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# Climate Change Loss and Damage Compensation

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## Abstract

The Conference of the Parties (COP) to the UN Framework Convention on Climate change (UNFCCC), held in Doha (2012), recognised “protection against loss and damage caused by climate change” as an agenda item for the negotiation of a new treaty on climate change. This is obviously one of the most controversial agendas of the COP negotiation; e.g. who is responsible for the harm that results from climate change, and how could/should the harmed states (or individuals) be compensated appropriately? The present author suggests that some national case law developments may be useful guidance for the future COP, especially when negotiating the controversial issues of harm and compensation. The reasoning behind the suggestion is that the case law developments helps us to understand nexus between national court’s litigation, legislation and also domestic policy of those countries which are generally not favourable from the binding obligation of emission reductions. And, an understanding of nexus (or tensions) that exist currently, at different national levels, could be instrumental to comprehend and acknowledge the domestic reality of the parties and conduct future COP negotiations accordingly. This paper focuses on the emerging trend of national adjudication

of climate change related disputes in some of the influential states in the COP, assessing how these litigations are building pressure on the necessary legislation on greenhouse gas emission reductions at national levels. The nexus between litigation and legislation, as well as the domestic climate policy of states, could be detrimental in shaping the content of “climate change loss and damage” into a new climate treaty that is slated to conclude in 2015 and implemented from 2020.

## 1. Introduction

The “loss and damage caused by climate change” is formally added as an agenda item of the international negotiations for a new treaty on climate change. The Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC) held in Doha 2012, specifically COP18, recognised the agenda.<sup>1</sup> The United States and some other likeminded states opposed use of the concept loss and damage in the text of the COP18. At the same time, the European Union (EU) and the group of developing countries endorsed the use of this phrase in the COP18 decision; and it is being described as a significant step towards a new treaty. The agenda may be a necessity for the COP, but it is certainly a dif-

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<sup>1</sup> Subsidiary Body for Implementation, Thirty-seventh session, Doha, 26 November to 1 December 2012, Agenda item 10; Approaches to address loss and damage associated with climate change impacts in developing countries, Decision 1/CP.16, paragraphs 26–29, see full document > <http://unfccc.int/resource/docs/2012/sbi/eng/l44.pdf>.

difficult obstacle to overcome by the COP. How the agenda might be incorporated into a new treaty, scheduled to be concluded in 2015 and implemented from 2020 onward, remains to be seen.<sup>2</sup> The present author suggests that some national case law developments may be used as a guide for future COP negotiations.

This paper implicitly focuses on emissions from fossil fuels use, particularly from industrial sectors. Other types of emissions, e.g. deforestation, methane, livestock and agriculture are not addressed. The main issue surrounding the climate change impacts mitigation and adaptation, when looked from the strict legal point of view, is that greenhouse gas emissions are not defined as an illegal act *per se* by any national law or international law. This means that the act of greenhouse gas emission may fall under the category of those harmful acts that are not prohibited by law, and therefore by its definition, could perhaps be addressed under the Common Law of equity and torts. The question is which option the COP will choose; whether the future COP negotiations could and should address climate change loss and damage in line with the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>3</sup> Or they rather should it be addressed based on the consequen-

tial damage, or will the COP negotiations follow the idea of control and reduction of the source of damage which is somewhat similar to the approach employed by the Ozone treaty regime.<sup>4</sup>

For example, the Climate Fund of can be developed and managed in a similar manner to the Ozone Fund established under the Montreal Protocol, involving and assisting developing countries as a compliance mechanism. The COP negotiations, thus, should, in particular, be focused on how the countries like China, India and Brazil as well as the other developing and least developed countries, could be guaranteed as beneficiaries of the Climate Fund.<sup>5</sup>

However, a number of questions arise concerning the above-mentioned issues and options for the COP. We shall group the questions into

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<sup>2</sup> The negotiations on loss and damage are not formally linked to the 2015 agreement, but implementation of the UNFCCC, i.e. COP18 referred the issue to the subsidiary body of responsible for negotiating the 2015 agreement. The work programme on loss and damage originates from the COP16.

<sup>3</sup> The International Law Commission (ILC) initially started its work on draft articles on the liability for harmful activities not prohibited under international law, on which the ILC later adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001 and 2006). Text adopted by the (ILC) at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report also contains commentaries on the draft articles, also presented in *Yearbook of the International Law Commission, 2001*, vol. II, Part Two.

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<sup>4</sup> The Ozone treaty regime consists of the Vienna Convention on Ozone depletion (1985) and its Montreal Protocol (1987), which aims to control production and consumption of specific chemicals CFCs (HCFCs), methyl bromide and similar chemicals. Specific targets are set under the ozone treaty regime, aiming at the reduction of chemicals under an agreed timetable by the parties. The Protocol has been amended in London (1990), Copenhagen (1992), Montreal (1997) and Beijing (1999). The London Amendment provided for an Interim Multilateral Fund to assist and qualify developing countries for compliance procedures, among others. In the Copenhagen Amendment, parties made the Interim Multilateral Fund permanent. The Montreal Amendment obligated countries to establish and implement a licensing system for the import and export of new, used, recycled and reclaimed controlled substances, and to control trade in the banned substances by parties not in compliance with the Protocol. The Beijing Amendment provided for a "basic domestic needs" exception for certain controlled chemicals and added bromochloromethane to the list of controlled substances.

<sup>5</sup> The Ozone Fund was agreed at fair cost and a reasonable grace period for the developing countries. In a similar approach to the grace period under the Montreal Protocol, China, India and Brazil could be offered a reasonable (greenhouse gas emissions) grace period in the short term, the other developing countries in the medium term, and the least developed countries in the long term, see Katak Malla, "The EU and Strategies for New Climate Treaty Negotiations", *European Policy Analysis*, NOVEMBER ISSUE 2011:12epa, p5.

two sets, in order to make an in-depth discussion on “loss and damage caused by climate change”, including issues of political as well as legal relevance.

The first set of questions that arises is of political and legal nature and they are also generally relevant to the COP negotiations: who is responsible for the harm that is and could be resulting from the greenhouse gas emissions? Is greenhouse gas emission reduction essentially a political issue and, if so, what is the political obligation of states (or individuals) for mitigating climate change? If climate harm is also a legal issue, then who has the right to file a case, against whom, (either governments or companies, or both) and in which court of law? Should climate change be considered as a part of the law of public nuisance and if so, what are the possibilities for the compensation to the victims of climate change? What conclusion can be drawn from the practices of some national courts in this regard? Does this line of litigation represent a solution to the problem, and if not, what possible solutions are available with regard to climate change mitigation and compensation of climate harm?

The second group of questions relates directly to the COP negotiations; what is the difference between the COP18 decisions that recognised “damage aid” from the classic official development aid (ODA)? In what sense does “damage aid” differ from the earlier COP decisions on mitigating climate change, e.g. “green climate fund” (COP15) and “long term finance” (COP16 and COP17)? Will the least developed countries and the small Island countries receive funds to repair “loss and damage” incurred as a result of climate change based on a pledge made by industrial states? If future COP decisions are simply going to be a policy statement, what is the relevance of such decisions in terms of legal “injury”, “harm” and “compensation” to victims of climate change?

Generally speaking, the state responsibility-based claim for damages under international law has to fulfil the following criteria; “(i) identifying the damaging activity attributable to a state; (ii) establishing a causal link between the activity and the damage, (iii) determining either a violation of international law or a violation of a duty of care (due diligence), which is (iv) owed to the damaged state, and (v) in a court of law would be to quantify the damage caused and relate those back to the activity.”<sup>6</sup>

Keeping view of these criteria, it can be useful to examine some case law developments as a way to explore the two set of questions mentioned above. In doing so, a few key case law examples, from a number of countries, will be demonstrated first. Afterwards, some noteworthy legal opinions will be discussed and finally conclusion will be presented.

## 2. Case Law

Some key pieces of litigation are selected from Canada, India and the United States. It is primarily because of language barriers of the present author, the case law developments in China, Brazil, Russia and others countries are not included in this work. It is because of its longstanding support of the COP negotiations and “climate and energy package”<sup>7</sup> already in place, the EU’s case law is less relevant to this study. With their democratic governments and independent judiciaries, Canada, India and the United States make their case law more relevant in exploring the possibilities for climate harm compensation.

This discussion will focus on the tension between litigation and climate policy of states, which are generally not favourable to the bind-

<sup>6</sup> Richard S.J. Tol and Roda Verheyen, “State responsibility and compensation for climate change damages—a legal and economic assessment”, *Energy Policy* 32, pp. 1109–1130, (2004).

<sup>7</sup> See ><http://ec.europa.eu/clima/policies/package/>>.

ing obligation of emission reductions. The selection of the case law is based on the countries' conflicting climate policy towards the binding obligation of emission reduction and national litigations.<sup>8</sup> A more careful study of the national court's approaches—especially of Canada, India and the United States— towards climate change litigation could serve as indicators.

After its formal withdrawal in 2011 from the Kyoto Protocol, Canada's position, in particular, has become more relevant pertaining to some of the above mentioned questions. The case law from India and the United States are considered as instructive, because the former does not have the same obligation of emission reductions (as the Annex 1 Parties to the Kyoto Protocol) and the latter remains outside the Protocol.

Some case law examples selected for the discussion are the national court decisions, including one, but important, decision from the international legal bodies, i.e. WTO. These decisions generally differ from the point of view of national and international jurisdictions, but they are also interrelated from a prism of the need for emission reductions and sustainable energy development. For instance, one case law is about Canada's obligation to reduce greenhouse gas emission under a Canadian federal law relating to the Kyoto Protocol, and another is about Canada's withdrawal from the Kyoto Protocol.

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<sup>8</sup> For example, the EU – and its member states – has accepted the legal obligation of the greenhouse gas emission reduction. The United States has not and does not seem ready to accept a legal obligation, so long as the developing economic powers, i.e. China and India and Brazil and others countries are not ready to do so, whose fossil fuel industrial emissions have increased in recent decades. Currently, China, India and Brazil are the rising economic powers, whose respective capabilities have increased considerably, both in terms of emission and technological knowhow. These three countries still consider themselves as developing countries and, therefore, they insist on the developed countries' responsibility of the greenhouse gas emission reductions.

Yet, another case decided by the WTO panel is about Canada's renewable energy projects.

The decisions selected from the Supreme Court of India deals with the important principles of international environmental law. Similarly, decisions, on focus, from the US Supreme Court deal with abatement of carbon dioxide emissions by fossil fuel-based utility companies. It should be acknowledged that domestic case law development is mostly not about liability in the strict sense (i.e., compensation for damages) but about injunctive relief (i.e., mitigation of greenhouse gas emissions).

How could domestic case law which is often motivated by slow progress on climate change mitigation, be expected to influence the COP negotiations? Generally, it is assumed that there are nexus or tension between litigation and legislation at various national levels. For example, despite the lack of a pro-active national policy for binding obligation of emission reductions, India's courts and tribunals have interpreted legislative provisions relating environmental protection that sustainable development to be taken into account.<sup>9</sup> The fact that the national legislations are increasingly becoming necessity for the low-carbon economic growth in the developed countries and developing countries, the author considers this progress as a lynchpin of the climate change mitigation solutions. As well, climate change and energy policies are being integrated and put into practice in the various national legislations. The EU's climate and ener-

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<sup>9</sup> For example, the decision of the Supreme Court in *Narmada Bachao Andolan v. Union of India* 2000 (10) SCC 664 at p. 727, *Taj Trapezium case*, *M.C. Mehta v. Union of India*, AIR 1997 SC 734; see also, Ilona Millar, "The Environmental Law Framework for Sustainable Development – Principles of Sustainable Development in International, National and Local Laws" [http://www.actpla.act.gov.au/\\_data/assets/pdf\\_file/0006/13893/Millar\\_paper.pdf](http://www.actpla.act.gov.au/_data/assets/pdf_file/0006/13893/Millar_paper.pdf).

gy package can be seen as a noteworthy example in that regard.<sup>10</sup>

Thus, it is considered necessary to demonstrate the tension or nexus between legislation, litigation and climate policy of states in focus. More specifically, Canada's internal tension can be seen in terms of its withdrawal from the Kyoto Protocol, Canada's Federal Court decision confirming right to withdrawal, and an implication of the WTO panel decision relating its renewable energy development.

In India, it is about its dilemma posed by judicial activism of the Supreme Court of India concerning harm and compensation, on the one hand, and India's policy of voluntary emission reductions, instead of binding obligation, on the other hand.

The tensions between litigation and legislation in the United States are interestingly demonstrative. For example, the US Supreme Court decisions have suggested legislation as a necessary tool for greenhouse gas emission reductions, a legislative bill on emission reduction stalled and died in the US Senate, as a result of the opposition to the bill. Afterwards, the US President Barak Obama has announced in public that, "if Congress won't act soon", he will "to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy."<sup>11</sup> It is, thus, logical to visualise that the internal situation in the United States would lead to the country towards adoption of an appropriate national legislation on the climate change or actively negotiate a new climate treaty under the COP, or even to do both.

Therefore, the above mentioned national case law developments and some relevant legal

opinions on harm and compensation (to be discussed later), pertaining to the rationale and risk as well as benefit of climate litigations, may be useful guide for future COP negotiations.

### 2.1 Rationale, risk and benefit of litigation

The rationale of analysing litigation is that a case law may be a small dot in the wider environmental law context, but a combination of such dots may also lead to the development of environmental jurisprudence. For instance, a decision made by the Federal Court of Canada, determining who can represent whom in the court of law concerning the reduction of greenhouse gas emissions, could be an inspiration for the Supreme Court of India or the United States. When the independent courts of the various countries decide the same issue by reaching the same, or different, conclusions, it helps jurists to form opinions which help to promote an evolution of the jurisprudence towards broader changes.

We should, however, be mindful that legal experts have identified a number of difficulties and/or risk associated with climate change-related litigations at the national and international levels.<sup>12</sup> Pursuing these types of lawsuits in the various courts of law is problematic, mainly because of the difficulties of presenting causal links between greenhouse gas emissions and climate harm. However, some progress is slowly being made. This kind of litigation exercise has opened up some possibilities for an adjudication of climate change-related cases.

With regard to litigation concerning climate change mitigations through the use of non-fossil fuel-based energy, we should be aware of the fact that in some situations the outcome of litigation

<sup>10</sup> See ><http://ec.europa.eu/clima/policies/package/><.

<sup>11</sup> President Barack Obama's speech that was directly broadcasted in the World's visual media, in February 13, 2013.

<sup>12</sup> Laura Horn, "Is Litigation an Effective Weapon for Pacific Island Nations in the War Against Climate Change?", *Asia Pacific Journal of Environmental Law*, Vol.12, issue 1 2009, 169–202.

may have “deterrent effect on the expansion of production capacity for renewable energy if it spreads to uncertainty about the types of support that really is legally acceptable.”<sup>13</sup> In other situations, the litigation’s outcome may “involve countermeasures of various kinds, or a desire to create ‘pawns’ to use in negotiations that do not necessarily involve the same substantive issues.”<sup>14</sup>

One specific research on the litigation relating to climate change suggests that, “it could be a useful tool to draw media attention.”<sup>15</sup> It is, thus, not unreasonable to assume that genuine media attention creates favourable national and international public opinion and, that in its turn influences the nexus between litigation and legislation, i.e. litigation by influencing public opinion and legislation and vice versa.

Analysis of the litigations of this sort is considered necessary, because it is possible that public opinion in favour of the environmental protection may result into national legislations or even conclusion of new climate treaty. Similarly, the burden of litigation may also lead to legislations. Mutual influence between litigation and legislation could be considered as means of accommodation with the competing policies, if not convergence of contradictory interests. Nexus between litigation and legislation could also influence institutional aspects of legislative and judicial branches and their competence.

A number of cases relating to the climate change were initiated in different countries by

using a variety of statutes under the Common Law and international law. Public interest litigations, or class actions, are lawsuits relevant to the climate change mitigations and sustainable energy. Public interest litigation means that an individual or a group of people (collectively or individually) could bring a claim to the court, involving the interests of not just to the parties of the case, but for the general public as a whole.<sup>16</sup> This type of litigations is not usually in practice in the Continental Legal system. How this type of litigation is used in Canada, India and the United States and in what ways highlights issues raised in this discussion, is the central focus in the following.

### 3. Canada

First, let us review and examine the case law from Canada to understand who is entitled to file a case and against whom and where (or which national courts), especially when the dispute is related to climate change mitigations, or climate harm and compensation for that matter.

One case law example from Canada revolves around the question whether or not non-governmental organizations (NGO) have a right to file a case against governments, demanding implementation of a particular national law that also relates to global common concern, i.e. climate change mitigation.

If NGOs do have those rights, does the litigation result in any tangible achievement towards mitigation? The Canadian case law example, together one WTO ruling, will also shed light on the complexities involving free trade and renewable energy development.

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<sup>13</sup> David Langlet, FÖRNYBAR ENERGI – DEN NYA KONFLIKTYTAN MELLAN MILJÖSKYDD OCH FRIHANDEL? – ANALYS, JP Miljönet 2013-03-12.

<sup>14</sup> Ibid.

<sup>15</sup> Laura Horn, “Is Litigation an Effective Weapon for Pacific Island Nations in the War Against Climate Change?”, *Asia Pacific Journal of Environmental Law*, Vol.12, issue 1 2009, 169–202. e.g. “the Pacific Island nations seeking to recover compensation from developed countries for the adverse effects of climate change”.

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<sup>16</sup> Litigation filed in a court of law for the protection of “public interest”, e.g. pollution and hazards waste etc.

### 3.1 Friends of the Earth v Canada

Despite formidable difficulties of litigation relating to climate change at the national courts, a noteworthy attempt was made in the *Friends of the Earth v Canada* (2008).<sup>17</sup> From the start, the issue of stake at the Federal Court of Canada was whether or not NGO could represent the general public interest. The plaintiff, Friends of the Earth (a NGO) had challenged the Government of Canada for not fulfilling its obligations under the Kyoto Protocol Implementation Act (KPIA).

It should be noted as a background of the case that Canada had initially agreed to reduce their greenhouse gas emissions by six per cent from 1990 levels by 2012, under the Kyoto Protocol to the UNFCCC. The KPIA is a Federal Law of Canada, aiming for effective implementation of the Kyoto Protocol. The case is thus based on the KPIA that include Canada's legal obligations to ensure that the country takes effective and timely action to meet its international treaty obligations under the Kyoto Protocol.

In the *Friends of the Earth v Canada*, the Court recognised *locus standi* of the Friends of the Earth—a right to sue the Government of Canada. This needs to be seen with the international law context, whereby NGOs are generally not recognised as the subject of international law. Whether Canada's Federal Court decision remotely recognised the Friends of the Earth as a subject of international law may be still debatable. The decision has, nonetheless, opened an avenue for NGOs to bring public interest litigations to national courts of law. Except for some exceptional circumstances such as genocide, crime against

humanity and the protection of human rights, individuals are not generally considered as the subjects of international law, but signatories to the 1998 Aarhus Convention have agreed to take a rights-based approach to environmental matters.<sup>18</sup>

The NGO's right to engage in public interest litigation has, since 2008, been established by the Federal Court of Canada. That decision stands as an example for other national courts to follow, especially, in countries where NGOs can bring cases against governments for failing the international obligations. Such a possibility, however, may exist only in the countries where the court system is able to exercise judicial independence.

Although the recognition of NGO's rights to represent public interest through litigation at the court of law is an achievement of the case, the Federal Court of Canada did not recognise the plaintiff's claim which demanded that the Government of Canada should fulfil its obligations to reduce its share of emissions. Instead, it is concluded that "the Court has no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments."<sup>19</sup> The Court also concluded that, "while there may be a limited role for the Court in the enforcement of the clearly mandatory elements of the Act such as those requiring the preparation and publication of Climate Change Plans, statements and re-

<sup>17</sup> *FRIENDS OF THE EARTH V. CANADA*, 2008 FC 1183, [2009] 3 F.C.R. 201, T-2013-07, T-78-08, 1683-07. The Court found that Parliament had, with the Act, "created a comprehensive system of public and Parliamentary accountability as a substitute for judicial review," see also *Emissions Trading and Climate Change Bulletin*, November 2008, McMillan LLP, >www.mcmillan.ca>.

<sup>18</sup> This convention grants the public rights regarding information, public participation and access to justice in governmental decision-making processes on matters concerning the local, national and trans boundary environment; The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, See also, Jonas Ebbesson, "Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention", *Erasmus Law Review*, Volume 4, Issue 2 (2011).

<sup>19</sup> *FRIENDS OF THE EARTH V. CANADA*, 2008 FC 1183, [2009] 3 F.C.R. 201, T-2013-07, T-78-08, 1683-07.

ports, those are not matters which are at issue in these applications.”<sup>20</sup>

Nonetheless, it must be noted that Canada’s Federal Court neither ordered the Government of Canada to comply with the demands of the plaintiff, nor did the Court hold that Canada is free from the commitments that the country has made under the Kyoto Protocol for its share of emission reductions.

A few years after the *Friends of the Earth v The Gov’t of Canada*, the Government of Canada notified the UN Secretary General (December 15, 2011) to the effect that the country has withdrawn from the Kyoto Protocol. In the aftermath of the notification, Law Professor Daniel Turp applied to the Federal Court of Canada, asking for the judicial review of the decision concerning Canada’s withdrawal from the Protocol. In the *Turp v Canada* (Minister of Justice), the Federal Court dismissed the application, concluding that, “the executive branch of the Government had the ability to withdraw from the treaty.”<sup>21</sup>

As a result of Canada’s withdrawal from the Kyoto Protocol, Canada has become a subject to international criticisms. In response to the increasing international criticisms, the Canadian Minister for the Environment, Peter Kent, argued that he invoked his country’s “legal right” to do so.<sup>22</sup> At the same time, UN Climate Chief Christiana Figueres commented that Canada had both

“a legal and moral obligation” to reduce emissions and lead efforts to fight climate change.<sup>23</sup>

Whatever maybe interests involved, Canada has withdrawn from the Kyoto Protocol. In context to the extension of the Kyoto Protocol for its second commitment period by the COP18, Canada’s withdrawal could be a point of further legal dispute domestically, as well as internationally. It could be a matter of contention between Parties to the Protocol, especially under the rubric of the Vienna Convention on the Law of Treaties (VCLT). If/when any dispute arises, the enforcement mechanisms established under the Kyoto Protocol could and should have taken priority over the VCLT-based general international obligations of states, because the Protocol is a specific treaty instrument,<sup>24</sup> and the VCLT is a general framework treaty. As a rule, the Parties to the Protocol are required to demonstrate that they are within their assigned amounts of greenhouse gas emissions,<sup>25</sup> according to the first commitment

<sup>20</sup> Ibid.

<sup>21</sup> *Turp v. Canada* (Minister of Justice) et al. 2012 FC 893; Whether Canada’s withdrawal from the Kyoto Protocol has violated the KPIA was not considered by the Court in *Turp v. Canada*. The separation of powers between the branches of the government also remained unaddressed by the Court, i.e. is the executive branch of the government free to withdraw from a treaty without the consent of the legislative branch?

<sup>22</sup> Canada pulls out of Kyoto Protocol CBC News posted: Dec 12, 2011 4:00 PM ET; ><http://www.bbc.co.uk/news/world-us-canada-16151310>>.

<sup>23</sup> Canada’s withdrawal from Kyoto Protocol regrettable – UN climate official> <http://www.un.org/apps/news/story.asp?newsid=40714#.UhNGa5hvmfA>>.

<sup>24</sup> In case of the failure to meet these obligations, there are two branches established under the Kyoto Protocol’s compliance mechanism: the Facilitative Branch and the Enforcement Branch. The Enforcement Branch is entitled to determine if a Party (Annex I) is not in compliance with its emissions limitation. In that case, the Party is required to cut emissions by an additional 30 per cent and a Party can be suspended from the Clean Development Mechanism (CDM), thereby being prohibited from making transfers by way of the Emission Trading Mechanisms. The procedural non-compliance issues concerning Canada should have been dealt with during the commitment period by the oversight body. On the other hand, substantive non-compliance would require a Party that has exceeded its emission allocation to purchase equivalent carbon emission rights. If the Party refuses to comply, then economic measures such as fines or trade-related enforcement measures may be used.

<sup>25</sup> According to Article 18 of the Kyoto Protocol, “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through

period (2008–2012). Whether Canada’s withdraw from the Kyoto Protocol at the end of the first commitment period is subject to legal judgment by the court of law. Canada’s withdrawal from the Protocol could also be challenged from the point of view of *pacta sunt servanda*, which in this case may implies that nonfulfillment of the obligation during the first commitment, as a breach of the Kyoto Protocol.

According to Article 27 of the Protocol, “Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Protocol.”<sup>26</sup> It seems that Canada’s withdrawal is aimed at the Protocol. Canada remains a party to the UNFCCC and continues to participate in the COP negotiations. So far, no further legal action has been taken against Canada’s withdrawal from the Kyoto Protocol, either by the Facilitative Branch or by the Enforcement Branch. None of the Parties to the Protocol, nor the EU— may be because legal jurisdictional or political reasons— seem ready to bring a case in the ICJ against Canada concerning its withdrawal from the Protocol based on the VCLT.

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the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.” The negotiations over the establishment of a compliance system find their roots in the process leading up to COP-3 in Kyoto. At COP-6 Part II in July 2001 in Bonn, the compliance debate focused on three areas: functions of the compliance bodies; penalties for noncompliance; and the legally binding nature of the agreement. Parties are still debating the legally binding nature of the compliance agreement.

<sup>26</sup> Article 27 of the Protocol reads: “(1). At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary. (2). Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.”

The Kyoto Protocol foresees the possibility of a party legally withdrawing, but a question arises, which courts jurisdiction is appropriate, if a case is to be filed against Canada.

### 3.2 WTO ruling

It is relevant to note that a related WTO case from 2011, particularly dealing with energy and trade, has led to a new twist in Canada’s position concerning climate change mitigation. This litigation started when Japan and the EU brought a complaint against Canada at the WTO, concerning Ontario’s renewable energy program. It should be noted that Canada has both federal and province-based energy laws and one of them is Ontario’s 2009 Green Energy and Green Economy Act (GEGEA). The GEGEA aims to ensure access to alternative energy, as well as energy conservation and efficiency. Japan and the EU consider that some rules of the GEGEA are contradictory to the WTO principle of non-discrimination. Especially, because of the “local content requirement” under the GEGEA, Japan and the EU brought the subject to the WTO panel of adjudication against Canada.<sup>27</sup> In 2012, the WTO ruled in favour of the plaintiffs. The WTO panel ruled that the renewable energy scheme had breached some WTO rules, but it failed to agree whether it constituted an illegality. The subsidy clause,

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<sup>27</sup> World Trade Organization, DS412/R and DS426/R. Summer 2012 Argentina initiated dispute settlement proceedings against the EU at which it argue that Spain’s implementation of the EU Directive 2009/28/EC on the promotion of the use of energy from renewable sources is contrary to WTO rules by improperly promoting EU-based producers and Certain Measures Concerning the Importation of Biodiesels. As negotiations in the autumn did not result in a solution called Argentina in December 2012 that a panel that is the first instance in the WTO dispute settlement process would be established (DS443). It is not EU law sustainability criteria for biofuels, which have been disputed by both political and scientific starting points, which are subject to review, but some national implementing measures.

which is intertwined with “local content requirements”, is the core issue of disagreement.

After the decision, Canada had lodged appeal over the WTO ruling, arguing that, “Ontario’s feed-in tariff (FiT) scheme aims to support renewable energy by guaranteeing electricity generators above-market rates on certain renewable sources of energy, such as wind and solar.”<sup>28</sup>

In response to Canada’s appeal, the WTO ruling, in May 2013, found Canada’s incentives offered to local companies against foreign firms, as discriminatory.<sup>29</sup> This ruling has made it clear that the use of quality, cost-effective technologies used for the sustainable energy development should not be hampered by protectionist measures. The ruling, in fact, has left no choice for Canada but to work with the provincial authorities to respond to the WTO ruling.

Some skepticism has, however, aroused, whether the situation after the ruling is spurring more WTO disputes. Such disputes are likely to be among those countries that are desperate for economic growth. The other countries may also be doing so, who may be suspecting that their energy development projects are being locked out of foreign interest as a result of the WTO ruling.<sup>30</sup> One would assume, in any case, and could argue that alternative energy development that leads to greenhouse gas emission reduction should prevail over trade issues. The WTO panel ruling has not prohibited renewable energy incentives but incentives that favour local content products

before products from other countries. Canada, or any other state, could have a FiT as long as it treats foreign and domestic renewable energy components equally. It is relevant to note that China has filed a complaint to the WTO against the EU, requesting consultations regarding domestic content restrictions, affecting the renewable energy generation sector, including feed-in tariff programs.<sup>31</sup>

The WTO decision has, thus, become a source of legal uncertainty. “While there are a number of potential opportunities associated with investments in emission reduction projects, there are also a number of potential liabilities associated with investing in firms or projects that have high emissions”, according to Chris Rolfe and Staff Counsel.<sup>32</sup> Rolfe and Counsel argues that, “emitters will pay carbon taxes, ... have to buy allowances or credits, or pay more for fossil fuels.”<sup>33</sup> Yet, “where long-term fixed price contracts commit an emitter to production of greenhouse gas intensive products, the emitter should consider trying to control its potential liability.”<sup>34</sup>

However, the fault-based liability in the strict sense of compensation for damage is difficult to establish, particularly in case of greenhouse gas emission reduction. The seriousness of the damage (or injuries) becomes the prime matter of legal relevance in any case involving liability for compensation of harm. An identification of a wrongful act is necessary to establish climate harm liability for compensation.<sup>35</sup>

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<sup>28</sup> On 5 November 2012, ICTSD Reporting; ><http://ictsd.org/i/news/biores/154399/>>.

<sup>29</sup> DS426.

<sup>30</sup> For example, the United States has already charged India with illegally favoring local producers in its solar sector and China has hit the EU with a claim that Greece and Italy favored solar power firms that bought local components. Other potential disputes are simmering, with Brazil, Indonesia, Nigeria, Russia, Ukraine and the United States all under scrutiny in sectors such as energy, mining, car making and telecoms”, as reported by *Reuters*, Mon May 6, 2013 12:39pm EDT.

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<sup>31</sup> WTO, DS452; >[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds452\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds452_e.htm)>.

<sup>32</sup> Chris Rolfe, Staff Counsel, “Opportunities and Liabilities from Greenhouse Gas Emissions and Greenhouse Gas Emission Reductions”, *West Coast Environmental Law*, March, (1999).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> For example, according to Article 2 of the Draft Articles on Responsibility of States for internationally wrongful Acts (DASR), an internationally wrongful act means that when conduct of an action or omission: a) is attributable

If any court of law is ever asked to decide the legality of greenhouse gas emissions, judges will have to rely on natural science-based evidence of what constitutes significant harm. In order to make a successful claim for climate change loss and damage compensation, it would require demonstration of clear linkage between cause and effect for example as was done with the linking of tobacco use to lung cancer.<sup>36</sup>

#### 4. India

It is worthwhile to contemplate how independent courts in other countries would have decided *Friends of the Earth v Canada* and *Turp v Canada*. For instance, how would the Supreme Court of India have decided in cases like these, given that there is exceptional judicial activism exercised by the Supreme Court of India, relating cases of harm and compensation, as well as the important environmental law principles?

Because of its landmark decisions, India's Supreme Court is somewhat unique in its high level of judicial activism as it concerns environmental rights and principles. Legal experts believe that the Supreme Court of India "will continue to play a significant role in facilitating adaptation to climate change."<sup>37</sup> This has led to the Indian Parliament's creation of the National Green Tribunal (NGT), which is a court to deal

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to the State under international law; and b) constitutes a breach of an international obligation of the State.

<sup>36</sup> One relevant case example how to prove link between human activities and climate change is the casual link between smoking and lung cancer. This link was initially proved by Richard Doll (in 1950) and nicotine substances were recognised as addictive by the United States District Court Judge Gladys Kessler and a federal appeals court in Washington upheld Kessler's findings and found large tobacco companies liable in the case in 2006, Source, news.bbc.co.uk, June 29th, 2010.

<sup>37</sup> Aitken Hem, THE ROLE OF THE SUPREME COURT IN FACILITATING ADAPTATION TO CLIMATE CHANGE IMPACTS IN INDIA, *Journal of Environmental Research And Development*, Vol. 7 No. 1, July–September 2012, pp. 155–165.

with environmental cases. The Tribunal is empowered to render decisions against violators of environmental laws and enforce the payment of civil damages.

The Supreme Court of India is known for its judicial activism and exercise of public interest litigations. In this context, a few but noteworthy examples need to be taken into perspective. Greenhouse gas emissions have not yet been proven to be a toxin. If and when such emissions are eventually scientifically proven to be toxic, India's Supreme Court decision *M.C. Mehta v Union of India*,<sup>38</sup> in which the Court defined polluters' "strict and absolute liability", could be relevant. In this case, it is held that if an enterprise is engaged in a hazardous or inherently dangerous activity such as emitting toxic gasses, the enterprise is strictly and absolutely liable to compensate all those who are affected by the toxic emissions.

One international case concerning trans boundary herbicide spraying is relevant here to mention. Ecuador filed a case against Colombia at the International Court of Justice (ICJ), concerning trans-boundary environmental harm, arguing that Colombia's aerial herbicide spraying at the border with Ecuador has resulted in significant environmental harm. The *Ecuador vs Colombia* case has eventually been settled by an agreement between the parties.<sup>39</sup> According to the 2013 Agreement, Colombia will not conduct aerial spraying operations across its border with Ecuador.<sup>40</sup>

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<sup>38</sup> *M.C. Mehta v. Union of India* AIR 1987SC (1965).

<sup>39</sup> September 13, 2013, the ICJ made an Order recording the discontinuance by Ecuador of the proceedings and directing the removal of the case from the Court's List. Aerial Herbicide Spraying (Ecuador v. Colombia) Case removed from the Court's List at the request of the Republic of Ecuador, see < <http://www.icj-cij.org/docket/files/138/17526.pdf>>.

<sup>40</sup> The Agreement of 9 September 2013 between the parties to the case > <http://www.icj-cij.org/docket/>

Again turning to the discussion on the cases decided by the Supreme Court of India, it is remarkable that India's Supreme Court has acknowledged the Polluter Pays Principle as the law of the land in the *Indian Council for Enviro-Legal Action v Union of India*;<sup>41</sup> it is a case involving an industrial chemical plant. In addition, in the *Vellore Citizens Welfare Forum v Union of India*, the Indian Supreme Court held that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country.<sup>42</sup>

The above-mentioned decisions indicate that, jurisprudence of the Indian Supreme Court has evolved significantly, which could be useful for climate change mitigation through litigation. In the *Municipal Council, Ratlam v Vardhichand*,<sup>43</sup> the Court held that pollutants discharged by the big factories are "public nuisance" and open drains, garbage, and pollutants being discharged by big factories to the detriment of those living nearby are detrimental to "social justice."

This is the current state of jurisprudence as defined by the Indian Supreme Court regarding nuisance and social justice. How the law of the nuisance is argued concerning the climate change mitigations and fossil fuel industrial emission reduction will be seen in the following case decided by the Supreme Court of United States.

## 5. The United States

Two important legal issues decided by the United States' Supreme Court stand out concerning the theme of this paper; whether or not states and private parties are entitled under the public law

of nuisance to bring a lawsuit against utility companies, demanding their share of carbon dioxide emission reductions; and whether issues involving greenhouse gas emission reductions are the pure political issues? And if these are also the legal issues, what legal conclusion can be drawn from the US case law development?

### 5.1 Connecticut v American Electric Power Co

The *Connecticut v American Electric Power Co* (2011) is a noteworthy case from the United States. The case was filed at the United States District Court for the Southern District of New York (2004). Eight Federal States, as well as New York City and three non-profit land trusts, sued the five largest electric power companies in the United States. The plaintiffs claimed that emissions have created a "substantial and unreasonable interference with public rights" and it is being done "in violation of the federal common law of interstate nuisance."<sup>44</sup>

The plaintiffs had asked for a permanent injunction order from the Court, requiring each of the five defendants, the *American Electric Power Co*, to abate their share of carbon dioxide emissions.<sup>45</sup> The United States District Court of New York initially dismissed the lawsuits, suggesting that greenhouse gas emission reduction is a political issue and therefore such a claim should be resolved by the legislature. The Court of Appeals for the Second Circuit, however, reversed the

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files/138/17526.pdf>.

<sup>41</sup> *Indian Council for Enviro-Legal Action v. Union of India* 5 SCC 212 (1996).

<sup>42</sup> *Vellore Citizens Welfare Forum v. Union of India and others*, 5 SCC 647, (1996).

<sup>43</sup> AIR, SC 1622, 1980.

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<sup>44</sup> *Connecticut v. American Electric Power Co* 564, U. S., (2011). This is litigation against the fossil fuel electricity suppliers of the United States, emitting 650 million tons annually, which accounts for 25 per cent of domestic emissions, 10 per cent of domestic anthropogenic emissions and 2.5 per cent of global anthropogenic emissions. The full decision see, ><http://www.supremecourt.gov/opinions/10pdf/10-174.pdf>>.

<sup>45</sup> It should be noted that an injunction is a traditional writ of the Common Law courts, (which may be difficult to apply in the Continental or Civil law systems), where legislations are considered more appropriate than the writ petitions.

District Court dismissal of the lawsuits and held that the dispute is not restricted to resolution in the political arena, and the Court considered that claim is valid under the federal common law of nuisance. The defendants demanded rehearing of the case, but the Second Circuit denied defendants' request, on the ground that the US Environmental Protection Agency had "failed to publicize any regulations on emissions" and could not "speculate whether the hypothetical regulation of emission would pertain to the issues" raised in the case.

The Supreme Court granted the writ of *certiorari*.<sup>46</sup> The question presented to the Court was that whether federal common law public nuisance claims could be made against carbon dioxide emitters. The Supreme Court held that the plaintiffs of *Connecticut v American Electric Power Co* could not pursue their claims under the federal common law of nuisance. The reason given behind the decision is that in the Clean Air Act, the United States delegates the federal role in managing greenhouse gas emissions to the Environmental Protection Agency (EPA). The Court held that the EPA is better equipped than federal judges to decide how strictly to regulate emissions. This was seen as a setback for those who had hoped to use federal common law to litigate against carbon dioxide emitters, but it says nothing about the "ability of states to use their own public nuisance laws to curb environmental harms."<sup>47</sup>

The outcome of the case suggests that attempts to limit emissions have to be done through the legislative and executive branches. Earlier on, in the *Commonwealth of Massachusetts*

*et al. v EPA*, the United States' Supreme Court also held that "carbon dioxide is an air pollutant under section 202(a) (1) of the Clean Air Act which provides that the EPA "shall by regulation prescribe...standards applicable to the emission of any air pollutant from...new motor vehicles... which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>48</sup>

The plaintiffs of *Connecticut v American Electric Power Co* had demanded *injunction*, not demand compensation, for damage that may have resulted from the defendant's share of carbon emissions that led to global warming and climate change. It is obvious that the burden of proof would have been higher should the plaintiffs had asked for compensation. Outcomes of the United States case example suggest that legislation, not litigation, is the basis for climate change mitigation.

So, what is the internal tension in the United States? A legislative bill on climate change was abandoned in the United States Senate in 2010, in the face of opposition. The United States President Barack Obama, in his State of the Union Speech (2013), made a pledge that "if Congress won't act soon to protect future generations, I will. I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communi-

<sup>46</sup> It is an order by a higher court directing a lower court, tribunal, or public authority to send the record in a given case for review.

<sup>47</sup> David R. Brody *AMERICAN ELECTRIC POWER CO. V. CONNECTICUT*, Harvard Environmental Law Review Vol. 36, 298–304.

<sup>48</sup> The judgment of 2nd April 2007 is available at: ><http://www.climatelaw.org/media/Mass.v.EPA.USSC> Court of Appeals for the District of Columbia Circuit, Judges. A similar view was arrived at in *Australian Conservation Foundation v Minister for Planning*, which held that "greenhouse gas (GHG) emissions from burning coal must be taken into account in a planning decision to approve a coal mine extension, i.e. the use to which the coal would be put must be taken into account in determining the environmental effects." Judgment of Justice Stuart Morris, available at: ><http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2029.html>>It should be noted that the Renewable Energy (Electricity) Act of Australia (2000) has had a mandatory national renewable energy target.

ties for the consequences of climate change, and speed the transition to more sustainable sources of energy.”<sup>49</sup>

It remains to be seen if the President’s words will be matched by future actions that lead to combating climate change and ensuring sustainable energy access and supply. But there is certainly internal stress concerning climate change mitigation liability (or obligation), especially between the climate policy of the United States, the court’s litigation and the national legislation.

The current internal situation in the United States would not be sustainable for longer term, according to a new “national strategic narrative” published by “Mr Y” under the pseudonym.<sup>50</sup> Mr Y suggests that, there is need for a new narrative to frame the national policy decisions of the United States, including policy on the environmental protection and climate change.

## 6. Legal opinions

Some relevant legal issues relating climate harm and compensation have been thoroughly examined by Professor Daniel Farber; who caused the harm? Are emitters of greenhouse gasses under an obligation to compensate?<sup>51</sup> Farber argues

that from the start “some of this [emission] activity was innocent, because the reality of climate change was not known at the time.”<sup>52</sup> An innocent act cannot be a subject to culpability without which liability for the compensation of damage cannot be ascertained. This is one important criterion for determining either a violation of international law or a violation of a duty of care (due diligence) towards the harmed state. There is no disagreement among jurists about these criteria.<sup>53</sup> Farber, thus, suggests that, “for those concerned about culpability, apportioning responsibility on the basis of emissions after some cut-off date would be an appropriate response.”<sup>54</sup>

What is the cut-off date, according to Farber? He considers that “one possible cut-off date is 1992, when the United States and other nations entered a framework agreement to reduce greenhouse gasses.”<sup>55</sup> The reason given for this cut-off date is that “at that point, the international community had clearly identified the harm; any source of emissions after that date was at least on notice of the damaging nature of the conduct.”<sup>56</sup>

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<sup>49</sup> President Barack Obama’s Speech that was directly broadcasted in the World’s visual media, February 13, 2013.

<sup>50</sup> Mr. Y, A NATIONAL STRATEGIC NARRATIVE; Captain Porter’s and Colonel Mykleby’s “Y article” could not come at a more propitious time, writes Anne-Marie Slaughter in the preface of the Article, who is also Director of Policy Planning, U.S. Department of State, 2009–2011; see <[http://www.foreignpolicy.com/articles/2011/04/13/the\\_y\\_article#sthash.BM9xxSYk.dpbs](http://www.foreignpolicy.com/articles/2011/04/13/the_y_article#sthash.BM9xxSYk.dpbs)>.

<sup>51</sup> Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, Environmental Law Institute®, Washington, DC, reprinted with permission from ELR®, <http://www.eli.org>, 1-800-433-5120. Prof. Daniel Farber argues that compensation for harm caused by climate change is a moral imperative, and he surveys various mechanisms that have been used in other circumstances to compensate large numbers of victims for environmental

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and other harms. In response, Professor Feinberg cautions that significant hurdles remain before any realistic compensation system could be considered, but suggests that the most effective approach may be evolving parallel tracks of civil litigation and government action to address climate harm. Peter Lehner and William Dornbos argue that using common-law doctrines to find greenhouse gas (GHG) emitters liable for harm is a more pressing concern than creating a compensation system. Finally, Raymond Ludwizewski and Charles Haake claim that the basic elements of liability are not readily discernable with climate change and that it would be more productive to invest in curtailing GHG emissions.

<sup>52</sup> Ibid.

<sup>53</sup> For example see, Richard S.J. Tol and Roda Verheyen, “State responsibility and compensation for climate change damages—a legal and economic assessment”, *Energy Policy* 32, pp. 1109–1130, (2004).

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

Farber's critics, specifically Raymond B Ludwiszewski and Charles H Haake argue that, "assuming such a cut-off date could be established, how would a court differentiate from a liability damages standpoint what is caused by post-1992 emissions—which would be actionable—and pre-1992 emissions—which would not be?"<sup>57</sup> Farber acknowledges that, "it is obviously impossible to link any specific greenhouse gas emissions with any specific injury from a particular company or governmental entity due to the cumulative nature of the (GHG) effect."<sup>58</sup>

Ludwiszewski and Haake argue that, "liability would require a finding that a putative defendant engaged in conduct that was unreasonable under the circumstances."<sup>59</sup> A vital question against Farber's arguments raised by Ludwiszewski and Haake is "what constitutes unreasonable conduct when it comes to emissions?"<sup>60</sup> The two critics note that, "Farber suggests that, "it may have been unreasonable for manufacturers to not use environmentally friendly technologies or to reduce production to account for the impacts of global warming."<sup>61</sup> The two critics further notes that, "Farber does not identify what viable alternative sources of energy could have been relied upon, nor does he provide any formula for determining what level of output is reasonable and what level is unreasonable; output after all, is dictated by the law of supply and demand."<sup>62</sup>

<sup>57</sup> Raymond B. Ludwiszewski and Charles H. Haake, RESPONSE Comment on *Basic Compensation for Victims of Climate Change Basic Compensation for Victims of Climate Change*, Environmental Law Institute®, Washington, DC, reprinted with permission from ELR®, <http://www.eli.org>, 1-800-433-5120.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

However, neither Farber nor his critics take into account that 80 per cent of the world's energy needs can be met through alternatives to fossil fuels.<sup>63</sup> Thus, it would be unreasonable for states not to agree for the use of alternative energy of fossil fuels, especially to prevent further loss and damage from the climate change. Even if states fail to negotiate an international agreement for sustainable energy, they will sooner or later, have to accommodate the competing interests, primarily as a result of nexuses between litigation arising from loss and damage caused by climate change, and legislation on sustainable energy development as a part of the climate change mitigations. The WTO will have to balance between environmental protections interests versus economic interests.<sup>64</sup>

There are, however, certain limitations of climate change mitigation through litigations. The UNFCCC provides for dispute settlement, but it precludes legal redress avenues from the Convention process.<sup>65</sup> In contrast to trans-boundary air or water pollution cases, where it may be relatively easy to identify the victims and the sources of harm, it is much more complicated to demonstrate causality in the present context,

<sup>63</sup> IPCC *Special Report on Renewable Energy Sources and Climate Change Mitigation* (IPCC 2011) Prepared by Working Group III of the Intergovernmental Panel on Climate Change [O. Edenhofer, R. Pichs-Madruga, Y. Sokona, K. Seyboth, P. Matschoss, S. Kadner, T. Zwickel, P. Eickemeier, G. Hansen, S. Schlömer, C. von Stechow (eds)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1075.

<sup>64</sup> There seems to be enough legal grounds to argue convincingly for the prioritisation of alternative energy development under the "local content requirement." But, at the same time, importing goods and services essential for sustainable development is also equally valuable under the WTO rules of non-discrimination and the most favoured nation clause. Until that case is decided, it will have to be sufficient to rely on legislation and/or treaties to balance between economic and environmental interests.

<sup>65</sup> Article 14 of the UNFCCC.

where there can even be a dual identity of injured (victims) and emitters (wrongdoers). The New Zealand's High Court rejection of an appeal of a Kiribati climate refugee case (2013) is an indication of difficulties in reconciling the country's generally favorable policy of emission reduction with the notion of "climate refugee".<sup>66</sup>

It is also difficult, if not impossible, to prove a case of climate harm, linking any specific anthropogenic emissions with any specific injury from a particular company or state, that is specific from the cumulative effect of emissions. It is, however, argued by some that, "harmed states are not bound to tolerate damage and liability that can be established according to the case facts at hand."<sup>67</sup> Some other, therefore, consider climate harm mitigation as a part of the "prevention duties and state responsibility"<sup>68</sup> and still other consider climate change as a "wrongful harm to future generations."<sup>69</sup> Yet, it remains difficult how to define greenhouse gas emission as a wrongful act. In this situation, should not the international community of states acknowledge the principle of *unjust enrichment* in dealing with the climate harm and compensation?

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<sup>66</sup> Petra Ďurková, Anna Gromilova, Barbara Kiss, Megi Plaku, *Climate refugees in the 21st century*, December 2012 <<http://acuns.org/wp-content/uploads/2013/01/Climate-Refugees-1.pdf>>. The asylum claim "based on vulnerability to climate change highlights the fact that international refugee law cannot respond to climate-induced displacement" > <http://www.ejfoundation.org/node/997>>.

<sup>67</sup> Christina Voigt, "State Responsibility for Climate Change Damages", *Nordic Journal of International Law*, Vol. 77, No. 1-2, (2008).

<sup>68</sup> Roda Verheyen, *Climate Change Damage and International Law Prevention Duties and State Responsibility*, Martinus Nijhoff Publishers, (2005).

<sup>69</sup> Marc D. Davidson, Wrongful Harm to Future Generations: The Case of Climate Change, *Environmental Values*, Volume 17, Number 4, November 2008, pp. 471–488(18).

## 6.1 Unjust enrichment

Harm and compensation are also part of the Common Law principles of equity and tort. Relevant to these concepts is *unjust enrichment*,<sup>70</sup> which suggests that those benefiting disproportionately at the expense of others should compensate the victims, even if the use of the resources involved is not illegal. It follows from this principle that any person, natural or corporate, who unjustly obtains wealth or property, owes compensation to the injured party, even if the property was not obtained illegally. This suggests that even if greenhouse gas emissions may not be an illegal act as such, it is illegal to harm the common interest of humanity, while taking advantage of the situation, in order to fulfil individual interest by a state or individual.

Thus, the principle of unjust enrichment scrutinises one party's right to use natural or human resources to optimise the fulfilment of its needs to the detriment of another party's pursuit

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<sup>70</sup> John Bede Donnelly (in a paper for the degree of Doctor of Juridical Science Deakin University February, 2004) suggests that, a like concept has had a place in the common law since its inception under several characterisations. It bears the mark of ancient Roman jurisprudence, but relates to independent principles. The jurisprudence was formed by special characteristics of its history. It is distinct from modern Roman/Dutch law but the doctrinal overtones of its foundational case law reflect the basis of reasoning, which in Continental law is founding the adopted ancient codes. It is this foundation of reasoning and the firm rejection of a normative general principle that makes Anglo/Australian law different in character and jurisprudence from unjust enrichment in USA and Canada. Stifled for centuries by quasi contract misconceptions, the law of unjust enrichment entered the modern law in the 20th C through the seminal judgments of Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Coombe Barbour Ltd*, [1943 AC 32] and related cases and through the strong judicial and juristic following they inspired. Donnelly seems to suggest that any civilised system of law is bound to provide remedies for unjust enrichment, as it "became an imperative across the common law world: it has long held a place in the Roman Dutch jurisdictions of South Africa and Continental Europe.

of the same. In addition, the principle can be a basis for restitution, compensation and introduction of global taxation, which can hold excessive greenhouse gas emitters directly responsible for global climate harm.

Keeping in view the difficulties to establish a fault-based compensation system, as well as in the light of value of the principle of *unjust enrichment*, a no-fault-based insurance scheme could be a suitable mechanism to deal with climate change loss and damage compensation.

Before reaching to any conclusion, it is important to address one crucial question; whether the existing legal concepts, rules and mechanisms are equipped to meet the challenges and complexity posed by climate change, including adequate compensation for climate change loss and damage?

The state responsibility to reduce greenhouse gas emissions is based on the UNFCCC, including the Kyoto Protocol. It is important to note that there is clear legal obligation of states to provide climate finance under Article 4 of the UNFCCC.<sup>71</sup> There are political obligations of states as well, especially recognised by the 2009 Copenhagen Accord (COP15)<sup>72</sup> in the form of self-imposed obligations. It should be also noted that there are historical evidences where such self-imposed political obligations have evolved

<sup>71</sup> The relevant parts of Article 4 of the UNFCCC and its para 4 and 8 reads as follows; 4) "The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects"; 8) "In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures".

<sup>72</sup> FCCC/CP/2009/L.7 18 December 2009.

into *de facto* legal obligation. For example, the Helsinki Accords and Final Act on Security and Cooperation in Europe<sup>73</sup> have, over decades, acquired legal significance, including political-military security, economic and environmental issues as well as protection of human rights.<sup>74</sup> Therefore, an importance of the political commitments under the Copenhagen Accord should not be underestimated,<sup>75</sup> particularly concerning the Green Climate Fund (COP15). In this context, the Fund could be developed in the future as global no-fault insurance schemes for compensation.

As mentioned earlier, the future COP negotiations might use the ozone treaty regime as a model, focusing on control and reduction of sources of damage, instead of concentrating on consequential damage and compensation. The

<sup>73</sup> The Final Act of the Conference on Security and Cooperation in Europe, known as the Helsinki Final Act, Helsinki Accords or Helsinki Declaration, was the final act of the Conference on Security and Co-operation in Europe held in Helsinki, Finland during July and August of 1975; see also the book review by Leo Gross and Anthony D'Amato, 78 *American Journal of International Law* 960 (1984) (Code BR1-84); See, also Igor I. Kavass, Jacqueline Paquin Granier and Mary Frances Dominick, ed., *Human Rights, European Politics, and the Helsinki Accord: the Documentary Evolution of the Conference on Security and Co-operation in Europe 1973-1975*. The Helsinki Accord type documents "engage States politically and morally, in the sense that they are not free to act as if they did not exist", see Gidon Gottlieb, "Relationism: Legal Theory for a Relational Society", 50 *University of Chicago Law Review*, 1983, pp. 567-582.

<sup>74</sup> The Helsinki process includes that respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. The Conference on Security and Cooperation in Europe held in Helsinki, Finland 1975, thirty-five states, including the United States, Canada, and all European states except Albania and Andorra, signed the declaration including Helsinki Final Act, Helsinki Accords or Declaration. This was an attempt to improve relations between the Communist bloc and the West.

<sup>75</sup> Katak Malla, *The International Negotiations for a New Global Climate Treaty: Legal Analysis of COP 15-16 and Basis for Further Action*, Clipore and Stockholm Miljörettscentrum publication, (2011).

COP19 has, thus, “decided to establish an international mechanism to provide most vulnerable populations with better protection against loss and damage caused by extreme weather events and slow onset events such as rising sea levels.”<sup>76</sup> There are ongoing efforts to distinguish the climate finance from the Official Development Aid (ODA).<sup>77</sup> The ongoing discussions on loss and damage are seeking to introduce a concept based on a different logic than ODA. The alternative concept is supposed to be in line with the notion of Article 4 of the UNFCCC, i.e. compensation owed to vulnerable countries due to damage caused by climate change.<sup>78</sup>

## 7. Conclusion

An examination of the case law developments in Canada, India and the United States shows that national court litigations have been driven, in part, to guarantee individual’s right to file climate-related cases against governments and/or individuals corporations. These litigations have certainly created considerable pressures on na-

tional governments and corporations to climate mitigate harm. As has been described earlier the internal situation of the United States, in terms of litigation, legislations and President Obama’s policy statements, it can be concluded that the United States sooner or later will have to adopt national legislation of climate change, or actively take part in the COP negotiation, or even both.

At the international level, a stalemate persists in the COP negotiations concerning a new climate treaty.<sup>79</sup> Appropriate national legislations by all industrialised countries, as well as developing countries, whose share of global emissions is on the rise, would be an important step towards climate change impacts mitigation and adaption.

A fault-based approach to climate change loss and damage compensation would be difficult, if not impossible, to include in a new treaty. An act of greenhouse gas emission, as well as liability to pay compensation for climate harm, could have been a part of the international liability for injurious consequences arising out of acts not prohibited by international law, but the ILC’s work encountered difficulties in developing draft articles. The ILC, therefore, shifted its approach towards responsibility of states for “internationally wrongful acts.”<sup>80</sup> Serious obstacles remain in recognising greenhouse gas emissions as a wrongful act. Similar difficulties exist concerning recognition of the legal status of climate “victim” or “refugee” in different national laws

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<sup>76</sup> Detailed work on the so-called “Warsaw international mechanism for loss and damage” remains to be established; >[http://unfccc.int/files/press/news\\_room/press\\_releases\\_and\\_advisories/application/pdf/131123\\_pr\\_closing\\_cop19.pdf](http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/131123_pr_closing_cop19.pdf)<.

<sup>77</sup> Felix Fallasch and Laetitia De Marez, “New and Additional? A discussion paper on fast-start finance commitments of the Copenhagen Accord”, *Climate Analytics*, 01 December, (2010).

<sup>78</sup> According to Article 4 of the UNFCCC and its para, 8 the following countries are listed as vulnerable: a) Small island countries; b) Countries with low-lying coastal areas; c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay; d) Countries with areas prone to natural disasters; e) Countries with areas liable to drought and desertification; f) Countries with areas of high urban atmospheric pollution; g) Countries with areas with fragile ecosystems, including mountainous ecosystems; h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and i) Land-locked and transit countries.

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<sup>79</sup> Especially between the United States and the Basic group – Brazil, South Africa, India and China – on the one hand, and between the EU and the United States, on the other; Katak Malla, “The EU and Strategies for New Climate Treaty Negotiations”, *European Policy Analysis*, NOVEMBER, ISSUE 2011:12epa.

<sup>80</sup> The United States had insisted that the ILC’s Draft Articles on Wrongful Acts should be crafted as non-binding guidelines.

and international law.<sup>81</sup> Given the situation, a no-fault based climate change loss and damage compensation, owed to vulnerable countries,

seems to be a workable option for the COP negotiations to follow, establishing a new global climate treaty regime.

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<sup>81</sup> "Climate change refugee bid denied by New Zealand court, High court in Auckland rules against Kiribati man's claim for asylum over rising sea levels caused by global warming," <http://www.theguardian.com/environment/2013/nov/26/climate-change-refugee-new-zealand-court>.