

NEWS FEATURE:

Courts take on climate change

Sonja van Renssen

Climate change could cost the world trillions of dollars every year. But at the moment, no one is required to pay for this damage, even if it is arguably their fault. That is where the world's courts come in.

Big energy companies are inevitably going to get sued for their part in driving climate change, believes Andrew Gage, Staff Counsel at West Coast Environmental Law in Canada. “Can you really have a business model that costs the world trillions of dollars a year and not have a conversation about who should be paying for that?” He adds: “The question is, can such litigation play a role in accelerating the transition away from fossil fuels or is it only going to be bickering over who pays for the major damages we’re experiencing?” Climate litigation is not a new idea. In the 2000s, several lawsuits in the US federal courts tried to hold big greenhouse gas emitters financially liable for climate change. They were all ultimately dismissed. Climate litigation has been given a new lease of life, however, with high-profile investigations and shareholder action targeting oil majors such as Exxon. In the Netherlands, one case shows that courts can force more action on climate change.

In 2015, a district court in The Hague ordered the Dutch government to increase its ambition and reduce greenhouse gas emissions by at least 25% by 2020 compared to 1990 levels. The Netherlands currently aims to cut emissions by just 17% in line with EU climate policy. The verdict sets a powerful precedent.

“This is the first time a court has imposed certain duties on a government to solve the climate change problem,” says Roger Cox, a Partner at Dutch law firm Paulussen Advocaten, who led the case against the government. Cox believes that courts not only have a role in ensuring that appropriate national climate goals are set but also in checking that they are implemented (<http://www.revolutionjustified.org/roger-cox-author-of-revolution-justified>). Many lawyers see the national climate action plans required under the Paris Agreement as a legal hook for future cases.

The Dutch verdict sets an important example “as a way to bring international obligations into domestic courts”, believes Carroll Muffett, President and CEO of the

Center for International Environmental Law headquartered in Washington DC. In other words, national courts could help enforce the Paris deal.

Others argue that courts are falsely being framed as a last resort to save the world. Lucas Bergkamp, a partner at Hunton & Williams law firm in Brussels, says the Dutch case is an example of the courts trying to “second guess” government policy. This argument over the separation of powers is one of the biggest barriers facing these cases.

Despite a pending appeal, the Dutch case has already impacted the country’s climate and energy policy. The government is researching the early closure of two extra coal plants, which are partly biomass-fired, on top of the five it already plans to shut down by 2020¹.

The verdict is also having an affect beyond the Netherlands. “Every country has its own legal system,” explains Cox. “But the legal standard used [in the Netherlands] —

a duty of care — exists in some form in almost every jurisdiction.”

A similar case is underway in Belgium, and with 10,000 citizens in tow, it is ten times as big as the Dutch case. Another case has been filed by a student in New Zealand and others may crop up in France, Switzerland and Australia over the next year-and-a-half, suggests Cox.

But it is not all about cutting emissions to mitigate climate change. For Michael Gerrard, director of the Sabin Center for Climate Change Law at Colombia Law School, USA, the issue of adaptation could also prove to be an important future avenue for climate litigation.

In 2015, a judge at Lahore High Court ruled in favour of a Pakistani farmer that sued the government for not implementing its own climate adaptation plans². A year before, a French court sentenced the former mayor of a small seaside town in France to four years in jail for concealing flood risks that led to the deaths of 29 people in a storm³.



Gerrard imagines liability claims against architects, engineers and builders who deliver infrastructure that does not withstand foreseeable weather events. In the US, there was some litigation along similar lines in the aftermath of Hurricane Katrina. For example, the US government is currently appealing a case at federal level in which the Army Corps of Engineers stands accused of improperly building and maintaining a water channel — the Mississippi River Gulf Outlet (MRGO, pronounced ‘Mister Go’) — that magnified the effects of storm surges on New Orleans. The channel, which had existed since the 1960s, was shut down in 2009.

It is not just today’s farmers and builders that climate change will affect, however. If governments have a duty of care for present generations, they could also be argued to have a responsibility to protect future generations.

To that end, the non-profit, ‘Our Children’s Trust’, was set up to support young people that want to sue governments for climate inaction, and it has had some success. In April, a judge rejected an attempt by fossil fuel firms and the US government to throw out a case at federal level. And in May, the Massachusetts Supreme Court ruled that the state was not properly implementing mitigation plans.

“Courts communicate with one another,” explains Julia Olson, executive director and chief legal counsel at Our Children’s Trust. “We want to educate the judiciary in different countries.” The judge in the US case cited the verdict in the Netherlands in his decision to consider the case.

Climate litigation victories so far have all been against governments. But what about suing companies?

Right now it’s easier to bring a case against a state than a company as “there is an obvious duty for a state to protect its people”, Cox says. The difficulty comes too in proving the company has caused the damage.

In one landmark case currently underway in Germany, however, a Peruvian farmer is asking the German utility RWE to help pay for safety measures at a glacial lake that has swelled to dangerous levels due to climate change⁴. That claim is not for damages, but for a contribution to risk reduction costs. The sum requested is based on RWE’s share of global greenhouse gas emissions, using its own data, and would amount to about €20,000.

“We do not have to prove that RWE did wrong, we simply have to prove that they did and do,” explains Dr Roda Verheyen, the farmer’s lawyer from firm Günther in Hamburg. “My key task is whether or not I can prove that this lake has filled up due to climate change.” Although this may never

be 100% provable, the court needs to decide what standard of proof is necessary.

In its official response in spring, RWE argued that the court should dismiss the suit — as the courts did with the acid rain cases in the 1980s — because it cannot sufficiently relate injury to emissions. But it is becoming easier to link companies to climate damage⁵.

Climate attribution expert Professor Myles Allen, from the University of Oxford, UK, says it is increasingly possible to make quantitative statements about the extent to which climate change has affected the size or probability of an event. “Most legal systems accept probabilistic evidence”, he points out.

Dr Peter Frumhoff, director of science and policy at the Union of Concerned Scientists in the US, says attribution science is expanding to include such a “science of climate responsibility”.

One example of this is a list identifying the world’s top 90 corporate emitters, responsible for about two-thirds of cumulative global CO₂ and methane emissions since the Industrial Revolution, collated by the Carbon Accountability Institute⁶. The list was recently cited in an investigation by the Philippines Human Rights Commission, which aims to determine whether the 50 investor-owned companies on it violated the rights of Filipinos by causing climate damage.

It’s not just the Philippines where vulnerable populations are starting to hit back. The non-profit organization, Environmental Law Alliance Worldwide, has identified several countries whose courts seem amenable to this type of lawsuit, including Brazil, India, Colombia, Ecuador, Kenya, Mexico, Uganda, Chile and Argentina.

Preparations are also reportedly underway for a case against big emitters by affected communities in Pacific Island countries. Pacific leaders are also exploring the idea of a climate treaty that could include a chapter on access to justice for climate damages. This could include provisions that make it easier for courts in the Pacific to enable people there to litigate⁷.

Further research is still needed. For now, some events (such as heat waves) are much easier to link to climate change than others (such as tropical cyclones). But for Frumhoff, investigations like the one in the Philippines are an opportunity for relevant research to be developed.

All this suggests that the world’s biggest greenhouse gas emitters are under pressure. Howard Covington, chair of the Alan Turing Institute for data science in London, and a former investment banker, says: “What is objectionable about the fossil fuel companies

is not that they are supplying the stuff we need, it’s that they are doing whatever they can to slow down the energy transition.” Combine that with how substantial they are in the value chain and they become prime litigation targets.

The ever widening investigation by US state Attorneys General into Exxon Mobil is slow poison for the industry. At the same time, shareholders are increasingly pushing through resolutions that demand more disclosure on climate risk. This is because those who manage other people’s money can be held liable for mismanaging it. Experts such as Covington suggest that investors and company directors may find themselves in the dock one day for failing to sufficiently adapt to climate risks⁸.

A group of activist environmental lawyers centred in the UK, ClientEarth, is working with pension fund members to challenge climate risk into their investment decisions. Pension holders in the US are already suing the directors and trustees at now-bankrupt coal giant Peabody for losing all of their pension funds because they invested the money straight back into company stock. In the future, pension fund members could end up suing retired pension plan directors who made decisions to continue investing in what later became stranded assets.

A recent report from think tank Carbon Tracker⁹ calculated that proceeding only with lower cost, less carbon-intensive projects could add US\$100 billion to the value of the world’s seven oil majors. Given the legal risks that high-carbon portfolios increasingly seem to entail, surely that’s a conversation worth having. □

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Correction

In original version of the News Feature 'Courts take on climate change' (*Nat. Clim. Change* **6**, 655–656; 2016) a paragraph was mistakenly truncated. This should have read 'But it is not all about cutting emissions to mitigate climate change. For Michael Gerrard, director of the Sabin Center for Climate Change Law at Colombia Law School, USA, the issue of adaptation could also prove to be an important future avenue for climate litigation.' This was corrected in all online versions on 7 September 2016.