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The Implications of Climate Change Litigation for International Environmental Law-Making

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Everyone is talking about climate change. Climate change has been on the cover of almost every U.S. magazine in the past year, including *Vanity Fair*, *Time*, *Newsweek*, the *Economist*, and even *Sports Illustrated*, on such television shows as *Oprah* and *The Tonight Show*, and in the movie theatres with Al Gore's *An Inconvenient Truth* and *Who Killed the Electric Car?*. To be sure, this media attention is driven first by the increasingly clear scientific connection between greenhouse gas concentrations, climate change, and real impacts affecting real people. But the growing public awareness of climate change is also being driven by the actions of lawyers and other climate advocates who are increasingly raising climate change in the world's courts, commissions and congresses. Climate change even made an appearance before the US Supreme Court.[2] Win or lose (and some will surely win as they did in the US Supreme Court), these litigation strategies are significantly changing and enhancing the public dialogue around climate change.

This chapter discusses these awareness-building impacts of climate litigation as well as related impacts such strategies may have on the development of climate law and policy—even if many of the individual cases lose.[3] The chapter does not discuss the significant implications if a tort action in the United States or the Inuit human rights claims, for example, were ultimately to prevail. Such precedents, which would obviously be far reaching, are discussed in the various chapters of this book addressing each strategy. The primary focus here is on the implications of the climate litigation strategies simply by virtue of their having been filed. In fact, the debate over whether specific theories will prevail or what remedies can be fashioned in a specific case misses

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[2] Massachusetts v. EPA, 127 S.Ct. 1438 (2007).

[3] *See also* Stephanie Stern, *State Action as Political Voice in Global Climate Change Policy: The Minnesota Environmental Cost Valuation Regulation*, in H. OSOFSY & W. BURNS, EDS., ADJUDICATING CLIMATE CONTROL: SUB-NATIONAL, NATIONAL AND SUPRA-NATIONAL APPROACHES (forthcoming Cambridge Press, 2007) (discussing how climate change actions by states can strengthen their political influence in the climate debate); JOSEPH SMITH & DAVID SHEARMAN, CLIMATE CHANGE LITIGATION: ANALYSING THE LAW, SCIENTIFIC EVIDENCE & IMPACTS ON THE ENVIRONMENT, HEALTH & PROPERTY 12 (2006) (noting public awareness-building impact and motivation of some of the climate litigation).

much of the significance of these litigation strategies. Just the acts of preparing, announcing, filing, advocating and forcing a response have significant impacts—and of course some will prevail.

Climate advocates are necessarily pushing the development of the law in new directions. The world's legal systems—both international and national—have never seen a challenge quite like climate change. The science involves complexities of global ecology that are of a scale new to the courts. Nearly all of our activities, whether as individuals, corporations, or governments, contribute to the problem and almost everyone is affected. The entire world is at once simultaneously both a potential plaintiff and defendant. Climate change presents significant geographic complexities, with significant implications for jurisdiction and the shaping of remedies.[4] Climate change also presents difficult temporal problems, with emissions today mixing with emissions from yesterday to cause impacts in the future. This geographic and temporal distance between the wrongs (for example, the emissions) and the injuries presents new challenges for law.

The unique aspects of climate change have forced climate advocates to innovate and to develop creative new strategies internationally and domestically. They have had to push for the progressive development of the law and related institutions, emphasizing not only the differences but the similarities of climate change with more familiar issues. Viewed in this light, climate change is just another, albeit distinctly modern, common law nuisance, threat to cultural property, or human rights violation. In this respect, the climate change advocates are right: climate change may be global, it may be complex, but climate change is also strikingly familiar. Real people, typically those already marginalized with few resources, will suffer real harm because of the activities of others. Isn't this precisely what the law is meant to address?

1. The Focus on Victims

Indeed, climate advocates' focus on specific injuries in specific situations has far-reaching implications for climate policy more generally. In the Kyoto negotiations or in previous national climate policy debates, the focus has primarily been on climate change's global impacts: average temperature increases, average sea level rise, average changes in precipitation. With the rise of

[4] *See, e.g.*, Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005); Hari M. Osofsky, *The Inuit Petition as a Bridge?: Dialectics of Climate Change and Indigenous Peoples' Rights*, in H. OSOFSY & W. BURNS, EDS., ADJUDICATING CLIMATE CONTROL: SUB-NATIONAL, NATIONAL AND SUPRA-NATIONAL APPROACHES (forthcoming Cambridge Press, 2007); *see also* Kirsten Engels, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, Ariz. Legal Stud. Discussion Paper No. 07-10, 155 U. PA. L. REV. (forthcoming 2007), *available at* SSRN: http://ssrn.com/abstract=968990.

climate litigation strategies, however, the focus necessarily shifts to the specific injuries being asserted by the plaintiffs or claimants: the impacts on New England's ski industry,[5] California's coastline,[6] the life and culture of the Inuit,[7] the survival of polar bears or penguins,[8] or the grandeur of Mount Everest or Glacier National Park.[9]

Advocates have had to compile and present detailed assessments of climate impacts in ways that highlight the many regional and local impacts of climate change. In *Connecticut v. American Electric Power*, for example, the New England states documented impacts that included declining snow pack and ice; increased loss of life and public health threats from heat-related illnesses and smog; impacts on the San Francisco Bay, Jamaica Bay National Wildlife Refuge and other coastal resources from storm surges and permanent sea-level rise; declining water levels in the Great Lakes; increases in temperatures in the upper surfaces of the Great Lakes; and rapid declines in forest resources, including New York's Adirondack State Park, among other regionally specific allegations.[10] Similarly, California, in *California v. General Motors*, details impacts of global warming that are already occurring in California and related costs the state is incurring in response. These impacts include, for example, a decline in snow pack in the Sierra Nevada range due to an increase in average winter temperatures; the costs of re-building levees to prevent sea water infiltration and other impacts of sea level rise on the

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[5] Complaint, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 04 Civ. 5669(LAP)) [hereinafter Connecticut v. AEP Complaint].

[6] Complaint, California v. Gen. Motors Corp., No. C06-05755 (N.D. Cal., Sept. 20, 2006) [hereinafter California v. Gen. Motors Complaint].

[7] *See* Center for International Environmental Law, An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change at 35-69 (2004), *available at* http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf [hereinafter Inuit Petition] (describing impacts on "every aspect of Inuit life and culture").

[8] Center for Biological Diversity, Petition to List the Polar Bear (Ursus maritimus) as Threatened under the Endangered Species Act before the Secretary of the Interior (Feb. 16, 2005), *available at* http://www.biologicaldiversity.org/swcbd/SPECIES/polarbear/petition.pdf [hereinafter Polar Bear Petition]; Center for Biological Diversity, Petition to List 12 Penguin Species under the Endangered Species Act before the Secretary of the Interior (Nov. 28, 2006), *available at* http://www.biologicaldiversity.org/swcbd/SPECIES/penguins/PenguinPetition.pdf [hereinafter Penguin Petition].

[9] *See, e.g.*, Petition to the World Heritage Committee for Inclusion of the Waterton-Glacier International Peace Park on the List of World Heritage in Danger and for Protective Measures and Actions (Feb. 16, 2006), *available at* http://law.lclark.edu/org/ielp/objects/Waterton-GlacierPetition2.15.06.pdf [hereinafter Waterton-Glacier UNESCO Petition]. Other petitions were filed to list the MesoAmerican Barrier Reef in Belize, Huarascán National Park in Peru, Sagarmatha National Park in Nepal, and the Great Barrier Reef in Australia. *See* Climate Justice Programme, UNESCO Danger-Listing Petitions Presented (Nov. 17, 2004), *available at* http://www.climatelaw.org/media/UNESCO.petitions.release [hereinafter UNESCO Petitions]. *See generally* UNESCO, World Heritage Centre, Predicting and Managing the Effects of Climate Change on World Heritage, WHC-06/30.COM/7.1, Annex 4 (June 26, 2006) [hereinafter World Heritage Climate Report].

[10] Connecticut v. AEP Complaint, *supra* note 5, at paras. 112-17, 121-27, 132-35.

Sacramento Bay-Delta; increased floods from earlier spring run-offs; and beach preservation efforts to reverse increased beach erosion from sea level rise.[11]

This focus on specific injuries is critical for building political support; such cases link climate change with the lives of ordinary people. Reports of a global increase in temperature of 1^{o} or even 5^{o} have little meaning to most people. The impact is much more understandable when an Inuit expresses implications of climate change for their lives, when the glaciers of Nepal are melting, or when descriptions of drowning or cannibalistic polar bears are reported on the news. The Inuit human rights petition, for example, provides thirty-five pages on impacts of climate change on their life and culture. The petition details changes in Arctic ice conditions and the resulting dangers for Inuit travel, the reduction in materials (thick ice) for building traditional igloos, and the deterioration of wildlife harvests because of declining populations of caribou, seals, polar bears and other animals.[12] In short, the petition tells a story about the impacts of climate change in human terms far removed from the antiseptic discussion of GHG concentrations or global mean temperatures that have traditionally predominated international climate negotiations.

The story-telling quality of "cases" thus makes climate change more tangible and more immediate, which significantly changes the tone of the climate debate.[13] If real victims—such as islanders or the Inuit—are in a room pressing their stories, it is harder for others to bluster about how climate change is a hoax or is unimportant because some regions may benefit from warming or will be able to adapt relatively easily. At the very least, addressing climate change takes on a renewed urgency when one moves from the abstraction of sea level rise, for example, to questions of how to treat climate refugees from South Pacific islands or how to shore up the eroding California coastline. A focus on victims increases the saliency of questions about compensation and adaptation to climate change, and the urgency of mitigating climate change to avoid even worse impacts in the future.[14] This builds momentum at both the national and international levels for stronger climate policy making.

2. Implications for Climate Policy

2.1 Implications for Climate Science

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[11] California v. Gen. Motors Complaint, *supra* note 6, at paras. 46-56.

[12] Inuit Petition, *supra* note 7, at 35-69.

[13] The story-telling or narrative quality of cases has spawned significant scholarship. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); PETER BROOKS & PAUL GEWIRTZ, LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (1996); GARY BELLOW & MARTHA MINOW, LAW STORIES (1996).

[14] *See infra* Section 2.2 (discussing impacts of litigation strategies on the development of international climate policy).

Climate litigation's focus on victims and on specific impacts has implications for how we use climate science and on what climate science is conducted. Every litigation strategy requires the collection, synthesis, and presentation of climate science in support of its claims. This process highlights and makes more accessible to a wider audience the expanding research and analysis on specific local and regional climate impacts.

This is proven particularly true of the reports issued by the Intergovernmental Panel on Climate Change (IPCC),[15] which have been cited as the scientific basis by most of the climate plaintiffs or petitioners. [16] The IPCC reports attract particular attention because they compile and summarize the international consensus on climate science at a specific point in time. Moreover, the IPCC's practice of explicitly bounding its views of the likelihood of certain scientific conclusions in terms of numeric probabilities not only assists international policymakers at the UNFCCC, but also offers lawyers scientific conclusions that are useful in explaining and meeting the standards for causation. This reliance on the IPCC's reports presents a two-way validation: the IPCC's prestige and international status provides a convenient and effective affirmation of the claimant's factual allegations (at least with respect to global climate trends) and, at the same time, use of the IPCC (and particularly its acceptance, if it ensues, by other institutions as authoritative) adds legitimacy and prestige to the IPCC and its reports. This has been evidenced by the enormous, mostly positive media attention the IPCC's Fourth Assessment has received since the beginning of its release in 2007, and the dominant role it now plays in public discourse over climate science. One can also expect that the Fourth Assessment will be central to the next generation of climate cases and claims. Although some may argue that the IPCC's reports are not meant to be used for direct advocacy in specific cases, the IPCC's screening and presentation of the emerging scientific provides an important service in allowing litigants and adjudicators alike to ground advocacy strategies and opinions in the current scientific consensus.

The IPCC reports are not the only scientific studies to play a significant role in climate litigation. The Inuit Petition, for example, relied heavily on the Arctic Climate Impact Assessment, a comprehensive regional report released by the Arctic Council and International Arctic Science

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[15] See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], WORKING GROUP I, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS (2007), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_SPM.pdf, [hereinafter IPCC, 2007 PHYSICAL SCIENCE BASIS]; IPCC, WORKING GROUP II, CLIMATE CHANGE 2007: IMPACTS, ADAPTION, AND VULNERABILITY 2 (2007), *available at* http://www.ipcc.ch/spm13apr07.pdf .

[16] *See, e.g.*, Massachusetts v. EPA, 127 S.Ct. at 1448-49; California v. Gen. Motors Complaint, *supra* note 6, at paras. 24, 26, 31; Connecticut v. AEP Complaint, *supra* note 5, at paras 80, 88, 92-93.

Committee.[17] That 2004 report concluded that the Arctic was "experiencing some of the most rapid and severe climate change on Earth."[18] California's complaint against the automobile industry also highlighted the Assessment.[19] Such use of the Assessment has helped to raise awareness of its findings in ways that would have been unlikely without it forming part of controversial and novel litigation strategies.

Climate litigation strategies not only rely on emerging science, but also will influence the development of climate science both directly and indirectly. Some domestic climate cases in several countries have been filed with the goal of improving the assessment of climate impacts and the use of climate science. In *Massachusetts v. EPA*, the US Supreme Court required the government to make a reasoned judgment on whether emissions of carbon dioxide are endangering public health and welfare as an initial step in determining whether to regulate carbon dioxide as an air pollutant under the Clean Air Act.[20] At the project level, cases in the United States,[21] Germany[22] and Australia[23] have sought (sometimes successfully) to require under national law the consideration of climate impacts in project finance or permitting. In Australia, for example, greenhouse gas emissions and resulting climate impacts must be assessed in coal mining and power plant operations, which presumably increases the scientific basis for decisionmaking in those

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[17] *See, e.g.*, Inuit Petition, *supra* note 7, at 35; *see also* Int'l Arctic Science Comm. [IASC] & the Arctic Council, ARCTIC CLIMATE IMPACT ASSESSMENT (Nov. 2004) [hereinafter Arctic Climate Assessment].
[18] California v. Gen. Motors Complaint, *supra* note 6, at para. 37 (quoting Arctic Climate Assessment, *supra* note 17).
[19] California v. Gen. Motors Complaint, *supra* note 6, at paras. 37-38.
[20] Massachusetts v. EPA, 127 S.Ct. at 1462-63; *see also* Coke Oven Envtl. Task Force v. EPA, No. 06-1131 (D.C. Cir. filed Apr. 7, 2006) (pending challenge to EPA's refusal to regulate carbon dioxide emissions in setting new source performance standards under the Clean Air Act).
[21] Friends of the Earth v. Mosbacher, No. C02-4106 JSW, 2007 WL 962955 (N.D. Cal. Mar. 30, 2007) (order denying plaintiffs' motion for summary judgement and granting in part and denying in part defendants' motion for summary judgement); Friends of the Earth v. Watson, No. C02-4106 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005) (order denying defendants' motion for summary judgement).
[22] *See* Press Release, GermanWatch & BUND, German Government Sued Over Climate Change (June 15, 2004), *available at* http://www.climatelaw.org/media/german.suit/press.release.pdf (announcing lawsuit against the German Federal Ministry of Economics & Labour to compel disclosure of the climate change contribution made by those projects financed by the German export credit agency, Euler Hermes AG); Bund & Germanwatch v. German Federal Ministry of Economics and Labour [BMWA], Beschluss, Verwaltungsgericht [VG Berlin] [Local Administrative Court] Jan. 10, 2006, VG 10 A 215.04 (2006), *translated at* http://www.climatelaw.org/media/Germany/de.export.decision.eng.doc. (order entering settlement with legal opinion).
[23] Australian Conservation Foundation v. Minister for Planning, Administrative Decision, (2004) VCAT 2029 (holding that the Australian Planning and Environment Act requires consideration of greenhouse gas emissions and resulting climate impact in licensing coal mining and power plant operations); Wildlife Preservation Soc. of Queensland Proserpine/Whitsunday Branch v. Ministry for Environment & Heritage, (2006) FCA 736 (upholding decisions by the Australian environment ministry to license two coal mines, despite their failure to consider climate impacts on natural heritage sites). For information on climate-related cases brought in Australia, see the website of the Australian Climate Justice Program, *available at* http://www.cana.net.au/ACJP/cases.php?case_table=cases_aust (last visited at May 28, 2007).

sectors.[24] A recent lawsuit in the United States is aimed at compelling the United States to complete a National Assessment of climate impacts, which was required by Congress to be completed by 2004.[25] Other U.S. cases seek to force the assessment of climate change impacts[26] or the consideration of such impacts in permitting decisions.[27]

In other cases, expanding climate science may be an indirect or secondary outcome of the litigation effort.[28] The petitions to the World Heritage Committee, for example, triggered a series of activities and reports that are aimed in part at reviewing the nature and scale of the risks posed to World Heritage properties arising specifically from climate change.[29] More generally, climate litigation efforts may provide an incentive to some scientists to prioritize certain questions that they might otherwise ignore. Questions of attribution, for example, become particularly relevant for litigation strategies aimed at securing compensation for those affected or for driving corrective action by identifying those responsible.[30] The science of attribution is gaining ground; one recent study, for example, found that the human contribution to the 2003 European heat wave increased the potential of risk of such weather from 4 to 10 times.[31] Approximately 22,000 to 35,000 people died from heat-related deaths, 75% of whom would have been likely to survive for more than a year without such heat.[32] Such studies will be critical in shaping future climate litigation strategies.

Finally, climate litigation is shaping the tone of the debate over climate science. In journalistic or political approaches to climate, the views of climate skeptics were previously given equal weight to the broad consensus views regarding science. In climate litigation forums,

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[24] *Australian Conservation Foundation*, VCAT 2029; *see also* Smith & Shearman, *supra* note 3 (discussing Australian Conservation Foundation).
[25] Complaint, Ctr. for Biological Diversity v. Brennan, No. C06-7061 (N.D. Cal. Nov. 14, 2006).
[26] *See, e.g.*, *Watson*, 2005 WL 2035596.
[27] Nw. Envtl. Def. Ctr.r v. Owens Corning Corp., 434 F. Supp. 2d 957 (D. Or. 2006) (opinion and order) (holding that plaintiff environmental organization had standing to challenge a permit application that would have permitted significant releases of a potent greenhouse gas (HCFC-142b)).
[28] *See, e.g.*, Inuit Petition *supra* note 7, at 118 (seeking as one remedy that the "US take into account the impacts of U.S. greenhouse gas emissions on the Arctic and affected Inuit in evaluating and before approving all major government actions"); *see also* Bund & Germanwatch v. German Federal Ministry of Economics and Labour [BMWA], Beschluss, Verwaltungsgericht [VG Berlin] [Local Administrative Court] Jan. 10, 2006, VG 10 A 215.04 (2006), *translated at* http://www.climatelaw.org/media/Germany/de.export.decision.eng.doc.
(entering order requiring Hermes to assess impacts of its financial decisions on climate change).
[29] *See* UNESCO, Announcement of World Heritage, Climate Change and World Heritage: Expert Meeting, March 16-17, 2006, *available at* http://whc.unesco.org/en/events/301 (last visited Dec. 16, 2006).
[30] *See, e.g.*, Myles Allen, *Attribution of Harm to Human Influence on Climate*, 155 U. PA. L. REV. (forthcoming 2007).
[31] *Id.*; *see also* Myles Allen, *Liability for Climate Change*, NATURE, vol. 421, 891-92 (Feb. 27, 2003); Peter Stott, et al, *Human Contribution to Europe Heat Wave of 2003*, NATURE, vol. 432, at 610 (Dec. 2, 2004); Simone Bastianoni, Federico M. Pulselli & Enzo Tiezzi, *The Problem of Assigning Responsibility for Greenhouse Gas Emissions*, 49 ECOLOGICAL ECON. 253 (2004) (discussing difficulties in assigning responsibility for greenhouse gas emissions).
[32] *See* Allen, *supra* note 30.

however, such skeptics may be asked to submit affidavits or even face cross-examination of their views. This ground-truthing of climate science may screen out and discredit those fringe scientists whose positions may not be able to withstand the scrutiny that comes from adversarial proceedings, particularly in domestic courts. To be sure, some opinions questioning the adequacy of climate science for judicial review have and will occur,[33] but recent cases, including the U.S. Supreme Court decision in *Massachusetts v. EPA*, are tending to support and recognize the general scientific consensus regarding climate change.[34] When courts and other highly credible institutions validate the basic science of climate change, the general public's perception of the climate debate shifts from *whether* climate change is occurring to what the appropriate remedies should be. For the public, Judicial decisions can move the debate from an esoteric one among scientists to an issue *decided* by impartial judges whose job it is to resolve such matters.

2.2. Implications for the Climate Negotiations

Climate change litigation strategies have been at least partly a response to the perceived weakness of the international climate regime. Initially, many of the litigation strategies were designed as an indirect response to the decisions by Australia and the United States to withdraw from the Kyoto Protocol.[35] More recently, a Canadian environmental group filed a lawsuit asking the courts to declare Canada in noncompliance (or imminent noncompliance) with the UNFCCC and Kyoto Protocol.[36] The application for judicial review alleges that Canada's Ministries of Environment and Health are in violation of Section 166 of the Canadian Environmental Protection Act, which requires them to act " if the Ministers [Ministers of the Environment and Health] have reason to believe that a substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute to (a) air pollution in a

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[33] Massachusetts v. EPA, 127 S.Ct. at 1463- (Roberts, C.J., dissenting); *Re Xstrata Coal Queensland Pty Ltd & Ors*, [2007] QLRT 33 (holding that plaintiffs had not proven a causal link between climate change and carbon emissions); Korsinsky v. EPA No. 05 Civ. 859 (NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005).

[34] Massachusetts v. EPA, 127 S.Ct. at 1455-58; *see also, e.g., In re* Quantification of Envtl. Costs, 578 N.W.2d 794, 799 (Minn. Ct. App. 1998) (upholding Commission finding that carbon dioxide negatively affects the environment).

[35] *See* Burns, *Introduction*, in H. OSOFSY & W. BURNS, EDS., ADJUDICATING CLIMATE CONTROL: SUB-NATIONAL, NATIONAL AND SUPRA-NATIONAL APPROACHES (forthcoming Cambridge Press, 2007).

[36] Application, Friends of the Earth v. Her Majesty the Queen, Minister of the Environment & Minister of Health, No. T-914-07 (Federal Court Ottawa, May 28, 2007), *available at* http://www.sierralegal.org/reports/notice_of_application07_05_29.pdf (application for judicial review of the Canadian government's actions, emitting greenhouse gases, in violation of sect. 166 of the *Canadian Environmental Protection Act*, the UNFCCC and the Kyoto Protocol).

country other than Canada; or (b) air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution."[37] According to the application, the Government of Canada's own reports estimate that its actual emissions will be nearly 40% higher than that which is allowed under the Kyoto Protocol.[38] Although this is the first lawsuit in the world aimed specifically at enhancing compliance with the international climate regime, many of the other climate litigation strategies have also been designed at least in part to increase the political will for stronger international climate change policy.[39]

The litigation efforts thus should not be seen in isolation from the negotiations under the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol. The Conference of the Parties (CoP) to the UNFCCC and the Meetings of the Parties (MoP) to the Protocol are now enormous events that bring together a broad range of non-traditional parties to discuss a wide range of responses to climate change. Many of the principle players in climate litigation are also active in international negotiating and policy-making processes. In the "epistemic community"[40] that has emerged around climate negotiations, climate advocates find both a ready audience for spreading the news of litigation and for seeking the same goals that they are seeking through the litigation. The CoP/MoP community is thus a critical venue for developing strategies, identifying partners, reaching out to the press, building legitimacy and credibility for the litigation, and developing factual experts that can help in the litigation.

For climate advocates, the CoP/MoP presents additional opportunities for pursing their specific goals and they actively seek to influence discussions at the negotiations. The Inuit, for example, held "side-events" at three UNFCCC CoPs before filing their petition,[41] and they chose the CoP as the place for formally announcing their intent to file the petition. This brought attention to their claims and their concerns, both for the filing of the petition but also in the negotiations process as well. So, too, the civil society coalition that submitted petitions to the World Heritage

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[37] *Id.*
[38] *Id.*
[39] *See, e.g.*, Stern, *supra* note 3 (noting that a Minnesota climate regulation was a "statement of political opposition to ineffective national and global climate change policies").
[40] *See generally* Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992) (defining epistemic communities as "networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area."); Robert Keohane & Joseph Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39 (1974). According to these and other authors in international relations, the recurrent meetings of these epistemic communities at, for example, annual meetings of multilateral environmental regimes link government and non-government officials in a more effective and dynamic, long-term policymaking process.
[41] Inuit Petition, *supra* note 7, at 117.

Committee, as well as the Secretary General of UNESCO, have held events at the UNFCCC CoP to highlight the impacts of climate change on World Heritage sites.[42]

High profile climate litigation strategies in the United States have also helped to undermine the U.S. opposition to the Kyoto Protocol, including particularly its efforts to derail the launch of negotiations for the second reporting period under Kyoto. At the 2005 CoP/MoP in Montreal, the U.S. sought to enlist Australia, China and India in a united front against the European push for negotiations of future commitments under the Kyoto Protocol. The U.S. strategy failed in part because of the multiplicity of U.S. voices at the negotiations (including local government officials, former President Bill Clinton, and several Senators) that argued action was occurring in the United States, that the Administration was isolated, and that the United States would likely engage in future international negotiations after the next President took office.[43] The presence of high profile alternative U.S. voices and actions thus emboldened negotiators to set out a future negotiation schedule, more confident that the United States would eventually come back to the table.

Harder to judge is the impact climate litigation strategies will have on the climate change regime if many of these cases prove successful. On one hand, taking climate change issues to other forums may seem to undermine the monopoly the climate secretariat might like to have on the issue. On the other hand, by focusing other institutions on climate impacts, the actions may help petitioners to be more active and productive players in the climate negotiations and create mechanisms for the integration of the climate regime with other institutions (for example, human rights tribunals, financial institutions or other treaty regimes). By forcing others institutions to take climate into account, climate litigation will create opportunities for policy coherence across international governance, even if through *ad hoc* cases. Claims to the World Bank Inspection Panel or the International Finance Corporation's Compliance Advisor/Ombudsman, for example, could

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[42] Statement of Koichiro Matsuura, UNESCO Director General, to the 12th Conference of the Parties to the UNFCCC (Nov. 2006), *available at* http://whc.unesco.org/en/activities/396/.

[43] *See, e.g.*, Pew Center on Global Climate Change, COP 11 and COP/MOP 1 Montreal, *available at* http://www.pewclimate.org/what_s_being_done/in_the_world/cop11/index.cfm (last visited Apr. 19, 2007); Andrew Buncombe & Geoffrey Lean, *Climate campaigners claim greatest ever success at Montreal*, THE INDEP., Dec. 11, 2006, *available at* http://news.independent.co.uk/environment/article332384.ece; Planktos, Inc., The 2005 Montreal COP/MOP in Review, Dec. 15, 2005, *available at* http://www.planktos.com/Newsroom/The2005MontrealCOPMOPinReview.html; *see also* Int'l Inst. for Sustainable Dev., Special Report on Selected Side Events at COP 11 & Kyoto Protocol COP/MOP 1: Events Convened on Monday, 5 Dec. 2005, *available at* http://www.iisd.ca/climate/cop11/enbots/enbots1707e.html (last visited on Apr. 23, 2007) (summarizing a panel on subnational initiatives including a presentation by the N.Y. State Attorney General's office regarding recent climate change cases brought in the United States).

seek to force those financial institutions to implement UNFCCC-approved methodologies for measuring, evaluating or reducing GHG emissions.[44]

The focus on remedies that is inherent to climate litigation may influence future debates at the UNFCCC over adaptation. Certainly, the portrayal of specific harm to victims *today*, as opposed to general impacts tomorrow, is likely to force climate negotiators and the UNFCCC secretariat to focus on adaptation and compensation sooner than it otherwise would. This could increase funding available under the regime to respond to the needs of victims. In the most extreme scenarios, the threat of civil liability could conceivably lead industry and others to promote a liability regime under the UNFCCC that would both clarify the rules of liability and essentially cap private sector liability—much as has been done with environmental damage from nuclear facilities[45] and oil spills.[46]

The relationship between remedies in climate litigation and in the climate regime goes both ways. Steps identified and supported by the UNFCCC may help shape remedies in climate litigation, which could remove a major obstacle for successful climate advocacy. Some analysts, for example, have already proposed that remedies in climate litigation should include the requirement to buy carbon offsets endorsed in the climate regime.[47] The climate regime may also be the appropriate forum for a broader remedial response for those who are victims of climate change. If the number of climate refugees increases, for example from sea level rise, a more comprehensive UN remedial response may be necessary and would likely come under the auspices of the UNFCCC. Viewed in this light, the climate change litigation strategies are clearly supportive of and a potential catalyst for a stronger and more comprehensive UNFCCC regime.

3. Implications for International Law Generally

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[44] *See* Jennifer Gleason & David Hunter, *Bringing Climate Change Claims to the Accountability Mechanisms of the International Financial Institutions*, in H. OSOFSY & W. BURNS, EDS., ADJUDICATING CLIMATE CONTROL: SUB-NATIONAL, NATIONAL AND SUPRA-NATIONAL APPROACHES (forthcoming Cambridge Press, 2007).

[45] Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251; Int'l Atomic Energy Agency [IAEA], Vienna Convention on Civil Liability for Nuclear Damage, IAEA Doc. INFCIRC/500 (May 21, 1963) (entered into force Nov. 12, 1977); Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Dec. 17, 1971).

[46] Int'l Convention on Civil Liability for Oil Pollution, Nov. 29, 1969, 973 U.N.T.S. 3, 9 I.L.M. 45; Protocol of 1992 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, *1971*, Nov. 27, 1992, 1953 U.N.T.S. 373 (1996); Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, Nov. 1977, 16 I.L.M. 1450.

[47] *See* Engels, *supra* note 4; *see also Mandatory CO2 Credit Purchases Eyed as Remedy in Climate Change Suits*, INSIDE EPA.COM (Nov. 24, 2006), *available at* http://www.law.arizona.edu/news/Press/Engel112706-2.pdf (quoting proposal from Kirsten Engels).

3.1. Promoting the Progressive Development of International Law

Whether international law will evolve to address climate change impacts effectively is still an open question, but just the act of filing climate-based petitions or complaints advances innovative arguments and pushes international law in new directions. The Inuit petition to the Inter-American Commission on Human Rights, for example, requires the interpretation and application of rights to the use and enjoyment of traditional lands, to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home.[48] The petition invites the Commission to continue its recent jurisprudence extending the Inter-American system's human rights protections to the intersection of human rights and the environment.[49] The Inuit petition also presents important and well-supported arguments for the progressive development of international environmental law, including specific reference to U.S. obligations under the UNFCCC and the Kyoto Protocol and to emerging principles of law, including the principle not to cause transboundary environmental harm, the principle of sustainable development, and the principle of precaution.[50] Even if the Commission (as now seems likely) will not pursue the Petition, both the Petition and the ensuing dialogue at the Commission will further the potential future interpretation of the links between international environmental and human rights law.

These initial efforts to use new areas of the law, such as the law relating to human rights or cultural heritage, may spawn other innovative efforts to build policy coherence between different fields of international law and climate change. On April 17, 2007, for example, the UN Security Council held its first briefing on the security implications of climate change. That sparked significant attention to the important linkages between climate change and national security.[51] The links between climate change and other fields of international law have triggered substantial scholarship as well as potentially innovative litigation strategies, including links between climate change and international trade law,[52] the law of the sea and fisheries conservation,[53] international

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[48] Inuit Petition, *supra* note 7, at 74-95; *see also* Osofsky, *The Inuit Petition*, *supra* note 4 (discussing the human rights and environment linkages in the Inuit claim).

[49] *See, e.g.*, Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); *see also* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11(1), Nov. 14, 1988, 28 I.L.M. 161 (1989).

[50] Inuit Petition, *supra* note 7, at 97-101.

[51] *See, e.g., U.N. Council Hits Impasse Over Debate on Warming*, N.Y. TIMES, Apr. 17, 2007, *available at* http://www.nytimes.com/2007/04/18/world/18nations.html; Andrew Revkin & Timothy Williams, *Global Warming Called Security Threat*, N.Y.TIMES, Apr. 15, 2007, at 25, col. 4.

[52] *See, e.g.*, Andrew Strauss, *The Legal Option: Suing the United States in International Forums for Global Warming Emissions*, 33 ENVTL. L. REP. (ENVTL. L. INST.) 10185 (2003); Andrew Strauss, *The Case for*

finance,[54] coporate social responsibility,[55] and the international protection of wetlands.[56] Taken collectively, these efforts not only explore new aspects of their respective fields, but contribute substantially to building policy and legal coherence between the fields of international law—an outcome that is important for sustainable development generally and for international responses to climate change more specifically.

3. 2. Strengthening International Institutions

One of the most important outcomes of the current climate litigation strategies is that they may strengthen certain international institutions simply by using them. The question of whether or how existing international institutions can address what may be the most important environmental question of our time speaks to the relevance of the institutions themselves. If an institution with an environmental mandate, or at least some relationship to sustainable development, cannot be called into service to address an issue of the magnitude of climate change, what is its relevance more generally?

Appealing to the World Heritage Convention, for example, shines the spotlight on that Convention and enables UNESCO and the World Heritage Committee to raise the importance of protecting world heritage sites from climate threats. Such petitions bring attention to the Convention and force the governments to address the impacts of climate change on cultural and natural heritage. They also provide an opportunity for the Committee to demonstrate its relevance and that of the World Heritage Convention to modern threats, like climate change, that arise indirectly from the processes of globalization and industrialization as opposed to direct, deliberate choices by individual host governments or corporations. Even if the ultimate decision of the Commission (to reject the petitions and adopt a more general strategy for addressing climate change threats to cultural heritage) was likely a politically motivated compromise, it may nonetheless

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Utilizing the World Trade Organization as a Forum for Global Environmental Regulation, 3 WIDENER L. SYMP. J. 309 (1998).

[53] *See* William C.G. Burns, *Potential Causes of Action for Climate Change Impacts Under the United Nations Fish Stocks Agreement*, SUSTAINABLE DEV. L. & POL'Y 34-38 (Winter, 2007); William C.G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 1(2) J. SUSTAINABLE DEV. L. & POL'Y 27-51 (2006).

[54] *See* Gleason & Hunter, *supra* note 41.

[55] *See* Cornelia Heydenreich, *Germanwatch Raises Complaint against Volkswagen: Climate Damaging Business Strategy Violates OECD Guidelines for Multinational Enterprises*, Germanwatch Briefing Paper, May 2007, available at http://www.germanwatch.org/corp/vw-hg07e.pdf; Beschwerde gegen die Volkswagen AG unter den OECD-Leitsatzen fur Multinationale Unternehmen, May 7, 2007, available at http://www.germanwatch.org/corp/vw-besch.pdf (petition filed in Germany challenging on climate change grounds Volkswagen's operations as violating the OECD guidelines on multinational enterprises).

[56] Delmar Blasco, Secretary General of the Convention on Wetlands, Statement to the 6th Conference of the Parties to the United Nations Framework Convention on Climate Change, Den Haag, The Netherlands, (Nov. 20, 2000).

provide the Committee with a long-term platform to highlight links between climate change and cultural heritage. By showing some well-reasoned restraint in expanding its scope to embrace climate change, it may strengthen the long-term credibility and trust the Committee has with member governments, while still garnering support from the petitioners and civil society organizations.[57]

The same can be said for the petition to the Inter-American Commission on Human Rights. The petition helps further the Commission's reach to situations other than traditional civil and political rights. Although the Commission has initially rejected the petition for providing insufficient information to demonstrate a violation of the American Convention,[58] the petition did prompt the Commission to hold, and invite the petitioners to, an unprecedented hearing on the "relationship between human rights and global warming."[59] Like the World Heritage Committee's approach described above, this response appears to be a compromise that keeps the door open for the Commission to continue to explore climate change in the context of the InterAmerican commitments to human rights. The Commission's reach is thus extended to embrace climate change, albeit not yet through a formal, expansive interpretation of the underlying legal instruments.

To some extent these cross-over petitions—i.e., those that make international institutions address an issue (climate change) that is normally outside of their respective mandates—positions the institutions to be more relevant for the complexities of sustainable development more generally. Thus, invitations to address the intersection of human rights and climate at the Inter-American Commission, trade and climate at the WTO, or finance and climate in the case of the IFI accountability mechanisms, are invitations for these institutions to show that they can address the complex and integrated aspects of contemporary sustainable development issues.

4. Strengthening the Democratization of Global Environmental Governance

Climate litigation at all levels is democratizing global environmental law and policy making. Although the scale, scope, and methods of participation by civil society in the formal climate negotiations have been substantial, at the end of the day everything from the agenda to the final outcome of international treaty negotiations—and the climate change regime is no exception—

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[57] *See, e.g., UNESCO Adopts Climate Change Strategy for World Heritage Sites*, ENV'T NEWS SERV., July 11, 2006 (quoting several petitioners supportive of the Committee).

[58] *See* Letter from the Organization of American States to Sheila Watt-Cloutier, et al, regarding Petition No. P-1413-05 (Nov. 16, 2006), *available at* http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf.

[59] Letter from the Organization of American States to Sheila Watt-Cloutier, et al, regarding Global Warming and Human Rights Hearing (Feb. 1, 2007), *available at* http://www.earthjustice.org/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf.

is appropriately monopolized by governments. Civil society can observe, propose, pressure, prod, and even parody, but ultimately its role in international negotiations is limited.

Not so in terms of litigation. Climate change litigation empowers civil society to shape the agenda in ways not allowed in formal negotiations. It was civil society, for example, that put climate change on the agenda of the World Heritage Committee and the Inter-American Human Rights Commission. Approval to file the petitions was not solicited nor needed, from either the governments or the relevant international institutions. Civil society's exercise of this agenda-creating authority contributes to the ongoing changes seen in who participates and influences international policy.

Climate litigation at the national level also helps to democratize climate policy. National level claimants are putting climate change on their national policy agendas. Clearly, this is the case in the United States where subnational government units (e.g., the states of Massachusetts, Connecticut and California, as well as municipalities, e.g., Oakland, California and Boulder, Colorado), frustrated with the lack of federal action, have taken strong action on climate change—thus expressing their keen interest in participating and shaping climate policy.[60] Similarly, Australian civil society claimants have put climate change on the agenda of otherwise reluctant government agencies.[61] Although *legal* actions, these were also *political* statements intended to pressure the respective governments on climate change and to show the world that at the subnational level, at least, many in the United States and Australia support stronger actions on climate change.

5.1. Transnational Climate Advocacy Networks

Climate litigation efforts are also changing the nature and scope of transnational advocacy networks focused on climate change. The existence of such networks is now widely recognized as having significant influence on environmental governance.[62] Climate change policy, generally, benefits from what is among the most well-networked and cooperative of all transnational environmental advocacy movements. Climate change has been a global policymaking priority for more than fifteen years now, and the depth, sophistication and trust that has built up in transnational climate advocacy networks is unprecedented in international environmental governance. Climate

[60] *See* Connecticut v. AEP Complaint, *supra* note 5 (plaintiffs include nine states); Friends of the Earth v. Watson, 2005 WL 2035596 (2005) (plaintiffs include Boulder, Colorado; Arcata, California; and Oakland, California); *see also* Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 43ASTAN. J. INT'L L. / 26A STAN. J. ENVTL L. (forthcoming 2007).
[61] *Australian Conservation Foundation*, VCAT 2029.
[62] *See, e.g.*, MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: LITIGATION NETWORKS IN INTERNATIONAL POLITICS (1998).

negotiations are host to literally thousands of civil society representatives. The Climate Action Network (CAN), a major network for organizing and coordinating civil society input into the climate negotiations boasts 365 non-governmental organizations as members and seven regional offices around the world;[63] it is well organized and very visible at the negotiations.

For the most part, the Climate Action Network (CAN) and its affiliated organizations and networks have focused their work on influencing the international negotiations, but the advent of the climate litigation strategies outlined in this book reveal a subtle, but important, shift in the strategies and scope of the climate advocacy networks. This shift entails a greater focus on litigation and advocating for specific remedies for particular harms, an extension to multiple forums beyond the UNFCCC Conferences of the Parties, and the inclusion of new advocacy organizations with a clearer focus on legal strategies. The climate litigation network is now its own transnational network, albeit arguably a subset of the broader climate networks exemplified by CAN. An advocacy statement calling for the national and international enforcement of climate-related laws, for example, was explicitly endorsed by nearly 75 advocates from 26 countries; this reflects both global support and cooperation in the strategy of bringing climate litigation claims.[64]

Although it may be too soon to predict, the cooperation in sharing information, strategies and expertise that is evident in the emerging climate litigation strategies—seen perhaps most readily in the coordinated efforts to file claims under the World Heritage Convention—may herald a new era of transnational cooperation that is designed less for influencing broad international policy and more in using domestic and national forums to bring coordinated impact litigation. This collaborative advocacy will both strengthen the individual cases, but will also serve to highlight the need for a global response. Such a coordinated and integrated litigation strategy, which is emerging in climate change, could also appear in the future with other global environmental issues such as ozone depletion, mercury pollution, or fisheries losses.

Conclusion

It is hard to judge how much, if at all, the pressure from climate change litigation will contribute to broader changes in climate policy, but it certainly is influencing the debate. Many of the climate advocates that have brought actions thus far have been motivated substantially (if not primarily) by the goal of raising the profile of climate change in the hopes of building political will to force more ambitious efforts to address the issue. Certainly, the state attorneys general who brought climate-related claims in the United States did so at least partly to pressure for national or

[63] *See* http://www.climatenetwork.org.
[64] *See* http://www.climatelaw.org.

state-wide climate policies. In California, for example, the litigation was one piece of a multi-part effort to move forward on climate change, which has included setting ambitious emission reduction targets, issuing new fuel efficiency standards and establishing the framework for a cap-and-trade program for greenhouse gases.[65]

Much of the litigation is directly aimed at forcing political action. The Inuit petition to the Inter-American Commission on Human Rights was aimed at using the moral and political persuasion of a formal human rights finding to isolate the United States and build both international and domestic pressure on the government to take stronger action. Domestic actions in the United States, Germany and Australia, for example, have also sought to compel government actions relating to climate change.[66] These actions range from requirements to assess climate impacts at the project level,[67] to incorporate climate change into public financing decisions,[68] or to compel government agencies to regulate carbon dioxide and other greenhouse gases as injurious pollutants.[69] Even when domestic actions fail, they may indirectly build pressure for legislative and policy action. In the United States, for example, dismissal of the *Connecticut v. AEP* complaint on political question grounds put the spotlight on the political branches of government for a solution.

Climate litigation also ripples through the private sector, receiving the attention of industries that have potential exposure to climate liability. Plaintiff-side tort lawyers are talented, resourceful, patient, and well-financed, and many of them believe climate change either now or in the future will present very real opportunities for successful litigation.[70] In response, corporations and their attorneys now speak openly about the emerging "litigation risk" from climate change.[71]

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[65] *See, e.g.*, Global Warming Solutions Act of 2006, Cal. State Code, Div. 1, Sec. 38500 (2006).
[66] *See generally* Smith & Shearman, *supra* note 3.
[67] Australian Conservation Foundation v. Minister for Planning, Administrative Decision, (2004) VCAT 2029.
[68] Friends of the Earth v. Mosbacher, No. C02-4106 JSW, 2007 WL 962955 (N.D. Cal. Mar. 30, 2007); Friends of the Earth v. Watson, No. C02-4106 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).
[69] Massachusetts v. EPA, 127 S.Ct. at 1438 (2007)
[70] *See, e.g.*, David Grossman, *Warming Up To A Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 9-33 (2003); Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL. L. REV. 407 (2005).
[71] *See, e.g.*,Vincent S. Oleszkiewicz & Douglas B. Sanders, *The Advent of Climate Change Litigation Against Corporate Defendants*, 35 ENV'T REP. (BNA) 2365 (Nov. 12, 2004) ("Despite the uncertainties, it may not be too early to prepare for the possibility of litigation. Next steps for potential defendants may include a preliminary risk assessment of their exposure to litigation and potential defenses…."); *Global Warming: Here Come the Lawyers*, BUS. WK. ONLINE, Oct. 30, 2006 (quoting Kevin Healy, a partner with the law firm of Bryan Cave, that in the wake of recently filed lawsuits he now advises corporate clients that they need to take "reasonable" steps to pare back emissions to reduce their legal exposure); Kristin Choo, *Feeling the Heat: The Growing Debate over Climate Change Takes on Legal Overtones*, A.B.A. J., 29, 30, July 2006 (quoting Prof. John Dernbach: "The prospect of liability is a serious matter for people who understand climate change and take it seriously."); Christina Ross, Evan Mills & Sean Hecht, *Limiting*

Major U.S. law firms now routinely market their abilities and successes in climate litigation,[72] and litigation (and the related regulatory) risk are important factors in motivating companies to take proactive steps to reduce their greenhouse gas emissions and related climate impacts.[73]

Thus, the turn to climate litigation and related litigation is reshaping how we think and respond to the climate change challenge—regardless of whether individual cases prevail. But, of course, climate change advocates hope to win. They seek specific and far-reaching remedies. The Inuit Petition, for example, seeks to have a plan established and implemented to protect Inuit culture and resources, including, *inter alia*, the land, water, snow, ice, and plant and animal species used or occupied by the Inuit.[74] The State Attorneys General in *Connecticut v. AEP* seek to have the courts impose a cap on greenhouse gas emissions from the five single largest emitting utilities in the United States.[75] The State of California seeks compensation for costs it is already incurring from climate change.[76] These are substantial remedies that would not only improve the plight of the specific plaintiffs, but would also make important contributions to the climate policy debate. Obviously, a court's use of its injunctive powers could lead to direct emissions reductions in the United States, but so too would a monetary damage judgment, which would reverberate throughout the private industry sector, forcing corporations to take proactive steps to reduce their exposure to climate liability.

Nor are victories in climate litigation a chimera. The recent U.S. Supreme Court decision in *Massachusetts v. EPA*, which will force EPA to revisit whether to regulate carbon under the Clean Air Act, is the most well known climate victory. In so doing, the Supreme Court found that the risk of rising sea levels alleged by the plaintiffs was sufficiently "real" to afford Massachusetts standing to raise its climate change-based claim.[77] Other courts in the US and Australia, for example, have extended standing to private parties pressing climate change claims.[78] Significant substantive

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Liability in the Greenhouse: Insurance Risk-Management Strategies in the Context of Global Climate Change, 43A STAN. J. INT'L L. / 26A STAN. J. ENVTL L. 251, 274 (forthcoming 2007).

[72] *See, e.g.*, Sidley Austin, LLP, Climate Change Advisory Nov. 21, 2006, *available at* http://www.sidley.com/db30/cgi-bin/pubs/ClimateChangeUpdate11.21.06.pdf(.

[73] *See* THE CLIMATE GROUP, CARBON DOWN, PROFITS UP (2d ed., 2005) (compiling an extensive list of voluntary emissions targets accepted by corporations).

[74] Inuit Petition, *supra* note 7, at 118.

[75] *Australian Conservation Foundation*, VCAT 2029.

[76] *Mosbacher*, 2007 WL 962955 (rejecting summary judgment motion in a case arguing that the US Overseas Private Insurance Company must conduct an assessment of the climate impacts of the projects they finance); *Watson*, 2005 WL 2035596 (same).

[77] Massachusetts v. EPA, 127 S.Ct. at 1438, 1455-56 (2007)

[78] *Owens Corning Corp.*, 434 F. Supp. 2d 957 (holding that plaintiff environmental organization had standing to challenge a permit application that would have permitted significant releases of a potent greenhouse gas (HCFC-142b)); *Watson*, 2005 WL 2035596 (upholding standing of environmental organization to bring a case seeking that a US government agency include climate change in their

victories have also required, for example, the assessment of climate impacts in the permitting of greenhouse gas emitting activities,[79] in decisions to provide financing,[80] and in requirements to reduce gas flaring associated with oil refineries.[81] These victories are likely just the tip of the litigation iceberg, but win or lose, climate litigation strategies have harkened in a new era of climate politics.

environmental assessments). *But see Korsinsky*, 2005 WL 2414744 (rejecting standing of an individual in a climate change tort action). .

[79] *See, e.g.*, *Australian Conservation Foundation*, VCAT 2029.

[80] *Mosbacher*, 2007 WL 962955 (rejecting summary judgment motion in a case arguing that the US Overseas Private Insurance Company must conduct an assessment of the climate impacts of the projects they finance); *Watson*, 2005 WL 2035596; Bund & Germanwatch v. German Federal Ministry of Economics and Labour [BMWA], Beschluss, Verwaltungsgericht [VG Berlin] [Local Administrative Court] Jan. 10, 2006, VG 10 A 215.04 (2006), *translated at* http://www.climatelaw.org/media/Germany/de.export.decision.eng.doc.

[81] Climate Justice Programme, Court Orders Nigerian Gas Flaring to Stop (Nov. 14, 2005), *available at* http://www.snm.nl/pdf/0500_2.7_court_orders_nigarian_flaring_to_stop__background_paper.pdf.