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Overview of Climate Change Litigation

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climate change, as well as developments in investor-state arbitration and the importance of robust neutral dispute resolution mechanisms in the transition to a green economy. Paula is trained in civil and common law and is a member of the international arbitration group of Freshfields in New York.

OVERVIEW OF CLIMATE CHANGE LITIGATION

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*By Michael Gerrard**

Climate change litigation is a global phenomenon. According to a database maintained by the Sabin Center for Climate Change Law,¹ as of February 4, 2019 a total of 1,297 climate cases had been filed in courts or other tribunals worldwide. Of these, 1,009—78 percent—were from the United States, Australia was a distant second, with ninety-eight, followed by the United Kingdom with forty-seven. No other country had as many as twenty. The cases were filed in twenty-nine countries and six international tribunals, led by the Court of Justice of the European Union, which had forty-one.

In the United States, according to another Sabin Center database,² the largest number of cases (163) were brought under the National Environmental Policy Act (NEPA), the statute that requires environmental impact statements for federal actions that could have a significant impact on the environment. Similarly there were 139 brought under state equivalents of NEPA. The great bulk of these were brought under the California Environmental Quality Act and challenged the environmental review for specific projects on the grounds that they had insufficiently studied the projects' impacts on climate change, or climate change's impacts on the project.

Another large category of cases were those brought under the Clean Air Act (151 cases). That is the principal federal statute that can be used to regulate greenhouse gases (GHGs). In *Massachusetts v. EPA*,³ the most important U.S. climate change decision to date, the Supreme Court ruled by a 5–4 vote that the Clean Air Act gives the U.S. Environmental Protection Agency (EPA) the authority to regulate GHGs, if it first makes an “endangerment finding” that GHGs pose a threat to public health and welfare. The decision was issued during the presidency of George W. Bush, whose administration did little to act under this authority. But when Barack Obama took office in January 2009, he directed the EPA to begin regulating GHGs. Within a few months the EPA issued the required endangerment finding. It was challenged in court by several industry groups and by states that oppose climate regulation, led by Texas and West Virginia, which argued that the scientific evidence supporting the finding was flawed. The U.S. Court of Appeals for the District of Columbia Circuit, in a strongly worded opinion, upheld the Endangerment Finding and found that the EPA had ample support in the administrative record for having issued it.⁴

Having issued the Endangerment Finding, the EPA issued regulations under the Clean Air Act's New Source Review Program, which requires permits for the construction or major modification of major new sources of air pollution. Most but not all of these regulations were upheld by the courts.⁵

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¹ Sabin Center, *Non-U.S. Climate Change Litigation*, at <http://climatecasechart.com/non-us-climate-change-litigation>.

² Sabin Center, *U.S. Climate Change Litigation*, at <http://climatecasechart.com/us-climate-change-litigation>.

³ 549 U.S. 497 (2007).

⁴ *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *aff'd in part, rev'd in part sub nom.* *Utility Air Regulatory Group v. EPA*, 134 S.C. 2427 (S. Ct. 2014).

⁵ *Utility Air Regulatory Group v. EPA*, 134 S.C. 2427 (S. Ct. 2014).

The EPA and the National Highway Traffic Safety Administration also issued regulations limiting the GHGs that could be emitted from passenger vehicles. These too were upheld by the courts.⁶ The Trump administration is moving to weaken those standards.

The EPA's next major move was issuance of the Clean Power Plan. It was aimed at reducing emissions from coal-fired power plants, which were then the largest source of GHGs in the United States (These emissions have since declined, largely due to the substitution of natural gas for coal in many markets, owing mostly to the inexpensive natural gas that was made available by hydraulic fracturing.) The Clean Power Plan was issued under an obscure provision of the Clean Air Act, Section 111(d), which allowed controls over existing sources of air pollution under very limited conditions. Using that provision's complicated requirements, the EPA set emission reduction targets for each state, and directed the states to come up with binding plans to meet those targets. For many states, this would require electric utilities not only to improve the efficiency of their power plants, but also to go "beyond the fence line" and act on matters outside the power plants, such as the construction of new renewable energy facilities and improving customers' energy efficiency. The Clean Power Plan was widely attacked as exceeding the EPA's authority under the statute. In February 2016, the Supreme Court by a 5–4 vote stayed the implementation of the Clean Power Plan until litigation over it was complete.⁷ This stay remains in effect, and the Trump administration is moving to revoke the Clean Power Plan.

The next largest subject matter of U.S. climate change litigation, with seventy-five cases, is species protection, mostly under the Endangered Species Act. Most of these cases concerned federal decisions to list (or not to list) certain species as threatened or endangered, as well as federal decisions to designate (or not designate) certain geographic areas as "critical habitat areas" for listed species. Many of these cases have led to orders that the Fish and Wildlife Service or the National Marine Fisheries Service move forward with acts to protect species whose habitat is threatened by climate change.

A smaller but very prominent set of cases were brought under the common law, in particular the public nuisance doctrine. One of those cases, *American Electric Power v. Connecticut*, sought an order that the coal-fired power plants of six electric utilities reduce their GHG emissions. The other cases sought money damages. The most prominent of these, *Native Village of Kivalina v. Exxon Mobil*, sought the costs of relocating an Alaska village that was threatened by melting ice. In 2011, the Supreme Court ruled in *American Electric Power* that the Clean Air Act gave the EPA the exclusive federal control over GHG emissions, leaving no room for action under the federal common law.⁸ With this, the *Kivalina* lawsuit was also dismissed, on the same theory.⁹

The Supreme Court left open the question of whether state common law cases could be brought over climate change. No case raised this question until 2017 when several suits were brought against the major fossil fuel companies by a number of states, counties, and cities, and a fishermen's association, seeking money damages. At latest count there were fifteen such suits. Two of them have been dismissed by the trial courts; both of them are now on appeal to the courts of appeals.¹⁰ Some of the other cases are on hold awaiting the appellate decisions, while in others there is litigation over whether the cases belong in federal or state court. The defendants tend to

⁶ Coalition for Responsible Regulation, *supra* note 4.

⁷ *Chamber of Commerce v. EPA et al.*, No. 15A787 (136 S. Ct. 2016).

⁸ 564 U.S. 410 (2011).

⁹ 696 F.3d 849 (9th Cir. 2012).

¹⁰ *City of New York v. BP p.l.c.*, No. 18-2188 (N.Y.2d, 2018); *People of the State of California (Oakland, San Francisco) v. BP P.L.C et al.*, No. 3:2017cv06012 (N.D. Cal. 2018).

prefer federal court, in part because this would make it more likely that the displacement doctrine announced in *American Electric Power v. Connecticut* applies.

Another small but prominent number of cases were brought under the public trust doctrine, a legal doctrine stemming from the Justinian Code, which provides that the state has an obligation to hold certain aspects of the natural environment in trust for the public. These lawsuits claimed that the public trust doctrine applies to the atmosphere, and not just rivers, parks, and other more conventional targets. The suits claimed that state or federal governments were thereby compelled to reduce GHG emissions within their jurisdictions. Almost all of these suits were ultimately dismissed. However, one survived—*Juliana v. United States*. Here a federal district court in Oregon held not only that the public trust doctrine could apply to GHG emissions, but also that it was grounded in the Due Process Clause of the U.S. Constitution. This finding surprised many legal scholars, as no previous federal court had found there to be a federal constitutional right to a clean environment. (Several state constitutions do have such provisions.) The court scheduled a trial. The U.S. Department of Justice made several efforts at the Court of Appeals for the Ninth Circuit and the Supreme Court to prevent the trial from going forward. The Ninth Circuit ultimately accepted an interlocutory appeal of the case. The appeal was argued on June 4, 2019. A decision is now awaited.

Yet another prominent set of cases concerns investigations by several state attorneys general, led by New York, into whether Exxon Mobil Corp. misled investors and regulators by publicly claiming that climate change is not a severe problem, while internally being advised otherwise by its own scientists. Exxon has made various efforts in state and federal courts to halt such investigations, all without success.¹¹ In 2018, the New York attorney general finally brought the long-anticipated lawsuit. It is still in its early stages.

An emerging category of cases concerns alleged failure to adapt to climate change—to prepare for the extreme weather events and other impacts that are coming. Most prominent of these is *Conservation Law Foundation v. Exxon Mobil*. This case alleges that certain large above-ground oil tanks owned by Exxon Mobil, located along the Mystic River near Boston, are vulnerable to storm surge and other coastal hazards, and that the Clean Water Act and the Oil Pollution Act require the companies to undertake greater precautionary measures. This case has survived initial motions to dismiss and is now being litigated at the trial court level.

Outside of the United States, the most prominent climate change case is *Urgenda v. Kingdom of the Netherlands*. A nongovernmental organization and several hundred Dutch citizens claimed that the commitments that the national government had made as part of the Paris Climate Agreement were insufficient, and it sought an order requiring more aggressive action. The trial level court ruled for the plaintiffs and issued the requested order, finding that the “duty of care” under Dutch law compelled this result. On appeal, the intermediate appellate court upheld the ruling for the plaintiffs but on different grounds—that the European Convention on Human Rights required such action. The Supreme Court of the Netherlands heard argument of this case in May 2019, and a decision is now awaited.

In all these cases, a wide variety of forms of relief are sought as indicated below, with examples:

- Direct order to state to reduce emissions: *Urgenda v. Kingdom of the Netherlands*;
- Order state to prepare plan to reduce emissions: *Juliana v. United States*;
- Money damages: U.S. public nuisance cases: *Lliuya v. RWE (Germany)*;
- Penalize false disclosures: *People of the State of N.Y. v. Exxon Mobil*;

¹¹ See, e.g., *Exxon Mobil Corp. v. Schneiderman*, 316 F.Supp.3d 679 (S.D.N.Y. 2018); *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312 (2018), *cert. den.* (2019).

- Halt actions until climate impacts are assessed: National Environmental Policy Act cases;
- Regulate GHGs under existing statutory authority: *Massachusetts v. EPA*;
- Protect species at risk due to climate change: Endangered Species Act cases;
- Adapt to climate change: *Conservation Law Foundation v. Exxon Mobil*; and
- Issue report and recommendations: Philippines Human Rights Commission investigation.

CLIMATE JUSTICE: HOLDING GOVERNMENTS AND BUSINESS ACCOUNTABLE FOR THE CLIMATE CRISIS

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*By Kristin Casper**

People around the world are already experiencing the impacts of climate change, and their human rights are under threat. Greenpeace's Climate Justice and Liability Campaign is collaborating with a growing number of communities to reclaim their rights through strategic climate litigation. Three themes run throughout these efforts. First, the climate breakdown is a human rights crisis. Second, political and business leaders must take immediate action or risk being sued. Third, there is mounting evidence that the fossil fuel industry is significantly responsible for the climate crisis and will ultimately be held accountable. Before exploring these themes, it is useful to understand the origins of Greenpeace International's climate justice efforts.

The efforts were born out of the political failure of the 2009 Copenhagen Climate Conference. Greenpeace Czech Republic and Greenpeace International, along with legal partners at Frank Bold (formerly called Environmental Law Service) supported the Federated States of Micronesia (FSM), a Pacific island nation, to legally challenge a climate polluting lignite, also known as brown coal, project. As a sovereign stakeholder, the FSM requested a transboundary environmental impact assessment of a lignite-fired power plant in the Czech Republic.¹ The nation's legal intervention was grounded in the customary international law requirement to conduct transboundary environmental impact assessments when a proposed activity poses significant risks to another state.² Ultimately, the Czech Ministry of Environment cleared the way for the construction of the plant. Yet, the FSM was recognized as an "affected state," and the Ministry required a compensation plan to offset emissions, in response to the comments by the nation and other stakeholders.³ Importantly, this Pacific island nation's courageous decision to wield the power of the law to achieve climate justice told a very powerful story to global audiences about the cultural, survival, and existential threats posed by climate change.

The first theme is that the climate breakdown is a human rights crisis, exemplified by developments in science and law. Last year, the Intergovernmental Panel on Climate Change (IPCC) issued a report on the impacts of global warming of 1.5°C and related global greenhouse gas emission

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¹ Leonita Bacalando, Kristin Casper, Maketo Robert, Kristina Šabová, Jan Šrytr & Jasper Teulings, *Transboundary Climate Challenge to Coal: One Small Step Against Dirty Energy, One Giant Leap for Climate Justice*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 589 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

² *Id.* at 610.

³ *Id.* at 559.