

POLICY BRIEF

The significance of climate litigation for the political debate on Loss & Damage

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Brief Summary

The policy brief addresses two important questions. Firstly, the role of climate litigation this far in addressing legal claims for Loss & Damage. Secondly, the potential that climate litigation holds in redressing the claims of Loss & Damage. The brief provides an analysis of how the two arenas of legal action – negotiations and litigation – interact and how they can work together to provide a more robust legal basis for supporting issues of Loss & Damage.

This policy brief owes its framing and insights to the thought leadership of Cesar Rodriguez Garavito, Professor of Clinical Law at NYU Law and Dr. Saleemul Huq, Director of the International Center for Climate Change and Development who have been instrumental in shaping the field of climate litigation and negotiations on Loss & Damage respectively.

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1 Legal avenues for Loss & Damage support – Claiming polluters’ responsibility

When international climate diplomacy fails to advance, affected people may take legal avenues to address the problem of Loss & Damage. Going to court, they can claim that large emitters should take responsibility in terms of liability for Loss & Damage. Based on COP decision 1/CP.21, the Paris Agreement and its article 8 on Loss & Damage do not “involve or provide a basis for any liability or compensation” (§51).¹ However, the COP decision “cannot exclude the application of the general rules on liability and compensation between states”² – hence, the formulation does not limit the application of other international duties, international law and national legal systems.

Recent years have seen an increase in climate-related litigation claims around the world by states, municipalities, public interest organizations and property owners.³ As of 2022, over 2000 cases have been filed in 44 countries and 15 international or regional courts and tribunals. The number of cases is increasing rapidly with around a quarter of them filed since 2020. Most cases were filed in the Global North with over 1400 in the US alone. A growing number of lawsuits are emerging in the Global South with 88 filed as of May 2022.⁴ Recent court filings show six trends regarding the purposes of climate change litigation (UNEP 2020):

- a) using human rights to compel climate action;
- b) holding governments to their legislative and policy commitments;
- c) keeping fossil fuels in the ground;
- d) Claiming corporate liability and responsibility for climate harms;
- e) establishing liability for failures to adapt to climate change;
- f) advocating for greater climate disclosures and an end to greenwashing.

In this paper, we will focus on the fourth approach: establishing that particular emissions contributed to adverse climate change impacts, seeking that emitters stop disruptive action or take compensatory and protective action.

One of these cases was brought to court by the Peruvian farmer Saúl Luciano Lliuya. In 2014, he filed a claim against the German energy company RWE⁵. Luciano Lliuya’s house lies below a dangerous glacial lake. He claims that CO₂ emissions from the defendant contributed in a relevant way to global warming and thereby to accelerated glacial melting and an increase in their lake’s volume.⁶ An avalanche could trigger an outburst flood from the lake, causing damage to his house and hometown

¹ This article is a negotiation compromise for including Loss & Damage in the Paris Agreement. It mainly reflects concerns by some developed country Parties, that a Loss & Damage article is seen as an admission of liability for climate Loss & Damage, potentially resulting in claims for compensation (Sharma et al. 2016).

² Sharma et al. 2016. For an in depth analysis of COP decision 1/CP.21 Art. 8 see Lees 2016.

³ Seley/Dudley 2016.

⁴ Setzer/Higham (2022). See also Climate Law and Litigation Database by Grantham Research Institute (LSE) for worldwide data without US, available at: www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/. And Climate Change Litigation Database by Columbia Law School for US data, available at: <http://wordpress2.ei.columbia.edu/climate-change-litigation/us-climate-change-litigation/>.

⁵ <https://rwe.climatecase.org/en>

⁶ Frank 2017.

of Huaraz.⁷ To prevent the danger, authorities plan to build a new dam and drainage system at the lake. The claim seeks that RWE contribute to these protective measures.⁸ RWE is the largest CO₂ emitter in Europe. As the company has contributed around 0.5 %⁹ of historic industrial emissions, the plaintiff demands that it covers 0.5% of the costs for protective measures, or around US\$ 20,000.

Luciano Lliuya's case is part of a worldwide trend. In 2018, *New York City* filed a federal lawsuit against the five largest investor-owned fossil fuel producers. It seeks to recover costs for protecting residents from the impacts of climate change (BP, Exxon Mobil, Chevron, ConocoPhillips und Shell).¹⁰ Over two dozen US cities and states have filed similar cases, all of them still pending, against major polluters over their contribution to climate change impacts and companies' efforts to mislead the public.¹¹ In July 2022, Indonesian islanders sued the Swiss cement producer Holcim seeking compensation for climate damages and demanding that the company cut its future emissions.¹² In the Philippines, a *human rights commission* found in 2022 that the collective contribution to global warming by 47 global coal, cement, oil and gas companies has violated Filipinos' basic rights to life, water, food, sanitation, adequate housing and self-determination – in particular through the Loss & Damage caused by superstorm Haiyan in 2013. This may provide the basis for future liability claims. The companies include some of the world's biggest fossil fuel producers, such as ExxonMobil, Chevron, Shell, Rio Tinto and Total.

The prospects for success vary. The cases are often compared to litigation against the tobacco industry where companies also knew for a long time about the harmful effects of their products.¹³ The companies tried to disguise their knowledge until the 1990s, when some lawsuits were successful and so many others were pending in the U.S. that the companies agreed to a settlement costing them at least \$206 billion¹⁴.

Saúl Luciano Lliuya achieved a preliminary success in November 2017. After the Essen District Court dismissed the claim on legal grounds, Luciano Lliuya appealed the judgement. He argued that there is a scientifically proven causal link between CO₂ emissions from RWE power plants and the danger he faces and that there is no legal reason why a large emitter such as RWE should be exempted from its climate-related legal responsibility regarding the threat to his property. In a November 2017 hearing, the Higher Regional Court Hamm rejected the lower court's judgement and followed Lliuya's legal reasoning on all points. It rejected RWE's claim that the law does not cover climate change since it is too "complex" and everyone emits greenhouse gases. The court not only accepted to hear the case but also recognised that in principle, it was possible to establish legal causality for RWE's contribution to climate risk in Peru. This already set a partial precedent: according to the judges' interpretation of the law, major emitters can be held liable for their contribution to climate change impacts. In the ongoing evidentiary phase, Luciano Lliuya now has to show that in this specific case sufficient scientific evidence exists to prove this causality. In May 2022, the court visited the plaintiff's

⁷ Frank/Bals/Grimm 2017.

⁸ Germanwatch 2017.

⁹ RWE AG is the largest CO₂ emitter in Europe which is responsible for 0,47% of global CO₂ emissions based on the so-called Carbon Major's report (Heede 2014).

¹⁰ See New York Times 10 January 2018: <https://www.nytimes.com/2018/01/10/nyregion/new-york-city-fossil-fuel-divestment.html>.

¹¹ See The Guardian 30 June 2021: <https://www.theguardian.com/environment/ng-interactive/2021/jun/30/climate-crimes-fossil-fuels-cities-states-interactive>

¹² See The Guardian 20 July 2022: <https://www.theguardian.com/world/2022/jul/20/indonesian-islanders-sue-cement-holcim-climate-damages>

¹³ Olszynski et al. 2017; Leonard et al 2016.

¹⁴ Called the Tobacco Master Settlement Agreement 1998. After this agreement, there were still claims filed – most recently successfully in the case of US vs. Philip Morris in 2009. See: <http://www.publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/united-states-v-philip-morris-doj-lawsuit>.

hometown and the growing glacier lake in the Peruvian Andes to examine the risk of flooding and glacial retreat.

Climate change lawsuits raise the issue of polluters' responsibility for climate change in terms of liability for Loss & Damage. Future claims will likely be shaped by the availability of scientific evidence. Attribution science made huge progress over the last decade. In addition, Luciano Lliuya's case draws on attribution science linking glacial retreat in the Andes to anthropogenic climate change.¹⁵ The court has also generally accepted that climate models can be used as evidence in court.

Recent academic work discusses how extreme weather event attribution could be used in climate litigation¹⁶ and others have examined the contribution of individual countries to temperature rises.¹⁷ A team of researchers also quantified the contribution of individual emitters to global warming and rising sea levels. 90 major industrial carbon producers contributed up to 50 % to the rise in global mean surface temperature and up to 32 % of global sea level rise.¹⁸ Attribution studies like this lay the groundwork for tracing emissions sourced from industrial carbon producers to specific climate impacts, especially to slow onset impacts like desertification, sea level rise or glacier melting. Moreover, more and more reports are disclosing that carbon majors had early knowledge of climate change risks, failing on opportunities to act on those risks and often even actively undermining an adequate public debate.¹⁹ In its latest Assessment Report, the IPCC found that the proliferation of climate litigation against major carbon polluters relies on recent advances in climate change attribution science.²⁰

¹⁵ IPCC 2014, Stuart-Smith et al 2021.

¹⁶ Marjanac & Patton 2018.

¹⁷ Beusch et al 2022.

¹⁸ Eckwurz et al. 2017.

¹⁹ E.g. evidence for the oil industry in CIEL 2017.

²⁰ IPCC 2022.

2 Typology of Cases and Associated Legal Strategies, Evidence Submitted and Challenges Faced

Based on the state of play of climate litigation on Loss & Damage described above a typology of cases can be derived. The typology is based on the nature of the plaintiff and defendant against whom the claim of compensation is being made. The typology is as follows:

- a) **Vulnerable State vs. Large Emitting State:** Here a vulnerable state, mostly Small Island Developing States, are intending to approach the International Court of Justice and the International Tribunal for the Law of the Seas to hold large emitting states accountable for liability and compensation on Loss & Damage.
- b) **Sub-national unit vs. Fossil Fuel Major:** These types of cases are largely seen in the United States where the sub-national unit like the state of New York pursues legal action against fossil fuel majors for compensation on Loss & Damage.
- c) **Citizen or civil society vs. State:** In these instances, citizens who are victims of floods have approached the unit of the government responsible for flood prevention accountable for the payment of damages. In a one-off case, a non-profit organisation in France is approaching the courts to hold France accountable for its lack of climate action and ambition. In Germany, the Constitutional Court found in 2021 that the government's climate policy was insufficient and forced it to speed up the implementation of emissions reduction goals.
- d) **Vulnerable State vs. Fossil Fuel Major:** The Philippines carbon majors case is an example of a vulnerable state holding corporations accountable for Loss & Damage as well as violation of human rights.
- e) **Affected Person in vulnerable state vs. Fossil Fuel Major:** The Saúl vs. RWE²¹ case is an example where a victim in a vulnerable state like Peru was able to hold an energy company accountable for its emissions and impact on glacial melting.

This typology is not all-encompassing; however, it categorizes the nature of important cases filed this far and offers a blueprint for possible approaches for future cases relevant for Loss & Damage.

2.1 Vulnerable State vs. Large Emitting State

Legal Strategies	The primary legal strategy in the case by Antigua, Tuvalu, and Barbados is the application of the polluter pays principle and the do-no-harm principle to get large emitting countries to pay for Loss & Damage.
Evidence	It will require evidence to prove the historical responsibility of the large emitting nations.
Venue	The International Court of Justice or the Tribunal for the Law of the Seas.
Remedy	The contribution of climate finance to support claims of Loss & Damage.

²¹ <https://rwe.climatecase.org/en>

Challenges	The enforceability of the decisions made in these fora; establishing that these countries have done all they can to adapt and use adaptation finance efficiently.
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2.2 Sub-national unit vs. Fossil Fuel Major

Legal Strategies	In these cases, the legal strategy used has been tort law claims of nuisance and the consumer protection law to address greenwashing by fossil fuel majors.
Evidence	They have effectively used attribution science to attribute the degree of emissions by fossil fuel majors and the associated impact in these regions. The use of advertisements and internal documents of the fossil fuel majors to establish that they knew the risk of promoting fossil fuels despite it causing climate change.
Venue	The district courts and avoiding the Supreme Court where such claims are dismissed because the regulatory Clean Air Act displaces claims of nuisance.
Remedy	Compensation for damages.
Challenges	The courts dismissed such cases on the grounds of the political question doctrine and issues of causality as well as displacement of the claim of nuisance.

2.3 Citizen or civil society vs. State

Legal Strategies	The dominant legal strategy being used is a combination of the duty of care of the relevant Ministry e.g. in preventing floods and negligence in protecting the citizens against such extreme weather events. These cases also argue the state failed to comply with its climate targets.
Evidence	The IPCC report has been submitted in making these claims and the administrative documents like the flood mitigation plan are used to highlight non-compliance.
Venue	The domestic courts.
Remedy	Compensation for damages experienced.
Challenges	These cases have not been dismissed by the courts and have resulted in insurance companies stepping in to pay the damages.

2.4 Vulnerable State vs. Fossil Fuel Major

Legal Strategies	The carbon majors case used human rights arguments to hold carbon majors accountable.
Evidence	The use of the Carbon Majors report (Heede 2014) as well as expert testimony from him.
Venue	The human rights commission.
Remedy	Compensation for damages experienced and cost for the restoration as well.
Challenges	Enforceability of the decision; jurisdictional challenges in both enforcement and hearing of such a case.

2.5 Victim in vulnerable state vs. Fossil Fuel Major

Legal Strategies	The RWE case uses the legal strategy of the impairment of property for which damages can be claimed.
Evidence	They have submitted a calculation of the emissions attributable to RWE and related that to the glacial melting in the Andes.
Venue	The court in Germany (NRW) where RWE is headquartered.
Remedy	Compensation for the loss of land.
Challenges	The case was initially dismissed for causality, which has now been in the second instance established.

3 Interaction between Litigation and Negotiations on Loss & Damage

As the glacial pace of negotiations prevents swift remedy for Loss & Damage propelling affected people and climate vulnerable countries to adopt litigation. It becomes salient to examine what the interaction between the two arenas of law setting and law implementing action will mean. A working theory of interaction is one where litigation becomes a gap filler for legal remedies that are not yet accessible within negotiations and operates as an additional lever that can shape progressive decision-making within the realm of negotiations. Two concrete ways of describing this interaction are:

- a) **Addressing the Corporate Accountability Gap:** Negotiations as an arena of legal action have not yet proven to be effective in holding large emitting states accountable for Loss & Damage. And it has not the legitimacy as a forum to hold fossil fuel majors accountable. Litigation then steps in as a filler of this accountability gap. Cases like the one against RWE and Holcim are examples where climate litigation can be an effective mechanism to hold corporations accountable for Loss & Damage and their contributions to climate change while the political process to address Loss & Damage has been stuck. People affected by the climate crisis can be active in both of these legal arenas and hope solutions for addressing the Loss & Damage they are experiencing.
- b) **Nudging:** Litigation provides a nudge factor in two ways, firstly it acts as an additional lever that vulnerable countries and communities can use to push negotiations in more progressive directions like the potential formation of a Loss & Damage facility. The second way in which litigation offers a nudge to negotiations is by providing an alternate forum where legal claims of compensation and liability can form part of the toolkit to address Loss & Damage. As the Paris Agreement in addressing Loss & Damage speaks to financing these claims without using the terms of compensation and liability litigation can offer a pathway for these legal claims to be realized and nudge future negotiations on Loss & Damage to include legal remedies of compensation. As litigation in the area of Loss & Damage is still growing examples of such legal claims of compensation are the recently filed case against Holcim where compensation for climate damages is part of the remedies being sought.

As litigating claims on Loss & Damage starts to pick up steam and threatening as it were a dam burst of individual lawsuits for compensation it may cause a shift within the realm of negotiations with large emitters wanting to settle these claims of liability as opposed to continuing to block negotiations on the issue.

COP27, held in December 2022, marked a breakthrough for Loss and Damage. First, it was the first time that Loss and Damage was put on the agenda. Second, a fund and related funding arrangements for responding to Loss and Damage were established. Negotiators noted that climate litigation played an important role in creating the political pressure to finally establish a dedicated funding mechanism for L&D. In addition to the formal negotiations, there were also bilateral pledges to fund Loss and Damage at COP27 with the Global Shield against climate risks initiative. The Global Shield aims to improve the coordination of the Global Climate and Disaster Risk Financing and Insurance architecture. Beyond financing, the Parties successfully operationalized the Santiago Network (SNLD) which coordinates technical assistance on Loss and Damage at a global scale (Germanwatch, 2022).

In conclusion, as climate vulnerable countries and communities strive to access financial means to cope with the ongoing losses and damages both litigation and negotiation will be critical arenas for legal action and justice in mutually beneficial way to address climate harms.

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