

# **Obligations to reduce emissions: from the Oslo Principles to enterprises**

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## **1. Background**

- The need for comprehensive treaties and the Paris Agreement (United Nations Framework Convention on Climate Change (UNFCCC))
- Limited impact of the internationally agreed framework and the need for alternatives
- Can law outside of this framework be used to fill the gap?
  - Politics and the power of lawyers to extend its application from the mundane to the extraordinary

## **1. Background**

- Oslo Principles on Global Climate Change Obligations were finally accepted on 1 March 2015 (<http://globaljustice.macmillan.yale.edu/news/oslo-principles-global-climate-change-obligations>)
  - Basis of principles
  - The central Oslo Principles
  - Extension to enterprises

## 2. Points of departure of the Oslo Principles

- Firm and concrete obligations
- Primarily obligations of states
  - The role of the state as emitter and as regulator of activities (*Urgenda Foundation v. The State of the Netherlands* C/09/456689 / HA ZA 13-1396 (24-06-2015))
- Climate change mitigation/Greenhouse gas (GHG) reduction obligations versus adaptation

### **3. Basis for the Oslo Principles**

- Legal v moral obligations
  - Law as it is and will develop
- Principles consider examples from various legal systems without being comprehensive
- Principles derive obligations from the corpus of laws and not just from specific areas of law

### 3.1. International law

- International environmental law
  - No harm principle
  - Precautionary principle
- International human rights law
- Problems with the application of international law (*Tel-Oren v Libyan Arab Republic* 726 F.2d 774, 776-82 (D.C. Cir. 1984); *Sosa v Alvarez-Machain* 542 US 692 (2004))

## **3.2. Domestic law especially tort law**

- What is the role of tort law in the development of the Oslo Principles
- Emphasis on the common core of tort law and the more progressive aspects of tort law BUT accepting that many systems will not allow the types of tort claims proposed here

## 3.2. Domestic law especially tort law

- Problems in tort law and how they are addressed
  - Foreseeability
  - Impact of the emphasis on injunctive relief
    - *Foreseeability of a particular plaintiff*
    - *The singling-out of a particular defendant*
    - *Time at which duty to reduce emissions commences*
    - *Proximity of particular emissions and particular harm (Comer v Murphy Oil USA 839 F. Supp. 2d 849 (2012); Kivalina v ExxonMobil 663 F Supp 2d 863 (ND Cal 2009); Urgenda Foundation v The State of the Netherlands C/09/456689 / HA ZA 13-1396 (24-06-2015) pars 4.4-4.10)*



## 3.2. Domestic law especially tort law

- Minimal contributions of particular defendant  
(*Connecticut v American Electric Power* 582 F.3d 309, 345-346 (2nd Cir 2009))
- Discounting the socially beneficial consequences of GHG emissions
- Cost of measures to prevent harm
  - *Relevance of cost to the distribution of duties*

## 3.2. Domestic law especially tort law

- Should courts defer to legislators or the executive?  
(*American Electric Power v Connecticut* 131 S Ct 813 (2010), 564 US 410 (2010); *Native Village of Kivalina v ExxonMobil Corp* 696 F.3d 849 (9th Cir. 2012); *Urgenda Foundation v The State of the Netherlands* C/09/456689 / HA ZA 13-1396 (24-06-2015) )
  - *Will decisions to impose restrictions affect the ability to negotiate international agreements?*

## **3.2. Domestic law especially tort law**

- Other areas of domestic law
  - Environmental provisions in constitutions (Constitution of the Republic of South Africa 108 of 1996 s 34; Dutch Constitution art 21)
  - Broader human rights

## **4. Oslo Principles : the primary mitigation obligation for states**

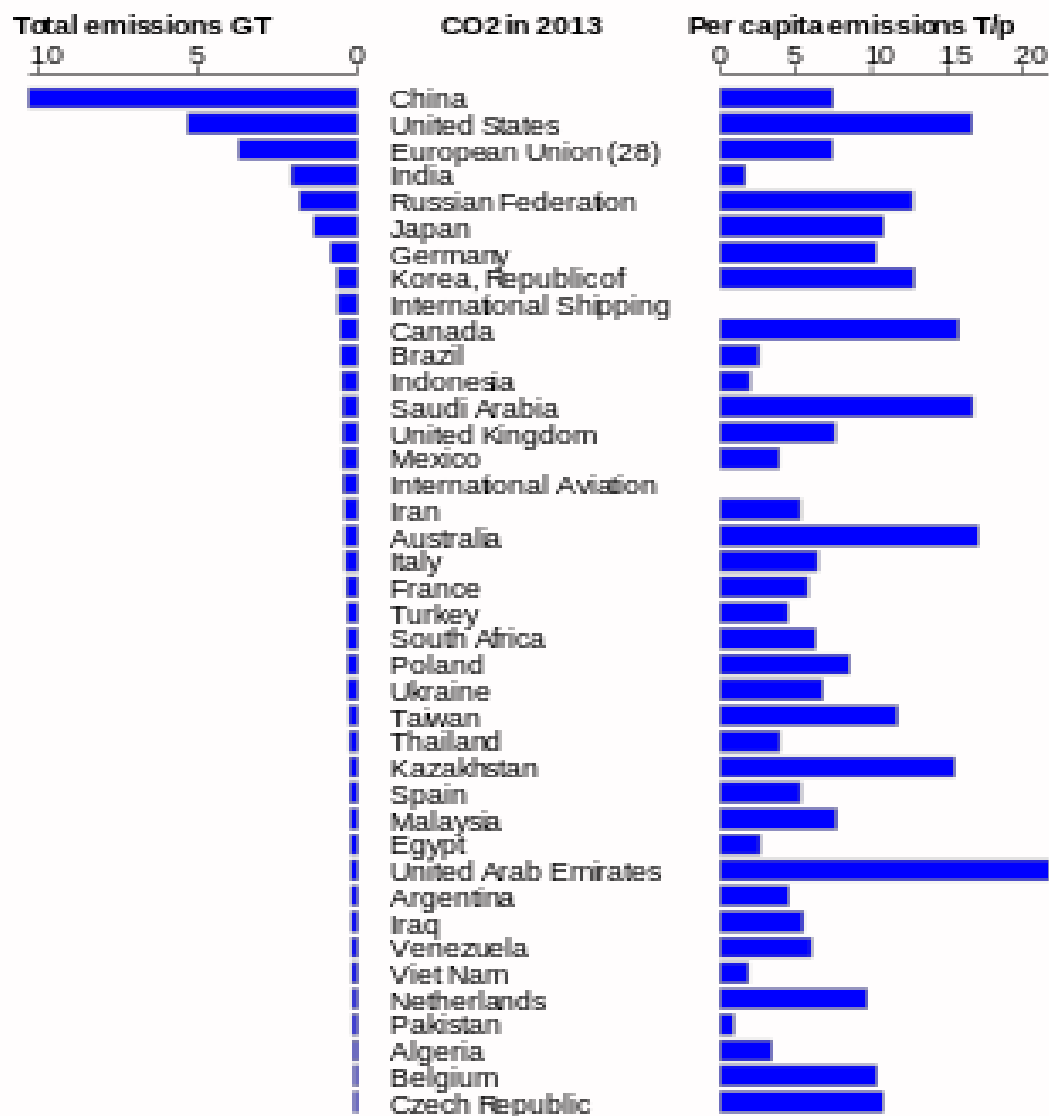
- Oslo Principles take a temperature increase of less than 2 degrees as the threshold
- Determining the obligation on states to reduce emissions = determining the emissions states are still allowed to make
- Process starts with the gross amount that may be emitted in a year that is “consistent with a plan of steady emissions reductions”

## **4. Oslo Principles : the primary mitigation obligation for states**

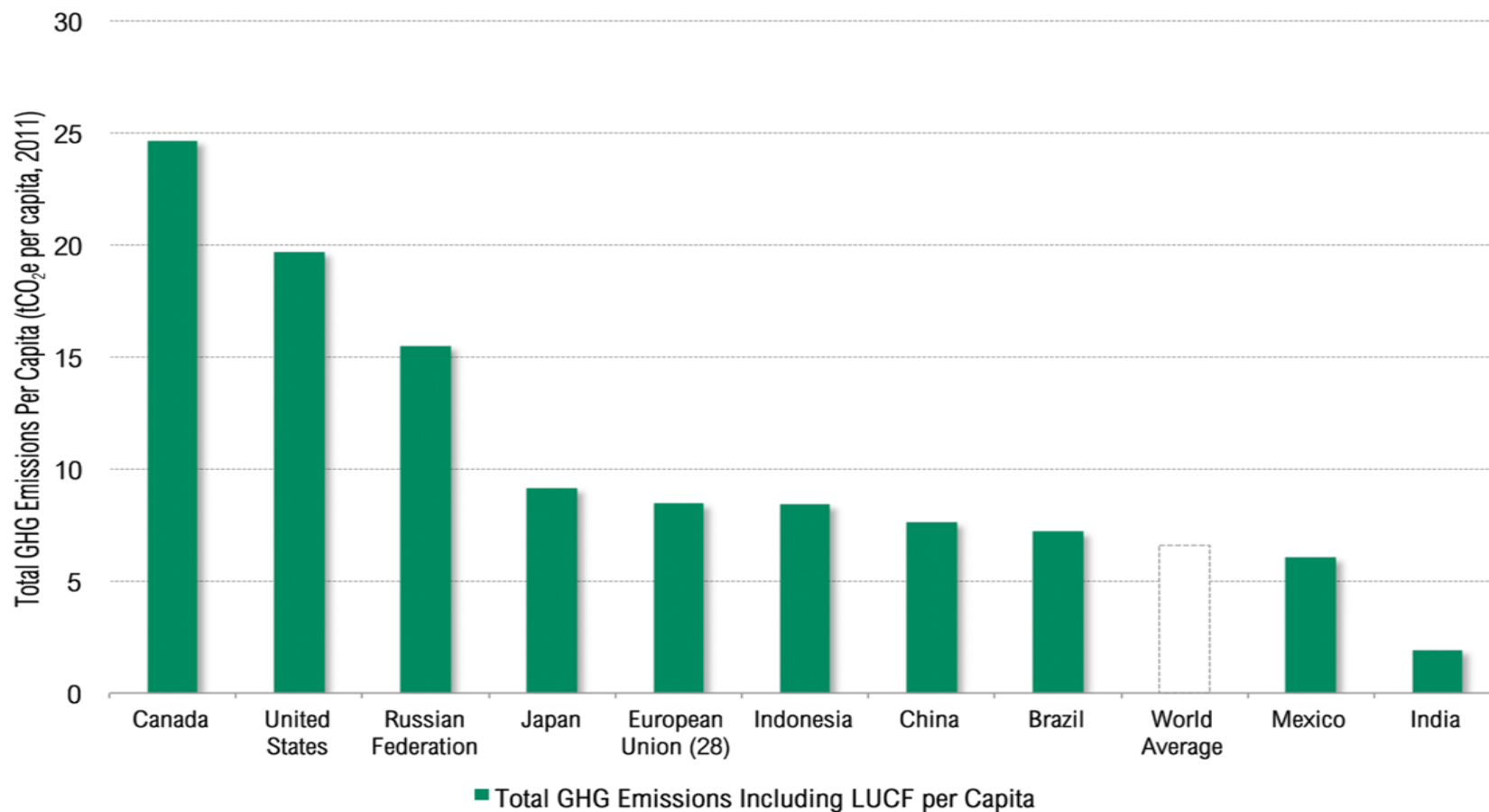
- Dividing this among states: Principle 13: “Every above-permissible-quantum country is required to reduce the GHG-emissions within its jurisdiction or control to the permissible quantum within the shortest time feasible”
  - Determine the global per capita amount that every person could emit in a year. This is the permissible quantum
  - Determine the annual per capita emission per country
  - Duty of above permissible quantum countries to reduce their emissions to the permissible quantum

## **4. Oslo Principles : the primary mitigation obligation for states**

- To save the world from +2 degrees warming, per capita emissions have to be reduced to 2 tons per person in 2050
- World average in 2011 was about 4.9 tons and 5 in 2013
- Most developed nations far above this
- Will have to get there by determining a reduced per capita amount that can be emitted every year



## Per Capita Emissions for Top 10 Emitters





## 4. Oslo Principles : the primary mitigation obligation for states

- Per capita concept
  - Is the per capita approach too legislative?
  - The per capita approach and fairness
  - Inter-generational equity (*Urgenda Foundation v The State of the Netherlands* C/09/456689 / HA ZA 13-1396 (24-06-2015))
  - Intra-generational equity among countries
    - *Common but differentiated responsibility*
    - *Accommodating historical contributions and the rights of poor nations to develop*

## **4. Oslo Principles : the primary mitigation obligation for states**

- Intra-generational equity within countries
- Problems regarding the calculation of per capita emissions
- Mechanisms to ameliorate the per capita approach
  - Principle 15: exclusion of liability for least developed nations
  - Principle 23: excessive hardship

## **5. From Oslo to reduction obligations for enterprises**

- Enterprises and the Oslo Principles
  - General statement of obligations (Principle 6)
  - Reductions that can be achieved without additional relevant cost (Principle 7)
  - New activities that produce excessive emissions (Principle 8)
  - Reductions that will be offset by future gains (Principle 9)

## **5. From Oslo to reduction obligations for enterprises**

- Assessment and disclosure of vulnerability to climate change (Principle 27)
- Assessment of assets that may be stranded (Principle 28)
- Impact assessment of activities for purposes of climate change (Principle 29)
- Banking and finance enterprises must assess climate change impact of projects financed (Principle 3)

## **5. From Oslo to reduction obligations for enterprises**

- Problems with the imposition of a Oslo-type reduction obligation on enterprises
  - International and Human Rights law has a more limited application to enterprises
  - The nature of states means that they are better suited to being the subjects of these types of obligations

## **5. From Oslo to reduction obligations for enterprises**

- Benefits of imposing Oslo-type obligations on enterprises
  - Enterprises are major contributors to GHG emissions
  - Due to the political role of states as opposed to enterprises, it may be easier to obtain remedies against enterprises

## **5. From Oslo to reduction obligations for enterprises**

- Some legal rules and principles will strengthen the case for imposing reduction obligations on enterprises
- Releasing the innovative energy of enterprises on the climate change problem

## 5. From Oslo to reduction obligations for enterprises

- Forum shopping may be easier where remedies are sought against enterprises rather than states
  - *States are protected from foreign immunity*
  - *Several factors will be relevant to jurisdiction (Alien Tort Claims Act 1789 (28 USC § 1350), Kiobel v Royal Dutch Petroleum Co 133 S. Ct. 1659 (2013); Sosa v Alvarez-Machain 542 US 692 (2004))*
    - Position of the plaintiff
    - Position of the defendant
    - Subject matter jurisdiction
    - Legal rules that will be applied



## **6. Concrete obligations for enterprises**

- Formulating concrete obligations in the context of the obligations that are imposed on states (United Nations Guiding Principles on Business and Human Rights 2011): Protect, respect remedy