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See You in Court: Around the World in Eight Climate Change Lawsuits

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SEE YOU IN COURT: AROUND THE WORLD IN EIGHT CLIMATE CHANGE LAWSUITS

MYANNA DELLINGER*

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INTRODUCTION

Climate change action is proving to be the political, diplomatic, and legal rollercoaster of our time. Just as the Paris Agreement got adopted by almost every single nation in the world and was hailed as the most promising international environmental law development in years, if not ever,¹ the incoming Trump administration announced its intent to not

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¹ See Fiona Harvey, *Paris Climate Change Agreement: The World's Greatest Diplomatic Success*, THE GUARDIAN (Dec. 14, 2015), <https://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations> [https://perma.cc/Y5H7-3D5W].

only withdraw from the treaty, but also to take several other steps to dismantle much of the climate change progress otherwise made in the United States.² The effects of this on the international arena and on the underlying substantive problem are yet unclear, but it stands to reason that political, diplomatic, and practical retreat from the superwicked problem of climate change is not good news on any scale.³

The American stance on climate change stands in stark contrast with developments in other nations, many of which are already backing their Paris pledges with national laws.⁴ One analysis shows that fourteen new laws and thirty-three executive policies related to climate change were introduced between the adoption of the Paris Agreement and May of 2017—a span of just one-and-a-half years.⁵ These new laws add to the over 1,200 climate change-related laws that were enacted since 1997 in no less than 164 countries, including 93 of the top 100 greenhouse gas (“GHG”) emitters.⁶ Compare this to the fact that in 1997, only sixty such laws existed just as in 2015 when only ninety-nine nations had any climate change laws at all.⁷

Nonetheless, serious doubt exists as to whether we, as a global society, will be able to curb the problem in time to prevent the potentially yet unforeseen and highly dangerous consequences of years of excessive global fossil fuel use.⁸ Even if the Paris parties actually lived up to their Paris Agreement pledges, an emissions gap still exists, preventing us from reaching the 1.5–2° C temperature increase goal stipulated in the Paris Agreement.⁹ In other words, if fully implemented, the Paris pledges

² Cf. Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [<https://perma.cc/AG2X-2AWL>].

³ *Id.*; Myanna Dellinger, *An Act of God—Rethinking Contractual Improbability in an Era of Anthropogenic Climate Change*, 67 U.C. HASTINGS L. J. 1551, 1589 (2016).

⁴ GRANTHAM RESEARCH INST. ON CLIMATE CHANGE & THE ENV'T, *More Countries are Backing their Paris Pledges with National Laws* (May 9, 2017), <http://www.lse.ac.uk/GranthamInstitute/news/more-countries-are-backing-their-paris-pledges-with-national-laws/> [<https://perma.cc/YV2N-6XVH>].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Alister Doyle & Nina Chestney, *U.N. Panel to Study a Cap on Global Warming that May be Out of Reach*, THOMSON REUTERS (Apr. 11, 2016); see also *Climate Action ‘A Necessity and Opportunity,’ Says UN Chief, Urging World to Rally behind Paris Accord*, UN NEWS CENTRE (May 31, 2017), <http://www.un.org/sustainabledevelopment/blog/2017/05/climate-action-a-necessity-and-an-opportunity-says-un-chief-urging-world-to-rally-behind-paris-accord/> [<https://perma.cc/XP4D-P8BF>].

⁹ See Kate Wheeling, *The World is on Track to Fall Short of Paris Agreement Goals*,

are projected to reduce warming by the end of the century by about half a degree Celsius only, from 3.6° C to 3.0° C.¹⁰

For these and many other reasons, it is doubtful whether regulatory and international diplomatic solutions will be forthcoming and sufficiently effective to solve the problem in time. In contrast, litigation may be an avenue that, in combination with others, might “nudge”¹¹ forth more action than solely relying on nations and subnational entities to produce the urgent solutions that we need. Such litigation may take place among purely private actors, private actors suing government entities, or among government entities internationally.

A new round of, for the most part, privately instigated climate change-related litigation commenced in several nations around the world. This Article will analyze the most promising of these cases in order to demonstrate the common litigation threads that litigators may choose to follow in the future. The article will show that these cases are *non-regulatory* and *non-treaty* based. Instead, human rights and constitutional law are appearing as new (or renewed) potential inroads against both recalcitrant nations and traditionally heavily polluting companies and industries. Suits for damages under common law torts principles are also rearing their heads as promising private causes of action. An exception to the trend away from regulatory-based suits is presented by actions based on investment regulations such as those in the Securities Exchange Act as will be briefly described below.

Much litigation risk exists for private entities.¹² Litigation, of course, has several known downsides: It is costly and time-consuming. Outcomes are far from guaranteed. It is a highly adversarial process that often leads to hard feelings among parties and bad publicity in the media. Compliance with judicial decisions is uneven nationally and especially internationally.¹³ At the same time,

PACIFIC STANDARD (Nov. 3, 2016), <https://psmag.com/news/the-world-is-on-track-to-fall-short-of-paris-agreement-goals> [<https://perma.cc/DDX9-76W9>].

¹⁰ See UNITED NATIONS ENV'T PROGRAMME (UNEP), THE EMISSIONS GAP REPORT 2016: A SYNTHESIS REPORT XVII (2016).

¹¹ See, e.g., Myanna Dellinger, *Localizing the Law of Climate Change*, 14 MINN. J. L. SCIEN. & TECH. 603, 652–54 (2013) (for more on the “nudge” theory.).

¹² See generally CLIMATE CHANGE LITIGATION DATABASE, <http://climatecasechart.com> [<https://perma.cc/Y9PW-NWK9>] (listing close to five hundred climate change cases around the world).

¹³ See Joseph Sinda Warioba, *Monitoring Compliance with and Enforcement of Binding Decisions of International Courts*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS L. 41, 42 (2001).

[t]hese cases are powerful vehicles for the progressive action on climate that is urgently needed. Far from being an undue interference with policy making processes, courts are reaching decisions in accordance with existing law and science. For as long as governments fail to take the steps necessary to avert dangerous change, courts can be expected to act as vital checks on political inaction.¹⁴

As precious time continues to go by, the climate change problem has to be tackled from several angles in order to create the solutions that we simply have to bring about, lest we are willing to enter a future with an unacceptably high risk of severe and potentially irreversible damage from climate change. Whereas litigation is not a panacea that can solve the problem without more, it does present some potential for progress that is worth investigating in these times of uncertain climate change action at the political level.

I. THE CASES

A. *General Torts*

In November 2015, Peruvian farmer Saúl Luciano Lliuya filed claims for declaratory judgment and damages in a German court against RWE, Germany's largest electricity producer.¹⁵ Lliuya's suit alleged that RWE knowingly contributed to climate change by emitting substantial volumes of GHGs and that RWE thus bore some responsibility for the melting of mountain glaciers near Lliuya's home town of Huaraz.¹⁶ That melting has, in fact, "given rise to an acute threat: Palcacocha, a glacial lake located above Huaraz, has experienced a substantial volumetric increase of water since 1975"¹⁷ This rate of increase has accelerated dramatically since 2003.¹⁸ Lliuya sought approximately \$19,000 from RWE towards a local dam in order to protect up to 50,000 people at risk

¹⁴ Tessa Khan, *How Climate Change Battles are Increasingly Being Fought, and Won, in Court*, THE GUARDIAN (Mar. 8, 2017), <https://www.theguardian.com/environment/2017/mar/08/how-climate-change-battles-are-increasingly-being-fought-and-won-in-court> [<https://perma.cc/JMG2-GCWA>].

¹⁵ GRANTHAM RESEARCH INST. ON CLIMATE CHANGE AND THE ENV'T, *Lliuya v. RWE* (June 19, 2017), <http://www.lse.ac.uk/GranthamInstitute/litigation/liuya-v-rwe/> [<https://perma.cc/TT4Z-9BGZ>].

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

of flooding.¹⁹ The amount was determined based on the utility's historic contribution to greenhouse gas emissions.²⁰

Lliuya presented several legal theories in support of his claim, including one that characterized RWE's emissions as a legal nuisance and argued that Lliuya had incurred compensable costs to mitigate that.²¹ Acknowledging that RWE was only one of several contributors to the emissions responsible for climate change and thus for the lake's growth, Lliuya asked the court to order RWE to reimburse him for a portion of the costs that he and the Huaraz authorities had incurred in order to build flood protections.²² That portion was 0.47% of the total cost of the project—the same percentage as Lliuya's estimate of RWE's accumulated annual contributions to global GHG emissions.²³

The judge ruled that while there was “scientific causality,” no “linear causal chain” could be discerned amid the complex components of the causal relationship between particular GHG emissions and particular climate change impacts.²⁴ In other words, the court was not convinced that RWE was legally responsible for protecting the town of Huaraz, despite evidence that RWE's activities had contributed to the town's predicament.²⁵ The court thus dismissed Lliuya's requests for declaratory and injunctive relief, as well as his request for damages.²⁶ Lliuya's attorney stated that her client was undeterred and would “most likely appeal” to a regional court after a thorough review of the case.²⁷ As of this writing, no such appeal has, however, been filed.²⁸

The importance of the case lies not so much in the court recognizing the scientifically established link between fossil fuel-based energy production and climate change, but rather by the court seemingly leaving the door open to a finding of legal causation between a particular actor and particular adverse effects of climate change.²⁹ Whereas it is still

¹⁹ Megan Darby, *Peruvian Climate Lawsuit Against German Coal Giant Dismissed*, CLIMATE HOME (Dec. 15, 2016), <http://www.climatechangenews.com/2016/12/15/peruvian-climate-law-suit-against-german-coal-giant-dismissed/> [<https://perma.cc/PMR5-GXRK>].

²⁰ *Id.*

²¹ GRANTHAM RESEARCH INST. ON CLIMATE CHANGE AND THE ENV'T, *supra* note 15.

²² *Id.*

²³ *Id.*

²⁴ *Id.*; Darby, *supra* note 19.

²⁵ Darby, *supra* note 19.

²⁶ GRANTHAM RESEARCH INST. ON CLIMATE CHANGE AND THE ENV'T, *supra* note 15.

²⁷ Darby, *supra* note 19.

²⁸ Lliuya v. RWE AG, CLIMATE CHANGE LITIGATION DATABASE, <http://climatecasechart.com/non-us-case/liuya-v-rwe-ag/> [<https://perma.cc/ZUB7-RYKG>].

²⁹ Darby, *supra* note 19.

difficult at best or impossible at worst to trace the damaging effects of climate change to a particular actor,³⁰ especially a corporate one, the “slice of the pie” theory is becoming more prevalent in climate discourse.³¹ By this, scientists have shown that certain percentages of the total problem can, in fact, be attributed to certain corporations and industries.³² For example, “nearly two-thirds, 63 percent, of the industrial carbon pollution released into the atmosphere since 1854 can be directly traced to carbon extracted from the Earth by just 90 entities.”³³ The top twenty entities (such as Chevron, Exxon Mobil, BP, and Shell) produced forty-eight percent of all industrial carbon pollution, with fifteen percent produced by another seventy entities.³⁴ Of these ninety companies and government-run industries, the top eight companies—ranked according to annual and cumulative emissions below—account for 18.7 percent of world carbon emissions from fossil fuels and cement production since the Industrial Revolution.³⁵

This is not a matter of organizations and governance units pointing fingers at climate culprits. Companies already undertake a large and increasing amount of carbon self-reporting.³⁶ For example, an Organization for Economic Cooperation and Development (“OECD”) study undertaken “to better understand current corporate practices and key challenges in the area of climate change reporting, and to explore companies’ expectations on existing or future government measures in this area” showed that “[o]nly 15% of the responding companies do not currently report climate change-related information.”³⁷ Additionally, “[m]ore than

³⁰ Justin Gillis, *How to Slice a Global Carbon Pie?*, N.Y. TIMES (Oct. 7, 2013), <http://www.nytimes.com/2013/10/08/science/how-to-slice-a-global-carbon-pie.html> [<https://perma.cc/LD69-LECB>]; Dellinger, *supra* note 3, at 1589.

³¹ *Id.*

³² UNION OF CONCERNED SCIEN., LARGEST PRODUCERS OF INDUSTRIAL CARBON EMISSIONS (Dec. 9, 2013), http://www.ucsusa.org/global_warming/science_and_impacts/science/largest-producers-industrial-carbon-emissions.html#.WUiLF_nyvIU [<https://perma.cc/9R9N-CX8P>].

³³ *Id.*

³⁴ *Id.*

³⁵ Douglas Starr, *Just 90 companies are to blame for most climate change, this ‘carbon accountant’ says*, SCIENCE (Aug. 25, 2016), <http://www.sciencemag.org/news/2016/08/just-90-companies-are-blame-most-climate-change-carbon-accountant-says> [<https://perma.cc/R5ER-TJ9Y>].

³⁶ See CÉLINE KAUFFMANN, C. TÉBAR LESS AND D. TEICHMANN, CORPORATE GREENHOUSE GAS EMISSION REPORTING: A STOCKTAKING OF GOVERNMENT SCHEMES, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2012), http://www.oecd.org/investment/internationalinvestmentagreements/WP-2012_1.pdf [<https://perma.cc/ES65-FTJF>].

³⁷ *Id.* at 12.

half of the responding companies report climate change related information under more than one reporting scheme.”³⁸ Many of the world’s largest companies willingly disclose their carbon emission and reduction scorecards.³⁹ One report, for instance, includes self-reporting from more than 5,000 companies across the globe.⁴⁰ More than four out of five of the largest public companies of that study now engage with the Carbon Disclosure Project to allow measurement of their carbon footprints.⁴¹ Of course, this does not show that they are willing to do much about climate change if it hurts their bottom line. To play devil’s advocate, climate self-reporting may simply be a matter of playing along with public relations trends such as “triple bottom line” rhetoric and thus only form over substance. However, it is still better than no publicity about the issue and may even work in future legal allocations of liability for climate-caused damages.

Although the *Urgenda* case analyzed further below is most famous for its human rights theories, the plaintiffs also argued that by not regulating and curbing Dutch GHG emissions, the state committed the tort of negligence against its citizens.⁴² Although the defendant government argued a lack of causation between Dutch emissions and the climate change consequences against which plaintiff Urgenda sought protection, the trial court agreed that the Dutch climate policies were inadequate and unlawful, labeled them as “hazardous negligence,” and ordered the Dutch government to limit the volume of GHG emissions.⁴³

With increasing focus on and awareness of the exact percentages of the climate change problem that can be attributed to specific actors, whether private or government entities, it is becoming more and more likely that a court may soon find legal causation between a given actor and specific damage. It is implausible that responsible actors will continue to be able to avoid liability simply by pointing out that others have *also* contributed to the problem. In *Lliuya v. RWE*, the amount sought was small, but a finding of legal causation in that or similar cases would still arguably set important precedent, whether in the legal or simply

³⁸ *Id.*

³⁹ Ryan Koronowski, *Are The World’s Biggest Businesses Addressing ‘The Mother Of All Risks?’*, THINK PROGRESS (Sept. 26, 2013), <https://thinkprogress.org/are-the-worlds-biggest-businesses-addressing-the-mother-of-all-risks-304c66b257f6> [<https://perma.cc/3J2X-KW39>].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² ROGER COX, A CLIMATE CHANGE LITIGATION PRECEDENT URGENDA FOUNDATION V THE STATE OF THE NETHERLANDS, CIGI PAPERS (Nov. 2015), https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf [<https://perma.cc/G6KC-UY6Q>].

⁴³ *Id.*

everyday sense of the word.⁴⁴ It may even be more likely that a court would hold a given actor liable where the damages sought are small rather than great. In finding defendants liable for relatively small amounts, the particular defendant would not be unduly harmed, but an important legal signal would still be sent to others in the same situation to prepare for potentially larger adverse holdings in the future. Entities around the world are already preparing for this outcome.⁴⁵

B. Public and Private Nuisance

With the Trump administration's climate deregulation efforts, it is highly likely that the nation will see an increased amount of climate-related litigation on non-regulatory bases. In addition to the theories already being trialed, other arguments may be introduced or reintroduced. For example, whereas public nuisance or negligence suits against power companies have not been tremendously successful litigation vehicles so far, new theories and suits are developed on just such bases.⁴⁶ In September 2017, for example, the cities of San Francisco and Oakland, California, sued five major oil companies for public nuisance, accusing the oil companies of organizing massive disinformation campaigns to deceive the public about the dangers fossil fuel production poses to the planet.⁴⁷ As referenced by the San Francisco City Attorney's News Release,

[t]he lawsuits ask the courts to hold the defendants jointly and severally liable for creating, contributing to and/or maintaining a public nuisance, and to create an abatement fund for each city to be paid for by defendants to fund infrastructure projects necessary for San Francisco and Oakland to adapt to global warming and sea level rise. The total amount needed for the abatement funds is not known at this time but is expected to be in the billions of dollars.⁴⁸

⁴⁴ See GRANTHAM RESEARCH INST. ON CLIMATE CHANGE AND THE ENV'T, *supra* note 15.

⁴⁵ *But see, id.*

⁴⁶ See Michael Burger, *The Battle Against Trump's Assault on Climate Is Moving to the Courts*, YALE ENV'T 360 (May 2, 2017), <https://e360.yale.edu/features/stopping-trump-the-battle-to-thwart-the-assault-on-climate-moves-to-the-courts> [<https://perma.cc/QR4J-47WW>].

⁴⁷ Complaint at 1–2, *People of S.F. v. BP P.L.C., et al.*, No. CGC-17-561370 (Super. Ct. Cal., Sept. 19, 2017); Complaint at 1–2, *People of Oakland v. BP P.L.C., et al.*, No. RG-17875889 (Super. Ct. Cal., Sept. 19, 2017).

⁴⁸ *San Francisco and Oakland sue top five oil companies over costs of climate change*, CITY ATTORNEY OF SAN FRANCISCO (Sept. 19, 2017), <https://www.sfcityattorney.org/2017/09/19/san-franciscooakland-sue-top-five-oil-gas-companies-costs-climate-change/> [<https://perma.cc/GG2M-U2S2>].

And according to Oakland's City Attorney, "[t]hese companies knew fossil fuel-driven climate change was real, they knew it was caused by their products and they lied to cover up that knowledge to protect their astronomical profits. The harm to our cities has commenced and will only get worse."⁴⁹

Similarly, San Mateo and Marin Counties as well as the City of Imperial Beach filed suit against thirty-seven fossil fuel companies for their role in sea level rise in July 2017.⁵⁰ The counties' lawsuit makes claims of both public nuisance and negligence against the companies.⁵¹

Time will tell what happens to these very new lawsuits, but it is entirely plausible that, with the amounts and clarity of new climate change science that has emerged in recent years, as well as yet another round of extremely disastrous weather events in this country and beyond, courts will listen with new interest to torts lawsuits in general and, in particular, allegations of public or private nuisance.

C. *Human Rights*

One of the most promising and internationally well-known recent cases is *Urgenda Foundation v. the State of the Netherlands*.⁵² The case was instituted by the Urgenda Foundation ("Urgenda"), a citizens' platform that develops plans and measures to prevent climate change.⁵³ The foundation represented itself and 886 individuals in the case.⁵⁴ Urgenda argued that the Dutch GHG emission levels constitute,

an infringement of, or [are] contrary to, Articles 2 [the "right to life"] and 8 [the "right to health and respect for family and family life"] of the [European Convention of Human

⁴⁹ Timothy Cama, *San Francisco, Oakland Sue Oil Companies Over Climate Change*, THE HILL (Sept. 20, 2017 3:36 PM), <http://thehill.com/policy/energy-environment/351603-san-francisco-oakland-sue-oil-companies-over-climate-change> [<https://perma.cc/7ALH-BNHH>].

⁵⁰ See Kevin Kelly, *San Mateo County Sues 37 Fossil Fuel Firms Over Sea Level Rise*, MERCURY NEWS (July 17, 2017), <http://www.mercurynews.com/2017/07/17/san-mateo-county-sues-37-fossil-fuel-firms-over-sea-level-rise/> [<https://perma.cc/X7LJ-9AJJ>]; see also Complaint, County of San Mateo v. Chevron Corp., et al., No. 17-CIV-03222 (Super. Ct. Cal. July 17, 2017), <https://www.sheredding.com/wp-content/uploads/2017/07/2017-07-17-SMCO-Complaint-5bFINAL-ENDORSED5d.pdf> [<https://perma.cc/V6DE-J4GA>].

⁵¹ See Complaint, *supra* note 47, at 78, 81–82.

⁵² Rb. Den Haag 24 juni 2015, 2015, 7196 m.nt. (Urgenda Foundation/Kingdom of the Netherlands) at 1 (Neth.), <http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf> [<https://perma.cc/7A9S-PMUF>].

⁵³ See *id.* at 5.

⁵⁴ See *id.*

Rights] ECHR . . . The greenhouse gas emissions in the Netherlands additionally contribute to the (imminent) hazardous climate change. The Dutch emissions that form part of the global emission levels are excessive, in absolute terms and even more so per capita. This makes the greenhouse gas emissions of the Netherlands unlawful. The fact that emissions occur on the territory of the State and the State, as a sovereign power, has the capability to manage, control and regulate these emissions, means that the State has “systemic responsibility” for the total greenhouse gas emission level of the Netherlands and the pertinent policy. In view of Article 21 of the Dutch Constitution, among other things, the State can be held accountable for this contribution towards causing dangerous climate change.⁵⁵

The plaintiffs further argued that

[m]oreover, under national and international law (including the international-law “no harm” principle, the UN Climate Change Convention and the [Treaty on the Functioning of the European Union] TFEU) the State has an individual obligation and responsibility to ensure a reduction of the emission level of the Netherlands in order to prevent dangerous climate change. This duty of care principally means that a reduction of 25% to 40%, compared to 1990, should be realised in the Netherlands by 2020.⁵⁶

Unsurprisingly, the Dutch government counterargued that no real threat of unlawful actions towards Urgenda is attributable to the State, that the State’s actions are in fact aimed at limiting the global temperature rise to less than 2°C, that the Dutch government has no legal obligation under either national or international law to take measures to achieve the reduction targets stated in Urgenda’s claims, and that allowing the claims to proceed would be contrary to the State’s discretionary power, which in turn would also interfere with the system of separation of powers and harm the State’s negotiating position in international politics.⁵⁷ The court, however, handed a groundbreaking victory to Urgenda, holding that

⁵⁵ See *id.* at 29.

⁵⁶ See *id.* at 29–30.

⁵⁷ See *Urgenda Foundation v. Kingdom of the Netherlands*, at 30.

[t]he State must do more to avert the imminent danger caused by climate change, also in view of its duty of care to protect and improve the living environment. The State is responsible for effectively controlling the Dutch emission levels. Moreover, the costs of the measures ordered by the court are not unacceptably high. Therefore, the State should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts. Any reduction of emissions contributes to the prevention of dangerous climate change and as a developed country the Netherlands should take the lead in this.⁵⁸

The court also noted that

with this order, the court has not entered the domain of politics. The court must provide legal protection, also in cases against the government, while respecting the government's scope for policymaking. For these reasons, the court should exercise restraint and has limited therefore the reduction order to 25%, the lower limit of the 25%–40% norm.⁵⁹

However, in reaching its holding, the court noted that “neighboring countries have adopted targets within the 25–40% range, such as Denmark (40 percent) and the United Kingdom (35 percent) [with] . . . no indication that this hurts their economies and the competitiveness of their businesses.”⁶⁰ With this, the court undoubtedly sent a signal that the Dutch government ought to aim higher rather than lower in its efforts to curb GHG emissions.

The 2015 Oslo Principles on Global Climate Change Obligations argue that there are sufficient legal means by which both countries and large fossil fuel companies can be compelled to limit GHG emissions.⁶¹ They conclude that judges can draw on international law, human rights, and international environmental law to order states to enact better climate policies and thus prevent the harmful effects of climate change.⁶²

⁵⁸ *See id.* at 1.

⁵⁹ *See id.*

⁶⁰ COX, *supra* note 42.

⁶¹ *See Oslo Principles on Global Climate Change Obligations* 3 Mar. 1, 2015, <http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf> [<https://perma.cc/XYZ2-B6VX>].

⁶² *See id.* at 2.

The *Urgenda* case is one of the first major court-directed steps in that direction. The Dutch government has, however, appealed the case.⁶³ No verdict has yet been issued in the appeal.⁶⁴

The case is very promising, not only because of the potential for individuals and public interest NGOs to gain standing to argue government responsibility for insufficient climate change action, but also for the potential that courts may cross otherwise strictly drawn prudential and constitutional lines between the legislative, executive, and judiciary branches of government in affirmatively ordering national governments to adopt stricter climate change mitigation laws. Although the ruling would not be binding on any other nation than Holland, it would still be a groundbreaking legal development in times when national governments still seem to waver on what action to take against climate change. It might set precedent for the world that would, hopefully, be repeated many times in other nations. "It always seems impossible until it's done," Nelson Mandela once said.⁶⁵ "Once it's done, it becomes easier to do it again, to replicate it."⁶⁶ The significance of *Urgenda*, unless overruled by an appellate court, is its potential to set precedent in relation to torts, human rights, international environmental law, and, equally if not more importantly, the ability of private entities to gain standing to argue legislative shortcomings in relation to climate change.

In Belgium, the public-interest NGO *Klimaatzaak* similarly sued the federal and regional governments of Belgium in April 2015 for contributing to global climate change by failing to reduce greenhouse gas emissions.⁶⁷ *Klimaatzaak* has sought to force the Belgian government to reduce GHG emissions 40% below 1990 levels by 2020 and 87.5% below 1990 levels by 2050.⁶⁸ Similarly to the *Urgenda* lawsuit, the Plaintiffs in *Klimaatzaak* have, among other things, alleged that failure to reduce

⁶³ See *Despite Pressure from Parliament, the Dutch Government Refuses to Pull Appeal in Landmark Climate Case*, URGENDA 1 (Sept. 29, 2015), <http://us1.campaign-archive2.com/?u=91ffff7bfd16e26db7bee63af&id=c5967d141c&e=46588a629e> [<https://perma.cc/5YM7-T5XN>].

⁶⁴ See *id.* at 2.

⁶⁵ Jessica Durando, *15 of Nelson Mandela's Best Quotes*, USA TODAY (Dec. 5, 2013), <https://www.usatoday.com/story/news/nation-now/2013/12/05/nelson-mandela-quotes/3775255/> [<https://perma.cc/3SBP-JF97>].

⁶⁶ COX, *supra* note 42, at 13.

⁶⁷ *VZW Klimaatzaak v. Kingdom of Belgium and Others*, CLIMATE CHANGE LITIGATION DATABASE 1 (2017), <http://wordpress2.ei.columbia.edu/climate-change-litigation/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/> [<https://perma.cc/3TCN-2XM8>] (no case documents are yet available).

⁶⁸ See *id.*

emissions constitutes a violation of human rights laws.⁶⁹ No further decision has yet been issued,⁷⁰ but these two cases could signal an important shift in judicial views on insufficient governmental climate change regulations, at least in the European Union (“EU”). Whether these cases could also be influential beyond the EU remains to be seen. Currently, many United States courts—including and most notably the Supreme Court—are reluctant to ascribe much weight to non-American law.⁷¹ Any European development in this area may thus not have much effect in the United States. Conversely, as both climate change science and law develop on their own accord around the world, American judges would be remiss in turning a completely blind eye to international legal developments in this area. Some judges are, in fact, showing an increasing willingness to render opinions that favor climate plaintiffs in previously unforeseen ways,⁷² as will be analyzed next.

D. *Constitutional Rights and General Governance Principles*

As a precursor of legal developments to come, a Nigerian federal court held as early as in 2005 that gas flaring is unconstitutional, as it violates the guaranteed fundamental rights of life and dignity of human persons provided in the constitution of the Federal Republic of Nigeria and the African Charter on Human and Peoples’ Rights.⁷³ A number of recent noteworthy cases around the world have further supported the rights of individuals to a healthy environment under both national, constitutional, and general governance principles.

For example, in South Africa’s first climate change lawsuit,⁷⁴ the High Court found that South Africa is not only a significant contributor to global GHG emissions as a result of the significance of mining and minerals processing to the South African economy and its coal-intensive

⁶⁹ *Id.* In a similar vein, the Columbia Constitutional Court recently struck down laws that threatened high-altitude ecosystems, calling these “carbon capture systems.” See Corte Constitucional [C.C.][Constitutional Court], febrero 8, 2016, C-035/16 (Colom.).

⁷⁰ *See id.*

⁷¹ *See* Justice Sandra Day O’Connor, *Keynote Address*, 96 AM. SOC’Y INT’L L. PROC. 348, 353 (2002).

⁷² For an example of this, *see* *Am. Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011).

⁷³ *See* *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd.*, (2005) AHRLR 151 (Nigeria).

⁷⁴ *Victory in SA’s first climate change court case!*, CENTRE FOR ENVIRONMENTAL RIGHTS (Mar. 8, 2017), <http://cer.org.za/news/victory-in-sas-first-climate-change-court-case> [https://perma.cc/7NDT-D9E5].

energy system, but also particularly vulnerable to the effects of climate change due to the nation's socio-economic and environmental context.⁷⁵ The court held that the South African government should thus have given proper consideration to the climate change impacts of a proposed coal-fired power station *before* a decision was made to allow for the power station to be built.⁷⁶

In Pakistan, a farmer filed suit alleging that the Pakistani government's inaction and delay in implementing its National Climate Change Policy and addressing vulnerabilities associated with climate change violates the fundamental constitutional rights to life and dignity.⁷⁷ In its first order, the Lahore High Court declared 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 [a] clarion call for the protection of [the] fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.⁷⁸

The court invoked the right to life and the right to dignity protected by the Constitution of Pakistan and international principles, including inter-generational equity and the precautionary principle.⁷⁹ Finding that federal and provincial officials had taken little, if any, on-the-ground action to implement adaptation measures to cope with changing climatic patterns that threaten food, water, and energy security, the court directed responsible ministries and departments to appoint a focal person on climate change to appear before the court, and to prepare a list of adaptation measures to be completed by the end of 2015.⁸⁰ The court also established a Climate Change Commission to help the court monitor progress and

⁷⁵ See *Earthlife Africa Johannesburg v. The Minister of Env'tl. Affairs*, (2016) The High Court of South Africa Gauteng Division, Pretoria 65662 at 25 (S. Afr.).

⁷⁶ See *id.*

⁷⁷ See *Asghar Leghari v. Fed'n of Pakistan*, (2015) Lahore High Court Green Bench, W.P. 25501 (Pak.).

⁷⁸ *Id.*

⁷⁹ See *id.*

⁸⁰ See *id.*

achieve compliance with guidelines.⁸¹ Interestingly, the court noted that although “Pakistan’s contribution to global greenhouse gas emissions is very small, its role as a responsible member of the global community in combating climate change has been highlighted by giving due importance to mitigation efforts in [other] sectors.”⁸²

In a second order, the court further recognized that “[f]or 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.”⁸³ For that reason, the court explained, it is important to implement the recommendations in Pakistan’s National Climate Change Policy in order to “ensure that climate change is mainstreamed in economically and socially vulnerable sectors of the economy and to steer Pakistan towards climate resilient development.”⁸⁴ The court further listed each official appointed as a “focal person” on climate change and the members of the Climate Change Commission.⁸⁵ The court retained jurisdiction (in the form of a continuing mandamus) to hear reports from representatives concerning their future progress.⁸⁶

In these and other newer cases, it is refreshing to see the focus on the environment over traditional “economic development first” arguments, especially in developing nations. Accepting, for a moment, the argument that action against climate change can be economically costly in the short term, it stands to reason that wealthier nations can better afford such action than developing nations. However, even highly developed nations often still do not focus on environmentally sound development, or indeed the *lack* of development, for environmental reasons.

An Austrian court also broke ground with this trend in 2017 when it blocked construction of a new runway at Vienna’s airport mainly on the grounds that the project would increase climate-changing GHG in violation of the Austrian Constitution and the United Nations Framework Convention on Climate Change (“UNFCCC”) Paris Agreement.⁸⁷

⁸¹ *See id.*

⁸² *See* Asghar Leghari v. Fed’n. of Pakistan (2015), LHC (Second Order) (Sept. 14, 2015) (Pak.).

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ Bob Berwyn, *Climate Change Concerns Prompt Court to Block Vienna Airport Expansion*,

The Austrian Climate Protection Law—which forms part of the Austrian Constitution—requires that the transportation sector reduce its share of the total GHG emissions by 2.25%.⁸⁸ However, construction of the runway would have increased emissions by 1.79%.⁸⁹ Under Austrian law, federal administrative law courts must decide cases involving state or federal permits such as this one by weighing competing public interests, including both the economy and the environment.⁹⁰ Said the court: “Through construction of the third runway and the increased air traffic, CO2 emissions in Austria would see a distinct increase. In the court’s view, the additional CO2 emissions can’t be justified, even though the proposal has positive economic aspects.”⁹¹ Furthermore, “[i]ncreased particulate air pollution and the loss of productive agricultural lands were also cited as considerations in the ruling.”⁹² This case was the first climate change case in Austria, although there have been other cases in Austria where projects have been blocked for environmental reasons.⁹³

A similar lawsuit is underway in Norway.⁹⁴ Notably, “activists in that case are asking a court to block a government permit for offshore oil drilling, basing their arguments on new climate protection provisions in the Norwegian Constitution that guarantee a healthy environment for citizens.”⁹⁵

In arguably the most famous non-regulatory environmental case in the United States in recent years, world-renowned climate scientist Dr. James Hansen and a group of youth, acting as guardian for future generations, filed suit against the federal government, claiming that the government’s affirmative actions in causing climate change have violated the youngest generation’s constitutional rights to life, liberty, and property, just as the government has failed to protect essential natural resources in violation of the public trust doctrine.⁹⁶ The government and, unsurprisingly, the intervenors (the National Association of Manufacturers, the

INSIDE CLIMATE NEWS, Feb. 15, 2017, <https://insideclimatenews.org/news/14022017/climate-change-vienna-airport-paris-climate-agreement-james-hansen> [https://perma.cc/9WU3-BK32].

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *Id.*

⁹² Berwyn, *supra* note 87.

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute) moved to dismiss for, *inter alia*, failure to state a claim.⁹⁷ Recognizing that “[t]his is no ordinary lawsuit,” and exercising her “reasoned judgment” as required by this particular area of the law, the judge noted that she has “no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society” and that “a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress.”⁹⁸ Before denying the motions to dismiss, the judge further stated that

this lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss. Indeed, the seriousness of plaintiffs’ allegations underscores how vitally important it is for this Court to apply those standards carefully and correctly. Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.⁹⁹

In June 2017, the same judge also denied the Trump administration’s motions seeking an interlocutory appeal of her 2016 opinion and order denying the U.S. government and fossil fuel industry’s motions to dismiss.¹⁰⁰ Demonstrating the Trump administration’s intense objections to this case, the government immediately filed a rare writ of mandamus to the Ninth Circuit Court of Appeals, seeking, again, to avoid an actual trial on the merits.¹⁰¹

Whether framing the issue as a general public trust issue or citing to particular constitutional and other human rights provisions, it is clear that plaintiffs are finding their way into new legal arenas rather than relying on traditional regulatory ones. This makes sense as few lasting positive results have stemmed from regulation action—including lawsuits—in recent years, at least in the United States.¹⁰² New litigation venues simply

⁹⁷ *Id.*

⁹⁸ *Id.* at 1250.

⁹⁹ *Id.* at 1262.

¹⁰⁰ See *Juliana, et al. v. United States et al.*, 2017 U.S. Dist. No. 6:15-cv-01517-TC, WL 2483705, at *2 (D. Or. June 8, 2017).

¹⁰¹ Pet. for Writ of Mandamus, *United States v. United States Dist. Court for the Dist. of Oregon*, No. 6:15-cv-01517-TC (Or. Ct. App. 2017).

¹⁰² See, e.g., Tim Doyle, *Congress Must Come to Terms On Climate Change Regulation*, THE HILL (Oct. 29, 2017, 3:00 PM), <http://thehill.com/opinion/energy-environment/357701-congress-must-come-to-terms-on-regulating-climate-change> [<https://perma.cc/R3UB-27FD>].

have to be sought out as precious time is, amazingly, still lost to unnecessary and counterproductive discussions about what to do about climate change at the governance level. Human and constitutional rights present just such promising, albeit relatively uncharted, possibilities for litigation that may well assist in pressing the climate issue forward in times of much government stalling and even denial.

E. Fraud and Investments

Much money is at stake for companies that, for years, have invested in products and services that have since proved to be turning unviable in the long term for climate change reasons. This is particularly true for energy providers.¹⁰³ But so is it for investors in various companies who stand to lose very large amounts of money if their investments do not pan out. Thus, “ExxonMobil (“Exxon”) shareholders have filed a class-action lawsuit against the company alleging that it misled its investors and the general public by failing to disclose the risks posed to its business by climate change.”¹⁰⁴ The alleged deception resulted in stockholders paying inflated prices for Exxon stock and subjected them to financial losses because the company knew that the value of its oil reserves was less than what it was telling investors.¹⁰⁵ Plaintiffs claim that

Exxon has long understood the negative effects of climate change and global warming and their relation to the worldwide use of hydrocarbons . . . Exxon understood and appreciated that it was highly likely that it would not be able to extract all of its hydrocarbon reserves and that certain of those assets were “stranded.” Yet Exxon publicly represented that none of its assets were “stranded” because the impacts of climate change, if any, were uncertain and far off in the future.¹⁰⁶

This would be a violation of the Securities Exchange Act as well as a breach of Exxon’s fiduciary duty to its investors.¹⁰⁷ The Securities and Exchange

¹⁰³ David Hasemyer, *Class-Action Lawsuit Adds to ExxonMobil’s Climate Change Woes*, INSIDE CLIMATE NEWS, Nov. 21, 2016, <https://insideclimatenews.org/news/18112016/exxon-climate-change-research-oil-reserves-stranded-assets-lawsuit> [<https://perma.cc/3J8V-YD5E>].

¹⁰⁴ *Id.*

¹⁰⁵ Compl. at 22–23, *Ramirez v. Exxon Mobil Corp.*, No. 3:16-CV-3111 (N. D. Tex. Nov. 7, 2016).

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.* at 23.

Commission (“SEC”) is currently investigating the allegations.¹⁰⁸ This lawsuit adds to the legal woes of Exxon as the company also faces fraud investigations by the attorneys general of New York and Massachusetts under the states’ consumer protection laws.¹⁰⁹ The attorneys general are seeking to determine whether Exxon deceived consumers and investors about the role of its products in contributing to climate change.¹¹⁰ A lawsuit by ExxonMobil seeking to block these climate change fraud investigations was dismissed in April 2017.¹¹¹

Additionally, a group of current and former employees are suing ExxonMobil under the Employee Retirement Income Security Act (“ERISA”).¹¹² The employees claim that the company has endangered the value of their retirement accounts by fraudulently inflating its stock and misrepresenting what it knows about the risks of climate change to its business.¹¹³ They allege that executives in charge of the employee retirement plan knew the company was committing fraud in misrepresenting the dangers of climate change and thus should have avoided investing in its stock.¹¹⁴ They argue this was most irresponsible when the stock was at its most-inflated price and that the company should have written off its stranded assets when the stock price was low and had less distance to fall.¹¹⁵ In failing to do so, the employees claim the company abdicated its fiduciary responsibility.¹¹⁶ It is important to note that Exxon and other companies had already known since the early 1970s that the fossil fuel they produce causes global warming.¹¹⁷ For example, “Exxon conducted cutting-edge climate research decades ago and then, without revealing all that it had learned, worked at the forefront of climate denial, manufacturing doubt about the scientific consensus that its own scientists had confirmed.”¹¹⁸

¹⁰⁸ *Id.* at 20.

¹⁰⁹ Hasemyer, *supra* note 103.

¹¹⁰ *Id.*

¹¹¹ Order at 1, *Exxon Mobil Corp. v. Schneiderman*, No. 17-CV-2301 (S.D.N.Y. Mar. 30, 2017).

¹¹² Am. Class Action Compl. at 2, *Attia v. Exxon Mobil Corp.*, No. 4:16-CV-03484 (S.D. Tex. Feb. 2, 2017).

¹¹³ *Id.* at 15.

¹¹⁴ *Id.* at 12–13, 40, 42.

¹¹⁵ *Id.* at 50–51.

¹¹⁶ *Id.*

¹¹⁷ Marcelo Gleiser, *ExxonMobil Vs. The World*, NPR (Nov. 30, 2016 5:13 AM), <http://npr.org/sections/13.7/2016/11/30/503825417/exxonmobil-vs-the-world> [<https://perma.cc/RGE5-BMWM>].

¹¹⁸ Neela Banerjee et al., *Exxon: The Road Not Taken*, INSIDE CLIMATE NEWS, Sept. 16,

Perhaps motivated by these developments, Chevron has become the first major oil company to warn investors of risks from climate change lawsuits to corporate profits and thus to investments in such companies.¹¹⁹ In the “risk factors” section of Chevron’s 2016 10-K financial performance report to the SEC, Chevron clearly admits that “increasing attention to climate change risks has resulted in an increased possibility of governmental investigations and, potentially, private litigation against the company.”¹²⁰ This may seem obvious, but recall that this is “Big Oil,” the industry that denied the existence of climate change for over half a century while at the same time knowing full well of not only the reality of climate change itself, but also its dangers to our planet.¹²¹

These developments follow in the wake of the much-publicized “dieselgate scandal” in which Volkswagen (“VW”) agreed to a \$4.3 billion settlement—“the largest ever U.S. criminal fine levied on an automaker to settle charges that it conspired for nearly 10 years to cheat on diesel emission tests.”¹²² The company also agreed to pay \$153.8 million to California.¹²³ In total, VW has agreed to spend approximately \$22 billion to address claims from owners, environmental regulators, U.S. states, and dealers just as six current and former senior VW executives have been indicted criminally for their roles in the scheme.¹²⁴

Sadly, it has become fairly common knowledge that even major, reputable companies have gone to extreme lengths to continue protecting their profits, even to the extent that major frauds have been committed

2015, <https://insideclimatenews.org/content/Exxon-The-Road-Not-Taken> [<https://perma.cc/6KPJ-D2JG>].

¹¹⁹ Joe Romm, *Chevron is first oil major to warn investors of risks from climate change lawsuits*, THINK PROGRESS (Mar. 2, 2017, 1:57 PM), <https://thinkprogress.org/chevron-admits-climate-lawsuits-threaten-profits-33937dd562fd> [<https://perma.cc/DWB8-N7LW>].

¹²⁰ Ian Johnston, *Chevron warns it could face climate change lawsuits with future oil drilling potentially ‘economically infeasible,’* INDEPENDENT (Mar. 3, 2017, 5:17 PM), <http://www.independent.co.uk/environment/chevron-oil-warn-climate-change-lawsuits-drilling-green-house-emissions-economically-infeasible-a7609411.html> [<https://perma.cc/43F9-NAYF>].

¹²¹ Joe Romm, *50 Years Ago Big Oil Bragged About Being Able To Melt Glaciers, While They Knew About Climate Change*, THINK PROGRESS (Apr. 14, 2016 6:57 PM), <https://thinkprogress.org/50-years-ago-big-oil-bragged-about-being-able-to-melt-glaciers-while-they-knew-about-climate-change-728efe887daa> [<https://perma.cc/9YX3-AKKY>]; *see also* Dellinger, *supra* note 3, at 1551, 1570.

¹²² David Shepardson, *U.S. indicts six as Volkswagen agrees to \$4.3 billion diesel settlement*, REUTERS (Jan. 11, 2017 9:55 AM), <http://www.reuters.com/article/us-volkswagen-emissions-epa-idUSKBN14V1T0> [<https://perma.cc/32W6-WADD>].

¹²³ *Id.*

¹²⁴ *Id.*

on the general public and individual investors alike.¹²⁵ Regulations have not prevented this. Frankly, litigation may not either, given the near-desperation under which some industries appear to operate in order to continue their corporate activities. In particular, this is the case for “Big Coal” and “Big Oil.” But, given the fact that regulations and common business ethics have been violated to such an extent, litigation certainly seems to be a viable method of asserting significant pressure on some of the companies and industries who otherwise resist the development in this area.

II. FURTHER POSSIBLE LITIGATION

A. *National Scale Litigation*

Regulatory, including, in particular, environmental impact statement lawsuits are always promising or threatening, depending on one’s viewpoint, in the climate change context. For example, “a coalition of environmental groups, ranchers, and the Northern Cheyenne Tribe have filed a lawsuit challenging the Department of Interior’s decision to lift the moratorium on leasing coal on federal lands without having completed a promised environmental review.”¹²⁶ Further,

New York State Attorney General Eric Schneiderman is leading a coalition suing the Trump administration for delaying efficiency standards for a host of appliances, including air conditioners and commercial boilers. In yet another lawsuit, environmental, consumer, and labor groups are challenging a Trump executive order on reducing regulations and regulatory costs, saying the order violates the separation of powers and will strip away safeguards that are vital to protecting the environment and public health.¹²⁷

In the insurance context, insurers have already sent the signal to their clients that they better prepare for climate change or risk getting sued. For example, in 2014, Farmers Insurance Group (“Farmers”) filed nine class-action lawsuits against two hundred municipalities and small towns for failing to prepare for floods and storms that will cost insurance

¹²⁵ See, e.g., *Ramirez v. Exxon Mobil Corp.*, No. 3:16-CV-3111; Am. Class Action Compl., *supra* note 112; Shepardson, *supra* note 122.

¹²⁶ Burger, *supra* note 46, at 360.

¹²⁷ *Id.*

companies billions of dollars in payments unless sufficient remedial efforts are undertaken.¹²⁸ Although Farmers subsequently dropped the lawsuit,¹²⁹ it remains clear that similar lawsuits may well be filed in the future. Cities and municipalities may be held liable for negligence if they, for example, decide to ignore the vulnerabilities exposed by a changing climate. Even nation states may not be safe from lawsuits for liability for loss and damage caused by climate change, despite their attempts in the Paris Agreement to avoid such liability.¹³⁰ For example, the century-old principle that a nation may not allow its territory to be used in ways that cause harm to the territories of other nations has been expanded to include the global commons.¹³¹ “States are under an obligation to protect the environment of other states and in areas beyond national jurisdiction from damage caused by activities on their territory.’ This notion is not limited to neighboring states.”¹³² Of course, lawsuits for such liability would involve difficult issues of causation and excuse, but with the legal developments that we currently witness in this area, it is likely that courts would precisely find legal traceability between activities that cause climate change and at least major wrongdoers such as those in the fossil fuel industry and governments who have failed to take sufficient regulatory action against climate change for decades. Similarly, traditional excuses such as force majeure and necessity may well no longer be granted to defendants in this field.¹³³

Lawsuits will pose a particular problem for private companies that lack the legal protections that otherwise “provide government agencies immunity from liability for discretionary decisions such as delaying infrastructure upgrades due to budget constraints.”¹³⁴ For instance, “[o]ne could easily imagine architects and engineers being accused of professional malpractice for designing structures that don’t withstand foreseeable climate-related events,” says Michael Gerrard of the Sabin Center for

¹²⁸ *Insurer’s Message: Prepare for Climate Change or Get Sued*, NBC NEWS (June 6, 2014, 4:50 PM), <http://www.nbcnews.com/science/environment/insurers-message-prepare-climate-change-or-get-sued-n122856> [<https://perma.cc/H3UU-74UK>].

¹²⁹ *Id.*

¹³⁰ See generally Myanna Dellinger, *Rethinking Climate Change-Related Force Majeure in Int’l Law*, 37 PACE L. REV. 455, 476 (2017).

¹³¹ See, e.g., *id.* at 455, 476.

¹³² *Id.* at 476 (citing to ‘No-Harm Rule’ and Climate Change, LEGAL RESPONSE INITIATIVE at 2 (July 24, 2012), <http://legalresponseinitiative.org/wp-content/uploads/2013/07/BP42E-Briefing-Paper-No-Harm-Rule-and-Climate-Change-24-July-2012.pdf> [<https://perma.cc/92CW-HFH5>]).

¹³³ See generally Dellinger, *supra* note 15; Dellinger, *supra* note 130.

¹³⁴ *Insurer’s Message: Prepare for Climate Change or Get Sued*, *supra* note 128.

Climate Change Law at Columbia Law School.¹³⁵ The exact nature of the legal risks in this area may not be known, but it is becoming clear that the risk of at least having to defend oneself against lawsuits on climate change bases is increasing whether defendants are small or large companies, government units, or even federal governments. The latter will be briefly examined next.

B. International Scale Adjudication

International-level adjudications among nation states, or obtaining advisory opinions from the International Court of Justice, provides another set of options for potential progress against climate change in combination with diplomatic negotiation solutions and national-level legislation.¹³⁶

Adjudication may be seen as a departure from the approach of the UN climate change regime, which is, to a great extent, based on negotiations and broad agreement.¹³⁷ The regime has generally adopted a managerial rather than an enforcement approach to compliance.¹³⁸ Concepts such as “reporting,” “review,” or “compliance” have been met with great resistance, whereas less confrontational terms such as “communication of information,” “international consultation and analysis,” and “multilateral consultative processes” have been preferred.¹³⁹ The “rule of negotiations paradigm”¹⁴⁰ has been favored as it is considered to bring about a greater degree of legitimacy than national or even international adjudication.¹⁴¹

However, the UNFCCC regime does operate with adjudication as an explicit option for dispute settlement dependent on state consent.¹⁴² Adjudication may serve a valuable complementary role to international

¹³⁵ *Id.*

¹³⁶ *See, e.g.*, Dellinger, *supra* note 130, at 459–60, 476–77.

¹³⁷ *UN Launches Partnership Initiative to Promote South-South Cooperation on Climate Change*, UN SUSTAINABLE DEV. GOALS (Apr. 27, 2016), <http://www.un.org/sustainable-development/blog/2016/04/the-united-nations-launches-new-partnership-initiative-to-promote-south-south-cooperation-on-climate-change> [https://perma.cc/2ZEC-D2QD].

¹³⁸ *See generally* ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

¹³⁹ United Nations Framework Convention on Climate Change art. 12–13, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Copenhagen Accord to the United Nations Framework Convention on Climate Change, UNFCCC Decision-/CMP.5, para. 5, U.N. Doc. FCCC/KP/CMP/2009/L.9.

¹⁴⁰ Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 *YALE J. INT'L L.* 451, 493–95 (1993).

¹⁴¹ *Id.*

¹⁴² UNFCCC, *supra* note 139, art. 14.

agreements and national-level legislation. For example, whereas democratic theory calls for people of a community to be able to govern themselves, democratic theory does not say that legislators are entitled to make decisions that affect people in other countries who are not represented in a given electoral process and thus have no voice.¹⁴³ Litigation could address specific contested issues at the national, but also international level.

However, even when international agreements are reached and allow for adjudication—such as the UNFCCC framework—the issue of climate *injustice* is often not addressed sufficiently from the point of view of vulnerable nation states. For example, such states were not even able to establish a mechanism to consider the issue of loss and damage until the 2013 Warsaw Agreement.¹⁴⁴ The 2015 Paris Agreement, however, makes it difficult for nation states to argue liability for damages caused by certain nations because the relevant article “does not involve or provide a basis for any liability or compensation.”¹⁴⁵ Still, under the UNFCCC regime, litigation is at least possible due to the state consent given under the framework.¹⁴⁶ Of course, actual litigation outcomes are far less certain and come with the usual range of litigation downsides.

Another less contested option may be to seek an advisory opinion from the International Court of Justice (“ICJ”).¹⁴⁷ An ICJ opinion would arise outside the will of negotiation parties and thus not be subject to endless negotiations and possible renegotiations.¹⁴⁸ An ICJ opinion regarding the obligations of states to ensure that their GHG do not cause serious damage to other states could potentially assist the negotiating process. Importantly, the ICJ has already declared that the duty to prevent significant transboundary harm is part of general international law.¹⁴⁹ The conflict between this holding and the UNFCCC framework’s

¹⁴³ STEVE VANDERHEIDEN, *ATMOSPHERIC JUSTICE: A POLITICAL THEORY OF CLIMATE CHANGE* 89–90 (2008); DAVID HELD, *MODELS OF DEMOCRACY* 337–38 (2d Ed. 1996).

¹⁴⁴ Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, UNFCCC Decision 2/CP.19, U.N. Doc. FCCC/CP/2013/10/Add.1, at 6 (Jan. 31, 2014).

¹⁴⁵ Adoption of the Paris Agreement, UNFCCC Decision 1/CP.21, para. 51, U.N. Doc. FCCC/CP/2015/10/Add.1, at 2 (Jan. 29, 2016).

¹⁴⁶ UNFCCC, *supra* note 139, art. 14.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See CHINTHAKA MENDIS, *SOVEREIGNTY VS. TRANS-BOUNDARY ENVIRONMENTAL HARM: THE EVOLVING INTERNATIONAL LAW OBLIGATIONS AND THE SETHUSAMUDURAM SHIP CHANNEL PROJECT*, UNITED NATIONS/NIPPON FOUNDATION FELLOW PAPER 7–8 (2006), http://www.un.org/depts/los/nippon/uniff_programme_home/fellows_pages/fellows_papers/mendis_0607_sri_lanka.pdf [<https://perma.cc/24ES-3VUS>]; see also Legality of the Use

rejection of liability for loss and damage appears obvious. The ICJ could delineate the responsibilities and liabilities in this context.

More diffuse advantages of an ICJ opinion are that it could help shape and influence future national and international negotiations on climate change. Negotiations often focus on what nation states are expected to do from practical and political angles. An ICJ opinion would help focus attention on the resulting legal obligations and outright financial liabilities that the world community will have to grapple with very soon. An opinion could, in other words, influence the ongoing UN climate negotiations, by “setting the terms of debate, providing evaluative standards . . . and establishing a framework of principles within which negotiations may take place to develop more specific norms.”¹⁵⁰ Judicial decisions serve to “redistribute argumentative burdens,”¹⁵¹ not only in future litigation, as precedents, but also in international diplomacy.

Finally, an ICJ opinion could serve an expressive function and thus help change social norms and values in general.¹⁵² Of all things needed, this is currently among the more important, as social paradigm and value shifts could, finally, provide a platform for the drastic change needed in relation to climate change.

As with everything, downsides of international adjudication also exist. Defendants may not comply, so even contentious proceedings may not actually prove effective in resolving disputes and bringing about the change needed. Actual litigation—and thus not “just” an advisory opinion—is contentious and may produce long-term effects of ill will, bad publicity, and further withdrawal from the international legal and diplomatic scene than what we are already witnessing. Such negative effects may spill over into future climate negotiations. However, the vicissitudes of national and international climate policy have made action at other levels of governance, by both public and private actors, more important than ever. This includes litigation-based approaches.

by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 29 (July 1996).

¹⁵⁰ Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 GLOBAL LEG. STUD. J. 105, 119 (1995) (describing effects of “declarative international law”).

¹⁵¹ Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking by International Courts*, in OXFORD HANDBOOK 503, 507 (2013).

¹⁵² See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (analogizing law to expressive social acts and social norms).

CONCLUSION

Along with other action, litigation may well prove to be an important method of ensuring the much-needed progress against climate change. Solely relying on regulatory action and government goodwill, it unfortunately appears, will not ensure a timely solution to the problem. Litigation proved successful in many other contexts (think tobacco, asbestos, faulty vehicles, and many medical treatments), and so too may it in relation to climate change. Lawsuits may set important legal precedent in legal systems that recognize this, but even where precedent is not legally recognized, they will undoubtedly make a major impression on judges and others. Says Michael Gerrard: "I think the great impact is that these decisions may embolden some judges around the world to use similar theories when deciding climate cases. It's always easier to be fifth or tenth at something than first."¹⁵³

Some experts even consider legal action to be the "last, best hope for averting catastrophic climate change."¹⁵⁴ Says former NASA scientist and climate activist James Hansen:

[t]his . . . is the conclusion I've come to. I've gone to more than a dozen countries, and to my surprise, it's not much different than the U.S. The fossil fuel industry is incredibly powerful worldwide. They have the ability to influence the executive and legislative branches of governments in all countries, so we have to plan on using the judicial branch to take action.¹⁵⁵

As litigation may, on the one hand, seem hostile and counterproductive, it may well prove to be an effective and certainly much needed way of signaling to lawmakers around the world that, as has been said so many times already, action can no longer wait. This is particularly true in the United States with our lingering and now apparently resurfacing resistance towards what we know we have to do: phase out our excessive use of fossil fuels and chemicals that place our planetary climate system in

¹⁵³ Bob Berwyn, *Climate Change Concerns Prompt Court to Block Vienna Airport Expansion*, INSIDE CLIMATE NEWS, Feb. 15, 2017, <https://insideclimatenews.org/news/14022017/climate-change-vienna-airport-paris-climate-agreement-james-hansen> [<https://perma.cc/GYG7-V4Q3>].

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

extreme jeopardy.¹⁵⁶ It appears that we as a nation keep beating around the bush for reasons of politics and corporate profits. Whereas there is a time and place for everything including shifting political attitudes and, of course, corporate profit-making, we simply have to realize that turning a blind eye to the necessity of taking effective action against climate change, undesirable as this may be for some actors, will only be making things much worse in the now no longer so distant future. To the extent that corporations, governments, and other responsible actors do not take sufficient action against climate change, one of the adverse consequences they will have to face will be lawsuits with worse and worse chances of winning.

¹⁵⁶ Gleiser, *supra* note 117.

