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Forum Shopping in the Eu – A Useful Strategy in Corporate Climate Change Litigation?

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SUMMARY

1. Introduction

It is 2015 when Peruvian farmer Luciano Lliuya "takes on an energy giant", to paraphrase the many international headlines about the case.[1] Lliuya files a claim in a German court against RWE AG, the German-based energy-multinational. He has a house and land in Huaraz, Peru and claims that his property is threatened by the melting of a nearby glacial lake. The melting is caused by global warming, he argues, for which RWE is partly responsible. To protect his house from flooding, he seeks payment in the amount of €17.000 from RWE, a sum he says is equivalent to RWEs overall contribution to global climate change of 0.47%.[2] The case is unique in many ways. For one, it is testing the boundaries of neighbourliness, evidence and standing. For another: it concerns a non-EU claimant against an EU-based corporate defendant.[3]

Mantovani calls cases like this the "underworld" of climate change litigation, hinting to the emergence of new court strategies whereby climate activists direct their claims against big transnational corporations.[4] The majority of the two thousand-plus climate cases that so far have been filed globally are directed against States, but corporate cases may very well become part of an already wide range of strategies in climate change litigation.[5] Recently, climate change actions against private actors are indeed on the rise, especially targeting fossil fuel and cement companies, being major greenhouse gas emitters.[6] Although these cases have mixed strategies and use a plethora of legal arguments, the majority concerns misleading advertising, followed by cases where corporations are demanded to reduce their emissions of greenhouse gases.[7]

Often plaintiffs in these lawsuits, like Lliuya, live in countries where climate change threatens livelihoods whereas defendants such as RWE are based in countries where the damage caused by climate change has so far been less

1 https://www.theguardian.com/world/2017/nov/14/peruvian-farmer-sues-german-energy-giant-rwe-climate-change; https://www.washingtonpost.com/climate-environment/interactive/2022/peru-climate-lawsuit-melting-glacier/; https://www.theenergymix.com/2022/06/01/officials-visit-melting-glaciers-in-peru-in-climate-case-against-german-utility-rwe/

2 For an impression of the facts on the ground in Huaraz, see https://www.youtube.com/watch?v=FqTd-7Bp2Fjc

3 *Lliuya v. RWE AG*, Essen Oberlandesgerich 2 O 285/15. For English translations of the documents exchanged so far in this case, see https://climatecasechArticlecom/non-us-case/lliuya-v-rwe-ag/

4 Montovani (2023).

5 This number is based on the US Climate Litigation Database, maintained by the Sabin Center for Climate Change Law (Columbia University): https://climatecasechArticlecom

6 Still mostly absent from courts in climate-related cases are actors that cause deforestation (for example the agribusiness and the meat industry) and the plastic industry and the shipping industry.

7 This information is based on the US Climate Litigation Database, maintained by the Sabin Center for Climate Change Law (Columbia University): https://climatecasechArticlecom

severe. The EU is historically responsible for a significant part of greenhouse gas emissions. It also has substantial climate ambitions and, being a frontrunner in reducing greenhouse gases, attracts the scrutiny of both its own citizens and those who suffer the consequences elsewhere. In addition to that there were some recent success stories in EU-courts that attracted international attention. All these factors together make the EU an interesting venue for climate change litigation.

Because after all, why did Lliuya choose a German multinational, and not – say – a Chinese or Saudi Arabian multinational? Why did he not sue RWE in the Peruvian courts? Is it perhaps because he knows that the EUs uniform, predictable framework of private international law might help him to get his case started in an EU-court? Is it because he knows (or hopes) that once those hurdles of private international law are taken, the applicable substantive law might work in his favour? Would Lliuya have opted for Germany had he known the outcome of Milieudefensie v. Shell in the Dutch courts[8], being what some call a "spectacular turning point" in corporate climate litigation?[9] And what if he was not just thinking legally, but also took the option of 'failing with benefits' into account? This paper deals with these questions as well as with the 'risk' of Lliuya succeeding and thus triggering a tsunami of similar cases. Is that indeed likely to happen? Will EU courts become the go-to-courts for this type of litigation?[10] How easy or difficult are these horizontal climate cases for non-EU plaintiffs?[11] In other words: does forum shopping in the EU make sense? And how does all this relate to that other traditionally popular venue for transnational litigation, the U.S.?

2. Civil liability as the common denominator

Cases against States have been analysed quite extensively from a comparative perspective, cases against corporate defendants not so much. It is therefore difficult to give a comprehensive overview of their peculiarities, similarities and differences. However, it is safe to say that they all involve some type of extracontractual civil liability aimed at protecting the body, health or property – if only because this type of civil liability is the most plausible ground available for plaintiffs.[12] Lliuya for example claims liability of RWE on the basis of Article 1004 of

8 *Milieudefensie et al. v Royal Dutch Shell*, Rb Den Haag, 26-05-2021, C/09/571932/ HA ZA 19-379 (court-issued English version)

9 Weiler, Tran (2022).

10 Cf. Stefer (2023).

11 As opposed to vertical climate actions; those between private parties and the State. Cf. Stefer (2023).

12 Weiler, Tran (2022).

the German Civil Code, which sees to impairment of property, a provision which is typically applied in disputes between neighbours. Lliuya is trying to construe a global neighbourly relationship between RWE and himself. He claims the removal of the impairment (the impending glacial lake outburst flood caused by greenhouse gas emissions) of his property.

In the French case *Notre Affaire à Tous v. Total* the claim for Total to meet its climate obligations is based on a law that imposes a corporate duty of vigilance.[13] This law of 2017 requires large French companies to establish measures, identify risks and prevent severe impacts on human rights and the environment both from its own activities and from those with whom it has an established commercial relationship. A court can impose a penalty for non-compliance. The law also provides for civil liability. Under the law, harmed individuals can bring a civil lawsuit based on French tort law to seek damages resulting from a company's failure to comply with its vigilance obligations, whereas compliance would have prevented the harm.[14] [15]

In the Dutch case *Milieudefensie v. Royal Dutch Shell* the demand that Shell reduces its greenhouse gas emissions was mainly based on Dutch tort law, which contains an unwritten standard of care, embedded in Article 6: 162 of the Dutch Civil Code.[16] The court interpreted this standard referring to, among other things, obligations under international human rights law, eventually holding Shell liable and ordering a further reduction of greenhouse gas emissions.[17]

Three corporate cases in three different EU-jurisdictions based on three different types of extracontractual liability. It shows that climate claims based on civil liability are diverse and the applicable domestic legal system might affect how to frame them. What they do have in common though, is that they all fall under the material scope of Regulation (EU) 1215/2012 on jurisdiction and the

13 https://climatecasechArticlecom/non-us-case/notre-affaire-a-tous-and-others-v-total/

14 https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/

15 Based on what plaintiffs call a "worrying interpretation of the law on duty of vigilance and the provisions on ecological damage" the case was dismissed in the first instance for mainly procedural reasons. Cf. press release, published in English at https://climatecasechArticlecom/wp-content/uploads/non-us-case-documents/2023/20230706_NA_press-release-1.pdf

16 Article 6:162:
– 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. – 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour. – 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

17 https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5337, For English translations: https://climatecasechArticlecom/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/

recognition and enforcement of judgments in civil and commercial matters, better known as Brussels I*bis*, and the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, better known as Rome II.

3. Establishing jurisdiction

Establishing jurisdiction of an EU-court in cases such as the abovementioned is relatively straightforward. Article 4 of Brussels I*bis* creates competence for the court of the place of domicile of the defendant, irrespective of domicile of the plaintiff.[18] Alternatively, Article 7 (2) Brussels I*bis*, which specifically sees to environmental damage, allows to sue before the place where the harmful event occurred or is likely to occur. ECJ case law has established that this could either be the place where the damage occurred (place of effect, *erfolgsort*) or the place of the event giving rise to the damage (place of action, *handlungsort*).[19] The latter would probably not create extra opportunities for plaintiffs, as it will in most cases lead to the domicile of the parent company and will thus not differ from the main rule of Article 4. The other alternative though, the place where the damage occurred, has the potential to open a can of worms.

Let us for example take a claim based on the breach of the obligation of a company to reduce greenhouse gas emissions. The court of the company's domicile would be competent to hear the entirety of the alleged damages, whereas under the mosaic-approach the courts of any place where alleged damage is suffered would be competent only in respect of the local damage.[20] This approach was established in other fields with dispersed losses, such as defamation or antitrust rules. Losses from global warming are at least as multi-territorial as those in antitrust or defamation situations, if not more; they are virtually omni-territorial. This would theoretically allow plaintiffs in any jurisdiction of the EU to address the court of that place to decide on the damages that occurred in that place.

At first sight, this is not very relevant for plaintiffs; why would they opt for such an approach if they have the courts of the defendant at their disposal for the full damages? But, just as the mosaic-approach in defamation cases is sometimes abused by certain plaintiffs to silence journalists, NGOs and civil society groups, so can it potentially be abused by climate litigators, suing corporations

18 Case C-142/98 *Group Josi v. UGIC* [2000] ECR I-05925.

19 Case C-21/76 *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA* [1976] ECR 01735.

20 Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA* [1995] ECR I-00415.

in multiple jurisdictions.[21] However, the strategy in these SLAPP[22] cases against journalists and activists to start multiple legal proceedings in multiple jurisdictions is to cause severe financial damage to the defendants. It is a strategy that is much less likely to be sought in climate cases, considering the fact that in climate cases the plaintiffs are the financially weaker party, not the defendants. A more plausible use of this alternative of Article 7 (2) Brussels I*bis* might be not to address *all* possible courts, but just the one where the best result is expected from a substantive law and/or public opinion perspective.

Leaving aside the mosaic-forums for now; as long as the defendant has domicile in the EU, irrespective of domicile or nationality of plaintiff, access to a European forum is guaranteed.[23] The system does not allow the discretionary tool often found in common law systems of forum non conveniens, whereby a court – even though the venue is proper – can decline to exercise its jurisdiction if it deems another court to be more convenient to hear the case.[24] This absence of forum non conveniens distinguishes the EU from the US, that other traditionally popular jurisdiction for foreign plaintiffs.

4. Jurisdiction outside the EU, the case of the U.S.

"As a moth is drawn to the light, so is a litigant drawn to the United States," reads the famous quote by Lord Denning.[25] Regardless whether that is indeed the case – of which no empirical evidence exists[26] – it is useful to have a look at the possibility of a foreign plaintiff bringing a climate damages claim against a U.S. defendant. Is it as easy as Lord Denning seems to assume? Is it easier than in the EU, thus keeping forum shoppers away from the EU, and flock to the U.S. after all?

For a U.S. court to assume jurisdiction in a case of a foreign plaintiff against a U.S.-based defendant, there must be both personal and subject-matter jurisdiction. Personal jurisdiction is the requirement that a given court is competent to hear a case based on minimum contacts of the defendant with the forum. Subject-matter jurisdiction is the requirement that a given court has power to

21 Cf. Borg-Barthet (2021).

22 Strategic Lawsuit Against Public Participation.

23 Domicile is either the place of a company's statutory seat, its central administration or irs principal place of business.

24 Case C-281/02 *Andrew Owusu v. N. B. Jackson* [2005] ECR I-01383.

25 *Smith Kline & French Laboratories Ltd and others v. Bloch*, 13 May 1982, https://vlex.co.uk/vid/smith-kline-french-laboratories-794009737.

26 Whytock (2022).

hear the specific kind of claim that is brought to that court. Personal jurisdiction is assumed when the minimum-contacts requirement has been met: defendant must have minimum contacts with the forum so that the exercise of jurisdiction falls within the notions of fair play substantial justice.[27] Factors taken into account when establishing minimum contacts of a defendant with the forum are things such as the amount, nature and quality of contacts, the interest of that State in providing a forum and the convenience of parties. There is no case law to support this (yet), but with a U.S. greenhouse gas producer as defendant, some if not most of these conditions would probably be met and thus a court could assume personal jurisdiction.[28] As to subject-matter jurisdiction, with a U.S.-based defendant, having its decision making headquarters in the U.S., or greenhouse gases being emitted within the U.S., a court would most likely have no problems establishing subject matter jurisdiction either.[29]

So far, establishing jurisdiction of a U.S. court by a foreign plaintiff does not seem that much different or more difficult than of an EU-court under Article 4 and 7 of Brussels Ibis, albeit the criteria applied are more flexible and open to interpretation on a case-by-case and court-by-court basis. Furthermore, for the past decade or two personal and/or subject-matter jurisdiction are being granted less generously than before.[30] And even if the U.S. court has jurisdiction, a U.S. defendant can raise the defence of forum non conveniens. This is the most fundamental difference with the EU system.

U.S. defendants can argue that an adequate alternative forum for litigation exists elsewhere. And the acceptance of forum non conveniens is on the rise, not because the law changed but because the courts changed their attitude towards it. With this what some call the recent trend of "litigation isolationism" in U.S. courts in mind, things do not necessarily bode well these days for foreign plaintiffs. In 2007, the Supreme Court expanded the availability of forum non conveniens by holding that courts may dismiss a case on forum non conveniens grounds without having first to determine whether they have subject-matter and personal jurisdiction over the claim.[31]

Thus, features that were typically considered to make the U.S. a magnet forum, seem less favourable today than they used to be. It is not clear, for lack of case law, whether this trend of isolationism would extend to climate cases. Recent cases of foreign plaintiffs against U.S. based companies for environmental

27 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 320 (1955).

28 Byers (2017).

29 Byers (2017).

30 Whytock (2022), p. 14.

31 Sinochem International Co. Ltd. v. Malaysia International Shipping Corp, 549 U.S. 422 (2007).

harms committed abroad, might be indicative. Over the past years the trend is that U.S. courts are increasingly closing the doors to foreign plaintiffs in these kind of cases.[32] If and how this will apply to foreign plaintiffs in climate cases, remains to be seen. This uncertainty might play a role when strategizing a climate case, and the relative predictability of EU-courts could very well be a plus for forum-shoppers.[33] Unless it involves State-owned enterprises. Then, the situation becomes much less predictable and much blurrier.

5. State-owned enterprises and Brussels I*bis*

RWE, Shell, Total; they are all privately owned companies. Would it make a difference if they were State-owned? After all, there is a wide range of State-owned actors responsible for large amounts of carbon emissions.[34] Looking beyond the 'usual suspects' of the carbon majors based outside the EU, such as Saudi Aramco or Mexico's Pemex, there are many other State-owned enterprises, including ones inside the EU. They might not extract natural resources but are nevertheless directly or indirectly responsible for greenhouse gas emissions, be it telecom, banks, insurance companies, electricity companies or commercial airlines.

Let us take the latter as an example and imagine a hypothetical case where a non-EU citizen sues an EU-based State-owned commercial airline in a civil – tort based – liability case in the court of its domicile, claiming that damaging climate change is partly caused by its activities. Normally, this would qualify as a civil or commercial matter, falling within the material scope of Brussels I*bis.* However, Article 1 (1) states that the regulation "[…] shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)."

What does this mean for our case? Would the rules to establish jurisdiction of Brussel I*bis* apply, or do the airline's activities fall outside its scope, because they are done by a State-owned company? Since the Eurocontrol-case in 1976, the European Court of Justice has consistently defined civil and commercial matters as excluding actions by public authorities acting in the exercise of their powers, i.e., powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals.[35]

32 Clagett (1996); Hester (2018).

33 Prévost (2023).

34 Tordo, Tracy, Arfaa (2011); Griffin (2017).

35 Case C-29/76, *LTU v. Eurocontrol* [1976], ECR 1976, p. 1541.

Article 1 (1) Brussels I*bis* is rather confusing. It gives the impression that it is about sovereign immunity, which it is not. The article does *not* deal with the question whether foreign States or entities thereof can be sued in courts of other States. It just deals with the question whether the regulation applies or not. If it does not, establishing jurisdiction returns to domestic rules of civil procedural law of the court seised, including its rules on sovereign immunity. If it does, jurisdiction is established according to the rules of Brussels I*bis.* To illustrate this, let's go back to our fictious example.

The court would first decide whether the airline's activities are *iure imperii.* There are two scenarios. The first is that it does not consider them as acts *iure imperii* and Article 4 Brussels I*bis* applies, leading to its jurisdiction as the court of domicile of the company. From thereon, things will take their normal course: the court will establish applicable law and apply that law. Sovereign immunity would play no further role, as it would not concern a lawsuit in one State against (an entity of) a foreign State.

The second scenario is that the claim does concern *iure imperii* activities. This does not lead to the incompetence of the court either, just to non-applicability of the regulation. The court would then refer to its own rules of civil procedural law, which most probably allows defendant to be sued in its place of domicile, being the natural forum in most jurisdictions. This scenario is similar to the first – and again not a matter of sovereign immunity – and the case would evolve around issues of substantive law of civil liability.

Things become complicated when the airline is sued outside the country of its domicile. For the sake of argument, let's assume this is the Netherlands. Here, things can go in different directions. Practically speaking, the court would probably first establish whether this is a matter of sovereign immunity (assuming the airline would raise that defense.) If so, this is where the case would end and there would be no further dealing with establishing jurisdiction. This is unlikely to happen.

Dutch courts apply the restrictive approach to State immunity, as recently been codified in the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "UN Convention"). Although the UN Convention has not entered into force yet, the Dutch Supreme Court has held that the UN Convention to be a codification of generally accepted standards of international law. The final version of this convention was largely based on the 1991 ILC Draft Articles on Jurisdictional Immunities. In the official commentary to that draft, it is stated that:

> *"[t]he concept of 'agencies or instrumentalities of the State or other entities' could theoretically include State enterprises or other entities established*

by the State performing commercial transactions. For the purposes of the present articles, however, such State enterprises or other entities are presumed not to be entitled to perform governmental functions, and accordingly, as a rule, are not entitled to invoke immunity..."[36]

Most likely the airline will not be considered a State-entity at all and cannot invoke immunity regardless its activities. Obviously, this does not necessarily apply to other State-run agencies; they might in principle be able to invoke sovereign immunity, in which case the activity at stake will have to be qualified as commercial or not. Pursuant to the UN Convention, immunity of jurisdiction is only applicable if the actions taken by a foreign State are by their nature considered to be the exercise of the foreign State's governmental task. This is not an easy task. It is as Fox says: "The extent to which immunity should be enjoyed by agencies, connected to the State but not so closely as to constitute central organs of government, remains a perennial problem in the law of State immunity."[37]

On the one hand, national courts have repeatedly granted State immunity to national fossil fuel companies that act as alter egos of a State. On the other, national courts have refused immunity when the entity has independent control over its own operations.[38] Generally speaking, a State cannot claim immunity of jurisdiction in respect of actions undertaken strictly for commercial purposes between a State and private parties, such as the sale of goods or supply of services. Thus, running an airline or extracting natural resources; one may, or one may not be rewarded with immunity.

Back to our case of the airline, where we now assume that the court would decide that there is no ground for sovereign immunity in the public international law sense. It would then establish whether Brussels I*bis* applies. If there is no immunity in the international sense, then the *iure imperii* exception of Article 1 (1) will most likely not apply either as the ECJ in the Rina-case seems to endorse the – confusing – idea that international law is relevant to define the scope of Brussels I*bis*.[39]

If Brussels I*bis* indeed provides the rules of jurisdiction, then there is only jurisdiction for the Dutch court if (part of) the damages occurred in the Netherlands. As discussed in the previous paragraph this is a long shot. It would come down to the argument that part of the effects of global warming caused by defendant are suffered in the Netherlands, thus bestowing jurisdiction of the

36 Commentary on 1991 Draft ILC Articles, Art: 2, para. (15).

37 Fox (2013).

38 Lorteau (2023), pp. 259-266.

39 Cuniberti (2021).

Dutch courts to decide on those damages. As remarked earlier, it is unlikely that a plaintiff would go down this mosaic-avenue, and courts would probably be reluctant assuming jurisdiction on this basis, as it would come down an open invitation for virtually all plaintiffs in the world. However, until tried and tested (up until the European Court of Justice) it will remain unclear how far Article 7 Brussels I*bis* reaches.

If anything, these theoretical scenarios expose some vulnerabilities of the Brussels I*bis* regulation. For starters, it causes confusion with the inclusion of the concept of acts *iure imperii* and gives the impression that we have to deal with this as if it is an issue of sovereign immunity, which it is not. Decisions whether to grant sovereign immunity or not, are left to the national court, whether that court has jurisdiction on the basis of Brussels I*bis* or otherwise.[40] As such, the inclusion of the concept of acts *iure imperii* into the regulation is unnecessary and confusing. Secondly, the scope of Article 7 and the omni-territorial character of climate damages needs interpretation and clarification.

Still, despite unclarities and uncertainties here and there, jurisdiction is not the toughest hurdle to take for foreign plaintiffs. Taking this hurdle is pointless though, if cases do not stand any chance as to substantive law. An equally important factor in strategizing a corporate climate case in the EU is therefore to take into account what law the court would apply. There is no uniform European tort-law and despite the fact that all member States have comparable basic categories of tortious liability, small differences may have considerable consequences.[41] A plaintiff therefore needs to think beyond establishing jurisdiction as cases may fall flat on their merits.

6. Establishing applicable law

When the case is built on extracontractual liability following from a duty of care, the conflict of law rules of the Rome II regulation apply. Article 4 provides for the main rule: *lex loci damni,* the law of the place where the damage is suffered. Alternatively, there is Article 7. This article specifically deals with environmental harm and offers a claimant the choice between the law of the place where the damage occurred or the law of the event giving rise to the damage (*lex loci delicti commissi),* the latter leading to the law of the place of the central administration of the company. This is indeed how Lliuya argued – and achieved – German to law to be applicable. It is worth quoting his argumentation here:

40 Cuniberti (2021).

41 Spitzer, Burtscher (2017), pp. 137-176.

> "According to Article 4 Rome II the place of the damaging event is the object of reference. This would be Peru. However, Article 4 Rome II is only applicable when no particular point of reference for Article 5-9 Rome II exists. Pursuant to Article 7 Rome II a particular point of reference is the place of the environmental effect:
>
> The material scope of applicability encompasses not only environmental effect in a narrow sense, such as the impairment of water, soil, air, ecosystems and species, but also claims for compensation for personal injury or material damages.
>
> According to recital No. 24 to the Rome II Regulation, environmental damage is any adverse change in a natural resource, as air or water (which corresponds to the definition in Article 2 Directive 2004/35/CE, 'Environmental Liability Directive').
>
> The emmissions attributable to the respondent are already causing an 'adverse change' through the increase of greenhouse gas concentrations in the atmosphere. Additionally, they contribute to a change in the aggregate state of the glacial ice above Lake Palcacocha, which in turn leads to the change in the lake's water level and the resulting hazard. An environmental damage in the meaning of Article 7 Rome II is given; furthermore (impending) material damages exist due to that damage."[42]

Lliuya then continues to argue that this is a typical "Distanzdelikt" where the place of the act and the place of the damage are different, which allows him to opt for the law of the place where the event giving rise to the damage took place, i.e., German law. The court of the first instance rejected the claim but not this argument. Lliuya appealed whereupon the court of appeal rejected the initial judgement and followed Lliuya's legal reasoning on virtually every point. The case is now in the evidence phase. In both instances German civil law was applied without the courts further elaborating on the topic of applicable law, implying it followed Lliuya's argumentation. That would be in line with the reasoning of the Dutch court in *Milieudefensie v. Shell*. The court in that case explicitly stated that despite a lack of case law from the European Court of Justice for guidance, climate change due to CO_2 emissions qualifies as environmental damage for the purpose of Article 7 Rome II:

> "Although Article 7 Rome II refers to an 'event giving rise to the damage,' i.e., singular, it leaves room for situations in which multiple events giving rise

42 Quote from unofficial translation provided by www.climatecasechArticlecom

> to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage. When applying Article 7 Rome II, RDS' adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region."[43]

7. Applicable law outside the EU, the case of the U.S.

Foreign plaintiffs are often drawn to U.S. courts due to the perception that U.S. tort law works in their favour, as opposed to foreign law. Depending on whether a State follows the First or Second Restatement Conflict of Laws, courts in the U.S. either take a territorial approach, focusing on the place of injury or damage (First Restatement) or take a more modern approach whereby other factors – such as domicile of the corporation – are taken into account as well (Second Restatement). Either one of these approaches can lead both to the application of foreign or U.S. tort law, depending on the specifics of the case. Similarly, it depends on the specifics of the case which law would benefit a plaintiff more.

Whytack foresees that in corporate climate cases "given that emissions that are alleged to be tortious do not occur in any one country, it might be argued that the tort, if it occurs anywhere, must occur in the jurisdiction where the harm occurs. That country may have a more significant relationship than a country where only some of the potential defendants reside and a small fraction of the emissions occurred […]."[44] He notes that Rome II provides more flexible rules for transnational environmental litigation, which is confirmed by Milieudefensie and Lliuya.

In a U.S. court Lliuya's case might have led to Peruvian law rather than German law as the applicable tort-law. This is not necessarily a bad outcome per se. In an attempt to map strategies for successful climate litigation against corporations lawyers affiliated with Environmental Law Alliance Worldwide found that civil law jurisdictions are more likely to have a particular statute under which a case seeking compensation for climate damages could be filed.[45]

All in all, U.S. rules of applicable law might be less flexible in that less different outcomes are available than the EU rules of private international law provide.

43 Court-issued English translation of the judgement, accessible through www.climatecasechArticlecom

44 Byers (2017), p. 295.

45 Environmental Law Alliance Worldwide, Holding Corporations Accountable for Damaging the Climate (2014), https://elaw.org/system/files/elaw.climate.litigation.report.pdf

This specifically matters if one has a specific national substantive law in mind and is thus something to take into account when strategizing a case and its forum. Because let us not forget indeed that clearing the private international law obstacles of jurisdiction and applicable law are just means to an end: finding the most favourable and predictable gateway to what comes next: substantive law.

8. Substantive law post-Milieudefensie v. Shell, a novel climate tort?

The difference between *Lliuya v. RWE* and *Milieudefensie v. Shell* is that Milieudefensie was seeking to force Shell to reduce CO_2 emissions whereas Lliuya is seeking compensation for past environmental damages linked to climate change. And surely, cases differ, legal systems differ, court systems differ, domestic laws differ. But a trend can be detected: the ordinary tool of tortious liability is used and moulded into shape to suit climate actions against corporations. How and to what extend still differs from jurisdiction to jurisdiction.

In Milieudefensie, the court – addressed by several civil society organizations led by Milieudefensie – ruled in favour of claimants and ordered oil-giant Royal Dutch Shell to reduce its CO_2 emissions by net 45% in 2030 compared to 2019-levels. The court based its decision on the general duty and unwritten standard of care as laid down in the Dutch Civil Code.[46] It was exactly that unwritten standard of care that gave the court ample manoeuvring space to establish a "climate standard of care", and a breach thereof. To construe this standard of care the court gathered fourteen different factors, such as the policy-setting position of Royal Dutch Shell in the Shell group, the group's CO_2 emissions, the right to life and the right to respect for private and family life of Dutch residents, the onerousness for Royal Dutch Shell and the Shell group to meet its reduction obligation etc.

However, this is a Dutch case, applying Dutch tort law. As mentioned before, there is no guarantee of a similar outcome in other EU-jurisdictions. Furthermore, Shell lodged an appeal and it is by no means certain that the decision will hold in higher instances. What plaintiffs would really need therefore, is uniform EU climate tort law. The proposal for a Directive on Corporate Sustainability Due Diligence could be a step in that direction.[47]

46 Cf. note 16.

47 Proposal for the Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM/2022/71 final. Accessible through https://eur-lex.europa.eu

Under that Directive EU companies would be responsible for mapping climate risks and provide an emission reduction plan.[48] The expansion of directors' duties in the EU may similarly give EU authorities more scope to make individual directors accountable for their companies' operations. The details of the regime are still to be negotiated, but it is clear that the EU is aiming for senior-level responsibility. Companies would be liable for damages if they fail to comply with obligations to prevent, end, or mitigate any potential adverse impacts — including where any failure leads to an adverse impact that could have been avoided.

However, in the current state of the proposal the possibility of climate change litigation is limited; its Article 22 on civil liability refers only to the due diligence obligations set out in Article 7 and 8 of the proposed Directive, leaving out the specific provision on climate change due diligence and mitigation requirements (Article 15). But this may change. In the review provision (Article 29 CSDDD Proposal) it is expressly requested that the European Commission assesses whether the due diligence requirements of Articles 4 to 14 of the proposed Directive should be extended to adverse climate impacts.[49] The contemplated timeline (seven years) after the entry into force of the proposed Directive for the European Commission to assess its impact is rather disappointing, given the urgency of the matter.

The Directive as well as other sustainability due diligence tools might still be in their infancy and in need of refining, but they do appear promising instruments. They can serve as a useful basis for climate change litigation in the EU, thus mitigating the differences between member States' substantive laws.

9. Greenwashing

And then there is greenwashing.[50] These cases are trying to expose that companies are misleading consumers about the effect of their products or services in causing climate change and/or intentionally misleading investors about climate-driven risks to its business, including by failing to disclose climate change

48 Prévost (2023).

49 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0071

50 Setzer, Higham (2022).

risks. Major players such as FIFA,[51] Volkswagen,[52] Ikea[53] and H&M[54] are being called out for misleading or false climate information about their products.

One of the most prominent cases currently pending in the EU is a case against KLM in the – once again – Dutch courts. Plaintiffs, a group of NGOs, argue that KLMs climate advertisements and marketing breach EU consumer law standards by creating the false impression that its flights do not contribute to global warming. The District Court of Amsterdam has granted permission for Dutch campaigners to bring the claim, following a prior hearing on the organisations' admissibility. The decision establishes for the first time that an environmental non-profit can bring a greenwashing claim under the recently passed Dutch class action law. But, just as in FIFA, Volkswagen, H&M or Ikea, this is a domestic case. So far, to the knowledge of the author, there have not been any transnational greenwashing lawsuits, in or outside the EU. It is therefore hard to predict how these cases would behave from a private international law perspective, leave alone from a substantive law perspective.[55] That being said, we can give it a tentative try.

Under existing European case law, jurisdiction in cases regarding misleading advertisement will be for the court of domicile of the company (Article 4) or the *handlungs* or *erfolgsort* of Article 7. Depending on the circumstances (and framing) of the case this may create an extra competence. If several markets are targeted by the advertisements (which will most likely be the case), there is jurisdiction in each of these markets, but for local harm only. This mosaic-approach was first established in Shevill, a pre-internet case.[56] This rule got more complicated with the introduction of internet, where – simply put – the reach of a message (and thus the range of what can be the *erfolgsort)* became virtually unlimited.[57]

51 *KlimaAllianz v. FIFA* (Switzerland); *New Weather Institute v. FIFA* (UK); *Notre Affaire à Tous v. FIFA* (France); *Carbon Market Watch v. FIFA* (France), all accessible through www.climatecasechArticlecom.

52 *Altroconsumo v. Volkswagen* (Italy); https://climatecasechArticlecom/non-us-case/altroconsumo-v-volkswagen-aktiengesellschaft-and-volkswagen-group-italia-spa/

53 https://www.earthsight.org.uk/news/investigations/ikea-house-of-horrors

54 *Chelsea Commodore v. H&M* (USA); https://www.business-humanrights.org/en/latest-news/usa-hm-faces-greenwashing-class-action-lawsuit-over-alleged-misleading-false-marketing-of-sustainable-clothing-line/

55 A Greenwashing Directive that would harmonize (part of) substantive law in the member States is in the making: Proposal for a Directive of the European Parliament and Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM/2023/166 final.

56 Case C-68/93, *Shevill and Others v. Presse Alliance.*

57 Thünken (2002).

Despite calls for a replacement or refinement of the mosaic-approach in internet cases,[58] the recent Gtflix-decision sticks to the principle.[59] Dealing with the interpretation of Article 7(2) of the Brussels I*bis* Regulation in the context of torts committed through an online publication, the ECJ confirmed that the mosaic-approach to jurisdiction first established in Shevill applies to an action seeking compensation for the harm allegedly caused by the placement of disparaging comments on the internet.[60] The court held that the courts of each Member State in which those comments are or were accessible have jurisdiction to hear the case, provided that the compensation sought is limited to the damage suffered within the Member State of the court addressed.

If we apply this approach to greenwashing cases it seems we would have a combination of the virtually limitless online reach of online advertisements resulting in damages that are not suffered by a limited group of individuals but by mankind. How would domestic courts or the ECJ deal with jurisdiction in such cases? Would that not effectively lead to twenty six alternative courts, in addition to the *forum rei*? We do not know the answer to this question as such cases haven't occurred yet, but surely they would present challenges for the judiciary.

As to applicable law, here it seems very important how to frame a case of greenwashing. If framed as a matter of environmental damage, Article 7 Rome II leads to the option for the law of the place where the event giving rise to the damage took place, thus aligning the *forum rei* and its law. However, if framed as unfair competition in the sense of Article 6 Rome II, the outcome may be different. The concept of 'unfair competition' is indeed generally understood to cover misleading advertising, triggering the application of article 6 of Rome II. The concept of unfair competition is broad enough to include both rules that protect consumers and rules that specifically protect competitors. This means that actions taken by consumer organisations based on misrepresentation are covered by the concept. Equally, competitors may rely on it to fight misleading advertising.

Article 6 (1) states that the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. If the consumers are spread out over several countries, the provision will refer each affected consumer to its own law. This rule does not apply where an act of unfair competition affects exclusively the interests of a specific competitor. In that case, the normal rules of Article 4 apply.

58 Buzzoni (2022).

59 *Gtflix Tv v. DR*, Case C-251/20.

60 *Fiona Shevill and Others v. Presse Alliance SA*, ECJ 7/3/1995 C-68/93.

As advertisements are no longer limited to an ad in the newspaper or on national tv, and as climate change has a universal effect, misleading climate advertisement potentially has universal reach with universal effects. These new dynamics lead at least theoretically to the possibility that the law of the country of the plaintiff *always* applies, thus leaving him deprived of the *lex loci delicti* of Article 7. Bringing a case to the EU might thus lead to finding a competent court which applies the law of the country of the plaintiff, not necessarily something he was looking for. This uncertainty might keep non-EU plaintiffs from bringing a misleading advertisement case in an EU-court. Clarification by (eventually) the ECJ as to how a greenwashing claim should be qualified would be welcomed.

10. It's not just about law

What we have established so far is that plaintiffs should not have too much trouble to find a competent court in the EU and having that court establish a reasonably predictable applicable law. As to the contents of that law, things are much less certain and despite recent climate successes in some EU courts, cases can (and will) still be lost as well. But this is not necessarily bad news only.

Obviously, one does not litigate without a fair chance of success. Litigating is generally a costly strategy, with uncertain outcomes, especially in adversarial systems, where claimants are likely to pay their legal representatives and experts' fees regardless the outcome of the case.[61] But there are benefits in trying climate cases, even if they fail in court, and not just to test the boundaries of the law. It is where litigation meets activism. Public opinion can be mobilized even if a case fails. Or maybe even *because* a case fails, especially against big corporate. High-profile judgments on climate change have attracted considerable media and academic attention, regardless of their outcome. For example, cases against others than the major carbons might raise awareness of how other industries might be equally or even more responsible for greenhouse gas emissions.

Litigation can also be used as a starting point of a broader strategy by social movements or organisations, either using other types of activism to set up, or lay the groundwork for, litigation, or resorting to litigation to ensure the feasibility of ongoing campaigns. Thus, although it is unlikely – and probably unwise – to start a court case for publicity reasons only, the attention it would generate as a side-effect might influence the risk assessment of a negative outcome. This is especially significant in what Bouwer and Setzer describe as "name and shame"

61 According to the *Financial Times*, the Lliuya case so far has cost EUR 750.000. Hodgson (2023).

cases, cases that are meant to emphasise the "flagrant inconsistency between discourse and action."[62]

From a legal perspective too, when cases fail, for example in preliminary hearings, this does not have to be just negative. They still might make a positive contribution to climate action. Thus, counter-intuitively for lawyers maybe, the choice to litigate as a strategy or mixed strategy in environmental activism does not always result in clear success in the litigation, but this does not necessarily have to deter activist litigators, if only because litigation campaigns can be re-used. For example, in Lliuya the court of appeal recognised that in principle, it was possible to establish legal causality for RWEs contribution to climate risk in Peru, thus stretching the national concept of neighbourliness to a global concept. This already set a partial precedent: according to the judges' interpretation of the law, major emitters can be held liable for their contribution to climate change impacts. That in itself is a positive, even if Lliuya fails to prove causality.

11. Conclusion

Is forum shopping in the EU a useful strategy in corporate climate change litigation? The tentative answer is yes. Jurisdiction is relatively easy to establish, that is: if one sticks to the safe option of Article 4 Brussels I*bis*: that of the place of domicile of defendant. As to alternatives offered by Article 7, the courts of the place giving rise to the damages, things are less predictable, or practical. The place of the event giving rise to the damage can under established case law either be the *handlungsort* – which in most cases will not lead to a different court than that of Article 4 – or the *erfolgsort.* The latter gives rise to uncertainty, if only because there is no case law in climate cases yet. Would each court in the EU in principle have the assume jurisdiction (considering that climate change and thus its effects are everywhere), and if so, would it then have to limit itself to the damages that occurred there? Practically, it would not make much sense for plaintiffs to go this route, unless it would be for exactly that reason: see if it works.

Of course, this does not mean that EU-courts are the only options available. The U.S. used to be very popular in transnational litigation cases and one would thus expect them to be so for transnational corporate climate cases. However, no such case has hit the U.S. courts yet. This might be a coincidence, or it might have to do with the recent isolationist approach that the U.S. courts have been taking. Furthermore, even without an isolationist trend, plaintiffs always run the

62 Bouwer, Setzer (xxxx).

risk of a successful *forum non conveniens* defence, the absence of which is one of the major advantages of the EU-system (for plaintiffs, that is).

Applicable law in a tort-based case seems to be rather straightforward as well, as it would either lead to *lex loci commissi* or *lex loci damni,* with the exception of greenwashing cases. Substantive law differs from jurisdiction to jurisdiction though, and what has been decided by the court of one Member State will not necessarily be decided by another. Thus, plaintiffs in transnational climate cases aiming for litigation in the EU need careful framing of the claim and careful research about the chances of success in particular Member States. The lack of a substantive body of domestic climate case law across EU-jurisdictions and the lack of interpretative decisions of the ECJ make this a challenging job. These cases are costly and therefore not likely to cause a tsunami of cases.

That being said, in particular the Netherlands might be an interesting go-to jurisdiction as so far it has delivered some promising landmark cases, such as *Milieudefensie v. Shell* and the pending KLM greenwashing case. As earlier in Urgenda,[63] a case against the State rather than a corporation and therefore not discussed in this paper, Dutch courts seem to be willing to accommodate climate claims. Perhaps this is too premature a conclusion though, as both the Shell and KLM cases will – considering their importance – most likely go all the way to the Court of Cassation.

Another development to keep a close eye on are the upcoming EU-Directives on corporate sustainability due diligence and greenwashing. Once adopted, they will help to close some of the gaps between the substantive laws of Member States, leading to a more uniform climate liability framework. This could certainly be an extra incentive for EU-forum shoppers. All in all, it is still early in the game for corporate climate cases as a whole, domestic or transnational, to draw firm conclusions. But surely in the near future things will continue to develop. That is, if sufficient funding for climate cases is available to help climate lawyers and their clients to explore climate change litigation boundaries.

63 HR 20-12-2019, *State of the Netherlands v. Urgenda*, English court-issued version available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf

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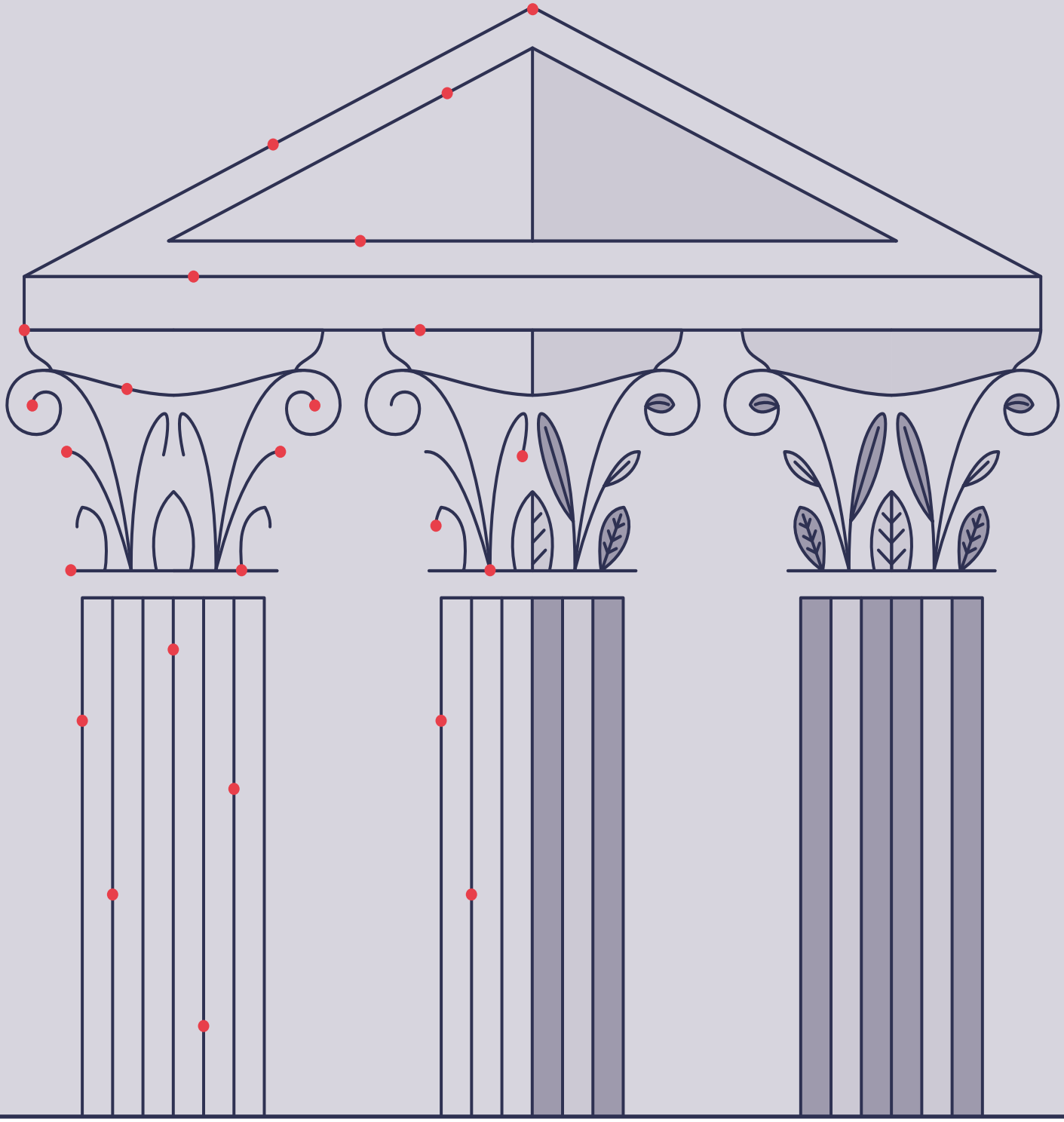
Global trends in climate change litigation: 2023 snapshot

Joana Setzer and Catherine Higham



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Contents

Summary

Key trends, 1 June 2022–31 May 2023

- 2,341 cases have been captured in the Sabin Center's climate change litigation databases, 190 of which were filed in the last 12 months. The growth rate in cases appears to be slowing but diversity in cases is still expanding.
- Climate change litigation has now been additionally identified in Bulgaria, China, Finland, Romania, Russia, Thailand and Turkey.
- More than 50% of climate cases have *direct* judicial outcomes that can be understood as favourable to climate action. Climate cases continue to have significant *indirect* impacts on climate change decision-making beyond the courtroom, too.
- Domestic legal protections (e.g. for the right to a healthy environment) along with domestic climate legislation, play a critical role in cases against governments.
- Litigants are employing recognisable strategies across different jurisdictions. Most recorded cases are 'climate-aligned' outcomes but non-climate aligned litigation (e.g. 'ESG backlash') is increasing.
- More cases are being filed against corporate actors, with a more complex range of legal arguments. Around 20 cases filed by US cities and states against the Carbon Majors are now likely to go to trial.
- There has been growth in 'climate-washing' cases challenging the accuracy of green claims and commitments. Some cases seeking financial damages are also challenging disinformation, with many relying on consumer protection law.
- Challenges to the climate policy response of governments and companies have grown significantly in number outside the US.
- Litigation concerning investment decisions is increasing and can help clarify the parameters within which decisions should be made in the context of climate change.
- High-emitting activities are now more likely to be challenged at different points in their lifecycle, from initial financing to final project approval.

This report reviews key global developments in climate change litigation, with a focus on the period June 2022 to May 2023, drawing primarily on the Climate Change Litigation databases maintained by the Sabin Centre for Climate Change Law.

Overview of observations and trends

Case numbers continue to grow but the overall rate of growth may be slowing

Overall, more than 2,341 cases have been captured in the Sabin Center's climate litigation databases. Around two-thirds of these cases (1,557) have been filed since 2015, the year of the Paris Agreement. Of these, 190 were filed in the last 12 months. Although the overall number of cases continues to grow, the growth rate may be slowing. This appears to be due in part to a continuing decline in the number of cases filed in the United States in the years since the end of the Trump administration. Outside the US, growth has remained relatively steady, except in 2021, when there was a significant spike in the number of cases filed.

Climate change litigation continues to be identified in new jurisdictions

In the past 12 months, cases from seven new jurisdictions were added to the databases: Bulgaria, China, Finland, Romania, Russia, Thailand and Turkey. The growth in new cases continues to vary

significantly between jurisdictions, with Germany standing out as having a high number of recent cases.

Although the majority of cases are filed in the Global North, new cases continue to be identified in the Global South (135), with innovative arguments based on human and constitutional rights being a common theme. Newly identified cases in China suggest that China may be developing a unique form of climate litigation, where the courts may play a role in guiding enterprises' response to climate change.

Three requests for advisory opinions from international courts and tribunals may shape future litigation

Requests for advisory opinions have been filed before the International Tribunal on the Law of the Sea (ITLOS), the Inter-American Court of Human Rights and the International Court of Justice. Although such opinions are non-binding, they have great potential to shape the future development of climate change law.

Outside the US, NGOs and individuals continue to file many climate cases, targeting a diverse range of actors, including companies

Nearly 90% of the cases filed since June 2022 outside the US (hereafter referred to as 'Global cases') have been brought by non-governmental organisations (NGOs), individuals, or both acting together, continuing a trend from previous years. However, there has been a decline in the proportion of Global cases filed gainst governments. Historically, these have made up 70% of cases; in the last 12 months only around 54% of cases filed were targeting this group. On the other hand, strategic litigation against companies continues to develop, with cases targeting corporate actors from across a growing range of sectors.

The number of strategic cases continues to rise, with litigants employing recognisable strategies across different jurisdictions

Many climate cases can be classified as 'strategic', meaning that they are filed with the aim of influencing the broader debate around decision-making with climate change relevance. Litigants in strategic cases often use similar strategies to those employed elsewhere.

In assessing the strategies used in strategic cases that were filed outside the US between 2015 and May 2023 we identify the following:[1]

- **'Government framework' cases:** 81 cases have been filed against governments outside the US, which seek to challenge their overall climate policy response. Cases may be focused on challenging the lack of ambition of the response, or a failure to implement policies or legislation, or both.
- **'Corporate framework' cases:** 17 cases have been filed against large corporations challenging their climate plans and/or targets on the basis that these are inadequate. Some of these cases may also involve arguments about 'climate-washing' (see below).
- **'Integrating climate considerations' cases:** 206 cases that seek to integrate climate considerations, standards or principles into a given decision have been filed globally. Such cases are often filed with the dual goal of stopping specific harmful policies and/or projects and making climate concerns more mainstream among policymakers. Many such cases challenge the development of new fossil fuel projects.
- **'Turning off the taps' cases**: 28 cases aimed at preventing the flow of finance to high-emitting or harmful projects or activities have been filed globally, 14 against public bodies

[1] Many cases employ more than one strategy and are therefore counted more than once.

or state-owned financial institutions (such as export credit agencies), and 12 against private parties including banks and pension funds.

- **'Failure-to-adapt' cases:** 14 cases challenge a government or corporation for failure to adapt to the requirements of the climate crisis, either by failing to adapt property or operations to physical risks or by failing to consider transition risks.
- **'Polluter pays' (compensation) cases:** 17 cases seeking monetary damages or awards from defendants based on an alleged contribution to climate change harms have been filed. These include cases seeking compensation for past and present loss and damage associated with climate change; contributions to the costs of adapting to anticipated future climate impacts; compensation to 'offset' emissions, where defendants' activities have caused damage to carbon climate sinks.
- **'Climate-washing' cases:** 57 cases challenge inaccurate government or corporate narratives regarding contributions to the transition to a low-carbon future, or misinformation about climate science. The overwhelming majority of these (52) have been filed against corporations.
- **'Personal responsibility' cases:** 8 cases seek to incentivise the prioritisation of climate issues among public and private decision-makers, by attributing personal responsibility, whether criminal or civil, for a failure to adequately manage climate risks.

The last few years have seen an explosion of 'climate-washing' cases

One strategy that has seen significant growth in recent years has been the focus on companies' so-called 'climate-washing' activities, concerning both climate misinformation and misleading green claims. In addition to looking at non-US cases, in Part II of the report we took a more in-depth look at the growth in both US and non-US cases filed against companies and changes in this figure over time. We find that a total of 81 climate-washing cases against companies were filed between 2015 and 2022. Of these, 27 were filed in 2021 and 26 were filed in 2022, compared with just 9 cases in 2020 and 6 cases in 2019.

Not all strategic litigation aims to advance climate action

Strategic litigation may seek to delay or prevent climate action. We call this 'non-climate aligned' litigation. Outside the US, such litigation can be difficult to identify, in part because cases are less likely to fall within the fairly narrow definition of climate litigation employed in the databases. Nonetheless, new cases challenging government powers to regulate or intervene in certain areas have been identified in the last 12 months. In the US 'anti-ESG [environmental/social/governance] backlash' litigation is one of the most recent trends to emerge.

Just transition cases are being filed against governments and companies

Climate litigation is commonly associated with 'pro-regulatory' (i.e. climate-aligned) cases aimed at advancing climate action and 'anti-regulatory' (i.e. non-climate-aligned) cases seeking to delay or obstruct climate action. We also distinguish 'just transition litigation': cases that aim to strike a balance between advancing the transition to a low-carbon economy with protecting the rights of affected communities, highlighting the complex interests and needs involved in the transition process.

Climate change litigation continues to have significant impacts on climate governance

An assessment of direct judicial outcomes in climate change cases indicates that more than 50% of the 549 cases in which either an interim or final decision has so far been rendered have outcomes favourable to climate action. Some cases with a favourable outcome have directly led to new climate policies and action. However, even when there is a positive judicial outcome, it is not always clear that the way in which a judgment is implemented would lead to an increase in climate mitigation or adaptation.

To understand the impact of climate litigation on climate governance and beyond, it is also critical to look at indirect impacts. These include the way in which climate litigation is amplifying perceptions and awareness of climate change risks among key stakeholders, including financial regulators and the legal community; the way in which climate change litigation is impacting the markets, with new research suggesting that litigation against companies impacts their share prices; and the way in which even unsuccessful litigation can shape narratives around climate action, encouraging decision-makers to change their approach.

Trends in focus: recent developments in climate litigation

Against governments: the role of human rights and the role of climate legislation

In the past 12 months there have been significant developments in government framework cases, also known as systemic climate litigation or *Urgenda*-style cases [after the *Urgenda Foundation v. State of the Netherlands* case].

International and regional courts are playing a key role in the development of jurisprudence relevant to framework cases

Recent developments at the international level include a decision by the UN Human Rights Committee in the case of *Daniel Billy and others v. Australia*, finding that states have an obligation to take adaptation measures to protect the human rights of citizens. The European Court of Human Rights is soon expected to rule on three cases that further question states' obligation to protect human rights through the adoption of ambitious mitigation targets (*KlimaSeniorinnen v. Switzerland* and *Careme v. France*, heard in May 2023, and *Duarte Agostinho et al. v. Portugal and 32 Others*, scheduled for September).

Domestic legal protections are also of critical importance

Domestic legal protections, such as the constitutional right to a healthy environment, have been part of the basis for framework cases to advance in various countries (e.g. *Held v. Montana* and *Navahine F. v. Hawai'i Department of Transportation*). At the same time, climate change framework laws continue to offer a statutory basis for new cases both at the framework and the sectoral level (see *Deutsche Umwelthilfe v. Germany*).

Human rights arguments against governments are used extensively beyond framework cases

This has been seen, for example, in the 'Cancel Coal' case in South Africa, where arguments and evidence similar to those first developed in framework cases were used to challenge a government procurement process.

Against corporations: past and future responsibility, and loss and damage

Efforts to establish corporate responsibility for harm from climate change caused by products have gained traction in recent years. Around 60 cases have been filed globally against the so-called 'Carbon Majors', with 20 of the 29 US cases filed by cities and states.

A merging of parallel trends in corporate cases has occurred in the past 12 months

Corporate liability cases have been characterised by significant differences in the type of relief sought. Some seek financial damages based on historic responsibility. Others aim to align companies' activities with the Paris Agreement and human rights obligations. An important development in recent months is the merging of both types of cases (e.g. *Asmania et al. v. Holcim* and *Greenpeace Italy et al. v. ENI S.p.A*).

Increased emphasis is being placed on current and past losses

Cases such as *Asmania* highlight damages *already suffered* due to climate-related events. Loss and damage arguments are increasingly prevalent in polluter-pays cases. For instance, *Municipalities of Puerto Rico v. Exxon Mobil Corp* links hurricane impacts to compounded losses sustained by the communities.

Disinformation is becoming increasingly important

Cases continue to develop new arguments relating to disinformation spread by high-emitting companies about the impacts of their products. *Municipalities of Puerto Rico v. Exxon Mobil Corp* accuses fossil fuel companies of continuous deception, amounting to racketeering activities. The case uses claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), a piece of legislation that was previously used in past cases against the tobacco industry.

Corporate responsibility cases continue to expand beyond the Carbon Majors

Several cases filed against auto manufacturers in Germany seeking to prohibit the production and sale of internal combustion engine vehicles have now been dismissed. However, new cases continue to be filed invoking 'due diligence' obligations, including cases involving financial institutions.

Managing climate risks: good investments in a warming world?

Recent litigation cases have focused on the question of what constitutes a reasonable investment strategy in the context of the low-carbon transition. These cases involve interpreting legal obligations under corporate and financial law to protect firms, shareholders, investors and beneficiaries.

Focus on predicted future impacts of current investment decisions

Early cases filed by shareholders focused on financial impacts already sustained by the company due to mismanagement and failure to disclose climate risks. More recent cases, such as *ClientEarth v. Shell Board of Directors*, focus on predicted future impacts, arguing that continued investment in fossil fuel projects will lead to long-term losses. While the initial case was rejected by the UK High Court, it raises questions about decision-makers' role in determining our planetary future and the need to adapt to the reality of climate change.

Litigation can help clarify responsibilities and encourage active engagement with uncertainty by key decision-makers

Adapting decision-making and risk management systems to the complexity of climate change remains a challenge, meaning that active and transparent engagement with uncertainty is critical. Litigation can help clarify obligations and responsibilities, as seen in the case of *Butler-Sloss v. Charities Commission*, where trustees successfully sought confirmation that aligning investments with environmental goals is not a breach of fiduciary duties.

Climate-washing and green claims

Climate-washing cases have surged in recent years and in the future are likely to be shaped by new laws and standards plus action from enforcement agencies

These cases cover various types of misinformation, including challenges to corporate climate commitments, claims about product attributes, overstated investments or support for climate action, and failure to disclose climate risks. Examples include complaints against Glencore for expanding coal production despite net zero commitments, challenges to claims of products being 'climate-neutral', a case against Volkswagen for inconsistency between climate pledges and corporate lobbying, and allegations of failure to disclose climate risks by banks. There have also been complaints regarding 'state-sponsored greenwashing' in Australia and challenges to the EU's Green Taxonomy.

Laws and standards, such as the now updated OECD Guidelines, EU Directive on Green Claims, and initiatives by regulatory bodies, are becoming more common. This could lead to further litigation and discourage climate-washing behaviour.

Combined strategies targeting the full lifecycle of high-emitting activities

Key high-emitting sectors are increasingly subject to litigation all along the value chain

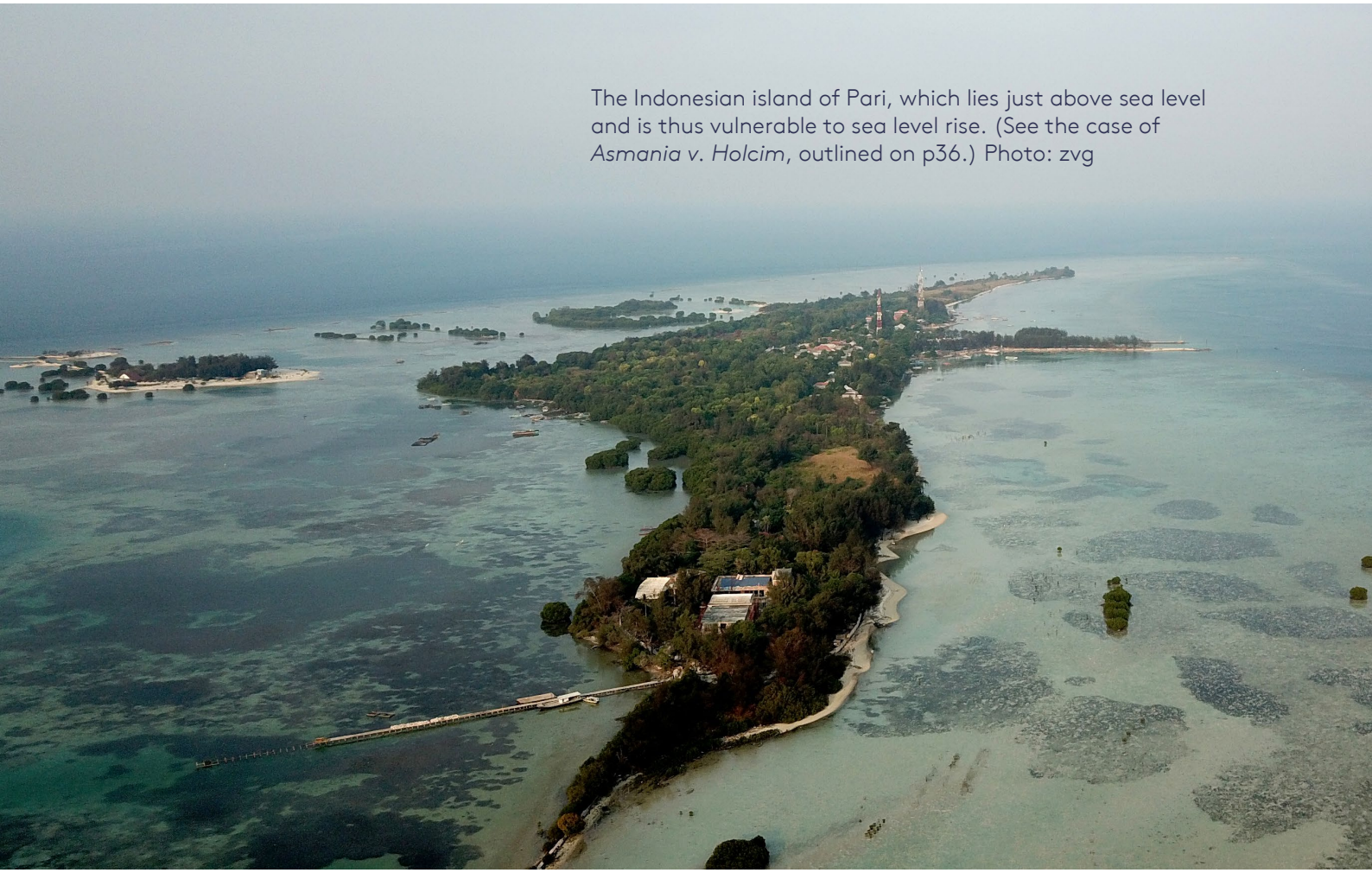
Cases continue to be filed against new fossil fuel developments targeting multiple stages of the value chain, from project development cases (e.g. *Sierra Club Canada Foundation et al. v.*

Minister of Environment and Climate Change Canada et al.) to cases concerning financing for the entire sector (e.g. *Notre Affaire à Tous v. BNP Paribas*). Similar trends are observed in cases addressing deforestation, where lawsuits target financing and communications by agriculture companies contributing to deforestation (e.g. a second lawsuit against BNP Paribas by Brazilian and French NGOs and the complaint filed with the US Securities and Exchange Commission against Brazilian meat giant JBS).

Future trends

We predict increasing litigation focused on the following issues in the coming years:

- **Litigation focused on the biodiversity–climate nexus**, particularly arguing that more ambitious measures are needed to restore forests and enhance their carbon absorption capacities
- **Future cases addressing the duties of governments and corporations to protect the ocean** from further climate impacts and to explore ocean acidification and ocean-based carbon dioxide removal techniques
- **Litigation arising from extreme weather events where climate change may not be the central focus,** but where cases can still have significant implications for climate action
- **Cases concerning short-lived climate pollutants,** such as methane and black carbon soot, which are identified by scientists as crucial targets for mitigation
- **International litigation between states,** particularly regarding disputes over fossil fuel production and use.



The Indonesian island of Pari, which lies just above sea level and is thus vulnerable to sea level rise. (See the case of *Asmania v. Holcim*, outlined on p36.) Photo: zvg

Introduction

This is the fifth annual instalment of the Grantham Research Institute's *Global trends in climate change litigation* series. Each report provides a synthesis of the latest research and developments in the climate change litigation field, outlining general trends to date as well as focusing on cases filed in the previous 12 months. This report's focus is the period 1 June 2022 to 31 May 2023 and contains an update on case numbers, metrics and categorisations based on those used in previous years' reports, along with a thematic review of recent cases.

Defining climate change litigation

Our primary goal in this series is to help readers understand the ways in which the law and the courts are being used as a tool to advance and challenge a variety of often inconsistent climate change-related agendas. To provide a succinct and coherent overview of this rapidly evolving field, we adopt a fairly narrow definition of climate [change] litigation. We consider such litigation to include cases before judicial and quasi-judicial bodies (this includes bodies such as arbitral tribunals, national human rights institutions, consumer watchdogs, and OECD National Contact Points, to name just a few) that involve material issues of climate change science, policy, or law. This is the approach adopted by the Sabin Center for Climate Change Law at Columbia Law School in identifying cases for inclusion in its Climate Change Litigation Databases, which form the primary data source for this report.

We acknowledge that although it is helpful for our purposes, this definition of climate change litigation has its limitations. As many scholars have noted, there will be numerous cases in which neither climate change science nor climate change law is at the heart of the case, but which will nonetheless have a serious impact on the volume of greenhouse gas emissions or on a country's resilience to climate change (see Peel and Osofsky, 2020; Bouwer, 2018; Hilson, 2010). Notably, the narrow definition of climate change cases adopted here excludes other forms of 'environmental' litigation, which may focus primarily on legal protections for biodiversity or air quality but which may nevertheless have significant co-benefits for climate action.

Similarly, cases in which climate change is a more peripheral issue are not included in this study, largely because those cases are not included in the climate litigation databases due to insufficient capacity to process an ever larger number of cases. We should point out that climate litigation in countries of the Global South is more likely to bring in climate change issues 'at the periphery' of the argument, and therefore excluding these cases may contribute to indicating a bias towards climate litigation in Global North countries (Peel and Lin, 2019). For example, a recent report on climate change in Indonesia identified at least 80 criminal cases in which the term 'climate change' featured in at least one court document, including witness statements (Sulistiawati, 2023). Many of these cases are centred on responsibility for forest fires and illegal deforestation and include a "superficial" (ibid.) mention of climate change in the context of the longer-term impacts of such activities. While 'peripheral' cases can play a role in shaping climate jurisprudence, and may when taken in aggregate be important for global climate action, such cases will not be discussed in this report for the reasons stated.

Data sources

The primary source of data for this report is the Global Climate Change Litigation database maintained by the Sabin Center for Climate Change Law, supported by institutional partners including the Grantham Research Institute on Climate Change and the Environment. A separate US Climate Change Litigation Database is maintained by the Sabin Center in collaboration with the law firm Arnold & Porter.

This report focuses primarily on lessons to be drawn from the Global (i.e. non-US) database, but supplements this by drawing on US data where we deem this helpful for highlighting similarities and differences between trends in the US and those elsewhere.

Box A. Understanding climate-alignment of cases and the emergence of 'just transition litigation'

Attention on climate litigation tends to focus on cases seeking to advance climate action (Setzer and Higham, 2022), sometimes referred to as 'pro-regulatory' cases. However, not all climate litigation is filed with that aim in mind. Climate litigation can also be brought to challenge the introduction of regulations or policies that would lead to greenhouse gas emission reductions or other 'positive' climate outcomes. Such cases have in the past been referred to as 'anti-regulatory' (Peel and Osofksy, 2015), 'defensive' (Ghaleigh, 2010) or

simply 'anti' (Hilson, 2010). For the most part they are filed by litigants who have a financial or ideological interest in delaying or obstructing climate action.

As in our previous reports, we adopt the terms 'climate-aligned' and 'non-climate-aligned' to describe these two types of cases. We use the idea of 'alignment' to reflect the fact that the litigants' motivation for filing a given case may extend beyond the desire to accelerate or delay global or local climate action agendas.

In this report we introduce a third distinct category of cases: 'just transition litigation'. These are cases that challenge not the lack of climate action but the manner in which that action is being taken (see further discussion on p.18). In our 2022 report we classified such cases as a sub-category of non-climate-aligned litigation. However, as our understanding of the issues involved in these cases evolves, it is evident that this is too simplistic a way of understanding the complex issues raised. As we discuss in further detail below, the objective of just transition litigation is not to undermine climate action. Often, the applicants' aim is to strike a better balance between the actions taken to advance the transition and the rights of communities impacted by those actions. In this regard, the examination of just transition litigation highlights the diverse interests and needs that co-exist in the transition to a low-carbon economy (Savaresi et al., forthcoming; Tigre et al., 2023b).

Data coverage and limitations

Since 2021, coverage of many jurisdictions has improved, thanks to the Sabin Center's convening of the Peer Review Network of Climate Litigation, a group of scholars and practitioners from around the world who track litigation within specified geographical areas and participate in ongoing information- and knowledge-sharing and dialogue about climate litigation. Nonetheless, the databases are unlikely to contain every case from every court in every country. The US Climate Change Litigation Database benefits from the assistance of commercial litigation databases in the US and is therefore likely to be more comprehensive than the Global database.

The databases offer a diverse and cross-cutting sample of cases covering a wide range of geographies, levels of government and types of actors and argument, enabling observations to be made about trends and innovations, which often inform and inspire further litigation efforts. While we attempt to give combined figures for cases in and outside the US, in some instances, given the high volume of US cases, we treat US and non-US cases separately.

Box B. Improving the provision of data on climate law

In previous years, data for this report series has been drawn from the Climate Change Laws of the World (CCLW) database, maintained by the Grantham Research Institute in partnership with the Sabin Center. The CCLW database contains the most comprehensive global dataset of climate change legislation and policy from around the world. This database has since May 2023 been upgraded through a new partnership with climate tech start-up Climate Policy Radar, which enables users to benefit from tools grounded in machine learning and natural language processing techniques to search for information within the full text of laws and policies and in multiple languages.

Prior to the upgrade, the CCLW database also offered litigation data drawn from the Global Climate Change Litigation database. As a temporary measure, litigation and legislation data will be offered separately as the Grantham Research Institute, the Sabin Center and Climate Policy Radar work together to develop a single integrated global resource to better support data users.

Access the datasets at: climate-laws.org and climatecasechart.com.

Structure of the report

Part I of the report provides an update on overall global trends in climate litigation, discusses the increased use of strategic climate litigation and some of the strategies employed, reviews the 'direct' outcomes of litigation and provides a discussion of the broader impacts and costs of litigation.

Part II takes a more detailed look at some of the strategies identified in Part I and at the interrelationships between them. We then move on to a discussion of possible future trends in litigation, focusing on the climate policy areas we think are most likely to be subject to legal controversy in the coming months and years.

A brief conclusion sums up and looks to future trends. More detail about our methodology is provided in the Appendix.

Part I. Understanding overall trends

In this section we provide an update on overall trends, including global case numbers and the timing, location, actors and focus of climate change litigation. We discuss the increased use of strategic climate litigation and some of the strategies employed by litigants, review the 'direct' outcomes of litigation and provide a discussion of the broader impacts and costs that litigation can entail.

Location and timing of cases

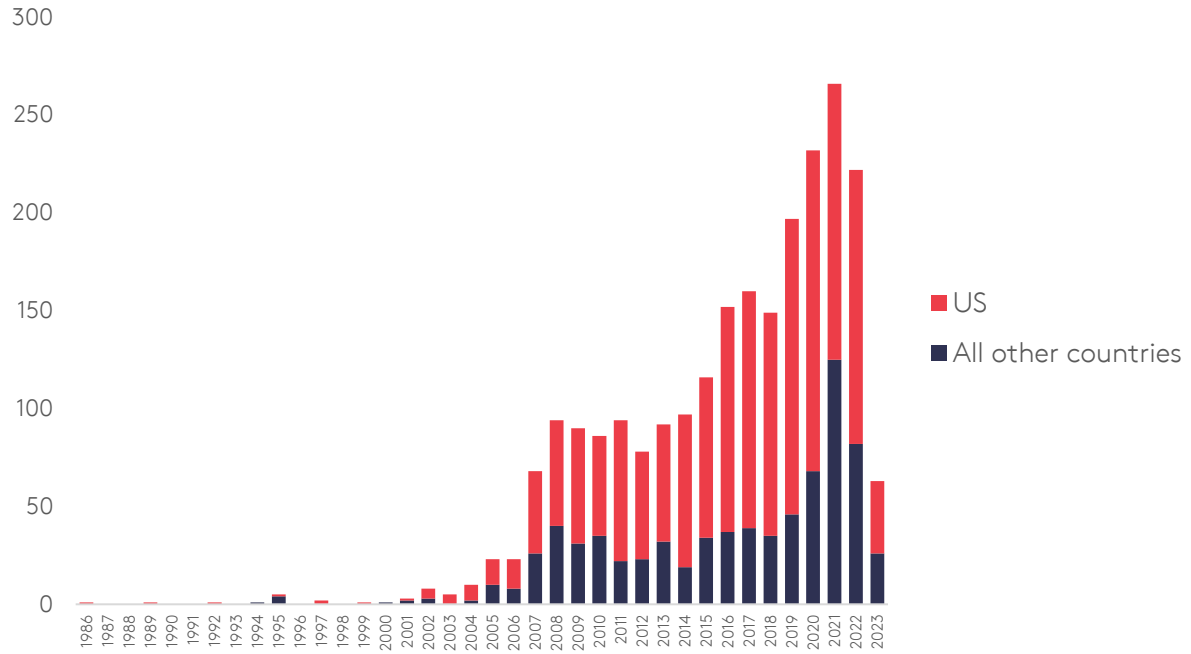
Cases over time

Overall, at least 2,341 cases have been captured in the Sabin Center's climate litigation databases.[2] Of these, 190 were filed in the last 12 months (i.e. 1 June 2022 to 31 May 2023). Around two-thirds of the total cases (1,157) have been filed since 2015, the year of the Paris Agreement. That year saw the start of a new 'wave' of litigation characterised by increasing diversity in the range of legal arguments used and the geographical spread of the cases (Setzer and Higham, 2022).

The growth rate in new climate cases may be slowing

Although the overall body of cases has continued to grow, data from the last few years suggests that growth may be slowing (see Figure 1.1). In the calendar year 2021 a total of 266 new cases were filed, while in 2022 this figure was 222.

Figure 1.1. Total climate change cases over time, US and non-US (1986 to 31 May 2023)



Note: Data collection for 2023 is still underway, and there may be a small delay between cases being filed and being identified and processed for inclusion in the databases, therefore the 2023 data are incomplete.

Source: Authors based on Sabin Center databases

[2] Includes all cases in the most recent data download for US cases available on 31 May 2023 (updated on 23 May), and all cases included in the Global database, or being processed for inclusion in the Global database, as of 31 May 2023.

Part of the slowdown in the overall rate of growth may be the fact that US case numbers peaked in 2020, the last year of the Trump presidency (see further Silverman-Roati, 2021). By contrast, the number of non-US cases filed each year continues to see fairly steady incremental growth, except in 2021 when there was a significant surge in cases. While it is not clear what caused this surge, one explanation may lie in increased availability of resources within and engagement from the NGO community who were actively involved in pursuing climate litigation around this time (see also discussion of claimants and defendants on p.18 below). Of course, many climate cases – particularly those involving requests for financial compensation – are still at very early stages. Should such cases meet with success, it is likely their number would increase, particularly in light of early interest shown by funders of commercial litigation (see Setzer and Higham, 2021; Kaminski, 2023; Hodgson, 2023).

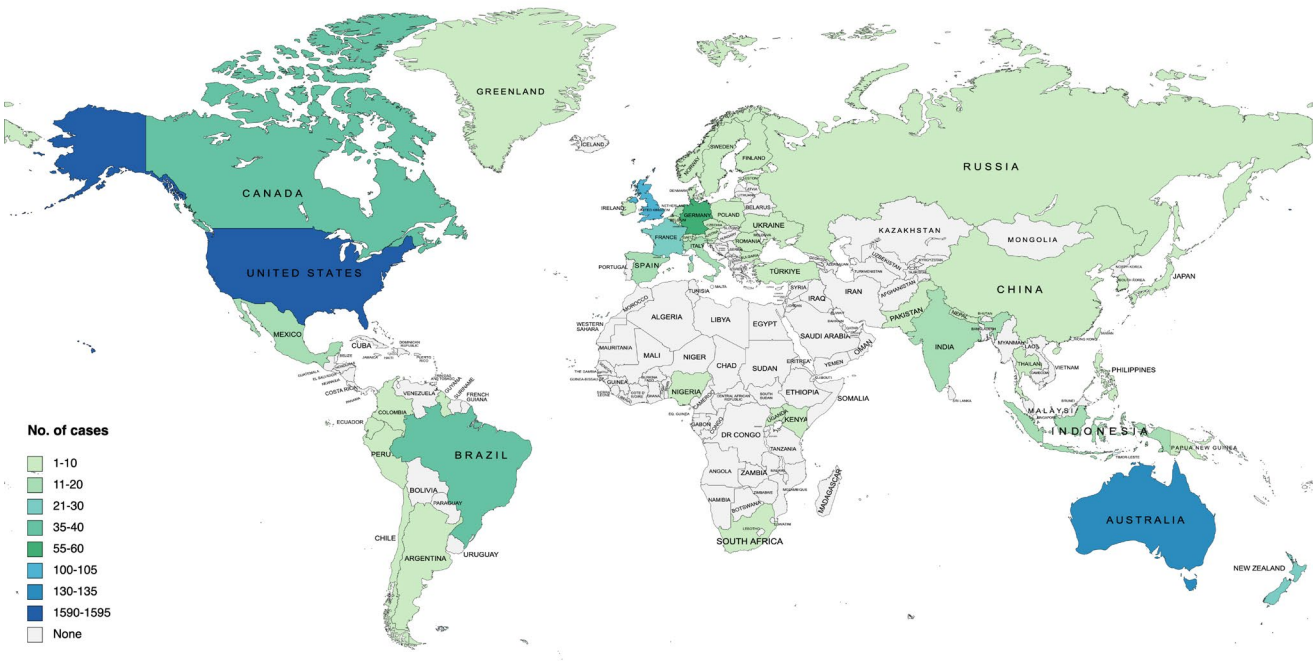
Cases by country

Cases have been filed in at least 51 countries from across every region of the world (see Figure 1.2). Cases have also been filed before international or regional bodies, courts or tribunals, which is discussed further later on.

In the past year, cases from seven new jurisdictions have been added to the Global database: Bulgaria (first case filed in 2021), China (first case filed in 2016), Finland (first case filed in 2022), Romania (first case filed in 2023), Russia (first case filed in 2022), Thailand (first case filed in 2022), and Turkey (first case filed in 2021).

The United States remains the country with the highest number of documented climate cases, with 1,590 cases in total. Next is Australia, where 130 cases have been identified, and the United Kingdom, where 102 cases have been identified. 67 cases have been filed before the Court of Justice of the European Union. Relatively high numbers of cases have also been documented in Germany (59), Brazil (40), and Canada (35).

Figure 1.2. Number of climate litigation cases around the world, per jurisdiction (up to 31 May 2023)



Note: Cumulative figures to 31 May 2023. This figure only includes cases filed before national courts or quasi-judicial bodies specific to a given country. The 118 cases filed before international or regional bodies, including the courts of the European Union, are not included.

Source: Authors based on Sabin Center databases. Created with mapchart.net.

National contexts inform the nature and number of climate cases

The number of cases is growing at varying rates across different jurisdictions. For example, the number of German cases documented in the Global database has doubled since our last report (increasing from 27 to 59). This may in part be explained by an increase in climate litigation in the wake of the successful outcome in *Neubauer et al. v. Germany*, which has been described as leading to a new generation of German cases (EUFJE National Report Germany, 2022). Subsequent cases concern the implementation of the Climate Protection Act – which was the subject of the *Neubauer* judgment – at the sectoral level (e.g. *BUND v. Germany; Deutsche Umwelthilfe v. Germany (LULUCF)*), subnational climate action (e.g *Luca Salis et al. v. State of Sachsen-Anhalt*), and cases challenging the transition plans of corporations, including those in the auto industry (e.g. *Kaiser et al. v. Volkswagen AG*). Complaints to consumer protection bodies and courts concerning 'climate-washing' make a significant proportion of the cases (21 out of 59 – see further discussion in Part II). This rapid rise in cases in Germany in recent years provides a good reminder of the need to take national contexts and specificities into account when considering trends in litigation (see also Box 1.1).

Box 1.1. How climate change legislation shapes climate change litigation – and *vice versa*

Not all climate change litigation relies on climate change legislation, that is, on legislation specifically introduced as part of a country's climate policy response. Instead, many of the highest-profile climate change litigation cases have been based in pre-existing legal duties, such as obligations under constitutional, human rights, consumer protection, or tort law. In these cases, litigants are asking the courts to interpret how such well-established legal duties should be interpreted in the face of novel fact patterns involving climate change.

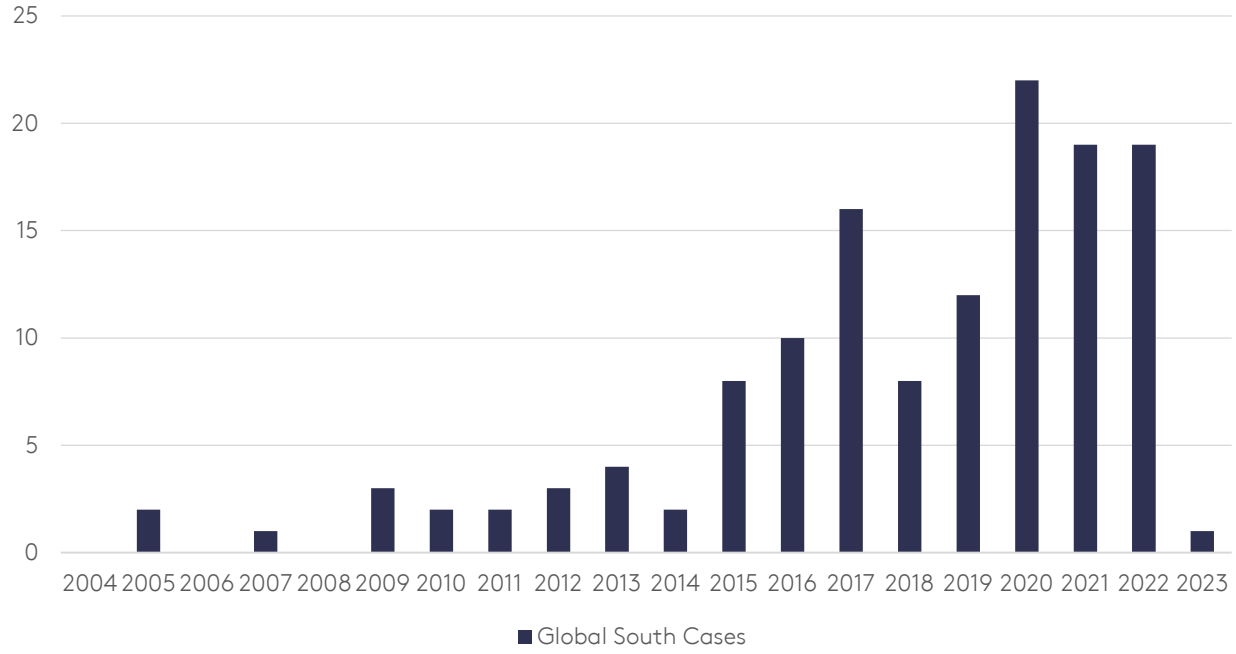
Nonetheless, the existence of climate change-specific legislation, particularly climate change framework legislation, is likely to shape the form of climate litigation in a given country. Around 60 countries around the world have now adopted domestic climate change framework laws that establish long-term climate change objectives, and also introduce the institutions and inter-institutional processes required to meet them (Higham et al., 2021; Averchenkova et al., 2017; Iacobuta et al., 2018). Of these, nearly half include a target to achieve net zero emissions by 2060 or earlier. Such laws often enshrine commitments made at the international level through countries' Nationally Determined Contributions (NDCs). However, national laws may also be more ambitious than the NDCs (at least initially) and surpass them in scope.

National variation in the design of these laws has a significant impact on the legal arguments adopted by litigants in climate change litigation cases, as discussed further in Part II. Frequently, such legislation is adopted or amended to create the necessary governance arrangements to support ambitious climate policy programmes and is then followed by further legislative action aimed at implementing specific climate policy measures. Such legislation may be shaped in part by past climate change litigation within a given jurisdiction, as in the case of Germany, where new climate targets were introduced following the case of *Neubauer et al. v Germany*. The existence of such legislation is also likely to shape the future direction of litigation efforts (for further discussion of this phenomenon in the European context see Higham et al., 2023).

Cases in the Global South

Historically, most climate cases falling within our definition have been filed in the Global North.[3] However, recent years have seen a growth in cases filed before courts in the Global South, along with improvements in the collection of such cases. Overall, 135 cases from the Global South have now been captured in the database, with more than 50 of those filed since 2020 (see Figure 1.3).

Figure 1.3. Number of climate litigation cases in the Global South over time (2004 up to 31 May 2023)



Source: Authors based on Sabin Center databases

Several key trends specific to Global South climate litigation have previously been identified. Among the most important trends are the innovative use of human rights arguments (Garavito, 2020), particularly arguments relying on the right to a healthy environment, and cases seeking to address gaps in the enforcement of pre-existing environmental legislation aimed at preventing environmental degradation (Lin and Peel, 2019; Setzer and Benjamin, 2020a, 2020b; Ohdedar, 2022). Such arguments have been most frequently used before Latin American courts (Auz, 2022; de Vilchez and Savaresi, 2023; Tigre et al., 2023b), but also in Africa (Bouwer, 2022; Bouwer et al., forthcoming 2024; Loser, forthcoming), and to a lesser extent in Asia. In many cases such legislation may not be specifically targeted at climate issues. This year, for the first time, cases from China have been added to the Global database, with indications that Chinese courts may continue to develop a unique form of climate litigation appropriate to their national context (see Box 1.2 below).

[3] The distinction between the 'Global South' and 'Global North' is based on economic inequalities, but the 'Global South' is not a homogeneous group of countries: legal development and legal capacity vary by country. We use the list of G77 + China countries to determine if a country is in the Global South.

Box 1.2. Climate litigation in China

The first two Chinese cases to be included in the database were filed simultaneously in 2016 by Chinese NGO The Friends of Nature against two state-owned utility companies in the provinces of Gansu and Ningxia. The NGO argued that the companies' failure to connect all available renewable power in the province to the grid violated the law on renewable energy, and that the companies should be held responsible for the environmental damage caused by the unnecessary continued reliance on coal power. The case against Gansu was settled in April 2023, with the Gansu state company agreeing to invest at least 913 million RMB in the construction of new energy supporting grids and improve the grid's transmission capacity of electricity generated by new energy sources. The second lawsuit – *Friend of Nature v. Ningxia State Grid* – is still pending.

While these cases were brought against state-owned companies, "it would be unthinkable for courts to pre-empt explicit central policy by overstepping into political roles" in cases more directly targeting government bodies (Yan, 2020: 374). However, there is potential for cases to be brought between private parties, as suggested by the third climate case filed in China – *Beijing Fengfujiuxin Marketing and Technology Co. Ltd. v. Zhongyan Zhichuang Blockchain Co. Ltd.*

China does not yet have a specific law on climate change, but courts can use existing government climate policies to interpret existing legal duties in favour of more ambitious climate action (Zhu, 2022). The possibility that courts in China will increasingly be required to determine disputes with climate change dimensions is supported by a recent media release by the Supreme People's Court of the People's Republic of China, after the court issued a new guideline on environmental protection. According to the media release, the guideline "stipulates that courts nationwide need to guide enterprises to save energy and reduce carbon emissions".

Developments in Global South jurisdictions that illustrate key trends

- **South Africa:** An important decision was recently handed by a South African Court in *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others* (Moodley, 2022). In September 2022 the High Court of South Africa confirmed that the grant of an exploration right for oil and gas, resulting in the need to conduct a seismic survey along the South Coast of South Africa, was unlawful. The Court referred to the 'unburnable' fossil fuel reserves and the inconsistency of further oil and gas exploitation with South Africa's international climate change commitments.

  To understand developments in South Africa in full, we need to look beyond the narrow definition of climate cases. One relevant case is *Trustees for the Time Being of the Groundwork Trust and Vukani Environmental Justice Alliance Movement in Action v. Minister of Environmental Affairs* (the 'Deadly Air' case), in which the applicants challenged the failure of the South African government to protect people's constitutional rights to health and wellbeing from toxic levels of ambient air pollution caused by coal-fired power generation projects in South Africa's Mpumalanga province, an area in which 12 coal-fired power stations, a coal-to-liquids plant, a refinery, and many polluting industries and mines are located. South Africa's Climate Change Act has been delayed and awaiting promulgation for over two years (Loser, forthcoming), so the case was brought as pollution and coal litigation. Professor David Boyd, the UN Special Rapporteur for Human Rights and Environment, intervened as a friend of the court. In March 2022 the Pretoria High Court issued a landmark decision, and the South African government was for the first time declared in breach of a constitutional right due to the health impacts of air pollution.

- **Indonesia:** In July 2022, a group of Indonesian youth filed a complaint against the government before the National Human Rights Commission, arguing that the government had failed to fulfil its obligations to protect their human rights including the right to a healthy environment (*Indonesian Youths and others v. Indonesia*). The case builds on a previous investigation by a national human rights institution, the Philippines Commission on Human Rights, the nearly seven-year-long *National Inquiry on Climate Change*. That inquiry investigated whether 47 of the largest fossil fuel companies in the world had violated the human rights of Filipinos. It was concluded in May 2022, with the Commission stating that major corporate emitters, including their value chains, may be compelled to undertake human rights due diligence and be held accountable for failure to remediate human rights abuses arising from their business operations (see further Setzer and Higham, 2022). Although the Indonesian case differs in its focus on the government, the previous Inquiry may provide an important model.
- **Brazil:** In July 2022, Brazil's constitutional and highest court gave an unprecedented recognition to the importance of the Paris Agreement. The judgment was given in *PSB et al. v. Brazil (on Climate Fund)* (ADPF 708), which challenged the government-induced paralysis of the Climate Fund, established by Brazil's National Policy on Climate Change to promote the financing of climate mitigation and adaptation projects. The decision brings significant lessons in a broad range of aspects of climate litigation (Tigre and Setzer, unpublished). The court found – for the first time in global climate change litigation – that the Paris Agreement is a human rights treaty. This recognition helps parties to integrate climate change and human rights into a shared framework for action, promoting greater accountability, international cooperation and climate justice (Knox, 2020). The decision also recognised the importance of climate finance to mitigate greenhouse gas emissions, and addresses challenges over the separation of powers. Procedurally, the case provides several legal innovations, including the possibility of having political parties as plaintiffs and the court holding a public hearing to inform the justices on the science and facts of climate change. The court invited 66 experts to speak, among them scientists, environmentalists, indigenous people, representatives from the agribusiness and financial sectors, economists, academics, parliamentarians and representatives of the federal and state governments.

Plenary session, Brazilian Supreme Court, during the judgement on the *PSB et al. v. Brazil* case on the Climate Fund. Photo: Carlos Moura/SFT.

Another case in Brazil shows how litigants in the Global South are innovating in other areas. In June 2022, a Brazilian NGO filed a lawsuit against Brazil's national development bank and its investment arm (*Conectas Direitos Humanos v. BNDES and BNDESpar*). The NGO claims that BNDESpar, which is responsible for managing BNDES's shareholdings in various high emitting companies, has no procedure in place for assessing the impact of its investments on the climate, and that this is a violation of Brazil's commitments under both the Paris Agreement and the National Policy on Climate Change.

- **Turkey:** A case in Turkey also demonstrates some of the challenges facing Global South communities as the impacts of climate change manifest. A cooperative of fishermen operating around the Marmara Lake, a wetland of national importance, filed a case against the government (*S.S. Gölmarmara ve Çevresi Su Ürünleri Kooperatifi v. Republic of Türkiye Ministry of Agriculture and Forestry, Manisa Directorate of Provincial Agriculture and Forestry*). The fishermen alleged that the government had failed to prevent the deterioration and drying up of the lake through a failure to conduct adequate environmental impact assessments for various infrastructure projects, as well as a failure to implement international obligations regarding climate change mitigation. The applicants argue that due to the government's failure to protect the lake, they should be exempt from paying for their fisheries licences.

International and regional cases

Although the vast majority of climate cases are filed before domestic courts and the courts of the EU, there have been at least 50 cases or complaints filed before 11 international and regional courts and tribunals, and before UN Treaty Bodies and Special Procedures and the UN Framework Convention on Climate Change (UNFCCC) Kyoto Protocol Compliance Committee.[4] Around 20 of these cases have been filed before human rights bodies, while 12 have been filed before Investor-State Dispute Settlement (ISDS) bodies under International Investment Agreements (see further Fermeglia et al., forthcoming).[5] Ten of the remaining cases were complaints under the non-compliance procedure of the Kyoto Protocol, filed between 2009 and 2018.

During the past 12 months, four new cases have been filed before international bodies. These include three requests for advisory opinions from international courts and one complaint requesting that prosecutors from the International Criminal Court investigate the Board of BP for its role in climate change.

Three requests for advisory opinions from international courts

Requests for advisory opinions have been filed before the International Tribunal on the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ). The request to ITLOS, submitted by the Commission of Small Island States on Climate Change and International Law, asks the Court to clarify what States' obligations are under the United Nations Convention on the Law of the Sea (UNCLOS) in terms of preventing, reducing and controlling pollution of the marine environment and protecting and preserving the marine environment in relation to climate change impacts. This is the first time that an advisory opinion has been sought on specific issues associated with sea level rise, and climate change more

[4] Currently, we are aware of cases filed or complaints submitted before the following bodies: International Court of Justice, International Tribunal on the Law of the Sea, Inter-American Court of Human Rights, Inter-American Commission on Human Rights, East African Court of Human Rights, European Court of Human Rights, World Trade Organisation Dispute Settlement Body, UNFCCC (Kyoto Protocol Compliance Committee), UN Human Rights Committee and UN Committee on the Rights of the Child, Office of the Prosecutor of the International Criminal Court, various UN Special Procedures, UN Secretary General, Permanent Court of Arbitration, Stockholm Chamber of Commerce, and International Centre for the Settlement of Investment Disputes. As discussed, cases have also been filed before the Court of Justice of the European Union and the European General Court, but we treat cases before EU courts as comparable to cases before domestic courts given the EU's unique supranational status.

[5] This is only a small sample of all climate-relevant ISDS cases, included for reference, which are more comprehensively mapped elsewhere.

generally. It builds on an established track record developed in UNCLOS case law in relation to obligations to protect the marine environment, and advances a legal exploration of the climate–ocean nexus (Roland Holst, 2022).

The request to the IACtHR was made jointly by Chile and Colombia, and asks for clarification on the scope of state obligations, in both individual and collective dimensions, to respond to the climate crisis. The request includes questions about climate adaptation and environmental defenders' protection, matters that were overlooked by a previous advisory opinion (OC-23/17) in which the IACtHR recognised the justiciable right to a healthy environment, making reference to climate change (Viveros and Auz, 2023).

Also for the first time, the ICJ, the world's highest court, has been asked to consider the question of climate change. The request for an advisory opinion was made by a group of 18 states led by the small island nation of Vanuatu and took over three years to be tabled, in part because standing rules mean that requests for such opinions can only be brought by public international bodies, and therefore require a broad base of support among member states. On 29 March 2023, the UN General Assembly unanimously adopted a resolution to ask the ICJ for an advisory opinion on climate change. The resolution asks the ICJ to clarify the duties of states to protect the climate system and the rights of present and future generations from climate-induced harms, as well as the legal consequences for states that have caused significant climate harm to the planet and its most vulnerable communities.

While there is a risk of a 'cacophony' of differing opinions arising from the cases, it is possible that the differences in scope of each request may instead help ensure complementarity and consistency between the opinions ultimately given by the courts (Auz and Viveros-Uehara, 2023), which are likely to play a significant role in shaping future cases against governments around the world. Even if advisory opinions from international courts are almost invariably non-binding, commentators have suggested that they nonetheless carry significant legal and moral weight, providing new reference points for legal discourse (Roland Holst, 2022). An advisory opinion from the ICJ, in particular, could make clear that nations whose emissions of greenhouse gases contribute to serious harm in other countries have a duty under international law to cease or alter their harmful activities (Kysar, 2022). The 'concretisation' of reasoning on legal obligations of states adopted in such cases is also likely to inform the decisions of other courts around the world (Savaresi et al., 2021).

Claimants and defendants: key actors in climate litigation

NGOs and individuals continue to file a high number of climate cases

Nearly 90% of the cases filed during the 12 months since June 2022 outside the US (hereafter referred to as 'Global cases') have been brought by non-governmental organisations (NGOs), individuals, or both acting together. This is consistent with our previous year's findings. In the US, the percentage remains lower, with just over 70% of cases brought by these actors, and a relatively high proportion (13%) of US cases filed in the last year brought by corporations and trade associations.

However, it should be noted that this trend is fairly recent. If we compare these figures with the overall number of cases filed since 1986, we see that the proportion of cases filed by these actors has changed over time: in total just under 60% (440 out of 751) of all Global cases have been filed by NGOs and individuals, while Sabin Center research into cases filed in the US in the four years of the Trump administration demonstrates that around 70% of cases were filed by NGOs (Silverman-Roati, 2021).[6]

[6] Cases brought by NGOs in their capacity as shareholders are classified as 'NGO cases' (e.g. *ClientEarth v. Shell Board of Directors*).

The increasing number of global cases filed by NGOs and individuals largely mirrors the increase in 'strategic' and 'semi-strategic' climate cases filed in recent years (discussed below), showing that litigation continues to be used as a tool for groups that tend to be excluded or who are unsatisfied with climate governance decisions to try to get a seat at the negotiating table (Batros and Khan, 2022).

Outside the US, cases are targeting a more diverse range of actors, beyond governments

An examination of the climate litigation datasets suggests that historically, the majority of climate cases have been filed against governments. However, over the past 12 months, there has been a decline in the proportion of Global cases filed against governments. Only around 52% of the 61 cases filed between 1 June 2022 and 31 May 2023 were uniquely targeting this group. In addition, the four international advisory opinions concern the obligations of governments, but we classified them as not having an individual defendant.[7] On the other hand, just over 40% of cases were filed with corporations or trade bodies among the defendants (we include here five cases filed against the international football governing body FIFA in a range of European countries, alleging that the organisation was involved in greenwashing around the World Cup).[8]

Strategic climate change litigation and case strategies

It is increasingly understood that climate change litigation is being used strategically "as a tool to influence policy outcomes and/or to change corporate and societal behaviour" (Bouwer and Setzer, 2020). In such cases, the focus is on achieving pro-regulatory impacts, although 'anti-climate' uses of strategic litigation (opposing climate change adaptation and/or mitigation policies, legislation or projects) are also possible (Golnarghi et al., 2021). In part, the climate change movement has already learned from strategic human rights litigation (Silbert, 2022). Batros and Khan (2022) discuss further lessons that strategic climate litigation can learn from strategic human rights litigation: the importance of identifying the role of the litigation as part of an overall theory of change (i.e. a set of interventions that are expected to lead to a desired outcome); consideration about challenges of implementation of judgments; and the need to evaluate risks of strategies.

Defining a case as strategic is a subjective and often imperfect effort (see the Appendix for more on our methodology). For the purposes of this study, we consider the following key components when classifying a case as strategic. Where some but not all of these factors are present, we consider cases to be 'semi-strategic'; however, we count semi-strategic and strategic cases as one group given that they share more similarities than differences for the purpose of this discussion. The key components are:

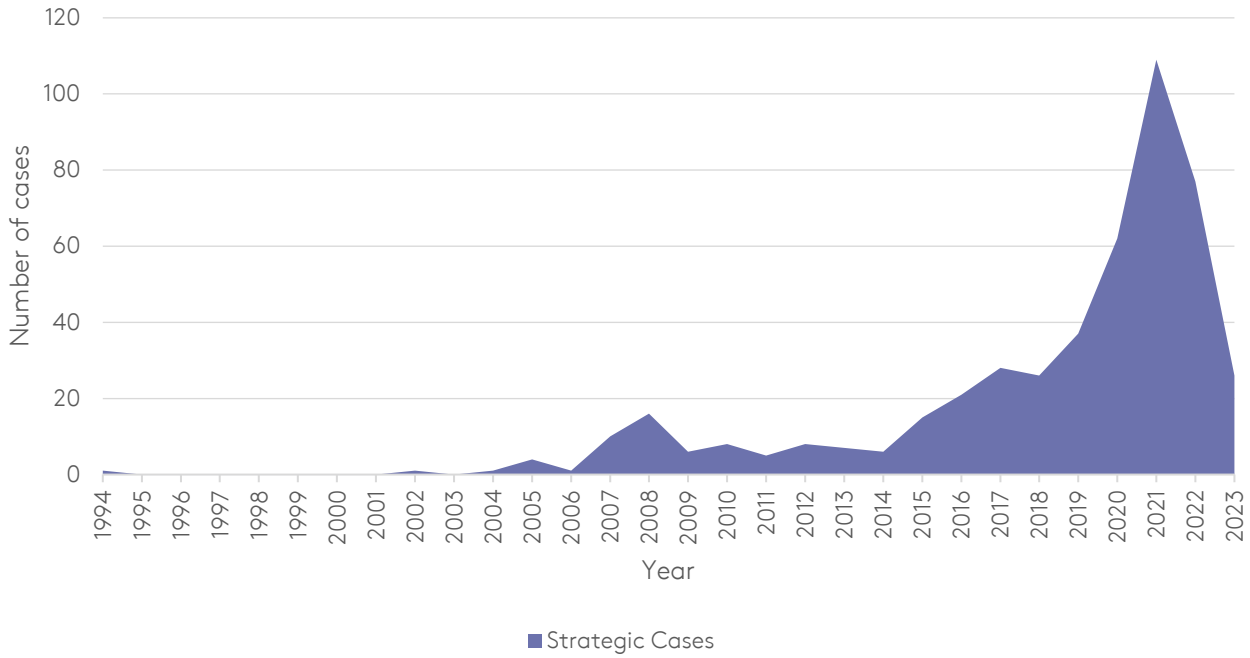
- *Identity of the plaintiffs.* In strategic litigation the plaintiffs are selected to communicate a carefully designed message (Peel and Markey-Towler, 2021). Most cases of strategic climate litigation are filed by an NGO, individual campaigner, a Member of Parliament or political party. Okoth and Odaga (2021) refer to 'litigation plus', an approach whereby as well as selecting claimants, the NGO and its lawyers work with communities to develop legal strategies around their concerns. others use the term 'movement lawyering' to emphasise the importance of co-creating strategic litigation with affected communities at the centre (Cummings, 2017). Claimants are usually represented by an experienced legal team with a track record of bringing other strategic legal interventions (Peel and Markey-Towler, 2022).

[7] It is open to debate whether these requests strictly count as 'litigation', but as they are critical to the development of the law in this area we have included them as such in this report.

[8] Cases filed against individual directors on behalf of a corporations are recorded in our dataset as involving both the corporation and individuals.

- *Identity of the defendants.* Strategic climate litigation has targeted actors that make the largest direct contribution to the problem (e.g. governments that can legislate and the largest emitters of CO_2) and actors who mislead the public about their climate action or consideration of climate risks. In addition to targeting the 'obvious suspects', strategic litigation can be brought against actors that are not so visible but are crucial for the survivability of the value chain, such as the public authorities that grant the licences and permits necessary for high emitters to carry out core activities, and the financial institutions that provide the necessary capital or insurance for high emitters to develop their core activities. This latter approach, which builds on systems thinking, is described by Solana et al. (2023) as 'systemic lawyering'.
- *Aim of the litigation.* Strategic litigation sees advocates using climate litigation "to drive ambition in climate action, taking a long view beyond the immediate success or failure of individual cases" (Bouwer and Setzer, 2020). Strategic cases seek remedies that extend beyond the situation of individual litigants and contribute to intended policy and regulatory impacts (Peel and Markey-Towler, 2021). Objectives for litigation might differ when comparing Global South jurisdictions with rich or developed countries (Setzer and Benjamin, 2020a), and in any one country the strategies might change quite significantly depending on the directions established by national leaders (e.g. climate litigation during the Trump era – see Gerrard and McTiernan, 2018).
- *If the case is one piece of a larger puzzle.* Strategic litigation is part of a broader advocacy strategy of one or several organisations (Eilstrup-Sangiovanni, 2019). When the legal intervention is connected to a larger advocacy strategy, it is possible to observe that the lawsuit complements or focuses on specific aspects of messages that will be raised by one or a group of organisations outside the courts. These efforts will be carried out by NGOs lobbying or pressurising legislators and policymakers, or sending letters to targeted companies, or by protesters taking to the streets. The climate litigation movement is also part of an emergent transnational climate litigation network that generates ideas and facilitates intellectual and financial resources to litigants (Iyengar, 2023). Media coverage and a communications campaign are often another part of this larger puzzle.

Figure 1.4. Strategic cases filed outside the US over time



Source: Authors based on Sabin Center databases

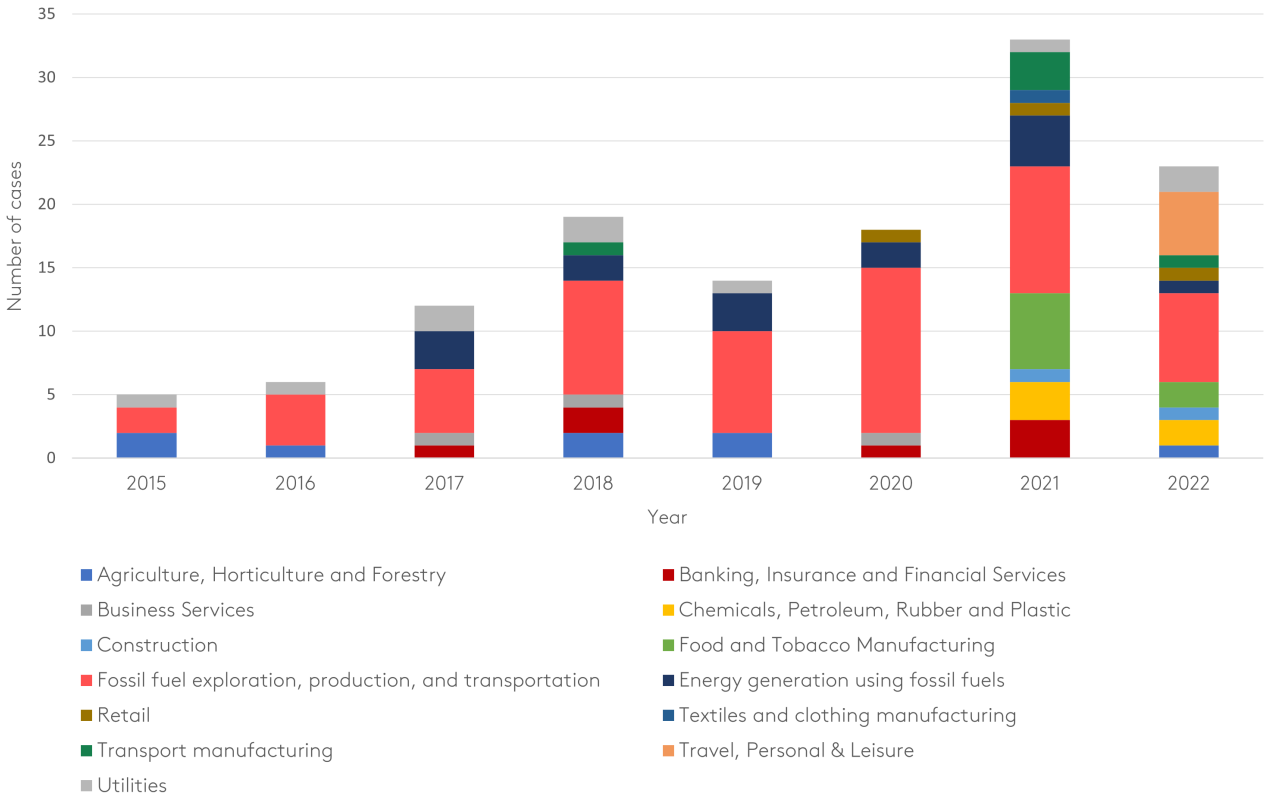
Strategic litigation against companies

Strategic litigation against companies is an area of increasing interest to many actors. Early examples of such litigation were filed in the US and focused on fossil fuel companies. More recently, the number of strategic cases challenging corporate action has started to diversify, with cases filed in new geographies and against companies in a wide range of sectors. Cases are focused on companies, financial institutions and trade associations in recognition of the fact that these organisations often have a significant influence on climate action, often to the serious detriment of citizens (Brulle and Downie, 2022).

When analysing all cases filed against companies between the start of 2015 and the end of 2022, we observe that 80% can be classed as strategic or semi-strategic. The year 2021 saw the highest number of corporate cases filed to date, with more than 30 cases so far identified (representing around 30% of all strategic cases filed that year). Analysis of these cases confirms their increasing diversification, with cases targeting companies in an increasingly diverse range of sectors over time (see Figure 1.5). One of the reasons for this trend appears to be a significant increase in 'climate-washing cases' – that is, cases seeking to hold companies accountable for claims about the climate-friendliness of their operations, products or services (discussed further below). Part of the shift may also be attributable to the increasing sophistication of litigation strategies and the identification of new pressure points within corporate value chains, particularly regarding the provision of finance for high-emitting activities.

Together with the increase in the types of cases and actors involved, there is a growing effort to understand the unique aspects of climate litigation across the corporate world. For example, in this last year a new global initiative examining the unique aspects of climate litigation across the corporate world was launched – the Global Perspectives on Corporate Climate Legal Tactics, led by the British Institute of International and Comparative Law (BIICL).

Figure 1.5. Number of cases against corporations by sector type, including US and Global cases (2015–2022)



Note: For the most part, the classification of 'sector type' is based on data about defendant companies drawn from the Orbis database. However, we have classified cases concerning energy generation using fossil fuels and cases concerning fossil fuel exploration production and transport according to the subject matter of the case rather than the sector listed on Orbis, given the high volume of such cases.

Source: Authors based on Sabin Center databases

Types of strategies in climate-aligned cases

In our 2022 report, we developed a typology of strategies being deployed by litigants in cases against companies and governments around the world in climate-aligned cases. This typology is just one of many ways to understand the diversity of climate change litigation cases, with other classifications emphasising different aspects of the phenomenon (see also UNEP, forthcoming). Our aim here is to help the reader understand more about the theories of change that underlie different types of cases. Many cases employ multiple strategies concurrently.

Last year, we applied that typology to all 'strategic' and 'semi-strategic' global cases filed since 2015, the year of the Paris Agreement. This year, we provide an updated assessment, and identify key growth areas. As the field has developed, we have also made several modifications to the typology:

- **In last year's report, we included a strategy type labelled 'public finance'. This year we have broadened that category to include cases against both public and private financial institutions and we call this broader category 'turning off the taps':** since all cases that use this approach share a common goal of depriving high-emitting activities of vital financial resources, even if such activities remain legal. The complexities of this group of cases and of the legal obligations governing the incorporation of climate risks is further discussed in Part II. Cases using this strategy also often employ a secondary strategy as well.
- **We have added a new category to capture the three requests for advisory opinions described above**, since the strategy adopted in such cases clearly differs from those used in contentious proceedings. We call these cases 'Global Guidance' cases.
- **We have modified the description of several categories to make clear the multiple types of cases included within them.** This also includes modifying the title of our previous category of 'compensation' cases to 'polluter pays' cases.

The results of our review of 382 climate-aligned 'strategic' or 'semi-strategic' cases identified in the Global database and filed between 1 January 2015 and 31 May 2023 are outlined in Table 1. 1. (We have identified more than 430 strategies. This is more than the number of cases as several cases use more than one strategy, as noted above.)

Table 1.1. Climate-aligned litigation strategies in Global cases

Strategy type *(with examples)*	No. of cases in which this strategy is used, by defendant type	
	2022	2023
Government framework: Cases that challenge the implementation or ambition of climate targets and policies affecting the whole of a country's economy and society. They can be divided into two broad types: (i) 'ambition cases', concerning the absence, adequacy or design of a government's policy response to climate change; and (ii) 'implementation cases', concerning the enforcement of climate protection measures to meet existing targets or implement existing plans (Higham et al., 2022). Cases often raise issues concerning the validity or interpretation of climate change framework laws. By focusing on the framework within which climate action should happen, litigants seek to have an impact on a broad range of operational decisions. Recent examples: *Anton Foley and others v. Sweden*; *Iten ELC Petition No. 007 of 2022.*	Government (65)	Government (81)

Corporate framework: Cases that seek to disincentivise companies from continuing with high emitting activities by requiring changes in corporate governance and decision-making. These cases focus on company-wide policies and strategies, and frequently draw on human rights and environmental due diligence standards. They have been brought before national courts, and proceedings have also been opened before OECD national contact points and national human rights bodies (both types are included in our case count). It is common for these cases to draw heavily on the legal theories developed in framework cases against governments, but due to the different responsibilities of governments and companies they should be viewed as a distinct category. Recent examples: *Notre Affaire à Tous and others v. BNP Paribas; Greenpeace Italy et al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.; ClientEarth v. Shell Board of Directors*.	Corporate (12)	Corporate (16) Corporate and government together (1)
Integrating climate considerations: Cases that seek to integrate climate considerations, standards, or principles into a given decision, with the dual goal of stopping specific harmful policies and projects, and mainstreaming climate concerns in policymaking*. Cases may challenge new policies developed without careful consideration of climate impacts, or decisions to roll back or reduce the level of ambition in existing climate policies. Cases may also focus on permits and licensing related to high emitting activities and individual projects. Recent examples: *Mexican Center for Environmental Law (CEMDA) v. Ministry of Energy and Others (on the Energy Sector Program 2022); Dennis Murphy Tipakalippa v. National Offshore Petroleum Safety and Environmental Management Authority and Anor; R (Finch on behalf of the Weald Action Group and Others) v. Surrey County Council (and Others)*.	Government (103) Corporate (20) Government and corporate together (4)	Government (165) Corporate (22) Government and corporate together (12) No defendant (7)
Turning off the taps: Cases that challenge the flow of finance to projects and activities that are not aligned with climate action. Cases may be filed against public or private financial institutions, or a combination of the two. Cases may also be filed by shareholders. Their common goal is to amplify the importance of climate risk in financial decision-making, increasing the cost of capital for high emitting activities to the point where such activities become economically unviable, even if they remain legally permissible. Recent examples: *Conectas Direitos Humanos v. BNDES and BNDESPAR ; Notre Affaire à Tous and others v. BNP Paribas*.	Government (n/a) Corporate (n/a)	Government (14) Corporate (12)
Failure to adapt: Cases that challenge a government or corporation for failure to take climate risks into account. Cases may allege (i) failure to consider and address the current or future threats posed by climate change to a given facility or area (Markell and Ruhl, 2012; UNEP, 2021); or (ii) failure to develop systems to identify and manage physical and transition risks, i.e. a 'failure to adapt' to the low-carbon transition (Golnaraghi at al., 2021). Many of the latter group of cases have been filed against financial service providers. Recent example: *S.S. Gölmarmara ve Çevresi Su Ürünleri*	Government (3) Corporation (5)	Government (7) Corporation (4) Individual and corporation (1) Government and individual (1) No defendant (1)

Kooperatifi v. Republic of Türkiye Ministry of Agriculture and Forestry, Manisa Directorate of Provincial Agriculture and Forestry.		
Polluter pays (compensation): Cases seeking monetary damages or awards from defendants based on an alleged contribution to climate change harms. These cases seek to implement the 'polluter pays' principle, and disincentivise greenhouse gas pollution by impacting the profitability of high emitting activities. Three different avenues have been used to date: (i) compensation for past and present loss and damage associated with climate change; (ii) contributions to the costs of adapting to anticipated future climate impacts; (iii) compensation to 'offset' emissions, where those activities have caused damage to carbon climate sinks. Recent examples: *Asmania et al. v. Holcim; Ministerio Publico Federal v. de Rezende*.	Government (0) Corporate (8) Individual (1)	Government (5) Corporate (11) Individual (1)
Climate-washing: Cases that challenge inaccurate government or corporate narratives regarding contributions to the transition to a low-carbon future (Benjamin et al., 2022). Cases can concern misleading claims asserting that products or services are more climate-friendly than they really are. Increasingly, these cases focus on claims regarding terms such as 'net zero', 'climate neutrality' and 'deforestation-free'. They can also concern the degree to which misinformation campaigns, or failure to disclose known risks, have contributed to harm caused by climate change. Recent examples: *Verbraucherzentrale Baden-Wuerttemberg v. DWS; Church of England Pensions Board and others v. Volkswagen AG; Climate Alliance Switzerland v. FIFA*.	Government (3) Corporate (13)	Government (5) Corporate (52)
Personal responsibility: These cases seek to incentivise the prioritisation of climate issues among public and private decision-makers, by attributing personal responsibility for a failure to adequately manage climate risks to particular individuals. Cases may include actions filed by shareholders or pension fund beneficiaries. They may also involve requests for criminal prosecutions of individuals, with cases of this type filed against both politicians (e.g. Bolsonaro, former president of Brazil) and corporate actors (such as the Board of BP). There is also growing discussion in the literature of responsibility for professionals that may enable climate-damaging activities, such as lawyers and accountants (Vaughan, 2022), although no cases have so far been identified. Recent example: *ClientEarth v. Shell Board of Directors*.	Individual acting for a corporation (1) Individual acting for a government (0)	Individual acting for a corporation (4) Individual acting for a government (4)
Global guidance: These cases seek to engage the normative authority of international courts on climate issues in a way that may influence the future development of climate diplomacy and the future interpretation of states' legal obligations by both international and domestic courts and tribunals. This strategy contributes to establishing a stronger foundation for further action, but does not necessarily anticipate an immediate impact on greenhouse gas	Non-contentious, concern obligations of governments (1)	Non-contentious, concern obligations of governments (4)

emissions. Recent examples: advisory opinions filed before the ICJ, ITLOS and IACtHR.		

*Notes: *The standards in question may be drawn from national legislation, international conventions or soft-law instruments. The cases often involve questions about the application of existing legal standards – such as requirements to consider environmental impacts, including cumulative environmental impacts – to the issue of climate change even when 'climate change' is not explicitly mentioned in the legislation or policy.*

Where the case number is 0 for the year 2022, this is because no such cases were documented in our 2022 report, even though we anticipated that such cases might be possible. All 2023 case numbers are based on the empirical review of cases.

Where the case number is listed as n/a for 2022 this is because we did not previously include this category in the report, or we did not include the defendant type within the category (e.g. previously the 'turning off the taps' category was referred to as public finance and only involved government defendants).

The case of Notre Affaire à Tous and others v. BNP Paribas *is used as an example of both a 'corporate framework' case and a 'turning off the taps' case as it is an important example of a case employing two strategies concurrently.*

In Part II, we provide more in-depth analysis of some of the key trends identified above. However, from the outset, it is critical to note that although litigants may use different combinations of strategies in any given case, they frequently seek to apply these to the same key issues. For example, if we look at the last 12 months, we see developments in a range of cases employing different combinations of strategies targeting fossil fuel supply-side activities, plus deforestation and land use. Cases target different actors (public and private financial institutions, companies, permitting authorities) and different decision points in the lifecycle of fossil fuel and agricultural commodities (licensing/permitting, financing, production, and transportation). This litigation exists in tandem with the increasingly intense debate about fossil fuel phase-outs and deforestation-free supply chains in international and domestic climate policy circles (van Asselt and Green, 2022; Partiti, 2021).

Youth plaintiff Georgi testifies while Judge Seeley listens in the *Held v. Montana* case.
Photo: Robin Loznak/Our Children's Trust.

Strategies in non-climate-aligned cases

Not all strategic litigation is aligned with climate goals. We have identified 16 non-climate-aligned strategic cases in the Global database filed since 2015.[9] We divide the strategies present into three types:

- ***Regulatory powers*** cases, in which litigants argue that a government body or branch of government has exceeded its authority in introducing climate regulations.
- ***Stranded assets*** cases, in which litigants seek compensation from a government, alleging that a climate-justified policy measure has impacted their property rights through either reducing the value of an asset or preventing its use entirely. These cases may be filed with the dual goals of recouping on losses (a non-strategic ambition) and dissuading governments from introducing further regulation and/or encouraging the repeal of regulations, i.e. creating 'regulatory chill' (a strategic ambition), making these cases extremely challenging to classify.
- ***Strategic litigation against public participation*** cases, in which a government or company files a case against those engaging in climate action to try to dissuade them and others from future action.

In the past 12 months, only two new strategic non-climate-aligned cases have been recorded in the Global database. These include an unsuccessful 'regulatory powers' challenge to a decree adopted by the Region of Flanders in Belgium, which prohibits the installation and replacement of new oil boilers (B*elgische Federatie der Brandstoffenhandelaars vzw and Others and Lamine v. Flemish Government)*, and an unsuccessful 'stranded assets' case filed by German companies RWE and Uniper before the Dutch courts seeking compensation following the early closure date imposed on one of its coal-fired power plants as a result of the Dutch coal phaseout law (*RWE and Uniper v. State of the Netherlands [Ministry of Climate and Energy]*). The Dutch domestic proceedings are running in parallel with requests for arbitration made by the companies under the ISDS provisions of the Energy Charter Treaty, an international agreement that has been the subject of extensive controversy because of the wide protections it offers to fossil fuel investors (see ClientEarth 2022).[10]

In the US, non-climate-aligned cases are well documented, with recent cases including a challenge to Minnesota's efforts to introduce greenhouse gas standards for vehicles (*Minnesota Automobile Dealers Association v. Minnesota Pollution Control Agency*) and another challenging Los Angeles' ban on oil drilling (*Warren E&P inc. v. City of Los Angeles*). Another strand of non-climate aligned claims emerging in the US can be understood as 'ESG backlash litigation'. In May 2023 twenty-three Republican state attorneys general sent a letter to members of the Net-Zero Insurance Alliance (NZIA) expressing "serious concerns" about whether the NZIA's requirements comply with federal and state laws. As a result of growing US political pressure and 'material antitrust risks' (Smith and Bryan, 2023), several global insurers started to quit the NZIA, which is one part of the Glasgow Financial Alliance for Net Zero (GFANZ) created by the former Bank of England governor Mark Carney before the UN climate summit COP26 in 2021. GFANZ and its members have come under attack from Republican politicians in the US who target collective climate action groups whom they perceive to be unfairly hitting the oil and gas industry. The story continues to grow in complexity: at least one Republican state attorney general, the attorney general of Kentucky, is now the subject of a lawsuit seeking to prevent his office from investigating ESG investing in the state. The lawsuit was filed by a bank trade association and affordable financer (*HOPE of Kentucky, LLC v. Cameron*).

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[9] This is only a small sub-sample of all climate-relevant ISDS claims documented to date (see Fermeglia et al., forthcoming). Similarly, there may be claims before other forms of arbitral tribunal of which we are not yet aware.

[10] Following unsuccessful negotiations on the creation of a fossil fuel carve-out for the Treaty, a number of European states signed up to the Treaty have signalled their intention to withdraw from the Treaty and are calling for a coordinated EU exit (Fermeglia et al., forthcoming).

One reason there are relatively few non-climate-aligned strategic cases in the Global database may be the difficulty of identifying such cases as 'climate' cases. For example, the past year has seen two challenges to 'climate-friendly' government actions filed in Europe that do not strictly meet the definition of 'climate change litigation' outlined above. The first is a case filed by US oil giant Exxon Mobil challenging the EU's decision to impose a 'solidarity tax' on oil and gas companies as part of its response to the energy crisis provoked by Russia's illegal invasion of Ukraine. While the case is clearly part of a corporate pushback against the new regulations (and as such may or may not be considered strategic litigation), it does not involve a clear issue of climate law or policy, since ostensibly the primary motivation for the policy measures under challenge (RePower EU) is energy security, and Exxon's challenge relates to the legal authority of the EU institutions to levy such a tax (Partington, 2022). Similarly, a case filed by Dutch Airline KLM against Schiphol Airport that aimed to reduce flight traffic, resulted in a suspension of new measures by the airport, although it appears from news reports that the proceedings centred on aspects of the policy intended to address noise pollution rather than greenhouse gas emissions (see Taylor, 2023).

Just transition cases

Climate litigation is a complex phenomenon, and increasingly the binary distinction that we make between aligned and non-aligned is insufficient to describe lawsuits raising questions over the justice and fairness of measures adopted to deliver climate action. To describe such claims, scholars have developed the term 'just transition litigation' (Savaresi and Setzer, 2022).

The term 'just transition' is now widely used to reflect the idea of a transition to a low-carbon economy in which the benefits and burdens of climate impacts and action on climate change are shared fairly among different sectors of society, and in which everyone is given a voice in decision-making processes that will affect their lives and livelihoods. Although originally grounded in the labour movement, the term has now taken on a broader resonance, and is engaging questions of distributive, procedural and recognition justice (Wang and Lo, 2021).

In turn, 'just transition litigation' can be defined as lawsuits raising questions over the justice and fairness of measures adopted to deliver climate action (Savaresi et al., under review). Just transition litigation must be brought by or on behalf of those who are negatively affected and structurally disadvantaged by the transition – such as workers, indigenous and traditional communities, women, children, minorities and other marginalised or vulnerable groups (ibid.).

There may be overlap between categories, with some cases that make arguments about the insufficiency of climate action to protect human rights also making arguments about the distributional impacts of current policies (e.g. *Mexican Center for Environmental Law [CEMDA] v. Ministry of Energy and Others [on the Energy Sector Program 2022]*). Others, like *Regional Government of Atacama v. Ministry of Mining and Others (2022)*, raise concerns over human rights violations associated with mineral extraction activities aimed to facilitate the transition. Still other cases might challenge policies purporting to advance the just transition, but which in reality would have limited benefits for communities and would entrench high emitting activities (e.g. *ADI 7095 [Complexo Termelétrico Jorge Lacerda]*).

Outcomes and impacts of climate litigation

One of the most critical questions for all actors interested in climate change litigation is: does it work? However, this question is too simplistic. It is now well established that climate litigation can have a range of impacts, and that each case can have diverse impacts. These are often characterised as either **direct impacts**, where the result of the case results in a statement of law that requires a change in the behaviour of the defendant (and potentially similar actors), or **indirect impacts**, where the case results in increasing costs and risks for an actor or actors, changes in public awareness, changes in policy or a variety of other types of change (Peel and Osofsky, 2015; Setzer, 2022). In addition to distinguishing between direct and indirect impacts, it is also helpful to separate impacts from outcomes, as even a successful final judgment (i.e. positive outcome) may not always result in a direct impact (Setzer et al., forthcoming). Moreover,

impacts can occur even before a case is filed and contribute to shifts in understanding and behaviour both during and for many years after the legal proceedings (Solana, 2020).

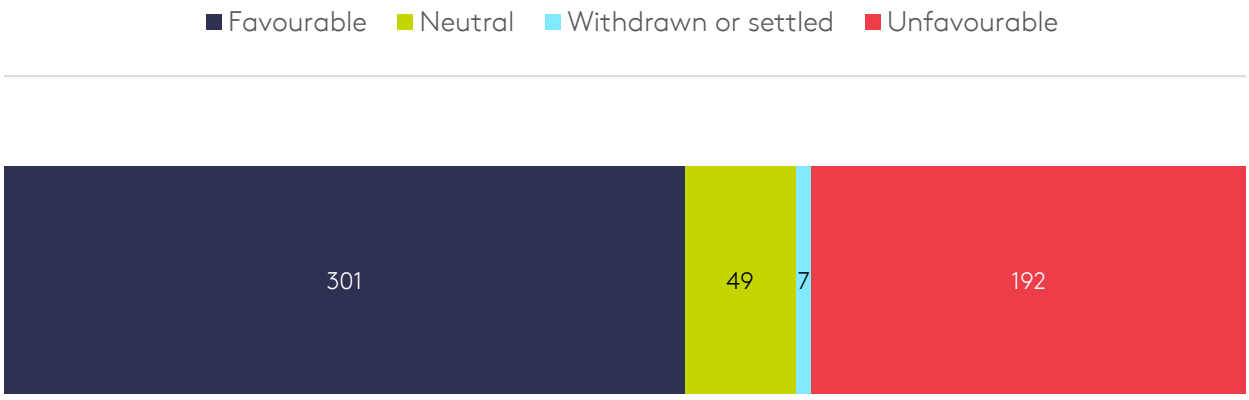
Peel et al. (2022) undertook a review of 280 publications addressing the impacts of climate change litigation: i.e. publications that examine key aspects relating to how climate change litigation achieves impact and in what circumstances. They find that there has been a significant focus in the impact literature on 'high-profile cases' – cases decided by the highest court in a judicial system, cases that received high media attention, or cases that are novel in some way, e.g. employing a novel legal theory or interpretation. However, discussion of impacts is typically brief and speculative, written close in time to case developments and therefore limited in assessment of longer-term impacts. Overall, Peel et al. conclude that care should be taken in extrapolating 'lessons' about the strategic value of different litigation targets, jurisdictions or forums, or legal avenues pursued in claims. There remains a research gap in "systemic, empirical, and long-term" studies on the impacts of climate litigation (ibid: 16).

Bearing these limitations in mind, below we first provide a brief overview of outcomes of cases filed outside the US and the potential impacts of climate litigation (see also Appendix: Methodological notes). We look at the direct judicial outcomes of cases where an interim or final decision has been issued, building on our analysis from previous years. We then provide comments on the ways in which litigation may be influencing the behaviour of different actors, particularly corporate and financial market actors.

Judicial outcomes: innovation and complexity

Around 55% of the 549 cases in which either an interim or final decision has so far been rendered have had outcomes that are favourable to climate action (see Figure 1.6). Cases are classified as neutral when it is not possible to assess whether the judgment would have a positive or negative impact on climate action. Cases may also be assessed as positive even where not all grounds argued by the claimants were successful (see further the Appendix: Methodological notes).

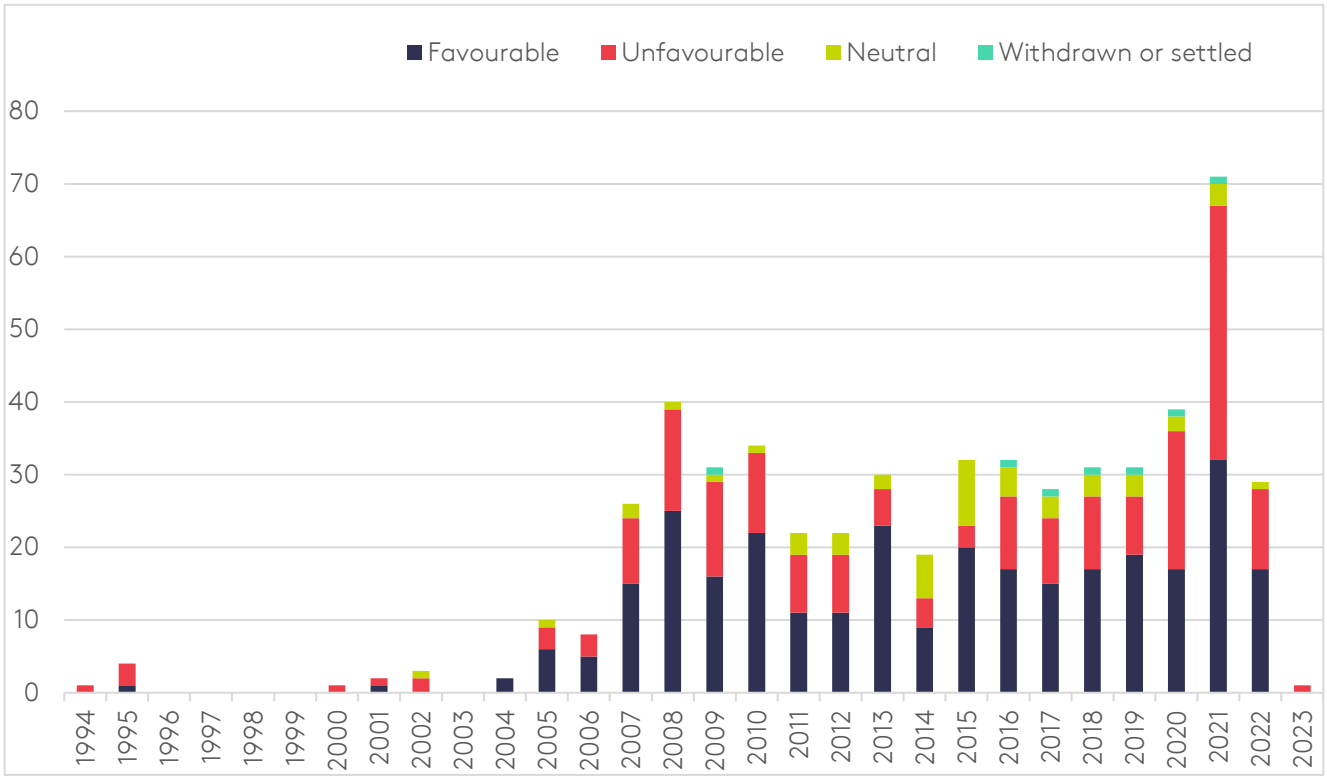
Figure 1.6. Outcomes in global climate litigation



Source: Authors using Sabin Center's databases

However, this figure only tells part of the story. If we compare the 'success' of cases by year of filing, we see a more complex picture emerging (see Figure 1.7). Although there was a spike in the number of unsuccessful cases when a group of 13 similar cases filed in Germany in 2021 were all dismissed simultaneously, cases filed more recently have seen a more even distribution of favourable and unfavourable outcomes. It is of course also worth noting that many cases filed in recent years, and therefore the majority of those using many of the more innovative strategies described above, have yet to conclude: 161 of the 301 cases filed outside the US since the start of 2020 are still awaiting decisions.

Figure 1.7. Outcomes in Global climate cases over time



Source: Authors using Sabin Center's databases

Favourable outcomes do not always lead to clear impacts

In some cases, the climate action resulting from a 'favourable outcome' may be relatively easy to identify, but in others it is more difficult. Two cases show this contrast. The first is the Australian case of *Bushfire Survivors v. EPA*, which resulted in the creation of the Climate Change Policy and Plan for 2023–2026, and the beginning of a process that "will eventually translate into hard emissions limits on licences" (Collins, 2023). The second is the UK case of *Friends of the Earth v. Secretary of State for BEIS (Net Zero Strategy)*, decided in July 2022. The judgment was hailed a victory by campaign groups after the court ordered the government to revise its Net Zero Strategy and make it more transparent, especially when the government did not appeal the ruling (Higham and Setzer, 2022). However, when the government subsequently issued a revised strategy – in part in response to the court order and in part following a change in leadership – the result was a document that "scales back" commitments in some areas in comparison to the previous iteration (Dehon and Parekh 2023). Further litigation on the same question is a possibility, which could result in a change in course, but this is far from certain.

The impacts of the French Conseil d'Etat's judgment in the case of *Grande-Synthe v. France* are similarly hard to assess. In that case, the Conseil d'Etat ordered the French government to increase new measures to meet legislated 2030 greenhouse gas emission reduction targets. According to media reports, earlier this year the Court reviewed the government's progress and found it inadequate. The court then ordered new measures to reduce emissions within a year to compensate for a lack of progress, despite the court's acknowledgement that the government had made good-faith efforts to comply with its order (AFP, 2023).

A further complication is introduced when we try to understand the impacts in terms of greenhouse gas emission reductions linked to climate action or policy changes arising from climate litigation. Mayer (2022) goes as far as to question whether litigation could lead to new legislation which in turn 'displaces' emissions to new jurisdictions (so-called carbon leakage). However, recent empirical analysis finds no evidence of this phenomenon occurring as a result of

the stock of existing legislation (Eskander and Fankhauser, 2023), and there is no reason to believe legislation arising as a result of litigation would be any different.

Indirect impacts of litigation

If we look beyond the outcomes, we see an even more complex picture emerging. Below we discuss three areas where there appears to be growing evidence of the 'indirect' impacts of the types of litigation discussed above.

Amplifying 'climate risk'

Finance is one sector that is starting to take considerable interest in the issue of climate change litigation. In last year's report we noted the increasing volume of evidence to show that actors external to the core community of climate litigation practitioners were starting to take the phenomenon of climate change litigation seriously. We suggested this evidence could be used as a proxy to understand where litigation risk might be influencing decision-making, citing references to climate litigation in the Bank of England's climate stress testing exercise and a paper on climate litigation produced by the Network for Greening the Financial System (Higham and Setzer, 2022).

New stakeholders have been engaging with climate litigation in the last 12 months, including the Climate Financial Risk Forum (CFRF), a joint initiative by the Prudential Regulatory Authority (PRA) and the Financial Conduct Authority (FCA) in the UK that brings together senior financial sector representatives to share their experiences in managing climate-related risks and opportunities. The CFRF published a report in December 2022 to guide the thinking of insurers and related stakeholders in their approach to managing and mitigating climate litigation risk. The report notes "climate litigation risk is emerging as a significant challenge for the insurance industry and one which will crystallise far ahead of the impact of climate change on physical insurance perils". Additionally, the World Economic Forum held a panel on the topic for the first time earlier this year, in Davos.

Increasingly, international and regional bodies are also taking climate change litigation into account in their work. In 2021, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers commission a study on "national climate litigation cases" as part of its broader work to address "issues of civil and criminal liability in the context of climate change". This recommendation was subsequently taken up by the Committee of Ministers, which invited the European Committee on Legal Co-operation to consider

Box 1.3. Climate change and the legal profession: has climate-conscious lawyering entered the mainstream?

The rise in climate change litigation and changing perceptions of the risk such litigation carries, along with the increasingly urgent warnings from the scientific community on the need for all sectors of society to engage in the climate challenge, have led to increasing interest in the topic of climate change from the broader legal community. All but one of the world's top 10 law firms by revenue have recently published reports or commentaries on climate litigation, while bar associations and other membership organisations, including judges' associations, are becoming increasingly engaged (see Dernback et al., 2023; ELF and CCBE, 2023; EUFJE, 2022).

Law societies, professional bodies that represent lawyers qualified in a certain jurisdiction, are also starting to issue guidance on the impact of climate change on the profession. For example, the Law Society of England and Wales published guidance in April 2023 noting that for lawyers, the most significant greenhouse gas emissions are likely to be emissions associated with the matters upon which they advise. Much of the conversation among legal practitioners is framed around the concept of 'climate-conscious lawyering', an idea popularised by Brian Preston, Chief Justice of the Land and Environment Court of New South Wales (Preston, 2021), after it was first developed by Bouwer (2015). The concept requires lawyers to incorporate an active awareness of the reality of climate change and how it interacts with legal problems into their daily practice.

conducting such a study about climate litigation. At the same time, the UN Special Rapporteur on Climate Change has recently launched a call for submissions regarding "Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice". Developments are also attracting attention among the broader legal profession (see Box 1.3 above).

Impacts on firm value

As the issue of climate change litigation becomes increasingly visible for investors, an important question is whether markets are systematically taking climate litigation risks into account. Evidence quantifying their impacts is still limited. A recent interdisciplinary study has assessed whether climate litigation systematically causes defendant corporations' stock prices to fall and to what degree (Sato et al., 2023). It finds small but statistically significant changes in valuation result from climate litigation. A filing or an unfavourable court decision in a climate case reduces firm value by -0.41% on average, relative to expected values. The largest stock market responses are found for cases filed against Carbon Majors, reducing firm value by -0.57% following case filings and by -1.50% following unfavourable judgments. Larger market reactions are observed in 'novel' cases involving a new form of legal argument or in a new jurisdiction. The study concludes that lenders, financial regulators, and governments should consider climate litigation risk as a material financial risk, since the observed decline in firm value suggests that the market is already responding to litigation risk.

Shaping narratives

Much of the literature on the impacts of climate litigation has focused on the way that the existence of a climate case may influence decision-making processes, even if the case itself is unsuccessful in the face of procedural or doctrinal hurdles. Setzer and Bouwer (2020) described this as cases "shaping narratives". The past 12 months have seen new developments that may be examples of this phenomenon in operation. In 2021, ClientEarth took the Belgian National Bank to court over its implementation of a European Central Bank corporate bond purchase scheme (*ClientEarth v. Belgian National Bank*). The scheme formed part of the ECB's monetary policy and was originally developed only with regard to the Bank's financial stability mandate. This meant that many of the bonds purchased were effectively supporting the high emitting activities of some of Europe's most polluting companies. ClientEarth argued that this was inconsistent with Europe's climate objectives and with the Paris Agreement. The case was initially dismissed on procedural grounds. It was then appealed by ClientEarth but in November 2022 the NGO issued a press release noting it had withdrawn the case, after the ECB updated its policy to ensure that new bond purchases were "tilted" towards climate-friendly activities, in a bid to align with the Paris Agreement. While the exact relationship between the case and the ECB's decision remains unclear, it provides another example of the way in which even unsuccessful cases can potentially have an influence on climate governance.

Part II: Litigation trends in focus

We have sought above to provide an overview of the landscape of climate change litigation cases identified to date. In this part of the report we take a more detailed look at the interrelationships between some of the strategies identified. This is necessary because a strict focus on dividing cases by actor type, geographical region or strategy may obscure certain commonalities and disparities between cases: for example, in terms of the legal grounds on which cases are brought or the types of decision-making that cases seek to influence.

Later, we move on to a discussion of possible future trends in litigation, focusing on the climate policy areas we think are most likely to be subject to legal controversy in the coming months and years.

Developments in litigation against governments: the roles of human rights and climate legislation

Significant developments in government framework cases have taken place over the past 12 months and these cases continue to grow in number.

Such cases are sometimes referred to as systemic climate litigation (Kelleher, 2022) or 'Urgenda-style cases' (the latter after the landmark case *Urgenda Foundation v. State of the Netherlands*) (Maxwell et al., 2022). They typically challenge the ambition or implementation of a government's economy-wide climate policy response. This group of cases is perhaps the most well-known subset of climate litigation cases, with litigants in different jurisdictions taking inspiration from noticeable successes elsewhere.

Government framework cases have been filed in 34 out of the 51 countries where climate cases have been recorded, and also before international and regional courts and tribunals. In 2022, government framework cases were filed for the first time in Russia, Indonesia, Sweden and Finland. In 2023, new framework cases were also filed against Austria and Romania, and a new case was filed against the Netherlands by citizens from the overseas territory of Bonaire. Around 70% of the government framework cases documented to date have included constitutional or human rights arguments (Higham et al., 2022). Typically, these cases include arguments about whether the ambition of national climate action is sufficient to protect the human rights of citizens, and many refer to international or regional human rights treaties.

Below, we discuss recent developments in cases before international and regional human rights bodies, before looking at the role that domestic climate legislation or constitutional protections are playing in national cases. Finally, we look beyond government framework cases, examining how some of the human rights arguments first developed in these cases are now being employed elsewhere.

Leveraging human rights treaties

One major development in the international jurisprudence in this area from the last 12 months that may influence subsequent cases is the decision of the UN Human Rights Committee in the case of *Daniel Billy and others v. Australia*. The case was brought by a group of Torres Strait Islanders alleging that the Australian government's failure to address climate change violated their human rights under the International Covenant on Civil and Political Rights. In particular, the claimants alleged violations of Article 27 (the right to culture), Article 17 (the right to be free from arbitrary interference with privacy, family and home), and Article 6 (the right to life). The majority decision of the Committee upheld the complaint, confirming that the Australian government's inaction violated the Islanders' rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home. However, the decision focused on the inadequacy of adaptation measures to protect the islands and the Committee did not accept

arguments that the violations also stemmed from Australia's failure to adopt more ambitious actions with regard to greenhouse gas emission reductions (mitigation).

The question of states' obligation to protect human rights through the adoption of ambitious mitigation targets remains a live issue, one that the European Court of Human Rights is expected to rule on in coming months (see Box 2.1).

Box 2.1. Climate litigation before the European Court of Human Rights: shaping the next generation of European climate cases?

In March 2023, there was a further major event in the development of international human rights law in the context of climate cases. The Grand Chamber of the European Court of Human Rights (EctHR) held hearings in two of the climate cases currently pending before it, *KlimaSeniorinnen v. Switzerland* and *Careme v. France*. The third case communicated to the Grand Chamber, *Duarte Agostinho et al. v. Portugal and 32 Others*, will be heard on 27 September 2023. This is particularly significant since more than half of all government framework cases filed to date have been filed in European countries (Setzer et al., 2022).

Despite its silence on the matter to date, the Strasbourg system holds promise for prospective climate litigants in light of the Court's existing case law on environmental issues – the Court has decided around 300 environmental cases (ECHR, 2022). Although the right to a healthy environment is not explicitly protected under the Convention, the Court has held that government failures to protect citizens from environmental harm caused by pollution may amount to a violation of protected rights, particularly the rights to life and private and family life (Articles 2 and 8 of the European Convention on Human Rights).

Speculation about the Court's response to this caseload is growing. If the applicants are successful, the ruling could become a landmark judgment, setting the course for future case law regarding human rights obligations of states in the context of climate change in Europe and beyond (Heri, 2022). The Court's decision may go beyond determining a human rights violation: it may also result in an order for governments to adopt legislative and administrative measures to prevent a global temperature increase of more than 1.5°C, including concrete emission reduction targets (see Keller et al., 2023 on potential remedies).

However, the applicants face several hurdles, not least the need to establish the right of standing, which involves satisfying stringent requirements to demonstrate 'victim status'. From the questions asked by the judges in the proceedings in the *Careme* case, this will be a critical issue in the case's ultimate determination.

Even if the applicants are not successful – that is, even if the Court decides that there was no violation by the States, or that the applicants lack standing – it is likely that further government framework cases will continue to be brought, in Europe and beyond.

Importance of domestic legal protections

Domestic legal protections have also provided the basis for successful framework cases. Two types of challenge stand out in particular: challenges grounded in domestic constitutional protections of the right to a healthy environment; [11] and challenges under domestic climate framework laws.

According to a 2019 report by the UN Special Rapporteur on Human Rights and the Environment, more than 80% of UN Member States now have some form of legal protection for the right to a healthy environment in their domestic law (UNHRC, 2020). This right has formed the basis for an

[11] Some climate cases have also relied on other constitutional rights, both successfully and unsuccessfully, but recent developments suggest that right-to-a-healthy-environment arguments may be gaining particular traction.

increasingly large number of cases, particularly in Latin America (de Vilchez and Savaresi, 2023). It has also been used effectively in domestic and regional courts in Africa (Bouwer, 2022; Loser, 2023). It is even a significant factor in new developments in the US: youth climate activists supported by Our Children's Trust have initiated some form of legal action in states across the country, although only two of these have yet passed initial procedural hurdles and been allowed to proceed to trial on the merits – *Held v. Montana* and *Navahine F. v. Hawai'I Department of Transportation*. Both Hawaii and Montana have the 'right to a healthy environment' enshrined in their constitutions (Gerrard, 2021).

At the same time, climate change framework laws continue to offer a statutory basis for new cases, at both the framework and the sectoral level. Building on past successes in framework cases in Ireland, France and Germany (see Higham and Setzer, 2021), a further German case is seeking to use the sectoral targets in Germany's climate framework law to argue that more urgent action is required in the transport sector after Germany's Council of Experts on Climate Change calculated that current measures are insufficient to meet sectoral targets (see *Deutsche Umwelthilfe v. Germany*). A similar case grounded in statutory obligations has also been filed in Finland, with the case placing a core emphasis on the government's failure to protect carbon sinks.

Youth plaintiffs are cheered on by supporters as they arrive for their second day of trial in the *Held v. Montana* case. Photo: Robin Loznak/Our Children's Trust.

Another example of the use of innovative human rights reasoning in a project-specific case can be seen in the March 2023 decision from the Hawaii Supreme Court in the case of *In re Hawai'i Elec. Light Co.*. The case involved an appeal from a company involved in the provision of biomass energy, Hu Honua, over a decision by Hawaii's Public Utilities Commission to withhold its approval for a power purchasing agreement for energy provided by Hu Honua. The Utility Commission concluded that the project proponent's carbon offsetting plans were highly speculative, and that even in the best-case scenario the date for the project to become carbon-neutral was 2047, two years after the state of Hawaii is required to achieve climate neutrality under state law. The company's appeal was dismissed by the court. In his concurring opinion in the case, Justice Michael Wilson argued that this decision was justified to protect not only the right to a healthy environment but also a related "right to a life-sustaining climate system". This right was acknowledged by a court in Oregon in the landmark framework case of *Juliana et al. v. US* (which was dismissed on appeal on procedural grounds but is now set to go to trial after the Federal District Court accepted an amended version of the complaint) and has also been claimed in the pending case of *IEA v. Brazil* (Setzer and Carvalho, 2021). However, the judicial recognition of a right to a stable climate remains relatively under-explored (Jegede et al., 2018), with most human rights cases focusing on the impacts of climate change on the right to a healthy environment or on other, well-established human rights.

Frontiers of corporate liability litigation: past and future responsibility, and loss and damage

Efforts to hold companies – particularly fossil fuel companies – directly responsible for the climate harm caused to communities and individuals by their products were among some of the earliest climate litigation cases to capture legal (and wider) imaginations. Following the failure of several early cases filed in the US in the mid-2000s, there was a significant lull in the filing of new cases concerned with direct corporate liability for climate harm for almost a decade. That changed with the publication of new research in 2014 that directly attributed more than two-thirds of global greenhouse gas emissions to the operations of around 100 companies – the Carbon Majors (ibid; see also Heede, 2014). That study provided the critical evidence needed for a 'second wave' of climate cases to be mounted against corporations, with the Carbon Majors as the primary targets (Ganguly et al., 2018). Fifty-nine cases have now been filed against these companies globally, 20 of them by cities and states in the US (see further Box 2.2).

Within this 'second wave' of corporate liability cases there is considerable variation in terms of the relief sought (Setzer, 2022). 'Retrospective' polluter-pays cases, such as *Lliluya v. RWE*, focus on the causal connection between a company's past contribution to climate change, and seek

Box 2.2. US cities and states cases against the Carbon Majors now set to proceed in state courts

One of the major issues facing cities and states that have attempted to sue the Carbon Majors have been the defendants' efforts to 'remove' the cases from the state courts where they have been filed to the federal courts. This procedural dispute has taken more than five years to resolve. However, it appears to have finally reached a conclusion: by March 2023, all six federal appellate courts tasked with determining whether the cases should be heard in state courts given the alleged breaches of state law had concluded that they should (Anderson and Sutherland, 2023). Attention then turned to a final appeal by the defendants to the US Supreme Court. The Court requested a brief by the US Solicitor General, who speaks for the federal government on matters of Supreme Court litigation, and the Solicitor General concurred with the federal courts that the cases should proceed in state courts. In April, the Supreme Court declined to take the case (denied certiorari) (see *City of Hoboken v. Exxon Mobil Corp.*). This means that these cases are now set to proceed to trial in state courts, although further procedural delays are still possible.

financial damages based on that past or historic responsibility. 'Prospective' corporate framework cases, such as *Milieudefensie v. Shell*, have focused on what companies should do now and in the future based on the global consensus around the need to rapidly reduce emissions. Typically, this second group of cases seeks court orders requiring companies to align their current and future activities with the goals of the Paris Agreement and to comply with their human rights obligations. 'Retrospective' cases generally present more challenging issues of causation, with applicants needing to demonstrate that past actions of the companies significantly contributed to harm or to the risk of harm. However, attribution science continues to advance and could assist plaintiffs in meeting the legal requirements for establishing causation, thereby becoming a critical factor in the success of litigation concerning adaptation and losses (Otto et al., 2022; Wentz et al., 2023).

Recent years have seen several important developments in this 'second wave' of litigation against companies. Below we consider four of these.

Merging of parallel trends

In *Asmania et al. v. Holcim*, a lawsuit filed by a group of Indonesian islanders before a court in Switzerland in July, we see both retrospective and prospective arguments being used together. The applicants argue that building materials company Holcim (one of the Carbon Majors) should be held responsible for its contribution to climate change. The precise legal arguments under Swiss law are not yet apparent from the documents available. However, the case is supported by a new study by Richard Heede, which attributes to Holcim 0.42% of all global industrial CO_2 emissions since the year 1750 (Heede, 2022). The claimants' requested relief includes both a court order requiring the company to rapidly reduce emissions to align with the goals of the Paris Agreement, and a request that the company pay a proportionate share of the costs of adapting the island to climate impacts. Although many elements of this case were foreshadowed in the ground-breaking Philippines Commission on Human Rights Inquiry into the Carbon Majors that concluded last year (see Part I), this is the first judicial case that brings together corporate human rights responsibilities to reduce emissions and arguments about paying for adaptation.

Another case which has merged approaches that were previously observed separately is the case of *Greenpeace Italy et al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.*. The lawsuit was filed by a group of 12 Italian citizens and two NGOs against the fossil fuel company ENI and ENI's two majority shareholders – the Italian Ministry of Economy and Finance and Italy's development bank. Building on *Milieudefensie et al. v. Shell*, it claims that ENI's decarbonisation strategy is not in line with the goals of the Paris Agreement or the best available climate science, posing environmental and health risks, and also violating human rights that are protected by the Italian Constitution and by international norms and agreements. The claimants are asking the Court of Rome to declare the company and the government institutions jointly liable for past and potential future damages, and to order they adopt an industrial strategy to reduce emissions associated with ENI's operations by 45% by 2030 against the company's 2020 baseline. No claim for the actual damage suffered by the 12 citizens or others is being sought, but the claimants are asking ENI to pay a monetary sum to be determined by the judge for any violation, non-compliance or delay in the execution of the obtaining order.

A new study by Grasso and Heede (2023) could provide further evidence for this type of case that combines retrospective and prospective arguments. Their study suggests that 21 of the world's leading fossil fuel companies are liable for annual climate reparations amounting to at least US$209 billion. The paper explores the anticipated economic toll of climate-related disasters such as droughts, wildfires, sea level rise and melting glaciers between 2025 and 2050.

Emphasis on current and past losses, i.e. loss and damage

The second important development is an emphasis not just on the costs of adapting to climate harm that is anticipated to occur in the future (as in the case of *Lliluya v. RWE*), but also on damage that has already occurred (Tigre and Werewinke-Singh, 2023). This can again be seen in

the *Asmania* case mentioned above: one aspect of the claim is focused on the damage that the plaintiffs have suffered to their homes and livelihoods as a result of climate-related flooding on the island of Pari in 2021. Similar arguments about loss and damage already sustained are also an increasingly prevalent part of the evidence in polluter-pays cases before US courts (Silverman-Roati and Tigre, 2022). For example, in the recent case *Municipalities of Puerto Rico v. Exxon Mobil Corp*, the plaintiffs make extensive arguments about the "compounded losses" sustained by Puerto Rican communities as a result of Hurricane María in 2017 and Hurricane Fiona in 2022.

A growing focus on disinformation

The third important development relates to a continuation of a trend from recent years that sees the use of evidence about climate misinformation or disinformation by companies featuring heavily in litigation against them. Again, the Puerto Rican case presents an interesting evolution of this phenomenon. The complaint alleges that the fossil fuel companies' long history of public deception about the harm caused by climate change and the benefits of fossil fuels delivered both directly and through others amounts to defrauding the public and consumers in an effort to earn profits, and as such constitutes a continuous pattern of 'racketeering'. Previous complaints have alleged consumer fraud and violations of state consumer protection laws (which has also led us to classify many such cases as 'climate-washing' – see below), but the Puerto Rican case is the first cities class action to rely on claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), building on a case filed by the Department of Justice against tobacco industry claimants in the late 1990s (Silverman-Roati and Tigre, 2022). Like the other cities and states cases, the complaint is likely to be subject to procedural battles about its admissibility. However, where other cities and states have fought to have their cases heard in state courts (see Box 2.2), this case is firmly based in federal law. This is another area of litigation where advancements in research might provide valuable evidence for new cases. For example, it was recently revealed in the journal *Science* that Exxon's public statements regarding climate science were in direct contradiction to their own scientific data (Supran et al., 2023).

Expansion beyond the Carbon Majors

The final important development is the continued expansion of 'prospective' corporate-framework-style cases beyond the original group of the Carbon Majors. The growing global consensus on the need for non-state actors and financial institutions to align with the goals of the Paris Agreement makes 'prospective' cases possible even when past contributions to harm have not been quantified. In Germany, for example, at least four cases have been filed against car manufacturers, arguing that the companies should be prohibited from carrying on production and making sales of internal combustion engine vehicles. The cases have been dismissed, although it is understood that they will be appealed. The case of *DUH v. Mercedes Benz* illustrates some of the challenges facing litigants in German courts: efforts to rely on the same constitutional rights protections as those successfully used in *Neubauer et al. v. Germany* failed on the basis that the constitutional obligations were addressed to the legislator, not to the company. Nonetheless, many other European countries permit some application of human rights to corporations (as in the Hague District Court decision in *Milieudefensie v. Shell*; also see Macchi and van Zeben, 2021). Moreover, we also see 'prospective' due diligence-based arguments continuing to expand, including to financial institutions (see discussion of a new case against BNP Paribas, below).

Managing climate risks: good investments in a warming world?

The cases discussed in the preceding section focus on the way in which corporate activity impacts the rights of those external to the firm/entity. The cases discussed below focus on how to interpret existing legal obligations under corporate and financial law aimed at protecting the firm/entity itself, or its direct stakeholders such as shareholders, investors and beneficiaries (in the case of pension funds). Although the litigants in both groups of cases may share the same goals and adopt similar tactics, it is nonetheless important to understand that we are looking at two groups of cases that are conceptually very distinct. Both groups of cases may have positive

impacts on reducing some high emitting activities, but the degree to which the cases discussed in this section can do so is effectively bound by the requirements of profitability imposed on corporate and financial decision-makers (see Bakan, 2021).

Early cases filed by shareholders focused on *financial impacts already sustained*

Early cases filed by shareholders against corporate executives included several cases filed on behalf of workers in the coal industry whose pension funds where heavily invested in the companies for which they worked and as a result lost significant value. The claimants argue that the managers of the fund should have foreseen the loss, given the changing regulatory context for the coal industry in the US (see *Lynn v. Peabody Energy*; *Roe v. Arch Coal*). These cases were ground-breaking in that they focused attention on the risk of 'stranded assets' and the need for duty-bearing decision-makers to anticipate the risk such assets posed to the capital they were required to safeguard. A further case was *Ramirez v. Exxon Mobil*, a securities class action filed in 2016, in which a shareholder argued that Exxon's failure to disclose information about its internal assessment of transition risk amounted to securities fraud, resulting in a drop in value for shares when the misinformation was subsequently corrected. Additional derivative actions were then filed, alleging that Exxon directors violated their fiduciary duties by allowing false and misleading disclosure of climate risks. These cases have now been consolidated into a single case (see *In re Exxon Mobil Derivative Litigation*). However, the issues raised in these cases were to some extent simpler than those in more recent cases: the actions under dispute in those cases had **already resulted in a demonstrable loss of value** as a result of the alleged mismanagement.

More recent cases have focused on predicted *future impacts*

A focus on financial impacts already sustained is not necessarily true for more recent cases such as *ClientEarth v. Shell Board of Directors*. ClientEarth filed the case in its capacity as a Shell shareholder, arguing that the continued policy of investment in new fossil fuel projects is a breach of the directors' duties to promote the best interests of the company under the UK Companies Act 2006. In the past year, oil companies such as Shell have reported record profits. Nonetheless, the applicants argue that if the company's executives do not rapidly adapt their business model, ceasing investments in new oil and gas in particular, these short-term profits will eventually be replaced by long-term losses.

The case was initially rejected by the UK High Court, following a review of written submissions. The Court determined that the actions that ClientEarth asserted were necessary to fulfil the directors' obligations under the Company's Act, described in the judgment as 'incidental duties', went far beyond what was required by law. To be successful, ClientEarth would have needed to show that the "[d]irectors' current approach falls outside the range of reasonable responses to climate change risk and will cause harm to Shell's members". Since Shell has adopted a net zero strategy, and conducted an assessment of climate risks, the Court held that this threshold had not been met. When determining whether the case had been brought in the best interests of the company, the Court also took into consideration the fact that ClientEarth is an NGO, with a clear external agenda.

ClientEarth has now requested an oral hearing in the case. Even if the NGO is unsuccessful – as many corporate law scholars anticipate, given the high threshold for demonstrating a breach of directors duties (Gibbs-Kneller, 2022) – it is not inconceivable that a future case possibly in another jurisdiction could have a different outcome. For example, if a case were brought in a more amenable country, by a large asset owner such as a pension fund against a company that had no net zero strategy, or had failed to implement such a strategy, several of the obstacles identified by the Court would no longer be relevant. As countries start to grapple with the need to align corporate activity with sustainability objectives more broadly, the landscape for such cases may change. For example, Fiji's Climate Change Act specifies that as part of the duty to act with reasonable care and diligence under the Companies Act, directors must consider and evaluate climate change risks and opportunities to the extent that they are foreseeable and intersect with the interests of the company (see further Chan and Higham, 2023). The European Parliament has

also recently approved a draft of a new 'Corporate Sustainability Due Diligence Directive', which imposes responsibility for climate transition planning on company management.

Regardless of the ultimate outcome, this case spotlights the question of appropriate time horizons for decision-makers faced with the urgent warnings of the scientific community. In so doing, it highlights two major questions: firstly, the critical role that a current generation of decision-makers plays in determining our shared planetary future (hence the emphasis on 'personal responsibility' in our classification of the case) and secondly, the question of how such decision-makers must change embedded ways of thinking, i.e. 'adapt' to the new reality of climate change before the impacts of that reality start to be felt (hence our classification of such cases as 'failure to adapt' cases and our belief in their close connection to the more traditional physical 'failure to adapt' cases described by others [Markell and Ruhl, 2012; UNEP, forthcoming]). To date, the *Shell Board of Directors* case remains the only example of an action that goes so far in arguing that prudent management of a company requires a halt to all new fossil fuel investments – although it builds on the earlier case of *ClientEarth v. Enea*, which applied a similar argument to investments in a specific fossil fuel project in Poland, and on some of the arguments raised in the case of *McVeigh v. REST* (concerning the obligations of pension fund managers [see Setzer and Higham, 2021]).

Litigation can be used to clarify *responsibilities*

The difficult balance facing decision-makers between assuming a classic understanding of good financial management, which gives paramount or near paramount importance to the need to generate a return on investment, and a more novel understanding of good investment practices in a warming world can also be seen in the case of *Butler-Sloss v. Charities Commission*, decided by the UK High Court in 2022. The case was filed by the trustees of two major charitable funds. The trustees sought confirmation that aligning their investment decisions with environmental goals such as the Paris Agreement, and therefore with the missions of their respective charities, even if it meant accepting a lower rate of return on the charities' investments, was not a breach of their fiduciary duties. The Court confirmed that it was not, perhaps setting a precedent that may be relevant in future more contentious disputes.

Active engagement with uncertainty

Among the issues facing both claimants and defendants in all these cases is the fundamental difficulty of adapting modern risk management systems, which tend to rely on quantitative models, to the complex dynamic processes of climate change (see Donald, 2023). Arguably, however, the inherent uncertainty in this area only strengthens the need for senior figures within corporations and financial institutions, whether C-suite, non-executive directors, or fiduciaries, to adopt explicit, well-reasoned positions, providing clarity about where uncertainties remain and on how such uncertainties have been accounted for in decision-making. By accepting responsibility and acting transparently, actors may have the best chances of convincing both potential litigants and courts that they have acted within the bounds of a reasonable margin of appreciation in the discharge of their duties.

Climate-washing and green claims

Cases concerned with mis- and disinformation on climate change are far from new, but the last few years have seen an explosion of 'climate-washing' cases filed before both courts and administrative bodies such as consumer protection agencies (see Figure 2.1). We use the term 'climate-washing' (rather than 'greenwashing') to describe these cases as we include cases concerned with specific types of misinformation associated with climate change, building on work by Benjamin et al. (2022). Our definition includes cases concerned with:

- **Corporate climate commitments**. One of the most significant groups of climate-washing cases to emerge in recent years have been cases challenging the truthfulness of corporate climate commitments, particularly where these are not backed up by adequate plans and policies. In the past 12 months, such cases have continued to be filed, including a complaint

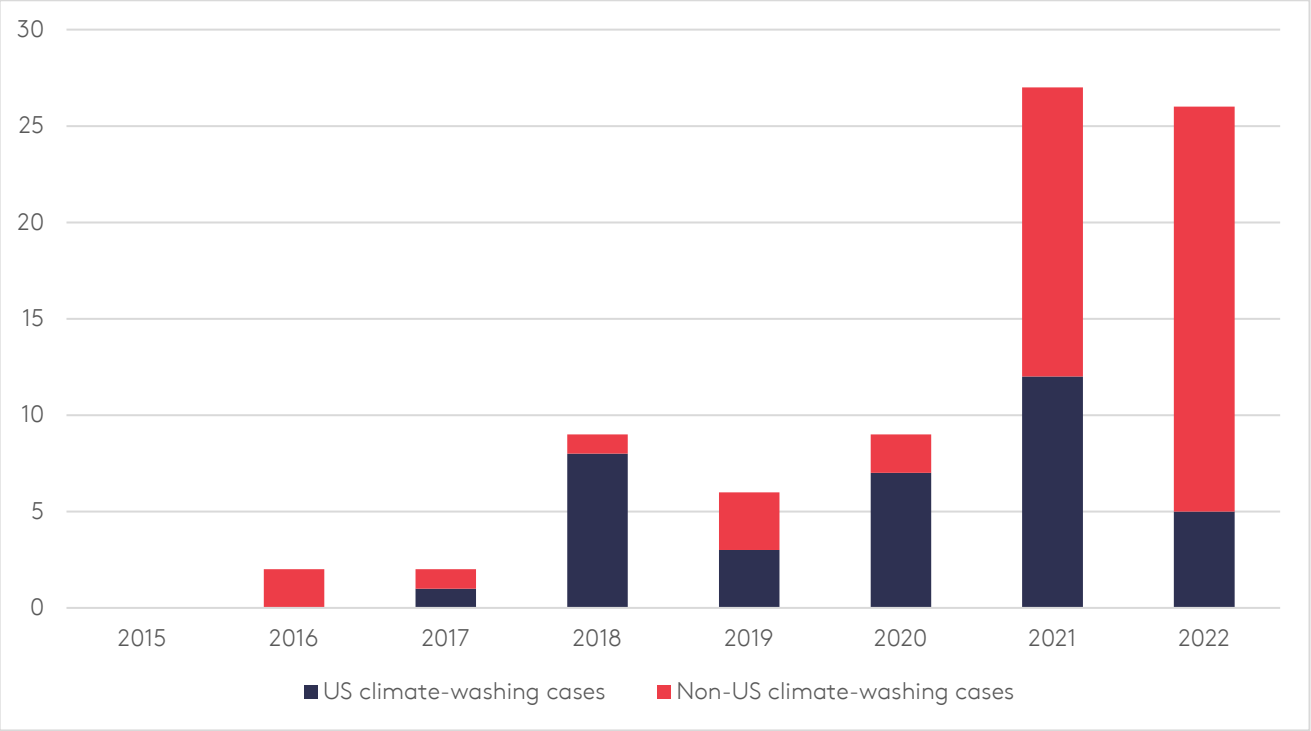
against Australian mining giant Glencore lodged by the Plains Clan of the Wonnarua People and Lock the Gate Alliance with the Australian Competition and Consumer Commission and Australian Securities and Investments Commission. The complaint argues that Glencore's continued expansion of coal production is inconsistent with its public commitments to net zero.

- **Product attributes**. The largest group of climate-washing cases identified so far involves challenges to statements about the environmental impact of particular product lines. In the last 12 months, numerous cases have been identified – many of them in Germany – that challenge claims that products ranging from dustbin liners to bananas are 'climate-neutral', 'carbon-neutral' or 'CO_2-neutral'. Outside of the courts, the Environmental Defenders Office (on behalf of Greenpeace Australia Pacific) asked the Australian Competition and Consumer Commission to investigate the environmental performance of Toyota's vehicles and whether the company's claims that its operations will be net zero by 2050 are misleading or deceptive.
- **Overstating investments in or support for climate action**. Previous work has identified cases challenging advertising campaigns that overstate a company's investment in renewables or similar as a major cause for concern (see *ClientEarth v. BP*). The past year has seen an evolution in cases of this type, with a group of institutional investors filing a case against Volkswagen for the inconsistency between its climate pledges on the one hand and its anti-climate corporate lobbying on the other (see *Danish AkademikerPension and the Church of England Pensions Board v. Volkswagen*). Another example is the complaint filed by Global Witness against Shell before the US Securities and Exchange Commission (SEC), the US agency charged with protecting investors. *Global Witness v. Shell* alleges that Shell misled investors by overstating its investments in renewable energy – 1.5% was spent on solar and wind power, instead of 12% as claimed by the company.
- **Obscuring climate risks**. This group includes cases alleging failures to disclose relevant climate risks to investors and customers, and several requests for disclosure by banks and financial institutions (see *Abrahams v. Commonwealth Bank of Australia*).

A further interesting development from the last 12 months has been the filing of a complaint alleging "state sponsored greenwashing" in Australia, and several arguably similar challenges to the EU's Green Taxonomy. The first complaint, which was filed to the Australian Competition and Consumer Commission, concerns the 'climate active' trademark, a government-backed certification scheme that certifies action taken by businesses to reduce emissions. The complainant, the Australia Institute, argues that the scheme is misleading and applied far too broadly. The second complaint, filed by a group of European NGOs, is challenging the inclusion of natural gas as a low-carbon transition fuel under the EU's new Green Taxonomy, which is designed to help investors make sustainable investments. Further cases challenging the taxonomy on similar grounds filed by Austria and a member of the European Parliament are also pending (see also Higham et al., 2023).

While these are not the first 'climate-washing' complaints to involve government actors – previously, a case was filed against Ontario for a misleading advertising campaign against a federal carbon pricing scheme, and a case was filed against France regarding Total's sponsorship of the Louvre museum – they may signal a new departure as they directly call into question government efforts to address the proliferation of 'sustainability' information and climate claims by companies (see further Box 2.3).

Figure 2.1. Climate-washing cases against corporate actors in the US and outside the US, 2015–2022



Source: Authors using Sabin Center databases

The growth in climate-washing cases reflects broader concerns with corporate accountability for climate pledges along with ongoing debates about the role of companies in climate decision-making. Among the ongoing policy processes that seek to address this issue, the recent report of the UN Secretary General's High Level Expert Group on Non-State Actor Net Zero Commitments stands out as one that may be particularly relevant for future litigation, as it provides a number of recommendations regarding such commitments that could be used to inform standards of expected conduct.

Another potentially important signal could come from the update to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD, 2023), which provides greater clarity on the importance of information accuracy and transparency. Even before this update, climate-washing complaints submitted to OECD national contact points (NCPs) had been somewhat successful in either inducing change in corporate practices or securing favourable decisions from NCPs. But it is possible that the update will help to enhance complainants' ability to contest suspected greenwashing activities by providing NCPs with a more authoritative mandate to investigate such conduct (Aristova et al., 2023).

Several other laws and standards could give rise to litigation. For example, in the EU context, in March 2023 the Commission adopted a proposal for a Directive on Green Claims; in the UK, the Competition and Markets Authority published a new code, in effect from 20 September 2021, to ensure that environmental claims made are properly substantiated and do not mislead consumers; and the US Securities and Exchange Commission launched a Climate and ESG Task Force to develop initiatives to proactively identify ESG-related misconduct consistent with increased investor reliance on climate and ESG-related disclosure and investment. Consistent initiatives taken by legislators and regulators give a more general 'steer' to courts that this kind of behaviour is unacceptable, but more may be required (see Box 2.3).

Box 2.3. Enforcing integrity in climate solutions

Although the rise in climate-washing (and the litigation aimed at exposing it) has prompted a range of responses from legislators and regulators, ongoing research by the Grantham Research Institute and law firm DLA Piper suggests that further action is needed to prevent dishonest or deceptive practices from derailing climate solutions. The project is identifying behaviours posing risks to climate solutions, running from outright breaches of criminal law, to breaches of existing regulatory law, civil law breaches or simply matters that are unethical or lacking in integrity. Examples of such behaviours include allegations of fraud and corruption related to projects implemented with climate funds, and fraud within the voluntary carbon markets. While many of these behaviours are penalised under existing legal frameworks, more targeted action might be required from enforcement authorities than has so far been seen to date.

Combined strategies targeting the full lifecycle of high-emitting activities

Litigants are combining different strategies to target the full lifecycle of high-emitting activities. We have observed this trend in combined strategies targeting fossil fuel supply-side activities and agricultural commodities that contribute to deforestation. These orchestrated efforts result in several cases brought against public and private financial institutions, companies and permitting authorities in the licensing, financing, production, transportation and commercialisation of fossil fuels and agricultural commodities.

The full lifecycle of fossil fuels

Legal interventions targeting fossil fuel supply traditionally consist of challenges to government approvals of individual fossil fuel projects or the granting of licences for fossil fuel exploration ('integrating climate consideration' cases). Litigants in such cases frequently argue that climate change impacts were insufficiently considered in the environmental impact assessment process. In recent years there has been a focus on failures to assess emissions produced when the fossil fuel is used (Scope 3), rather than the emissions associated with its production (Scope 1 and 2). This strategy remains popular, with challenges in the last year mounted against many major projects, including a challenge to the Bay du Nord development in Newfoundland, Canada, an area with expected reserves of 300 million barrels of oil (*Sierra Club Canada Foundation et al. v. Minister of Environment and Climate Change Canada et al.*), and a challenge to a new permit for a liquid natural gas pipeline in Germany (*Deutsche Umwelthilfe v. State Office for Mining, Energy and Geology*).

Alongside these ongoing challenges to project approvals, we also see new 'turning off the taps' cases focused on fossil fuel supply, such as a case filed in February 2023 against BNP Paribas in France, alleging that the bank has failed to comply with its obligations under France's 'duty of vigilance law' to assess, disclose and mitigate the social and environmental impacts of its investments (*Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v. BNP Paribas*). Three months after the filing, BNP Paribas announced it will reduce its financing of oil exploration and production by 80% by 2030 and phase out financing for the development of new oil and gas fields (BNP Paribas, 2023). However, following the announcement the plaintiffs noted that most of the bank's support for oil and gas is given through corporate loans and bond underwriting services, not the direct loans that BNP has addressed in its new policy (White and Bryan, 2023).

The last 12 months have also seen the continued rise of cases filed against public financial institutions and regulators over failures to ensure that decision-making is properly adapted to account for the risks associated with new oil and gas developments. In addition to the case against the Brazilian development bank discussed in Part I, there has been a case against the UK's Financial Conduct Authority alleging that the FCA failed in its duty when it approved the prospectus of an oil and gas company without requiring the company to disclose all relevant

climate risks (*ClientEarth v. Financial Conduct Authority – Ithaca Energy plc listing on London Stock Exchange*). Another UK case, filed by Friends of the Earth against UK Export Finance, was dismissed at the Court of Appeal. The case, which explicitly involves questions about what is required to align public financial flows with the goals of the low-carbon transition under Article 2.1l of the Paris Agreement, is now likely to be heard by the UK Supreme Court (*Friends of the Earth v. UK Export Finance*).

The use of multiple strategies targeting fossil fuel supply can also be seen in cases filed in the US in the past 12 months.[12] This includes cases filed by Earthjustice and Trustees for Alaska, challenging the Biden administration's controversial approval of the Willow oil drilling project in Alaska's Western Arctic, which is anticipated to add nearly 260 million tons of carbon dioxide to the atmosphere over the next 30 years.

The 'Deadly Air' case, in which the applicants challenged the failure of the South African government to protect people's constitutional rights to health and wellbeing from toxic levels of ambient air pollution caused by coal-fired power generation projects (see p.15). Photo: Daylin Paul.

[12] Note that US cases like Alaska Willow are not included in Table 1.1. However, the case is included here to illustrate the broader point.

Addressing the deforestation value chain

A similar trend is observed in the more recent group of cases that seek to reduce emissions from deforestation. Some of these cases highlight the importance of preserving biodiversity-rich, natural carbon sinks, such as forests, peatlands and wetlands, from the threats posed by current land use practices. This area is likely to be the subject of an increasing volume of litigation in coming years. Numerous climate cases have been filed in the past concerning the protection of the Amazon rainforest. These include cases filed in Peru, Brazil and Colombia; and the extraterritorial supply chain case filed in France against a major French supermarket chain for its role in selling products contributing to Amazonian deforestation (*Envol Vert v. Casino*).

The latest legal interventions seeking deforestation-free supply chains target the financing made to and the communications made by agriculture companies. 'Turning off the taps' cases include the lawsuit brought against BNP Paribas by Brazilian NGO Comissão Pastoral da Terra and French group Notre Affaire À Tous (mentioned above), for providing financial services to companies that allegedly contribute to the deforestation of the Amazon rainforest. A 'climate-washing' and fraud complaint was presented by the NGO Mighty Earth to the US Securities and Exchange Commission, calling for a full investigation into alleged misleading and fraudulent 'green bonds' issued by the Brazilian meat giant JBS. The complaint claims that JBS based the bond offerings on its commitment to achieve net zero emissions by 2040 – but that its emissions have in fact increased and the target excluded Scope 3 supply chain emissions that comprise 97% of its climate footprint.

Another interesting point is that until recently, cases using supply chain tracing had focused on meat-based products rather than plant-based products, as there are usually fewer processing steps in the supply chain of meat-based products before they reach the supermarket shelf, making attribution of environmental harm easier. However, this trend is also changing. A recent complaint submitted by ClientEarth to the National Contact Point of the OECD in the US alleges that the Brazilian soy giant Cargill is failing to carry out proper checks on the soy it buys, trades and ships to markets worldwide to ensure it is not causing harm to people or nature. *Humane Being v. United Kingdom*, a case filed before the European Court of Human Rights, deploys novel climate arguments that focus on the danger of agricultural methane emissions and highlights that soy feed consumption in UK factory farming is a key driver of deforestation in the Amazon basin (Setzer et al., 2022). The case was dismissed not on merit, but for failure of the plaintiffs to exhaust domestic remedies.

However, so far we observe few examples of 'integrating climate consideration' cases, where litigants challenge government approvals granted to farming or other activities leading to deforestation.

Future trends

Biodiversity–climate nexus and the importance of carbon sinks

Litigation seeking deforestation-free supply chains is likely to increase with legislative developments requiring corporate actors to carry out enhanced due diligence throughout their operations and value chains, as well as enhanced remote sensing and financial data. Some of this legislation includes requirements that are specifically applicable to forest-risk commodities (e.g. the EU's Deforestation Regulation).

This type of litigation is also likely to increase with the increasing willingness of courts to disregard separate legal personality of subsidiaries (Van Dam, 2021). Existing extraterritorial cases raise the question of how to accurately attribute the sources of harm to biodiversity. The cases point either to ownership structures (*Vedanta v. Lungowe; Okpabi and Oguru v. Shell; Mariana*) or supply chains (*Envol Vert et al. v. Casino; ClientEarth v. Cargill*; *BIRD v. Jaguar Land Rover*) for this purpose. Making this distinction between tracing via supply chains and tracing via ownership structure is crucial, as in practice each leads to very different legal questions and obstacles.

Still on the biodiversity and climate nexus, litigation challenging carbon sinks is another area where we might see an increase in litigation. Arguments about the protection of carbon sinks under domestic climate legislation have started to emerge as a theme in countries including Sweden, Germany and Finland over the past 12 months (Kulovesi et al., 2023).

Deforestation cases might also go beyond the climate–biodiversity nexus. A recent case brought by the last uncontacted indigenous tribe outside of the Amazon in Peru against Jaguar and BMW in Italy combined the protection of global climate, biodiversity and human rights. This type of litigation has the potential to emphasise the intention of protecting both nature and the people whose survival is dependent on and inevitable for the preservation of that nature, and could be understood as examples of 'biocultural heritage litigation' (Gilbert and Sena, 2018) or 'planetary litigation' (Kotzé, 2021).

Focus on the ocean

In addition to the focus on terrestrial carbon sinks described above, litigation may increasingly focus on the ocean, the world's largest carbon sink. Current estimates suggest that the ocean absorbs more than a quarter of human-caused greenhouse gas emissions (Friedlingstein et al., 2022), and about 90% of the excess heat caused by greenhouse gas emissions already in the atmosphere (NASA, n.d.).

To date, climate litigation involving the oceans has tended to focus on two types of argument (Keuschnigg and Higham, 2022). Firstly, litigants have used arguments grounded in national or international protections for ocean ecosystems and the communities that depend on them to challenge climate-damaging projects. A good example can be found in the above-mentioned case of the South African case of *Sustaining the Wild Coast and Others v. Minister of Mineral Resources and Energy and Others*, in which applicants sought to prevent an oil exploration seismic survey on the basis that it would negatively impact coastal ecosystems, the spiritual and economic relationship that communities had to those ecosystems, and climate change. Secondly, cases have emphasised the damage that changes to the ocean and its ecosystems caused by climate change are having on communities (see *Asmania et al. v. Holcim*).

Coming years could see a shift in emphasis. New cases could include legal questions about the duties of governments and corporations to protect the ocean from further impacts of climate change, and therefore protecting its vital carbon sink function. Such cases would build on both the petition for an advisory opinion from ITLOS and the carbon-sink-focused litigation noted above. Ocean acidification could potentially become another area addressed by litigation, for which mitigation measures would need to focus specifically on reducing CO_2 emissions, rather than all or other greenhouse gases (Abate et al., 2022) and/or on ocean acidity measured in terms of pH level (Roland Holst, 2022). Cases might also emerge around efforts to enhance the ocean's capacity to remove carbon through ocean-based carbon dioxide removal (CDR) techniques such as seaweed cultivation and enhancing ocean alkalinity (see also Silverman-Roati et al., 2021; Webb et al., 2021). While private companies dedicated to such technologies are starting to emerge, serious questions remain about the negative impacts of their deployment on marine biodiversity (Temple, 2022).

Extreme weather events – beyond 'climate' litigation

As the impacts of climate change manifest in increasingly frequent and severe extreme weather events, we are seeing growth in the number of claims arising in the wake of such events. While some cases may put climate change at the centre of the claims – the *Holcim* case noted above, and the anticipatory 'failure to adapt' case of *Conservation Law Foundation v. Exxon Mobil* are examples – others may not fit the usual profile of climate litigation cases. One example of the latter is the case of *Stephens Ranch v. Citi Energy*, which followed winter storms in Texas in February 2020. Stephens Ranch, an operator of wind turbines, was unable to provide power to Citigroup in accordance with a power supply contract, resulting in financial losses for Citigroup which was forced to purchase the power elsewhere at a higher price. Stephens Ranch argued that it should not be held liable for breach of contract on the basis of 'force majeure'. However, after

an initial decision from the judge, who found that the breach was related to Stephens Ranch's failure to prepare its wind turbines for severe wintery conditions despite repeated warnings to do so, Stephens Ranch settled the case (see also CCLI and CGI, 2022). Similarly, there has been a wave of further litigation in the wake of Winter Storm Uri in 2021, which although not directly focused on climate issues may have significant impacts on how the outcomes of climate-related disasters are understood (Barnes, 2023).

Short-lived climate pollutants

Research shows that decarbonising the energy system needs to be combined with a rapid cut in non-CO_2 'super climate pollutants' and protection of carbon sinks (IGSD, 2022). Super climate pollutants include longer-lived nitrous oxide and four short-lived climate pollutants (SLCPs): methane, black carbon soot, tropospheric ozone, and hydrofluorocarbons. As the science becomes clearer, different legal strategies may be used to challenge these pollutants. At the international level, the Montreal Protocol to protect the ozone layer, signed by nearly 200 countries in 1987, is considered the most successful environmental treaty (Sabel and Victor, 2022), and one that also had climate co-benefit: not only did it phase out 99% of all ozone-depleting substances, but also many of the chemicals banned under the Protocol are powerful greenhouse gases. A recent study found that the Protocol averted around 0.5°C of global warming and more than half a million square kilometres of Arctic summer sea ice loss by 2020 (England and Polvani, 2023). This precedent may inform future efforts.

Looking at litigation, investigations and lawsuits could be brought against entities involved in the illegal trade in hydrofluorocarbons. Lawsuits might also be filed against government agencies or businesses with regard to black carbon soot or tropospheric ozone. Nuisance cases could also be potentially filed against farms that emit methane and ammonia. These lawsuits can be based on existing tort or human rights laws, and regulations related to pollution and environmental protection, as well as on specific environmental legislation that seeks to hold polluters accountable for the damage they cause to the climate.

Inter-state litigation

Our analysis suggests that most climate cases before international courts and tribunals to date consist of cases filed before human rights bodies or of investor–state arbitrations under international investment agreements. While such disputes invoke international law, they are not typical international law disputes, as they are not concerned with the obligation that one state owes to another, but rather public and private law obligations that states owe to individuals or corporations. As momentum grows behind the three requests for advisory opinions from international and regional bodies, questions emerge on the possibility of inter-state cases with climate issues at their centre being filed before international and regional bodies. Such cases could involve significant disputes about ongoing fossil fuel production and use, as in the case of *Czech Republic v. Poland*, which saw the two countries engaged in a dispute over the extension of permits for one of the largest lignite mines in Europe. While that case involved questions of European law, other countries may seek to invoke wider international legal standards in the future.

Conclusion

Our analysis of trends in climate litigation over the past 12 months confirms that the field of climate change litigation has continued to diversify, with an increasing number of strategic cases brought against corporate actors and financial institutions. We also observe significant transnational exchange in this area of law, with both lawyers and judges looking beyond national borders for ideas.

Cases that have been many years in the making have seen major developments: the European Court of Human Rights hearing in the *KlimaSeniorinnen* case, for example, which took place seven years after the domestic case was originally filed, and the resolution of the procedural wrangling that has dogged the US cities and states cases since 2017. The effort to engage the ICJ in the question of climate obligations has also been under consideration for over a decade. The outcomes of these processes are likely to shape the future of the field, but as demonstrated by the diverse domestic laws relied on in the various cases discussed throughout this report, there is no shortage of new avenues for litigants to pursue, even in the event of an unfavourable outcome in any different line of cases.

Although we observe new cases filed employing all the strategies we identified in our typology of strategies, climate-washing litigation stands out as one area where there has been a particular surge in action. The growth in climate-washing cases could be a result of the relative ease with which such cases can be filed, and it aligns with broader concerns about the credibility and integrity of climate action, particularly given the rapid spread of climate commitments and green claims by non-state actors. Along with the emerging field of just transition litigation, and the rise of cases focused on implementation of domestic climate statutes, this suggests that in future we may continue to see many more cases focused on how 'climate solutions' are being put into practice.

Finally, numerous new developments suggest that climate litigation is having an impact both within and beyond the courtroom. We continue to see the overall body of direct outcomes in global climate cases tilted in favour of climate action (although only just), and also new stakeholders engaging with the phenomenon of litigation. While much more work is needed to trace the full impacts of litigation over time, it is clear that it remains an important force in global and domestic climate governance.

Appendix. Methodological notes

Data collection

The databases contain only cases in which an issue of climate change science, policy or law is a material issue of law or fact. Over time, as climate change has become increasingly well understood in both scientific and policy circles, more and more cases have raised these issues as central and explicit arguments and our methodology for assessing whether such an issue is present has been more strictly applied. During the course of the study period, cases have been removed from both the US and global databases, at the same time as more cases have been added. More detail can be found in the Methodology section of the CCLW website and on the About page of the Sabin Center's climate case charts.

Because of considerable differences between US and non-US litigation, comparisons between them are both challenging to conduct and – depending on the kind of comparison being made – of limited analytical use.

Overall case classification

When classifying cases for these reports we primarily base our findings on the case summaries. In cases where it is challenging to make a determination about a case based on the information available in the summaries we may sometimes also make reference to the full case documents in the databases and/or media reports. Some decisions about whether to classify a case as 'strategic' or the degree to which issues of climate change science, policy or law can be said to be a significant issue in the case are necessarily subjective. Case assessments are also often made on imperfect or incomplete information, particularly about the parties' intentions. For example, classifying a case as 'strategic', 'semi-strategic' or 'non-strategic' does not imply a judgment of one being better or more impactful than another. Cases brought to achieve a relief that will apply to an isolated situation (i.e. non-strategic) can be as important as cases that seek the realisation of broader changes in society (i.e. strategic litigation). Courts rarely have regard for the broader intentions of the parties when determining a case, meaning that cases brought with little or no strategic intent may nonetheless provide opportunities for courts to issue far-reaching judgments on novel legal issues.

Once a case has been classified as 'strategic' or 'semi-strategic', we then assess whether it is climate-aligned or non-climate-aligned, employing the definition from the Introduction. This means that we do not classify the 'climate alignment of all cases. The exception is for just transition cases, since this is such a novel area. In some instances, we classify a case as both a just transition case and a climate-aligned case, to reflect the fact that the applicants are seeking both more ambitious and more equitable climate action. One example is the case of *Greenpeace v. Ministry of Energy and Others (on the Energy Sector Program 2022)*, which challenges both the government of Mexico's alleged lack of ambition in its renewable energy purchasing and the fact that the government has not developed a strategy to ensure a just energy transition.

Classification of strategies

As noted in Part I, we have sought to understand and quantify the strategies used in strategic climate cases. Again, this review of cases has been based primarily on case summaries and if deemed necessary by reference to original case documents or accompanying materials where these are available. In some instances, the full case strategy may not be evident from the available materials and it is possible that some cases may employ additional strategies which we have not identified here. Similarly, we have confined our review to primary and secondary strategies, but determining which strategy takes precedence is a subjective question and our assessment may differ from the deeper understanding afforded to the parties by their access to more privileged information. Nonetheless, we feel that the classification of cases by strategy can offer a more detailed understanding of the body of climate litigation, particularly given that differences in legal cultures may require different litigants to employ a variety of legal grounds to achieve the same ends.

Classification of outcomes

When reviewing our classification of direct judicial outcomes, readers should note that we classify outcomes at several different stages within a given case. The first stage at which a case may be classified as having a given outcome (as opposed to being classed as 'open') is when there is a positive ruling on a procedural issue such as standing or justiciability, even if the case has not proceeded to trial. While we do not normally classify such interim decisions, we may do so in a case where the issues presented are of a novel nature, or where the case runs counter to a procedural decision taken in a similar case. The second stage is when there is an initial ruling on the case from a court of first instance prior to an appeal being filed (if we are aware of an appeal the case will be considered 'open'), and the third stage is when the outcomes of any appeals become known. This means that the status of a case may change from 'favourable' or 'unfavourable' throughout the course of the proceedings as different judgments are issued.

In some instances, cases that may have been classified as having negative outcomes for the parties and for immediate climate action may nonetheless advance an issue of fact or law that may have positive impacts on subsequent litigation. For example, the case of *Sacchi et al. v. Argentina* has been classified as having an unfavourable outcome for climate litigation because it was dismissed by the Committee on the Rights of the Child. However, it could be argued that the case has in fact had positive outcomes because it has helped to clarify several issues of international law. This reflects the overall limitations of imposing a quantitative assessment of outcomes on complex legal cases.

Finally, where a climate-aligned case is argued on many grounds, and succeeds on one, we would tend to classify this as a 'positive outcome'. For example, in the *UK Net Zero Strategy* case discussed above, we have classified the outcome as positive despite the fact that the applicants lost on all grounds but one.

We include a category for 'neutral' outcomes. These are cases where the outcome appears unlikely to have an immediate impact on climate action, or where it is unclear what the impact would be. For example, in the case of *Greenpeace v. Mexico (Budget reduction for combating climate change)*, Greenpeace challenged the Mexican government's decision to reduce the funds available for climate action. The case was ultimately decided by the Supreme Court on a point related to the applicant's standing. However, while that issue was resolved in favour of Greenpeace, the substantive issue was not, since the budget measure that formed the subject of the claim was no longer in force at the time that the decision was issued.

It should also be noted that we typically assess the outcome on the basis of the summary of the argumentation and evidence in the case. So, for example, in the case of *Private Forest Owners v. Thuringia*, we assessed the outcome as favourable to climate action. In that case, the applicants sought to challenge an aspect of the Thuringia Forest Act, which would have prevented them from building windfarms on land in forested areas, despite the fact that the biodiversity value of those forests was said to have been previously damaged by pest infestations and had to be cleared in any event. We acknowledge that this approach may be subject to criticism as in some cases it may be argued that a substantive outcome in favour of 'pro-climate' applicants may ultimately lead to unanticipated negative impacts, particularly where there is some dispute over the scientific basis for the claim.

As noted in the main body of this report, cases may have indirect impacts that are favourable to climate action that happen outside the courtroom. This type of impact is not considered in our classification of direct judicial outcomes. However, in many cases where a case is settled or withdrawn, this may be because of a positive resolution that addresses some of the original concerns raised in the case. Where this is apparent from the information available, we will classify the case as having enhanced climate action. For example, in the case of *Verbraucherzentrale Baden-Wuerttemberg v. DWS*, in which the consumer protection association of Baden-Wurttemberg challenged certain advertising by DWS for making green claims, the case was settled after DWS agreed to withdraw the advertising. In this case we have listed the outcome as favourable.

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Trends in Human Rights-Based Climate Litigation: Pathways for Litigation in Australia

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Abstract

There is growing recognition of the intersection between human rights and climate change. As linkages between climate change and human rights grow, so too has climate litigation overseas that seeks to use human rights arguments. While climate litigation overseas has been observed as taking a 'rights turn', this same trend has not been followed in Australia. This article examines how and why human rights-based climate litigation in Australia has differed from the overseas context. Through a survey of overseas human rights-based climate litigation based on three types of causes of action: international and regional treaties; constitutional rights; and human rights enshrined in statute, this article demonstrates that these causes of action are limited in availability and scope in the Australian context. To respond to these limitations, this article offers two possibilities for human rights-based climate litigation in Australia: using human rights as a tool for statutory interpretation; and using human rights to understand breaches of other laws, such as planning or environmental laws.

I Introduction

The ramifications of climate change are reverberating across the globe, along with increased pressure to mitigate the causes of climate change and adapt to its consequences. In this context, there is growing recognition of the intersection between human rights and climate change. As linkages between climate change and human rights grow, so too does climate litigation that is based on causes of action that have a human rights foundation.

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Overseas, there has been a rise in climate litigation that employs human rights arguments. These cases have been based on different causes of action, including international and regional treaty law, constitutional law, domestic statutes, and other sources of law. Yet, as this article will reveal, human rights litigation in Australia has not followed the same trends of human rights-based climate litigation overseas. Human rights-based climate litigation in Australia has been limited both in terms of the number of cases and the human rights content of these cases. This article examines the questions of how and why human rights-based climate litigation in Australia has differed from human rights-based climate litigation overseas. Through a survey of overseas human rights-based climate litigation, we demonstrate that the Australian legal landscape has limited causes of action for human rights arguments related to climate change. To respond to these limitations, this article offers some possibilities for human rights-based climate litigation in the Australian legal context.

Part II begins with a short introduction to the relationship between human rights and climate change, and the role of litigation in negotiating and developing this relationship. Part III offers an overview of human rights litigation focusing on three causes of action based on international and regional treaties, constitutional rights and human rights enshrined in statute. Part IV probes the possibilities for each of these causes of action in the Australian context. We argue that there are limited possibilities for human rights-based litigation in Australia based on causes of action under treaty law, constitutionally protected rights, and human rights enshrined in statute. These human rights-based litigation pathways in Australia are limited by Australia not being part of a binding regional human rights system; having few rights in the Constitution and no national bill of rights; and a lack of independent causes of action available in State human rights legislation. Outside of these causes of action, however, lie other possibilities for human rights-based climate litigation in Australia. Part V analyses two possibilities for human-rights based climate litigation in Australia, both concerned with the interpretation of laws. One involves using human rights as a tool for statutory interpretation, and the other involves using human rights to understand breaches of other laws, such as planning or environmental laws. Part VI offers concluding thoughts on the implications of these trends and directions.

II The relationship between climate change and human rights

Before human rights-based climate litigation can be examined, it is necessary to understand the relationship between climate change and human rights, and the role of climate litigation in this context. Climate change has widespread implications for a range of human rights. Human rights, in turn, have implications for mitigation of and adaptation to climate change. Climate

litigation is one forum through which the relationship between human rights and climate change has been developed and elaborated upon.

A Climate change and human rights

Climate change has implications for a broad spectrum of human rights. These include the rights to life, safe drinking water and sanitation, food, health, housing, self-determination, culture, work and development. The impacts of climate change on human rights are being increasingly recognised. On 5 October 2021, United Nations Human Rights Council resolution A/HRC/48/L.23/Rev.1 (Resolution 48/13) recognised the human right to a safe, clean, healthy and sustainable environment, and the implications of climate change for this right, and a cognate resolution (A/HRC/48/L.27) established a Special Rapporteur on the promotion and protection of human rights in the context of climate change. On 28 July 2022, the UN General Assembly adopted a similar resolution to that of the UN Human Rights Council (A/RES/76/300), recognising the human right to a clean, healthy and sustainable environment. Since the passing of Resolution 48/13, the Resolution has been mentioned by the Constitutional Court of Costa Rica in a decision ordering the government to stop the use of a bee-killing pesticide,[1] and by the Constitutional Court of Ecuador in a decision prohibiting mining in protected forests.[2]

States have procedural and substantive obligations to enable effective enjoyment of these rights.[3] At a national level, these substantive obligations include an obligation of every state to protect those within its jurisdiction from the harmful effects of climate change, with respect to both climate mitigation and adaptation.[4] Procedural obligations include duties to assess environmental impacts and allow access to environmental information; to facilitate public participation in environmental decision-making; and to provide access to remedies for harm.[5] Former Special Rapporteur John Knox elaborated on these obligations in framework principles on human rights and the environment,[6] which summarise the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. The

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[1] David Boyd, 'Newsletter 11', *United Nations Special Procedures of the Human Rights Council* (Web Page, April 2022) <https://us19.campaign-archive.com/?u=ba766e1bd004df444598dd9ff&id=f4ce565869>.
[2] Ibid.
[3] John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report*, UN Doc A/HRC/31/52 (1 February 2016) [50]-[80].
[4] Ibid [68].
[5] Ibid [50].
[6] John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report*, UN Doc A/HRC/37/59 (24 January 2018).

framework principles recognise that "environmental harm interferes with the enjoyment of human rights, and the exercise of human rights helps to protect the environment and to promote sustainable development".[7]

Importantly, there is increasing recognition that climate change disproportionately impacts people and communities in vulnerable situations[8] who have historically contributed the least to greenhouse gas emissions. In July 2021, Human Rights Council resolution (A/HRC/RES/47/24) requested the Secretary-General to prepare and submit a report to the Human Rights Council on the adverse impact of climate change on the full and effective enjoyment of human rights of people in vulnerable situations.

Human rights, in turn, have implications for mitigation and adaptation to climate change. International instruments mandate a human rights-based approach to climate change. Human rights were originally marginal to international climate change law. There is a lack of explicit human rights language in the United Nations Framework Convention on Climate Change (UNFCCC)[9] and Kyoto Protocol,[10] although these instruments can be seen to capture human rights concerns in the more general language of human welfare, human interests and equity.[11]

The preamble to the Paris Agreement acknowledges that all states "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".[12] While the insertion of human rights into the Paris Agreement is an important step, the content of the provision has been described as weak on the basis that it is limited to responses to climate change, rather than to impacts which are already occurring and will occur in the future.[13] Further, the language requires parties only to *consider* rather than to *fulfill*

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[7] Ibid 7.
[8] Human Rights Council, *Resolution adopted by the Human Rights Council on 14 July 2021,* UN Doc A/HRC/RES/47/24 (14 July 2021).
[9] *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).
[10] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997 (entered into force 16 February 2005).
[11] Ben Boer and Rosemary Mwanza, 'The Converging Regimes of Human Rights and Environmental Protection in International Law' in Tuula Honkonen and Seita Romppanen (eds) *International Environmental Law-making and Diplomacy Review* (University of Eastern Finland, 2018) 25.
[12] *Paris Agreement*, opened for signature 16 February 2016, UNTS I-54113 (entered into force 4 November 2016).
[13] Ben Boer, 'The Preamble' in Geert van Calster and Leonie Reins (eds) *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar, 2021) 60.

human rights obligations.[14] The rights enumerated in the Paris Agreement are limited, and notably do not include the right to life or rights concerning food and safe water or cultural rights. However, the Paris Agreement undoubtedly "represents a breakthrough, in that it explicitly links human rights and climate change".[15]

A human rights-based approach to climate change involves identifying rights-holders and corresponding duty-bearers, and formulating policies and programs with the objective of fulfilling human rights.[16] Norms, principles and standards derived from human rights law should guide climate mitigation and adaptation.[17] In his Call to Action on the occasion of the 75th anniversary of the United Nations, United Nations Secretary-General António Guterres set out climate justice as a priority area for human rights.[18] The Call to Action notes that "climate change is the biggest threat to our survival as a species and is already threatening human rights around the world" and calls for climate justice, particularly for future generations.[19]

Cases discussed later in this article reveal that a human-rights based approach to climate change involves grappling with tensions between different human rights – for instance, tensions between cultural rights and rights to a healthy environment. Other examples of human rights issues in climate mitigation and adaptation are highlighted in the thematic study by the Special Rapporteur on the rights of indigenous peoples on the impacts of climate change and climate finance on indigenous peoples' rights.[20] The report notes situations where climate change mitigation projects have negatively affected the rights of indigenous peoples, notably renewable energy projects such as biofuel production and the construction of hydroelectric dams.[21] For example, test flooding of the Barro Blanco hydroelectric project in Panama prompted allegations of displacement and negative impacts on the traditional lands and cultural sites of the Ngäbe peoples. The project, which was eligible for carbon credits and registered under the Clean Development Mechanism (CDM) under the UNFCCC, was later

[14] Ibid.
[15] David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019) ('Safe Climate Report') [54].
[16] Office of the High Commissioner for Human Rights, *A human rights-based approach to climate change* (Web Page, 2021) <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/AboutClimateChangeHR.aspx>.
[17] Ibid.
[18] António Guterres, *The Highest Aspiration: A Call to Action for Human Rights* (United Nations, 2020).
[19] Ibid 9.
[20] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples*, UN Doc A/HRC/36/46 (1 November 2017).
[21] Ibid [14].

withdrawn from the CDM registry under pressure from indigenous communities and international organizations.[22]

The very balancing between climate mitigation and adaptation is itself a human rights issue, as it involves navigating different benefits and burdens. This is because stronger mitigation measures now limit the need for adaptation in the future, while weaker mitigation measures now increase the need for future adaptation. [23] The balancing of benefits and burdens in choosing between mitigation and adaptation measures is a human rights issue.

B *Climate litigation and human rights*

The relationship between human rights and climate change has been developed through litigation. Climate litigation is litigation in which a question of climate change law, policy or science is a material issue of law or fact.[24] Over the past decade, there has been a noted rise in climate litigation which relies, in whole or in part, on human rights arguments. Saveresi and Setzer identify that, as May 2021, 112 cases worldwide relied on human rights law obligations.[25] The vast majority of these cases were commenced after 2015.[26] This has prompted academics to identify a 'rights-turn'[27] in climate litigation, that is to say, "an increasing trend for petitioners to employ rights claims in climate change lawsuits, as well as a growing receptivity of courts to this framing."[28]

While Australia is the country with the highest number of identified climate litigation cases outside of the United States of America,[29] there have been notably few climate litigation cases based on human rights arguments in Australia. Of the 194 climate litigation cases recorded by the University of Melbourne Climate Change Litigation Database, only three[30] have been

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[22] Ibid [109].
[23] See Brian Preston, 'The Adequacy of the Law in Achieving Climate Change Justice – Some Preliminary Comments (2016) 34(1) *Journal of Energy & Natural Resources Law* 45, 45.
[24] As adapted from David Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual' (2012) 64 *Florida Law Review* 15.
[25] Annalisa Saveresi and Joana Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (Working Paper, May 2021) 2.
[26] César Rodríguez-Garavito, 'Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action' (Working Paper, May 2021) 3 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3860420>.
[27] Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37.
[28] Ibid 37.
[29] Joana Setzer and Catherine Higham, *Global trends in climate change litigation: 2022 snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, 2022) 9.
[30] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 2) [2021] QLC 4 and *0907346* [2009] RRTA 1168. *0907346* was a review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the

classified as human rights litigation. Part IV of this article explores possible explanations for this low number. However, before undertaking this enquiry, we must first look to overseas jurisdictions to understand the bases for the "rights-turn" in climate litigation.

III Human rights-based litigation overseas

In order to examine how and why human rights-based climate litigation in Australia differs from human rights-based climate litigation overseas, it is necessary to first understand the bases and trends of overseas human rights-based climate litigation. This part provides an exploration of human rights-based climate litigation in overseas jurisdictions. It focuses on three causes of action prominent in overseas cases: international and regional treaties; human rights protected by constitutions; and human rights enshrined in statute.

The intention of this part is not to provide a conclusive or exhaustive survey, but rather to describe human rights-based climate litigation overseas sufficiently to explain the few convergences but more divergences in Australian climate litigation. This survey of overseas litigation enables us to identify trends overseas that may or may not be occurring in Australia, and to thereby assist in a better understanding of the limitations and possibilities for human-rights based climate litigation in the Australian legal context.

A *International or regional agreements*

The first type of human rights-based climate litigation are causes of action that are grounded in international or regional human rights instruments. Some cases draw on international or regional human rights instruments to make claims in domestic jurisdictions, such as in the *Urgenda* litigation. Other cases involve using complaints mechanisms in international and regional human rights instruments.

Urgenda v The Netherlands is perhaps the most high-profile climate litigation case and marks a historical linkage between human rights and climate litigation. The Urgenda Foundation and 900 Dutch citizens sued the Dutch government seeking orders to require it to take additional actions to mitigate climate change. The plaintiffs claimed that the Dutch government's

applicant a protection visa under the *Migration Act 1958* (Cth). The applicant, a citizen from Kiribati, argued that he fell within the definition of a "refugee" for the purposes of the *Migration Act* because he feared returning to his country of nationality due to sea level rise and other climate impacts. The Tribunal affirmed the Minister's decision not to grant the visa, and held at [51] that "In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required". The *Waratah Coal* cases will be discussed later in this article.

unambitious climate policy and mitigation action breached its duty of care under the Dutch Civil code and human rights law under the European Convention on Human Rights (ECHR).

On 24 June 2015, The Hague District Court found that the Dutch State's emissions reductions targets were insufficient and ordered the Dutch government to limit GHG emissions to 25% below 1990 levels by 2020. The District Court concluded that the State has a duty, under the law of hazardous negligence in the Dutch Civil Code, to take mitigation measures due to the severity of the consequences of climate change and the risk of climate change occurring.[31] The District Court did not, however, uphold the claim of breach of human rights law. The District Court held that "Urgenda itself cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR".[32] Nevertheless, the District Court found that the ECHR could be taken into account when applying national law standards or concepts, and serve as a source of interpretation when implementing private law concepts such as the duty of care.[33]

The Dutch government appealed the decision. The Hague Court of Appeal upheld the District Court's ruling, but this time on the basis of a breach of human rights law. The Court held that the emissions targets contravened the right to life under Article 2 of the ECHR and the right to private life, family life, home, and correspondence under Article 8 of the ECHR. The Court noted that while the ECHR cannot result in imposing an impossible or disproportionate burden, the State must take appropriate measures to uphold these rights.[34] Dangerous climate change threatens the lives, wellbeing and environment of citizens in the Netherlands and worldwide, and threatens the enjoyment of citizens' rights under Articles 2 and 8 of the ECHR.[35] Articles 2 and 8 therefore create an obligation for the State to take positive measures to contribute to reducing emissions relative to its own circumstances.[36]

On the further appeal by the Dutch government, the Supreme Court of the Netherlands upheld the decision of The Hague Court of Appeal that the ECHR imposed a positive obligation to take appropriate measures to prevent climate change.[37] Given the findings that climate change constitutes a real and immediate risk, "the mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken."[38] The

[31] *Urgenda Foundation v State of the Netherlands* (ECLI:NL:RBDHA: 2015:7145) ('*Urgenda I*').
[32] Ibid [4.45]
[33] Ibid [4.46], [4.52].
[34] *State of the Netherlands v Urgenda Foundation* (ECLI:NL:GHDHA:2018:2610) ('*Urgenda II*') [5.3.4].
[35] Ibid [5.2.2]-[5.3.2], [5.6.2].
[36] Ibid [5.9.1].
[37] *State of the Netherlands v Urgenda* (ECLI:NL:HR:2019:2007) ('*Urgenda III*').
[38] Ibid [5.6.2].

Supreme Court found that these measures require the Netherlands to achieve a greenhouse gas emissions reduction target of 25% compared to 1990 levels, by the end of 2020. The *Urgenda* litigation is a clear example of human rights litigation that utilised causes of action based on a regional human rights instrument.

While perhaps less strictly defined as 'litigation',[39] international treaty bodies offer another forum for human rights-based climate litigation. In *Sacchi et al v Argentina et al,* 16 young people filed a petition to the Committee on the Rights of the Child complaining that Argentina, Brazil, France, Germany and Turkey violated their rights under the *Convention on the Rights of the Child* (CRC).[40] The complainants argued that by failing to prevent and mitigate the consequences of climate change, the state parties have violated their right to life and right to survival and development of the child (Articles 6 CRC), right to health (Article 24 CRC) and cultural rights (Article 30 CRC), read in conjunction with the obligation to act in the best interests of the child (Article 3 CRC). The Committee on the Rights of the Child found that the communication was inadmissible because the complainants had not exhausted domestic remedies.[41] Nevertheless, the Committee did accept the complainants' arguments for the purpose of jurisdiction and standing, holding that the complainants "have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established prima facie that they have personally experienced a real and significant harm in order to justify their victim status."[42]

Climate litigation based on international and regional human rights instruments has also demonstrated tensions between different rights in the climate litigation context. For example, where measures to mitigate climate change are taken, the taking of those measures may itself interfere with human rights protected by international agreements. A recent illustration is *Statnett SF v Sør-Fosen sijte*,[43] where the Supreme Court of Norway unanimously held that

[39] For example, the Grantham Institute climate litigation database includes international complaints mechanisms as litigation: see Methodology – Litigation, *Climate Laws of the World* (Grantham Research Institute on Climate Change and the Environment, 2021) <www.climate-laws.org/methodology-litigation>.
[40] Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019*, UN Doc CRC/C/88/D/104/2019 (8 October 2021) ('*Sacchi et al v Argentina et al*').
[41] Ibid [10.15].
[42] Ibid [10.14].
[43] HR-2021-1975-S (sak nr. 20-143891SIV-HRET), (sak nr. 20-143892SIV-HRET) og (sak nr. 20-143893SIV-HRET).

the construction of wind power plants on the Fosen peninsula interfered with the rights of reindeer herders to enjoy their own culture under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). The right to a healthy environment needed to be balanced against the reindeer herders' cultural rights. The Supreme Court held that renewable energy production is an important factor in ensuring enjoyment of the right to a healthy environment. Nevertheless, there were other development alternatives that did not infringe the reindeer herders' right to cultural enjoyment. The Supreme Court unanimously concluded that the wind power licence and expropriation decision were invalid. In this example, human rights considerations can be seen to impact climate mitigation measures.

Regional and international instruments thereby offer one type of cause of action for human rights-based climate litigation in overseas and international jurisdictions. Part IVA discusses the potential for this type of cause of action in the Australian context.

B *Human rights enshrined in national constitutions*

Constitutional law has become an important source of law for overseas human rights-based climate litigation. While some of these cases involve a reinterpretation of constitutionally enshrined human rights, such as the right to life, other cases find new bases for constitutional rights specifically directed toward climate change.

One example of utilising constitutionally enshrined rights in the climate adaptation context is the 2015 case of *Leghari v Federation of Pakistan*.[44] The Lahore High Court held that the Pakistan government's inaction in implementing Pakistan's *National Climate Change Policy 2012* and *Framework for Implementation of Climate Change Policy* breached fundamental rights as read with constitutional principles and international environmental principles. The Court identified a breach of "fundamental rights, like the right to life (Article 9) which includes the right to a healthy and clean environment and right to human dignity (Article 14)" and constitutional principles of democracy, equality, social, economic and political justice that included "within their ambit and commitment" the international environmental principles of sustainable development, the precautionary principle, environmental impact assessment, inter- and intra- generational equity and the public trust doctrine. By way of remedy, the Court established a Climate Change Commission to monitor the implementation of the climate policies and detailed the expectations and responsibilities of the Climate Change

[44] *Asghar Leghari v Federation of Pakistan* (2015) WP No. 25501/2015, Order Sheet (4 September 2015); Judgement Sheet (25 January 2018).

Commission.[45] The Court monitored the activities of the Commission over 25 hearings between 2015-2018. In 2018, the Court dissolved the Commission, leaving open the possibility that the case may be revived in the event of future breaches.[46] Since the dissolution of the Commission there have, however, been gaps identified in Pakistan's climate legislation and policy framework, including the need for additional funding for implementation.[47]

Litigation based on constitutional rights has also been brought to challenge the inadequacy of law and policy to mitigate greenhouse gas emissions. *Neubauer et al v Germany*[48] involved a constitutional complaint regarding Germany's Federal Climate Protection Act (the *Bundesklimaschutzgesetz*).[49] The Climate Protection Act aimed to implement Germany's obligations under the Paris Agreement. Under the Act, greenhouse gas emissions were required to be reduced by at least 55% by 2030, relative to 1990 levels. The Act set out the annual allowable greenhouse gas emission amounts for various sectors in line with reduction quotas for the target year 2030. There were, however, no provisions for targets beyond the year 2030. The Act instead provided that in 2025 the Federal Government must set annually decreasing emission amounts for further periods after the year 2030 by means of ordinances. The youth complainants challenged the Climate Protection Act on the basis that the emission reduction targets were insufficient and violated their human rights as protected under the Constitution of Germany, the Basic Law (*Grundgesetz*), including the right to life and physical integrity (Article 2(2)), right to property (Article 14(1)) and right to the protection of "natural sources of life" (Article 20a).

The German Constitutional Court held that the failure of the Climate Protection Act to set greenhouse gas emission reduction targets beyond 2030 limits intertemporal guarantees of freedom.[50] Fundamental rights under the Basic Law protected the complainants against threats to freedom caused by the greenhouse gas reduction burdens being unilaterally offloaded onto the future. The provisions of the Climate Protection Act have an advance interference-like effect on the freedoms. The complainants' opportunity to exercise protected

[45] Ibid [108].
[46] Ibid [27].
[47] Umair Saleem, 'Strengthening the Legal Framework to address Climate Change in Pakistan' (2022) 12 *IUCN Academy of Environmental Law Environmental eJournal* 40.
[48] *Neubauer et al v Germany* (2021) 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 ('*Neubauer v Germany*').
[49] See Petra Minnerop, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2022) 34(1) *Journal of Environmental Law* 135; Gerd Winter, 'The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection' (2022) 34(1) *Journal of Environmental Law* 209.
[50] *Neubauer v Germany* (n 48) [182]-[183]. Note, however that the complainants failed to show violation of art 2(2) and art 14(1) of the German Basic Law: see [144]-[153].

freedoms that involve emitting greenhouse gases in the future conflict with constitutional limits on the levels of greenhouse gases that can be safely emitted in the present. Any exercise of freedom involving greenhouse gas emissions will be subject to increasingly stringent, and constitutionally required, restrictions. In order to be constitutional, the advance interference-like effect of current emission provisions − an effect that arises not only de facto, but also de jure − must be compatible with the objective obligation to take climate action as enshrined in the Basic Law.[51] The procedural requirements of the Climate Protection Act were not stringent enough and did not set down all necessary aspects of developing the targets within the required timeframe. The legislature must, at a minimum, determine the size of the annual emission amounts to be set for periods after 2030 or impose more detailed requirements for their determination.[52]

While these climate litigation cases were reliant on more established constitutional rights,[53] more recent cases are based on an emerging stand-alone right to a safe climate arising from national constitutions.[54] The ongoing case of *Juliana et al v United States* seeks recognition of a right to a stable climate as an extension of existing rights under the United States Constitution, relying on the due process clause. The due process clause of the Fifth Amendment to the US Constitution bars the Federal Government from depriving a person of "life, liberty, or property" without "due process of law." The plaintiffs had argued that the Federal Government had violated their due process rights by approving fossil fuel production, consumption and combustion. The defendants and intervenors argued that, first, the plaintiffs had failed to identify infringement of a fundamental right or discrimination against a suspect class of persons, and second, the defendants have no affirmative duty to protect the plaintiffs from climate change.

The US government and industry interveners sought to summarily dismiss the action. US District Court Judge Ann Aiken issued an Opinion and Order denying the Federal Government and industry intervenors' motions to dismiss the case.[55] The Court determined that the political

[51] Ibid [184]-[187].
[52] Ibid [261].
[53] See also Camille Cameron and Riley Weyman, 'Recent Youth-led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices' (2022) 34(1) *Journal of Environmental Law* 195 for a discussion of three ongoing Canadian climate litigation cases which are grounded in the *Canadian Charter of Rights and Freedoms*.
[54] Right to a "safe" climate reflects the language of international human rights (see, for example, Safe Climate Report (n 15)) whereas *Juliana v United States* (cited in n 55) frames this as a right to a "stable" climate.
[55] *Juliana v United States* 217 F Supp 3d 1224 (D Or 2016) ('*Juliana v United States* (D Or 2016').

question doctrine does not apply to the case; the plaintiffs have standing; and the plaintiffs had properly asserted due process and public trust claims.

Importantly, the Court also articulated a new fundamental right. The Court noted that "fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) 'deeply rooted in this Nation's history and tradition' or (2) 'fundamental to our scheme of ordered liberty'".[56] The Court discussed the earlier Supreme Court decision of *Obergefell v Hodges,*[57] which held that same sex marriage is a fundamental right under the Constitution's due process clause. The Court noted that "just as marriage is the 'foundation of the family', a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress." In determining whether a right is fundamental, courts must exercise "reasoned judgment," keeping in mind that "history and tradition guide and discipline this inquiry but do not set its outer boundaries." In exercising this "reasoned judgement", the Court concluded that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.[58] As such, a complaint that "alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, states a claim for a due process violation."[59] The plaintiffs had adequately alleged infringement of this fundamental right.[60]

The District Court decision was reversed on appeal by the Ninth Circuit Court.[61] The majority denied the standing of the plaintiffs, holding that the plaintiffs' injuries were not redressable by the judiciary. The majority stated that instead the plaintiffs' case "must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box."[62] In her dissenting judgment, Judge Staton reasoned that "some rights serve as the necessary predicate for others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections."[63] Judge Staton held that the due process clause, taken together with the text and context of the Constitution, creates a "principle of perpetuity" which prevents

[56] Ibid 1249.
[57] 576 US 644 (2015).
[58] *Juliana v United States* (D Or 2016) 1250.
[59] Ibid.
[60] Ibid.
[61] *Juliana v United States* 947 F 3d 1159 (9th Cir 2020).
[62] Ibid 1175.
[63] Ibid 1177.

"the willful dissolution of the Republic."[64] While the perpetuity principle "is not an environmental right", it protects the perpetuity of the nation[65] and is engaged by the existential threat of climate change. The proceedings in *Juliana* are ongoing.

Litigation based on a stand-alone constitutional right to a safe climate has been initiated in other jurisdictions. On 8 October 2020, the Institute of Amazonian Studies filed a class action against the Federal Government of Brazil, seeking recognition of a fundamental right to a stable climate for present and future generations under the Brazilian Constitution, and seeking an order to compel the Federal Government to comply with national climate law.[66] The plaintiffs allege that the Federal Government has failed to comply with its own action plans to prevent deforestation and mitigate and adapt to climate change, violating national law and fundamental rights. On 5 June 2021, environmental justice non-governmental organisation A Sud, along with over 200 plaintiffs, filed a suit against the Italian government. The plaintiffs allege that, by failing to take necessary measures to meet the temperature targets under the Paris Agreement, the government is violating fundamental rights, including the right to a stable and safe climate.[67] The action seeks a declaration that the government's inaction is contributing to the climate emergency and an order to reduce greenhouse gas emissions by 92% by 2030 from 1990 levels. An independent right to a safe climate is thus one emerging area of climate litigation overseas.

There is also an increasing number of countries which have specifically incorporated environmental rights within their constitutions. This has been described as "environmental constitutionalism",[68] and has been a growing practice since the 1970s.[69] On 5 October 2021, Resolution 48/13 noted that "more than 155 States have recognized some form of a right to a healthy environment in, inter alia, international agreements or their national constitutions, legislation or policies". The constitutional recognition of environmental rights has been seen to create a number of benefits,[70] including allowing litigants to enforce environmental rights-

[64] Ibid 1179.
[65] Ibid.
[66] Sabin Centre for Climate Change Law, 'Institute of Amazonian Studies v. Brazil' *Climate Case Chart* (Web Page, 2021) <http://climatecasechart.com/climate-change-litigation/non-us-case/institute-of-amazonian-studies-v-brazil/>.
[67] Sabin Centre for Climate Change Law, 'A Sud et al. v. Italy' *Climate Case Chart* (Web Page, 2021) <http://climatecasechart.com/climate-change-litigation/non-us-case/a-sud-et-al-v-italy/>.
[68] Louis Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Bloomsbury Publishing, 2016) 145.
[69] Navraj Ghaleigh, Joana Setzer and Asanga Welikala, 'The Complexities of Comparative Climate Constitutionalism' (Working Paper No 2022/06, University of Edinburgh School of Law, 2022) 6.
[70] Joana Setzer and Délton de Carvalho, 'Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate' (2021) 30 *Review of European, Comparative & International Environmental Law* 197, 200.

based claims against governments and corporations on a constitutional basis,[71] thereby enhancing access to justice and the ability to redress environmental harms.[72] Such provisions are, however, limited. For instance, Auz shows how political economy of extractivism, constitutional design that grants the president too much power, and elitist nature of litigation limits the reach of climate litigation.[73]

Dedicated climate provisions are also being incorporated in national constitutions, with the eleven countries having been identified as having these provisions to date: Algeria, Bolivia, Côte d'Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela, Vietnam and Zambia.[74] Other countries, such as France, Sri Lanka and Chile, are also considering including climate provisions in their constitutions.[75] However, this has been met with varying levels of success. On 6 July 2021, the French government abandoned its plans to introduce a new climate provision in the French Constitution that would "guarantee environmental protection and biological diversity, and combat climate change". The provision was opposed by members of the Senate who were concerned that the word "guarantee" would elevate environmental concerns over other constitutional principles.[76] The constitutional character of legal responses to climate change is a growing area of legal and academic exploration.[77]

Causes of action based on constitutional law have therefore been a fruitful area of human rights-based climate litigation overseas. Some of these cases centre around reinterpretation of existing human rights enshrined in constitutions, while others offer the possibility for new human rights specifically directed toward climate protection. Part IVB shows that the potential for human rights-based climate litigation based on Australian constitutional law does not offer these same pathways for litigation.

C *Human rights enshrined in statute*

Overseas human rights-based climate litigation is firstly grounded on human rights provisions in domestic statutes. For example, in the United Kingdom case of *R (on the application of Plan*

[71] Ibid. César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 *AJIL Unbound* 40.
[72] Ghaleigh, Setzer and Welikala (n 69) 6.
[73] Juan Auz, 'Human Rights-Based Climate Litigation: A Latin American Cartography' (2022) 13(1) *Journal of Human Rights and Environment* 114.
[74] Ghaleigh, Setzer and Welikala (n 69) 9.
[75] Ibid 13-14; Setzer and de Carvalho (n 70) 201.
[76] Constant Méheut, 'France Drops Plans to Enshrine Climate Fight in Constitution', *The New York Times* (Web Page, 6 July 2021) <https://www.nytimes.com/2021/07/06/world/europe/france-climate--change-constitution.html>; Ghaleigh, Setzer and Welikala (n 69) 13.
[77] Ghaleigh, Setzer and Welikala (n 69) 5, 8, 15-16.

B Earth and others) v The Prime Minister and others,[78] the plaintiffs argued that the UK government had breached s 6 of the *Human Rights Act 1998* (UK), which makes it unlawful for a public authority to act in a way which is incompatible with the ECHR. The plaintiffs argued that the UK government's unambitious greenhouse gas emissions targets and climate policy had breached their rights to life (Article 2), private and family life (Article 8), and protection from discrimination (Article 14) in the ECHR as incorporated into domestic law by the *Human Rights Act 1998*. The plaintiffs argued that the UK government had a duty to, but had failed to, put in place an administrative framework designed to provide effective deterrence against threats to the right to life and to private and family life from climate change. The High Court refused permission to proceed on the papers. The "insuperable problem" with the plaintiffs' claims under Articles 2 and 8 was that there was an administrative framework to combat the threats posed by climate change in the form of the *Climate Change Act 2008* (UK) and all the policies and measures adopted under the Act.[79] That framework was constantly evolving.[80] It was not for the Court to evaluate the adequacy or effectiveness of the adopted framework.[81] The Court also held that the plaintiffs could not show that they were a 'victim' of a breach of ECHR rights so as to qualify to bring a claim under s 7(1) of the *Human Rights Act 1998*.[82] Although the plaintiffs were unsuccessful, the case demonstrates that human rights enshrined in domestic statutes may offer opportunities for litigation. This is discussed in the Australian context in Part IVC.

Overseas human rights-based climate litigation is also grounded on domestic laws other than specific human rights legislation. One example is the statutory responsibilities of private actors and corporations to uphold human rights obligations. When it comes to climate change, the responsibility of corporate actors looms large, with a total of 90 companies (referred to as 'carbon majors') having produced fuels that have led to 63% of the world's greenhouse gas emissions between 1854 and 2010.[83] While human rights law is not well-suited to pursuing corporate actors,[84] there is an increasing move to sue corporations and their directors for corporate actions and activities that cause or contribute to climate change-induced human rights violations. Human rights obligations of corporate actors are also being expanded at the

[78] [2021] EWHC 3469 (Admin).
[79] Ibid [48].
[80] Ibid [49].
[81] Ibid [50], [51], [54].
[82] Ibid [78].
[83] Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010' (2014) 122 *Climatic Change* 229.
[84] Annalisa Savaresi and Joana Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers' (2022) 13(1) *Journal of Human Rights and the Environment* 7, 19, 28.

international level. For instance, human rights law is one of the legal bases for the United Nations Binding Principles of Business and Human Rights[85] and the Principles on Climate Obligations of Enterprises.[86]

In *Milieudefensie et al v Royal Dutch Shell plc*,[87] Milieudefensie and six other plaintiffs alleged that Royal Dutch Shell had violated its duty of care under Dutch civil law by emitting greenhouse gas emissions that contributed to climate change. The Hague District Court relied on human rights law to define the scope of the duty of care owed by Royal Dutch Shell under Dutch civil law. The Court found that climate change threatens the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region.[88] In its interpretation of the standard of care, the Court considered the United Nations Guiding Principles on Business and Human Rights,[89] noting that "companies may be expected to identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships"[90] and must take "appropriate action" on the basis of this assessment.[91] The Court held that Shell had an obligation to reduce its greenhouse gas emissions by 45% by 2030 compared to 2010 levels, and to zero by 2050 in line with the Paris Climate Agreement.[92]

In 2019, the National Commission on Human Rights of the Philippines announced its preliminary findings and recommendations following a four-year inquiry into the human rights impacts of climate change in the Philippines and the contribution of 47 carbon majors to those impacts.[93] Greenpeace Southeast Asia and a number of other organisations had filed a petition requesting the Commission to investigate "the human rights implications of climate change and ocean acidification and the resulting rights violations in the Philippines" and "whether the investor-owned Carbon Majors have breached their responsibilities to respect

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[85] John Ruggie, *Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, UN Doc A/HRC/17/31 (21 March 2011).
[86] Expert Group on Global Climate Change, *Principles on Climate Obligations of Enterprises* (Eleven International Publishing, 2nd ed, 2020) 72.
[87] ECLI:NL:RBDHA:2021:5337.
[88] Ibid [4.4.10].
[89] Ibid [4.4.11].
[90] Ibid [4.4.20].
[91] Ibid [4.4.21].
[92] Ibid [4.4.55].
[93] Commissioner Roberto Cadiz made this announcement during the 2019 United Nations Climate Change Conference (COP25): see Isabella Kaminski, 'Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules', *Business & Human Rights Resource Centre* (Web Page, 9 December 2019) <https://www.business-humanrights.org/en/latest-news/carbon-majors-can-be-held-liable-for-human-rights-violations-philippines-commission-rules/>.

the rights of the Filipino people." In May 2022, the Commission published its final report finding that the carbon majors, which include ExxonMobil, Chevron, Shell, BP and Repsol, played a clear role in anthropogenic climate change and could be held legally liable for its impacts. The Commission found that the carbon majors engaged in "willful obfuscation and obstruction" to prevent meaningful climate action.[94] The Commission held that the carbon majors "directly by themselves or indirectly through others, singly and/or through concerted action, engaged in willful obfuscation of climate science, which has prejudiced the right of the public to make informed decisions about their products, concealing that their products posed significant harms to the environment and the climate system. All these have served to obfuscate scientific findings and delay meaningful environmental and climate action."[95] The Commission concluded that these acts may be bases for liability[96] and encouraged states, as part of their duty to human rights, to enact and/or enforce laws to hold companies accountable.[97]

Obligations of corporate and private actors are thus a growing area of human rights-based climate litigation. This may be based on domestic statutes which regulate corporations or domestic statutes with human rights provisions. Statutory pathways for human rights-based litigation are discussed in the Australian context in Part IVC.

IV Human rights-based climate litigation in Australia

Part III has outlined trends in human rights-based climate litigation overseas through an exploration of three different types of causes of action grounded in human rights law: international and regional human rights law, constitutional law and statute. This Part investigates pathways for litigation for each of these causes of action in Australia. It shows that the Australian legal landscape offers limited possibilities for litigation for these causes of action.[98]

[94] Commission on Human Rights of the Philippines, *National Inquiry on Climate Change* (Report, 2022) 104.
[95] Ibid 108-109.
[96] Ibid 115.
[97] Ibid 115.
[98] The Asia-Pacific regional human rights framework is fragmented, with limited enforcement mechanisms: see Ben Boer, 'Climate Change and Human Rights in the Asia-Pacific: A Fragmented Approach' in Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2016).

A *International or regional treaty*

Australia is a party to a plethora of international human rights treaties. In a dualist legal system like that of Australia, the signing and ratification of international instruments do not create binding domestic obligations or abrogate the power of Parliament to make laws that are inconsistent with international instruments.[99] In the absence of legislation incorporating international human rights treaties, they are not a source of law or rights.[100] While some treaties have been partially implemented through domestic legislation,[101] the majority have not been incorporated into Australian domestic law. The pathways for using international law as an interpretative principle are discussed in Part V of this article.

Consistent with trends in other countries, as discussed in Part IIIA, Australia has been the subject of complaints in the international arena,[102] including a recent complaint brought by eight Torres Strait Islander people against the Australian government to the United Nations Human Rights Committee.[103] The petition alleges that Australia is violating the plaintiffs' fundamental human rights under the ICCPR due to the government's failure to address climate change. The complaint alleges that Australia's insufficient action on climate change has violated the right to culture (Article 27 ICCPR), the right to be free from arbitrary interference with privacy, family and home (Article 17 ICCPR), and the right to life (Article 6 ICCPR). The complaint argues these violations stem from both insufficient targets and plans to mitigate greenhouse gas emissions and inadequate funding for coastal defence and resilience measures on the islands, such as seawalls. The complaint is still pending before the Committee.

On 25 October 2021, five young Australians lodged a joint complaint to the United Nations Special Rapporteur for human rights and environment, the Special Rapporteur for the rights of Indigenous people, and the Special Rapporteur for the rights of persons with disabilities with regard to the Australian government's lack of climate action.[104] The complainants argue

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[99] See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 305; [1992] HCA 57; *Minister for Immigration v B* (2004) 219 CLR 365; [2004] HCA 20 [171].
[100] *Chow Hung Ching v The King* (1949) 77 CLR 449.
[101] For example, the *Disability Discrimination Act 1992* (Cth) reflects many provisions contained in the Convention on the Rights of People with Disabilities.
[102] The Grantham Research Institute on Climate Change and the Environment and Sabin Centre databases identify complaints before UN mechanisms as climate litigation.
[103] Sophie Marjanac and Sam Hunter Jones, 'Are matters of national survival related to climate change really beyond a court's power?' *Open Global Rights* (Web Page, 28 June 2020) <https://www.openglobalrights.org/matters-of-national-survival-climate-change-beyond-courts/>.
[104] Environmental Justice Australia, 'Ahead of COP26, five young Australians lodge human rights complaint with UN over government inaction on climate crisis' (Media Release, 25 October 2021) <https://www.envirojustice.org.au/ahead-of-cop26-five-young-australians-lodge-human-rights-complaint-with-un-over-government-inaction-on-climate-crisis/>.

that the Australian government's emissions reduction targets fail to uphold the human rights of young people in Australia, particularly those at acute risk from climate harms, including young First Nations people and people with disabilities.

International mechanisms have also been used to hold business to account. In January 2020, Friends of the Earth Australia and three individuals submitted a complaint against ANZ Bank to the Australian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises. The complaint alleged that ANZ failed to adhere to the OECD Guidelines through lack of climate-related disclosure and due diligence, inadequate environmental policies and management, and disregard for consumer interests. The NCP Initial Assessment accepted the complaint, offering its 'good offices' process with the aim of reaching an agreement between the parties.[105]

While international complaints against Australia may influence the development of domestic law, human rights enshrined in international human rights treaties are not a source of law in the absence of incorporating legislation. They therefore offer limited options for litigation pathways in Australian domestic litigation.

B *Human rights enshrined in the Australian constitution*

Unlike many other countries, including those discussed at Part IIIB, the Australian Constitution was not intended to be a mechanism of human rights protection. The Australian Constitution does not expressly include a bill of human rights. There are some limited human rights, such as the right to implied freedom of political communication, that courts have implied within the Australian Constitution. These rights are, however, extremely limited, leading to restricted pathways for human rights-based litigation. Part VA of this article explores possibilities for human rights enshrined in the Australian Constitution as a means of interpretation of other domestic law.

C *Human rights enshrined in statute*

As noted, at a national level, Australia does not have a bill of rights. The States of Victoria,[106] Queensland[107] and the Australian Capital Territory[108] have each adopted human rights legislation. These legislative frameworks for human rights are still relatively new in Australia,

[105] Australian National Contact Point, *Initial Assessment: Complaint was submitted by Friends of the Earth Australia and others, against Australia and New Zealand Banking Group Limited* (24 November 2020).
[106] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[107] *Human Rights Act 2019* (Qld).
[108] *Human Rights Act 2004* (ACT).

having been met with "excitement and exhilaration but also one of trepidation and reservation",[109] as the then Chief Justice Marilyn Warren noted at the time of the introduction of the Victorian Charter of Human Rights and Responsibilities.

Each of these three pieces of human rights legislation contains different human rights and different procedures for complaints and enforcement, and applies only within its respective state and territory. There are also limited options for stand-alone claims under these human rights laws. For example, under the *Victorian Charter of Human Rights and Responsibilities Act 2006*, a claim under the Charter must be attached to another cause of action.[110] Under the *Human Rights Act 2019* (Qld), a claim must similarly 'piggy-back' off a different cause of action.[111] By contrast, the *Human Rights Act 2004* (ACT) "has one major advantage over the Queensland *HR Act* and *Victorian Charter*, in that it provides for a direct cause of action… Despite this broader cause of action, there is limited jurisprudence on this provision"[112] to guide future human rights-based climate litigation.

That said, the human rights legislative frameworks in these jurisdictions do offer pathways for litigation. Bell-James and Collins show that human-rights based climate litigation is available under the Queensland Human Rights Act.[113] Indeed, such litigation is currently on foot. The Queensland case of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*[114] is exceptional in its position as the only Australian climate litigation based on a human rights statute. Youth Verdict and the Bimblebox Alliance objected to Waratah Coal's mining lease and environmental authority for a proposed coal mine development in the Galilee Basin on the basis that the decision to grant the mining lease and environmental authority was unlawful under s 58(1) of the *Human Rights Act 2019*. Waratah Coal applied to strike out the human rights objections to the extent that they relied on the *Human Rights Act* or, in the alternative, obtain a declaration that the Queensland Land Court does not have jurisdiction and was not obliged to consider those objections. The Land Court rejected Waratah Coal's application and held that human rights considerations apply to the Land Court in making its recommendations on applications for a mining lease and an environmental authority. The Land Court's recommendation on an application for a mining lease or environmental authority is both an "act" and a "decision" as

[109] Chief Justice Marilyn Warren, 'Opening Remarks to Judicial College of Victoria: Introduction to Human Rights' (Speech, State Library Theatrette, 19 February 2007).
[110] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(1).
[111] *Human Rights Act 2019* (Qld) s 59.
[112] Justine Bell-James and Briana Collins, 'Queensland's *Human Rights Act:* A New Frontier for Australian Climate Change Litigation?' (2020) 43(1) *UNSW Law Journal* 3, 24. See *Human Rights Act 2004* (ACT) ss 40B, 40C.
[113] Bell-James and Collins (n 112).
[114] [2020] QLC 33.

those terms are used in s 58(1) of the *Human Rights Act*. The Land Court's recommendation would have a practical benefit to the ultimate decision-makers, who themselves would be bound by s 58(1).[115] The Land Court has jurisdiction to consider objections based on the *Human Rights Act* in hearing objections to mining lease or environmental authority applications and also is compelled, as a public entity, to itself make a decision in a way that is compatible with human rights.[116] The Land Court held that the objectors could rely on s 58 of the *Human Rights Act*, without seeking a remedy or separate relief under s 59, and objectors would be entitled to seek relief in the event the Land Court failed to make a recommendation in a way that was compatible with human rights.[117]

The Land Court recently handed down a further decision in the case, dealing with the need to take evidence from First Nations witnesses on country in order to protect their human rights under the *Human Rights Act*.[118] The Land Court granted leave to Youth Verdict and the Bimblebox Alliance to take on country evidence of First Nations witnesses about the impact of climate change on their community and cultural rights in order to uphold the witnesses' human rights under s 28(2)(a) of the *Human Rights Act*. While the Land Court acknowledged that inconvenience and costs could be borne by the parties to hear the evidence on country,[119] it gave significant weight to the cultural rights of the First Nations witnesses to have the evidence heard on country and in the company of Elders as was required by the witnesses' cultural protocols.[120] The Land Court further noted that solely relying on the witnesses' written statements would not allow for a proper analysis of the evidence as "written evidence from a First Nations witness is a poor substitute for oral evidence given on country and in the company of those with cultural authority."[121]

These two human rights decisions of the Queensland Land Court based on the *Human Rights Act* are, however, the exception. The lack of effective human rights laws elsewhere in Australia, and hence the lack of precedent-setting judicial decisions, has led plaintiffs to search for alternative means by which human rights may be protected through climate litigation. One

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[115] Ibid [54], [64].
[116] Ibid [77].
[117] Ibid [87].
[118] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4. An international example of climate litigation regarding the protection of cultural rights is *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy* (2022) 1 All SA 796 (ECG). The South Africa High Court relied on evidence of customary knowledge from Indigenous communities to hold that the grant of an exploration right to oil and gas companies, which was awarded without meaningful consultation with the communities, constituted a violation of the applicants' right to consultation that deserves to be protected by way of an interim interdict.
[119] [2022] QLC 4 [28], [44].
[120] Ibid [19], [33], [37].
[121] Ibid [38].

means is to raise the human rights implications in challenges to specific developments that might contribute to climate change. The endorsement of the concept of the carbon budget in *Gloucester Resources v Minister for Planning*[122] ('*Gloucester*') has been noted as an alternative way of linking the cumulative and indirect nature of greenhouse gas emissions to climate harms, including interference with human rights.[123] Project-based climate litigation is an example of one legal pathway toward protecting human rights through climate litigation in the absence of a dedicated human rights legislative framework. Further alternative pathways which may offer possibilities for future climate litigation are discussed later in this article.

Another means is to raise the procedural rights implications. Procedural rights are an important aspect of human rights-based climate litigation,[124] although comparatively few human rights-based climate cases concern alleged breaches of procedural obligations.[125] Climate litigation (and environmental litigation more generally) in Australia has included litigation seeking to uphold procedural rights – namely access to information, public participation in environmental decision-making and access to justice.[126] Litigation regarding access to information has included, in the climate context, information regarding funding of fossil fuel projects. For instance, in the recently initiated case of *Abrahams v Commonwealth Bank of Australia*,[127] shareholders of the Commonwealth Bank of Australia are seeking access to internal company documents under s 247A of the *Corporations Act 2001* (Cth). These documents include information regarding the Commonwealth Bank's investment in gas projects in Australia and overseas. On 4 November 2021, the Court made consent orders agreed to by the parties to allow the plaintiffs to inspect a limited scope of the documents sought.[128] The Court was satisfied that the plaintiffs were acting in good faith and that inspection was to be made for a proper purpose as required by law. The litigation is ongoing.

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[122] (2019) 234 LGERA 357; [2019] NSWLEC 7 ('*Gloucester*').
[123] Julia Dehm, 'Coal Mines, Carbon Budgets and Human Rights in Australian Climate Litigation: Reflections on Gloucester Resources Limited v Minister for Planning and Environment' (2020) 26(2) *Australian Journal of Human Rights* 244.
[124] Knox (n 3) [50].
[125] Annalisa Savaresi and Joana Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers' (2022) 13(1) *Journal of Human Rights and the Environment* 7.
[126] *Rio Declaration on Environment and Development*, 31 ILM 874 (1992), Principle 10; *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (adopted 25 June 1998, entered into force 30 October 2001) ('Aarhus Convention'). *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (adopted 4 March 2018, entered into force 22 April 2021) ('Escazú Convention'). Australia is not a party to the Aarhus Convention which enshrines procedural environmental rights in Europe, or the Escazú Convention which enshrines procedural environmental rights in Latin America and the Caribbean.
[127] (2021) FCA NSD864/2021.
[128] Order of Cheeseman J in *Abrahams v Commonwealth Bank of Australia* (Federal Court of Australia, NSD864/2021, 4 November 2021).

Public participation in environmental decision-making has long been an issue in Australian climate litigation. This includes mechanisms for community participation in decisions regarding fossil fuel projects. There are various levels of public participation, ranging from less involved to more involved and meaningful levels of engagement.[129] Typically, laws regulating land and its resources afford limited levels of public participation. For some strategic planning and policy decisions, the public may have no opportunity to participate and may merely be informed of decisions that have already been made.[130] For other project-specific decisions, a minimum opportunity for public participation may be provided, usually in the form of public notice and comment,[131] with the decision-maker taking into account any public comments received in making project specific decisions.[132]

There is also a problem of the timing of public participation. Public participation will be more effective when it occurs at a stage when it has the potential to influence the nature, extent and other features of the use of land and its resources. Communities could participate at the involve or collaborate levels of public participation to formulate alternatives, identify solutions, and select and design the preferred project for which a legal licence is to be sought.[133] The Court in *Gloucester* noted the social impacts of limiting the extent to which individuals and groups have input into the decisions that affect their lives and the extent to which they have access to complaints, remedy and grievance mechanisms.[134] The Court described "residents' sense of powerlessness and helplessness in the decision making process for approval of the Project and the acquisition of affected properties as evidence of this type of social impact."[135] The Court concluded that the mine would result in social impacts on residents and Aboriginal people due to the limitations on these people being able to meaningfully participate and control the decision making process. The Court concluded, however, that these limitations flow from the planning system and not from the particular project proposed.[136] The law thereby limits public participation in environmental decisions, including those involving fossil fuel extraction.[137]

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[129] Brian Preston, 'The Adequacy of the Law in Satisfying Society's Expectations for Major Projects' (2015) 32 *Environment and Planning Law Journal* 182, 191.
[130] For example, there are limited consultation requirements for the making of environmental planning instruments including a State environmental planning policy or a local environmental plan under the *Environmental Planning and Assessment Act 1979* (NSW) s 3.30(1).
[131] See, eg, *Environmental Planning and Assessment Act 1979* (NSW) Sch 1.
[132] See, eg, *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(d).
[133] Preston (n 129) 193.
[134] *Gloucester* (n 122) [389].
[135] *Gloucester* (n 122) [390].
[136] *Gloucester* (n 122) [392].
[137] Preston (n 129).

There is, therefore, potential for climate litigation in Australia regarding procedural rights. When it comes to substantive human rights, however, Australia's notable lack of a national bill of rights and limited human rights legislation leaves Australia without the same foundations for human rights-based climate litigation that have allowed such litigation in other jurisdictions. Bearing in mind these limitations, other legal pathways for human rights-based climate litigation in Australia need to be explored. This is the subject of Part V of the article.

V Future directions for human rights-based climate litigation in Australia

As discussed in the previous parts, the types of causes of action and complaints that have been pursued overseas are limited in availability and scope in Australia. The likelihood is that climate litigation in Australia will explore other legal pathways to protect human rights. What those alternative legal pathways might be is difficult to predict; it depends on the legal imagination and ingenuity of plaintiff lawyers. Inspiration may be drawn from overseas climate litigation. Climate litigation can be "contagious".[138] This may lead to climate litigation in Australia pursuing the three emerging areas of climate litigation overseas discussed in previous Part III, notwithstanding the difficulties in doing so. Overseas experience also suggests at least two other potential legal pathways for human rights-based climate litigation in Australia: using human rights as a tool for statutory interpretation and using human rights as a way of understanding breaches of other laws, such as planning and environmental laws. These will be explored below.

A *Human rights as an interpretative tool*

Human rights can inform the interpretation of legislation. A court's approach to interpretation of legislation involves a number of assumptions (sometimes known as 'rules') of interpretation. Examples of these approaches to interpretation include: the presumption not to alienate vested proprietary rights without compensation;[139] the presumption that legislation will not have extraterritorial effect;[140] and the assumption that the legislature would not have intended to remove the jurisdiction of the courts[141] or to alter established common law doctrines.[142] Many of the traditional rights, freedoms and privileges embedded in these interpretative rules

[138] Natasha Affolder, 'Contagious Environmental Lawmaking' (2019) 31 *Journal of Environmental Law* 187; Brian J Preston, 'The Influence of the Paris Agreement on Climate Change Litigation: Causation, Corporate Governance and Catalyst (Part II) (2021) 33 *Journal of Environmental Law* 227, 247-255.
[139] *Clissold v Perry* (1904) 1 CLR 363; [1904] HCA 12.
[140] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; [1908] HCA 95.
[141] *Magrath v Goldsbrough, Mort & Co Ltd* (1932) 47 CLR 121, 134; [1932] HCA 10.
[142] *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, 433.

are described in the language of human rights.[143] Approaches to statutory interpretation can therefore be seen as forming a "common law Bill of Rights".[144] What might be the implications for climate change of this "common law Bill of Rights"? This article contemplates two examples: the principle of legality and the presumption that laws are consistent with international law.

1 Principle of legality

Courts do not impute to the legislature an intention to interfere with fundamental rights unless there is clear expression of an unmistakable and unambiguous intention to interfere with these fundamental rights.[145] This was expressed by the High Court in *Coco v R* as an "insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity".[146] This approach has been described as the "principle of legality". The principle of legality has been the subject of much judicial and academic debate.[147] Whether or not the principle is "an unhelpful label"[148] that obscures proper legal analysis, the principle of legality is one that regularly guides courts in interpreting legislation.[149]

The principle of legality is of particular significance in Australian jurisdictions with a human rights legislative framework. Despite different approaches taken by the High Court in *Momcilovic v The Queen*,[150] the majority held that the Victorian Charter of Human Rights reflects the principle of legality and does not establish a new paradigm of statutory interpretation.[151]

One rationale for the principle of legality is that Parliament would not abrogate or curtail fundamental common law rights without express intention. Parliament must therefore "squarely confront what it is doing and accept the political cost" when these fundamental rights

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[143] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129) [1.7]. For instance, Murphy J referred to 'the common law of human rights' in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346; [1983] HCA 9.
[144] James Spigelman, 'The Common Law Bill of Rights: First Lecture in the 2008 McPherson Lectures on Statutory Interpretation and Human Rights' (Speech delivered at the University of Queensland, Brisbane, 10 March 2008).
[145] *Coco v R* (1994) 179 CLR 427, 437-38; [1994] HCA 15 ('*Coco v R*'); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 [313] (*'Lee*'); *Kassam v Hazzard; Henry v Hazzard* (2021) 393 ALR 664; [2021] NSWSC 1320 [193] ('*Kassam* NSWSC'); *Kassam v Hazzard; Henry v Hazzard* (2021) 396 ALR 302; [2021] NSWCA 299 [80]-[94], [162]-[167] ('*Kassam* NSWCA').
[146] *Coco v R* (n 145).
[147] See commentary in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).
[148] John Basten, 'The Principle of Legality – An Unhelpful Label' in Meagher and Groves (n 147) 74.
[149] See, recently, *Kassam* NSWSC (n 145) [193]; *Kassam* NSWCA (n 145) [80]-[94], [162]-[167].
[150] (2011) 245 CLR 1; [2011] HCA 34 ('*Momcilovic*').
[151] Ibid [43]-[46], [51] (French CJ), [684] (Bell J).

are curtailed.[152] The principle of legality thereby serves the related purposes of protecting rights and freedoms from unintended legislative interference and increasing the effectiveness of the democratic process when legislation impacting such rights is considered.[153] Gleeson CJ noted in *Al-Kateb v Godwin* that:

> "Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment."[154]

The statutory intention to abrogate or curtail fundamental rights must be expressed in clear and unambiguous words.[155] As Kiefel J observed in *X7 v Australian Crime Commission*:

> "The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness. That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so."[156]

The principle of legality applies to fundamental rights, freedoms and immunities, as distinguished from other rights that have been recognised by law. In order to apply the principle of legality, it is necessary to identify with a degree of precision the fundamental right, freedom or immunity which is said to be curtailed or abrogated, or that specific element of the general system of law which is similarly affected.[157] In *Lee v New South Wales Crime Commission,*[158] Gageler and Keane JJ observed:

> "Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the

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[152] See *R v Secretary of State for the Home Department; Ex Parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman) ('*Simms*').
[153] *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [174] (Bell J).
[154] (2004) 219 CLR 562; [2004] HCA 37 [19]-[20], dissenting in result but not in principle.
[155] This test has also been expressed in different formulations, including "unambiguously clear" and "irresistible clearness"; "express words of plain intendment"; and 'clear words or necessary implication: for a list of these various formulations, see *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340; [1999] NSWCA 324 [44].
[156] (2013) 248 CLR 92; [2013] HCA 29 [158]. See also Basten JA in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 95 NSWLR 157; [2016] NSWCA 379 [45].
[157] *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599; [2018] NSWCA 209 [39].
[158] *Lee* (n 145).

> protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature." [159]

There is no clear methodology for how and when a right or freedom becomes fundamental at common law, and "what rights and freedoms are recognised as fundamental at common law is ultimately a matter of judicial choice."[160] Certain rights have, however, been recognised by the courts as requiring clear legislative intention in order to be abrogated.[161] These include: personal rights, such as personal liberty,[162] freedom of movement,[163] and freedom of expression;[164] property rights, such as the right from alienation of property without compensation;[165] and procedural rights, such as the right to procedural fairness.[166] Importantly, the categories of rights that might be regarded as "fundamental" are not closed.

Fundamental rights change depending on time and place,[167] and what is necessary to displace the presumption may have a variable standard.[168] This raises the question of whether climate change and its consequences for human rights can inform both the identification of certain rights as fundamental and what is necessary to find abrogation of these rights. Climate change is undisputedly one of the greatest challenges in the current time and in the place of Australia. In the context of a public duty to develop environmental quality objectives, guidelines and policies to ensure environment protection, the Land and Environment Court of NSW found that the environmental quality objectives, guidelines and policies that need to be developed to ensure environment protection will need to change in response to the threats to the

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[159] Ibid [313].
[160] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449.
[161] See Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) for a summarised list of examples where courts have required the need for a clear indication of an intention for the principles, rights and privileges specified to be abrogated. See also the list of examples given in *Momcilovic* (n 150) [444].
[162] *Williams v R* (1986) 161 CLR 278, 292; [1986] HCA 88.
[163] *Kruger v Commonwealth* (1997) 190 CLR 1; [1997] HCA 27.
[164] *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52; [1980] HCA 44.
[165] *Clissold v Perry* (n 139).
[166] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 [58], [59].
[167] *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290; [2001] HCA 14 [28]. See also *Bropho v Western Australia* (1990) 171 CLR 1, 18; [1990] HCA 24.
[168] Pearce (n 161) [5.9]

environment that prevail and are pressing at the time.[169] The Court concluded that "at the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected."[170] By analogical reasoning, in the current time and place, in which climate change touches every aspect of our legal and social systems,[171] could climate change and its consequences for human rights inform a court's application of the principle of legality in cases where it arises?

There are three steps in answering this question: first, identifying a fundamental right, freedom or immunity that is recognised at common law or is of such a fundamental nature or character as to engage the principle of legality; secondly, ascertaining whether the relevant legislation interferes with this right; and thirdly, assessing whether the principle of legality in fact operates to constrain any interference with such rights.[172]

Starting with the first step, this article raises three possibilities of such a fundamental right: (1) a right that has already been recognised by the courts as fitting within the recognised class of fundamental rights; (2) a right already recognised within international human rights law, such as the right to life; (3) and a right specifically related to climate change, such as the right to a safe climate.

As to the first, courts have identified a number of rights which fit into a recognised category of fundamental rights, freedoms and immunities that require express legislative intention to be curtailed or abrogated. One instance where environmental concerns have intersected with recognised fundamental rights is the right to freedom of expression. The High Court has long recognised that a freedom of political communication is implied in the Constitution,[173] and the principle of legality provides an additional protection for freedom of expression.[174] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of expression unless this intention is unambiguously clear.[175] The implied freedom of

[169] *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 [66].
[170] Ibid [69].
[171] See Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *Modern Law Review* 173.
[172] *Kassam* NSWCA (n 145) [92].
[173] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; [1992] HCA 45; *Nationwide News v Wills* (1992) 177 CLR 1; [1992] HCA 46; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570; [1997] HCA 25.
[174] Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129) [4.30].
[175] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; [2013] HCA 3 [42]–[46]*; Evans v New South Wales* (2008) 168 FCR 576; [2008] FCAFC 130 [72]; *Simms* (n 152), 130.

political communication, and corresponding principle of legality was discussed in *Brown v Tasmania*.[176] The plaintiffs were arrested and charged with offences under the *Workplaces (Protection from Protesters) Act 2014* (Tas) (Protestors Act) while raising public and political awareness about logging in the Lapoinya Forest in Tasmania. Although the prosecution did not proceed with the charges, the plaintiffs instituted proceedings in the original jurisdiction of the High Court challenging the validity of sections of the Protesters Act. In finding that these sections[177] were invalid, the majority held that the measures adopted by the Protesters Act to deter protesters effected a significant burden on the freedom of political communication. This burden was not justified.[178] In particular, vague definitions and lack of clarity around the boundaries of "business premises" or a "business access area" in the Protestors Act[179] would likely result in errors such that some lawful protests would be prevented or discontinued, and protesters would be deterred from further protesting.[180] The balance of the impugned provisions were not reasonably necessary because the Protesters Act was likely to deter protests of all kinds, which was "too high a cost to the freedom given the limited purpose of the Act".[181]

While *Brown* is a judgment about constitutional and common law protection of forums for expression, it is a case situated within the history of environmental protest in Tasmania.[182] The judgments are framed within the context of Tasmanian forests,[183] such that "the subtext to this case was to pit the plaintiff's claim to a right to protest inside the forest against the State's claim to close the forest for the purposes of private logging".[184] The history of environmental protest in Tasmania and the importance of the forest as a site for the protests[185] is detailed in the judgments. For instance, the majority notes that "onsite protests have been a catalyst for granting protection to the environment in particular places and have contributed to governments in Tasmania and throughout Australia granting legislative and regulatory environmental protection to areas not previously protected".[186] The analysis of the implied

[176] (2017) 261 CLR 328; [2017] HCA 43 ('*Brown v Tasmania*').
[177] *Workplaces (Protection from Protesters) Act 2014* (Tas) s 6(1), 6(2), 6(3), 6(4), 8(1), s 11(1), 11(2), 11(6), 11(7), 11(8), 13 and Pt 4.
[178] *Brown v Tasmania* (n 176) [152].
[179] Ibid [67].
[180] Ibid [77], [84], [85].
[181] Ibid [145].
[182] Cristy Clark and John Page, 'Of Protest, the Commons, and Customary Public Rights: An Ancient Tale of the Lawful Forest' (2019) 42(1) *UNSW Law Journal* 26, 30.
[183] *Brown v Tasmania* (n 176) see [6], [23], [32] (Kiefel CJ, Bell and Keane JJ), [221] (Gageler J), [240] (Nettle J).
[184] Clark and Page (n 182) 30.
[185] *Brown v Tasmania* (n 176) [64].
[186] Ibid [33].

freedom of communication and related right to freedom of expression was thereby situated within the forest as a site of environmental protest.[187]

How might climate change and its consequences assist in the interpretation of the right to freedom of expression or implied freedom of political communication? Consider, for example, legislation which creates offences for protestors seeking to disrupt operations at a coal mine. It is necessary to consider the operation and effect of a statute in order to answer the question whether a statute impermissibly burdens the implied freedom of political communication.[188] In considering whether such legislation might be interpreted as placing an unjustified burden on freedom of expression or the implied freedom of political communication, a court might have regard to the importance of place. Here, a court might consider the relevance of the coal mine as a site for protest, compared with the coupes in the forest discussed in *Brown,* or may draw upon the history of climate protest in an analogous manner to forestry protests in *Brown.* Climate change might, therefore, feed into an analysis of the implied freedom of political communication and the corresponding fundamental right to freedom of expression.

The second possible fundamental right is a right already recognised in human rights law. It has been argued that it is legitimate and consistent with the common law to draw upon international human rights norms to update the set of values[189] protected through the principle of legality.[190] In this way, international human rights norms could be adopted as a "touchstone"[191] for the principle of legality. A former Chief Justice of Australia, the Hon Robert French, has stated extra-judicially that "[i]t does not take a great stretch of the imagination to visualise intersections between these fundamental rights and freedoms, long recognised by the common law, and the fundamental rights and freedoms which are the subject of the Universal Declaration of Human Rights and subsequent international Conventions to which Australia is a party."[192] In *Director of Public Prosecutions v Kaba,* the Supreme Court of Victoria held that the rights and freedoms in the International Convention on Civil and Political

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[187] Clark and Page (n 182).
[188] *Brown v Tasmania* (n 176) [61].
[189] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449.
[190] David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5, 6.
[191] Meagher (n 189) 449.
[192] Chief Justice Robert French, 'Oil and Water? International Law and Domestic Law in Australia' (Speech delivered at the Brennan Lecture, Bond University, 26 June 2009) 21 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26June09.pdf>. See application of this statement in *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [179].

Rights were fundamental rights and freedoms for the purpose of the principle of legality.[193] If this approach were to be taken in Australia, internationally recognised human rights might be identified as fundamental rights engaging the principle of legality.

One internationally recognised human right is the right to life. Overseas, there are numerous cases where the right to life has been understood as encompassing environmental rights. An example is the 30-year history of litigation brought by environmental public interest lawyer MC Mehta,[194] such as *M.C. Mehta v Union of India*,[195] which discussed the right to life and personal liberty in Article 21 of the Constitution of India.[196] The Supreme Court of India has held elsewhere that "the right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life."[197] The right to life "encompasses within its ambit the protection and preservation of the environment, ecological balance, freedom from pollution of air and water, and sanitation, without which life cannot be enjoyed. Any contract or action which would cause environmental pollution… should be regarded as amounting to violation of Article 21".[198] The content of the right to life has therefore been held as including a right to live in a healthy and safe environment.

These cases are part of a broader trend of constitutional courts and texts recognising the environment as a subject for protection under human rights law.[199] A logical extension of these decisions might be that the right to live in a healthy and safe environment includes the right to live in an environment with a safe climate. The UN Human Rights Committee has noted that climate change and environmental degradation are some of the "most pressing and serious threats to the ability of present and future generations to enjoy the right to life." The Committee found that state obligations under international environmental law should inform the contents of the right to life (article 6 of the ICCPR), which should in turn inform the contents of state obligations under international environmental law.[200] Implementation of the right to life

[193] *Director of Public Prosecutions v Kaba* (n 192) [181].
[194] See MC Mehta, *In the Public Interest: Landmark Judgments and Orders of the Supreme Court of India on Environment and Human Rights* (Prakriti Publications, 2009).
[195] 1987 SCR (1) 819.
[196] *M.C. Mehta vs Union of India* (Writ Petition Nos 158128/2019 and 158129/2019) [2].
[197] *Subhash Kumar v State of Bihar* (1991) AIR SC 420.
[198] *Virender Gaur v State of Haryana* (1995) 2 SCC 577.
[199] Erin Daly and James May, *Global Environmental Constitutionalism* (Cambridge University Press, 2015).
[200] Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (CCPR/C/GC/36, 30 October 2018) at [62].

therefore includes taking measures "to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors."[201]

A third possibility is to develop and recognise a new fundamental right related to climate change. As earlier discussed, the categories of rights that might be regarded as "fundamental" are not closed, but include rights that are important within our system of representative and responsible government under the rule of law.[202] Could it be argued that a safe climate is so important to the rule of law and Australian system of representative government that it should be recognised as a fundamental right protected by the principle of legality? In the previously discussed case of *Juliana*, the US District Court found that the right to due process in the US Constitution includes a fundamental right to a stable climate. The Court noted that the principles of substantive due process evolve to encompass different rights over time. A right to a stable climate fell within the concept of due process in the US Constitution because it was held to be fundamental to a free and ordered society.[203]

By analogical reasoning, could a climate that is compatible with a safe, clean and healthy environment be so "important within our system of representative and responsible government under the rule of law"[204] that a right to such a climate might fall within the category of fundamental rights that cannot be abrogated without clear legislative intention? As noted in *Juliana,* "a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress."[205] Judge Staton's dissent in the Ninth Circuit Court of Appeal's decision similarly found that the existential threat posed by climate change engaged the perpetuity principle, which protected the plaintiffs from the "willfull destruction" of the Nation. The consequences of climate change are widespread, rapid and intensifying, and unprecedented.[206] In Australia, the impacts of climate change include more frequent and hotter heatwaves; increased extent and intensity of bushfires; and increased extent and intensity of extreme rainfall events. The Australian system of representative and responsible government, and the rule of law, are not separate from the natural environment but are constituted by and dependent on it. On this reasoning, it is arguable that a safe climate might be able to be seen as so important to the rule of law and governmental systems that it falls within the class of fundamental rights protected by the principle of legality.

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[201] Ibid.
[202] *Lee* (n 145) [313].
[203] *Juliana v United States* (D Or 2016) (n 55) 1250.
[204] *Lee* (n 145) [313].
[205] *Juliana v United States* (D Or 2016) (n 55) 1250.
[206] Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Report, 2021) A.1.

If a fundamental right were to be identified, the second step would involve ascertaining whether the relevant legislation interferes with this right and if so, the extent of the interference. This interference must be material: the principle of legality will not necessarily be engaged if the interference with the fundamental right that is authorised by the legislation is slight or indirect or temporary.[207] As Gageler and Keane JJ observed in *Lee*,[208] "the notion that any subtraction, however anodyne it might be in its practical effect, from the forensic advantages enjoyed by an accused under the general law necessarily involves an interference with the administration of justice or prejudice to the fair trial of the accused is unsound in principle."

The third step involves an assessment of whether the principle of legality in fact operates to constrain any interference with the fundamental right. This includes examining whether the legislation that curtails or abrogates the fundamental right expresses a clear and unambiguous intention to do so. The language of such an express intention would need to correspond with, and be directed to, the fundamental right that is intended to be abrogated or curtailed. Where the objects or purpose of the legislation contemplates the abrogation or curtailment of particular rights, the principle of legality will have little if any role to play.[209] Thus in *Australian Securities and Investments Commission v DB Management Pty Limited*,[210] the High Court found that "the relevant provisions of the legislation in question have, as their primary concern, interference with vested proprietary rights."[211] The legislation enabled compulsory acquisition of property. In this circumstance, "it is of little assistance, in endeavouring to work out the meaning of parts of that scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve."[212] A law that is directed toward authorising interference with a fundamental right will thus manifest an intention to abrogate or curtail this fundamental right. This might be particularly relevant to, for example, legislation which itself approves or otherwise fast-tracks the approval process for fossil fuel projects, that contribute to climate change.

The clarity with which the intention to curtail or abrogate the fundamental right needs to be expressed will be correlative to and vary with the strength or fundamental nature of the right involved,[213] "with the required clarity increasing the more that the rights are 'fundamental' or

[207] *Kassam* NSWCA (n 145) [87].
[208] *Lee* (n 145) [324] and see also [126] (Crennan J).
[209] *Kassam* NSWCA (n 145) [85].
[210] (2000) 199 CLR 321; [2000] HCA 7.
[211] Ibid [43].
[212] Ibid [43].
[213] *Mann v Paterson Constructions Pty Limited* (2019) 267 CLR 560; [2019] HCA 32 [159]; *Kassam* NSWCA (n 145).

'important'."[214] McHugh J similarly observed in *Gifford v Strang Patrick Stevedoring Pty Limited,*[215] "the presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action".[216]

In these ways, the principle of legality might be able to be invoked in human rights-based arguments in climate litigation.

2 Presumption of consistency with international human rights law

A different interpretative tool is to interpret legislation in a way that accords with international human rights law.[217] There has been much debate regarding the effect of international treaties that Australia has signed but not incorporated into Australian domestic law. In *Minister for Immigration and Ethnic Affairs v Teoh,*[218] an unincorporated convention to which Australia was a party, the CRC,[219] could not be relied on as a limitation on the exercise of an administrative discretion,[220] yet the High Court held that ratification of the CRC raised a legitimate expectation that the decision-maker would take account of the CRC.[221] In the later decision of *Re Minister for Immigration and Multicultural Affairs and Indigenous Affairs; ex parte Lam*,[222] four of the judges criticised aspects of the *Teoh* decision. While the extent to which an unincorporated treaty can be relied on as a limitation on the exercise of an administrative discretion is therefore contentious, *Teoh* is "too well established to be repealed now by judicial decision".[223] Hence, it can be taken that "where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party."[224] A wider interpretative principle has

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[214] Ibid [159].
[215] (2003) 214 CLR 269; [2003] HCA 33.
[216] Ibid [36].
[217] For consideration of the relationship between the principle of legality and presumption of consistency with international law: see Wendy Lacey, 'Confluence or Divergence? The Principle of Legality and the Presumption of Consistency with International Law' in Meagher and Groves (n 147) 237.
[218] (1995) 183 CLR 273 ('*Teoh*').
[219] Opened for signature 20 November 1989, 1577 UNTS 3; 28 ILM 1456 (entered into force 2 September 1990).
[220] *Teoh* (n 218) 287.
[221] Ibid.
[222] (2003) 214 CLR 1; [2003] HCA 6.
[223] *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37 (McHugh J) [65] ('*Al-Kateb*'). For a comprehensive list of applications of *Teoh,* see Pearce (n 161) annexure [3.12].
[224] *Teoh* (n 218) 287. See also *Momcilovic* (n 150) [18].

been suggested by Justice Kirby, that legislation should be interpreted so as to be consistent with the principles of the international law of human rights and fundamental freedoms.[225]

Either interpretative approach has implications for human rights-based climate litigation. As noted earlier, climate change impacts a range of human rights under international human rights law. Human rights recognised under human rights conventions such as the ECHR, including the right to life and the right to family and private life, have been found to have environmental content.[226] Government inaction on climate change has been held specifically to threaten the right to life and the right to private life, family life, home, and correspondence.[227] Climate change has also been held to violate rights under other treaties or international conventions, including the Convention on the Rights of the Child.[228]

Where legislation or executive action under legislation interferes with human rights, a court could interpret such legislation, where it is ambiguous or unclear, in a way that accords with Australia's obligations under a treaty or an international convention to which Australia is a party (the first interpretative principle) or is consistent with principles of international law of human rights and freedoms (Kirby J's interpretative principle). Either way, the result may be to uphold human rights that are being or will be affected by climate change.

B *Human rights informing other laws*

The second alternative pathway is using human rights to frame and describe breaches of other laws, such as planning or environmental laws. Threats from extreme weather events, such as bushfires or floods, can be described as a threat to the effective enjoyment of the right to life. Threats from climate change-induced drought can be described as a threat to the right to food or the right to water. Threats from sea-level rise can be described as a threat to the right to self-determination. Where these rights are not directly enforceable through human rights legislation, they can be used as a discourse and a way of understanding a breach of other substantive laws.

In the *Urgenda* litigation, the breach of the duty of care under the Dutch civil law was described in terms of impacts on the right to life under Article 2 of the ECHR and the right to private life,

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[225] *Al-Kateb* (n 223) [193]. See also Michael Kirby, 'Municipal Courts and the International Interpretive Principle: Al-Kateb v Godwin' (2020) 43(3) *UNSW Law Journal* 930.
[226] *Öneryıldız v Turkey* (Application No. 48939/99, 20 November 2004); *López Ostra v Spain* (Application No. 16798/90, 9 December 1994); *Fadeyeva v Russia* [2005] ECHR 376; (2007) 45 EHRR 10.
[227] *Urgenda II* (n 34); *Urgenda III* (n 37).
[228] *Sacchi v Argentina* (n 40).

family life, home, and correspondence under Article 8 of the ECHR.[229] Human rights law was used to describe the harms caused by the breach. While the Netherlands is a party to the ECHR, there is nothing to prevent the framing of climate change-related harms as human rights violations in the absence of such a convention.

Similarly, the recent Federal Court of Australia decision of *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*[230] described the harms of future climate scenarios,[231] and direct impacts on the applications, including heatwaves[232] and bushfires,[233] in addition to indirect impacts.[234] The factual findings of *Sharma* were upheld on appeal,[235] although the legal conclusion that the relevant Minister owed but breached a duty of care in exercising statutory powers under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was overturned. If there had been a duty of care, it might have assisted in describing the harms in terms of human rights, in order to understand the salient features relevant to determining the content of the duty of care and any breach of duty. In this way, human rights discourse might assist in the assessment and analysis of a duty of care and breach of duty.

Even in jurisdictions without dedicated human rights legislation, human rights discourse may be used to describe harms or frame arguments of a breach of other substantive laws. For example, the harms described in *Gloucester* to peoples' health and wellbeing[236] could have been described in the discourse of the right to health. The impacts on peoples' culture[237] could have been described in the discourse of cultural rights. Indeed, in considering the social impacts of the mine, the Court considered the *Social Impact Assessment Guideline* (Department of Planning and Environment, 2017), which stated that, "as a guide, social impacts can involve changes to people's personal and property rights, including whether their economic livelihoods are affected, and whether they experience personal disadvantage or have their civil liberties affected". In this context, the Court discussed personal and property rights, including issues related to economic livelihood and whether or not people experience

[229] *Urgenda I* (n 31).
[230] [2021] FCA 560 ('*Sharma*').
[231] Ibid [55]-[69]. See Jacqueline Peel and Rebekkah Markey-Towler, 'A Duty to Care: The Case of Sharma v Minister for the Environment [2021] FCA 560' (2021) 33(3) *Journal of Environmental Law* 272.
[232] *Sharma* (n 230) [205]-[225].
[233] Ibid [226]-[235].
[234] Ibid [237]-[246].
[235] *Minister for the Environment v Sharma* (2022) 400 ALR 203; [2022] FCAFC 35 [273]-[290], [330]-[331], [412], [834].
[236] *Gloucester* (n 122) [353]-[368].
[237] Ibid [340]-[352].

personal disadvantage or have their civil liberties affected.[238] These social impact harms could have been described and framed in terms of human rights obligations. Human rights discourse could thereby have aided the Court's appreciation of the extent of the harms caused in the case.

VI Conclusion

This article has explored how and why human rights-based climate litigation in Australia has differed from human rights-based climate litigation overseas. Through a survey of overseas human rights-based climate litigation, three types of causes of action in human rights-based climate litigation have been examined: international and regional treaties; constitutional rights; and human rights enshrined in statute. Each of these causes of action is limited in availability and scope in the Australian context, leading to a dearth of human rights-based climate litigation in Australia. Outside of these causes of action, however, lie other possibilities for human rights-based climate litigation in Australia. Two such possibilities are using human rights as a tool for statutory interpretation, and using human rights to understand breaches of other laws, such as planning or environmental laws.

[238] Ibid [380].

Briefing Paper

International Law Programme

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Climate change and human rights-based strategic litigation

Summary

- Rights-based climate litigation is helping to bridge the gap between international pledges and governmental action at the national level, constituting an important 'bottom-up' form of pressure on governments to do their 'fair share' in tackling climate change.
- Human rights-based cases against governments are taking a range of formats: challenging not just inaction on climate change (as in the *Urgenda* case against the Netherlands), but also governments' failure to honour existing commitments (as in the *Leghari* case against Pakistan) and climate change strategies that themselves contribute to human rights violations.
- Global South countries that have led the way in socioeconomic rights jurisprudence are likely to be particularly fertile jurisdictions for human rights-based climate cases in future.
- Cases against corporations are set to increase, aided by the trend for human rights due diligence laws that concretize corporate responsibilities on human rights into hard law.
- An increasing proportion of rights-based cases are being brought by young people on behalf of future generations, including high profile cases before the European Court of Human Rights (such as *Duarte Agostinho and Others v Portugal*) and a petition by Greta Thunberg and 15 others before the UN Committee on the Rights of the Child that represents a major step forward for child rights cases.

Kumaravadivel Guruparan and Harriet Moynihan

CHATHAM HOUSE

Introduction

The 2021 Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) underlines in stark terms the link between human activity and climate change and warns of the need for urgent action to address the crisis.[1]

In addition to other well-known impacts, climate change interferes with the enjoyment of a wide range of human rights recognized and protected by international law. In 2014, 27 UN Special Rapporteurs and other independent experts issued a joint letter on the implications of climate change for human rights. They noted that a 'safe, clean, healthy and sustainable environment is indispensable to the full enjoyment of human rights, including rights to life, health, food, water and housing, among many others'.[2] Reports of the UN's Office for the High Commissioner on Human Rights (OHCHR) and resolutions of the UN's Human Rights Committee have also emphasized the adverse effects that climate change can have on a range of human rights,[3] and that states have obligations to take steps to protect human rights from the harmful effects of climate change.[4]

Litigation is a relatively recent tool used by activists to pressure states to respond better to climate change. Litigation based on the impact of climate change on human rights is growing fast: prior to 2015, there were only a handful of rights-based climate cases but since 2015, 40 cases have been brought in 22 countries and before three international bodies.[5]

Rights-based litigation still makes up a comparatively small proportion of all climate change litigation: of 1,841 climate change cases that are ongoing or concluded, human rights arguments have been used in 112[6] – 93 against governments and 16 against corporations.[7] But scholars have observed a 'rights turn' in climate change litigation in the last few years,[8] galvanized by the success of a small number of prominent cases such as *The State of the Netherlands vs the Urgenda Foundation* ('*Urgenda*'). According to a study by the Climate Litigation Accelerator, over 90% of climate cases are now argued on rights grounds.[9] This trend is set to continue.

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1 IPCC (2021), *Climate Change 2021: The Physical Science Basis*, https://www.ipcc.ch/report/ar6/wg1.
2 OHCHR (2014), *A New Climate Change Agreement Must Include Human Rights Protections For All*, https://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf.
3 See, for example, UN Human Rights Council Resolution, *Human rights and climate change* (adopted on 22 June 2017), UN Doc. No. A/HRC/RES/35/20.
4 OHCHR (2009), *'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights'*, UN Doc. No. A/HRC/10/61. For further discussion of the human rights implications of climate change, see UN Environment Programme (2015), '*Climate Change and Human Rights*', http://columbiaclimatelaw.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf.
5 Rodríguez-Garavito, C. (2020), 'Climate litigation and human rights: averting the next global crisis', *Open Global Rights*, 26 June 2020, https://www.openglobalrights.org/climate-litigation-and-human-rights-averting-the-next-global-crisis.
6 Setzer, J. and Higham, C. (2021), *Global trends in climate change litigation: 2021 snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 6, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.
7 Ibid., p. 5.
8 Peel, J. and Osofsky, H. M. (2018), 'A Rights Turn in Climate Change Litigation', *Transnational Environmental Law* 7 (1): p. 37–67, doi:10.1017/S2047102517000292.
9 Rodríguez-Garavito, C. (2021), 'Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action', in Rodríguez-Garavito, C., *Litigating the Climate Emergency: How Human Rights, Courts and Legal Mobilization Can Bolster Climate Action* (forthcoming), Cambridge University Press, p. 2.

The objectives of this paper are twofold. First, it highlights the diverse and innovative ways in which human rights are being used as the basis for climate change litigation. These include the use of litigation: to pressure governments to increase their efforts to mitigate climate change; to enforce current climate obligations and targets; to protect human rights when governments undertake actions on climate change; and to establish the responsibilities of corporations.

Second, the paper considers the challenges inherent in rights-based climate cases and the extent to which human rights-based litigation is having – and can have in the future – an impact on climate change policy at the national and international level. To what extent is rights-based litigation an effective tool to push forward action on climate change by governments, and to generate greater awareness among policymakers, the public and the press of the need for action?

Different types of rights-based climate change litigation

There is well-established jurisprudence on the duties that states have to respect, protect and fulfil the human rights of individuals within their jurisdiction. These arguments have been developed and honed in the context of human rights-based environmental litigation over the past 20 years. Increasingly, we are seeing litigators seek to extend these arguments to the climate change context.

Adoption of adequate response measures to address climate change

Over 80% of rights-based climate cases are aimed at pressuring governments to do more to mitigate climate change, for example through challenging emission reduction plans.[10] The 2015 Paris Agreement on climate change provides a useful baseline for such claims, by setting benchmarks against which to assess governments' climate action. The Paris Agreement was the first climate treaty to explicitly recognize the relevance of human rights to climate change, and that actions to address climate change must comply with human rights obligations.[11] The Agreement also commits states to minimize the economic, social and environmental impacts that may result from the implementation of response measures to mitigate or adapt to climate change.

The *Urgenda* judgment of 2019 was the first case in the world to establish that there was a legal duty on a government to prevent dangerous climate change.[12] In that case, the claimants sought an injunction to compel the Dutch government to reduce its greenhouse gas emissions, on the basis that the government had taken inadequate action. The NGO Urgenda asked the Dutch Supreme Court to set an exact standard for carbon emissions – a reduction of 25%. The litigants argued that human rights impose positive duties on governments

10 Ibid., p. 5.
11 Para 11 of Preamble to Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UN Doc. FCCC/CP/2015/L.9/Rev/1.
12 Setzer, J. and Byrnes, R. (2020), p. 16.

to adopt adequate measures, including legislation to reduce greenhouse gas emissions and to adapt to the impacts of climate change. The court held that reducing emissions with the highest possible level of ambition amounts to a 'due diligence standard' for complying with these human rights obligations.

The litigants argued that human rights impose positive duties on governments to adopt adequate measures, including legislation to reduce greenhouse gas emissions and to adapt to the impacts of climate change.

In *Urgenda*, human rights arguments were technically peripheral to the grounds of the case, which centred on Dutch tort law. But they ended up being decisive to the result[13] as they were utilized by the court to fill in the content of due diligence standards owed under the duty of care considered by the court. The case is a progressive example of how regional and domestic courts can actively use the substantive and procedural provisions of international human rights law, together with soft law provisions such as targets agreed under the Paris framework, to interpret domestic law, and to bridge the gap between the international law obligations of the state concerned and its domestic law.[14] The Dutch Supreme Court's finding that risks of climate change fell within the European Convention on Human Rights (ECHR) – especially Articles 2 (right to life) and 8 (right to private and family life) – has provided a useful precedent for future rights-based cases.

The court used the 'common ground' approach pioneered by the European Court of Human Rights (ECtHR), under which a respondent state need not have ratified the entire collection of instruments applicable. Rather, it is sufficient if the instruments concerned represent 'a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and shows, in a precise area, that there is common ground in modern societies'.[15] This common ground approach is increasingly invoked in climate mitigation cases, enabling a court to draw on a 'baseline of norms' (arising from both hard law treaties and soft law instruments such as the Paris Agreement and IPCC reports) in relation to climate rights.[16]

International law was also used by a court to help interpret domestic law in the case of *Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others*,[17] brought against the South African government in 2017. The South African Constitution requires domestic law to be interpreted in line with both

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13 Savaresi, A. and Setzer, J. (2021), 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation', *SSRN*, https://ssrn.com/abstract=3787963.
14 Rodríguez-Garavito, C. (forthcoming), *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, p. 7.
15 Demir and Baykara vs Turkey (2008), Council of Europe/European Court of Human Rights, (GC) -34503/97, 113.
16 Rodríguez-Garavito, C. (forthcoming), *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, p. 14.
17 *Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others* (65662/16) (2017).

South Africa's Bill of Rights[18] and international law.[19] The High Court read the constitutional provision protecting the right to environment, along with the UN Framework Convention on Climate Change (UNFCCC)[20] to which South Africa is a party, to find for the claimant that South Africa had to consider climate change as part of the environmental impact assessment required prior to deciding on the authorization of a coal-fired power plant.[21]

Another successful case that sought to require the adoption by a government of adequate measures in relation to climate change was *Future Generations vs Ministry of Environment, Colombia (2018)*. In that case, 25 youth plaintiffs sued several bodies within the Colombian government, Colombian municipalities and several corporations for failure to enforce their claimed rights to a healthy environment, life, health, food and water, as a result of the failure to tackle deforestation of the Amazon or make adequate efforts to reach targets set in relation to the Paris Agreement and National Development Plan.[22]

The Colombian Supreme Court held that the Colombian Amazon is a '"subject of rights", entitled to protection, conservation, maintenance and restoration by the State and the territorial agencies.'[23] The court ordered various government agencies, with the participation of the claimants, the affected communities and the interested population in general, to formulate short-, medium-, and long-term action plans within four months, 'to counteract the rate of deforestation in the Amazon, tackling climate change impacts.'[24]

Regional human rights courts are also being used by litigants to bring rights-based climate cases. The Inter-American Commission on Human Rights is currently considering a petition filed in September 2019 by organizations from multiple Latin American countries about the impact of climate change on indigenous peoples, claiming violations of their right to health, property and culture[25] – particularly the right of indigenous people to follow their practices.[26] The court is also hearing a petition filed by a Canadian indigenous group alleging lack of action on the part of Canada to prevent the melting of Arctic glaciers, on the basis that it is affecting their health, property, way of life and livelihood.[27]

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18 *Constitution of the Republic of South Africa,* (1996), section 39.
19 Ibid., section 223.
20 *Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others* (2017), paragraph 83.
21 Ibid., paragraph 91.
22 *Future Generations vs Ministry of the Environment and Others* (Colom Sup Ct, 11001-22-03-000-2018-00319-01, 5 April 2018).
23 Dejusticia (2018), 'Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court's Decision', 13 April 2018, https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision.
24 Ibid., p. 45.
25 Organization of American States (OAS), American Convention on Human Rights (adopted 22 November 1969). Article 4 provides for the Right to Life, Article 17 the Right of the Family, Article 21 the Right to Property.
26 Climate Case Chart (2019), 'Hearing on Climate Change Before the Inter-American Commission on Human Rights', http://climatecasechart.com/climate-change-litigation/non-us-case/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights.
27 Arctic Athabaskan Council (2021), 'Petition To The Inter-American Commission On Human Rights Seeking Relief From Violations Of The Rights Of Arctic Athabaskan Peoples Resulting From Rapid Arctic Warming And Melting Caused By Emissions Of Black Carbon By Canada', http://climatecasechart.com/climate-change-litigation/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions.

In September 2020, in *Duarte Agostinho and others vs Portugal and 32 other states*, six Portuguese youths alleged inaction on climate change on the part of Portugal and 32 other Council of Europe member states.[28] The applicants' claim alleges not just violations of the right to life and right to privacy, but also age-based discrimination on the basis that 'children and young adults are being made to bear the burden of climate change to a far greater extent than older generations'.[29] A number of organizations, as well as a group of UN Special Rapporteurs, have filed supporting briefs in this case.

Enforcement of existing commitments and targets

Some cases have been brought on the basis that states have positive duties to enforce legislation in which they have committed to address climate change, and to provide redress to those suffering the impacts of climate change. The rights basis of this argument is that states cannot respect, protect and fulfil human rights while breaching legislation they themselves have adopted.[30]

Courts in jurisdictions where environmental rights are directly provided for in the state's constitution, as is more commonly the case in the Global South, have sometimes found it easier to adapt rights-based claims to the climate change context. For example, in *Leghari vs Federation of Pakistan (2015)*,[31] the Lahore High Court held that the right to life, right to human dignity, right to property and right to information under Articles 9, 14, 23 and 19A of the Constitution, which already had been interpreted to provide for the right to a healthy environment, must now also extend to cover climate change.

The court found that these provisions 'provide the necessary judicial toolkit to address and monitor the Government's response to climate change'[32] and ordered the government to appoint a climate change focal point in certain departments. It also ordered the government to publish an adaptation action plan realizable within a few months of the order and to establish a Climate Change Commission to monitor progress.

In another such case, *PSB et al. vs Brazil*, the applicants are alleging that the Brazilian government's failure to implement its Action Plan for the Prevention and Control of Deforestation in the Legal Amazon has violated the fundamental rights of indigenous people and future generations and contributed to dangerous climate change.[33]

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28 Savaresi and Setzer (2021), p. 9.
29 ECtHR (2020), *Duarte Agostinho and others vs Portugal and 32 other states*, ECtHR no 39371/20, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206535%22]}.
30 Savaresi and Setzer, (2021), p. 9.
31 *Leghari vs Federation of Pakistan* (2015), Lahore High Court, W.P. No. 25501/2015.
32 Ibid.
33 *PSB et al. vs Brazil* (Pending) (2020), Supreme Court of Brazil, ADPF 760.

Obligations on states to protect human rights when undertaking actions on climate change

A growing number of rights-based climate change cases focus not on the inadequacy of states' responses to climate change, but rather on the argument that states' negative obligations require them to ensure that their mitigation and adaptation activities in response to climate change do not *themselves* contribute to human rights violations.[34] The Paris Agreement preamble focuses only on states' response measures, not the human rights implications of climate change itself. The OHCHR advocates a broader approach, underlining that states should not authorize activities or adopt policies leading to environmental impacts that in turn affect the enjoyment of human rights (for example, the right to life, family life or property).[35] The UN's Human Rights Committee has also sought to emphasize the importance of incorporating human rights concerns into climate advocacy.[36]

For example, applicants have challenged measures to reduce emissions that they allege encroach on traditional land uses and livelihoods. Such cases often allege violation by the state of procedural obligations, including inadequate consultation with, or provision of information to, affected groups. There have been several cases in Mexico brought by indigenous people alleging that the authorization of wind farms took place without a process of fair, prior and informed consent.[37]

This kind of litigation puts pressure on governments to expand their approach to tackling climate change beyond purely a regulatory one to a more holistic strategy that takes account of the intersection between climate change and other social justice issues. As governments increasingly have to make trade-offs between the pursuit of climate objectives (such as the achievement of net zero) and other societal concerns, including the position of vulnerable or minority groups such as the poor, farmers and indigenous people, we are likely to see an increase in this kind of litigation.[38]

Cases against corporations

As noted above, most human rights-based climate litigation cases to date have been brought against states rather than against businesses. This is unsurprising, as traditionally states are the bearer of human rights obligations, and the issue of whether corporations have similar obligations remains contested. The UN Guiding Principles on Business and Human Rights (UNGPs) set out the responsibility of businesses not to cause (directly or indirectly) harm to human rights as a result of their business activities. But the UNGPs are non-binding soft law, which makes litigation more of a challenge.

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34 Savaresi and Setzer (2021), p. 13, describing these as 'anti climate cases'.
35 OHCHR (2015), *Understanding Human Rights and Climate Change*, https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf.
36 UN Human Rights Council (2021), 'Human Rights and Climate Change' (adopted on 12 July 2021), HRC/RES/47/24.
37 Velasco Herrejon, P. and Savaresi, A. (2020), 'Wind Energy, Benefit-Sharing and Indigenous Peoples: Lessons from the Isthmus of Tehuantepec, Southern Mexico', *OGEL: Oil, Gas and Energy Law Journal*, 1(2020), https://www.ogel.org/article.asp?key=3870.
38 Savaresi and Setzer (2021), p. 16.

Nevertheless, rights-based climate cases against corporations are also on the rise. In the domain of environmental law, there exists a wide body of jurisprudence of how corporations can be held accountable for human rights violations, which is now starting to inform climate change litigation.

In 2021, the Dutch courts delivered a pioneering victory for rights-based climate change litigation, in one of the world's first human rights claims against a corporation in relation to climate change.[39] In *Milieudefensie et al. vs Royal Dutch Shell PLC (2021)*,[40] 17 NGOs and more than 17,000 individuals filed an action before the Hague District Court against Royal Dutch Shell PLC (Shell). The claimants sought a declaration that the annual CO_2 emissions of the global Shell group constituted an unlawful act against the claimants for which Shell was responsible. The claimants argued that Shell has a tort law duty of care under Article 6:162 of the Dutch Civil Code interpreted in light of Articles 2 (right to life) and 8 (right to a private life, family life) ECHR.

Increasingly the human rights responsibilities of companies are being concretized into binding legal obligations through domestic legislation mandating human rights due diligence by companies.

As in the *Urgenda* case, the court used human rights law, including international treaties and the UNGPs, to define the parameters of the corporate duty of care and of due diligence obligations under Dutch law.[41] The court noted that while the UNGPs are not legally binding, they 'are suitable as a guideline in the interpretation of the unwritten standard of care'.[42] The court concluded that Shell should be ordered to reduce its CO_2 emissions by a net rate of 45% at the end of 2030, relative to 2019 figures, through its group corporate policy. Shell is appealing the decision.[43]

While the *Shell* case is currently an exception, increasingly the human rights responsibilities of companies are being concretized into binding legal obligations through domestic legislation mandating human rights due diligence by companies. Several governments have recently enacted, or are enacting, laws that require companies to safeguard human rights and the environment, including in their global supply chain operations (e.g. in Australia, France, Germany and the EU). These binding obligations can then form the basis of rights-based legal challenges in the courts, as they did in *Notre Affaire à Tous and Others vs Total*

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39 *Milieudefensie et al. vs Royal Dutch Shell PLC*, (2021) C/09/571932, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true.
40 Ibid.
41 Ibid., paragraph. 4.4.9, Book 6, Section 162 of the Dutch Civil Code.
42 Ibid., paragraph. 4.2.4.
43 Shell PLC (2021), 'Shell confirms decision to appeal court ruling in Netherlands climate case', 20 July 2021, https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case.html.

(2021),[44] a claim based on France's corporate due diligence legislation.[45] The claimants sought a court order requiring Total to issue a corporate strategy that identifies the risks resulting from its greenhouse gas emissions, the risks of serious climate-related harms being committed by Total as outlined in the IPCC special report of October 2018, and the action the company will take to ensure its activities align with a trajectory compatible with the climate goals of the Paris Agreement.

Although the Court of Appeal ultimately held that the Commercial Court should hear the case, the case has inspired other claimants seeking to hold major companies to higher standards of climate responsibility. In a case brought against the global retailer Groupe Casino in France in March 2021, claimants relied on the same due diligence law, and international indigenous rights law, to demand that Casino supermarkets take all necessary measures to exclude beef tied to deforestation and the taking of indigenous territories from its supply chains in Brazil, Colombia and elsewhere.[46]

In April 2021, the environmental law NGO ClientEarth filed an action against the National Bank of Belgium for buying bonds in carbon-intensive corporations. Among other things, the suit bases its claims on the EU Charter on Fundamental Rights, which imposes duties in relation to environmental protection.[47]

Challenges facing rights-based climate change litigation

Rights-based climate change litigation faces a number of challenges, including establishing a causal link between the failure of a government to act in relation to climate change and the impact on human rights ('causation'); whether or not a court has a mandate to hear a claim about executive decisions on climate change ('justiciability'); issues of eligibility to file a case in court ('standing'); difficulties in dealing with complex scientific evidence; and the fact that litigation is expensive, time-consuming and – with cases brought against governments and corporations – laden with resource and power asymmetries. The first two challenges, which to date have been particularly problematic, are considered below.

44 *Notre Affaire à Tous and Others vs France*, (2021). No. 1904967, 1904968, 1904972, 1904976/4-1, Paris Administrative Court.
45 Article L. 225-102-4.-I of the Commercial Code (Loi 27 Mars 2017 sur le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre).
46 Rodríguez-Garavito, C. (forthcoming), *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, p. 21.
47 European Union, *Charter of Fundamental Rights of the European Union*, Brussels: Official Journal of the European Union, 55, 26 Oct. 2012. doi:10.3000/1977091X.C_2012.326.eng. Article 37 reads as follows: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

Establishing a causal link

The complex and global nature of climate change can make it difficult for a court to attribute responsibility for climate change to a particular government or corporate entity alone. Further, as an individual cannot claim alone to be affected by climate change, issues of standing can also arise, particularly where the impact is claimed to be on behalf of future generations.

It has proved difficult to bring compensation claims against governments based on principles of state responsibility under international law, partly due to political hurdles and partly the challenge of establishing a causal link given the fragmentation of responsibility between the states implicated. But litigants are increasingly overcoming challenges of causation in rights-based climate cases through the framing of the claim in terms of states' obligations to protect against the infringement of human rights by climate change. John Knox, former UN Special Rapporteur on the issue of a safe, clean, healthy and sustainable environment, cites the 2008 ECtHR case of *Budayeva and others vs Russia*, which concerned mudslides in the Caucasus that killed eight people. The government did not cause the mudslide, but the court held that it nevertheless had a responsibility to take appropriate steps to safeguard the lives of those within its jurisdiction.[48]

Advances in climate attribution – that is, robust evidence to establish a strong causal connection between historic and future greenhouse gases, an increase in surface temperature and the likelihood of severe weather as a result – are helping litigants to establish greater causality in climate change cases.[49]

Causation was raised by the Dutch government in the *Urgenda* case as part of its argument that Articles 2 and 8 ECHR do not contain obligations on the state to offer protection against the risks of climate change. The government argued that the risks would not be sufficiently specific, that they would be of a global nature (and hence not a responsibility that can be attributed to the Netherlands alone), and in any case that the environment was not protected under the ECHR. The court drew on the UNFCCC to find that while the problem is of a global nature, each state has a duty to do its part, as acknowledged by parties to the UNFCCC, including the Netherlands. This standard was informed by the emerging notion that in light of climate change and human rights obligations, governing countries have to contribute a 'fair share' to global climate mitigation,[50] as well as the well-established 'no harm principle', which gives rise to an obligation on states to prevent activities within their jurisdiction that cause cross-boundary environmental damage.[51]

In October 2021, the UN's Committee on the Rights of the Child made groundbreaking findings on jurisdiction, victim status and causation. This high profile case was brought by 16 youth activists, including Greta Thunberg, alleging that Argentina, Brazil, France, Germany and Turkey violated their rights under the UN Convention on the Rights of the Child by making insufficient cuts to

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48 Knox, J. and UNHCR (2016), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, p. 10.
49 Setzer, J. and Byrnes, R. (2020), *Global trends in climate change litigation: 2020 snapshot*, p. 19.
50 Ibid., para 5.7.5.
51 Ibid., para 4.3.9.

greenhouse gases and failing to encourage the world's biggest emitters to curb carbon pollution.[52] Drawing on a 2017 advisory opinion of the Inter-American Court of Human Rights on environmental rights, the Committee found that the Convention gives rise to extraterritorial obligations on states to address climate change, and that the collective nature of climate change does not absolve states of their individual responsibilities. On causation, the Committee found that the claimants had *prima facie* established a real and significant harm to justify their victim status. While the complaints were ultimately unsuccessful due to the claimants' failure to first exhaust domestic remedies, the findings in this case represent a major step forward for future child rights cases.[53]

The causal link between the activities of corporations such as the 'carbon majors' (usually referring to major industrial carbon producers in the oil, natural gas, coal and cement sectors) and climate change is also becoming more established. In the *Carbon Majors Inquiry* in the Philippines, the National Human Rights Commission concluded in December 2019 that 47 of the world's biggest fossil fuel producers – including BP, Chevron, ExxonMobil, Repsol and Shell – play a clear role in human-induced climate change and can be held accountable for violating the rights of its citizens for the damage caused by global warming, where domestic law provides a basis of claim, as civil law does in the Philippines.[54]

Justiciability

Some rights-based climate cases – particularly those brought in the US and Canada – have foundered on the question of justiciability. In *Juliana et al. vs United States of America* (2020), a rights-based challenge to government inaction on climate change in the US, the US Ninth Circuit Court of Appeal refused to order the government to formulate a comprehensive scheme to combat climate change on the basis that this would require 'a host of complex policy decisions which for better or worse must be entrusted to the wisdom of the legislative and executive branches.'[55]

Similarly, in *Lho'imggin et al. vs Her Majesty the Queen (2020)*,[56] a case filed under section 91 of the Canadian Constitution and sections 7 and 15 of Canada's Charter of Rights and Freedoms, the claimants asked the Federal Court of Canada to order the Canadian government to amend each of its environmental assessment statutes that apply to high greenhouse gas emitting projects. Addressing the issue of policy complexity, the court noted that 'when the issue spans across various governments,

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52 *Sacchi et al. vs Argentina, Brazil, France, Germany and Turkey* (2019), UN Committee on the Rights of the Child. See further: Arnoldy, B., 'Greta and 15 Kids Just Claimed Their Climate Rights at the UN', *Earthjustice* blog, 23 September 2019, https://earthjustice.org/blog/2019-september/greta-thunberg-young-people-petition-UN-human-rights-climate-change.
53 Nolan, A. (2021) 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v Argentina', *EJIL: Talk!* blog, 20 October 2021, https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina.
54 Kaminski, I. (2019), 'Carbon Majors Can Be Held Liable For Human Rights Violations, Philippines Commission Rules', *Business and Human Rights Resource Centre*, 9 December 2019, https://www.business-humanrights.org/en/latest-news/carbon-majors-can-be-held-liable-for-human-rights-violations-philippines-commission-rules.
55 *Juliana vs United States*, (9th Cir. 2020) 947 F.3d 1159, p. 525.
56 *Lho'imggin et al. vs Her Majesty the Queen* (2020), FC 1059.

involves issues of economics and foreign policy, trade, and a host of other issues, the courts must leave these decisions in the hands of others'.[57] The Federal Court came to a similar decision in *La Rose vs Her Majesty the Queen (2020)*.[58]

The case of *R (Plan B Earth & others) vs Secretary of State of Business (2018)*,[59] a challenge to the refusal of the UK government to revise the 2050 carbon target under the UK's Climate Change Act 2008, alleging among other things that it violated the Human Rights Act 1998 and Articles 2 and 8 ECHR, also failed on justiciability grounds. The High Court held that: '… the executive has a wide discretion to assess the advantages and disadvantages of any particular course of action, not only domestically but as part of an evolving international discussion.'[60]

Sometimes courts will be prepared to find a violation of international human rights law but not be prepared to order remedies in response, due to concerns about exceeding their mandate. In *VZW Klimaatzaak vs Kingdom of Belgium & Others*,[61] a 2021 case challenging the inadequacy of Belgium's response to climate change, the Brussels Court of First Instance found a violation of both domestic law and the ECHR (Articles 2 and 8) but held that it was beyond its powers to impose specific emission targets.[62]

Other courts have taken a different approach. In the Canadian case of *Mathur vs Her Majesty the Queen (2020)*,[63] seven youth claimants challenged the Province of Ontario's 2030 greenhouse gas reduction target of 30% below 2005 levels, for violating their Section 7 and 15 Charter rights. The Superior Court of Ontario commented that unlike in *La Rose*, the court was being asked to look at the compatibility of a particular act with the Charter of Rights and Freedoms, as opposed to reviewing the whole of Canada's climate change policy, and hence that the claim was justiciable,[64] paving the way for a full hearing of the case.

Similarly, in *Friends of the Irish Environment vs Government of Ireland (2020)*,[65] the Irish Supreme Court held that the National Mitigation Plan – a main plank of the Irish government's climate change policy – was vague and imprecise in relation to the targets specified under Ireland's Climate Act. The claimants argued that the Plan violated Ireland's Climate Action and Low Carbon Development Act 2015, the Constitution of Ireland[66] and obligations under the European Convention on Human Rights, particularly the right to life and the right to private and family life. The court refused to consider the matter as one for the executive alone to decide, holding that '[c]onstitutional rights and obligations and matters of policy do not fall into hermetically sealed boxes', and that 'the Court can and must act to vindicate such rights and uphold the Constitution.[67]

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57 Ibid., paragraph 56.
58 *La Rose vs Her Majesty the Queen*, (2020) FC 1008.
59 *Plan B Earth and Others vs The Secretary of State for Business, Energy, and Industrial Strategy*, (2018) EWHC 1892.
60 Ibid., paragraph 49.
61 *VZW Klimaatzaak vs Kingdom of Belgium & Others*, (2021) case 2015/4584/A.
62 Ibid.
63 *Mathur vs Ontario*, (2020) ONSC 6918.
64 Ibid., paragraph 134.
65 *Friends of the Irish Environment vs Government of Ireland*, (2020) IESC 49.
66 Constitution of Ireland, 1 July 1937. Article 40.3.1° states that 'the State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'.
67 *Friends of the Irish Environment vs Government of Ireland,* (2020) paragraph 8.16.

Summary of trends

The 'rights turn' is here to stay

It is clear that litigants are learning from past rights-based cases, for example improving the prospects of justiciability of their own cases by framing arguments in relation to the compatibility of specific legislation with rights, rather than challenging government policy as a whole.

The range of cases highlighted above also shows that rights-based climate litigation is being conducted both in the Global North and the Global South. In the latter, there is generally more scope to base claims on constitutional rights in general, or on socioeconomic rights, and to apply for a broader range of remedies.[68] Rights-based climate cases in Colombia, India, Pakistan, the Philippines and South Africa have been able to draw on doctrines and remedies developed over the years in the context of claims challenging the violation of socioeconomic rights such as the right to housing, health, food and work in these jurisdictions.[69] Indigenous rights litigation has also provided a useful body of case law relevant to climate change litigation, including on the requirement for free, prior and informed consultation and consent of relevant communities.[70] Global South countries that have led the way in socioeconomic rights litigation and jurisprudence are therefore likely to be particularly fertile jurisdictions for human rights-based climate cases in future.[71]

In the Global South, the type of remedies available may also be broader. For example, in South Asia, courts have a history of pressurising the executive and legislature to promulgate instruments and set up supervisory mechanisms to monitor the efficacy of executive plans. This is reflected both in the *Leghari* case discussed above and in the Nepali Supreme Court's 2015 decision to direct parliament to pass legislation on climate change.[72]

Global South countries that have led the way in socioeconomic rights litigation and jurisprudence are therefore likely to be particularly fertile jurisdictions for human rights-based climate cases in future.

The trend for bringing human rights-based climate change cases is likely to continue as governments come under increasing pressure to do more in this area, and as courts and human rights bodies elucidate and entrench the relationship between rights and climate change through caselaw. On 8 October 2021, the UN's

68 Setzer and Byrnes (2020), p. 14.
69 Rodríguez-Garavito, C. (2020), 'Human Rights: The Global South's Route to Climate Litigation', in Peel, J. and Lin, J. (2020), *Transnational Climate Litigation: The Contribution of the Global South*, Cambridge: Cambridge University Press, p. 3.
70 Ibid., p. 4.
71 Ibid., p. 5.
72 *Shrestha vs Office of the Prime Minister et al.,* (2015) Supreme Court of Nepal, NKP Part. 61 Vol. 3.

Human Rights Council voted 42–1 in favour of a resolution to recognize the right to a safe, clean, healthy and sustainable environment as a human right.[73] While not legally binding, this political statement is likely to strengthen the basis of rights-based climate litigation before national courts, especially in countries where such a right is not explicitly recognized by domestic law. A General Comment on children's rights and the environment with specific reference to climate change, which the UN's Human Rights Committee is in the process of preparing, is likely to do the same.

Whereas to date most rights-based cases have been brought on the basis of substantive obligations rather than procedural issues, we are likely to see more cases raising procedural questions. This will include challenges to governments on the basis of the right to access information, to access justice or the right to participation. In a recent procedural challenge in the UK case of *R (Plan B Earth & others) vs Secretary of State for Transport (2018)*, the applicants argued that the government should have considered the Paris Agreement goals in its policy framework for the expansion of Heathrow Airport.[74]

Growth in cases brought by youth activists

It is striking how many rights-based cases – including *Future Generations vs Minister of the Environment, Neubauer et al. vs Germany (2021)* and *Juliana* – involve young people using the courts to hold governments to account for the effects of climate change, both now and for future generations. Grounding the cases in human rights enables litigants to highlight the disproportionate impact that the failure to tackle climate change is having on vulnerable groups, including children. Organizations mobilizing these litigation efforts are increasingly drawing the public into the litigation process.

In these claims on behalf of future generations, international human rights law is being invoked in a forward-looking way, distinct from the more linear, backward-looking responsibility model of typical human rights claims.[75] Cases filed on behalf of young plaintiffs connect future human rights violations to the present by showing that people alive today will suffer the negative impacts predicted for 2050 and beyond.[76] In *Neubauer et al. vs Germany*, the German Federal Constitutional Court, upholding the complainants' challenge, stated that 'fundamental rights [are] intertemporal guarantees of freedom',[77] positioning human rights as dynamic rather than static, and extending into the future as well as into the past.

Youth activists are also petitioning UN bodies (as in the case brought by Greta Thunberg and others cited on p. 10) and regional human rights courts. In *The People vs Arctic Oil*, an ECtHR case brought by six individuals aged 20–27, as well as Greenpeace and Young Friends of the Earth, the claimants are arguing that

73 Human Rights Council Resolution 48/13.
74 *Plan B Earth and Others vs The Secretary of State for Transport*, (2018) EWCA Civ 214. The Supreme Court ultimately ruled in favour of the government: https://www.supremecourt.uk/cases/docs/uksc-2020-0042-press-summary.pdf.
75 Rodríguez-Garavito, C. (2020), 'Human Rights: The Global South's Route to Climate Litigation', p. 23.
76 Ibid.
77 *Neubauer et al. vs Germany,* (2021). 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

Norway's oil drilling in the Arctic deprives young people of their future.[78] In the high profile ECtHR case of *Duarte Agostinho and others vs Portugal and 32 other states*, the six youth applicants allege not just violations of the right to life and right to privacy, but also discrimination against the youth, on the basis that 'children and young adults are being made to bear the burden of climate change to a far greater extent than older generations'.[79]

If the case is held to be admissible by the court, the applicants will argue that the respondent states share a responsibility for dangerous climate change that, on its current trajectory, far exceeds the Paris Agreement's 1.5°C target and may expose them to the possibility of living to see as much as 4°C of global warming. This argument puts the burden on the respondent states to demonstrate the adequacy of their climate change mitigation efforts. The outcome of the case will set the tone, not just for the ECtHR's approach to climate change, but for all 47 contracting states within the Council of Europe.

Impact of rights-based climate change litigation

Rights-based climate change litigation needs to be understood and assessed in conjunction with other strategies such as policy advocacy and public campaigns,[80] and as one of an array of tools being used to highlight the human rights risks of climate change, including legal institutions and mechanisms, alliances and mass mobilization.

Rights-based litigation has to be run strategically and sensitively in order to have impact, otherwise there is a risk that a case can polarize opinion and provoke a backlash. The human rights dimension also has to be carefully situated and explained. Rights activists are increasingly acting in concert with other activists and movements, and drawing on and involving other parts of the international human rights law ecosystem – including interventions by UN Special Rapporteurs, submissions before UN human rights treaty bodies and the participation of human rights NGOs – in building rights-based cases before domestic and regional courts.

It is too early to reach thorough conclusions about the impact of the 'rights turn' in climate litigation, as it remains a relatively recent trend. Many rights-based cases are either pending or on appeal, and their implementation can take years. But some initial observations can be made.

Direct impact

Even if a case is successful, its impact will substantially depend on proper implementation of the judicial remedy by the government or corporate respondent. Some of the cases cited in this paper led to direct regulatory impacts, such as a change of law or a government decision to adopt more robust targets.

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78 *The People vs Arctic Oil*, (2021) ECtHR; see Greenpeace Norge (2021), 'People vs. Arctic Oil', https://www.greenpeace.org/norway/people-vs-arctic-oil.
79 *Duarte Agostinho and others vs Portugal and 32 other states*, (2020) ECtHR, 39371/20.
80 Setzer and Byrnes (2020), p. 23.

Following *Urgenda,* for example, the Dutch government adopted 30 of the proposals in Urgenda's *54 Climate Solutions Plan*,[81] which was drawn up in collaboration with 800 civil society groups and other organizations.[82] The government plan to comply with the court's decision also included a 75% reduction in capacity at the country's three coal-fired power stations, opened within the last five years,[83] and a €3 billion package of measures to reduce Dutch emissions by 2020. The response of the German parliament to the *Neubauer et al.* case was similarly swift – in June 2021, the Bundestag passed an amendment to legislation that commits Germany to become greenhouse gas neutral by 2045, five years ahead of its previous target. A 65% reduction in greenhouse gas emissions is also required by 2030.[84]

But in other cases, implementation of the remedy has not been so forthcoming or is more challenging due to appeals by the government or company involved. For example, in the *Earthlife* decision against the government of South Africa, following the High Court's ruling that the government's review of plans for a new coal-fired power plant was invalid, the Minister of Environmental Affairs again gave authorization for the plant. It was only when the claimants brought a further case challenging the decision that an agreement was reached to set aside all government authorizations for the plant.[85]

Indirect impact

Run strategically, rights-based climate cases can have a mobilizing power beyond the individual case concerned, by building a narrative about the need for stronger action to tackle climate change, which increases public awareness. These cases can also play a role in reducing misinformation through evidence, and by promoting a shared understanding of reality on climate action. Such cases can also lead to greater sensitization of legal institutions to the nature of climate change, and increased perception among governments that they may be challenged and held to account in court for their actions.[86]

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81 Urgenda (2020), *54 Climate Solutions Plan*, https://www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan.
82 Watts, J. (2020), Dutch officials reveal measures to cut emissions after court ruling, *The Guardian*, 24 April 2020, https://www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling.
83 Ibid.
84 Boldis, A. and Lütkehaus, C. (2021), 'How a court ruling changed Germany's Climate Protection Act', *Pinsent Masons*, 20 July 2021, https://www.pinsentmasons.com/out-law/analysis/court-ruling-germany-climate-protection-act.
85 *EarthLife Africa Johannesburg vs Minister of Environmental Affairs and Others* (2016), 65662/16 (2020).
86 For further analysis of how human rights and strategic litigation can be leveraged in the climate context, see Open Global Rights' 'Litigating the Climate Emergency' blog series, https://www.openglobalrights.org/up-close/climate-emergency-litigation/#up-close.

Even where rights-based climate cases are unsuccessful – of the 40 cases mentioned in the introduction, outcomes have been evenly split so far – they may still influence future litigation by helping to establish normative standards that have impact beyond the particular project or issue under consideration. In *Ioane Teitiota vs New Zealand (2020)*[87] the UN Human Rights Committee's individual petition procedure was invoked to raise the issue of rising sea levels and its implications for low-lying islands and communities. The claimant relied upon the duty of states under Article 6 of the International Covenant on Civil and Political Rights not to deport a person when there is a real risk of irreparable harm to the right to life.

In its January 2020 decision, the Human Rights Committee accepted Teitiota's claims that rising sea levels are likely to render Kiribati uninhabitable in 10–15 years' time, but found that there was enough time for the Kiribati state to take remedial measures, so that the decision to deport was not unlawful. While the case failed, the Committee noted that, 'without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 [the right to life and the right not to be subject to cruel inhuman or degrading treatment] of the Covenant, thereby triggering the non-refoulement obligations of sending States.'[88] This decision is likely to have useful precedential value for future challenges relating to asylum protection from the effects of climate change.[89]

Even strong dissenting decisions can be useful in moving public opinion, as in the *Juliana* case, where Judge Staton's dissent – 'The majority laments that it cannot step into the shoes of the political branches… but appears ready to yield even if those branches walk the Nation over a cliff.'[90] – is having a galvanizing effect on youth activists.[91]

Cases against corporations, even if unsuccessful, put businesses such as the 'carbon majors' on notice of the legal and financial risk to which they are increasingly exposed through their operations.[92] Shareholder activism and commercial law avenues for holding corporations to account for climate change are also likely to be strengthened by developments in human rights-based climate change litigation, nudging behavioural change in the business community.

As in other domains such as technology regulation, international human rights law has an important role to play in providing a substantive and procedural framework for climate litigation. At a substantive level, it provides hard rights which, when combined with the Paris framework targets, create a lens through which to hold

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87 *Ioane Teitiota vs New Zealand* (2020), UN Human Rights Committee (HRC), UN Doc CCPR/C/127/D/2728/2016.
88 Ibid., paragraph 9.11
89 OHCHR (2020), 'Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims', 21 January 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482.
90 *Juliana vs United States* (2020), 18-36082, p. 49, https://static1.squarespace.com/static/571d109b04426270152febe0/t/5e22101b7a850a06acdff1bc/1579290663460/2020.01.17+JULIANA+OPINION.pdf.
91 Meyer, R. (2020), 'A Climate-Lawsuit Dissent That Changed My Mind', *The Atlantic*, https://www.theatlantic.com/science/archive/2020/01/read-fiery-dissent-childrens-climate-case/605296.
92 Ganguly, G., Setzer, J., and Heyvaert, V. (2018), 'If at First You Don't Succeed: Suing Corporations for Climate Change', *Oxford Journal of Legal Studies*, 38(4), p. 841–868, doi:10.1093-ojls.gqy029.

governments to account. We are likely to see an increased range of rights invoked in future, including the right to housing and family life, given predictions that there may be up to one billion climate refugees by 2050.[93]

At the procedural level, human rights law helps to elaborate due diligence standards and procedural guarantees for both governments and corporations. In this way, rights-based claims can also help fill the enforcement gap between national and international law, as seen in *Urgenda*.

While rights-based litigation has scored some notable and impactful wins, ultimately the success of any strategic litigation initiative is not in the immediate outcome of particular cases but the extent to which such efforts give impetus to popular discourse and policy outcomes. In the US, *Brown vs Board of Education* in 1954 preceded and probably influenced the Civil Rights Act of 1964, but it would be not until many decades later that the impact of the change from that initiative took effect. In relation to climate change, however, there is no time for a long learning curve.

Conclusion

Rights-based climate litigation faces a number of challenges, but litigants are increasingly surmounting these through innovative strategies. Rights-based cases constitute an important 'bottom-up' form of pressure on governments to do their 'minimum fair share' in tackling climate change, and to take account of the link between current climate harms and future human rights violations in doing so. In addition to the growing raft of cases challenging governments' climate mitigation measures, we are likely to see a rising number of cases challenging the impact of proposed climate change policies on a range of human rights, as well as an increase in litigation against corporations.

Litigation is necessarily reactive and undertaken on a case-by-case basis, as opposed to more proactive tools such as legislation. Human rights cases are no substitute for the need for reasoned and urgent policy action from the executive and legislative branches of government. The response to climate change must be effective, but it must also take place where different interests have a seat at the table, can negotiate and resolve differences.

The first place for that is the political arena – both domestically and in international forums such as the Conference of the Parties (COP) to the UNFCCC – rather than the courts. But where governments and companies fail to act, they can increasingly expect human rights law to be invoked in court to hold them to account for the impact of climate change on the fundamental rights of today's citizens – and those of tomorrow.

93 Rodríguez-Garavito, C. (2020), *Climate litigation and human rights: averting the global crisis.*

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Cover image: Greta Thunberg speaking at a press conference given by a group of 16 youth climate activists in New York, USA on 23 September 2019.
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