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– Final Draft Legal Brief –

Highlights from Climate Litigation *(c. 10 pages).*

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1. INTRODUCTION

The impacts of climate change are on the rise, with the 1.5 °C Special Report (SR15) by the Intergovernmental Panel on Climate Change (IPCC) mentioning we have about twelve years before irreversible damage is done - climate litigations are increasingly becoming a reliable way to address the anthropogenic role in it[1]. Over the years, the legal system has seen some norm-changing climate change litigations (CCL) that have addressed both the mitigation and adaptation aspects of climate change[2]. In this paper, we discuss why CCL are playing an increasingly important role in addressing climate change that cannot be ignored by governments, companies as well as financial decision-makers.

For the purpose of this brief, CCL can be defined as "any piece of federal, state, tribal, or local administrative or judicial litigation in which the . . . tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts"[3]. Since this brief will look at cases globally, this definition is extended to accommodate international cases related to the impacts and causes of climate change.

In this brief, we discuss five commonly successful arguments brought forward in CCL, followed by some developing trends and possible steps forward that could be taken by groups to avoid being liable to such CCL themselves. We begin by identifying the strategies used in CCL that have made them relatively successful in different jurisdictions and why that have been the case. Through research, we have identified human rights claims, precautionary principle, public trust doctrine, nuisance provisions and climate risk disclosures as some common arguments used in CCL. These arguments and why they have worked in a legal setting will be discussed with relevant cases. Following which, some general developing trends in CCL will be looked at, especially as they relate to mitigation and adaptation-related cases, how common and civil law systems have responded to CCL. Moving forward, from the analysis of CCL, potential actions that could be taken by governments, organisations and corporations will be identified to avoid liability - these include raising ambitions for taking action related to addressing climate change, disclosing the full risks associated with climate change and divestment from fossil fuel investments. These actions could help address possible CCL types that are commonly brought against private companies and

individuals, such as financial redress, or those brought against governments, such as increasing ambitions. Failure to take adequate action in preparation for CCL could result in possible financial, reputational or political losses for the entities concerned.

2. Climate litigation – Recent Developments Internationally

Greenhouse gas (GHG) emissions have been increasing at a dangerous rate, placing the world's population increasingly at risk of catastrophic climate change[4]. Historically, many nations and companies within them are releasing large amounts of GHG partly due to weak domestic and international legal frameworks limiting their release[5]. While climate change has been an issue of concern for decades, recently there has been a rise in the use of the legal system as a way to provoke action[6]. According to a recent report, there have been more than 1000 CCL filed globally, with about 800 of them in the United States (US) alone[7]. Majority of these litigations were based on domestic laws that existed within those jurisdictions[8]. As of 2018, there are about 1500 climate-relevant laws globally – which is an increase of more than 20 times over the past 2 decades[9]. All 197 ratifying and signatory countries of the Paris Agreement have at least one law related to the transition to a low-carbon economy or climate change[10].

While the increase in CCL taking place globally has been impressive, it is likely to only increase in light of some recent developments at the UNFCCC level that give them more credence. In October 2018, the release of the SR15 spurred greater conversations around the urgency to reduce GHG emissions given that the report claimed there is only twelve years before global temperatures will rise above 1.5 degrees Celsius, which will have disastrous consequences for the ecosystem and humans[11]. The report was aimed to provide a reliable scientific resource for policy makers and practitioners to address climate change[12]. On a positive note, a key message from the SR15 was that limiting global temperature rise to 1.5 degrees Celsius by 2030 is possible if "*rapid, far-reaching"* transitions are made in energy, buildings, cities, amongst others, to result in a quick emissions reduction[13]. This call, coupled with the increasing evidence base of anthropogenic GHG sources' role in causing climate change[14], is threatening greater CCL against governments, corporations and organisations to hold them accountable for their actions or inactions in light of climate change.

In December 2018, the 24th UNFCCC Conference of Parties took place in in Katowice, Poland - where the Paris Rulebook was adopted[15]. The Paris rulebook operationalises the Paris Agreement (PA) text that was agreed in 2015[16]. While most of the negotiations that took place during COP24 tended to focus on the technical operational aspects of the PA, there are some areas that could be of interest with respect to CCL. For example, under decision -/CP.24 Annex, which pertains to the

'Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts' *(WIM ExCom)*, the WIM ExCom invited parties in 1(g)(i):

> *"To consider formulating laws, policies and strategies, as appropriate, that reflect the importance of integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change and in the broader context of human mobility, taking into consideration their respective human rights obligations and, as appropriate, other relevant international standards and legal considerations"*[17].

However, while it is a progress on some fronts, the recommendation itself is in the Annex and coupled with the fact that it merely 'invites' parties to consider the recommendation, the implied importance of the text is greatly reduced in a legal setting. Hence, while it is unlikely to result in a strong foundation for a CCL, it could still guide some legal challenges and further developments in the next COP, where the WIM will be reviewed, are to be watched[18].

In addition, in Katowice, under matters relating to Article 15 of the PA, on the Compliance Mechanism, parties agreed to a 12-member committee to oversee compliance to the PA by parties[19]. The committee is specified to be "*expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive*"[20]. Hence, the committee itself may not be able to punish parties for a lack of action as per the PA but its decisions could be used by litigants in a CCL as additional support against a government entity.

Last year, the Carbon Majors Report (2017) was released and it narrowed down the attribution of GHG to specific companies - claiming that more than 70% of the global GHG emissions can be traced backed to just 100 companies, which includes both private and state-owned entities[21]. The increased accuracy that attribution science has evolved to is an incredible achievement as it allows a more focused approach to finding solutions. However, at the same time, it could increase the possibility of CCL being brought forward against the entities that have been found to have emitted large amounts of GHG, such as specific corporations[22].

The International Organization for Migration (IOM), the leading intergovernmental migration agency, set up in 2015 its Migration, Environment and Climate Change (MECC) Division to focus on research that intersects in the area of climate change and migration[23]. While climate- and

environmental-induced migration has long been an area of concern for the IOM, in the recent years, there has been increasing awareness that it will be one of the leading obstacles in the 21st century. In addition to transnational migration, there is also a high risk of internally displaced migration that could occur due to the impacts of climate change. Legislation that adequately addresses and prepares both public and private entities in face of mass migrations is necessary to provide for the migrants while also a necessary precaution against liabilities that might arise due to litigation.

3. SUCCESSFUL CCL ARGUMENTS

In CCL, some key arguments commonly used by litigants have made considerable progress recently. In this section, arguments have been selected based on a combination of the potential wider consequence if found successful in a court setting together with their legal admissibility. Hence, success here does not necessarily indicate that they have been successful in their outcomes, as some of the cases are still ongoing.

Human Rights Claims

In both developed and developing country legal systems, basic human rights are enshrined in a country's constitution or in international human rights acts that a country is usually a signatory to. These declarations of human rights could be interpreted in a way to hold a country's government or a corporation that acts within a country accountable in regards to action on climate change. This is exactly what happened in 2015 in the case *Ashgar Leghari v. Federation of Pakistan.*

In *Ashgar,* a farmer sued the Pakistani government for not taking adequate actions to protect its citizens against climate change. The government was claimed to have failed in carrying out its Framework for Implementation of Climate Change Policy (2014- 2030) and National Climate Change Policy of 2012[24]. As a developing country, the main focus of the plaintiff and the court was on adaptation undertaking by the government[25]. Hence, the court found the Pakistani government liable for taking greater action to protect the rights of its citizens as codified in articles 9 (right to life), 14 (human dignity), 19A(information) and 23 (property) of Pakistan's constitution[26]. The court stated "*the delay and lethargy of the State in implementing the Framework offend the fundamental rights of the citizens,*" and ordered the government to appoint a climate

change focal person for many government ministries, with a list of action points, and to create a multi-stakeholder Climate Change Commission to oversee the government's progress[27].

The *Ashgar* case showed how wide of a repercussion could a single CCL have in a national context. One of the primary reasons for successful outcome of the case was due to the detailed 734 action points listed by the government ministry, of which 232 were listed as priorities[28]. Without this detailed list of actions, it would have been difficult for the court to decide if indeed the government had failed in its efforts to protect the citizens' rights under the Pakistani constitution.

In this CCL, a human rights-based argument was used, and it provided a pathway through which action could be taken on those who were responsible for increasing efforts to address climate change.

Precautionary Principle

The precautionary principle is another key argument that has been commonly used in CCLs. The principle exists in different forms in a number of legal systems but one place where it exists that has an almost universal acceptance is in the UNFCCC itself under Article 3.3:

"*The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost*."[29]

As all UN nations have ratified the UNFCCC that contains a precautionary principle[30], it could be potentially used by litigants in a CCL to hold entities, such as country governments, accountable. Yet, as the word "should" is used in the convention when referring to the principle, it does not carry with it as much of a heavy legal obligation as "shall"[31]. Hence, it is up to the discretion of the court to interpret it accordingly. In the case of *Urgenda Foundation v. Kingdom of the Netherlands,* the Dutch court interpreted the principle in a way to hold the government accountable to their international obligations[32].

Urgenda was the first successful case in which collective public action made use of the precautionary principle of the UNFCCC, amongst others, to hold the Dutch government accountable to limit its GHG emissions[33]. In the case, first launched in 2015, the Urgenda Foundation and 900 Dutch citizens were the plaintiffs who sued the Dutch government to increase its actions in reducing GHG emissions[34]. Similar to *Ashgar,* the government in Urgenda was claimed to have violated the constitutional duty of care towards its citizens. The Dutch government had initially pledged to reduce their GHG emissions by 17% below 1990 levels by 2020 but the court ruled that it was insufficient and ordered a decrease of 25% instead[35]. To arrive at its final decision, the Hague District Court, cited without applying directly, the precautionary principle in the UNFCCC, 'Article 21 of the Dutch constitution' (on citizens' rights), amongst other laws and principles[36].

There are two reasons as to why the precautionary principle can be useful in a CCL. Firstly, the principle can provide a potential solution to the issue of proving causality in a CCL for litigants. Proving causality is one of the main challenges litigants face as climate attribution science has not reached that level of specificity to be used in a court setting against a particular GHG emitter. The IPCC defines "well-mixed greenhouse gases" in the atmosphere as climate change's key causal mechanism[37]. Due to this mixing, it is difficult to ascertain distinct contributions, making attribution of damage and hence, causality, difficult. This is where the precautionary principle could be useful, preventing the release of GHGs in the first place on the grounds that GHGs are for a fact harmful to the climate if released[38]. Secondly, the precautionary principle causes the burden of proof to be held by the implementing entity of a policy or action to demonstrate that no harm will arise, when there is no scientific consensus[39]. Hence, this could be useful for litigants who may not have the capability or resources to provide proof of harm attributable by the GHG.

Public Trust Doctrine

The public trust doctrine is another important line of argument used in CCL to hold governments accountable for action against climate change. The public trust doctrine can be defined as the duties of a government, with regards to natural resources, which prevent it from

"*depriving a future legislature of the natural resources necessary to provide for the well- being and survival of its citizens*"[40].

The public trust doctrine is a useful base for arguing in a CCL for two main reasons. First, it can be found in both civil and common law systems, as it is derived from old Roman laws[41]. This allows CCL to capitalise on it across a broad range of legal systems. Second, the doctrine can be interpreted relatively flexibly, to the advantage of citizens or interest groups, against governments for the environment[42]. Yet, one challenge with using the public trust doctrine is that it is not always clear if it can be used to include the oceans and atmosphere, as historically it has only been used for land and rivers[43].

One prominent case in which the public trust doctrine has played a key role is *Juliana v. United States.* In *Juliana,* twenty-one young plaintiffs (Our Children's Trust) have sued the US government in 2015 for violating their constitutional right to 'life, liberty and property' by intentionally allowing carbon dioxide emissions to rise to a 'catastrophic level' and thereby not fulfilling their duty under the public trust doctrine[44]. While many similar cases have been previously outright dismissed by US courts, primarily due to a lack of standing by the plaintiff or the lack of recognition of a clean environment as a right[45], *Juliana* progressed as the US District Court of Oregon upheld that access to a clean environment was a fundamental right[46]. While the case is currently on appeal and held up by the Ninth Circuit Court of Appeals, if a favourable ruling is eventually reached, it would be a landmark achievement on many levels for CCL globally[47].

Nuisance Provision

Under tort law, nuisance provisions could be another potential avenue through which CCL could be launched. Nuisance provisions under tort law are useful for two main reasons. Firstly, nuisance provisions exist in many jurisdictions and can be a useful foundation to launch CCL with[48]. The nuisance provisions could be interpreted in a way to claim damages from fossil fuel companies. Second, the nuisance provisions could allow a CCL to be used against a private corporation responsible for climate change by foreign individuals or groups, bypassing the need for an international court. This can be achieved in national jurisdictions that allow it, such as in Germany as evidenced by *Lliuya v. RWE AG.*

In 2015, Saúl Luciano Lliuya, a Peruvian farmer, filed for damages against RWE, a German utilities company[49]. Lliuya claimed that RWE should pay for flood protections he had built in his hometown to protect it from glacial melting due to RWE's historical emission of GHG over the years. As Germany's largest electricity producer having been around for more than a hundred years, RWE was sued to pay for 0.47% of the total cost of the floodwall, which was roughly the

estimated share of RWE's annual contribution to GHGs by Lliuya[50]. While initially dismissed, in November 2017 the appeals court decided it was well-pled and admissible, progressing it to the evidentiary phase[51]. *Lliuya* is grounded in the 'nuisance' provision of German Tort Law, under § 1004 of the German Civil Law Code (BGB)[52]. The German appellate court decided that despite the lack of evidence to prove linear causality directly attributing the entire flood risk posed to Lliuya's hometown by RWE's GHG emissions alone, it was sufficient to prove a 'partial causation'[53]. Moreover, the court has granted the use of climate models for legal evidence, without the need for direct attribution[54]. Germany is unique in the sense that it is a signatory to the 2001 Brussels Regulation, which allows plaintiffs to "file a case in a European Union member state against a corporation domiciled in that country for climate damages that take place outside of Europe"[55].

Climate Risk Disclosure

A relatively recent type of argument through CCL that could pose a challenge to financial entities is climate risk disclosure. Financial entities, such as banks and other investment corporations, are often responsible for providing their investors a transparent assessment of risks so that investors can make informed decisions[56]. There is an increasing awareness that the assessment of risks by companies should include those posed by issues related to climate change, both the physical risks as well as those posed by the increasing pace of transition to a low-carbon economy[57]. In light of the difficulty in ascertaining climate-related risks adequately, the Financial Stability Board (FSB) established the Task Force on Climate-Related Financial Disclosures (TFCD)[58]. The TFCD is an industry-led task force that is made up of 32 international members comprising banks, consulting firms, large non-financial companies, amongst others, and has published a number of reports recommending climate-related financial disclosure in the areas of governance, strategy, risk management, metrics and targets[59].

Not disclosing climate-related risk could leave a company liable to CCL, as demonstrated by *ClientEarth v Enea* that was filed on October 2018[60]. In the case, ClientEarth, a non-governmental environmental law organisation that holds shares in Enea, a Polish utility company, sued Enea due to a company resolution to build a new €1.2bn 1GW coal-fired power plant[61]. The CCL was based on the Polish Commercial Companies Code, with ClientEarth claiming that the construction of the new coal power plant will harm the economic interests of the company as a result of climate-related financial risks[62]. According to ClientEarth, Enea's actions "*risk breaching board members' fiduciary duties of due diligence and to act in the best interests of the companies and their shareholders*"[63]. The financial risks posed by the construction of the new plant to shareholders are a result of increased competition from lower-priced renewable energies, increasing carbon prices

and EU energy reforms that could impact state subsidies for coal power[64]. Since the case has only recently been filed, the pleading is not yet publicly available, and it remains to be seen how exactly the ruling will turn out[65]. Yet, whatever the ruling might be, this serves as a warning to other companies to be careful in disclosing climate-related risks to their shareholders or risk being liable to CCL themselves.

In a similar case, *People of the State of New York v. Exxon Mobil Corporation,* Exxon Mobil Corporation was alleged by the Attorney General of New York for fraudulent acts in misleading investors on the company's climate change risk management practices. According to the litigation filed, climate change is a "*critical investment issue*" to investors and while Exxon had proxy internal prices to account for the cost of GHG reducing risks, these were inconsistently applied or not applied at all internally[66]. For example, in 2010 and 2011, Exxon publicly stated that it adopted a proxy cost of US$60 for its projects in OECD countries due to climate change regulatory risks but it only applied a cost of US$40 internally[67]. This is supported by internal communication evidence that showed 'Exxon's management approved of this deviation even though it knew that the lower internal values were less protective against climate change regulatory risk than the proxy cost described publicly'[68]. The case is still ongoing[69], but the developments so far show the liability of companies to such risks if they do not adequately incorporate the challenges climate change poses to its investors.

4. DEVELOPING TRENDS

Mitigation vs. Adaptation cases

An analysis of climate litigation legal databases reveals that out of the over 1000 CCL recorded, more than 90% of them occurred in developed countries, with most of these cases being mitigation-related cases[70]. A large portion of the non-US cases were usually brought forward by corporations against governments, about 40 percent[71].

Adaptation-related cases are in the minority, in both US and non-US litigation databases[72]. Very few plaintiffs have pursued cases that focus on seeking relief for harm due to stated failure to expect and attend to the impacts of climate change[73]. However, there is a likelihood of such cases increasing as more insurers and investors become aware of the gap between scientific evidence for climate change and the lack of adequate adaptation actions to address them[74].

Common Law vs. Civil Law Systems

Given the differences between common law and civil law systems, CCL might have to be approached differently in each system. Within common law systems, the common approaches for CCL tend to be mostly through nuisance, trespass, negligence and strict liability actions. For civil law systems, given its adherence to pre-set civil codes, there is an increasing likelihood of CCL being pursued based on new environmental civil codes – as exemplified in the EU and China.

Common Law

Nuisance

Within CCL, nuisance tends to be the most typical action pursued within a common law system[75]. There are generally two types of nuisance actions, private and public. Private nuisance can be defined as '*when the plaintiff's use and enjoyment of her land is interfered with substantially and unreasonably through a thing or activity'* [76]. Public nuisance can be defined as '*when a person unreasonably interferes with a right that the general public shares in common*'[77]. In both private and public nuisance actions, the defendant's actions need to be proved that they '*unreasonably interfered'* in the consumption or indulgence of an item that was protected and subsequently caused the plaintiff *'substantial'* harm[78]. If successful, the plaintiff in such cases is usually awarded a right an abatement of the nuisance or a compensation in damages caused. One key difference to determine if a private or a public nuisance is preferable depends on the intended outcome. In the private nuisance action, if the economic cost of nuisance abatement (or social utility) is found to be greater than the amount of damage awardable, the court may allow the defendant to continue 'unreasonably interfering' while paying damages to the plaintiff. This was the case in *Boomer et al. v. Atlantic Cement Company,* where the court ordered the cement company to pay damages to the plaintiff for causing damage to his land due to the pollution from the company's factory[79]. Given that in a public nuisance case, the cost to the public is likely to be higher collectively, there could be a higher chance of the court requesting for an abatement of the nuisance – such as in reducing production or even closing the factory down. Generally, the courts tend to prescribe compensation of damages for nuisance actions[80].

Trespass

Trespass is another action that can be used in a common law system for CCL. It differs slightly from nuisance actions in that it *'requires an intentional invasion of the plaintiff's interest in the*

exclusive possession of property, whereas nuisance requires a substantial and unreasonable interference with his use and enjoyment of it'[81]. One of the main benefits of using a trespass action is that the plaintiff would not require to show that a substantial amount of injury has taken place for the trespass action to be successful[82]. In addition to the '*knowingly entering*' criterium, the physical act of invasion and the unprivileged entry are required[83]. As long as the trespass is proved technically, the plaintiff has the right to receive at least a minimum amount of damages[84]. Trespass actions are commonly used in cases of pollution control. For example, in the case *City of New York v. BP p.l.c,* the plaintiff (City of New York) filed a case against fossil fuel companies, that involves an illegal trespass on city property[85]. While the case was initially dismissed, it is currently being appealed and stands to show the type of CCL a corporation could be charged with.

Negligence

Negligence is also an action that is used within common law systems for CCL and can be defined as a *'failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behavior usually consists of actions but can also consist of omissions when there is some duty to act'*[86]. To hold an entity liable under a CCL based on negligence, the defendant's actions must be the '*proximate cause'* of damage. Proximate cause can be defined as *'An act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred'*[87]. Through a CCL based on negligence, plaintiffs can attempt to claim for damages and losses from suitable defendants. To make a successful negligence case, plaintiffs need to ensure that there are four elements to it: breach, duty, injury, and causation[88]. An example of such a case is *Rhode Island v. Chevron Corp.,* in which the plaintiff (Rhode Island) is claiming for damages from the defendants (fossil fuel companies) – one of their complaints is that the defendants failed to warn the plaintiff of the known risks due to their fossil fuel products[89]. One benefit of pursuing a CCL through negligence for the plaintiff is that a defendant's complete adherence to permit conditions and government regulations would still be an insufficient defence if negligence is conclusively proved.

Strict Liability

Finally, under common law systems, strict liability is another pathway to action on CCL. Strict liability can be defined as liability for *'committing an action, regardless of what his/her intent or mental state was when committing the action'*[90]. The principle of strict liability is particularly relevant for cases involving environmental pollution. The case *Rylands v. Fletcher* set a number of precedents for this action to be interpreted. In the case, the defendant (Rylands) had built an underground water reservoir which led to the collapse of the plaintiff's (Fletcher) mine shafts[91]. While neither of them were found to be negligent nor intentional in causing the damage, the principle of strict liability was applied and hence, the final decision was in favour of the plaintiff (Fletcher)[92]. There were two aspects that played a critical role in determining strict liability - the

first was the circumstance of 'escape' from the land something which might cause harm if it escaped and secondly, the aspect of 'non-natural' use of land[93]. These aspects continue to influence decisions in Common law systems on CCL that would be worth noting.

Civil Law

Civil law systems are the most prevalent legal system in the world, present in some form in about 150 countries[94]. Unlike common law systems that can be developed over time through decisions made in court, civil law systems are mainly based on written codes[95]. In a number of civil law systems, new civil codes that incorporate the environment are being introduced[96] – this gives the opportunity for increased CCL to be pursued in those jurisdictions. Given the geographic focus and diverse civil codes present globally, the following section focuses on new environmental civil codes introduced in the EU and China that form the basis for environmental litigations.

EU

While not exclusively a civil law system, the EU can be considered a mixed legal system given its large collection of treaties and regulations that operate as civil codes. These codes are increasingly forming the basis for CCL to be launched in the EU, by actors both within and outside the EU. In 2018, ten families from around the world filed the case *Armando Ferrão Carvalho and Others v. The European Parliament and the Council.* Although not every family that is part of the plaintiffs reside in the EU, the case was filed on the basis that all of the actions that affect the families originated from the EU – this opens up both state and non-state actors within the EU increasingly to transnational CCL. Two codes within the EU were especially relevant to the *Armando Ferrão Carvalho and Others v. The European Parliament and the Council* case :

Article 191 of the Treaty on the Functioning of the European Union

Article 191 lays out the EU's policy towards environmental issues, as of 2008[97]. Given the article's broad implications ranging from protecting '*human health'*, prudent use of *'natural resources'* and even requirement to cooperate with other countries to pursue environmental objectives, there is much room for a CCL to be launched based on this against the EU or entities within it[98].

Article 37 of the EU Charter

Under the EU Charter of Fundamental Rights, article 37 focuses on environmental protection[99]. The article requires that the EU pursues policies that will allow it to protect the environment while still enabling sustainable development[100].

China

China's legal system is primarily defined as a 'socialist legal system' but is generally a civil law system. Increasingly, CCL are being launched in the country as the country is adopting a 'Green

Principle' under its General Provisions for Civil Law, which prioritises the protection of the environment and natural resources during civil actions[101].

Article 9 'Green Principle'

The 'Green Principle' within the Chinese civil code states that *"the parties in civil legal relations, when conducting civil activities, shall contribute to the conservation of resources and protection of the ecological environment"*[102]. Prior to this, there was no private law that set out legal relations between individuals which required compulsory natural resource and environmental protection in the country[103]. While there are public environmental laws present in the Chinese civil code, they tend to be more geared towards administrative regulation. The introduction of the 'Green Principle' in private law opens up the opportunity for more environmental litigations to be filed by private individuals. The new code is to be passed in 2020[104]. Since the early 2000s, environmental courts had been established and there has been a proliferation of environmental public interest litigations, despite a lack of adequate legal frameworks for it – the new 'Green Principle' is likely to cause a greater increase of CCL within the country.

5. Steps Forward

In light of the CCL and the arguments presented, there are a few steps that could be taken by entities to prepare or prevent liability from such CCL. These are mainly in the forms of ambition, divestment and disclosure.

Ambition

One potential way in which entities could protect themselves from CCL in the future is to set ambitious climate-related goals and declare them publicly, with adequate steps taken to pursue them. There are some advantages and disadvantages associated with this pathway. One main advantage is that by doing so, entities are able to refer to their goals and set clear targets on what they hope to achieve for their shareholders or citizens. Their ambitions could be aligned with guidelines in the PA, INDCs of respective countries and the TFCD, amongst others. Shareholders and citizens would be less inclined to launch a CCL against a government or company that has already made known its awareness of the importance of climate change and is taking steps to address it. However, one main disadvantage is that by declaring ambitions and making them publicly known, the entity is also making itself publicly accountable in achieving those ambitions. Hence, unless adequate steps are taken to progressively achieve the goals set, they could set themselves to be liable to CCL later.

Divestment

Clients could pursue divestment of fossil fuel-related other climate-risk prone assets as a form of precaution to reduce liability to CCL. Divestment refers to a politically influenced action of wealth owners, that could include government entities or private financial institutions, in withholding investments for moral reasons, in this case, for the environment-related risks associated with owning such investments[105]. By divesting from fossil fuel-related investments, both individuals and groups will not only send a message to their shareholders of their environmental concern, but they will also be protecting their fiduciary duties, hence reducing liability to CCL in the future. Fiduciary duties in this case are protected in the sense that by avoiding owning fossil fuel-related investments, especially in the coal industry, wealth owners could avoid the high risk of them becoming stranded assets which could result in poor or negative performance for shareholders[106].

Disclosure

As climate-related risk disclosures are increasingly becoming a key component of many CCL launched against financial institutions and other private corporations, precaution could be taken by groups to be transparent and accurate in disclosing climate-related risk to stakeholders. The TFCD lays out a set of detailed recommendations for both financial and non-financial entities to follow in taking steps to adequately disclose the risks associated with climate change[107]. The TFCD recommendations broadly cover four main areas: governance, strategy, risk management as well as metrics and targets[108]. For example, one of the TFCD's recommended disclosures targets the resilience of the organisation amidst varied climate scenarios[109]. Beyond the recommendations, the TFCD also provides some guidelines on how best to implement these recommendations[110]. In addition to the TFCD, there are also other voluntary disclosure standards such as through the Carbon Disclosure Project (CDP) and the Global Reporting Initiative (GRI). The CDP runs a global disclosure system, which contains GHG emissions and climate risks, aiming to eventually reduce them – it currently contains over 7000 companies with over US$3.3 trillion in purchasing power between its members[111]. GRI also similarly has its own standards system, with over 30 environmental indicators, such as quantified CO_2 emissions and financial transparency[112]. Through the implementation of these recommended disclosures, an organisation could prepare itself more adequately for climate-related risks and reduce its liability to CCL in the future.

Conclusion

This brief is not meant to be an exhaustive list of CCL arguments that have been brought forward but mainly to serve as an advisory brief identifying the key arguments that are increasingly being used in CCL globally. As both international and national legislations develop, there will likely be more avenues through which CCL could be launched against both financial and non-financial organisations to hold them accountable for their actions in contributing to climate change. CCL have the potential to be extremely damaging legally, reputationally and even financially to companies. It is important that companies and organisations prioritise preparing themselves for potential CCL adequately. Through understanding some of the commonly used arguments and taking the recommended steps to reduce liabilities, organisations could be better prepared against CCL in the future.

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[1] Peel, J. and Osofsky, H.M., 2015. *Climate Change Litigation*(Vol. 116). Cambridge University Press.

[2] Ibid.

[3] Markell, D. and Ruhl, J. (2012). An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?. *SSRN Electronic Journal*.

[4] IPCC 5th Assessment Synthesis Report. (2018). *IPCC Fifth Assessment Synthesis Report*. [online] Available at: http://ar5-syr.ipcc.ch/

[5] Birnie, P.W. and Boyle, A.E., 1994. *International law and the environment*.

[6] Grantham Research Institute on climate change and the environment. (2017). Climate in the courtroom: Litigation is increasingly used to influence action on climate change. [online] Available at: http://www.lse.ac.uk/GranthamInstitute/news/climate-in-the-courtroom-litigation-is-increasingly-used-to-influence-action-on-climate-change/

[7] Nachmany, M. and Setzer, J. (2018). *Policy brief - Global trends in climate change legislation and litigation: 2018 snapshot*. [online] Lse.ac.uk. Available at: http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/Global-trends-in-climate-change-legislation-and-litigation-2018-snapshot-3.pdf [Accessed 10 Feb. 2019].

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] IPCC. (2018). *IPCC PRESS RELEASE - Summary for Policymakers of IPCC Special Report on Global Warming of 1.5ºC approved by governments*. [online] Available at: https://www.ipcc.ch/site/assets/uploads/2018/11/pr_181008_P48_spm_en.pdf [Accessed 5 Jan. 2019].

[12] Ibid.

[13] Ipcc.ch. (2019). *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments — IPCC*. [online] Available at: https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/ [Accessed 27 Dec. 2018].

[14] Ibid.

[15] UNFCCC. (2019). The Katowice climate package: Making The Paris Agreement Work For All | UNFCCC. [online] Available at: https://unfccc.int/process-and-meetings/the-paris-agreement/katowice-climate-package [Accessed 8 Feb. 2019].

[16] Ibid.

[17] UNFCCC. (2018). *Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts*. [online] Available at: https://unfccc.int/sites/default/files/resource/SB_DT_SBI_i10_SBSTA_i4v2.pdf [Accessed 9 Jan. 2019].

[18] News, A. (2019). *A talking point for COP25; A realistic approach needed to fund loss and damage from climate change | Acclimatise – Building climate resilience*. [online] Acclimatise.uk.com. Available at: http://www.acclimatise.uk.com/2019/03/13/a-talking-point-for-cop25-a-realistic-approach-needed-to-fund-loss-and-damage-from-climate-change/ [Accessed 23 Mar. 2019].

[19] Unfccc.int. (2018). *Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*. [online] Available at: https://unfccc.int/sites/default/files/resource/l05_2.pdf [Accessed 2 Jan. 2019].

[20] Ibid.

[21] The Carbon Majors Database CDP Carbon Majors Report 2017. (2017). [online] Available at: https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1499691240 [Accessed 7 Mar. 2019].

[22] Ibid.

[23] International Organization for Migration. (n.d.). *Migration, Environment and Climate Change (MECC) Division*. [online] Available at: https://www.iom.int/migration-and-climate-change [Accessed 9 Feb. 2019].

[24] Climate Change Litigation Database. (n.d.). *Leghari v. Federation of Pakistan - Climate Change Litigation*. [online] Available at: http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/ [Accessed 9 Feb. 2019].

[25] Ibid.

[26] Climate Change Litigation Database. (2015). Climate Change Litigation Database. [online] Available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision-1.pdf [Accessed 9 Feb. 2019].

[27] Ibid.

[28] Ibid.

[29] Unfccc.int. (1992). *United Nations Framework Convention On Climate Change*. [online] Available at: https://unfccc.int/resource/docs/convkp/conveng.pdf

[30] Ibid.

[31] Ibid.

[32] Sabin Center for Climate Change Law. Climate Change Litigation. (2019). *Urgenda Foundation v. State of the Netherlands - Climate Change Litigation*. [online] Available at: http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ [Accessed 5 Mar. 2019].

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] Field, C.B. and Barros, V.R. eds., 2014. *Climate change 2014: impacts, adaptation, and vulnerability* (Vol. 1). Cambridge and New York: Cambridge University Press.

[38] Cameron, J. and Abouchar, J., 1991. *The precautionary principle: a fundamental principle of law and policy for the protection of the global environment*. BC Int'l & Comp. L. Rev., 14, p.1.

[39] Kriebel, D., Tickner, J., Epstein, P., Lemons, J., Levins, R., Loechler, E.L., Quinn, M., Rudel, R., Schettler, T. and Stoto, M., 2001. The precautionary principle in environmental science. Environmental health perspectives, 109(9), p.871.

[40] U.S. Climate Change Litigation Database. (2017). Juliana v. United States. [online] Available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2016/20161110_docket-615-cv-1517_opinion-and-order-1.pdf

[41] Nanda, V.P. and Ris Jr, W.R., 1975. The Public Trust Doctrine: A Viable Approach to International Environmental Protection. *Ecology LQ*, *5*, p.291.

[42] Ibid.

[43] U.S. Climate Change Litigation Database. (2017). Juliana v. United States. [online] Available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2016/20161110_docket-615-cv-1517_opinion-and-order-1.pdf

[44] Ibid.

[45] Schwartz, J. (2018). Young People Are Suing the Trump Administration Over Climate Change. She's Their Lawyer. [online] The New York Times. Available at: https://www.nytimes.com/2018/10/23/climate/kids-climate-lawsuit-lawyer.html [Accessed 13 Jan. 2019]. | Epps, G. (2018). The Government Is Trying to Silence 21 Kids Hurt by Climate Change. [online] The Atlantic. Available at: https://www.theatlantic.com/ideas/archive/2018/10/government-silencing-kids-hurt-climate-change/573790/ [Accessed 13 Feb. 2019].

[46] U.S. Climate Change Litigation Database. (2017). Juliana v. United States. [online] Available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2016/20161110_docket-615-cv-1517_opinion-and-order-1.pdf

[47] U.S. Climate Change Litigation Database. (2019). Juliana v. United States - Climate Change Litigation. [online] Available at: http://climatecasechart.com/case/juliana-v-united-states/ [Accessed 11 Mar. 2019].

[48] Grantham Research Institute on climate change and the environment. (2017). *Lliuya v. RWE*. [online] Available at: http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe/

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Ibid.

[54] Ibid.

[55] French, K. (2017). A Peruvian farmer is suing an energy giant over climate change. [online] The Verge. Available at: https://www.theverge.com/2015/12/2/9821758/climate-change-lawsuit-un-rwe-energy-vs-peru-farmer [Accessed 10 Jan. 2018].

[56] Dietz, S., Bowen, A., Dixon, C. and Gradwell, P., 2016. 'Climate value at risk'of global financial assets. *Nature Climate Change*, *6*(7), p.676.

[57] Dietz, S., Bowen, A., Dixon, C. and Gradwell, P., 2016. 'Climate value at risk' of global financial assets. *Nature Climate Change*, *6*(7), p.676.

[58] TCFD. (2017). *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017) - TCFD*. [online] Available at: https://www.fsb-tcfd.org/publications/final-recommendations-report/# [Accessed 2 Jan. 2019].

[59] Ibid.

[60] Non-US Climate Change Litigation. (2018). *ClientEarth v Enea - Climate Change Litigation*. [online] Available at: http://climatecasechart.com/non-us-case/clientearth-v-enea/ [Accessed 10 Mar. 2019].

[61] Ibid.

[62] Ibid.

[63] Documents.clientearth.org. (2018). *Briefing - Ostrołęka C: Energa's and Enea's Board Members' Fiduciary Duties to the Companies and Shareholders*. [online] Available at: https://www.documents.clientearth.org/wp-content/uploads/library/2018-09-20-clientearth-briefing-ostroleka-c-energa-and-enea-board-members-fiduciary-duties-to-the-companies-and-shareholders-ce-en.pdf [Accessed 2 Jan. 2019].

[64] ClientEarth. (2018). *World-first climate risk case launched over major coal plant in Poland | ClientEarth*. [online] Available at: https://www.clientearth.org/world-first-climate-risk-case-launched-over-major-coal-plant-in-poland/ [Accessed 2 Jan. 2019].

[65] Ibid.

[66] U.S. Climate Change Litigation database. (2018). People of the State of New York v. Exxon Mobil Corporation Summons. [online] Available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181024_docket-4520442018_complaint.pdf [Accessed 2 Mar. 2019].

[67] Ibid.

[68] Ibid.

[69] Ibid.

[70] Nachmany, M. and Setzer, J., 2018. Policy brief Global trends in climate change legislation and litigation: 2018 snapshot. *London: Grantham Research Institute on Climate Change and the Environment http://www. lse. ac. uk/Granthamlnstitute/publications/rr bythet*.

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] Kuszaj, J. (2005). Common Law Environmental Remedies. [online] North Carolina State University, Department of Agricultural and Resource Economics. Available at: https://projects.ncsu.edu/cals/course/are309b/Common_Law_Environmental_Remedies.pdf [Accessed 8 Feb. 2019].

[76] Legal Information Institute (LII). Cornell Law School. (n.d.). Nuisance. [online] Available at: https://www.law.cornell.edu/wex/nuisance [Accessed 8 Feb. 2019].

[77] Ibid.

[78] Kuszaj, J. (2005). Common Law Environmental Remedies. [online] North Carolina State University, Department of Agricultural and Resource Economics. Available at: https://projects.ncsu.edu/cals/course/are309b/Common_Law_Environmental_Remedies.pdf [Accessed 8 Feb. 2019].

[79] Ibid.

[80] Ibid.

[81] Beena Kumari, V.K., 1984. Environmental Pollution and Common Law Remedies. Cochin University Law Review, 8, pp.101-114.

[82] Ibid.

[83] Legal Information Institute (LII). Cornell Law School. (n.d.). *Prima facie*. [online] Available at: https://www.law.cornell.edu/wex/prima_facie [Accessed 8 Feb. 2019], Legal Information Institute (LII). Cornell Law School. (n.d.). *Trespass*. [online] Available at: https://www.law.cornell.edu/wex/*trespass*. [Accessed 8 Feb. 2019].

[84] Beena Kumari, V.K., 1984. Environmental Pollution and Common Law Remedies. Cochin University Law Review, 8, pp.101-114.

[85] U.S. Climate Change Litigation Database. (2018). *City of New York v. BP p.l.c. - Climate Change Litigation*. [online] Available at: http://climatecasechart.com/case/city-new-york-v-bp-plc/ [Accessed 11 Mar. 2019].

[86] Legal Information Institute (LII). Cornell Law School. (n.d.). Negligence. [online] Available at: https://www.law.cornell.edu/wex/negligence [Accessed 8 Feb. 2019].

[87] Legal Dictionary. (n.d.). *Proximate Cause*. [online] Available at: https://legal-dictionary.thefreedictionary.com/proximate+cause [Accessed 8 Mar. 2019].

[88] Hunter, D. and Salzman, J., 2006. Negligence in the air: the duty of care in climate change litigation. U. Pa. L. Rev., 155, p.1741.

[89] U.S. Climate Change Litigation Database. (2019). *Rhode Island v. Chevron Corp. - Climate Change Litigation*. [online] Available at: http://climatecasechart.com/case/rhode-island-v-chevron-corp/ [Accessed 15 Mar. 2019].

[90] Legal Information Institute (LII). Cornell Law School. (n.d.). Strict Liability. [online] Available at: https://www.law.cornell.edu/wex/strict_liability [Accessed 12 Feb. 2019].

[91] Bohlen, F.H., 1910. Rule in Rylands v Fletcher. U. Pa. L. Rev., 59, p.423.

[92] Bohlen, F.H., 1910. Rule in Rylands v Fletcher. U. Pa. L. Rev., 59, p.423.

[93] Beena Kumari, V.K., 1984. Environmental Pollution and Common Law Remedies. Cochin University Law Review, 8, pp.101-114.

[94] CIA. (n.d.). References :: Definitions and Notes — The World Factbook - Central Intelligence Agency. [online] Available at: https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html?countryName=Iran&countryCode=ir&regionCode=me#2100 [Accessed 13 Mar. 2019].

[95] Ibid.

[96] Nachmany, M. and Setzer, J. (2018). Policy brief - Global trends in climate change legislation and litigation: 2018 snapshot. [online] Lse.ac.uk. Available at: http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/Global-trends-in-climate-change-legislation-and-litigation-2018-snapshot-3.pdf [Accessed 10 Feb. 2019].

[97] Treaty on the Functioning of the European Union. (2008). TITLE XX: ENVIRONMENT - Article 191. EUR-Lex - 12008E191 - EN. [online] Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E191:EN:HTML [Accessed 10 Mar. 2019].

[98] Ibid.

[99] European Union Agency for Fundamental Rights. (2000). *Article 37 - Environmental protection*. [online] Available at: https://fra.europa.eu/en/charterpedia/article/37-environmental-protection [Accessed 14 Mar. 2019].

[100] Ibid.

[101] Zhai, T. and Chang, Y.C., 2019. The Contribution of China's Civil Law to Sustainable Development: Progress and Prospects. Sustainability, 11(1), p.294.

[102] Ibid.

[103] Ibid.

[104] Ibid.

[105] Ansar, A., Caldecott, B. and Tilbury, J. (2013). *Stranded assets and the fossil fuel divestment campaign: what does divestment mean for the valuation of fossil fuel assets?*. [online] Ora.ox.ac.uk. Available at: https://ora.ox.ac.uk/objects/uuid:f04181bc-8c4f-4cc1-8f01-cafce57975ae/download_file?file_format=pdf&safe_filename=2013.10.08_SA_in_FF_Div_Campaign.pdf&type_of_work=Report [Accessed 2 Jan. 2019].

[106] Ibid.

[107] TCFD. (2018). *Task Force on Climate-related Financial Disclosures | TCFD - Homepage*. [online] Available at: https://www.fsb-tcfd.org/ [Accessed 1 Jan. 2019].

[108] Ibid.

[109] Ibid.

[110] Ibid.

[111] Carbon Disclosure Project. (2019). *About us - CDP*. [online] Available at: https://www.cdp.net/en/info/about-us [Accessed 15 Mar. 2019].

[112] Global Reporting Initiative. (n.d.). *Getting started with the GRI Standards*. [online] Available at: https://www.globalreporting.org/standards/getting-started-with-the-gri-standards/ [Accessed 16 Mar. 2019].