USA

Law and Practice

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1. MULTILATERAL AND REGIONAL REGIMES

1.1 Multilateral Climate Change Legal Regime

The United States of America participates in the multilateral climate change regime. The USA signed and ratified the United Nations Framework Convention on Climate Change. The USA signed the Kyoto Protocol to the United Nations Framework Convention on Climate Change, but the USA never ratified this protocol. Similarly, the USA signed, but has not ratified, the Paris Agreement to the United Nations Framework Convention on Climate Change. It should be noted, however, that the USA had recently limited its participation in the multilateral climate change regime. Notably, in June 2017, President Donald Trump announced that the USA was officially withdrawing from the Paris Agreement to the United Nations Framework Convention on Climate Change. However, on his first day in office in 2021, President Joe Biden signed the instrument to bring the USA back into the Paris Agreement. Per the terms of the Paris Agreement, the USA then officially became a Paris Agreement Party again on 19 February 2021.

The USA's positions around mitigation and adaptation in particular have generally focused on a belief that each party to the United Nations Framework Convention on Climate Change should undertake efforts to reduce greenhouse gas emissions and adapt to climate change. This is a revised approach to the principle of common but differentiated responsibilities, and this approach generally rejects the idea that only developing countries should have mitigation and adaptation obligations. The USA has also taken the position that more attention should be paid to private sources of funding, including ways in which public resources and policies can help mobilise such funding. The USA has rejected the position that a party's obligation to meet its mitigation commitments should be contingent on the provision of sufficient funding by other parties. The USA has taken a cautious approach to technology transfer, advocating for this to be a component of multilateral climate change engagement, but also seeking to protect intellectual property rights.

Recently, the Biden administration has indicated that it will continue efforts to reduce greenhouse gas emissions and announced that it would "continue to keep the goal to limit global warming to 1.5 degrees Celsius within reach." At the 26th session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, the USA made several commitments, including joining the Global Methane Pledge, committing to a goal of reducing global methane emissions by at least 30% from 2020 levels by 2030, and committing to ending international public support for the unabated fossil fuel energy sector by the end of 2022 and instead prioritising support for the clean energy transition.

1.2 Regional Climate Change Legal Regimes

Federal Agreements

The USA issues bilateral statements with other nations concerning climate change from time to time. Notable recent examples include the United States-China Joint Glasgow Declaration on Enhancing Climate Action in the 2020s dated 10 November 2021 and the United States-China Joint Statement Addressing the Climate Crisis dated 17 April 2021. Within North America, the USA and Mexico issued a recent Joint Statement on Mexican–US Engagement on Climate Change dated 19 October 2021. Additionally, states on both sides of the Mexico–United States border co-operate to prepare greenhouse gas emissions and inventories, and implement climate change action plans. The USA and Canada also co-operate regionally on a number of climate

change initiatives. For instance, the USA and Canada established a Bilateral Working Group on Climate Change to expand and intensify bilateral efforts to address climate change. The USA and Canada hold High-Level Climate Ministerials to co-ordinate semi-annual dialogue between the countries on enhancing their respective Paris Agreement Nationally Determined Contributions, developing strategies for achieving targets under the Paris Agreement, ensuring climate change policy and regulatory alignment, and increasing adaptation and resilience to climate change impact for the most vulnerable.

State-Level Agreements

Individual states also enter into agreements concerning climate change with nations. California has entered into climate change agreements with New Zealand, China, Mexico and Canada, for example. The USA and Canada also co-operate on a regional basis because California's Cap-and-Trade Program is linked with the Cap-and-Trade System of Québec. Allowances issued by one of these jurisdictions are recognised in the other jurisdiction. Under California's Cap-and-Trade Program, the California Air Resources Board sets a declining cap on statewide greenhouse gas emissions in accordance with emission reduction targets and generates a number of credits under the cap. If an entity in California creates greenhouse gas emissions as part of its activities – for example, fuel refining – it must comply with the programme by purchasing credits in an amount equal to that level of emissions. Each year, the cap declines and the number of overall credits available (and therefore emissions) decreases accordingly. There are two types of compliance instruments: allowances and offsets. An allowance is a tradable credit to emit up to one metric ton of carbon dioxide equivalent. An offset is a tradable compliance instrument that represents a greenhouse gas reduction or greenhouse gas removal enhancement of one metric ton of carbon dioxide equivalent. A covered entity may only meet up to 8% of its compliance obligation using offset credits, a limit that declines over time.

2. NATIONAL POLICY AND LEGAL REGIME (OVERVIEW)

2.1 National Climate Change Policy

The USA has submitted a nationally determined contribution in line with Article 4 of the Paris Agreement to the United Nations Framework Convention on Climate Change. This includes an economy-wide target of reducing net greenhouse gas emissions by 50–52% below 2005 levels in 2030. The USA supports a robust system of Paris Agreement reporting and transparency that would apply to developing and developed countries. The USA has implicitly linked issues surrounding loss and damage with adaptation. The USA has recommended assessment of the risks posed by climate change, prioritisation of the most vulnerable sectors, strengthening linkages between institutions and organisations, and supporting the provision of technical guidance to developing countries. The extent to which the USA would support the use of internationally transferrable mitigation outcomes by participating in an international market mechanism that is set up pursuant to the Paris Agreement remains unclear. Information regarding the USA's approach to technology and climate finance can be found in **1.1 Multilateral Climate Change Legal Regime**.

2.2 National Climate Change Legal Regime

At the federal level, the USA regulates greenhouse gas emissions under the Clean Air Act, which is the principal source of the federal government's statutory authority for controlling air pollution in the USA. Courts have consistently upheld the constitutionality of the United States

Congress' delegation of authority to the Environmental Protection Agency under the Clean Air Act. Congress established the Clean Air Act's basic structure in 1970, and made major revisions in 1977 and 1990. However, Congress drafted the Clean Air Act in such a way that allows this statute to be used to address air-related problems that become better understood over time, such as how greenhouse gas emissions cause climate change. For this reason, it wasn't until 2007 that the Supreme Court, in Massachusetts v EPA, found that greenhouse gases are air pollutants covered by the Clean Air Act.

Key components of the Clean Air Act aim at minimising pollution increases from vehicles, and from new or modified stationary sources. These new or modified stationary sources are required to use the best available technology to control emissions, while less stringent standards apply to existing sources. Greenhouse gas emissions are therefore now addressed in different ways under these Clean Air Act provisions that focus on emissions from mobile sources, new and modified stationary sources and, to a lesser extent, existing stationary sources. The specific ways in which climate change is addressed within these different statutory provisions are discussed in **3.1 Policy/Regulatory Instruments and Spheres of Government/Sectors**.

2.3 Key Policy/Regulatory Authorities

At the domestic level, the Environmental Protection Agency is the federal agency that is primarily responsible for climate change policy development and regulatory enforcement. At the international level, the United States Department of State Office of Global Change is responsible for implementing and managing international policy on climate change, and represents the USA in negotiations under the United Nations Framework Convention on Climate Change.

3. NATIONAL POLICY AND LEGAL REGIME (MITIGATION)

3.1 Policy/Regulatory Instruments and Spheres of Government/Sectors

Mobile Sources of Greenhouse Gases

In 2009, the federal Environmental Protection Agency concluded that current and projected concentrations of six greenhouse gases in the atmosphere threaten the public health and welfare of current and future generations. The Environmental Protection Agency then began setting national greenhouse gas emissions standards for passenger cars and light trucks, and addressing greenhouse gas emissions from new and modified fossil fuel-fired power plants and other large stationary sources under the Clean Air Act's Prevention of Significant Deterioration programme. For passenger cars and light trucks, for example, the most recent revised greenhouse gas emissions standards increase in stringency each year, with increases by 10% in model year 2023, 5% in model year 2024, 6.6% in model year 2025, and over 10% in model year 2026.

Stationary Sources of Greenhouse Gases

New and modified sources

For stationary sources, greenhouse gas emissions from the new and modified large stationary sources are covered by the Clean Air Act's Prevention of Significant Deterioration programme. This programme is designed to ensure that construction and modification of stationary sources will not cause violations of United States National Ambient Air Quality Standards and to prevent significant deterioration of air quality. In 2014, in Utility Air Regulatory Group v EPA, the Supreme Court held that Prevention of Significant Deterioration permits that are otherwise required (based on emissions of other pollutants) may continue to require limitations on greenhouse gas emissions based on the application of Best Available Control Technology.

Existing sources

Mitigating climate change by limiting greenhouse gas emissions from existing stationary sources has been much more controversial, however. In 2015, the Environmental Protection Agency issued the Clean Power Plan rule that aimed to reduce carbon dioxide emissions from existing power plants by 30% below 2005 levels by 2030. The rule established emissions performance rates representing the best system of emissions reduction for fossil fuel-fired electric utility steam generating units and stationary combustion turbines within each state. States were given flexibility to achieve these targets individually or at a regional scale, and to translate the rate-based targets into mass-based targets for compliance purposes. Opponents of the Clean Power Plan initiated litigation challenging it, however. In February 2016, in West Virginia v EPA, the Supreme Court stayed the Clean Power Plan. In 2017, the Environmental Protection Agency issued notices proposing to repeal the Clean Power Plan and propose an alternative regulatory approach to addressing greenhouse gas emissions from existing stationary sources. The Environmental Protection Agency then submitted a request to the DC Circuit Court of Appeals to hold the West Virginia v EPA case in abeyance pending the agency's reconsideration of the rule. In 2019, the Environmental Protection Agency then issued the Affordable Clean Energy rule, which would have given states significant discretion in deciding how to regulate emissions from power plants. It defined the "best system of emissions reduction" as on-site, heat-rate efficiency improvements. Instead of setting numeric emission reduction targets for each state, emissions guidelines would have included a list of candidate technologies that could be used to establish standards of performance and incorporated into state plans. States would have then had the discretion to determine which technologies were appropriate for each power plant and to establish corresponding performance standards. Opponents of the Affordable Clean Energy rule initiated litigation challenging the rule. In 2021, in American Lung Association v EPA, the DC Circuit Court of Appeals vacated the Affordable Clean Energy rule and directed the Environmental Protection Agency to issue a new rule. However, a coalition of states and coal companies asked the Supreme Court to review the DC Circuit's American Lung Association v EPA ruling. These petitions argued that the ruling effectively and wrongly gives the Environmental Protection Agency broad authority to direct transformation of the power sector through a single Clean Air Act provision. The Supreme Court granted certiorari and heard oral argument in February 2022. Reportedly, the Supreme Court appeared reluctant to entertain the states' and coal companies' arguments and focused on the fact that there is no current proposed regulation for the Supreme Court to review. In fact, while the current Environmental Protection Agency under President Joe Biden has not yet issued a new proposal for regulating existing stationary sources of greenhouse gas emissions, this administration has indicated that it does not intend to try to revive the Clean Power Plan in response to the 2021 direction from the DC Circuit Court of Appeals to issue a new rule.

Greenhouse Gas Reporting

With respect to a requirement to report greenhouse gas emissions, the Environmental Protection Agency's greenhouse gas reporting rule requires reporting of greenhouse gas data and other relevant information from large greenhouse gas emission sources, fuel and industrial gas suppliers, and carbon dioxide injection sites.

Additionally, climate change mitigation is becoming an issue for consideration in the granting of certain environmental permits or authorisations. This is happening because President Joe Biden's administration recently began the process of reinstating a policy that would require

review and updating on how greenhouse gas emissions and the effects of climate change are considered in environmental review under the National Environmental Policy Act. Please see **6.2 Directors' Climate Change Liability** for a more detailed discussion of the National Environmental Policy Act and climate change.

4. NATIONAL POLICY AND LEGAL REGIME (ADAPTATION)

4.1 Policy/Regulatory Instruments and Spheres of Government/Sectors

The federal Environmental Protection Agency's Climate Adaptation Plans detail actions the Environmental Protection Agency will take in connection with climate change adaptation. These plans are periodically updated, and the most recent plan was released in 2021. The most recent plan prioritises consulting and partnering with Tribes, states, territories, local governments, environmental justice organisations, community groups, businesses, and federal agencies to strengthen adaptive capacity and increase resilience, with a focus on advancing environmental justice.

5. RESPONSES TO INTERNATIONAL DEVELOPMENTS

5.1 Carbon Markets

The extent to which the USA participates or intends to participate in the market mechanism evolving under Article 6 of the Paris Agreement and the extent to which the USA is taking actions pursuant to the Article 6 Rulebook remain unclear. The USA has not implemented federal laws or regulations pursuant to the Article 6 Rulebook agreed at the 26th session of the Conference of the Parties to the United Nations Framework Convention on Climate Change. Transactions involving the voluntary carbon market are common in the USA.

5.2 European Union Carbon Border Adjustment Mechanism (CBAM)

The CBAM is, in the absence of significant changes to the CBAM's current design or to US climate policy, likely to affect US exports to the EU. The extent of the impact will depend on the final details and design of the CBAM, which EU lawmakers are still negotiating.

The European Commission's CBAM proposal would apply to imports of covered products from all non-EU countries, except for a small group of European countries with emissions trading systems (ETS) linked to the EU's ETS. The CBAM would impose a carbon price on imports from all other countries (including the USA) based on the emissions-intensity of the imported product. The carbon price applied to imports would correspond to the carbon price imposed on EU domestic producers under the EU ETS.

Importantly, the Commission's proposal would reduce the carbon price applied to imports to account for a carbon price paid in the imports' country of origin. This approach would limit certain countries' exposure to the CBAM. However, the USA does not maintain a nationwide carbon price, and California is the only the US state that currently imposes a price on carbon emissions from industrial facilities. In many cases, therefore, US exports of covered products to the EU could be subject to the full carbon price applied by the CBAM. This could substantially increase the cost of exporting covered products from the USA to the EU.

The US government has not objected to the CBAM in principle, and has expressed interest in imposing a carbon border adjustment of its own. However, US officials have expressed concern that explicit carbon pricing in the country of

origin is the only climate policy the CBAM would recognise as warranting a reduction in the carbon price applied to imports. US officials have argued that carbon border adjustments should take into account other climate policies in the country of origin that reduce emissions (eg, regulations and subsidies), rather than focus only on explicit carbon pricing. This position reflects President Biden's climate agenda, which seeks to reduce emissions through a combination of subsidies, tax credits, and regulations, and does not include plans for a US carbon price. Some EU lawmakers have discussed modifying the CBAM to account for such "non-price" policies, whereas others oppose this idea, arguing that it would be difficult to administer. Opponents also argue that the CBAM as currently designed would account for non-price policies that reduce emissions, as exports from countries maintaining such policies would be less carbon-intensive and thus incur a smaller CBAM liability. The CBAM's impact on US exports will depend in part on how this issue is resolved.

The CBAM's impact on US exports will depend also on the scope of products covered by the measure. The product scope proposed by the Commission in June 2021 covers five categories (cement, iron and steel, aluminium, fertilisers, and electricity), which together represent a small fraction of the USA's total exports to the EU. Nevertheless, the effects on firms within these sectors could be significant. The European Parliament has also debated whether to add polymers, organic chemicals, and hydrogen to the CBAM's scope from the early stage of the instrument's application and then – by 2030 – to have full product coverage mirroring the scope of the EU's ETS. Thus, the CBAM's scope could grow to encompass a significant share of US exports to the EU.

The CBAM's impact on US exports will depend also on the scope of emissions covered by the measure. The Commission proposes to cover only "direct emissions" released in the process of producing a covered good. However, the Parliament is debating whether the CBAM should be expanded to also cover "indirect emissions" (ie, emissions from the production of electricity consumed during the manufacturing process). No EU lawmaker has so far proposed to cover the "full carbon footprint" of a covered good, namely all GHG emissions from "cradle to grave," which would include emissions from mining of raw materials, among other sources. While it seems that the CBAM might not cover the full carbon footprint of imported products, it could still have a significant impact on US exports, as coverage of direct and/or indirect emissions could still increase the costs of importing US goods into the EU.

The CBAM's impact may also vary by sector. Given the relatively low carbon footprint of US producers in certain sectors covered by the CBAM, the measure could improve the competitive position of some US exports in the EU market, relative to other exporting countries. On the other hand, the CBAM would neutralise a cost advantage that US producers would otherwise enjoy over their EU competitors, owing to the lack of a US carbon price and the phase-out of free emissions allowances for some EU producers under the ETS.

6. LIABILITY FOR CLIMATE CHANGE AND ESG REPORTING

6.1 Task Force on Climate-Related Financial Disclosures (TCFD)

The federal Securities and Exchange Commission proposed rules that would require public companies to disclose climate change-related information in their filings with the Securities and Exchange Commission. The proposed disclosure

framework is modelled in part on the voluntary framework and recommendations from the Task Force for Climate-Related Financial Disclosures. Civil society or non-governmental organisations are participating in the public comment process associated with these proposed rules.

Investor initiatives, such as the Climate Action 100+, are actively seeking to enhance climate change considerations in investment and operational decisions. Climate Action 100+ is the largest investor engagement initiative on climate change working with corporate greenhouse gas emitters to improve climate performance and ensure transparent disclosure. The investor signatories of Climate Action 100+ believe that engaging and working with the companies in which they invest, to secure greater disclosure of climate change risks and robust company emissions reduction strategies, is consistent with their fiduciary duty. Additionally, Blackrock's Larry Fink has been trying to encourage companies in which Blackrock invests to implement climate change mitigation measures, most notably through his annual letters to shareholders.

6.2 Directors' Climate Change Liability

In the USA, in the absence of extraordinary circumstances, a company's directors should not be subject to liability for climate change impacts, either on their companies or of their companies, simply by virtue of serving as a director of a company whose operations are associated with climate change impacts. In theory, directors may be held liable where they fail to satisfy the legal obligations of their position, thereby enabling the occurrence of climate change-related harm.

Environmental Assessments

Infrastructural investments and financing arrangements that may have negative climate change impacts are often the target of regulatory attention in the USA. This regulatory attention is often required by the National Environmental Policy Act, which mandates an environmental analysis called an Environmental Assessment prior to the permitting or construction of a project subject to the National Environmental Policy Act. Courts and agencies have consistently required climate change assessments in National Environmental Policy Act reviews. Based on an Environmental Assessment's results, the lead federal agency conducting the environmental review may then prepare a more rigorous assessment providing for public review and comment, and responses to substantive comments. This more rigorous assessment is an Environmental Impact Statement. The National Environmental Policy Act requires an Environmental Impact Statement to be prepared whenever a proposal involves a major federal action that will significantly affect the quality of the human environment. The Environmental Impact Statement must include consultation with agencies preparing studies mandated by specified environmental laws and must include the comments of federal agencies that have jurisdiction by law or special expertise with respect to any environmental impact involved. Environmental Impact Statements include a description of the action under consideration, a description of the current state of the environment that could be affected by the action, analysis of how the action could affect the environment, analysis of alternatives to the action, and a description of methods to mitigate any adverse impacts.

The Biden Administration's Restoration of the National Environmental Policy Act

As discussed in **3.1 Policy/Regulatory Instruments and Spheres of Government/Sectors**, President Joe Biden's administration is in the process of rescinding draft guidance that would have limited the scope of the required analysis for greenhouse gas emissions and climate change impacts in the National Environmental Policy Act review process. The draft guidance that the current administration is working to rescind had

been issued by President Donald Trump in 2020 as part of that administration's efforts to facilitate timely reviews under the National Environmental Policy Act. Most recently, in May 2022, the Biden administration's amendment to the federal regulations implementing the National Environmental Policy Act to reverse certain changes made by the Trump administration with respect to the definition of "effects" took effect. This change restores the definition of "effects" that requires agencies to consider the historic categories of "reasonably foreseeable" direct, indirect and cumulative effects. This aims to ensure that agencies evaluate all relevant environmental impacts under the National Environmental Policy Act, and is particularly noteworthy in terms of an agency's consideration of climate change because cumulative climate change impacts tend to be significantly greater than the climate change effects of a single project. With this change, the Biden administration is confirming that climate change impacts should be considered in evaluating direct, indirect and cumulative impacts. Additional rulemaking is expected to further revise the National Environmental Policy Act review process for infrastructural investments and/or financing arrangements that may have negative climate change impacts.

Civil Society Action

Civil society or non-governmental organisations often target investments and financings that may have negative climate change impacts in the USA, and they seek to delay or even stop investments or financings they disfavour. For instance, through the National Environmental Policy Act review process, civil society or non-governmental organisations can submit comments concerning the alleged negative climate change impacts associated with an investment or financing, and the lead agency must address these comments. Civil society or non-governmental organisations can also submit comments through the public comment period associated with an agency's review for purposes of granting a new or modified air emissions permit. The agency granting the permit may then have to respond to such comments. Civil society or non-governmental organisations that exhaust their administrative remedies through the National Environmental Policy Act or permitting review and comment process, for example, may then be able to bring a lawsuit in federal court challenging the government's action with respect to an investment or financing on the grounds that the government did not properly consider and address negative climate change impacts.

6.3 Shareholder or Parent Company Liability

In the USA, in the absence of extraordinary circumstances, shareholders or parent companies should not be liable for the climate change damage or breaches of climate change law that the entities that they own cause or commit. Generally, shareholders are not liable unless they take an active role in environmental management or the operations or decisions that cause environmental impacts. The corporate veil is rarely pierced to hold parent companies liable, but a parent company may be liable if the corporate formalities were not observed or if the parent company is itself involved in the climate change damage or breach of climate change law.

6.4 ESG Reporting and Climate Change

Most federal environmental legislation in the USA requires environmental reporting. The USA maintains a Toxics Release Inventory designed to track the management of certain toxic chemicals deemed to pose a threat to human health and the environment. The inventory includes information reported annually from US facilities in several industry sectors (typically larger facilities involved in manufacturing, metal mining, electric power generation, chemical manufacturing and hazardous waste treatment) regarding how much of each of the chemicals is released

to the environment and/or managed through recycling, energy recovery and treatment. The inventory currently includes 770 individually listed chemicals and 33 chemical categories. The Clean Water Act requires entities that propose to discharge pollutants to water bodies to submit Notices of Intent to discharge and entities that are discharging to submit Discharge Monitoring Reports, and can require other waivers, certifications and notices related to water quality. The Resource Conservation and Recovery Act requires hazardous waste generators and facilities that treat, store or dispose of hazardous waste to report their hazardous waste activities. The Emergency Planning and Community Right-to-Know Act requires industry to report on the storage, use and releases of hazardous substances. The Clean Air Act's Title V permit programme requires air emissions and air quality monitoring and reporting by emitters in order to ensure compliance with permit conditions as well as any pollutant standards established by the Clean Air Act. The Clean Air Act greenhouse gas reporting rule requires reporting of greenhouse gas data and other relevant information from large greenhouse gas emission sources, fuel and industrial gas suppliers, and carbon dioxide injection sites.

Regulation S-K, Item 103 requires US public companies to include disclosure on any proceeding under environmental laws to which a governmental authority is a party and that involves potential monetary sanctions in public filings with the Securities and Exchange Commission, unless the company reasonably believes that the proceeding will result in no monetary sanctions or monetary sanctions of less than USD300,000. The Securities and Exchange Commission also released guidance in 2010 that explained that the need for climate change disclosure will be governed by the "materiality" standard – in other words, what a reasonable investor would find important in determining whether to buy or sell a company's security. The Securities and Exchange Commission's recently proposed rules that would require public companies to disclose climate change-related information are discussed in **6.1 Task Force on Climate-Related Financial Disclosures (TCFD)**.

7. TRANSACTIONS

7.1 Due Diligence

Environmental due diligence has been a key component of M&A, finance and property transactions in sectors such as power, oil and gas and chemicals for decades in the USA, but the scope of that diligence exercise is starting to expand to cover climate change issues along with other environmental legal liabilities. Climate change due diligence may include assessing how an acquisition target may be impacted by the increasing number of climate change-related legal proceedings in the USA, particularly against fossil fuel producers, that have been initiated in the last four years. Climate change diligence may also include assessing how an acquisition target's facilities and business by be impacted by physical changes such as extreme weather or sea level rise. Other topics that may be covered as part of climate change due diligence by a purchaser of shares or assets may include:

- how an acquisition target's management oversees climate change risk and policy;
- the extent to which an acquisition target has greenhouse gas emissions reduction targets;
- the extent to which an acquisition target reports and verifies greenhouse gas emissions data associated with its operations and value chain;
- the extent to which an acquisition target is offsetting greenhouse gas emissions; and
- the extent to which the acquisition target's products or businesses may or may not

conform to changing customer values and perceptions around climate change.

8. CLIMATE-FRIENDLY INVESTMENT SUPPORT

8.1 Renewable Energy

The United States federal government provides support for the uptake of renewable energy technologies. For instance, the Renewable Fuel Standard is a federal policy promulgated by the Environmental Protection Agency that requires transportation fuel sold in the USA to contain a minimum volume of renewable fuels.

Additionally, the Department of Energy's Loan Programs Office finances energy infrastructure projects in the USA. Projects that receiving financing include utility-scale solar and wind and electric vehicle manufacturing. The Renewable Energy and Efficient Energy Program administered by the United States Department of Energy has earmarked USD3 billion in loan guarantees to support offshore wind projects. This Department of Energy programme offers a repayment guaranty for senior construction debt and may provide direct loans to developers, thereby making available an additional source of capital at a potentially lower cost.

The USA also provides support for the uptake of renewable energy technologies through tax incentives for onshore and offshore wind projects, for example. Until recently, all onshore and offshore wind projects were eligible for production tax credits at specified percentages of a baseline rate of 1.5 cents per kWh of electricity produced and sold to unrelated parties. The rate was adjusted for inflation each year – in 2020, the baseline rate was increased to 2.5 cents per kWh. For projects that began construction after 31 December 2016, the percentages of the baseline rate available for credits declined pursuant to "phase-out" rules. Projects that began construction after 2020 would not have been eligible for production tax credits. That changed when the Consolidated Appropriations Act of 2021 was signed into law on 27 December 2020. The law provided for a one-year extension of the production tax credit, so projects that began construction in 2021 are eligible for production tax credits. The Consolidated Appropriations Act of 2021 recently extended a one-time option to receive one-time investment tax credits, in lieu of production tax credits, so that projects that started construction in 2021 are eligible for a credit equal to 18% of the tax basis of applicable property. This law also provided a standalone investment tax credit for qualified offshore wind facilities equal to 30% of the basis of applicable investment tax credit property for any project where construction begins after 2016 and before 2026. Moreover, the 30% rate is fixed and not subject to phase-out rules. To receive the standalone investment tax credit, projects must be located in the inland navigable waters of the USA or in the coastal waters of the USA, as described in the production tax credit definition of "qualified offshore wind facility."

8.2 Other Support

The United States federal government provides support for climate-friendly investment. For instance, the Infrastructure Investment and Jobs Act authorises the federal government to spend USD550 billion on a variety of infrastructure projects, including certain types of decarbonisation projects. The United States Department of Energy's Hydrogen Program Plan is a strategic framework for research, development and demonstration activities across various offices within the Department of Energy, and it describes a high-level, cross-agency strategy for fostering the hydrogen economy by funding research and development. The Hydrogen Program Plan analyses potential uses of funding for hydrogen development, primarily focusing on hydrogen's

role in power generation and transportation, sectors in which hydrogen could become more prevalent if technological advances made it financially accessible and environmentally sustainable. In addition, the Hydrogen Program Plan examines the production, storage, and transportation of hydrogen, specifically methods to make carbon-neutral or carbon-negative hydrogen an affordable reality.

Additionally, the federal Section 45Q Tax Credits for Carbon Oxide Sequestration creates a significant incentive for carbon capture and sequestration projects by providing a dollar-for-dollar credit against US federal income tax. This credit is awarded to taxpayers who both capture carbon oxide and either store the carbon oxide or use it in a permitted way (for example, as an injectant in the enhanced oil recovery process).

White & Case LLP offers climate change counselling, litigation, transactional and regulatory services. The firm has advised a sovereign nation in connection with global climate change treaty negotiations that resulted in the Paris Agreement to the United Nations Framework Convention on Climate Change. It works on tort-based climate change claims, claims of misrepresentation linked to allegations of greenwashing, and disputes involving changing weather patterns. White & Case provides clients with regular monitoring of worldwide judicial and non-judicial proceedings concerning climate change. It works on climate change disclosure and governance, the Task Force on Climate-Related Financial Disclosures, conservation of forest carbon stocks, carbon capture and storage, and the UN Sustainable Development Goals. The firm has advised sovereigns and private clients on the compatibility of carbon regulations (in particular the EU's Emission Trading Scheme and Carbon Border Adjustment Mechanism with trading rules under the World Trade Organization agreements.

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WHITE & CASE

Trends and Developments

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Juliana v United States and the Intersection Between Human Rights and Climate Change Law

Introduction

Juliana v United States is one of the most well-known climate change lawsuits in the USA. In this case, plaintiffs tried to establish a fundamental or human right associated with a right to a climate system capable of sustaining human life. Notably, the administrations of Presidents Barack Obama, Donald Trump and Joe Biden have all worked to prevent the lawsuit from moving forward.

Human rights are becoming a prevalent issue in climate change disputes. However, while the vast majority of climate change litigation is pending in the USA, most cases in the USA are not based on human rights. Outside of the USA, human rights-based climate change cases are working their way through courts. Courts in Europe are generally more willing to embrace theories based on human rights law compared to courts in the USA.

Initial attempts to establish a human right associated with climate change

Early attempts at using litigation to establish an obligation to consider human rights impacts associated with climate change in the USA were generally unsuccessful. For instance, there was an unsuccessful 2005 "Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States". This unsuccessful petition requested the Commission to recommend that the USA adopt mandatory measures to limit its greenhouse gas emissions, consider the impacts of greenhouse gas emissions on the Arctic in evaluating all major government actions, establish and implement a plan to protect Inuit culture and resources and provide the assistance necessary for the Inuit to adapt to the impacts of climate change that cannot be avoided.

Other attempts to establish that the government's actions with respect to climate change violate fundamental or human rights principles were similarly unsuccessful. For instance, in Reynolds v Florida, a Florida state court also dismissed a case brought by a group of young Florida residents asserting a "right to a stable climate system" under Florida's state constitution. The plaintiffs in this case sought a court order compelling the Florida state government to alter the state's "Fossil Fuel Energy System." However, the state court in Reynolds v Florida held that the court "lacks the authority to grant the relief requested due to the Separation of Powers Clause of the Florida Constitution… Plaintiff's claims are nonjusticiable. The claims are inherently political questions that must be resolved by the political branches of government." The Florida Court of Appeal subsequently affirmed the dismissal of this case.

These types of human rights-based climate change claims brought under state laws have also been unsuccessful in Washington State. The state court in Aji P. v State of Washington was unwilling to allow a case to proceed alleging that state constitutional rights require a court to find "fundamental and inalienable constitutional rights to life, liberty, property, equal protection and a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty." The court was not willing

to "[o]rder [the state] to develop and submit to the Court... an enforceable state climate recovery plan" requiring the state to "transition almost completely off of natural gas and gasoline and diesel fuel within the next 15 years," and "generate 90% of its electricity from carbon-free sources by 2030." Like the court in Reynolds v Florida, the court in Aji P. v State of Washington concluded that the plaintiffs' "claims present a political question to be determined by the people and their elected representatives, not the judiciary." Similar to the 2019 federal court opinion in Clean Air Council v United States, the 2021 state court opinion in Aji P. v State of Washington provided a long list of citations to cases from other courts that held that plaintiffs cannot assert a right to a healthy environment and climate system capable of sustaining human life. The plaintiffs in Aji P. v State of Washington petitioned the Washington State Supreme Court asking for a review of the lower court ruling, but the Washington Supreme Court denied the petition.

The Juliana complaint and initial decision favouring the plaintiffs

Putting these state court cases aside; Juliana v United States is the best example of a case in the USA where a lower court recognised a novel theory concerning how United States law could establish a fundamental or human right associated with a right to a climate system capable of sustaining human life. Although an appellate court ultimately overturned the lower court decision and dismissed this case, corporate defendants in other climate-related cases have cited this dismissal as authority in seeking to have such cases filed against them heard in federal court on the ground that the cases have their source in federal law.

In Juliana, 21 youth plaintiffs sued the Obama administration and the United States government in 2015 for allegedly violating their constitutional right to a safe climate by causing carbon dioxide concentrations to persist in the atmosphere and exacerbating climate change. The plaintiffs argued that the government's promotion and use of fossil fuels violated fundamental rights under the United States Constitution to life, liberty, property, equal protection, and the right to a stable climate. The United States Constitution "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Notably, United States courts have been reluctant to include a right to a stable climate in this list of fundamental liberty interests or rights afforded by the United States Constitution. Nevertheless, United States law allows an individual who believes that their constitutional rights have been violated to bring a civil action against the government to recover the damages sustained as a result of that violation.

Based on these principles, the Juliana case proceeded under a theory that the United States Constitution recognises a right to a climate system capable of sustaining human life, and the federal government violated the plaintiffs' rights to "life, liberty, or property" without "due process of law" by "caus[ing] atmospheric CO_2 to rise to levels that dangerously interfere with a stable climate system required alike by our nation and Plaintiffs[.]" The plaintiffs sought a federal court order requiring the government to not only stop the promotion and facilitation of fossil fuel use, but also to "move swiftly to phase out CO_2 emissions, as well as take such other action as necessary… to develop a national plan to restore Earth's energy balance, and implement that national plan so as to stabilise the climate system."

The initial federal court decision in Juliana appeared to acknowledge a legal basis for the plaintiffs' human rights-based climate change claims under United States law. The court

found that the right to a climate system capable of sustaining human life is a "fundamental" constitutional right. The court went on to hold, "where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation."

The Appellate Court rules in favour of the government defendants

However, the United States government appealed the initial federal court decision, and a three-judge panel on the United States Court of Appeals for the Ninth Circuit ruled for the government in January 2020 and dismissed the case. The dismissal was based on a finding from the appellate court that the plaintiffs lacked standing and that the plaintiffs' request for relief "must be made to the political branches or to the electorate at large." The Ninth Circuit held that, although the plaintiffs did establish that the young people faced significant harm from climate change and that the plaintiffs produced compelling evidence about climate change impacts, they failed to show how the courts could address their claims, because addressing the claims could involve changes in transportation and energy policies, along with how the government manages public lands. Making such changes, the court said, is not the job of the courts under US law. Instead, it is the duty of the President and Congress. Courts in the USA frequently rely on "non-justiciability" grounds, or the idea that the appropriate audience for climate-related claims are the executive and legislative branches rather than the courts, to prevent climate change cases against the federal government from moving forward.

Notably, the January 2020 decision from the three-judge panel on the United States Court of Appeals for the Ninth Circuit was not unanimous, and arguments can be made that US courts disagree about the protection of environmental rights in the Constitution, and thus in their application. District Judge Josephine Laura Staton, serving as part of the Ninth Circuit panel, dissented in the January 2020 ruling, concluding that the claims were not beyond the ability of federal courts to redress. She viewed the separation of powers principle and the United States Constitution as obliging federal courts to prevent the other branches from bringing the nation to its demise by failing to take action. Furthermore, the majority found that the United States federal government has historically promoted fossil fuel use despite knowledge of climate change, and that failure to change existing policy may "hasten an environmental apocalypse." The Ninth Circuit also noted that "[r]easonable jurists can disagree about whether the asserted constitutional right exists."

On 10 February 2021, a majority of active judges on the Ninth Circuit declined to reconsider the January 2020 decision that dismissed the case. On 9 March 2021, the plaintiffs decided not to appeal this decision to the United States Supreme Court. Plaintiffs have indicated that the reason for not appealing is that the case has an incomplete factual record, and is therefore not suitable for establishing a nationwide Supreme Court precedent on the issues presented. Instead, the plaintiffs moved to amend their complaint to seek relief that a court, rather than the other branches of government, can award. The plaintiffs are trying to do this by requesting that the court enter a judgment declaring, among other things, that "the [US] national energy system that creates the harmful conditions... has violated and continues to violate the Fifth Amendment of the [US] Constitution and Plaintiffs' constitutional rights to substan-

tive due process and equal protection of the law." Plaintiffs argue that, while the legislative and executive branches may have the authority to make changes in transportation and energy policies, courts have the authority to issue the type of declaratory judgment that plaintiffs seek. The plaintiffs' motion to amend their complaint remains pending.

White & Case LLP offers climate change counselling, litigation, transactional and regulatory services. The firm has advised a sovereign nation in connection with global climate change treaty negotiations that resulted in the Paris Agreement to the United Nations Framework Convention on Climate Change. It works on tort-based climate change claims, claims of misrepresentation linked to allegations of greenwashing, and disputes involving changing weather patterns. White & Case provides clients with regular monitoring of worldwide judicial and non-judicial proceedings concerning climate change. It works on climate change disclosure and governance, the Task Force on Climate-Related Financial Disclosures, conservation of forest carbon stocks, carbon capture and storage, and the UN Sustainable Development Goals. The firm has advised sovereigns and private clients on the compatibility of carbon regulations (in particular the EU's Emission Trading Scheme and Carbon Border Adjustment Mechanism with trading rules under the World Trade Organization agreements.

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