

Climate change litigation is heating up

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Environment analysis: What are the challenges when bringing a climate change case? Lawyers and project leaders at ClientEarth and Greenpeace discuss the hurdles and what to look out for when bringing such cases, and give us some predictions for the future of climate change litigation.

What sort of evidence would/could be necessary in a challenges against carbon majors, such as the one in the Philippines?

PSL practical point: For more on the Philippines challenge see *News Analysis* Climate change litigation—Philippines investigates carbon majors' responsibility for human rights breaches.

Scientific evidence is likely to play an important role in any climate change litigation. However, helpfully for claimants and courts, the reports of the Intergovernmental Panel on Climate Change (IPCC) provide an authoritative source of the latest scientific consensus on the causes and likely effects of climate change (the IPCC's latest report, the Fifth Assessment Report, is available on their website). The IPCC's rigorous process of obtaining consensus among all government participants means that courts can take judicial notice of the facts contained in the IPCC's reports, which was the approach taken by the Dutch court in the *Urgenda* decision (*Urgenda Foundation v the State of the Netherlands*, C/09/456689/HA ZA 13-1396, judgment of 24 June 2015).

Scientific understanding of the effects of climate change on weather is also rapidly improving. Scientists can now conclude that human activities have directly changed the frequency or intensity of specific extreme weather events, and have also developed methodologies allowing them to attribute events to human influence rapidly after they occur (see climate central analysis). This work may have significant implications for climate change litigation (Thornton, J & Covington, H, 'Climate change before the court', CarbonBrief).

While courts are becoming increasingly comfortable with climate science, lack of full scientific certainty may not be an insurmountable barrier for claimants. Litigants in some jurisdictions may be able to rely on the precautionary principle, which allows courts to consider the serious environmental risks posed by climate change, even though the exact harm is uncertain. The Philippine Rules of Procedure for Environmental Cases explains that '[p]recaution requires even greater diligence than prevention, by calling for measures to safeguard the environment even if the occurrence of harm is uncertain' (Sub-committee on the Rules of Procedure for Environmental Cases, Rules of Procedure for Environmental Cases, Apr. 29, 2010 at 82). This approach was recently confirmed in the landmark Supreme Court case *ISAAA v Greenpeace SEA (Philippines)* concerning a genetically engineered eggplant (aubergine). The court explained that '[a]n application of the precautionary principle to the rules on evidence will enable courts to tackle future environmental problems before ironclad scientific consensus emerges' (*ISAAA v Greenpeace Southeast Asia (Philippines)*, et al., G.R. No. 209271, at 100).

What could be the possible remedies?

Climate change victims may wish to request a range of remedies from the courts, including declaratory orders, compensatory damages or injunctive relief. The remedies that courts will be prepared to issue will depend on the particular facts and circumstances of the case. Other litigants concerned with the mitigation of climate change-related harms are likely to seek orders relating to the extraction and use of fossil fuel products, the main source of greenhouse gas emissions. Climate litigants will also be interested in orders creating greater market transparency and forcing companies to ensure business activities are consistent with national and international climate, environmental and human rights laws.

Defendants in climate change litigation have argued that climate change litigation raises non-justiciable political questions that should be resolved by the elected branch of government (these arguments were raised by the defendants in *American Electric Power Co, Inc., et al v Connecticut*, 206 F Supp 2d 265 (SDNY, 2005) and accepted by the District Court of New York, although they did not form the basis of the Supreme Court's final decision to reject the claimant's claims). However, a US federal magistrate judge recently found that although climate change litigation raises difficult

issues, this should not bar claims, especially where allegations are made of interferences with fundamental rights (*Kelsey Cascade Rose Juliana, et al v the United States of America, et al*, No. 6:15-cv-01517-TC, 8 April 2016). Claimants suffering the effects of climate change will seek remedies that they consider protect their lives, rights and livelihoods.

What are the jurisdictional issues?

Complex jurisdictional issues arise from the nature of climate change as a global, trans-boundary environmental crisis. The most vulnerable people are likely to be the first victims of climate change and are also likely to reside in developing nation-states with little past contribution to global greenhouse gas emissions. Furthermore, those nation-states may be reluctant to assert extra-territorial jurisdiction over private defendants such as the carbon majors, particularly if they do not have a presence or operations in the court's jurisdiction.

As noted in the Philippines petition, the UN's Guiding Principles on Business and Human Rights (Guiding Principles) call on companies to respect human rights (United Nations Human Rights Council, Resolution Adopted by the Human Rights Council: 17/4 Human Rights and Transnational Corporations and Other Business Enterprises, Seventeenth Session, July 06, (last accessed on Apr. 20, 2016)). This applies to the entire spectrum of internationally recognised human rights and requires companies to consider the impacts of business, wherever they occur and throughout operations (Guiding Principles at 2, principles 11–12 at 13–14).

The petition also notes that, according to international law, nation-states have obligations with respect to human rights, both within their territories and extra-territorially, and they must take necessary measures to prevent their corporations from interfering with the enjoyment of human rights both within their territory and in other countries and that they should take action, separately and jointly through international cooperation, to realise human rights universally (Maastricht Principles on Extra-territorial Obligations of States in the Area of Economic, Social and Cultural Rights).

Despite the jurisdictional issues, there is potential for cross-boundary claims by individuals who have been harmed by the operations of multi-national corporations. For example, in the case of *Bodo Community & Ors v Shell Development Company of Nigeria (Bodo Community v Shell Petroleum Development Co of Nigeria Ltd* [2014] EWHC 1973 (TCC), the UK Supreme Court exercised jurisdiction over a Nigerian subsidiary of a UK domiciled parent. The High Court more recently accepted jurisdiction over the London listed Vedanta Resources, in the context of a claim brought by Zambian claimants affected by its subsidiary's copper mining operations (*Lungowe v Vedanta* [2016] EWHC 975 (TCC)).

Greenpeace Southeast Asia recognises that a range of jurisdictional questions are expected to be raised by the Philippines Commission, such as whether the investigating body has jurisdiction over the respondents (listed in different parts of the world). Issues may also arise regarding the subject matter which pertains to the harms resulting from the impacts of climate change, and whether the Commission can grant the remedies sought. However, the responsibility of businesses to respect human rights must be carried out within and beyond their premises and businesses must be mindful of the long-term and far-reaching impacts of their operations on the human rights of people anywhere in the world, such that if the businesses infringe, cause or participate, directly or indirectly, in the infringement of human rights — current and future—it is the mandate of the human rights institution to hold them accountable.

Is this an emerging area of law that lawyers should pay closer attention to? If so, why and what?

This is certainly an emerging area of law that lawyers should be paying attention to. Climate change is fundamentally disruptive by its nature and will have a range of diverse impacts across society, causing significant financial loss (see 'The cost of inaction: Recognising the value at risk from climate change') and widespread human suffering. Affected parties will want to prevent activities that are contributing to the harm and shift liabilities and/or seek compensation from those who are seen as most responsible for the current climate crisis and who continue to cause or contribute to that harm.

The Prudential Regulation Authority's seminal report of September 2015 *The impact of climate change on the UK insurance sector: A Climate Change Adaptation Report* by the Prudential Regulation Authority, considered the risks of climate change to the insurance sector, identifying the following three main categories of risk to arise from the effects of climate change:

- physical risks—eg the first-order risks which arise from weather-related events, such as floods and storms

(they comprise impacts directly resulting from such events, such as damage to property, and also those that may arise indirectly through subsequent events, such as disruption of global supply chains or resource scarcity)

- transition risks—the financial risks which could arise for firms from the transition to a lower-carbon economy
- liability risks—risks that could arise for insurance firms from parties who have suffered loss and damage from climate change, and then seek to recover losses from others who they believe may have been responsible

These risks apply equally to companies in other sectors, and indeed across the whole economy. Investors are starting to appreciate the scale of the financial risks posed by climate change and are engaging with companies using their rights to propose shareholder resolutions requiring companies to analyse the potential impacts of climate change on company business models. (In 2015, Shell and BP passed shareholder resolutions calling on the company to provide greater transparency in relation to climate-related impacts and risks. This year in the UK, investors in Anglo American, Rio Tinto and Glencore passed similar resolutions, supported by the 'Aiming for A' investor coalition. 2016 saw the largest number of climate-related resolutions proposed in the US, with record support from mainstream investors for resolutions calling on Chevron and Exxon to stress test their portfolio's resilience in a low carbon economy.)

From the perspective of the most vulnerable, climate change infringes legally enforceable rights. It would be a grave injustice for the courts to deny remedies to the victims of climate change whose nations and communities have often made the smallest contribution to global greenhouse gas emissions.

What are the trends in this area? What are your predictions for the future?

As noted above, there are clear signs that investors are becoming concerned about the financial implications of climate-related risks for companies and the financial sector. Companies that fail to adequately manage these concerns may face shareholder backlash.

In light of the historic COP 21 Paris Agreement, in which states agreed to implement emissions reduction policies in line with their nationally determined contributions, we can expect increased regulation of greenhouse gas emissions by states. There will also be greater scrutiny of licensing and permitting of new greenhouse gas intensive projects, and new developments are likely to be challenged on the basis of climate impacts. This is likely to lead to increased scrutiny from both industry and civil society groups as states begin the challenging task of delivering on their international obligations.

The International Bar Association (IBA) produced a report, *Achieving Justice and Human Rights in an Era of Climate Justice* (July 2014) that contains a number of recommendations to ensure those gravely affected, but least responsible, can seek climate justice. One of the recommendations is for a comprehensive model statute that would provide for 'the identification of actionable rights available to individuals'.

In the US state of California, the Climate Science Truth and Accountability Act of 2016 was proposed to extend the statute of limitations in state law and enable law enforcement to hold companies liable if found to have committed fraud by deceiving the public about the risks of climate change, in order to maximise profits.

Finally, there is a growing global climate justice movement persistent in improving the capacity of the people to take judicial and quasi-judicial actions, in strengthening scientific and legal evidence and in mobilising the legal community in the fight for climate justice.

It is clear that climate change litigation is just warming up.

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