

# Climate change litigation in action



Ana de Liz

*The lawyers connecting human rights with global warming and pollution to fight climate change and its consequences around the world*

‘**T**he law adapts to reality,” says Twenty Essex barrister Monica Feria-Tinta, reflecting on the cases that have sprung to prominence in the past couple of years. While in that past ‘reality’ for Feria-Tinta involved matters relating to human rights or law of the sea, those two categories have become increasingly connected to climate change, a reality that the claimant she currently acts for have been dealing with since the start of the decade.

Feria-Tinta expects the amount of climate change-related litigation to keep rising every year due to the increased worldwide awareness of the issue. According to the Climate Change Laws of the World database, there have been 339 climate litigation cases filed in the past 30 years. In the past, most such cases were brought against corporations, but over time litigation has increasingly been directed at governments as well.

The barrister is currently involved with several climate change-related cases and hopes to set the crucial precedents needed for others to be decided.

For example, working on behalf of West Timor’s inhabitants, she lodged a claim to United Nations Special Rapporteurs late last year for compensation over the transboundary harm suffered by the islanders because of the Montara oil spill that occurred in 2009.

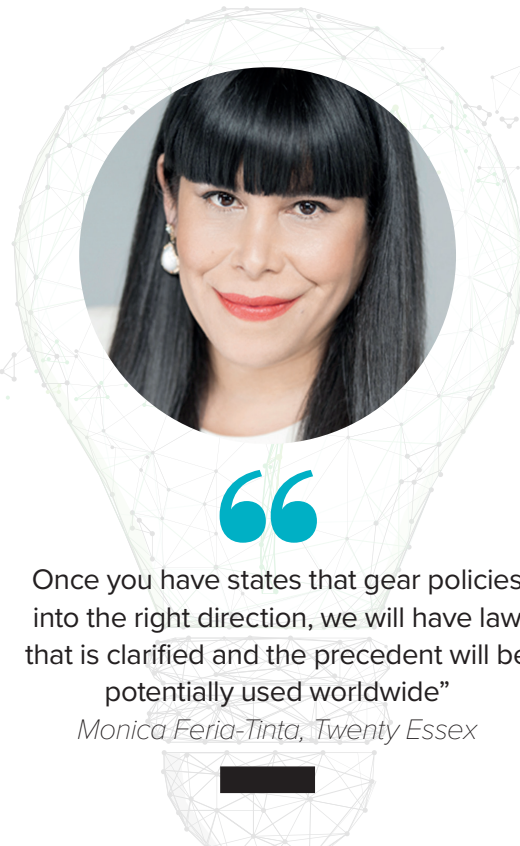
Beyond economic reparations for the people of West Timor affected by the spill, she hopes that the case will draw attention to the fact that platform spills are not regulated in the same way that shipping oil spills are, and sets a precedent by clarifying the laws that should be followed by states and companies in the event of similar future disasters. The historical conventions to deal with these events have been reactive, she explains.

## Climate change and human rights

One of the main ways to bring climate change legal battles to the highest courts has been to use existing treaties and human rights laws and match them to the reality of environmental duress. Feria-Tinta did this with the Montara oil spill case, as well as on the first climate change case to reach the UN Human Rights Committee: that of the Torres Strait Islands, which have been sinking as a result of climate change, against Australia.

“This case is focusing squarely on the issue of climate change and enforcing the Paris Agreement via the interpretation of human rights – so bringing climate change to the courts as a human rights issue,” she says.

The islanders allege that Australia has violated three articles from the International Covenant on Civil and Political Rights: the right to culture; the right to be free from arbitrary interference with privacy, family and home; and the right to life. The Australian government has recently pledged a \$25m (£12.3m) infrastructure



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package for the islanders. However, the case continues as it is centrally focused on how the Paris Agreement can also inform mitigation measures for the future.

“The case of the petitioners is that they cannot leave the islands and they have links to the space, both the sea and land, and they want action so that they are not in a situation where it becomes impossible to inhabit the islands in the future. They are the ones who contributed the least to this mess, but are the most affected,” Feria-Tinta says.

The dispute also has the underlying issue of asking the UN Human Rights Committee to clarify the human rights obligations that states have under the International Covenant in relation to both climate change adaptation and mitigation. “Once you have states that gear policies into the right direction, we will have law that is clarified and the precedent will be potentially used worldwide,” Feria-Tinta adds.

## Climate change litigation eight years in the making

Last December, on the other side of the world, an eight-year climate change battle came to an end. Dutch law firms Höcker and NautaDutilh represented the non-profit Urgenda in the final hurdle of its case against the Dutch government, which resulted in a

landmark decision in which the Dutch Supreme Court established that the government will have to reduce greenhouse gas emissions by at least 25 per cent compared to 1990 levels, by the end of this year, to protect the human rights of Dutch citizens from the dangers posed by climate change.

More than 40 scientists provided evidence over the lifetime of the litigation, and like the Torres Strait Islands case and that of the West Timor islanders, it was grounded in human rights law. It put the duty of care principle that the government has to its current and future inhabitants at the heart of the decision, says NautaDutilh partner Freerk Vermeulen, who took on the “incomparable” case, his first ever for an NGO.

“There has been a growing tendency in Dutch legal literature that human rights could be more solid grounds to argue on than Dutch law only, because it is supra-national law and something which cannot be altered in any circumstance by the Dutch government, and would provide for strengthened minimum requirements to prevent future harm from happening,” he says.

The Dutch Supreme Court, Vermeulen adds, gave its decision with full awareness and reflection on the novelty of basing climate litigation on human rights. The international dimension of the case, he says, was based on the effort-sharing norms embodied in the European human rights convention, which led the Supreme Court to hold that even though the Dutch government is only responsible for 0.5 per cent of global carbon dioxide emissions, it should take action according to its proportional contribution to the global issue.

“In the past, a lot of climate litigation actually failed because of this causality type of argument, and that is why the Supreme Court has been very principled to tell the government that it should take measures in accordance to its contribution to the global phenomenon,” Vermeulen says.

Will the targets be met? Vermeulen says the Dutch government will announce the measures it will take to meet the target in April, “which is, of course, a bit late, given the timing, but it is possible. The question of course, is at what cost.”

And what if it fails to meet the target by the end of 2020? “If the government was not to meet the rule of law, we would have, of course, a very serious issue in the Netherlands. You can imagine that this will be regarded by different political parties as extremely serious, if the government was not to comply with this order given by three consecutive judges over time. It would be very problematic.”

The partner says that judges who make decisions on climate

**The Torres Strait Islands case focuses on climate change**



change litigation, whether in the Netherlands or anywhere else, are undergoing a process of influencing, finding justifications, inspiring and encouraging each other as more and more cases are being brought to national courts – even though each case is ultimately guided by how the rule of law is applied in each jurisdiction.

Vermeulen further predicts that the increase of attention on climate change means that, if governments fail to take robust measures in the coming years, the responsibility of CEOs and corporate boards are likely

to be taken rapidly to the legal level, financial institutions, banks and insurers may well be targeted, and that organisations such as central banks will become more and more demanding of robust policies on climate change, which could also result in further litigation.

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