JUST ATONEMENT INC.

justice · equal opportunity hope peace unity golden age progress sustainability democracy freedom human rights harmony civilization

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Consent to publication on the website of the Special Rapporteur is hereby granted

Just Atonement Inc. (JAI) incites transformative social change by empowering lawyers and law students with the opportunities, training and means to defend democracy, human rights, and a livable planet. JAI was founded in the United States of America in 2017.

JAI invites and organizes legal professionals globally into a single order and aligns a vision of a peaceful, sustainable world, governed by the democratic rule of law; litigates in courts all over the world on cutting edge human rights cases to build peace and sustainability, and to defend democracy; and advocates for a vision of a true Golden Age for humanity: a world where countries settle their disputes peacefully, manage social and economic systems that are in harmony with the planet, and govern themselves through the principles of democracy, the rule of law, and human rights.

JAI submits this written submission in response to the invitation by the Special Rapporteur on extreme poverty and human rights with respect to a "just transition".

Specifically, JAI provides the following response on Issue 1.2. *Which innovative fiscal and financial incentives can be relied on to reduce cost gaps between renewables and fossil fuel technologies, in order to make clean energy affordable to all?*

JAI calls to the attention of the Special Rapporteur the following recommendations:

- Ending government assistance to fossil fuel corporations
- Encouraging divestment of assets connected to fossil fuel corporations
- Imposing legal obligations on Boards of Directors to take into account the impact of corporate conduct on the climate

I. Ending Government Assistance to Fossil Fuel Corporations

1. In 2019, the Environmental Energy and Studies Institute put "U.S. direct subsidies to the fossil fuel industry at roughly $20 billion per year; with 20 percent currently allocated to coal

and 80 percent to natural gas and crude oil. European Union subsidies are estimated to total 55 billion euros annually."[1]

2. Governments must immediately stop subsidizing businesses, corporations, and other industries that produce fossil fuels, or, in the alternative, expressly condition such subsidies on the recipients using such funds for the purposes of sequestering their historic emissions.

3. With some estimates placing the direct costs of climate change at US $7.9 trillion by 2050,[2] government subsidies towards fossil fuel production is economically senseless. One recent example of misplaced government policy is the approximately US $113 million in disaster relief funds that went to fossil fuel corporations in the United States[3]—funding that was not at all contingent on any further obligations to change business practices or to implement mitigation measures with respect to historic emissions.

II. Encouraging Divestment of Assets Connected to Fossil Fuel Corporations

4. Energy divestment movements play an important role in the political economy of energy transitions. Governments should take political action with tougher laws, but they should also regulate the market by weakening offending companies fiscally through such measures. Fossil fuel divestment initiatives call for institutions and individuals to sell their shares, private equity or debt from firms investing in fossil fuels. Targets of this movement are mostly university endowments, banks, and sovereign wealth funds. The main focus is to undermine the legitimacy of investing in fossil fuel corporations since it is essential to get rid of the "social license" that fossil fuel companies operate under. According to Desmond Tutu, "it makes no sense to invest in companies that undermine our future."[4]

a. State-owned investment funds

5. First, governments must join this movement by themselves divesting their assets in the fossil fuel sector. This helps to set an example for the market, akin to state action in delegitimizing cigarette smoking or driving under the influence of alcohol. If influential powers such as the United States or European countries ditched their holdings in fossil fuel asset classes and explained the rationale behind the movement, they would encourage other countries and private actors to do the same.

[1] https://www.eesi.org/papers/view/fact-sheet-fossil-fuel-subsidies-a-closer-look-at-tax-breaks-and-societal-costs#:~:text=Conservative%20estimates%20put%20U.S.%20direct,total%2055%20billion%20euros%20annually.

[2] https://phys.org/news/2019-11-climate-impacts-world-trillion.html

[3] https://www.theguardian.com/business/2020/may/14/us-oil-gas-companies-coronavirus-relief-loan-ppp

[4] https://www.theguardian.com/commentisfree/2014/apr/10/divest-fossil-fuels-climate-change-keystone-xl

6. For instance, the Norwegian Central Bank has advised its government to divest from existing oil and gas companies and to rule out future investments in this industry. Norway's sovereign wealth fund is the world's biggest, and the Bank's proposal to dump assets in oil and gas companies is therefore an effective measure against the fossil fuel sector. As a consequence, Europe's index of fossil fuel shares hit its lowest in 2017—even before the Norwegian government took action towards the proposal.[5] This makes clear that even a recommendation from a central bank can create an avalanche effect.

7. Another example comes from California, by way of the Investing with Values and Responsibility Act. This law obligates the state's public pensions plans to remove all assets from corporations when at least half of their revenue is composed of coal mining.[6]

8. Governments can also do more to support the Divest-Invest movement to reduce cost gaps. In addition to divestment, sustainable investments are also necessary to achieve climate justice. This should also include reinvesting fossil fuel funds in renewable energy alternatives or other environmentally beneficial projects.

b. Private investors

9. Governments must encourage private investors to divest their assets through financial sanctions and/or incentives to invest in eco-friendly businesses. Some countries such as the United Kingdom and Australia have already passed laws to promote Socially Responsible Investment (SRI). Similarly, 'environmental, social and governance (ESG)' investing could be better supported by government regulation. Since ESG investing is already supported by the market, all that governments have to do is to clarify its implementation and legality. Government regulation can help build a fair marketplace for ESG investing by making it more precise and as profitable as "standard" investment practices. For example, the European Commission adopted an action plan on sustainable finance to integrate ESG considerations which included proposals including a unified classification system and investors' duties. Governments could make such considerations mandatory and/or provide tax or other incentives to draw private capital towards ESG investing.

10. Government action should also draw attention to overlooked considerations such as human rights abuses and other ecological problems, since the divestment movement's main purpose is to stigmatize the fossil fuel industry as a whole. For instance, as a result of the divestment movement, ING Bank sold its stakes financing the Dakota Access Pipeline. The city of Seattle has also voted to divest from another bank involved in financing the pipeline project. Government action is clearly a necessary stimulator of the shift to a just socio-energy regime.

[5] https://www.theguardian.com/business/2017/nov/16/oil-and-gas-shares-dip-as-norways-central-bank-advises-oslo-to-divest

[6] https://www.theguardian.com/environment/2015/sep/02/california-pension-funds-divest-coal

11. Governments could also impose additional legal and/or fiduciary duties on private investors to consider climate change risks, particularly since the future of oil and gas assets are in doubt. For instance, the trustees of university endowment or banks already owe a fiduciary responsibility to their organization and shareholders. Accordingly, lack of consideration of climate change related problems in a fiduciary's investment decisions should be considered as a breach of its duties, imposing potential liability. The US Department of Labor has already addressed this issue by stating that "ESG factors may have a direct relationship to the economic and financial value of [a retirement] plan's investment. In such instances, the ESG issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices."[7] This could be made stricter by requiring fiduciaries to consider environmental issues whenever they are investing.

III. Imposing Legal Obligations on Boards of Directors To Take Into Account The Impact of Corporate Conduct on the Climate

12. Governments must amend their corporate laws to impose an affirmative duty of care on members of corporate boards to take into account the conduct of the corporation on the climate system, such that those board members may face personal liability if that duty of care is violated.

a. Corporate directors already owe fiduciary duties to the corporation

13. Under U.S. state law, directors of corporations owe fiduciary duties to the corporation in the form of a duty of care and a duty of loyalty. Directors can face potential personal liability in the event they violate these fiduciary duties.

14. In order to obviate concerns related to such liability, corporations retain talented individuals to sit on corporate boards through (i) indemnifying directors of corporations for their corporate acts, to the extent permitted by law; and (ii) purchasing directors' and officers' insurance for acts and omissions taken by directors in performing their corporate duties.

b. Directors should have a fiduciary obligation to consider the impact of corporate conduct on the climate system

15. Domestic laws should be amended such that directors have a duty of care to take into account the actions of their decisions on the climate system itself. Incorporating an express fiduciary obligation to take into account the climate system does several things:

- Raises the issue of responsibility to the climate system from a mere background norm or overlooked business assumption to an affirmative legal duty;

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[7] https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/etis-and-investment-strategies-that-consider-esg-factors.pdf

- Permits stockholders to bring derivative claims on behalf of the corporation against directors who violate a duty of care to consider the climate system;

- Forces the corporation to consider costs of litigation—and the indemnification and insurance obligations associated with such litigation—in selecting its directors and in undertaking corporate activity.

c. Director liability for negative social impact is not a new concept

16. The idea of director liability for violations of potential legal obligations of an international character is not at all new. At the Nuremberg Trials for example, corporate managers, directors, and executives were found guilty of war crimes and crimes against humanity based on the actions of the Flick, Krupp, and I.G. Farben corporate conglomerates.

17. Even in relatively corporate-friendly legal jurisdictions like the U.S. state of Delaware, there is an increasing recognition that a director's duty of care and loyalty is sometimes implicated by social harm. For example, the Delaware Chancery Court ruled in the *Caremark* case[8] that directors in Delaware can violate their duty of loyalty to the corporation if they fail to be responsible for certain aspects of corporate oversight. Recently, in *Marchand v. Barnhill*, the Delaware Supreme Court reaffirmed the concept of *Caremark* liability, noting that a director "must make a good faith effort to oversee the company's operations" and that a *Caremark* claim can be made by the company's stockholders when directors "completely fail to implement any reporting information system or controls."[9] In *Marchand*, the corporation had completely failed to oversee certain aspects of its business that led to a *listeria* outbreak—even after the board had been placed on repeated notice of food safety issues within the corporation for several years. The board failed to do anything about it. The Delaware Supreme Court permitted a stockholder derivative claim directly against the board members for a breach of the duty of loyalty.

18. Potential *Caremark* liability is not specific to climate change, and Delaware courts have stressed that proving a breach of a fiduciary duty in this context is difficult. However, even Delaware courts recognize that a director's fiduciary obligation may encompass social harm.

19. Imposing affirmative obligations on directors will also help bring consensus internationally on the issue of corporate liability for the climate crisis. While international and domestic trials have not yet crystallized on the exact form of legal responsibility of polluting countries or corporate entities for their respective contributions to the climate crisis, there is a growing consensus that the right to life, the right to self-determination, and the right to a healthy environment are at least subject to potential infringement.

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[8] *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

[9] *Marchand v. Blue Bell Creameries USA, Inc., et al*, C.A. No. 2017-0586-JRS (Del. June 19, 2019).

20. Directors of corporations must be on notice that their conduct today may infringe these international obligations, including *jus cogens* norms, and understand the risk of potential liability thereto.

d. Summary of benefits with respect to the imposition of a fiduciary obligation on directors to consider the climate

21. We view the imposition of director liability for negative impacts on the climate as a remarkably seamless mechanism in reducing the cost gaps between renewables and fossil fuel products. Such director liability will:

- Increase the potential costs associated with the production of fossil fuels in a manner truly commensurate with the damages and risks associated with the use of fossil fuels, by increasing potential liability on individual directors for climate damage caused by such conduct.

- Create incentives on corporations to lower and manage such risks.

- Create secondary markets (such as insurance markets) that can also help create additional business incentives and mechanisms to allocate risks.

    - To the extent that an insurer refuses to insure certain corporate boards because of the risks associated with that corporation's business practices, there would be a strong incentive on such corporations to change their practices to avoid liability on directors.
    - Corporate board members who cannot be insured because of business practices undertaken by the corporation will have incentives to change those business practices, and/or remove themselves from the board of directors.

- Better align the long term business practices of a corporation with the long term health and sustainability of the planet and a stable climate system.

- Act as a moral signal, written into law, that a corporation must take into account the climate and link the climate in its business practices.

- Promote greater shareholder oversight of corporate board decisions, as dissenting shareholders can undertake derivative lawsuits against corporate board members if a shareholder believes that a fiduciary obligation has been breached by the board in relation to the climate.

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This submission was prepared by Dave Inder Comar (Stanford 2001; Stanford 2002; NYU School of Law 2005) and Ece Yagci (Paris 1 Panthéon-Sorbonne University 2019; Columbia Law School and Paris 1 Panthéon-Sorbonne University 2022)