British Institute of International and Comparative Law

Corporate Climate Litigation: Lessons Learned, Comparative Perspectives and Future Pathways

Event Report

British Institute of
International and
Comparative Law

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

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Executive Summary

More than 2000 climate change litigation cases have been filed globally. Whilst the majority of these cases have been filed against States, climate change-related cases have also been filed against private actors, mostly against the fossil fuel and cement companies that are the major greenhouse gas emitters. Although there is a growing body of work analysing climate litigation from a comparative perspective, analysis of the peculiarities of cases involving corporate players has yet to receive the same rigorous treatment as cases against States.

Against this background, the British Institute of International and Comparative Law (BIICL) has developed a landmark research project on 'Global Perspectives on Corporate Climate Legal Tactics', which will provide a Toolbox of the most effective best practices worldwide in terms of substantive and procedural legal provisions relevant to climate change cases, to be used as legal models by policymakers and legal practitioners. It will also act as an authoritative reference point for judges and other adjudicators, leading to more informed decisions and producing clearer precedents, thus offering an inspiration for corporate actors to raise their climate-related ambitions.

As a central component of the project research, the project team is currently conducting a comparative analysis across 17 legal systems, in collaboration with national rapporteurs from those jurisdictions and an international expert group of eminent individuals in the field of climate law. The completed global Toolbox will be presented during an event at the UNFCCC COP28 in Dubai.

On 11 May 2023, BIICL convened a webinar to provide the public with expert analysis and discussion of this critical field of research and practice, with the participation of members of the BIICL Climate Change Law team and of the Core Group. The event drew on experience from other disciplines and areas of litigation, allowing valuable lessons to be learned for more effective corporate climate litigation. In addition, the event provided an opportunity to discuss comparative perspectives from different legal systems and future pathways for climate litigation involving businesses. The present report provides an overview of the discussions, divided into the contributions of each speaker.

The event was convened by Dr Ivano Alogna, Project Lead and overall Research Leader in Environmental and Climate Change Law at the British Institute of International and Comparative Law.

This report is issued on the understanding that if any extract is used, BIICL should be credited, preferably with the date of the event.

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- Dr Ivano Alogna, Research Leader in Environmental and Climate Change Law, BIIC
- Nigel Pleming KC, 39 Essex Chambers and BIICL Honorary Senior Fellow
- Prof. Dr Christina Voigt, University of Oslo, Co-Chair, Paris Agreement Implementation and Compliance Committee (PAICC), and Chair, IUCN World Commission on Environmental Law (WCEL)

Speakers

- Dr Irene Pietropaoli, Senior Fellow in Business and Human Rights, BIICL
- Richard Lord KC, Brick Court Chambers
- Prof. Duncan Fairgrieve, Senior Research Fellow in Comparative Law and Director, Product Liability Forum, BIICL
- Prof. Michael Gerrard, Andrew Sabin Professor of Professional Practice, and Director of the Sabin Center for Climate Change Law, Columbia Law School
- Marc Clément, Presiding Judge at the Administrative Tribunal of Lyon, and member of the French Environmental Authority and of the Aarhus Convention Compliance Committee
- Prof. Qin Tianbao, Luojia Professor of Law and Director of the Research Institute of Environmental Law (RIEL), Wuhan University
- Prof. Mathilde Hautereau-Boutonnet, Professor of Private Law and Researcher in Environmental Law at Aix-Marseille University, and Visiting Research Fellow, BIICL
- Prof. Annalisa Savaresi, Associate Professor, Center for Climate Change, Energy and Environmental Law, University of Eastern Finland, and Senior Research Associate, University of Stirling
- Dr Joyce Kimutai, Climate scientist at the African Climate & Development Initiative

Panel 1: Lessons Learned

Dr Irene Pietropaoli

Senior Fellow in Business and Human Rights, British Institute of International and Comparative Law

Q. What are the international business and human rights standards relevant for corporate climate litigation?

The question is about the international business and human rights standards that can be applied to the issue of environmental rights in general and specifically climate change. At present, at the international level, the international human rights responsibilities of corporations are still limited to soft law or voluntary principles, specifically, the UN Guiding Principles on Business and Human Rights (UNGPs), as well as the OECD guidelines for multinational enterprises.

The UNGPs were endorsed in 2011 by the UN General Assembly, and the breakthrough was the challenging of the traditional view in international human rights law that only States, only governments, have international human rights obligations. With the UNGPs and then everything that followed after them, now there is an expectation that corporations also have a responsibility, even if it's not yet a legal obligation in international law, to respect human rights and the environment in their operation: do no harm.

Soft law can be a powerful instrument because eventually if those principles become widely accepted and it is evident that States are treating them as a legal obligation they can facilitate the development of hard law norms that consolidate into legislation. That's what happened with the UNGPs. They managed to attract broad international consensus because they were negotiated with consensus between governments but also involvement of civil society and corporations. And they reflect the agreement on the need for corporations to respect human rights where they operate and to exercise human rights due diligence to identify and address the negative impacts that they may cause, contribute to or be linked to by their business relationships.

The UNGPs are now influencing legislation at the domestic level, as well as at the European Union level. This legislation is actually going beyond what was originally established by the UNGPs because they only referred to internationally recognised human rights, without any mention of environmental rights and definitely no mention of climate change. Now, however, references to environmental rights as well as climate change are being included in new instruments that are being established. For example, in the UN draft treaty on business and human rights that is currently under negotiation at the UN, environmental rights and climate change is mentioned; and domestic legislation in a number of European countries and legislation at the EU level are establishing mandatory human rights and environmental due diligence obligations for corporations. Furthermore, while still limited, their use in litigation against corporations is becoming increasingly common. The well-known case of *Milieudefensie v Shell* is a very important example of how these non-binding instruments can be hardened through their interpretation in domestic law, and applied to environmental damaging activities.

In 2021, the District Court in The Hague ordered Shell to cut its global carbon dioxide emissions by 45% by 2030, as compared to 2019 levels. This was a landmark judgment because it represents the first imposition of a specific mitigation obligation on a private company over and above reduction targets set by existing cap and trade regulations or other governmental mitigation policies. In interpreting Shell's duty of care under Dutch tort law, the Court referred extensively to international soft law, including the UNGPs; in fact, Articles 2 and 8 of the European Convention on Human Rights, as well as the UNGPs, were among the 14 grounds on which the Court based its interpretation of Shell's duty of care under Dutch law. The Court referred to the UNGPs as an authoritative and internationally endorsed soft law

instrument. The Court also noted Shell's support of the UNGPs, while at the same time pointing out that due to their universally endorsed content, it was irrelevant whether or not Shell committed to the UNGPs. Thus, the Court showed that it considered the UNGPs to be the global standard of expected conduct for corporations, which established the corporate responsibility to respect human rights over and above compliance with national law and regulations.

The *Milieudefensie* judgment also provided guidance as to the climate due diligence responsibility of the Shell group, distinguishing between direct emissions and indirect emissions. In this way, the Court affirmed Shell's obligation of result to cap the scope one emissions, but also referred to Shell's best effort or due diligence obligation to reduce scope two and three emissions. This distinction resonates with the distinction in the UNGPs between the strict responsibility of corporations when they cause or contribute to human rights harms versus the due diligence responsibility that they have to seek to prevent or mitigate human rights impacts that are directly linked to their operation. The due diligence responsibility to try and influence the conduct of third parties, for example suppliers, is explained in the UNGPs through the concept of leverage, which can be exercised by the parent company by means of contractual clauses in supply contracts, training, shareholder activism and other means. Thus, this Shell judgment really provides a first authoritative attempt to clarify the climate due diligence responsibility of a carbon major through a holistic interpretation that builds on the UNGPs, on the Paris Agreement and climate science. The implications of this will, of course, go beyond this case and beyond the territory of the Netherlands.

Q. Does existing mandatory human rights due diligence regulation apply to climate change responsibilities of corporations?

We have seen in the past few years an expansion of corporate human rights responsibility to also include environmental responsibility. Several jurisdictions in Europe have adopted or are in the process of adopting regulatory instruments that translate the principle of human rights due diligence, and now including climate change responsibility, into binding obligations.

Just two weeks ago, the European Parliament Legal Affairs Committee adopted its position on the European Union Corporate Sustainability Due Diligence Directive, which was formally proposed by the European Commission in February 2022. The position of the European Parliament is a significant step forward from the proposal, ensuring mandatory human rights and environmental due diligence across the full value chain. It includes several important improvements from the proposal, for example, more companies are liable for impacts on human rights and environment. Companies will be required to evaluate value chain partners when carrying out due diligence, and this should include not just the supplier but also activities related to sale, distribution and transport. The European Parliament also extended the application of the new rules compared to the Commission proposal to include European-based companies with more than 250 employees and worldwide turnover higher than 40 million euros. And the rules will also apply to non-European companies with a turnover higher than 150 million euros if at least 40 million euros is generated in the EU. There is also more in terms of supervision and sanctions, as non-compliant companies will be liable for damages and EU Member States will have to establish supervisory authorities with the power to impose sanctions. The European Parliament suggests fines to be at least 5% of the company's net worldwide turnover, and also a ban for non-compliant third country companies from public procurement. Companies will have to engage with people affected by their actions, including human rights defenders and human rights activists, and introduce a grievance mechanism to monitor the effectiveness of due diligence policy. And specifically to help combat climate change, all company directors will be obliged to implement a transition plan compatible with a global warming limit of 1.5 degrees Celsius. Directors of companies with over 1000 employees will be directly responsible for this transition plan, which in turn will affect valuable parts of their pay, such as bonuses, for example.

A number of countries in Europe have already established legislation mandating human rights and environmental due diligence for corporations in slightly different forms. France was the first to do so, passing, in 2017, a corporate duty of vigilance law, mandating certain large French companies to respect human rights and the environment and establishing legally binding obligations for companies to identify, prevent and mitigate human rights and environmental impacts resulting from their own activities and from the operation of companies under their control. Relying on this new duty of vigilance law, in January 2020, a case was filed by several NGOs and local authorities against Total in an attempt to force the company to reduce greenhouse gas emissions. The claimants allege that Total did not include sufficiently detailed information in its vigilance plans on how it would reduce its emissions. The case is ongoing. Total, of course declared that the plan does comply with the vigilance law. And the latest on this is that last February NGOs and the local authorities asked the Court to implement provisional measures against Total, while the outcome of the case is still pending. Specifically, they want the Court to institute measures requiring Total to suspend any new oil and gas projects and to implement measures to reduce emissions in line with the Paris Agreement.

The latest law in terms of corporate mandatory human rights due diligence is the new German Supply Chain Act which entered into force in January. This law obliges German companies to identify and account for impacts on human rights by overseas direct suppliers and, when necessary, also indirect suppliers. Environmental obligations are mentioned in the Act, but the obligations are limited to those contained in three conventions ratified by Germany which are aimed at protecting health. Biodiversity loss and climate change are not specifically covered and it is submitted that a general clause relating to environmental damage is needed.

To conclude, we are going to see more and more of this legislation coming up in Europe as other countries have similar laws under negotiation and the European Union Directive will come into force, probably towards the end of this year, which Member States will have two years to implement.

Richard Lord KC

Barrister, Brick Court Chambers

Picking up a couple of things from Dr Pietropaoli's presentation, Richard Lord discussed some important lessons he has learned in his career as a commercial litigator. First, he used to think that soft law wasn't really relevant, it was just something 'nice and fluffy' that was out there but really not for lawyers; however, he has learned that that is completely misconceived, at least in the field of climate change. Soft law is very important in all sorts of ways, including as benchmarks for duties of care and standards of care and so on. Second, the importance of looking at corporate climate litigation both as a rights issue and as what a tort lawyer would just call a wrongs issue. Actually, a lot of human rights litigation against companies isn't based on human rights at all, it's based on tort but the two really interact and come together. As one sees in Shell and other cases, it's this synthesis of legal approaches that is so important and interesting in corporate accountability.

Q. What are the similarities between climate litigation and tobacco litigation?

In summary, both with tobacco and industrial disease or asbestos, there are definitely lessons to be learned, definitely parallels, but they tend to be overstated.

One of the things that is perhaps striking is timescale. If one looks very briefly at the overview of tobacco litigation in North America, as soon as the link between smoking and cancer was made in the early '50s, there were private lawsuits: there were some 800 lawsuits in the 50s, 60s and 70s. All of them were unsuccessful. They were dismissed, first of all, on the grounds of foreseeability. It was successfully argued that no one could foresee that producing a cigarette would give someone cancer, even if that was then the science. Then they were dismissed based on voluntary assumption of risk. It was successfully argued that these smokers knew the risks and decided to smoke. Then they were dismissed because of the question of traceability in cases where people had smoked lots of different things. And so for around 30 years, these cases were being brought, and they were consistently lost.

Then, in brief, states became involved as they decided to sue for the cost of the Medicare on an aggregate basis. And prompted partly by that Canada introduced legislation that allowed recovery. And then, more and more evidence came out, not only of the risks but of the tobacco companies' knowledge of the risks and their misinformation. Eventually, there was the famous master settlement agreement with the states for nearly quarter of a trillion dollars. And then around eight years later, in 2006, there was the famous judgment in the cause of action by the DOJ under Rico, which established that the tobacco companies had effectively knowingly deceived people.

The point is this, if you look at climate change, when Richard first talked about the possibility that there could be any connection between climate change and legal liability, in February 2003, he was treated like someone from outer space! One sometimes thinks the development of the law is slow but in timescale, things have moved very fast and at the moment there's no sign of that abating. Although it's far too early to say that climate litigation will have a parallel in terms of tobacco, things have moved very fast in terms of concepts of legal liability.

Turning to some other points of comparison, tobacco is less obviously useful than fossil fuels. Fossil fuel producers have said they need to produce fossil fuels as they make the world go round and there's demand for it, which we are satisfying. While there are many arguments to counter that, that same argument couldn't really be made with tobacco. And by the same token, the damage from tobacco is much more direct, the effects are more obvious, and they're confined (leaving aside secondary and passive smoking). In summary, on a sort of product liability basis, you've got a small base of manufacturers of the product, making it with the only objective of it being smoked by the smokers, and it was the smoker, subject to the passive smoking point, who suffered the damage and the damage wasn't

just some ephemeral economic damage or slight change, but it was obviously very serious physical illness or death. And that is very different from the complexities involved in corporate accountability on climate change.

Similarly, certainly in the states' action on tobacco, there weren't the same problems with traceability because they looked at causation on an aggregate basis and they could determine the cost of dealing with tobacco on a statistical basis. And it was much harder for the defendants to run arguments against that.

There are also some similarities. First of all, in both cases, one is looking at a product that initially and for many years was considered harmless and beneficial, in the sense that tobacco was relaxing and something that people enjoyed doing. Then in both cases one sees a change in public and social attitude, partly based on increasing scientific knowledge but also in terms of what one sees as social licence. And similarly, albeit in a different way, with respect to fossil fuel producers and other manufacturers of automobiles etc, there is a change in attitude as we see a gradual awareness, not only of evidence of the damage, but that those who manufacture the products had knowledge of the risks involved. Allied to that, of great potential relevance is the evidence, some would say very compelling evidence, in both cases of a campaign of misinformation: evidence of deliberately understating risks and seeking to cast doubt on what would in most contexts be seen as an overwhelming scientific consensus. With respect to evidence in tobacco cases, such a campaign was the very clear finding of Judge Glasser in 2006. And now climate litigation has featured not only the traditional sort of negligence and nuisance causes of action, but recently, and significantly, allegations of knowledge and either suppression of the evidence or presenting misleading evidence or the financing of science or media campaigns known to be inaccurate in order to continue to justify production. We've got echoes of this in many climate actions now with respect to greenwashing, among many other cases, Total has been recently subject to a greenwashing action.

There is also similarity with respect to the issue of traceability when you've got individual claimants, whether actual human individuals or corporations or municipalities. This question of showing a causal connection sufficient to found legal liability between the actions of the defendants and damage caused to the claimant. Although there's the added complexity in climate change in that you have got in simple terms, a two stage process: do the defendants actions cause or contribute to climate change? And does climate change cause or contribute to their damage, whether it's long term flooding, sea level rise, extreme weather events or so on? This brings us to the second question.

Q. What are the similarities with industrial disease litigation, specifically on the issue of causation?

Richard explained that what first got him interested in industrial disease litigation was the case of *Fairchild v Glenhaven*, which was dealing with the problem of how you could make companies liable either jointly or severally, when it was clear that the claimant had suffered damage from inhalation of asbestos fibres, and that it was caused by one of the five defendants, but you couldn't prove which one. And in that very specialised circumstance, there was a finding that you could use causation tests based on material increase in risk. That was potentially very important because both in tort and in other types of law, there is very often a threshold test where you have got to show at least 'but for' causation, and possibly more than that. It's got to be a material causal impact. And that was, and of course still is to some extent, seen as a real problem. How can you show that someone who at most might be, even post Rick Heede's work, liable for 3 or 5% of global emissions can be responsible for some damage caused to a fisherman in Bangladesh or a municipality in California? As Michael Gerrard asked in an article in the wake of all the challenges to jurisdiction during the first wave of tort litigation, even if you get through jurisdiction, can you satisfy causation?

What has really been interesting in the industrial disease cases is that they have opened the way to the use of statistics to consider the increasing risk of getting a disease, in order to allow recovery in certain

tort cases. There are interesting debates about how material increase in risk works and whether you can say that a doubling of risk amounts to satisfying the traditional causation test, but what is important for the present discussion is the fact that the English law has shown it is very flexible on causation. And even in things like business interruption insurance, the Supreme Court has said it doesn't have to be the but for test, and there are other threads of jurisprudence which suggest that this attribution and traceability problem may not be as significant as it was thought to be 10 or 15 years ago, and the courts will find solutions to this if they think that liability should be imposed. There are all sorts of theories as to such solutions, such as market share.

This flexibility has been shown in some of the litigation, such as *Urgenda*, albeit in a public law context, and *Milieudefensie v Shell*, where the arguments by the defendants that they're only responsible for 0.5% of emissions have been rejected. Of course, there are other complexities in the tort context, but these approaches to causation issues are a parallel that can be drawn between climate litigation and industrial disease cases.

Prof. Duncan Fairgrieve

Senior Research Fellow in Comparative Law and Director, Product Liability Forum at BIICL

Q. What is the importance and relevance of comparative law and analogous cases?

Climate litigation is an area where comparative law is very important and has come into its own. Traditionally, comparative law was sort of a pursuit of a small group of enthusiasts, a bit like train spotters, who look at cases in different jurisdictions and discuss them in the abstract, in the ivory towers of this world. That traditional approach to comparative law was shaken up by the late, great Sir Basil Markesinis about 20 years ago, in a series of books and articles where he said it was very important to use comparative law in a practical way. Duncan believes that Basil would have very much cited this area as one where comparative law could be usefully deployed.

Indeed, we are seeing the use of comparative law in a number of the cases, such as *Urgenda* and the *Shell* case, as well as references across different jurisdictions to these emerging cases. We see comparative law also in the sort of projects that are being developed academically, including the project that Ivano is leading, where the idea is to bring together learning across borders, transnational learning, and to assemble it in such a way that it can be analysed and understood in a practical way, then used by practitioners to practically put forward in their own jurisdictions, arguments which have been used elsewhere and deployed successfully in other jurisdictions. There are also a lot of other projects and big databases that are being generated that allow access to these materials in foreign languages and different systems, so that they can be usefully deployed with respect to attribution, causation, scientific evidence etc.

Following on from points that Richard made about tobacco and asbestos litigation, it is true that sometimes similarities with climate litigation have been over emphasised, particularly if one looks at a granular level. However, if you stand back a little bit from both of those types of litigation you see, actually, quite a lot of macro similarities. One is the public interest nature of that litigation, particularly tobacco litigation in the US where tort was being used as, in the words of one leading tort lawyer, an ombudsman. It is not just about damages, it's about accountability, and we see that in the climate cases as well, where tort law is being suffused with human rights notions and public law notions and being used as an accountability mechanism, both in relation to States and to private actors and corporations. We see that in a lot of those cases, including the master settlement that resulted in the US.

Point two, what is interesting is the link between regulation and litigation. Tobacco and asbestos are highly regulated products, where there was a lot of regulation trying to deal with the issue. And one realised that that sort of preventive regulation was not enough to provide the answer. Duncan thinks the same with climate change as well, you need a slightly more pointy stick to actually change behaviour in that ombudsman role, and damages liability claims before the courts allow one to do that, and we saw how tobacco changed, ultimately, quite quickly because of that.

The third point is that these types of litigation concern mass claims. These are cases where we've got large numbers of claimants. Tobacco was a very good example of that, asbestos to a certain extent as well, where procedural mechanisms had to deal with that element. This is an important aspect of climate change as well, in terms of the way in which the procedures can be used.

Fourth point is the causation dimension. We shouldn't forget, of course, in tobacco, it wasn't just about the direct tobacco cases, tobacco litigation spawned a whole series of cases, including the passive smoking cases where there's almost an environmental pollution argument. These cases engage quite a lot of the sort of arguments we're seeing in the air pollution style arguments where you've got problems about causation and attribution.

Final point is on private versus public law. The asbestos cases weren't just brought, as in the *Fairchild* case, against private entity corporations. In some jurisdictions, particularly France, State liability claims were made as well, in other words going after the State for failure to regulate asbestos early on, despite the knowledge of the risks. This again, is a parallel with the climate change area because, of course, in climate change you see claims against private and public actors being brought, always in tandem.

Panel 2: Comparative Perspectives

Prof. Michael Gerrard

Andrew Sabin Professor of Professional Practice, and Director of the Sabin Center for Climate Change Law, Columbia Law School

Q. What is happening with lawsuits in the US against fossil fuel companies?

The Sabin Center runs a database that attempts to have all of the climate change litigation in the world. They have counted 2,300 cases, of which about 70% are from the United States. In the United States the great bulk of the litigation is on Environmental Impact Statements under the National Environmental Policy Act and its state equivalents. A very small percentage are cases against fossil fuel companies for money damages.

The first of the major cases in the US against fossil fuel companies was brought in 2004 against several electric power companies seeking an injunction to require them to reduce their greenhouse gas emissions. The Supreme Court dismissed the lawsuit saying that the Clean Air Act gave EPA the sole federal authority over greenhouse gas emissions and it was not for the federal courts under federal common law to adjudicate that. There was then another case on money damages that reached a similar result, the courts left for another day the question of whether the state common law could apply. And so we ultimately had 28 lawsuits brought by various states and counties and cities, all of them against fossil fuel companies, all of them seeking money damages for climate change. In all of these cases, the plaintiffs wanted to be in state court and the defendant oil companies wanted to be in federal court. For the last six years, we've been in litigation over whether these cases belong in state court or in federal court. There have been several appellate decisions on that, all of them saying that these cases belonged in state court, thus the oil companies tried to get in front of the Supreme Court on this issue. Two weeks ago, the Supreme Court decided to deny the request of the oil companies and send these court cases back to state court. So this is like a breaking of the dam and all of these cases are going to go forward. First, we will see motions to dismiss by the oil companies, some of them are going to be based on jurisdictional issues of whether the state courts have jurisdiction over the international activities of the oil companies; there are going to be demands for discovery on both sides; there will be motions to stay the discovery, pending the disposition of the motions to dismiss; we may see more lawsuits brought. But this is going to be an extremely active area of litigation in the United States for the next several years. And the litigation may eventually proceed to the merits and get to the questions of causation and damages and so forth.

Judge Marc Clément

Presiding Judge at the Administrative Tribunal of Lyon, and member of the French Environmental Authority and of the Aarhus Convention Compliance Committee

Q. How did corporate climate litigation get started in France?

The first thing, although obvious, that we have to take into account is that bringing an action against a company in the field of climate change is a very complex issue. This is evident from applications from NGOs in this context which are not very clear as to what they are really seeking. While climate change cases are generally complex, the complexity is higher when challenging States. The first thing is that it's very difficult to identify the precise legal ground on which to stand. And, more importantly, what is really complex is that we are looking forward, looking to future damages, looking for risks. Judges are more used to taking into account past situations, damages that happened in the past and trying to find remedies for them.

The current climate change cases in France can be linked to their history. It is probably true also in many other countries that the NGOs have experienced some successes and failures in past cases and they are building on the basis of these past successes and failures. It is very important for understanding the situation in France, to refer to the *Commune de Mesquer* case arising from the Erika oil spill that was adjudicated in 2008. This was a very complex case against Total, in a complex situation where there were many actors involved and Total was not necessarily the easiest actor to challenge in this context. The Cour de Cassation, the supreme civil and criminal court in France, recognised the liability of Total on the basis of soft low commitments, voluntary commitments made by Total with respect to the control of ships. There is no doubt, this was a very important case and a big success for the NGOs and other plaintiffs. The first very important thing to understand is that this judgment of 2008 started to put in the French landscape this idea of liability for due diligence. The second very important element in this judgment was the development of the concept of ecological damages. Both concepts are currently implemented in law: the law on due diligence adopted in 2017, and also for ecological damage, the modification of the Civil Code that happened in 2016.

To further set the scene before talking about the current cases, we have also to take into account the main climate change litigation cases that were filed against the French State. First, the *Grande-Synthe* case that was decided in 2020 and 2021 by the French Conseil d'Etat, the Supreme Administrative Court. As recently as yesterday, the French Conseil d'Etat ordered the State to continue to find solutions, saying that clearly the *Grande-Synthe* case is not resolved. So it's putting additional pressure on the French State for more action against climate change. And there was also another case, *Notre affaire à tous*, which was decided by the first instance administrative court in 2021. Interestingly, the latter case was based also on ecological damage.

Q. What are the main legal challenges that we can see in current cases?

The cases just described have set up a kind of landscape for litigation, which now is based on the 2017 due diligence law. Basically, this is the main avenue for developing corporate climate change litigation in France. As lawyers, looking at the development of the law is very

interesting. but it also creates a lot of legal questions to be decided by judges as regards the way the law has to be interpreted. The TotalEnergies case brought in 2020, briefly introduced by the first speaker Irene above, is based on the 2017 Law. It is complex due to this new legal background, the first illustration of that complexity was the challenge of determining the competent court, as the first question was which tribunal should be in charge of the case as it needed to be clarified. This is just one obstacle on the road to the solution, there will be many, many additional things to clarify.

Other complex cases brought on the basis of the 2017 law include a 2019 case concerning projects of TotalEnergies in Uganda and Tanzania, and a case in 2019 against EDF, the French electricity company, concerning wind turbine development that was dismissed. Another interesting case in this area was brought in 2021, concerning deforestation in South America linked to marketing of meat by the Casino Group. Two more recent cases at the stage of the formal notice (before the court gets involved) are also interesting because they involve a bank, the Banque Nationale de Paris (BNP), and relate to the support of projects leading to deforestation and development of fossil fuels. Just today BNP announced that it had decided to cease financing fossil fuel projects. Thus, it was more or less pushed by the formal notice and the action of the NGOs, and possibly also the effect on the company's image.

Prof. Qin Tianbao

Luojia Professor of Law and Director of the Research Institute of Environmental Law (RIEL), Wuhan University

Q. How does China's corporate climate litigation benefit from public interest litigation?

In 2014, China's Environmental Protection Law introduced public interest litigation (PIL), which entitles NGOs to bring environmental lawsuits against polluters. It opens the door to climate change litigation in general, by recognising the climate system as a common good and that litigation may be used to protect this public climate interest. In the last eight years, PIL has been increasingly developed.

PIL addresses the standing issue faced by many other judicial systems, as plaintiffs do not have to prove a direct stake in climate claims. This is quite meaningful where there is legislative insufficiency on climate change. In China, specialised climate change law is still developing and so PIL fills the gap. PIL has also reduced the burden of proof for plaintiffs as, according to the Supreme Court's interpretation of environmental tort, plaintiffs only need to present prima facie evidence whereas the defendant shoulders a major burden of proof to exempt themselves from the legal liability. There are causality difficulties worldwide, and the shift in the burden of proof for PIL cases in China gives some hope to the plaintiffs who usually have less power and influence compared to the greenhouse gas emitters. PIL smooths the judicial procedure generally as plaintiffs may introduce expert testimony and technical assistance. Climate change lawsuits involve complex scientific issues and both judges and the litigation benefit from this procedural arrangement. What's more the Supreme Court has confirmed that to further enable PIL plaintiffs to move forward with cases which are complicated technically and factually, for instance the carbon sink cases, agencies, NGOs and Science Associations can present in the court as co-plaintiffs.

As well as procedural benefits, the PIL in China has expanded to gradually improve substantive law. The obvious example is the development of court injunctions for environmental protection. In practice, such injunctions have been applied in anti-pollution cases, but this obviously results in a co-benefit of climate change mitigation.

Q. What are the main characteristics of corporate climate litigation in China? How does this kind of litigation specifically contribute to mitigation and adaptation in China?

We can find several features: corporate climate litigation covers both public and private interest litigation in the broad legal framework of environmental protection and natural resources management. The coverage of corporate climate litigation is broad, from industrial emissions reduction to improving green finance and enhancing low carbon consumption. Corporations are obliged to adhere to strict and explicit environmental information disclosure requirements.

The corporate climate litigation in China also covers both mitigation and adaptation. As mentioned above, climate risks have been considered in cases.

Panel 3: Future Pathways

Prof. Mathilde Hautereau-Boutonnet

Professor of Private Law and Researcher in Environmental Law at Aix-Marseille University, and Visiting Research Fellow at BIICL

Q. What legal tools are in the French toolbox other than those that were already addressed throughout the discussions today?

To give a very clear answer to this question is not easy because there are several elements to take account of. Concerning the duty of vigilance recognised by French law in the Commercial Code, which imposes an obligation upon the parent company to establish and apply a map of vigilance, it is important for plaintiffs to remember what the Court of Paris decided last February in the TotalEnergies case. It should be recalled that in the judgment, the judge of the Court of Paris considered that he was not competent to judge in the context of an emergency because the duty of vigilance raises difficult questions of understanding. According to the Court of Paris, a violation of the duty of care must be examined on its merits. This finding of the judge gives two indications to plaintiffs: First, it is better to bring the action through legal action before the judge of the merits and not before the judge of the emergency. Obviously, the problem for the NGOs is that this type of legal action takes more time and it will be necessary to wait several years to obtain decisions from the judge. Secondly, the judge in this decision was very critical about the duty of vigilance. In this case, to gain a better understanding of the law he called three amicus curiae and asked these experts to explain the meaning of the law. In the future, plaintiffs would therefore be well-advised to strengthen their arguments regarding the duty of vigilance in order to convince the judge and to explain the meaning and the scope of the duty, and also to provide strong evidence to show that the defendant is violating the law.

Q. What can we expect concerning future judgments from France?

Climate cases may concern a greater diversity of defendants and claimants in the future. Initially, only TotalEnergies, the largest French oil company, was sued. Today, lawsuits are also being brought against banks, BNP for instance, and large food industry groups, such as the Groupe Casino and also Danone. We can imagine that tomorrow some other sectors will be involved, also in the context of transnational litigation. For example, the possibility also to take an action against car manufacturers. There have already been three lawsuits against car manufacturers in Germany; they failed, but they could inspire French lawyers. Finally, concerning the victims, it is true that in France, for the moment, before the French courts, we can find NGOs and public authorities, but in the future, we could imagine some actions initiated by individuals based on the violation of human rights. On these points, it will be necessary to pay attention to the decisions that the European Court of Human Rights will take in the future and which French courts will be obliged to respect.

Prof. Annalisa Savaresi

Associate Professor, Center for Climate Change, Energy and Environmental Law (UEF), Senior Research Associate, University of Stirling (UK)

Q. What legal changes and legal instruments are in the pipeline that could address the accountability gap that we currently have with regard to corporate accountability for climate damages?

Many speakers have already mentioned the many developments that are taking place in terms of due diligence legislation. It cannot be emphasised enough how important this is from a climate perspective. We can only go so far with existing tort law instruments. While it is encouraging that some courts are summoning the courage to use the tort law mechanisms that are available to us, we really desperately need to move in the direction of greater and better dedicated legislation.

Due diligence legislation that is being passed all over Europe is really important, and especially the transnational implications of this legislation. There will be nowhere for polluters to hide if we are serious about the transnational implications and application of this legislation, which leads to consideration of the challenges of this emerging architecture. The success of due diligence legislation as it is being conceived in Europe relies on its broad global application. If we don't have that, the chances of this legislation making a difference globally are limited. Everyone following these lawmaking debates really must keep their eyes on the goal and really push for the ambitious legislation in the proposals from the European Parliament to go through as framed.

If we are serious about using due diligence as a tool for climate governance, we really have to be ambitious, we really have to ensure the global reach of these instruments so that polluters everywhere in the world are impacted by its application and therefore amend their practices. As long as there are gaps and loopholes in the system, we will see procrastination with respect to the hard decisions that corporate actors have to take.

On the back of what has been said, it is very important for us to reflect on the role of lawyers in the context of these debates. On the one side, there is the challenge to use the tools that we have as effectively as we can. And it is really encouraging to see the early case law in France, and how it highlights the limitations in the legislation that is being developed so that we learn from those shortcomings in order to do better with the new instruments that are being negotiated. It is always daunting to be a first mover as France was because whenever we legislate on a new problem or address a problem that was framed in different ways earlier, we are pushing the limits of lawmaking processes. This is why sharing lessons and talking amongst us is really important.

We are really in desperate need to share lessons of what we're learning from pilot cases. But more importantly, we really need to share information about lawmaking and implementation. So well done on BIICL and Ivano for leading this project because we need to share information and make the most of the opportunities that are before us in terms of both litigation and lawmaking.

Dr Joyce Kimutai

Climate scientist at the African Climate & Development Initiative

Q. Please provide a brief overview of what attribution science can or maybe cannot deliver in the context of climate litigation.

Attribution science is a fast-evolving field of climate science. It is not considered new anymore because it has been here for 20 years. Its history stems from one morning when Myles Allen looked out of his door and asked whether the impacts of flooding happening in Oxford could be linked to the people responsible for greenhouse gas emissions and warming of the climate. To do this you have to demonstrate that the warming of the climate is directly responsible for the impacts that are being experienced from extreme events. Now it is relatively commonplace to demonstrate the links between climate change and extreme events and their impacts, but it is still a bit difficult to connect the impacts to human climate change directly. It is still a bit tricky to say these particular impacts that resulted in widespread damages and losses can directly be linked to climate change.

Climate justice requires evidence related to mitigation, adaptation and loss and damage. What you see currently is that there is a relatively large amount of evidence on mitigation that can be used in climate litigation because we have well-established tools that can track mitigation, such as the IPCC task force on greenhouse gases. Also it is relatively easy to track progress on mitigation and to set pledges such as nationally determined contributions. However, when you come to adaptation and loss and damage where the big debate is, there is not so much information to support this sort of climate litigation. This has also been observed with the loss and damage fund set up by UNFCCC which faced many pitfalls in designing eligibility criteria for compensation as it is very difficult given the dearth of evidence to determine who gets what and who was responsible for the damage.

Attribution science currently really underserves low-income countries because of inadequacies in tools, expertise, and resources. Furthermore, climate models are not fully capturing climate processes because in attribution science you have to simulate the changing climate beginning with the start of the industrial revolution and it is hard to develop accurate climate models.

Attribution science has to be grown in every part of the world and should follow similar principles. We could also have something like the IPCC task force to also serve adaptation and loss and damage, as well as increased collaboration between scientists and lawyers and policymakers to deepen awareness and understanding of attribution science.

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