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David Hunter

Wenhui Ji

Jenna Ruddock

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### Recommended Citation

David Hunter, Wenhui Ji, & Jenna Ruddock, *The Paris Agreement and Global Climate Litigation after the Trump Withdrawal*, 34 Md. J. Int'l L. 224 (2020).

Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol34/iss1/9>

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# The Paris Agreement and Global Climate Litigation after the Trump Withdrawal

DAVID HUNTER, WENHUI JI & JENNA RUDDOCK<sup>†</sup>

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## I. INTRODUCTION

When President Trump announced his intention to withdraw from the Paris Agreement,<sup>1</sup> it re-confirmed that the U.S. federal government is not a reliable player in global efforts to combat climate change.<sup>2</sup> Other national governments, U.S. state and local governments, private sector leaders and environmental organizations all voiced their frustration.<sup>3</sup> More generally, the United States' reversal was a reminder that the world's response to climate change should not be hostage to the whims of the political branches of government. Government regulators, who operate with a relatively short time horizon and are frequently captured by the regulated community, need to be monitored and sometimes prodded by an engaged judiciary.

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<sup>†</sup> David Hunter is Professor of Law at American University Washington College of Law. He specializes in international and comparative environmental law. Wenhui Ji received her JD from Vermont Law School in 2017 and is currently an LLM candidate in International Law at American University Washington College of Law. Jenna Ruddock is a JD candidate at American University Washington College of Law interested in environmental and human rights law.

1. For the Paris Agreement, see G.A. Res. 1/CP.21, Paris Agreement (Dec. 12, 2015), [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf) [hereinafter Paris Agreement].

2. Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

3. Nadja Popovich & Tatiana Schlossberg, *How Cities and States Reacted to Trump's Decision to Exit the Paris Climate Deal*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/interactive/2017/06/02/climate/trump-paris-mayors.html>.

The emergence of climate-related litigation in the United States and abroad pre-dates the Trump Administration's withdrawal from the Paris Agreement, but that withdrawal underscored the need for judicial engagement. Climate-related litigation now includes many different approaches and legal theories.<sup>4</sup> Some cases aim to hold fossil fuel companies liable for damages for injuries attributable to climate change.<sup>5</sup> Some cases aim to ensure climate change is taken into account in planning decisions or in financial disclosures.<sup>6</sup> More commonly, claims aim at strengthening a government's approach to mitigating climate change either generally or with respect to a specific project. Particularly in these latter cases, the Paris Agreement is playing a critical and somewhat surprising role—given that by its terms it creates no internationally binding mitigation requirement.<sup>7</sup>

This article explores the ways in which litigants and courts around the world are invoking the Paris Agreement to push for a stronger response to climate change. This article focuses on two general categories of litigation where the Paris Agreement is playing, or is likely to play, a vital role: (1) litigation aimed at strengthening governments' climate change mitigation efforts (notwithstanding the well-known non-binding nature of the mitigation commitments under the Paris Agreement);<sup>8</sup> and (2) litigation involving financial disclosure and investment expectations of the fossil fuel industry.<sup>9</sup> The Paris Agreement's mitigation commitments are not necessarily being enforced directly, but the Agreement's mitigation framework, including the particular Nationally Determined Contributions (NDCs), mid- and long-term goals and the temperature targets, provides a policy and factual benchmark against which courts are

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4. A recent United Nations report identified 654 climate-related cases in the United States and 230 others in 24 countries worldwide. U.N. ENV'T PROGRAMME THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL REVIEW 10–11 (2017) [hereinafter UNEP Climate Litigation Report]; see also Jeffrey Williamson, *As Climate Lawsuits Grow Worldwide, Legal Strategies Evolve Too*, CLIMATE LIABILITY NEWS (Dec. 26, 2018), <https://www.climateliabilitynews.org/2018/12/26/legal-strategy-climate-lawsuits/>.

5. See, e.g., Dana Drugmand, *Courts Will Play Key Role in Addressing Climate Crisis, Experts Say*, CLIMATE LIABILITY NEWS (Sept. 27, 2018), <https://www.climateliabilitynews.org/2018/09/27/climate-crisis-litigation-columbia/> (summarizing tort-based litigation to recover the costs of addressing climate change).

6. See UNEP Climate Litigation Report, *supra* note 4, at 14; Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. OF LEGAL STUD. 841, 860 (2018).

7. See Paris Agreement, *supra* note 1, art. 4(19).

8. See *infra* text accompanying notes 35-107.

9. See *infra* text accompanying notes 108-31.

evaluating government or private sector actions.<sup>10</sup> The Paris Agreement's utility in litigation thus extends beyond the legal nature of its mitigation commitments. As a result, although other obstacles to climate litigation exist in the United States, President Trump's announced withdrawal may not significantly lessen the value of the Paris Agreement to judicial review even here in the United States.

After a brief summary of the Paris Agreement's approach to climate mitigation,<sup>11</sup> Parts II to IV of this article survey the use of the Agreement in cases evaluating the government's approach to climate change mitigation under national law,<sup>12</sup> international human rights law,<sup>13</sup> and international environmental law.<sup>14</sup> Part V analyzes the signaling effect of the Paris Agreement in shaping cases involving financial disclosure and investment-backed expectations of the fossil fuel industry.<sup>15</sup> The conclusion briefly considers the potential impact of the Trump withdrawal on the Paris Agreement's litigation role.<sup>16</sup>

## II. AN OVERVIEW OF THE PARIS AGREEMENT'S APPROACH TO CLIMATE MITIGATION

The 2015 Paris Agreement was celebrated as a major advance in the world's efforts to address climate change, in particular because for the first time all countries agreed to take steps to mitigate or prevent climate change.<sup>17</sup> The Paris Agreement sits within the framework established by the 1992 United Nations Framework on Climate Change (UNFCCC).<sup>18</sup> Under the UNFCCC, the objective of global cooperation in climate negotiations is to "prevent dangerous anthropogenic interference" (known as (DAI), which is defined in terms of avoiding significant damage to natural ecosystems, food security and economic development).<sup>19</sup> To meet the objective of avoiding DAI, the Paris Agreement sets the overall mitigation target "to hold the increase in the global average temperature to *well below*

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10. See *infra* text accompanying notes 35-47.

11. See *infra* text accompanying notes 17-34.

12. See *infra* text accompanying notes 35-47.

13. See *infra* text accompanying notes 48-90.

14. See *infra* text accompanying notes 91-107.

15. See *infra* text accompanying notes 108-31.

16. See *infra* text accompanying notes 132-34.

17. See *Historic Paris Agreement on Climate Change: 195 Nations Set Path to Keep Temperature Rise Well Below 2 Degrees Celsius*, UNFCCC (Dec. 13, 2014), <https://unfccc.int/news/finale-cop21>.

18. United Nations Framework Convention on Climate Change art. 2, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) [hereinafter UNFCCC].

19. *Id.* art. 2.

2°C above pre-industrial levels and *to pursue* efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.”<sup>20</sup> The 2°C temperature goal reflects the governments’ consensus of the maximum temperature rise that would give the world a reasonable chance of avoiding significant harm from climate change. The Parties also recognized that this goal might be insufficient, and thus agreed to “pursue efforts” to limit the temperature increase to 1.5°C.

Rather than negotiating a carbon budget with binding national targets and timetables aimed at meeting the temperature goal, each country was invited to announce their own nationally determined mitigation actions in the run-up and during the Paris negotiations.<sup>21</sup> The resulting NDCs comprise each country’s primary commitments to help prevent climate change under the Paris Agreement framework.<sup>22</sup> As of March 2019, one-hundred-eighty-two countries had formally announced an NDC in support of the overall objectives of the Agreement.<sup>23</sup>

Despite near universal participation in adopting NDCs, by all accounts the cumulative pledges fall significantly short of the total emissions reductions needed to achieve the Paris Agreement’s 2°C goal and by implication the UNFCCC’s objective to avoid DAI.<sup>24</sup> Although estimates vary, according to the United Nations, fully implementing the current NDCs would meet only one-third of the necessary emissions reductions.<sup>25</sup>

The Parties anticipated that the initial NDCs would leave such an “emissions gap” and established a process for increasing NDCs over time.<sup>26</sup> The Parties agreed to review their NDCs and communicate “successive” NDCs every five years, beginning in 2020.<sup>27</sup> The Parties are not allowed to backslide on their

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20. See Paris Agreement, *supra* note 1, art. 2(1)(a) (emphasis added).

21. See UNFCCC, *Nationally Determined Contributions (NDCs)*, <https://unfccc.int/process/the-paris-agreement/nationally-determined-contributions/ndc-registry> (last visited Mar. 28, 2019) [hereinafter NDC Registry]; see also Paris Agreement, *supra* note 1, art. 4(2).

22. See Paris Agreement, *supra* note 1, art. 2(1)(a).

23. For a list of NDCs submitted pursuant to the Paris Agreement, see NDC Registry, *supra* note 21.

24. The United Nations issues an annual report assessing progress on the Nationally Determined Contributions under the Paris Agreement. See, e.g., U.N. ENV’T PROGRAMME, EMISSIONS GAP REPORT 2018 (2018).

25. U.N. ENV’T PROGRAMME, EMISSIONS GAP REPORT 2017, at xiv (2017).

26. Paris Agreement, *supra* note 1, art. 4.

27. Paris Agreement, *supra* note 1, art. 4(9); see also Framework Convention on

commitments. Each Party's successive NDC should "represent a progression beyond the Party's then current [NDC] ... and reflect its highest possible ambition."<sup>28</sup> In addition, the Parties also signaled their long-term resolve to move the world beyond fossil fuels to a low carbon future. The Paris Agreement endorses a "global peaking" of GHG emissions "as soon as possible" and commits countries to "rapid reductions thereafter ... so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century."<sup>29</sup> To operationalize these long-term goals, the Parties should submit "mid-century, long-term low greenhouse gas emission development strategies" by 2020.<sup>30</sup>

Although the Paris Agreement is a binding international agreement, the Parties carefully crafted the language for the NDCs and other mitigation commitments to ensure that the specific commitments were not binding as a matter of international law.<sup>31</sup> The Agreement does not contemplate any legal process for enforcing or compelling a Party to implement their NDC. Nor does the Paris Agreement explicitly create or require any cause of action to enforce the NDC under national law. The soft law, non-binding nature of the NDCs was a condition for gaining U.S. support for the Agreement.<sup>32</sup> The non-binding nature of the NDCs may be less important than it initially seems. The Paris Agreement contemplates a harmonized "rulebook" that sets forth a transparent system to allow the international community to track and evaluate implementation of the

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Climate Change, Rep. of the Conference of the Parties on its Twenty-First Session, ¶¶ 23–24, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) (the Parties *request* a new NDC from those having 2025 as their target date and only *urge* a new NDC in 2020 from those having 2030 as a target date) [hereinafter Report of the Paris CoP].

28. Paris Agreement, *supra* note 1, art. 4(3).

29. *Id.* art. 4(1).

30. Report of the Paris CoP, *supra* note 27, ¶ 35; *see also* Paris Agreement *supra* note 1, art. 4(19).

31. *Paris Agreement: Frequently Asked Questions*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/blog/2016/09/the-paris-agreement-faqs/> (last visited Mar. 29, 2019).

32. Erika Rosenthal, *Paris Climate Agreement: A Good Deal for the United States. An Essential Deal for the Planet*, EARTH JUSTICE (Mar. 29, 2019), <https://earthjustice.org/features/paris-agreement>.

commitments.<sup>33</sup> More to the point, national courts in several countries are enforcing, or otherwise invoking, the Paris Agreement in evaluating the adequacy of climate mitigation efforts.<sup>34</sup>

### III. ENFORCING THE NDCs

Although the Paris Agreement's non-binding treatment of NDCs clearly avoids state-to-state enforcement under international law, as this section demonstrates a country's NDC may nonetheless be enforceable as a matter of national law. National courts may be enlisted to review the adequacy of NDCs, progress in their implementation, or the consistency of proposed activities with their NDCs.

In New Zealand, for example, Susan Thomson, a law student, sought judicial review of the adequacy of New Zealand's NDC primarily based on administrative law requirements.<sup>35</sup> The High Court of New Zealand rejected the government's arguments opposing judicial review, finding that the urgency of climate change required judicial scrutiny over what might otherwise be considered a strictly political issue.<sup>36</sup> The Court held that the government acted unlawfully when it failed to review its 2050 mitigation target to reflect advancements in climate science.<sup>37</sup> As a matter of national law, the Court required the government to review its long-term target whenever the Intergovernmental Panel on Climate Change (IPCC) issued a new report.<sup>38</sup> The Court ultimately deferred its review of the adequacy of the NDC in part because an incoming government had announced it would review the NDC within a year.<sup>39</sup>

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33. The Parties made significant progress in negotiating the rulebook in the 2018 Conference of the Parties. See *Success of COP24 – We Have the Katowice Rulebook*, COP24-KATOWICE 2018 (Dec. 15, 2018), <https://cop24.gov.pl/news/news-details/news/success-of-cop24-in-katowice-we-have-a-global-climate-agreement/>.

34. See *infra* text accompanying notes 35-47.

35. Rebecca Macfie, *New Zealand's first climate change lawsuit rejected by High Court*, NOTED (Nov. 17, 2019), <https://www.noted.co.nz/planet/new-zealand-s-first-climate-change-lawsuit-rejected-by-high-court/>.

36. The Court first rejected the government's argument that the adequacy of its climate targets involved balancing many socioeconomic factors and were thus "political". The Court also rejected the government's argument that because the NDCs were made pursuant to an international agreement, the courts should not intervene in the executive branch's exercise of its foreign relations authority. *Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 [¶¶ 133–134] per Mallon J (N.Z.) [hereinafter *Thomson v. New Zealand*].

37. *Id.*

38. *Id.* ¶¶ 93–98.

39. *Id.*

In Ireland, Friends of the Irish Environment has announced a suit against the government claiming that the country's 2017 National Mitigation Plan is inadequate, as it would result in Ireland exceeding its equitable share of the global carbon budget implicit in the Paris Agreement.<sup>40</sup> The suit also alleges violations of the Climate Act, the Irish Constitution, and human rights obligations.<sup>41</sup> The case was not decided as of March 2019.<sup>42</sup>

The Paris Agreement has also been invoked against specific projects that are arguably either inconsistent with NDCs or have not been adequately assessed in light of their NDC. In 2017, for example, the South African High Court for North Gauteng invalidated the approval of a proposed coal-fired power plant because the environmental assessment had not included an assessment of climate change impacts.<sup>43</sup> The Court noted that South Africa's NDC under the Paris Agreement contemplated growth in carbon emissions from coal-fired power plants, but found that climate change impacts must nonetheless be considered in permitting new plants:

The respondents further argued that the power station project is consistent with South Africa's NDC under the Paris Agreement, which envisages that South Africa's emissions will peak between 2020 and 2025. Again, I agree with Earthlife that this contention misses the point. The argument is not whether new coal-fired power stations are permitted under the Paris Agreement and the NDC. The narrow question is whether a climate change impact assessment is required before authorising new coal-fired power stations. A climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa's peak,

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40. As of January 2019, the pleadings in the case have not been made public but the action is described at the Friends of the Irish Environment's website. See CLIMATE CASE IRELAND, <https://www.climatecaseireland.ie/climate-case/> (last visited Mar. 14, 2019).

41. *Id.*

42. *Id.*

43. *EarthLife Africa Johannesburg v. Minister of Env'tl. Affairs* [2017] 65662/16 2 (High Ct. of S. Afr., Gauteng Division, Pretoria) [hereinafter *EarthLife v. South Africa*]; see also Leonie Joubert, *Court Stalls New Coal Plan in South Africa*, ENERGY TRANSITION: THE GLOBAL ENERGIEWENDE (Oct. 10, 2017), <https://energytransition.org/2017/10/court-stalls-new-sa-coal-mega-station/>.



plateau and decline trajectory as outlined in the NDC and its commitment to build cleaner and more efficient than existing power stations.<sup>44</sup>

The South African decision referenced the NDC as the framework against which to evaluate climate-related decisions even though South Africa had yet to enact the Paris Agreement into domestic law.<sup>45</sup>

In another example, an Australian court recently cited inconsistency with Australia's commitment to the goals of the Paris Agreement as one of the arguments for denying a permit for a new coal mine.<sup>46</sup> The Court held:

The Project will be a material source of GHG emissions and contribute to climate change. Approval of the Project will not assist in achieving the rapid and deep reductions in GHG emissions that are needed now in order to balance emissions by sources with removals by sinks of GHGs in the second half of this century and achieve the *generally agreed* goal of limiting the increase in global average temperature to well below 2°C above pre-industrial levels. . .

In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet *generally agreed* climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.<sup>47</sup>

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44. *EarthLife v. South Africa*, *supra* note 43, ¶ 90.

45. *Id.*

46. *Gloucester Resources Ltd. v. Minister for Planning* [2019] NSWLEC 7 (Feb. 8, 2019).

47. *Id.* ¶¶ 697-699 (emphasis added).

The Australian court thus used the temperature and longer term goals of the Paris Agreement as a benchmark against which to measure the government's actions in denying the coal mine permit.

The judicial review of NDCs by national courts like New Zealand may not be so surprising to the extent that the NDCs are enacted as part of national law. Perhaps more surprising is the South African and Australian courts' use of the Paris Agreement's overall mitigation framework, including the temperature targets and the mid- and long-term mitigation goals. These courts do not rely on the Paris Agreement as setting a binding legal standard, but rather as a "generally agreed" benchmark for evaluating government decisions relating to climate change. This is the same approach being taken in climate change cases relying on international human rights law, as discussed below.

#### IV. THE PARIS AGREEMENT AS DEFINING HUMAN RIGHTS OBLIGATIONS OF STATES

For many years now, human rights advocates have warned that, if left unchecked, climate change would lead to significant violations of human rights.<sup>48</sup> A stable climate system, and by implication, the destruction of a stable climate system, have been linked not only to a right to a healthy environment, but also to the rights to life, family, water, housing, and food, among others.<sup>49</sup> The UNFCCC objective of DAI explicitly references the need to avoid socioeconomic impacts on food security and economic development.<sup>50</sup> As a result, if a country fails to meet the objective under the UNFCCC, they are also failing to prevent violations of associated human rights. Put another

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48. See, e.g., Human Rights Council, Human rights and climate change ¶1, U.N. Doc. A/HRC/35/L.32 (June 19, 2017); *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* ¶¶ 23-39, 65, 68, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016) (noting that the "... greater the increase in average temperature, the greater the effects on the right to life and health...") [hereinafter "Report on the Issue of Human Rights Relating to the Environment"]; see also *Joint statement by UN Special Procedures on the occasion of World Environment Day*, U.N. OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS (June 5, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E> (reiterating that "an average increase in global temperature of even 2.0°C will adversely affect a wide range of human rights, including the rights to life ..."); *Rep. of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009), <https://undocs.org/A/HRC/10/61> [hereinafter OHCHR].

49. See OHCHR, *supra* note 48, ¶¶ 20-41; see also David Hunter, *Human Rights for Climate Change Implications*, 11 OR. REV. INT'L L. 331 (2009).

50. UNFCCC, *supra* note 18, art. 2.

way, determinations of what collectively countries must do to meet the UNFCCC obligation also reflects what countries collectively must do at a minimum to reach a safe level of emissions for protecting human rights.

As noted above, the NDCs under the Paris Agreement leave us cumulatively well short of achieving the 2°C temperature goal, let alone the more ambitious 1.5°C goal.<sup>51</sup> The Paris Agreement’s temperature goal reflects a determination that holding temperatures “well below 2°C” is necessary to avoid impacts beyond DAI under the climate regime.<sup>52</sup> Estimates suggest that the current NDCs, if fulfilled, would allow an estimated increase in global average temperatures of 3.3°C.<sup>53</sup> Such a temperature increase would, among other things, threaten food security, create severe water shortages, cause fatalities from extreme heat, and leave millions of individuals displaced by sea level rise and increased frequency of extreme weather events.<sup>54</sup> This result threatens the realization of basic human rights. Although the meeting the Paris Agreement goals may not be sufficient to protect human rights from the impact from the impact of climate change, attaining them is certainly a minimum step forward from the status quo.

Viewed in this light, the Paris Agreement helps to define what temperature goal and by implication what mitigation efforts are at a minimum to protect the “right to life” or the right to a “healthy environment.” In the past few years, human rights advocates have increasingly incorporated the science-based, political consensus of the Paris Agreement, particularly its temperature goals, in asking courts to review their country’s respective efforts to protect internationally or nationally recognized individual rights against the threats posed by climate change. The leading case taking this

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51. *Facilitating Global Transition: The Role of National Determined Contributions in Meeting the Long-term Temperature Goal of the Paris Agreement*, NDC PARTNERSHIP <http://ndcpartnership.org/facilitating-global-transition-role-nationally-determined-contributions-meeting-long-term>, (last visited Mar 30, 2019).

52. See Paris Agreement, *supra* note 1, pmbl. (“In furtherance of the objective of the Convention”), art. 2(1) (“in enhancing implementation of the Convention, including its objective”).

53. See *Increase in Global Temperature by 2100*, CLIMATE INTERACTIVE SCOREBOARD, <https://img.climateinteractive.org/wp-content/uploads/2017/04/Scoreboard-static-clean-Apr5.png> (last visited Mar. 14, 2019).

54. See, e.g., WORLD BANK GROUP, *TURN DOWN THE HEAT: WHY A 4°C WARMER WORLD MUST BE AVOIDED*, at xvi (2012).

approach is *Urgenda v. Netherlands*, in which an appellate court has upheld a rights-based challenge claiming the Netherlands' commitments to mitigate climate change are insufficient.<sup>55</sup>

*A. Urgenda v. Netherlands*

In *Urgenda*, a Dutch environmental group sued the Netherlands government for its inadequate action to prevent serious environmental and health risks from climate change, which Urgenda alleged violated the government's obligation to protect its citizens' rights to life and to family life under the European Convention of Human Rights.<sup>56</sup> The plaintiffs sought to compel the government to impose more stringent restrictions on greenhouse gas (GHG) emissions than currently contemplated.<sup>57</sup> The plaintiffs specifically cited the Dutch government's decision to significantly scale back its previous commitment to reduce greenhouse gas emissions.<sup>58</sup> Until 2011, the Netherlands had promoted a thirty percent reduction from 1990 levels by 2020, but political considerations led the Netherlands to reduce its commitment by the time of the lawsuit to seventeen percent.<sup>59</sup> The plaintiffs challenged the lack of scientific support for lowering the Dutch commitment and argued that the government had failed to fulfill its obligation toward the plaintiffs.<sup>60</sup> In 2015, the Hague District Court agreed with the plaintiffs. The court ordered the government to reduce emissions at least twenty-five percent from 1990 levels, while leaving the choice of reduction methods to the government.<sup>61</sup>

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55. Hof Den Haag 9 Oktober 2018, AB 2018, 417 m.nt. Van G.A., Van der Veen en Ch.W. Backes (De Staat Der Nederlanden/Stichting Urgenda) (Neth.) [hereinafter *Urgenda App. Dec.*].

56. See Rechtbank Den Haag, 24 Juni 2015, ECLI:NL:GHDHA:2018:2591 (Stichting Urgenda/De Staat Der Nederlanden) (Neth.) [hereinafter *Urgenda Lower Ct. Dec.*]; see also Council of Europe, Convention for the Protection of Human Rights and Environment, ETS No. 005, Arts. 2, 8 (1950) [hereinafter ECHR]; see generally Eleanor Stein & Alex Geert Castermans, Comment, *Urgenda v. The State of the Netherlands: The "Reflex Effect" – Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care*, 13 MCGILL J. SUSTAINABLE DEV. L. 303, 305 (2017); Josephine van Zeven, *Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?*, 4 TRANSNAT'L ENVTL. L. 339, 341 (2015).

57. *Urgenda App. Dec.*, *supra* note 55.

58. Stein & Castermans, *supra* note 56; van Zeven, *supra* note 56.

59. *Urgenda Lower Ct. Dec.*, *supra* note 56.

60. *Id.*

61. *Id.*

In upholding the appeal, the Hague Court of Appeal relied in part on the Paris Agreement (negotiated after the lower court's opinion was issued) in defining the Netherlands' duty of care.<sup>62</sup> The Court first reviewed the potential impacts of climate change, finding that there is: "a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life . . . [I]t follows from Articles 2 and 8 [of the] ECHR that the State has a duty to protect against this real threat."<sup>63</sup> Having rooted the legal obligation in the human rights to life (Article 2) and to family life (Article 8) under the European Convention on Human Rights (ECHR), the question remained as to what level of care would meet the State's obligation to protect these rights. The Court found the answer at least partly in the Paris Agreement. The Court noted the Netherlands had committed in the Paris Agreement to keeping the global rise in temperature "well below" the 2° C limit and that a 'safe' temperature rise should not exceed 1.5°C.<sup>64</sup> In order to achieve these levels, the Court noted that the atmospheric concentration of greenhouse gases could not exceed four hundred and fifty and four hundred and thirty ppm, respectively.<sup>65</sup> The Court used these references to conclude that at least a twenty-five to forty percent reduction of CO<sub>2</sub> is not an "overly pessimistic starting point[] for establishing the State's duty of care."<sup>66</sup>

The Court traced the long negotiating process that led to the Paris Agreement and reflected on the Netherlands approach to reduction target over the years. The Court found that:

The State has known about the reduction target of twenty-five to forty percent for a long time. The IPCC report which states that such a reduction by end-2020 is needed to achieve the 2°C target (AR4) dates back to 2007. Since that time, virtually all COPs (in Bali, Cancun, Durban, Doha and Warsaw) have referred to this twenty-five to forty percent standard and Annex I countries have been urged to align their reduction targets accordingly. This may not have established a legal standard with a direct effect, but the Court believes that it confirms the fact that at least a twenty-

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62. Urgenda App. Dec., *supra* note 55.

63. *Id.* ¶ 45.

64. *Id.* ¶ 44.

65. *Id.*

66. *Id.* ¶ 50.

five to forty percent reduction of CO<sub>2</sub> emissions as of 2020 is required to prevent dangerous climate change.<sup>67</sup>

Based on this analysis, the Court held that the State's duty of care to protect the rights of its citizens required the State to reduce its emissions by at least twenty-five percent from 1990 levels by the end of 2020.<sup>68</sup> Interestingly, the State did not hold that the Paris Agreement created a legally binding obligation. Rather, the Paris Agreement's temperature goals, as well as the science underlying those goals, were used as evidence of a generally accepted minimum level of action necessary to meet a legal obligation rooted in the ECHR.<sup>69</sup>

### *B. Other Rights-based Cases*

*Urgenda* has inspired a number of youth groups to explore similar rights-based challenges to their country's climate-related policies. For example, in Colombia twenty-five young plaintiffs alleged that deforestation rates violated their human rights under the 1991 Colombian Constitution, including rights to a healthy environment, life, food and water.<sup>70</sup> In April 2018, the Colombian Supreme Court of Justice ruled in favor of the plaintiffs who challenged the government's failure to prevent accelerating rates of deforestation in the Amazon basin.<sup>71</sup> Like the outcome in the *Urgenda* case, the Colombian court mandated that the government

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67. *Id.* ¶ 51.

68. *Id.* ¶ 76.

69. *Id.*

70. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil abril 5, 2018, M.P.: Luis Armando Tolosa Villabona, STC4360-2018, Radicación No. 11001-22-03-0000-2018-00319-01 (Colom.) [hereinafter Barragán, C.S.J. Dec.]; see also Uclia Wang, *Colombian Court Orders Government to Stop Deforestation, Protect Climate*, CLIMATE LIABILITY NEWS (Apr. 5, 2018), <https://www.climateliabilitynews.org/2018/04/05/colombia-amazon-climate-change-deforestation/>. Similarly, in *Leghari v. Federation of Pakistan*, a farmer sued the national government for failure to carry out the 2012 National Climate Policy and Framework. *Leghari v. Federation of Pakistan*, W.P. No. 25501/2015 (Lahore High Ct.) (2015) (Pak.). The Lahore High Court ruled that "Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system . . . [O]n a legal and constitutional plane this is a clarion call for the protection of fundamental rights of the citizens of Pakistan." *Id.* ¶ 6. The court found that "the delay and lethargy of the State in implementing the Framework offend the fundamental rights of the citizens." *Id.* ¶ 8. Accordingly, the court created a twenty-one-member Climate Change Commission to help ensure implementation of the climate laws. See *id.* ¶ 8.

71. Anastasia Moloney, *Colombia's Top Court Orders Government to Protect Amazon Forest in Landmark Case*, REUTERS (Apr. 6, 2018), <https://www.reuters.com/article/us-colombia-deforestation-amazon/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case-idUSKCN1HD21Y>.

take action in the near future, without specifying exactly what measures would be sufficient.<sup>72</sup> The Court also declared the Amazon to be an “entity subject of rights,”<sup>73</sup> extensively referencing the importance of the Amazon basin to achieving Colombia’s international climate change commitments, including those set under the Paris Agreement.

Inspired by *Urgenda* and other youth-based lawsuits, a group of elderly Swiss women sued their government arguing that Switzerland was not on an emissions reduction trajectory consistent with the Paris Agreement’s 2°C temperature goal.<sup>74</sup> This failure, they alleged, was also a failure to meet the State’s obligation to prevent violations of articles 10 (right to life), 73 (sustainability principle), and 74 (precautionary principle) of the Swiss Constitution and by articles 2 (right to life) and 8 (right to family life) of the ECHR.<sup>75</sup> They asked the government to work towards achieving greenhouse gas emissions reductions of at least twenty-five percent below 1990 levels by 2020 and at least fifty percent below 1990 levels by 2050.<sup>76</sup> In November 2018, the Swiss Federal Administrative Court dismissed the claim, finding that the elderly plaintiffs were not particularly vulnerable from climate change and thus had no justiciable claims different than that of the general public.<sup>77</sup>

*C. The Rights-based Approach in the United States: Juliana v. United States*

To highlight the impacts of climate change on future generations,<sup>78</sup> twenty-one children and young adults filed suit against the federal government, alleging that the U.S. government has failed

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72. *Id.*

73. *Id.*

74. Request to Stop Emissions in Climate Protection Pursuant to Art. 25(a) APA and Art. 6 ¶ 1 and 13 ECHR, Verein KlimaSeniorinnen Schweiz v. Federal Council (Oct. 25, 2016), [https://klimasenioren.ch/wp-content/uploads/2016/10/Gesuch-um-Erlass-Verfuegung\\_Sperrfrist.pdf](https://klimasenioren.ch/wp-content/uploads/2016/10/Gesuch-um-Erlass-Verfuegung_Sperrfrist.pdf) (Switz.).

75. *Id.*

76. *Id.*

77. Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Nov. 27, 2018, A-2992/2017, [https://klimasenioren.ch/wp-content/uploads/2018/12/Scan\\_urteil-BvG\\_20180512.pdf](https://klimasenioren.ch/wp-content/uploads/2018/12/Scan_urteil-BvG_20180512.pdf) (Switz.).

78. See First Amended Complaint, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. Sept. 10, 2015) (No.: 6:15-cv-01517-TC) [hereinafter *Juliana* Complaint]. For all of the major filings in the case, see OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/juliana-v-us>.

to enact climate change policies that would adequately protect their constitutional rights to life, liberty, and property, as well as public trust resources.<sup>79</sup>

The plaintiffs alleged that despite knowing “for decades” that GHG emissions contributed to climate change, the federal government has “continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption and exportation,” including on federal land.<sup>80</sup> The complaint states claims for violations of several constitutional principles, including the due process clause and equal protection principles of the Fifth Amendment and certain unenumerated rights in the Ninth Amendment, as well as for violation of the public trust doctrine.<sup>81</sup> As redress for these violations, the complaint requests the defendants cease “permitting, authorizing, and subsidizing” fossil fuels and to develop and implement a “national plan,” which would include limiting the atmospheric concentration of carbon dioxide to three hundred and fifty parts-per-million by the year 2100.<sup>82</sup>

In a remarkable decision, District Court Judge Aiken recognized “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”<sup>83</sup> As the court held in 2016 and reaffirmed in 2018:

where a complaint alleges knowing governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no

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79. Juliana Complaint, *supra* note 78, ¶¶ 277-309. See generally Gabriela Steier, *No Ordinary Lawsuit: Juliana v. United States is a Landmark Precedent for Climate Change Legislation*, JURIST (Jan. 6, 2017), <https://www.jurist.org/commentary/2017/01/gabriela-steier-juliana-v-united-states/>; Rick Reibstein, *Can Our Children Trust Us with Their Future? Juliana is a Reminder That the Government’s Purpose is to be a Guardian for Future Generations*, A.B.A. (Jan. 16, 2018), [https://www.americanbar.org/groups/young\\_lawyers/publications/tyl/topics/environmental-law/can-our-children-trust-us-their-future](https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/environmental-law/can-our-children-trust-us-their-future).

80. Juliana Complaint, *supra* note 78, ¶¶ 5-7.

81. *Id.* ¶¶ 277-309.

82. *Id.* ¶ 310.

83. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) [hereinafter “*Juliana P*”].



protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.<sup>84</sup>

The Court found that the plaintiffs should be given the opportunity to develop their claim through discovery.

The plaintiffs in *Juliana* chose not to rely on the Paris Agreement temperature goals in defining what steps they sought the government to take, in part because they view the 2°C target as too high to ensure a stable climate system.<sup>85</sup> The structure of the argument is largely the same as in *Urgenda*, but the *Juliana* plaintiffs seek to stabilize atmospheric GHG concentrations at three hundred and fifty ppm by 2100 (more ambitious and scientifically defensible than the four hundred and fifty ppm associated with the 2°C under the Paris Agreement).<sup>86</sup>

Notwithstanding whether the 2°C goal is sufficient, the reasoning in *Urgenda* and similar cases could still help inform the analysis in *Juliana*. To some extent, the fact that the world, including the United States, has reached a scientifically based political consensus on the temperature goal of climate mitigation relieves the U.S. court from having to reach its own decision of how much mitigation is enough. Like the courts in South Africa and Australia,<sup>87</sup> the court can accept that consensus as a minimum benchmark against which to measure U.S. actions, thus narrowing the political nature of the decisions facing the court. Moreover, the Trump Administration's withdrawal from the Paris Agreement does not change the fact that a scientifically supported political consensus has "generally agreed" to the goal of avoiding DAI (and by implication disruption of basic rights) requires limiting temperature increases to well below" 2°C.

The Trump Administration strongly opposed the District Court decision and took unprecedented steps to avoid the trial. After initially failing to have the case certified for an interlocutory appeal, the Administration filed an unprecedented number of petitions for mandamus, including to the U.S. Supreme Court.<sup>88</sup> Because these

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84. *Id.*; *Juliana v. United States*, 339 F. Supp. 3d 1062, 1098 (D. Or. 2018) [hereinafter "*Juliana IP*"]. In its holding, the Court also rejected the government's efforts to block the case on political question grounds and on standing.

85. *Juliana* Complaint, *supra* note 78, ¶ 4.

86. *Id.*

87. *See supra* text accompanying notes 43-47.

88. *See, e.g.*, Adam Liptak, *Supreme Court Lets Youth's Case Demanding Climate*

efforts continued to delay the trial, the District Court certified the case for an interlocutory appeal,<sup>89</sup> and the Ninth Circuit agreed on December 26, 2018, to hear the appeal.<sup>90</sup>

#### V. CLAIMS UNDER INTERNATIONAL ENVIRONMENTAL LAW

A different approach, one rooted in international environmental law, has been taken in a recent petition before the European Court of Justice. In *Armando Ferrão Carvalho, et al. v. The European Parliament and the Council*, the plaintiffs alleged that the European Parliament and Council have failed to take adequate steps to limit GHG emissions.<sup>91</sup> In addition to rights-based claims patterned after *Urgenda*, the plaintiffs argued that the European Union was failing to avoid transboundary environmental harm caused by climate change.<sup>92</sup> The plaintiffs argue that the EU has violated its obligations under the Paris Agreement and under customary international environmental law to “do no harm” to States or areas outside of their jurisdiction.<sup>93</sup>

According to the plaintiffs (some of whom are not EU residents), the EU Member States have the obligation to prevent significant harm to the population and environment of other states or areas beyond national jurisdiction.<sup>94</sup> They rely on the “do no harm” principle, which was first applied in the environmental context in the 1941 *Trail Smelter Arbitration*.<sup>95</sup> In that case, the United States sought to enjoin a lead smelter located in Trail, British Columbia, from further polluting the air within the United States.<sup>96</sup> The arbitration panel ruled that international law recognizes each country’s sovereign right to use its territory as it chooses, but not in a manner that harms another State’s environment.<sup>97</sup> The United

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*Action Proceed*, N.Y. TIMES (Nov. 2, 2018), <https://www.nytimes.com/2018/11/02/us/politics/supreme-court-youth-climate-case.html>; Karen Savage, *Ninth Circuit Pauses Kids Climate Suit to Hear Latest Government Appeal*, CLIMATE LIABILITY NEWS (Nov. 8, 2018), <https://www.climateliabilitynews.org/2018/11/08/ninth-circuit-kids-climate-suit-appeal/>.

89. Order, *Juliana v. United States*, Case No.: 6:15-cv-01517-AA (D. Or., Nov. 21, 2018) (certifying interlocutory appeal).

90. Order, *Juliana v. United States*, Case No.: 18-80176 (9th Cir., Dec. 26, 2018) (granting interlocutory appeal).

91. Application for Annulment ¶¶ 137–140, *Armando Ferrão Carvalho & Others v. Parliament & Council*, Case T-330-18 (filed May 24, 2018).

92. *Id.* ¶¶ 206–207.

93. *Id.* ¶¶ 287–289.

94. *Id.* ¶ 137.

95. See *Trail Smelter (U.S. v. Can.)*, 3 U.N. Rep. Int’l Arb. Awards 1905 (Arb. Trib. 1941).

96. *Id.* at 1945, 1965.

97. *Id.* at 1965 (“[N]o State has the right to use of permit the use of its territory in such

Nations endorsed the principle in both the Stockholm and Rio Declarations.<sup>98</sup> The International Court of Justice in *Advisory Opinion on the Legality of Nuclear Weapons*, subsequently found that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment.”<sup>99</sup>

The plaintiffs in *Carvalho* recognize that the do no-harm principle is not absolute but requires identifying the contours of the State’s duty of care. Citing the International Court of Justice, the plaintiffs framed this standard as follows: “A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory or in any area under its jurisdiction, causing significant damage to the environment of another State.”<sup>100</sup> The Petitioners argue that the degree of care required is proportional to the risk that is involved.<sup>101</sup> Citing the catastrophic hazards posed by climate change “. . . the duty of care is particularly demanding. It requires as a minimum that states must take all measures of which they are technically and economically capable.”<sup>102</sup>

In the climate change context, petitioners argue that the Paris Agreement lends specificity to the general duty of care. The petitioners argue that the 2°C target in the Paris Agreement “formulates a clear upper limit that must be regarded as binding hard law in an obligation of result, not only of conduct.” The Petitioners contend:

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a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”).

98. U.N. Conference on the Human Environment, *Stockholm Declaration*, Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (June 1972); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 2, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

99. Legality of the Threat or Use of Nuclear Weapons, *Advisory Opinion*, 1996 I.C.J. Rep. 226, ¶¶ 29–30, 241–242 (July 8) (emphasis added); see also *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C. J. Rep. 135, ¶¶ 68, 193 (Apr. 20), <https://www.icj-cij.org/en/case/135>; *The Indus Waters Kishenganga (India v. Pak.)*, 31 U.N. Rep. Int’l Arb. Awards 1, ¶¶ 448–449 (*Indus Waters Treaty Ct. of Arb.* 2013), [http://legal.un.org/riaa/cases/vol\\_XXXI/1-358.pdf](http://legal.un.org/riaa/cases/vol_XXXI/1-358.pdf) (referring to the rule in *Trail Smelter* as a “foundational principle of customary international law”).

100. Application for Annulment, *supra* note 91, ¶ 224.

101. *Id.* ¶ 226.

102. *Id.* ¶ 154.

The threshold of ‘well below 2°C’ should not be misunderstood to be an entitlement for states to fully exploit the space up to 2°C. It is a maximum limit that shall not be reached. Rather, States shall pursue ‘efforts to limit the temperature increase to 1.5°C’ . . .

The Paris Agreement has not superseded the no-harm rule. The no-harm rule remains as a freestanding customary international obligation. It follows that it may impose obligations further than those reflected in the Paris Agreement.<sup>103</sup>

In this way, petitioners invoke the Paris Agreement temperature targets as informing an upper limit carbon budget beyond which country contributions would be in violation of the obligation not to cause transboundary harm.

As customary international law, the obligation not to cause harm applies equally to all states, including the United States, unless the state has consistently objected to its application.<sup>104</sup> The United States has not consistently objected. Indeed, the genesis of the principle as noted above is the *Trail Smelter Arbitration*, in which the United States succeeded in holding Canada responsible for transboundary air pollution.<sup>105</sup> In the United States, the principle is also viewed as entailing an obligation to take due care to avoid significant harm. According to the *U.S. Restatement (Third) of the Law of Foreign Relations*:

1. A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control

(a) conform to *generally accepted international rules and standards* for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and

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103. *Id.* ¶¶ 140–141.

104. See Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L. J. 457, 457 (1985).

105. See *supra* text accompanying notes 95–97.

(b)are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.<sup>106</sup>

At least in the climate context, the Paris Agreement arguably qualifies as a “generally accepted international standard” that can inform the interpretation and application of the customary law.<sup>107</sup> The obligation of due care thus arguably requires each country to take measures consistent with its equitable share of mitigation aimed at meeting the 2°C target.

The Trump Administration’s withdrawal from the Paris Agreement likely does not change this analysis significantly. The United States is still subject to its customary law obligations, and the Paris Agreement’s temperature target remains a “generally accepted international standard” that provides a useful reference point for defining the obligation. In fact, the withdrawal from the Paris Agreement and the retrenchment on climate change policies likely strengthens the case that the United States has not met the ‘due care’ necessary to prevent the transboundary harm of climate change.

## VI. SIGNALING THE FUTURE REGULATION OF CARBON

In addition to establishing an implicit carbon budget shaped by the temperature goals, the Paris Agreement also sent clear signals regarding the future regulation of carbon emissions. Furthermore, the Agreement explicitly endorsed two other longer term goals: (1) to reach a global peak of GHG emissions “as soon as possible” and (2) to achieve a goal of zero net emissions after 2050.<sup>108</sup> Although non-binding, the Parties established a plan for operationalizing these long-term goals by inviting each Party to submit by 2020 “mid-century, long-term low GHG development strategies.”<sup>109</sup> Through this explicit endorsement of a low-carbon future, the Parties signaled their resolve to move the world’s economy away from fossil fuels.

Achieving the post-2050 no net GHGs goal does not, strictly speaking, require the elimination of fossil fuels, because enhancing carbon sinks or improving carbon capture technology could

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106. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 601 (AM. LAW INST. 1987) (emphasis added).

107. *Id.*

108. Paris Agreement, *supra* note 1, art. 4(1).

109. Report of the Paris CoP, *supra* note 27, ¶ 35; *see also* Paris Agreement, *supra* note 1, art. 4(19).

theoretically still allow for significant use of fossil fuels.<sup>110</sup> Nonetheless, the 2050 goal unequivocally builds momentum for a low-carbon energy future and a significant preference for renewable energy over fossil fuel sources. Although we may not be able to predict our future energy mix, the Agreement suggests that fossil fuels will be significantly less important. The Paris Agreement does not include any binding requirements for achieving the long-term vision, but it does provide a global policy framework that will guide everything from international advocacy campaigns against fossil fuels to national and subnational regulation of greenhouse gas emissions, to voluntary initiatives to reduce energy use. Through these pathways, the Paris Agreement foretells a significant change in future energy usage. The Paris Agreement's clear signal of change in future energy markets potentially has a legal effect on at least two types of future cases: those relating to the financial reporting of fossil fuel companies and challenges brought under investor-state dispute resolution systems by fossil fuel interests.<sup>111</sup>

#### *A. Financial Reporting and Stranded Assets*

The Paris Agreement reflected a global consensus in favor of a low carbon future, one in which carbon will be heavily regulated and highly priced.<sup>112</sup> This presents a challenge to fossil fuel companies on how to value their assets, particularly oil, gas, and coal reserves that they expect to exploit in the future.<sup>113</sup> If countries hold true to the Paris Agreement's commitments, the future development of many of these reserves may be prohibited or prohibitively expensive—thus potentially creating stranded assets with little actual value.<sup>114</sup> Similarly, as carbon emissions are increasingly regulated, the costs of fossil fuel use will increase (either directly through a carbon tax or indirectly through requirements for emission reductions or carbon

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110. See, e.g., David Biello, *Can Carbon Capture Technology Be Part of the Climate Solution?*, YALE ENVIRONMENT 360 (Sept. 8, 2014), [https://e360.yale.edu/features/can\\_carbon\\_capture\\_technology\\_be\\_part\\_of\\_the\\_climate\\_solution](https://e360.yale.edu/features/can_carbon_capture_technology_be_part_of_the_climate_solution).

111. See *infra* text accompanying notes 112-131.

112. Mark Schapiro, *Oil Companies Quietly Prepare for a Future of Carbon Pricing*, YALE ENVIRONMENT 360 (Sept. 23, 2014), [https://e360.yale.edu/features/oil\\_companies\\_quietly\\_prepare\\_for\\_a\\_future\\_of\\_carbon\\_pricing](https://e360.yale.edu/features/oil_companies_quietly_prepare_for_a_future_of_carbon_pricing).

113. *Id.*

114. Sini Matikainen, *What are stranded assets?*, GRANTHAM RES. INST. ON CLIMATE CHANGE & THE ENV'T (Jan. 23, 2018), <http://www.lse.ac.uk/GranthamInstitute/faqs/what-are-stranded-assets> (noting that some of the causes of stranded assets include “new government regulations that limit the use of fossil fuels (like carbon pricing); a change in demand (for example, a shift towards renewable energy because of lower energy costs), or even legal action.”).

capture).<sup>115</sup> Both the potential for declining value of stranded assets and the potential for increasing costs of carbon emissions present significant regulatory risks that, in turn, present challenges of financial disclosure for the fossil fuel industry.

Failure to address these regulatory risks appropriately in financial disclosure statements could lead to significant legal liabilities. In October 2018, the Attorney General of New York brought suit against ExxonMobil for allegedly “defrauding their shareholders by downplaying the expected risks of climate change to its business.”<sup>116</sup> The Complaint alleges that Exxon misled investors in concluding that governments would not strictly regulate GHG emissions in accordance with a 2°C temperature scenario because the projected costs were simply too high.<sup>117</sup> According to the complaint, “Exxon’s analysis of the costs associated with a two degree scenario was based on assumptions it knew to be unreasonable and unsupported by the sources upon which it purported to rely.”<sup>118</sup> Exxon also allegedly told investors it was managing the costs to its operations from future climate regulation, by consistently employing an escalating “proxy cost” of GHG emissions in its evaluations and projections of future operations.<sup>119</sup> In reality, according to the Attorney General of New York, ExxonMobil did not consistently apply the proxy cost in evaluating their operations.<sup>120</sup> As a result, the company was exposed “to greater risk from climate change regulation than what the investors were led to believe.”<sup>121</sup> The Attorney General of Massachusetts has opened a similar investigation into Exxon, focusing on the company’s misrepresentations, both to consumers and to investors, “with respect to the impact of fossil fuels on climate change, and climate change-driven risks to Exxon’s business.”<sup>122</sup>

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115. See, e.g., James McAuley, *France’s climate change commitments trigger rising diesel prices and street protests*, THE WASH. POST (Nov. 17, 2018), [https://www.washingtonpost.com/world/frances-climate-change-commitments-trigger-rising-diesel-prices-and-street-protests/2018/11/17/fdc01fa6-e9b1-11e8-8449-1ff263609a31\\_story.html](https://www.washingtonpost.com/world/frances-climate-change-commitments-trigger-rising-diesel-prices-and-street-protests/2018/11/17/fdc01fa6-e9b1-11e8-8449-1ff263609a31_story.html).

116. John Schwartz, *New York Sues Exxon Mobil, Saying It Deceived Shareholders on Climate Change*, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/climate/exxon-lawsuit-climate-change.html>.

117. Complaint at ¶¶ 286–297, *New York v. Exxon Mobil Corp.* (N.Y. Sup. Ct., filed Oct. 24, 2018), [https://ag.ny.gov/sites/default/files/summons\\_and\\_complaint\\_0.pdf](https://ag.ny.gov/sites/default/files/summons_and_complaint_0.pdf).

118. *Id.* ¶ 7.

119. *Id.* ¶¶ 286–297.

120. *Id.* ¶ 2-7.

121. *Id.* ¶ 2.

122. *Attorney General’s Office Exxon Investigation*, MASS.GOV, <https://www.mass.gov/lists/attorney-generals-office-exxon-investigation> (last visited Mar. 15, 2019).

Although the global discussion of a low-carbon future has been progressing for over three decades, it is arguably not clear when that discussion had coalesced to the point where global regulation of carbon presented a material risk that had to be disclosed. Regardless of what the standard may be for past disclosure decisions, since the 2015 Paris Agreement, carbon-intensive industries are on notice that they face significant regulatory risks going forward. Litigation will be available to ensure proper financial disclosure of those risks.

*B. Future Investor – State Disputes*

The Paris Agreement's long-term goals also have implications for investor-state disputes going forward. Under most multilateral and bilateral investment treaties, investors are given an opportunity to challenge national regulations they believe have severely affected their operations.<sup>123</sup> These provisions are meant to protect foreign investors, who are often relying on thirty to forty years of revenue flows to recoup their initial capital investment, from unexpected efforts by host countries to expropriate their property. Such protections are offered against both direct expropriations and indirect regulatory takings based on unexpected regulation of the investor's property.<sup>124</sup> Under most investment agreements, foreign investors can bring their claim to an international arbitration panel or a similar investor-state dispute system (ISDS).<sup>125</sup>

The Paris Agreement's long-term commitments put the fossil fuel industry and other emission-heavy industries on notice that carbon will be more heavily regulated in the future. Thus notified, investors will be hard-pressed to argue that future regulations were unexpected or were intended to expropriate their property.

A similar argument prevailed in a recent challenge brought by Philip Morris to Uruguay's cigarette packaging regulation.<sup>126</sup> In ruling for Uruguay, the arbitration panel relied partly on the clear signals of future regulation implicit in Uruguay's participation in the

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123. See James McBride, *How Are Trade Disputes Resolved?*, COUNCIL ON FOREIGN RELATIONS (Oct. 25, 2018), <https://www.cfr.org/backgroundunder/how-are-trade-disputes-resolved>.

124. *Id.*

125. *Id.*

126. Phillip Morris Brands Sarl, et al., v. Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016) 26-29 (emphasis added).



World Health Organization's Convention on Tobacco Control.<sup>127</sup> After detailing the guidelines for packaging regulations under the Convention,<sup>128</sup> the Tribunal held:

Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed... On the contrary, in light of *widely accepted articulations of international concern* for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products.<sup>129</sup>

Although significant differences exist between the Tobacco Convention and the Paris Agreement, the Paris Agreement is arguably an “articulation of international concern” for the harmful effects of fossil fuels.<sup>130</sup> Like cigarette manufacturers, the fossil fuel industry's expectations can now only be of “progressively more stringent regulation” of carbon.<sup>131</sup> The signals from the Paris Agreement should be a strong impediment to investor claims that future regulations disadvantaging fossil fuel companies were unexpected or arbitrary.

The Trump Administration's withdrawal could blur the regulatory signal emanating from the Paris Agreement, but only to the extent it undermines the global consensus for stronger future regulation of fossil fuels. Given that other countries have not reversed their support for the Paris Agreement, companies operating outside the United States should still expect host countries to enact increasingly ambitious NDCs under the Agreement over time.<sup>132</sup> When they do, investor challenges to regulations consistent with those NDCs will likely be dismissed.

## VII. CONCLUSION

In the more than three years since its adoption, the Paris Agreement has begun to influence climate litigation in ways probably not fully contemplated by the negotiators. The highly-scrutinized

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127. *Id.* ¶¶ 85–95.

128. *Id.*

129. *Id.* ¶¶ 429–430.

130. *Id.*

131. *Id.*

132. *See* Paris Agreement, *supra* note 1, art. 4(2).

compromise on the legal status of the NDCs resulted in a formally binding Agreement, but with language specifically designed to ensure the mitigation commitments were non-binding. Nonetheless, many NDCs may be binding under national law and their adequacy may be subject to judicial review.<sup>133</sup> In addition, the Paris Agreement provides a science-based, generally accepted global framework against which national courts can evaluate climate mitigation efforts,<sup>134</sup> financial disclosures of climate risk,<sup>135</sup> and investment-backed expectations of future regulations.<sup>136</sup>

The Paris Agreement's temperature targets and mid- and long-term mitigation goals, along with its principles and procedures for developing future NDCs, are providing an implicit carbon budget and framework for informing foreign courts' deliberations regarding climate-related cases. The framework is not providing a legal requirement, but it is providing the factual background from which courts calculate, for example, a country's equitable share of climate mitigation efforts necessary to avoid catastrophic climate change impacts.

The Paris Agreement's role in shaping future litigation will not be significantly limited by the Trump Administration's decision to withdraw, particularly as his lead is not being followed by other countries. Most obviously, courts in other jurisdictions will not view one country's politically motivated disavowal of the Agreement as undermining the general consensus that supports the mitigation approach taken at Paris. Even in the United States, the withdrawal may not end the utility of the Agreement to litigators. Just as in other jurisdictions, reliance on the Agreement may be based on its general affirmation of a scientifically based set of mitigation goals. The legal basis for a claim in the United States may have to come from some other legal doctrine (just as it has in foreign jurisdictions), but the fact that a general consensus exists affirming the temperature and mitigation goals is not dependent on the United States maintaining its participation in the Agreement. These aspects of the Agreement will continue to provide a valid framework within which a court can evaluate climate mitigation efforts, financial disclosures, and investor expectations, among other climate-related challenges.

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133. *See supra* text accompanying notes 35-39.

134. *See supra* text accompanying notes 48-107.

135. *See supra* text accompanying notes 112-121.

136. *See supra* text accompanying notes 122-31.