threat – we are already feeling and experiencing its impacts across the country and the region. The country experienced devastating floods during the last three years. These changes come with far reaching consequences and real economic costs.'*

The Pakistani case is groundbreaking because it is the first time that a court has accepted the existence of climate justice. The Green Bench relied upon the right to life and the right to dignity as protected by the Pakistani Constitution and international principles. The principles include the right to intergenerational equity and the precautionary principle. The Judge Syed Mansoor Ali Shah stated that:

*'The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e., Climate Change. From Environmental Justice .... We need to move to Climate Change Justice. Fundamental rights lay at the foundation of these two overlapping justice systems. Right to life, right to human dignity, right to property and right to information ... read with the constitutional values of political, economic and social justice provide the necessary judicial toolkit to address and monitor the Government's response to climate change.'*

This decision provides support for the view that climate justice is an emerging principle of law that applies to governments and the private sector. The decision aims to 'steer Pakistan towards climate resilient development.'

**Replicability** – the Pakistani decision should be replicable in jurisdictions where there is a constitutional right to life and a judicial willingness to interpret this right to life as including a right to a healthy environment, a right to clean air and/or other similar rights. These rights could be enshrined in the country's constitution or they may be found in human rights law. Where such laws exist, this creates fertile ground for successful litigation requiring a government to do or not do something in relation to climate change.

While the Indian Constitution does not expressly recognise the right to live in a healthy environment, Indian courts have found that it is protected by the Constitution.<sup>91</sup> Constitutional protection of rights is found in Ireland and South Africa.<sup>92</sup> Other jurisdictions which would allow claimants to rely upon

91 *M.C. Mehta v Kamal Nath* [2000] 6 SCC 213 available at <http://www.elaw.org/node/6920>; see also *M.C. Mehta v Union of India* [1987] SCR (1) 819 available at <http://indiankanoon.org/doc/1486949/>. The Indian Constitution includes duties for the state and citizens to protect the environment (Articles 48A and 51A(g), and the right to life (Article 21) and the right to equality (Article 14). See Environmental Law Alliance Worldwide, *Holding Corporations Accountable for Damaging the Climate* (2014) available at <http://www.elaw.org/system/files/elaw.climate.litigation.report.pdf>, 9.

92 Danwood Mzikenga Chirwa, 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10(2)

fundamental rights include Brazil,<sup>93</sup> Colombia,<sup>94</sup> Ecuador,<sup>95</sup> Kenya<sup>96</sup> and Mexico.<sup>97</sup>

The Pakistani decision also reflects the desirability of bringing climate litigation before courts that are specialised in environmental matters in seeking to replicate the decision. Judges are likely to have a greater degree of expertise suitable to climate litigation which may be important in complex matters. Jurisdictions with specialist environmental courts include Kenya, Bangladesh, India (National Green Tribunal), the Philippines, Thailand and Australia.<sup>98</sup>

### 2.3.3 *Belgium: Human rights/tort case against Belgian Government*

#### VZW KLIMAATZAAK V KINGDOM OF BELGIUM ET AL

**Objective:** Court order for the Belgian government to do more on climate change

**Plaintiffs:** Klimaatzaak (non-profit organisation) and 9,000 Belgian citizens

**Defendant:** Belgian government

**Outcome/Progress:** Filed

**Future:** Hearing expected in late 2016

Klimaatzaak, an organisation of concerned Belgian citizens, has sued the regional and federal governments of Belgium for contributing to climate change by failing to reduce greenhouse gas emissions to 40% below 1990 levels by 2020 and 87.5% below 1990 levels by 2050. Klimaatzaak literally means 'climate case'. The case is reportedly inspired by the Dutch Urgenda case. Klimaatzaak filed the case in April 2015 and has signed up 9,000 citizens as co-plaintiffs.<sup>99</sup> The plaintiff seeks to rely upon Belgium's international law obligations, and alleges that the impacts of climate change are a violation of human rights.<sup>100</sup> The court hearing is expected to occur at the end of 2016.

**Replicability** – As with the *Urgenda* case [Part 2.3.1], the case brought by Klimaatzaak is highly replicable in the EU and perhaps many other jurisdictions in both the civil law and common law traditions.

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*Law, Democracy and Development* 21.

93 Article 225 of the Brazilian Constitution recognises the right to live in a clean and healthy environment. Constituição da República Federativa do Brasil de 1998.

94 Article 79 of the Colombian Constitution recognises the right to enjoy a healthy environment. Constitución Política de la República de Colombia de 1991.

95 Article 14 of the Ecuadorian Constitution recognises the right to live in a clean and ecologically balanced environment that ensures sustainability and good living ('sumak kawsay'). Constitución de la República del Ecuador 2008. Ecuador also protects rights of nature, or Pacha Mama (Article 71).

96 Article 42 of the Constitution of Kenya recognises the right to a clean and healthy environment. The Constitution of Kenya, 2010.

97 Article 4 of the Constitution of Mexico protects the right to live in a healthy environment. Constitución Política de los Estados Unidos Mexicanos. Environmental Law Alliance Worldwide, *Holding Corporations Accountable for Damaging the Climate* (2014) available at <http://www.elaw.org/system/files/elaw.climate.litigation.report.pdf>, 6. Another possible jurisdiction is Nigeria, particularly in light of the decision in *Jonah Gbemre v Shell Petroleum Development Company of Nigeria*, Federal High Court of Nigeria Benin Division, Suit NO. FHC/B/CS/53/05 1, 29, available at <http://climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf>.

98 See Tun Lin et al, *Green Benches: What can the People's Republic of China learn from environment courts of other countries?* Asia Development Bank (2009) available at <http://www.adb.org/sites/default/files/publication/27523/green-benches.pdf>.

99 <http://www.climatechangenews.com/2015/07/08/around-the-world-in-5-climate-change-lawsuits/>.

100 See <http://blogs.law.columbia.edu/climatechange/2015/07/07/july-2015-update-to-climate-litigation-charts/#sthash.JvEcPTX5.dpuf>.

### 2.3.4 United States: Constitutional and public trust litigation against US Federal and State Governments

Young people have brought constitutional and public trust litigation in many state jurisdictions<sup>101</sup> and at the Federal level in the US. As part of a strategic campaign coordinated and led by Our Children's Trust, youth have brought administrative rulemaking petitions and lawsuits in each state of the US.<sup>102</sup> The [public trust doctrine](#) and state and federal constitutional principles have been used throughout these cases to argue that governments have a sovereign obligation to preserve the health of the atmosphere so as to ensure the viability of our oceans and climate system. The public trust doctrine provides that the government has an affirmative fiduciary duty to protect the natural resources that are essential for survival and prosperity of its present citizens and to preserve those natural resources in such a way that they remain intact for the benefit of future generations as well. Atmospheric trust litigation is a form of climate litigation in which claimants argue that the atmosphere is held in public trust by government trustees and must be protected for the beneficiaries of the trust, both present and future generations.<sup>103</sup> The individual rights and government duties asserted in these cases vary in different jurisdictions, but draw on specific constitutional and common law jurisprudence as well as codified law, establishing rights to life, liberty, property and environmental health, all of which are threatened by climate change.

#### *FOSTER V WASHINGTON DEPARTMENT OF ECOLOGY* No 14-2-25295-1

**Objective:** Order the state authority to commence a rulemaking process establishing emission reductions consistent with current science

**Plaintiffs:** Zoe and Stella Foster, minor children, through their guardians, along with other children and guardians

**Defendant:** Washington Department of Ecology

**Outcome/Progress:** State authority ordered by court to promulgate regulations of carbon dioxide emissions and make recommendations to state legislature

**Future:** N/A

In 2014, youth climate activists supported by Our Children's Trust filed a petition with the Washington Department of Ecology (Ecology). The youths argued that under existing law, Ecology has a constitutional, public trust and statutory obligation to regulate carbon dioxide emissions in accordance with the best available, current science and to move the state onto the path of climate stability. In August 2014, the Department of Ecology denied the petition for rulemaking, and the youth subsequently sought judicial review of this decision.

In June 2015, the court ordered that Ecology reconsider its denial of the petition after considering scientific evidence submitted by the youth and Ecology's own report where it concludes the state's existing greenhouse gas reductions 'need to be more aggressive' and 'should be adjusted to better reflect the current science.' In August 2015, Ecology informed the court that it had affirmed its denial of the youth's petition but that it was initiating a rulemaking to adopt a greenhouse gas emissions rule under a directive issued by the state's governor in July 2015. The gubernatorial directive required

101 State cases now pending are Oregon, Massachusetts and Colorado. See Our Children's Trust, *State Lawsuits* available at <http://ourchildrenstrust.org/US/LawsuitStates>.

102 Our Children's Trust, *State Lawsuits* available at <http://ourchildrenstrust.org/US/LawsuitStates>.

103 See Mary Wood, 'Atmospheric trust litigation across the world' available at [http://ourchildrenstrust.org/sites/default/files/ATLAcrossTheWorld\\_0.pdf](http://ourchildrenstrust.org/sites/default/files/ATLAcrossTheWorld_0.pdf).

Ecology to initiate a rulemaking related to greenhouse gas emissions. The youth pursued their appeal of Ecology's continued denial of their petition.

In November 2015, the court found that the state has a constitutional public trust responsibility to protect natural resources, but declined to order Ecology to commence the rulemaking process the youth requested that would have established greenhouse gas emission standards consistent with current science. Judge Hill found that the state authority was working toward fulfilling its constitutional and statutory responsibilities on the basis that it was developing the Clean Air Rule to reduce carbon emissions.

In the decision, Judge Hill found that the state environmental authority has a legal duty to fight climate change. The 'very survival' of the teenage plaintiffs 'depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming... before doing so becomes first too costly and then too late.' Judge Hill found that separating the navigable waters and the atmosphere would be 'nonsensical'. The judge decided that the public trust doctrine mandates that the state act through its designated agency 'to protect what it holds in trust.' The court found that '[t]he state has a constitutional obligation to protect the public's interest in natural resources held in trust for the common benefit of the people.' The court determined that Washington has a 'mandatory duty' to 'preserve, protect, and enhance the air quality for the current and future generations'.

However, despite the court's order, and despite having forestalled action on the youth's science-based petition, in February 2016, the state authority unilaterally withdrew its proposed rule.<sup>104</sup> In response to this withdrawal, the youth filed a motion for relief in April 2016.<sup>105</sup> Promptly thereafter, on 29 April 2016, Judge Hill ruled from the bench that Ecology promulgate an emissions reduction rule by the end of 2016 in accordance with the constitutional and public trust legal requirements established in her November 2015 order, and make recommendations to the state legislature on science-based greenhouse gas reductions for the 2017 legislative session. Further, Judge Hill ordered Ecology to consult with the youth petitioners in advance of that recommendation.<sup>106</sup>

Significantly, this decision marks the first time that a US court has ordered a state authority to promulgate regulations of carbon dioxide emissions, in accordance with its affirmative constitutional and public trust responsibilities, within a strict timeframe, and in consultation with youth petitioners.

**KELSEY JULIANA; XIUHTEZCATL MARTINEZ; ET AL. V THE UNITED STATES OF AMERICA; BARACK OBAMA; ET AL.**

**Objective:** Order for the development and implementation of national comprehensive climate recovery plan by US government to protect the constitutional rights of youth plaintiffs and achieve science-based targets for greater climate mitigation action consistent with a 350 ppm CO<sub>2</sub> target by 2100

**Plaintiffs:** 21 individual youth plaintiffs and Dr. James Hansen, guardian for future generations

**Defendants:** US government, US President, and specific federal agencies, with fossil fuel industry trade groups as defendant-intervenors

**Outcome/Progress:** Motions to dismiss denied

**Future:** Review of decision to deny motion to dismiss and trial

In August 2015, a group of 21 youth plaintiffs from across the US filed a constitutional lawsuit against

104 Our Children's Trust, *Washington: Legal Updates* available at <http://ourchildrenstrust.org/state/Washington>.

105 Our Children's Trust, *Washington: Legal Updates* available at <http://ourchildrenstrust.org/state/Washington>.

106 Our Children's Trust, *Youths secure second win in Washington State climate lawsuit* (29 April 2016) available at <http://ourchildrenstrust.org/sites/default/files/2016.04.29WAFinalRulingPR.pdf>.

the US government, US President and multiple federal agencies, alleging that for over fifty years, knowing of the serious dangers to future generations, the US government allowed and promoted the development and use of fossil fuels, thus increasing the concentration of CO2 emissions in the atmosphere to unsafe levels and creating the dangerous climate change and ocean acidification that we face today.

The youth plaintiffs assert in their complaint that the defendants' 'historic and continuing permitting, authorizing, and subsidizing of fossil fuel extraction, production, transportation, and utilization'

## XIUHTEZCATL MARTINEZ UNITED STATES

" Youth are standing up all over the planet to find solutions. We are flooding the streets and now flooding the courts."



Suing US government to protect youth rights.

infringe upon their rights to life, liberty and property in violation of their substantive due process rights. The youth further allege that their rights to equal protection under the Fifth Amendment are being violated, and that an implicit right (via the Fifth and Ninth Amendments) to a stable climate and an ocean and atmosphere free from dangerous levels of CO2 is being violated. Finally, the youth plaintiffs allege that the US government and President's affirmative aggregate acts in the areas of fossil fuel production and consumption have caused substantial impairment to essential public trust resources in violation of their affirmative obligations under the public trust doctrine to manage

the shared atmospheric and oceanic resources in such a way that guarantees their viability for the benefit of future generations.

In November 2015, fossil fuel industry trade groups filed pleadings to join the lawsuit, stating that it was a 'direct threat to [their] businesses'. The trade groups include American Fuel and Petrochemical Manufacturers (representing ExxonMobil, BP, Shell and others), the American Petroleum Institute (representing 625 oil and natural gas companies) and the National Association of Manufacturers. In January 2016, Judge Coffin allowed the three trade groups to intervene as defendants in the case.<sup>107</sup>

The US government and trade groups filed motions to dismiss the youth's lawsuit. The motions asserted that the youth plaintiffs lack standing, that the case raised non-justiciable political questions, and that the plaintiffs failed to state a constitutional claim. Further, the motions asserted that the public trust doctrine does not provide a cognizable federal cause of action.

In April 2016, Magistrate Judge Thomas Coffin issued Findings and Recommendations denying those motions, and rejecting every argument raised by the federal government and fossil fuel industry. In relation to standing, the plaintiffs needed to satisfy three requirements: (1) they suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favourable court decision.

107 Our Children's Trust, *Federal Climate Change Lawsuit: Legal Updates* available at <http://ourchildrenstrust.org/US/Federal-Lawsuit>.



In his landmark decision, Judge Coffin found that the plaintiffs had alleged that climate change will create impacts that will be nearly impossible for them to adapt to and that their survival and well-being is threatened. The allegations detailed the global changes of climate change that also lead to local harms, including sea level rise damaging coastal regions, changes in rainfall and atmospheric conditions impacting water and heat distribution causing floods, droughts and reduced crop yields and other harms. Further, the plaintiffs also asserted injuries that are personal in nature such as: jeopardy to family farms from increased temperatures and wildfires; lost recreational opportunities; and harm to family dwellings from superstorms<sup>108</sup> and that the harms befall them to a greater extent than older segments of society. Judge Coffin found that ‘while the personal harms are a consequence of the alleged broader harms... that does not discount the concrete harms already suffered by individual plaintiffs or likely to be suffered by these plaintiffs in particular in the future.’<sup>109</sup> He stated that the ‘court should be loath to decline standing to persons suffering an alleged concrete injury of a constitutional magnitude.’<sup>110</sup> In relation to justiciability, Judge Coffin found that:

*The intractability of the debates before Congress and state legislatures and the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for courts to evaluate the constitutional parameters of the action or inaction taken by the government. This is especially true when such harms have an alleged disparate impact on a discrete class of society.*

In relation to the causation element of standing, the youth plaintiffs argued that the aggregate acts of the federal government defendants—allowing the extraction of fossil fuels from the federal public domain, subsidising fossil fuel production and consumption, approving the transport of fossil fuels around the nation and abroad, authorizing emissions from power plants, pipelines and fossil fuel processing facilities, which could not operate without government approval, and setting standards allowing emissions in the transportation, buildings and appliances sectors—are fairly traceable to the carbon dioxide pollution of the US. While the government said that there were too many intervening actions by unidentified parties, Judge Coffin found that without the government’s conduct, the third parties would not be able to engage as extensively in the activities alleged to cause climate change and the harms.

The court then had to decide whether it could fashion a remedy to address the harm alleged by the plaintiffs (redressability element of standing). Judge Coffin noted that the plaintiffs alleged that the US is responsible for about 25% of the global CO<sub>2</sub> emissions. He noted that although Dutch courts have no authority outside of the Netherlands, there was a recent decision in the *Urgenda* case ordering the government reduce greenhouse gas emissions by at least 25% by 2020 [see Part 2.3.1]. Judge Coffin stated that ‘regulation by this country, in combination with regulation already being undertaken by other countries, may very well have sufficient impact to redress the alleged harms.’

After finding that the plaintiffs had standing, the court moved to the issue of political questions. Judge Coffin found that although on the surface the case ‘appears to implicate authority of Congress, courts can order agencies delegated that authority (via Congress) to craft regulations, to engage in such a process.’<sup>111</sup> Significantly, Judge Coffin found that the complaint raises issues concerning the

108 *Juliana Kelsey et al v United States of America et al* US District Court for the District of Oregon (8 April 2016), Magistrate Judge Coffin, p 5-6 available at <http://ourchildrenstrust.org/sites/default/files/16.04.08.OrderDenyingMTD.pdf>.

109 *Juliana Kelsey et al v United States of America et al* US District Court for the District of Oregon (8 April 2016), Magistrate Judge Coffin, p 6 available at <http://ourchildrenstrust.org/sites/default/files/16.04.08.OrderDenyingMTD.pdf>.

110 *Juliana Kelsey et al v United States of America et al* US District Court for the District of Oregon (8 April 2016), Magistrate Judge Coffin, p 7 available at <http://ourchildrenstrust.org/sites/default/files/16.04.08.OrderDenyingMTD.pdf>.

111 *Juliana Kelsey et al v United States of America et al* US District Court for the District of Oregon (8 April 2016), Magistrate Judge Coffin, p 7 available at <http://ourchildrenstrust.org/sites/default/files/16.04.08.OrderDenyingMTD.pdf>.

constitutionality of government action or inaction and that these are issues committed to the courts rather than either of the political branches.<sup>112</sup>

The court found that the plaintiffs had, for the purposes of a motion to dismiss, established valid constitutional and public trust claims that should proceed to a judicial determination on the merits of the claims. In relation to the public trust doctrine, Judge Coffin did not accept arguments from the defendants that this doctrine did not exist under US federal law. The next stage of the case will involve a review of Judge Coffin's decision by another federal judge in the same court, after which the case will proceed toward trial.

*“Judge Coffin accepted the Complaint’s presentation of undisputed scientific evidence that the federal government has, and continues to, damage these young Plaintiffs’ personal security and other fundamental rights. Unlike almost every other case deciding constitutional rights throughout history, the climate rights that will now be decided in this case, cannot be vindicated by future generations. The science is clear that if we do not obtain the relief we seek in this case, our climate system will be irreversibly and catastrophically damaged. Now these young plaintiffs have the right to prove that the government’s role in harming them has been knowing and deliberate for more than 50 years.”*

— Julia Olson, counsel for the plaintiffs and Executive Director of Our Children’s Trust.

## **KAIN ET AL. V. MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**Objective:** Order forcing the Department of Environmental Protection to enact regulations that would establish declining annual levels of greenhouse gas emissions.

**Plaintiffs:** Four teenagers

**Defendants:** Massachusetts Department of Environmental Protection

**Outcome/Progress:** Court order that the Department of Environmental Protection produce and implement stronger and more expansive regulations, including greenhouse gas limits that decline on an annual basis

**Future:** N/A

On 17 May 2016, the Massachusetts Supreme Judicial Court found in favour of four youth plaintiffs, who were supported by Our Children’s Trust and other non-profit organisations, in a case against the Massachusetts Department of Environmental Protection (DEP). 1 The court found that the DEP was not complying with its legal obligation to reduce state-based emissions and ordered DEP to ‘promulgate regulations that address multiple sources or categories of sources of greenhouse gas emissions, impose a limit on emissions that may be released ... and set limits that decline on an annual basis.’ 2 The case was based upon the Massachusetts Global Warming Solutions Act which provided that the state was to reduce emissions by 25% over those of 1990 by 2020, and by 80% by 2050. The youth

112 *Juliana Kelsey et al v United States of America et al* US District Court for the District of Oregon (8 April 2016), Magistrate Judge Coffin, p 8 available at <http://ourchildrenstrust.org/sites/default/files/16.04.08.OrderDenyingMTD.pdf>.

plaintiffs also relied upon their constitutional and public trust rights to clean air, a healthy atmosphere, and a stable climate system.

**Replicability** – Constitutional and public trust litigation on climate change is highly replicable in nearly every jurisdiction. Constitutional level protections for rights threatened by climate change can be found in constitutional text or jurisprudence in most democratic jurisdictions. Because the public trust doctrine originated in first Roman and then English law, it is easily replicable in common law countries, but can be replicated in civil law countries as well. Our Children’s Trust, the non-profit organisation spearheading this constitutional and public trust litigation globally, is not only working on cases in the US but also working with youth and lawyers in other jurisdictions to develop similar litigation. Our Children’s Trust is currently working with youth and/or lawyers in Uganda,<sup>113</sup> Pakistan,<sup>114</sup> the Philippines, Australia, India, the Netherlands, Canada, France, England, Norway and Belgium to support efforts to replicate the litigation.<sup>115</sup>

### *2.3.2 Pakistan: Public trust and human rights case against Pakistani Government*

#### **RABAB ALI V FEDERATION OF PAKISTAN AND PROVINCE OF SINDH**

**Objective:** Order for greater mitigation action by Pakistani government to protect the constitutional public trust rights of Pakistani youth and stop new coal development in the Thar region

**Plaintiff:** Rabab Ali, a child

**Defendants:** Pakistani government and Province of Sindh

**Outcome/Progress:** Filed in April 2016

**Future:** Ongoing

In April 2016, Rabab Ali, a 7-year-old girl,<sup>116</sup> filed a case against the Federation of Pakistan and the Province of Sindh in the Supreme Court of Pakistan.<sup>117</sup> The case has been brought on behalf of all Pakistani people. Ali’s petition alleges that both the actions and omissions of the defendants are deliberately increasing Pakistan’s CO<sub>2</sub> emissions in violation of the public trust doctrine and youth’s fundamental constitutional rights to life, liberty, property, human dignity, information, and equal protection of the law.<sup>118</sup> The Constitutional Petition challenges the defendants’ exploitation and ongoing promotion of fossil fuels, particularly the development of Pakistan’s vast untapped low-grade coal reserves in the Thar region, which the Pakistan government promotes and plans for in its own climate change policy documents.

The Constitutional Petition states that the Pakistani legal system is based upon English common law

113 A case is ongoing in Uganda, see Our Children’s Trust, *Uganda* available at <http://ourchildrenstrust.org/legal/international/Uganda>.

114 Our Children’s Trust, Pakistan case information at <http://ourchildrenstrust.org/legal/international/Pakistan>.

115 Our Children’s Trust, *International Legal Actions* available at <http://ourchildrenstrust.org/legal/international>.

116 See Thom Mitchell, ‘Seven-Year-Old Pakistani latest to sue government over climate inaction’ (8 April 2016, New Matilda) available at <https://newmatilda.com/2016/04/08/seven-year-old-pakistani-girl-sues-government-over-climate-inaction/>; Our Children’s Trust, ‘7-year-old filed climate change lawsuit with the Supreme Court of Pakistan’ (6 April 2016, Eco Watch) available at <http://ecowatch.com/2016/04/06/climate-petition-pakistan/>.

117 Our Children’s Trust, *Pakistan* available at <http://ourchildrenstrust.org/legal/international/Pakistan>.

118 *Rabab Ali v Federation of Pakistan & Another, Constitutional Petition* (2016) is available at <http://ourchildrenstrust.org/sites/default/files/PakistanYouthClimatePetition.pdf>.

## RABAB ALI PAKISTAN

"I want my government to create a plan that will allow me and future generations a safe environment to grow up in."



Suing Pakistani government to protect youth rights.

and includes the doctrine of public trust as part of its jurisprudence.<sup>119</sup> It further states that the public trust doctrine holds that the Pakistani people have an inalienable right to safe levels of CO<sub>2</sub> in the atmosphere. Ali alleges that fossil fuel pollution harms and continuously threatens her mental and physical health, quality of life and wellbeing.<sup>120</sup> The Petition alleges that the defendants 'are intentionally fast-tracking the development of Coal in Pakistan, with complete indifference to the real and devastating Climatic and Environmental effects that Coal mining and burning have on the people of Pakistan. . . . in violation of the Pakistani peoples' Fundamental Rights, guaranteed by the Constitution, and in violation of their obligations under the Doctrine of Public Trust to

do Pakistan's share in protecting and restoring the atmosphere and Climate system, on which the Pakistani people depend for their wellbeing and survival.'

The youth plaintiff is seeking a range of remedies, including a declaration that the defendants have violated the public trust doctrine and fundamental rights; and injunctive relief against the defendants in a number of respects, including that the defendants 'keep untapped coal reserves in the ground and to immediately refrain from any further coal exploration or power generation'.<sup>121</sup> The case is similar to the cases brought by youth in the US and has been supported by the non-profit organisation Our Children's Trust.

*"The protection of these inalienable and fundamental rights is essential if we are to have any chance of leaving our children and future generations with a stable climate system and environment capable of sustaining human life. Pakistan is rich in renewable energy resources such as solar and wind, more than enough to meet the energy needs of current and future generations of Pakistanis. Yet the federal and provincial governments of Pakistan, along with the vested interests in the country and the region, are exploiting Pakistan's most environmentally degrading and carbon intensive fuels—low-grade coal from the Thar Coal Reserves—in violation of the Pakistani people's constitutionally protected fundamental rights."*

— Qazi Ali Athar, public interest environmental attorney representing his daughter as youth petitioner in the case

119 *Rabab Ali v Federation of Pakistan & Another, Constitutional Petition* (2016) is available at <http://ourchildrenstrust.org/sites/default/files/PakistanYouthClimatePetition.pdf>, p 30.

120 *Rabab Ali v Federation of Pakistan & Another, Constitutional Petition* (2016) is available at <http://ourchildrenstrust.org/sites/default/files/PakistanYouthClimatePetition.pdf>, p 13.

121 *Rabab Ali v Federation of Pakistan & Another, Constitutional Petition* (2016) is available at <http://ourchildrenstrust.org/sites/default/files/PakistanYouthClimatePetition.pdf>, p 38.

**Replicability** – the Pakistani case brought by child Rabab Ali is highly replicable, itself a replication of climate litigation in the US. The case is likely to build upon the declarations of law by a court in an earlier case in Pakistan decided in 2015 [see Part 2.3.2] where a court ordered that the Pakistani government implement its existing climate policy (which included the development of Pakistan’s coal reserves and would increase Pakistan’s greenhouse gas emissions 1000 times present levels). The case’s reliance upon the public trust doctrine could be replicated in other jurisdictions where this doctrine exists, particularly common law countries. Further, the case’s reliance upon fundamental constitutional rights could be relied upon in other jurisdictions. Our Children’s Trust has announced that it is currently working with youth and lawyers in Uganda,<sup>122</sup> the Philippines, the Netherlands, Canada, Australia, India, France, England, Norway and Belgium to support litigation of a similar nature.<sup>123</sup>

### 2.3.6 *New Zealand: Judicial review proceedings against New Zealand Government*

#### **SARAH THOMSON V MINISTER FOR CLIMATE CHANGE ISSUES**

**Objective:** An order that the Minister for Climate Change Issues has failed his ministerial duties by not setting science-based emissions targets

**Plaintiff:** Sarah Thomson, a law graduate

**Defendants:** Minister for Climate Change Issues, New Zealand

**Outcome/Progress:** Filed in November 2015

**Future:** Ongoing

Sarah Thomson, a law graduate, has filed judicial review proceedings against the Minister for Climate Change Issues of New Zealand. Thomson claims that the Minister has failed his ministerial duties by not setting science-based emissions targets.<sup>124</sup> She is calling upon the New Zealand High Court to review New Zealand’s emissions targets.<sup>125</sup> A hearing date has not yet been set for the case.<sup>126</sup>

**Replicability** – these judicial review proceedings in New Zealand have been inspired by cases brought in the US and supported by Our Children’s Trust [Part 2.3.4], and also the decision in the Uganda case [Part 2.3.1]. Limited information is currently available about the proceedings so it is difficult to assess its replicability. However, as was discussed above, there are many possible opportunities for concerned citizens to bring climate litigation against their governments for not setting science-based emissions targets.

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122 A case is ongoing in Uganda, see Our Children’s Trust, *Uganda* available at <http://ourchildrenstrust.org/legal/international/Uganda>.

123 Our Children’s Trust, *International Legal Actions* available at <http://ourchildrenstrust.org/legal/international>.

124 Sarah Thomson, ‘Press release: Law student sues climate minister over poor emissions target’ (12 November 2015) available at <http://www.scoop.co.nz/stories/PO1511/S00190/law-student-sues-climate-minister-over-poor-emissions-target.htm>.

125 Rachel Thomas, ‘Hamilton student sues government over climate change targets’ (12 November 2015) available at <http://www.stuff.co.nz/environment/73951223/Hamilton-student-sues-government-over-climate-change-targets>.

126 John Schwartz, ‘In novel tactic on climate change, citizens sue their governments’ (New York Times, 10 May 2016) available at <http://www.nytimes.com/2016/05/11/science/climate-change-citizen-lawsuits.html>.

## 2.4 Immigration cases

### 2.4.1 Tuvalu immigration case

Low lying island States, particularly in the Pacific, are highly vulnerable to the impacts of climate change. The majority of Pacific Islanders would prefer to live on their islands and live their traditional life. However, without strong mitigation these island nations are faced with the prospect of becoming increasingly uninhabitable. National leaders such as President Anote Tong from Kiribati have sought negotiated solutions, particularly with the neighbouring countries of Australia and New Zealand. President Tong and other Pacific Island leaders have specifically objected to the application of the term 'refugee' to them. Nonetheless, the unique legal situation facing people displaced by the impacts of climate change is beginning to come before national courts under immigration law.<sup>127</sup> One recent case from New Zealand is profiled in this section.<sup>128</sup>

**IN RE: AD (TUVALU)**

**NEW ZEALAND IMMIGRATION AND PROTECTION TRIBUNAL [2014] CASES 501370-371 (NEW ZEALAND)**

**Objective:** To secure immigration permits

**Applicants:** Family from Tuvalu

**Respondent:** New Zealand government

**Outcome/Progress:** Immigration permits were granted on a humanitarian basis

**Future:** N/A

In re: AD, a family from Tuvalu brought an [appeal](#) against a decision to deny them New Zealand resident visas. The family made a number of arguments, including that they would be at risk of suffering the adverse impacts of climate change if they were deported to Tuvalu. The New Zealand Immigration and Protection Tribunal (Tribunal) decided that in accordance with the *Immigration Act* 2009, the family had established 'exceptional circumstances of a humanitarian nature, which would make it unjust or unduly harsh for the appellants to be removed from New Zealand.'

While the Tribunal stated that climate change impacts might impact the enjoyment of human rights, the Tribunal declined to decide whether climate change provided a basis for granting resident visas in this case. The Tribunal found 'exceptional circumstances' based upon other factors, including the husband's extended family in New Zealand, the family's integration into the New Zealand society, and the best interests of the children.

**Replicability** – The case is replicable in that individuals from countries that are becoming increasingly uninhabitable due to climate change and ocean acidification could seek immigration permits on a humanitarian basis in a great variety of jurisdictions. Climate change could lead to the displacement of 200 million or more people by 2050.<sup>129</sup> A multitude of forces can lead to the eventual displacement

<sup>127</sup> There is much literature on the options for international law and policy developments for climate displacement. See e.g. Jane McAdam, 'Swimming Against the Tide: Why a Climate Displacement Treaty is Not the Answer' 23 *International Journal of Refugee Law* (2011) 2.

<sup>128</sup> See also *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* New Zealand Supreme Court [2015] NZSC 107.

<sup>129</sup> See e.g. Norman Myers, 'Environmental refugees: A growing phenomenon of the 21<sup>st</sup> Century' (2002) 357(1420) *Philosophical Transactions of the Royal Society of London* 609; Office of the U.N. High Commissioner for Refugees, *Forced displacement in the*

of people, within countries and across borders. It is expected that climate change will exacerbate existing political instability and that it poses a serious risk to international security. While individuals may seek immigration permits from other countries, the preferred option among small island developing states is that communities remain living on their territories, and if they eventually must relocate that this happens collectively.

### ***KEY FINDINGS: CLIMATE LITIGATION***

- 1. Climate litigation has spread beyond the US into new jurisdictions throughout Asia, the Pacific and Europe.*
- 2. Climate litigation is targeting the 'Carbon Majors', who are the world's largest Big Oil, Coal and Gas Producers, as well as the governments that are continuing to support and collude with the Carbon Majors.*
- 3. The Philippines Commission on Human Rights is investigating the role of the Carbon Majors in the human rights implications of climate change. Similar investigations could be brought in other countries with human rights commissions, which includes a multitude of jurisdictions across every region of the world.*
- 4. A Peruvian farmer is seeking \$21,000 damages from German utility company RWE in German courts. The case could be replicated by plaintiffs from anywhere in the world who could seek damages in European courts, and could also be replicated in other countries that are favourable to transnational litigation (e.g. the US and Australia).*
- 5. A Dutch court decided in the Urgenda case that the Dutch Government was not doing enough to address climate change, and ordered it to do more. The case could be replicated in jurisdictions where tort law and other laws provide a basis for government action on climate change. It has already been replicated in Belgium, where a similar case has been filed.*
- 6. People displaced from low lying island nations are now beginning to seek immigration on humanitarian grounds in countries such as Australia and New Zealand. The cases are likely to be replicated by other individuals across other jurisdictions, although communities from these nations have a preference to relocate collectively.*
- 7. A Pakistani judge has declared the government's inaction on climate change offends the fundamental rights of its citizens, including constitutional and human rights. He called for a move to climate justice. The case is replicable across jurisdictions that protect these rights, such as Brazil, Colombia, Ecuador, Kenya and Mexico.*
- 8. Young people in the US are having success bringing litigation against governments to enforce affirmative obligations on state and federal governments to protect constitutional and public trust rights through greenhouse gas emission and climate recovery planning. The litigation is replicable throughout jurisdictions because constitutional and/or public trust obligations are present in many countries. The litigation has already been replicated in several states in the US, in Pakistan, where a young child has recently filed a case, and is being developed in conjunction with Our Children's Trust in multiple other countries.*
- 9. Seventeen state governments in the US are investigating Big Oil for allegedly lying to the public about climate change or to investors about the risks of climate change. The investigations could trigger federal racketeering and organised crime law. Similar investigations could be brought by governments around the world.*

# 3. THE ROLE OF LITIGATION IN OTHER SECTORS

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## 3.1 The role of litigation in tobacco control

Litigation against the tobacco industry has taken an important role in tobacco control in the US and some other countries.<sup>130</sup> Tobacco litigation has had a range of goals, including compensation for personal injuries, but also wider societal goals such as reducing smoking rates, changing society's perceptions towards smoking, and shifting the burden of tobacco damage from the state to industry. Such goals are consistent with legal theories of using litigation to assign responsibility to companies that impose unreasonable risks and/or cause harm.<sup>131</sup>

The litigation began in the 1950s, with individuals first bringing cases against tobacco companies. It later developed into litigation from 1988 where plaintiffs relied upon industry documents produced as a result of discovery. For example, 30 million separate items were produced in litigation brought by the Minnesota attorney general.<sup>132</sup> From the 1990s tobacco litigation has primarily come in the form of class actions<sup>133</sup> and medical cost recoupment litigation. In relation to litigation brought by individuals, the tobacco companies raised defenses such as contributory negligence and individual responsibility of smokers, which were serious barriers for plaintiffs.<sup>134</sup>

Litigation against the tobacco industry has been highly successful in the US and contributed to the broader public interest (specifically achieving public health objectives in a decentralized, but efficient manner).<sup>135</sup> It has provided access to millions of internal industry documents; undermined the legitimacy of the tobacco industry; helped shift the industry's position on the causation of smoking to the diseases; and added around \$10 billion per year to the costs of the tobacco industry.<sup>136</sup> The added costs for the tobacco industry have resulted in significant price increases that have contributed to reductions in smoking rates.<sup>137</sup>

A significant development occurred from the 1990s when state governments brought lawsuits seeking monetary, equitable and injunctive relief under various laws, focusing upon the public health expenses associated with tobacco smoking. After four of these cases resulted in individual settlements, the tobacco companies and state governments began negotiating a national resolution.<sup>138</sup> The Master Settlement Agreement (MSA) between the US States and that US tobacco industry was reached

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130 <http://www.tobaccoinaustralia.org.au/chapter-16-litigation>.

131 Gostin L Public Health Law: Power, Duty, Restraint University of California Press (2003).

132 Marlo Miua, Richard A. Daynard & Jonathon M. Samet, 'The Role of Litigation in Tobacco Control' (2006) 48 *Salud Publica de Mexico* 121.

133 See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

134 Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview* (2015) available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf>.

135 Basil Bitas and Pedro Barros, 'Tobacco Control and the Role of Litigation: A Survey of Issues in Law, Policy, and Economics' available at <http://ssrn.com/abstract=1121000>, 2. See also Stephen D Sugarman, *The Smoking War and the Role of Tort Law* (1998 draft), available at <http://www.law.berkeley.edu/faculty/sugarmans/jgfs.htm>; Richard Daynard & Graham Kelder, 'Tobacco Litigation as a Public Health and Cancer Control Strategy' (1996) 51 *Journal of American Women's Association* 57.

136 R Daynard "Why tobacco litigation?" *Tobacco Control* 2003;12:1-2.

137 R Daynard "Why tobacco litigation?" *Tobacco Control* 2003;12:1-2.

138 Mississippi, Minnesota, Florida and Texas settled with tobacco companies in 1997. See Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview* (2015) available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf>.



in 1998 and totaled \$206 billion over 25 years.<sup>139</sup> The parties settled 'to avoid further expense, delay, inconvenience, burden and uncertainty of continued litigation (including appeals from any verdicts.'<sup>140</sup> The tobacco industry agreed to curb certain marketing practices in exchange for the US States dropping all similar legal claims.<sup>141</sup> The tobacco companies agreed to dissolve certain tobacco industry groups.

The MSA does not protect the tobacco industry from lawsuits brought by individuals, labor unions and private health-care insurers.<sup>142</sup> The number of tobacco companies participating in the MSA has changed over time, as some companies have joined and others have gone out of business. An independent auditor calculates the settlements payments to be made each year by each company and the amount that each state is to receive. If the calculation is disputed, the matter is submitted to arbitration by former federal judges. The success of the US States in negotiating this settlement was to a large extent due to the power of governments and the risks that government power poses to the tobacco industry, rather than legal principles alone.<sup>143</sup> The state governments have been criticised for not primarily using the settlement revenue for tobacco control, despite the fact that the MSA provides that it is designed to decrease youth smoking and promote public health. In 2015, state governments received \$25.6 billion in settlement revenue and tobacco taxes, but only allocated 1.9% of these funds to tobacco control.<sup>144</sup>

The US Federal Government, which was not a party to the MSA, brought a case in 1999 against the tobacco industry which included an allegation of racketeering, under the *Racketeering Influenced Corrupt Organizations Act*, known as RICO.<sup>145</sup> The racketeering provisions allow someone to be held liable for certain crimes that they have ordered or assisted others to commit.<sup>146</sup> It was designed to target organized crime but is not limited to that alone. The US Department of Justice (DOJ) alleged that the tobacco companies had purposely and fraudulently misled the public about the dangers and risks of smoking from 1953 while the company's internal scientific research confirmed the risks of smoking.

In 2006, the District Court for the District of Columbia found that the defendant companies had been guilty of racketeering as provided under RICO by fraudulently covering up the health risks of smoking and for marketing their products to children.<sup>147</sup> Judge Kessler stated that

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139 This was preceded by a \$40 billion settlement with Minnesota, Mississippi and Texas, so a total figure of \$246 billion is often used. See Rabin R L "The Third Wave of Tobacco Tort Litigation" in R Rabin and S Sugarman (eds) *Regulating Tobacco*, Oxford University Press (2001) 192. The Master Settlement Agreement is available here: [http://web.archive.org/web/20080625084126/http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724\\_1032468605\\_cigmsa.pdf](http://web.archive.org/web/20080625084126/http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf).

140 Master Settlement Agreement (1998), s 1.

141 Graham Kelder & Patricia Davidson (eds), *The Multistate Master Settlement Agreement and Local Tobacco Control: An Analysis of Selected Topics and Provisions of the Multistate Master Settlement Agreement of November 23, 1998*, available at [http://www.tobacco.neu.edu/tobacco\\_control/resources/msa/msa\\_analysis.pdf](http://www.tobacco.neu.edu/tobacco_control/resources/msa/msa_analysis.pdf).

142 Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview* (2015) available at <http://publichealth-lawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf>.

143 Basil Bitas and Pedro Barros, 'Tobacco Control and the Role of Litigation: A Survey of Issues in Law, Policy, and Economics' available at <http://ssrn.com/abstract=1121000>, 16.

144 See Campaign for a Tobacco Free Kids, *Broken Promises to Our Children: A State-by-State Look at the 1998 State Tobacco Settlement 16 years later* (2014) available at [http://www.tobaccofreekids.org/content/what\\_we\\_do/state\\_local\\_issues/settlement/FY2015/2014\\_12\\_11\\_brokenpromises\\_report.pdf](http://www.tobaccofreekids.org/content/what_we_do/state_local_issues/settlement/FY2015/2014_12_11_brokenpromises_report.pdf); Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview* (2015) available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf>.

145 *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. §§1961-1968 (2006).

146 US Department of Justice, *Criminal RICO: A Manual for Federal Prosecutors* (Fifth Revised Edition, 2009) available at <https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/rico.pdf>.

147 See *U.S. Cigarette Companies Liable for Violating Federal Anti-Racketeering Statute: Backgrounder and Commentary*, August 17, 2006, available at [http://www.tobacco.neu.edu/litigation/cases/DOJ/kessler\\_decision\\_0806.htm](http://www.tobacco.neu.edu/litigation/cases/DOJ/kessler_decision_0806.htm).

*'In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.'*<sup>148</sup>

The court ordered a range of remedies, including the issue of corrective statements, but did not order the multibillion-dollar remedies sought by DOJ for the disgorgement of illegal profits on the basis that it was not a valid remedy. The decision was upheld on appeal. This judgment and others against the tobacco industry discredited the industry and helped reduce the ability of tobacco companies to influence politics. Similar litigation could be brought under RICO against the fossil fuel industry.<sup>149</sup>

However, tobacco litigation has often been difficult and unsuccessful. The tobacco industry spends a great deal on defending litigation (estimated in 2000 to total up to \$900 million per year in the US).<sup>150</sup> One tobacco industry document revealed the rationale behind this defense, stating that 'the way we won was not by spending all [the company's] money, but by making the [plaintiff] spend all his.'<sup>151</sup>

Experiences in the US of tobacco litigation suggest that the most powerful climate litigation will likely be brought by governments against private corporations in order to recoup the costs that private corporations are forcing upon governments. Governments have sought to recoup the massive health costs of tobacco and in the case of fossil fuels, governments might seek to recoup environmental, health and economic costs. Such legal action has already started in the US against fossil fuel corporations, with multiple states investigating ExxonMobil and others for allegedly lying to the public about climate change and to investors about the risks of climate change [see Part 2.2.4]. As plaintiffs, governments have the power to negotiate outcomes of greater societal impact. Governments are also more appropriate representatives of the public interest than individuals or even groups of plaintiffs that represent a discrete segment of society.

Further, if climate litigation follows the path of tobacco litigation, it is conceivable that litigation may reveal vast amounts of internal documents from fossil fuel corporations to the detriment of those corporations. The revelation of internal memos showing knowledge and disregard of risk by tobacco companies had a major impact on social and governmental views of the tobacco industry. Documents unearthed by investigations into ExxonMobil and others may play a transformative role in public attitudes towards fossil fuel corporations.

Tobacco litigation in Australia began in 1986 and the first case in Europe was filed in 1988.<sup>152</sup> Cases have been brought in Finland, Israel, Spain and France. However, a number of elements unique to the US (e.g. large damages awards and the existence of class action statutes) have meant that the litigation in that country has gone further in scope and magnitude than other jurisdictions.<sup>153</sup> The common law system of the US provides judges with a central role for determining complex disputes including those dealing with collective rights, as it does in other similar jurisdictions such as India, Pakistan and Australia. Other jurisdictions, such as those found in Europe and to some extent Asia,

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148 United States of America v Philip Morris USA Inc et al available at <http://www.tobaccolawcenter.org/documents/FinalOpinion.pdf>.

149 Dana Nuccitelli, *Is the fossil fuel industry, like the tobacco industry, guilty of racketeering?* (29 September 2015, The Guardian) available at <http://www.theguardian.com/environment/climate-consensus-97-per-cent/2015/sep/29/is-the-fossil-fuel-industry-like-the-tobacco-industry-guilty-of-racketeering>.

150 M Geyelin M and G Fairclough "Taking a hit: Yes, \$145 billion deals a huge blow, but not a killing one", Wall Street Journal 17 July 2000, A1.

151 Rabin, R "The Third Wave of Tobacco Tort Litigation" in R Rabin and S Sugarman (eds) *Regulating Tobacco*, Oxford University Press (2001) 181; *British Columbia v Imperial Tobacco Canada Ltd* (2003) 227 DLR (4th) 323, 2003 BCSC 877 (see the "Judicial History" section of a 2005 appeal decision in the same matter, at <http://www.canlii.org/en/ca/scc/doc/2005/2005scc49/2005scc49.pdf>, p20; *British Columbia v Imperial Tobacco Canada Limited* 2008 BCSC 419.

152 Basil Bitas and Pedro Barros, 'Tobacco Control and the Role of Litigation: A Survey of Issues in Law, Policy, and Economics' available at <http://ssrn.com/abstract=1121000>, 27.

153 Basil Bitas and Pedro Barros, 'Tobacco Control and the Role of Litigation: A Survey of Issues in Law, Policy, and Economics' available at <http://ssrn.com/abstract=1121000>, 28.

have a less litigious approach to managing major issues and tend to take a more regulatory and administrative approach.<sup>154</sup> Litigation has the benefit of raising the profile of the dangers of smoking, thereby potentially having a wider societal impact than other forms of law making.<sup>155</sup>

Despite their different approaches, the overall law and policy outcome in both the US and Europe are moving towards a gradual decline and eventual phase out of tobacco. Subsidies for the tobacco industry have been reduced or removed over time.<sup>156</sup> In contrast, the fossil fuel industry is heavily subsidised by governments. In 2015, the IMF found that energy subsidies totaled US\$5.3 trillion, or 6.5% of global GDP.<sup>157</sup> Further, the IMF concluded that eliminating energy subsidies worldwide could reduce deaths related to fossil-fuel emissions by over 50 percent and fossil-fuel related carbon emissions by over 20 percent. Removal of fossil fuel subsidies could be effectively coupled with higher taxes to ensure that governments recuperate the costs of the climate change from the industry [see Part 4.3].

The international community has agreed to the *Framework Convention on Tobacco Control*, and related Protocols. The *Framework Convention on Tobacco Control* recognises the importance of tobacco litigation and states in its guiding principles that '[i]ssues relating to liability, as determined by each Party within its jurisdiction, are an important part of comprehensive tobacco control'. Article 19.1 requires Parties, '[f]or the purpose of tobacco control', to 'consider taking legislative action or promot[e] their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate'. The acknowledgement of the central role of liability within international tobacco law is remarkable and contrasts to the Paris Agreement [Part 1 and 4]. States were in agreement that seeking both civil and criminal liability were appropriate and desirable responses by governments. The international community also agreed to a ban on the tobacco industry having a voice on the setting of health policy, a measure that could be adapted for climate policy in relation to the fossil fuel industry [Part 4.1]. The acknowledgement of the central role of liability within international tobacco law is remarkable. It contrasts with the UNFCCC and Paris Agreement [Part 1 and 4], but offers potential pathways for future consideration,<sup>158</sup> in particular now that loss and damage from climate change is becoming more dominant.

The approach of the international community to actively support and call upon governments to litigate against tobacco corporations contrasts to the absence of such language in the international climate regime to date. The Paris Agreement deliberately avoids the topic of liability and compensation, instead of recognizing it as an unavoidable element of climate change (see Part 1.5). The Paris Agreement does not even mention the term fossil fuels once, which contrasts to the *Framework Convention on Tobacco Control* which has controlling tobacco at its core. It may be that the fossil fuel industry learned from the experiences of tobacco companies and implemented a policy to deflect attention and blame.<sup>159</sup> Litigation against the fossil fuel industry could serve to refocus efforts back onto the corporate actors.

The tobacco industry has relied heavily upon arguing that individuals have personal responsibility

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154 W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts* 36 (Harvard Law School Discussion Paper No. 291, 2000) available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1079&context=harvard/olin>.

155 David M. Cutler & Edward L. Glaeser, *Why Do Europeans Smoke More than Americans?* (National Bureau of Economic Research, Working Paper No. 12124, 2006).

156 In the US, tobacco farmers have long received subsidies. Congress voted in 2004 to eliminate the government's involvement in the tobacco industry with a \$9.6 billion buyout program that paid farmers on a yearly basis

157 David Coady et al, *How Large are Global Energy Subsidies?* (IMF Working Paper, May 2015) available at <https://www.imf.org/external/pubs/ft/wp/2015/wp15105.pdf>.

158 See Corporate Accountability International, *Fueling the Fire: The Big Polluters Bankrolling COP* (2015) available at [https://www.stopcorporateabuse.org/sites/default/files/resources/dossier\\_final\\_hyperlinksweb.pdf](https://www.stopcorporateabuse.org/sites/default/files/resources/dossier_final_hyperlinksweb.pdf).

159 See Naomi Oreskes and Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (Bloomsbury Press, 2011).

for the harms associated with smoking. Similarly, the fossil fuel industry has sought to entrench itself within the energy system and rely upon the idea that fault is with all of us. Legal actions taken by governments have the potential of avoiding these arguments of individual responsibility. Further, legal actions by governments can simplify questions of causation as the damages are at a different scale than those raised by individuals.

Finally, tobacco litigation has shown the value in targeting the largest manufacturers, or Tobacco Majors, when there were other parts of the supply chain that could have been addressed (e.g. individuals, growers and sellers). In the context of climate change, the equivalent is the fossil fuel industry, and particularly the Carbon Majors. These entities are the largest corporate actors who have exerted the most power politically and who hold the most power to make or stop climate change.

## 3.2 The role of litigation in asbestos

The World Health Organisation estimates that over 107,000 people die each year from asbestos-related lung cancer, mesothelioma and asbestosis from occupational exposures.<sup>160</sup> Further people die from asbestos through other types of exposures. Asbestos was a widely used product in the early 20<sup>th</sup> century primarily due to its resistance to fire, particularly in the construction and maritime industries.<sup>161</sup> The executives of The Johns-Manville Corp., the largest asbestos manufacturer in the US, were aware of the hazards posed from asbestos from the 1930s.<sup>162</sup> From 1973, usage of asbestos in the US declined sharply in response to growing knowledge of the risks of asbestosis, lung cancers and mesothelioma and in response to the US Occupational Safety and Health Administration calling for its removal.<sup>163</sup> One of the earliest asbestos cases was filed in 1972 by a worker against an asbestos manufacturer.<sup>164</sup> The worker won \$68,000 by jury verdict. The number of asbestos cases filed since then has increased over time, eventually at an exponential rate.

The Manville Corporation filed for bankruptcy in 1982<sup>165</sup>, and was at the time the largest company ever to file bankruptcy. Manville Corporation was 181<sup>st</sup> on the Fortune 500, but faced 16,500 asbestos claims.<sup>166</sup> Internal memos from Manville Corporation reveals deliberate attempts to avoid liability:

*The fibrosis of this disease is irreversible and permanent so that eventually compensation will be paid to each of these men. But, as long as the man is not disabled it is felt that he should not be told of his condition so that he can live and work in peace and the company can benefit by his many years of experience.*<sup>167</sup>

The American legal system has struggled to meet the demands of asbestos litigation, particularly due to the complexity of scientific evidence and the sheer number of cases.<sup>168</sup> Asbestos litigation is the

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160 [http://www.who.int/ipcs/assessment/public\\_health/asbestos/en/](http://www.who.int/ipcs/assessment/public_health/asbestos/en/)

161 Paul D. Carrington, 'Asbestos lessons: The consequences of asbestos litigation' (2007) 26 *The Review of Litigation* 583.

162 Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* 5, 112-113 (1985).

163 Paul D. Carrington, 'Asbestos lessons: The consequences of asbestos litigation' (2007) 26 *The Review of Litigation* 583, 588.

164 *Borel v Fibreboard Paper Prods. Corp.*, 493 F. 2d 1076 (5<sup>th</sup> Cir. 1973).

165 Johns-Manville re-established in 1988. Jonathon Stempel, 'Court orders Travelers to pay \$500M in Johns-Manville asbestos claims' (22 July 2014, Insurance Journal) available at <http://www.insurancejournal.com/news/national/2014/07/22/335470.htm>.

166 <https://web.archive.org/web/20100715214855/http://www.lhc.org.uk:80/members/pubs/books/asbestos/asb09.htm>

167 <https://web.archive.org/web/20070608074844/http://www.ewg.org:80/reports/asbestos/printerfriendly.php>

168 Paul D. Carrington, 'Asbestos lessons: The consequences of asbestos litigation' (2007) 26 *The Review of Litigation* 583,

# Litigation Comparison



Tobacco



Asbestos



Climate

## Litigation Targets



Tobacco Majors', largest tobacco companies



First the largest asbestos companies; now peripheral companies due to bankruptcies



'Carbon Majors', largest fossil fuel companies

## Nature of Litigation



Complex. High # of cases. Long period between exposure and disease manifestation



Complex. High # of cases. Long period between exposure and disease manifestation. Overwhelmed US courts



Range of complexity. Fewer # of cases. Range of time between emissions and damage.

## Early Cases



Brought by individuals. Took time to be successful.



Brought by individuals. Took time to be successful.



Brought by individuals and governments.

## Government Lawsuits



Highly successful. Tied to Government led settlements



Limited. Lack of government will to impose solution.



Just beginning. Lack of government will to impose a solution?

## Discovery



Powerful tool to access internal company documents



Powerful tool to access internal company documents



No substantial discovery of internal company documents (yet)

## Industry Influence



Philip Morris silenced White House on infamous racketeering case



Asbestos industry remains highly influential in some countries



Fossil fuel industry joined as interveners in case brought by children against US government

# IMPACT

## Subsidies on Industry



Reduced or removed



Industry insolvent in many countries



Still heavily subsidised

## Status of Product



On market with marketing restrictions and increased taxation



Off market in the US but present in many developing countries



Remain on market

## Company Actions to Reduce Liability Exposure



Unknown



Defendant companies shifted assets, split companies and fled jurisdictions to avoid liability



Companies beginning to shift assets and split operations (e.g. fossil fuels / renewables)

## International Law and Liability



FCTC encourages litigation to secure civil and criminal liability



Basel Convention & Protocol establish liability and compensation scheme for trans-boundary movement



Paris Agreement avoids topic of liability and compensation

## International Law and the Industry



FCTC targets tobacco industry



Basel Convention & Protocol target 'disposer' of hazardous waste



Paris Agreement and UNFCCC do not mention role of fossil fuel industry

## Influence of Industry upon International Negotiations



Years of undue influence. FCTC now bans tobacco industry from having a role in health policy



Asbestos industry has obstructed international law and blocked listing in Rotterdam Convention



Fossil fuel industry treated as 'stakeholders' in negotiations

**Hold the fossil fuel industry responsible for its role in climate change.**

longest and most expensive mass tort in US legal history.<sup>169</sup> By 2002, over 600,000 people had filed asbestos claims in the US, often for death or serious personal injury.<sup>170</sup> Approximately 27.5 million workers have been exposed to asbestos,<sup>171</sup> equivalent to around 10% of the American population at that time. It is estimated that the total cost of asbestos claims are \$200 billion to \$265 billion.<sup>172</sup>

The complexity of asbestos cases mean that the costs of bringing cases is exceptionally high. The National Association of Manufacturers estimated in 2006 that for every \$1 paid to an asbestos claimant, \$2.38 was paid to lawyers and medical examiners.<sup>173</sup>

The US federal judiciary responded to the challenge of asbestos litigation by adopting a practice of case management, involving tight control over pretrial proceedings, with the goal of inducing a higher rate of settlement.<sup>174</sup> The majority of asbestos claims do not reach court. In 2002, less than 2,000 out of almost a million asbestos cases had been tried on the merits.<sup>175</sup>

A distinguishing feature of the asbestos litigation is that the product is already off the US market.<sup>176</sup> A further interlinked feature is that there is generally a 20 to 40 year time period between first exposure to asbestos and disease manifestation.<sup>177</sup> There is a temporal delay between the harmful activity by corporate defendants and the resulting harm. This delay also creates great uncertainty around the magnitude of future possible claimants. One key factor in the US in the asbestos litigation has been the absence of universal health care, which means that without successful claims many of the asbestos claimants will not have adequate access to medical services.

A particular challenge facing asbestos claimants is the widespread bankruptcies among asbestos defendants, with at least 60 bankruptcies in the US attributed to asbestos litigation.<sup>178</sup> The asbestos industry is insolvent, which makes the number of possible defendants very small. The original defendant companies, who were most responsible for the harms caused by asbestos, have ceased to exist. Claims are now brought against companies that are 'peripheral', meaning that they did not manufacture, sell, or install asbestos-containing materials, and that asbestos was incidental to their operations.<sup>179</sup>

The goal of distributing harms caused by a product over a period of time requires an ongoing market. If a defendant was producing a harmful product that could be replaced with a safer product, such a transition would allow an ongoing market through which that defendant can distribute the loss.<sup>180</sup>

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169 <http://www.pointoflaw.com/asbestos/overview.php>

170 Stephen J. Carroll et al, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002). Available at <http://rand.org/publications/DB/DB397.pdf>.

171 Stephen J. Carroll et al, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002), 14-15. Available at <http://rand.org/publications/DB/DB397.pdf>. This figure does not include workers exposed in industries with lower levels of exposure.

172 Stephen J. Carroll et al, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002), 77. Available at <http://rand.org/publications/DB/DB397.pdf>.

173 *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing on S. 32774 Before the S. Comm. On the Judiciary*, 109<sup>th</sup> Congress 41 (2006) (statement of John Engler, President, National Association of Manufacturers).

174 Paul D. Carrington, 'Asbestos lessons: The consequences of asbestos litigation' (2007) 26 *The Review of Litigation* 583, 593.

175 Stephen J. Carroll et al, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002), 56. Available at <http://rand.org/publications/DB/DB397.pdf>.

176 Paul D. Carrington, 'Asbestos lessons: The consequences of asbestos litigation' (2007) 26 *The Review of Litigation* 583, 593.

177 Stephen J. Carroll et al, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002), 16. Available at <http://rand.org/publications/DB/DB397.pdf>.

178 Stephen J. Carroll et al, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002), 75. Available at <http://rand.org/publications/DB/DB397.pdf>. See also Joseph E. Stiglitz et al, 'The impact of asbestos liabilities on workers in bankrupt firms' (2003) 12 *Journal of Bankruptcy Law and Practice* 51, 61.

179 Joseph E. Stiglitz et al, 'The impact of asbestos liabilities on workers in bankrupt firms' (2003) 12 *Journal of Bankruptcy Law and Practice* 51, 66.

180 Paul D. Carrington, 'Asbestos lessons: The consequences of asbestos litigation' (2007) 26 *The Review of Litigation* 583,

However, in the case of asbestos, the market has collapsed and the very limited current sales of asbestos cannot support the liability generated by past sales. The shift to peripheral defendants in asbestos litigation means that asbestos liability and bankruptcies are widely distributed across multiple industries.<sup>181</sup> Thus, the harms created by past wrongdoing by an insolvent industry are passed on across society, impacting the workers, shareholders and creditors across many sectors in an arbitrary and uneven manner.

The ad hoc manner in which the American legal system is distributing losses from asbestos across society is something that would better be managed by the legislative system. However, efforts to resolve the problems posed by the congestion of asbestos litigation through legislation have been unsuccessful.<sup>182</sup> Congress did not have the will to impose a solution, particularly because agreement could not be reached with corporations in America and plaintiffs' lawyers were in disagreement due to the wide range of situations faced by clients.<sup>183</sup>

*The experience of asbestos litigation in the US carries some important lessons for climate change. First, the temporal lag between business sales and the resulting harm meant that the profits of the asbestos corporations was largely disconnected from the immense financial and economic burden that the product carried. Climate change threatens to take a similar path, as the temporal lag between the profits of fossil fuel corporations today will be far removed from what may be an immense amount of climate litigation brought by future generations. There is no guarantee that ExxonMobil will still exist for a sufficiently long time to compensate all those harmed by its business.*

Indeed, it is anticipated that fossil fuel usage will be eventually phased out with the Paris Agreement seeking to 'achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.'<sup>184</sup> Further, the G-7 industrial countries have agreed to 'decarbonize the global economy in the course of this century.'<sup>185</sup> If warming is to be kept below 1.5C fossil fuels would need to be phased out by mid-century. In such a scenario, in the absence of actions to address it, the burden of future climate loss and damage will be spread disproportionately from present to future generations, costing future generations even further through impacts on peripheral industries than if impacts were restricted to the fossil fuel industry.

Second, the complexity of climate cases and the sheer number of potential plaintiffs who may bring cases in the future is likely to overwhelm existing legal systems, just as asbestos litigation has overwhelmed the US judicial system. Future climate litigation could also overwhelm the insurance industry. The enormity of asbestos litigation has been labelled as the 'greatest single threat to Lloyd's of London's existence.'<sup>186</sup> Lloyd's of London is a corporate entity that operates as an insurance market in London, offering both insurance and reinsurance business. Inadequate responses to climate change today, including in relation to questions regarding liability, will exacerbate this situation. In contrast, careful planning by governments through the international climate negotiations and through national

1027.  
181 Joseph E. Stiglitz et al, 'The impact of asbestos liabilities on workers in bankrupt firms' (2003) 12 *Journal of Bankruptcy Law and Practice* 51, 65-67.

182 See e.g. *The Fairness in Asbestos Compensation Act*, H.R. 1283, 106<sup>th</sup> Cong. (1999).

183 Paul D. Carrington, 'Asbestos lessons: The consequences of asbestos litigation' (2007) 26 *The Review of Litigation* 583, 594.

184 Paris Agreement, available at <https://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>.

185 Kate Sheppard, *G-7 Nations Agree to Phase Out Fossil Fuels by 2100* (6 October 2015, Huffington Post) available at [http://www.huffingtonpost.com.au/entry/g-7-fossil-fuels\\_n\\_7545004.html?section=australia](http://www.huffingtonpost.com.au/entry/g-7-fossil-fuels_n_7545004.html?section=australia).

186 <http://news.bbc.co.uk/2/hi/business/658834.stm>

action could significantly reduce the threats posed by not responding collectively and fairly with the best interests of society at heart to the issues of liability and compensation.

Asbestos litigation has occurred in a number of other jurisdictions, though to varying degrees. In 2008, Brazilian Supremo Tribunal Federal (STF) decided to maintain a law which prohibits the use of any asbestos product in the state of São Paulo.<sup>187</sup> In 2004, NGO Kalyaneshwari brought a case in India seeking a ban on asbestos. However, in its judgment given in 2011, the Indian Supreme Court refused to ban the product and instead directed the Union and state governments to establish a body to regulate its use and manufacturing.<sup>188</sup> Asbestos is widely used in India though mining of asbestos is technically banned. India remains one of the largest importers of asbestos, particularly for roofing structures for the poor.

However, one of the impediments to asbestos litigation in most jurisdictions has been that generally limitation periods bar actions that are taken a lengthy period of time after the cause of action has lapsed. In the US, the limitation periods vary by state and generally accrue from the time of injury. However, courts have found that the limitation period for asbestos claims begin at the time that the effects of exposures manifest (discovery rule).<sup>189</sup> Other countries such as Australia have amended their laws of limitations to run the time period from the time of discovery of illness.

However, asbestos plaintiffs in Australia have struggled to secure successful outcomes, primarily because the principal defendant company James Hardie Industries Ltd (James Hardie) responded to asbestos litigation by removing the company from the jurisdiction in 2001. James Hardie left most of its asbestos liabilities with subsidiary companies that were acquired by the Medical Research and Compensation Foundation, with insufficient assets to meet those asbestos liabilities.<sup>190</sup> It may be that fossil fuel corporations will respond or may be already responding to climate litigation by shifting their assets to alternative jurisdictions or splitting up their companies. In Germany RWE and E.ON have both isolated their coal and nuclear business in one corporation, while establishing a separate corporation for their renewables and services businesses into a new company, due to the risks posed to their nuclear and perhaps coal operations.<sup>191</sup> The risks of defendants taking action to avoid liability is something that lawmakers will need to address. Introducing a global levy on fossil fuel extraction is one method that could be used [see Part 4.3].

Whilst no other jurisdiction has experienced the volume of asbestos litigation as found in the US, some jurisdictions that are also common law jurisdictions such as Australia and the United Kingdom have seen a large number of cases and expect asbestos litigation to continue for some time. However, the lack of asbestos litigation seeking liability and compensation in many other jurisdictions reflects the problematic interaction of limitation periods with the temporal delay between the acts of defendant companies and the resulting harms in workers and others. Plaintiffs seeking compensation for climate impacts may face similar hurdles unless limitation periods are adjusted.

Asbestos is listed as a hazardous substance under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal provides specific rules around liability for asbestos and other wastes transported over

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187 Jornal do Brasil, 5th. of June 2008, Year 118, No.58, Page A7

188 <http://www.thehindu.com/sci-tech/health/article1108238.ece?homepage=true>. See also <http://www.thehindu.com/news/cities/Delhi/invader-in-white/article3696941.ece>.

189 *Borel v Fibreboard Paper Prods. Corp.* 1973 US Ct of Appeals Fifth Circuit.

190 D. F. Jackson, *Report of the Special Commission of Inquiry into the Medical Research Fund and Compensation Foundation (2004)* available at [http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0020/11387/01PartA.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0020/11387/01PartA.pdf).

191 Tino Andresen, 'RWE's U-turn on splitting forced by Merkel's love of green power' *Bloomberg* (1 December 2015) available at <http://www.bloomberg.com/news/articles/2015-12-01/rwe-to-spin-off-partly-list-renewables-grids-retail-business>.



boundaries, with a focus upon the disposer of wastes.<sup>192</sup>

Research has revealed that asbestos companies have worked to alter asbestos-cancer scientific literature and utilised a range of strategies to reduce exposure to litigation while maintaining sales in developing countries.<sup>193</sup> The asbestos industry remains influential upon government policy in some countries which have sought to influence international scientific organisations. These lobbying efforts have posed a serious threat to scientific objectivity.<sup>194</sup>

Through these efforts, the asbestos industry has obstructed further developments in international law, specifically in relation to the Rotterdam Convention.<sup>195</sup> The Rotterdam Convention aims to promote shared responsibilities in relation to the importation of hazardous chemicals. In 2011, Canada refused to allow chrysotile asbestos fibers to be added to the Rotterdam Convention,<sup>196</sup> but announced in 2012 that it would no longer oppose its inclusion.<sup>197</sup> Seven countries now block the inclusion of chrysotile asbestos, including Russia and India.<sup>198</sup> There have been calls for a ban on the influence of asbestos industry influence on public policy, similar to the FCTC ban on tobacco industry influence.<sup>199</sup>

### 3.3 The role of litigation in oil spill regulation

The international nature of most oil spills means that the international law has a critical role to play. There are a number of regional and international agreements that govern oil pollution, including the United Nations Convention on the Law of the Sea (LOSC),<sup>200</sup> the International Convention for the Prevention of Pollution from Ships 1973 and the Protocol of 1978 (MARPOL 73/78), the 1969 International Convention on Civil Liability for Oil Pollution and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The latter two of these conventions were amended by the 1992 Civil Liability Convention<sup>201</sup> and the 1992 Fund Convention.<sup>202</sup>

Member states have voluntarily agreed to be bound by the International Oil Pollution Compensation

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192 The Basel Convention and Protocol are available at <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/Basel-ConventionText-e.pdf>.

193 David Egilman et al, 'Dust diseases and the legacy of corporate manipulation of science and law' (2014) 20(2) International Journal of Occupational and Environmental Health 115.

194 Kathleen Ruff, How the asbestos industry used McGill University scientists to promote its interests (Asbestos Symposium, Copenhagen, 12 December 2014) available at [https://www.bispebjerghospital.dk/afdelinger-og-klinikker/arbejds-og-miljoe-medicinsk-afdeling/om-afdelingen/Moeder-phd-forsvar-og-disputatser/tidligere-afholdte-m%C3%B8der/Documents/Kathleen\\_Ruff\\_asbestsymposium\\_121214.pdf](https://www.bispebjerghospital.dk/afdelinger-og-klinikker/arbejds-og-miljoe-medicinsk-afdeling/om-afdelingen/Moeder-phd-forsvar-og-disputatser/tidligere-afholdte-m%C3%B8der/Documents/Kathleen_Ruff_asbestsymposium_121214.pdf).

195 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

196 Laura Payton, 'Canada wins battle to keep asbestos off hazardous list' (24 June 2011, CBC News) available at <http://www.cbc.ca/news/politics/canada-wins-battle-to-keep-asbestos-off-hazardous-list-1.1124476>.

197 CBC News, 'Canada won't oppose asbestos limits' (14 September 2012) available at <http://www.cbc.ca/news/canada/montreal/canada-won-t-oppose-asbestos-limits-1.1254033>.

198 Tim Povtak, Seven countries block Rotterdam Convention efforts to restrict asbestos shipping (16 May 2013) available at <http://www.asbestos.com/news/2013/05/16/countries-blocking-asbestos-shipping-restriction/>.

199 Colin L. Soskolne and Stanley Weiss, Need for an equivalent of the Framework on Tobacco Control (FCTC) to contain the relentless influence of asbestos interests in promoting the safe use of chrysotile asbestos (Online program, American Public Health Association) available at <https://apha.confex.com/apha/141am/webprogram/Paper293867.html>.

200 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 U.N.T.S. 397.

201 International Maritime Organization Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, opened for signature 15 January 1993, 1956 U.N.T.S. 255.

202 International Maritime Organization Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, opened for signature 15 January 1993, 1953 U.N.T.S. 373.

Funds (IOPC) and the Offshore Pollution Liability Association (OPOL). IOPC is financed by any person who received more than 150,000 tons of crude and contributing oil from a state party to the 1992 Civil Liability Convention.<sup>203</sup> Ship owners are strictly liable for damage caused by their vessels (meaning that no proof of fault or intent is required).<sup>204</sup> IOPC and OPOL provide compensation to injured parties through the collection of damages from the liable party, and contain limits on the amount of compensation that can be collected per party, per incident, and per year. The caps on liability result in not all victims being able to claim full compensation. For spills that occur after November 2003, the limit in total liability for any one incident is \$307.5 million.<sup>205</sup> Further funds are available if the State in which damage occurred has agreed to the 2003 Supplemental Fund, increasing the total possible liability to \$1.2 billion per incident. Claims brought under the IOPC have frequently exceeded the available limits on liability, including the 1978 Amoco Cadiz spill (costing \$282 million when the liability was limited to \$95 million at the time), the Nakhodka spill and Erika spill. States and victims of oil spills from vessels currently access these provisions to secure compensation.<sup>206</sup> However, in many cases the amount of damage agreed between the Fund and claimant can be fully paid.<sup>207</sup>

Victims, including individuals, partnerships, companies, private organisations or public bodies, are able to directly access compensation funds by making a claim to IOPC Funds.<sup>208</sup> If there are a large number of claims a local claims office might be established. The Director has the authority to settle claims and pay compensation up to specified levels. Incidents involving larger claims or where a claim involves a question of principle not previously addressed, the Director needs approval from the relevant governing body of the applicable Fund. If a claim is not settled it may progress to court.<sup>209</sup>

OPOL was established to address oil pollution from fixed platforms and provides a voluntary compensation regime.<sup>210</sup> It covers offshore facilities located in the United Kingdom, Denmark, Germany, France, Ireland, the Netherlands, Norway, the Isle of Man, and the Faroe Islands. OPOL allows claims to be made by a public authority or be any other party, thus allowing people impacted by oil spills to bring claims, with strict liability. Currently, the OPOL has liability caps of \$250 million per incident.<sup>211</sup> Claims are heard through OPOL's arbitration provisions with all disputes heard in London.

In April 2010, the BP's Deepwater Horizon oilrig (a fixed platform) exploded off the coast of Louisiana, becoming the world's largest oil spill in history.<sup>212</sup> President Barack Obama stated that it was 'the worst environmental disaster America has ever faced.'<sup>213</sup> About 185 million gallons of crude oil leaked from the site over a period of approximately 3 months, devastating the environment and local tourism and fishing industries.<sup>214</sup> In response, BP established a \$20 billion relief fund.<sup>215</sup> While the IOPC and OPOL did not apply to the Deepwater Horizon disaster, the \$20 billion fund established by BP far exceeded any of the liability caps in these schemes. In response to the disaster, the OPOL board

203 1992 Fund, article XII.

204 1992 CLC, article IV.

205 Secretariat of the International Oil Pollution Compensation Funds, The International Regime for Compensation for Oil Pollution Damage – Explanatory Note 1 (2011) available at <http://www.iopcfund.org/npdf/genE.pdf>.

206 International Oil Pollution Compensation Funds, *Incidents involving the IOPC Funds* (2012) available at [http://www.iopcfunds.org/uploads/tx\\_iopcpublications/incidents2012\\_e.pdf](http://www.iopcfunds.org/uploads/tx_iopcpublications/incidents2012_e.pdf).

207 IOPC Fund, *Compensation and Claims Management* available at <http://www.iopcfunds.org/compensation/>.

208 IOPC Fund, *Compensation and Claims Management* available at <http://www.iopcfunds.org/compensation/>.

209 IOPC Fund, *Compensation and Claims Management* available at <http://www.iopcfunds.org/compensation/>.

210 Offshore Pollution Liability Agreement (2010) available at <http://www.opol.org.uk/downloads/opol-agreement-oct10.pdf>.

211 OPOL Agreement, cl. IV(A).

212 Kate Galbraith, 'Gap in Rules on Oil Spills from Wells', *International Herald Tribune* (17 May 2010) available at <http://www.nytimes.com/2010/05/17/business/energy-environment/17green.html>.

213 Justin Gillis, 'Where Gulf Spill Might Place on the Roll of Great Disasters', *New York Times* (19 June 2010).

214 Elizabeth Wilson, 'Oil Spill's Size Swells', *Chemical and Engineering New* (27 September 2010).

215 BP, 'BP establishes \$20 billion claims fund for Deepwater Horizon spill and outlines dividend decisions' (16 June 2010) available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>.

increased liability caps to \$250 million per party, per incident and \$500 million per party aggregated in one year for fixed platform pollution.<sup>216</sup> The Deepwater Horizon oil spill was subject to the US Oil Pollution Act of 1990 (OPA) but the liability limit under this legislation was \$75 million plus cleanup costs for offshore platforms, which was also far exceeded by the BP fund and was waived by BP. There is currently no multinational agreement concerning liability for oil pollution from fixed platforms.

The \$20 billion set aside by BP was placed into a trust fund and designed to support claims made under the administrative program, the Gulf Coast Claims Facility (GCCF) with the aim of compensating all victims of the spill. The rationale of the GCCF was to resolve private claims in an efficient manner and provide quick access to compensation for victims.<sup>217</sup> In 18 months, BP paid out \$6.2 billion to more than 220,000 claimants without the involvement of lawyers.<sup>218</sup> While the GCCF was effective in providing billions of dollars of compensation within a short period of time, it was ultimately replaced by class action lawsuits. The class action settlement that resulted provided higher payments to claimants than under the GCCF. It has been hypothesized that the reason for these higher payments in the class action settlement was because it provided finality for BP than the individual claim approach of the GCCF could not provide.<sup>219</sup>

The history of oil spill litigation indicates that there are risks in the creation of compensation funds, whether by governments or on a voluntary basis. The creation of a limit of liability which is locked into a particular figure has been shown to result in limits that are far too low given the actual cost of damages. BP voluntarily waived the US legislated liability limit in recognition that it was completely inadequate. It has proved difficult to change international agreements and national legislation, making the updating of liability limits difficult. The design of a compensation fund for climate change, whether on the national or international level [See Part 4.3] must address this issue by either not setting a liability limit or by creating a system that allows the limit to be automatically increased over time at an appropriate rate.

However, the operation of the IOPC and the GCCF show that compensation funds can provide quick and efficient access to funds for persons impacted by environmental disasters. The GCCF provided billions of dollars in compensation for a large number of claimants, with efficiency that is particularly impressive in light of the problems faced in other sectors such as asbestos litigation. Compensation funds established for climate change could provide much needed access to funds for many people, without the need for lawyers to be involved, costly and time consuming litigation.

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216 Marissa Smith, 'The Deepwater Horizon disaster: An examination of the spill's impact on the gap in international regulation of oil pollution from fixed platforms' *Emory International Law Review* available at <http://law.emory.edu/eilr/content/volume-25/issue-3/comments/deepwater-horizon-impact-regulation-pollution-platforms.html>.

217 Samuel Issacharoff and D. Theodore Rave, 'The BP oil spill settlement and the paradox of public litigation' (2014) 74 *Louisiana Law Review* 397.

218 BDO Consulting, *Independent evaluation of the Gulf Coast Claims Facility: Executive Summary* (19 April 2012) available at <http://www.justice.gov/iso/opa/resources/697201241917226179477.pdf>.

219 Samuel Issacharoff and D. Theodore Rave, 'The BP oil spill settlement and the paradox of public litigation' (2014) 74 *Louisiana Law Review* 397.

## **KEY FINDINGS: THE ROLE OF LITIGATION IN OTHER SECTORS**

1. Tobacco litigation has been highly successful in the US and contributed to the broader public interest. Access to millions of internal industry documents undermined the legitimacy of the tobacco industry. Documents unearthed in climate litigation may play a transformative role in public attitudes towards fossil fuels.
2. The most powerful tobacco litigation was brought by US governments (e.g. prosecution under the Racketeering Influenced Corrupt Organizations Act). Governments have greater power in negotiating outcomes with defendant corporations.
3. The Framework Convention on Tobacco Control acknowledges the central role of pursuing private liability and criminal responsibility in controlling tobacco. The international climate regime has thus far failed to recognize the importance of private liability.
4. Other jurisdictions have a less litigious approach to managing major issues than the US.
5. The American legal system has struggled to meet the demands of asbestos litigation, particularly due to the complexity of scientific evidence and the sheer number of cases. These difficulties could eventually be faced in climate litigation.
6. There is a lag of between 20 to 40 years between first exposure to asbestos and disease manifestation. The asbestos industry is insolvent, which means cases are brought against 'peripheral' companies, for whom asbestos was incidental to their operations. The harms created by an insolvent industry are passed on across society in an arbitrary and uneven manner. The delay in climate impacts means that the profits of fossil fuel giants today will be far removed from what may be an immense amount of climate litigation brought by future generations if we rely upon litigation.
7. The principal asbestos defendant corporation in Australia fled the jurisdiction to avoid liability. It is likely that the Carbon Majors will respond to climate litigation by shifting their assets to alternative jurisdictions or by splitting their companies. Such actions may be already beginning to occur.
8. Claims brought under the IOPC for oil spill damage have frequently exceeded the available limits on liability. However, states and victims of oil spills from vessels currently access these provisions to secure compensation. The IOPC currently has a liability cap of \$307.5 million, with an increase to \$1.2 billion if a party has agreed to the Supplemental Fund. Liability caps in relation to climate change risk being inadequate.
9. In the aftermath of the Deepwater Horizon disaster, BP established a \$20 billion fund for claimants (the GCCF). This far exceeded the \$75 million statutory limit provided under the US Oil Pollution Act 1990, which BP voluntarily waived. In 18 months, BP paid out \$6.2 billion to more than 220,000 claimants without the involvement of lawyers. The GCCF was ultimately replaced by class action lawsuits, which BP settled. A compensation fund for climate change could provide quick and easy access to funds for claimants.

# 4. INTERSECTION OF CLIMATE LITIGATION AND THE CLIMATE NEGOTIATIONS

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## 4.1 Relationship between litigation, the negotiations and the fossil fuel industry

The fossil fuel industry is responsible for the majority of climate change yet has not been held accountable. Governments around the globe are directly complicit in the perpetuation of fossil fuel exploitation. The extraction of fossil fuels by the Carbon Majors since the time of the industrial revolution amounts to nearly two-thirds of all the carbon dioxide emitted.<sup>220</sup> In many cases, investor-owned Carbon Majors have extracted more than most countries and they have been permitted by those countries to do so.

Fossil fuel corporations have a vested interest in the continued exploitation of fossil fuels. The fossil fuel industry exerts great pressure upon national governments and the UNFCCC process.<sup>221</sup> In 2014, the fossil fuel industry spent US\$141 million lobbying in Washington, DC.<sup>222</sup> ExxonMobil, Royal Dutch Shell and three oil industry trade groups spend approximately \$115 million annually to obstruct laws on climate change.<sup>223</sup> ExxonMobil spent US\$30.9 million from 1998 to 2014 on the support of think tanks running climate denial campaigns.<sup>224</sup> ExxonMobil has stated that serious greenhouse gas emissions cuts are 'highly unlikely' and plans to continue producing fossil fuels without limit.<sup>225</sup>

Research by Corporate Europe Observatory found that for every meeting the Commissioner for Climate had with the renewable energy industry, he had 22 meetings with the fossil fuel industry.<sup>226</sup> The fossil fuel industry holds and promotes their own events alongside the climate negotiations. For example, Solutions COP21, which was held in Paris and officially endorsed by COP21, provided a huge greenwashing opportunity.<sup>227</sup> A further problem is found in what is termed the 'revolving door' between fossil fuel corporations and government institutions, whereby senior bureaucratic staff, political staffers, members of parliament and ministers move on to work for the fossil fuel industry, and vice versa.<sup>228</sup> It is for reasons like these that judicial enforcement of constitutional checks on executive and legislative functions are so critical to ensure that this influence does not continue to control the

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220 Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' (2013) 122(1) *Climatic Change* 229. See also [www.carbonmajors.org](http://www.carbonmajors.org).

221 See Naomi Oreskes and Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (Bloomsbury Press, 2011); Union of Concerned Scientists, *A Climate of Corporate Control: How corporations have influenced the U.S. dialogue on climate science and policy*, Executive Summary available at [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific\\_integrity/a-climate-of-corporate-control-summary.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific_integrity/a-climate-of-corporate-control-summary.pdf).

222 <http://www.opensecrets.org/lobby/indusclint.php?id=E01&year=2014>.

223 Melissa Cronin, *This is how much the fossil fuel industry spends to avoid climate regs* (7 April 2016, Grist) available at <http://grist.org/climate-energy/this-is-how-much-the-fossil-fuel-industry-spends-to-avoid-climate-regs/>.

224 <http://www.exxonsecrets.org/>.

225 <http://ecowatch.com/2014/04/14/exxon-climate-mitigation-futile-burn-oil-reserves/>.

226 Corporate Europe Observatory, *Cooking the planet: Big Energy's year of privileged access to Europe's climate commissioners* (2015) available at <http://corporateeurope.org/environment/2015/11/cooking-planet>.

227 Corporate Europe Observatory, *Why the corporate capture of COP21 means we must kick Big Polluters out of climate policy* (3 December 2015) available at <http://corporateeurope.org/climate-and-energy/2015/12/why-corporate-capture-cop21-means-we-must-kick-big-polluters-out-climate>. See also Réseau Action Climat France, *Du Business and Climate Summit à la COP21: Quelles Solutions Pour le Climat?* (2015).

228 Corporate Europe Observatory, *Brussels, big energy, and revolving doors: a hothouse for climate change* (19 November 2015) available at <http://corporateeurope.org/revolving-doors/2015/11/brussels-big-energy-and-revolving-doors-hothouse-climate-change>.

degree to which our governments discharge their sovereign obligations to protect life and crucial natural resources on which humanity depends.

The fossil fuel industry is treated as 'stakeholders' in the climate negotiations. Corporate sponsorship of the international climate negotiations allows fossil fuel companies one powerful method of influencing the negotiations. A report by Corporate Accountability International identified three of COP21's corporate sponsors as particularly problematic: Engie, a European electric utility company which is Europe's largest importer of natural gas; EDF, a French electric utility company that operates major coal-fired power stations; and BNP Paribas, a multinational bank with billions of dollars invested in coal-fired power stations and coal mines.<sup>229</sup>

Efforts to remove the fossil fuel industry from the climate negotiations process have cited the history of tobacco control.<sup>230</sup> After years of undue influence by the tobacco industry, the World Health Assembly recognised in 2001 that 'the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic.'<sup>231</sup> The UN World Health Organisation then took action against the tobacco industry to address its influence over global health policy.

The Preamble of the *WHO Framework Convention on Tobacco Control* recognised the Parties 'need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts.' Article 5.3 bans the tobacco industry from having a role or voice in setting health policy, which applies to the international, regional and national levels of policymaking. This prohibition on lobbying by the tobacco industry has had a major role in ensuring the development of effective tobacco control policies. The Conference of the Parties, in decision FCTC/COP2(14) established a working group to elaborate guidelines for the implementation of Article 5.3. The Guidelines<sup>232</sup> are based upon the elaboration of a number of principles, including that 'there is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests'. The international community has clearly recognised that there is a need to protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the fullest extent possible.

Given the conflict of interest faced by the fossil fuel industry in relation to climate change policy, it is evident that the climate negotiations would benefit from a similar course of action. The fossil fuel industry's potentially subversive role should be recognised by the international community and responded to through restrictions on its ability to lobby governments at all levels of policymaking.

The fossil fuel industry has also directly shown its opposition to climate litigation by joining as intervenors in the federal public trust case brought by youth against the US government [see Part 2.2.4]. Fossil fuel industry trade groups filed pleadings to join the lawsuit, stating that it was a 'direct threat to [their] businesses'. The trade groups include American Fuel and Petrochemical Manufacturers (representing ExxonMobil, BP, Shell and others), the American Petroleum Institute (representing 625 oil and natural gas companies) and the National Association of Manufacturers.

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229 Report is referenced at <http://www.motherjones.com/environment/2015/12/climate-change-summit-paris-cop21-fossil-fuels-sponsors>

230 See e.g. Tim McDonnell, 'The fossil fuel industry is bankrolling the Paris climate talks' *Mother Jones* (2 December 2015) available at <http://www.motherjones.com/environment/2015/12/climate-change-summit-paris-cop21-fossil-fuels-sponsors>.

231 World Health Assembly resolution WHA54.18 Transparency in tobacco control (22 May 2001) available at [http://www.who.int/tobacco/framework/wha\\_eb/wha54\\_18/en/](http://www.who.int/tobacco/framework/wha_eb/wha54_18/en/).

232 See Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry, available at [http://www.who.int/fctc/guidelines/article\\_5\\_3.pdf](http://www.who.int/fctc/guidelines/article_5_3.pdf).

It is likely that the fossil fuel industry will also exert considerable pressure upon governments around climate litigation, particularly if governments take legal action against the industry. In the context of the US government's racketeering lawsuit against tobacco companies [see Part 3.1], an internal Philip Morris email written by Greg Little (Associate General Counsel for Philip Morris) revealed such efforts. The email credits Philip Morris' legal team with silencing the White House on the lawsuit, reducing federal funding for the lawsuit and neutralising political pressure around the lawsuit.<sup>233</sup> If replicated by the fossil fuel industry, these types of lobbying efforts have the potential to significantly undermine efforts by governments to take legal action against the fossil fuel industry, particularly if the public is not aware that such lobbying is occurring. Without strong international action on these risks, it is also likely that fossil fuel companies will threaten to remove their businesses from jurisdictions where climate litigation becomes particularly threatening.

The *Framework Convention on Tobacco Control* encourages governments to pursue liability and compensation. Therefore, a realistic option is for the climate convention to move in the same direction. The text of paragraph 51 of the decision is likely to be overridden in the future and instead a more proactive and positive stance implemented.

The development of measures to support private liability of the fossil fuel industry would be consistent with Principle 13 of the Rio Declaration. Principle 13 provides that states shall cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.<sup>234</sup> Principle 13 also provides that States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.

*'The [climate] negotiations respond to external pressure - including legal action. The fossil fuel industry lobbies the negotiations and has influence through industry reps, delegates and decision makers at all levels. Successful litigation against the industry or a credible threat thereof could lead governments and the industry to take and support ambitious climate action and a robust framework of implementation and compliance.'*

— Christoph Schwarte, Executive Director of the Legal Response Initiative

*'The [climate] negotiations drive change but the level of ambition is weak and the pace slow. Litigation can drive positive change but the legal avenues to hold states and private entities accountable for climate change are still limited and there are risks of negative outcomes. The fossil fuel industry sponsorship of the climate talks is inappropriate and should be prevented, the industry exercises negative influence at a state level in order to weaken action on climate change and it is a common goal of activism at the negotiations and through litigation to decrease the use of fossil fuels.'*

— Gita Parihar, Head of Legal at Friends of the Earth United Kingdom

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233 Greg Little, N914, Email 30 January 2000 available at <https://industrydocuments.library.ucsf.edu/tobacco/docs/#id=tg-dh0085>.

234 *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

## 4.2 Will the Paris Agreement drive litigation?

As this report has shown, climate litigation is entering a new phase in the US, with the development of constitutional and public trust litigation and a growing involvement of governments in investigating fossil fuel corporations. Climate litigation is spreading beyond the US into fresh jurisdictions, with new and recent cases found in Europe, Asia and the Pacific. Further, key successes are beginning to emerge, such as the groundbreaking decisions in Pakistan, the US and the Netherlands. There is a growing momentum towards climate litigation that is premised not only upon an emerging body of climate law but also a growing sense that we are now experiencing climate change. The human rights investigation of the Philippines is fuelled by the sense of injustice caused by the devastation of Typhoon Haiyan.

There is a complex relationship between the international climate negotiations and climate litigation. The Peruvian plaintiff bringing his case for compensation against RWE filed his lawsuit at the time of the Paris climate negotiations.<sup>235</sup> Similarly, the Commission on Human Rights of the Philippines (CHR) chose the Paris negotiations to announce its intention to launch its investigation into the human rights implications of climate change.<sup>236</sup> The climate negotiations are more than a media opportunity for these cases. Announcements of climate litigation during the climate negotiations reflect the fact that failures by the international community to adequately address climate change will inevitably result in climate litigation. Whether cases are brought by governments against fossil fuel corporations, or by individuals or communities against corporations or governments, these cases will come. Further, there will inevitably be a significant growth in individuals and families seeking immigration permits from governments as they are displaced from their homes by climate change.

Attempts to exclude or avoid liability or compensation from the texts of agreements and decisions in the climate negotiations will do nothing to stem the tide of climate litigation. Only effective action by the international community will be able to do anything to dampen the growing momentum of litigation in national courts.

Further, other forces can bring about climate litigation. One catalyst at least for some of the recent litigation has been the Carbon Majors research which identified the Carbon Majors as major source of industrial carbon dioxide (see Part 2). The human rights complaint in the Philippines specifically targets the investor-owned Carbon Majors and the case against RWE is based upon the company's historic contribution as calculated in the Carbon Majors research. Furthermore, the cases supported by Our Children's Trust, seeking to enforce the constitutional and fiduciary responsibilities of governments to ensure the stability of our climate system in accordance with science, rather than to perpetuate industry and government exploitation of fossil fuels, are critical to securing the urgent remedy we must achieve for this time-critical climate catastrophe we face.

The climate change impacts that have long been predicted are now increasingly being experienced around the world. The association of extreme weather events such as Typhoon Haiyan with climate change can act as a powerful incentive for those impacted to come forward as plaintiffs.

*'The adverse effects of climate change will drive litigation and other legal action. If compensation and liability had been addressed comprehensively in a fair and equitable*

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235 Kristen French, 'A Peruvian farmer is suing an energy giant over climate change' (2 December 2015) *The Verge* available <http://www.theverge.com/2015/12/2/9821758/climate-change-lawsuit-un-rwe-energy-vs-peru-farmer>.

236 Zahra Hirji, 'In the Philippines, largest polluters face investigation for climate damage' (15 December 2015) *Inside Climate News* available at <http://insideclimatenews.org/news/15122015/philippines-human-rights-commission-50-largest-polluters-climate-change-global-warming-exxon>.



*manner, providing prompt, equitable and easy access to adequate compensation future litigation in the courts would be less of an issue - legally and in practise. But since the international community has failed to address a matter of fundamental global environmental injustice (the inequitable use of atmospheric space) people, groups, maybe even states will seek other remedies - including litigation.'*

— Christoph Schwarte, Executive Director of the Legal Response Initiative

### 4.3 What are the alternatives to litigation in the existing system?

There are a number of alternatives to litigation that governments could explore and implement. The development of the loss and damage mechanism within the climate negotiations offers an opportunity for the international community to establish a means for communities to access equitable and adequate compensation for the impacts of climate change.<sup>237</sup> Governments need to directly address issues of private liability for the fossil fuel industry, just as occurred in relation to the tobacco industry. The Carbon Majors research has revealed the enormous contribution made by the Carbon Majors to climate change. If private liability is not addressed by governments, the costs of climate change will be carried by governments and their citizens. Further, climate litigation brought by individuals seeking damages may eventually expand to such a level that it could dwarf previous experiences in tobacco, asbestos and oil spill litigation.

The loss and damage mechanism could be partly funded by a levy on fossil fuel producers (Carbon Levy). Fossil fuel entities could contribute to the International Mechanism for Loss and Damage in two ways. Firstly, they could provide a one-off payment, calculated on the basis of the historical emissions for which they are responsible. Secondly, fossil fuel entities could pay an ongoing levy on each tonne of coal, barrel of oil and cubic metre of gas extracted. The reporting and collecting of these contributions should be undertaken at the national level and transferred by governments to the International Mechanism for Loss and Damage. Alternatively, fossil fuel producers could be compelled to directly deposit the levies into the international mechanism. As with the IOPC Funds example [see Part 3.3], individuals and communities should be able to directly access the funds made available through this process.<sup>238</sup>

The proposal for a Carbon Levy offers a number of advantages. First, it provides governments with a simple and comprehensive method for addressing private liability. Second, it would create a source of funding for the most vulnerable people impacted by climate change that does not require litigation. It would provide funds to people who may not be able to access litigation due to a range of issues, including extreme poverty. Potential plaintiffs who live in developing countries have virtually no ability to bring claims against fossil fuel companies based in industrial countries. Third, it addresses the threat of defendant companies leaving jurisdictions where climate litigation occurs, by creating an international response.

The Executive Committee of the International Mechanism for Loss and Damage recently released

237 See M Khan et al, *Compensation for Loss and Damage: Law and Justice Perspective* (Climate Justice Policy Brief, 2013).

238 See Gita Parihar, *Proposal for a compensation fund and redress process for loss and damage* (Friends of the Earth, 2015) available at <https://www.foe.co.uk/sites/default/files/downloads/loss-damageproposal-compensation-fund-redress-process-76293.pdf>.

an information paper that recognised the levy proposal as one innovative method of generating financial resources.<sup>239</sup> The paper stated that ‘currently available financial instruments that have been reported seem to fall short of generating financial resources at a scale sufficient to meet the growing requirements related to potential future losses and damages from climate change.’ It further stated that one suggestion for an innovative instrument would be ‘a fossil fuel levy (or Carbon Majors Levy)’ or ‘fossil fuel extraction levy’.<sup>240</sup> The information paper noted that further attention may be needed for innovative schemes such as the levy in order to meet the growing demand for financial instruments around loss and damage.

Another, potentially related, option is that state and federal governments could develop and implement climate compensation law which would alter the rules of liability and compensation in relation to climate change.<sup>241</sup> Many states have created legislation to deal with a specific environmental or public health harm, including tobacco<sup>242</sup> and transboundary haze.<sup>243</sup> Some jurisdictions have already developed legislation that specifically address climate liability.<sup>244</sup>

Climate compensation legislation could either clarify the existing law as it relates to climate litigation or alternatively it might change the law to make climate litigation feasible. A model Climate Compensation Act (Model Act) was released on the sidelines of the Paris climate negotiations which seeks to provide a draft of such legislation that could be adapted to different jurisdictions.<sup>245</sup> The Model Act is based upon common law principles of liability and compensation to establish processes and procedures specifically designed to manage climate litigation. It sets out proposed laws relating to jurisdiction, plaintiffs and defendants (focusing upon ‘Majors Emitters’) and proposes the establishment of a climate compensation fund and climate damages insurance.

A key advantage of the Model Act is that it would allow governments to recover a portion of the cost of climate damages from fossil fuel corporations. Such action would provide pressure on fossil fuel corporations to shift away from fossil fuels and allow governments to act on behalf of their communities impacted by climate change.

*A key aim [of campaigns] must be transformation of social and political conditions so that the use of fossil fuels and other environmentally harmful agents becomes unacceptable. Litigation plays a role in that, but needs to be part of a*

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239 Executive Committee of the Warsaw International Mechanism for Loss and Damage, *Best Practices, Challenges and Lessons Learned from Existing Financial Instruments at all Levels that Address the Risk of Loss and Damage Associated with the Adverse Effects of Climate Change* (Information Paper, 2016) available at [http://unfccc.int/files/adaptation/groups\\_committees/loss\\_and\\_damage\\_executive\\_committee/application/pdf/information\\_paper\\_aa7d\\_april\\_2016.pdf](http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/information_paper_aa7d_april_2016.pdf).

240 Executive Committee of the Warsaw International Mechanism for Loss and Damage, *Best Practices, Challenges and Lessons Learned from Existing Financial Instruments at all Levels that Address the Risk of Loss and Damage Associated with the Adverse Effects of Climate Change* (Information Paper, 2016), 20 available at [http://unfccc.int/files/adaptation/groups\\_committees/loss\\_and\\_damage\\_executive\\_committee/application/pdf/information\\_paper\\_aa7d\\_april\\_2016.pdf](http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/information_paper_aa7d_april_2016.pdf).

241 Andrew Gage and M Byers, *Payback Time: What the internalization of climate litigation could mean for Canadian fossil fuel companies* (West Coast Environmental Law, 2014).

242 See e.g. Tobacco Damages Act 1997 (British Columbia).

243 Transboundary Haze Pollution Act. Statutes of Singapore, No. 24 of 2014.

244 In Israel, the Abatement of Environmental Nuisances (Civil Action) Act focused on court-ordered relief and create a cause of action for environmental nuisances. The legislation provides that air pollution means ‘material whose presence in the air causes or may cause ... climate or weather change.’ Abatement of Environmental Nuisances (Civil Action) Act, Israel. See Richard Lord et al, *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012), 294. An English translation of the legislation is available here: <http://www.sviva.gov.il/English/Legislation/Documents/Nuisances%20Laws%20and%20Regulations/Prevention-OfEnvironmentalNuisances-CivilAction-Law1992.pdf>.

245 Andrew Gage and Margaretha Wewerinke, *Taking Climate Justice into Our Own Hands: A Model Climate Compensation Act* (Vanuatu Environmental Law Association and West Coast Environmental Law, 2015) available at [http://static1.squarespace.com/static/565777bfe4b0509ba9e4f31e/t/5666fee5dc5cb481d318cb85/1449590501349/web\\_version\\_final.pdf](http://static1.squarespace.com/static/565777bfe4b0509ba9e4f31e/t/5666fee5dc5cb481d318cb85/1449590501349/web_version_final.pdf).

wider strategy of grassroots organising, mobilising, alliance/movement building, campaigning, political engagement etc.

— Gita Parihar, Head of Legal at Friends of the Earth United Kingdom

### **KEY FINDINGS: INTERSECTION OF CLIMATE LITIGATION AND THE CLIMATE NEGOTIATIONS**

1. The fossil fuel industry exerts great pressure upon national governments and the UNFCCC process. In 2014, the fossil fuel industry spent \$141 million lobbying in Washington, DC. Governments hold more meetings with the fossil fuel industry than with the renewable energy industry. The fossil fuel industry holds and provides their events alongside the climate negotiations. There is a 'revolving door' between fossil fuel corporations and government institutions.
2. The World Health Assembly recognised in 2001 that the tobacco industry had acted to subvert the role of governments. Article 5.3 of the Framework Convention on Tobacco Control bans the tobacco industry from having a role or voice in setting health policy. The climate negotiations would benefit from a similar course of action against the fossil fuel industry.
3. There is a growing momentum towards climate litigation that is premised not only upon an emerging body of climate law but also increasing climate impacts, including loss of life and economic costs.
4. Announcements of climate litigation during the climate negotiations reflect the fact that failures by the international community to adequately address climate change will inevitably result in climate litigation. Further, there will inevitably be a significant growth in individuals and families seeking immigration permits from governments as they are displaced from their homes by climate change.
5. One catalyst at least for some of the recent litigation has been the Carbon Majors research which identified the Carbon Majors as major source of industrial carbon dioxide.
6. The development of the loss and damage mechanism within the climate negotiations offers an opportunity for the international community to establish a means for communities to access equitable and easy access to adequate compensation for the impacts of climate change. If communities had access to these funds, there would be significantly less incentive for communities to bring cases seeking compensation.
7. Climate compensation legislation could either clarify the existing law as it relates to climate litigation or alternatively it might change the law to make climate litigation feasible. A key advantage of such legislation is that it would allow governments to recover a portion of the cost of climate damages from fossil fuel corporations.

## 5. CONCLUSION

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The Paris Agreement is an historic agreement, which established loss and damage as the third pillar of the international climate regime and the first international recognition of the concept of climate justice. However, there is a yawning chasm between the need to keep warming well below 1.5C and the non-binding and inadequate pledges agreed in Paris. Article 8 of the Paris Agreement established loss and damage as the third pillar of the international climate regime.

The associated Decision which provides that Article 8 of the Agreement does not provide a basis for liability or compensation was a compromise pushed by developed countries who clearly want to de-emphasise the importance of state liability for the consequences of harmful activities within the context of international environmental agreements. These efforts do not displace existing international law governing state responsibility for breaches of international law, nor do they displace the application of other substantial international law upon the problem of climate change. International human rights law, world heritage law and the law of the sea continue to apply to the threats of climate change to human rights, world heritage and the marine environment.

Climate litigation has spread beyond the US into new jurisdictions throughout Asia, the Pacific and Europe. Claimants are targeting the 'Carbon Majors', who are the world's largest producers of oil, coal and gas, and governments that support and collude with the fossil fuel industry. The Philippines human rights commission is investigating fossil fuel corporations for their role in the human rights impacts of climate change. A Peruvian farmer is seeking \$21,000 in damages from German utility company RWE in German courts. State governments within the US are investigating fossil fuel corporations for allegedly lying to the public and investors over climate change. Efforts by individuals seeking compensation from fossil fuel corporations are likely to increase over time, and will foreseeably be transnational in nature.

At the same time, citizens, including children, are increasingly bringing climate litigation against their governments and are achieving successes. A Dutch court decided in the *Urgenda* case that the Dutch Government was not doing enough to address climate change, and ordered it to do more. A Pakistani judge has declared the government's inaction on climate change offends the fundamental rights of its citizens, including constitutional and human rights. Youth in the US seeking protection of the atmosphere from climate change have had a major victory in a federal lawsuit and have survived a motion to dismiss brought by the US government as defendant and fossil fuel industry trade groups as intervenors. A young Pakistani girl has sought to replicate the litigation within her country.

In addition, the first immigration cases have been brought by citizens of Pacific Island nations seeking to migrate to New Zealand. One claimant was successful in securing an immigration permit based upon humanitarian grounds.

Governments need to avoid repeating the disastrous history of asbestos litigation in the US where the claims cripple the judicial system at a time when the original defendants have ceased to exist. Governments need to honour their sovereign obligations to protect the constitutional and human rights of their citizens and to preserve natural resources to ensure their health and longevity for the benefit of both present and future generations. Governments need to actively pursue liability for fossil fuel corporations within national courts, through new legislation or codification of laws. The importance of such efforts by governments could be explicitly recognised and actively encouraged in the international climate regime, just as it is in the international tobacco regime.

Without this shift to government responsibility and private liability, governments are likely to see increasing litigation against them brought by private citizens dissatisfied with government action and inaction. Climate litigation may overwhelm legal systems, in its complexity and the sheer number of possible cases.

***We recommend that governments:***

- 1. Remove the fossil fuel industry from the climate negotiations process and ban the industry from having a role or voice in setting climate change policy.*
- 2. Acknowledge and discharge governments' affirmative sovereign obligations to preserve essential natural resources, including a healthy atmosphere, ocean and climate system, in accordance with best available science, for the benefit of all present and future generations, with comprehensive plans for emission reductions and reforestation/carbon sequestration.*
- 3. As well as making appropriate contributions in their own right (public climate finance), introduce a levy on fossil fuel producers to partly fund the International Mechanism for Loss and Damage, allowing for individuals and communities to directly access the funds made available through this process.*
- 4. Remove fossil fuel subsidies and couple this action with carbon levy to ensure that governments recuperate the true and complete costs of climate change from industry.*
- 5. Introduce into international climate law a provision that recognises the role of private sector liability and encourages governments to take legislative action and legal actions under existing laws to deal with criminal and civil liability of the fossil fuel industry.*
- 6. Take legal action against the fossil fuel industry within national jurisdictions to establish liability, recuperate the costs of climate change and expose internal industry documents.*
- 7. Consider amending limitation periods if necessary to allow claimants to bring cases from the time that climate damages manifest.*
- 8. Implement strategies to ensure fossil fuel defendants do not take action to avoid liability (e.g. through shifting assets to alternative jurisdictions or splitting up their companies).*
- 9. Introduce legislation that specifically addresses climate liability if there is a need for clarification of the law or a need to change the law to make climate litigation feasible.*

<b>Network of African National Human Rights Institutions (NANHRI) without full A status</b>	
<b>Country</b>	<b>Body</b>
Algeria	National Human Rights Commission of Algeria
Angola	Provedor de Justica e de direitos (Angola)
Benin	Benin Human Rights Commission
Burkina Faso	National Human Rights Commission of Burkina Faso
Cameroon	National Commission on Human Rights and Freedoms
Chad	Chat National Human Rights Commission
Democratic Republic of the Congo	National Human Rights Observatory (DR Congo)
Republic of the Congo	National Human Rights Commission (Republic of the Congo)
Ethiopia	Ethiopian Human Rights Commission
Gabon	National Human Rights Commission (Gabon)
Madagascar	National Human Rights Commission (Madagascar)
Mali	Commission nationale consultative des droits de l'homme (Mali)
Mauritania	<a href="#">Commissariat aux Droits de l'Homme, a la Lutte contre la Pauvreté et l'Insertion (Mauritania)</a>
Nigeria	National Human Rights Commission (Nigeria)
Sierra Leone	Human Rights Commission of Sierra Leone
Sudan	Southern Sudan Human Rights Commission
Tunisia	Higher Committee on Human Rights and Fundamental Freedoms (Tunisia)

<b>Asia Pacific Forum (APF) members with B status</b>	
Bangladesh	National Human Rights Commission of Bangladesh
Maldives	Human Rights Commission of the Maldives
Sri Lanka	National Human Rights Commission

<b>Asia Pacific Forum (APF) members with C status</b>	
Hong Kong	Hong Kong Equal Opportunities Commission
Iran	Islamic Human Rights Commission

<b>European Network of National Human Rights Institutions (ENNHRI) members with B status</b>	
<b>Country</b>	<b>Body</b>
Austria	Volksanwaltschaft
Belgium	Interfederal Centre for Equal Opportunities and Opposition to Discrimination and Racism
Belgium	Federal Migration Centre
Bulgaria	The Ombudsman of the Republic of Bulgaria
Macedonia	Ombudsman Institution of the Republic of Macedonia
Norway	Norwegian Centre for Human Rights

Slovakia	Slovenske narodne stredisko pre ludske prava
Slovenia	Varuh Clovekovih Pravic RS
Sweden	The Equality Ombudsman

<b>European Network of National Human Rights Institutions (ENNHRI) members with C status</b>	
<b>Country</b>	<b>Body</b>
Romania	Romanian Institute for Human Rights

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