Who Owns Climate Litigation Awards?

*Adi Gal**

Since 2017, U.S. states, municipalities, tribes, and cities have sought billions of dollars in damages from oil and gas companies for the environmental harm they have caused by their fossil fuel activities. This subnational government-led litigation campaign seeking to hold fossil fuel companies accountable is a meaningful step in the fight against the growing climate catastrophe. At the same time, it raises complex legal and ethical questions that have received scant attention. As this Article illustrates, the fragmentation of global climate harm into individual lawsuits, in which each local government seeks damages for its own mitigation and adaptation costs, could lead to a "first-sue, first-served" climate finance regime. And while U.S. states have launched their judicial battles for redress, developing countries—which are least responsible for carbon emissions yet are the most climate-vulnerable—are likely to fall last in line. The urgency to secure funds to mitigate and adapt to climate harms is exacerbated by the limited success of international negotiations, which have thus far failed to provide developing countries with adequate financial guarantees. This Article explores the benefits and risks of this litigation effort, the responsibilities of wealthy subnational litigants toward developing nations, and how applying new approaches to climate litigation awards could better align domestic litigation with international climate justice.

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* J.S.D. Candidate, Yale Law School. This piece is dedicated to the blessed memory of my beloved grandfather, Amnon—once a seaman and always a humanist, whose quiet solidarity with the most vulnerable continues to inspire me.

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INTRODUCTION

Over the past four decades, more than 2,900 climate-related claims have been filed worldwide, with more than half being filed in the United States alone.[1] For the most part, climate litigation cases have been filed by nongovernmental organizations (NGOs) and individuals against governments and corporations.[2] More recently, however, a different trend has emerged. As climate disasters become more frequent and their enormous costs accumulate,[3] governments have begun to seek damages from corporations for both past and future harms.[4] This

1. *See* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2025 SNAPSHOT 4 (2025) https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2025/06/Global-Trends-in-Climate-Change-Litigation-2025-Snapshot.pdf ("The total number of cases filed between 1986 and 2024 displayed in our dataset reached 2,967 by the end of 2024 (1,899 in the US and 1,068 elsewhere around the world)."). The authors rely primarily on the Sabin Center for Climate Change Law's Climate Litigation database, the leading database for climate litigation procedures in and outside the United States. *See U.S. Climate Change Litigation*, SABIN CTR. FOR CLIMATE CHANGE L., https://www.climatecasechart.com [hereinafter Sabin Center Database]. In 2002, Gerald Torres presented a pressing environmental question: "Who owns the sky?." He argued that the public holds an ownership interest in the air as a common resource, with the government serving as its trustee. Since then, communities worldwide have become increasingly aware that their governments have authorized corporations to use their most precious resources, and climate litigation has become a pivotal tool in their efforts to reclaim them. The title of this Article is inspired by Torres's. *See generally* Gerald Torres, *Who Owns the Sky*, 19 Pace Env't. L. Rev. 515 (2002).

2. *See* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2024 SNAPSHOT 18-19 (2024) https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf (noting that, like in previous years, most climate litigation cases in 2024 "have been filed by NGOs or individuals"; that "historically, the majority of climate cases have been filed against governments" and that this "remained true in 2023, with over 70 [percent] of all cases filed in this year involving government actors among the defendants"; and that, after governments, corporations appeared most frequently as defendants (accounting for 26 percent of cases)).

3. *See* Robert Hart, *Climate Change will Cost Global Economy $38 Trillion Every Year within 25 Years, Scientists Warn*, FORBES, (Apr. 17, 2024), https://www.forbes.com/sites/roberthart/2024/04/17/climate-change-will-cost-global-economy-38-trillion-every-year-within-25-years-scientists-warn/ (warning that "[d]amages from climate change will set the global economy back an estimated $38 trillion a year by 2049" and that "[i]mportantly, as the model only factored in data from previous emissions, these costs can be considered something of a floor"); *Billion-Dollar Weather and Climate Disasters*, NAT'L CTRS. FOR ENVT'L INFO. (Sept. 10, 2024), https://www.ncei.noaa.gov/access/billions (noting that "[i]n 2024, there were 27 confirmed weather/climate disaster events with losses exceeding $1 billion each to affect the United States").

4. *See infra* Part I.B.

trend, which this Article terms *climate finance litigation*, has gained momentum among U.S. states, municipalities, tribes, and cities.[5]

Climate finance litigation (CFL) refers to litigation brought by subnational governments that seeks legal remedy for the climate change-related harms caused by oil and gas companies for mitigation, adaptation, and loss and damage.[6] In such cases, the plaintiffs claim that the fossil fuel industry should abate its harmful conduct; finance the necessary infrastructure transformation to prevent harms expected to be generated in the future; and pay damages for the climate harms it has caused.[7]

In September 2023, California filed a CFL complaint against six of the biggest oil and gas companies seeking billions of dollars in damages for losses resulting from decades of harmful conduct and public misrepresentations.[8] According to the complaint, the state was forced to plan, "at significant expense, adaptation and mitigation strategies to address climate change-related impacts in order to preemptively mitigate and/or prevent injuries to itself and its residents."[9] These mitigation and adaptation plans have allegedly cost the state billions of dollars and will require "multiples of that figure in the years to come."[10]

California is the largest state and economy to go after the big oil and gas companies to date,[11] but it is neither the first nor the last to join the CFL trend. Just a few months earlier, in June 2023, Multnomah County, Oregon filed a complaint against fossil fuel companies, asserting claims of negligence, public nuisance, fraud, and deceit, for which it sought $50 million for past damages, $1.5 billion for future damages, and an additional $50 billion to establish an abatement fund.[12] A few months after California, the City of Chicago sued several fossil fuel companies, asserting liability "for all past damages the City has incurred, and future damages the City will incur as a result of [the fossil fuel companies'] conduct."[13] More recently, in May 2025, the State of Hawai'i joined

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5. *Id*.

6. Although not all defendants produce both oil and gas, this Article will refer to them collectively without distinction. Notably, all defendants are fossil fuel companies, and the terms "oil and gas companies" and "fossil fuel companies" will be used interchangeably.

7. I propose creating CFL as a new category to underscore the distinctiveness of this campaign, which addresses both past harms and adaptation objectives. For both practical and academic reasons discussed in this Article, I argue that it should remain separate from other private-plaintiff cases or cases focused solely on specific harms.

8. *See generally* Complaint, California v. Exxon Mobil Corp., No. CGC23609134 (Cal. Super. Ct. Sept. 15, 2023) [hereinafter California's Complaint].

9. *Id.* at 118.

10. *Id*.

11. *Attorney General Bonta Announces Lawsuit against Oil and Gas Companies for Misleading Public about Climate Change*, STATE OF CAL. DEP'T OF JUST. (Sept. 16, 2023), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-lawsuit-against-oil-and-gas-companies (announcing that "[w]ith our lawsuit, California becomes the largest geographic area and the largest economy to take these giant oil companies to court").

12. Complaint at 174-75, County of Multnomah v. Exxon Mobil Corp., No. 23CV25164 (Or. Cir. Ct. June 22, 2023) [hereinafter Multnomah's Complaint].

13. Complaint at 154, City of Chicago v. BP p.l.c., No. 2024CH01024 (Ill. Cir. Ct. Feb. 20, 2024) [hereinafter Chicago's Complaint].

the CFL trend, alleging in its complaint that "[w]hile Defendants have promoted and profited from the extraction and consumption of fossil fuels, Hawai'i has spent, and will continue to spend, substantial sums to recover from and adapt to climate change-induced harms."[14] Since 2017, more than two dozen states and municipalities, including New Jersey,[15] Delaware,[16] and Connecticut,[17] have filed similar complaints and more are likely to follow.[18]

Climate activists and scholars have widely supported CFL as a mechanism for holding fossil fuel companies accountable for climate and environmental harms.[19] For instance, at the 2023 United Nations Climate Ambition Summit, representatives of both governments and NGOs applauded California's Governor when he mentioned the state's lawsuit, which had been filed just days earlier.[20] Such enthusiasm, however, might be shortsighted. As this Article observes, CFL is currently exclusively led by U.S. states and is being considered by other wealthy litigants from industrialized and developed countries.[21] Meanwhile,

14. Complaint at 5, Hawai'i v. BP p.l.c., No. 1CCV-25-0000717 (Haw. Cir. Ct. May 1, 2025) [hereinafter Hawai'i's Complaint].

15. Complaint, Platkin v. Exxon Mobil Corp., No. MER-L-001797-22 (N.J. Super. Ct. Oct. 18, 2022) [hereinafter New Jersey's Complaint].

16. Complaint, Delaware v. BP America Inc., No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020) [hereinafter Delaware's Complaint].

17. Complaint, Connecticut v. Exxon Mobil Corp., No. HHDCV206132568S (Conn. Super. Ct. Sep. 14, 2020) [hereinafter Connecticut's Complaint].

18. To date, complaints have been filed by states, municipalities, tribes, cities, and countries. For the full list, *see infra* note 83.

19. *See, e.g.*, Sanjali De Silva, *Supreme Court Rejects Fossil Fuel Companies' Petitions to Hear Appeals in Climate Lawsuits*, UNION OF CONCERNED SCIENTISTS (Apr. 24, 2023), https://www.ucsusa.org/about/news/supreme-court-rejects-fossil-fuel-companies-petitions-hear-appeals-climate-lawsuits (referring to a statement made by Dr. Delta Merner, lead scientist at the Science Hub for Climate Litigation at the Union of Concerned Scientists, who addressed the Supreme Court's rejection of the companies' appeals, saying that "[w]hile no amount of money can compensate for the damage climate change has wrought, a victory in this case could provide some measure of justice and demonstrate the power of litigation as a tool for climate action"); David Gelles, *California Sues Giant Oil Companies, Citing Decades of Deception*, N.Y. TIMES (Sept. 15, 2023), https://www.nytimes.com/2023/09/15/business/california-oil-lawsuit-newsom.html (quoting Richard Wiles, the president of the Center for Climate Integrity, who said that "California's case is the most significant, decisive, and powerful climate action directed against the oil and gas industry in U.S. history"); Alex Brown, *After a Long Slog, Climate Change Lawsuits Will Finally Put Big Oil on Trial*, STATELINE (Apr. 4, 2024), https://stateline.org/2024/04/04/after-a-long-slog-climate-change-lawsuits-will-finally-put-big-oil-on-trial/ (quoting Hannah Wiseman, a law professor at Penn State University, who said that "[h]aving California in the mix could meaningfully alter the course of climate litigation [as] [t]hey have the resources for this type of litigation that other states have been working to amass").

20. *See* UNITED NATIONS, *Climate Ambition Summit Opening* (YouTube, Sept. 20, 2023), https://www.youtube.com/watch?v=wectEQVHt2M [hereinafter The U.N. Climate Ambition Summit].

21. The term "developed countries," in the climate context traditionally refers to forty-three countries listed in Annex I under the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC was signed in 1992 and has near-universal membership (198 Parties). It is the parent treaty of the Paris Agreement (discussed infra note 58). The Conference of the Parties (COP) is the main decision-making body of the UNFCCC and the Paris Agreement. *See* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; *Conference of the Parties (COP)*, UNITED NATIONS CLIMATE CHANGE, https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop (last visited Aug. 6, 2025). Annex I countries are the industrialized countries that were members of the Organisation for Economic Co-operation and Development (OECD)

since the vast majority of the biggest oil companies are either headquartered or registered in developed countries, litigants in developing countries often lack the legal infrastructure, financial means, scientific data, or international jurisdiction to hold these corporations accountable.[22]

Climate change has long been recognized to raise difficult social justice questions in light of the significant inequalities between those who contributed to climate change and those who have been, and will be, most affected by it.[23] CFL, I suggest, could deepen these inequalities. Well-resourced plaintiffs from developed countries, who reaped huge financial advantages from allowing these companies to operate in their territories, may now recover billions, potentially trillions, of dollars in damages from the same companies. Meanwhile, developing countries that contributed close to zero greenhouse gas (GHG) emissions and did not gain any financial advantage from the operation of oil companies, yet whose climate-related injuries are likely to be the most severe and their adaptation needs more urgent, may win nothing.

Consider, for example, a scenario in which the California courts, known for their strong nuisance protection jurisprudence,[24] decide that the defendants in *California v. Exxon* are responsible for the alleged losses and damage and order them to establish an abatement fund as requested in the complaint.[25] Now imagine a scenario where Tuvalu also sues the same oil and gas companies for climate harms allegedly caused by these defendants' activities; yet, it loses for

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in 1992. This categorization has been subjected to criticism. In its recent submission to the International Court of Justice, the United States contested the use of the term "developed" and "developing" states, claiming that:

> By the time the Paris Agreement was adopted, some non-Annex I countries had a larger share of historical emissions and/or higher per capita income than many countries listed in Annex I, rendering the lists in the UNFCCC annexes obsolete for purposes of understanding countries' respective contributions to global warming and their capacities to take measures to address it and help others do so too.

See Request by the United Nations General Assembly for an Advisory Opinion, "Obligations of States in Respect of Climate Change," Written statement of the United States of America, at 47 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-06-00-en.pdf [hereinafter U.S.'s Written Statement on the Obligations of States]. Others have suggested that responsibility be assigned according to emissions per capita or even per capita consumption-based emissions. *See e.g.*, Olle Torpman, *Isolationism and the Equal Per Capita View*, 30 ENVT'L POL. 357, 357-58 (2021). Despite the many problems with the "developed" and "developing" nations paradigm, climate treaties and the vast majority of countries continue to use the terms. As such, this Article uses the term "developed countries" when referring to countries listed in Annex I and "developing countries" for non-Annex I countries, particularly those most climate-vulnerable, as explained in Part III.A.1. For the lists, *see Parties to the United Nations Framework Convention on Climate Change*, U.N. CLIMATE CHANGE, https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states?field_national_communications_target_id%5B515%5D=515 (last visited Aug. 1, 2025).

22. *See infra* Part III.B.

23. Julia Dehm, *Climate Change, 'Slow Violence' and the Indefinite Deferral of Responsibility for 'Loss and Damage,'* 29 GRIFFITH L. REV. 220, 221 (2020).

24. Alexandra B. Klass et al., *Civil Remedies*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 289, 297 (Michael B. Gerrard et al. eds., 3d ed. 2023) ("[T]he law of public nuisance is fairly well developed in California and has been used in the past to recover for lead paint remediation and other environmental harms.").

25. California's Complaint, *supra* note 8, at 122.

reasons having nothing to do with the merits of its claims but rather due to jurisdictional barriers. Should California, the third-largest state in a country responsible for the highest GHG emissions in history and still one of the top emitters today,[26] be compensated by the fossil fuel industry before Tuvalu? A tiny island nation whose contribution does not reach 0.01 percent of global GHG emissions,[27] but which has already begun creating a metaverse replica of itself because it is sinking into the Pacific Ocean?[28]

The litigation inequality and the derivative inequalities that could result from this litigation[29] could have been alleviated had international climate finance mechanisms provided sufficient assistance to developing countries.[30] Yet, negotiations regarding international climate finance are going awry. Developed countries refuse to finance developing countries' mitigation and adaptation with any binding mechanisms,[31] and the current voluntary pledges to which they have agreed fall far behind what is required, called by developing countries "insultingly low."[32] Under these circumstances, developed and major carbon-emitting countries pursuing litigation that seeks to secure potentially billions in damages for themselves risks deepening international injustices and disputes, infusing resentment and mistrust into the already fragile negotiation process,[33] and may even lead to complex inter-state legal proceedings—some of which may already be underway following the recent International Court of Justice (ICJ) advisory opinion on Obligations of States in respect of Climate Change.[34]

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26. Laura Paddison & Annette Choi, *As Climate Chaos Accelerates, Which Countries are Polluting the Most?*, CNN (Jan. 2, 2024), https://www.cnn.com/interactive/2023/12/us/countries-climate-change-emissions-cop28 (placing China as the largest climate polluter and the United States as the second biggest polluter in 2022).

27. Public sitting on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations), Verbatim Record, at 47, CR 2024/51 (Dec. 12, 2024, at 10:00 CET), https://www.icj-cij.org/sites/default/files/case-related/187/187-20241212-ora-01-00-bi.pdf ("Tuvalu's situation is unique, though, because despite producing less than 0.01 percent of greenhouse gas emissions, on the current trajectory of GHG emissions, Tuvalu will disappear completely beneath the waves that have been lapping our shores for millennia.").

28. Lucy Craymer, *Tuvalu Turns to the Metaverse as Rising Seas Threaten Existence*, REUTERS (Nov. 15, 2022), https://www.reuters.com/business/cop/tuvalu-turns-metaverse-rising-seas-threaten-existence-2022-11-15.

29. *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 95-97 (1974) (illustrating the limitations of litigation—particularly within the American legal system—as a tool for redistribution). While Galanter's analysis focuses on domestic inequalities, his insights remain applicable on an international scale.

30. In the twenty-ninth Conference of Parties to the UNFCCC in Azerbaijan, developing countries made clear that they would require 1.3 trillion dollars annually to reach their mitigation and adaptation goals. However, developed countries pledged to transfer 300 billion dollars annually by 2035, creating a rift between the delegations. *See infra* Part III.A.

31. *See infra* Part III.A.2.

32. Martina Igini, *COP29 $300 Billion Climate Finance Pledge an 'Insult', Say Developing Nations, Campaigners*, EARTH.ORG (Nov. 25, 2024) https://earth.org/cop29-300-billion-climate-finance-pledge-an-insult-say-developing-nations-campaigners.

33. *See infra* Part III.A.4.

34. Obligations of States in respect of Climate Change, Advisory Opinion, 2025 I.C.J. Rep. No. 187 (July 23) [hereinafter ICJ Advisory Opinion on the Obligations of States in Respect to Climate Change]; *see infra* Part III.C.

Indeed, CFL is a domestic procedure, yet it is part of a complex and delicate international climate context.

CFL also raises difficult distributive questions with respect to the fossil fuel industry. Although oil and gas companies are valued at trillions of dollars and could undoubtedly compensate the first five, fifteen, or even fifty plaintiffs, at some point, their ability to pay damages to all victims of climate-related losses—especially damages valued in the trillions of dollars—may come to an end.[35] Should climate damages be distributed on a "first-sue, first-served" basis? Is such an approach justified given that the same conduct—decades-long fossil fuel drilling—caused damage to both California and Tuvalu? And is it justified, considering that the primary beneficiaries from these conducts throughout the years have been the former?

If CFL plaintiffs are successful and U.S. states reach large settlements, should they share these awards or keep them for their own adaptation needs? Do entities whose economies reaped a substantive economic advantage from the defendants' activities bear any responsibility toward other countries harmed by those same actions?[36] And why would subnational entities, already struggling to protect their own communities, share their much-needed funds with other countries? In a world of depleting resources and a race for climate resilience: Who owns climate litigation awards?

This Article explores these questions and suggests that while U.S. states and municipalities should continue to file claims to hold fossil fuel companies accountable for their contribution to climate change, the remedial framework requires a more holistic approach that considers the unique international nature of climate harm, and its structural injustice. Given the significant role private law plays in CFL, this Article suggests some initial ideas on how drawing on private law doctrines might provide normative frameworks and help CFL's remedial structure become more just and equitable.

For example, drawing on the class action's pro-rata remedial distribution formula, CFL awards could be distributed on a pro-rata basis so that plaintiffs would receive a significant part of the award, but not the entirety; a portion would be distributed to global reserves for developing countries that are in critical need of replenishment.[37] Such a remedial approach could further integrate CFL and climate change litigation into climate policy and aid in the vindication of environmental rights without exacerbating climate finance disputes and inequalities.

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35. *See infra* Part III.A.5

36. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-103676, FEDERAL OIL AND GAS ROYALTIES: OPPORTUNITIES EXIST TO IMPROVE INTERIOR'S COMPLIANCE PROGRAM (2024), (noting that "[r]oyalties on the sale of oil and gas produced on federal lands are a significant source of federal revenue. From 2012-2022, companies paid the U.S. government $74 billion in royalties"); *see also* LEXIE RYAN, CONG. RSCH. SERV., R46537, REVENUES AND DISBURSEMENTS FROM OIL AND NATURAL GAS LEASES ON ONSHORE FEDERAL LANDS 1 (2025) (explaining that "[i]n states other than Alaska, 40% of revenues arising from oil and gas leasing on federal lands are deposited into the Reclamation Fund, and states other than Alaska receive 50% of revenues from extraction operations in those states.").

37. See *infra* notes 215-218 and accompanying text.

The Article proceeds as follows. Part I opens by providing a broad overview of climate litigation and describing its three main pillars: mitigation, adaptation, and loss and damage. It then presents the recent and growing trend of CFL complaints and lays out their typical causes of action and requested forms of relief.

Part II examines three principal advantages of CFL. First, it addresses the regulatory implications such actions might have even when they do not reach trial. Second, it explores how, by unveiling the fossil fuel industry's deceit, CFL can shift public opinion and change consumption habits. Third, it highlights the distinctive forms of evidence that states and municipalities are able to produce, which could strengthen the efforts of climate litigants worldwide.

Part III is dedicated to the drawbacks of CFL, which have not received sufficient attention thus far.[38] It underscores the decades-long disputes between developed and developing countries on climate finance responsibility, considers the legal barriers that prevent developing countries from suing oil and gas companies, and argues that, in light of those barriers and disputes, CFL could lead to a problematic "first-sue, first-served" finance regime that could increase political tensions; hinder inter-state climate cooperation; and potentially lead to international legal disputes, where states expend valuable time and resources suing one another for climate damages—diverting focus from broader climate goals.

Part IV goes back in time to the tobacco litigation of the 1990s, the "blueprint" on which CFL is based. It explores the monumental victory of government-led litigation over the big tobacco companies, but also describes the negative consequences that this litigation had on developing countries—consequences that have not yet been discussed in the climate litigation context despite their relevance. The Part concludes by suggesting how CFL could inspire a different remedial model that could preserve this type of litigation's advantages and mitigate its disadvantages.

Part V suggests various doctrines that might be more fitting than a "classic" mass tort remedial approach under which only the plaintiff receives the award. It proposes strengthening the linkage between international climate funds and CFL by developing a shared-remedy model. Drawing on class action principles, bankruptcy rationales, and innovative levy mechanisms, it identifies normative foundations for a distributive remedial approach and considers the incentives for CFL litigants to share potential awards.

Finally, Part VI concludes that how we choose to use CFL—whether as a purely domestic tool or as a mechanism for fostering a more cohesive and globally inclusive response to fossil fuel harm—is a difficult decision, and

38. *But see* Kim Bouwer, *Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation*, 9 TRANSNAT'L ENVT'L L. 347, 375-77 (2020) (discussing climate litigation more generally and suggesting that "[t]ort claims of this nature [loss and damage] raise quite significant questions about distributive justice, which sit uncomfortably with the still-controversial status and unsettled meaning of climate loss and damage in the global conversation"); Meinhard Doelle & Sara Seck, *Loss & Damage from Climate Change: from Concept to Remedy?*, 20 CLIMATE POL'Y 669, 673 (2020).

perhaps even a tragic one, given the urgent need for redress among millions of American victims. Nevertheless, if CFL is truly meant to advance climate justice, as the plaintiffs claim, only the latter approach proves sustainable.

I. THE PILLARS OF CLIMATE POLICY AND LITIGATION

A. Mitigation, Adaptation, and Loss & Damage

As climate litigation expands, so do the various ways to classify it.[39] In its broadest categories, I suggest that it can be divided into three main pillars in alignment with international understandings of climate change solutions: mitigation, adaptation, and loss and damage.[40]

According to the Intergovernmental Panel on Climate Change, mitigation, the first pillar, means "implementing policies to reduce greenhouse gas emissions and enhance sinks."[41] Similarly, mitigation litigation seeks to prevent further climate deterioration through governance, regulation, and the reduction of specific emissions.[42] Mitigation litigation can be seen in and outside the United States. For example, in *Massachusetts v. Environmental Protection Agency*, the U.S. Supreme Court held that the EPA has the authority under the Clean Air Act to regulate GHG emissions, which laid the groundwork for future litigation to enforce federal regulations of carbon emissions.[43] Another landmark mitigation case is *Urgenda Foundation v. the Netherlands*, in which the Hague District Court determined that the government must decrease the country's emissions by 25 percent by 2020.[44] In Asia, a famous mitigation case is *Leghari v. Federation of Pakistan*, where a Pakistani farmer succeeded in challenging the government's weak climate policy, which he said violated his fundamental

39. The Sabin Center Database categorizes cases by the type of claims made, the laws they invoke, jurisdictions, and defendants. *See* Sabin Center Database, *supra* note 1. However, even the question of what "climate litigation" is has been a source of debate. *Compare* Sabin Center Database, *Methodology at a Glance*, https://www.climatecasechart.com/methodology ("[C]limate change law, policy, and/or science must be a material issue of law or fact in the case."), *with* Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 J. ENVT'L L. 483, 484 (2018) (explaining that addressing climate litigation in this manner overlooks cases—particularly in the Global South—that do not explicitly frame their claims as 'climate change' cases. Yet, these cases still advance climate goals and make significant contributions to global climate litigation: "'[C]limate change litigation' can happen inadvertently, particularly where this involves small and mundane issues that nevertheless interface with any aspect of domestic climate policy. It is important that we think about litigation 'in the context of' climate change, as well as litigation 'about' climate change, in order to render the invisible visible.").

40. *See* Hari M. Osofsky, *Litigating Climate Change Infrastructure Impacts*, 118 NW. U. L. REV. ONLINE 149, 150 (2023) (noting that these three categories are "areas for needed action that the international climate change regime recognizes").

41. THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 84 (2008), https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf.

42. *See* Mehrad Payandeh, *The Role of Courts in Climate Protection and the Separation of Powers, in* CLIMATE CHANGE LITIGATION: A HANDBOOK 62, 70-72 (Wolfgang Kahl & Marc-Philippe Weller eds., 2021).

43. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

44. RBDHA 24 Juni 2015, HAZA C/09/00456689 (Urgenda Foundation/State of the Netherlands) (Neth).

rights.[45] These landmark cases demonstrate how plaintiffs can use litigation to hold governments accountable for inaction on climate change mitigation.

Unlike mitigation's "ex-ante" character, adaptation is an "ex-post" approach that includes "initiatives and measures to reduce the vulnerability of natural and human systems against actual or expected climate change effects."[46] For example, in *Kivalina v. ExxonMobil*, the Alaskan Native Village of Kivalina sought damages from major oil companies for the costs of relocating their village due to the drastic erosion caused by climate change.[47] In another case, *Lliuya v. RWE AG*, a Peruvian farmer, with the help of a German NGO, sought compensation from a German energy corporation for damages caused by the defendant's role in a glacier melt that risks destroying the plaintiff's town.[48] The plaintiff asked the court to compel the company to reimburse him and the town for the costs they will have to incur for flood protection.[49] Adaptation litigation, therefore, seeks not to prevent further climatic change but to help nations and communities adapt to its impacts.[50]

While mitigation and adaptation agendas are essential and interrelated, mitigation has taken the lead in policy and litigation.[51] There are several reasons for this, including fear that an emphasis on adaptation would undermine mitigation attempts and signal their failure;[52] concern on the part of developed countries that moving to an adaptation policy would result in greater pressure on them to provide aid to developing countries;[53] fear on the part of developing countries that adaptation aid would be at the expense of other development aid;[54] scientific difficulty in assessing the type of adaptation that might be required;[55] and ethical complexity surrounding choices of what should be adapted first.[56]

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45. Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Pak.).

46. THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 41, at 76 ("Various types of adaptation exist, e.g. anticipatory and reactive, private and public, and autonomous and planned. Examples are raising river or coastal dikes, the substitution of more temperature-shock resistant plants for sensitive ones, etc.").

47. Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853-54 (9th Cir. 2012).

48. Essen Landesgericht [Essen LG] [Essen Regional Court] Dec. 15, 2016, Case No. 2 O 285/15 (Ger.). In an interview, Mr. Lliuya explained that "[t]wo glaciers could collapse into the lake, that would cause a big flood wave which would destroy the house of my family and many other houses in Huaraz. This is an unacceptable risk." *See* Dan Collyns, *Peruvian Farmer Demands Climate Compensation from German Company*, THE GUARDIAN (Mar. 16, 2015), https://www.theguardian.com/environment/2015/mar/16/peruvian-farmer-demands-climate-compensation-from-german-company.

49. *See* Complaint at 20, Luciano Lliuya v. RWE AG, Case No. 2 O 285/15 (Essen Regional Court Nov. 23, 2015) (Ger.).

50. Margaux J. Hall & David C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights* Law, 37 YALE. J. INT'L L. 308, 312 (2012).

51. JACOB ELKIN, CLIMATE SCIENCE IN ADAPTATION LITIGATION IN THE U.S. 2 (2022) https://scholarship.law.columbia.edu/sabin_climate_change/192.

52. Michael B. Gerrard, *Introduction*, *in* THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS 3 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012).

53. *Id*. at 4.

54. *Id*.

55. *Id*.

56. *Id*.

However, over time, the intensification of climate damage and the need for large-scale adaptation policies have become unavoidable, and correspondingly, climate adaptation policy and litigation have begun to grow.[57]

An important step in international adaptation policy was the 2015 Paris Agreement,[58] which requires that State parties enhance their "adaptive capacity, strengthening resilience and reducing vulnerability to climate change."[59] Since then, adaptation litigation against public and private entities has sought to ensure that decision makers are aware of updated climate data and force public bodies or private entities to develop new policies that would aid communities and infrastructure in adapting to the new climate reality.[60]

Finally, alongside mitigation and adaptation, which seek to prevent or adapt to prospective harm, the third pillar, loss and damage, concentrates on climate harms that have already occurred. While the definition of loss and damage remains vague under the international climate regime, the United Nations Environment Programme defines it as "the negative effects of climate change that occur despite mitigation and adaptation efforts."[61] Meinhard Doelle and Sara Seck suggested two kinds of harm typically referred to in climate literature as loss and damage.[62] The first "involves permanent harm, or irrecoverable 'loss,' such as the loss of landmass from sea level rise."[63] The second "involves reparable or recoverable 'damage,' such as shoreline damage from storms."[64]

An example of a loss and damage case is *Comer v. Murphy Oil*, in which New Orleans residents sued Murphy Oil for damages from Hurricane Katrina in 2005, alleging that the company's harmful conduct contributed to the disaster.[65] Another example is the *Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp.*, in which Californian fishermen's associations claimed that thirty fossil fuel companies should pay for the harm they caused to California's fisheries.[66]

Until recently, the loss and damage pillar in climate policy has gained far less attention than mitigation and adaptation, and was conflated with adaptation.[67] This was despite the decades-long claims made by developing

57. *Id*.

58. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No 16-1104 (entered into force Nov. 4, 2016) [hereinafter Paris Agreement].

59. *Id*. art. 7 ¶ 1.

60. ELKIN, *supra* note 51, at 16.

61. *About Loss and Damage*, U.N. ENV'T PROGRAMME, https://www.unep.org/topics/climate-action/loss-and-damage/about-loss-and-damage (last visited Aug. 6, 2025).

62. Doelle & Seck, *supra* note 38, at 669.

63. *Id*.

64. *Id.*

65. Comer v. Murphy Oil U.S.A., 585 F.3d 855, 859-61 (5th Cir. 2009).

66. Complaint at 5-6, Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp., CGC-18-571285 (Cal. Super. Ct. Nov. 14, 2018).

67. This is evident in Article 8 of the Paris Agreement. *See* Paris Agreement, *supra* note 58, at art. 8 ¶ 1 ("Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage."). According to

countries who have insisted that the wide-scale and irreparable damage cannot be addressed through adaptation measures; indeed, no adaptation measures can save a sinking island.[68] Conflating loss and damage with adaptation also meant relying on fewer financing sources.[69] Instead of widening the pool of available funding and dedicating new resources specifically for loss and damage in *addition* to adaptation, countries looking for loss and damage redress have been expected to settle for adaptation-purpose funds only.[70] As international environmental scholar Patrick Toussaint explained, "addressing loss and damage as part of adaptation implies that international funding would come from existing rather than new and additional sources, cutting into already limited adaptation finance."[71]

Developed countries, however, refused to acknowledge that loss and damage require separate funds, leading to a rift in the 2015 Paris Agreement conversations.[72] After signing the Agreement, then-U.S. Secretary of State John Kerry stated that the United States is "not against [loss and damage]" but "in favor of framing it in a way that doesn't create a legal remedy."[73] Meanwhile, in its domestic jurisdiction, U.S. states and municipalities were preparing to seek their own legal remedies. In less than two years, American states, counties, and cities would file a long list of complaints against oil and gas companies,

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Julie-Anne Richards et al., "[i]n the UNFCCC negotiations one of the delaying tactics used by developed countries has been to deliberately cause confusion as to what loss and damage is by using the language 'to avert, minimise and address' loss and damage, or by actively conflating loss and damage with 'adaptation and resilience' objectives." *See* JULIE-ANNE RICHARDS ET AL., THE LOSS AND DAMAGE FINANCE LANDSCAPE: A DISCUSSION PAPER FOR THE LOSS AND DAMAGE COMMUNITY ON THE QUESTIONS TO BE RESOLVED IN 2023 FOR AMBITIOUS PROGRESS ON THE LOSS AND DAMAGE FUND 26 (2023) https://us.boell.org/sites/default/files/2023-05/the_loss_and_damage_finance_landscape_hbf_ldc_15052023.pdf. Additionally, art. 8 ¶ 4 includes areas of cooperation for State Parties to address loss and damage but not financial aid for harm caused, instead referring to early warning systems, emergency preparedness, and comprehensive risk assessment—measures that can easily belong to adaptation policy. According to Riccardo Luporini, art. 8 ¶ 4 "weakens the distinctiveness of the new autonomous pillar of the regime." *See* Riccardo Luporini, *Strategic Litigation at the Domestic and International Levels as a Tool to Advance Climate Change Adaptation? Challenges and Prospects*, 4 Y.B. INT'L DISASTER L. ONLINE 202, 210-11 (2021).

68. *See* Patrick Toussaint, *Loss and Damage and Climate Litigation: The Case for Greater Interlinkage*, 30 REV. EUR. COMP. & INT'L ENV'T L. 16, 18 (2021).

69. *Id*.

70. *Id*.

71. *Id*.

72. *See* Dehm, *supra* note 23, at 230 (noting that "[l]oss and damage was one of the most controversial aspects" of the Paris Agreement on Climate Change); *see also* AMNESTY INT'L, CLIMATE-RELATED HUMAN RIGHTS HARM AND THE RIGHT TO EFFECTIVE REMEDY 10 (2024) https://www.amnesty.org/en/documents/ior40/7717/2024/en. Article 8 of the Paris Agreement acknowledges the need to address loss and damage, yet it does not involve any financial guarantees. In an accompanying decision to the Agreement, the COP clarified that Article 8 "does not involve or provide a basis for any liability or compensation," suggesting that any loss and damage support from developed countries would be voluntary. *See* U.N. Framework Convention on Climate Change, Report of the Conference of the Parties on its Twenty-First Session, held in Paris from 30 November to 13 December 2015, U.N. Doc FCCC/CP/2015/10/Add.1, art. 51 (Jan. 29, 2016).

73. *See* Dehm, *supra* note 23, at 230.

demanding billions of dollars for loss and damage awards alongside mitigation and adaptation remedies.[74]

In 2022, at the twenty-seventh meeting of the COP, held in Sharm el-Sheik, the UNFCCC developed State Parties finally agreed to reassess their thirty-year approach to loss and damage and established the Fund for Responding to Loss and Damage (FRLD), which is provided for by voluntary donations from countries.[75] To date, the FRLD has raised $768 million from twenty-seven contributors.[76] However, the loss and damage in developing countries alone is estimated to be around $400 billion and to reach $1 trillion by 2050.[77]

B. The Rise of Climate Finance Litigation

Since 2017, a rapidly growing trend has emerged: Alongside NGOs and individuals seeking injunctions or compensation from states or corporations, American states, cities, counties, and tribes have shifted to the plaintiffs' side.[78] Actions brought by these subnational entities have a mitigation component as they seek both declaratory injunctions recognizing the climate harm created by defendants as well as preventative injunctions meant to abate the harmful conduct.[79] However, they are mainly framed in loss and damage and finance adaptation language, seeking mostly monetary relief.[80]

The plaintiffs in such cases generally allege that the oil and gas companies should pay for their decades-long contribution to climate change caused by their GHG emissions (i.e., cover loss and damage caused),[81] and finance the growing

74. The first complaint in the CFL trend was filed by San Mateo in 2017. *See* Complaint, San Mateo v. Chevron Corp., No. 17CIV03222 (Cal. Super. Ct. July 17, 2017) [hereinafter San Mateo's Complaint]. The suit filed by the Native Village of Kivalina and the City of Kivalina, Alaska against ExxonMobil could also be considered a CFL case, making it the first in the United States, despite the suit's strong focus on adaptation. However, it would take almost a decade for CFL to spread and become a broader litigation trend. *See* Complaint, Native Village of Kivalina v. ExxonMobil Corp., No. 4:08-cv-01138-SBA (N.D. Cal. Feb. 26, 2008); *see also supra* note 47 and accompanying text.

75. For the history of the negotiations leading to the establishment of the FRLD, *see generally* Patrick Toussaint, *Loss and Damage, Climate Victims, and International Climate Law: Looking Back, Looking Forward*, 13 TRANSNAT'L ENVT'L L. 134 (2023).

76. U.N. Framework Convention on Climate Change, Fund for Responding to Loss and Damage, Status of Resources Fifth Meeting of the Board, U.N. Doc. FRLD/B.5/6, at 3 (Apr. 7, 2025) https://unfccc.int/sites/default/files/resource/FRLD_B.5_6_Status_of_resources_report_of_the_Trustee.pdf (last visited Oct. 9, 2025) [hereinafter FRLD's Status of Resources].

77. *Unpacking Finance for Loss and Damage*, HEINRICH BOLL STIFTUNG, https://us.boell.org/en/unpacking-finance-loss-and-damage (last visited Oct. 7, 2025).

78. The Sabin Center Database categorizes these complaints as "[a]ctions seeking money damages for losses," under the category of "adaptation." *See* Sabin Center Database, *supra* note 1.

79. *See infra* Part I.B.2.

80. *Id*.

81. *See, e.g.*, Complaint at 93, City of Hoboken v. Exxon Mobil Corp., No. HUD-L-003179-20 (N.J. Super. Ct. Sep. 2, 2020) [hereinafter Hoboken's Complaint] (alleging that the City "has already suffered devastating economic losses as a result of Defendants' conduct," including, for example, "[h]undreds of millions of dollars in damages when Hurricane Irene and Superstorm Sandy—whose emergence and intensity were correlated to anthropomorphic climate change—inundated over 80 [percent] of the City and destroyed both public and private infrastructure . . . includ[ing] a massive drop-off in business activity in the City and reduction in City tax revenue").

adaptation needed to protect the public from future damages related to health, displacement, and reshaping maritime territories (i.e., establish funds for adaptation).[82]

According to the Sabin Center Database, thirty-six complaints filed to date fit within what I term CFL, twenty-three of which were filed since 2020.[83] Although other countries have expressed an intent to file similar complaints, thus far, the phenomenon of government-led CFL appears to be limited to the United States.[84] As I now turn to illustrate, these complaints all rely on similar causes

82. *See, e.g.*, Connecticut's Complaint, *supra* note 17, at 44 (seeking relief "for past, present and future deceptive acts and practices that will require future climate change mitigation, adaptation, and resiliency").

83. Complaints are listed in reverse order of filing based on the date of the initial complaint. Some were filed separately but were coordinated by the courts for procedural efficiency, including certain California local governments, Washington tribal complaints, Maryland local governments, and Puerto Rico municipalities; amended complaints are not included: Hawai'i's Complaint, *supra* note 14; Complaint, Town of Carrboro v. Duke Energy Corp., No. 24CV003385-670 (N.C. Super. Ct. Dec. 4, 2024); Complaint, Maine v. BP p.l.c., No. PORSC-CV24-442 (Me. Super. Ct. Nov. 26, 2024) ; Complaint, Estado Libre Asociado de Puerto Rico v. Exxon Mobil Corp., No. SJ2024CV06512 (P.R. TPI Jul. 15, 2024); Chicago's Complaint, *supra* note 13; Complaint, Bucks County v. BP p.l.c., No. 2024-01836-0000 (Pa. C.P. Mar. 25, 2024) [hereinafter Bucks County's Complaint]; Multnomah's Complaint, *supra* note 12; California's Complaint, *supra* note 8; Complaint, Makah Indian Tribe v. Exxon Mobil Corp., No. 23-2-25216-1 (Wash. Super. Ct. Dec. 20, 2023) [hereinafter Makah Indian Tribe's Complaint]; Complaint, Shoalwater Bay Indian Tribe v. Exxon Mobil Corp., No. 23-2-25215-2 (Wash. Super. Ct. Dec. 20, 2023) [hereinafter Shoalwater Bay Indian Tribe's Complaint]; Complaint, Municipality of San Juan v. Exxon Mobil Corp., No. 3:23-cv-01608 (D.P.R. Dec. 13, 2023) [hereinafter San Juan's Complaint]; New Jersey's Complaint, *supra* note 15; Hoboken's Complaint, *supra* note 81; Complaint, Municipalities of Puerto Rico v. Exxon Mobil Corp., No. 3:22-cv-01550 (D.P.R. Nov. 22, 2022) [hereinafter Municipalities of Puerto Rico's Complaint]; Complaint, Anne Arundel County v. BP p.l.c., No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021) [hereinafter Anne Arundel's Complaint]; Complaint, City of Annapolis v. BP p.l.c., No. C-02-CV-21-000250 (Md. Cir. Ct. Feb. 22, 2021) [hereinafter Annapolis's Complaint]; Complaint, County of Maui v. Sunoco LP, No. 2CCV-20-0000283 (Haw. Cir. Ct. Oct. 12, 2020) [hereinafter Maui's Complaint]; Complaint, City and County of Honolulu v. Sunoco LP, No. 1CCV-20-0000380 (Haw. Cir. Ct. Mar. 9, 2020) [hereinafter Honolulu's Complaint]; Complaint, District of Columbia v. Exxon Mobil Corp., No. 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020) [hereinafter D.C.'s Complaint]; Complaint, Minnesota v. Am. Petroleum Inst., No. 62-CV-20-3837(Minn. Dist. Ct. June 24, 2020) [hereinafter Minnesota's Complaint]; Delaware's Complaint, *supra* note 16; Complaint, City of Charleston v. Brabham Oil Co., No. 2020CP1003975 (S.C. Ct. Com. Sep. 9, 2020) [hereinafter Charleston's Complaint]; Connecticut's Complaint, *supra* note 17; Complaint, Mayor and City Council of Baltimore v. BP p.l.c., No. 24-C-18-004219 (Cir. Ct. Balt. City July 20, 2018) [hereinafter Baltimore's Complaint]; Complaint, Rhode Island v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018) [hereinafter Rhode Island's Complaint]; Complaint, King County v. BP p.l.c., No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018); Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc., No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018); Complaint, City of Richmond v. Chevron Corp., No. C18-00055 (Cal. Super. Ct. Jan. 22, 2018) [hereinafter Richmond's Complaint]; Complaint, City of New York v. BP p.l.c., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018); Complaint, County of Santa Cruz v. Chevron Corp., No. 17CV03242 (Cal. Super. Ct. Dec. 20, 2017); Complaint, City of Santa Cruz v. Chevron Corp., No. 17CV03243 (Cal. Super. Ct. Dec. 20, 2017); Complaint, California v. BP p.l.c. (San Francisco), No. CGC-17-561370 (Cal. Super. Ct. Sep. 19, 2017); Complaint, City of Oakland v. BP p.l.c., No. RG17875889 (Cal. Super. Ct. Sep. 19, 2017) [hereinafter Oakland's Complaint]; Complaint, City of Imperial Beach v. Chevron, No. C17-01227 (Cal. Super. Ct. July 17, 2017); Complaint, County of Marin v. Chevron Corp., No. CIV1702586 (Cal. Super. Ct. July 17, 2017); San Mateo's Complaint, *supra* note 74.

84. In 2019, Toronto's Infrastructure and Environment Committee stated that "given recent research highlighting the role of oil companies' impact on climate change and their involvement in decades-long

of action and request similar forms of relief, even though they vary depending on the circumstances of each case.[85]

1. Climate Finance Litigation: Causes of Action

CFL claims submitted thus far include some or all of the following five causes of action: public and private nuisance, violations of state or federal consumer protection laws, trespass, negligence and product liability, and unjust enrichment.[86] The following explains these causes of action using the complaints as examples.

One type of count is nuisance claims, which fall into two types: public and private. Under the public nuisance theory, plaintiffs claimed that by contributing to climate change, defendants had harmed public health, property, and the environment.[87] For example, in *California v. Exxon*, California alleged that the defendants created "harmful climate-related conditions" throughout the state, including "extreme heat, drought, increased wildfire risk, air pollution, flooding, damage to agriculture, sea level rise, coastal erosion, habitat destruction, and loss of ecosystems. . . ."[88] These conditions, the state claimed, had "compounding effects in frontline communities," leading to health issues, obstruction of free use of property, and interference with the ability to enjoy life and property.[89] In a similar vein, Chicago claimed in a suit against BP and others that by contributing to extreme climate conditions, the defendants are responsible for climate-related harms that "obstruct and interfere with rights common to the public, including . . . the public health, the public safety, the public peace, the public comfort, and the public convenience."[90]

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efforts to cast doubt on climate science, City Council should explore joining New York, San Francisco, and other major metropolitan cities in taking major oil companies to court." However, so far, no claims have been filed. CITY OF TORONTO INFRASTRUCTURE AND ENV'T COMM., DECISION IE4.4 PURSUING COMPENSATION FOR THE COST OF CLIMATE CHANGE TO THE CITY OF TORONTO 2 (2019), https://www.toronto.ca/legdocs/mmis/2019/ie/bgrd/backgroundfile-131814.pdf.

85. The cases are at various stages of litigation. Some have advanced in state courts, while others are awaiting final rulings, and several have been dismissed. This Article does not delve into the specifics of their proceedings but focuses on the broader phenomena.

86. Other causes of action, such as antitrust, public trust, and civil conspiracy, are less common but have also been intertwined in several complaints and been pursued simultaneously in CFL. *See, e.g.*, Rhode Island's Complaint, *supra* note 83, at 135-38 (public trust), Municipalities of Puerto Rico's complaint, *supra* note 83, at 228-30 (antitrust), Chicago's Complaint, *supra* note 13, at 171-73 (civil conspiracy).

87. *See e.g.*, Annapolis's Complaint, *supra* note 83, at 145 (asserting that Defendants "individually and in concert with each other, by their affirmative acts and omissions, have created, contributed to, and/or assisted in creating, conditions that significantly interfere with rights general to the public, including public health, public safety, the public peace, the public comfort, and the public convenience"). *See also* Hanoch Dagan & Avihay Dorfman, *Public Nuisance for Private Persons*, 74 U. TORONTO L.J. 198, 202 (2024) (arguing that this wide use is justiciable as "the public nuisance tort plays an important role in establishing and protecting fundamentally private rights to fundamentally public spaces").

88. California's Complaint, *supra* note 8, at 119.

89. *Id*. at 119-20.

90. Chicago's Complaint, *supra* note 13, at 164.

Under the private nuisance theory, plaintiffs have claimed that GHG emissions or pollutants interfered with state property rights by contributing to climate change, which damages or diminishes the value of their property.[91] In 2018, the City of Richmond, California, argued that property within its borders "ha[d] been injured and will be injured by rising sea levels" and "more frequent and extreme" drought, precipitation events, heat waves, and wildfires is likely to occur.[92]

Another species of claim that the majority of CFL plaintiffs assert involves fraud, including the violation of state and federal consumer protection laws.[93] In these claims, the plaintiffs argue that the defendants have engaged in deceptive practices by misleading consumers and investors about the risks of climate change associated with their products, including false advertising, fraud, or violations of consumer protection statutes.[94] For example, Multnomah County, Oregon, alleged that Exxon Mobil and other fossil fuel industry defendants "fraudulently concealed their knowledge that the continued and increased use of their products would cause climate shifts resulting in extreme heat waves and heat domes of greater than 40°F over the mean temperature."[95] The County's complaint asserted that because of this misrepresentation and deceit, the County and its residents were unprepared for massive climate-related harms.[96]

A third type of claim that CFL plaintiffs frequently raise is trespass, which categorizes GHG or pollutants as a physical invasion or interference with the plaintiff's property.[97] New Jersey, for example, claimed that it did not give the fossil fuel companies "permission" to have "floodwaters, extreme precipitation, saltwater encroachment, and other materials . . . enter the State's property and natural resources."[98]

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91. *See, e.g.*, Hawai'i's Complaint, *supra* note 14, at 177 ("State property has been and will be impaired by private nuisances from Climate-Related Harms caused by Defendants' tortious conduct . . . which materially diminishes the values of such property to the State and the public."). The majority of the complaints include private and/or public nuisance. *See, e.g.*, Oakland's Complaint, *supra* note 83 (including solely public nuisance, not private nuisance, claims); Baltimore's Complaint, *supra* note 83, at 107-15; Rhode Island's Complaint, *supra* note 83, at 115-20.

92. Richmond's Complaint, *supra* note 83, at 103.

93. *See, e.g.*, Baltimore's Complaint, *supra* note 83, at 128-30; Connecticut's Complaint, *supra* note 17, at 36-43; Charleston's Complaint, *supra* note 83, at 133-36; Delaware's Complaint, *supra* note 16, at 209-16.

94. *See, e.g.*, Baltimore's Complaint, *supra* note 83, at 129 (alleging that the defendants were "making false and misleading statements regarding the known severe risks posed by their fossil fuel products," as well as "making false representations and misleading omissions of material fact regarding the known severe risks posed by their fossil fuel with the intent that consumers would rely on those representations.").

95. Multnomah's Complaint, *supra* note 12, at 173.

96. *Id*. at 158.

97. *See, e.g.*, San Mateo's Complaint, *supra* note 74, at 96-97; Baltimore's Complaint, *supra* note 83, at 126-28; Rhode Island's Complaint, *supra* note 83, at 133-35; Maui's Complaint, *supra* note 83, at 132-33; Charleston's Complaint, *supra* note 83, at 132-33; Delaware's Complaint, *supra* note 16, at 203-04; Hoboken's Complaint, *supra* note 81, at 131-36; Honolulu's Complaint, *supra* note 83, at 113-15; Anne Arundel's Complaint, *supra* note 83, at 163-65; Annapolis's Complaint, *supra* note 83, at 158-60; Multnomah's Complaint, *supra* note 12, at 173-74; Bucks County's Complaint, *supra* note 83, at 166-69.

98. New Jersey's Complaint, *supra* note 15, at 172.

Other prevalent causes of action are negligence and strict products liability, including the failure to warn.[99] The City of Annapolis alleged that the defendants were both strictly liable and negligent for failing to warn "any consumers or any other party of the climate effects that inevitably flow from the intended or foreseeable use of their fossil fuel products," causing Annapolis to sustain injuries and incur substantial expenses.[100]

Finally, a fifth notable cause of action is unjust enrichment. The core of this theory is that the oil and gas companies have been unjustly enriched at the public's expense and should, therefore, be ordered to provide restitution or disgorgement of profits obtained through their allegedly unlawful conduct.[101] Chicago, for example, claimed unjust enrichment by asserting that the companies "have and continue to reap monetary benefits as a direct result of [their] deceptive marketing campaign. . . ."[102] Unlike the other causes of action mentioned above, unjust enrichment is less commonly used, at least explicitly. Nevertheless, as the next Subpart illustrates, almost all complaints refer to it indirectly by requesting disgorgement of profits—a remedy granted in cases of unjust enrichment.[103] Since unjust enrichment does not require proof of harm or causation, it has received increasing attention in the literature as a promising strategy in the battle against the fossil fuel industry, and it might become more common in future proceedings.[104]

2. Climate Finance Litigation: Remedies

The similarity in their causes of action has led CFL plaintiffs to ask courts for similar forms of monetary relief meant to cover loss and damage and adaptation measures.[105] For that purpose, plaintiffs seek compensatory damages, the establishment of abatement funds, punitive damages, civil penalties, and disgorgement of profits.[106] Combined, these remedies can reach trillions of dollars. In addition to monetary remedies, CFL plaintiffs also typically seek

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99. *See, e.g.*, Baltimore's Complaint, *supra* note 83, at 115-26; Rhode Island's Complaint, *supra* note 83, at 120-133; Maui's Complaint, *supra* note 83, at 127-32; Charleston's Complaint, *supra* note 83, at 127-31; Delaware's Complaint, *supra* note 16, at 198-202; Minnesota's Complaint, *supra* note 83, at 74-77; Anne Arundel's Complaint, *supra* note 83, at 158-63; Annapolis's Complaint, *supra* note 83, at 153-59; Municipalities of Puerto Rico's Complaint, *supra* note 83, at 233-42; New Jersey's Complaint, *supra* note 15, at 159-63; San Juan's Complaint, *supra* note 83, at 227-36; Makah Indian Tribe's Complaint, *supra* note 83, at 95-97; Shoalwater Bay Indian Tribe's Complaint, *supra* note 83, at 95-97; California's Complaint, *supra* note 8, at 127-32; Multnomah's Complaint, *supra* note 12, at 144-55; Bucks County's Complaint, *supra* note 83, at 144-55; Chicago's Complaint, *supra* note 13, at 149-59.

100. Annapolis's Complaint, *supra* note 83, at 154-56; *see also* Honolulu's Complaint, *supra* note 83, at 108-10 (strict liability failure to warn), 111-13 (negligent failure to warn).

101. *See, e.g.*, Chicago's Complaint, *supra* note 13, at 173-75; Municipalities of Puerto Rico's Complaint, *supra* note 83, at 246; San Juan's Complaint, *supra* note 83, at 240.

102. Chicago's Complaint, *supra* note 13, at 174.

103. *See infra* notes 123-31 and accompanying text.

104. *See generally* Maytal Gilboa et al., *Climate Change as Unjust Enrichment*, 112 GEO. L.J. 1039 (2024).

105. *See infra* notes 108-135 and accompanying text.

106. *Id*.

declaratory judgments affirming the companies' liability for their role in climate change, preventative injunctions meant to mitigate the harmful conduct, and injunctive relief ordering them to disclose their research.[107]

The most straightforward monetary remedy CFL plaintiffs seek is to recover the expenses they incurred due to climatic conditions or events.[108] In most cases, the plaintiffs seek compensatory damages for losses estimated to be in the tens of millions and even billions of dollars, with specific amounts to be proven at trial.[109] In some cases, the amount of compensation requested is specified. For instance, in *Multnomah*, the complaint asserted damages of $50 million to compensate for the costs of actions the County claimed it had already taken to protect its residents' health, safety, and property from climate-related harms and losses it had already incurred in doing so.[110]

In addition to seeking compensation for past expenses and harm, climate plaintiffs seek to establish funds to finance projects and initiatives to alleviate the impacts of climate change and adapt to its effects.[111] Like the tobacco litigation settlements,[112] which included funds for public health initiatives and anti-smoking campaigns, climate funds are meant to cover the costs of infrastructure improvements, community resilience projects, and other measures necessary to adapt to and alleviate the adverse impacts of climate change.[113] For example, in its action against Exxon Mobil and others, New Jersey sought to establish a fund to cover the costs of "fortifying public infrastructure from storm damage, natural resource restoration, funding local climate resilience measures,

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107. *See infra* notes 133-135 and accompanying text.

108. *See e.g.*, Maui's Complaint, *supra* note 83, at 102, 134 (alleging that the defendants are liable for "increased frequency and intensity of extreme weather events in the County, including hurricanes and tropical storms, 'rain bomb' extreme precipitation events, drought, heatwaves, wildfires, and others; ocean warming and acidification that will injure or kill coral reefs in the County's waters; habitat loss of endemic species in the County, and range expansion of invasive and disease carrying-pest species; diminished availability of freshwater resources; and the cascading social, economic, and other consequences of those environmental changes" and requesting "compensatory damages in an amount according to proof").

109. *See e.g.*, California's Complaint*, supra* note 8, at 5 (noting that "the State and its residents have spent, and will continue to spend, billions of dollars to recover from climate change-induced superstorms and wildfires").

110. Multnomah's Complaint, *supra* note 12, at 174.

111. *See e.g.*, Shoalwater's Complaint, *supra* note 83, at 97 (requesting to "[o]rder Defendants to abate the nuisance they created, including but not limited to funding an abatement fund to be managed by the Tribe to remediate and adapt its Reservation lands, natural resources, and infrastructure"); Connecticut's Complaint, *supra* note 17, at 45 (requesting the court issue "[a]n order that ExxonMobil fund a corrective education campaign to remedy the harm inflicted by decades of disinformation, to be administered and controlled by the State or such other independent third party as the Court may deem appropriate").

112. *See infra* Part IV.

113. *See e.g.*, Maui's Complaint, *supra* note 83, at 117-18 ("The County has planned and is planning, at significant expense, adaptation and mitigation strategies to address climate change related impacts in order to preemptively mitigate and/or prevent injuries to itself and its citizens. Those efforts include, but are not limited to, preparation of a Multi-Hazard Mitigation Plan . . . Additionally, the County has incurred and will incur significant expense in educating and engaging the public on climate change issues, and to promote and implement policies to mitigate and adapt to climate change impacts, including promoting energy and water efficiency and renewable energy.").

and rebuilding natural barriers to protect communities from sea-level rise and climate-influenced storms."[114] Comparatively, Multnomah's complaint is more specific and requests "at least $50 billion" in its abatement fund.[115]

A third monetary remedy is punitive damages, generally meant to address the "highly culpable wrongdoing" of the defendants.[116] Plaintiffs have sought punitive damages in conjunction with various causes of action. For example, in *Honolulu v. Sunoco*, the City and County of Honolulu sought punitive damages for public and private nuisance violations, negligent and strict liability for failure to warn, and trespass, all of which, they alleged, were committed with "actual malice."[117] Although punitive damages are rarely granted, when they are awarded they are typically "eye-poppingly large," so they can be felt by profitable companies.[118] Thus, although the award of punitive damages in CFL is at the court's discretion, if awarded, such damages could reach staggering amounts.[119]

In many CFL complaints, the plaintiffs also sought civil penalties for violations of law.[120] For example, in *Minnesota v. American Petroleum Institute*, Minnesota sought "maximum civil penalties pursuant to Minnesota Statutes" for the defendants' climate-related misconduct.[121] Since the maximum civil penalty is $25,000, and the state requested a civil penalty "for each separate violation of Minnesota law" the plaintiffs' award could easily reach tens of millions of dollars, given that violations allegedly occurred on a daily basis.[122]

Another monetary remedy that CFL plaintiffs frequently seek is the disgorgement of profits.[123] The goal of disgorgement is to strip fossil fuel companies of the financial gains obtained through their allegedly harmful and

114. New Jersey's Complaint, *supra* note 15, at 193-94.

115. Multnomah's Complaint, *supra* note 12, at 175 (requesting a compensation award for future damages of "no less than $1.5 Billion." The total amount requested in the complaint is no less than $51.5 billion).

116. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 170 (2020).

117. Honolulu's Complaint, *supra* note 83, at 104, 108, 110, 113-14.

118. GOLDBERG & ZIPURSKY, *supra* note 116, at 169.

119. DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 186 (5th ed. 2019) (quoting Seltzer v. Morton, 154 P.3d 561, 597 (Mont. 2007) ("[P]unitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.").

120. *See, e.g.*, D.C.'s Complaint, *supra* note 83, at 77; Connecticut's Complaint, *supra* note 17, at 8; New Jersey's Complaint, *supra* note 15, at 194; Chicago's Complaint, *supra* note 13, at 184.

121. Minnesota's Complaint, *supra* note 83, at 83.

122. *See id.*; MINN. STAT. § 8.31(3) (2024).

123. *See, e.g.*, Baltimore's Complaint, *supra* note 83, at 130; Rhode Island's Complaint, *supra* note 83, at 140; Maui's Complaint, *supra* note 83, at 134; Connecticut's Complaint, *supra* note 17, at 8; Charleston's Complaint, *supra* note 83, at 136; Minnesota's Complaint, *supra* note 83, at 83; Honolulu's Complaint, *supra* note 83, at 115; Anne Arundel's Complaint, *supra* note 83, at 169; Annapolis's Complaint, *supra* note 83, at 164; Municipalities of Puerto Rico's Complaint, *supra* note 83, at 246; New Jersey's Complaint, *supra* note 15, at 194; San Juan's Complaint, *supra* note 83, at 240; Bucks County's Complaint, *supra* note 83, at 171; Chicago's Complaint, *supra* note 13, at 184.

deceptive practices.[124] The Municipalities of Puerto Rico, for example, claimed that:

> Defendants' conduct was so vile, base, and contemptible that it would be looked down upon and despised by reasonable people, justifying an award of punitive and exemplary damages in an amount subject to proof at trial, and justifying equitable disgorgement of all profits Defendants obtained through their unlawful and outrageous conduct.[125]

In the *Restatement (Third) of Torts*, "profit" is defined as the "used value of the property taken, proceeds from the sale or exchange of the property taken, and 'consequential gain.'"[126] "Disgorgement" refers to "an award of profits that exceeds the market value of what was taken from plaintiffs."[127] The *Restatement* also states that disgorgement of net profits can be awarded where a defendant is "a conscious wrongdoer" or acted as "a defaulting fiduciary without regard to notice of fault."[128] Other defendants who can be found liable for disgorgement of profits are those who are "substantially responsible for their own enrichment."[129] Hence, the sums awarded could potentially exceed the plaintiffs' damages and could even be awarded if the plaintiff has not suffered any damage,[130] making it a very attractive remedy amongst plaintiffs.[131]

Alongside these and other monetary remedies,[132] CFL complaints also seek equitable relief, including the "abatement of the nuisances complained of";[133]

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124. *See e.g.*, Connecticut's Complaint, *supra* note 17, at 44 (seeking an order "pursuant to Conn. Gen. Stat. § 42-100 directing ExxonMobil to disgorge all revenues, profits, and gains achieved in whole or in part through the unfair acts or practices complained of herein").

125. Municipalities of Puerto Rico's Complaint, *supra* note 83, at 234.

126. LAYCOCK & HASEN, *supra* note 119, at 537 (referring to RESTATEMENT (THIRD) OF TORTS: RESTITUTION AND UNJUST ENRICHMENT § 51(5)(a) (AM. L. INST. 2010)).

127. LAYCOCK & HASEN, *supra* note 119, at 537. According to Laycock & Hasen, the *Restatement (Third)* recognizes the word "but doesn't actually use it in its own explanations of how to measure recovery. The reporter prefers to speak simply of 'restitution' and to keep always in mind that the measure of restitution will depend, in substantial part, on defendant's culpability." *See id.; see also* Connecticut's Complaint, *supra* note 17, at 44 (requesting both restitution for adaptation as well as disgorgement of all profits).

128. LAYCOCK & HASEN, *supra* note 119, at 538 (quoting RESTATEMENT (THIRD), *supra* note 126 § 51(4)).

129. *Id*.

130. *Id*. at 682.

131. This slightly weakens the claim made by scholars that unjust enrichment is uncommonly raised. Although the plaintiffs do not expand on unjust enrichment, disgorgement of profits has been present in these lawsuits since 2017. *See* Gilboa et al., *supra* note 104, at 1045 (pointing out that "the application of the principle of unjust enrichment in climate litigation is still in its early stages"). It is also questionable whether one can argue for unjust enrichment without tort, as offered by Gilboa et al. According to Laycock and Hasen "talk of waiving the tort is quite misleading. If plaintiff really waived the tort, she would have nothing left to sue for; it is the tort that makes defendant's enrichment unjust." *See* LAYCOCK & HASEN, *supra* note 119, at 539.

132. Other, albeit less frequent, monetary remedies, include requesting the court order defendants to fund a corrective education campaign, *see, e.g.*, Connecticut's Complaint, *supra* note 17, at 45; Minnesota's Complaint, *supra* note 83, at 82, and treble damages (asking the court to triple the damages); *see, e.g.*, Charleston's Complaint, *supra* note 83, at 136; Hoboken's Complaint, *supra* note 81, at 144.

133. *See, e.g.*, Anne Arundel's Complaint, *supra* note 83, at 169; Annapolis's Complaint, *supra* note 83, at 164; Baltimore's Complaint, *supra* note 83, at 130.

"temporary and permanent equitable relief . . . to prevent further pollution, impairment and destruction of the natural resources";[134] as well as injunctive relief compelling defendants to disclose their internal documents and studies as evidence that the industry knew about the climatic risk it was creating.[135]

II. ADVANTAGES OF CLIMATE FINANCE LITIGATION

As demonstrated in the previous Part, CFL bears meaningful advantages, and climate activists have widely supported the rising trend to hold oil and gas giants accountable and make them pay for the harm they have caused.[136] However, even if not all litigation reaches final judgment, CFL holds the potential to promote climate justice in other ways. First, like the tobacco and opioids cases, orchestrated lawsuits filed by multiple states increase the chances of reaching a robust settlement with a regulatory component.[137] Second, regardless of CFL's results, there is immense value in changing public opinion, which, despite positive trends in recent years, could regress to climate change-denial under the current administration, which has indicated its intent to halt these legal actions.[138] Third, and related to the second point, CFL, which compiles complex scientific data and "translates" it into a more accessible language, allows the public to be more engaged regarding the defendants' shared responsibility for climate disasters.[139] This information can then be used by other potential litigants worldwide. I explore all three advantages in the following.

A. Settlement and Regulation

The first and perhaps most obvious advantage that can arise from CFL is the financial threat it poses to oil giants, even if a final judgment is not entered

134. *See, e.g.*, California's Complaint, *supra* note 8, at 124.

135. *See* Connecticut's Complaint, *supra* note 17, at 44-45; Minnesota's Complaint, *supra* note 83, at 82.

136. *See supra* note 19 and accompanying text.

137. In 1998, fifty-two state and territory attorneys general signed the Master Settlement Agreement (MSA) with major tobacco companies to resolve lawsuits over smoking-related healthcare costs, with over forty-five companies ultimately settling. *See The Master Settlement Agreement*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement (last visited Aug. 12, 2025) [hereinafter MSA]. I discuss this in *infra* Part IV. Further, on July 21, 2021, a bipartisan coalition of attorneys general finalized a $26 billion settlement with Johnson & Johnson and three major pharmaceutical distributors—AmerisourceBergen, Cardinal Health, and McKesson—resolving claims over their role in the opioid crisis and requiring business reforms, with negotiations led by a fourteen-state executive committee. *See Opioids*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/issues/opioids (last visited April 26, 2025).

138. *See, e.g.*, Exec. Order No. 14 260, Protecting American Energy from State Overreach, 90 Fed. Reg. 15513 (Apr. 14, 2025) (directing the Attorney General to challenge and halt enforcement of state laws and causes of action deemed burdensome to domestic energy production). It is too soon to assess the full impact of the executive order, as its implications are varied. Nonetheless, states and municipalities have continued to file new cases after the order was issued, and the order itself is being contested in the courts.

139. *See, e.g.*, *U.S. Billion-Dollar Weather and Climate Disasters*, NOAA NATIONAL CTRS. FOR ENV'T INFO., (May 12, 2025), https://www.ncei.noaa.gov/access/billions ("In 2024, there were 27 confirmed weather/climate disaster events with losses exceeding $1 billion each to affect United States.").

by a court. U.S. states and municipalities, with all their financial and regulatory power, present risks to the industry that are much more substantial than those of any non-governmental plaintiff in terms of reputational damage, economic loss, regulatory restraints, and procedural barriers.[140] In the 1990s tobacco litigation campaign, state lawsuits against the tobacco industry, based on grounds such as misrepresentation, deceptive advertising, public nuisance, and unjust enrichment—alleging that these practices contributed to the epidemic of smoking-related health problems—placed such a heavy financial burden on the companies that they began to settle in just a couple of years.[141] The same could happen via concentrated CFL efforts.

Settlements would give states and municipalities much-needed funds to allow hundreds of millions of Americans to improve their resilience in future climate disasters and to compensate them for losses and damages they have already suffered.[142] But settlements could also include a regulatory component similar to previous mass tort settlements.[143] CFL plaintiffs seeking to abate public nuisance, could insist that the companies significantly reduce their GHG emissions and transform their operations to clean energy. Additionally, states might insist that companies be more transparent about their products and the hazards they present to reduce consumption.[144] Plaintiffs can also demand, as

140. James R. Copland, *Trial Lawyers, Inc.: Think Globally, Sue Locally*, MANHATTAN INST. (Feb. 17, 2021), https://manhattan.institute/article/trial-lawyers-inc-think-globally-sue-locally ("As plaintiffs in civil lawsuits for damages, governments' sheer size creates potentially enormous dollar liability—and generates substantial pressure on defendants to settle. That's true even for the largest corporations, as settlements with tobacco and pharmaceutical companies have shown."); Mia Lin, *Is Meta the next Big Tobacco? How State Attorneys General Can Use Consumer Protection Litigation to Enforce Corporate Accountability,* 15 NE. U. L. REV. 37, 64 (2023) (discussing the powers of attorneys general to use regulatory power to pressure defendants); Sharon Yadin, *Regulatory Shaming and the Problem of Corporate Climate Obstruction*, 60 HARV. J. ON LEGIS. 337, 343 (2023) (discussing regulatory climate shaming as a useful tool "for offsetting corporate climate obstruction practices.").

141. *See infra* Part IV.A.

142. The awards could potentially be distributed amongst victims. *See, e.g.*, James Ward & Paris Barraza, *California Gas Gouging Lawsuit Settlements Distributed*, PALM SPRINGS DESERT SUN (May 13, 2025), https://www.desertsun.com/story/news/nation/california/2025/05/13/california-gas-gouging-lawsuit-settlements-distrubited/83600551007 (noting that California drivers in certain counties received payments from a $50 million settlement resolving allegations that gas trading firms manipulated gasoline prices in 2015). Awards can also benefit citizens more broadly through dedicated funds and other adaptation projects.

143. The 2021 national opioid settlements included several regulatory-like requirements, including the companies' obligation to "[t]erminate customer pharmacies' ability to receive shipments, and report those companies to state regulators, when they show certain signs of diversion"; "[p]rohibit sales staff from influencing decisions related to identifying suspicious opioid orders"; and "[e]stablish a centralized independent clearinghouse to provide all three distributors and state regulators with aggregated data and analytics about where drugs are going and how often, eliminating blind spots in the current systems used by distributors." *See Opioids*, *supra* note 137.

144. Under the MSA, tobacco companies were required to create and organize a foundation meant for educational purposes, and one of its functions was to carry out a "nationwide sustained advertising and education program to (A) counter the use by Youth of Tobacco Products, and (B) educate consumers about the cause and prevention of diseases associated with the use of Tobacco Products." *See* NAT'L ASS'N OF ATT'YS GEN., MASTER SETTLEMENT AGREEMENT 44 (2019), https://www.naag.org/wp-content/uploads/2020/09/2019-01-MSA-and-Exhibits-Final.pdf. This is already included in some of the complaints. *See supra* note 132.

part of any settlement, that companies disclose their internal research and reports, which could be valuable to the entire international community.[145]

Additionally, CFL could have a regulatory impact even if a settlement is not reached. When discussing the importance of climate litigation of any kind, scholars have observed that "regardless of the outcome of climate change lawsuits, merely filing them has significant implications for policy making in terms of framing, generating information, and agenda setting" for policy makers.[146] These litigations create momentum for regulators on a national and international level.[147] Thus, even unsuccessful CFL claims can be highly effective in inducing robust regulatory action.[148]

B. Changing Public Opinion by Unveiling Corporate Deceit

Another clear advantage of CFL is opening the public's eyes with respect to the oil and gas industry and climate change. CFL complaints describe how oil and gas companies willfully concealed the harm caused by their activities,[149] as well as used "green-washing" strategies meant to mislead the public into believing that their products are not harmful to the environment.[150] As Kysar observed, the "extent of corporate deceit" revealed through litigation caused the shift in the "politics of tobacco" in America: "That kind of stigmatization of the industry . . . is something that the litigants in the climate change lawsuits are trying to achieve by painting corporate actors like Exxon and Chevron as knowing deceivers of the American public."[151]

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145. This is already included in some of the complaints. *See supra* note 135 and accompanying text.

146. Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1868 (2008).

147. *Id.* at 1869 (referring to David Hunter, *The Implications of Climate Change Litigation: Litigation for International Environmental Law-Making*, *in* ADJUDICATING CLIMATE CONTROL: SUB-NATIONAL, NATIONAL, AND SUPRA\NATIONAL APPROACHES 357 (William C.G. Burns & Hari M. Osofsky eds., 2009)).

148. Lisa Benjamin, *The Road to Paris Runs through Delaware: Climate Litigation and Directors' Duties*, 2020 UTAH L. REV. 313, 318 (2020).

149. *See supra* notes 93-96 and accompanying text.

150. *See* AKRITI BHARGAVA ET AL., CLIMATE-WASHING LITIGATION: LEGAL LIABILITY FOR MISLEADING CLIMATE COMMUNICATIONS 5-6 (2022), https://www.lse.ac.uk/granthaminstitute/publication/climate-washing-litigation-legal-liability-for-misleading-climate-communications (explaining that "climate-washing strategies include employing false claims, obscuring important information that could help evaluate the meaning, sincerity or context of a claim, and/or using vague or ambiguous terms," and maintaining that "[t]hrough their communication and marketing strategies, major emitting companies often deploy such strategies in a bid to shift public perception regarding their business activities to be viewed as part of the solution to, rather than the primary cause of, climate change").

151. *Yale Experts Explain Climate Lawsuits*, YALE SUSTAINABILITY (Aug. 16, 2023) https://sustainability.yale.edu/explainers/yale-experts-explain-climate-lawsuits [hereinafter Kysar's Interview]; *see also* Lin, *supra* note 140, at 61 ("The AGs also sought to change the public's perception of the tobacco industry by exposing its lies to ultimately reduce youth smoking, prevent tobacco companies from advertising to children, and secure monetary damages to fund tobacco prevention and control programs.").

By now, the public's view on climate change has generally shifted from indifference to increasing concern.[152] Yet, many continue to deny and minimize the relationship between fossil fuels and climate change, including the President.[153] In this climate, there is tremendous significance to the fact that states and other public subnational entities have taken and will continue to stress through CFL a clear and united stand in exposing the industry for its decades-long manipulation and deceit.[154]

In particular, when it comes to unveiling deceit, perhaps one of the biggest advantages governments have over private litigants, especially in early stages of litigation, is their power under consumer laws.[155] State laws that protect consumers from unfair and deceptive acts and practices, known as UDAP laws, grant state attorneys general (AGs) the power to issue a civil investigative demand (CID), including pre-complaint discovery requests.[156] Thus, at the complaint stage, an AG can provide the court with a much more substantive body of evidence than non-governmental litigants.[157]

The consolidated effort by dozens of AGs to investigate and analyze evidence obtained from oil and gas companies is a major achievement in and of itself, even if the litigation does not culminate in a favorable settlement or judgment for the plaintiffs. Any data collected in the course of CFL (including the pre-litigation stage of CID insofar as it is later replicated in court records), may be useful for other litigants and policymakers all over the world who seek to hold these companies accountable. This highlights another advantage of CFL: its ability to translate scientific data into more accessible and easily understandable terms, as explored in the next Subpart.

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152. *See, e.g.*, Benjamin, *supra* note 148, at 318 (citing polls from recent years showing that "the majority of Americans now 'alarmed' or 'concerned' about the issue");Yadin, *supra* note 140, at 357 (describing the "broad public awakening . . . as more and more people around the world are becoming aware, concerned, and even passionate about climate change").

153. President-elect Donald Trump declared that the climate crisis is "one of the great scams of all time." *See* Dharna Noor, *Trump Continues to Deny Climate Crisis as He Visits Hurricane-Ravaged Georgia*, THE GUARDIAN (Oct. 1, 2024), https://www.theguardian.com/us-news/2024/oct/01/trump-visits-georgia-denies-climate-crisis-after-hurricane-helene.

154. *See, e.g.*, Kat So, *Climate Deniers of the 118th Congress*, CTR. FOR AM. PROGRESS (July 18, 2024), https://www.americanprogress.org/article/climate-deniers-of-the-118th-congress (reporting that an "analysis of the 118th U.S. Congress found that 123 elected officials are climate deniers—23 percent of 535 total members").

155. Lin, *supra* note 140, at 76 n.273 (explaining that "a CID [civil investigation demand] allows the AG to conduct pre-litigation discovery, a key advantage that private plaintiffs do not enjoy but surely wish they did").

156. Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 45-46 (2018) (noting that "even when a UDAP statute does not grant this right, another statute or the state's common law may create it"; that "[f]ederal enforcers have a similar power"; and that "[t]his tool, held by the public but not the private enforcer, can prove critical for building a case and reaching a settlement outside of court").

157. Lin, *supra* note 140, at 51 (discussing CIDs in the context of Massachusetts' Chapter 93A, which allows the AG to strengthen their complaints "through evidence beyond mere information and belief," and suggesting that this often leads to quicker settlements).

C. Using State Resources to Compile Scientific Data

A third advantage, and final for this discussion, is the substantial scientific data that CFL generates and is likely to continue producing. Climate science plays a significant part in CFL litigation. For the plaintiffs to prove causation, they must provide compelling scientific data to show that the defendants' conduct caused the climate consequences they have experienced and expect to experience in the future.[158] Contrary to the tobacco litigation, where causation was somewhat easier to prove,[159] the elements of causation and attribution in climate change cases have been extremely difficult to establish because of the challenges associated with attributing the diffuse effects of climate change to particular polluters.[160]

While commentators have expressed skepticism concerning CFL plaintiffs' ability to prove causation, governments are likely to have more resources than private litigants to invest in marshaling the required scientific data.[161] This includes hiring expensive climate scientists and providing historical records of fossil fuel consumption or GHG emissions.[162]

Again, the significance of compiling this type of data does not depend on the success of individual lawsuits. Merely framing complex scientific knowledge in accessible language can have a meaningful impact on the public, regulatory efforts, and other climate litigation efforts.[163] When the City of Chicago produces documents showing how fossil fuel companies intentionally failed to disclose the harms they knew were associated with their products,[164] or when the State of Delaware provides evidence showing that a defendant's actions led to mounting environmental damages,[165] other litigants from all over the world can rely on the data and claims.

CFL serves as both a powerful normative statement and an effective legal mechanism. It attributes climate-related harms to fossil fuel companies at a time when the federal government is downplaying their impact and legitimizing their activities.[166] At the same time, it holds the potential to secure meaningful

158. ELKIN, *supra* note 51, at 2, 6-15 (discussing attribution science for both past and future climate change).

159. Doland Kochan, *Climate Change Lawsuits Are Not 'The New Tobacco'*, LAW 360 (Dec. 1, 2021), https://www.law360.com/articles/1444517/climate-change-lawsuits-are-not-the-new-tobacco.

160. *See* Gilboa et al., *supra* note 104, at 1066 (noting that "[t]he nature of climate litigation makes it difficult for plaintiffs to overcome the tort requirements of causation. It is difficult to attribute the future harms of global warming to specific defendants, in terms of proving a causal link").

161. *See* Aisha I. Saad, *Attribution for Climate Torts*, 64 B.C. L. REV. 867, 896-899 (2023) (examining the obstacles to proving causation and the emerging scientific methodologies that may help overcome them).

162. *Id.* at 877-79.

163. *See* Lytton, *supra* note 146, at 1868-69.

164. Chicago's Complaint, *supra* note 13, at 65-92.

165. Delaware's Complaint, *supra* note 16, at 135-49.

166. *See* Devid Gelles et al., *'Full-On Fight Club': How Trump is Crushing U.S. Climate Policy*, N.Y. TIMES (Mar. 2, 2025), https://www.nytimes.com/2025/03/02/climate/trump-us-climate-policy-changes.html (warning that Trump "has waged a multipronged assault at regulations designed to curb pollution, immediately sweeping some rules to the side and circumventing the normally lengthy rule-

remedies through settlements or judgments. Nevertheless, in its current form it also raises complex ethical challenges that, if unaddressed, could weaken its role in advancing climate justice, as explored in Part III.

III. DRAWBACKS OF CLIMATE FINANCE LITIGATION

Despite the significant advantages of CFL and the wide support it has received,[167] not everyone is in favor of this litigation wave. Some scholars have criticized CFL's focus on monetary damages instead of focusing on carbon reduction;[168] some have claimed that the international scope of climate change requires a regulatory institutional solution, not a litigation-based one;[169] a few commentators have pointed out that using the tobacco litigation model for climate change actions could fail due to the difficulty in proving causation;[170] and others have warned that such litigation could have the perverse effect of giving the big oil companies more power.[171]

Notably, these critics focus on whether CFL is the correct way to address the existing carbon emission problem. Far less attention has been given to CFL's potential for creating an entirely new set of problems, not with respect to the oil and gas industry, but rather on the international level, between states.[172]

In what follows, I point to three main risks CFL could create in the inter-state context: First, CFL could frustrate already fragile international finance negotiations; second, it could deepen international inequalities by creating a "first-sue, first-served" climate finance regime; and three, it could accelerate litigation, which would divert time and money from a collective international climate solution to adversarial court battles. Although these risks are distinct, they are interrelated and affect one another.

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making processes . . . [and] has declared an energy emergency, giving himself the authority to fast-track the construction of oil and gas projects as he works to stoke supply as well as demand for fossil fuels").

167. *See, e.g.*, *supra* notes 19-20 and accompanying text; Benjamin, *supra* note 148, at 319 (noting that this "litigation has important implications for directors of carbon-major corporations as it highlights the risks of climate change to corporations and the financial implications of those risks").

168. *See* Natalie Marionneaux, *The Road to Hell Is Paved with Good Intentions (and Master Settlement Agreements): Alternatives to Climate Litigation Informed by Cautionary Tales of Tobacco and Opioid*, 12 L.S.U. J. ENERGY L. & RES. 251, 267 (2024) (referring to Karen Savage, *After Opioids, Will Climate Change Be The Next Successful Liability Battle?,* CLIMATE DOCKET (Sept. 12, 2019)).

169. *See, e.g.*, Sarah Hunt, *Litigation isn't the Way to Advance Responsible Climate Solutions*, BLOOMBERG L. (Oct. 19, 2022), https://news.bloomberglaw.com/us-law-week/litigation-isnt-the-way-to-advance-responsible-climate-solutions; David R. Hill, *Litigation is Not the Right Path for Climate Solutions*, POWER (Feb. 2. 2022) https://www.powermag.com/blog/litigation-is-not-the-right-path-for-climate-solutions.

170. *See, e.g.*, Kochan, *supra* note 159; Kysar's Interview, *supra* note 151.

171. *See* Kysar's Interview, *supra* note 151 (noting that there is a risk of repeating the gun industry lawsuits: "The big gamble is, will these lawsuits pressure the fossil fuel industry to fundamentally change the nature of their business, or instead cause them to use their immense influence over politicians to get immunity without responsibility?").

172. While a few scholars acknowledged the moral dilemma of victims in wealthy countries receiving redress before those in less wealthy nations, they have not considered how this dynamic might impact inter-state relations and international negotiations. *See supra* note 38; Saad, *supra* note 161, at 929-30.

A. Climate Finance Litigation Risks Deepening the Gaps between Countries Most Responsible and Countries Most Vulnerable to Climate Change, Frustrating Already Fragile Finance Negotiations

1. Developing Countries' High Vulnerability to, and Low Responsibility for, Climate Change

While climate change affects the entire international community, three groups of ninety-one developing countries are currently recognized as the most climate-vulnerable due to a combination of their geographic features and economic development: the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States.[173]

a. Least Developed Countries (LDCs)

LDCs represent today's "poorest and weakest" nations.[174] These forty-four countries are home to around one billion people, yet are responsible for less than 4 percent of the global GHG emissions.[175] Their reliance on agrarian economies makes them highly climate-sensitive to extreme weather, and their economic development and technological capacity have made it exceptionally hard to implement climate resilience policies.[176]

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173. In 2002, the U.N. established the Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States in a General Assembly Resolution. *See* G.A. Res. 56/227 (Feb. 28, 2002). According to the UN Secretary General's Report, which was acknowledged in the General Assembly Resolution,

> [T]he economic and social development of the least developed countries, which represent the poorest and weakest segment of the international community, continues to be a major challenge for those countries as well as for their development partners. Together with the landlocked developing countries and the small island developing States, they are characterized by their exposure to a series of vulnerabilities and constraints.

U.N. Secretary-General, *Follow-up Mechanism for Coordinating, Monitoring and Reviewing the Implementation of the Programme of Action for the Least Developed Countries for the Decade 2001-2010*, ¶ 2, U.N. Doc. A/56/645 (Nov. 23, 2001).

174. *About Least Developed Countries*, U.N. OFF. OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES (UN-OHRLLS), https://www.un.org/ohrlls/content/about-least-developed-countries (last visited Apr. 26, 2025) (noting that "[s]ince 1971, the United Nations has recognized the Least Developed Countries (LDCs) as the 'poorest and weakest segment' of the international community"). At the time of writing, these countries include: Afghanistan, Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Yemen, and Zambia. *Id.*

175. *The Least Developed Countries Report 2024*, U.N. TRADE AND DEV., https://unctad.org/publication/least-developed-countries-report-2024 (last visited Aug. 13, 2025).

176. U.N. Conference on Trade and Development, *The Least Developed Countries Report: Leveraging Carbon Markets for Development*, at 7-15 U.N. Doc. UNCTAD/LDC/2024 (2024), https://unctad.org/system/files/official-document/ldc2024overview_en.pdf.

b. Landlocked Developing Countries (LLDCs)

LLDCs,[177] as their name suggests, lack territorial sea access or are "locked by land," making them depend on their neighbors—often other developing countries—for trade and transport.[178] LLDCs, a group of thirty-two countries with an overall population of more than 560 million, are responsible for less than 2 percent of GHG emissions.[179] Nevertheless, they suffer from intensified desertification, loss of biodiversity, droughts, floods, and landslides, which over time will slowly make their territories uninhabitable.[180]

c. Small Island Developing States (SIDS)

SIDS are a group of thirty-nine islands spread between the Caribbean Sea, Pacific Ocean, Atlantic Ocean, South China Sea, and Indian Ocean.[181] They are responsible for less than 1 percent of global GHG emissions, yet they face the highest existential risk from climate change in terms of threats to their land and

177. *About Landlocked Developing Countries*, U.N. OFF. OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES, https://www.un.org/en/landlocked/about-landlocked-developing-countries (last visited Aug. 17, 2025). At the time of writing, these countries include: Afghanistan,* Armenia, Azerbaijan, Bhutan, Bolivia, Botswana, Burkina Faso,* Burundi,* Central African Republic,* Chad,* Eswatini, Ethiopia,* Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic,* Lesotho,* Malawi,* Mali, Mongolia, Nepal,* Niger,* North Macedonia, Paraguay, Moldova, Rwanda,* South Sudan,* Tajikistan, Turkmenistan, Uganda,* Uzbekistan, Zambia,* and Zimbabwe. (*) = Also a Least Developed Country.

178. *Id*. ("Overall, the level of development in LLDCs is about 20 percent lower than it would be were they not landlocked.").

179. U.N. Off. of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *Summary Report of the High-level Side Event on "Strengthening Climate Action in Landlocked Developing Countries: Experiences on Adaptation and Mitigation,"* at 3-4 (Nov. 9, 2022), https://www.un.org/ohrlls/sites/www.un.org.ohrlls/files/2022_summary_report_lldcs_and_climate_action_-_9_nov.pdf.

180. *Id*. at 3 (warning that these climatic events "bring about loss of lives and livelihoods, damages to infrastructure, settlements and to other social and economic assets. These disasters often come in succession and trigger other calamities like famine, disease outbreaks, loss of biodiversity and environmental services, and forced migration.").

181. *About Small Island Developing States*, U.N. OFF. OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES, https://www.un.org/ohrlls/content/about-small-island-developing-states (last visited Aug. 17, 2025). At the time of writing, these countries include: Antigua and Barbuda, Bahamas, Barbados, Belize, Cabo Verde, Comoros,* Cook Islands, Cuba, Dominica, Dominican Republic, Fiji, Grenada, Guinea-Bissau,* Guyana, Haiti,* Jamaica, Kiribati,* Maldives, Marshall Islands, Micronesia, Mauritius, Nauru, Niue, Palau, Papua New Guinea, Samoa, São Tomé and Príncipe, Singapore, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Seychelles, Solomon Islands,* Suriname, Timor-Leste,* Tonga, Trinidad and Tobago, Tuvalu,* and Vanuatu. (*) = Also a Least Developed Country.

territory.[182] This is mainly due to slow onset events,[183] particularly sea level rise, which poses an existential threat to SIDS' communities.[184]

2. The Principle of Common but Differentiated Responsibility and Respective Capabilities (CBDR-RC)

At the heart of the international climate finance negotiations is the question of responsibility. Developing countries have demanded that high-income industrialized countries take responsibility for their disproportional contribution to climate change and the economic burden it creates.[185] Developed countries, however, have steadfastly resisted taking responsibility and have only agreed to accept the principle of common but differentiated responsibility and respective capabilities (CBDR-RC).[186]

According to the CBDR-RC principle, developed countries have responsibility based on their financial and technological advancements, but not due to past wrongs.[187] As articulated in the UNFCCC,

> The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.[188]

The CBDR-RC is a central principle of the current climate change treaty framework and finance structure. It has dictated the legal obligation framework in the UNFCCC,[189] the Paris Agreement obligations,[190] and the Kyoto

182. *Snapshot: Small Island Developing States,* UNDP (Jan. 16, 2023), https://climatepromise.undp.org/research-and-reports/snapshot-small-island-developing-states.

183. Slow onset events refer to "the risks and impacts associated with increasing temperatures, desertification, loss of biodiversity, land and forest degradation, glacial retreat and related impacts, ocean acidification, sea level rise, and salinization." *See Slow Onset Events*, U.N. CLIMATE CHANGE, https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/SOEs (last visited Apr. 26, 2025).

184. *Snapshot: Small Island Developing States*, *supra* note 182, at 3 (noting that "[f]or those SIDS whose land lies only five meters or less above sea level, projected sea-level rise represents a direct threat to their existence").

185. Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 1, 10 (Shawkat Alam et al. eds., 2015).

186. *Id.*

187. *Id.*; *see also* Toussaint, *supra* note 75, at 149 (noting that "[u]ntil the very last days of negotiations, the US continued to oppose any implications of historical responsibility" and that, as a result, the UNFCCC reference that developed countries are taking the lead because of their "large share of global emissions of greenhouse gases" was left out).

188. *See* UNFCCC, *supra* note 21, at art. 3 ¶ 1.

189. *Id.* art. 4 ¶ 3 (establishing the obligation of developed country Parties to "provide new and additional financial resources" to developing country Parties so that the latter can meet their Convention obligations); art. 4 ¶ 7 (stating that the degree to which developing country Parties can implement their commitments under the Convention will depend on the financial support they receive from developed country Parties while clarifying that poverty reduction remains a priority for developing countries).

190. *See* Paris Agreement, *supra* note 58, at art. 2 ¶ 2 (stating that "[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances").

Protocol;[191] yet its meaning has been highly contested.[192] For example, in its written statement to the ICJ's Advisory Opinion on the Obligations of States,[193] India submitted that "the 'lead' that developed countries are expected to take is on the basis of their historical contribution to the problem, as well as their capacity (economic and technological) to address the problem. Both these factors do not apply to developing countries."[194] Bangladesh argued that "in line with the best available science and the principle of CBDR, States must increase their financial contributions to levels necessary to meet global adaptation needs effectively."[195]

The United States, on the other hand, expressed a different view at the ICJ proceedings. First, it argued that the distinction between developed and developing countries is "obsolete."[196] It recalled that the signatory states to the Paris Agreement added to the principle of CBDR-RC the wording "in the light of different national circumstances"[197] in order to apply a more nuanced responsibility without a categorical "bifurcation between categories of countries."[198] This change, it emphasized, stemmed from some developing countries' new capabilities that did not exist in 1992 when the UNFCCC was adopted.

Second, the United States maintained that the CBDR-RC was never meant to be read as a legal obligation "to mobilize finance or, beyond that, to be part of

191. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 art. 10 ("All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances . . . (C) [c]ooperate in the promotion of effective modalities for the development, application and diffusion of, and take all practicable steps to promote, facilitate and *finance*, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries . . . .") (emphasis added).

192. *See, e.g.,* Michal Kolmaš, *The Failure of CBDR in Global Environmental Politics,* 23 GLOBAL ENVT'L. POL. 1, 2-3 (2023).

193. ICJ Advisory Opinion on the Obligations of States in Respect to Climate Change, *supra* note 34. I discuss the ICJ Advisory Opinion in Subpart III.C.

194. Request by the United Nations General Assembly for an Advisory Opinion, "Obligations of States in respect of Climate Change," Written Statement by the Republic of India, at 8-9 (Mar. 21, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-05-00-en.pdf.

195. Public Sitting on the Obligations of States in respect of Climate Change (Request for Advisory Opinion Submitted by the General Assembly of the United Nations), Verbatim Record, at 72, CR 2024/36 (Dec. 2, 2024, at 15:00 CET) https://www.icj-cij.org/sites/default/files/case-related/187/187-20241202-ora-02-00-bi.pdf [hereinafter Public Sitting on the Obligations of States, Dec. 2, 2024, at 15:00].

196. U.S.'s Written Statement on the Obligations of States, *supra* note 21, at 26 n.131, 47. The United States was referring to China, arguing that, despite being the world's biggest emitter and second-largest economy, has been exploiting its "developing country" status to avoid its responsibility to transfer money and technology to other developing countries. *See id*. at 24.

197. Paris Agreement, *supra* note 58, at art. 2 ¶ 2.

198. Request by the United Nations General Assembly for an Advisory Opinion, "Obligations of States in respect of Climate Change," Written Comments of the United States of America, at 37 (Aug. 15, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-09-00-en.pdf ("In the Paris Agreement, States ultimately declined to adopt a categorical approach to differentiation of climate change mitigation-related obligations.").

a quantified collective goal."[199] In other words, contribution to climate finance is voluntary—a stance shared by other highly developed countries.[200] This divide in perspectives has had devastating outcomes for international climate finance mechanisms, which continue to fall short in providing sufficient support for developing nations.

3. An Overview of Existing Climate Finance Mechanisms

The international climate finance regime includes two main clusters:[201] private finance[202] and public international finance.[203] However, both mechanisms have thus far failed to provide sufficient financial assistance to developing countries.

Private finance mechanisms, which are profit-driven, provide investment opportunities in some middle-income countries, yet they are significantly less prominent in LDCs due to challenges in securing funding for these countries as well as concerns about capital costs.[204] Other options that can foster financial stability, like insurance companies and insurance-based models, are unlikely to provide coverage to countries with too high a risk, such as SIDS, or those that cannot afford to pay high premiums, like LLDCs.[205] The rising frequency and severity of weather events are driving reinsurance companies to reduce their liability coverage to sovereign risk pools and national insurers, resulting in countries being compensated for only a fraction of the losses caused by these events.[206] This lack of coverage turns countries uninvestable, deepening their

199. *Id.* at 20 n.62, 35 ("[The United States] does not accept any interpretation . . . that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries.").

200. *See, e.g.,* Request by the United Nations General Assembly for an Advisory Opinion, "Obligations of States in respect of Climate Change," Written Statement of Germany, at 13 (Mar. 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240326-wri-01-00-en.pdf ("It is of utmost importance to differentiate between obligations agreed upon and political goals set within the respective framework.").

201. *See* Chiara Falduto et al., *The New Collective Quantified Goal on Climate Finance: Options for Reflecting the Role of Different Sources, Actors, and Qualitative Considerations* 4 (OECD/IEA Climate Change Expert Group Papers, Working Paper No. 2024(2), 2024), https://www.oecd-ilibrary.org/environment/the-new-collective-quantified-goal-on-climate-finance_7b28309b-en. Falduto refers to domestic efforts as a third cluster that includes "elements relating to domestic public interventions that can directly finance climate action and mobilise private finance, or that help to create policy, regulatory, and fiscal environments that incentivise investment for climate action." *Id*.

202. *Id.* at 47.

203. *Id*. at 34.

204. *Id.* at 10 (adding that "notably, while the private sector represents a large share of climate finance in high-income and some middle-income countries, it is less prevalent in financing climate action in most developing countries, and particularly in least-developed countries").

205. Toussaint, *supra* note 75, at 146 (citing the Special Envoy to the Prime Minister of Barbados on Climate Finance, who said: "It is victim pays, just in instalments").

206. *Id*. at 145 (noting that "the government of Antigua and Barbuda received US$ 6.79 million from the Caribbean Catastrophe Risk Insurance Facility, equivalent to only 3 [percent] of recovery costs in Barbuda resulting from Hurricane Irma," and that in a similar vein, Malawi received "US$ 8.1 million from Africa Risk Capacity scheme (equivalent to 2.2 [percent] of US $365.9 million in estimated economic losses)").

reliance on loans and debts.[207] In light of these and other difficulties,[208] it has been argued that "[p]rivate finance is clearly no panacea for the climate crisis."[209]

The second cluster, financial aid provided through international public finance, includes two main categories: development banks and funds. Both of these are more committed to equitable distribution than private actors and provide aid to countries that are unlikely to attract private investment.[210] Nevertheless, over 90 percent of the aid that development banks provide is in the form of loans.[211] This system has forced developing countries to choose between borrowing funds, thereby increasing their debt and lowering their credit ranking (which undermines their poverty reduction agenda), or forgoing loans and accepting climatic risk in the hope of receiving a grant from one of the international climate funds.[212]

In light of this dilemma, SIDS expressed that international climate funds, the second type of international public mechanism, are the most preferable option for finance mechanisms.[213] The funds are managed by the United Nations, funded by paid-in contributions from developed countries, and are mostly grant-based (56 percent).[214] Yet the five climate funds operating today[215] are currently

207. *See* Public Sitting on the Obligations of States, Dec. 2, 2024, at 15:00, *supra* note 195, at 78 (Barbados' Minister of Foreign Affairs and Foreign Trade explaining that Barbados "like some regions in larger countries, is now in grave danger of becoming uninsurable and it follows logically, Mr. President, that, without the ability to access or sustain insurance premia, a country's economy will also then become uninvestable").

208. Arth Mishra & Connor O'Brien, *Private Finance Cannot Lead the Global Response to Climate Change*, THE INTERPRETER (Nov. 9, 2023), https://www.lowyinstitute.org/the-interpreter/private-finance-cannot-lead-global-response-climate-change (explaining that developing countries are often not "investment-ready," leading private investors to require public support to build project pipelines; that "the cost of financing clean energy infrastructure remains concerningly high" with governments forced to absorb excessive risks and divert scarce resources to attract private capital; and that "[p]rivate capital would only flow following public spending . . . However, the need for adaptation investments is immediate").

209. *Id*.

210. Toussaint, *supra* note 75, at 144.

211. ORG. FOR ECON. CO-OP. AND DEV., CLIMATE FINANCE PROVIDED AND MOBILISED BY DEVELOPED COUNTRIES IN 2016-2020: INSIGHTS FROM DISAGGREGATED ANALYSIS 23 (2022), https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/09/climate-finance-provided-and-mobilised-by-developed-countries-in-2016-2020_7b466264/286dae5d-en.pdf [hereinafter OECD Report] (noting that "[t]he majority (91 [percent]) of climate finance provided via MDBs [multilateral development banks] was extended in the form of loans").

212. Gaia Larsen et al., *Adaptation Finance: 10 Key Questions, Answered*, WORLD RES. INST. (May. 19, 2025), https://www.wri.org/insights/adaptation-finance-explained ("Some countries have opted to turn down loans for climate-related activities to avoid adding further debt to their balance sheets.").

213. Toussaint, *supra* note 75, at 144 (noting that the Association of Small Island States "envisaged public funding from industrialized countries as the primary vehicle to deliver loss and damage finance").

214. *See* OECD Report, *supra* note 211, at 23 (noting that "[i]n contrast [to development banks], the majority of climate finance provided via climate funds was provided in the form of grants (56%).").

215. The five climate funds are the Least Developed Countries Fund (LDCF), the Special Climate Change Fund (SCCF), the Adaptation Fund, the Green Climate Fund (GCF), and the newly established Fund for Responding to Loss and Damage (FRLD). *Funds and Financial Entities*, UNITED NATIONS CLIMATE CHANGE, https://unfccc.int/process-and-meetings/bodies/funds-and-financial-entities (last visited Sept. 15, 2025).

insufficient to meet existing climatic needs.[216] For example, the Green Climate Fund, the biggest of the five, was able to raise only $10.6 billion for the period between 2025 and 2029.[217] This sum is supposed to be divided between mitigation and adaptation efforts, yet developing countries' adaptation needs alone, for 2021 to 2030, are estimated at $387 billion (in 2021 prices) annually.[218]

4. Developing Countries' Growing Frustration with Finance Negotiations

In 2024, at the twenty-ninth meeting of the COP (COP29) in Baku, Azerbaijan, developing countries stressed that they require mobilizing one trillion dollars per year by 2030 from all sources in order for them to reach the agreed-upon mitigation and adaptation goals.[219] However, developed countries instead pledged to transfer $300 billion annually, a sum denounced as "insultingly low."[220] To put things in perspective, in 2022 subsidies to oil, coal, and gas companies reached seven trillion dollars.[221] Reflecting the concern of many, the climate envoy for the Marshall Islands stated: "We came in good faith, with the safety of our communities and the well-being of the world at heart. Yet,

216. Although these funds draw from multiple sources, including direct contributions, trust funds, and other mechanisms, their resources remain insufficient to meet the scale of mitigation, adaptation, and loss-and-damage needs. *See, e.g.*, GREEN CLIMATE FUND, AUDITED FINANCIAL STATEMENTS OF THE GREEN CLIMATE FUND FOR THE YEAR ENDED 31 DECEMBER 2024 6 (2025), https://www.greenclimate.fund/sites/default/files/document/06-audited-financial-statements-green-climate-fund-year-ended-31-december-2024-gcf-b42-08-rev01.pdf. ("As of 31 December 2024, the Trust Fund account has accumulated notional amounts of USD 19.6 billion since its inception."); GLOBAL ENV'T FACILITY, STATUS REPORT FOR THE LEAST DEVELOPED COUNTRIES FUND 4 (2025), https://www.thegef.org/sites/default/files/documents/2025-05/EN_GEF.LDCF_.SCCF_.38.Inf_.04_Financial%20Report%20on%20the%20LDCF.pdf (noting that as of March 31, 2025, the LDCF has accumulated approximately USD 2.23 billion in approved funding, with over USD 1.08 billion held in trust and available for future allocation); *Funding*, GLOBAL ENV'T FACILITY, https://www.thegef.org/who-we-are/funding (last visited Aug. 18, 2025) (noting that the GEF's budget for 2022-2026 is approximately USD 5.33 billion); *Adaptation Fund*, UNITED NATIONS CLIMATE CHANGE, https://www.adaptation-fund.org/wp-content/uploads/2024/08/AFB.EFC_.34.3_Trustee-report-as-at-30-June-2024.pdf (last visited Aug. 18, 2025) (reporting that, as of 30 June 2024, the Adaptation Fund Trust Fund reported cumulative receipts of about USD 1.83 billion); FRLD's Status of Resources, *supra* note 76 (reporting that as of 7 April 2025, a total of USD 768.40 million has been pledged to the Fund by 27 contributors).

217. *Resource Mobilisation: GCF's Second Replenishment*, GREEN CLIMATE FUND, https://www.greenclimate.fund/about/resource-mobilisation/gcf-2 (last visited Apr. 26, 2025).

218. U.N. ENV'T PROGRAMME, ADAPTATION GAP REPORT 2024: COME HELL AND HIGH WATER - AS FIRES AND FLOODS HIT THE POOR HARDEST, IT IS TIME FOR THE WORLD TO STEP UP ADAPTATION ACTIONS, at 44 (Nov. 7, 2024), https://www.unep.org/resources/adaptation-gap-report-2024.

219. *At Least $1 Trillion in Climate Finance Needed Each Year, Report Finds*, U.N. CLIMATE SUMMIT (Nov. 14, 2024), https://unclimatesummit.org/at-least-1-trillion-in-climate-finance-needed-each-year-report-finds/.

220. *See* Igini, *supra* note 32.

221. Simon Black et al., *Fossil Fuel Subsidies Surged to Record $7 Trillion*, IMF BLOG (Aug. 24, 2023), https://www.imf.org/en/Blogs/Articles/2023/08/24/fossil-fuel-subsidies-surged-to-record-7-trillion.

we have seen the very worst of political opportunism here at this COP, playing games with the lives of the world's most vulnerable people."[222]

Following COP29, Barbados expressed its frustration with the negotiation process by noting in the ICJ Advisory Opinion oral proceedings that:

> [L]ike many other countries, [it] had put great faith in this negotiation process and in the undertakings of the States . . . [yet] [t]he massive gaps between promise and delivery are at the heart of the climate crisis for developing countries in general and for Small Island Developing States like Barbados in particular.[223]

Similarly, Bangladesh, both an LLDC and LDC, stressed to the Hague Court the injustice of paying the highest price despite minimal contributions to global emissions, emphasizing that "[developing countries] that have contributed the least to global emissions are paying the highest price, [and are] forced to make enormous investments to adapt to the catastrophes caused by high-emitting States."[224] South Africa underscored that developed countries benefited from early industrialization, which played a significant factor in climate change, while developing countries, "have not received the economic benefits of industrialization and are thus faced with the detrimental effects of climate change and little financial capacity to respond thereto."[225]

More recently, at the 2025 Africa Climate Summit in Addis Ababa, Kenyan President William Ruto said that even the sums that were promised are hardly delivered, expressing his "extreme[] concern[]" about the Western leaders' failure to keep their financial promises to help poorer countries' adaptation efforts, calling it a breach of their "climate blood pact."[226] Undeniably, both European countries and the United States have significantly scaled back their

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222. *COP29 Climate Finance Deal Clinched, What are Countries Saying?*, REUTERS (Nov. 23, 2024), https://www.reuters.com/business/environment/cop29-climate-summit-overtime-what-are-countries-saying-2024-11-23 (quoting a statement by Tina Stege, the climate envoy for the Marshall Islands).

223. Public Sitting on the Obligations of States, Dec. 2, 2024, at 15:00, *supra* note 195, at 78.

224. *Id.* at 69.

I am grateful to M. Hafijul Islam Khan, Director at the Centre for Climate Justice-Bangladesh, who shed further light on this issue and the general frustration and fear the people of Bangladesh are experiencing. Mr. Khan is now preparing to file a complaint in Luxembourg against an international oil corporation for climate damage his country has been suffering and will continue to suffer if climate negotiations continue in this manner. For a discussion on the legal hurdles developing countries' litigants face when suing international corporations see *supra* Part III.B.

225. Public sitting on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations), Verbatim Record, at 122, CR 2024/35 (Dec. 2, 2024, at 10:00 CET), https://www.icj-cij.org/sites/default/files/case-related/187/187-20241202-ora-01-00-bi.pdf.

226. Kenza Bryan, *Kenya's Ruto Says Western Leaders Have Broken 'Climate Blood Pact*,' FIN. TIMES (Sept. 8, 2025), https://www.ft.com/content/c59f1907-4b2c-4f36-886a-60dabbdd29cc.

pledges,[227] with the Trump Administration consistently pulling back from climate agreements.[228]

5. Climate Finance Litigation Could Exacerbate Tensions in Climate Finance Negotiations

It is in this context that CFL's contribution to climate justice should be assessed. Falling short in providing federal financial aid to meet developing countries' needs, while state and local governments are potentially securing billions of dollars for their own adaptation needs, could deepen mistrust and frustration.[229] Indeed, compensating the nations most responsible for climate change first while leaving those most affected and least positioned to adapt by the wayside seems questionable, at the very least.[230]

Compare Tuvalu and California. The first is an island that has started creating a metaverse of itself due to its inevitable sinking.[231] The second is the third-largest state in the United States, the nation that until recently was the largest GHG emitter in the world.[232] Both are affected by the oil industry's misconduct.[233] Ideally, both Tuvalu and California, as well as all other countries that have suffered climatic harm caused by the fossil fuel industry, would be

227. Indrabati Lahiri, *From Finland to the UK, European Countries Are Slashing Aid. What Does it Mean for Climate Funds?*, EURO NEWS (Mar. 30, 2025), https://www.euronews.com/green/2025/03/30/from-finland-to-the-uk-european-countries-are-slashing-aid-what-does-it-mean-for-climate-f.

228. *See, e.g.,* Exec. Order No. 14162, Putting America First in International Environmental Agreements, 90 Fed. Reg. 8455 (Jan. 20, 2025).

229. Toussaint, *supra* note 75, at 153-54 ("The low track record on adaptation finance, complex access modalities under the Adaptation Fund and Green Climate Fund, as well as the unfulfilled US $100 billion per year target for mitigation finance by 2020, have sown mistrust among vulnerable developing countries that a new loss and damage fund will deliver."). CFL could also create a chilling effect on European countries and the European Union. Since the United States is finding ways to secure funds for itself, European countries may argue that the United States should contribute more to climate finance than they (European countries) do. I am grateful to Liane Schalatek, Associate Director at Heinrich Boell Stiftung, Washington, D.C., for pointing out the effect CFL could have on European developed countries in this context.

230. *See* Bouwer, *supra* note 38, at 377.

231. Kalolaine Fainu, *Facing Extinction, Tuvalu Considers the Digital Clone of a Country,* THE GUARDIAN (June 27, 2023), https://www.theguardian.com/world/2023/jun/27/tuvalu-climate-crisis-rising-sea-levels-pacific-island-nation-country-digital-clone; *see also* Craymer, *supra* note 28.

232. *See* Paddison & Choi, *supra* note 26.

233. *See Tuvalu Becomes Second Nation-State to Call for a Fossil Fuel Non-Proliferation Treaty*, FOSSIL FUEL NON-PROLIFERATION TREATY INITIATIVE (Nov. 8, 2022), https://fossilfueltreaty.org/tuvalu (quoting Tuvalu's Prime Minister's statement as his country joined the Fossil Fuel Non-Proliferation Treaty that "[w]e all know that the leading cause of the climate crisis is fossil fuels"); Sam Meredith, *Sinking Pacific Island Nation Issues Historic Call for Treaty to Phase Out Fossil Fuels,* CNBC (Nov. 8, 2022), https://www.cnbc.com/2022/11/08/cop27-tuvalu-issues-call-for-global-treaty-to-phase-out-fossil-fuels.html (quoting Prime Minister Natano stating at COP27 that "[t]he warming seas are starting to swallow our lands—inch by inch. But the world's addiction to oil, gas and coal can't sink our dreams under the waves"). For California's claims against the fossil fuel industry and the harm it has caused *see generally* California's Complaint*, supra* note 8.

compensated by their perpetrators, but that scenario is unlikely.[234] First, the fossil fuel industry is unlikely to contribute profits voluntarily.[235] Second, while fossil fuel companies can compensate one, five, or twenty countries, at some point, they could reach their limit;[236] as rich as the industry is, it too has limited resources.[237] Furthermore, the liabilities the companies are now facing could push them to restructure in order to protect themselves from additional claims,[238] as seen in opioid manufacturers' cases.[239] Such a reconstruction would clearly narrow the pool for later litigants.

Under these circumstances, litigation seems to be the most efficient way to force the companies to pay significant amounts in damages, and the faster litigants can do so, the better. However, as the next Subpart illustrates, in this litigation race, developing countries stand little chance of winning.

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234. *See* Doelle & Seck, *supra* note 38, at 673 ("In an ideal world, it would be possible to adequately compensate all who suffer harm, or otherwise provide a remedy. In our very imperfect world, however, it is more likely that defendants will seek bankruptcy protection before full compensation has been paid out - if any has been paid at all").

235. *See, e.g.*, Kevin Crowley & Alix Steel, *Chevron CEO Pushes Back on California's Suit Against Big Oil*, BLOOMBERG (Sep. 18, 2023), https://www.bloomberg.com/news/articles/2023-09-18/chevron-ceo-pushes-back-on-california-s-suit-against-big-oil (quoting Chevron Corp. Chief Executive Officer Mike Wirth stating that California's case "is one of many such actions that we've seen over the years—ironically, a number of them filed on behalf of people who have actually profited from and encouraged energy development," and that "[c]limate change is a global issue. It calls for a coordinated global policy response, not piecemeal litigation that benefits attorneys and politicians").

236. Benjamin, *supra* note 148, at 376 (explaining the unpredictable costs the current litigation can bring upon the fossil fuel companies). According to Benjamin,

> Banks and international financial institutions are moving away from financing fossil-fuel intensive activities and industries, and if financial institutions become the target of litigation, carbon-majors could encounter difficulties finding financing for future activities. Litigation imposes both direct costs on companies of settlements and attorneys' fees, but also indirect costs such as investor uncertainty about firm prospects, loss of customers, suppliers and prestige, and a diversion of management time and resources. Litigation can also affect credit ratings, the cost of debt, and other financing costs.

Id. Benjamin adds that markets have a limited ability to accurately price risk, meaning that a company's current valuation does not necessarily reflect its future value, particularly in light of the transformations driven by the climate crisis. *Id.* at 366-67

237. This was especially evident in the year 2020, in which twenty mining, oil, and gas companies with over one billion dollars in assets filed for bankruptcy. *See* Alexander Gouzoules, *Going Concerns and Environmental Concerns: Mitigating Climate Change through Bankruptcy Reform*, 63 B.C. L. REV. 2169, 2186-87 (2022). Climate change has already taken a toll on the coal industry, leading several companies to file for bankruptcy. *See* Benjamin, *supra* note 148, at 320 n.31.

238. Aisha Saad, *The Impact of Climate Litigation on Corporate Governance*, ECGI (Mar. 13, 2023), https://www.ecgi.global/publications/blog/the-impact-of-climate-litigation-on-corporate-governance.

239. *See e.g.*, *In re* Mallinckrodt p.l.c., No. 20-12522 (Bankr. D. Del. Oct. 12, 2020); *In re* Endo Int'l p.l.c., No. 22-22549 (Bankr. S.D.N.Y. Aug. 16, 2022). According to Saad, such restructuring would benefit communities if oil companies were reorganized as public benefit corporations. However, even in that case, the primary beneficiaries would likely be the communities represented by the plaintiffs. *See*, Saad, *supra* note 238 (mentioning the case of Purdue Pharma); *see Plan of Reorganization of Purdue Pharma L.P. Receives Bankruptcy Court Approval*, PURDUE PHARMA (Sept. 1, 2021), https://www.purduepharma.com/news/2021/09/01/plan-of-reorganization-of-purdue-pharma-l-p-receives-bankruptcy-court-approval.

B. The Risk of Climate Finance Litigation Promoting a "First-Sue, First-Served" Finance Regime

1. Barriers Facing Litigants in Developing Countries

According to the International Climate Litigation Report published every few years by the United Nations, climate litigation cases are concentrated in the Global North,[240] with the United States being home to around 64 percent of cases.[241] This concentration is even more pronounced in loss and damage cases, which are brought almost exclusively in the Global North.[242] CFL—i.e., government-led litigation against oil and gas companies for mitigation, adaptation, and loss and damage needs—has thus far been restricted to the United States, although other developed countries have expressed their intent to follow its lead.[243]

To be sure, climate litigation cases have begun to rise significantly in developing countries, yet they tend to involve constitutional and human rights-based claims filed by NGOs or individuals.[244] While a few governments in developing countries have taken action against corporations for specific environmental harms,[245] there is currently no government-led litigation against

240. UN ENVIRONMENT PROGRAMME, CLIMATE CHANGE IN THE COURTROOM: TRENDS, IMPACTS AND EMERGING LESSONS, 7 (2025) https://wedocs.unep.org/bitstream/handle/20.500.11822/48518/Global-Climate-Litigation-Report-2025-Status-Review.pdf?sequence=6 (noting that "cases in the Global North represent 83.2 per cent of the total number of climate litigation cases. Cases in the Global South amount to 9.8 per cent, while international and regional cases amount to 7.1 per cent"). While this Article has primarily been using the terms "developed" and "developing" nations given their use by their respective countries, the terms "Global North" and "Global South" are also used throughout this Article in conformity with cited sources.

241. *Id.* at 8.

242. Toussaint, *supra* note 68, at 22.

243. *See supra* note 83.

244. Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT'L L. 679, 705 (2019) (finding that "the Global South has seen a substantial number of rights-based cases . . . making up 44 percent of the Global South docket" compared to 5 percent in the Global North); *see also* Kim Bouwer, *The Influence of Human Rights on Climate Litigation in Africa*, 13 J. HUM. RTS. & ENV'T 157, 157 (2022) (arguing that "human rights protections and human rights-based strategies have fundamentally shaped African climate litigation, and will continue to do so"). While there has been a rise in governmental action, it is still focused mostly on regulation enforcement and local damages. *See* SETZER & HIGMAN, *supra* note 1, at 3 (pointing out that in 2024, 56 percent of cases in the Global South were led by governmental bodies, signaling "a shift towards enforcement actions and cases seeking compensation for localized climate damages, such as from deforestation in Brazil").

245. *See* SETZER & HIGMAN, *supra* note 1, at 14 ("In Brazil . . . the Federal Prosecutor's Office . . . and the environmental agency . . . are increasingly bringing climate cases, including more than 30 lawsuits seeking climate damages from illegal deforestation in the Amazon."); JOLENE LIN & JACQUELINE PEEL, LITIGATING CLIMATE CHANGE IN THE GLOBAL SOUTH 63 (2024) (noting that there are very few Global South cases in which the defendants are companies or corporations, with the Indonesian government as an exception: The Indonesian government "has filed cases against timber companies and oil palm concession holders for illegal logging and causing pearland fires, with the plaintiff government seeking compensation for the environmental damage resulting from the defendants' illegal conduct as well as costs to restore the natural resource to its prior state").

oil and gas companies for past and future climate damages in developing countries, similar to the American CFL.[246]

Litigants in developing countries interested in filing CFL against companies—whether in their own countries or the firms' home countries—are likely to face considerable constraints.

First, litigants from developing countries are likely to prefer suing in the companies' home countries or other countries where the defendants have substantial assets, as this can make it easier to enforce any resulting judgment.[247] Yet, since the biggest companies are headquartered in developed countries, developing countries' litigants are already at a disadvantage for having to sue in a foreign court, in a foreign language, with foreign lawyers, and with all the financial implications these factors entail.[248] Even if litigants overcome these initial barriers, defendants are likely to file a motion to dismiss based on forum *non conveniens* and argue that the case should be tried where the harm occurred.[249]

Furthermore, even if the foreign court accepts that it has jurisdiction, the presumption against extraterritoriality can limit the applicability of domestic statutes, thereby reducing the potential scope of relief.[250] In the United States, for example, the consumer protection laws that constitute a significant chunk of the claims brought by U.S.-based litigants are likely to be inapplicable for foreign

246. This is according to the Sabin Center Database, UN reports, and open media outlets.

247. Noah M. Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 UCLA L. REV. 837, 847 (2008) ("Judgments in civil suits for transboundary environmental damage can be enforced by national courts, giving them real bite. National courts have a panoply of mechanisms at their disposal to enforce judgments and attach assets.").

248. As Sachs notes, "For the 2.8 billion individuals living in developing countries on incomes of less than $2 per day, access to transnational tort remedies may, as a practical matter, be unattainable." *Id*. at 848.

249. *Id.* An example of such practice is the legal battle between Ecuadorian plaintiffs and Chevron Corporation. For three decades, between the 1960s and 1990s, Texaco, which was later purchased by Chevron, operated oil extraction in the Ecuadorian Lago Agrio region, located in Amazon rainforest. The local communities accused the company of causing significant environmental damage by dumping billions of gallons of toxic waste into rivers and forests, leading to health and environmental issues. Ecuadorian indigenous and rural communities filed a class action lawsuit against Texaco in a New York federal court, seeking remediation for the damages they suffered. Chevron successfully argued *forum non conveniens*, and the case was moved to Ecuador. In 2011, an Ecuadorian court issued an $18.2 billion judgment against Chevron, which was later reduced to $9.5 billion by the Ecuadorian Supreme Court. Chevron refused to pay, alleging that the judgment was obtained through fraud and corruption, and sued the Plaintiffs' counsel, Steven Donziger, for $60 million under the Racketeer Influenced and Corrupt Organizations Act (RICO). As of January 2025, the Ecuadorian plaintiffs have not received the awarded damages. *See* Aldo Orellana López, *Chevron vs Ecuador: International Arbitration and Corporate Impunity*, OPEN DEMOCRACY (Mar. 27, 2019), https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity; Katie Surma, *Their Lives Were Ruined by Oil Pollution, and a Court Awarded Them $9.5 Billion. But Ecuadorians Have Yet to See a Penny from Chevron*, INSIDE CLIMATE NEWS (Dec. 18, 2022), https://insideclimatenews.org/news/18122022/steven-donziger-chevron-ecuador-oil-pollution/; Elizabeth Haight, *Biden Should Pardon Steven Donziger Before Leaving Office,* AMNESTY INT'L (Jan. 7, 2025), https://www.amnesty.org/en/latest/news/2025/01/biden-should-pardon-steven-donziger-before-leaving-office/.

250. Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, 44 HARV. ENVT'L L. REV. 169, 184-85 (2020).

litigants.[251] Tort claims could also be difficult to prove given the local action rule, according to which real property damage claims should be brought where the damage occurred.[252] Claims under the Alien Tort Statute have already been significantly narrowed, and they are particularly difficult to pursue in the context of environmental harms.[253]

Suing in developing countries' courts is also far from ideal. Putting aside the question of judgment enforcement, environmental protection in many of these countries has been significantly less advanced.[254] Some developing countries have tended to view climate change as a less pressing problem than economic development and energy security. According to Joana Setzer and Lisa Benjamin, some countries still perceive environmental regulation as a "luxury" they cannot afford because it risks undermining potential economic development, which is essential for poverty reduction.[255] The resulting lack of environmental regulation has led to deficient monitoring and enforcement institutions in these nations, which are critical for successful litigation.[256]

Nevertheless, underdeveloped environmental legislation is not solely a choice made by developing countries but also a result of a decades-long dictated policy.[257] Following World War II, post-colonial states were integrated into world commerce by exporting raw materials and importing mass-produced goods.[258] While many of these countries advocated for a New International Economic Order in which they would receive favorable trade benefits to compensate for economic underdevelopment resulting from colonialism,[259] the 1980s debt crisis forced them into a much less favorable position.[260]

The International Monetary Fund and the World Bank offered loan relief to developing countries in exchange for conditions that included privatization, deregulation, and growth of raw material exports,[261] which often came at the

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251. *Id*.

252. Sachs, *supra* note 247, at 848.

253. Todd, *supra* note 250, at 185.

254. *See* Clifford Russell & Ruth Greenspan Bell, *Environmental Policy for Developing Countries*, ISSUES IN SCI & TECH. (Spring 2002), https://issues.org/greenspan-environmental-policy-developing-countries.

255. Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9 TRANSNAT'L ENVT'L L. 77, 81 (2019). *But see* PAU DE VILCHEZ MORAGUES, CLIMATE IN COURT: DEFINING STATE OBLIGATIONS ON GLOBAL WARMING THROUGH DOMESTIC CLIMATE LITIGATION 99 (2022) (noting that in the climate negotiations there has been a "divide between developing countries that want to prioritize economic growth, . . . and developing countries who . . . want to focus international action on mitigation even if it's at the expense of economic development").

256. Setzer & Benjamin, *supra* note 255, at 81-82.

257. Atapattu & Gonzalez, *supra* note 185, at 9.

258. *Id.* at 6.

259. *Id.* at 7-8 (describing that in the mid-1950s, twenty-nine new states from Africa and Asia undertook to promote human rights and self-determination and to oppose new manifestations of imperialism. The goal was to develop a New International Economic Order (known as NIEO) that would allow them to trade freely and receive favorable treatment in environmental and investment international law as redress for the inequalities caused by colonialism).

260. *Id.*

261. *Id.* at 8.

expense of environmental regulation.[262] In addition, international investment law can require host countries to compensate foreign investors when regulatory measures diminish the profitability of their investments.[263] Thus, countries seeking foreign investment often face a choice between imposing environmental regulations and promoting development projects, and the latter interest frequently prevails.[264]

Finally, in addition to procedural and regulatory hurdles, developing countries' litigants also face substantive difficulties in proving that the climate damage they suffer from is attributable to the defendants. As mentioned in Subpart II.C, CFL relies heavily on scientific data.[265] To prove causation, a successful litigant must have the capacity to show that it was the misconduct of the defendants that caused the alleged harm. Proving causation is a complicated task, even for the most powerful litigants. And because, as Setzer and Benjamin note, "[c]ountries in the Global South often lack the capacity to . . . create strong scientific knowledge bases for environmental policymaking,"[266] their ability to produce the scientific evidence necessary for litigation is limited.

These and other legal barriers have been referred to as "a liability wall," meant to "insulate domestic firms from foreign suits over environmental damage."[267]

2. Climate Finance Litigation Undermines the International Pledge to Reach the Furthest Behind First

In 2015, 193 United Nations Member States adopted the 2030 Agenda for Sustainable Development, pledging that "no one will be left behind" and "endeavor[ing] to reach the furthest behind first."[268] CFL, however, could

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262. *Id.* at 7 (noting that "in order to earn badly needed foreign exchange, debt-ridden Southern countries flooded world markets with minerals, timber, and agricultural products").

263. *See* Jona Razzaque, *Access to Remedies in Environmental Matters and the North-South Divide*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 598 (Shawkat Alam et al. eds., 2015)

264. *Id.* (noting that "the risk of having to compensate the foreign investor can chill environmental regulation when governments fear that environmental and human rights regulations may hamper economic competitiveness"); *see also* Shalanda H. Baker, *Project Finance and Sustainable Development in the Global South*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 338, 339-40 (Shawkat Alam et al. eds., 2015) (discussing the rise of project finance in the Global South and "the diminished accountability of private developers").

265. *See* ELKIN, *supra* note 51, at 45 ("[C]limate science plays a key role in litigation centered on public and private bodies' alleged failure to account for or respond to climate change impacts. One factual question that runs through these cases is whether plaintiffs can show that the actions a defendant is taking (or failing to take) today are likely to have negative consequences in the future, either by identifying risks that a defendant has missed or chosen to ignore, . . . or through other means. Attribution and predictive science has been pivotally important in the evidence that both plaintiffs and defendants have put forward to answer that question.").

266. Setzer & Benjamin, *supra* note 255 at 81. The authors also point out that foreign meddling has led some governments to restrict environmental NGOs funded by foreign countries from operating in their territories, despite these NGOs' advantages in terms of expertise and ability to assist local communities in vindicating their rights in the context of climate change. *Id.* at 81-82.

267. Sachs, *supra* note 247, at 848-49.

268. G.A. Res. 70/1, ¶ 4 (Sep. 25, 2015).

contribute to a "first-sue, first-served" regime, leading to a rather different world order, in which litigation capabilities, not need, would determine who will be redressed first.

As Delle and Seck note:

> It appears problematic, then, that comparatively privileged claimants who reside in a developed country that is also the home state of a corporate fossil fuel defendant, should face fewer legal hurdles than those that would confront a more climate-vulnerable plaintiff who happens to reside in a least developed country . . . [and] may also face a lack of governmental capacity to offer adequate remedies . . . .[269]

To be sure, victims in CFL jurisdictions have suffered and continue to suffer from climate change harms, and they should not be forsaking their justifiable claims.[270] Yet, as Kim Bouwer poignantly notes, it is unclear that they should "be first in the queue when it comes to recovering for loss and adaptation costs from fossil fuel companies."[271]

In recent years, scholars have increasingly highlighted the importance of developing countries' litigation strategies and their unique contribution to international climate litigation strategy.[272] Yet, however meaningful, developing countries' climate litigation cannot compete with CFL's potential to yield significant monetary awards. Litigants in developing countries have succeeded in advancing constitutional and human rights-based environmental and climate cases, but such actions have rarely yielded significant monetary relief.[273] Since many of them, particularly LDCs, LLDCs, and SIDS, lack the financial and regulatory resources to initiate CFL, their chances of being compensated by the fossil fuel industry seem to be significantly lower than litigants in the United States today.[274] CFL proceedings pursued by developed countries in courts that are highly experienced with complex mass torts cases and backed by advanced

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269. Doelle & Seck, *supra* note 38, at 673.

270. *See, e.g.*, U.S. GLOB. CHANGE RSCH. PROGRAM, FIFTH NATIONAL CLIMATE ASSESSMENT 15-6 (2023) ("It is an established fact that climate change is harming physical, mental, spiritual, and community health and well-being through the increasing frequency and intensity of extreme events, increasing cases of infectious and vector-borne diseases, and declines in food and water quality and security. Climate-related hazards will continue to grow, increasing morbidity and mortality across all regions of the US.").

271. Bouwer, *supra* note 38, at 377.

272. *See, e.g.*, LIN & PEEL, *supra* note 245, at 51; SETZER & HIGMAN, SNAPSHOT 2025, *supra* note 1, at 15.

273. *See supra* note 244 and accompanying text.

274. ASIAN DEV. BANK, CLIMATE CHANGE, COMING SOON TO A COURT NEAR YOU: CLIMATE LITIGATION IN ASIA AND THE PACIFIC AND BEYOND 127-28 (2020), https://www.adb.org/sites/default/files/publication/659631/climate-litigation-asia-pacific.pdf [hereinafter ADB Litigation Report] ("Within Asia, litigants are more likely to rely on constitutional environmental rights" yet even in those cases, the Bank notes, "few courts have extended the constitutional right to life to include climate justice or protection."); *see also* Hari M. Osofsky, *The Geography of Emerging Global South Climate Change Litigation*, 114 AJIL UNBOUND 61, 65 (2020) ("Many of the countries in the Global South facing adaptation and loss and damages challenges" are poor and "lack . . . governmental and judicial infrastructure.").

environmental regulation stand a much higher chance of yielding significant monetary awards than actions pursued by developing countries.[275]

Such gaps in litigation might matter less if developing countries had access to alternative sources of funding for meeting their mitigation and adaptation needs and recovering from loss and damage. However, as the previous Subpart illustrates, negotiations over such funds have been, as the Prime Minister of Barbados described them, "painful" to watch,[276] increasing the pressure to explore other, less diplomatic, avenues, such as inter-state litigation.

C. The Risk of Intensifying Litigation

1. Developing Countries' Pursuit of Legal Remedies

Over the years, developing countries, especially SIDS, have considered turning to international fora to pressure developed countries when diplomacy fails to yield sufficient results. For instance, in 2002, Tuvalu's Prime Minister declared that the island was planning to sue Australia and the United States in the ICJ because of their refusal to join the Kyoto Protocol, which requires State Parties to reduce their GHG emissions.[277] While Tuvalu abandoned that initiative,[278] it illustrates the pendulum movement between diplomacy and litigation, which continues to this day.

In 2011, with the increasing threat of territory loss due to rising sea levels and the slow progress of negotiations, the Republic of Palau attempted to form a coalition of climate-vulnerable states to promote another legal action at the ICJ.[279] This time, the goal was to push the U.N. General Assembly to request that the ICJ render an advisory opinion regarding the climate obligations of developed countries and the legal consequences that may arise from not adhering to those obligations.[280]

This new campaign was not well received by the United States, which threatened that pursuing international legal action, even an advisory opinion,

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275. *Cf.* RoseMary Reed, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL'Y J. 399, 421 (2002) (arguing that island nations can frame their complaint under the Alien Torts Statute and "claim that greenhouse gas emission by corporations in the United States is done under color of state law"), *but see* Todd, *supra* note 250, at 185 (discussing the limited scope of ATS).

276. The U.N. Climate Ambition Summit, *supra* note 20, at 1:37:54.

277. *See* Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 WASH. INT'L. L. J. 103, 104-05 (2005).

278. *See id.* at 115 (mentioning the different hurdles Tuvalu would have to face if it proceeds with the suit, for example, that "since the United States is not bound by the Kyoto Protocol, it could avoid being sued in the ICJ by refusing to consent to the Court's jurisdiction").

279. Maxine Burkett, *A Justice Paradox: Climate Change, Small Island Developing States, and the Absence of International Legal Remedy*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 435, 442 (Shawkat Alam et al. eds., 2015).

280. *Id*. Article 96(1) to the United Nations Charter states: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

would be met with financial aid reductions.[281] Diplomatic representatives of developing countries reported at the time that the U.S. State Department made it clear to them that "while it is sympathetic to the islands' plight, a court case would cripple any chance of persuading Congress to reduce emissions or sign off on international funding,"[282] and the message was effective. In a 2012 interview, Abdul Momen, the Permanent Representative of Bangladesh to the United Nations, said that "[s]ome [developing countries] are afraid since . . . they depend on help and assistance from the big countries."[283]

Eventually, however, the fear of climate disasters outweighed the fear of retaliation.[284] In December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS) requested the International Tribunal for the Law of the Sea (ITLOS) to render an advisory opinion regarding the obligations of State Parties to prevent and reduce marine environment pollution caused by climate change.[285] Three months later, developing countries backed by European countries were able to gather enough votes at the U.N. General Assembly to request the ICJ to render its own advisory opinion concerning both the legal obligations of states to "ensure the protection of the climate system" and the "legal consequences under these obligations."[286]

Meanwhile, the United States maintained its stance that diplomacy, not adjudication, should be the preferred approach to climate policymaking.[287] In the General Assembly plenary meeting concerning the ICJ advisory opinion, U.S. Representative Nicholas Hill stated that:

> [L]aunching a judicial process, especially given the broad scope of the questions, will likely accentuate disagreements and [will] not be conducive to advancing ongoing diplomatic and other processes. In the light of those concerns, the United States disagrees that the initiative is the best approach to achieving our shared goals and takes this opportunity to reaffirm our view

281. Lisa Friedman, *Island States Mull Risks and Benefits of Suing Big Emitters*, POLITICO (Nov. 16, 2012), https://subscriber.politicopro.com/article/eenews/1059972615.

282. *Id*.

283. *Id*.

284. Burkett, *supra* note 279, at 443-44 (noting that "a comparison of the annual aid dollars that the United States gives to the Maldives versus the cost of certain adaptations or the loss of GDP due to the total loss of territory demonstrates the uneven impacts of climate change").

285. *See generally* Request for Advisory Opinion, Letter dated Dec. 12, 2022 from the Comm'n of Small Island States on Climate Change and Int'l L. to the Int'l Tribunal for the L. of the Sea, https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

286. Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change, Letter dated Mar. 1, 2023 from the General Assembly to the International Court of Justice, U.N. Doc. A/77/L.58 3 (Mar. 1, 2023).

287. The United States has maintained this stance even after the U.N. decided to refer the matter to the ICJ. Indeed, the State Department later made this explicit: "[T]he United States remains of the view that climate change is best addressed through diplomatic efforts . . . ." *International Court of Justice Hearings on Climate Change*, U.S. DEP'T OF STATE (Dec. 2, 2024), https://2021-2025.state.gov/international-court-of-justice-hearings-on-climate-change/?safe=1.

> that diplomatic efforts are the best means by which to address the climate crisis.[288]

Indeed, generally speaking, negotiations and international cooperation should be preferred over litigation. As climate scholars Verheyen and Roderick emphasize, this is especially true in the case of climate change, which knows no borders, and therefore should be based on cooperation and good faith, not on "cumbersome individual cases."[289] Nevertheless, as those authors stress, this does not mean states should refrain from resorting to litigation when cooperation fails.[290]

2. Climate Finance Litigation Could Accelerate Inter-State Litigation

While the U.S. federal government emphasized that cooperation should take precedence over litigation,[291] subnational governments are increasingly turning to the courts to secure substantial funding for their future climate-related needs. This duality could push developing countries away from diplomacy, potentially undermining global cooperation and stalling urgent climate policymaking. Coupled with the recent advisory opinions issued by ITLOS and the ICJ, CFL may contribute to a significant rise in inter-state lawsuits.[292]

In its advisory opinion, ITLOS made clear that State Parties to the 1982 Law of the Sea Convention "have the specific obligation to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions," including the obligation to grant them "preferential treatment in funding, technical assistance[,] and pertinent specialized services from international organizations."[293]

The ICJ, the world's highest international judicial authority, drew on ITLOS's advisory opinion but, given the breadth of its mandate, significantly thickened the legal grounding for developing countries seeking redress from developed nations.[294] In its long-awaited advisory opinion, the Court

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288. U.N. GAOR, 77th Sess., 64th plen. mtg. at 28, U.N. Doc. A/77/PV.64 (Mar. 29, 2023).

289. RODA VERHEYEN & PETER RODERICK, BEYOND ADAPTATION: THE LEGAL DUTY TO PAY COMPENSATION FOR CLIMATE CHANGE DAMAGE 28 (2008) https://wwfint.awsassets.panda.org/downloads/beyond_adaptation_lowres.pdf.

290. *Id*.

291. *See supra* notes 287-288 and accompanying text.

292. Advisory Opinion on the Request Submitted to the Tribunal by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Order of May 21, 2024, [hereinafter ITLOS Advisory Opinion]; ICJ Advisory Opinion on the Obligations of States in Respect to Climate Change, *supra* note 34.

293. ITLOS Advisory Opinion, *supra* note 292, at 117, 150.

294. *See e.g.*, ICJ Advisory Opinion on the Obligations of States in Respect to Climate Change, *supra* note 34, at 47, 50, 86, 90 (citing ITLOS's Advisory Opinion in support of nations' obligations under international law with respect to climate). Many climate scholars and activists praised the Advisory Opinion for its significant contribution to clarifying states' obligations under international law. *See, e.g.*, Sara K. Phillips et al., *Unpacking What the ICJ's Advisory Opinion Means for Climate and Environmental Action*, STOCKHOLM ENV'T INST. (July 28, 2025), https://www.sei.org/perspectives/icj-opinion-climate-environmental-action; Maria Antonia Tigre et al., *The ICJ's Advisory Opinion on Climate Change: An Introduction*, CLIMATE LAW (July 24, 2025),

emphasized that when determining the obligations of states to protect the climate system and the environment from GHG emissions, the applicable law includes not only the climate and environmental treaty regime, but also other sources of law, including customary law,[295] human rights law,[296] and other international legal principles[297] that impose obligations on all states.[298] It also clarified, however, that Annex I countries have "additional obligations to take the lead in combating climate change" by limiting emissions and enhancing sinks.[299]

With respect to the consequences of violating these obligations, the Court emphasized that a breach would constitute an internationally wrongful act,[300] leading to reparations such as restitution, compensation, or satisfaction, if causality and attribution are demonstrated.[301] It emphasized that the conduct of any state organ is attributable to that state, including the failure to regulate private actors' emissions, such as those from fossil fuel activities.[302] In other words, states are responsible for their own actions and omissions, including failure to limit GHG emissions caused by private actors under their jurisdiction.[303] It explained that while climate change results from cumulative emissions, it is possible to determine each state's contribution,[304] and reminded that, since the obligations are *erga omnes*, all states, not only those injured, have an interest in enforcing them and can hold others accountable for failing to fulfill them.[305]

While both the ITLOS and ICJ advisory opinions are non-binding and do not refer to specific countries, they are likely to become part of a broader litigation strategy to ensure that developed countries fulfill their legal obligations. According to Toussaint, the intention in seeking an advisory opinion was not to stop negotiations under the UNFCCC "but rather aim at enforcing the Convention and existing rights and obligations under international law."[306] Still,

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https://blogs.law.columbia.edu/climatechange/2025/07/24/the-icjs-advisory-opinion-on-climate-change-an-introduction; Marisa McVey & Annalisa Savaresi, *The ICJ Advisory Opinion on Climate Change: A Business and Human Rights Perspective*, OPINIO JURIS (Aug. 4, 2025), https://opiniojuris.org/2025/08/04/the-icj-advisory-opinion-on-climate-change-a-business-and-human-rights-perspective.

295. ICJ Advisory Opinion on the Obligations of States in Respect to Climate Change, *supra* note 34, at 48-51 (listing the customary duty to prevent significant harm to the environment and the duty to co-operate for the protection of the environment).

296. *Id.* at 51-52.

297. *Id*. at 52-56 (concluding that "principles of sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity and the precautionary approach or principle are applicable as guiding principles for the interpretation and application of the most directly relevant legal rules").

298. *Id.* at 58.

299. *Id.* at 130.

300. *Id.* at 132.

301. *Id.* at 126-29.

302. *Id.* at 122.

303. *Id*.

304. *Id*.

305. *Id*. at 125-26. *Erga omnes* obligations are "the concern of all States" or "a common concern of humankind." *Id.* at 125.

306. Toussaint, *supra* note 68, at 29.

it remains unclear whether the advisory opinions would be used as leverage during negotiations or instead serve as a starting point for inter-state lawsuits.[307]

Climate legal scholars have long suggested that developing countries have a legal basis under international law for seeking compensation from developed countries for damages resulting from their contribution to climate change.[308] The advisory opinions,[309] particularly that of the ICJ, provided a legal compass for these potential proceedings. At the same time, there are still substantive, procedural, and diplomatic difficulties in bringing inter-state lawsuits.[310]

Whether or not such international legal actions stand a chance of providing sufficient remedies for developing countries is difficult to determine.[311] What is clear is that they will increase diplomatic and political tensions at a time when international cooperation is crucial.[312] This is not to say that developing countries should simply refrain from international adjudication. Instead, I suggest that CFL plaintiffs consider the global ramifications of their actions, and adopt a more just and politically responsible remedial plan.

Before explaining the incentives for such a remedial approach and the possible doctrinal hooks a future remedial model can draw on (in Part V), in the following Part, I discuss how a lack of this international consideration played out in the context of another government-led litigation effort, and the possible lessons for CFL.

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307. *Id*. at 27.

308. *See, e.g.*, VERHEYEN & RODERICK, *supra* note 289, at 15-16, 23 (pointing out that "[a] State suffering impacts as a result of temperature increases, now or in the future, would not have major difficulty in demonstrating, as a matter of law, that GHG emissions from developed countries have significantly contributed to those impacts."); Burkett, *supra* note 279, at 445 (adding that in order to avoid fear of retaliation, "countries might act in concert to deflect some of the specific scrutiny a single country might face if it brings claims on its own" and that such claims can be brought in international tribunals); *see also* Osofsky, *The Geography*, *supra* note 274, at 62 (noting that suing in Global North countries could "impact the behavior of major emitter governments and corporations headquartered in those countries [and] assist in the transferring of resources to those impacted by climate change . . . .").

309. A few other important climate-related advisory opinions were recently issued by regional courts and forums. *See, e.g.*, Climate Emergency and Human Rights, Advisory Opinion OC-32-25, Inter-Am. Ct. H.R. (ser. A) (May 29, 2025); In Re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility Therefor, if Any, of the 'Carbon Majors,' Philippines Human Rights Commission, Case No. CHR-NI-2016-0001 (May 6, 2022).

310. This is especially true with respect to the United States, which withdrew from the ICJ's general compulsory jurisdiction in 1985 and could therefore only be brought before the Court if it consents to a specific dispute. *See* Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies, in* THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 46, 67 (Cesare P. R. Romano ed., 2009) (describing the United States's 1985 announcement that it intended to withdraw from ICJ compulsory jurisdiction). Without such consent, a claim cannot proceed. *Id.* at 61.

311. It should also be noted that the ICJ had not granted prospective relief in its past judgments, and it is not clear from its advisory opinion that it will in this context. *See* Jacobs, *supra* note 277, at 128.

312. The UNFCCC preamble expresses this. ("Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response."). *See* UNFCCC, *supra* note 21.

IV. LESSONS FROM THE TOBACCO LITIGATION: LOCAL SUCCESS AND INTERNATIONAL AFTERMATH

CFL strategy against big oil companies might be new to international climate litigation, but in American legal history, the "blueprint" was designed thirty years ago during the highly successful, government-led litigation campaign against big tobacco companies.

Much has been written about how the oil and gas industry has followed the tobacco industry's deceitful and obfuscatory tactics,[313] and commentators have observed that governments have responded with the procedural and substantive tools they used against the big tobacco companies in hopes of reprising their 1990s victories.[314]

Undeniably, tobacco litigation led to many significant achievements that CFL plaintiffs are now hoping for, including hundreds of billions of dollars in settlements, new regulations, and, most importantly, a significant reduction in Americans' smoking habits.[315] However, when it comes to its international consequences, tobacco litigation carries important warning signs that CFL plaintiffs, scholars, and climate activists should consider. The following Part is dedicated to the tobacco litigation success, its international aftermath, and suggested takeaways for CFL.

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313. *See generally* SETH SHULMAN ET AL., SMOKE, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO'S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE (2007), https://www.ucs.org/sites/default/files/2019-09/exxon_report.pdf; NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING (2010); Elizabeth Dubats, *An Inconvenient Lie: Big Tobacco Was Put on Trial for Denying the Effects of Smoking; Is Climate Change Denial Off-Limits*?, 7 NW. J. L. & SOC. POL'Y 510 (2012); Lindsay Leone, *Putting the Heat on the Fossil Fuel Industry: Using Products Liability in Climate Change Litigation*, 21 B.U. PUB. INT'L. L.J. 365 (2012); Christine Parker et al., *Lawyers, Confidentiality and Whistleblowing: Lessons from the Mccabe Tobacco Litigation*, 40 MELB. U. L. REV. 999 (2017); Martin Olszynski et al., *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 GEO. ENV'T. L. REV. 1 (2017).

314. *See, e.g.,* Benjamin, *supra* note 148, at 338-39 (noting that "[t]hese suits were patterned more closely on tobacco and asbestos litigation"); Mackenzie Kern, *Climate Litigation's Pathways to Corporate Accountability*, 54 CASE W. RES. J. INT'L L. 477, 496 (2022) ("Scholars have speculated that the looming threat of climate change will lead to a similar wave of climate litigation that will mirror the waves of tobacco litigation and the struggles those plaintiffs faced."); Marionneaux, *supra* note 168, at 262 ("If these claims appear familiar, it is because the oil and gas industry is not the first to face similar legal battles . . . the tobacco and opioid industries have litigated similar claims for decades."). Further, various CFL plaintiffs have explicitly compared the industries in their complaints. *See, e.g.*, D.C.'s Complaint, *supra* note 83, at 3 ("Defendants acted through sophisticated, coordinated, tobacco-industry-style campaigns involving industry associations and front groups to deceive and mislead the public. . . ."); Maui's Complaint, *supra* note 83, at 85 ("A 'Global Climate Science Team' ('GCST') was created that mirrored a front group created by the tobacco industry. . . ."); Oakland's Complaint, *supra* note 83, at 22 ("Defendants Borrowed The Big Tobacco Playbook In Order To Promote Their Products."); Jan Ellen Speigel & Mark Pazniokas, *Tong Takes on ExxonMobil Over Climate Change*, CT MIRROR (Sep. 14, 2020), https://ctmirror.org/2020/09/14/tong-takes-on-exxonmobil-over-climate-change (quoting Connecticut's Attorney General saying that in litigation regarding climate change, like tobacco, "our job is to hold wrong-doers accountable and to hold them to account to pay for the social damages that they cause").

315. *See infra* notes 329-334 and accompanying text.

A. The Local Success

For most of the twentieth century, cigarettes had an "iconic status" in America.[316] By the mid-1960s, almost half of all American adults were smokers.[317] Even as the incidence of lung cancer increased, and studies began to suggest that the reason was "America's new addiction," tobacco companies responded with "milder" and filtered solutions,[318] refusing to acknowledge that their products were inherently hazardous and maintaining that, like candy, only excessive use could lead to health problems.[319]

Tort law was not especially helpful. Despite the products liability revolution of the 1960s, the more the American public learned about the risks posed by cigarettes, the more courts and juries denied smokers' claims for damages, attributing their injuries to their own fault and assumption of risk.[320] Tobacco companies' defense that smoking-related injuries were the result of personal choice seemed insuperable, and states were left holding the medical bills.[321]

In 1985, a few law professors suggested that a direct action brought by the states under the *parens patriae* doctrine could penetrate the tobacco industry's defenses where individual complaints could not.[322] Under *parens patriae*, states could argue that their claimed damages predominantly originate from injuries their residents sustained, which the states later assumed financial responsibility for through medical assistance programs.[323]

In May 1994, the State of Mississippi relied on the *parens patriae* doctrine,[324] and launched what would become a nationwide litigation campaign when it filed suit against thirteen of the biggest tobacco companies, alleging that "in equity and fairness, it is the defendants, not the taxpayers of Mississippi, who should pay the costs of tobacco-related diseases."[325] This complaint, Gifford

316. DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION 14 (2010).

317. *Id*.

318. *Id*. at 21-22.

319. *Id*. at 22-23 (noting that in 1962, only 38 percent of Americans believed that cigarettes caused cancer).

320. *Id*. at 38-39.

321. *See* CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 200-01 (2003) (suggesting that "[j]urors had little sympathy for plaintiffs who chose to smoke because they made the individual decision that, for them, the risk was worth the benefit" and concluding that "this was the shield that protected the tobacco companies in more than a thousand lawsuits").

322. GIFFORD, *supra* note 316, at 121.

323. *Id*. at 123.

324. *Id*. at 121-23.

325. Moore v. American Tobacco Co., No. 94-1429 (Ch. of Jackson Cnty., Miss. filed May 23, 1994). Similar allegations were recently presented by states in their complaints against oil companies. New Jersey, for example, has argued that "[f]airness demands that Defendants should bear the costs of their failure to warn and of their deceptive promotion, not the State and its taxpayers." New Jersey's Complaint, *supra* note 15, at 166. Similarly, Chicago claimed that "[p]lacing the financial burden of Defendants' deceptive practices on taxpayers is against the fundamental principles of justice, equity, and good conscience." Chicago's Complaint, *supra* note 13, at 175; s*ee also* Municipalities of Puerto Rico's Complaint, *supra* note 83, at 245; Charleston's Complaint, *supra* note 83, at 6; Delaware's Complaint,

notes, "would revolutionize legal actions seeking to hold product manufacturers liable for pervasive product-caused public health problems."[326]

Mississippi was followed by at least forty other states that sought injunctive relief and damages for misrepresentation, deceptive advertising, public nuisance, unjust enrichment, and antitrust violations.[327] By 1996, with the American public increasingly aware of the tobacco industry's manipulation and deceit; with the FDA examining regulatory options to restrict tobacco products; and with mounting legal fees of over $600 million per year (equivalent to around $1.2 billion today), tobacco companies decided to explore settlement.[328] In November 1998, the parties agreed to a Master Settlement Agreement (MSA), according to which the companies would pay $206 billion (around $418 billion in today's dollars) in annual installments over twenty-five years and set limits and conditions on tobacco advertising and sales.[329] These measures resulted in a steep decline in cigarette consumption.[330]

In the United States today, cigarettes are, in many ways, a thing of the past.[331] Smoking rates have declined from 46 percent in 1950,[332] to 21 percent in 2005, and further to 19.8 percent in 2022.[333] The national education campaigns regarding the hazards of cigarettes have led to an incredible public denunciation of tobacco and an unprecedented public health success over mass production corporations.[334]

B. The International Aftermath

According to medical historian Allan Brandt, "[o]ne of the most disturbing ironies of twentieth century public health is that it was the relative success in reducing tobacco use in the developed world that spurred the sharp increases in cigarette use in developing nations."[335] Between 1975 and 1994, when cigarette

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supra note 16, at 8; Minnesota's Complaint, *supra* note 83, at 3; Honolulu's Complaint, *supra* note 83, at 5; Anne Arundel's Complaint, *supra* note 83, at 7; Annapolis's Complaint, *supra* note 83, at 7.

326. GIFFORD, *supra* note 316, at 121.

327. *Id*. at 122.

328. *Id*. at 131.

329. *Id*. at 176.

330. *Id*. at 178. A year later, the Clinton administration brought its own litigation against the industry and sought disgorgement of $280 billion in profits, but the District of Columbia Circuit held that disgorgement was not an available remedy under the RICO provisions. *Id*. at 122.

331. *But see Top 10 Communities Disproportionately Affected by Cigarette Smoking and Tobacco Use*, AM. LUNG ASS'N, https://www.lung.org/research/sotc/by-the-numbers/top-10-populations-affected (last updated Jan. 27, 2025) (reporting that "smoking rates are higher in certain parts of the country and among certain communities in the U.S.")

332. ALLAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA 449 (2009).

333. *Current Cigarette Smoking Among Adults in the United States*, U.S. CENTER FOR DISEASE CONTROL AND PREVENTION (Sept. 17, 2024), https://www.cdc.gov/tobacco/php/data-statistics/adult-data-cigarettes/?CDC_AAref_Val=https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm.

334. BRANDT, *supra* note 332, at 449.

335. *Id*. at 450.

consumption declined by 20 percent in the United States, the tobacco industry expanded its market reach and saw production rates actually increase by 11 percent.[336] Just as smoking rates were decreasing in the United States, they sharply increased in Asia and Africa.[337] In 1997, the New York Times reported that since 1990, the American cigarette company Phillip Morris "increased sales of cigarettes abroad by nearly 80 percent."[338] This exponential growth was made possible with the help of the U.S. government, which pushed for robust export commerce of U.S. products.[339]

In 1998, when Phillip Morris and others in the industry signed the MSA, they were not required to restrict production but rather to adhere to the new strict regulations on tobacco advertising and sales inside the United States.[340] Because the MSA required the tobacco companies to make settlement payments over the course of twenty-five years, the state signatories had an interest in ensuring that the companies had sufficient revenue to satisfy their payment obligations throughout this time.[341] In other words, even as states sought to lower their healthcare costs, they needed the tobacco industry to remain lucrative. As Gifford poignantly observed, "[p]erhaps the most important consequence of the MSA was that the states and the tobacco companies became financial partners, arguably inhibiting the cash-strapped states from adopting and implementing effective antismoking policies."[342] By shifting the costs of tobacco use—addiction, disease, and death—to developing countries, the industry was able to thrive financially. This allowed the state signatories to the MSA to achieve both objectives: securing compensation from companies that continued operating overseas while significantly reducing smoking-related health issues at home.[343]

So, as meaningful as the tobacco litigation success was for U.S. consumers, the public health gains it achieved—and the concomitant savings to public coffers—did not spread to the rest of the world. The remarkable legal success that led to the MSA took little interest in its potential international implications and non-U.S. victims. Today, the World Health Organization records show that there are 1.3 billion tobacco users in the world, 80 percent of which live in developing countries.[344] Meanwhile, the United States has the largest number of

336. *Id*.

337. *Id.*

338. Jane Perlez, *Fenced In at Home, Marlboro Man Looks Abroad*, N.Y. TIMES (June 24, 1997), https://www.nytimes.com/1997/06/24/us/fenced-in-at-home-marlboro-man-looks-abroad.html.

339. *See* Lucien J. Dhooge, *Smoke Across the Waters: Tobacco Production and Exportation as International Human Rights Violations*, 22 FORDHAM INT'L L.J. 355, 375-78, 390-91, 419 (describing U.S. government programs supporting the tobacco industry and U.S. tobacco companies' expansion into new international markets).

340. GIFFORD, *supra* note 316, at 176.

341. *Id*. at 179.

342. *Id*.

343. *Id;* BRANDT, *supra* note 332, at 453.

344. *Tobacco*, WORLD HEALTH ORG. (June 25, 2025), https://www.who.int/news-room/fact-sheets/detail/tobacco.

top tobacco companies worldwide, including the market leader, Philip Morris International.[345]

C. Some Lessons

Scholars have pointed out that the tobacco history carries "cautionary tales" for climate litigation.[346] They warn that the MSA funds, not properly designated for tobacco control only, were used as part of the states' general budgets;[347] that the attorney fees paid were too high;[348] and the soft regulation established as part of the MSA ensured that the companies would continue to operate.[349] As important as these observations are for CFL, none of them address the tobacco litigation's adverse *international* implications. The risk of CFL is that, like in the tobacco case, local success can unintentionally lead to perverse results on the international level.

The United States' incredible legal success through a well-coordinated, aggressive litigation campaign against the tobacco industry could have been leveraged to benefit developing countries too, either by restricting production or limiting exportation. Instead, in an attempt to maximize profits, the MSA externalized costs to developing countries. In the case of CFL, the result might not be the increasing emissions in developing countries (although it might), but rather the deepening of inequalities, the enhancement of political tensions, and increasing mistrust and resentment.

A CFL settlement that ends up exacerbating the already profound international inequalities between the most responsible countries and the most vulnerable ones risks undermining its own success. Any settlement must be designed in a way that supports, rather than undermines, international climate core policies of "reaching the further behind first,"[350] and seek, as much as possible, to mitigate these gaps.

The damage caused by the oil and gas industry stretches far beyond U.S. soil. The robust American legal system, being perhaps one of the best equipped to hold the oil and gas companies accountable, especially in light of its vast experience with mass tort cases, can be an opportunity for U.S. local governments to demonstrate their commitment to climate justice instead of undermining it by benefiting only American victims. As the following Part suggests, our civil law system offers various doctrines to inspire and support such a future model.

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345. *Top 25 Largest Companies in the Tobacco Industry in the World by Market Cap*, DISFOLD (July 1, 2025), https://disfold.com/industry/tobacco/companies.

346. Marionneaux, *supra* note 168, at 272.

347. GIFFORD, *supra* note 316, at 178.

348. *See* Kochan, *supra* note 159 ("[P]ostmortems on tobacco litigation show billions of dollars went to the lawyers in contingency fees, little went to the states, and what funds made it to the states after all the players took a cut was actually seldom spent on tobacco-related harms or helping with smoking cessation.").

349. GIFFORD, *supra* note 316, at 179.

350. *See* G.A. Res. 70/1, *supra* note 268288.

V. SUGGESTIONS FOR A CLIMATE REMEDY-SHARING APPROACH

One of the most striking features of CFL is its extraterritorial nature. The fossil fuel industry's alleged nuisances, trespasses, negligence, and fraud across U.S. states and municipalities have caused injuries that extend beyond the boundaries of these jurisdictions—as their governments candidly admit.[351] For example, California alleges, that "[d]efendants' individual and collective conduct . . . accelerated global warming . . . in California *and elsewhere*";[352] that the defendants' statements in "California *and elsewhere* . . . were designed to conceal and mislead consumers and the public";[353] and that the defendants' conspiracy regarding the dangers of fossil fuels has affected and will continue to affect California "*also*."[354]

Whether California's references to "elsewhere" are intended to designate other locations within or outside of the United States is not clear. However, CFL plaintiffs represent a small fraction of a very long list of countries and communities worldwide that have been harmed in various ways by the same alleged conduct of the defendants and, nevertheless, will not be receiving any portion of the awards as they are not listed as plaintiffs, despite them being victims of the same alleged conduct.

In this final Part of the Article, I suggest several doctrinal "hooks" for establishing a more international-oriented remedial model to mitigate the alienation CFL risks creating between different groups of victims: U.S. states on the one hand, and developing countries on the other. I then observe the incentives for subnational entities to take a more significant role in the international climate finance regime.

A. Class Action Doctrinal "Hooks" for Climate Finance Litigation's Shared Remedy Model

While scholars have contemplated the idea of an international class action against states in international tribunals,[355] the idea of initiating a transnational class action against corporations in state courts seems to be procedurally unrealistic, especially in U.S. courts which are unlikely to consider them manageable.[356] Nevertheless, it is certainly conceivable that CFL will create a remedial regime that draws on class action remedial doctrines and methods.

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351. *See, e.g.*, Anne Arundel's Complaint, *supra* note 83, at 126 (noting that the fuel companies' campaign was directed both to Maryland and elsewhere).

352. California's Complaint, *supra* note 8, at 6 (emphasis added).

353. *Id*. at 9 (emphasis added).

354. *Id*. at 30.

355. *See, e.g.*, Burkett, *supra* note 279, at 445-47 (suggesting that a group of nations could use "class action-type mechanism that would allow developing nations to pool their complaints in cases against larger or more developed nations.").

356. Yotam Kaplan et al., *The Renaissance of Private Law*, 119 NW. U. L. REV. 1427, 1462 (2025) (pointing out that when private class members are from different countries, courts "dismiss the action as unmanageable").

One doctrinal hook CFL's remedial model can draw from class actions is the distribution of awards between the class members and their counsels.[357] Class counsels have long been referred to as "private attorneys general,"[358] as they privately enforce the law against wrongdoers.[359] The lead counsels are responsible for most of the litigation, with almost no interaction with the class members. They are the ones compiling the evidence, arguing before the courts, initiating discovery, hiring experts, and managing the depositions.[360] By doing so, they allow a large group of victims to be compensated in cases where each individual class member might not have strong enough incentives to file suit.

Because of the social benefits class actions provide and because they incentivize private counsels to reach optimal settlements for class members, class action scholars and courts have developed various counsel fee structures.[361] The most well-known is the percentage-of-recovery method (POR).[362] The POR method allows the court to determine the percentage of the total award that the attorneys will be paid—most commonly, twenty or thirty percent—after the total award for the class has been determined.[363]

Extrapolating from the POR method, a potential CFL remedial model could entail a similar, albeit reversed, distribution, in which the "counsel" (CFL plaintiffs and the communities they represent) receive the lion's share, and class members (vulnerable developing countries) receive a decided percentage.

Although CFL plaintiffs do not represent developing countries, both CFL plaintiffs and developing countries were harmed by similar torts allegedly committed by the defendants. In an ideal world, damages would be sought by both U.S. attorneys general and developing countries' attorneys general in their respective courts or, alternatively, in an international class action. But, since such legal proceedings are unlikely to happen in the real world, CFL proceedings might be thought of as a "second-best proceeding," in which a set percentage of the final settlement would be distributed to communities who cannot get their day in court as other "quasi-class members."[364]

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357. *See, e.g.*, BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 22-25 (2005), https://www.uscourts.gov/sites/default/files/classgde.pdf; *see generally*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151 (2021).

358. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 101 (1991).

359. Kaplan et al., *supra* note 356, at 1462.

360. RICHARD A. NAGAREDA ET AL., THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 348 (3d ed. 2020).

361. *Id*. at 349.

362. *Id*.

363. *Id*. at 351.

364. Courts have adopted various doctrines meant to benefit class members who were not able to prove their damages yet demonstrated that they were subjected to structural misconduct. Under pro-rata back pay, courts have ordered defendants to pay damages when there is "clear proof of systematic race discrimination . . . but an unclear methodology for determining which specific individuals deserved backpay relief." *See* United States. v. City of Miami, 195 F.3d 1292, 1300 (11th Cir. 1999). In CFL, policymakers, not courts, should decide how much of the monetary remedies should be transferred to

Under this analogy, CFL attorneys general operate as class action counsel who share part of their award with the quasi-class members (developing countries). Since in the case of CFL, the attorneys general operate not for personal gains but for the victims of their respective states, the lion's share of the awards would go to the people in whose name the complaint was filed, with a set percentage of the final sum distributed to developing countries.

To be sure, distributing litigation proceeds to non-party countries is not the same as distributing them to class members, which, of course, gives rise to additional substantive and procedural questions. For example, deciding how and which countries will receive the shared awards could create considerable ancillary costs. But this, too, might be resolved by invoking another familiar class action doctrine: *cy pres* distribution.

The term *cy pres* is derived from the French expression "as near as possible" (*si près* or *aussi près*).[365] The rule originally appeared in the context of charitable trusts: When a charitable gift is at risk of failing, the court can order "the next best use of the fund to satisfy the testator's intent as near as possible."[366] However, the doctrine has also been utilized by courts in class actions when class members are difficult to identify or when a portion of the funds remains unclaimed.[367] In these cases, the courts direct the distribution of the funds for a purpose that is as close as possible to the purpose of the class action.[368]

While scholars and courts have criticized *cy pres* for divesting funds from their original purpose and suggested minimizing its use,[369] some have recently offered to expand the doctrine beyond the class action context, specifically for the purpose of climate litigation.[370] According to these suggestions, since climate change and environmental litigation typically affect very large groups of victims, the utilization of *cy pres* can incentivize public plaintiffs to sue even if the victims are not fully identified, including future generations.[371]

In the case of CFL, *cy pres* could be used as a doctrinal foundation when justifying the distribution of a portion of the awards not directly to quasi-class member countries but rather to their proxies, such as the Green Climate Fund or the FRLD, that, as explained in Part III, are in desperate need of

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international funds for developing countries. Deciding who these policymakers should be is an important question beyond the scope of this Article. For now, my point is simply to demonstrate that even if victims cannot prove the damages they suffered, they nonetheless deserve compensation in light of the structural misconduct to which they were subjected by oil and gas companies.

365. NAGAREDA ET AL., *supra* note 360, at 493 (quoting *In re* Airline Ticket Comm. Antitrust Litig., 268 F.3d 619, 625 (8th Cir. 2001)).

366. *Id*.

367. *Id*.

368. *Id*.

369. *See* LAYCOCK & HASEN, *supra* note 119, at 817 (noting that "the practice [of *cy pres*] grew, first to include larger amounts of unclaimed funds and then to include settlements where everything went to the lawyers and to charity and nothing went to the class").

370. *See* Kaplan et al., *supra* note 356, at 1470-71 ("Using cy pres, private plaintiffs can sue on behalf of the public interest, seeking a remedy that will go to institutions that generally promote the relevant social interests related to the claim.").

371. *Id.* at 1474; Gilboa et al., *supra* note 104, at 1088.

replenishment.[372] Climate funds are already equipped with the institutional knowledge to determine which country would benefit most from the funds and would save additional transfer costs.[373]

B. Bankruptcy Doctrinal "Hooks" for Climate Finance Litigation's Shared-Remedy Model

For centuries, bankruptcy law has been developing various approaches to address the difficult allocation problems of limited resources among various groups of creditors.[374] Although oil and gas companies' bankruptcy might seem unimaginable, their resources, too, are limited and they will not be able to compensate victims in full for the economic—let alone the non-economic—damages they have caused and continue to cause.[375] This is especially true if the request for disgorgement of profits is ordered, as requested by so many plaintiffs.[376]

While some have suggested modifying bankruptcy laws as a means to wind down fossil fuel corporate activity,[377] I suggest considering bankruptcy as a doctrinally established mechanism of distributing damage awards between CFL plaintiffs and vulnerable communities (by disbursing to U.N. climate funds or otherwise). Hence, where under the class action framework CFL plaintiffs can be thought of as "counsels," under the bankruptcy framework CFL plaintiffs can be considered "trustees."

In bankruptcy, a trustee is appointed to protect the interests of unsecured creditors.[378] In the most common cases, the trustee collects the debtor's assets, liquidates them, and divides them among the debtor's creditors pro rata:[379]

372. *Supra* notes 76-77, 216-218 and accompanying text.

373. *Cy pres* is not the only doctrine that courts use to benefit non-plaintiffs. Another type of distribution is fluid class recoveries. Fluid class recoveries have been used in cases of employment discrimination against minority applicants. Class relief was used in these types of cases because identifying former applicants was difficult. Hence, the remedy was to order the employer to prefer minority applicants in the future. *See* LAYCOCK & HASEN, *supra* note 119, at 816.

374. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 188 (1980) (discussing the evolution of bankruptcy law, and comparing old English laws which were unsatisfactory and modern law).

375. *See e.g.*, U.N. ENV'T PROGRAMME, ADAPTATION GAP REPORT 2023: UNDERFINANCED. UNDERPREPARED—INADEQUATE INVESTMENT AND PLANNING ON CLIMATE ADAPTATION LEAVES WORLD EXPOSED XIX (Nov. 2, 2023), https://www.unep.org/resources/adaptation-gap-report-2023 [hereinafter Adaptation Gap Report 2023] (emphasizing that "damages in the 55 most climate-vulnerable economies alone exceeded US$500 billion over the past two decades. These costs will rise steeply in the coming decades, particularly in the absence of strong mitigation and adaptation, but more robust numbers are needed that underpin the urgency of addressing loss and damage").

376. *See supra* notes 124-126 and accompanying text.

377. Gouzoules, *supra* note 237, at 2175 (suggesting that "Congress should reexamine Chapter 11's underlying assumptions in situations where the debtor corporation's continued operation as a going concern would significantly contribute to greenhouse gas emissions . . . [in order to] wind down—rather than reorganize—insolvent polluters, directing at least some assets toward climate remediation").

378. LAYCOCK & HASEN, *supra* note 119, at 578.

379. *Id*.

Secured creditors, protected by their collateral, receive the most significant share, while unsecured creditors split the remainder equally.[380]

Applying the bankruptcy paradigm to CFL could mean that the public entity, which the plaintiffs represent, would be treated like "secured creditors" who are compensated first, yet not in full. The remaining part would be shared (through international climate funds) among developing countries as "unsecured creditors."[381] Unsecured creditors enjoy a weaker right, yet they nonetheless have a "claim upon the debtor."[382] A similar balance could be applied to CFL.

C. Litigation Levies

Alongside the remedial doctrines offered above, I suggest CFL could disperse part of its final monetary award as what can be called a "litigation levy," i.e., a fee collected from CFL settlements to benefit victims residing in developing countries.

Over the past two decades, the idea of tax and levies has gained more support among states, the United Nations,[383] and NGOs, especially in the context of the FRLD.[384] At a meeting of the U.N. Transitional Committee, responsible for operationalizing the new fund,[385] both developed and developing state members suggested financing the fund through taxes and levies in various sectors, including commercial aviation, consumption, fossil fuels, financial transactions, or cross-border carbon adjustments.[386]

Similarly, according to the U.N. Adaptation Gap Report, because losses and damages will grow exponentially in the future, more "innovative sources of finance" must be explored in addition to the existing forms of grants, insurance,

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380. *Id*.

381. Unsecured creditors are individuals or entities to whom money is owed but who do not have collateral backing their claims, meaning they are repaid only after secured creditors in the event of bankruptcy.

382. GARRARD GLENN, THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY 3 (2002).

383. *See, e.g.*, U.N. DEP'T OF ECON. AND SOC. AFFAIRS, UNITED NATIONS HANDBOOK ON CARBON TAXATION FOR DEVELOPING COUNTRIES, U.N. Sales No. E.21.XVI.4 (2021).

384. *See, e.g.*, Abdoulaye Diallo, *Who Should Pay for Climate Loss and Damage? Tax Big Oil for Fueling the Climate Crisis*, GREENPEACE (Nov. 22, 2024), https://www.greenpeace.org/international/story/71448/who-should-pay-for-climate-loss-and-damage-tax-big-oil-for-fuelling-the-climate-crisis-extreme-weather ("A small tax on just seven of the world's biggest oil and gas companies could grow the UN Fund for Responding to Loss and Damage by more than 2000%, as shown in an analysis by environmental organisations Greenpeace International and Stamp Out Poverty.") (internal citations omitted).

385. The Transitional Committee was established at the 2022 Conference of the Parties of the UNFCCC (COP 27), held in Egypt. *See* U.N. Climate Change, Transitional Committee, https://unfccc.int/process-and-meetings/bodies/constituted-bodies/transitional-committee (last visited Aug. 8, 2025).

386. LISA SCHULTHEIß ET AL., OPERATIONALISING THE LOSS AND DAMAGE FUND: LEARNING FROM THE FUNDING MOSAIC, 14-15 (2023), https://www.germanwatch.org/sites/default/files/germanwatch_sei_operationalising_the_loss_and_damage_fund_2023.pdf (reporting on the work of the U.N. Transitional Committee).

and concessional loans.[387] The report thus offers similar levies, including shipping and aviation, as well as debt relief or debt swaps.[388] The report emphasizes that these additional sources are "essential" to meeting the required financial scale and assisting countries in overcoming the damage they are expected to endure.[389]

According to Amnesty International and the Center for International Environmental Law, in addition to the above levies, and in accordance with the polluter pays principle,[390] states should concentrate on taxing fossil fuel companies, including windfall taxation, and eliminating and redirecting their subsidies.[391] The Prime Minister of Barbados, Mia Mottley, was more direct in her approach, and suggested that fossil fuel companies (along with other industries, including aviation and insurance) should contribute a part of their profits to the international climate finance effort.[392] However, as Mottley knows all too well, these industries are unlikely to voluntarily share their dividends, and as Toussaint warned, relying on private finance would "mark[] a further step in the diffusion of responsibility for loss and damage."[393]

CFL litigation levies could serve as a suitable compromise between the need for more public finance on the one hand and the justified preference that fossil fuel companies, not taxpayers, should be the ones to pay on the other. Litigation levies ensure that the money will come from private companies yet be distributed and monitored by international finance mechanisms. While not all climate

387. U.N. Adaptation Gap Report 2023, *supra* note 375, at XIX, 74.

388. *Id.* (suggesting debt relief in exchange for new commitments to invest in green initiatives).

389. *Id*.

390. The polluter pays principle was first officially adopted by the OECD in 1972, and establishes that "the polluter has to bear the cost of steps that he is legally bound to take to protect the environment, such as measures to reduce the pollutant emissions at source and measures to avoid pollution by collective treatment of effluent from a polluting installation and other sources of pollution." OECD, THE POLLUTER-PAYS PRINCIPLE: OECD ANALYSES AND RECOMMENDATIONS 5 OCDE/GD (92) 81 (1992), https://one.oecd.org/document/OCDE/GD(92)81/En/pdf. In 1992, the principle was adopted by the Rio Declaration on Environment and Development, designed to outline principles for sustainable development. *See* U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I, Principle 16 (Aug. 12, 1992).

391. AMNESTY INT'L, *supra* note 72, at 20. The U.S. Chamber of Commerce has warned that a windfall tax would be ineffective and end up harming consumers. Yet, others have suggested various approaches and regulations that would guarantee shareholders, not consumers, bear the tax. *See* Curtis Dubay, *A Windfall Profits Tax Would Reduce Energy Production When We Need It Most and Raise Prices in the Long Run*, U.S. CHAMBERS OF COM. (Apr. 13, 2022), https://www.uschamber.com/economy/a-windfall-profits-tax-would-reduce-energy-production-when-we-need-it-most-and-raise-prices-in-the-long-run; Seth Hanlon & Trevor Higgins, *As Energy Prices Skyrocket, Congress Must Return the Oil and Gas Industry's Windfall Profits to the American People*, CTR. FOR AM. PROGRESS (Apr. 6, 2022), https://www.americanprogress.org/article/as-energy-prices-skyrocket-congress-must-return-the-oil-and-gas-industrys-windfall-profits-to-the-american-people/.

392. The U.N. Climate Ambition Summit, *supra* note 20, at 1:38:39 ("Indeed when you have 2.5 trillion dollars in profits on your table, even 10-15 [percent] leaves you more than a belly full to be able to satisfy your shareholders and the dividends that you pay them. But if you don't take corrective action now, you will have to tell us where you have been keeping all of your scientific research to relocate you and your families to planet Mars or to planet Pluto."); *see also* Marco Grasso & Richard Heede, *Time to Pay the Piper: Fossil Fuel Companies' Reparations for Climate Damages,* 6 ONE EARTH 459, 459 (2023).

393. Toussaint, *supra* note 75, at 146.

change litigants would be required to share their awards—such as those involved in rights-based climate litigation or cases pursued by private plaintiffs, which this Article does not consider as CFL[394]—as this Article has argued, there are strong reasons for applying these principles to CFL proceedings, and potentially to other future claims filed by local governments against transnational polluting industries.

D. Incentives for U.S. States and Other Subnational Plaintiffs to Develop a Shared-Remedy Model

In addition to the proposals outlined above, which present a first step toward a theoretical framework for a future distributive model, this final Subpart will suggest incentives for plaintiffs (national or subnational), as well as academics, lawyers, and policymakers to advance this effort further.

1. Aligning Domestic and International Moral Claims

The first, primary, incentive is rooted in social justice. CFL plaintiffs have historically contributed significantly to GHG emissions and, in turn, greatly benefited from them.[395] By adopting a shared-remedy model, they might not entirely remedy the structural injustice they contributed to, but would significantly strengthen the moral foundation on which their legal actions are based.[396] Insofar as plaintiffs appeal to fairness, equity, and justice to support their claims, they should adhere to those very values,[397] and support countries and communities disproportionately affected by the same fossil fuel companies, many of which would not have operated to begin with, without the plaintiffs' past approval and support.

While the proposed doctrines still grant the vast majority of the final award to the plaintiffs litigating the case, supporting such a model would constitute an important step toward more equitable award distribution methods and could mark the beginning of a new remedial framework that links domestic proceedings and international climate finance. Such a framework can be later extended to litigation against other polluting industries like aviation and shipping.

394. *See supra* notes 6-7 and accompanying text.

395. *See supra* note 36 and accompanying text.

396. In her theory on global justice, Iris Marion Young terms what she calls the "social connection model" of responsibility. Under this model, "all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices." Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y. 102, 102-03 (2006).

397. *See supra* note 325.

2. A Shared-Remedy Model Aligns with U.S. Plaintiffs' Long-Term Geopolitical and Economic Interests

The climate harms now borne primarily by developing countries will not remain distant from the United States. As climate change intensifies natural disasters, exacerbates water shortages, and fuels armed conflict, the resulting instability is likely to drive migration, disrupt international trade, and place increasing strain on U.S. resources.[398]

In December 2024, the Congressional Budget Office issued a comprehensive report at the request of the Chairman of the Senate Budget Committee assessing the potential economic consequences of climate change for the federal budget, GDP, and other aspects of the U.S. economy, including the effects of climate-related harms abroad.[399] It concludes that agricultural losses and natural disasters worldwide, particularly in less developed countries, are likely to increase immigration to the United States, thereby "boost[ing] output and revenues as well as federal spending."[400] The report also notes that climate-related geopolitical instability is likely to put the United States at greater risk of being drawn into a conflict, adding that "[t]he regions that will be more susceptible to conflict as a result of climate change are those that are more dependent on agriculture and less able to adapt."[401]

To be sure, allocations from CFL awards will not, on their own, close the international climate finance gap. Yet they could provide a meaningful economic contribution, bolster the resilience of the most vulnerable, and serve as a first step toward a broader approach that treats climate litigation as a tool for channeling funds from defendants both to plaintiffs and to international funds.

3. Positioning Subnational Entities as Leaders in Climate Action

A third reason to develop a distributive remedial model is that it enables state leaders to actively participate in its design, demonstrating their commitment to climate justice. The debate over the legal obligations of Annex I countries to support climate finance in developing nations is likely to intensify following the ICJ's Advisory Opinion, and there have already been growing discussions on the responsibility of subnational entities.[402] Adopting a shared-remedy model could

398. *See generally* CONG. BUDGET OFFICE, THE RISKS OF CLIMATE CHANGE TO THE UNITED STATES IN THE 21ST CENTURY (2024).

399. *Id.*

400. *Id*. at 37.

401. *Id.*

402. *See, e.g.*, Neelima Jain, *Climate Summits Should Accelerate Subnational Action*, CSIS (Nov. 30, 2022) https://www.csis.org/analysis/climate-summits-should-accelerate-subnational-action; Benjamin Leffel, *Subnational Diplomacy, Climate Governance & Californian Global Leadership*, CTR. ON PUB. DIPL. (Mar. 2018), https://uscpublicdiplomacy.org/publication/subnational-diplomacy-climate-governance-californian-global-leadership; *Subnational Governments at the Forefront of Climate Action*, THE CLIMATE GROUP, https://seors.unfccc.int/applications/seors/attachments/get_attachment?code=6DTDMM8OJPR1X4Q3ILP6CAZZB3HTGI32 (last visited Sept. 16, 2025).

enable plaintiffs to preempt potential pressure and create a framework on their own terms and to their liking.[403] Such a framework can be later extended to litigation against other polluting industries and to other countries, positioning U.S. plaintiffs as climate leaders.

Many of these states, including California, Connecticut, and New York, are known for their progressive environmental policies and leadership in climate action.[404] As the Governor of California expressed at the U.N. Summit, the State of California is proud to "lead by example," mindful of the fact that "we are all in this together."[405] Developing a model that supports other vulnerable communities harmed by companies operating in their jurisdiction will allow California and others to set an example for other subnational entities worldwide and strengthen their reputation as climate leaders.[406]

4. A Shared-Remedy Model is Consistent with the Official U.S. Position on International Responsibility and with the CBDR-RC

Unlike other financial arrangements that the United States has rejected,[407] the shared remedial framework this Article proposes does not require plaintiffs to admit fault for climate change or consider their contributions as a legal remedy.[408] Instead, such an approach would simply adhere to the principle of CBDR-RC. While "respective capabilities" traditionally encompass scientific expertise, technical capacity, and economic infrastructure, I suggest that the strength of a country's legal system, and the fact that many major companies are headquartered within its territory, should also be counted among those capabilities. In CFL, plaintiffs' respective advantages include their robust legal systems and the regulatory ability to hold the oil industry accountable. Despite the fact that the climate treaty regime is country-based, subnational entities have

403. *See* EYAL BENVENISTI & GEORGE W. DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL AND INTERNATIONAL COURTS 83 (2017) (discussing how states have historically sought to shape international legal arrangements to reflect their own interests and values).

404. For example, in California, programs like the California Climate Investments (funded by its cap-and-trade system) and its involvement in international coalitions, such as the Under2 Coalition, emphasize its global commitment to climate action. *See* CAL. AIR RES. BD., ANNUAL REPORT TO THE LEGISLATURE ON CALIFORNIA CLIMATE INVESTMENTS USING CAP-AND-TRADE AUCTION PROCEEDS (2025), https://ww2.arb.ca.gov/sites/default/files/auction-proceeds/cci_annual_report_2025.pdf; *California*, UNDER2, https://www.theclimategroup.org/under2-coalition/region/california (last visited Sept. 16, 2025).

405. *See* The U.N. Climate Ambition Summit, *supra* note 20, at 0:50:42, 0:53:01.

406. Politically, it could be argued that leaders involved in these proceedings aim to present themselves as a counterpoint to Trump-era policies; yet it is worth noting that California Governor Gavin Newsom spoke at the U.N. on these issues even before Trump took office, highlighting the significance he attributes to these claims in the broader international context. *See id*.

407. *See, e.g.*, *supra* note 73 and accompanying text (describing the United States's preference for financing structures that do not "create a legal remedy").

408. *Id.*

their own unique capabilities that could make them an integral part of not only the local, but the global efforts toward mitigation and adaptation.[409]

Over the years, states, NGOs, and scholars have insisted that a just distribution of climate adaptation and loss and damage funds must entail recognition of wrongdoing.[410] Julia Dehm suggested that "the question of historical responsibility gives rise not just to legal obligations, but also to moral obligations arising from a history where some states have benefited from carbon-based industrialisation, which could not be 'discharged through compensation without admission of liability.'"[411]

This Article takes a different stand. Ideally, the distribution of funds would come with an admission of fault. However, climate disasters continue at a staggering pace, and such acknowledgment by developed countries in the near future, especially under the current Administration, seems unrealistic. Time is not on our side, and the sooner funding can be directed toward mitigation, adaptation, and loss and damage needs, the better. Insisting on framing funding transfers as remedies for wrongdoing matters less than providing vulnerable communities with as much financial support as possible.[412]

CONCLUDING REMARKS

In 1978, Guido Calabresi and Philip Bobbitt referred to allocation decisions that societies face as "tragic choices."[413] For better or for worse, they said, we live in a world of limited resources; some goods cannot be made available to all, and societies must choose how to allocate them, to whom, and in what manner.[414]

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409. So far two subnational entities contributed to international climate finance directly via climate funds: Scotland, and regional governments in Belgium. *See Funding Pledge for Loss and Damage,* SCOTTISH GOV'T (Nov. 8, 2022), https://www.gov.scot/news/funding-pledge-for-loss-and-damage ("An additional £5 million of funding to tackle loss and damage has been announced by First Minister Nicola Sturgeon at the COP27 climate summit."); *Walloon Region (Belgium)*, ADAPTATION FUND, https://www.adaptation-fund.org/about/resource-mobilization/contributors/belgium-wallonia (last visited Apr. 27, 2025) ("Regional governments in Belgium (including the Brussels-Capital, Walloon and Flanders Regions) have consistently pledged to the Adaptation Fund, contributing a total of nearly . . . 25 million [U.S. dollars] to the Fund. The collective involvement of local, regional and national governments is increasingly crucial in the urgent and global fight against climate change.").

410. *See, e.g.,* AMNESTY INT'L, *supra* note 72, at 12-16 (suggesting that truth commissions should be used as "foundational guidance" for climate finance arrangements); Toussaint, *supra* note 75, at 153 ("Arguably, whether by any other name, a fund without an admission of wrongdoing remains exactly that - a fund. The moral reasons of why polluters should pay into the fund would thus be obscured and risk being co-opted into a narrative of greater capacity, goodwill, international solidarity or, more specifically, humanitarian relief."); Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 524-26 (2009).

411. Dehm, *supra* note 23, at 223.

412. Alternatively, the responsibility Young articulates seems to be far better suited to the complex relational structure of climate-related harm. *See* Young, *supra* note 396, at 118 ("While it is usually inappropriate to blame those agents who are connected to but removed from the harm, it is also inappropriate, I suggest, to allow them (us) to say that they (we) have nothing to do with it."). *See also* Adi Gal, *Human Remedies*, 65 HARV. INT'L L. J. 387, 450, 453-55 (2024) (questioning the role of fault in climate remedial arrangements).

413. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES 18 (1978).

414. *Id.*

Today, as climate change risks every living being on Earth, these choices are more tragic than ever. Any allocation of goods for climate needs will have to be constrained by our limited resources, and how we address our allocation choices will define who we are.[415]

While litigation is not, and should not become, the main path through which countries fund their climate-related needs, it is nevertheless a central one, turning climate litigation awards into allocation choices with significant moral, political, and economic implications. As this Article suggests, this means that our climate remedial choices must align with broader climate policy principles and not undermine agreed-upon international values, or else they will push us into moral dissonance.[416] CFL's remedial structure must therefore shift from a narrow and fragmented "first-sue, first-served" basis to a collective and more equitable one that considers the unique international torts caused by fossil fuel companies and the historical circumstances that have led the least polluting countries to be the most climate-vulnerable. If this is achieved, our allocation choices through CFL might feel less tragic, and instead become a source of resilience and pride.[417]

415. *Id.* at 17.
416. *Id*. at 198.
417. *Id*. at 18.