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### Global Climate Litigation Report: 2023 Status Review

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# Global Climate Litigation Report

2023 Status Review



# Global Climate Litigation Report

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2023 Status Review

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## Global Climate Litigation Report: 2023 Status Review

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## List of abbreviations and acronyms

BNDES	Brazilian National Development Bank
CJEU	Court of Justice of the European Union
CO <sub>2</sub>	Carbon dioxide
CSPP	Corporate Sector Purchase Programme
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental impact assessment
EPA	Environmental Protection Agency
GHG(s)	Greenhouse gas(es)
HRC	United Nations Human Rights Council
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICSID	International Centre for Settlement of Investment Disputes
IPCC	Intergovernmental Panel on Climate Change
ISDS	Investor-State dispute settlements
ITLOS	International Tribunal for the Law of the Sea
NDC	Nationally determined contribution
NGO	Non-governmental organization
OECD	Organisation for Economic Co-operation and Development
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

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## Foreword

The climate crisis is getting worse, not better. Every year, the impacts of climate change are getting more intense. Every year, hundreds of millions of people endure increasingly regular extreme weather events, taking away livelihoods and lives. Every year, our economies – and in some cases, entire countries – begin to see the reality of an uncertain future. As the United Nations Secretary-General summarized to delegates gathered in Egypt at the twenty-seventh Conference of the Parties to the United Nations Framework Convention on Climate Change in November 2022, “We are in the fight of our lives, and we are losing.”

Climate litigation represents a frontier solution to change the dynamics of this fight. As this report shows, people are increasingly turning to the courts to combat the climate crisis. Governments and private sector entities are being increasingly challenged and held to account. Children and youth, women’s groups, local communities and Indigenous Peoples, among others, are also taking a more prominent role in bringing these cases and driving climate change governance reform in more and more countries around the world.



The legal grounds for these cases are also widening. Both the United Nations Human Rights Council and the United Nations General Assembly have now recognized the right to a clean, healthy and sustainable environment. We are seeing new claims centred around the violation of legislation related to net-zero targets, environmental impact assessments, advertising standards, and obligations under the Paris Agreement. Climate litigation has set precedents for climate action all over the globe, going beyond the jurisdictions in which they were brought and empowering and driving similar action in other countries.

This report demonstrates the importance of an environmental rule of law in combating the triple planetary crises of climate change, biodiversity loss and pollution. Access to justice enables the protection of environmental law and human rights and promotes accountability in public institutions. It is not enough that we recognize human rights, we must make every effort to protect and uphold them and enable individuals to seek redress where they are violated.

I would like to acknowledge the outstanding support of the Sabin Center for Climate Change Law at Columbia University. Our collaboration in producing the *Global Climate Litigation Report: 2023 Status Review* would not have been possible without their dedication and commitment.



*PKameri*

**Patricia Kameri-Mbote**  
Director of the Law Division  
United Nations Environment Programme

## Executive summary

**Climate ambition around the world remains inadequate to meet the challenge of our climate crisis. Despite improvement in countries' mitigation and adaptation targets, and despite numerous corporate pledges to achieve net-zero emissions in the future, the international community is still a long way from achieving the goals and objectives of the Paris Agreement. In response, individuals, children and youth, women and human rights groups, communities, Indigenous groups, non-governmental organizations (NGOs), business entities, and national and subnational governments have turned to courts, tribunals, quasi-judicial bodies or other adjudicatory bodies, including special procedures of the United Nations and arbitration tribunals, seeking relief through:**

- (i) The enforcement of existing climate laws
- (ii) Integration of climate action into existing environmental, energy and natural resources laws
- (iii) Orders to legislators, policymakers and business enterprises to be more ambitious and thorough in their approaches to climate change
- (iv) Establishment of clear definitions of human rights and obligations affected by climate change
- (v) Compensation for climate harms



As these cases become more frequent and numerous overall, the body of legal precedent grows, forming an increasingly well-defined field of law.

This *Global Climate Litigation Report: 2023 Status Review*, which updates previous United Nations Environment Programme reports published in 2017 and 2020, provides an overview of the current state of climate change litigation and an update of global climate change litigation trends. It provides judges, lawyers, advocates, policymakers, researchers, environmental defenders, climate activists, human rights activists (including women's rights activists), NGOs, businesses and the international community with an essential resource to understand the current state of global climate litigation, including descriptions of the key issues that courts have faced in the course of climate change cases.

While the legal arguments and the adjudicative forums in which they are brought vary greatly, climate change cases have typically addressed similar key legal issues. Like the 2017 and 2020 Litigation Reports, this report summarizes those issues, which include challenges to whether the court has the power to resolve the dispute, identifying the source of an enforceable climate-related right or obligation, crafting a remedy that will lessen the plaintiffs' injuries, and, importantly, marshalling the science of climate attribution. Over the course of reporting on these issues, it is clear that parties are putting forward innovative arguments on connections between a specific greenhouse gas emitter's actions and global climate change, and how foreseeable climate-driven impacts can be linked to specific harms suffered by plaintiffs.

**Part 1** describes the importance of climate change litigation through an overview of the environmental, diplomatic and political circumstances that make climate change litigation efforts especially important.

**Part 2** provides an overview of global climate litigation through an analysis of the overall number of gathered cases and their geographic distribution. As described in more detail elsewhere in this report, the cases analysed here were collected by the Sabin Center for Climate Change Law in its Climate Change Litigation databases.

**Part 3** provides a survey of the state of climate change litigation and a discussion of evident and emerging trends.

**Part 4** describes the types of climate cases that suggest where global climate change litigation may be heading in the coming years.





As at 31 December 2022, the Sabin Center's Climate Change Litigation databases included 2,180 cases filed in 65 jurisdictions and international or regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies, including special procedures of the United Nations and arbitration tribunals. This number includes 1,522 cases in the United States of America and 658 cases in all other jurisdictions combined.

**In summary, climate change litigation is increasing and broadening in geographical reach, while the range of legal theories is expanding. It has become clear – and is now recognized by the Intergovernmental Panel on Climate Change – that inclusive approaches to climate litigation that also address the human rights of the most vulnerable groups in society can contribute in meaningful ways to compel governments and corporate actors to pursue more ambitious climate change mitigation and adaptation goals.**



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# Introduction

# Introduction



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The United Nations Environment Programme (UNEP) published its first survey of global climate change litigation in 2017 (UNEP 2017)<sup>1</sup> and the second instalment in 2020 (UNEP 2020).<sup>2</sup> These reports identified key developments, profiled significant cases, described then-current and emerging trends, and outlined critical legal issues in climate change cases. This 2023 Litigation Report represents the third instalment of the global survey on climate litigation. It updates the status of cases that were still pending when they were featured in the previous reports, follows up on key trends that have continued in intervening years, and outlines legal changes, new trends and emerging issues in climate litigation.

The report analyses pending cases, decisions and trends in the 2020–2022 period, as well as cases added to the Climate Change Litigation databases maintained by the Sabin Center for Climate Change Law (Sabin Center), as part of the Sabin Center's launch of the Peer Review Network of Global Climate Litigation ("the Network"). The publication also briefly highlights women's role in climate change litigation. This places women not only as

victims disproportionately suffering the impacts of climate change, but also shows their contributions towards environmental justice for everyone's benefit. These inextricable linkages are important to the achievement of the Sustainable Development Goals by 2030, which call for gender equality and human rights as key objectives. Except where otherwise noted, this report contains information correct as at 31 December 2022.

<sup>1</sup> Throughout this report, we refer to this previous UNEP report on climate litigation as the "2017 Litigation Report".

<sup>2</sup> Throughout this report, we refer to this previous UNEP report on climate litigation as the "2020 Litigation Report".

## Box 1: Defining "climate change litigation"

This report follows the definition of "climate change litigation" used by the Sabin Center in the development and maintenance of its Climate Change Litigation databases. Under this definition, climate change litigation includes cases that raise material issues of law or fact relating to climate change mitigation, adaptation or the science of climate change (Sabin Center for Climate Change Law 2022a).<sup>3</sup> Such cases are brought before a range of administrative, judicial and other adjudicatory bodies. These cases are typically identified by the Sabin Center with keywords like "climate change", "global warming", "global change", "greenhouse gas", "GHGs" and "sea level rise". Cases that raise issues of law or fact related to climate change but do not use those or other specific terms are also included.

This report excludes cases where the discussion of climate change is incidental, or where a non-climate legal theory would guide the substantive outcome of the case. Thus, when climate change keywords are only used as a passing reference to the fact of climate change and those issues are not related to the laws, policies or actions actually at issue, the case is excluded.

Similarly, this report excludes cases that seek to accomplish goals arguably related to climate change adaptation or mitigation, but their resolution does not depend on the climate change dimensions of those goals. For example, lawsuits seeking to use human health regulations to limit air pollution from coal-fired power plants may incidentally cause a court to compel that power plant to emit a lower level of greenhouse gases (GHGs). Such cases are not considered "climate change litigation" for the purposes of this study (Peel and Lin 2019).<sup>4</sup>



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<sup>3</sup> This definition guides the collection of cases included in the Climate Change Litigation databases, which are developed and maintained by the Sabin Center for Climate Change Law at Columbia Law School. See also Part 2.II.

<sup>4</sup> Peel and Lin (2019) note that in the Global South, in particular, cases are less likely to fit into the definition of climate change litigation used here. On pages 690 and 691, they argue that analyses of climate change litigation should include matters in which climate change is a peripheral issue because those cases still "make an important contribution to climate governance". On the other hand, on page 695, they similarly exclude matters where climate change is mentioned only incidentally.

**Notably, both the 2020 and 2023 Litigation Reports conclude that litigation is central to efforts to compel governments and corporate actors to undertake more ambitious climate change mitigation and adaptation goals**

This report proceeds in five parts:

**Part 1** sets the stage by describing the growing urgency of the climate crisis and the role that climate change litigation plays in the domains of climate law and policy.

**Part 2** surveys the current status of global climate change litigation, drawn from the cases included in the Sabin Center's Climate Change Litigation databases. This section provides a broad overview of the data of global climate litigation, including a comprehensive regional analysis.

**Part 3** assesses current trends in climate litigation. Those trends reflect continued and increasing numbers of cases focused on one or more of the following:

- (i) The use of "climate rights" in climate litigation
- (ii) Domestic enforcement
- (iii) Keeping fossil fuels and carbon sinks in the ground
- (iv) Corporate liability and responsibility
- (v) Climate disclosures and greenwashing
- (vi) Failure to adapt and the impacts of adaptation

**Part 4** reflects the predictions for emerging trends, including a few updates from the 2020 Litigation Report and others that are freshly observed. Notably, both the 2020 and 2023 Litigation Reports conclude that litigation is central to efforts to compel governments and corporate actors to undertake more ambitious climate change mitigation and adaptation goals, and litigants around the world continue to expand the range of theories under which defendants are obligated to take climate-related action.

Lastly, summaries of significant cases appear throughout this report, providing context and examples of those issues and the trends they comprise.

# Part 1: The importance of climate change litigation



# Part 1: The importance of climate change litigation



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While GHG emissions temporarily dropped in the first half of 2020 due to the COVID-19 pandemic, emissions rebounded by the end of the year (Intergovernmental Panel on Climate Change [IPCC] 2022). In 2021, global energy-related carbon dioxide (CO<sub>2</sub>) emissions rose by 6 per cent above 2020 levels to 36.3 billion tons, their highest level ever (International Energy Agency 2022). Overall, CO<sub>2</sub> emissions rebounded by 4.8 per cent in 2021, consuming 8.7 per cent of the remaining carbon budget (IPCC 2018)<sup>5</sup> for limiting anthropogenic warming to 1.5°C (Liu *et al.* 2022).

At 1.1°C, global warming is already causing widespread disruption worldwide, including droughts, extreme heat, record floods and storms, food insecurity, wildfires, the harming of species and ecosystems as well as the enabling of vector-borne disease transmission (IPCC 2022). Scientists have warned that every tenth of a degree of additional warming will escalate threats to people, species

and ecosystems (IPCC 2022). Furthermore, the effects of climate change are disproportionately felt across the globe and by populations in vulnerable situations, causing gender and income inequalities and development challenges, especially in the Global South and in small island developing States.<sup>6</sup> IPCC has stated that climate change unequivocally endangers the well-being of people and ecosystems

<sup>5</sup> Total carbon budget is defined by the IPCC as: "Estimated cumulative net global anthropogenic CO<sub>2</sub> emissions from a given start date to the time that anthropogenic CO<sub>2</sub> emissions reach net zero that would result, at some probability, in limiting global warming to a given level, accounting for the impact of other anthropogenic emissions."

<sup>6</sup> The phrase "Global South" refers broadly to the regions of Latin America and the Caribbean, Asia, Africa and Oceania, and denotes regions that are mostly low-income and often politically or culturally marginalized. However, it must be noted that the Global South is not a homogeneous group of countries, and that legal development and legal capacity vary by country.

throughout the globe. Delayed climate action poses irreversible risks, with a narrow window of opportunity to realize a sustainable and liveable future.

**Climate change litigation provides civil society, individuals and others with one possible avenue to address inadequate responses by governments and the private sector to the climate crisis.**

In the lead-up to the twenty-seventh Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), the UNFCCC secretariat analysed the nationally determined contributions (NDCs) of 166 countries, covering 94.9 per cent of the total global emissions in 2019 (UNFCCC 2022a). To keep the long-term temperature goal set out in article 2 of the Paris Agreement and limit global temperature rise to 1.5°C, countries need to significantly cut global emissions in half by the end of this decade. However, the UNFCCC secretariat estimated that, based on the latest NDCs, countries would likely use up 89 per cent of the remaining carbon budget in 2020–2030 (UNFCCC 2022a). In its 2022 Emissions Gap Report, UNEP calculated that recent pledges "make a negligible difference to predicted 2030 emissions" and that current policies point to a 2.8°C warming by the end of the century. While that trajectory is a significant improvement from the prior estimate of a 4°C warming scenario, it remains far beyond the

goals set forth under the Paris Agreement (UNEP 2022). At the same time, in its 2021 Production Gap Report, UNEP concluded that governments plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with limiting global warming to 1.5°C. The Glasgow Climate Pact (Decision 1/CMA.3) has called on countries to "revisit and strengthen" their 2030 targets by the end of 2022 to align them with the Paris Agreement's temperature goals (UNFCCC 2022b). It also asks all countries that have not yet done so to submit long-term strategies to 2050, aiming for a just transition to net-zero emissions around mid-century.

Climate change litigation provides civil society, individuals and others with one possible avenue to address inadequate responses by governments and the private sector to the climate crisis. In climate cases, plaintiffs, petitioners, applicants, complainants or communicants (referred throughout as plaintiffs), through a variety of legal strategies in a wide range of national and international jurisdictions, often seek to compel more ambitious mitigation and adaptation goals from the public and private sectors. However, plaintiffs also sometimes seek to challenge climate regulations and reduce climate ambition. In its Sixth Assessment Report, IPCC recognized, for the first time (with medium confidence), that climate litigation has influenced the outcome and ambition of climate governance (Dubash *et al.* 2022). IPCC also identified climate litigation as an important avenue for actors to influence climate policy outside of the formal UNFCCC processes (Dubash *et al.* 2022). In addition, successful cases brought by plaintiffs have motivated the filing of similar claims in other jurisdictions. For example, the decision in *Urgenda Foundation v. State of the Netherlands*, the first time in which a court found a government to be responsible for mitigating GHG emissions, has brought a wave of ambition cases in other countries, most of which specifically mention the decision

despite it not being an authoritative source of law beyond the Netherlands (Supreme Court of the Netherlands 2019).<sup>7</sup> With increased scientific research on climate science and attribution, and with novel legal theories being explored under international and domestic climate law, climate litigation continues to expand in scope.

Additionally, it is worth noting the energy crisis that resulted from the aggression by the Russian Federation against Ukraine. In a few instances, governments' plans to rearrange their energy supplies away from fossil fuels were adapted to these circumstances, further jeopardizing the achievement of the goals of the Paris Agreement (Climate Action Tracker 2022). With gas production and infrastructure expansion planned to respond to the energy crisis worldwide, climate litigation may arise to avoid further delays in the energy transition.



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## Part 2: Overview of global climate litigation

<sup>7</sup> *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, Case No. 19/00135, 20 December 2019 (Netherlands). For the importance of the case, see the 2020 Litigation Report, pages 13 and 15.

## Part 2: Overview of global climate litigation



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Part 2 surveys the current status of global climate change litigation, drawn from the cases included in the Sabin Center's Climate Change Litigation databases. Unless otherwise noted, the cases featured in this 2023 Litigation Report were updated until December 2022 and were pending determination by the forums in which they were brought.

### I. Methodology

This report adopts the narrow approach to defining climate change litigation used by the Sabin Center in identifying cases for inclusion in its Climate Change Litigation databases (see Box 1: Defining climate change litigation) (Sabin Center 2022a). Under this definition, climate change litigation includes cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law. Thus, cases must satisfy two key criteria for inclusion. First, cases must generally be brought before judicial bodies, though in some exemplary instances matters brought before administrative or investigatory bodies are also included. Second, climate change law, policy or science must be a

material issue of law or fact in the case. Cases that make only a passing reference to climate change but do not address climate-relevant laws, policies or actions in a meaningful way are omitted. In general, cases that may directly impact climate change mitigation and adaptation strategies, but do not explicitly raise climate issues, are also not included. The databases and this report refer to international or regional courts, tribunals, quasi-judicial bodies or other adjudicatory bodies in addition to specific jurisdictions. These include complaints submitted to special procedures of the United Nations Human Rights Council (HRC), the United Nations Secretary-General, UNFCCC and other United Nations bodies

(including the United Nations Human Rights Committee and the United Nations Committee on the Rights of the Child), arbitration tribunals (International Centre for Settlement of Investment Disputes [ICSID], Stockholm Chamber of Commerce and the Permanent Court of Arbitration), and complaints before the Organisation for Economic Co-operation and Development (OECD).

As part of its continual effort to update and maintain the Global Climate Change Litigation Database, the Sabin Center launched the Network in December 2021. As at 31 December 2022, the Network includes 113 practitioners and scholars who act as "national rapporteurs" for 107 jurisdictions or international or regional courts, tribunals, quasi-judicial bodies or other adjudicatory bodies (Sabin Center 2022b). In addition, several researchers and academic institutions have established national or regional climate litigation databases, including in Latin America and the Caribbean (Tigre, Ortúzar and Dávalos 2022), Brazil (JusClima 2030 2022; JUMA 2022), Australia (University of Melbourne 2022), and Southeast Asia (Litigasia 2022). While the definitions of relevant litigation and the methodologies for case collection differ among the databases, the Sabin

Center has partnered with some of them to share information about cases using the Sabin Center's definition where applicable.<sup>8</sup>

Unless otherwise noted, cases were updated until 31 December 2022. This report deals with a fast-moving field and the subject matter may become quickly outdated. Readers are advised to check the main sources cited for updates and new materials. However, UNEP considers the fundamentals of climate change litigation as discussed in this report to be more durable and likely to remain relevant in the immediate future.

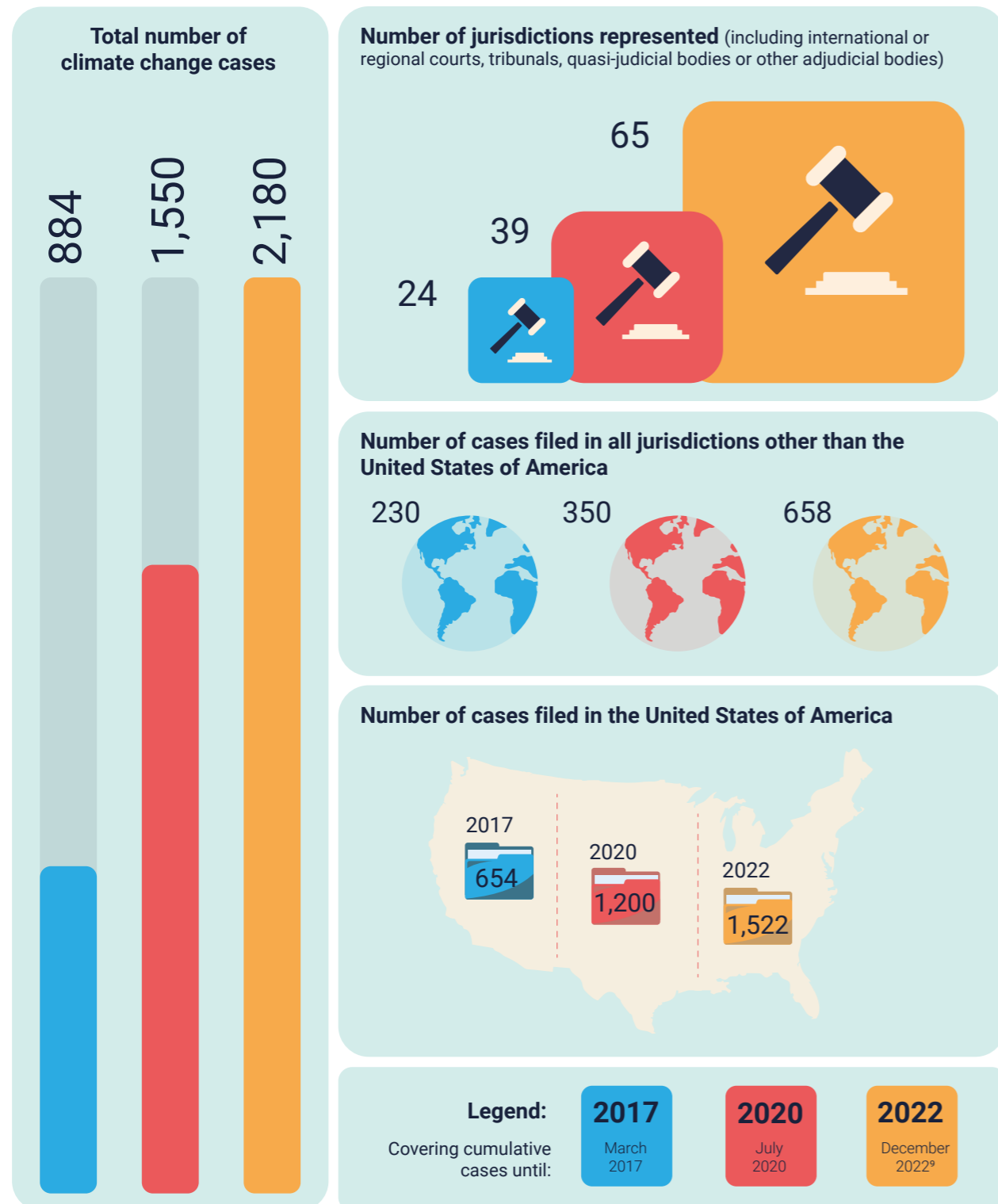
This report adopts a qualitative approach to surveying global climate litigation, informed by quantitative information where relevant. In identifying trends and cases as significant, the report considers the potential impact of the litigation within a jurisdiction and beyond the case itself, the novelty and complexity of the legal theories and issues involved, and the likelihood of the litigation influencing future cases and climate policy.



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<sup>8</sup> The Sabin Center has partnered with the Interamerican Association for Environmental Defense for rights-based cases in Latin America and the Caribbean, as well as with national databases in Brazil and Australia.

Figure 1. Growth of climate litigation as represented in UNEP's 2017, 2020 and 2023 Litigation Reports



<sup>9</sup> As a result of the Network, the number of cases in the Sabin Center's databases have increased substantially. These include cases filed before 2020 as well as new cases filed in 2021 and 2022. All cases added to the database as a result of the Network's contributions are included in this report, including those filed before the publication of the 2020 Litigation Report.

## II. Survey of climate change litigation

Climate litigation is a growing field, and both the number of cases filed and the number of jurisdictions within which they have been brought have increased in recent years. The 2020 Litigation Report identified 1,550 cases brought in 39 jurisdictions, including international or regional courts, tribunals, quasi-judicial bodies or other adjudicatory bodies, such as special procedures of HRC, arbitration tribunals, international adjudicatory bodies and the European Union. These include 1,200 cases in the United States

of America and 350 cases in all other jurisdictions combined. As at 31 December 2022, the cumulative number of cases tracked in the Sabin Center's databases has increased, with 2,180 climate change cases filed in 65 jurisdictions.<sup>10</sup> This number includes 1,522 cases in the United States of America and 658 cases in all other jurisdictions combined. Figure 1 compares the numbers of cases and jurisdictions covered in the three instalments of the litigation reports.



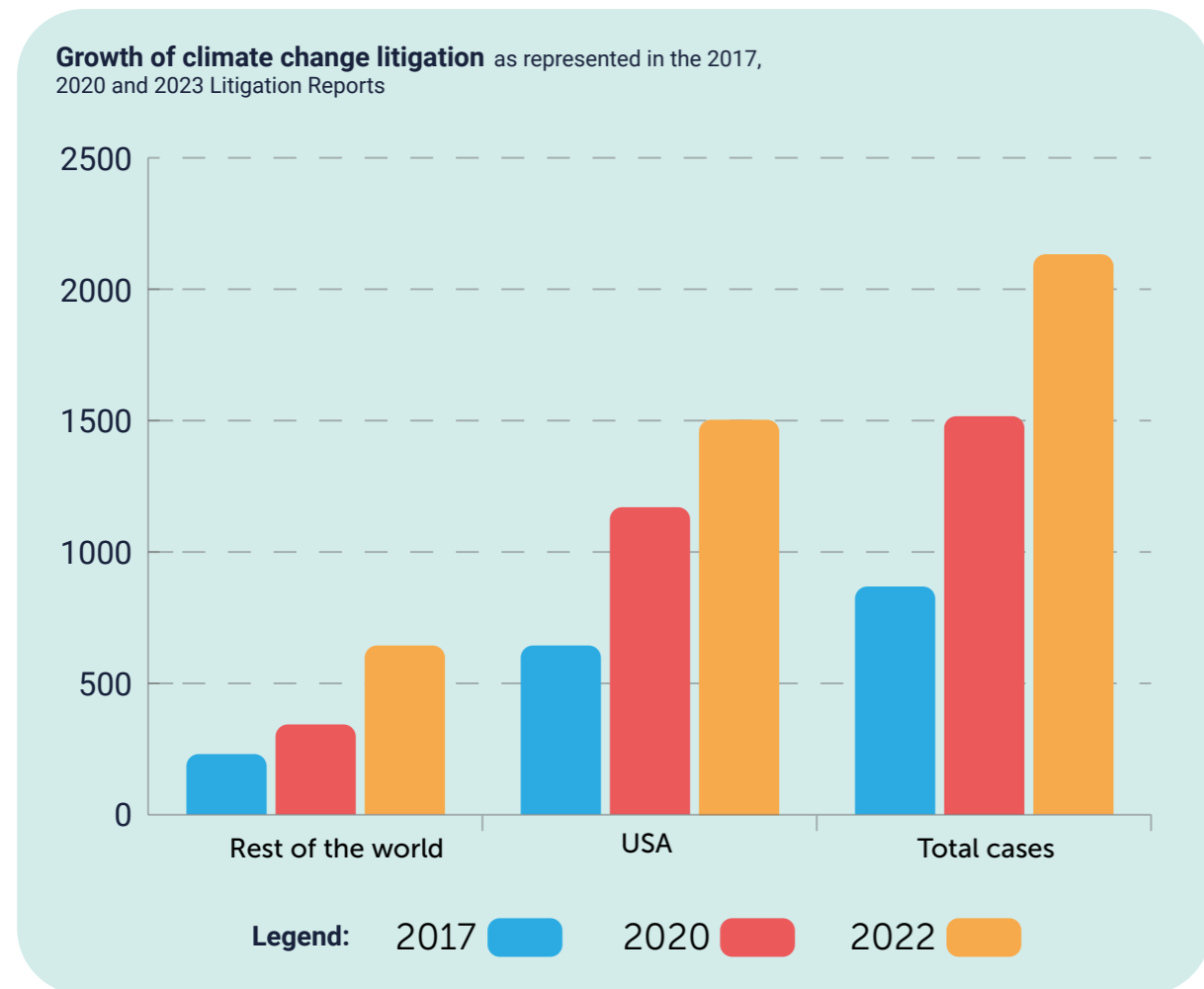
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<sup>10</sup> The jurisdictions in which climate change cases were identified in the database for the first time since the publication of the 2020 Litigation Report are: China, Czech Republic, Guyana, Estonia, Finland, Papua New Guinea, Republic of Korea, Russian Federation, Türkiye, the East African Court of Justice and the International Tribunal for the Law of the Seas.

As Figure 1 shows, the overall number of climate litigation cases has grown since 2017, and the cumulative number of cases is now 2.5 times higher than five years ago. Figure 2 provides a visual representation of how climate litigation cases worldwide are steadily increasing. The increase in the number of cases since the 2020 report relates not only to cases filed in the period covered in this report (July 2020 to December 2022) but also, as detailed in Part 4, older cases recently added to the databases as part of the creation of the Network.

Still, there are countries in which there is still limited information about the extent of climate litigation. Therefore, it is likely that more cases in jurisdictions not yet represented will be brought to light in the near future. The research conducted by the Sabin Center on the databases is an ongoing process. While this research has significantly expanded in geographical scope, its coverage of jurisdictions is not yet universal.<sup>11</sup>

Figure 2.



<sup>11</sup> For the countries where the Sabin Center's Network does not yet have rapporteurs, the Sabin Center relies on other sources of data, including cases mentioned in the media and in scholarship, among others.

Figure 3.

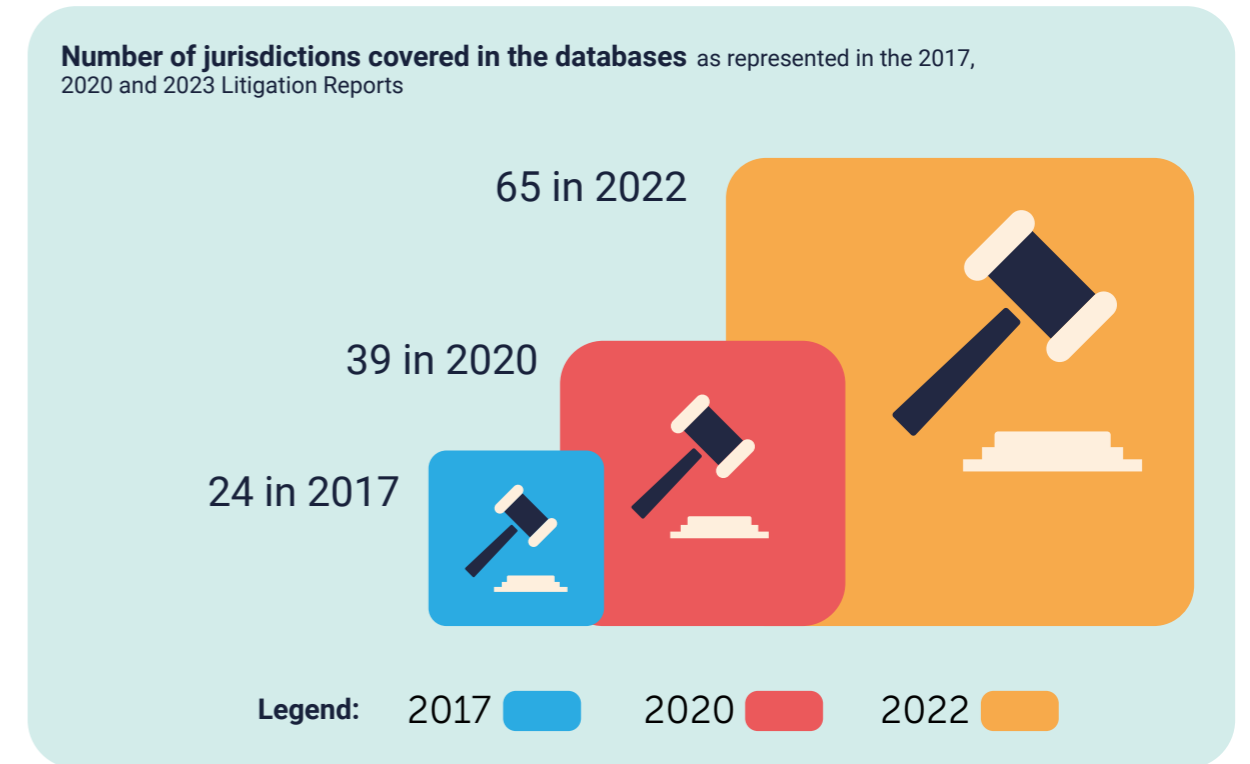


Figure 3 shows the increase in the geographic representation covered in the three instalments of the report. The 2017 Litigation Report included cases from 24 jurisdictions and the 2020 report from 39 jurisdictions. This 2023 report includes cases from 65 jurisdictions. These include international or regional courts, tribunals, quasi-judicial bodies or other adjudicatory bodies. This proliferation shows that climate litigation is expanding its regional reach, with cases in the Global South particularly gaining new visibility.

### III. Regional representation of climate change litigation

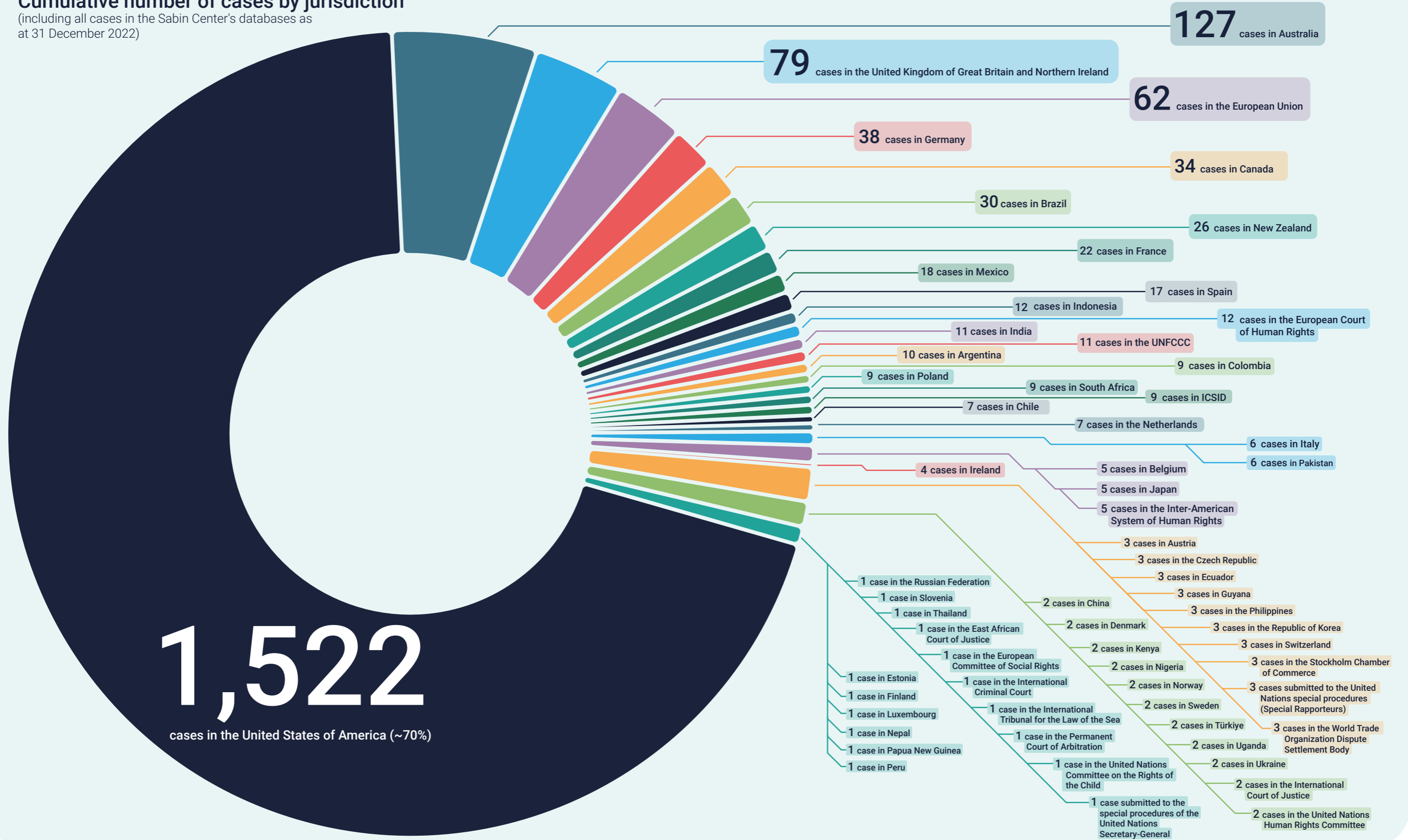
As at 31 December 2022, the Sabin Center's Climate Change Litigation databases include 1,522 cases filed in the United States of America and 658 filed in all other jurisdictions combined, including international or regional courts, tribunals, quasi-judicial bodies or other adjudicatory bodies, such as special procedures of HRC, arbitration tribunals and the European Union. Figure 4 (overleaf) shows the number of cases per jurisdiction.



Figure 4.

### Cumulative number of cases by jurisdiction

(including all cases in the Sabin Center's databases as at 31 December 2022)



Note: UNFCCC cases refer to non-compliance procedures under UNFCCC.

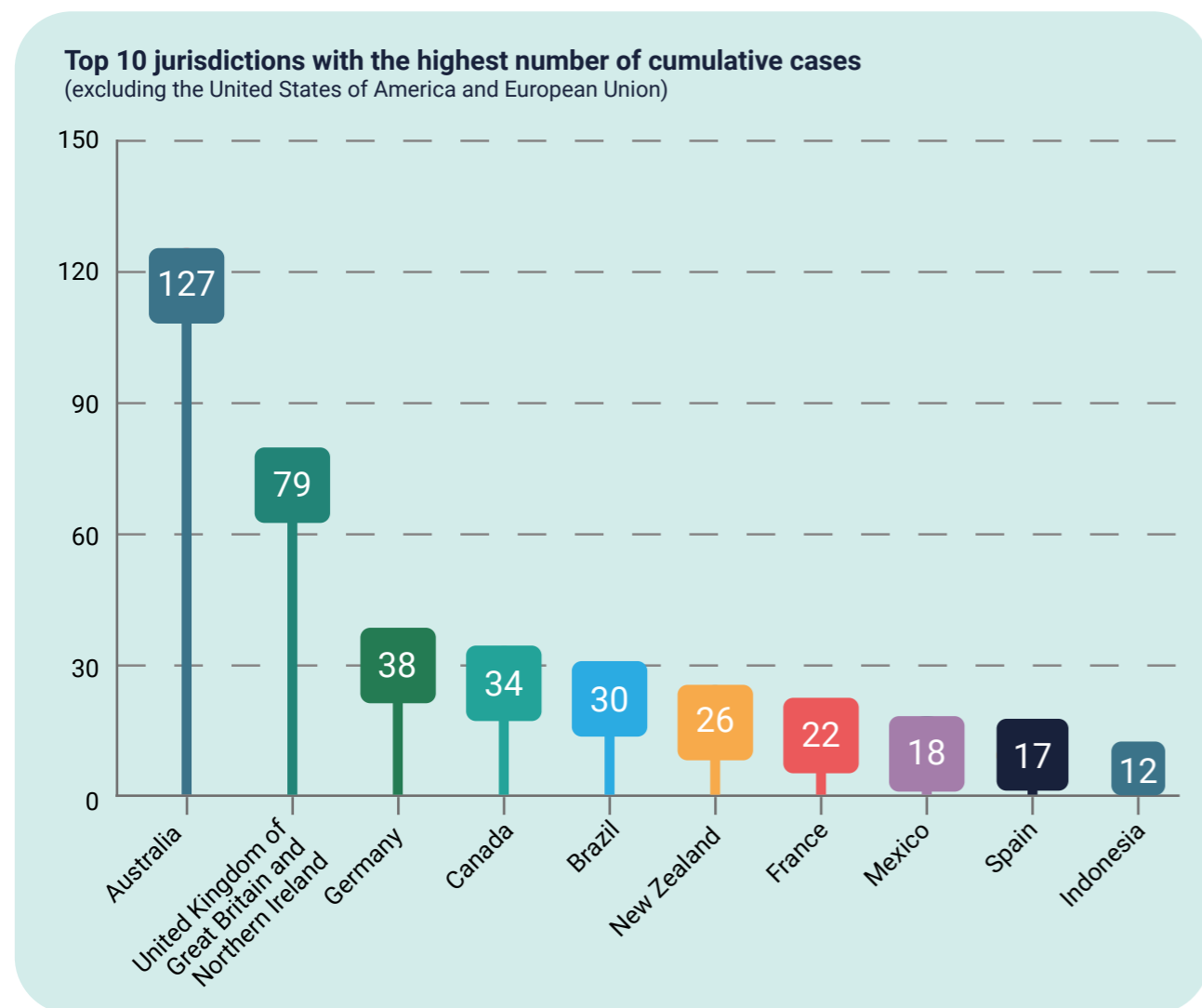
Figure 5 shows the 10 jurisdictions, excluding the United States of America and the European Union, with the highest number of cases, which are (in descending order) Australia, the United Kingdom, Canada, Brazil, New Zealand, Germany, France, Spain, Mexico and India.<sup>12</sup>

While cases in the United States of America still represent an overwhelming majority of cases globally, the overall percentage of cases outside the United States of America is increasing. In the 2017 Litigation

Report, cases in the United States of America represented 74 per cent of the total. In 2020, it was 77 per cent and in 2022, it was 70 per cent.

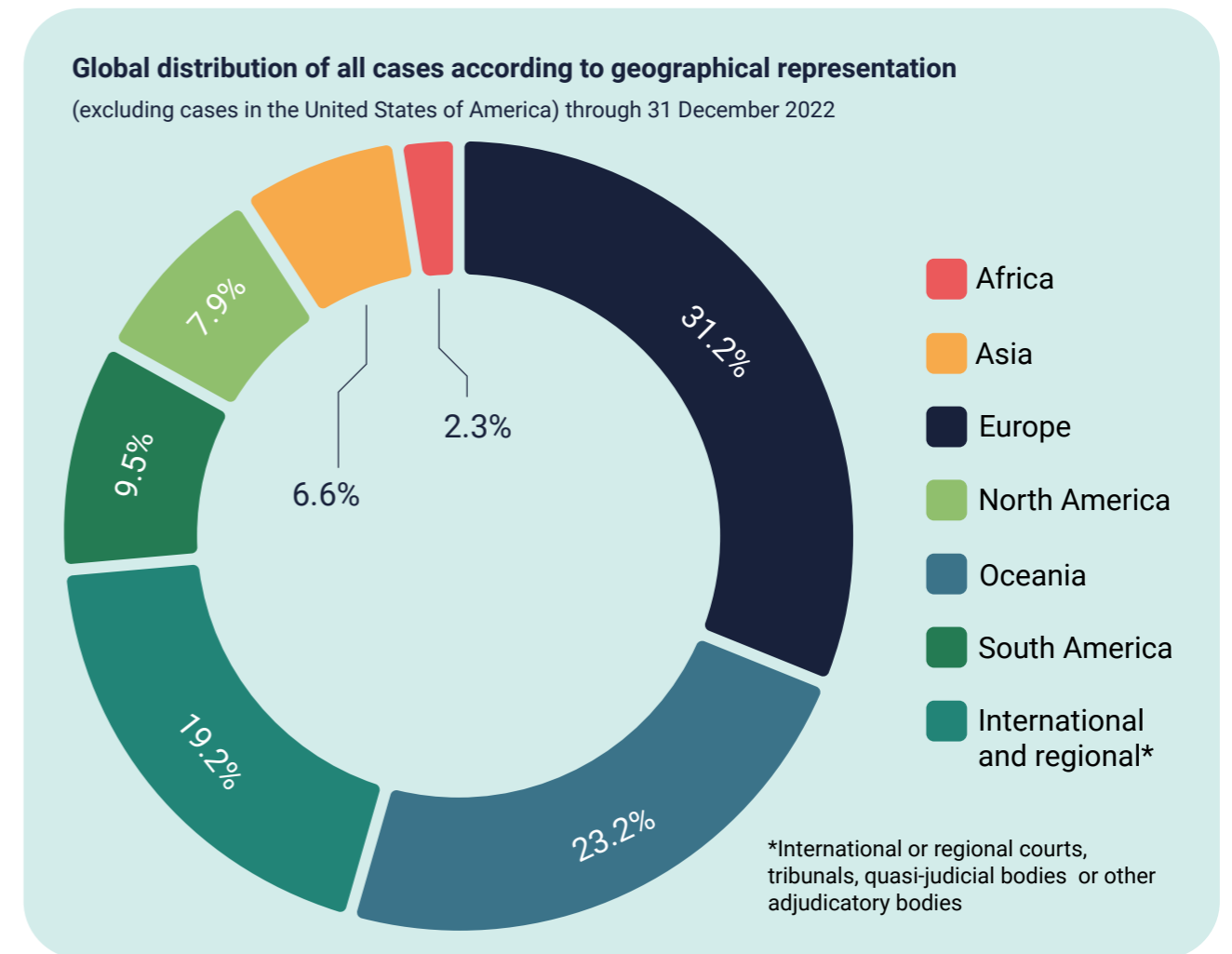
Figure 6 illustrates that, excluding cases in the United States of America, Europe as a region has the highest percentage of cases with 31.2 per cent. Oceania represents 23.2 per cent of the cases. International or regional courts, tribunals, quasi-judicial bodies or other adjudicatory bodies represent 19.2 per cent of the global cases. South America has 9.5 per cent

Figure 5.



<sup>12</sup> The likelihood that climate litigation will be filed in a particular country depends on a range of factors that include the country's legal culture, whether unsuccessful plaintiffs must pay the defendants' costs, the degree of frustration over governments' actions or inactions on climate change, how frequent, extensive, and damaging climate-driven physical losses are becoming, and the existence of regulatory frameworks and judicial precedent that establish enforceable climate-related rights and obligations.

Figure 6.



(Global Change Data Lab 2015)

**Note:** This figure has been developed using the regional definitions as contained in Our World in Data. The category "International and regional", as noted elsewhere in this report, refers to cases brought before international or regional courts, tribunals, quasi-judicial bodies or other adjudicatory bodies.



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of the cases while North America has 7.9 per cent. There is currently no domestic climate litigation in the Caribbean. Asia and Africa still have the lowest representation with 6.6 per cent and 2.3 per cent respectively. As noted in the introduction, some regions remain underrepresented due to gaps in the current research. As the Sabin Center's Network develops, it is likely that these numbers will change.

Litigation in the Global South represents a small but growing percentage of global climate litigation, and these cases are analysed here along with cases from the Global North. While the definition of Global South remains contested, the term is widely used in the context of multilateral debate about the transformation of the global order, especially in reference to emerging economies (Gray and Gills 2016).

According to the Climate Change Litigation databases, there have been 114 cases in the Global South, 421 in the Global North (or 1,943 cases including the United States of America) and 127 in international and regional courts, tribunals and adjudicatory bodies (which can include plaintiffs from the Global North and Global South). As depicted in Figure 7, if considering the cases in the United States of America, cases in the Global North represent 89 per cent of the total number of climate litigation cases. Cases in the Global South amount to 5.2 per cent while international and regional cases amount to 5.8 per cent. As shown in Figure 8, excluding the United States cases from the number of cases in the Global North, the percentage share of cases in the Global South accounts for 17.2 per cent of cases.

Figure 7.

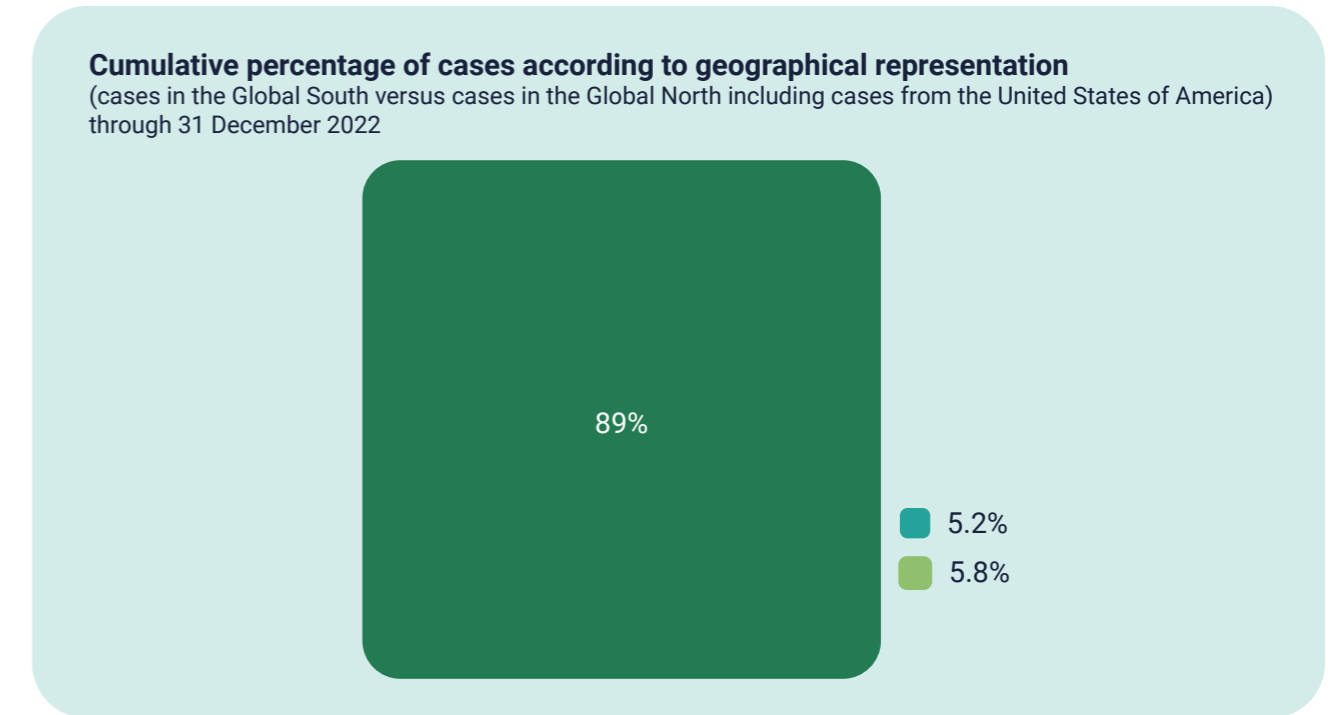
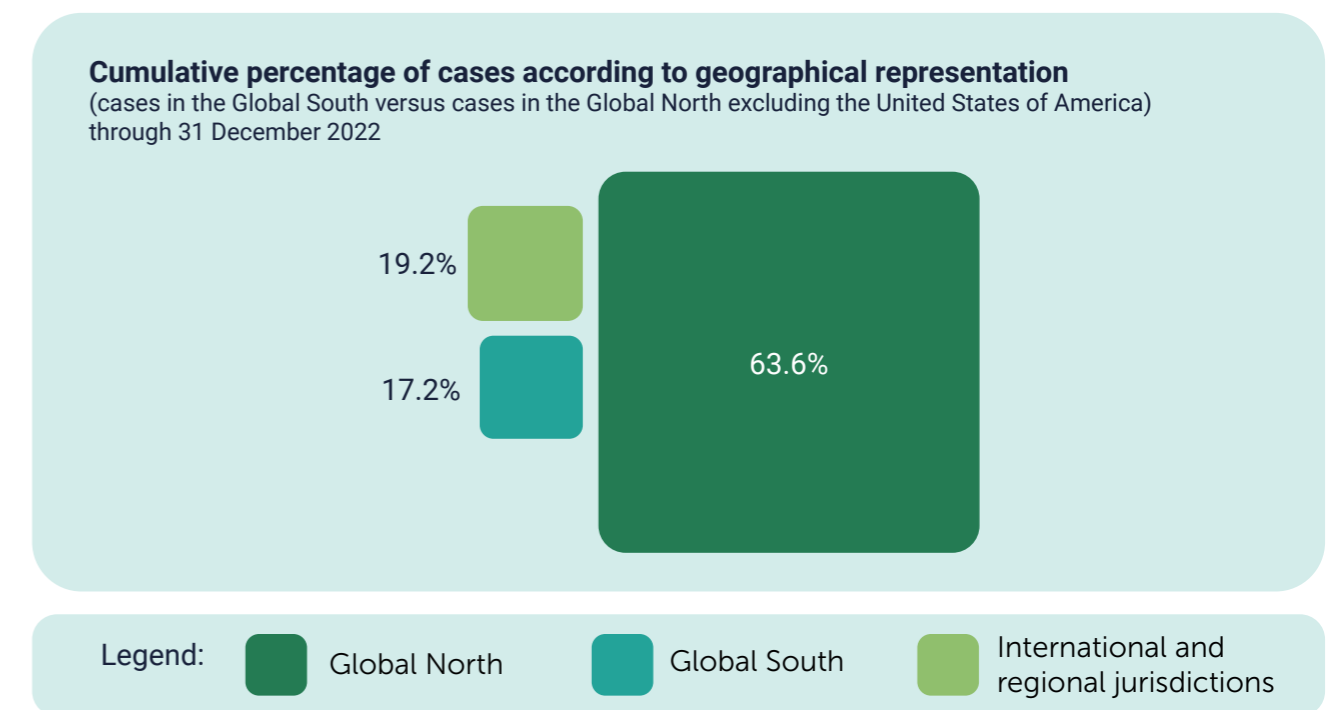


Figure 8.



**Box 2: Changes in the data set since the launch of the Peer Review Network of Global Climate Litigation**

Since the launch of the Network in 2021, the Sabin Center has added 58 cases to the database which were filed prior to the publication of the 2020 status report. As these cases were added to the database after the 2020 Litigation Report was published, they were not analysed in that report. These cases are included in the analysis of the present report and represent an ongoing effort to fill the gaps in the geographic representation in the database. Of these, as Figure 9 shows, 18 cases come from Asia, 13 from Europe, 12 from South America, 6 from North America, 2 from Africa, 2 from Oceania, and 5 from international and regional courts, tribunals and adjudicatory bodies.

Figure 9.



Cases identified here have been filed between 2009 and 1 July 2020, the cut-off date for cases examined in the 2020 Litigation Report.

This box summarizes some highlights that relate to this data set specifically. The analysis is divided by geographical region rather than by topic, as is the rest of the report, to show the expansion in the database's geographical coverage.

A significant proportion of pre-2020 cases from Asia were challenges brought by the Government of Indonesia against palm oil, mining and logging companies for the destruction of peatland ecosystems. In particular, six cases filed between 2012 to 2019 establish the Indonesian Government's right to sue palm oil producers for GHG emissions and loss of carbon sinks from peatland destruction, as well as the actual cost to restore the ecosystem to its original state (*Minister of Environment v. PT Kalista Alam* 2017; *Ministry of Environment and Forestry v. PT Jatim Jaya Perkasa* 2018; *Ministry of Environment and Forestry v. PT Palmina Utama* 2018; *Ministry of Environment and Forestry v. PT Arjuna Utama Sawit* 2020; *Ministry of Environment and Forestry v. PT Asia Palem Lestari* 2021; *Ministry of Environment and Forestry v. PT Rambang Agro Jaya* 2021).<sup>13</sup> In these cases, climate damages arising from GHG emissions were calculated by assigning a numerical value to the cost of emitting a unit of carbon, then calculating the units of carbon emitted by a corporation's actions. In *Shrestha v. Office of the Prime Minister et al.* (2018) Nepal's Supreme Court ruled that climate change impaired the petitioner's constitutional rights to a clean and healthy environment and a dignified life and ordered the Government to enact a new climate law.<sup>14</sup>

Pre-2020 cases from South America focused largely on the global and local costs of resource extraction. In Ecuador, in 2020, gas flaring was declared unlawful because it violates Ecuadorians' rights to a healthy environment and health as well as Ecuador's international climate commitments (*Herrera Carrion et al. v. Ministry of the Environment et al. [Caso Mecheros]* 2021).<sup>15</sup> In Colombia, in 2016, the Constitutional Court ruled that:

- (i) The Colombian Government's failure to protect Indigenous and Afro-descendent communities from river pollution from mining violated their fundamental rights
- (ii) The river in question had legal personhood
- (iii) The Government needed to consider climate change in future mining and energy policy decisions (*Atrato River Decision T-622/16* 2016)<sup>16</sup>

In 2017, that same court ruled that diverting a river for mining violated the Wayúu Indigenous community's right to water, health and food sovereignty, in part because climate change had already impacted the river's water supply, and conducting mining activities in a climate-vulnerable region was likely to cause significant harm. The court ordered the mining company to pay compensation and begin mitigation and correction efforts (*Decision SU-698/17* 2017).<sup>17</sup> In 2020, the Colombian Government's issuing of mining permits was declared impermissible when climate change already threatened ecosystem health and water security. The Constitutional Court ordered the mining activities to be halted immediately (*Combeima River Case* 2020).<sup>18</sup>

<sup>13</sup> *Minister of Environment v. PT Kalista Alam*, Supreme Court of the Republic of Indonesia, Decision No. 12/PDT.G/2012/PN.MBO, 18 April 2017 (Indonesia). *Ministry of Environment and Forestry v. PT Jatim Jaya Perkasa*, Supreme Court of the Republic of Indonesia, Decision No. 108/Pdt.G/2015/PN.Jkt.Utr., 28 June 2018 (Indonesia). *Ministry of Environment and Forestry v. PT Palmina Utama*, Banjarmasin Court of Appeal, Decision No. 48/PDT/2018/PT.BJM, 15 August 2018 (Indonesia). *Ministry of Environment and Forestry v. PT Arjuna Utama Sawit*, Supreme Court of the Republic of Indonesia, Decision No. 213/Pdt.G/LH/2018/PN.Plk, 10 December 2020 (Indonesia). *Ministry of Environment and Forestry v. PT Asia Palem Lestari*, District Court of North Jakarta, Decision No. 607/Pdt.G-LH/2019/PN.Jkt.Utr., 5 January 2021 (Indonesia). *Ministry of Environment and Forestry v. PT Rambang Agro Jaya*, District Court of Central Jakarta, Decision No. 445/Pdt.G/2019/PN.Jkt.Pst, 11 January 2021 (Indonesia).

<sup>14</sup> *Shrestha v. Office of the Prime Minister et al.*, Supreme Court of Nepal, Order 074-WO-0283, 25 December 2018 (Nepal).

<sup>15</sup> *Herrera Carrion et al. v. Ministry of the Environment et al. (Caso Mecheros)*, Provincial Court of Justice of Sucumbio, Juicio No. 21201202000170, 29 July 2021 (Ecuador).

<sup>16</sup> *Atrato River Decision T-622/16*, Constitutional Court of Colombia, 10 November 2016 (Colombia).

<sup>17</sup> *Decision SU-698/17*, Constitutional Court of Colombia, 28 November 2017 (Colombia).

<sup>18</sup> *Combeima River Case*, Administrative Tribunals of Colombia, 73001-2331-000-2011-00611-03, 14 September 2020.

Cases pre-2020 from North America focused largely on the national energy sector and climate change policy. In Canada, an NGO challenged the Canadian Government's approval of a new liquefied natural gas facility because (among other things) the initial environmental impact assessment (EIA) did not consider GHG emissions for the entire lifetime of the facility (*SkeenaWild Conservation Trust v. Government of Canada* 2019).<sup>19</sup> That case was withdrawn after the project investor walked away from the project.

Cases pre-2020 from Europe included citizen and NGO challenges to inaction on Paris Agreement commitments. In France and the United Kingdom, climate activists faced criminal charges for actions taken during climate protests (*R. v. Brown [Extinction Rebellion protest, London City Airport]* 2022).<sup>20</sup> In *ADP Group (Paris Airports) v. Climate Activists* (2021), activists who illegally entered the tarmac at Paris Charles de Gaulle Airport and halted airport operations were acquitted because their actions were taken in a "state of necessity" to warn of future danger, namely climate change.<sup>21</sup>

Cases from international and regional bodies included challenges to the European Union's environmental legislation by impacted parties in Southeast Asia. Two pre-2020 cases currently before the World Trade Organization Dispute Settlement Body have challenged European Union regulations on "high-risk" biofuels on the basis that they unnecessarily advantage intra-European Union producers and disadvantage Indonesian and Malaysian palm oil producers, in violation of international trade agreements (*DS-593: European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-based Biofuels* 2019; *DS-600: European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels* 2021).<sup>22</sup> The measures taken by the European Union were implemented to pursue policy objectives of climate change mitigation, environmental protection, preserving biodiversity and ensuring energy security and sustainability.

The two cases from Oceania both originated in New Zealand. One case did not allow the urgency of the climate crisis as a defence to criminal liability when lawful protest activities were available to climate activists (*Police v. Hanafin* 2020).<sup>23</sup> Another case challenged a local government's decision not to sign a "Local Leaders Climate Change Declaration", an agreement to take aggressive climate change action and compel the national Government to do the same. The High Court of New Zealand ruled that the local government's decision not to sign the pledge was unreasonable in light of the local impacts of climate change and ordered the government to reconsider its decision (*Hauraki Coromandel Climate Action Incorporated v. Thames-Coromandel District Council* 2020).<sup>24</sup>

In South Africa, the High Court rejected a case by the City of Cape Town seeking authorization to purchase renewable electricity from independent power producers without obtaining approval from the Minister of Mineral Resources and Energy. That case was rejected because it was determined to be an intergovernmental dispute that should be settled outside of court (*The City of Cape Town v. National Energy Regulator of South Africa and Minister of Energy* 2020).<sup>25</sup>

<sup>19</sup> *SkeenaWild Conservation Trust v. Government of Canada*, Federal Court of Canada, Application No. T-1836-16, 27 October 2016 (Canada).

<sup>20</sup> *R. v. Brown (Extinction Rebellion protest, London City Airport)*, Court of Appeal (Criminal Division) of England and Wales, Case No. [2022] EWCA Crim 6, 14 January 2022 (United Kingdom of Great Britain and Northern Ireland).

<sup>21</sup> *ADP Group (Paris Airports) v. Climate Activists*, Court of First Instance of Bobigny, Tribunal Correctionnel, 12 November 2021 (France).

<sup>22</sup> *DS-593: European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-based Biofuels*, World Trade Organization Dispute Settlement Body, Doc. No. WT/DS593/1, 9 December 2019 (World Trade Organization).

*DS-600: European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, World Trade Organization Dispute Settlement Body, Doc. No. WT/DS600/1, 15 January 2021 (World Trade Organization).

<sup>23</sup> *Police v. Hanafin*, District Court of New Zealand, Decision No. CRI-2019-076-001503, 13 November 2020 (New Zealand).

<sup>24</sup> *Hauraki Coromandel Climate Action Incorporated v. Thames-Coromandel District Council*, High Court of New Zealand, Case No. CIV-2019-419-173, NZHC 3228, 8 December 2020 (New Zealand).

<sup>25</sup> *The City of Cape Town v. National Energy Regulator of South Africa and Minister of Energy*, High Court of South Africa, Case No. 51765/17, 11 August 2020 (South Africa).

# Part 3: The state of climate change litigation



## Part 3: The state of climate change litigation



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This section describes and summarizes the status of climate change litigation throughout the world. It discusses key cases and how they are thematically linked to larger categories of climate cases. It identifies six important categories into which most cases can be placed and discusses issues that both arise in and run through these cases. Climate cases to date often fall into one or more of six categories:

- (i) The use of “climate rights” in climate litigation
- (ii) Domestic enforcement
- (iii) Keeping fossil fuels and carbon sinks in the ground
- (iv) Corporate liability and responsibility
- (v) Climate disclosures and greenwashing
- (vi) Failure to adapt and the impacts of adaptation<sup>1</sup>

### I. The use of “climate rights” in climate litigation

One of the most visible categories of climate cases includes actions asserting that insufficient climate mitigation or adaptation violates plaintiffs’ rights, including the rights to life, health, food, water, liberty, family life, a healthy environment, a safe climate and more. Here, this category is referred to as “climate

rights”. Climate rights encompass the ways in which national constitution, human rights law and other laws in general, imbue individuals and communities with rights to climate mitigation and adaptation action. It refers to both international and domestic commitments made to ensure that people will enjoy

<sup>1</sup> As the analysis in this Part 3 indicates, several cases demonstrate features of more than one trend and thus appear in multiple sections.

a safe and stable climate as well as other rights that do not explicitly focus on climate but have an impact in addressing climate change. These rights are variously known as human rights, environmental rights and human rights obligations related to the environment. As women are disproportionately impacted by climate change, women’s rights remain a key category of human rights that directly fulfils Sustainable Development Goal 5 on gender equality and the empowerment of women. Obligations pertaining to climate rights fall into three main categories: substantive obligations, procedural obligations, and obligations relating to persons and groups in vulnerable situations (United Nations 2022).

**“Cases brought in domestic forums have argued that climate rights emerge from existing constitutional and fundamental rights under domestic law, and often relate to international obligations under the Paris Agreement.”**

Cases brought in domestic forums have argued that climate rights emerge from existing constitutional and fundamental rights under domestic law, and often relate to international obligations under the Paris Agreement. The 2017 and 2020 Litigation Reports highlighted climate rights cases in Austria, Australia, Brazil, Canada, Colombia, India, Netherlands, Norway, Pakistan, Peru, Philippines, the Republic of Korea, Switzerland and the United States of America. Several of these cases are still pending as at 31 December 2022. However, many cases are still not brought to the forefront as financial challenges, intimidation, lack of know-how and other barriers remain in place. These barriers are especially harmful for vulnerable groups including Indigenous Peoples, women and those from a lower socioeconomic status, the majority of whom are women. The 2020 Litigation Report also highlighted a group of cases in international forums asserting that climate change violates international human rights. Since 2020, more claims have been brought and decisions have been reached in several instances. This section is divided between international and domestic climate rights cases.



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## A. International climate rights cases

The number of climate rights claims before and decisions by international adjudicative bodies has been growing. While still a small percentage of cases, these claims build on a body of soft law, including statements from the Inter-American Court of Human Rights (IACtHR), HRC and the United Nations General Assembly.

In October 2021, HRC adopted a historic resolution (A/HRC/RES/48/13) recognizing the human right to a clean, healthy and sustainable environment. HRC recognized that climate change, the environmental crisis and biodiversity loss have negative impacts on the enjoyment of all human rights, “including the rights to life, to the enjoyment of the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to housing, to safe drinking water and sanitation and to participation in cultural life, for present and future generations”. In July 2022, Member States of the United Nations General Assembly adopted a landmark resolution (A/RES/76/300) that recognizes that a clean, healthy and sustainable environment is a human right. While the resolution is not legally binding, it can give rise to constitutional and legal changes that could positively impact the environment and human well-being. Recognizing the right to a healthy environment at the international level is likely to reinforce rights-based claims before adjudicatory bodies.

Similar developments on the recognition of a right to a healthy environment are also taking place at the regional level. For example, the Parliamentary Assembly of the Council of Europe has presented a draft of an additional protocol to the European Convention on Human Rights (ECHR) which would anchor the right to a safe, clean, healthy and sustainable environment and make such a right enforceable in law in all countries which ratified it (United Nations 2021).

### i. Cases at the United Nations

To date, there have been several petitions filed with various United Nations bodies.

In October 2021, the United Nations Committee on the Rights of the Child rejected a petition filed by 16 children in *Sacchi, et al. v. Argentina, et al.* (2021), which alleged that Argentina, Brazil, France, Germany and Türkiye violated their rights under the United Nations Convention on the Rights of the Child by making insufficient cuts to GHG emissions.<sup>2</sup> The petitions were dismissed due to a failure to exhaust domestic remedies. Nonetheless, the findings and legal reasoning of the United Nations Committee on the Rights of the Child provide valuable guidance on children’s rights in the context of climate change. First, the United Nations Committee on the Rights of the Child found that the potential harm of the States’ acts or omissions regarding their carbon emissions was reasonably foreseeable to the States. Second, it affirmed that the States’ carbon emissions actively contribute to the harmful effects of climate change and that these are not limited to emissions within these States’ boundaries. Third, it concluded that the petitioners had pleaded sufficient facts to establish that the violation of their rights under the United Nations Convention on the Rights of the Child as a result of the States’ carbon emissions was reasonably foreseeable and that they have personally experienced significant harm (Tigre and Lichet 2021). After the dismissal of the petition, the same children submitted a petition to the United Nations Secretary-General asking him to declare a climate emergency, which would mobilize a United Nations comprehensive response to the climate emergency and activate a crisis management team to oversee immediate and comprehensive global action on climate change (Sacchi *et al.* 2021). The petition is still pending as at 31 December 2022.

## Box 3: Decision by the United Nations Human Rights Committee on the Torres Strait Islanders Petition

In September 2022, the United Nations Human Rights Committee delivered a landmark decision in *Daniel Billy and others v. Australia (Torres Strait Islanders Petition)* (2022), finding that the Australian Government was violating its human rights obligations to the Indigenous Torres Strait Islanders through climate change inaction.<sup>3</sup> The Committee found that Australia’s failure to adequately protect Indigenous Torres Strait Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home. For the first time, a United Nations body had found that a country violated international human rights law through inadequate climate policy. The decision also represents the first time that Indigenous Peoples’ right to culture was found to be at risk from climate impacts. The United Nations Human Rights Committee recognized that climate change was currently impacting the claimants’ daily lives and that, to the extent that their rights are being violated, Australia’s poor climate record was a violation of their right to family life and right to culture. The decision also specifically called on Australia to adopt significant climate adaptation measures.

Petitions to United Nations bodies do not require an official response. However, they can lead to statements from the United Nations special procedures that are relevant for climate litigation. To date, there has not been any formal action in response to a petition that was brought to the United Nations special procedures by five tribes in Louisiana and Alaska, United States of America. The petition has highlighted the negative impacts of climate change and claimed that the Government of the United States of America has violated their human rights in failing to address climate displacement (*Rights of Indigenous People in Addressing Climate-Forced Displacement 2020*).<sup>4</sup>

In October 2021, a petition was submitted to the United Nations special procedures by Environmental Justice Australia on behalf of several young Australians. The petition relied on the climate vulnerability of young people, First Nations people and people with disabilities, and argued that climate change exacerbates existing inequalities and directly undermines their health and cultural rights

(*Environmental Justice Australia (EJA) v. Australia 2021*).<sup>5</sup> It asked the Special Rapporteurs to seek an explanation from Australia on how:

- (i) The State’s climate inaction is consistent with its human rights obligations
- (ii) The current conduct is compatible with the human rights of young Australians and a pathway towards limiting the temperature increase to 1.5°C above pre-industrial levels
- (iii) Its current NDC has involved young people in Australia in the process of developing NDC and whether the State will establish a permanent forum to include the participation of young people from impacted communities

In addition, the complaint called on the Special Rapporteurs to urge Australia to set a 2030 emissions reduction target consistent with its human rights obligations.

<sup>2</sup> *Sacchi, et al. v. Argentina, et al.*, United Nations Committee on the Rights of the Child, Communication No. 104/2019 (Argentina), Communication No. 105/2019 (Brazil), Communication No. 106/2019 (France), Communication No. 107/2019 (Germany), Communication No. 108/2019 (Türkiye), 12 October 2021 (United Nations Committee on the Rights of the Child).

<sup>3</sup> *Daniel Billy and others v. Australia (Torres Strait Islanders Petition)*, United Nations Human Rights Committee, CCPR/C/135/D/3624/2019, 23 September 2022 (United Nations Human Rights Committee).

<sup>4</sup> *Rights of Indigenous People in Addressing Climate-Forced Displacement*, United Nations Special Rapporteurs, Ref. AL USA 16/2020, 15 September 2020 (United Nations).

<sup>5</sup> *Environmental Justice Australia (EJA) v. Australia*, United Nations Special Rapporteurs, 25 October 2021 (United Nations).

In *The Planet v. Bolsonaro* (2021), a communication was filed to the Office of the Prosecutor of the International Criminal Court (ICC) in 2021 requesting an investigation into former Brazilian President Jair Bolsonaro for his role in crimes against humanity resulting from ongoing deforestation and related activities in the Amazon rainforest.<sup>6</sup> The communication alleged that former President Bolsonaro has promoted and facilitated a widespread attack on the Amazon biome and those who defend and depend upon it, which represents a clear and extant threat to humanity itself. The complaint argued that global climate security is dependent on the Amazon and its key role in regulating global

temperatures and weather patterns, and that the severe damage to the functions of the Amazon biome caused by deforestation, conversion of deforested land to cattle ranching and vast intentional forest fires has disrupted this critical ecosystem, turning it from a carbon sink to a carbon source. The Office of the Prosecutor must first conduct an analysis of information to determine whether the statutory threshold of "a reasonable basis to proceed" to start an investigation is met, according to ICC rules (ICC 2016). If there is an investigation, it would be the first time that an investigation relating to crimes against humanity would be based on alleged environmental and climate harm.

#### Box 4: Initiatives to seek advisory opinions on climate change from international courts

International adjudicating bodies are not only mandated to settle disputes, but also to issue advisory opinions, which may be of great value in the development of international law. Two requests for advisory opinions of international courts are currently in progress. In 2022, the Republic of Vanuatu initiated an international campaign to seek an advisory opinion on climate change from the International Court of Justice. The draft zero of the request for advisory opinion (A/77/L.58), which is currently under negotiation and may be subject to changes, includes the following questions:

- (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment for present and future generations
- (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
  - (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
  - (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

An International Court of Justice advisory opinion may be issued at the request of the United Nations General Assembly, the Security Council or by other United Nations organs and specialized agencies. The Vanuatu campaign is pursuing the United Nations General Assembly route, which requires support from the majority of United Nations members present and voting (Savaresi, Kulovesi and van Asselt 2021).



<sup>6</sup> *The Planet v. Bolsonaro*, ICC, 12 October 2021 (ICC).

In addition, Antigua and Barbuda and Tuvalu signed an agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, to seek an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS) (De Shong 2021). The Climate Commission Agreement is open to accession by any other members of the Alliance of Small Island States (Freestone, Barnes and Akhavan 2021). ITLOS can give an advisory opinion on a legal question on the interpretation and application of the United Nations Convention on the Law of the Sea to climate change, which could include, for example, questions on sea level rise and ocean acidification and deoxygenation (Cruz Carrillo 2021). The advisory jurisdiction of ITLOS can be triggered by three elements:

1. An international agreement related to the purposes of United Nations Convention on the Law of the Sea clearly providing for the submission to the tribunal of a request for an advisory opinion
2. The request must be transmitted to ITLOS by an authorized body or per that agreement
3. The request must be premised on a legal question

In December 2022, the co-chairs of the Commission of Small Island States on Climate Change and International Law submitted a request for an advisory opinion from ITLOS (*Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* 2022).<sup>7</sup> The Commission referred the following legal questions to ITLOS:

"What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNCLOS'), including under Part XII:

- (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
- (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"

#### ii. Regional cases

At the regional level, climate cases are proceeding in several venues. These cases are discussed below.

##### a. Cases before the Inter-American System of Human Rights

The 2020 Litigation Report noted that IACTHR issued advisory opinion OC-23/17 in 2019, in response to a request from Colombia, in which the court concluded that the right to a healthy environment is a human right under the American Convention on Human Rights (*A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and*

*5(1) of the American Convention on Human Rights* 2017).<sup>8</sup> The opinion addressed climate change throughout, acknowledging that climate change is widely understood to interfere with the enjoyment of human rights and articulating a State's extraterritorial responsibility for environmental damage and climate change (Tigre and Urzola 2021).

In 2021, the Inter-American Commission of Human Rights (IACHR) and the Office of the Special Rapporteur on Economic, Social, Cultural, and Environmental Rights, relying on IACTHR's advisory opinion, jointly adopted resolution No. 3/21, entitled *Climate Emergency: Scope of Inter-American human rights obligations* (IACHR 2021a). The resolution's purpose is to systematize States' human rights

<sup>7</sup> *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS, Case No. 31/2022, 12 December 2022 (ITLOS).

<sup>8</sup> *A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights*, IACTHR, Advisory Opinion OC-23/17, 15 November 2017 (IACTHR).



obligations in the context of the climate crisis to ensure that public policy decisions are made according to a rights-based approach. The resolution calls on States to comply with standards of climate action that particularly protect the rights of the most vulnerable and calls on States to “move towards a clean and just energy transition”. The resolution encourages companies to “adjust their behaviour and operations to the norms of the business and human rights regime” and “adopt plans to reduce GHG emissions” and make them public (IACHR 2021a). This duty to adopt mitigation plans covers products and services, subsidiaries and suppliers.

In the 2021 *Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti* (2021), several Haitian children petitioned IACHR to investigate human rights violations stemming from waste disposal in their residential district (IACHR 2021b).<sup>9</sup> The petition includes a discussion of climate change’s intensification of harms to children through environmental displacement and exacerbation of waterborne diseases. Petitioners have alleged violations of the provisions of the American Convention on Human Rights on the rights of the

child (article 19), the right to dignity (under the right to privacy, article 11), the right to live in a healthy environment (articles 4 and 26), and the right to judicial protection (article 25). IACHR is expected first to decide whether to assert jurisdiction.

#### b. Cases before the East African Court of Justice

In November 2020, four civil society organizations filed a suit against the Governments of the United Republic of Tanzania and Uganda in the East African Court of Justice, seeking an injunction to stop the construction of the East African Crude Oil Pipeline. In *Center for Food and Adequate Living Rights et al. v. Tanzania and Uganda* (2020), plaintiffs have alleged that the Governments, without objection from the Secretary-General of the East African Community who is responsible for oversight of the East African Community Treaty, have signed agreements to build the pipeline without proper environmental, social, human rights and climate impact assessments. The pending claim arises under Ugandan national law, and the East African Community Treaty and its protocols.<sup>10</sup>



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<sup>9</sup> *Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti*, IACHR, 4 February 2021 (IACHR).

<sup>10</sup> *Center for Food and Adequate Living Rights et al. v. Tanzania and Uganda*, East African Court of Justice, 6 November 2020 (East African Court of Justice).



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#### c. Cases before European regional courts

Several cases have recently been filed under European regional courts. Cases under the Court of Justice of the European Union (CJEU) have been met with limited success and were dismissed on procedural grounds. Some pending claims at the European Court of Human Rights (ECtHR) as at 31 December 2022 are discussed below.

##### Court of Justice of the European Union

CJEU has explicit and far-reaching review powers to interpret the law of the European Union and ensure it is applied in the same way across the member States of the European Union, including the power to annul legislative acts (European Union 2007; European Union 2008). CJEU has so far had two climate cases, and both were dismissed due to lack of standing (*Peter Sabo et al. v. European Parliament and Council of the European Union* 2020).<sup>11</sup> In *Armando Ferrão Carvalho and Others v. the European Parliament and the Council* (2021) (the People’s Climate Case), the applicants (families in the agricultural or tourism sectors in several European Union and non-European

Union countries) challenged European Union legislation adopted to enable it to meet its GHG emissions reduction targets, which, they argued, were insufficient to protect their lives, livelihoods and human rights from the impacts of climate change.<sup>12</sup> The applicants in *Carvalho* argued that the violation of climate-related human rights is so unique that the strict standing test (that applicants need to show an individual concern particular to them or their group) (*Plaumann & Co. v. Commission of the European Economic Community* 1963; *Hartmann and Willers* 2021)<sup>13</sup> should be altered (Winter 2020). However, CJEU rejected those arguments and dismissed the claim, concluding that since everyone is impacted by climate change in one unique way or another, the applicants could not demonstrate that they were individually impacted by the European Union’s climate policy (Tigre 2022a). CJEU’s approach prevents individuals and environmental groups from challenging European Union law measures of general application, even when human rights are affected (*Hartmann and Willers* 2021).

In *Ville de Paris and Others v. European Commission* (2022), the City of Paris, the City of Brussels and the

<sup>11</sup> The European Union Biomass case was highlighted in the 2020 Litigation Report. *Peter Sabo et al. v. European Parliament and Council of the European Union*, CJEU, Case No. T-141/19, Order ECLI:EU:T:2020:179, 6 May 2020 (European Union).

<sup>12</sup> *Armando Ferrão Carvalho and Others v. the European Parliament and the Council*, CJEU, Case No. T-330/18, 25 March 2021 (European Union).

<sup>13</sup> *Plaumann & Co. v. Commission of the European Economic Community*, CJEU, Case No. 25/62, Order ECLI:EU:C:1963:17, 15 July 1963 (European Union).

Municipality of Madrid brought an action against the European Commission, challenging a regulation establishing a new procedure for testing the real driving emissions of certain motor vehicles. The cities argued that the regulation would prevent them from imposing restrictions on the circulation of passenger vehicles in relation to their air pollutant emissions. In 2018, the General Court partially upheld the action, prompting an appeal to CJEU. In 2022, CJEU handed down its decision in that appeal, ruling in favour of the European Commission.<sup>14</sup> The ruling clarifies requirements for standing under primary law of the European Union to challenge a Commission regulation. CJEU held that the General Court had erred when it stated that the cities were prevented from exercising their powers to regulate the circulation of passenger vehicles to reduce pollution because the cities did not have a “direct concern”.

### European Court of Human Rights

ECtHR has not yet ruled on the implications of climate change for the enjoyment of the rights enshrined in ECHR. However, 12 climate cases have recently been brought before ECtHR. In these, applicants argue that the Member States of the Council of Europe have violated some of the provisions of ECHR when considered in light of the Paris Agreement. All cases rely on the respondent States’ positive obligations concerning the right to life (article 2) and the right to respect for private and family life (article 8). The cases further make discrimination claims (article 14), alleging that the characteristics of their group or their personal circumstances are such that they will suffer particularly from the impacts of climate change.<sup>15</sup>

Three cases (*Duarte Agostinho*, *KlimaSeniorinnen*, and *Greenpeace Nordic*) have already been communicated to State parties, meaning they were considered admissible at the preliminary stage. The court can still assess admissibility issues at a later stage. Four climate cases (*Duarte Agostinho*,

*KlimaSeniorinnen*, *Greenpeace Nordic*, and *Carême*) have been considered “impact cases” and deemed a priority for hearing. In April and June 2022, respectively, ECtHR announced that the Grand Chamber would deal with *KlimaSeniorinnen*, *Carême* and *Duarte Agostinho*. This option can be used when the seven judges decide that the case raises “a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the chamber might have a result inconsistent with a judgment previously delivered by the court”.<sup>16</sup> This development underlines the high profile the court is giving those cases, which are following a fast track at ECtHR (Schmid 2022).

In *Duarte Agostinho and Others v. Portugal and 32 Other States* (2021), six Portuguese youth filed a complaint against 33 countries alleging that the respondents violated petitioners’ human rights by failing to take sufficient action on climate change, and the applicants requested member States of the European Union to take more ambitious domestic action. The applicants alleged that wildfires and increased temperatures affect their human rights and further breach the prohibition of discrimination due to climate change’s disproportionate impact on younger generations resulting from the prolonged effects they will suffer.<sup>17</sup> The plaintiffs filed the case directly with ECtHR without first exhausting domestic remedies, based on the urgent needs to address the climate crisis. Two other similar complaints (*De Conto v. Italy and 32 other States* 2021; *Uricchio v. Italy and 32 other States* 2021) were filed against Italy, relying on the same legal grounds and also without first exhausting domestic remedies.<sup>18</sup>

*Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others (KlimaSeniorinnen v. Switzerland)* (2020) was brought by an association of senior women and four individual applicants against Switzerland in November 2020.<sup>19</sup> Their application to ECtHR

<sup>14</sup> *Ville de Paris and Others v. European Commission*, CJEU, Case No. C-177/19 P to C-177/19 P, 13 January 2022 (European Union).

<sup>15</sup> *Ibid.*

<sup>16</sup> Article 30 of the ECHR.

<sup>17</sup> *Duarte Agostinho and Others v. Portugal and 32 Other States*, ECtHR, Query No. 39371/20, 4 February 2021 (ECtHR).

<sup>18</sup> *De Conto v. Italy and 32 Other States*, ECtHR, Complaint No. 14620/21, 3 March 2021 (ECtHR).

*Uricchio v. Italy and 32 Other States*, ECtHR, Complaint No. 14615/21, 3 March 2021 (ECtHR).

<sup>19</sup> *Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others*, Federal Supreme Court of Switzerland, Case No. A-2992/2017, 26 November 2020 (Switzerland).

follows a domestic rejection of the applicants’ complaint on the basis that senior women are not uniquely affected by climate change, as detailed below. *Müllner v. Austria* (2021) was lodged against Austria by an individual applicant who suffers from Uhthoff’s syndrome, which affects people with multiple sclerosis who suffer when temperatures rise above 25°C. The case was filed after an unsuccessful appeal to the Austrian Supreme Court.<sup>20</sup> In *Greenpeace Nordic and Others v. Norway* (2021), several NGOs and six young climate activists filed a claim against the Norwegian Government, alleging that continued oil exploration by the Norwegian State breaches their fundamental human rights.<sup>21</sup> The case follows a decision by the Norwegian Supreme Court, as explained below. In *Carême v. France* (2022), the Mayor of Grande-Synthe, whose application in *Commune de Grande-Synthe v. France* (2021) was rejected, complained that the Council of State erred in rejecting his action. By claiming that he had no interest in the proceedings even though he was exposed to climate risk caused by insufficient government action, the mayor claimed the Council of State had violated his human rights.<sup>22</sup>

Five additional applications were filed in 2022. For example, in *Soubeste and Others v. Austria and 11 Other States* (2022), young European citizens alleged that their human rights have been adversely affected by climate change, which is driven, to a large extent, by the fossil energy industry.<sup>23</sup> They further

contended that the 1994 Energy Charter Treaty, ratified by all 12 respondent States, protects investors in that sector from regulatory changes and gives them access to exorbitant remedies through investor-State dispute settlement (ISDS) mechanisms, thereby inhibiting the respondent States from taking immediate measures against climate change and making it impossible for them to attain the long term temperature goals enshrined in the Paris Agreement. In *Plan B. Earth and Others v. United Kingdom* (2022), applicants alleged that, in breach of its legal obligations arising under the Human Rights Act 1998 and ECHR, the United Kingdom is systematically failing to take practical and effective measures to address the threat from man-made climate breakdown.<sup>24</sup> In *Humane Being v. the United Kingdom* (2022), the applicant alleged that the United Kingdom is in breach of its obligations under ECHR for failing to address the risks of the climate crisis, future pandemics and antibiotic resistance created by factory farming.<sup>25</sup> This application posed novel climate arguments focusing on the danger of agricultural methane emissions and highlighting soy feed consumption in factory farming in the United Kingdom as a key driver of deforestation in the Amazon basin.

<sup>20</sup> *Müllner v. Austria*, ECtHR, 25 March 2021 (European Court of Human Rights).

<sup>21</sup> *Greenpeace Nordic and Others v. Norway*, ECtHR, Application No. 34068/21, 15 June 2021 (ECtHR).

<sup>22</sup> *Commune de Grande-Synthe v. France*, Council of State of France, No. 427301, 1 July 2021 (France). *Carême v. France*, ECtHR, Application No. 7189/21, 7 June 2022 (ECtHR).

<sup>23</sup> *Soubeste and Others v. Austria and 11 Other States*, ECtHR, Case No. 31925/22, 2022 (ECtHR).

<sup>24</sup> *Plan B. Earth and Others v. United Kingdom*, ECtHR, 11 July 2022.

<sup>25</sup> *Humane Being v. the United Kingdom*, ECtHR, 26 July 2022 (European Court of Human Rights).

## B. Domestic climate rights cases

Cases brought in domestic forums have argued that climate obligations emerge from existing constitutional and fundamental rights secured under domestic law. These cases highlight the impact of climate change on human rights and challenge deficiencies of domestic regimes to address climate change. They have relied on:

- (i) Human rights
- (ii) The right to a healthy environment
- (iii) Rights of nature
- (iv) A combination of these

### i. Human rights

Several cases brought in Europe rely on articles 2 and 8 of ECHR to inform domestic law. These cases often challenge whether a government's mitigation efforts are adequate to meet Paris Agreement commitments or whether particular government policies are consistent with human rights obligations. While several cases are still pending, these strategies have achieved some success. Courts in Belgium and Germany have found that insufficient climate mitigation breaches human rights obligations under ECHR and under the national government's duty of care. Courts have found that governments have failed to take the necessary measures to prevent the harmful effects of climate change or protect human rights to minimize climate risk.

In April 2021, the *German Federal Constitutional Court in Neubauer, et al. v. Germany* (2021) struck down parts of Germany's Federal Climate Protection Act as incompatible with constitutional rights to life and health, among others, because the legislation did not include sufficient provisions for emissions cuts beyond 2030.<sup>26</sup> The court found the legislation's mitigation targets inadequate to protect human

rights or to proportionally distribute the global carbon budget between current and future generations. The court concluded that Germany's climate law was effectively "offloading" emissions reduction to future generations in a violation of fundamental freedoms. The court grounded the decision in the State's duty to protect fundamental rights and to minimize a foreseeable and sufficiently serious risk of harm posed by climate change. The court ordered the legislature to set clear provisions for reduction targets from 2031 onward by the end of 2022. A revised Climate Protection Act requiring a reduction of 65 per cent in GHGs from 1990 levels by 2030 was passed in 2021. A new challenge was brought before the Federal Constitutional Court in 2022, arguing that the targets continue to infringe fundamental rights as they still exceed Germany's remaining carbon budget and lack coordination between federal states (*Steinmetz, et al. v. Germany* 2022).<sup>27</sup>

The role of federal German states in establishing climate laws and mitigation targets was challenged in a series of 11 cases brought against the subnational governments in Germany in the Federal Constitutional Court of Germany (1 BvR 1565/21, 1 BvR 1566/21, 1 BvR 1669/21, 1 BvR 1936/21, 1 BvR 2574/21, 1 BvR 2575/21, 1 BvR 2054/21, 1 BvR 2055/21, 1 BvR 2056/21, 1 BvR 2057/21, 1 BvR 2058/21 2022).<sup>28</sup> These claims argued that codifying a legally binding reduction path is required at the subnational level, as states bear co-responsibility for protecting human rights, including safeguarding future generations, within their sphere of competence. In 2022, the court gave one joint decision for all 11 complaints, refusing to admit them for adjudication based on a lack of adequate prospects Federal Constitutional Court of Germany (2022b).<sup>29</sup> The court found that the German federal legislature, not the subnational legislatures, is subject to implementing a carbon emissions budget. Additional claims have been brought before state courts in Germany seeking more ambitious climate action (*Deutsche Umwelthilfe (DUH) v. Nordrhein-Westfalen (NRW)* 2020; *Deutsche Umwelthilfe*

(*DUH) v. Bayern* 2021; *Marlene Lemme, et al. v. State of Bayern [Subsidiary Claim]* 2021; *Deutsche Umwelthilfe [DUH] v. Baden-Württemberg [BaWü]* 2021).<sup>30</sup>

In 2021, the Brussels Court of First Instance held in *VZW Klimaatzaak v. Kingdom of Belgium & Others* (2021) that Belgium and three subnational governments had breached their duty of care under the Civil Code by failing to take necessary measures to prevent the harmful effects of climate change and comply with their mitigation targets. Further, the court found that by failing to take sufficient climate action to protect the life and privacy of the plaintiffs, the defendants were in breach of their obligations under articles 2 and 8 of ECHR. However, the court declined to set more stringent emissions reduction targets on separation of powers grounds. In November 2021, *Klimaatzaak* appealed the judgment pertaining to the court's refusal to set specific binding targets related to the reduction of GHG emissions over time.<sup>31</sup>

In a case involving similar claims decided in 2022, *Klimatická žaloba ČR v. Czech Republic* (2022), the Prague Municipal Court ordered the State to urgently take the necessary measures to address climate change and devise a precise plan to achieve the goals of the Paris Agreement.<sup>32</sup>

Several claims filed in other jurisdictions also challenge the adequacy of national climate action under ECHR provisions that have been integrated into domestic law. In *A Sud et al. v. Italy* (2021), an environmental NGO and more than 200 individuals filed a suit against the Italian Government for failing to take actions necessary to meet the Paris Agreement's temperature goal of well below 2°C

with respect to pre-industrial levels while aiming to limit temperature increase to 1.5°C. They have sought a court order to reduce emissions by 92 per cent by 2030 compared with 1990 levels, based on Italy's "fair share" of global emissions under the Paris Agreement.<sup>33</sup> Similarly, in 2021 ClientEarth in Poland brought five identical suits on behalf of private citizens against the Polish Government, alleging that the Government has permitted GHG emissions from its territory in excess of the nation's "fair share" under the Paris Agreement, in violation of its human rights obligations (*ClientEarth v. Poland [on Behalf of M.G.]* 2021; *ClientEarth v. Poland [on Behalf of M.O.]*; *ClientEarth v. Poland [on Behalf of M.S.]*; *ClientEarth v. Poland [on Behalf of P.N.]*; *ClientEarth v. Poland [on Behalf of P.N.]* 2021).<sup>34</sup>

Cases that have challenged specific projects or policies based on human rights obligations under ECHR have had limited success to date. In *Greenpeace et al. v. Austria* (2020), the Austrian Constitutional Court dismissed a lawsuit requesting an invalidation of tax exemptions granted to air travel and not railways, finding that rail passengers do not have standing to sue over preferential tax treatment.<sup>35</sup> Similarly, in *Greenpeace Netherlands v. State of the Netherlands* (2020), The Hague District Court found that the State does not have a legally enforceable obligation under ECHR to attach climate conditions to a COVID-19 bailout package for the Dutch airline KLM Royal Dutch Airlines and deferred to the executive branch's discretion in responding to the pandemic.<sup>36</sup> In *Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy* (2019), the High Court of Justice in London refused permission to proceed in a case alleging that the United Kingdom's continued support for high-emission transportation and fossil fuel industries within the

<sup>26</sup> *Neubauer, et al. v. Germany*, Federal Constitutional Court of Germany, 29 April 2021 (Germany).

<sup>27</sup> *Steinmetz, et al. v. Germany*, Federal Constitutional Court of Germany, 24 January 2022 (Germany).

<sup>28</sup> See Federal Constitutional Court, Germany: <http://climatecasechart.com/non-us-jurisdiction/federal-constitutional-court/>.

<sup>29</sup> 1 BvR 1565/21, 1 BvR 1566/21, 1 BvR 1669/21, 1 BvR 1936/21, 1 BvR 2574/21, 1 BvR 2575/21, 1 BvR 2054/21, 1 BvR 2055/21, 1 BvR 2056/21, 1 BvR 2057/21, 1 BvR 2058/21, Federal Constitutional Court of Germany, 18 January 2022 (Germany).

<sup>30</sup> *Deutsche Umwelthilfe (DUH) v. Nordrhein-Westfalen (NRW)*, Higher Administrative Court of North Rhine-Westphalia, 3 December 2020 (Germany).

*Deutsche Umwelthilfe (DUH) v. Bayern*, Higher Administrative Court of Bayern, 24 June 2021 (Germany).

*Marlene Lemme, et al. v. State of Bayern (Subsidiary Claim)*, Bayern Constitutional Court, 30 June 2021 (Germany).

*Deutsche Umwelthilfe (DUH) v. Baden-Württemberg (BaWü)*, Higher Administrative Court of Justice Baden-Württemberg, 8 November 2021 (Germany).

<sup>31</sup> *VZW Klimaatzaak v. Kingdom of Belgium & Others*, Brussels Court of First Instance, 17 November 2021 (Belgium).

<sup>32</sup> *Klimatická žaloba ČR v. Czech Republic*, Municipal Court in Prague, Judgment No. 14A 101/2021, 15 June 2022 (Czech Republic).

<sup>33</sup> *A Sud et al. v. Italy*, Civil Court of Rome, 5 June 2021 (Italy).

<sup>34</sup> *ClientEarth v. Poland (on Behalf of M.G.)*, Białystok Court of Appeal, 8 September 2021 (Poland).

*ClientEarth v. Poland (on Behalf of M.O.)*, District Court, 2021 (Poland).

*ClientEarth v. Poland (on Behalf of M.S.)*, District Court, 2021 (Poland).

*ClientEarth v. Poland (on Behalf of P.R.)*, District Court, Poland, 2021 (Poland).

*ClientEarth v. Poland (on Behalf of P.N.)*, Poznań Regional Court, 20 December 2021 (Poland).

<sup>35</sup> *Greenpeace et al. v. Austria*, Constitutional Court of Austria, Decision No. G 144-145/2020-13, V 332/2020-13, 30 September 2020 (Austria).

<sup>36</sup> *Greenpeace Netherlands v. State of the Netherlands*, The Hague District Court, Decision No. ECLI:NL:RBDHA:2020:12440, 9 December 2020 (Netherlands).

United Kingdom and its overseas territories violates rights protected by ECHR and the United Kingdom's Human Rights Act.<sup>37</sup>

Rights-based litigation challenging national climate policies and policy- and project-level approvals has also emerged outside of Europe. In *ENVironnement JEUnesse v. Procureur General du Canada* (2022), an environmental non-profit organization alleged that Canada's GHG reduction targets were insufficient to avoid dangerous climate change impacts, that the plans to meet these targets were themselves inadequate, and that both of these breach Canada's obligations to protect the human rights of young people under the Canadian Charter of Rights and Freedoms and the Québec Charter of Rights and Freedoms. The federal Government submitted that the issues were not justiciable because they were inherently political and outside the competence of the court and because the allegation was government inaction. In December 2021, the Québec Court of Appeal accepted the Government's arguments and denied a motion to certify a class action by the group of citizens. The appellants filed an application for leave to appeal to the Supreme Court of Canada, but this application was denied.<sup>38</sup>

In *Laboratório do Observatório do Clima v. Minister of Environment and Brazil* (2022), a network of civil society organizations filed a class action in the judicial section of Amazonas against the Brazilian Government. The plaintiffs requested that the National Climate Change Policy be updated to align Brazil's GHG emissions with a 1.5°C global warming scenario. The plaintiffs asserted that climate change affects a wide range of human rights such as the rights to life, dignity, health, food and housing, as well as the constitutionally recognized right to a healthy environment.<sup>39</sup>

The violation of human rights has also been used as the basis for legal arguments demanding adaptation measures from a government. In *Tsama William and Others v. Uganda's Attorney General and Others* (2020), the victims of recurring landslides in Bududa District, Uganda, filed a suit against the Government for failing to implement landslide adaptation measures. The applicants requested a declaration of violation of rights, damages, and compensation for the loss of life, threats to life, destruction of property, infringement of their other fundamental human rights and the costs of resettlement to safer areas. The case is pending as at 31 December 2022.<sup>40</sup>

## ii. The right to a healthy environment

Several cases have made challenges to national climate policy premised on the right to a healthy environment, as laid out in several domestic constitutions (*Vilchez Moragues and Savaresi* 2021).<sup>41</sup> The majority of these cases are found in the Global South.

In 2022, the Brazilian Supreme Court held in *PSB et al. v. Brazil (on Climate Fund)* (2022) that the Paris Agreement is a human rights treaty, which enjoys "supranational" status. This "supralegality" of human rights treaties means that they are above "regular" laws in the legal hierarchy. Accordingly, any Brazilian law or decree that contradicts the Paris Agreement, including the NDC, may be invalidated. The case concerned the Government's failure to adopt administrative measures concerning the allocation of funds of a financial mechanism for subsidizing mitigation and adaptation measures. The Supreme Court ruled that the executive branch has a constitutional duty to execute and allocate the funds to mitigate climate change, based on both the separation of powers and the constitutional right to a healthy environment. The court further found that

<sup>37</sup> *Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy*, High Court of Justice of England and Wales, Claim No. CO/16/2018, 25 January 2019 (United Kingdom of Great Britain and Northern Ireland).

<sup>38</sup> *ENVironnement JEUnesse v. Procureur General du Canada*, Superior Court of Québec, 28 July 2022 (Canada).

<sup>39</sup> *Laboratório do Observatório do Clima v. Minister of Environment and Brazil*, Seventh Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas, Ação Civil Pública No. 1027282-96.2021.4.01.3200, 13 May 2022 (Brazil).

<sup>40</sup> *Tsama William and Others v. Uganda's Attorney General and Others*, High Court of Uganda at Mbale, Miscellaneous Case No. 024 of 2020, 14 October 2020 (Uganda).

<sup>41</sup> Decisions highlighted in previous reports that rely on the right to a healthy environment include: *Leghari v. Federation of Pakistan*, Lahore High Court, W.P. No. 25501/201, Granted, 25 January 2018 (Pakistan); *Future Generations v. Ministry of the Environment and Others*, Colombia Superior Tribunals, Radicación 11001 22 03 000 2018 00319 00, 5 April 2018 (Colombia); *In re Court on Its Own Motion v. State of Himachal Pradesh and others*, National Green Tribunal, CWPI No. 15 of 2010, 9 May 2019 (India).



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the judiciary, in turn, must act to avoid the regression of environmental protection. The constitutional duty to allocate the funds effectively means that there is a duty to mitigate climate change considering the international commitments under the climate change framework.<sup>42</sup>

In Mexico, the Supreme Court in *Amparo En Revision 610/2019* (2020) invalidated a rule that would have allowed higher ethanol content in gasoline, concluding that the right to a healthy environment and the precautionary principle required the evaluation of the potential of increased GHG emissions and an analysis of the country's commitments under the Paris Agreement.<sup>43</sup> In *Greenpeace Mexico v. Ministry of Energy and Others (on the National Electric System Policies)* (2020), Mexico's First Circuit Collegiate Tribunal held that policies reducing the country's share of renewable energy violate the constitutional right to a healthy environment and are regressive.<sup>44</sup>

In *PSB et al. v. Brazil (on Deforestation and Human Rights)* (2022) seven political parties in Brazil brought an action against the federal Government

for failing to implement the national deforestation policy, thereby contributing to dangerous climate change. The claims were based on fundamental constitutional rights, including the right to a healthy environment, the rights of Indigenous Peoples and the rights of present and future generations.<sup>45</sup> In *Institute of Amazonian Studies v. Brazil* (2022), as at April 2023, the plaintiffs are seeking recognition of a fundamental right to a stable climate for present and future generations under the Brazilian Constitution as well as an order to compel the federal Government to comply with the national climate law. The plaintiffs have alleged that the federal Government has failed to adhere to its action plans to prevent deforestation and mitigate and adapt to climate change.<sup>46</sup>

In *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v. Arctic Oil)* (2020), the claimants alleged that Norway's grant of deep-sea petroleum extraction licences within the South Barents Sea constituted a failure to exercise due diligence to protect against the human rights implications of climate change, contrary to the constitutional right to a healthy environment, and the rights to life and private and family life under the ECHR and the

<sup>42</sup> *PSB et al. v. Brazil (on Climate Fund)*, Federal Supreme Court of Brazil, ADPF 708, 1 July 2022 (Brazil).

<sup>43</sup> *Ruling on Modification to Ethanol Fuel Rule*, Supreme Court of Mexico, 610/2019, Opinion, 22 January 2020 (Mexico).

<sup>44</sup> *Greenpeace Mexico v. Ministry of Energy and Others (on the National Electric System Policies)*, District Court in Administrative Matters, Amparo No. 104/2020, 17 November 2020 (Mexico).

<sup>45</sup> *PSB et al. v. Brazil (on Deforestation and Human Rights)*, Federal Supreme Court of Brazil, ADPF 760, 6 April 2022 (Brazil).

<sup>46</sup> *Institute of Amazonian Studies v. Brazil*, Federal Regional Court, Fourth Region, ACP No. 5048951-39.2020.4.04.7000, 29 March 2022 (Brazil).

Norwegian Constitution. On appeal, the Supreme Court of Norway held that future emissions from exported oil are too uncertain to bar the granting of licences for deep-sea extraction and that the constitutional right to a healthy environment does not grant individual rights to challenge petroleum-related

activities (Voigt 2021). Notwithstanding, the court recognized the constitutional right of private parties to be informed of petroleum-related decisions that could have a local environmental impact (Gociu and Roy 2021). The plaintiffs have appealed this case to ECtHR (see Part 3.B.ii.c).<sup>47</sup>

### Box 5: Children and youth-led claims and future generations

As at 31 December 2022, about 34 cases have been brought by and on behalf of children and youth (usually defined as people younger than 25 years old) based on human rights, as tracked in the Sabin Center's databases. These cases rely on children and youth's special vulnerability to climate harm and on the principle of intergenerational equity. Children and youth plaintiffs argue that due to their young age, they will endure the effects of climate change – which will intensify over time – for longer. Two claims were led by girls as young as 7 and 9 years old, respectively. In *Rabab Ali v. Federation of Pakistan & Another* (2016), the 7-year-old girl challenged Pakistan's climate policies from a rights-based perspective.<sup>48</sup> In *Ridhima Pandey v. Union of India & Ors.* (2017), a 9-year-old girl questioned the adequacy of India's climate mitigation efforts based on the public trust doctrine.<sup>49</sup> The disproportionate effects of climate change give rise to claims for equal treatment (Gradoni and Mantovani 2022). The United Nations Committee on the Rights of the Child recognized the merits of this type of claim by stating that children “are particularly affected by climate change, both in terms of how they experience its effects and the potential of climate change to affect them throughout their lifetimes, particularly if immediate action is not taken” (Sacchi et al. 2021). Cases generally focus on (i) insufficient efforts to reduce carbon emissions and meet climate commitments, (ii) insufficient efforts to implement mitigation and adaptation measures and (iii) specific regulatory approvals that are expected to have dramatic climate impacts (Parker et al. 2022).

Several children and youth-led cases have been filed in the United States of America. These cases have mostly relied on the public trust doctrine and/or constitutional rights. Two cases, *Juliana v. United States (Juliana)* (2020) and *Held v. State* (2020), are still pending determination by the court. The plaintiffs in *Juliana* – a case that was analysed in the 2020 Litigation Report<sup>50</sup> – are currently seeking permission to amend their complaint, which was dismissed in a decision from the Court of Appeals for the Ninth Circuit.<sup>51</sup> The plaintiffs and defendants in *Held v. State* are moving to trial in Montana state court.<sup>52</sup> The vast majority of cases (14) have not been successful on the merits and were dismissed for a lack of justiciability, standing, or on the court's decision to defer to the executive and legislative branches (Sabin Center for Climate Change Law 2023).



<sup>47</sup> *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v. Arctic Oil)*, Supreme Court of Norway, HR-2020-2472-P, Case No. 20-051052SIV-HRET, 23 January 2020 (Norway).

<sup>48</sup> *Rabab Ali v. Federation of Pakistan & Another*, Supreme Court of Pakistan, Constitution Petition No. 1 of 2016, April 2016 (Pakistan).

<sup>49</sup> *Ridhima Pandey v. Union of India & Ors.*, National Green Tribunal, Original Application No. 187/2017, March 2017 (India).

<sup>50</sup> This was a case in which young plaintiffs claimed that their constitutional rights to life, liberty, and property were violated by policies allowing fossil fuel production, consumption and combustion at “dangerous levels”. See the 2020 Litigation Report, pages 15, 39, 43 and 44.

<sup>51</sup> *Juliana v. United States*, United States Court of Appeals for the Ninth Circuit, 947 F.3d 1159, Granted, 17 January 2020 (United States of America).

<sup>52</sup> *Held v. State*, Montana District Court, No. CDV-2020-307, Complaint, March 13 2020 (United States of America).

Cases have also been filed in Australia, Brazil, Canada, Colombia, Germany, Guyana, India, Ireland, Italy, Mexico, Netherlands, New Zealand, Norway, Pakistan, the Philippines, Poland, the Republic of Korea, South Africa, Spain, Uganda and the United Kingdom, as well as in CJEU, ECtHR and IACHR (Parker et al. 2022).<sup>53</sup>

### Box 6: Climate litigation cases brought by women

Certain groups' vulnerability to the pervasive impacts of climate change is slowly being addressed in climate litigation. While a number of cases have addressed the impacts of climate change on children and future generations, as noted above, and on Indigenous groups as noted in the future trends section (Part 4), other groups have started using arguments related to equality before the law to request certain protective measures from their respective governments. For example, four cases in Chile, Pakistan, Switzerland and ECtHR were brought by girls or women who claimed they were disproportionately affected by climate change. In two cases, these arguments were unsuccessful. For example, in *KlimaSeniorinnen v. Switzerland* (2020) (see Part 1.A.ii.c), the Swiss Federal Administrative Court found that women older than 75 years were not exclusively affected by climate change. *Women from Huasco and Others v. the Government of Chile, Ministry of Energy, Environment and Health* (2022) was dismissed on procedural grounds.<sup>54</sup> A recent study has assessed how gender-based arguments have been used in climate litigation in Latin America, finding that plaintiffs and courts have failed to fully engage with a gender analysis to understand the disproportionate impacts suffered by marginalized groups in the region (Urzola forthcoming). Two cases are still pending. *KlimaSeniorinnen* (2022) (now at ECtHR) raises arguments on the disproportionate impact of climate change on senior women to ECtHR.<sup>55</sup> In *Maria Khan et al. v. Federation of Pakistan et al.* (2019), a coalition of women have argued that since climate change has a disproportionate impact on women, the federal Government's climate inaction violates women's rights to equal protection under the law and no discrimination on the basis of sex.<sup>56</sup>

<sup>53</sup> Two cases had positive outcomes on the merits: *Future Generations v. Ministry of the Environment and Others* (2018) and *Neubauer, et al. v. Germany* (2021). One case had a negative outcome on the merits: *Greenpeace Nordic and Others v. Norway* (2021). Cases that were dismissed for lack of justiciability and/or standing include: *PUSH Sweden, Nature and Youth Sweden and Others v. Government of Sweden* (2016), *Ridhima Pandey v. Union of India & Ors* (2018), *La Rose v. Her Majesty the Queen* (2019), *Six Youths v. Minister of Environment and Others* (2021), *Sacchi, et al. v. Argentina, et al.* (2021), and *ENvironnement JEUnesse v. Procureur General du Canada* (2022).

Depending on the jurisdiction, the outcome of a case on separation of powers grounds may be a merits decision or a justiciability question. Several cases are expected to proceed on the merits: *Rabab Ali v. Federation of Pakistan & Another* (2016), *Álvarez et al. v. Peru* (2019), *Do-Hyun Kim et al. v. South Korea* (2020), *Youth Verdict v. Waratah Coal* (2020), *Mathur et al. v. Her Majesty the Queen in Right of Ontario* (2020), *Duarte Agostinho and Others v. Portugal and 32 Other States* (2021), and *Youth v. Government of Mexico* (2022).

<sup>54</sup> *Women from Huasco and Others v. the Government of Chile, Ministry of Energy, Environment and Health*, Court of Appeal of Copiapo, No. 323-2021, 7 May 2022 (Chile).

<sup>55</sup> *KlimaSeniorinnen v. Switzerland*, ECtHR, Application No. 53600/20, 5 December 2022 (European Court of Human Rights).

<sup>56</sup> *Maria Khan et al. v. Federation of Pakistan et al.*, Lahore High Court, No. 8960, Filed, 15 February 2019 (Pakistan).

## II. Domestic enforcement of international climate change commitments

National and subnational governments commit to addressing climate change through varied international agreements and related national legislation or policy statements. These commitments may be subject to litigation challenging their scope, mode of implementation or non-execution. Governments are the most common defendants in litigation challenging mitigation and adaptation commitments, but as indicated in the 2020 Litigation Report, similar suits have been brought against corporations and other institutions. As more governments and companies commit to net-zero targets, more litigation that questions the implementation of these plans will likely emerge.

**“ Governments are the most common defendants in litigation challenging mitigation and adaptation commitments, but as indicated in the 2020 Litigation Report, similar suits have been brought against corporations and other institutions. ”**

Several cases in Europe have questioned governments' compliance with and implementation of their national mitigation commitments or net-zero strategies. Two French decisions from 2021 have specifically assessed the French Government's compliance with its commitments. In *Notre Affaire à Tous and Others v. France* (2021) (part of *L'Affaire du siècle*), the Administrative Court of Paris held that the State's climate inaction and failure to meet its carbon budget goals have caused climate-related ecological damages under international and European climate directives and regulations, the French Environmental

Charter, Energy Code and Civil Code.<sup>57</sup> The court later ordered the State to take immediate and concrete actions by 31 December 2022 to comply with its mitigation commitments under national laws and repair the climate-related ecological damages caused by inaction, including subtracting excess emissions in the subsequent year. Any future slippage of emissions beyond the legislative commitments was also to be compensated by the French Government. In *Commune de Grande-Synthe v. France* (2021), the Council of State of France found that the Government had failed to adopt the necessary legislative measures to comply with its mitigation commitments. The refusal to take further action was incompatible with France's obligations under French and European Union law. The Council of State ordered the Government to “take all the measures necessary” to meet its climate goals by bending the curve of GHG emissions, including a 40 per cent reduction by 2030. The procedure concerning the evaluation of the Government's compliance with the decision is currently ongoing.

In the United Kingdom, a case was brought challenging the Government's Net Zero Strategy. In *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* (2022), Friends of the Earth asked for judicial review of the economy-wide decarbonization strategy and the heat and buildings strategy for decarbonizing heating and homes. Friends of the Earth claimed that the policies will not enable compliance with the carbon budgets set under the Climate Change Act and that the strategy does not assess its impacts on people with protected characteristics, such as people with disabilities, people of colour and older people as required under the Equality Act. In July 2022, the High Court of Justice found that the United Kingdom Government had failed to comply with its legal duties under the Climate Change Act 2008 when approving the Net Zero Strategy.<sup>58</sup> That failure rested not on the strategy's content, but on the absence of key evidence, assumptions and numbers that the secretary of state should have relied on when approving the strategy but were missing from the final document.

In Latin America, several climate litigation cases were brought challenging government efforts to relax climate regulation or deregulate. This trend, which was highlighted in the 2020 report, continues in countries like Brazil and Mexico. Cases in Brazil include *Institute of Amazonian Studies v. Brazil* (2022) and *PSB et al. v. Brazil (on Deforestation and Human Rights)* (2022). Cases in Mexico include *Greenpeace Mexico v. Ministry of Energy and Others (on the Energy Sector Program)* (2021), where Greenpeace has argued that the Energy Sector Program violates the right to a healthy environment and the right to access electricity based on renewable sources by promoting fossil fuel use at the expense of investments in renewable energy, GHG emissions reduction and adaptation.<sup>59</sup> Cases in Mexico include *Greenpeace Mexico v. Ministry of Energy and Others (on the National Electric System Policies)* (2020), where Greenpeace questioned the constitutionality of electricity sector policies that would limit renewable energy. In the latter case, the First Circuit Collegiate Tribunal held that the policies in question were regressive and unconstitutional as they violated the right to a healthy environment and the international climate framework, displaced renewable energies and effectively prevented Mexico from meeting GHG emission reduction targets. Three separate lawsuits from 2021 (brought by civil society organizations, youth groups, individual young people and members of the Mexican Senate Minority) further challenged amendments to Mexico's Electric Industry Law, which favoured coal and oil-fired power plants (*Nuestros Derechos al Futuro y Medio Ambiente Sano et al., v. Mexico [Unconstitutionality of the*

*reform to the Electric Industry Law]* 2022; Challenge to the Constitutionality of Amendments to the Rules Governing Clean Energy Certificates 2022; *Julia Habana et al., v. Mexico [Unconstitutionality of the reform to the Electricity Industry Law]* 2022).<sup>60</sup> These cases cite the Mexican Constitution's right to a healthy environment, the Paris Agreement and sustainability principles in the Electric Industry Law. The cases are still pending as at 31 December 2022.

In 2022, the Supreme Court of the United States of America issued a decision in *West Virginia v. EPA* (2022), and held that section 111(d) of the Clean Air Act did not give the United States Environmental Protection Agency (EPA) the authority to use “generation-shifting” measures to set CO<sub>2</sub> emission limits for power plants. In doing so, the court reversed a January 2021 decision by the Court of Appeals for the District of Columbia (D.C.) Circuit that found that the former President Trump Administration's repeal and replacement of the previous President Obama Administration's Clean Power Plan was based on a too-narrow construal of EPA's authority under section 111(d). The Clean Power Plan used generation-shifting measures as two of the three “building blocks” for the “best system of emission reduction” for power plants under section 111(d). One building block shifted electricity production from coal-fired to natural gas-fired units, and another building block shifted generation to low- or zero-carbon sources such as wind and solar.<sup>61</sup> The decision in *West Virginia* has reduced the EPA's discretion in finding innovative ways to regulate GHG emissions from power plants.

<sup>57</sup> *Notre Affaire à Tous and Others v. France* (2021), Administrative Court of Paris, Nos. 1904967, 1904972, 1904976/4-1, 21 October (France)

<sup>58</sup> *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy*, High Court of Justice of England and Wales, EWHC 1841, 18 July 2022 (United Kingdom of Great Britain and Northern Ireland).

<sup>59</sup> *Mexico, Greenpeace Mexico v. Ministry of Energy and Others (on the Energy Sector Program)*, District Court in Administrative Matters, Amparo No. 372/2020, 19 March 2021 (Mexico).

<sup>60</sup> *Mexico, Nuestros Derechos al Futuro y Medio Ambiente Sano et al., v. Mexico (Unconstitutionality of the reform to the Electric Industry Law)*, District Court in Administrative Matters, Amparo No. 204/2021, 28 December 2022 (Mexico). *Challenge to the Constitutionality of Amendments to the Rules Governing Clean Energy Certificates*, Supreme Court of Mexico, Acción de Inconstitucionalidad 64/2021, 7 April 2022 (Mexico). *Julia Habana et al., v. Mexico (Unconstitutionality of the reform to the Electricity Industry Law)*, Supreme Court of Mexico, Amparo No. 210/2021, 22 December 2022 (Mexico).

<sup>61</sup> *West Virginia v. EPA*, Supreme Court of the United States, 142 S. Ct. 2587, 30 June 2022 (United States of America).

### III. Keeping fossil fuels and carbon sinks in the ground

Cases that challenge specific resource-extraction and resource-dependent projects (as well as environmental permitting and review processes to ensure adequate assessment of the projects' climate change implications) represent another highly visible category of climate cases. These cases relate to the long-term, global effect of projects extracting or processing fossil fuels as well as to the local impacts of mining and drilling activities on water, land use, air quality and biodiversity. These cases are increasingly alleging that proper consideration of a project's impacts should include the extent to which the project facilitates fossil fuel consumption elsewhere in the world and for an extended period into the future. The 2017 and 2020 Litigation Reports described key cases in Chile, Colombia, Estonia, Japan, Kenya, Norway, Pakistan, the United Kingdom and United States of America. Several of those cases are still pending as at 31 December 2022. Additional cases seeking to keep fossil fuels in the ground have targeted various sectors, including fossil fuel and mining extraction, power plants, roads, other types of fossil fuel infrastructure, land use and carbon sinks. This section highlights cases that question (i) a project's consistency with the Paris Agreement or a government's net-zero commitments and (ii) EIA requirements.

#### A. Consistency with the Paris Agreement or net-zero commitments

A number of cases have been brought challenging government approvals based on a project's inconsistency with the Paris Agreement or a country's net-zero commitments.

The Court of Appeal (Civil Division) of England and Wales in *ClientEarth v. Secretary of State* (2021) declined to address whether the conversion of a power plant from coal to natural gas ignored the United Kingdom's net-zero target, finding that GHG emissions were not a "freestanding reason for

refusal" of a project's approval. The court reasoned that the relevant agency had discretion over the weight to assign to GHG emissions and that the secretary of state properly balanced the project's adverse effects, including GHG emissions, with the positive effects, including socioeconomic outcomes and the reuse of existing infrastructure.<sup>62</sup>

In New Zealand, several students have sued the New Zealand Minister of Energy and Resources, challenging the decision to grant permits for onshore oil and gas exploration as inconsistent with the Government's legal obligations under the country's Climate Change Response (Zero Carbon) Amendment Act 2019 (*Students for Climate Solutions Inc v. Minister of Energy and Resources* 2022).<sup>63</sup>

In *Citizens' Committee on the Kobe Coal-Fired Power Plant v. Japan* (2023), the Osaka District Court rejected a request for an injunction to prevent the construction and operation of two new units at a coal-fired plant in Japan. The petitioners argued that the project was inconsistent with Japan's 2030 and 2050 climate targets. The court found that the plaintiffs' human rights claims were general rather than individual and therefore lacked standing. The court further deferred to the discretion of the granting authority.<sup>64</sup> A similar lawsuit, also currently pending, was filed by the same NGO against the two private companies planning the project (*Citizens' Committee on the Kobe Coal-Fired Power Plant v. Kobe Steel Ltd., et al.* 2023).<sup>65</sup>

The Paris Agreement calls for parties to respect, promote and consider their obligations on human rights including aspects of gender equality, intergenerational equity and the empowerment of women. In *Women from Huasco and Others v. the Government of Chile, Ministry of Energy, Environment and Health* (2022), a group of women called for the shutdown of two thermoelectric power plants,



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arguing they were contrary to Chile's decarbonization plans, the Paris Agreement and their human rights. In May 2022, the Court of Appeals of Copiapo rejected the claim on the grounds of separation of powers. The case was appealed to the Chilean Supreme Court.

Similar claims have been brought in Australia. In *Sharma and others v. Minister for the Environment* (2022), youth plaintiffs filed a lawsuit against the Australian Federal Minister for the Environment, arguing that the Minister owed a common-law duty of care to Australian children to avoid causing climate harm in exercising her statutory powers to approve a coal mine expansion. In July 2021, the Federal Court

of Australia declared that the Minister had a duty to take reasonable care in the exercise of her powers under the Environment Protection and Biodiversity Conservation Act 1999 to avoid causing personal injury or death to Australian children "arising from emissions of CO<sub>2</sub> into the Earth's atmosphere".<sup>66</sup> In March 2022, the Full Federal Court of Australia, an intermediate appellate court, unanimously overturned that decision (*Tigre* 2022b). The court found that the relationship between the youth plaintiffs and the Minister lacked the closeness and directness that the common law demands before finding a duty is owed by one party to another. The court also rejected the Minister's argument that the primary judge made

<sup>62</sup> *ClientEarth v. Secretary of State*, Court of Appeal (Civil Division) of England and Wales, Case No. C1/2020/0998/QBACF, 21 January 2021 (United Kingdom of Great Britain and Northern Ireland).

<sup>63</sup> *Students for Climate Solutions Inc v. Minister of Energy and Resources*, High Court of New Zealand, NZHC 2116 Decided, 24 August 2022 (New Zealand).

<sup>64</sup> *Citizens' Committee on the Kobe Coal-Fired Power Plant v. Japan*, Supreme Court of Japan, 9 March 2023 (Japan).

<sup>65</sup> *Citizens' Committee on the Kobe Coal-Fired Power Plant v. Kobe Steel Ltd., et al.*, Kobe District Court, 20 March 2023 (Japan).

<sup>66</sup> *Mullaley Gas and Pipeline Accord Inc v. Santos NSW (Eastern) Pty Ltd.*, New South Wales Land and Environment Court, NSWLEC 147, 16 December 2021 (Australia).

findings based on unfounded evidence of climate change. The plaintiffs announced that they would not appeal the decision.

In *Mullaley Gas and Pipeline Accord Inc v. Santos NSW (Eastern) Pty Ltd* (2021), the Land and Environment Court New South Wales dismissed a challenge to the approval of a coal seam gas field and associated infrastructure. The court found that the plaintiffs had not sufficiently established that the planning commission erred in (i) considering the expected GHG emissions; (ii) excluding Scope 3 or downstream GHG emissions from its assessment; and (iii) failing to consider the climate impacts of gas transmission pipelines.<sup>67</sup> However, in *KEPCO Bylong Australia v. Independent Planning Commission and Bylong Valley Protection Alliance* (2021), the New South Wales Court of Appeal found that the Commission had adequately found that KEPCO had not proposed to minimize GHG emissions despite the State Climate Change Policy's requirements.<sup>68</sup> Similar pending claims question the validity of a water-sharing plan

(*Nature Conservation Council of New South Wales v. Minister for Water, Property and Housing* 2022)<sup>69</sup> and power station licences (*Environment Victoria v. the EPA et al.* 2021).<sup>70</sup>

In *Guyane Nature Environnement and France Nature Environnement v. France* (2022), the Council of State ruled that a renewal of authorization of a thermal power plant in French Guiana – an overseas territory of France – did not need to consider France's overall mitigation goals. However, in April 2022, the administrative court cancelled the environmental authorization of the power plant given that there was an insufficient search for an alternative location and would pose a nuisance to protected species.<sup>71</sup> In New Zealand, the Government abandoned a project to fund and build a road after a judicial review claim questioned its compatibility with the Paris Agreement (*All Aboard Aotearoa v. Waka Kotahi* 2021).<sup>72</sup> Several similar cases, in which government permits and authorizations are challenged on climate grounds, are still pending as at 31 December 2022.



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<sup>67</sup> *Mullaley Gas and Pipeline Accord Inc v. Santos NSW (Eastern) Pty Ltd.*, New South Wales Land and Environment Court, NSWLEC 147, 16 December 2021 (Australia).

<sup>68</sup> *KEPCO Bylong Australia v. Independent Planning Commission and Bylong Valley Protection Alliance*, Court of Appeal of Australia, NSWCA 216, 14 September 2021 (Australia).

<sup>69</sup> *Nature Conservation Council of New South Wales v. Minister for Water, Property and Housing*, New South Wales Land and Environment Court, Case 2021/00282599, 8 June 2022 (Australia).

<sup>70</sup> *Environment Victoria v. the Environmental Protection Agency et al.* (2021), Supreme Court of Victoria, S ECI 2021 03415, 16 September 2021 (Australia).

<sup>71</sup> *Guyane Nature Environnement and France Nature Environnement v. France*, Council of State of France, No. 455465, 456314, 455497, 455500, 10 February 2022 (France).

<sup>72</sup> *All Aboard Aotearoa v. Waka Kotahi*, High Court of New Zealand, 4 June 2021 (New Zealand).

Three related cases, now combined, were filed in Argentina questioning the Ministry of Environment and Sustainable Development's decision to approve the implementation of an offshore seismic acquisition project.<sup>73</sup> In *Africa Climate Alliance et al. v. Minister of Mineral Resources & Energy et al.* (#CancelCoal case) (2022), NGOs launched a youth-led constitutional challenge questioning the South African Government's plans to procure new coal-fired power electricity.<sup>74</sup> In Denmark, an NGO questioned the construction of an artificial peninsula – a project developed as a climate adaptation measure – as it failed to account for GHG emissions as well as Danish and European Union net-zero targets (*The Climate Movement v. Ministry of Transportation* 2021).<sup>75</sup>

Cases have also been brought with the goal of protecting key ecosystems that act as carbon sinks. For example, in *Asociación Civil por la Justicia Ambiental v. Province of Entre Ríos et al.* (Delta del Paraná case) (2021), NGOs and a group of children have questioned three Argentinian provinces and a municipality's duty to protect the Delta del Paraná, a wetland of international importance under the Ramsar Convention on Wetlands of International Importance, that burned significantly throughout 2020. Relying on human rights and Argentina's obligation under the Paris Agreement, the plaintiffs asked the court to declare the rights of nature of the ecosystem due to its climate mitigation and adaptation characteristics.<sup>76</sup> A similar case was brought in Türkiye, related to the Marmara Lake, a wetland of national importance and a significant carbon sink. The plaintiffs argue that the government has failed to protect the lake, directly violating the

Paris Agreement (*S.S. Gölarmara ve Çevresi Su Ürünleri Kooperatifi v. Republic of Türkiye Ministry of Agriculture and Forestry* 2022).<sup>77</sup> Several Brazilian cases related to the protection of the Amazon rainforest also argue that the forest acts as a significant carbon sink (*Ministério Público Federal v. IBAMA* 2020; *Institute of Amazonian Studies v. Brazil* 2022; *PSB et al. v. Brazil [on Deforestation and Human Rights]* 2022; *PSB et al. v. Brazil [on Amazon Fund]* 2022).<sup>78</sup>

## B. Environmental impact assessment requirements

Many cases in this category are partially or entirely premised on EIA and similar planning requirements. These cases often, though not always, challenge project permitting and approval decisions for failing to consider climate impacts as part of required environmental reviews.

In *Saonu and Morobe Provincial Government v. Minister for Environment and Conservation and Climate Change and Others* (2021), the Morobe Provincial Government in Papua New Guinea challenged the environmental permit of a mining lease for failing to consider climate change when issuing the permit, improper review of climate issues, inadequate consultation of affected communities and the irreparable environmental damages. In 2021, the Court of Justice at Waigani, Papua New Guinea, noted that the parties did not provide any information on whether the EIA factored levels of CO<sub>2</sub> emissions and impacts on the local and global environment or proposed measures to minimize such emissions. The court issued an order of stay pending substantial review.<sup>79</sup> Similarly, the Chilean Supreme Court ruled

<sup>73</sup> See Federal Court of Mar del Plata N. 2, Argentina: <http://climatecasechart.com/non-us-jurisdiction/federal-court-of-mar-del-plata-n-2/>.

<sup>74</sup> *Africa Climate Alliance et al., v. Minister of Mineral Resources & Energy et al.* (#CancelCoal case), High Court of South Africa, Case No. 56907/21, 20 January 2022 (South Africa).

<sup>75</sup> *The Climate Movement v. Ministry of Transportation*, Western High Court of Denmark, 22 October 2021 (Denmark).

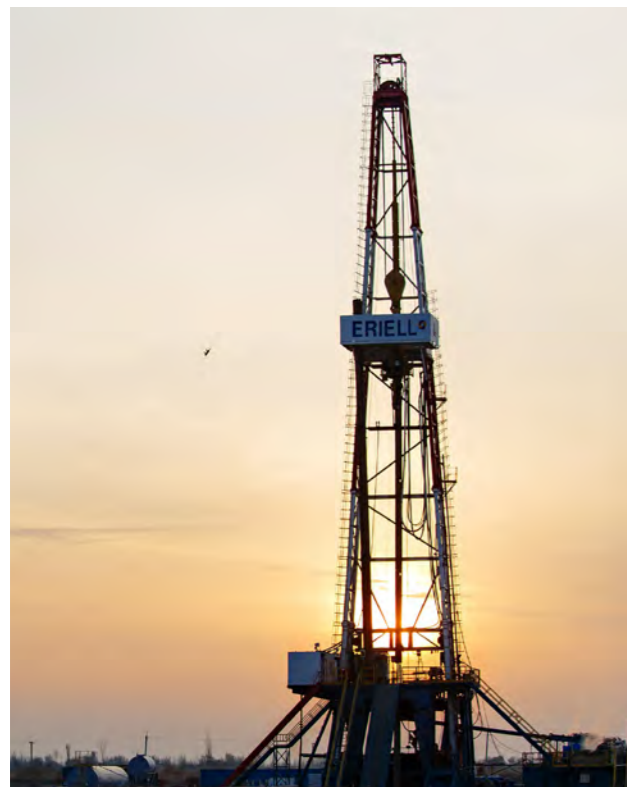
<sup>76</sup> *Asociación Civil por la Justicia Ambiental v. Province of Entre Ríos, et al.* (Delta del Paraná case), Supreme Court of Argentina, CSJ 542/2020, 28 December 2021 (Argentina).

<sup>77</sup> *S.S. Gölarmara ve Çevresi Su Ürünleri Kooperatifi v. Republic of Türkiye Ministry of Agriculture and Forestry*, Administrative Court of Manisa, July 2022 (Türkiye).

<sup>78</sup> *Ministério Público Federal v. IBAMA*, Seventh Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas, ACP No. 1007104-63.2020.4.01.3200, 21 May 2020 (Brazil).  
*PSB et al. v. Brazil (on Amazon Fund)*, Federal Supreme Court of Brazil, ADO 59/DF, 3 November 2022 (Brazil).

<sup>79</sup> *Ministério Público Federal v. IBAMA*, Seventh Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas, ACP No. 1007104-63.2020.4.01.3200, 21 May 2020 (Brazil).





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in 2022 in *Mejillones Tourist Service Association and others with the Environmental Evaluation Service (SEA) of Antofagasta* (2022) that climate impacts should be included in the environmental review process, including in a revision of older environmental permits.<sup>80</sup>

In South Africa, NGOs sought an interdict prohibiting seismic surveys off the coast of South Africa. The High Court ruled in *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others* (2022) that the exploration right was awarded without proper consultation or an assessment of climate impacts. The court

recognized the risk of irreparable and imminent climate harm, as well as impacts on the communities' cultural practices and ocean conservation.<sup>81</sup>

Cases in the United States of America have also confirmed that consideration of climate change is a required component of EIAs. The D.C. Circuit Court of Appeals invalidated the Bureau of Ocean Energy Management's lease sale of offshore land in the Gulf of Mexico for oil and gas development in *Friends of the Earth v. Haaland* (2023), holding that the EIA was deficient because the Bureau did not consider changes in foreign oil consumption when evaluating GHG emissions associated with the lease sale.<sup>82</sup> The Ninth Circuit Court of Appeals found an EIA deficient for similar reasons in *Center for Biological Diversity v. Bernhardt* (2020).<sup>83</sup> In *Food & Water Watch v. FERC* (2022), the D.C. Circuit affirmed again in 2022 that the Federal Energy Regulatory Commission was required to consider the GHG emissions attributable to burning the gas to be carried by a pipeline in its EIA, at least in some circumstances.<sup>84</sup>

In *R (Finch on behalf of the Weald Action Group & Others) v. Surrey County Council (& Others)* (2022), claimants challenged permits issued for new hydrocarbon wells due to inconsistency with the United Kingdom's net-zero target and the Government's failure to consider Scope 3 or downstream emissions. The High Court initially dismissed the claim in 2020, finding that the Government failed to assess downstream emissions. On appeal, the Court of Appeal in 2022 issued a split decision in which the majority deferred to the Government's discretion and the dissent argued that the Government had failed to meet its EIA obligations.<sup>85</sup>

<sup>80</sup> *Mejillones Tourist Service Association and others with the Environmental Evaluation Service (SEA) of Antofagasta*, Supreme Court of Chile, Case No. 6930-20216930-2021, 19 April 2022 (Chile).

<sup>81</sup> *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others*, High Court of South Africa, Case No. 3491/2021, 1 September 2022 (South Africa).

<sup>82</sup> *Friends of the Earth v. Haaland*, Court of Appeals for the D.C. Circuit, Nos. 22-5036, 22-5037, 22-5067, 24 January 2023 (United States of America).

<sup>83</sup> *Center for Biological Diversity v. Bernhardt*, Ninth Circuit Court of Appeals, 982 F.3d 723, 7 December 2020 (United States of America).

<sup>84</sup> *Food & Water Watch v. FERC*, Court of Appeals for the D.C. Circuit, 28 F.4th 277, 11 March 2022 (United States of America).

<sup>85</sup> *R (Finch on behalf of the Weald Action Group & Others) v. Surrey County Council (& Others)*, Court of Appeal (Civil Division) of England and Wales, CO/4441/2019 and C1/2021/0261, 2022 (United Kingdom of Great Britain and Northern Ireland).

Several similar claims are still pending as at 31 December 2022. In *South Durban Community Environmental Alliance v. Minister of Environment and Others* (2021), an NGO challenged the South African Government's approval of offshore oil and gas exploration on the basis that it failed to consider climate impacts in the EIA.<sup>86</sup> In *South Durban Community Environmental Alliance & Groundwork v. Minister of Forestry, Fisheries, and the Environment* (2021), NGOs have challenged the authorization of a

gas-fired power plant for inadequate assessment of climate impacts.<sup>87</sup> In *Thomas & de Freitas v. Guyana* (2021), two citizens alleged that Guyana violated constitutional rights by approving oil exploration licences to an ExxonMobil-led group.<sup>88</sup> In *Henry v. Environmental Protection Agency* (2022), three citizens questioned the decision of EPA of Guyana to grant a modified environmental permit allowing Esso/ExxonMobil to flare gas without considering GHG emissions.<sup>89</sup>



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<sup>86</sup> *South Durban Community Environmental Alliance v. Minister of Environment and Others*, High Court of South Africa, June 2021 (South Africa).

<sup>87</sup> *South Durban Community Environmental Alliance & Groundwork v. Minister of Forestry, Fisheries, and the Environment*, High Court of South Africa, 8 April 2021 (South Africa).

<sup>88</sup> *Thomas & De Freitas v. Guyana*, Supreme Court of Guyana, 27 September 2021 (Guyana).

<sup>89</sup> *Henry v. Environmental Protection Agency*, Supreme Court of Guyana, 2021-HC-DEM-CIV-FDA, 21 January 2022 (Guyana).

## IV. Corporate liability and responsibility

From 2020 to 2022, a growing number of cases have emerged that name private parties as defendants and demonstrate an increasing diversity of legal strategies that use a variety of theories. Key examples include cases seeking to hold GHG emitters or fossil fuel companies responsible for climate harm, as well as cases against financial institutions on the basis that they have ignored or misused knowledge about climate change risk. The 2017 Litigation Report described several legal actions of this kind. It noted that plaintiffs had yet to establish that certain emitters were the proximate cause of the plaintiff's specific injuries. The 2020 Litigation Report highlighted several pending cases in the United States of America against fossil fuel producers seeking to hold corporations accountable for a share of climate change's impacts. These include claims that defendant companies are liable both for public nuisance due to their deceptive marketing of fossil fuels as well as their failure to warn the public and consumers about the foreseeable harm their products cause. While a company's liability for climate impacts has yet to be established, in at least one instance a fossil fuel company has been found to owe a duty to mitigate emissions from its products.



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### A. Corporate duty to mitigate emissions

Increasingly, climate litigation cases have targeted corporations in an attempt to identify their corporate responsibility to mitigate GHG emissions. The 2020 Litigation Report highlighted *Smith v. Fonterra Co-Operative Group Limited* (2022), a case brought against seven companies in the agriculture and energy sectors in New Zealand. As noted in the 2020 Litigation Report, the High Court of New Zealand ruled that the companies had no duty of care towards the plaintiffs as the climate damages were not reasonably foreseeable or proximately caused by the companies' actions. In an appeal, the Court of Appeal ruled that tort law was not the appropriate avenue for dealing with climate change, reasoning that every person in the world is at the same time the one responsible for causing the relevant harm and the victim of that harm. The case was granted leave to appeal to the New Zealand Supreme Court.<sup>90</sup>

The issue of a corporate duty of care was also recently analysed by a first instance court in the Netherlands. In *Milieudefensie et al. v. Royal Dutch Shell* (2022) (*Milieudefensie*), The Hague District Court ordered Dutch-based oil and gas multinational

<sup>90</sup> *Smith v. Fonterra Co-Operative Group Limited*, High Court of New Zealand, NZSC 35, 31 March 2022 (New Zealand). See also the 2020 Litigation Report pages 22, 38, 42, and 44.



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Royal Dutch Shell to reduce CO<sub>2</sub> emissions associated with its products by 45 per cent from 2019 levels by 2030. The judgment represents the first time a private company was ordered to comply with the Paris Agreement and was found to have a duty to mitigate GHG emissions under the Paris Agreement. The court grounded its decision in climate-related human rights responsibilities and tort-based duties, including those related to corporate due diligence, and on an unwritten standard of care based on the goals of the Paris Agreement and the United Nations Guiding Principles on Business and Human Rights.<sup>91</sup> The judgment is under appeal as at 31 December 2022.

France's 2017 Law on the Duty of Vigilance, which imposes parent-based due diligence obligations covering human rights and the environment, has

also facilitated new climate claims against corporations. In *Notre Affaire à Tous and Others v. Total* (2021), plaintiffs have asked the court to order the oil and gas company Total to recognize the risks generated by its business activities and align its conduct with the Paris Agreement. After a debate on the court's competency to decide the case, the case will then move to the merits stage. In *Envol Vert et al. v. Casino* (2021), a coalition of NGOs sued the French supermarket chain Casino for its supply chain emissions related to the cattle industry in Brazil and Colombia. The case has challenged "emissions outsourcing" and targeted a company that has low emissions profiles in their corporate home but whose products have caused significant pollution in other jurisdictions. The case is still in the preliminary stage.<sup>92</sup>

<sup>91</sup> *Milieudefensie et al. v. Royal Dutch Shell plc.*, The Hague District Court, C/09/571932 / HA ZA 19-379, 25 April 2022 (Netherlands).

<sup>92</sup> *Envol Vert et al. v. Casino*, Judicial Court of Saint-Étienne, 2 March 2021 (France).

### Box 7: Philippines Carbon Majors report

In 2022, the Commission on Human Rights of the Philippines published its National Inquiry on Climate Change, the outcome of its seven-year investigation into the responsibility of 47 fossil fuel-producing companies (the so-called “Carbon Majors”) for climate change (Philippines, Commission on Human Rights of the Philippines 2022). The investigation was initiated in response to a petition by Greenpeace Southeast Asia and other environmental organizations and individual Filipino citizens in *In re Greenpeace Southeast Asia and Others*, who asked the Commission to investigate “the human rights implications of climate change and ocean acidification and the resulting rights violations in the Philippines,” naming the Carbon Majors as respondents.

The Commission conducted a fact-finding mission that included hearings in Manila, London and New York. In its report, the Commission concluded that the Philippine Government owes a duty (based on the United Nations Guiding Principles on Business and Human Rights) to protect human rights and avoid abuses by non-State actors, and that the Government’s refusal or failure to engage in meaningful and concrete action to mitigate climate change may be categorized as a human rights violation. The Commission further concluded that business enterprises must respect human rights, irrespective of whether domestic laws exist or are fully enforced domestically. This corporate duty includes the responsibility to avoid causing or contributing to adverse human rights impacts through harm to the environment or climate change. The Commission acknowledged that the Carbon Majors had early awareness, notice or knowledge of their products’ adverse impacts on the environment and climate system and engaged in wilful obfuscation and obstruction to prevent meaningful climate action. The Commission concluded that the Carbon Majors have a corporate responsibility to undertake human rights due diligence and provide remediation.

Cases against corporations targeting a corporate duty to reduce GHG emissions were also brought in Germany after the decision in *Neubauer*. Three cases were filed against automakers seeking to compel them to strengthen their carbon emissions target and stop producing fossil fuel-emitting cars by 2030: *DUH v. BMW* (2021),<sup>93</sup> *DUH v. Mercedes-Benz* (2022),<sup>94</sup> and *Kaiser, et al., v. Volkswagen AG* (2021).<sup>95</sup> Grounding their case in the Paris Agreement and German federal climate law, the plaintiffs have argued that the automakers have been violating the fundamental right to climate protection (as recognized in *Neubauer*) and impinging on the rights and freedoms of future generations by not adhering to a fair carbon budget. In *Barbara Metz et al., v. Wintershall Dea AG* (2021), plaintiffs used similar legal grounds to seek an order to compel the energy company Wintershall Dea AG to strengthen its emissions target and give

up the extraction of natural gas and crude oil by 2025.<sup>96</sup> All cases are in the preliminary stages as at 31 December 2022.

Two cases were recently filed in Italy before the OECD National Contact Point, seeking broader corporate emissions reductions. In *Rete Legalità per il Clima (Legality for Climate Network) v. Intense Livestock Farming Multinational Companies Operating in Italy* (2021), plaintiffs challenged the compatibility of the practice of intensive livestock farming with Italy’s net-zero commitments.<sup>97</sup> In *Rete Legalità per il Clima (Legality for Climate Network) and others v. ENI* (2022), plaintiffs questioned the adequacy of the business plan pursued by the oil company ENI as it pertains to its commitment to net-zero emissions by 2050. Both cases are also in the preliminary stages.<sup>98</sup>

<sup>93</sup> *Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW)*, Regional Court of Munich, 3 September 2021 (Germany).

<sup>94</sup> *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG*, Regional Court of Stuttgart, 13 September 2022 (Germany).

<sup>95</sup> *Kaiser, et al. v. Volkswagen AG*, Regional Court of Braunschweig, 11 November 2021 (Germany).

<sup>96</sup> *Barbara Metz et al., v. Wintershall Dea AG*, Regional Court of Kassel, 4 October 2021 (Germany).

<sup>97</sup> *Rete Legalità per il Clima (Legality for Climate Network) v. Intense Livestock Farming Multinational Companies Operating in Italy*, OECD National Contact Point, 6 December 2021 (OECD).

<sup>98</sup> *Rete Legalità per il Clima (Legality for Climate Network) and Others v. ENI*, OECD National Contact Point, 15 February 2022 (OECD).

### Box 8: Nuisance cases in the United States of America

Nearly two dozen states and cities in the United States of America have sued large fossil fuel companies seeking compensation for damages related to climate change (*City of New York v. BP p.l.c.* 2021; *City of New York v. Exxon Mobil Corp* 2021; *Connecticut v. Exxon Mobil Corporation* 2022; *Vermont v. Exxon Mobil Corp* 2022; *City of Hoboken v. Exxon Mobil Corp* 2022; *City of Oakland v. BP p.l.c.* 2022; *Mayor & City Council of Baltimore v. BP p.l.c.* 2023; *City of Charleston v. Brabham Oil Co.* 2023; *City & County of Honolulu v. Sunoco LP* 2023; *Rhode Island v. Shell Oil Products Co.* 2023; *County of San Mateo v. Chevron Corp* 2023; *State v. American Petroleum Institute* 2023; *Delaware v. BP America Inc.* 2023; *District of Columbia v. Exxon Mobil Corp* 2023; *Board of County Commissioners of Boulder County v. Suncor Energy [U.S.A.]* 2023).<sup>99</sup> The types of claims vary and include nuisance, negligence, strict liability and trespass claims, as well as claims under state and local consumer protection and unfair trade practices statutes. Since the first case was filed in 2017, litigation has centred on whether the cases belong in federal or state courts, raising the broader issue of the court’s authority to address climate issues. Every court that has issued a decision to date has found that, because the cases seek to impose liability based on the companies’ deceptive marketing, historic disinformation campaigns and failure to warn consumers and not the mere production of fossil fuels, the cases belong in state court (*City of Oakland v. BP p.l.c.* 2022; *Mayor & City Council of Baltimore v. BP p.l.c.* 2023; *City & County of Honolulu v. Sunoco LP* 2023; *Rhode Island v. Shell Oil Products Co.* 2023; *County of San Mateo v. Chevron Corp.* 2022; *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.* 2023).

At the time of this publication, there are several cases that are moving into litigation in state courts, including cases in Hawai’i, Maryland and Rhode Island, while others await final rulings on the issue. In *City of New York v. Chevron Corp.* (2019), the Second Circuit Court of Appeals (a federal court) affirmed the dismissal of New York City’s case asserting common-law claims, which sought to impose liability based on the companies’ fossil fuel production. The Second Circuit held that, as the case relates to federal common law, it displaced the state law claims. Furthermore, it held that the Clean Air Act (a federal statute) regulates any federal common-law claims related to domestic emissions. It also held that foreign policy concerns foreclosed federal common-law claims stemming from emissions outside the United States of America.<sup>100</sup> In contrast, a trial-level state court in Hawai’i denied defendants’ motion to dismiss a lawsuit brought by the City and County of Honolulu. It distinguished the Second Circuit’s decision, noting that the Hawai’i lawsuit sought to impose liability based on the companies’ tortious speech and failure to warn, and not only the production of fossil fuels (*City & County of Honolulu v. Sunoco LP* 2023).

<sup>99</sup> *City of New York v. BP p.l.c., Court of Appeals for the Second Circuit*, No. 1:18-cv-00182, 24 April 2021 (United States of America).  
*City of New York v. Exxon Mobil Corp.*, District Court for the Southern District of New York, No. 1:21-cv-04807, 12 November 2021 (United States of America).  
*Connecticut v. Exxon Mobil Corporation*, Court of Appeals for the Second Circuit, No. 21-1446, 31 August 2022 (United States of America).  
*Vermont v. Exxon Mobil Corp.*, District Court for the District of Vermont, No. 2:21-cv-260-wks, 2 September 2022 (United States of America).  
*City of Hoboken v. Exxon Mobil Corp.*, Court of Appeals for the Third Circuit, HUD-L-003179-20, 12 October 2022 (United States of America).  
*City of Oakland v. BP p.l.c.*, District Court for the Northern District of California, No. CGC-17-561370, 24 October 2022 (United States of America).  
*Mayor & City Council of Baltimore v. BP p.l.c.*, Supreme Court of the United States, No. 24-C-18-004219, 3 January 2023 (United States of America).  
*City of Charleston v. Brabham Oil Co.*, District Court for the District of South Carolina (Charleston Division), No. 2020CP1003975, 20 January 2023 (United States of America).  
*City & County of Honolulu v. Sunoco LP*, Supreme Court of the United States, No. 1CCV-20-0000380, 22 February 2023 (United States of America).  
*Rhode Island v. Shell Oil Products Co.*, Supreme Court of the United States, No. PC-2018-4716, 22 February 2023 (United States of America).  
*County of San Mateo v. Chevron Corp.*, Supreme Court of the United States, No. 17CIV03222, 27 February 2023 (United States of America).  
*State v. American Petroleum Institute*, Court of Appeals for the Eighth Circuit, No. 62-CV-20-3837, 23 March 2023 (United States of America).  
*Delaware v. BP America Inc.*, Supreme Court of the United States, No. N20C-09-097, 27 March 2023 (United States of America).  
*District of Columbia v. Exxon Mobil Corp.*, Court of Appeals for the D.C. Circuit, No. 2020 CA 002892 B, 31 March 2023 (United States of America).  
*Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, Supreme Court of the United States, No. 2018CV030349, 5 April 2023 (United States of America).

<sup>100</sup> *City of New York v. Chevron Corp.*, Court of Appeals for the Second Circuit, 993 F.3d 81, 1 April 2019 (United States of America).



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### B. Corporate liability for adaptation

A limited number of cases have addressed the recognition of corporate liability for adaptation to climate change. Some pending lawsuits highlighted in the 2020 Litigation Report have yet to be decided as at 31 December 2022. These include *Luciano Lliuya v. RWE AG* (2022), a case brought by a Peruvian farmer against a German utility company seeking compensation for the costs of protecting the plaintiff's town from melting glaciers.<sup>101</sup> Due to delays related to the COVID-19 pandemic, the case remains in the evidentiary phase.

### C. Responsibility of financial institutions

Courts are beginning to assess the responsibility of financial institutions for the climate dimensions of their investments. In *ClientEarth v. Belgian National Bank* (2022), plaintiffs argued that the bank had failed to meet environmental, climate and human rights requirements when purchasing bonds from fossil fuel and other GHG-intensive companies as part of the European Central Bank's Corporate

Sector Purchase Programme (CSPP). ClientEarth argued that the CSPP undermines the European Union's emissions reduction targets and fails to take into account climate considerations and sought a preliminary reference to the CJEU to determine whether the decision to establish the CSPP was lawful.<sup>102</sup> Two cases in Brazil previously mentioned, *PSB et al. v. Brazil (on Climate Fund)* (2022) and *PSB et al. v. Brazil (on Amazon Fund)* (2022) have questioned the allocation of funds by the Brazilian National Development Bank (BNDES). In 2022, an NGO questioned how BNDES and its investment arm, BNDESPar, which are both publicly funded, have reported carbon emissions associated with BNDESPar's investment portfolio and maintained equity positions in sectors that are among the most carbon-intensive in the Brazilian economy (*Conectas Direitos Humanos v. BNDES and BNDESPar* 2022).<sup>103</sup> Finally, in *Kang et al. v. KSURE and KEXIM* (2022), a case from the Republic of Korea, plaintiffs have questioned the investment of an export credit agency in a gas reserve off the coast of Indigenous land in Australia.<sup>104</sup>

<sup>101</sup> *Luciano Lliuya v. RWE AG*, Higher Regional Court of Essen, Case No. 2 O 285/15, On Appeal, May 2022 (Germany).

<sup>102</sup> *ClientEarth v. Belgian National Bank*, Court of First Instance of Brussels, 21/38/C, Withdrawn, 2022 (Belgium).

<sup>103</sup> *Conectas Direitos Humanos v. BNDES and BNDESPar*, Ninth Federal Civil Court of the Federal District, ACP 1038657-42.2022.4.01.3400, 22 June 2022 (Brazil).

<sup>104</sup> *Kang et al. v. KSURE and KEXIM*, District Court of Seoul, 23 March 2022 (Republic of Korea).

## V. Climate disclosures and greenwashing

Increased public awareness and understanding of climate change have spurred actions brought against corporations on claims of misrepresentative statements about climate change. This was well highlighted in the 2020 Litigation Report, which included a few examples of greenwashing cases in Australia, the United Kingdom and United States of America. All cases mentioned are pending as at 31 December 2022 (*York County v. Rambo* 2019; *People of the State of New York v. Exxon Mobil Corporation* 2020; *Ramirez v. Exxon Mobil Corp.* 2022; *Commonwealth v. Exxon Mobil Corp.* 2022; *O'Donnell v. Commonwealth* 2022),<sup>105</sup> and several others have been filed since. These kinds of actions involve plaintiffs bringing suits claiming they relied on those statements to make financial decisions, as well as cases brought by governments enforcing securities disclosures and consumer protection laws, and NGOs challenging alleged greenwashing or climate-washing campaigns. Investors continue to file suits alleging that public disclosures relating to climate risk were misleading or fraudulent, both in relation to the risk that a transition away from fossil fuels poses to their business or investment assets and the risk of physical impacts to infrastructure, operations and supply chains associated with climate change.

As observed in the 2020 Litigation Report, the climate disclosure cases are usually grounded in national consumer protection or corporate laws. Importantly, the regulatory context for climate disclosures is in flux. In 2019, the European Commission approved non-binding guidelines on reporting climate-related information (European Commission 2019). In 2021, it adopted the Corporate Sustainability Reporting Directive, a legislative proposal to strengthen the

nature and extent of sustainability or Environmental, Social and Governance (ESG) reporting in the European Union, which would constitute substantial regulatory reform in the ESG reporting space (European Commission 2022). A new rule aimed at enhancing publicly traded companies' disclosure of climate-related risks has been proposed by the United States Securities and Exchange Commission (United States of America, Securities and Exchange Commission 2022). These regulations could lead to litigation on multiple fronts.

### A. Protection of investors: climate disclosures

Cases concerning disclosure of investments in high-emitting GHG activities are found in Australia, Brazil and the European Union. In *ClientEarth v. European Investment Bank* (2021), the European Union General Court ordered the European Investment Bank to accept ClientEarth's petition for an internal review of the bank's decision to finance a biomass power plant. The request relied on the provisions of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). ClientEarth claimed that the project overestimated the environmental advantages by underestimating the risks of logging and forest fire emissions.<sup>106</sup> In *Abrahams v. Commonwealth Bank of Australia* (2021), shareholders sued the Commonwealth Bank of Australia for disclosure of documents under the Corporations Act of 2001 of the bank's involvement in a series of fossil fuel projects that potentially infringed the bank's environmental

<sup>105</sup> *York County v. Rambo*, District Court for the Northern District of California, No. 3:19-cv-00994, 22 February 2019 (United States of America). *People of the State of New York v. Exxon Mobil Corporation*, Supreme Court of New York, No. 452044/2018, 27 February 2020 (United States of America). *Ramirez v. Exxon Mobil Corp.*, District Court for the Northern District of Texas, No. 3:16-cv-3111, 31 March 2022 (United States of America). *Commonwealth v. Exxon Mobil Corp.*, High Court of Massachusetts, No. SJC-13211, 24 May 2022 (United States of America). *O'Donnell v. Commonwealth*, Federal Court of Australia, VID482/2020, 22 June 2022 (Australia).

<sup>106</sup> *ClientEarth v. European Investment Bank*, CJEU, T-9/19 and C-212/21 P, Appealed, 2 February 2021 (European Union).

and social policies. The Federal Court allowed the plaintiffs to inspect a limited scope of documents and ordered the Commonwealth Bank of Australia to produce the relevant documents.<sup>107</sup> In *Clara Leonel Ramos and Bruno de Almeida de Lima v. State of São Paulo (Families for the Climate and IncentivAuto Program)* (2021), a community group in Brazil sued the state government of São Paulo seeking disclosure of the budgetary and climate impacts of the IncentivAuto Program, an over USD 150 million fund designed to incentivize automaking in the state. Plaintiffs alleged that the fund offered financing without requiring any climate mitigation efforts on the part of the carmakers. The plaintiffs claimed that the programme was potentially illegal for failing to minimize GHG emissions, in violation of São Paulo's Climate Change Plan.<sup>108</sup>

There have also been climate disclosure cases against pension funds brought in Australia, Luxembourg and the United Kingdom. The 2020 Litigation Report noted the Australian case *McVeigh v. Retail Employees Superannuation Trust* (2020), in which the plaintiff alleged that the fund violated the Corporations Act 2001 by inadequately responding to his request for information about the fund's knowledge of climate change risk, its assessment of that risk and the actions taken in response. The parties settled the case through an agreement for the fund to implement a net-zero goal; to measure, monitor and report climate progress in line with the Task Force on Climate-related Disclosures; to ensure investee climate disclosure; and to publicly disclose portfolio holdings, among other commitments.<sup>109</sup> In *Greenpeace A.S.B.L. v. Schneider* (2020), in which Greenpeace asked for information on how Luxembourg's sovereign fund aligned its investments with the goals of the Paris Agreement, the administrative judge ruled that the sovereign pension fund had to disclose the information sought. The court also found that the fund had no legal obligation to comply with the Paris Agreement.<sup>110</sup>

In *Ewan McGaughey et al., v. Universities Superannuation Scheme Limited* (2021), plaintiffs in the United Kingdom issued proceedings against the University Superannuation Scheme's directors under the directors' duty to act in the beneficiaries' best interests. Claimants argued that fossil fuels have been the worst-performing asset class since 2017 and that the failure to create a divestment plan has prejudiced the success of the company. The claimants further relied on the ECHR and the directors' duties under the Paris Agreement.<sup>111</sup>

In *Amis de la Terre and Sherpa v. Perenco* (2022), French NGOs attempted to obtain documents related to the environmental impacts of the oil company's operations in the Democratic Republic of the Congo. The Tribunal de Grande Instance de Paris and the Paris Court of Appeal denied their request, and so they appealed to the Court of Cassation. In March 2022, the Court of Cassation ruled in favour of the NGOs and held that any interested party may ask a French judge for an investigative measure if there is a legitimate reason to preserve or establish, before any proceedings, evidence that could be relevant to the resolution of a dispute, provided that the action envisaged is not manifestly inadmissible or contrary to the law or doomed to failure.<sup>112</sup>

In *In the Matter of AGL Limited* (2022), the plaintiff was a high-value shareholder of AGL Energy Limited, Australia's biggest GHG emitter. Although the plaintiff did not have access to the materials that AGL put to shareholders for a vote on a demerger, the plaintiff was concerned that those materials might not adequately address climate risks. Shareholders are typically unable to access the materials before the first hearing of the application. In May 2022, at a hearing of the Supreme Court of New South Wales, the plaintiff sought leave to be heard in the court's hearing of the application, including on the basis that the proposed demerger was not in the best interests of shareholders. Leave was granted, and AGL was

<sup>107</sup> *Abrahams v. Commonwealth Bank of Australia*, Federal Court of Australia, NSD864/2021, 26 August 2021 (Australia).

<sup>108</sup> *Clara Leonel Ramos and Bruno de Almeida de Lima vs. State of São Paulo (Families for the Climate and IncentivAuto Program)*, Court of Justice of São Paulo, No. 1047315-47.2020.8.26.0053, 10 June 2021 (Brazil).

<sup>109</sup> *McVeigh v. Retail Employees Superannuation Trust*, Federal Court of Australia, NSD1333/2018, Settled, 2 November 2020 (Australia).

<sup>110</sup> *Greenpeace A.S.B.L. v. Schneider*, Administrative Court of Luxembourg, No. 43604 du rôle, 12 March 2020 (Luxembourg).

<sup>111</sup> *Ewan McGaughey et al. v. Universities Superannuation Scheme Limited*, High Court of Justice of England and Wales, EWHC 1233, 27 October 2021 (United Kingdom of Great Britain and Northern Ireland).

<sup>112</sup> *Amis de la Terre and Sherpa v. Perenco*, Court of Paris, No. 20-22.444, 9 March 2022 (France).

required to provide the scheme materials to the plaintiff to review. The court ordered the unamended publication of the documents. AGL later decided to withdraw the demerger proposal.<sup>113</sup>

### B. Protection of consumers: greenwashing complaints

Greenwashing complaints allege that corporate advertising contains false or misleading information about climate change impacts contrary to responsible advertising or fair competition legislation or standards.

In one case, the Italian Competition Authority has questioned Eni's Diesel+ advertising campaign as it pertained to the green claims in the advertising messages, which, according to the Competition Authority, have disseminated false and omissive information regarding the fuel's environmental impact

and GHG emissions reductions (*Italian Competition Authority Ruling Eni's Diesel+ Advertising Campaign* 2019).<sup>114</sup> The United Kingdom's Advertising Standards Authority (ASA) found that airline Ryanair's claims of having low CO<sub>2</sub> emissions and being the lowest-emissions airline were misleading. The ASA found that consumers would find insufficient information in the advertisements to substantiate that they would reduce their personal CO<sub>2</sub> emissions compared with flying with another carrier (*ASA Ruling on Ryanair Ltd t/a Ryanair* 2020).<sup>115</sup> In another case, the ASA concluded that Shell had to clarify that the carbon offsetting was contingent on membership in a loyalty scheme. Shell's campaign on a scheme that allowed customers to "drive carbon-neutral" through offsetting emissions of fuel purchases was ruled misleading (*ASA Ruling on Shell UK Ltd's Shell Go+ Campaign* 2020).<sup>116</sup> New Zealand's energy company Firstgas' campaign on "zero-carbon gas" was also deemed misleading by the ASA Complaints Board due to



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<sup>113</sup> *In the Matter of AGL Limited*, Court of New South Wales, Common Law Division, NSWSC 576, 12 May 2022 (Australia).

<sup>114</sup> *Italian Competition Authority Ruling Eni's Diesel+ Advertising Campaign*, Regional Administrative Court of Lazio, 20 December 2019 (Italy).

<sup>115</sup> *ASA Ruling on Ryanair Ltd t/a Ryanair Ltd*, Advertising Standards Authority, Complaint No. G19-1035778, 5 February 2020 (United Kingdom of Great Britain and Northern Ireland).

<sup>116</sup> *ASA Ruling on Shell UK Ltd's Shell Go+ Campaign*, Advertising Standards Authority, 8 July 2020 (United Kingdom of Great Britain and Northern Ireland).

unsubstantiated environmental statements (Lawyers for Climate Action Complaint to the Advertising Standards Board 2021).<sup>117</sup> In *Milieudefensie* (2020), The Hague District Court also concluded that Shell had falsely claimed that its plans were aligned with the Paris Agreement. In Denmark, NGOs filed a suit against Danish Crown, a farm cooperative and the European Union's largest pork producer, claiming that the company was misleading consumers through its campaign that claimed its pork production was "climate controlled" and that the pork was "more climate-friendly than you would think." The claimants have alleged that the company is misrepresenting its climate footprint and is in violation of the Marketing Act (*Vegetarian Society et al. of Denmark v. Danish Crown* 2022).<sup>118</sup> The claim is still pending as at 31 December 2022.

Greenwashing claims have also relied on marketing campaigns that are incompatible with a company's investments. For example, a complaint was filed at Ad Standards Australia against HSBC bank for continued fossil fuels investments despite a marketing campaign to support the protection of the Great Barrier Reef (*Complaint to Ad Standards on HSBC's Great Barrier Reef Ad* 2021).<sup>119</sup>

In *Fossielvrij NL v. KLM*, several NGOs have challenged the airline KLM's advertising campaign based on the argument that there is currently no such thing as "flying responsibly" and that KLM seeks company growth and increased flight sales when it should be reducing emissions by reducing the number of flights "to keep a just, liveable world within reach." The case builds on an April 2022 decision of the national Advertisement Code Commission, in



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<sup>117</sup> *Lawyers for Climate Action Complaint to the Advertising Standards Board*, Advertising Standards Authority Complaints Board, No. 21/194, 6 July 2021 (New Zealand).

<sup>118</sup> *Vegetarian Society et al. of Denmark v. Danish Crown*, Western High Court of Denmark, 2022 (Denmark).

<sup>119</sup> *Complaint to Ad Standards on HSBC's Great Barrier Reef Ad*, Ad Standards, 0265-21, 13 October 2021 (Australia).

which the Dutch media watchdog ruled that elements of the "Fly Responsibly" campaign violated the code's provisions on misleading advertising, especially those elements referring to climate neutrality or "CO2ZERO". This includes the slogans "Be a hero, fly CO2ZERO"

and "CO<sub>2</sub> neutral: KLM compensates for the CO<sub>2</sub> emissions of your KLM Holidays flight" (*Fossielvrij-Beweging v. Koninklijke Luchtvaart Maatschappij N.V.* 2022).<sup>120</sup>

### Box 9: Greenwashing complaints – net zero

As more companies commit to net-zero targets, it is likely that questions will be raised as to how these will be implemented. Two cases were filed in Australia and France challenging oil and gas companies' campaigns on net-zero emissions. In Australia, the Australasian Centre for Corporate Responsibility sued oil and gas company Santos over claims that it provides clean energy natural gas and has plans for net-zero emissions by 2040 (*Australasian Centre for Corporate Responsibility v. Santos* 2021).<sup>121</sup> The suit has alleged that these misrepresentations are in violation of Australian consumer protection and corporation laws. In France, several NGOs questioned Total's net-zero advertising campaign, arguing they were false and misleading in their depiction of the role of gas and biofuels. The case was brought under French national law, implementing the European Union's Unfair Commercial Practices Directive and represents the first case challenging an oil and gas major's net-zero claims for greenwashing in Europe (*Greenpeace France, Amis de la Terre France, Notre Affaire à Tous v. TotalEnergies SE, TotalEnergies Electricité, Gaz France* 2022).<sup>122</sup>

### C. Protection of consumers: misrepresentation of products

In the United States of America, cases have been brought by cities and states against fossil fuel companies questioning their role in climate disinformation and misrepresentation of products. In *Connecticut v. Exxon Mobil Corp.* (2022), the state of Connecticut sued ExxonMobil to hold the company accountable for violating the Connecticut Unfair Trade Practices Act in connection with alleged deceptive acts to create uncertainty about climate

science. In *City of New York v. Exxon Mobil Corp.* (2021), New York City sued several oil companies under the city's consumer protection laws arguing that the companies engaged in deceptive trade practices by misrepresenting their fossil fuel products to consumers, misleading consumers about the impact of fossil fuels. Similarly, in *Vermont v. Exxon Mobil Corp.* (2022), the state of Vermont brought a protection lawsuit against fossil fuel companies alleging deceptive and unfair business practices in connection with the companies' sale of their products.

<sup>120</sup> *Fossielvrij-Beweging v. Koninklijke Luchtvaart Maatschappij N.V.*, District Court of Amsterdam, 7 July 2022 (Netherlands).

<sup>121</sup> *Australasian Centre for Corporate Responsibility v. Santos*, Federal Court of Australia, NSD858/2021, 25 August 2021 (Australia).

<sup>122</sup> *Greenpeace France, Amis de la Terre France, Notre Affaire à Tous v. TotalEnergies SE, TotalEnergies Electricité, Gaz France*, Court of Paris, 2 March 2022 (France).

## VI. Failure to adapt and impacts of adaptation

Although some governments and private parties are undertaking a variety of measures to adapt to the increasingly severe effects of climate change, others are aware of those changes and the foreseeable extreme weather events that climate change will bring but have not taken steps to prepare. Courts are seeing both cases seeking compensation for adaptation efforts that have caused harm or damaged property and seeking injunctive relief for failing to adapt in the face of known climate risks. However, despite the importance of adaptation efforts, there are still a limited number of cases focused on adaptation. The 2017 and 2020 Litigation Reports described such cases in Australia, Canada, India, Japan, South Africa and the United States of America.

In 2021, a United States of America federal trial court in *Conservation Law Foundation v. ExxonMobil Corp.* (2016) issued an order concerning the next steps for the Conservation Law Foundation's lawsuit that alleged that Exxon failed to prepare its marine terminal in Everett, Massachusetts for the impacts of climate.<sup>123</sup> The district court concluded that a 2021 Supreme Court decision did not alter the standard the district court had used in denying a motion to dismiss claims for prospective injunctive relief for lack of standing. Similar cases have been filed in Rhode Island (*Conservation Law Foundation, Inc. v. Shell Oil Products US* 2022)<sup>124</sup> and Connecticut (*Conservation Law Foundation v. Shell Oil Co.* 2022; *Conservation Law Foundation v. Gulf Oil LP* 2022).<sup>125</sup> These cases are moving forward to trial.

As highlighted in the 2020 Litigation Report, several cases deal with government steps to address the heightened risk of coastal flooding through permitting

denials. In 2021, the Supreme Court of Pakistan upheld a notification barring the construction of new cement plants or the expansion of existing cement plants in environmentally fragile zones called "negative areas". In that case, a cement company owner challenged the notification because it violated their constitutional right to freedom of trade, business and profession. The Supreme Court upheld the notification as a climate-resilient measure due to the activities' potential environmental impact, especially on groundwater. The court emphasized the need to consider climate change in government decisions and the impact of climate change on water resources. The court specifically noted the value and need of devising and implementing appropriate adaptation measures to ensure water, food and energy security for the country (*D.G. Khan Cement Company v. Government of Punjab* 2021).<sup>126</sup>

A few other cases have been brought forward due to a Government's lack of consideration of adaptation measures. In *Texans Against High-Speed Rail, Inc. v. U.S. Department of Transportation* (2021), plaintiffs challenged the Federal Railroad Administration's approval of a "Rule of Particular Applicability" for a high-speed rail technology proposed for use in Texas. The plaintiffs included a claim under the National Environmental Policy Act, the EIA law in the United States of America that alleges that the defendants failed to consider how the potential rail project's design would account for increasing rainfall levels resulting from climate change.<sup>127</sup> In *Tsama William and Others v. Uganda's Attorney General and Others* (2020), the applicants question the Ugandan government's lack of adaptation measures against constant landslides related to climate change.

<sup>123</sup> *Conservation Law Foundation v. ExxonMobil Corp.*, District Court for the District of Massachusetts, No. 1:16-cv-11950, 29 September 2016 (United States of America).

<sup>124</sup> *Conservation Law Foundation, Inc. v. Shell Oil Products US*, District Court for the District of Rhode Island, No. 1:17-cv-00396, 21 July 2022 (United States of America).

<sup>125</sup> *Conservation Law Foundation v. Shell Oil Co.*, District Court for the District of Connecticut, No. 3:21-cv-00933, 16 September 2022 (United States of America).  
*Conservation Law Foundation v. Gulf Oil LP*, District Court for the District of Connecticut, No. 3:21-cv-00932, 29 September 2022 (United States of America).

<sup>126</sup> *D.G. Khan Cement Company v. Government of Punjab*, Supreme Court of Pakistan, C.P. 1290-L/2019, 16 April 2021 (Pakistan).

<sup>127</sup> *Texans Against High-Speed Rail, Inc. v. U.S. Department of Transportation*, District Court for the Western District of Texas, No. 6:21-cv-00365, 18 August 2021 ((United States of America).



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# Part 4: The state of climate change litigation – future directions

# Part 4: The state of climate change litigation – future directions



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Similar to the 2020 Litigation Report, an analysis of these cases and others, the accelerating impacts of climate change and the global political context suggests several areas where one might expect to see increased climate change litigation in the coming years. As was observed in the same report, although each new case is unique and the outcome of a given case is difficult to predict, prior cases in some of these categories offer some evidence of how future cases may be resolved.

This section first revisits similar trend forecasts, made in the 2017 and 2020 Litigation Reports, of cases involving:

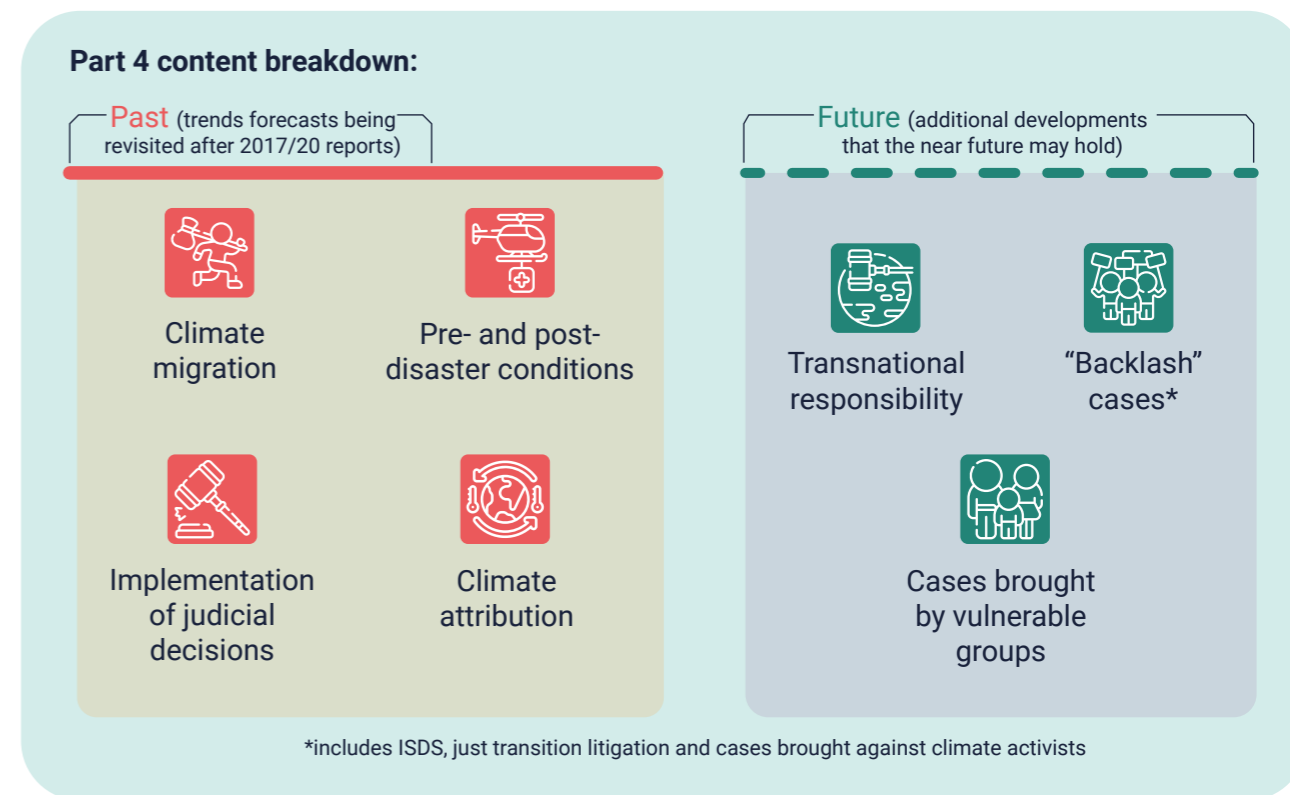
- (i) Climate migration
- (ii) Pre- and post-disaster conditions
- (iii) Implementation of the judicial decisions themselves<sup>1</sup>

It then suggests additional developments that the near future may hold:

- (iv) Transnational responsibility
- (v) Cases brought by vulnerable groups
- (vi) “Backlash” cases, which include ISDS, just transition litigation and cases brought against climate activists

<sup>1</sup> With the increase in certain types of cases, some of the categories identified as future directions in the 2020 Litigation Report are now in the current trends. This includes the consumer and investor fraud claims and the increasing use of international adjudicatory bodies.

Figure 10.



## I. Update on 2020 predictions: climate migration

The 2017 and 2020 Litigation Reports (UNEP 2017; UNEP 2020) suggested that cases addressing the needs and status of persons displaced by climate change impacts would be a growing litigation trend. Since the 2020 Litigation Report, there has been one important decision in a climate migration case, in Italy. In 2021, Italy’s Supreme Court of Cassation ruled in *I.L. v. Italian Ministry of the Interior* that judges evaluating requests for humanitarian protection should consider not only armed conflict but also social, environmental or climate degradation and situations in which natural resources are subject to unsustainable exploitation. That case was brought by a Nigerian national living in the Niger Delta, whose request for humanitarian protection was initially denied. In its decision, the court cited the humanitarian values articulated in the Teitiota case

(United Nations, Human Rights Committee 2020), namely that “states have the obligation to ensure and guarantee the right to life of people, and that this right also extends to reasonably foreseeable threats and potentially lethal situations”, and concluded that the Niger Delta’s severe environmental instability, a result of the indiscriminate exploitation of the area by oil companies and the ethnic-political conflicts, might qualify the plaintiff for humanitarian protection. The court ordered the court of first instance to re-evaluate the application, incorporating into their analysis environmental, climate and resource extraction impacts on an individual’s right to life and dignified existence (*I.L. v. Italian Ministry of the Interior and Attorney General at the Court of Appeal of Ancona* 2021).<sup>2</sup>

<sup>2</sup> *I.L. v. Italian Ministry of the Interior and Attorney General at the Court of Appeal of Ancona*, Supreme Court of Cassation, N. 5022/2021, 24 February 2021 (Italy).



## II. Update on 2020 predictions: pre- and post-disaster cases

Legal actions on the failure to appropriately plan for the consequences of extreme weather events, which are also closely related to adaptation, are likely to increase as the number of such events does.

A few different types of claims have been brought after the occurrence of a disaster or climate change impact, seeking a variety of legal remedies. This was previously addressed in the 2020 Litigation Report where courts were being asked to review a defendant's action or inaction in the face of known risk that climate-related extreme events would result in damage to plaintiffs' property or loss of life. As summarized in that report, the scope of potential liability from cases of this type is broad: any entity that arguably neglected an obligation to plan or prepare for climate-driven damages faces a risk of being sued in the wake of an extreme weather event or after slow-moving climate impacts injure potential plaintiffs. In the Ugandan case *Tsama William and Others v. Uganda's Attorney General and Others* (2020), applicants have sought damages and compensation from the Government for the loss of life, threats to life, destruction of property and infringement of fundamental human rights, as well as the costs of resettlement to safer areas due to occurrence of recurring landslides in Bududa District. The plaintiffs claim that the Government has failed to prevent and properly adapt to climate-driven damages, therefore affecting their human rights. Landslides have been made more frequent and intense as a result of climate-related extreme weather events.

In *Bushfire Survivors for Climate Action Incorporated v. Environmental Protection Authority* (2021), the plaintiffs alleged that they had been harmed by bushfires made likely or more intense by climate change and claimed that the New South Wales Environmental Protection Authority of Australia failed to develop guidelines or a policy to regulate GHGs consistent with limiting global temperature

rise to 1.5°C.<sup>3</sup> In 2021, the Land and Environment Court ordered the New South Wales Environmental Protection Authority to develop environmental quality objectives, guidelines and policies to ensure protection from climate change impacts. The court found that the duty to develop environmental protection instruments included specific climate change measures.

In a financial case from 2021, a company constructing a large run-of-river hydroelectric project in the Andes Mountains in Chile filed for bankruptcy in Delaware, United States of America. The company cited significant impacts of climate change, which have impacted the hydrology of the Maipo Valley, where the project is being constructed (*In re Alto Maipo Delaware LLC* 2021).<sup>4</sup> It noted that the rivers that would power the project have seen a substantial drop in water flow, altering the amount of power that can be produced and therefore the financial viability of the project.

Cases addressing extreme weather events are also being filed before those events occur. The *Conservation Law Foundation v. ExxonMobil Corp.* (2016) case discussed earlier, and also highlighted in the 2020 Litigation Report, exemplifies how groups might use existing statutes to seek protection against environmental and public health disasters from climate-related extreme events.<sup>5</sup> In 2021, the Conservation Law Foundation filed two similar citizen suits, *Conservation Law Foundation v. Shell Oil Co.* (2022) and *Conservation Law Foundation v. Gulf Oil LP* (2022). These cases asserted that the defendants' bulk storage and fuel terminals in New Haven, Connecticut violated the Clean Water Act and Resource Conservation and Recovery Act because defendants have not designed, maintained, modified or operated their terminals to account for the numerous effects of climate change, including sea level rise and more frequent and more severe storms.

<sup>3</sup> *Bushfire Survivors for Climate Action Incorporated v. Environmental Protection Authority*, Land and Environment Court of Australia, NSWLEC 92 and NSWLEC 152, 5 March 2021 (Australia).

<sup>4</sup> *In re Alto Maipo Delaware LLC*, Bankruptcy Court for the District of Delaware, No. 21-11507, 17 November 2021 (United States of America).

<sup>5</sup> See the 2020 Litigation Report, page 23.

## III. Update on 2020 predictions: implementation challenges

As the number and variety of climate change cases increase, plaintiffs are likely to continue seeking a broad range of remedies. However, the implementation of those remedies remains a challenge across all types of cases. The 2020 Litigation Report pointed out a trend suggesting the increased number of climate change cases would result in judicial orders requiring defendants to take broad action to reduce economy-wide, sectoral or individual source emissions; halt or slow deforestation and land-use change; prevent fossil fuel extraction and protect peatlands; and increase the resilience of communities. It is possible that the implementation or non-execution of such orders will form the basis of legal suits moving forward. For

instance, as was also noted in the 2020 Litigation Report (Part 2.III.D), implementation of the court's decision in the Colombian Future Generations case continues to raise challenges (Dejusticia 2019). After the decision in *Milieudefensie*, Shell decided to move its headquarters to the United Kingdom, potentially making implementation of the decision more challenging (Hurst 2021). Several countries in Europe, in efforts to reduce dependence on Russian energy, have also recently decided to revert to coal due to the aggression by the Russian Federation against Ukraine (Betz 2022). This policy change can have significant consequences in the implementation of systemic mitigation decisions such as *Urgenda v. the Netherlands* and *Neubauer*.

## IV. Update on 2020 predictions: increased attention to climate attribution and fair share assessments of mitigation

The 2020 Litigation Report predicted that rights-based claims on potential governmental or corporate climate mitigation obligations, as well as cases on climate change liability for private actors, would proceed to their evidentiary phases. It remains that, to prove the existence of an obligation or a breach of duty, plaintiffs or petitioners in some cases will likely have to demonstrate both that their injuries were caused by climate change and that the defendant substantially contributed to climate change. Since 2020, few courts have yet to reach the merits of these types of claims, despite the growing body of

science illustrating the connections (Burger, Wentz and Horton 2020). The science of climate attribution continues to be central to climate litigation, and as more cases are filed and reach the merits of the plaintiffs' claims, as was anticipated in the 2020 Litigation Report, there will be increased judicial attention on the matter.

*Lliuya v. RWE AG* (2022) and *Milieudefensie* directly make use of attribution studies. *Lliuya* specifically assesses the corporate responsibility of private GHG emitters (in this case, based in Germany) for



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the impacts of climate change in a different country (in this case, Peru) (Stuart-Smith *et al.* 2021). In addition, several standing decisions address this for the purposes of injury. In *Juliana* (2020), the Ninth Circuit Court of Appeals agreed with the district court that the plaintiffs met the injury and causation requirements for standing because at least some plaintiffs had alleged concrete and particularized injuries caused by fossil fuel carbon emissions that were increased by federal subsidies and leases. In *Natural Resources Defense Council v. Wheeler* (2020), the D.C. Circuit Court of Appeals found as a threshold matter that the Natural Resources Defense Council and one of the state petitioners (New York) each had standing based on potential

injuries from climate change, which were caused in part by hydrofluorocarbon emissions and would be redressed by restrictions on such emissions.<sup>6</sup>

As plaintiffs rely on the notion of fair share of global emissions under the Paris Agreement to precisely determine a country's obligations to mitigate climate change, it is likely that specific studies will also be relied on in climate litigation cases. For example, in *A Sud et al. v. Italy* (2021), Climate Action Tracker specifically presented a report assessing Italy's fair share in climate mitigation to substantiate the claim to reduce emissions by 92 per cent by 2030 compared with 1990 levels.

## V. Transnational responsibility (extraterritorial responsibility)

Increasing discussion on extraterritorial jurisdiction will likely become a central aspect of cases in the future. The previously noted advisory opinion by the IACtHR delineated for the first time the parameters for establishing jurisdiction in cases seeking redress for transboundary environmental harms (IACtHR

2017; Tigre and Urzola 2021). The court reasoned that extraterritorial jurisdiction can be established when (i) there is a factual nexus between conduct within a State's territory and an extraterritorial human rights violation, and (ii) a State exercises effective control over the activities carried out in



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6 *Natural Resources Defense v. Wheeler*, Court of Appeals for the D.C. Circuit, 446 U.S. App. D.C. 93, 955 F.3d 68, 7 April 2020 (United States of America).

another State that caused the harm and consequent violation of human rights in the other State. The recognized nexus broadens a State's responsibility for environmental harms, including climate change, and reflects its obligation to exercise due diligence within its territory when human rights elsewhere are at stake (Murcott, Tigre and Zimmermann 2022).

Using the IACtHR's legal reasoning, the United Nations Committee on the Rights of the Child found in *Sacchi et al. v. Argentina, et al.* (2021) that countries have extraterritorial responsibilities related to climate change. Specifically, when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated if (i) there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, and (ii) the State of origin exercises effective control over the sources of the emissions in question. The findings provide a significant pathway for future climate litigation beyond the Convention on the Rights of the Child, and its reliance on the interpretation of extraterritorial responsibility by the IACtHR shows a growing cross-fertilization between courts.

One of the key legal questions in *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy (People v. Arctic Oil)* (2020) was whether extraterritorial emissions from the combustion or other use of oil exported from Norway were relevant in applying the constitutional right to a healthy environment. The Supreme Court found that emissions are the responsibility of each State within their jurisdictional scope and that the right does not provide protection outside of Norwegian territory (Voigt 2021). However, the court left open the possibility of holding the State responsible for violating its duty to provide a clean and healthy environment for the combustion of its oil exports when (i) the case involves governmental activities or activities performed under the control of the Government of Norway, including when the Government fails to implement measures against polluting activities, and (ii) when direct environmental damage occurs in Norway as a consequence of the activities for which the Government is directly or even indirectly responsible (Gociu and Roy 2021). This interpretation may open the door to responsibility for extraterritorial emissions when GHGs emitted elsewhere from oil and gas exploited in Norway but combusted by companies in another country

accumulate in the atmosphere and lead to harm in Norway as well (Gociu and Roy 2021; Voigt 2021). A similar claim can be seen in the case of *Greenpeace Argentina et al., v. Argentina et al.* (2022), in which plaintiffs have argued that the State is responsible for the emissions that arise from fossil fuel exports, in addition to emissions within its own territory.<sup>7</sup>

In *Amis de la Terre and Sherpa v. Perenco* (2022), the Court of Cassation in Paris provided an avenue for establishing extraterritorial responsibility for a French company's actions in the Democratic Republic of the Congo under the Duty of Vigilance statute. The court found that one seeking compensation for environmental damage or subsequent damage may choose to invoke either the law of the country in which the damage occurred or the law of the country in which the event giving rise to the damage occurred. In this case, the event giving rise to the damage originated in France: the environmental damage suffered in the Democratic Republic of the Congo is due to the de facto control and dominant influence of the company (whose head office is in France) over the companies of the group operating in the Democratic Republic of the Congo. Therefore, the right to request measures to preserve or establish evidence relevant for a case questioning environmental liability abroad is defined in the law of the jurisdiction or venue in which legal action is brought (in this case, in France).

Another way to indirectly establish a country's extraterritorial jurisdiction is by including plaintiffs from beyond the particular jurisdiction where the case is filed. These often include plaintiffs from Global South jurisdictions, which are often most vulnerable to climate impacts. Some of the plaintiffs in the German case *Neubauer* were from Bangladesh and Nepal. The court agreed that it was conceivable that fundamental constitutional rights obliged Germany to protect people in other countries (Peel and Markey-Towler 2022). However, it did not answer the question of whether the rights of the foreign plaintiffs were violated. The court noted that the duty to protect plaintiffs from Nepal and Bangladesh would not necessarily have the same content compared with people living in Germany.

Other pending cases may ultimately expand on the interpretation of extraterritorial responsibility for climate harm, including the *French case Envol Vert et*

7 *Greenpeace Argentina et al., v. Argentina et al.*, Federal Court of Mar del Plata No. 2, FMP 105/202, 5 December 2022 (Argentina).

*al., v. Casino* (2021), and *Lliuya v. RWE AG* in Germany. These cases are interesting because they relate to the potential damage of companies headquartered and operating in a Global North jurisdiction in jurisdictions in the Global South. Similarly, a recent claim was brought by Indonesian citizens in *Four Islanders of Pari v. Holcim* (2023) in a Swiss court, with a request for the Swiss cement company to (i) provide proportional compensation for climate

## VI. Cases brought by vulnerable groups

While climate change affects people worldwide, it affects them unequally. This has slowly begun to be represented in climate litigation, as plaintiffs from at-risk communities bring cases on behalf of themselves or by representing their communities. This has been more prominent with cases filed on behalf of children, as noted earlier. Indigenous groups and women are also increasingly becoming more active in litigation. As these cases are decided, it is possible that more plaintiffs from vulnerable groups will push for increased government action addressed at their vulnerabilities.

Indigenous Peoples' territories contain nearly 80 per cent of the world's biodiversity (Etchart 2017). While different areas are experiencing different effects of climate change, Indigenous groups are disproportionately affected due to their connection to the land and their specific vulnerability to marginalization on other frontiers, such as economic well-being, food security and other available rights and capabilities. According to the *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, Indigenous Peoples are among those who have least contributed to the problem of climate change, yet they are the ones who suffer the most from its effects (HRC 2017). Many Indigenous Peoples live in areas at greater risk of becoming uninhabitable, such as islands and coastal areas, as well as fragile polar and forest ecosystems. This vulnerability is slowly finding representation in a small but growing number of climate litigation claims (Tigre 2022c). Examples can be found in Argentina, Australia, Canada, Ecuador, France, New Zealand and the United States of America. These pending

change-related damages on the Indonesian island of Pari, (ii) reduce CO<sub>2</sub> emissions by 43 per cent by 2030, compared with 2019 levels (or according to findings of climate science in order to limit global warming to 1.5°C), (iii) financially contribute to adaptation measures on Pari.<sup>8</sup> The claim can be seen as novel and unprecedented as it combines two approaches at a transnational level: the reduction of GHGs and compensation for climate damages.

cases provide insight into how Indigenous-specific domestic legal approaches may shape climate-related adjudication going forward (Marcum 2022).

Overall, the climate litigation cases brought by Indigenous groups have had limited success. In one of the few successful cases so far, a Colombian court recognized the impact of climate change on natural water supply due to mining activities as well as the specific violation of fundamental rights of Indigenous groups due to their relationship with water bodies in accordance with their worldviews (Constitutional Court of Colombia 2017). In *Lho'imggin et al. v. Her Majesty the Queen* (2021), the Canadian Federal Court dismissed a claim brought by Indigenous groups that challenged the government's overall approach to climate change on separation of powers grounds. The court found that climate change is an inherently political issue left to the executive and legislative branches of government. With regard to remedies, the court found that it could not take on a supervisory role to ensure adequate climate laws were passed due to the multifaceted problem of climate change. The court never reached the merits to assess whether inadequate responses to climate change by the Canadian Government breached Indigenous human rights.<sup>9</sup> The decision is currently under appeal. In *Baihua Caiga et al., v. PetroOriental S.A.* (2021), Indigenous groups sued oil company PetroOriental for the climate impacts of gas flaring in Ecuador.<sup>10</sup> Applicants argued that the company has violated several human rights due to the impacts of climate change, including the rights of nature as GHG emissions altered the carbon cycle, and the right to land and territory because their ability to enjoy natural

<sup>8</sup> *Four Islanders of Pari v. Holcim*, Office of the Justice of the Peace of the Canton of Zug, 1 February 2023 (Switzerland).

<sup>9</sup> *Lho'imggin et al. v. Her Majesty the Queen*, Federal Court of Appeal of Canada, T-211-20, 28 June 2021 (Canada).

<sup>10</sup> *Baihua Caiga et al., v. PetroOriental S.A.*, Family, Women, and Children Judicial Unit from Francisco de Orellana Canton, No. 22201202000469, 15 July 2021 (Ecuador).



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resources through ancestral practices has been limited, among others. The court of first instance did not admit the claim as the plaintiffs had not sufficiently demonstrated the violation of rights.

In *Dennis Murphy Tipakalippa v. National Offshore Petroleum Safety and Environmental Management Authority & Anor* (2022), the Federal Court of Australia decided to halt a project for offshore oil drilling near the Tiwi Islands, a biodiversity hotspot, because Indigenous groups had not been properly consulted.<sup>11</sup>

Several claims are still pending as at 31 December 2022. In *Pabai Pabai and Guy Paul Kabai v. Commonwealth of Australia* (2022), First Nation leaders from the Gudamalulgal nation of the Torres Strait Islands have challenged Australia's failure to cut GHG emissions, asserting that the Government's inaction will force their communities into climate migration. The plaintiffs detailed the climate vulnerability of Torres Strait Islander communities, including loss of fisheries, damages due to sea level rises, including to sacred sites and cemeteries, and the impairment of observance of traditional practices and ceremonies. The applicants alleged that the

Australian Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them, their culture, traditional way of life and the environment from harms caused by climate change, and that the Government has breached this duty as the targets are inconsistent with the best available science.<sup>12</sup> In *Youth Verdict v. Waratah Coal* (2020), Indigenous youth plaintiffs who were part of the Youth Verdict environment group challenged a coal mining project that would significantly contribute to climate change and limit the cultural rights of First Nations Queenslanders to maintain their distinctive relationship with the land. The case represents the first time that the 2019 Queensland Human Rights Act has been considered in relation to the environmental impacts of a resource project.<sup>13</sup>

In *Mataatua District Māori Council v. New Zealand* (2020), claimants have alleged that New Zealand has breached its obligations to Māori under the Treaty of Waitangi by failing to take adequate steps to reduce its fair share of GHG emissions. The claim relies on the importance of the natural ecosystem to the Māori culture. The claim is pending at the Waitangi Tribunal, the forum where disputes over the

<sup>11</sup> *Santos NA Barossa Pty Ltd v. Tipakalippa*, Federal Court of Australia, FCAFC 193, 2 December 2022 (Australia).

<sup>12</sup> *Pabai Pabai and Guy Paul Kabai v. Commonwealth of Australia*, Federal Court of Australia, VID622/2021, 31 March 2022 (Australia).

<sup>13</sup> *Youth Verdict v. Waratah Coal*, Queensland Land Court, QLC 33, 2020 (Australia).



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performance of the Treaty of Waitangi between Māori and the Government of New Zealand are heard and resolved.<sup>14</sup>

The two petitions currently pending before the United Nations special procedures, previously mentioned in Part 3.1, also include Indigenous petitioners and rely on the rights of Indigenous groups to a claim for increased climate action by the Governments of the Australia and the United States of America. In *Envol Vert et al., v. Casino* (2021), the plaintiffs have requested compensation to Brazilian Indigenous

## VII. Backlash cases

Recent years have witnessed the initiation of several “anti-climate” cases – or backlash cases – which aim to delay or dismantle existing or emerging regulations that promote climate action (Markell and Ruhl 2012; Peel and Osofsky 2020). These include (i) ISDS claims, (ii) just transition litigation and (iii) criminal cases brought against climate activists. Backlash cases will likely continue to be brought to curb advancements in climate change mitigation and adaptation actions.

groups for the loss of opportunity and moral damage stemming from Casino Group’s failure to adhere to its duty of vigilance in avoiding deforestation and being supplied cattle from deforested areas and farms established on Indigenous territories. In a Brazilian case seeking enforcement of command-and-control measures to curb deforestation in the Amazon rainforest, the petitioner, the public prosecutor’s office (Ministério Público Federal) calls for the expulsion of land grabbers in Indigenous lands situated in critical areas of deforestation, known as hotspots (*Ministério Público Federal v. IBAMA* 2020).

### A. Investor-State dispute settlements

International investment law is gaining increasing attention as a forum for climate change litigation. Arbitration and mediation are becoming important means of resolving climate-related disputes. However, the confidential nature of such processes makes them difficult to examine and quantify. At least 14 climate-related ISDS cases filed between 2010 and 2022 were identified. While these cases do not always contain explicit references to climate change,

<sup>14</sup> *Mataatua District Maori Council v. New Zealand*, Waitangi Tribunal, WAI 2607, 16 January 2020 (New Zealand).

they all relate directly to the introduction, withdrawal or amendment of a policy measure explicitly developed to meet a country’s climate goals.

The need to curb GHG emissions will lead to further asset stranding in developed and developing countries. Aligning national policies with climate needs will inevitably affect investments in the field of fossil fuel infrastructure across the supply chain. Therefore, the more compelling the need to adopt ambitious and abrupt measures to pursue climate objectives, the higher the risk of ISDS cases being brought against host States. ISDS claims do not – at least not directly – aim to suspend or overturn domestic regulation. Rather, the claims seek compensation for the detriment caused by such measures to foreign investors on a case-by-case basis. Moreover, they strictly relate to the violation of standards of protection under investment treaties for the purposes of obtaining monetary compensation.

IPCC noted that these cases may be hindering national mitigation efforts (IPCC 2022). For example, in *Eco Oro Minerals Corp. v. Republic of Colombia* (2021), an arbitration panel at ICSID found Colombia to be in breach of the Free Trade Agreement related to minimum standard treatment due to the actions of the Colombian Government, which continued to encourage Eco Oro with respect to the mining concession despite a potential overlap of the area with the páramo ecosystem, an important carbon sink. The majority considered the Government’s delay in delimiting the páramos and its failure to comply with constitutional obligations to protect the ecosystem at the time of the company’s investment. The tribunal found that the company had legitimate expectations to undertake the mining exploitation activities in its concession, and that Colombia’s delay in regulating the páramos and delimiting its geographical scope was arbitrary and disproportionate, damaging Eco Oro without serving any apparent purpose. The tribunal concluded that

Eco Oro was entitled to damages, to be decided at a later date.<sup>15</sup>

On the other hand, two domestic courts in Germany and the Netherlands have significantly limited the ability of corporations to seek compensation for the effects of climate policies on their assets, directly affecting two pending ISDS cases, *RWE v. the Kingdom of the Netherlands* (2021)<sup>16</sup> and *Uniper v. the Kingdom of the Netherlands* (2022).<sup>17</sup> The two arbitration claims against the Netherlands relate to the Government’s phase-out of coal by 2030, which the energy companies argue violates the Energy Charter Treaty. In an anti-arbitration injunction brought by the Dutch Government in Germany in *The Netherlands v. RWE and Uniper*, the Higher Regional Court of Cologne declared in September 2022 that both ICSID arbitral claims were inadmissible. The court found the arbitral clause of the Energy Charter Treaty incompatible with the law of the European Union and thus invalid in intra-European Union arbitrations. The court’s decision can be appealed. However, after the decision was handed down, the German Government announced that it would take over 99 per cent of Uniper in exchange for which the company agreed to withdraw its ICSID claim against the Netherlands (*The Netherlands v. RWE and Uniper [Anti-arbitration Injunctions]* 2023).<sup>18</sup>

In *RWE and Uniper v. the Netherlands (Ministry of Climate and Energy)* (2022), The Hague District Court held that companies RWE and Uniper could not claim financial compensation from the Government for the mandatory phase-out of coal-fired electricity production. The court ruled that there was no “unlawful interference” with property rights based on the case law of the European Union, and decided that the measures taken by the Dutch State to reduce CO<sub>2</sub> emissions were proportional and that the interests of the companies had been sufficiently considered when adopting the law.<sup>19</sup>

<sup>15</sup> *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID, No. ARB/16/41, 9 September 2021 (ICSID).

<sup>16</sup> *RWE v. the Kingdom of the Netherlands*, ICSID, Case No. ARB/21/4, 2 February 2021 (ICSID).

<sup>17</sup> *Uniper v. the Kingdom of the Netherlands*, ICSID, Case No. ARB/21/22, Withdrawn, 2022 (ICSID).

<sup>18</sup> *The Netherlands v. RWE and Uniper (Anti-arbitration Injunctions)*, Higher Regional Court of Cologne, January 2023 (Netherlands).

<sup>19</sup> *RWE and Uniper v. the Netherlands (Ministry of Climate and Energy)*, District Court of North Holland, ECLI:NL:RBDHA:2022:12628; ECLI:NL:RBDHA:2022:12635; ECLI:NL:RBDHA:2022:12653, 30 November 2022 (Netherlands).

## B. Just transition cases

Decarbonization strategies to phase out fossil fuels are developed in a context of socioeconomic problems, including inequality and racial injustice. A just transition, perceived from an environmental and labour-driven perspective, is vital to ensure that decarbonization is both successful and fair. It is defined as the shift towards a low-carbon society that ensures the protection of minorities and carbon-dependent communities from undue burdens of the decarbonization costs. This scenario is even more significant in the Global South. The equity piece of global decarbonization policies gives rise to “anti-regulatory” or “defensive” climate litigation (Savaresi and Setzer 2022). Similar to backlash cases, these lawsuits aim to delay or dismantle existing or emerging regulatory measures that promote climate action (Markell and Ruhl 2012; Peel and Osofsky 2020). Just transition cases question the way in which climate policies are developed and implemented or impact the enjoyment of human rights (Tigre *et al.* 2023). With governments adopting decarbonization strategies, it is likely that just transition cases brought by workers and communities in vulnerable situations impacted by these policies will lead to lawsuits questioning potential breaches of their human rights. These cases often centre around the participation of impacted communities in government decisions.

In 2021, the Supreme Court of Chile ruled in *Company Workers Union of Maritima & Commercial Somarco Limited and Others v. Ministry of Energy* (2021) that a just transition strategy was essential for the workers harmed by the loss of their direct and indirect source of employment resulting from Chile’s Energy Sector Decarbonization Plan to achieve carbon neutrality by 2050. The court also ruled it was essential for the communities affected by the loss of services linked to the development of the declining thermoelectric activity. The ruling ordered the government authorities to implement a plan for the reinsertion into the labour market of workers affected by the decarbonization process, consulting them in that process and adopting control measures to ensure compliance.<sup>20</sup>

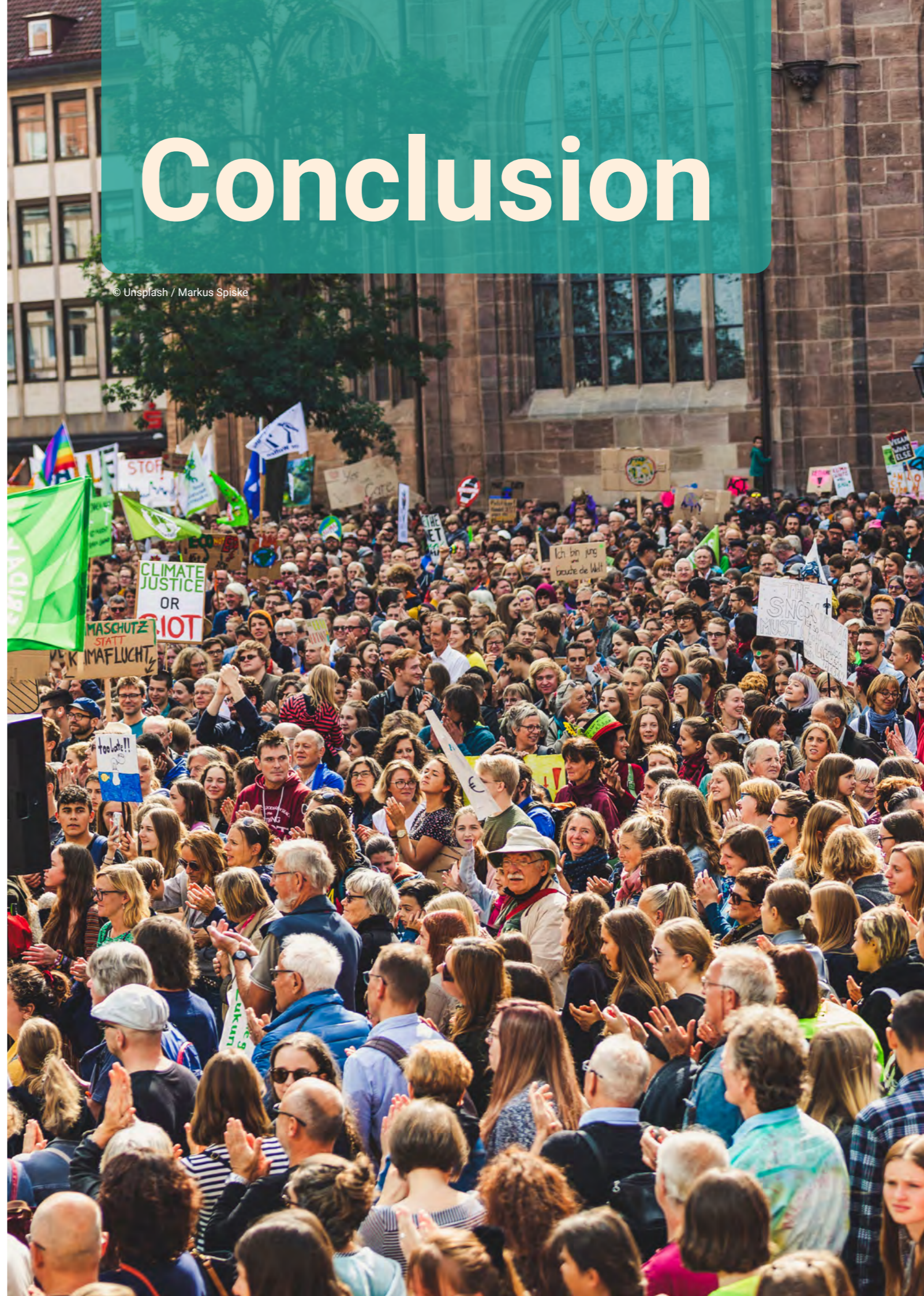
The increasing need for the necessary minerals to develop batteries in renewable energy projects for decarbonization strategies suggests an increase in the cases that question the environmental impacts of mining. This subset of just transition cases is likely to grow in the near future, especially in the Global South, where most transition minerals are located. Claims have recently been brought in Chile (*Regional Government of Atacama v. Ministry of Mining and Other* 2022) questioning the public participation of affected communities in the authorization of the mining project and environmental impacts of lithium mining pushed forward as part of the energy transition.<sup>21</sup>

## C. Claims against climate activists

With the backdrop of a growing social movement raising awareness about the impacts of climate change and protesting the lack of government action, the Sabin Center has also started to add to its database cases bringing criminal charges against climate activists. Such cases have so far been observed in Australia, Canada, France, New Zealand, Switzerland and the United Kingdom. In the cases that have already been decided, judges have generally taken the climate crisis into consideration in sentencing. In recent cases, protesters have argued for a reduced sentence or have attempted to avoid criminal or civil sanctions, arguing that civil disobedience is necessary given the state of the climate crisis. For example, in *Police v. Hanafin* (2020), the New Zealand District Court accepted that anthropogenic climate change and its effects are undeniable and that there is a right to freedom of expression, further noting that without activism, change may be too late. However, the judge held that activism does not necessarily mean civil disobedience, and peaceful civil disobedience cannot be condoned where it infringes the genuine existing rights of another. The activists were convicted but discharged without penalty. In *Climate Activists v. Paris Airports* (2021), activists who illegally entered the tarmac at Charles De Gaulle airport and halted airport operations were acquitted because their actions were taken in a “state of necessity” to warn of future danger, namely climate change. As civil disobedience related to climate change continues, it is likely that more similar cases will be brought.

# Conclusion

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<sup>20</sup> *Company Workers Union of Maritima & Commercial Somarco Limited and Others v. Ministry of Energy*, Supreme Court of Chile, 25.530-2021, 9 August 2021 (Chile).

<sup>21</sup> *Regional Government of Atacama v. Ministry of Mining and Other*, Court of Appeal of Copiapo, 9-2022, 30 January 2022 (Chile).

# Conclusion

This report has provided a broad overview of current trends in climate litigation, showing how litigation has become a key driver of climate change mitigation and adaptation. The number and variety of climate change cases continues to increase, as does the geographical range in which climate litigation takes place. Key trends identified in the report include:

- (i) Ongoing and increasing numbers of cases relying on human rights enshrined in international law and national constitutions to compel climate action
- (ii) Challenging the domestic enforcement (and non-enforcement) of climate-related laws and policies
- (iii) Seeking to keep fossil fuels and carbon sinks in the ground
- (iv) Claiming corporate liability and responsibility for climate harms
- (v) Advocating for greater climate disclosures and an end to greenwashing (de Freitas Netto et al. 2020) on the subject of climate change and energy transition
- (vi) Addressing failures to adapt and the impacts of adaptation

Several cases identified in the previous reports are still pending, suggesting that litigants, courts and international tribunals will be presented with many more opportunities to resolve the pressing dangers created by climate change in the coming years.

This report further identified a series of future trends in global climate litigation, indicating the direction in which it may head in the coming years. First, it is predicted that the number of cases dealing with migrants, internally displaced people and asylum seekers seeking temporary or permanent relocation from their home countries or regions, owing at least in part to climate change, will continue to grow (United Nations, Human Rights Committee 2020). Second, research continues to suggest a growing number of pre- and post-disaster cases premised on a defendant's failure to properly plan for or manage the consequences of extreme weather events. Third, as more cases are filed and some reach a conclusion, implementing courts' orders will continue to raise new challenges. Fourth, courts and litigants will increasingly be called on to address the law and science of climate attribution as both cases that seek to assign responsibility for private actors' contributions to climate change and cases that argue

for greater government action to mitigate advance and proliferate. Fifth, courts will continue to be asked to determine whether States can be held responsible for the extraterritorial dimensions of climate change. Sixth, as the impacts of climate change continue to affect Indigenous communities disproportionately, they will likely bring more cases seeking to bring about a change in climate policies or redress for climate harm. Additionally, several backlash cases will continue to be brought to curb advancements in climate change mitigation and adaptation actions, including ISDS claims, just transition litigation and cases against climate activists. Future research will integrate a gender analysis to better determine the involvement of women and girls who are often viewed as victims to the impacts of climate change as opposed to agents of change who, given the necessary resources and opportunities, are strong leaders that fight for climate justice for the benefit of all.

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