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Philippines Climate Change Report: Implications for Carbon Majors

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I Introduction

On May 6, 2022, the Commission on Human Rights of the Philippines (“**CHRP**”) issued a landmark report on its investigation into the role of 47 of the world’s largest investor-owned fossil fuel and cement producers (“**carbon majors**”) in respect of the impacts of climate change (the “**Report**”).¹ The Report stems from a 2015 petition that non-governmental organisations (“**NGOs**”) filed, requesting that the CHRP investigate the human rights implications of climate change, and whether carbon majors have breached their responsibilities to respect these human rights. In the petition, these NGOs requested that the carbon majors be held responsible for their contribution to climate change, which, the petitioners alleged, was negatively impacting the human rights of the Filipino people.

This is the first climate proceeding where a National Human Rights Institution (“**NHRI**”) has conducted an investigation and concluded that energy companies violated human rights in connection with their contribution to climate change. The Report is non-binding, but may be invoked by claimants, especially in the Philippines.

The Report demonstrates that human rights are increasingly relevant in the context of climate change litigation, given the growing success of rights-based claims as a means of holding governments and corporations responsible for contributions to climate change. While no free-standing human right to a clean environment appears in the nine core international human rights instruments or the Universal Declaration of Human Rights, breaches of environmental protections can have significant impacts on the enjoyment of recognised human rights such as the right to life, health, food, water and sanitation.² Over 100 human rights-based climate change claims had been brought to courts and international institutions globally as of 2021, with 34 of those claims having been filed in the preceding two years.³

While most of these human rights-based claims have been against government bodies, an increasing number directly implicate and pursue judgment against corporations, posing a growing risk to businesses in carbon-intensive industries, and influencing corporate risk management.⁴

What is more, recent case law indicates that courts and legislatures could look across borders for innovative approaches to effectively distribute the economic burdens of the impacts of climate change. The basis on which courts, tribunals and non-judicial mechanisms find liability may be transferable across jurisdictions insofar as these cases are based on universal human rights principles and international or European “soft law” instruments. While it is difficult to predict to what extent legal grounds are transferable, it is important to take note of findings such as those reached by the CHRP in its Report in an assessment of best practices for corporate risk management.

II Overview of the Report

The CHRP is an independent NHRI vested by the Constitution of the Philippines with the mandate to investigate violations of human rights of Filipino people.⁵ The scope of the CHRP’s investigation included energy companies that were not incorporated in the Philippines, despite objections from oil companies regarding territoriality. The CHRP reasoned that its mandate and the performance of its duty are not constrained by or anchored in the principle of territoriality, and that it was tasked to set a high standard of human rights protection.⁶ The investigation into the role of the carbon majors therefore involved interdisciplinary consultation. Hearings were conducted in Manila, New York, and London.⁷

The CHRP states that its inquiry was intended to “help identify, or elaborate on, basic rights and duties relative to climate change, as well as amplify standards for corporate behavior”. On this basis, the Report makes recommendations with respect to the carbon majors and a broad range of other organisations, including governments, financial institutions and investors, the United Nations and other international bodies, NHRIs, courts, NGOs, the legal profession, and global citizens. It also sets out recommendations specifically for the Philippine government. For the purpose of this chapter, we have limited our analysis to the Report’s findings and its potential implications with respect to carbon majors and other carbon-intensive industries.

A Findings

1. The Report finds that climate change is a human rights issue

The CHRP conducted an intensive examination of the nexus between climate change and human rights, and concluded that climate change is a human rights issue. The CHRP found evidence that climate change and the increased frequency of severe weather, natural disasters and other detrimental events negatively impact the established rights of Filipino people, including the right to life, health, food security, water and adequate housing, as enshrined not only in the Philippine constitution but also in international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

In reaching this finding, the CHRP relied on scientific evidence and research reports from the Intergovernmental Panel on Climate Change, as well as a multi-year fact-finding mission to investigate the impact of climate change on the Filipino people.⁸ The fact-finding mission identified a significant amount of on-the-ground evidence of human rights violations that had resulted from greenhouse gas emissions (“**GHGs**”). To that end, the CHRP drew on witness testimony from community representatives (including

fishing communities, farmers, activists, and survivors of typhoons), community dialogues, documentary evidence, *amicus* briefs and expert testimony from various scientists, legal and human rights experts, researchers and medical professionals.⁹ In that sense, the Report differs from human rights-based climate change litigation that refers only to the *threat* of human rights violations as a result of climate change because the Report also concerns alleged past and ongoing violations.¹⁰

2. The Report finds that carbon majors were aware of climate change impacts and engaged in obstruction to prevent meaningful climate action

Recounting the role of carbon majors in the context of climate change, the CHRP highlighted that (i) the anthropogenic causes of climate change are both quantifiable and substantial, (ii) the fossil fuel industry had knowledge of the effects of GHGs on the climate since at least 1965, and (iii) the carbon majors have engaged in a targeted effort to convince the public that the use of their products is not harmful.¹¹ Therefore, the CHRP considered that carbon majors “engaged in willful obfuscation of climate science that has prejudiced the right of the public to make informed decisions about their products, and concealed the fact that their products posed significant harms to the environment and the climate system”.¹²

While the CHRP acknowledges that “renewable energy is not yet of sufficient scale to effectively replace carbon-based fuel”, it notes that the challenge is to “hasten the transition of the global economy towards clean energy”.¹³ Ultimately, the CHRP concludes that “all acts to obfuscate climate science and delay, derail, or obstruct this transition may be bases for liability” and that such actions are “at the very least immoral”, arguably breach existing law in the Philippines, and may be the basis for legal liability in other countries.¹⁴

B Recommendations

The report includes a number of non-binding recommendations for carbon majors and other corporations.

As a preliminary matter, the CHRP finds that corporations have a responsibility to respect human rights under the United Nations Guiding Principles (“**UNGPs**”).¹⁵ Similar to the Dutch court’s finding in *Milieudefensie v. Royal Dutch Shell*,¹⁶ the CHRP notes that “[t]he UNGP now embodies the global standard of practice expected of states and business with regard to business and human rights”, despite its non-binding nature.¹⁷

To operationalise the UNGPs in the context of climate change, the CHRP explains that fossil fuel companies should adopt appropriate policies and processes, including: (1) a policy commitment to meet their responsibility on human rights;¹⁸ (2) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;¹⁹ (3) a mechanism to identify and assess the specific human rights impacts of climate change arising from their operations and products; (4) appropriate action mechanisms to mitigate the GHG emissions from their operations and products; (5) policies and processes to track the effectiveness of measures, report on GHG emissions and set targets to mitigate future emissions; and (6) processes to enable the remediation of any adverse human rights impacts that the company caused or contributed to.²⁰

Based on these principles, one of the main conclusions in the Report is that carbon majors within the Philippine jurisdiction may be “compelled” to undertake human rights due diligence and provide remediation.²¹ The CHRP refers to UNGP 13 to note that “[t]he corporate responsibility to refrain from contributing to climate change impacts extends not only to the whole group of

companies of each carbon major in recognition of the enterprise theory of corporate personhood, but also to all business enterprises in each of the carbon majors’ respective value chains”.²²

The CHRP urges carbon majors to “conduct due diligence, and climate change and human rights impact assessments in accordance with the UNGP in all stages of their operations and across all their value chains, even if not required by government regulations in the jurisdictions they operate in”.²³ The recommendation for carbon majors to conduct due diligence throughout their operations and value chains is another indication of the gradual acceptance that even in the absence of a regulatory requirement to conduct due diligence, companies may have a mandatory duty to conduct due diligence throughout the value chain. The recommendation in the Report follows various states proposing and implementing laws on mandatory due diligence, including France, Germany and Norway, as well as the EU proposal for a Directive on Corporate Sustainability Due Diligence.²⁴

The CHRP further encourages carbon majors and other corporations to be more transparent about their operations and disclose GHG emissions resulting from the totality of their operations, including subsidiaries across multiple jurisdictions.²⁵ This recommendation appears to extend beyond what is considered common practice, as many companies only report on GHG emissions from assets and operations under their direct control.

The CHRP also recommends that carbon majors make public pronouncements about their commitments to combat climate change in line with Paris Agreement targets, including by publishing business transition plans for intended GHG emissions reductions, and decarbonisation and transition targets. The CHRP recommends that carbon majors set performance indicators that can be reviewed and evaluated.²⁶ Most global energy companies have set GHG emissions reduction targets, most commonly in the form of net-zero GHG emissions targets, and many have also announced interim targets. However, several of these companies’ strategies have been challenged in recent litigation as being insufficient in aligning the companies on a path that conforms with efforts to limit the increase in the global average temperature to 1.5°C above pre-industrial levels, as stated in the Paris Agreement.²⁷

The Report goes further and states that carbon majors may even be held to account for continuing to invest in oil exploration for “largely speculative purposes”²⁸ and recommends that “carbon majors must stop further exploration of new oil fields or other sources of fossil fuels”, stating that these assets will become stranded in the future. This recommendation may call into question whether companies that continue to invest in exploration or expand production of fossil fuels might allegedly be violating human rights in connection with such exploration, notwithstanding any efforts to reduce greenhouse gas emissions or implement other climate mitigation efforts such as carbon capture, utilisation and storage. This recommendation extends beyond the findings of the Dutch Court in *Milieudefensie v. Royal Dutch Shell*, which found that it was up to Shell to determine its GHG emissions reduction pathway, “leav[ing] room for the compensation of CO₂ emissions” and noted that Shell is free to decide not to make new investments in explorations and fossil fuels.²⁹

Carbon majors are further encouraged to contribute to funds that finance the implementation of mitigation and adaptation measures.³⁰ Similar to many “greenwashing” lawsuits, the CHRP urges carbon majors to desist from all activities that undermine climate science.³¹ Instead, in making these recommendations, the CHRP encourages carbon majors to cooperate with climate scientists, NGOs, affected communities and stakeholders, and emphasises the importance of “a new chapter of cooperation towards a united front for climate action”.

III Potential Impact of the Report

A Litigation risk

The Report is non-binding, and in that sense does not have a direct impact on carbon majors and other companies in terms of compliance with the Report's recommendations. However, the Report may have some precedential value, and be invoked by claimants in climate change litigation to support arguments that (1) climate change adversely impacts human rights, and (2) companies have certain duties in connection with climate change and human rights.

Human rights have become a prevalent issue in climate change disputes, particularly as the concept of corporate accountability for human rights and environmental harm gains acceptance among the international community. Human rights-based climate change litigation is influencing corporate risk management, even in the absence of adverse decisions, and some see the emergence of a duty for companies to conduct climate due diligence to minimise litigation risk.

There have been a number of recent cases brought before courts in Europe and the US, though there are key differences between the legal theories underlying the climate change claims in each region. A significantly higher volume of climate change litigation is pending in the US, but most cases in the US are not based on human rights. Instead, most US cases relating to climate change seek damages based on statute or tort law, including negligence, trespass and failure to warn. In Europe, by contrast, there has been more focus on climate change claims based on human rights theories, with more success. Many of these human rights-based cases in Europe have been brought against governments, but some have been brought (successfully) against companies.³²

The CHRP national inquiry is the first factual investigation into the impact of climate change on human rights. Particularly in Europe, courts increasingly view the reports of international fact-finding missions as evidentiary support in litigation cases, for example in asylum cases. It therefore seems likely that the Report will be offered as a resource for courts considering the nexus between climate change and human rights.

It is also possible that climate change claimants will cite the Report in future rights-based climate-related claims to advocate that the UNGPs now embody a global standard of practice expected of states and businesses, particularly with regard to business and human rights due diligence, and the need to conduct diligence in relation to all entities across a company's value chain. To date, only research reports have been available to claimants and courts. For example, in *Milieudefensie v. Royal Dutch Shell*, the Dutch court issued a ruling grounded in human rights ordering Royal Dutch Shell Plc ("**RDS**") to reduce the aggregate annual volume of all CO₂ emissions of the Shell group, its suppliers, and customers by at least net 45% by the end of 2030, relative to 2019 levels.³³

The court found that RDS has a legal obligation that derives from an "unwritten standard of care" under Dutch tort law to "contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group".³⁴ In the ruling, the court relied on a research report from the University of Oxford, which, according to the court, demonstrated a certain consensus with respect to corporate responsibility on Scope 3 GHG emissions.³⁵

NGOs and public authorities are likely to continue filing climate change lawsuits against corporations and governments on behalf of plaintiffs that experience climate harms. Plaintiffs will likely continue to rely on reports or studies that embody the growing view that companies must conduct business and human rights due diligence in relation to all entities across the value chain. The Report provides further support for this principle.

B Risk mitigation

The findings of the Report suggest that risk mitigation strategies could play a vital role in avoiding claims in litigation and resulting liability for harm from climate change. Risk mitigation strategies may involve putting policies and processes in place to meet human rights responsibilities in line with the UNGPs, as explained above. The Report particularly highlights the expectation that companies should conduct human rights due diligence to address the risk of legal claims and avoid human rights harm. To anticipate and mitigate these developments, companies may wish to put in place appropriate auditing and internal controls and due diligence processes that map and prioritise human rights and environmental risks. This includes mechanisms that identify and assess actual or potential adverse human rights impacts that the company may cause or contribute to through its activities, or which may be directly linked to its operations across the value chain.³⁶

Ultimately, plaintiffs pursuing human rights-based climate change claims are likely to expect carbon majors and other companies to do more than comply with diligence obligations in order to demonstrate that the company took appropriate action to avoid or minimise a human rights-related harm associated with climate change. Such action could include some of the specific measures recommended by the CHRP, such as stakeholder engagement and activities to align with the 1.5°C temperature benchmark in the Paris Agreement.

Endnotes

1. Commission on Human Rights of the Philippines National Inquiry on Climate Change Report (2022) p. 3 (hereinafter, the "**CHRP Report**"), available at <https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf>.
2. The right to the enjoyment of a safe, clean, healthy and sustainable environment is also gaining increased recognition. On Oct. 8, 2021, the United Nations Human Rights Council adopted a resolution recognising the human right to a clean, healthy and sustainable environment, with 43 votes in favour and four abstentions. See UN Human Rights Council Resolution, HRC/RES/48/13, Oct. 8, 2021, available at <https://digitallibrary.un.org/record/3945636?ln=en>. For discussion of the so-called "greening" of human rights (i.e. the process of elaborating the understanding that a healthy environment is of fundamental importance to the full enjoyment of a vast range of human rights), see United Nations, General Assembly, Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H. Knox. Preliminary Report, A/HRC/22/43 (December 24, 2012), section II.B, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf; see also United Nations, General Assembly, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/73/188 (July 19, 2018), section II, available at <https://undocs.org/A/73/188>.
3. See *Global Trends in Climate Change Litigation: 2021 Snapshot* by the Grantham Research Institute on Climate Change and the Environment within the London School of Economics and Political Science, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.
4. *Id.*
5. CHRP Report p. 9.

6. CHRP Report pp 4–5, 11–12, 74–78.
7. CHRP Report p. 6.
8. CHRP Report pp 32–69.
9. CHRP Report pp 13–26.
10. *See, e.g., Milieudefensie v. Royal Dutch Shell*, District Court of The Hague ECLI:NL:RBDHA:2021:5339 (May 26, 2021) ¶¶ 4.4.9–4.4.10, available at https://uitspraken.rechtspraak.nl/inzien_document?id=ECLI:NL:RBDHA:2021:5339#_d24c9e98-6d09-4e3b-9c10-7fd7eeca5af9 (“**Shell Judgment**”).
11. CHRP Report pp 98–108.
12. CHRP Report pp 108–109.
13. CHRP Report p. 115.
14. CHRP Report p. 115.
15. CHRP Report pp 69, 88.
16. Shell Judgment ¶¶ 4.4.12–4.4.14.
17. CHRP Report p. 90, *citing* United Nations Office of the High Commissioner of Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, at 1, U.N. Doc. HR/PUB/12/01 (2012) (“**UNGP Interpretative Guide**”).
18. UNGP, Principle 16.
19. UNGP, Principle 17.
20. CHRP Report pp 91, 94–95, *citing* UNGP, Principle 16–22. The CHRP also recited additional soft law mechanisms on corporate responsibility to respect human rights, including the United Nations Global Compact, OECD Guidelines for Multinational Corporations and the Principles on Climate Change Obligation of Enterprises. *See* CHRP Report pp 92–98. The latter directs businesses to reduce GHG emissions and avoid activities that will cause excessive GHG emissions. CHRP Report pp 96–97.
21. CHRP Report p. 110.
22. CHRP Report pp 112–113.
23. CHRP Report p. 130.
24. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, available at <https://www.whitecase.com/publications/alert/european-commission-issues-major-proposal-due-diligence-obligations-protect>; *see also* White & Case, *European Commission issues major proposal on due diligence obligations to protect human rights and the environment across supply chains* (Feb. 24, 2022), available at <https://www.whitecase.com/publications/alert/european-commission-issues-major-proposal-due-diligence-obligations-protect>.
25. CHRP Report p. 130.
26. CHRP Report pp 130–131.
27. *See, e.g., Complaint, Greenpeace France et al. v. TotalEnergies SE and TotalEnergies Electricite et Gaz France*, Court of Paris (Mar. 2, 2022).
28. CHRP Report p. 109.
29. Shell Judgment ¶¶ 4.4.25, 4.4.30.
30. CHRP Report pp 131–132.
31. CHRP Report p. 131.
32. *See Urgenda Foundation v. State of the Netherlands*, Rechtbank Den Haag, Judgment (June 24, 2015), ECLI:NL:RBDHA:2015:7196; Shell Judgment; *VZW Klimaatzaak v. Kingdom of Belgium & Others*, Brussels Court of First Instance (June 17, 2021); *Neubauer et al. v. Germany*, Federal Constitutional Court Germany (Apr. 29, 2021).
33. *See* Shell Judgment ¶ 5.3.
34. Shell Judgment ¶ 3.2.
35. Specifically, the Dutch court found that RDS’ responsibility “extends to the CO₂ emissions of ... end-users (Scope 3) ... in line with the analysis of the various protocols and guidelines for climate change for non-state actors, drawn up by the University of Oxford in 2020 ... [which] shows the points on which there is broad consensus and regarding which there are differences of opinion”. The court’s decision acknowledges that “the Oxford report does not mention a legal obligation for energy companies to reduce Scope 3 emissions in absolute and uniform steps” but states that “it does follow from the Oxford report that, although there are nuances, it is internationally endorsed that companies bear responsibilities for Scope 3 emissions”. Shell Judgment ¶ 4.4.18.
36. UNGP Interpretative Guide, commentary to Principle 17.

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