



SCOTIA GROUP



POLICY PROPOSAL 8.

THE MODEL STATUTE FOR
PROCEEDINGS CHALLENGING
GOVERNMENT FAILURE TO ACT
ON CLIMATE CHANGE



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This report, launched by the International Bar Association (IBA) in February 2020, highlights the role of litigation in setting requirements for governments to protect their citizens and communities from climate impacts.

Background:

In July 2014 the IBA published the Task Force report, 'Achieving Justice and Human Rights in an Era of Climate Disruption', a 'ground-breaking' critical comprehensive survey of existing international, regional and domestic legal frameworks relevant to climate change, and identified, using a justice-centred perspective, opportunities for legal, regulatory and institutional reforms at multilateral, state, corporate and individual levels to enhance mitigation and adaptation to climate change.

Citizen climate litigation can provide a critically important means for people and vulnerable communities to ask courts to require governments to reduce greenhouse gas (GHG) emissions and other measures to reduce climate-related impacts. These types of claims are increasing, particularly in the wake of the Paris Agreement in December 2015.

Recent citizen climate litigation has led to judges in some countries requiring governments to assess and take action to address climate change. On the other hand, in many other countries, legal obstacles might prevent citizens even getting through the courthouse door or judges from adapting existing judicial procedures to remedy government climate inaction. The legal hurdles often raised in an attempt to defeat citizen climate claims for governments to act, were identified by the International Bar Association's (IBA) Task Force on Climate Change Justice and Human Rights in its 2014 report. A large part of the problem was associated with procedural requirements and concepts that had been developed in legal contexts that were mainly intended for different types of disputes between two parties and that did not have to deal with worldwide diffuse sources of climate change and climate harms.



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The term ‘climate change litigation’ is increasingly used to refer to a broad range of disputes before domestic or international courts and tribunals, where a party’s claim is based on harms allegedly being caused by environmental factors. In turn, litigants often seek one of three types of remedies:

- (1) mitigation of climate change (ie, reducing GHG emissions);
- (2) adaptation to climate change (ie, curbing the negative effects of climate change on ecosystems, communities or infrastructure); and/or
- (3) compensation for the alleged harms caused by climate change.

The first two categories of cases to date largely have targeted government actors, while cases in the third category have generally been brought against private actors and are not the subject of the Model Statute.

What does the Model Statute do?

The Model Statute is intended to lower the identified legal hurdles. It builds on recent successes and judicial reasoning in highlighting the role of courts in setting remedies that can require governments to protect the public. The Model Statute provides detailed rationales, precedents and 23 specific Articles for reforms – these can be regarded as a ‘menu of options’ rather than a complete code. The adoption of some or all of the Model Statute by judges, rules of court or legislation will help ensure timely critical GHG emission cutbacks and achieve climate justice.

Focused principally on process, the Model Statute does not prejudge the outcome of any such potential cases or speak to their merits under the laws that control in a specific jurisdiction. The Model Statute also does not speak to or promote any actions or remedies against corporations or private parties. Instead, the focus here is on process against governments that may be lying dormant or failing to enforce climate change laws that have been enacted. The Model Statute seeks to provide a pathway for judicial intervention to assess government response to climate change under applicable laws and, if legally mandated, compel governments to take appropriate action.

This Model Statute is focused exclusively on actions against government actors to pursue climate change mitigation and adaptation efforts, such as regulations to reduce GHG emissions and/or promote adaptation to climate change effects. Mitigation, and to a lesser extent adaptation, are the categories that are the most advanced in case law around the world and that have led some parties to obtain remedies that, in turn, have resulted in governmental action related to climate change. Thus, when access to courts is available, these types of cases have the potential to enable those impacted by climate change to seek real and actual relief from dormant governments.



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Because the Model Statute is specifically drafted with government actors in mind, it does not address and is not intended to be applicable to actions against private parties, which can raise different types of issues regarding jurisdiction, standing, causation, redressability and, if applicable, remedies.

Finally, the Model Statute is presented in a modular way so that nations can adopt portions of it to fit their judicial, regulatory and government systems. Thus, the draft articles below are intended to serve as a resource for legislatures, government departments, judiciaries and litigants considering the complex issues that emerge when pursuing climate change

The Backdrop of Existing Challenges Against Governments:

The Model Statute centres on the following fact pattern:

- a government is perceived to have failed to take any action or sufficient action to address climate change;
- an individual or group concerned about the impacts of climate change petitions the government to do something and is denied;
- that group then goes to court and asks the court to intervene.

Following successful actions such as *Massachusetts v EPA* [2007] 127 S Ct 1438 (US Supreme Court), the Netherlands Supreme Court decision in December 2019 in *Urgenda Foundation v The State of The Netherlands* and *Ashgar Leghari v Federation of Pakistan* [2015] Supplemental Decision in Case WP No 25501/2015 (Lahore High Court), individuals and groups are looking to build on these precedents by pursuing new cases and legal theories in courts to drive climate change action.

The report covers access to courts; the framework for adjudication of climate change litigation against governments; and remedies against government defendants. A full copy of the report is available [here](#).