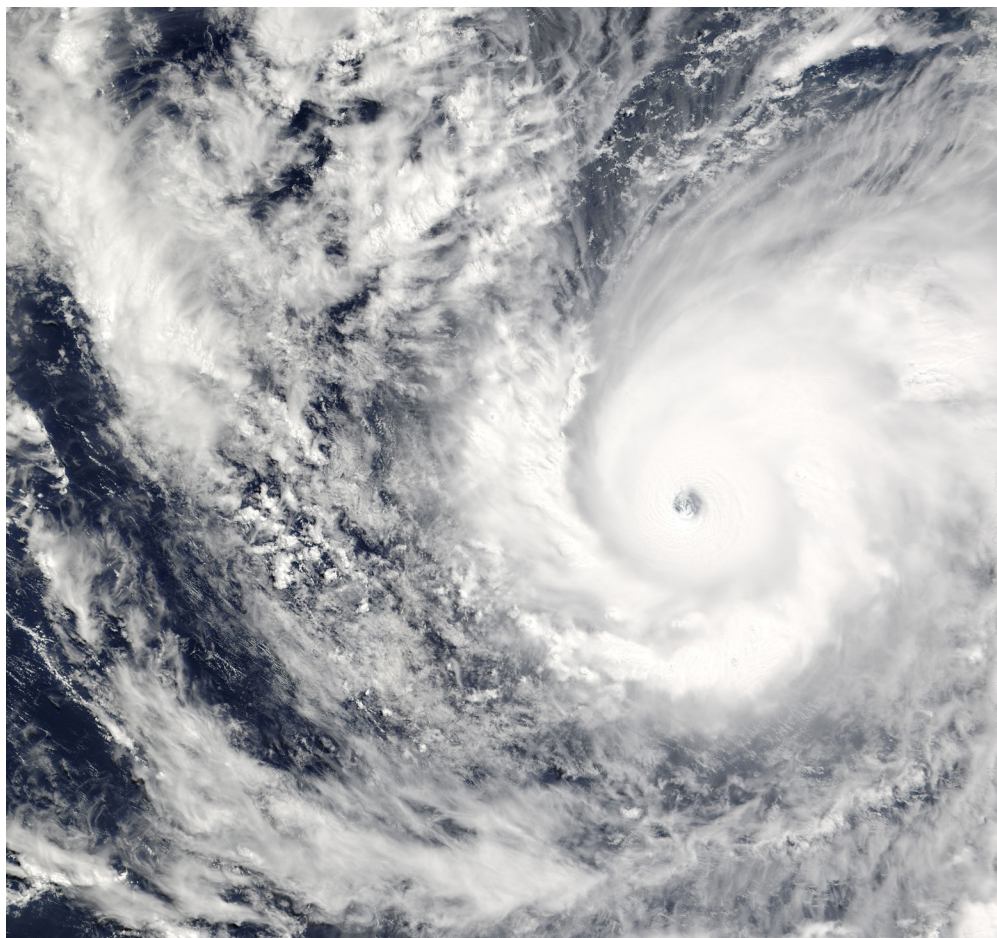


# TAKING CLIMATE JUSTICE INTO OUR OWN HANDS

## A Model Climate Compensation Act

Vanuatu Environmental  
Law Association

*Protecting the Ocean,  
the Islands, the People*



**BY Andrew Gage,**  
**LLB,** Staff Counsel,  
West Coast  
Environmental  
Law (Canada)

AND

**Margaretha  
Wewerinke, PhD,**  
Lecturer in  
Environmental Law,  
School of Law,  
University of the South  
Pacific (Vanuatu)

With contributions  
from George  
Toaki, Kelsey Frank  
and Sarah Ure.

**DECEMBER 2015**



**WALLACE  
GLOBAL FUND**



**OAK  
FOUNDATION**

**Acknowledgments**

West Coast Environmental Law would like to thank our funders, without which this publication would not have been possible: the Oak Foundation, Minor Foundation for Major Challenges, Wallace Global Fund, Law Foundation of British Columbia and the Eden Conservation Trust. The views expressed in this paper are those of the authors.

# Contents

## 1 Executive Summary

### PART I

## 4 Introduction

- 5 The international need for a climate compensation act
- 7 The national need for a climate compensation act
- 8 Precedents for a climate compensation act

### PART II

## 11 Transnational litigation and climate damages litigation

- 12 What is a tort and where does it occur?
- 13 Jurisdiction
- 16 Choice of Law
- 17 Recognition and Enforcement of Orders
- 18 Conclusion of Part II

### PART III

## 19 A model Climate Compensation Act

- 20 Asserting Jurisdiction
- 21 Cause of Action – Nuisance
- 23 Plaintiffs
- 26 Defendants
- 28 Causation and Attribution
- 29 Remedies
- 31 Climate Damages Insurance
- 32 Removing Barriers

### APPENDIX A

## 36 Model Climate Compensation Act



# Executive Summary



Destruction in Port Vila, Vanuatu, from Hurricane Pam (2015). (Photo by UNICEF Pacific, via Flickr. No modifications.)

Each year, more fossil fuel pollution and other greenhouse gases than the world's natural systems can handle enter the global atmosphere, creating a heat trapping blanket and disrupting weather patterns. Unpredictable and costly flooding, wildfires, droughts and other climate impacts are already occurring in countries around the world – and global temperatures have only increased globally by 0.85 °C.

The world's nations have been discussing how to address this problem since before 1992, when the United Nations Framework Convention on Climate Change (UNFCCC), with insufficient progress. This is despite the fact that the UNFCCC imposes obligations on developed countries to take the lead in climate action, and to share technologies and provide finance for sustainable development in developing countries. Fossil fuel pollution and greenhouse gas emissions have nonetheless continued to rise globally, while scientists have sounded ever more urgent warnings and communities suffering the impacts of climate change have become ever more frantic.

With each year that passes, communities suffer more from the impacts of climate change. To many of the victims of these impacts, it is apparent that the window of opportunity to avoid major, and often unmanageable

atmospheric changes, has already closed. The best we can achieve now, in terms of mitigation, is to reduce the impacts that might otherwise occur and minimise the chances of still more catastrophic changes to the climate system.

We can identify many reasons for global inaction – including wealth, the history of colonialism, the slow acting nature of climate change and misinformation on the science. This report builds on the premise that one important reason for the glacial pace of progress in climate action is the widely held assumption that fossil fuel pollution is normal and permissible, and may continue until individual countries choose to regulate them or an international agreement regulating them is reached.

The climate movement and international climate negotiations are badly in need of a different narrative.

Let's start with two revolutionary concepts:

1. **It has never been legal to knowingly destroy property, lives, and, indeed, entire nations** – either in international law or national law.
2. A country has legal authority over harm that occurs within its borders, **even if the causes of that harm are global.**

These two concepts open the door to a country's courts making orders, and its government making laws, related to legal consequences of fossil fuel pollution - particularly as it relates to global sources of fossil fuel pollution from corporations. They allow a country's citizens to petition their own courts and tribunals under their own laws to hold **global** fossil fuel companies accountable for the harm that their product is causing.

### **Legal basis for a Climate Compensation Act**

And they open the door for climate compensation legislation – laws that clarify how a country's liability rules apply to harm caused by large-scale fossil fuel polluters through their contribution to climate change.

The damages from climate change are rising, and in many countries the desire to set rules related to the legal consequences of greenhouse gas emissions may be a practical one – seeking compensation for costs ranging from the costs of adapting to climate change, to the costs of rebuilding communities devastated from storm events or other climate-related impacts.

There are ample precedents for national legislation that clarifies or modifies civil liability rules for health and air pollution related impacts, but in relation to a global problem like climate change, there are additional hurdles. One might think that a climate compensation act would be of limited use if adopted by a country with few major sources of greenhouse gases, where few potential defendants (large-scale emitters) were present. In other countries, there would be fears that enacting such a law would cause potential defendants to “flee the jurisdiction” – moving their operations to other countries that do not have such a law.

While these are risks, existing laws and treaties create a range of options for litigants under a climate compensation act. The laws in question vary from country to country, and this report does not offer a comprehensive review of all laws that might apply in all relevant countries, but reviews some relevant laws in some key countries related to:

- a. The ability of a country to assert legal power over a conflict on the basis of a legal wrong and harm that occurs within the jurisdiction, even if the cause of the harm occurs elsewhere.
- b. The obligation of a court hearing a climate-related lawsuit to apply the law of the country where the harm occurred; and
- c. The willingness of one country's courts to enforce a damages award obtained in another country.

Existing laws related to obtaining and enforcing judgments concerning transnational torts give great flexibility, and a wide range of option, to plaintiffs bringing an action under a climate compensation act. These options include bringing an action in their own country's courts, and then enforcing it elsewhere, or in bringing an action in the courts of a defendant's country, and pressing to have the climate compensation act applied in those courts.

### **A Model Climate Compensation Act**

A *Climate Change Compensation Act* will, depending on one's interpretation of the law, either clarify the law related to climate change litigation or to alter the law to make climate litigation possible.

We have assumed that compensation for climate-related harms should occur only where it is fair to award such compensation. The Model *Climate Compensation Act* is drafted based on common law and statutory principles that exist in common law countries.

The full model Act may be found in Appendix A, but the Report reviews the approach taken in the model Act in relation to several critical questions.

**Who can sue for what climate-related damages?** – The Model Act sets out the legal basis for lawsuits brought by governments, local and (where appropriate) Indigenous governments, and individuals.

**Who can be sued for climate-related damages?** – The Model Act sets out a range of potential defendants that might be responsible for large-scale greenhouse

gas emissions, from fossil fuel companies to vehicle manufacturers, and then limits liability to those defendants that are “Major Emitters,” in the sense that their impact on the global atmosphere is detectable. In addition, the Model Act provides for the apportionment of climate-related damages between defendants on the basis of their contribution to climate change, including addressing overlapping emissions by more than one defendant.

**On what basis can a claim for climate-related damages be brought?** – The Model Act provides for lawsuits on the basis of the common law concept of “nuisance,” clarifying that interference with the health of the global atmosphere is a nuisance, and that an action may be brought where such interference causes harm within the country that has enacted by the Act.

**What rules apply to determining whether a Defendant’s actions have caused a particular climate-related damage?** – The Model Act addresses some of the challenges associated with causation in climate lawsuits by clarifying that interference with the global atmosphere itself constitutes a nuisance, and through other provisions related to evidence related to statistical risk.

In addition, the Model Act provides for the creation of a climate compensation fund, climate damages insurance and addresses many of the barriers to bringing a climate damages claim that might be experienced by potential litigants.

## PART I

# Introduction



A Guiuan woman outside her home after Super Typhoon Haiyan, Guiuan, Philippines, 2013.

Each year, more fossil fuel pollution and other greenhouse gases than the world's natural systems can handle enter the global atmosphere, creating a heat trapping blanket that is altering weather patterns, warming the ocean and accelerating the melting of glaciers and ice sheets. Around the world, the frequency, scale and intensity of climate-related events – such as floods, wildfires and droughts – is increasing. Communities vulnerable to other more gradual impacts, such as rising sea levels, are also being affected. At this stage global land and water surface temperatures have only increased globally by 0.85 °C.<sup>1</sup>

With most countries (and especially developed countries) apparently reluctant to take ambitious, unilateral action, many hope that international negotiations conducted under the United Nations Framework Convention on Climate Change (UNFCCC) result in collective commitments.

The world's nations began discussing how to address this problem even before 1992 when the United Nations Framework Convention on Climate Change

(UNFCCC) was adopted. However, fossil fuel pollution and greenhouse gas emissions have continued to rise globally, before and after the UNFCCC negotiations. Scientists have sounded ever more urgent warnings and communities suffering the increasing impacts of climate change have become ever more frantic. With each year that passes, communities suffer more from the impacts of climate change. To many of the victims of these impacts, it is apparent that the window of opportunity to avoid major, and often unmanageable atmospheric changes, has already closed. The best we can achieve now, in terms of mitigation, is to reduce the impacts that might otherwise occur and minimise the chances of still more catastrophic changes to the climate system.

On the face of it, it seems as if zero-sum thinking prevails in international negotiations – with countries that emit large quantities of greenhouse gases seemingly reluctant to agree to major reductions when other countries will thereby gain much of the advantage. Clearly exacerbating the problem is that developed countries maintain a poor record of complying with their legal obligations under the UNFCCC to share technologies and provide finance to developing countries, which would enable those

1 IPCC Working Group 1. 5th Assessment Report — Summary for Policy Makers. (2013), p. 3, available at [https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WGIAR5\\_SPM\\_brochure\\_en.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WGIAR5_SPM_brochure_en.pdf), last accessed 22 November 2015.



countries to develop sustainably and avoid or reverse high-pollution development pathways.<sup>2</sup>

We can identify many reasons for the compliance gap – including wealth, the history of colonialism, the slow acting nature of climate change and misinformation on the science. This report builds on the premise that one important reason for the lack of progress in climate action is the widely held assumption that fossil fuel pollution is normal and permissible, and may continue until individual countries choose to regulate them or an international agreement regulating them is reached.

That assumption – held by international negotiators and corporate CEOs but also in many cases by the climate movement itself – means that the countries where fossil fuels are burnt, and which benefit economically from that fossil fuel use, can behave as if they have exclusive power to regulate those emissions.

Those who want action on climate change are expecting the very countries that have benefited economically from fossil fuel use to regulate it. In the short term, we're asking them to regulate the goose that laid the golden egg, and in the long-term, we want them to phase out those golden eggs.

Meanwhile, fossil fuel companies have made billions of dollars from inaction on climate change, knowing that their products are causing climate change, and have brought their considerable economic resources to bear to block a global agreement.<sup>3</sup>

## The international need for a climate compensation act

The climate movement and international climate negotiations are badly in need of a different narrative.

Let's start with two concepts with revolutionary implications:

1. **It has never been legal to knowingly destroy property, lives, and, indeed, entire nations** – either in international law or national law.
2. A country has legal authority over harm that occurs within its borders, **even if the causes of that harm are global.**

The first point has been discussed internationally. Some developing country negotiators have made this point when they have spoken of climate compensation or reparations, as have climate campaigners who speak about climate justice. It's also been discussed in relation to lawsuits filed in the United States against energy companies by the victims of climate change.<sup>4</sup>

But the second point has received little attention.

We'll discuss the legal basis for national action in relation to global climate-related damages further in Part II of this report, but consider the implications if the legal consequences for large-scale greenhouse gas emissions can be established under the laws of countries that are experiencing climate impacts – instead of by countries that are benefiting from the fossil fuel use.

Imagine if a country's courts can make orders and its government can make laws related to the legal consequences of fossil fuel pollution – particularly as it relates to global sources of fossil fuel pollution from corporations. Imagine if its citizens can petition their own courts or tribunals (as occurred recently in the Philippines<sup>5</sup>) under their own laws to hold **global** fossil fuel companies accountable for the harm that those products have caused, or lobby their governments to pass new laws clarifying the basis for such legal action.

Consider the implications for:

- **Governments** – If it is clear that fossil fuel polluters may have to pay a share of the harm caused by climate change that is proportionate to

2 M. Stillwell. "Climate finance — How much is needed" in What Next, Vol III (September 2012) (Uppsala, Sweden: What Next Forum, 2012), p. 120.

3 <http://www.desmog.ca/2015/11/10/fossil-fuel-industry-s-bad-behaviour-spotlight-during-paris-climate-negotiations>, last accessed 18 November 2015.

4 <http://www.arnoldporter.com/resources/documents/ClimateChangeLitigationChart.pdf>, at p. 21, last accessed 22 November 2015.

5 <http://www.greenpeace.org/international/en/press/releases/For-the-first-time-fossil-fuel-companies-face-national-human-rights-complaint-on-climate-change/>, last accessed 12 November 2015.



their historical contributions to global greenhouse gas emissions, there is an additional incentive to shift each country's economy away from fossil fuels as quickly as possible. At the same time, there is clear legal action that the governments can take on behalf of their climate impacted communities.

- **Fossil fuel companies and their investors** – The potential for legal action arising anywhere in the world under a wide range of legal systems will be daunting, particularly if it results in orders to pay compensation. The prospect of public discussions about whether they should pay a fair share for the damage caused by their products and what that means for their social licence may be equally challenging.
- **Climate impacted communities** – The victims of climate change will potentially have recourse in their own courts, or by petitioning their own governments.
- **Climate movement** – By recognizing that issues related to responsibility for harm are within national jurisdiction, the climate movement gains a host of legal options, including advocating for climate compensation legislation, such as that proposed in this report.

The *Climate Compensation Act* described in this report is one way to assert jurisdiction over climate damages, and demonstrate that there are consequences for fossil fuel polluters for failing to reduce greenhouse gases entering the global atmosphere, and that the rules for those consequences can be established and enforced by an individual country (or in some cases sub-national government).

At the same time, the described Act would uphold the principle of equity and common but differentiated responsibilities and respective capabilities (CBDRRC) by (i) only imposing a risk of liability on major corporate actors; and (ii) ensuring that liability for damages is proportionate to historical responsibility.



Trees cocooned in spider webs, an unexpected side effect of Pakistan flooding in 2010. (Photo by DFID - UK Department for International Development)

Essentially, a *Climate Compensation Act* seeks to internalise the costs of climate pollution by clarifying that causing significant harm to the global atmosphere has been illegal since the potential risks of releasing anthropogenic greenhouse gases into the atmosphere were first emphasized by scientists. In doing so, the Act challenges the legitimacy of corporate actors that assume that they can continue to profit from greenhouse gas emissions and shift the cost of doing so onto others and get away with having done so in the past. Even if a country's *Climate Compensation Act* is never used the message sent about the illegitimacy of the fossil fuel economy would be clear. It would be a risk that fossil fuel companies and other large-scale greenhouse gas producing companies should disclose to their shareholders.

By creating the possibility of a consequence for past, present and future emissions, a *Climate Compensation Act* fundamentally changes the dynamics in national and international climate policy development – creating an incentive to come to the table and address the risks to corporate and national bottom lines.

## The national need for a climate compensation act

The damages from climate change are rising, and in many countries the desire to set rules related to the legal consequences of greenhouse gas emissions may be a practical one – seeking compensation for costs ranging from the costs of adapting to climate change, to the costs of rebuilding communities devastated from storm events or other climate-related impacts.

This motivation will only grow in countries around the world, as taxpayers and the victims of climate change begin a public conversation about who should pay for those costs seems inevitable. As Daniel Farber wrote in his seminal article, *Adapting to climate change: who should pay*, in 2007:

We should start thinking about cost allocation now because very soon the world is going to start doing so. As the realization sinks in that climate change will cause billions of dollars of harm even if we do everything feasible to cut back on emissions, the people who are directly harmed are going to start wondering whether they alone should bear the costs.<sup>6</sup>

Climate change affects legal rights in dramatic and unprecedented ways. It is difficult to imagine another context in which humans could knowingly cause hundreds of thousands of deaths and billions of dollars worth of damages to private, community and government rights, including private property rights, human rights and personal injuries, where there would not be loud and vigorous demands that the perpetrators put a stop to the harm, and provide remedies, including compensation.

One commentator has pointed out that if all greenhouse gas emissions were emitted by a single entity, a “hypothetical super-emitter,” the legal system would be well equipped to find legal responsibility.

And yet, because of the numbers of emitters involved in climate change, and the centrality of fossil fuel use to our culture and economy, perhaps together with lingering doubts about the science of climate change in some circles, there has been limited public discussion about who should pay for climate change damages, even as some governments prepare to spend billions of taxpayer dollars to adapt, and more billions to bail out victims of storm events that were likely climate-related.

---

6 D. Farber, *Adapting to Climate Change: Who should pay*, 23(1) *Journal of Land Use 1* (2007) at p. 4.

## Compensation internationally

**At the international level there have, of course, been discussions about the damages caused by climate change, and whether some countries might have a legal and/or moral responsibility to pay other countries compensation, or at least assist those countries in addressing “loss and damage.” These discussions resulted in the creation of the Warsaw Loss and Damages Mechanism. The logistics of this important mechanism continue to be developed.**

**Recently, our colleagues at the Climate Justice Program have proposed that the funding for this mechanism come from a carbon levy on the fossil fuel companies based on their emissions – which would have the effect of creating a global carbon price and helping developing countries address climate impacts.**

At the same time, there has been active academic debate about the prospect that large-scale fossil fuel polluters might be held liable for damages related to climate change. And the debate has not been merely academic, with lawsuits filed in the U.S., and more recently announced in Germany<sup>7</sup> against energy companies for climate related damages.

It is clear that the laws in most countries have never addressed a problem quite like climate change before. Climate change is not just international – in the sense that the emissions that cause the harm cross borders – it is truly global, in that the harm occurs only when emissions from around the world mix in the global atmosphere and have a global effect which affects people in every country around the world. To add to the complexity, the effects of greenhouse gas emissions may take years to show up, and when they do, in many cases,

it will often be challenging to prove the link between that specific effect and climate change.

There is a long list of unanswered questions that would have to be answered by the courts in addressing a claim for compensation arising from climate change. From the broad policy questions of whether the courts should even consider such issues to specific questions of what type of remedy a court might grant, any party to a climate damages lawsuit face a great many unknowns, which guarantee a complex, lengthy and expensive hearing for any climate plaintiff “lucky” enough to get to trial.

While in many countries there are existing laws and legal principles that might well provide the answers to these questions, and form the basis of a lawsuit against large-scale fossil fuel polluters, these questions could be resolved more quickly and cheaply through legislation that clarifies the basis for a climate damages lawsuit. Such legislation could protect the rights of the victims of climate change while providing much-needed clarity to the companies and entities that contributed most to the harm.

## Precedents for a climate compensation act

The concept of government enacting a new law to change rules of liability and compensation is hardly unusual. There are ample precedents for governments passing legislation to clarify, amend or change the rules surrounding liability to ensure that the laws of a country will achieve (in the view of the legislator) a more just, equitable or efficient result.

In many countries, known as civil law countries, all rules for liability are based in legislation. Even in common law countries, in which rules for liability are developed over time by judges, governments can and do pass legislation changing those rules. Just a few notable examples include:

- Contaminated sites legislation, such as the U.S. *Comprehensive Environmental Response, Compensation, and Liability Act* (also known as the

<sup>7</sup> D. Collins. Peruvian farmer demands climate compensation from German company. The Guardian (March 16, 2015), available on-line at <http://www.theguardian.com/environment/2015/mar/16/peruvian-farmer-demands-climate-compensation-from-german-company>, last accessed 22 November 2015.



*Superfund Act*), creating or clarifying liability for the clean-up of contamination;

- Legislation imposing the polluter pays principle on, but limiting liability for, oil spills;
- Workers' Compensation legislation, which in many countries replaces the right of workers and employers to sue for work-place industry in court, with a specialized tribunal system.

Some jurisdictions already have legislation related to climate-related litigation.<sup>8</sup>

It is also worth noting the example of tobacco damages legislation enacted by the U.S. State of Florida and Canadian provinces in the 1990s. Many commentators have noted the similarities between tobacco litigation and climate damages litigation, such as the challenges related to causation that are posed by both types of lawsuit. In the early 1990s the perception was that it would be difficult or impossible to bring a tobacco damages case under Canadian law. However, Canadian provinces, which pay for public health care, were paying significant costs as a result of tobacco-related illnesses:

Canadian provinces were therefore very interested when, in 1995, the State of Florida enacted the Medicaid Third Party Liability Act, which allowed it to recover smoking-related costs covered by Medicaid, and changed the rules for liability in lawsuits against tobacco companies. ... British Columbia was the first province to take action, enacting the Tobacco Damages Act in 1997. Like the Florida legislation, the Tobacco Damages Act created a new cause of action, allowed the



Smog over Cairo, Egypt. Climate change will make instances of smog more severe. (Photo by United Nations Photo, via Flickr. No modifications.)

government to recover damages on behalf of the health care system, allowed the award of damages where a defendant's actions had increased the risk of an outcome, and dealt with the apportionment of liability between parties. All other Canadian provinces followed the B.C. lead, although to date only B.C., Ontario and New Brunswick have filed suits under the new laws.<sup>9</sup>

The ability of Canada's provinces to enact this type of legislation, notwithstanding the impacts of such legislation on international companies, has been upheld by the Supreme Court of Canada.<sup>10</sup>

More recently, Singapore's 2014 *Transboundary Haze Pollution Act* provides an example of a country flexing its legal muscle in a transnational pollution context.<sup>11</sup> A response to forest fires set intentionally in Indonesia that caused air pollution and health impacts in Singapore, the *Haze Pollution Act* creates civil liability for companies that contributes to haze pollution in Singapore.<sup>12</sup> It is

8 For example, Israel's Abatement of Environmental Nuisances (Civil Action) Act, which focuses not on damages but court-ordered relief, creates a cause of action for environmental nuisances, and expressly defines air pollution as including "material whose presence in the air causes or may cause... climate or weather change": Abatement of Environmental Nuisances (Civil Action) Act, Israel; R. Lord et al. *Climate Change Liability: Transnational Law and Practice*. (Cambridge: Cambridge University Press, 2012) discusses this provision at p. 294, suggesting that damages may be possible when the statute is used in concert with other legislation. See an English-language translation of the Act on-line: <http://www.sviva.gov.il/English/Legislation/Documents/Nuisances%20Laws%20and%20Regulations/PreventionOfEnvironmentalNuisances-CivilAction-Law1992.pdf> (last accessed 20 May 2015).

9 A. Gage and M. Byers. *Payback Time: What the internalization of climate litigation could mean for Canadian fossil fuel companies*, (Vancouver, Canada: West Coast Environmental Law, 2014), p. 35.

10 *Imperial Tobacco v. BC*, 2005 SCC 49.

11 *Transboundary Haze Pollution Act*. Statutes of Singapore, No. 24 of 2014.

12 The provisions related to liability creates a duty of entities to avoid contributing to the "haze pollution in Singapore," and then makes a breach of that duty "actionable conduct at the suit of any person in Singapore" who has suffered personal injury, property loss or economic loss as a result of the breach of duty (s.6); The Act also creates various presumptions that would assist the plaintiff in such litigation (s. 8).



important to note that this Act relies on the presence of several relevant Indonesian corporations in Singapore, rather than the right of all countries to define liability in relation to harm suffered within their borders, as is the case for the Model Act proposed in this Report, and discussed further in Part II.

As the damages from climate change rise, and especially as long as international negotiations fail to result in the action and international cooperation that is necessary to tackle climate change and assist countries with adapting to climate change, there is a growing incentive for countries to seek recourse in their own courts. While this is, to our knowledge, the first public draft of a model *Climate Compensation Act*, such legislation has been suggested (in addition to West Coast Environmental Law) by a committee of the International Bar Association<sup>13</sup> and the authors of *The Canadian Law of Toxic Torts*.<sup>14</sup>

There may also be growing interest from climate vulnerable countries in options like these. We end this Part of the report by quoting the recent joint “People’s Declaration for Climate Justice”, signed by six island nations in June 2015, that reads, in part:

We are from island states in shared oceans. We stand in solidarity.

We commit to holding those most responsible for climate change accountable. By doing so, we send a message of hope that the people and not the polluters are in charge of humanity’s destiny.

We commit to bring a case that would investigate the human rights implications of climate change and hold the big carbon polluters accountable to appropriate international bodies or processes.<sup>15</sup>

13 International Bar Association Climate Change Justice and Human Rights Task Force. *Achieving Justice and Human Rights in an Era of Climate Disruption* (International Bar Association, 2014), pp. 116, 127.

14 L. Collins and H. McLeod-Kilmurray. *The Canadian Law of Toxic Torts*. (Toronto: Thomson Reuters Canada Ltd., 2014), p. 291.

15 Available on-line at <http://www.greenpeace.org/international/Global/international/briefings/climate/2015/People%E2%80%99s%20Declaration%20for%20Climate%20Justice.pdf>, last accessed 18 November 2015.

## The political challenges of a climate compensation act

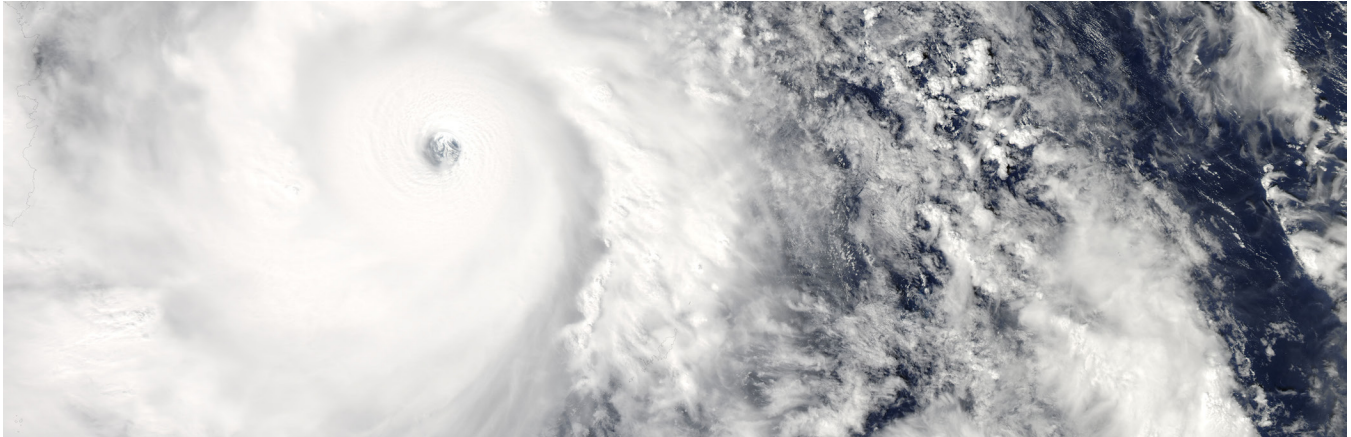
The purpose of this report is to outline the legal basis for a climate compensation act, and to suggest what the actual language of such legislation. However, it is important not to underestimate the political and economic barriers that might exist in many nations.

These will vary considerably from country to country, but in general developing countries, which have typically benefited economically from cheap oil and gas, may be concerned about impacts on their economy, while developing countries may be concerned that efforts to hold fossil fuel companies liable may result in a loss of foreign aid and other pressure from developed countries.

In both cases, a wide-spread public debate about the moral and legal responsibility of fossil fuel companies and other large-scale fossil fuel polluters may be essential in creating the political space for this type of climate change legislation.

## PART II

# Transnational litigation and climate damages litigation



Typhoon Haiyan, Philippines, 2013

One might think that a climate compensation act would be of limited use if adopted by a country with few major sources of greenhouse gases, where few potential defendants (large-scale emitters) were present. In other countries, there would be fears that enacting such a law would cause potential defendants to “flee the jurisdiction” – moving their operations to other countries that do not have such a law.

While these are risks, there are existing laws and treaties that the parties involved in bringing transnational litigation can invoke, and which create a range of options for litigants under a climate compensation act.

The laws in question vary from country to country, and this report does not offer a comprehensive review of all laws that might apply in all relevant countries. However, we can make some comment on relevant laws in some key countries related to:

- a. A country asserting legal jurisdiction on the basis of harm that occurs within the jurisdiction, even if the cause of the harm occurs elsewhere; (jurisdiction)
- b. When a court that is hearing a climate-related lawsuit should apply the law of the country where the harm occurred; (choice of law)
- c. When a court should enforce a damages award obtained in another country (enforcement of foreign judgments).

Before turning to these questions, however, it would be helpful to discuss briefly the idea of “torts” or “delicts” and where one may be said to occur, as the location of the tort in a climate-damages lawsuit is key to understanding all three of these subjects.

## What is a tort and where does it occur?

A tort, known as a delict in some countries, is a recognized category of legal wrong for which a court will provide a remedy. It has been defined as:

Wrong ; injury; ... In modern practice, tort is constantly used as an English word to denote a wrong or wrongful act, for which an action will lie, as distinguished from a contract. A tort is a legal wrong committed upon the person or property independent of contract.<sup>16</sup>

In brief, a tort is a wrongful act which a plaintiff can sue for, and it will be a key concept in any climate compensation act, as we are attempting to explain how an existing type of tort (notably nuisance) applies to climate damages litigation.

As we shall see, in the laws of many countries, the question of where a tort takes place can be critical in understanding which court has jurisdiction, which laws apply, and, as a result, when a court should consider enforcing a foreign judgment related to that tort.

In most cases, the question of where the tort takes place is straightforward, since both the action giving rise to harm, and the actual harm, both occur in close proximity. Not so in the case of climate-related harm, where emissions occur around the world, and the damage that forms the basis of the suit will most often occur in one country.

The cause and harm of a tort (or other types of legal wrong) will, on occasion, cross geographic boundaries, in which case the location of the tort is “both ambiguous and diverse.”<sup>17</sup> However, many courts have recognized, in the words of the Supreme Court of Canada:

There are situations, of course, notably where an act occurs in one place but the consequences are

directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong.<sup>18</sup>

In such cases, the courts will often look to the components of the actual tort to evaluate where the harm took place: does this particular type of tort focus on the action of the defendant, or on the harm to the plaintiff? Thus, in a case related to negligent advice given – which focuses on the allegedly careless actions of the defendant – an Australian court ruled that the tort took place where the statement was made, and not where the damage had occurred as a result of the statement:

The cause of complaint was the act of providing the professional accountancy services on an incorrect basis... The act of providing accountancy services was an act complete in itself, or, if not complete in itself, one that was initiated and completed in the one place. That place was Missouri. The fundamental significance of that simple fact is not diminished merely because it may be possible, for the purpose of legal classification, to treat that act as equivalent to a statement that was received or acted upon in Australia.<sup>19</sup>

By contrast, defamation law – which focuses on the damage to a person’s reputation – has been held to occur where the reputational damage occurred, no matter where in the world the initial publication occurred. In the era of the internet, where publication in one place may give rise to harm anywhere in the world, this opens up a wide range of possible locations:

The most important event so far as defamation is concerned is the infliction of the damage, and that occurred at the place (or the places) where the defamation was comprehended.<sup>20</sup>

16 <http://thelawdictionary.org/tort/>, last accessed 16 November 2015.

17 Keys M 2010, ‘Substance and procedure in multistate tort litigation’, *Torts Law Journal* vol 18, pt 3, 205.

18 *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, para. 43 (Canada).

19 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 64

20 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, at 649 per Callinan J (Australia); See also *Edition Ecosociete Inc. v. Banro Corp*, 2012 SCC 18 (Canada).

The tort of private nuisance focuses on the interference with the plaintiff's use and enjoyment of their private property, and in our view, a climate-related claim in private nuisance will take place where the private property, and therefore the harm, is located. For public nuisance, which is focused on interference with the rights and interests of the public, the location of the tort may depend upon which country's "public" the tort is intended to protect.

Similar considerations arise in understanding the multi-national implications of statutes that create (or modify) rules of liability, and questions about the location of the tort should be taken into account in drafting key pieces of a climate compensation act.

In the United States, the 9th Circuit Court of Appeals considered whether Canadian aluminum giant Teck Cominco could be liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The case concerned the clean-up of contamination in the U.S. that was the result of pollution that occurred in Canada, but which subsequently spread down river across the U.S.-Canada border. The Court ruled that because the statute defined liability related to causing contamination at a particular U.S. site, the liability was domestic, not international, even though the source of the contamination was pollution that occurred in Canada.

We hold that applying CERCLA here to the release of hazardous substances at the Site is a domestic, rather than an extraterritorial application of CERCLA, even though the original source of the hazardous substances is located in a foreign country.<sup>21</sup>

Also relevant is the Supreme Court of Canada's consideration of legislation, enacted by the Province of British Columbia, to change liability rules related to tobacco lawsuits. Although not directly discussing the location of the tort, the Supreme Court ruled that British

Columbia could set the rules for such litigation, because the tort related to the harm suffered in the province:

[N]o territory could possibly assert a stronger relationship to that cause of action than British Columbia. That is because there is at all times one critical connection to British Columbia exclusively: the recovery permitted by the action is in relation to expenditures by the government of British Columbia for the health care of British Columbians.<sup>22</sup>

The final question of where a climate-related tort under a climate compensation act takes place will depend on the particular language of the statute. However, it is important to note that torts related to climate change do not merely cross national boundaries – they are truly global in nature. The emissions occurring from one defendant in one country cannot, by themselves, be said to be the cause of climate change (and therefore of harm suffered), but only one cause, along with others. It is worth considering whether a tort, in such circumstances, can ever be said to have occurred in one location, if it is not in the location where the harm occurred.

## Jurisdiction

Each country's own laws set the rules for when its courts may claim jurisdiction over a legal dispute. In some cases, that jurisdiction may be very broad indeed. Under French law, for example, a French citizen residing anywhere in the world may sue a foreign defendant in the French courts even if the case otherwise has no connection to France.<sup>23</sup> Similar provisions exist in Belgium and the Netherlands,<sup>24</sup> although they are not the norm internationally.

21 *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214 (9th Cir. 2011).

22 *Imperial Tobacco v. BC*, 2005 SCC 49, para. 49.

23 French Civil Code, Article 14. This is not to suggest an absence, depending on the facts of the case, of other legal concepts such as *forum non-conveniens* (the idea that a court should decline to act, even if it has jurisdiction, where there is a more appropriate place to bring the claim) that might dissuade a court with such a wide jurisdiction from hearing a climate damages claim.

24 K. MacDonald. *Cross-Border Litigation: Interjurisdictional Practice and Procedure*. (Aurora, Ontario: Canada Law Book, 2009), p. 7, footnote 4, citing Code Judiciaire (Belgian Judicial Code), articles 635(5) and 638; and Code of Civil Procedure (Netherlands), articles 126(3).





Aerial view of devastation from Typhoon Haiyan in Tacloban, Philippines, 2013.

In some cases a country asserts broader jurisdiction over issues with a uniquely international dimension. For example, Spain asserts a “universal jurisdiction” over alleged torturers, a concept that at least one commentator has suggested could be applied to climate change-related claims.<sup>25</sup>

But while there is nothing (subject to the constitutional restraints of an individual country) preventing a country from simply declaring its jurisdiction over climate change, that broad authority is unlikely to be recognized by other countries. To the extent that a country is going to need help to enforce climate-related orders, it would be preferable to ground the jurisdiction on more a broadly recognized legal principles under what is known as “private international law.”

Most countries require that there be some direct connection between the case – usually in the form of some combination of either the subject of the case (subject matter jurisdiction) or the parties, and especially the defendant(s) in the case (personal jurisdiction), so that any order made by the court order can have a direct effect within the country. These two requirements are

sometimes considered separately, and are sometimes blended into a single test.

Without attempting a comprehensive review, it is worth noting that in many countries, either as a result of common law<sup>26</sup> or statutory innovations<sup>27</sup>, it is possible to bring a tort claim against international defendants that are not present within the jurisdiction where:

- the tort (legal wrong) occurred in that country; and/or
- where the tort claim involves harm to real property that is situated in that country.

To list just a few examples:

- Torts brought in the European Union by EU-based plaintiffs against EU-based defendants must

<sup>25</sup> J.B. Gracer, *Climate Change Litigation: Could it take root outside of the United States?* 20(3) *Environmental Claims Journal* 248 (2008).

<sup>26</sup> For example, the Supreme Court of Canada’s development of its “real and substantial connection” test as a basis for jurisdiction, discussed below at notes 33 and 34.

<sup>27</sup> In many cases, court rules or practice directions have extended the ability of a plaintiff to serve out of jurisdiction, thereby resolving questions of personal jurisdiction. M. Keyes. in A. Dickson et al. (eds). *Australian Private International Law for the 21st Century*, (Portland, OR: Hart Publishing, 2014), p. 17: “In most international cases, personal jurisdiction is established by service out of the jurisdiction pursuant to the rules of court, a form of delegated legislation which is made by Rules Committees of the courts.”

be brought “in the courts for the place where the harmful event occurred;”<sup>28</sup>

- Torts in the UK can only be initiated against non-EU-based defendants with a judge’s permission to serve the defendant, but such permission may be granted where “damage was sustained, or will be sustained, within the [United Kingdom]”<sup>29</sup> or where the tort “relates wholly or principally to property within the [United Kingdom]...”<sup>30</sup>
- Plaintiffs based in New Zealand may commence an action in tort against a defendant not based in the country without leave of the court for “any act or omission in respect of which damage was sustained was done or occurred in New Zealand,” or where the subject matter of the tort is “land or other property situated in New Zealand.”<sup>31</sup>
- In Australia, although the rules vary by state: “In every jurisdiction except Western Australia, the court is competent to deal with tort claims where the claimant claims to have suffered some loss or injury within the forum, irrespective of where the tort occurred.”<sup>32</sup>
- Tort which occur within a Canadian province result in a strong presumption that there is a “real and substantial connection,”<sup>33</sup> between the case and the province, resulting in jurisdiction, even where one or more of the defendants are not present in the jurisdiction.<sup>34</sup>

28 Brussels I Convention on Jurisdiction, s. 5(3).

29 Practice Direction 6B — Service out of the jurisdiction, s. 3.1(9); the same section also provides that such service may be granted where the tort arises from actions taken within the jurisdiction. The passage in this and the following note refer to impacts occurring “within the jurisdiction,” refers to the jurisdiction of the court in question, but for the purposes of this report means the appropriate court in the United Kingdom.

30 Ibid., 3.1(11)

31 New Zealand’s Court Rules explicitly provide for the court to hear cases whenever the harm that is the subject of a lawsuit has occurred in New Zealand: N.Z. High Court Rules, r 6.27, cited in Chambers, above, note 57, at p. 44.

32 M. Keyes, above, note 27, p. 17.

33 Morguard Investments v. De Savoye (1990), 76 D.L.R. (4th) 256 (S.C.C.); Beals v. Saldanha (2003), 234 D.L.R. (4th) 1 (SCC); Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 S.C.R. 572.

34 In Bredren v. Black, 2012 SCC 19, for example, the Supreme Court of Canada accepted that the court had jurisdiction even though “[O]nly one of the 10 defendants is resident in Ontario and none of the other nine has consented to

In all of these cases, the courts have a general ability to refuse to hear a case simply because it is not the appropriate forum (*forum non conveniens*).

Missing from this list is the United States, which does not accept that a claim can be brought on the basis of the tort or harm occurring within its borders, instead maintaining a strong requirement that the defendant(s) be actually present within the state or country where the action is brought. As a practical matter, this may be less of a challenge for U.S. plaintiffs than would be the case in many other countries, due to the number of large-scale fossil fuel polluters with a presence in the country. For instance, an article by Jonathan Zasloff evaluates the potential for a climate damages lawsuit brought in the U.S. against the Indian car company, Tata, concluding that the Indian company has sufficient presence in the U.S. to ground such a lawsuit.<sup>35</sup>

Finally, it is worth noting some policy advantages to allowing the courts of the country where climate-related damages have occurred to hear any resulting court cases:

- A single court can consider the relative contributions of, and the interaction between, the major sources of global emissions, even when they occur in different countries. This would not be possible if individual lawsuits in respect of climate-related damages had to be brought in multiple jurisdictions where the harmful emissions had occurred, or where the multiple defendants were based.
- Plaintiffs would be able to lead evidence related to the climate-related damage in one court proceeding, and allow the defendants to respond to that evidence in one proceeding. If jurisdiction were dependent upon where the emissions occurred, a plaintiff would theoretically need to bring separate actions in multiple jurisdictions where the emissions occurred, and defendants operating

submit to the jurisdiction of the Ontario court.”

35 J. Zasloff. The Judicial Carbon Tax: Reconstructing public nuisance and climate change. 53 UCLALaw Review 1, at p. 49.

in multiple jurisdictions might need to defend parallel actions.

- All greenhouse gas producers would be subject to the same laws,<sup>36</sup> at least in relation to a particular climate-related harm. This addresses the problem of “leakage,” in which producers move operations from countries with strong environmental laws to those with weaker laws.
- Individuals impacted by climate change may have legal recourse in their own courts.

## Choice of Law

In international litigation, after a court has asserted jurisdiction, it may be necessary to consider which country’s laws apply. Although one might assume that a court would apply its own laws, in many countries, a court considering a transnational case will apply the “law of the place where the activity occurred,” a principle referred to as *lex loci delicti*. What that means in practice is that the court should apply the laws of the place where the tort occurred – and not its own laws.<sup>37</sup>

This means that the plaintiff in a climate-related lawsuit has the option, at least in many countries, of suing one or more climate-related defendants in a country where the defendant is located, and then ask that country’s courts to apply the law of the country where the harm was suffered (assuming that the court agrees that that is where the tort took place).

This situation is clearer in Europe where member countries have signed a treaty known as Rome II that deals with inter-jurisdictional issues. Rome II, which came into force in 2009, adopts what is essentially a *lex loci delicti* approach, although its language describes the approach in terms of damages:

[T]he law applicable to a non-contractual obligation arising out of a tort/delict shall be

the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.<sup>38</sup> [Emphasis added]

In addition, Rome II has a special, and more flexible rule, that applies to environmental litigation only, and which gives the plaintiff a choice of whether to sue based on the laws of the “country where the damage occurred” or the country where “the event giving rise to the damage occurred.”<sup>39</sup>

Rome II is intended to apply to all litigation within EU countries.<sup>40</sup> Silke Goldberg and Richard Lord write:

The Rome II regime is of potentially great significance in climate change litigation, where nationals in developing countries may allege damage suffered in those countries as a result of actions by corporations domiciled in the EU. Such corporations may be sued in their State of domicile, with the claimant able to rely on the law of his/her own State.<sup>41</sup>

These rules mean that if a country enacts a climate compensation act, the liability rules contained in that act may ultimately be applied in the courts of other countries – countries where the defendant fossil fuel polluters are present. This may be particularly important for countries with limited judicial capacity, or where few large-scale greenhouse gas emitters are present.

<sup>36</sup> This benefit is subject to the decision of the court on the appropriate “choice of law”, a concept discussed below at notes 37 - 41.

<sup>37</sup> Tolofson, above, note 18, pp. 151-153.

<sup>38</sup> REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32007R0864>, last accessed 18 November 2015, at Article 4(1). Note that even before Rome II most EU countries applied variants of the *lex loci delicti* approach to determining which law should apply. Thus, recent litigation against Royal Dutch Shell in the courts of the Netherlands by Nigerian plaintiffs applied the law of the Nigeria, since the damages in question had occurred prior to Rome II. See, for example, F. Akpan v. Royal Dutch Shell, District Court of the Hague, docket number: C/09/337050 / HA ZA 09-1580, Final Judgment, available at [https://www.milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/at\\_download/file](https://www.milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/at_download/file), last accessed 18 November 2015.

<sup>39</sup> *Ibid.*, Article 7.

<sup>40</sup> *Ibid.*, Article 3 (note, however, the exception of Denmark, which did not sign the Treaty: *Ibid.*, Article 1(4).)

<sup>41</sup> Lord, above, note 8, p. 484.



## Recognition and Enforcement of Orders

Lawyers interested in bringing climate change lawsuits have been concerned about the apparently limited prospects for collecting damage awards issued by courts in countries where the emitters do not have assets or otherwise carry on business. This is one reason why legal discussions so far have focused on bringing lawsuits in the jurisdiction where the emissions occurred, or at least where emitters have assets.

However, in many countries around the world, once a judgment for damages has been obtained in a “foreign jurisdiction,” it is possible to have that judgment recognized as a debt and enforced. As with the other aspects of international litigation, whether and how this occurs depends on the laws of the individual country.<sup>42</sup>

Notably, many countries are parties to treaties or other arrangements that may allow for collection of international debts. These treaties may exist between two nations (bi-lateral treaties), at a regional level, or between multiple countries. In each case each treaty’s own legal requirements will vary.<sup>43</sup>

Even without such treaties, many countries have rules related to the collection of debt. For example, under Canada’s common law,<sup>44</sup> the courts will generally recognize a final judgment of a foreign court where:

- a. the foreign court had jurisdiction according to Canadian law (i.e. a “real and substantial connection” to the case, as discussed above);
- b. the order is final and conclusive; and
- c. the order is not for a penalty or for taxes, or for enforcement of a foreign public law.<sup>45</sup>

<sup>42</sup> See Macdonald, above, note 24, p. 295.

<sup>43</sup> R. Michaels. Recognition and Enforcement of Foreign Judgments. Max Planck Encyclopedia of Public International Law, available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699>, last accessed 18 November 2015.

<sup>44</sup> It should be noted that the common law has been displaced by statute in some of Canada’s provinces, but the statutory rules are not substantially different.

<sup>45</sup> MacDonald, above, note 24, at pp. 254 — 261. See also M. Koehnen and A. Klein. The Recognition and Enforcement of Foreign Judgments. (Vancouver: International Bar Association International Conference 2010, 2010), available at [http://mcmillan.ca/Files/132622\\_Paper\\_%20Recognition%20and%20](http://mcmillan.ca/Files/132622_Paper_%20Recognition%20and%20)



More severe and widespread drought is one impact of climate change. (Photo by Christopher “cricket” Hynes, via Flickr)

It is important to note that a statute focused on compensation will generally not be a “foreign public law,” referred to in this last point. If it did, it would be impossible to enforce judgments from civil law countries – in which all liability is based in statute. In *United States of America v. Ivey*,<sup>46</sup> the Ontario Court of Appeal considered whether an order for compensation under the U.S. *Comprehensive Environmental Response Compensation and Liability Act* (1980), which deals with liability for contaminated site remediation, should be enforced in Canada. The court concluded that the public law exception, if it exists in Canadian law, does not apply to legislation like this, aimed at compensation for environmental harm occurring within the boundaries of the jurisdiction. The trial judge, Sharpe, J., in reasons adopted by the Court of Appeal, writes about the complex relationship between legislation and the common law:

[T]he traditional remedies of the common law have effectively been supplanted by detailed statutory and regulatory regimes... If these judgments are

**Enforcement%20of%20Foreign%20Judgments%20in%20Canada%20%20-%20IBA%20Vancouver%20October%202010%20%28co-%20%282%29.pdf**, last accessed 17 July 2014, which adds another required element (that the amount of damages must be for “a definite and ascertainable sum of money” (which MacDonald includes in (b)), and lists (c) as a defence to enforcement, rather than a required element for enforcement.

<sup>46</sup> (1996), 30 O.R. (3d) 370 (C.A.), affirming 26 O.R. (3d) 533.



to be refused enforcement on the grounds that they represent an assertion of foreign sovereignty, it is difficult to see how enforcement could ever be accorded a civil judgment in favour of a foreign state.

Provided that the focus of legislation is on compensation for harm, and remedies are available not just to the government but to all suffering such harm, then it appears that the foreign law exception will not apply. This is not to say that legislation aimed at enabling climate change compensation could never be found to have a predominantly public purpose, and this risk means governments adopting climate compensation legislation should base their laws, to the extent possible, on existing and accepted principles of liability and to clearly link compensation owed to the actions of the defendants and the harm caused.

In addition, the Canadian courts will not enforce a foreign judgment that is contrary to public policy as a result of being, “founded on a law contrary to the fundamental morality of the Canadian legal system. The public policy defence also guards against the enforcement of a judgment rendered by a foreign court that is proven to be corrupt or biased.”<sup>47</sup> Consequently, evidence of fraud, a fundamentally unfair court process, or other circumstances that would shock Canadian consciences, can prevent enforcement.<sup>48</sup> However, there is no reason why an award for climate-related damages should not be enforceable under these rules.

This is not to imply that all country’s laws provide for such collection of debt,<sup>49</sup> but even if one country’s courts do not ultimately enforce such a debt, many large greenhouse gas producers operate in multiple countries,

which means that the judgment could potentially be enforced in numerous countries.<sup>50</sup>

## Conclusion of Part II

Existing laws related to obtaining and enforcing judgments concerning transnational torts give great flexibility, and a wide range of option, to plaintiffs bringing an action under a climate compensation act. These options include bringing an action in their own country’s courts, and then enforcing it elsewhere, or in bringing an action in the courts of a defendant’s country, and pressing to have the climate compensation act applied in those courts.

That being said, the plaintiff in a climate compensation case will need to carefully evaluate where and how to initiate litigation, based on the defendants that they are considering suing and the countries that might have jurisdiction to hear a claim. Consideration should be given both to where a climate case might be won, but also how and where it might be enforced.

---

47 *Beals v. Saldanha* (2003), 234 D.L.R. (4th) 1 (S.C.C.) at para. 72.

48 See Koehnen, above, note 45, pp. 30-39, discussing fraud, denial of natural justice and public policy defence. See also MacDonald, above, note 24, at p. 267-268, discussing the relationship between fraud, natural justice and public policy defence, and generally from pp. 261-271.

49 In particular, the UK Supreme Court’s decision in *Rubin v. Eurofinance SA*, [2012] UKSC 46 suggests that UK courts may not enforce orders from countries where the defendant was not present, notwithstanding that UK rules provide for service out of jurisdiction, above, note 29.

---

50 Not addressed in this report is the question of whether the courts in some countries might also enforce injunctive relief (i.e. court orders requiring a party to stop doing something — reducing greenhouse gas emissions, for example — or to do something) made by foreign courts in respect to large-scale greenhouse gas producers: see *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, for discussion of when Canadian courts will consider enforcing injunctive relief in an order from another country’s courts. The enforcement of such orders could potentially represent a significant source of uncertainty for large-scale greenhouse gas producers.

## PART III

# A model Climate Compensation Act



Forest fire in Kelowna, BC, 2015. Increased frequency and severity of wildfires will be an impact of climate change. (Photo by Preserved Light Photography, via Flickr. No modifications.)

A *Climate Compensation Act* will, depending on one's interpretation of the law, either clarify the law related to climate change litigation or alter the law to make climate litigation possible.

We have assumed that compensation for climate-related harms should occur only where it is fair to award such compensation. The process must be transparent, unbiased and predictable, and the person claiming compensation should be required to prove that the harm they suffered was in some way caused by climate change and by the defendants – even if rules of causation or proof may need to be modified to make this possible.

Moreover, if a *Climate Compensation Act* is drafted in a way that seems fundamentally unfair to climate defendants,<sup>51</sup> it will undermine the credibility of the

legislation. Draconian legislation that simply asserts that major greenhouse gas producers owe compensation, or which introduces clear biases, may also decrease the likelihood that other countries will recognize or enforce findings of liability made under the *Act*.

For these reasons, it is crucial that a *Climate Compensation Act* strike an appropriate balance between the rights of the plaintiffs and the defendants, even while clarifying rules for determining and assigning liability. Where possible a *Climate Compensation Act* should be

---

Act seems less concerned with fair compensation, and more concerned with punishing GHG polluters, the Act may be seen as being a “foreign public law”, which may act as a reason for a Canadian court not to enforce damages orders. K. MacDonald. *Cross-Border Litigation: Interjurisdictional Practice and Procedure*. (Aurora, Ontario: Canada Law Book, 2009), at pp. 254 — 261. See also M. Koehnen and A. Klein. *The Recognition and Enforcement of Foreign Judgments*. (Vancouver: International Bar Association International Conference 2010, 2010), available at [http://mcmillan.ca/Files/132622\\_Paper\\_%20Recognition%20and%20Enforcement%20of%20Foreign%20Judgments%20in%20Canada%20-%20IBA%20Vancouver%20October%202010%20%28co-%20%282%29.pdf](http://mcmillan.ca/Files/132622_Paper_%20Recognition%20and%20Enforcement%20of%20Foreign%20Judgments%20in%20Canada%20-%20IBA%20Vancouver%20October%202010%20%28co-%20%282%29.pdf), last accessed 18 November 2015. See *United States of America v. Ivey* (1996), 30 O.R. (3d) 370 (C.A.), affirming 26 O.R. (3d) 533, for discussion of the limited application of the “foreign public law” rule.

---

51 Fundamentally unfair rules may be contrary to the “fundamental morality of the Canadian legal system”, as the Supreme Court of Canada put it in *Beals v. Saldanha* (2003), 234 D.L.R. (4th) 1 (S.C.C.) at para. 72. Similarly, if the

based on existing and well recognized legal principles and be focused on fair compensation. It should be based on determining fair compensation and assigning responsibility for that compensation fairly.

The Model *Climate Compensation Act* is drafted based on common law and statutory principles that exist in common law countries, minimizing the likelihood that the judgments can be dismissed out of hand. Obviously, the model Act may require some modification to be true to the legal principles found in individual countries, particularly in countries that operate on a civil law system, but the basic approach should, we hope, be adaptable to a range of national circumstances.

The full Model Act may be found in Appendix A. The discussion that follows is organized in terms of an explanation of the approach taken in the model Act in relation to the following questions:

- What is the basis for the court to hear a claim for climate-related damages? (“Jurisdiction”)
- Who can sue for what climate-related damages? (“the Plaintiffs”)
- Who can be sued for climate-related damages? (“the Defendants”)
- On what basis can a claim for climate-related damages be brought? (“Cause of action”)
- What rules apply to determining whether a Defendant’s actions have caused a particular climate-related damage? (“Causation”)
- What types of orders for damages or other remedies might a court make? (“Remedies”)
- Are there other barriers to climate change litigation that should be addressed? (“Barriers”)
- Are there ways in which different jurisdictions should coordinate in relation to climate compensation? (“Coordination”)

The purpose of the following discussion is not to fully canvas all the possible answers to these questions, but

simply to demonstrate that the approach used in the Model Act is grounded in logical answers based on existing legal frameworks and legal norms.

## Asserting Jurisdiction

The legal basis for a government claiming sovereignty over liability for climate-related damages that occur within its boundaries is discussed in Part II, above; however, we felt that it was important to spell out that jurisdiction in the Model Act, including providing for service on defendants which are not present in the jurisdiction.

The Model Act explicitly asserts at section 19, that court have jurisdiction over climate-related damages occurring within their boundaries.

The section adopts a cautious approach, requiring the plaintiff to demonstrate that there is some basis for the claim that the defendant has committed a climate-related tort.

The Act also provides for the service of defendants whose actions are alleged to have caused climate-related damages who are not present within the jurisdiction (either in accordance with the rules or as directed by a judge) and expressly asserts jurisdiction such defendants.

### Jurisdiction

**19 (1) For the purposes of this Act, the [Trial Court in the Country] has jurisdiction in a civil proceeding brought in relation to climate-related damages where:**

**(a) The damages occurred within [Country];**

**(b) The damages were caused in whole or in part by climate change and its impacts; and**

**(c) There is, on its face, a claim that the defendant has committed a climate-related tort under this Act or the common law.**



In addition, the Model Act provides for reciprocal enforcement of orders – providing that a successful plaintiff in a climate damages suit in another country may collect the debt against defendants if the other country would likely recognize an order made under the Model Act.<sup>52</sup> This type of reciprocal enforceability will increase the impact of climate compensation legislation as it is adopted in an increasing number of countries.

## Cause of Action – Nuisance

Key to any climate compensation legislation is the identification of legal rights that can form the basis of a climate damages lawsuit or other claims to remedies.<sup>53</sup>

As noted, the specific cause of action may vary from state to state. Notably, in some countries there may be existing constitutional or other rights that can readily be applied to climate damages litigation.<sup>54</sup>

In common law jurisdictions, interference with public rights or in the public's interests in respect of commonly held resources, may give rise to the tort of "public nuisance." Damage to, or interference with, private property may give rise to a "private nuisance." Professor Shi-Ling Hsu, writing about possible U.S. and Canadian litigation, goes so far as to suggest that nuisance is the "only theory treated seriously" in current climate change lawsuits,<sup>55</sup> although in our view other options may exist in other countries.

How the Act characterizes the cause of action may have an impact on other problems that the Act needs to address. On the one hand, a focus on the impact of greenhouse gas emissions **on the global atmosphere**,

rather than only on the damages that result from a changing global climate, may simplify causation. On the other hand, for the reasons in Part II, the claim to jurisdiction over climate-related damages is enhanced by expressly link the tort to **damage that occurs within the country**.

There are various descriptions of public nuisance, but its oldest form involves protection of a defined, legally-recognized public right – such as the right of members of the public to use highways or to fish. One of the authors of this Report has argued elsewhere that there is a legal common law basis for recognizing the existence of a public right to a healthy atmosphere:

If a public right to a healthy global atmosphere is recognized, then the focus of a climate change litigant can be on the impacts of large-scale GHG emissions on the composition of the atmosphere, and therefore on that right, which simplifies the issues of causation considerably. Such a public right may be justified [under traditional common law rules for the establishment of a public right]: as an extension of the public right to clean air; through public use of the atmosphere from time immemorial; and due to the inherent necessity and character of the global atmosphere.<sup>56</sup>

There is some reason to believe that the courts in at least some countries may recognize such a common law public right in respect of a healthy atmosphere,<sup>57</sup> but even if they do not, it is our view that the concept of a public right to a healthy atmosphere, and the resulting public nuisance caused by disruption of that right, is an accessible and powerful concept that makes the reality of the current climate crisis clear. The Model Act

52 Model Climate Compensation Act, s. 18.

53 See, IBA, above, note 13, p. 128: "identification of actionable rights available to individuals."

54 ELAW. Holding corporations accountable for damaging the Climate (ELAW, Eugene, OR: 2014), available at <http://www.elaw.org/node/8395>, last accessed 13 November 2015.

55 Hsu, Shi-Ling, A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit. 79 U.Col.L.R. 701 (2008) 79, at pp. 731 to 733, available online at SSRN: <http://ssrn.com/abstract=1014870>, last accessed 18 November 2015. We note that the court case brought by the Alaskan village of Kivalina, filed after Professor Hsu's paper was published, has generated a lot of attention for its use of the tort of conspiracy against companies alleged to have intentionally mislead the public in respect of climate change.

56 A. Gage, Climate Change Litigation and the Public Right to a Healthy Atmosphere, 24 J. Env. L. & Prac. 257 (July 2013), p. 1).

57 In Canada, see *Radenhurst v. Coate*, 1857 CarswellOnt 8, 6 Gr. 139 (U.C. Ch.) ("It is a plain common law right to have the free use of the air in its natural unpolluted state..."). In U.S., see *Angela Bonser-Lain et al. v. Texas Commission on Environmental Quality*, District Court of Travis County, Texas, 201st Judicial District, Cause No. D-1-GN-11-002194, Opinion of Gisela Triana, August 2, 2012. *Akilah Sanders-Reed et al. v. State of New Mexico*, State of New Mexico, Santa Fe County, 1st Judicial District Court, File No. D-101-CV-2011-01514, Order of Judge Sarah Singleton, dated Jul 14th, 2012.

adopts this approach and makes it clear that measurable interference with this right is a public nuisance, but also makes damage or the potential damage within the country that enacts the Act a key aspect of the tort.

## Right to a Healthy Atmosphere

**4 (1) The people of [country] have relied upon a healthy global atmosphere to regulate heat from the sun since time immemorial and have a right to a healthy global atmosphere;**

**(2) The alteration of the health and composition of the global atmosphere to a measurable degree and in a manner that causes or may cause harm in [country] violates the right in s. 4(1) and is a significant contribution to Climate Change, and as such constitutes a public nuisance;**

Even if contribution to climate change constitutes a public nuisance, however, it has been argued that a defendant should escape liability if it can demonstrate that its activities were reasonable. Michael Gerrard identifies the appropriate standard of care as a key question facing climate litigation, asserting that: “Public nuisance liability is generally imposed only on those who engaged in unreasonable conduct.”<sup>58</sup>

It is important not to overstate this difficulty. While the courts will generally not impose public nuisance liability for unforeseen, non-negligent actions, there is authority that a direct, ongoing and intentional violation of a public right is presumptively unreasonable.<sup>59</sup> However, the safest course of action is for a *Climate Compensation Act* to address the question of the defendant’s conduct directly in the legislation.

<sup>58</sup> Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 *YALE L.J.* 135 (2011), p. 137.

<sup>59</sup> Klar, L. *Tort Law* (4th Ed), (Thomson Carswell, 2008), at p. 720: “The role which negligence plays in the private action for public nuisance is unclear. Where, as is the most common case, the defendant’s activity was itself the public nuisance, the issue does not arise. Thus, if ... the deliberate discharge of pollutants into the air or water ... constitute public nuisances, negligence is not in issue. The defendants in these cases have in fact intentionally created the public nuisances, and only the extent of their liability for damages remains to be determined.”

Building on case-law that holds that a nuisance which physically damages property or to a person is presumptively unreasonable,<sup>60</sup> the *Climate Compensation Act* will state that in cases involving climate-related damage to property or the person – or reasonable costs attempted at avoiding those types of damages (since this has the potential to actually minimize the damage to properties which the defendant would otherwise be liable for) – the interference with the rights of the plaintiff(s) will be considered unreasonable.

For other damages, the *Climate Compensation Act* could simply remove the defence of reasonableness, could provide for some other standard of reasonableness, or could limit liability under the Act to physical damage to property and the person (which may itself be a very major amount of damage). Our Model Act proposes that where the damages claimed were reasonably foreseeable as a consequence of climate change, and the defendant knew that their actions were contributing to climate change, the defendant’s actions will be considered unreasonable.

**(3) In an action for public nuisance under (2), there is no requirement to demonstrate that a Major Emitter’s actions are unreasonable where the damages claimed involve physical damage to property, physical harm to an individual or reasonable expenses related to preventing or mitigating such damage or harm.**

**(4) In an action for public nuisance under (2) in respect of damages not covered by (3), the Major Emitter’s actions will be unreasonable if the defendant knew, or should have known, that its emissions would contribute to climate change and it was reasonably foreseeable that climate change would cause the types of damages claimed.**

<sup>60</sup> The principle was established in *St. Helen’s Smelting Co. v. Tipping* (1865), 11 H.L.C. 642, 11 E.R. 1483, but applied in a range of cases: *Newfoundland (Minister of Works, Services and Transportation) v. Airport Realty Ltd.*, 2001 NFCA 45, 205 Nfld. & P.E.I.R. 95 (CA); *Jespersen’s Brake & Muffler Ltd. v. Chilliwack (District)* (1994), 88 B.C.L.R. (2d) 230 (C.A.); Note, however, that the Supreme Court of Canada recently cautioned against mechanical application of this principle, while still acknowledging that: “where there is significant and permanent harm caused by an interference, the reasonableness analysis may be very brief.” (*Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, para. 50.)

## Plaintiffs

A threshold question in climate change litigation is who can bring a claim – or, as the courts put it, who has “standing” to appear before the courts. This question is often closely linked to the question of what type of damages a court will consider giving compensation for. As the International Bar Association has put it:

For climate change litigation to be effective, a model statute would need to provide a clear definition of legal standing to inform an adjudicative body of who must be allowed to seek legal remedies. ... The model statute should also provide guidance that outlines the types of harms that are capable of being considered injury in fact and that are fairly traceable to the global impacts of climate change.<sup>61</sup>

The basic rule for standing in claims for damages, in most common law countries, is that a person must show some direct interest in the case – usually in the form of the damage that they have suffered to their legal rights. Because of this tie between damages suffered and standing, it makes sense to discuss the sections of the *Climate Compensation Act* addressing the ability of parties to bring a claim also relate to the damages that each type of party can bring.

Legislation could allow various parties to sue – from government or a designated government agency through to individuals. For our Model Act, we have decided to be inclusive, with provisions providing that any or all of the following be allowed to bring climate lawsuits:

- National/provincial/state level governments;
- Local governments;
- Indigenous Governments (where applicable); or
- Individuals or groups who have suffered from the impacts of climate change.

<sup>61</sup> IBA, above, note 13, p. 129.

We have created a hierarchy between these suits so that a lawsuit on behalf of the public in respect of particular climate damages will preclude other levels of government and individuals from bringing a lawsuit in respect of the same damages.

## Government – *Parens Patriae* lawsuits

Where a legal wrong doesn’t affect any one person, but rather affects everyone – as is clearly the case with climate change – the common law has traditionally held that any court action should ideally be brought by the government – rather than individuals. In Canada and in the United States, at least, this ability to sue includes the ability to sue as *parens patriae*, meaning like a parent, on behalf of the public at large.<sup>62</sup>

In the U.S., the ability of state-level governments to sue on behalf of the public in relation to climate change was affirmed in the Second Circuit Appeals Court opinion in *Connecticut v. American Electric Power Corp.*, which held that

The States have adequately alleged the requirements for *parens patriae* standing ... They are more than “nominal parties.” Their interest in safeguarding the public health and their resources is an interest apart from any interest held by individual private entities. Their quasi-sovereign interests involving their concern for the “health and well-being – both physical and economic – of [their] residents in general,” ... are classic examples of a state’s quasi-sovereign interest. The States have alleged that the injuries resulting from carbon dioxide emissions will affect virtually their entire populations. Moreover, it is doubtful that individual plaintiffs filing a private suit could achieve complete relief.<sup>63</sup>

<sup>62</sup> In Canada see *Canadian Forest Products v. BC*, [2004] 2 S.C.R. 74. In the U.S. see *North Dakota v. Minnesota*, 263 U.S. 365 (1923), at p. 374; *Missouri v. Illinois*, 180 U.S. 208 (1901); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); and *New York v. New Jersey*, 256 U.S. 296 (1921).

<sup>63</sup> 582 F.3d 309 (2nd Circuit Ct., 2009), p. 72-73. The U.S. Supreme Court, hearing an appeal from this decision, divided 4-4 on whether this conclusion on standing was correct or not. As a result, the 2nd Circuit Court opinion, as it relates to



Consequently, it is not a stretch for a *Climate Compensation Act* to affirm the standing of the government to bring a climate-related claim on behalf of the general public, including for general environmental harms.

A lawsuit brought by the government under the *parens patriae* jurisdiction should be able to claim a wide range of damages – both to the government and public resources held by the public, but also for damages suffered by the public.

**5 (1) In accordance with the *parens patriae* role of the [Government], the [Attorney General or other representative of the government] may bring claims for damages arising from a public nuisance described in 4(2) as follows:**

- (a) Climate-related damages suffered by the government, including but not limited to damages in relation to publicly owned property, infrastructure, structures, resources or other assets;**
- (b) Increased public costs associated with disaster relief, wildfire control, and public health care arising from climate change;**
- (c) Harm to the natural environment, including the costs associated with restoring damaged habitat, watercourses or other environmental features, designing, building or implementing adaptation measures or compensation for harm suffered by the environment; and**
- (d) Harm to public rights, public assets or other damages suffered by the public as a result of climate change not otherwise covered in the definition of climate-related damages.**

The Model Act also allows for coordination between claims brought by the government on behalf of the

public, and those brought by other levels of government or individuals. Since the government may claim on behalf of its residents, it is necessary to ensure that the defendants are not sued more than once in respect of the same damages.



Ibrahim Didi, Minister of Fisheries and Agriculture in the Maldives, signs an underwater decree to make a statement on the urgent need for climate action. 2009. (Photo by Presidency Maldives, via Flickr. No modifications.)

### Local and Indigenous governments

Local governments – cities, village, regional and similar governments – do not at common law have a general ability to sue on behalf of its public for environmental harms. However, a local government can certainly sue for damage to local government owned property and infrastructure, including environmental harm.

In addition, local governments have the responsibility to their citizens to build and maintain safe infrastructure, and to protect the public against risks. Consequently, it is cities and other local governments that are on the front-line in terms of adapting to a changing climate. As a result, at a time when local governments often have limited resources, they are spending considerable resources upgrading existing infrastructure, and building new infrastructure, to withstand the current and projected impacts of climate change.

Local governments that fail to adapt may find themselves being sued when a foreseeable climate-related loss occurs. In 2014, the insurance company, Farmers Insurance Co. filed (and later withdrew), nine class actions against

standing, remains good law: 131 S. Ct. 2527.

Chicago area local governments that had failed to prepare their stormwater infrastructure for climate-related flooding.<sup>64</sup>

Local governments, at common law, would likely have standing to claim compensation for climate-related damages impacting their properties, and for the costs of adapting their infrastructure and properties to address climate change. They would also likely have standing, when defending a lawsuit for failing to adapt to climate change, to argue that other defendants ultimately caused the risk, and the damage. The Model Act incorporates these types of standing.

The Model Act provides square-bracketed provisions and definitions related to Indigenous Governments. This should not be taken as suggesting that protection of the rights and powers of such governments is optional; rather it is to highlight that the precise role of Indigenous Governments, and what standing they may have to bring climate damages claims, will vary considerably from country to country. The law of a given country may not recognize any special rule of standing, or may recognize an ability to bring claims that exceeds that of local governments.<sup>65</sup>

In the interests of simplicity in developing an approach which may be transferable to many countries, we have, for the purposes of the Model Act, treated indigenous governments as having a similar right to sue for climate-related damages to local governments. We acknowledge that, particularly as the common law related to Aboriginal Governance evolve, in some countries a more expansive approach may be appropriate.

**6 (1) A local government [or Indigenous Government] may bring claims for climate-related damages suffered by the local government or Indigenous community, including but not limited to damages in relation to their property, infrastructure, structures, resources or other assets, including such costs reasonably required or incurred to protect, from reasonably expected climate impacts, the health, safety, property, environment or well-being of:**

**(a) the local government’s constituents [or Indigenous community members]; or**

**(b) lands within the local government’s boundaries [or Indigenous Lands.]**

### Individuals and Special Harm

In many common law jurisdictions, it is possible for an individual to bring a private claim for damages resulting from a public nuisance if it can be shown that he or she has suffered special injury<sup>66</sup>. The injury to the plaintiff must “special” in the sense of being different than the harm caused to other members of the general public.<sup>67</sup>

However, there are examples of legislation which extends the right to sue for public nuisance to individuals or organizations.<sup>68</sup> The approach taken in our Model Act is closely modeled after legislative provisions of this type. In addition to giving all individuals who suffer direct Climate-related damages the right to sue (if there has not been an action in respect of the same climate damages on behalf of the public by the government), the section also clarifies that such damages can include reasonable costs of adapting to a changing climate. The section also clarifies that claims can be brought by groups of individuals.

64 R. McCoppin. Insurance company drops suits over Chicago-area flooding. Chicago Tribune. 3 June 2014, available on-line at <http://www.chicagotribune.com/news/local/breaking/chi-chicago-flooding-insurance-lawsuit-20140603-story.html>, last accessed 16 November 2015.

65 In Canada, the courts have increasingly recognized the ability of First Nations and their governments to hold and manage land (including lands obtained through Treaty or through lawsuits claiming common law Aboriginal Title), and this may well include governance rights over such lands.

66 Ryan v. Victoria, [1999] 1 S.C.R. 201, at p. 236, para 52, Stein v. Gonzales (1984), 14 D.L.R. (4th) 263 (B.C.S.C.).

67 A.M. Linden, B Feldthusen, HTO-47: “What constitutes a public nuisance”. Halsbury’s Laws of Canada — Torts. (LexisNexis Canada. 2007)

68 For example: Prevention of Environmental Nuisances Act (Israel), above, note 8, s. 2; Environmental Bill of Rights, S.O. 1993, c. 28, s. 103 (Ontario, Canada).



The 'Carbon Majors', 90 companies that have produced nearly two-thirds of carbon dioxide emitted since the 1750s.

**7(1) No person who has suffered or may suffer a direct Climate-related damages as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action in respect of the loss only because the person has suffered or may suffer a loss of the same kind or to the same degree as other persons.**

**(2) For clarity, an economic loss under section 7(1) includes reasonable adaptation costs directly connected with the person's property rights and indemnity for losses claimed by third parties associated with a failure to put in place adaptation measures.**

## Defendants

Of all the questions grappled with in climate compensation legislation, the question of who can be sued may be one of the most controversial – raising questions of which, if any, parties it is fair and appropriate to hold legally responsible for causing climate damages.

On the one hand, there is the argument — usually heard in developed countries – that responsibility for climate change is a collective responsibility, and to a certain extent this is true. However, this should not distract from differences in gradation of responsibility: some people and even entire nations have made negligible contributions to emissions that cause climate change, while certain private entities (e.g. fossil fuel companies, coal-fired energy plants, car manufacturers in developed countries) have either directly or indirectly resulted in massive GHG emissions – and have profited considerably from the fact that the costs of the use of their products have not recognized the climate impacts. In many cases, these companies are best placed to develop and implement alternative technologies, but instead have worked against such technologies and/or have actively lobbied against national and international regulation of greenhouse gas emissions and have worked to mislead the public on the science of climate change.<sup>69</sup> Recent revelations that Exxon Mobil's own scientists warned the company as early as 1978 of the threats posed by climate change illustrate that while we may all be responsible for climate change, some of us are more responsible than others.<sup>70</sup>

But even if we accept that some companies which contribute to large-scale GHG emissions could be held legally responsible, which companies? Michael Gerrard writes:

Many GHG emissions come from automobile tailpipes. In order for that to happen, oil is extracted from wells, transported to refineries, refined into gasoline, transported to filling stations, and pumped into vehicles that are assembled by various manufacturers (from parts fabricated by numerous companies) and then driven by motorists. Who along this supply chain is liable — the oil producers, the refiners, the fuel transporters, the

69 See e.g. Naomi Oreskes and Erik Conway, 'Merchants of Doubt' (Bloomsbury 2010).

70 <http://insideclimatenews.org/news/23092015/ExxonMobil-May-Face-Heightened-Climate-Litigation-Its-Critics-Say>, last accessed 22 November 2015.



filling stations, the vehicle manufacturers, the motorists? (The same sort of question could be asked, for example, about coal that is mined from the ground, sent by rail to a power plant, and burned there, generating electricity that travels by wire to homes, where it runs lights and appliances.) What principle is used in selecting the point(s) along the chain where liability attaches?<sup>71</sup>

In addition, even large-scale emitters are swift to deny that their contribution is significant:

A common defense mounted by defendants in climate change litigation is that the GHG emissions from a particular activity are but a “drop in the ocean” in global terms and hence cannot be said to cause climate change harm and/or have a significant environmental impact.<sup>72</sup>

Any climate compensation legislation will need to address these key issues in a fair and credible way.

There are two obvious approaches.

One is to use the statute to limit liability to a key stage in the production of fossil fuels. The most obvious stage would be the extraction and production of the fossil fuels, as this stage is necessary for the production of fossil fuel pollution (and therefore the largest portion of greenhouse gases), and because ground-breaking work has been done that identifies the historic contribution of many of the world’s fossil fuel companies to climate change (discussed below in relation to apportionment of damages).

However, this approach might well be seen as unfairly targeting fossil fuel companies, and the second approach is the approach widely adopted in contaminated sites legislation. The United States *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA), and similar legislation in other countries, recognizes that the cost of cleaning up contaminated sites may be significant, with many parties contributing to

the problem over many years. Consequently, CERCLA spreads a broad net of possible responsible parties – from companies that delivered or handled the products that gave rise to contamination, to past and current owners of a site.<sup>73</sup> The legislation then limits that liability in respect of parties that may not actually have contributed to the contamination, or may have contributed in a minor way only.

Our Model Act is based on this type of approach, with consideration of what is known as the common law’s “but for” test. Tort law asks whether, “but for” the actions of a party, would the harm complained of occurred. We define “Emitters” as referring to a range of parties which, “but for” their contribution, a quantity of greenhouse gas emissions would not have occurred.

We then go on to limit liability to “Major Emitter,” defined by reference to the amount of GHGs caused. Judges have long insisted that the “law does not concern itself with trifles,” and a crucial question to be answered is how significant emissions need to be before the Act, and therefore the courts, will assign legal responsibility. Purely from a practical point of view, the Model Act cannot, as Gerrard suggests, hold the individual “motorist” liable for climate damages, but the Act must focus on defendants that by themselves are a cause of more than trivial emissions of greenhouse gases.

Once again, our Act can draw on how the common law has dealt with cases involving multiple-polluters before. In particular, the common law related to water pollution has consistently held that if a defendant’s pollution is detectable within a water body, it is significant, and a lawsuit can be brought (in that case by the owners of properties along the water body) against the polluter.<sup>74</sup>

Applying this approach to the global atmosphere, if a defendant’s GHG emissions can be detected at an

71 Gerrard, above, note 58, p. 138.

72 J. Peel, *Issues in Climate Change Litigation*. 2011 *Carbon & Climate L. Rev.* 15 (2011), p. 16.

73 *Comprehensive Environmental Response, Compensation and Liability Act*, 42 U.S. Code § 9607 — Liability.

74 See Gage, above, note 56, p. 275–279; see *Wood v. Waud*, 3 Exch. 748 at 775, per CJ Baron Pollock at 772.

atmospheric level, the emissions would be considered significant.

Carbon dioxide can be detected in the global atmosphere at about 0.1 part per million (ppm) of carbon dioxide. By way of context, pre-industrial levels of CO<sub>2</sub> were about 280ppm, many scientists feel that 350ppm is the maximum level for avoiding dangerous climate change, and we have recently passed 400ppm. It seems to us that if a corporation is, by itself, emitting so much carbon dioxide that we can measure how it is altering the global atmosphere, it is clearly a significant emitter.

**8(2) An emitter will be considered a Major Emitter when the greenhouse gases for which they are directly or indirectly responsible under any or all of the categories described in subsection (1):**

- (a) are of such a magnitude that they are globally or regionally detectable over a five-year period; or**
- (b) over a five-year period cause a 0.1 ppm rise in global CO<sub>2</sub>e concentrations.**

The Model Act also clarifies that the emissions used to determine whether a defendant is a major emitter include not merely direct emissions, but also “downstream emissions” – emissions by end users that are made possible by, and are the easily foreseeable result of, the defendant’s actions.

## Causation and Attribution

It is frequently claimed that “causation” is one of the largest barriers to successful climate damages litigation. Causation refers to proving that a particular harm, suffered by an individual defendant, was “caused” by climate change (or, even more challengingly, by the emissions of some particular group of defendants).

Michael Gerrard writes:

We can say that hurricanes, droughts, and heat waves will be more frequent and severe on a

warmer planet, but such events occurred long before the industrial era; there has always been natural variability. How would the victims of one such event establish that it specifically was caused by climate change? Would they have to? What burden of proof would they have to bear? (This problem might be somewhat eased for injuries resulting from longer trends, such as coastal erosion and snowpack melt, and for expenses for reasonable adaptation efforts.)<sup>75</sup>

Given that causation is perceived as such a challenge to climate damages litigation, it may seem surprising that the Model Act does not introduce major changes to the law. It doesn’t take a lot of imagination, for example, to imagine legislation that places the obligation of demonstrating that an extreme weather event was not climate change-related on the defendants, or other similarly dramatic shifts in the law.

However, our Model Act is fairly modest in addressing causation, merely:

- Affirming that the court “may have regard to scientific or statistical information or modeling, historical experience and information derived from other relevant studies, including information derived from sampling”;
- Confirming that the doubling of the likelihood of a particular type of event occurred due to climate change is equivalent to proof on the balance of probabilities that the event was caused by climate change;
- Confirming that expenses reasonably incurred to adapt to, or prepare for, expected changes resulting from climate change, including costs not yet incurred, are expenses caused by climate change.

Each of these three points has a solid grounding in the common law, and should likely be viewed as just

<sup>75</sup> Gerrard, above, note 58, p. 139.

declarative. However, it is important that the Model Act confirm these basic principles.

Why not more dramatic amendments to the law?

First, as noted previously, we are seeking to strike an appropriate balance between the rights of plaintiffs and defendants at the procedural level. Because causation is critical to the success of any case, we believe that a test for causation that is biased in favour of the plaintiff could potentially undermine the credibility of the Act and any resulting decision.

Second, many of the other provisions of the Model Act have an impact on issues that are broadly related to causation, and do so in a manner that is consistent with existing legal principles. For example, provisions declaring that significant alteration of the global atmosphere is itself a public nuisance mean that the causal connection between a defendant's GHG emissions and the general problem of climate change is clear. Similarly, provisions related to apportioning of damages for climate-related impacts mean that it is not necessary to demonstrate that a defendant's emissions by themselves caused 100% of a harm, but only that their emissions contributed to the problem of climate change in a substantial way.

Third, scientific evidence is increasingly able to make at least statistical links between climate change and particular types of weather events and other impacts. While scientists cannot generally declare with 100% certainty that climate change caused a particular drought or a flood, it is increasingly possible to prove that the type of event was more likely to occur as a result of climate change. This likelihood can often be quantified and modelling related to certain types of climate impacts, for example those related to storm impacts exacerbated by sea-level rise, can be relatively straightforward.

That being said, there are examples of courts imposing partial liability where a defendant's actions have increased the probability of harm occurring. For example, the Supreme Court of Israel has ruled that it is possible to find liability based upon statistical increase of risk where:

a tortfeasor creates recurring risks to a large group of people and where there is a systemic bias that prevents plaintiffs from proving in the preponderance of the evidence that in their case the risk materialised and caused them harm.<sup>76</sup>

As these principles, while sound, are not widely applied, we have included them in the Model Act in brackets – as optional text. Countries where climate modeling is more basic, or which seek a more plaintiff-friendly approach to causation might well choose to provide for partial recovery where the odds of a particular event were increased, but where evidence was not available to show that the increased likelihood amounted to a balance of probabilities.

## Remedies

Any Climate Compensation Act will need to address the types of order that the court may give in climate damages litigation. The Model Act has sections related to both the awarding of damages for climate-related harm, and also other remedies that the court may order.

The question of the types of damages is closely connected to the question of who can bring a claim, and is discussed above, in the section on plaintiffs.

However, details about how responsibility for damages will be apportioned between multiple possible defendants, and other tools related to the distribution of those damages are discussed in this section.

## Apportionment of Damages

The Model Act must also consider the question of how damages determined by the court to be climate-related should be apportioned between defendants.

Many jurisdictions apportion damages in tort claims on the basis of “joint and several liability” – meaning that defendants are liable both for the whole of the

---

<sup>76</sup> Lord, above, note 8, pp. 292-93, citing *Carmel Hospital v. Malul*, DNA 4693/05 (29 August 2010); see also *Tokyo Minamata disease case*, Judgment of the Tokyo District Court, 7 February 1993, *Hanrei joho* special edition (25 April 1993), 3, cited in Lord, *ibid.*, p. 230.

damage that they contributed to, and to their share (as against the other defendants). If the same rule were to apply in a climate damages case, this would mean that a plaintiff could sue one Major Emitter for the full costs of climate change.

While this has some obvious appeal to plaintiffs, it seems grossly unfair to defendants in the context of climate change – where one party that made a relatively small contribution to climate change might find itself responsible for full repayment of all climate-related damages claimed by a plaintiff.

In addition to seeming unfair, adopting a joint and several liability approach may impact how litigation under a Climate Compensation Act unfolds. As Gerrard explains:

If ... joint and several [liability] prevails, the inevitable result is third-party litigation. The defendants who are named in the complaint will sue numerous other GHG emitters who were not named, and those new defendants will in turn sue still more. That is what happened in the litigation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980<sup>3</sup> over liability for cleaning up contaminated sites. The courts ruled that in some circumstances CERCLA imposes joint and several liability, and it was common in large sites — especially landfills that had accepted waste from entire regions — to see concentric circles of third-, fourth- and fifth- party defendants, ultimately sometimes reaching into the hundreds. At least one CERCLA case grew so large that no existing courtroom could accommodate the hundreds of lawyers, and a special courtroom had to be built in another building. Stories abounded about how large chemical companies were impleading donut shops and nursing homes to spread the pain, to achieve coercive settlements, and to drag out the cases. The number of potential defendants in a GHG case is

staggering, and the consequent case management challenges are immense.<sup>77</sup>

This risk is reduced to some degree by the fact that the Model Act limits liability to “Major Emitters.” However, one could easily imagine litigation, even with such a limit, growing to include all of the carbon majors, pipeline companies, vehicle companies and all manner of other large-scale GHG producing companies.

In keeping with our approach of seeking to balance the rights of plaintiffs and defendants, for the most part adopts a proportional contribution approach, rather than joint and several liability. In other words, a company which is responsible for 2% of GHG emissions should be responsible for 2% of the damages caused by climate change.

That being said, the Model Act does qualify this approach in two important ways.

First, because the Model Act defines emitters as including defendants that are involved at different stages of the extraction, refining, transportation, delivery, sale and use of fossil fuels, it is quite possible that two defendants will have played a crucial role in the same emissions, and thus have over-lapping emissions. For example, if a coal company were to transport its product through a coal port operated by another company, both companies would be responsible, under the Model Act, for the GHG emissions from that coal.

Clearly the Model Act needs to account for such overlapping responsibilities – which it does by declaring that both companies are jointly and severally liable for these emissions (and only such emissions). However, in order to keep the case manageable, and in keeping with the principle that non-globally detectable emissions are insignificant, a company can only be added to the case by a defendant if their share in the emissions covered by the case (ie. their share of the emissions of all the defendants) is itself globally significant.

---

<sup>77</sup> Gerrard, above, note 58, p. 136.



Second, the Model Act gives the judge the discretion to consider various other factors that may warrant increasing or decreasing the liability assigned to a particular defendant. Such factors include, but are not limited to:

- The role of the defendant in spreading dis-information about climate change and its causes;
- The role of the defendant in failing to adopt techniques or policies that could have reduced its emissions;
- The relative emissions profile of the major emitter within its sector; and
- Efforts by the defendant to delay or prevent GHG regulations and/or other mitigation policies or action at the local, national or international level.

With these exceptions, we believe that making Major Emitters responsible for their proportionate share of climate-related damages is a fair and equitable approach.

### Climate Compensation Fund

The Model Act allows a court to award damages for harm suffered by the public at large, as well as allowing for punitive damages that do not reflect the damages suffered by a particular plaintiff. In other circumstances, a plaintiff may win compensation for adaptation-related expenses that are not yet incurred. For such circumstances, the Model Act creates a Climate Compensation Fund, and empowers the court to order these amounts to be paid into that fund.

The fund is intended to be flexible, allowing the court and/or the government to create rules for the pay-out of funds, allowing them to be used to apportion compensation to members of the public who have suffered loss, or to be used for adaptation related expenses, disaster relief, and other climate-related expenses.

The Government may also choose to pay funds into the Climate Compensation Fund.

The Model Act also empowers the court to authorize the use of funds from the Climate Compensation Fund to assist plaintiffs who would otherwise be unable to afford to bring climate-damages claims.

The precise operations of the fund are not spelled out in the Model Act, but will be developed through regulations.

## Climate Damages Insurance

Major Emitters may see the threat of damages as a stick, but there is a carrot in the Model Act for responsible companies. The Act provides that a Major Emitter may purchase a Climate Damages Insurance policy that is acceptable to the government.

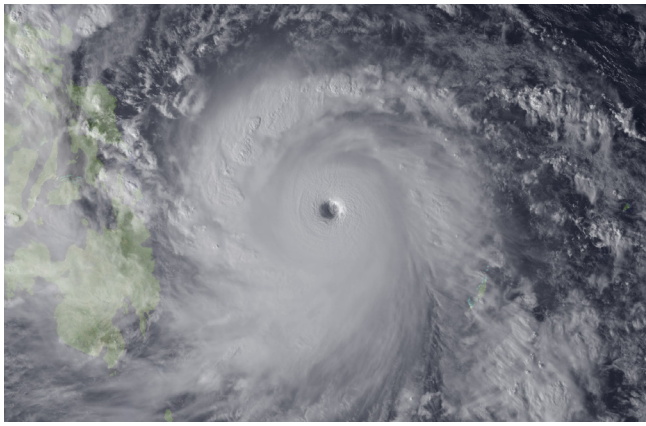
The profile of the idea of protecting vulnerable countries from climate impacts through disaster insurance recently received a boost when the G7 leaders called for an expansion of existing publicly funded insurance schemes.<sup>78</sup> However, public insurance, while part of the equation, ignores the responsibility of Major Emitters. The Model Act, with its focus on the responsibility of Major Emitters, provides for insurance policies funded by the Major Emitters.

Anastasia Telesetsky, in discussing the potential for privately funded climate damages insurance, notes that other examples of disaster relief insurance are “primarily public models and mechanisms”, due to “a society wide inclination to allow the government ... to be the primary risk manager for catastrophic disaster relief.”<sup>79</sup> However, in the case of climate change, reliance on public funding from the affected country is no longer appropriate:

While it may be efficient for industry to allow government to shoulder the expenses of disaster relief, it is no longer equitable for government

78 Leaders Declaration G7 Summit, 7–8 June 2015, available on-line at [https://www.g7germany.de/Content/DE/\\_Anlagen/G8\\_G20/2015-06-08-g7-abschluss-eng.pdf?\\_\\_blob=publicationFile](https://www.g7germany.de/Content/DE/_Anlagen/G8_G20/2015-06-08-g7-abschluss-eng.pdf?__blob=publicationFile), last accessed 18 November 2015.

79 A. Telesetsky, 27(3) Insurance as a Mitigation Mechanism: Managing International Greenhouse Gas Emissions through Nationwide Mandatory Climate Change Catastrophe Insurance”, *Pace Environmental Law Review* (2010) 691 at p. 701.



Typhoon Haiyan, Philippines, 2013

to be the primary financier of disaster relief. If the government remains the loss manager of first resort for a climate change related disaster, the government absolves the private sector of its responsibility for contributing to the larger pollution problem and provides no incentive to change any “business as usual” practices.<sup>80</sup>

In the Model Act, a Climate Damages Insurance policy is an insurance policy whereby an insurance company agrees to pay funds reflecting compensation from damages where certain “triggers” occur. The government may, through regulation, set the triggers that the insurance policy must address. Telesetsky notes that the use of such triggers “is already common for certain types of index insurance such as weather based crop insurance schemes,” and proposes developing science-based triggers in climate insurance in order to “avoid a constant battle of experts over each claim.”<sup>81</sup>

The Model Act leaves the development of the specific requirements of an insurance policy, including triggers, to the government, through regulations. However, government regulations could specify (for example) that an acceptable Climate Damages policy should provide for compensation for such events as:

- cyclones/hurricanes of more than a certain class;
- storm-surges of more than a certain elevation;

<sup>80</sup> Ibid., p. 702.

<sup>81</sup> Ibid, p. 721-22.

- droughts of a certain intensity; and
- flooding of a certain severity.

If those events occurred, the policy would require payment of funds into the Climate Compensation Fund without proof that the event was climate-related.

In developing the details of the insurance scheme, a government will presumably wish to set requirements that are science-based and are attractive enough to Major Emitters that those companies will consider purchasing the insurance as an alternative to future litigation. Consequently, the amount of damages that a Major Emitter might expect to pay, while based on their actual emissions, could (depending upon the requirements set by the government) be significantly less than would be the case for an event that was conclusively linked to climate change. In the meantime, all parties would be spared the considerable expense of litigation.

Major Emitters who chose to adopt this option could legitimately claim to be taking responsibility for their product, and would essentially be adopting a voluntary carbon price.

In addition, the Model Act gives a judge the ability to order a Major Emitter to purchase an insurance policy to address future losses arising from that defendant’s emissions.

**16(1) A Major Emitter which holds an acceptable insurance policy in respect of damages arising from all its past and ongoing emissions shall not be liable for damages covered by the policy.**

## Removing Barriers

Litigation is expensive and many of the rules may create barriers for climate damages plaintiffs, particularly when the defendants may include some large and deep-pocketed companies.

To this end, the Model Act includes several access to justice provisions intended to reduce or eliminate such barriers, while still respecting the rights of defendants. These include:

- a. Addressing limitation periods;
- b. Class actions;
- c. Restricting adverse costs awards;
- d. Providing funding; and
- e. Addressing judicial capacity.

### Limitation periods

Limitation periods are intended to prevent plaintiffs from suing years after an event occurred. Depending on the rules set by a government, litigation may have to be brought within 2, 3 or some other number of years of harm occurring. Some have suggested that these rules may limit plaintiffs in climate damages cases to suing for recent emissions:

Many states bar claims for money damages for nuisance that were incurred more than a set period before the filing of the complaint; in New York, for example, that time is three years. Does that mean that, for a suit brought in 2011, damages could only be sought for emissions from 2008 and later?<sup>82</sup>

This objection is dubious. In most, if not all, jurisdictions, limitations periods begin “running” from when the damage occurs, not from when the defendant’s actions occurred. Indeed, since science tells us that several years may pass between greenhouse gas emissions occurring and their having an impact on global temperature, it cannot be the case that a tort needs to be brought soon after a specific set of emissions occurring.

In many countries, the law recognizes the concept of an “ongoing nuisance,” in which a defendant continues pollution or another type of harm year after year, and can be sued at any time that the harm materializes.

More difficult, from the point of view of the plaintiff, is deciding when the harm has materialized. In the case of a “slow onset” event, such as sea-level rise, should the plaintiff sue when sea-levels have risen 2 cm, 10 cm, 1 metre or 5 metres? And at what point does the limitation period start running?

Similarly, where there is a storm or other extreme event, but it is not immediately clear whether the event is caused by climate change, when should the time-limit to bring a lawsuit start to run?

The Model Act clarifies that greenhouse gas emissions are an ongoing nuisance and sets rules for when the time-limits should run from. In general, the limitation period will start running from when it should have been clear to the plaintiff that the loss suffered was climate-related, although these periods are slightly different for slow-onset events and for losses associated with the cost of building infrastructure adapted to climate change.

In addition, many Limitations Acts include a long-term “ultimate limitations period” – after which even claims for undiscovered losses cannot be brought. The Model Act clarifies that the ultimate limitations period does not begin to run as long as the on-going nuisance is occurring (that is, that the defendant remains a Major Emitter).

### Class action

Class Action legislation is intended to allow multiple plaintiffs to band together to make common claims, and may be an ideal way to increase plaintiff access to the courts in these expensive cases.

If causation can be established and defendants can be found who are potentially culpable, subject to the court’s jurisdiction, and sufficiently wealthy to be worth suing, the number of potential plaintiffs may be very large. A class action would be the natural way to proceed.<sup>83</sup>

---

82 Gerrard, above, note 58, p. 138.

---

83 Gerrard, above, note 58, p. 139.

It therefore makes sense for the Model Act to define the relationship between any existing class action legislation and claims brought under the Act. Since each jurisdiction's class action legislation may be different, and it is beyond the scope of this report to summarize best practices for class action legislation, the Model Act (at s. 12) merely confirms the relationship to existing class action legislation.

### Costs and advanced costs

Climate litigation can be extraordinarily expensive, and of course, its outcome won't be certain, even with a climate compensation act in place. The costs of going to court can be a major barrier for many plaintiffs, particularly when facing deep-pocketed opponents.

The risks are even greater for the plaintiffs in the many jurisdictions where a losing party will need to pay some portion of the victor's court costs (a concept known as "adverse costs").

The Model Act attempts to address those challenges by limiting adverse costs and by allowing a plaintiff to apply to court for funds from the Climate Compensation Fund to be made available to a plaintiff who would otherwise be unable to bring a case.

In some countries, most prominently including the United States,<sup>84</sup> court rules generally only require repayment of actual expenses, and not lawyer's fees, which may reduce the risks to a plaintiff considerably. However, even in countries which require the losing party to bear some portion of the winner's lawyer's fees, courts and governments often recognize that in cases that raise issues of public importance it may be unfair or counter-productive to impose the full adverse costs on unsuccessful parties.

Indeed, the Court of Justice for the European Union declared that an international treaty on public participation in environmental decisions, the Aarhus Convention, requires the United Kingdom to modify its

adverse cost rules to ensure that access to the courts is not "prohibitively expensive" in environmental cases.<sup>85</sup> As a result, in the United Kingdom the courts may issue "protective costs orders" in public interest cases and in environmental cases there are clear rules about the maximum that a party can be required to pay.<sup>86</sup>

In other countries there are examples of legislation which simply requires each party to bear their own costs in certain types of litigation where it is deemed unfair to apply the usual cost rules.<sup>87</sup>

The Model Act uses this last approach - declaring that each side should bear their own court costs in litigation brought under the Act, unless a party has acted inappropriately or to unnecessarily extend the litigation.

#### 14(1) A court may only award costs to a party in respect of all or any part of Climate Litigation if:

**(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,**

**(b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or**

**(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.**

<sup>84</sup> Federal Rules of Civil Procedure, Rule 54.

<sup>85</sup> The Convention on access to information, public participation in decisionmaking and access to justice in environmental matters, or the Aarhus Convention, Article 9, recognizes the importance of access to the courts. In *European Commission v. United Kingdom*, Case No C530/11, 13 February 2014, the Court of Justice for the European Union ruled that several aspects of the United Kingdom's rules related to costs in environmental cases represented a barrier and a violation of the Aarhus Convention. As a result, the United Kingdom has revised its rules around costs.

<sup>86</sup> Practice Direction 45, Fixed Costs, available on-line at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs>, last accessed 3 July, 2015.

<sup>87</sup> For example, Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 37.



In addition, the Model Act addresses the more fundamental question of whether a plaintiff can afford litigation through a provision that allows the court to order that funds be made available, where appropriate, to the plaintiff from the Climate Compensation Fund, to assist in the costs of litigation. Many governments provide funding to assist in the costs of litigation that raises public interest issues.<sup>88</sup> The Model Act provides that such funds may be granted to the plaintiff in climate damages litigation only where “the plaintiff does not have the financial resources to support their own proceeding and there is no other realistic option for bringing the issues to trial.” In addition, limits on the funds available in the Climate Compensation Fund and/or poor behaviour by the plaintiff may disqualify the plaintiff from receiving such funds.

If either party engages in vexatious, frivolous or abusive conduct, or other inappropriate conduct, they may be ordered to repay some or all of an adverse costs award to the Climate Compensation Fund.

While not entirely resolving the financial barriers that a plaintiff may face in undertaking complicated climate damages litigation, these sections of the Model Act go a long way to reducing these obstacles.

### Judicial capacity

In some countries, the ability of the courts to hear long and complicated tort cases may pose a problem for climate damages cases – and may deter governments from enacting this type of legislation. However, a government that is concerned about this issue can address at least some issues with judicial capacity through the Climate Compensation legislation itself.

For example, climate compensation legislation could (among other things):

- Provide for additional funding for the courts where required due to a climate case;
- Provide for training of the judiciary in climate science or the appointment of climate scientists to assist the judiciary;
- Provide for the creation of a specialized green bench or environmental court to hear climate-related claims;
- Delegate, with the agreement of nearby countries, climate cases to the courts of another country, or to an international regional court,<sup>89</sup> thereby pooling resources from several countries;
- Provide for coordination of evidence between the courts of different countries;
- Provide for the appointment of scientific experts to assist the court in evaluating evidence; or
- Provide for the streamlining of judicial procedures to help move climate damages cases along quickly through the courts.

The precise problems of judicial capacity that a court might wish to address will vary considerably from country to country, and the Model Act does not attempt to address every possible issue or solution. Instead, the Model Act merely empowers the Chief Justice to set rules and take measures “for the timely and efficient resolution” of climate damages litigation.

---

<sup>88</sup> C. Albiston et al. *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 (1) *Law and Social Inquiry* 62 (Winter 2014) (regarding U.S.). <http://www.pilsni.org/barriers-public-interest-litigation-northern-ireland>, last accessed 18 November 2015 (regarding North Ireland); for examples of Canadian courts ordering government to provide funding for such litigation (known as “advanced costs”), see *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38.

---

<sup>89</sup> Examples of regional courts include the Caribbean Court of Justice and the European Court of Justice. Neither court ordinarily sit as a court of first instance in tort claims, but the idea of regional courts is not unprecedented.

# Model Climate Compensation Act

Whereas, human caused climate change is occurring;

Whereas, climate change is already adversely affecting communities in [Country] and around the world with impacts that include the spread of pest species, extreme rainfall and flooding, rising sea levels, increased droughts, the melting of glaciers and other impacts;

Whereas, climate change has been estimated to already contribute to nearly 400,000 deaths annually;<sup>90</sup>

Whereas climate change is already costing an estimated US\$700 Billion in losses annually around the world;<sup>91</sup>

Whereas communities will need to spend further billions to adapt infrastructure to climate change to avoid or reduce these huge losses;

Whereas, major pollution-based businesses profit from activities that result in the release of anthropogenic

greenhouse gas emissions without paying for the damages that they are causing;

Whereas the people of [Country] cannot afford to continue paying for the damages caused by climate change;

Whereas the polluter pays principle is a principle of national and international law;

Whereas it will be beneficial to clarify the legal rules related to claims related to damages arising from greenhouse gas emissions and climate change, and to ensure that the victims of climate change have recourse in the courts;

Therefore, [the Government of Country] enacts as follows:

## Short Title

1. This Act may be cited as the Climate Compensation Act.

---

<sup>90</sup> DARA-Climate Vulnerable Forum: Climate Vulnerability Monitor A Guide to the Cold Calculus of A Hot Planet, 2nd edition, Executive Summary.

<sup>91</sup> Ibid.

## Purpose

2. The purpose of this Act is to recognize and clarify the common law right of individuals and groups of individuals suffering personal, communal, property or financial loss or damage from climate change to obtain adequate and effective remedies, including damages from major emitters of greenhouse gases, and to clarify the legal and procedural rules associated with the exercise of this right

## Definitions

3 (1) In this Act:

“Assistance” means financial resources allotted for and granted directly to person(s) in order to offset costs and expenses resulting from climate-related damages.

“Adaptation costs” mean such costs, or additional costs, reasonably incurred to modify, reconstruct, restore or relocate lands, water bodies and associated ecosystems, structures and infrastructure, in order to adapt, or be more resilient, in order to be capable of withstanding extreme weather events, sea-level rises or other reasonably expected impacts of climate change.

“Climate adaptation measures” are infrastructure and policies implemented by a government or a company for the purpose of preventing or mitigating climate-related damages.

“Climate change” means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

“Climate Compensation Fund” is the fund established under section 11 of this Act.

“Climate Litigation” means a lawsuit filed against a Major Emitter, in order to recover monetary damages and/or obtain other court orders to remedy climate-related damages.

“Climate-related damages” means damages arising from the alteration of concentrations of carbon dioxide and other greenhouse gases in the global atmosphere,

including damages related to ocean acidification or other impacts resulting from such changes in the global atmosphere, and includes, but is not limited to:

- (a) Damages to property, infrastructure, structures, resources, or other assets or legal rights arising from climate change;
- (b) Death, injury, illness or other personal harm arising from climate change and the costs associated with treating or caring for people suffering from such harm;
- (c) Costs of climate and weather monitoring, research and analysis reasonably incurred to provide information about the impacts of climate change its rights, duties or responsibilities and appropriate adaptation measures in relation to such rights, duties or responsibilities;
- (d) Economic or physical climate-related loss to property, infrastructure, structures, resources or other assets, including costs associated with insurance reasonably required due to the risk of climate-related losses;
- (e) Loss of land or damage to infrastructure arising from rising sea-levels, including but not limited to slow onset losses from rising sea-levels;
- (f) Costs of responding to emergencies arising from natural disasters associated with climate change;
- (g) Adaptation costs; and
- (h) Indemnification for losses claimed by another party for failing to meet any duties or responsibilities related to measures required to address reasonably expected climate-impacts.

In relation to a claim for damages by a government, local government or Indigenous Government, climate-related damages may relate to damages, losses, expenses incurred or other costs and damages arising out of the governments’ legal and moral obligations to their citizens or members.

“Compensation” means money awarded, either as a result of climate litigation or via the Climate Compensation Fund, to person(s) who suffer climate-related damages.

“Emissions” means human caused emissions of carbon dioxide and other greenhouse gases that result in climate change.

“Environmental Features” are specific characteristics of a region or ecosystem, including, but not limited to, soil, hydrology, temperature, and air quality.

“Extreme Weather Events” are atmospheric events occurring within a regional weather system that measurably impact a region’s local economy, infrastructure or environmental features and are either

- (a) anomalous, or
- (b) the result of a shift in local climatological parameters that can be attributed to global warming trends.

“Fund Administrator” means the minister or other designated official responsible for managing the Climate Compensation Fund under section 11 of this Act.

“Greenhouse Gas Reducing” describes actions, policies, infrastructure, or other actions, policies, infrastructure, activities, works or undertakings which effectively reduce emissions in comparison to other equivalent measures that serve the same function or purpose.

### Definitions for countries with Indigenous Governments

**“Indigenous Governments” refers to the political and governance arrangements that an Indigenous Community has self-identified as representing them.**

**“Indigenous community” refers to a self-determined and distinct political and cultural group comprised of the existing descendants of the peoples who traditionally inhabited the present territory of a country, but have been**

**reduced to a non-dominant or colonial situation; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form a part, under State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant. In [Country], [for example: First Nations, Aborigines, ...] are Indigenous Communities.**

**“Indigenous Lands” are territories or regions which an indigenous community has traditionally owned or otherwise occupied or used, including, but not limited to, Reserve Lands, lands covered by a Treaty with an Indigenous people or over which Aboriginal Title or Rights have been proved, and lands over which an Indigenous people have a strong *prima facie* claim to Aboriginal Title or Rights. Indigenous Lands includes the water and resources located on the Indigenous Lands.]**

“Local Government” has the same meaning as in [Legislation creating local, regional or municipal governments].

“Major Emitter” means any person described as a Major Emitter in section 8 of this Act.

“Minister” means the Minister responsible for administering the *Climate Compensation Fund* described in section 11 of this Act.

“Property” includes rented lands, Indigenous Lands, an easement or covenant, public rights, or other property interests which give a right to occupy, use or limit the use of land.

“Proportionate Share” means a share of climate change damages based on the emissions for which the Major Emitter is responsible, relative to the total global greenhouse gas emissions caused by human activity, up to and including the last year for which figures are reasonably available.



“Slow onset event” means an event caused by climate change and resulting in climate change damage that occurs incrementally and over a long period.

- 3 (2) Nothing in this Act concerning Indigenous Communities or Governments shall be interpreted to contravene any part of the *United Nations Declaration on the Rights of Indigenous Peoples*.

### Right to a Healthy Atmosphere

- 4 (1) The people of [country] have relied upon a healthy global atmosphere to regulate heat from the sun since time immemorial and have a right to a healthy global atmosphere;
- (2) The alteration of the health and composition of the global atmosphere to a measurable degree and in a manner that causes or may cause harm in [country] violates the right in s. 4(1) and is a significant contribution to **Climate Change**, and as such constitutes a public nuisance;
- (3) In an action for public nuisance under (2), there is no requirement to demonstrate that a Major Emitter’s actions are unreasonable where the damages claimed involve physical damage to property, physical harm to an individual or reasonable expenses related to preventing or mitigating such damage or harm.
- (4) In an action for public nuisance under (2) in respect of damages not covered by (3), the Major Emitter’s actions will be unreasonable if the defendant knew, or should have known, that its emissions would contribute to climate change and it was reasonably foreseeable that climate change would cause the types of damages claimed.

### Parens patriae jurisdiction

- 5 (1) In accordance with the *parens patriae* role of the [Government], the [Attorney General or other representative of the government] may

bring claims for damages arising from a public nuisance described in 4(2) as follows:

- (a) Climate-related damages suffered by the government, including but not limited to damages in relation to publicly owned property, infrastructure, structures, resources or other assets;
- (b) Increased public costs associated with disaster relief, wildfire control, and public health care arising from climate change;
- (c) Harm to the natural environment, including the costs associated with restoring damaged habitat, watercourses or other environmental features, designing, building or implementing adaptation measures or compensation for harm suffered by the environment; and
- (d) Harm to public rights, public assets or other damages suffered by the public as a result of climate change not otherwise covered in the definition of climate-related damages.
- (2) Where climate change causes climate-related damages to many members of the public, the Attorney General may initiate an action on behalf of the public to recover damages that could be recovered, and have not already been recovered, by an individual under section 7, on behalf of the general public, or, by a Local Government or Indigenous Government, with the consent of the Local Government or Indigenous Government, under section 6.
- (3) Where the Attorney General initiates an action under subsection (2), the judge hearing the government’s action may make any orders that it considers appropriate related to the relationship between that action and any pre-existing actions brought under sections 6 or 7, including but not limited to joining the actions, staying the pre-existing actions or making orders to avoid

duplication or multiple claims being brought in respect of the same damages.

- (4) If the Attorney General has litigated an action initiated under subsection (2), the outcome of the case is conclusive in respect of all climate-related damages covered by that action.
- (5) In respect of an award for damages related to a claim under subsection (2), or related to a claim under subsection (1) where the Court is of the view that some or all of the damages should be paid out to members of the general public, the Court may make an order that the award for damages should be paid into the Climate Compensation Fund and the court may make any direction that it sees fit about the disposition of those funds to individuals or groups on whose behalf the damages were awarded.

#### **Local government jurisdiction**

- 6 (1) A local government [or Indigenous Government] may bring claims for climate-related damages suffered by the local government or Indigenous community, including but not limited to damages in relation to their property, infrastructure, structures, resources or other assets, including such costs reasonably required or incurred to protect, from reasonably expected climate impacts, the health, safety, property, environment or well-being of:
  - (a) the local government's constituents [or Indigenous community members]; or
  - (b) lands within the local government's boundaries [or Indigenous Lands.]

#### **Individual causes of action**

- 7 (1) No person who has suffered or may suffer a direct Climate-related damages as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action in respect of the loss only because

the person has suffered or may suffer a loss of the same kind or to the same degree as other persons.

- (2) For clarity, an economic loss under section 7(1) includes reasonable adaptation costs directly connected with the person's property rights and indemnity for losses claimed by third parties associated with a failure to put in place adaptation measures.
- (3) Subsection (1) does not apply if the Attorney General has previously brought an action seeking compensatory damages on behalf of the public under section 6(2) in respect of the same damages.

#### **Major Emitters**

- 8 (1) The following persons, whether natural or otherwise, are considered emitters under this Act:
  - (a) the producer of fossil fuels that produce carbon dioxide or other greenhouse gases when used and the producer knows or should know that the fossil fuels will be so used;
  - (b) the owner or operator of dedicated or specialized pipelines, ports, ships, trucks, railway cars or other infrastructure used to transport fossil fuels or other greenhouse gas sources to, or towards, a user or users who the owner or operator knows or should know that the use of the fossil fuels will result in the discharge of carbon dioxide or other greenhouse gases into the atmosphere;
  - (c) the user of fossil fuels who causes the discharge of carbon dioxide or other greenhouse gases into the atmosphere;
  - (d) the manufacturer of greenhouse gases who releases such gases into the environment, or who knows, or ought to know, that the gases will be released by their end user;

(e) the manufacturer or vendor of equipment or infrastructure which, in the ordinary course of its use, will result in the discharge of greenhouse gases into the atmosphere;

(f) a person who by contract, agreement or otherwise directly or indirectly causes or allows the release of greenhouse gases into the global atmosphere;

(g) a person who owns a controlling interest in a corporate person that is an emitter as described in this section;

(h) a person who is the parent company of one or more corporate persons that collectively carry on a common venture that if, operated by one corporate entity, would be an emitter as described in this section;

(i) such persons as may be designated by a regulation under this Act as emitters;

(j) without limiting the generality of (a) through (h) anyone who carries on activities or operations that result in the emissions of greenhouse gases into the environment.

(2) An emitter will be considered a Major Emitter when the greenhouse gases for which they are directly or indirectly responsible under any or all of the categories described in subsection (1):

(a) are of such a magnitude that they are globally or regionally detectable over a five-year period; or

(b) over a five-year period cause a 0.1 ppm rise in global CO<sub>2</sub>e concentrations.

(3) A Major Emitter is responsible for greenhouse gas emissions that they knew or ought to have known would be discharged as a result of their activities described in subsection (1). For greater certainty, the emitter is responsible even if further steps, or the actions of further parties, were required before the emissions

actually occurred, provided that the emitter knew or should reasonably have known that the emissions would occur as a result of their actions.

(4) A parent company described in s. 8(1)(h) is responsible for all emissions associated with the common venture.

### **Proportionate liability Based on Climate Change Contribution**

9 (1) Where a court finds that a Major Emitter has committed a nuisance under section 4, and thereby contributed to the impacts of climate change:

(a) The Major Emitter shall be liable for a proportionate share of damages caused by human caused alteration of the global atmosphere and Climate Change; and

(b) The major emitter shall not be jointly liable for climate damages, except to the extent provided in (2).

(2) If more than one major emitter is responsible for the same emissions under section 8(3), then they are jointly and severally liable for the proportionate share of any damages awarded in respect of their joint emissions.

(3) Where a major emitter has shown a reckless disregard for the impacts of the public nuisance that they have caused, a court may, in addition to damages under section (1), find the major emitter responsible for such damages as the Court may order, reflecting a portion of climate-related damages which would otherwise be unrecoverable. In evaluating whether the major emitter has shown reckless disregard and in determining the amount of damages under this subsection, the court may have regard to:

(a) The role of the major emitter in knowingly funding, spreading or otherwise supporting

misinformation about climate change and its causes;

(b) Decisions of the major emitter to defer the development or implementation of techniques, practices, technology or other means of controlling its emissions at a time when the impacts of those emissions were known, or should have been known, to the major emitter;

(c) The emissions and energy efficiency profiles of the major emitter as compared to competitors in its industry;

(d) Efforts of the major emitter to stall, delay or prevent the negotiation, adoption or enactment of an international agreement, national legislation or sub-national legislation to restrict or reduce the use of greenhouse gases, or the achievement of targets or goals under such agreements or legislation; and

(e) Such other matters as the court may find appropriate.

- (4) A Major Emitter may not add third parties to the suit, unless those Emitters fall within s. 9(2) and the share of emissions that third party and all defendants to the case have in common would themselves meet the requirements of s. 8(2).

### **Causation of climate losses**

- 10 (1) In determining whether particular damages or costs are caused by climate change, or by a particular weather, flooding or other event, or series of such events, and the quantum of such damages and costs, the court may have regard to scientific or statistical information or modeling, historical experience and information derived from other relevant studies, including information derived from sampling.
- (2) In a case where climate change is alleged to have caused a particular weather, flooding or other

event, or a series of such events, then evidence that climate change has doubled the likelihood of that type of event occurring will be sufficient to show on a balance of probabilities, that the event has been caused by climate change.

- (3) Expenses associated with adaptation measures are caused by climate change if the court finds, on a balance of probabilities, that implementing the adaptation measures have, or are likely to, reduce the damage to property, life or financial losses expected in relation to climate change by an amount that is equal to or greater than the expenses incurred. Where the purpose of the adaptation measures is to prevent unquantifiable loss, expenses incurred are caused by climate change if the adoption of these measures was reasonable and/or necessary to prevent the violation or denial of a human right or rights.
- (4) For greater certainty, the adaptation costs may be claimed under (3) even if such work or costs have not yet occurred if the court is of the view that the damages award is reasonably required for the planning, initiation or completion of the work. In such a case, the court may make such orders as it considers appropriate for the payment of estimated costs into the Climate Compensation Fund and for the time-frame or manner of the costs being paid out to the parties based upon the completion of the adaptation work.
- (5) [Where a court is satisfied that climate change has increased the probability of a particular weather, flooding or other event, or a series of such events, the court may make a finding of partial liability based upon the best available assessment of the statistical increase in risk.]

### **Climate Compensation Fund**

- 11 (1) There shall be established a Climate Compensation Fund;



- (2) The Fund shall be administered by the [Minister of the Environment or other public official];
- (3) The Fund shall be held in trust for:
  - (a) Assistance and compensation for members of the public who have suffered climate related losses;
  - (b) Climate and weather monitoring, modeling or analysis required to inform the people of [Country] and their governments on the impacts of climate change in [Country] and appropriate adaptation measures;
  - (c) The design, construction, purchase and maintenance of climate adaptation measures, including measures related to environmental features, based upon the best available information about future climate-related impacts in [Country];
  - (d) The design, construction, purchase and maintenance of greenhouse gas reducing public structures, infrastructure or technology, including, but not limited to, public transit infrastructure, building retrofits, and renewable energy infrastructure associated with public buildings or spaces;
  - (e) The payment of an advance costs award under section 13; and
  - (f) Such other purposes related to mitigation, adaptation or compensation for climate change and climate damages as may be specified by regulation.
- (4) Where Funds intended for the compensation of members of the public who have suffered private climate-related damages have been paid into the Fund as a result of:
  - (a) a court order for damages claimed on behalf of the public under s. 5(2);
  - (b) a settlement agreement related to litigation;

(c) a payment from an acceptable insurance policy under section 16;

(d) a payment of funds from the Crown at its discretion; or

(e) for other reasons specified in Regulations enacted under this section;

the [Fund Administrator] shall establish a fair and open process whereby members of the public who suffered the damages in question can apply for the compensation or such portion of the compensation that the court may direct.

- (5) A Court, in making an award for damages, may order that funds be paid into the Fund for such purposes, and to be paid out on such a basis, as the court directs.

The [Executive arm of the Government] may pass regulations related to any aspect of the operations and functioning of the Climate Compensation Fund, including, but not limited to:

(a) The purposes to which the Fund can be put under subsection 11(3)(f);

(b) The structure and administration of the Fund; and

(c) The process for awarding or apportioning funds from the Climate Compensation Fund under subsection 11(4).

### **Class Actions**

- 12 In an action to recover costs or damages in a climate change action, an action may be brought by or on behalf of a person in the person's own name or as a member of a class of persons under [*Class Proceedings Legislation*].

### **Advance Costs Award from Fund**

- 13 (1) A court, on application made at any stage of a claim, may direct that a plaintiff in an action

for nuisance under sections 6 or 7 be awarded Advance Costs from the Climate Change Fund where:

- (a) the case involves a loss, damages or costs to the plaintiff due to climate change;
- (b) the plaintiff does not have the financial resources to support their own proceeding and there is no other realistic option for bringing the issues to trial;
- (c) the plaintiff has not engaged in vexatious, frivolous or abusive conduct; and
- (d) in the view of the court and having regard to the funds available in the Climate Change Fund, including recognizing purposes to which the funds have been committed, it is fair and just to do so.

#### **Limitation of Costs**

- 14 (1) A court may only award costs to a party in respect of all or any part of Climate Litigation if:
- (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
  - (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
  - (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
- (2) A court that orders costs under subsection (1) may order that those costs be assessed in any manner that the court considers appropriate.
- (3) An order that a party pay costs under subsection (1) may include an order to repay to the Climate Change Fund part or all of any advanced costs order made under s. 13.

#### **Limitation Periods**

- 15 (1) A public nuisance under s. 4(2) is an ongoing nuisance, for as long as a Major Emitter continues to be a Major Emitter, and the ultimate limitation period under [the relevant Limitations Legislation] commences when the Major Emitter ceases to be a Major Emitter.
- (2) In respect of climate-related damages, and for the purposes of [Limitations Legislation], the claim will be considered to have been discovered when, having regard to the nature of the injury, loss or damage, it should be clear to the plaintiff that the loss was climate-related.
- (3) Notwithstanding (2), in the case of climate adaptation measures, at the time that the plaintiff, or, in the case of a claim under s. 6(2) of this Act, the individual or entity on whose behalf damages are claimed, took concrete steps to implement the adaptation measures in respect of which damages are claimed.
- (4) In addition to the requirement of (2), in cases involving slow onset events that occur incrementally, the claim will be discovered after climate-related damage has reached such levels that it should have been clear to the plaintiff that a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

#### **Climate Damages Insurance and Immunity from liability**

- 16 (1) A Major Emitter which holds an acceptable insurance policy in respect of damages arising from all its past and ongoing emissions shall not be liable for damages covered by the policy.
- (2) For greater certainty, the fact that a Major Emitter holds an acceptable insurance policy does not insulate the Major Emitter from potential liability if the policy did not apply, for

any reason, to the damages that form the basis of the lawsuit.

- (3) For the purposes of this section, an acceptable insurance policy means an insurance policy that complies with any regulations under this section and provides for the payment of climate-related damages, or damages that are presumed to be climate-related under the policy, to the government of [Country], reflecting the Major Emitter's contribution to global climate damages.
- (4) A settlement agreement reached in climate litigation, whether under this Act or otherwise, may include an agreement that a party take out and maintain an acceptable insurance policy.
- (5) A judge presiding over climate litigation, whether under this Act or otherwise, may order, in addition to any other order he or she might make, that a party take out an acceptable insurance policy to cover future damages.
- (6) Funds paid to the Crown out of an acceptable insurance policy shall be paid into the Climate Compensation Fund created under section 11.
- (7) The [Executive] may pass regulations defining the requirements of an acceptable insurance policy, including, but not limited to:
  - (a) identifying the terms which must be included in the policy;
  - (b) identifying the circumstances under which the policy must provide for the payment of funds to the Crown, including how climate damages or damages presumed to be climate related damages should be identified,
  - (c) defining what insurance companies or classes of insurance company may offer an acceptable policy,

(d) creating bodies, processes, structures or other means of administering the climate insurance schemes contemplated by this section.

### **Remedies**

- 17 (1) If a Major Emitter is found to be liable under section 4, the Court may make such orders as it feels is appropriate, including, but not limited to:
  - (a) Awarding damages to the plaintiff;
  - (b) Ordering that damages be paid into the Climate Compensation Fund, which may include an order as to how and when the funds should be paid out;
  - (c) Injunctive relief requiring a defendant to reduce or eliminate the emissions of greenhouse gases or operations or actions leading to such emissions; and
  - (d) Declarations of the rights and responsibilities of the parties.

### **Enforcement of Foreign Judgments**

- 18 (1) If a judgment in a climate litigation case has been given in a court in a reciprocating state, the judgment creditor may apply to have the judgment registered in the [Court] unless
  - (a) the time for enforcement has expired in the reciprocating state, or
  - (b) 10 years have expired after the date the judgment became enforceable in the reciprocating state.
- (2) On application under subsection (1), the [Court] may order that the judgment be registered.
- (3) For the purposes of this section “reciprocating state” means a state or jurisdiction in which:
  - (a) Applicable legislation, including but not limited to climate compensation legislation, would provide for reciprocal enforcement of climate damages legislation under this act; or

(b) case law or other rulings by judges of the jurisdiction clearly indicate that a climate damages judgment under this Act would be enforceable in that jurisdiction.

- (4) In relation to an application under subsection (1), Part II of the *Court Order Enforcement Act* applies.
- (5) The fact that a climate judgment does not originate from a court from a reciprocating state does not prevent a court from recognizing and enforcing such a judgment under the [*Court Order Enforcement Act* or common law rules for recognition or enforcement of judgments].
- (6) For the purpose of section 18(5), in the case of a foreign judgment, a foreign court has jurisdiction in a civil proceeding if the factors listed in section 19(1) would apply in respect of that jurisdiction.

### **Jurisdiction**

- 19 (1) For the purposes of this Act, the [Trial Court in the Country] has jurisdiction in a civil proceeding brought in relation to climate-related damages where:
- (a) The damages occurred within [Country];
  - (b) The damages were caused in whole or in part by climate change and its impacts; and
  - (c) There is, on its face, a claim that the defendant has committed a climate-related tort under this Act or the common law.
- (2) In relation to s. 19(1)(c), the [Trial Court] has jurisdiction under this section even if the plaintiff elects to pursue only some major emitters in a civil proceeding, provided that the emissions which are alleged to have given rise to damages, whether caused by the defendants or other parties, occurred in multiple jurisdictions.

- (3) If one or more of the defendants are not present within the country, the plaintiff may [serve the defendant in accordance with rules of court for foreign defendants][or][apply to the court ex parte for directions on how to serve those defendants.]
- (4) For greater certainty, if a plaintiff complies with a court's directions in respect for service of a defendant under (3), the court has jurisdiction to hear the claim in respect of that defendant.

### **Powers of the Chief Justice**

- 20 (1) The Chief Justice of the [Court] may make rules or take measures for the timely and efficient resolution of litigation brought under this Act, including, but not limited to:
- (a) providing training or expert support to judges who are hearing, or may hear, climate change cases, including retaining experts to assist the court;
  - (b) establish rules related to the management of cases under this Act;
  - (c) Establish a temporary or permanent green bench or other judicial structures to concentrate expertise related to claims under this Act; and
  - (d) Enter into agreements with courts in other jurisdictions related to the taking of evidence or other coordination and cooperation in related climate change litigation.
- (2) The costs of any measures taken by the Chief Justice under subsection (1) may, should the Chief Justice so order and if available in the Fund, be taken from the Climate Change Fund.

### **Regulation-making powers**

- 21 The [Executive] may make regulations related to the purposes of this Act.



### **Declarative and Retroactive Effects**

- 22 This Act is intended to be declarative of the common law, but to the extent that the Act modifies the common law, a provision of this Act has any retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under sections 4, 5, 6 & 7 for a climate change damages, whenever the climate change related wrong occurred.

### **Coming into Force**

- 23 The provisions of this Act come into force on a day or days to be fixed by order of the [Executive].



Vanuatu Environmental  
Law Association

*Protecting the Ocean,  
the Islands, the People*

**Vanuatu Environmental  
Law Association  
First Floor, Pilioko House  
Lini Highway  
Port Vila  
VANUATU**



**West Coast Environmental Law  
200-2006 West 10th Avenue  
Vancouver, BC V6J 2B3  
CANADA**

**[www.wcel.org](http://www.wcel.org)  
(+1) 604 684 7378**