Event Summary

On September 26th, 2018, the Columbia Center on Sustainable Investment, the Sabin Center for Climate Change Law, and the Sustainable Development Solutions Network hosted "Climate Change, the Courts, and the Paris Agreement," a conference on the status of and role for legal action to promote the achievement of the Paris Agreement.

The conference included panels on legal challenges to governments and corporations, with discussion of cases in the United States, the Netherlands, Colombia, Germany, the Philippines, Ireland, Switzerland, and New Zealand. These legal actions have invoked a variety of legal theories and seek an array of remedies. They include efforts by cities to sue fossil fuel companies for damage from climate impacts, suits brought by youth to force governments to adopt more aggressive climate policies, NGO campaigns to block or shut down fossil fuel infrastructure, and state, NGO, and fenceline community challenges to rollbacks of critical federal regulation.

The discussions made clear that legal interventions have a crucial place in the climate advocacy toolkit. These interventions are particularly impactful and important when they:

- contest energy, transportation, and land use planning decisions at the myriad judicial and administrative venues where they're made,
- prevent governments from improperly rolling back crucial climate regulations,
- force governments to increase climate ambition in accordance with existing constitutional, statutory, or international law commitments, and
- help to build political will for climate action, including by focusing public attention on climate change, framing responsibility for harm and action, and unearthing new information about past misconduct by defendants.

Nevertheless, the panelists stressed that litigation is but one tactic, and cannot replace comprehensive legislation to combat climate change and protect citizens from its impacts. As one participant advised, "don't conflate the catalytic power of the courts with the social change needed to address this problem. Courts can spur us, but we need every branch of government aligned in this fight." While legal action can contribute to that social change, it cannot replace much needed policies to usher in a just transition to a zero-carbon society.

Event Recap

On September 26th, 2018, the Columbia Center on Sustainable Investment, the Sabin Center for Climate Change Law, and the Sustainable Development Solutions Network hosted "Climate Change, the Courts, and the Paris Agreement," a conference on the status of and role for legal action to promote the achievement of the Paris Agreement.

Professor **Michael Gerrard**, Director of the Sabin Center, framed the afternoon's discussion with a somber reminder that the world governments' response to climate change has been wholly inadequate by any objective measure: not only is the Paris Agreement's 2 ^{o}C target unsafe, but government emissions reduction commitments[1] are projected to far overshoot 2 ^{o}C, and existing policies in place are insufficient to fulfil those already underwhelming commitments.

Senator Sheldon Whitehouse of Rhode Island, offering taped remarks, explained this global failure to prevent climate change as a product of the fossil fuel industry's outsize political influence. At least in the US, Whitehouse held that oil, gas, and coal companies have used their immense power and wealth to buy the legislative and the executive branches of government, which are now beholden and do the industry's legislative bidding.

Therefore, it's no surprise that climate advocates have increasingly turned to the courts to promote a responsible climate agenda. **Michael Burger**, Executive Director of the Sabin Center, noted that these efforts have ballooned in recent years, and that the Sabin Center and Arnold & Porter's climate litigation database now includes details on over 1,200 climate-related cases.

These cases have been brought by citizens, sub-national governments, national human rights institutions, and NGOs hoping use existing law to bend down emissions curves and hold governments and corporations accountable for their contributions to climate change. They invoke a variety of legal theories and seek an array of remedies. They include efforts by cities to sue fossil fuel companies for damage from climate impacts, suits brought on behalf of children to force governments to adopt more aggressive climate policies, NGO campaigns to block or shut down fossil fuel infrastructure, and state, NGO, and fenceline community challenges to rollbacks of critical federal regulation.

This conference brought together experts and practitioners from many of the world's most prominent climate cases to showcase a panoramic snapshot of the state of climate litigation, and discuss the role for legal action in efforts to hold warming to 1.5 ^{o}C.

The conference's first panel focused on litigation against governments and the proliferation of cases intended to force responsible government responses to the climate crisis.

Among these cases, the most well-known is perhaps the Dutch case *Urgenda Foundation v. Kingdom of the Netherlands*, which, in 2015, resulted in the first ever decision ordering a government to reduce greenhouse gas emissions on non-statutory grounds (the decision survived an appeal in the Dutch intermediate appellate court shortly after the conference was held). **Tessa**

[1] In the form of Nationally Determined Contributions, or NDCs.

Khan of the Urgenda Foundation and the Climate Litigation Network explained that Urgenda had invoked Dutch liability law, as well as constitutional, international and regional legal principles, to argue that the Netherlands had a duty to protect its citizens from dangerous changes to the climate, and that the government was effectively liable for the tort of negligence in adopting meager emissions reductions goals. However, she also stressed that while the legal implications of the case were and are important, the case also had a transformative impact on climate *politics* in the Netherlands; the country's center right coalition government has since proposed one of the most ambitious climate policies in the world (including commitments to shutter coal power plants and reduce emissions by 49% by 2030).

University of Oregon Law Professor **Mary Wood**, Dejusticia Executive Director **César Rodríguez Garavito**, and Germanwatch Policy Advisor **Caterina Freytag** also discussed legal efforts to provoke government action on climate.

Mary Wood described the highest profile US case of this type, *Juliana v. United States*. According to Wood, the litigants in the case, representing 21 youth plaintiffs, have argued that government's affirmative actions destabilizing the climate system jeopardize their core interests of life, liberty, and property and violate their constitutional rights under the due process and equal protection clause. They also argue that the atmosphere is a public trust belonging to all citizens, and that the Federal Government has firm fiduciary responsibility to protect that trust so that it can continue to support the survival of citizens and the endurance of the nation. The case was scheduled to go to trial in late October, but is temporarily stayed while the Ninth Circuit and U.S. Supreme Court simultaneously consider petitions for writs of mandamus filed by the Department of Justice in its ongoing efforts to avoid a trial in the case. While four such petitions have already been denied, the Department of Justice continues to argue that the courts have no role in climate cases, and that the legislative and executive branches are more appropriate actors to address climate change. The plaintiffs contend that the judiciary is the designated branch to enforce constitutional rights, which are implicated by an affirmative fossil fuel policy that brings climate chaos, puts plaintiffs in peril, and destroys the public trust resources that they and future generations depend on for survival and wellbeing.

Fortunately, judges in Colombia have been more willing to allow a role for the courts in promoting responsible action on climate. In January, the Colombian human rights non-profit Dejusticia filed a special legal action for constitutional violations called a *tutela* on behalf of 25 youth plaintiffs over the government's inadequate plan to meet both national and international commitments to achieve net zero deforestation by 2020. Dejusticia argued that failure to reduce deforestation and combat climate change would infringe upon Colombians' constitutional rights to a healthy environment, life, health, food, and water. The Colombian Constitutional Court ruled in favor of Dejusticia in April 2018, and Dejusticia has been working with the Ministry of Environment to create a monitoring and implementation plan to reign in deforestation in the months since. Critically, the tutela has empowered the Ministry of Environment to push other government actors, including the police, the army, and the Attorney General, to crack down on illegal deforestation as well.

In the European Union, the German advocacy group Germanwatch has similarly been exploring litigation as a climate action tool. In addition to collaborating with plaintiffs on the

groundbreaking case *Lluiya v. RWE AG*, in which a Peruvian farmer at risk from glacial melt sued a German utility for damages from historic contributions to climate change, Germanwatch is also supporting the "People's Climate Case," or *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*. The case, brought on behalf of ten European, African, and Pacific Islands families, also invokes fundamental rights to health, education, occupation, and equal treatment to argue that the EU Parliament must increase emissions reduction ambition to between 50% - 60% below 1990 levels by 2030. The case was initially filed in May 2018.

Meanwhile, climate policy ambition in the United States, *Juliana* aside, seems to be moving backwards. The Environmental Protection Agency under President Trump has taken action to unravel the Obama Administration's signature climate policies to reduce emissions from power plants, transportation, methane leaks, and extremely potent hydrofluorocarbons (HFCs) used in refrigeration. But, as **David J. Hayes**, Executive Director of the State Energy & Environmental Impact Center at the NYU School of Law, made clear, state attorneys general have mobilized in force to block these regulatory rollbacks and salvage key environmental policies. By Hayes' count, these AGs have filed 135 administrative actions and cases challenging potentially harmful federal decisions, and have met impressive success. Further, as **Lemuel Srolovic**, Environmental Protection Bureau Chief for the New York State Office of the Attorney General, reminded during the second panel, lawsuits by attorneys general have also been used to push *proactive* federal action on climate, for example in *Massachusetts v. EPA*, which resulted in the Supreme Court decision that allows the EPA to regulate greenhouse gases (GHGs) as pollutants under the Clean Air Act.

The environmental legal advocacy organization Earthjustice, where **Abigail Dillen** is now President, has joined and supported many of these lawsuits against the federal government. But it has also worked to use established environmental and energy statutes and case law to stop fossil fuel extraction and combustions and promote renewable energy deployment. This often means intervening in impactful, but less high-profile, venues like state public utility commissions and with other local and state decision-making venues to block fossil fuel infrastructure and ensure that renewable energies get their fair shake. While Earthjustice has found some success with this approach, Dillen also warned that President Trump's potential bailouts for the coal sector, and efforts to change agency-level rule-making procedures (for example, by constraining what can be considered in cost-benefit analyses) threaten to set back progress made through legal action.

Kicking off the second panel on litigation against companies, Sierra Club Beyond Coal Campaign Director **Mary Anne Hitt** echoed many of Dillen's sentiments. Beyond Coal, which often collaborates with Earthjustice, began as a shoe-leather campaign to marry environmental and climate justice in parts of the country traditionally neglected by the environmental movement. The campaign connects Sierra Club attorneys with local organizers to block and shutter coal power plants. By targeting state utility commissions and arguing against the economics of continued reliance on coal power, Beyond Coal has prompted the early retirement of over half of all coal plants in the US, 274 in total. Now, in addition to challenging those remaining coal plants, Beyond Coal is pushing utility commissions to leapfrog natural gas to meet electricity needs with renewable energy, and has launched a Beyond Coal Europe Campaign.

Susan Amron, Chief of the Environmental Law Division for the City of New York, and **Vic Sher**, co-founding Partner at Sher Edling LLP, have also pioneered new innovative climate litigation strategies. Between July 2017 and July 2018, 11 cities and counties and the State of Rhode Island filed lawsuits against major fossil fuel companies for their contributions to climate change. Amron is working on the New York City lawsuit against Exxonmobil, British Petroleum, Chevron, Shell, and ConocoPhillips, and Sher is representing Rhode Island, the City of Baltimore, and six California cities and counties in similar cases. Unlike the cases against governments that sought to order affirmative action on the part of government actors, these are more typical tort cases, seeking damages for past harms and to cover the costs of adaptation.

In their claims, which include arguments on public nuisance, product liability, negligence, and failure to warn, the cities must establish (1) the causal link between emissions and harm, (2) that emissions can be attributed to specific actors, and (3) that those specific actors bear responsibility for that harm. The case for liability under these criteria has been made much stronger in recent years by advances in climate attribution science, research on companies' historic emissions, and investigative reporting on these companies' internal climate risk research and efforts to mislead the public on climate science's veracity and confidence. Together, they've found that many of these companies have emitted significant portions of total historic GHG emissions despite knowing for decades that their products would cause harmful changes to the climate.

However, in order to receive a finding of liability, the plaintiffs in these cases must find a way to circumvent the precedent from the 2011 decision *American Electric Power Co. v. Connecticut*, in which the Supreme Court ruled that the EPA's authority to regulate GHGs under the Clean Air Act displaces company liability under federal common law. The plaintiffs sought to sidestep this precedent by filing the suits in state courts, not bound by Supreme Court precedent, rather than federal ones. In a few of the cases, including the New York case, judges have held that the issues at play are federal in nature and so have have dismissed the suits; appeals have been or will be brought. But, Judge Chhabria in the San Mateo and Marin counties and the City of Imperial Beach cases has allowed the cases to proceed in California state courts.

Like Amron and Sher, **Lemuel Srolovic** of the New York State Attorney General's Office is working on a case that rests on fossil fuel companies' intentional underplaying of climate change risk. The New York AG's Office has used the Martin Act to investigate fossil fuel companies that have intentionally overstated uncertainties and understated risks from climate change to investors in search of potential fraud. In 2015, the AG's Office secured a settlement with Peabody Energy over these misleading statements, only a few days after it announced a second investigation into ExxonMobil's conduct. New York Attorney General Barbara Underwood filed a lawsuit alleging that ExxonMobil fraudulently deceived investors about management of climate regulatory risks on October 24, 2018.

Finally, Commissioner **Roberto Cadiz** of the Philippines Commission on Human Rights discussed the Commission's investigation into whether the actions of a number of fossil fuel majors have violated the human rights of Filipino citizens through contributions to climate change. Because most of these companies do not operate in the Philippines and the Commission cannot subpoena witnesses or hold them in contempt, the Commission has sought to conduct its

investigation in a dialogical, rather than adversarial, manner, and is not trying to enforce damages. Yet, despite these efforts to conduct a participatory, transparent, and fair investigation, no fossil fuel company haas cooperated to date. Commissioner Cadiz nevertheless considers these constraints to be potential opportunities, freeing up the Commission to explore questions that other courts would not touch, and potentially come to a novel conclusion unencumbered by past precedent. In other words, he stressed that "national human rights institutes can be idealistic instead of pragmatic and can establish guiding principles that can inform future precedent and legislation" where courts might be more cautious.

In sum, the conference made clear that legal interventions have a crucial place in the climate advocacy toolkit. These interventions are particularly impactful and important when they:

- contest energy, transportation, and land use planning decisions at the myriad judicial and administrative venues where they're made,
- prevent governments from rolling back crucial climate regulations,
- force governments to increase climate ambition in accordance with existing constitutional, statutory, or international law commitments, and
- help to build political will for climate action, including by focusing public attention on climate change, framing responsibility for harm and action, and unearthing new information about past misconduct by defendants.

As for the overall role for litigation to promote climate action? Abigail Dillen borrowed from a former law professor in reminding that, at the end of the day, "the courts can never save us." The courts are, and will continue to be, an essential tool to achieve climate justice and maintain a livable planet. But "don't conflate the catalytic power of the courts with the social change needed to address this problem. Courts can spur us, but we need every branch of government aligned in this fight." While legal action can contribute to that social change, it cannot replace much needed policy to usher in a just transition to a zero carbon society.