

Maritime Transport and Climate Change Litigation

Shipping in Changing Climates 2017

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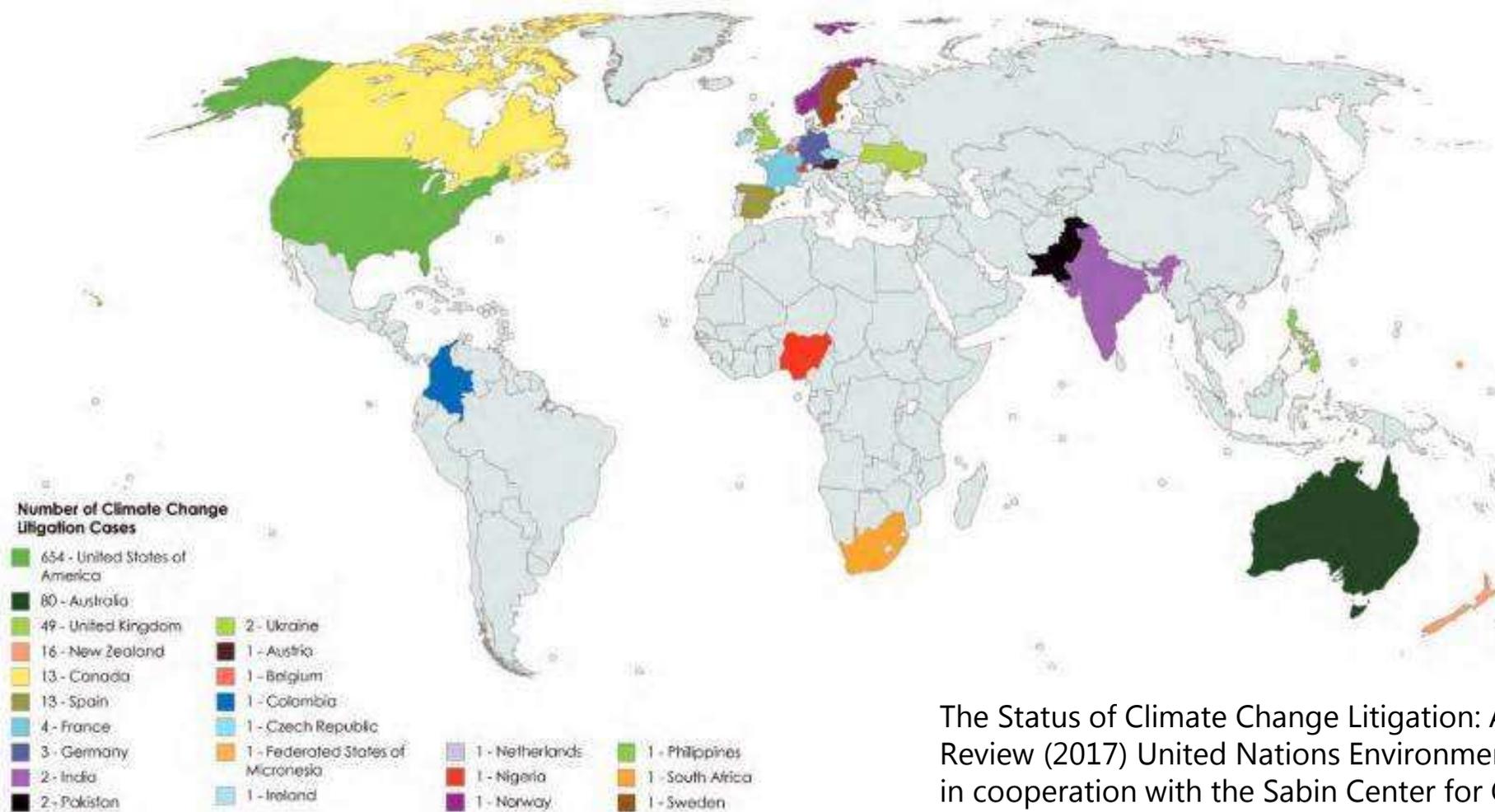
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Outline

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Climate Change Litigation



The Status of Climate Change Litigation: A Global Review (2017) United Nations Environment Programme in cooperation with the Sabin Center for Climate Change Law at Columbia University

Climate Change Litigation : Trends

The Status of Climate Change Litigation: A Global Review (2017) United Nations Environment Programme in cooperation with the Sabin Center for Climate Change Law at Columbia University

M. Nachmany et al, (2017) Global trends in climate change legislation and litigation. Grantham Research Institute on Climate Change and the Environment.

- The number of climate litigation cases is rising (first case in 1994)
- Climate litigation has many objectives (administration, information, **legislation, damages**)
- Most court cases are brought by firms
- Governments are the most frequent defendants

Climate Change Litigation: Trends

- linking the impacts of resource extraction to climate change
- establishing that particular emissions are the immediate cause of particular adverse climate change impacts -
- establishing liability for failures (or efforts) to adapt to climate change
- applying the public trust doctrine/duty of care to climate change.
- rise in developing countries

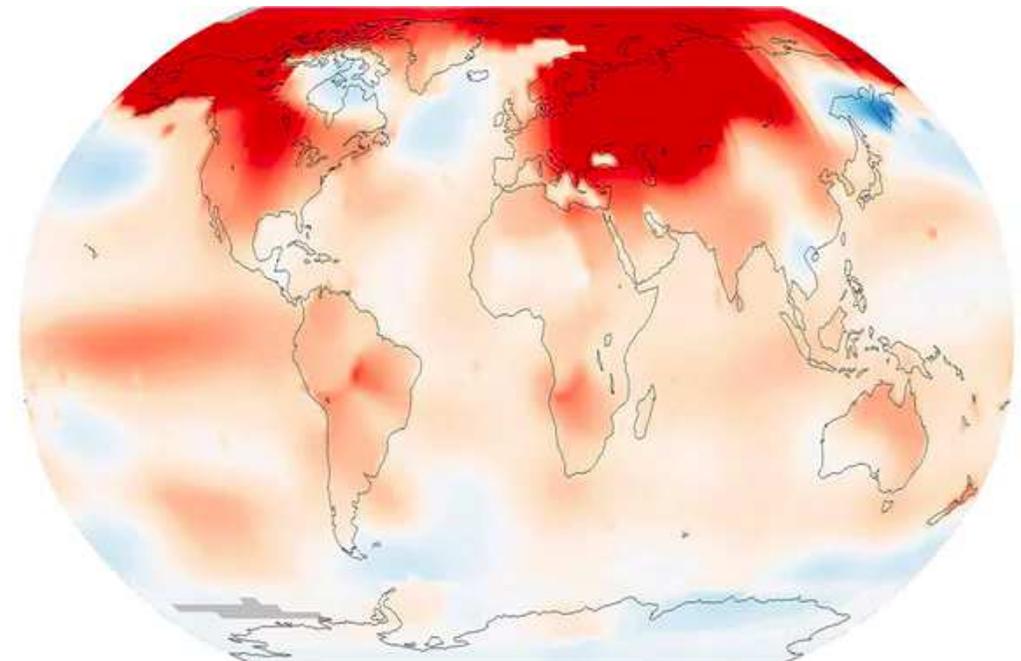
Climate Change Litigation: Paris Agreement

1. A Long-Term Goal (2 - 1.5 °C)
2. Countries Nationally Determined Contributions



'We're now breaking global temperature records once every three years.' The Guardian 23/01/2017

Image NASA



Potential of climate change litigation

- **complement the actions of legislators** in mitigation and adaptation to climate change ruling on the **implementation of existing climate laws or providing a basis** for the regulation of greenhouse gas emissions.
- aims at **pressing legislators and policymakers to be more ambitious** and thorough in their approaches to climate change
- seeks to **fill the gaps left by legislative and regulatory inaction**

Potential of climate change litigation

- **'Two-thirds of court cases challenging regulation have either strengthened or maintained climate change regulation.** In one-third of cases, policies have been weakened.' M. Nachmany et al, (2017) Global trends in climate change legislation and litigation. Grantham Research Institute on Climate Change and the Environment
- **'assist judges** in understanding the nature and goals of different types of climate change cases, issues that are common to these cases, and how the particularities of political, legal, and environmental settings factor in to their resolution. Another goal is to **contribute to a common language among practitioners** around the world working to address climate change through the courts.' The Status of Climate Change Litigation: A Global Review (2017) United Nations Environment Programme in cooperation with the Sabin Center for Climate Change Law at Columbia University
- 'role of courts in climate governance could be considered vital as the judiciary may be by far the **most authoritative instance for public participation** when the legislature and executive fail to secure the adequate policy' Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-making Become a Game-changer? (2016) Samvel Varvaštian

Potential of climate change litigation

- 'the role of litigation in addressing the problem of climate change focuses **not only** on how the massive and growing number of lawsuits **influences regulation directly, but also on how the lawsuits shape corporate behaviour and public opinion.**' - H. Olofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy (2015)
- 'One of the most powerful tools climate advocates have at their disposal is filing lawsuits against governments and private parties. **Litigation can generate media coverage and shape public discourse.**' Climate Change Litigation and Narrative: How to use litigation to tell compelling stories (2017) Grace Nosek

Litigation against government

1. Urgenda Foundation v. the state of the Netherlands (2015)
Dutch Government is found liable on the basis of tort law



2. Juliana v. United States of America (2016)
Whether climate change interferes with the exercise of constitutional rights



Image: 'The 11-Year-Old Suing Trump Over Climate Change.'
The Atlantic. 13/02/2017

	Urgenda	Juliana
Standing	Public interest – NGO Threat of future damage Standing & Damage - requirements for liability	Personal interest injury - threshold for standing Injured in a personal way
Causal link	Requirement for liability Reject 'drop in the ocean' Did not apply the 'but for' test but 'cumulative harm'	'Fairly traceable' to the government conduct
Obligations through principles of tort law/constitutional right	Breach of duty of care. Damages not necessary since not asking for compensation – just the threat of future damage. Negligence - great risk of 'Hazardous climate change'	Infringement of fundamental right (to life, liberty, property.) A stable climate change system as precondition for fundamental rights
Courts and the legislative	Key job of the judiciary: legal protection and judicial review	Political question doctrine Court support to go beyond international commitments!

Litigation against corporations

Case Saúl Luciano Lliuya v. RWE AG, Az. 2 O 285/15, Regional Administrative Court of Essen, Germany, claim dismissed; appeal pending (Essen Regional Court)

Flood risk from climate change - economic compensation

large greenhouse-gas emitters can be held liable for the consequences of climate change?

the question of causality

Victims compensation - Tabaco industry like From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability (2017) Martin Olszynski, Sharon Mascher, Meinhard Doelle

Implications for the Maritime Sector

- Unregulated
- Increasingly visible - while other sectors reduce
- Projections of emissions in 2050
- NDCs – Paris agreement paves the way for more litigation
- Extension of the State's responsibility to protect the victims from Climate Change from nationals to humanity – Pau de Vilchez
- Shipping companies be next in the line?

Implications for the Maritime Sector

- A) Actions against governments – might put pressure and lead to policies and regulation for the sector.

- B) Actions against corporations – risk of litigation and liability might lead to more ambition by the industry lobbying for regulation, pursue reductions unilaterally and changes in insurance.

Challenges and Opportunities

Challenges

- Uncertainty
- Standing
- Causality
- Political questions
- Science and law
- Jurisdiction specific issues
- Concerns over democratic legitimacy
- Replication of cases?

Opportunities

- Scientific evidence grows
- Differences across jurisdictions can be transcended by identifying concepts common in several legal systems
- New tools - growing body of legal research and cases
- Judicial innovation (hazardous climate change, right to climate system to support life)

Thank you.

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