

## ENVIRONMENTAL LAW

## Expert Analysis

# Scale and Focus of Climate Litigation Outside of United States

The large and growing volume of litigation in the U.S. courts about climate change has received an avalanche of analysis in the professional and academic literatures. In contrast, climate litigation outside the United States is little known on these shores and has gotten far less attention.

For the first time, this non-U.S. climate litigation has now been compiled and analyzed. Some of the findings:

- There is far more climate litigation in the United States than in the rest of the world combined. Through the end of 2013, more than 420 climate cases had been resolved in the United States;<sup>1</sup> the total for the rest of the world was 173.

- The other country with the largest volume of climate litigation is Australia. The cases there are dominated by disputes about the assessment of projects' impacts on greenhouse gas (GHG) emissions, and of the impact that sea level rise and other climate-related events may have on projects.

- Numerous cases have arisen from the European Emissions Trading System, such as disputes about member states' implementation measures.

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By  
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- The underlying science of climate change is broadly accepted; it is rarely questioned in the courts..

The compilation of non-U.S. cases is found in a database maintained and posted by the Sabin Center for Climate Change Law where I am director.<sup>2</sup> This column is based on an analysis of these cases.<sup>3</sup>

### Strategic vs. Tactical

One striking difference between litigation inside and outside the United States is the relative breadth of its ambition.

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In the United States, litigation has played a central role in the development of climate law and policy. Administrative petitions and lawsuits filed by those frustrated with federal inaction culminated in 2007

in the landmark Supreme Court decision in *Massachusetts v. Environmental Protection Agency*,<sup>4</sup> which held that the Clean Air Act gives the Environmental Protection Agency the power to regulate GHGs. This decision has formed the basis for most of the flurry of federal activity that has occurred since, and that is continuing today.

States and industries that are opposed to regulating GHGs have looked to the courts to try to halt EPA's actions. The first round of EPA rules led to more than 100 lawsuits; all were dismissed together by the U.S. Court of Appeals for the District of Columbia, giving EPA a resounding victory.<sup>5</sup> The Supreme Court granted review but ultimately left standing all the EPA actions with the exception of one narrow provision that applied to only a small fraction of GHG emissions.<sup>6</sup>

EPA has proposed an elaborate set of new regulations on GHG emissions from fossil fuel power plants; when they are issued in final form—probably this summer—a new flood of litigation seeking to invalidate them seems inevitable.

The federal courts here have seen several high-profile cases that attempted to use public nuisance theories to establish a federal common law that would limit or impose money damages for GHG emissions,<sup>7</sup> and another set of cases using public trust doctrine theories.<sup>8</sup> None of these cases has succeeded, though several

of the public trust doctrine cases are still pending and more are being filed.

On top of all these cases with strategic objectives is a large volume of cases with narrower aims, such as seeking to block the construction of particular coal-fired power plants.

With the few exceptions discussed below, this sort of strategic litigation has been absent in the rest of the world. Litigation has not either spurred or sought to halt climate regulation anywhere else. A suit was brought in the federal courts of Canada to force that country to comply with the Kyoto Protocol; it was dismissed as raising political questions beyond the reach of the judiciary.<sup>9</sup> Though there are several other common law countries, in none has a suit been brought attempting to utilize common law theories against GHG emitters.

Our Childrens Trust, the Oregon-based group that has organized much of the U.S. litigation under the public trust doctrine, has also spurred comparable cases elsewhere in the world, with broad aims to spur climate regulation. The suit in Ukraine enjoyed a partial victory in the lower court, but this was reversed on appeal.<sup>10</sup> A suit filed in the High Court of Uganda is pending. A petition was filed with the Philippines Supreme Court in February 2014 seeking a change in the nation's transportation system to reduce GHG emissions and make roads safer for people traveling by bicycle or on foot. This case is now being briefed.<sup>11</sup>

One of the most interesting pending cases was filed in December 2013 in the District Court in The Hague, Netherlands, by the Urgenda Foundation and 886 Dutch citizens against the Dutch State (the Kingdom of the Netherlands). The suit seeks an order that the Dutch State take measures to reduce GHG emissions in the Netherlands to at least 25 percent below 1990 levels before 2020.<sup>12</sup> The legal bases for the case are the principle of international law that transboundary pollution may not cause harm in

another state; obligations under the United Nations Framework Convention on Climate Change and subsequent decisions under it; the European Convention on Human Rights, especially Article 2 (right to life) and Article 8 (right to private and family life); and torts such as nuisance and endangerment. The plaintiffs are relying in particular on a 1988 decision from the Dutch Supreme Court, called the Potash Mines judgment, concerning liability for cumulative emissions from different sources. The case has been briefed and will be argued on April 14.

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### Statistical Findings

Of the 173 cases found, 159 were claims against government entities. The largest group by far (107 cases) involved the environmental assessment and permitting processes. These cases focus on procedural requirements for land use and planning, including impact assessment and construction and emissions permits.

The second largest category (38 cases) involved substantive climate change regulations, especially the European Emissions Trading System.

Australia had 70 cases. Second was the United Kingdom (35 cases), followed by the European Union (30 cases). New Zealand and Spain follow with 14 and 13 cases, respectively. One or two cases also arose in Canada, France, Czech Republic, Germany, Nigeria, and Ukraine.

### Australian Cases

Since Australia has by far the largest volume of climate litigation outside the United States, some attention to its cases is warranted.

Seventeen of Australia's 70 cases were challenges to the permitting of direct and indirect emissions sources. These claims were almost exclusively aimed at proposed coal mines and coal-fired power plants.

Plaintiffs trying to prevent direct emissions sources only experienced a few successes among many failures. While Australian state courts generally agree that direct GHG emissions should be considered in the permitting process,<sup>13</sup> they did not usually find emissions sufficient to justify rejection of the proposed project.<sup>14</sup> Most sympathetic to plaintiffs challenging emissions sources has been the New South Wales (NSW) Land and Environment Court, which found legal justification to set a limit on GHG emissions in two instances, but the decisions were short-lived. In *Macquarie Generation v. Hodgson*, this court found that a power station's license to emit carbon dioxide included an implied limitation of "reasonable regard and care for people and the environment."<sup>15</sup> However, the NSW Court of Appeal reversed the decision, reasoning that interpreting the permit not to allow carbon dioxide emissions would "deprive the license of sensible operation."<sup>16</sup>

*Hunter Environmental Lobby v. Minister for Planning* involved a challenge to the expansion of a coal mine.<sup>17</sup> The NSW Land and Environment Court affirmed the project approval, but subject to conditions, including requiring offsets for any direct GHG emissions from the mine that exceed projected levels. The court found that these conditions were permissible under a state statute that grants the power to include in planning permits reasonable conditions that are consistent with the goals of the statute.

