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CLIMATE LITIGATION: PRIVATE ACTORS INCREASINGLY BECOMING THE TARGETS OF CLAIMS

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Climate-related litigation is increasingly being used as a tool to hold companies and governments to account over their contributions to climate change. According to the Grantham Institute's 2021 Global Trends in Climate Change Litigation Policy Report (the **"Report"**), the number of climate-related cases has more than doubled since 2015: between 1986 and 2014, approximately 800 cases were filed, but between 2015 and 2021, approximately 1,000 cases were filed. As noted by the Intergovernmental Panel on Climate Change's (**"IPCC"**) Working Group III contribution to the Sixth Assessment Report, this growth in climate-related litigation is having a profound impact on the "*outcome and ambition of climate governance*".

Although the majority of the climate-related cases identified in the Report were brought against regional and national governments, the Report also identified a marked increase in the number of climate-related cases brought against private sector actors.Of the 193 climate-related cases identified in the Report as being filed in 2021, 38 were filed against private sector actors; a significant increase from the 22 filings in 2020. But who were the main targets of these climate-related cases, and what is responsible for this upwards trend?

The trends identified in the Report

As one would expect, certain sectors are targeted more than others.The Report identifies companies involved in the extraction, refining and sale of fossil fuels as the target of 16 of the 38 filings in 2021 (for a detailed discussion of one of these filings, please read our earlier blog post here). The cases are premised on a variety of grounds, but notable examples of the (alleged) conduct or practices that attract criticism include the following:

- Making misleading claims that defendant companies produce 'clean energy', i.e. 'greenwashing' (for more information on greenwashing, please read our earlier blog posts here and here) ;
- Proposing to invest in carbon-intensive projects ;
- Concealing information about companies' contributions to climate change;
- Failing to adhere to requirements under relevant climate change and environmental legislation ; and
- Failing to reduce their greenhouse gas (**"GHG"**) emissions in line with their internal commitments and/or government policy .

Companies operating in the food and agriculture, and plastics sectors were also common targets, with five cases being brought against companies in each of these sectors in 2021.The Report identifies that four cases were filed against companies in the transport sector in 2021, whilst three cases were filed against actors in the finance sector.Again, litigants brought these cases on different grounds, but the themes of companies engaging in 'greenwashing', failing to adopt sufficiently stringent GHG emissions reductions targets, and failing to adequately consider climate-related risks when making investment/financing decisions, are prevalent.

Explaining the trends identified in the Report

One of the main reasons for the increase in climate-related claims against private sector actors is the increase in both international and national legislation and regulatory activity aimed at combatting climate change. In recognition of the urgency for meaningful action to tackle the climate crisis, climate-focused measures are being adopted – around the world – at an unprecedented rate, and have ranged from mandating GHG emissions reductions to imposing requirements for companies to make TCFD-aligned disclosures (for further information on the UK's mandating of TCFD-aligned disclosures, please read our earlier blog posts here and here).A more sophisticated, and stringent, climate-related regulatory landscape has provided, and will continue to provide, more avenues for potential litigants to hold companies to account for failing to address climate change.

The identity and nature of plaintiff or claimant parties, and their ability to deploy significant resources to pursue litigation is another key factor.With regard to resources, the increased availability of litigation funding, and the ability of not-for-profit organisations to gain access to grants/donations from philanthropic foundations, are highly significant.Notable examples include the MacArthur Foundation and Open Society Foundation, who are committed to promoting social welfare and addressing global socio-environmental issues such as climate change.The ‘pockets’ of these foundations can be quite deep: the MacArthur Foundation has, for example, provided USD 429.2 million in grants to 112 organisations since 2014.The ability of not-for-profit organisations to tap-into these funds will only increase as the litigation funding market continues to evolve.

However, arguably the most important contributing factor to the upwards trend in climate-related litigation is the increasing desire from the general public for meaningful, systemic, action and change to address the climate crisis. Not-for-profit organisations are increasingly perceiving "strategic" climate litigation as a vehicle to hold both governments and private sector actors to account for causing climate change or failing to respond to it.Cases are, therefore, being brought by not-for-profit organisations with the aim of changing behaviour and/or establishing responsibility for climate change, rather than just simply recovering monetary damages. As noted by the International Programme Director of Earthjustice in his interview with Reuters, "*winning isn't everything*" for not-for-profit organisations bringing these claims; having a day in court is often seen as a victory in and of itself, since the associated negative publicity can adversely impact consumer demand, deter potential investors from investing, and alert regulators to the prospect of bringing claims of their own, which can substantially influence the behaviour of private sector actors.

Looking to the future

The regulatory landscape continues to evolve at the international, national and regional levels; as more stringent requirements are introduced, the bases available for bringing climate-related cases against private sector actors will grow.A broad range of stakeholders, including not-for-profit organisations, will continue to explore, and pursue, existing and new, perhaps innovative, grounds on which to bring such claims.It seems likely, therefore, that the number of climate-related cases brought against private sector actors will increase in the near future.

Whilst future trends are hard to predict with any degree of certainty, according to the Report, the increase in litigation against companies in the food and agriculture sector suggests that other high GHG-emitting sectors, such as the textiles and shipping sectors, may be the next big target for litigants.However, the risk of facing climate-related litigation is by no means sector-specific, and so all private sector need to be aware of this heightened litigation risk.

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