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Climate Change - An Administrative Law Perspective

By Elena Emilia Ștefan[*]

Given the astonishing speed at which society and nature are changing, the issue of climate change can no longer be analysed solely from a legal perspective, but also from an ethical one. It is important to address the phenomenon of climate change, as it has become so widespread in recent years that we are now witnessing litigation involving not only individuals and authorities but also states. The occasion for our analysis is the news in the media according to which, in our country Romania, in January 2023, the first action was brought before the contentious administrative court against the Romanian state for not adopting measures to combat climate change. This prompted us to learn more on this subject. The theme is topical and relevant for both legal professionals and private individuals. The scope of the study is to investigate the extent to which ethical values, such as respect and responsibility, are intertwined with legal analysis of environmental issues and can help us find a solution to mitigate damage caused by climate change. Using methods specific to law, we will underline the conclusion of our paper, namely that the focus should be shifted to respect and responsibility, i.e. to prevention, nature, citizens, international organisations, states.

Keywords: *Contentious administrative; Public authorities; Climate change; Environment; State.*

Introduction

Among the most topical issues of interest to specialists in various fields are those relating to the environment. In the broader context of the analysis of liability issues in administrative law, the relationship between liability and responsibility has been developed[1]. In this study, we take a different approach to legal liability, but we analyse it in relation to the state's obligations towards the environment.

The proposed aim of our essay is to find out as much information as possible about the regulatory framework applicable to climate change, as well as what the most topical issues related to the theme under consideration are. The essay proposes a three-tiered structure, including doctrine, legislation and relevant case-law, both from national and comparative law.

The action brought before the contentious administrative division against the Romanian state was filed with the Court of Appeal of Cluj[2]. From this perspective,

[*]Ph.D. Associate Professor, Faculty of Law, "Nicolae Titulescu" University of Bucharest, Romania. Email: stefanelena@univnt.ro

[1]See Ștefan (2013) at 11-96.

[2]See in this respect public information at https://www.revnic.ro/actiune-impotriva-statului-roman-pentru-neadoptarea-masurilor-pentru-combaterea-schimbarilor-climatice-comunicat

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we highlight the absolute novelty of the theme for our country, which gives our investigation topicality. In order to meet the general research scope, we will also try to answer these questions: "*Is there any international legislation applicable to climate changes*?" or "*How can we stop climate change*?".

The following are the specific goals of the essay:

1. to make a review on the specialised literature regarding the general issue of climate change;
2. to identify and present the legislative framework on climate change;
3. to make research on current climate emergency issues;
4. to highlight the case-law on climate litigation from the administrative law perspective.

The novelty of our paper is that all the scientific research supports the development of the phenomenon of current climate change, by providing panoramic information, research being interdisciplinary, starting from administrative law. Given that the issue of protecting nature, the place where we live today, must be of concern to all citizens of the globe, such an issue should not be ignored in general, and even more so by legal specialists.

Literature Review

Researchers worldwide believe that climate issues need to be addressed. In reviewing the literature, we have noted that there are concerns about topics such as climate change in relation to climate emergency, environmental damage, and climate litigation. Recent doctrine considers that:

> "*the risks and difficulties associated with climate change generate a vast process of reconfiguration and conceptual elaboration in disciplines as varied as they are important, such as philosophy, law, ethics, political sciences or international relations*[3]".

Our analysis is undoubtedly based on the idea that the law must be observed in any situation, be it by private persons or authorities, and this follows from the legal interpretation of art. 1 para. (5) of the Constitution: "*In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory*" in conjunction with art. 16 para. (2): "*No one is above the law*".

According to specialised literature: "*human coexistence increasingly feels the need for security, clarity and order in its inner relationships*[4]" and "*the binding nature of the legal rule undoubtedly derives from general legal awareness*[5]". The medical crisis generated by the Covid virus, the humanitarian crisis leading to large displacements of people, war, pollution, climate disruption, the information

[3]Duțu (2021) at 42.
[4]See Popa (2008) at 63.
[5]See Rarincescu (1936) at 9.

avalanche, digitisation[6] of public administration are just some of the realities of the last 3 years to which society has been forced to adapt. The doctrine also points out: "*contemporary society is faced, inter alia, with an acute crisis of law* [...][7]".

Recent studies insist on cooperation between academia and public authorities. In this respect, the report *Limiting Climate Change and its Impacts: An Integrated Approach for Romania* subject to public debate called for better involvement of the scientific community in public policy making and policy support processes:

> "*the establishment of a National Council for Climate Change along the lines of the European Scientific Advisory Council on Climate Change provided for in the European Climate Act was proposed* [8]".

As one author points out "*the response of the law to climate challenge is part of the emergencies and key approaches to solving the environmental crisis in all its dimensions*[9]". From this perspective, we point to an interesting study that analyses the relationship between climate emergency and the obligation to prevent state extinction. It is rightly assessed that

> "*the effects of climate change are inevitable and are now being felt all over the planet. In what concerns the most vulnerable states to the effects of climate change, such as small island states [...], their capacity to govern their territory and population is already affected, which could alter their status of sovereign states in the long term, even their survival*[10]".

There are concerns in the doctrine about the identification of the causes of climate change in the public or private sector. There is one study which discusses

> "*whether the emergence of climate tort cases, an increasing drive to hold corporations responsible for climate change, and a company focus on voluntary climate action, could lead to the emergence of a new duty of care by corporate actors* […]".[11]

Another work examines responsibility and risk sharing in climate adaptation by conducting a case study of vegetation fire risk in Australia[12]. This article "*explores how law assigns responsibility for climate adaptation by examining its approach to a specific climate impact in Australia: the increasing frequency and severity of bushfire*".

In terms of the litigations that can emerge, specialised literature analysed the case-law regarding the actions in contentious administrative appeals in relation to

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[6]["*Regulating the digital sector (...) implies the formation of new paradigms in the legal area*"] - See Conea (2020) at 11.
[7]See Bădescu (2022) at 13.
[8]Public source at https://www.presidency.ro/files/userfiles/Raport%20Limitarea%20Schimbarilor%20Climatice.pdf at 166.
[9]See Duțu-Buzura (2021) at 10.
[10]See Costi (2022) at 233-267.
[11]See Popa, Kallies, Johnston & Belfrage-Maher (2022) at 185-215.
[12]See Mc Donald & Mc Cormack (2022) at 128-161.

the environment. In this regard, a decision of the Court of Appeal of Cluj[13] was mentioned. In the respective case, the Court noted the following:

> "*environmental damage may be reported by any person, even without justifying any damage other than the legal rules relating to environmental protection, since the law recognises the objective protection of the environment independently of the infringement of a specific type of subjective right and independently of the occurrence of any damage* [...][14]". Furthermore, French doctrine underlines that "*the term of party does not benefit from a genuine definition in contentious administrative*[15]".

Therefore, the court notes the following:

> "*the legal nature of the action for annulment of an administrative act issued by a public authority in the exercise of the legal prerogatives provided for by the legislation on environmental protection is that of an objective action, the plaintiff seeking primarily to defend an objective right or a legitimate public interest, for the purposes of ascertaining whether rights which constitute the content of a legal situation of a general and impersonal nature have been infringed and whether a general rule of law has been infringed*"[16].

In the concerns of specialists, we note the analysis of future generations as the subject of law[17]. We believe that the philosophy of climate litigation before the contentious administrative court is based precisely on the protection of present and future generations. On another occasion, the following was stated:

> *"nowadays, the interests of leaders at the highest level in states are huge and long-term, involving future generations, namely: identifying solutions and mechanisms to increase public confidence in state authorities* […][18]".

The following was pointed out:

> *"Numerous climate disputes have emerged around the world since the 2000s and have multiplied, including in Europe since 2015*[19]". French doctrine held the following: "*Every person has the facility to submit to the tribunals organized by law the petitions which he/she intends to file. […] The right to take legal action, understood in this sense, is not a private right; it is a public right […]*[20]".

Another author states the following:

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[13]C.A Cluj, division III of the contentious administrative and fiscal, Decision no.1195/2019, available at www.sintact.ro *apud* Apostol Tofan (2022) at 47-48.
[14]*Ibid*, at 48.
[15]See Barray & Boyer (2020) at 165.
[16]See Apostol Tofan (2022) at 48.
[17]See Duşcă (2021) at 59-70.
[18]See Ştefan (2017) at 96.
[19]See Torre-Schaub (2021) at 1445-1458.
[20]See Glasson & Tissier (1925) at 415 *apud* Drăganu (2003) at 17.

"*on 24 June 2015, very shortly before the adoption of the Paris Agreement, the Court of First Instance of Hague, in case Urgenda v. The Netherlands*[21]*, delivered a judgment which shook the way in which the possibility for national courts to contribute to the implementation of international provisions on the reduction of greenhouse gas emissions had previously been viewed*[22]". The quoted author details: "*by means of the judgment pronounced in case Urgenda v. The Netherlands, the Dutch State was required to take measures to reduce greenhouse gas emissions by at least 25% by 2020 compared to the levels of 1990*[23]".

Moreover, the doctrine rightly points out:

"*the conflicts and tensions caused by the ecological and social changes, disturbances and complications of the climate are already the subject of a contentious international which is in the process of being identified as such and which requires specific knowledge and approaches*[24]".

Research Methods

The scientific research methods specific to law used in the paperwork include the following: theoretical research of specialized literature, the computer method used to access sources available online, observation, analysis and comparison of the applicable normative acts, collection of case-law, synthesis of information, as well as the deductive method. The collection of data (legislation, case law, doctrine) was followed by their analysis and interpretation in order to reach a result and formulate conclusions.

From this point of view, in order to achieve our proposed goal, the analysis of the topic is interdisciplinary, being at the meeting of several disciplines of study such as: administrative law, environmental law, European Union law. The proposed case studies give importance and topicality to the theme under analysis, being specially selected to underline the conclusion of our paper.

A Brief Review of International Climate Change Legislation

The scope of this section is not to discuss all the legislation of the European Union[25] on climate change, but to point out certain applicable international legal instruments. National law cannot be self-sufficient, as it is obligated to continually adapt to international trends and developments in society as a whole. Our analysis cannot ignore the international efforts made by the countries of the world in response to the threat of climate change. As the doctrine pointed out:

[21]For further details see the public information at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZAC0900456689_judgment.pdf
[22]See Mitroi (2019) at 268.
[23]*Ibid.*
[24]See Duțu (2021) at 44.
[25]"*The typology of law has been enriched, in real terms, by the European Union's system of law* [...] "- See Fuerea (2016) at 5.

"*notwithstanding, Member States' failure to comply with EU law does, under certain conditions, make them liable for breaching it* [26]".

2023 marks 31 years since the signing of the Rio Convention on climate change. We indicate this first act in order to have a chronology of the applicable legislation in the field. Romania ratified the United Nations Framework Convention on Climate Change of 5 June 1992 by Law no. 24/1994[27]. *Climate changes* are defined in art. 1 of the Framework Convention:

> "*climate changes which are attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods*".

The Kyoto Protocol on climate change is the next international normative act that we briefly mention in this paper[28]. It was adopted on 11 December 1997, entered into force in February 2005 and "*is one of the most important international legal instruments in the fight against climate change*[29]".

Our analysis also includes Paris Agreement of 2016, the first global agreement signed[30] in the field of climate change, a binding legal act[31]. This Agreement, according to art. 2: "*aims to strengthen the global response to the threat of climate change*".

Subsequently, the European Commission communicated in December 2019 the European Green Deal[32], and in 2020 adopted the European Climate Law[33]. The doctrine points out:

> "*under the European Green Deal (...)climate emergency imposed the objective of carbon neutrality and credited the green transition as a continental strategy for sustainable growth* [34]".

According to art.1 of the European Climate Law: "*This Regulation sets out a binding objective of climate neutrality in the Union by 2050 (...)*". Art. 2 para. (1)

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[26]See Popescu (2011) at 213.

[27]Law no. 24/1994 for the ratification of the United Nations Framework Convention on Climate Change, signed at Rio de Janeiro on 5 June 1992, published in Official Journal no. 119 of 12 May 1994.

[28]Public source at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM:kyoto_protocol

[29]See in this respect the public source at http://publications.europa.eu/resource/cellar/b2d8257e-bd35-49f6-8356-934286204791.0020.02/DOC_2

[30]Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, published in Official Journal of the European Union L282/1 of 19.10.2016.

[31]Published in Official Journal of the European Union L 282 of 19.10.2016.

[32]See in this respect the public source at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52019DC0640

[33]Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, published in Official Journal of the European Union L343/1 of 9.07.2021.

[34]See Duțu-Buzura (2021). at 11.

provides the following: "*Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date* [...]".

The European Climate Law also covers adaptation to climate change and art. 5 para. (4) provides: "*Member States shall adopt and implement national adaptation strategies and plans, taking into consideration the Union strategy* [...]". From this perspective, it should be noted that the following are adopted at national level: National strategy on climate changes and economic growth based on low-carbon emissions for the period 2016-2020 and National Action Plan for the Approval of the Strategy [...][35].

Current Climate Emergency Issues

In this section, we will analyse the international case-law to learn about the most current climate emergency issues. In the context of global concerns of states to regulate and implement measures with a direct impact on climate change, there is a growing need for regulatory certainty. In this regard, we note an initiative of two countries that felt the need for support on the interpretation of legal instruments to help countries know how to relate to climate emergency.

According to public information, the Republic of Colombia and the Republic of Chile submitted a request for an advisory opinion on climate emergency and human rights to the Inter-American Court of Human Rights on 9 January 2023. The aim of this approach is: "*to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law (...)*[36]".

By analysing the document, it appears that the questions are grouped in six sections but, in relation to the topic we have analysed, we present only what we consider necessary to illustrate the topicality of our theme, i.e. the questions in section A (first category) and in section F (last category).

In section A – "*Regarding State obligations derived from the duties of prevention and the guarantee of human rights in relation to the climate emergency"*, four questions were formulated.

First question – "*What is the scope of the State's duty of prevention with regard to climate events caused by global warming, including both extreme events and slow onset events, based on the obligations under the American Convention, in light of the Paris Agreement and the scientific consensus which recommend that global temperatures should not increase beyond 1.5°C?"*[37].

[35]Government Resolution no. 739/2016 for the approval of the National strategy on climate changes and economic growth based on low-carbon emissions for the period 2016-2020 and National Action Plan for the Approval of the National strategy on climate changes and economic growth based on low-carbon emissions for the period 2016-2020, published in Official Journal no. 831 of 20 October 2016.

[36]See in this respect the public source at https://www.corteidh.or.cr/docs/opiniones/soc_12023_en.pdf

[37]*Idem*, at 8.

The second question is more complex: "*In particular, what measures should States take to minimize the impact of the damage due to the climate emergency in light of the obligations established in the American Convention?(...).*"[38]

"2.A - *What should a State take into consideration when implementing its obligations: (i) to regulate; (ii) to monitor and oversee; (iii) to request and to adopt social and environmental impact assessments; (iv) to establish a contingency plan, and (v) to mitigate any activities under its jurisdiction that exacerbate or could exacerbate the climate emergency?*

2.B. - *What principles should inspire the actions of mitigation, adaptation and response to the losses and damage resulting from the climate emergency in the affected communities*?"[39]

In section F – "*Regarding the shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency*" the two questions referred to the Court were:

"1. *What considerations and principles should States and international organisations take into account (...) when analysing shared but differentiated responsibilities in the context of climate change, from the perspective of human rights and intersectionality?*

2. *How should States act (...) to guarantee the right to redress for the damage caused by their acts and omissions in relation to the climate emergency (...)?*[40]"

This legal approach indirectly gives us a topic to reflect on: we must never forget that our actions have consequences and that taking responsibility can be a solution to dealing with an uncertain regulatory framework.

Climate Litigation Case Study - From the Administrative Law Perspective

Following our research, we learned considerably about the precedents that have been set for climate litigation around the world. Therefore, in Romania we are witnessing a first for this type of litigation, widely referred to as climate litigation.

A search of the court portal revealed that in January 2023, at the Cluj Court of Appeal, the first legal action against the Romanian State was filed with the contentious administrative and fiscal division[41], with the following subject matter: "*the obligation to do*". From the public information available on the court portal, it appears that there are six plaintiffs: one NGO and five individuals and six defendants (Government of Romania; Prime Minister; Ministry of Environment, Waters and Forests; Ministry of Energy, plus two interveners (two associations).[42]

By means of the suit petition, the plaintiffs[43] request the following:

[38]*Idem.*
[39]*Idem,* at 9.
[40]*Idem,* at 12-13.
[41]See in this respect the public source at https://portal.just.ro/33/SitePages/Dosar.aspx?id_dosar=3300000000074688&id_inst=33
[42]*Idem.*
[43]Public source at https://instrumente.declic.ro/uploads/Actiune-schimbari-climatice-31-01-2023.pdf

1. "*The obligation of the defendants to take all necessary measures to reduce greenhouse gases (GHG) by 55% by 2030 and to achieve climate neutrality by 2050*;
2. *The obligation of the defendants to take all necessary measures to increase the share of renewables in final energy consumption to 45% and to increase energy efficiency by 13% by 2030*;
3. *The obligation of the defendants to adopt, within no more than 30 days as of the final judgment, concrete and coherent climate change adaptation and mitigation plans, including annual carbon budgets, in order to achieve the targets […].*"

This litigation falls under the jurisdiction of the contentious administrative and fiscal division, according to Law no. 554/2004 of the contentious administrative. Art. 52 para. (1) of the Constitution is also applicable in this case:

> "*Any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an administrative act or by the failure of a public authority to solve his/her application within the lawful time limit, is entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and reparation for the damage*".

Therefore, one of the conditions of the action in contentious administrative is that the administrative act infringes on a legitimate right or interest[44].

We mention in this respect Principle 1 of the Stockholm Declaration[45] of 1972:

> "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*". Given the first climate litigation in our country, we can only express our confidence in the favourable resolution of such cases[46].

In other European countries this type of litigation in contentious administrative is no longer new, as we will illustrate below.

We mention in the following a recent case in French case law, from 2021, symbolically called - *L'Affaire du Siecle*, case detailed at length on another occasion[47]. In this case, the French State was found guilty by the Administrative

[44]See Vedinaș (2020) at 451-453.

[45]See in this respect the public source at https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf,

[46]At the time of writing this study, the dispute is before the court and a final judgment has not been pronounced yet. On June 6, 2023, the first court (the Cluj Court of Appeal) decided: *"(…) reject the request us unfounded. The sentence has the right of appeal within 15 days from the communication*".

[47]See Ștefan (2021) at 11-21.

Court of Paris for ecological damage regarding climate changes[48]. Therefore, the statements of the French author Rene Chapus fit in this case:

> "*The right to damages can only be recognised if the conditions for liability are met. There must be a damage which is the direct consequence of the act considered harmful*[49]".

The specialized literature also presented information about the first climate process in the Czech Republic:

> "*In June 2022, a Czech climate lawsuit, Klimatická žaloba ČR, z. s. and others v. Government of the Czech Republic and Others was decided by a first-instance court. The litigation was led against the Czech state for insufficient climate mitigation and adaptation effort*[50]".

The source also states that:

> *"The Municipal Court in Prague largely upheld the plaintiffs' claim that the Czech mitigation measures adopted to date were contrary to the Paris Agreement; and it found that the country must substantially strengthen its reduction rate of greenhouse gas emissions. This result—the first of its kind in the Czech Republic—was a surprise to many in a country whose courts have been conservative in environmental matters*[51]".

Conclusions

In this study, we have tried to find out the extent to which ethical values, such as respect and responsibility, are intertwined with legal analysis of environmental issues, and how they can help us find a solution to mitigate the damage caused by climate change. In view of the information presented, we consider that the research objective of this study has been achieved, i.e. the logical thread of the analysis revealed the synergy between ethical values and legal norms. The proposed structure of the paper included legislation, doctrine and case-law, in order to note the practical applicability of the concepts and to draw some conclusions.

A first conclusion we came to was that there is international legislation applicable to climate change such as the European Climate Law. In relation to the international normative acts referred to in the paper, it is noted that national legislation is bound to harmonise with the Community acquis. Another conclusion relates to the fact that, in our view, we are likely to see an exponential increase of the national legislation in the near future in order to achieve the climate neutrality goal required.

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[48]See in this respect the public information at http://paris.tribunal-administratif.fr/content/download/179360/1759761/version/1/file/19049671904968190497219049 76.pdf
[49]See Chapus (1988) at 746.
[50]See Müllerová & Ač (2022) at 273-284.
[51]*Ibid.*

From the analysis of legislation and case-law, it can be noted that environmental issues are both interdisciplinary and intersectional, seen strictly in terms of time and space. In this way, there is a broad category of subjects involved: individuals, international organisations, states and unions of states. This is why, in the international legislation applicable to climate change, we find the principle of solidarity, shared responsibility and accountability.

In our opinion, in addition to the legal aspects, the focus on ethics and morality in the approach to solutions for limiting environmental damage can also be a solution to clarifying the ideal regulatory framework for environmental protection. The literature search helped us to understand the state of knowledge of the issue we are analysing and to be able to create a research plan on the topic in order to open new research directions, providing a framework for debate and dialogue.

The analysis of the topic gave us a possible result, as an answer to the formulated research question: "*How can we stop climate change*?", only action - *intervention*, as an immediate reaction to the violation of international environmental protection documents, ensuring that the subjects involved are held accountable, is no longer sufficient to achieve a balance in relation to nature, without taking into account *prevention,* i.e. individual responsibility.

In order to add value to the research, the first climate litigation case in Romania was presented for the first time, based on the summarized information publicly available. Therefore, from the documentation carried out, we pointed out that an action was filed with the contentious administrative and fiscal divisions of the Court of Appeal of Cluj on 31 January 2023. From this we noticed that, unlike in other countries such as France or the Czech Republic, in our country there was no case-law for this kind of litigation. In the absence of actions taken by public authorities to fulfil their obligations in relation to the environment, persons whose rights have been violated have resorted to contentious administrative proceedings.

We believe that the litigation introduced in our country is in line with citizens' concerns about climate change awareness. Notwithstanding, we believe that in the not-too-distant future, there is a possibility to presume upon the exercise of access to justice, leading to the promotion of global climate processes. The reasoning that leads us to such an assessment refers to the fact that it may be wrong to approach the problem strictly from a one-way perspective, i.e., only to investigate compliance with state obligations in relation to the environment, without taking into account the responsibility of each of us and the responsibility we must have towards nature and the law.

Finally, in relation to a recent judicial approach of two countries, presented above, even the states have difficulties in regulating the implementation of international law both normatively the measures taken at the international level and practically through administrative acts. Therefore, this approach shows respect and responsibility on the part of the states.

In conclusion, the proposed research topic has not been exhausted and may involve many other approaches. We draw future lines of research to continue our analysis with other topical issues such as the contribution of some public or private entities in causing climate disruption.

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