Global trends in climate change litigation: 2020 snapshot

Joana Setzer and Rebecca Byrnes

Policy report
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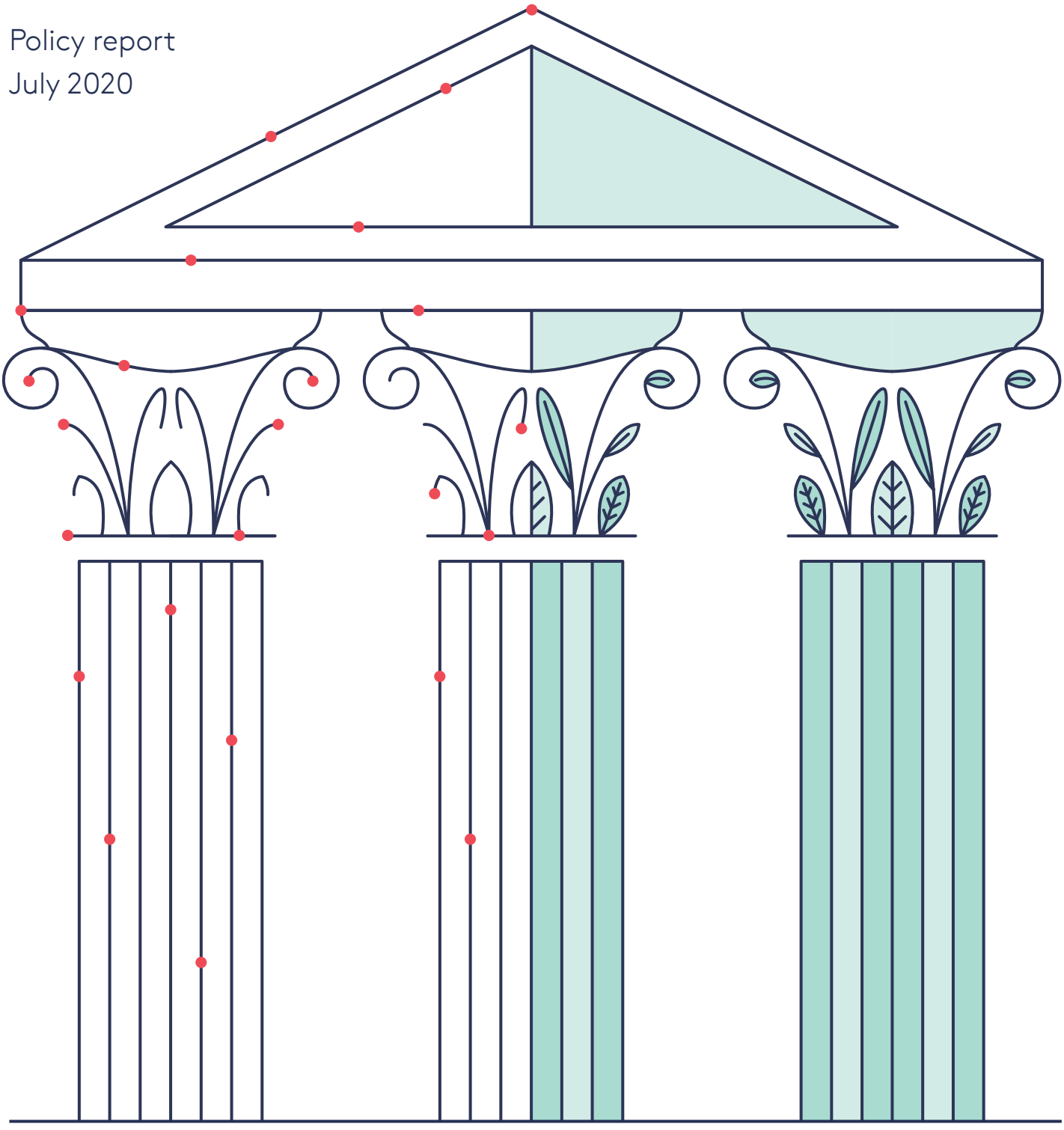

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About the authors

Joana Setzer is an Assistant Professorial Research Fellow at the Grantham Research Institute on Climate Change and the Environment.

Rebecca Byrnes is a Policy Analyst at the Grantham Research Institute on Climate Change and the Environment.

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Contents

Executive summary

Climate change litigation, or simply 'climate litigation', has been growing in importance over the past three decades as a way of either advancing or delaying effective action on climate change. This report reviews key developments around the world in climate litigation over the period May 2019 to May 2020.

A spread to new jurisdictions and some trends continuing as before

Over the period climate litigation cases were filed across six continents and include complaints made to National Contact Points for the OECD Guidelines for Multinational Enterprises, the UN Committee on the Rights of the Child, and to UN Special Rapporteurs. For cases outside the US, trends in the type of plaintiff and defendant are similar to previous years: over 80 per cent of these cases have been brought against governments, typically by corporations or individuals. There has been little change too in terms of how favourable case outcomes are to effective climate policy and how central climate change has been to the main arguments of the cases in question: climate change was at the 'centre' of the legal argument in about 41 per cent of cases (155 out of 374), and was a 'peripheral' issue in the remaining 59 per cent. For non-US cases, 58 per cent (187) of cases had outcomes favourable to climate change action, 33 per cent (106) had unfavourable outcomes, and 9 per cent (28) had no discernible likely impact on climate policy.

Important developing trends in strategies and arguments

The new cases that have been filed, and major developments in ongoing cases, over the period May 2019 to May 2020 have revealed important developing trends in litigation strategies and types of arguments adopted by litigants:

- **Human rights arguments are being used as support in an increasing number of cases**

Human rights have been important in a number of new climate cases and decisions over the past year. The ultimate success in December 2019 of the *Urgenda* case – seeking an injunction to compel the Dutch government to reduce its emissions – provides an even greater impetus for these cases.

Even where cases are unsuccessful, they might lead to indirect impacts and/or to influence potential future litigation. Two examples are the *Teitiota* case and the *Juliana* case. In the *Teitiota* case a Kiribati citizen affected by climate change was seeking asylum in New Zealand; the UN Human Rights Committee did not decide in his favour. In the *Juliana* case the US Court of Appeals dismissed the young plaintiffs' claim that the federal government was violating their rights. However, in both of these cases the decisions included statements that recognise the risks imposed by climate change, and that do not close the door on future successes in different circumstances.

- **Various strategies are being used in lawsuits against the Carbon Majors**

A variety of strategies are being used to bring lawsuits against major fossil fuel companies – known as the 'Carbon Majors' – ranging from claims of nuisance to fraud and disclosure-related lawsuits, particularly in the United States.

It can still take years before nuisance and fraud cases are decided in courts, but litigants are also using alternative strategies. One such strategy has been to take claims of deceptive 'greenwashing' marketing campaigns by Carbon Major companies to courts or to non-judicial bodies.

Activism, advocacy and COVID-19 are all impacting on litigation

In 2019 there was an escalation in the use of litigation by activists and advocacy groups, including as a part of the wave of climate protests that took place in many cities around the world. But the COVID-19 crisis of 2020 is changing every aspect of society, including litigation. While it is possible that COVID-19 will lead to a delay or decrease in new filings, the crisis could alternatively motivate litigants to find new grounds for bringing cases, linking the current health emergency to the climate emergency.

Impacts of litigation

While direct and indirect regulatory impacts can be observed among all types of climate litigation, questions about whether the outcomes of these cases actually help to address climate change in a meaningful way remain unanswered.

A handful of successful landmark cases against governments indicates the type of pro-regulatory impacts that can result from climate litigation. A clear example is the Dutch government's commitment made in response to the final decision in the *Urgenda case* (to reduce the capacity of its remaining coal-fired power stations by 75 per cent and implement a €3 billion package of measures to reduce Dutch emissions by 2020).

Regulatory challenges to permits authorising high emitting projects can also be considered successful in regulating emissions. These decisions could lead to effective mitigation, provided that the Court mandates are not overturned by ministerial action or inaction. Even in cases that are ultimately lost in courts, litigants might claim some success, for example in building narratives or in a strong dissenting judgment decision.

But litigation also implies risks, and economic costs and impacts. Direct financial impacts include legal and administrative costs, legal fees and fines and awards of damages. Indirect financial impacts include increasing premiums under liability insurance policies and potential impacts on market valuation. Event studies could try to assess the potential impact of climate litigation on stock prices of plaintiff companies.

Understanding the impacts of climate litigation will help to inform how it can be best used as a check on decision-making in the post-COVID-19 recovery.

Introduction

This is the latest in the *Trends in climate change litigation* series produced by the Grantham Research Institute.[1] This report aims to provide a synthesis of key developments in climate change litigation (or more simply, 'climate litigation') around the world over the year from May 2019 to May 2020.[2]

We highlight evolving themes and strategies, including an updated assessment of known case numbers and metrics for categorising cases. The report explores the continued and growing focus in climate cases on human rights and the different strategies used in recent litigation against major fossil fuel companies. It also offers insights and suggestions for how litigants and policymakers could measure the impacts of climate litigation. A selection of ongoing cases is used to illustrate these points.

Climate litigation has been growing in importance over the past three decades as a way of either advancing or delaying effective action on climate change: climate legal action is generally recognised to have started in the United States in the late 1980s and early 1990s. The number of cases addressing the causes and consequences of climate change, and the public interest in such litigation, has now grown to a point where litigation is considered by many as a governance mechanism for addressing climate change (Peel and Osofksy, 2015; Setzer and Vanhala, 2019).

Structure and outline of the report

This report is divided into three parts.

Part 1 outlines the most up-to-date figures from the Climate Change Laws of the World (CCLW) and the Sabin Center for Climate Change Law databases,[3] which track climate change litigation cases from around the world. There have been 26 new cases filed over the past year outside the United States and major developments in ongoing cases that reveal important trends in the litigation strategies and types of arguments adopted by litigants.

These trends are outlined in Part 2. In particular, we highlight that in some countries litigation has been blended with direct protesting, becoming part of a broader strategy of environment and climate advocacy. We then explore the importance of human rights in a number of new climate cases and decisions over the past year. We also describe in Part 2 how a variety of strategies are being used to bring lawsuits against companies that are major emitters of greenhouse gases, known as the 'Carbon Majors'.

Part 3 discusses potential impacts of litigation, a vital consideration for those relying on it as a governance tool to enhance climate action. Depending on the lawsuit and strategies employed, litigation might impact on government policy, company profits, share prices and broader public framings around climate change. However, litigation as a governance strategy is costly and risky, and it takes place alongside other political and social mobilisation efforts. Lessons learned from recent litigation trends therefore need to be situated in an understanding of broader approaches to law and social change to assess how effective it might be as a regulatory tool.

[1] See our 2019 climate litigation report (covering the May 2018 – May 2019 period) here: www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot/

[2] This report covers a 13-month period, from the start of May 2019 to the end of May 2020.

[3] https://climate-laws.org and http://climatecasechart.com

1. Understanding general trends

Total cases to date

In total 1,587 cases of climate litigation have been identified as being brought between 1986 and the end of May 2020: 1,213 cases in the United States and 374 cases in 36 other countries and eight regional or international jurisdictions. Outside the United States, the majority of cases have been brought in Australia (98 cases), the UK (62) and the EU bodies and courts (57). These data were produced mainly by the Sabin Center for Climate Change Law at Columbia University, with inputs from the Grantham Research Institute and others – see Box 1.1 on data sources below.

Cases to date in the Global South

The databases contain 37 cases of climate litigation in the Global South, of which 16 are in Asia, seven in Africa and 14 in Latin America. More than half (21) of these cases were brought in the five years between 2015 and 2019. Cases that were previously undetected continue to be identified by new and ongoing efforts (e.g. by the Asian Development Bank – ADB, and the World Commission on Environmental Law – WCEL).

New and resolved cases, May 2019–May 2020

The databases of Climate Change Laws of the World and the Sabin Center for Climate Change Law captured 26 new cases outside the US filed between May 2019 and May 2020. These cases were filed across six continents and include complaints made to National Contact Points for the OECD Guidelines for Multinational Enterprises, the UN Committee on the Rights of the Child, and to UN Special Rapporteurs (see Box 1.1).

A heterogeneous group of cases

The term 'climate [change] litigation' covers a wide variety of cases.

Some of the cases are designed to reach outcomes that go beyond the individual litigant bringing the case. These cases seek to advance climate policies, drive behavioural shifts by key actors, and/or create awareness and encourage public debate. Litigants bringing such cases make strategic decisions about who will bring the case, where and when the case will be filed, and what legal remedy will be sought. These cases are sometimes referred to as cases of 'strategic litigation' (see Ramsden and Gledhill, 2019, The Public Law Project and the European Commission on Human Rights for definitions of strategic litigation – though not specific to climate). There has been a growing interest in recent years from scholars, activists and practitioners in this type of litigation to address climate change (see Setzer and Vanhala, 2019; Peel and Osofsky, 2020).

The term climate litigation also includes civil and administrative procedures brought in the pursuit of private interests, which might not involve activist intent (Bouwer, 2018), such as litigation seeking to uphold planning approvals or to clarify reporting requirements under an emissions trading system.

While it is difficult to establish a clear distinction between strategic cases and other forms of climate litigation, it is useful to keep in mind that not all consists of legal action seeking to bring social change and/or to impact society and law beyond the individual case.

Box 1.1. Data sources

Our main source of data is the Climate Change Laws of the World (CCLW) database, an open-access, searchable database created and maintained by the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science (LSE). The database is a joint initiative with the Sabin Center for Climate Change Law at Columbia Law School, using cases and summaries from the Center's non-US Climate Litigation Database. A separate US Climate Litigation Database is maintained by the Sabin Center in collaboration with the law firm Arnold and Porter. This report focuses primarily on lessons to be drawn from the CCLW database, but supplements this by drawing on US data where appropriate.

Database coverage: At the end of May 2020 the CCLW database featured 374 court cases in 36 countries (excluding the US) and eight regional or international jurisdictions, as well as 1,872 climate laws and policies in 198 jurisdictions. The Sabin Center's database for the United States featured 1,213 climate lawsuits in the US up to the end of May 2020.

Defining 'climate change litigation': A broad definition of 'litigation' includes lawsuits brought before administrative, judicial and other investigatory bodies, in domestic and international courts and organisations, that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts (Markell and Ruhl, 2012; Burger et al., 2017). Because broader definitions present challenges for data collection, we adopt a narrower definition of climate litigation, which focuses on judicial cases and targeted adjudications involving climate change presented to administrative entities and a few international bodies. Commercial disputes, which are increasingly administered by dispute resolution bodies, are not included. In the CCLW database the case-files contain one or more of the following keywords: *climate change, global warming, global change, greenhouse gas, sea level rise*.

Data limitations: The Sabin Center and CCLW litigation databases are the largest global climate change litigation databases compiled to date, but due to limitations in data collection across all countries and languages, they may not include every climate case filed in each court around the world. The cases included in the databases are typically but not exclusively written in English, and their inclusion relies on independent and collaborative research, networks of practitioners and academics, and plaintiffs and defendants reporting the cases, as well as on news coverage and crowdsourcing. By contrast, the US Sabin Center database benefits from the assistance of commercial litigation databases in the United States. These differences limit the possibilities for making universal claims about trends in climate change litigation or comparing the US and non-US data.

Trend identification: Despite the limitations described, the databases offer a diverse and cross-cutting sample of cases covering a wide range of geographies, levels of government and types of actor, allowing observations about trends in high-profile cases which often inform and inspire new litigation efforts.

Accessing the datasets: https://climate-laws.org and http://climatecasechart.com

Table 1.1. Number of cases identified by jurisdiction, 1986 to May 2020

Argentina	1	Australia	98	Austria	2
Belgium	1	Brazil	6	Canada	22
Chile	2	Colombia	2	Czech Republic	1
Ecuador	1	Estonia	1	European Union	57
France	11	Germany	6	International Court of Justice	1
India	9	Indonesia	1	Inter-American Court and Commission on Human Rights	3
Ireland	4	Japan	3	Kenya	1
Luxembourg	1	Mexico	1	Netherlands	2
New Zealand	18	Nigeria	1	Norway	1
OECD	6	Pakistan	4	Peru	1
Philippines	2	Poland	3	South Korea	1
South Africa	4	Spain	13	Sweden	1
Switzerland	2	Uganda	1	Ukraine	2
UN Committee on the Rights of the Child	1	UN Human Rights Committee	2	UN Framework Convention on Climate Change	10
United Kingdom	62	UN Special Rapporteurs	2	United States	1,213

Geographical distribution of 1,587 cases worldwide (374 cases outside the United States)

Case characteristics, objectives and outcomes

Central or peripheral to cases

For this report, cases in the CCLW database were classified on the basis of whether climate change is a *central* or *peripheral* issue in the case. Climate change is at the 'centre' of the legal argument in about 41 per cent of cases (155 out of 374), and is a 'peripheral' issue in the remaining 59 per cent. In the latter cases, there is explicit reference to climate change, but litigants rely on other grounds to call for climate-related behaviour change, such as air pollution (e.g. *ClientEarth v. Polska Grupa Energetyczna*), protection of forests (e.g. *Vimal Bhai v. Ministry of Environment and Forests*), companies' obligations under emissions trading schemes (e.g. *INEOS Köln GmbH v. Bundesrepublik Deutschland*) or risks to coastal developments resulting from sea level rise (e.g. *Taip v. East Gippsland Shire Council*).

Incidental to cases

Cases that make no specific reference to climate but that do have practical implications for climate change mitigation or adaptation are sometimes referred to as *incidental* climate litigation and are generally not included in the climate litigation databases. Examples of incidental litigation include challenges to private injunctions which seek to constrain protestor activity in relation to fracking exploration projects, disputes relating to insurance and risk, lawsuits dealing with illegal deforestation (Setzer et al., forthcoming), and disputes over

intellectual property rights which could impact on new technologies to support climate change (Bouwer, 2018).

In developing countries climate change is often *incidental* or at most *peripheral* to the case (Peel and Lin, 2019; Setzer and Benjamin, 2019; Zhao et al., 2019).

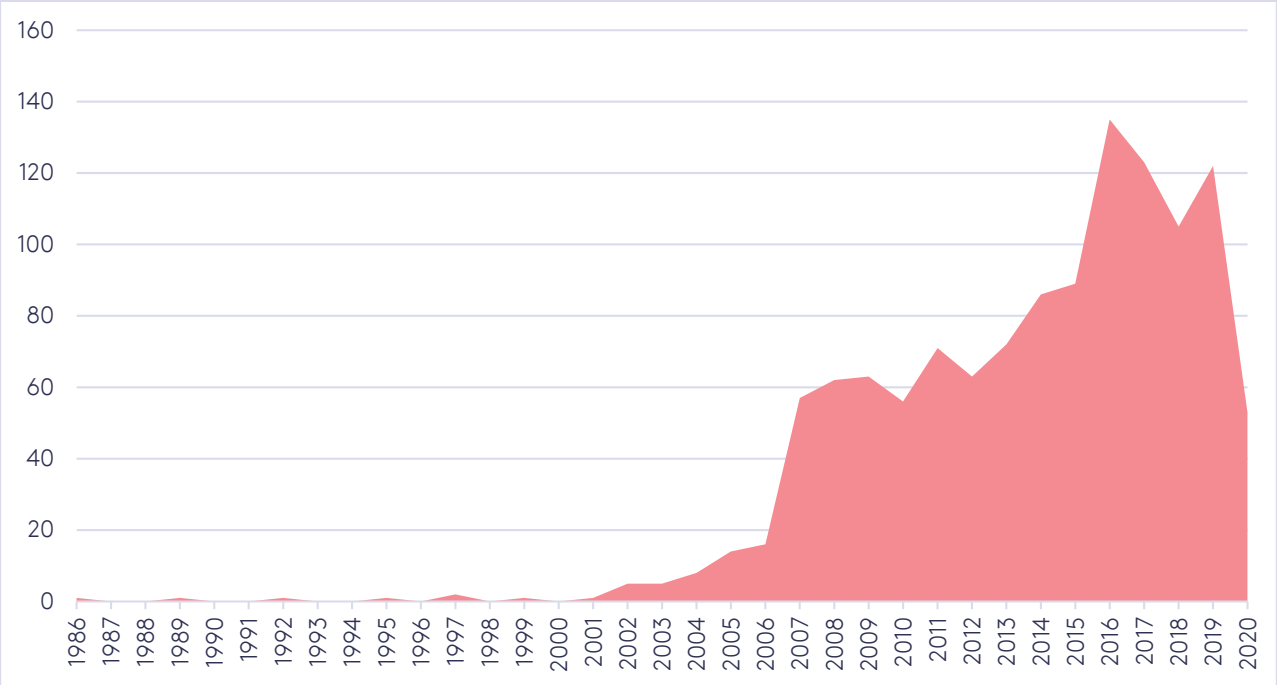
Arguably, litigation cases where climate change is incidental can also have important strategic, policy or governance implications (Bouwer, 2018). Moreover, these cases may be filed for the express purpose of addressing climate change, but litigants might opt to actively exclude issues of law or fact regarding the science of climate change, or climate change mitigation or adaptation efforts, from their argument for strategic reasons.[4]

The number of new climate litigation cases has been increasing in the United States and some other countries

The majority of climate litigation cases recorded since 1986 have occurred from the mid-2000s onwards. Early cases were spearheaded in industrialised countries – in EU and OECD member states, including the US (Figure 1.1). From the figures alone it is not possible to discern whether or not developments in international law have influenced the number of climate cases (Eskander et al., 2020). However, scholars observe that the failure of the UN climate change conference in Copenhagen in 2009 (COP15) reignited an interest in the prospects for climate litigation in some countries, and many of the cases that occurred subsequently have been led by activists seeking the courts to challenge climate inaction (Peel and Osofsky, 2015). The years following the Paris Agreement in 2015 have also seen an increase in activity in some places, both in terms of activism and in new types of climate-related cases in the courts.

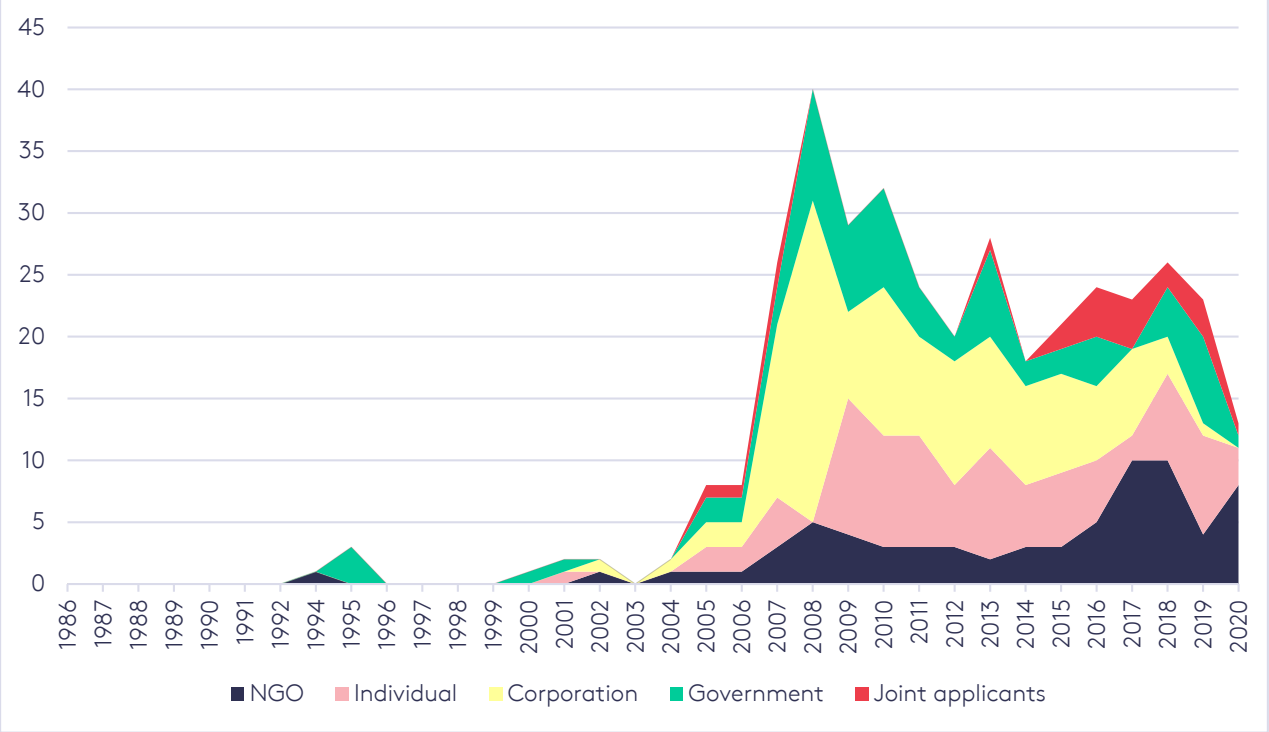
Figure 1.1. Climate change litigation, 1986–May 2020

a) Cases in the United States (all types of plaintiff)

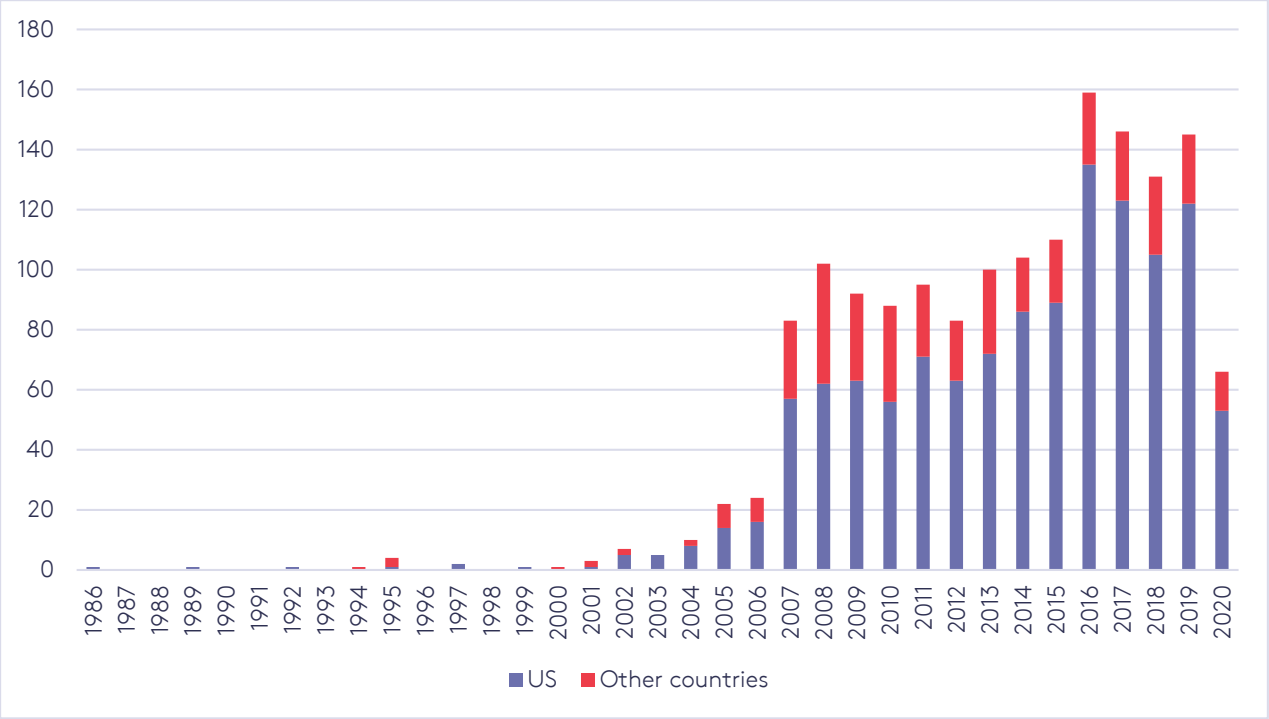


[4] For example, in *ClientEarth v Enea*, ClientEarth, an NGO and a shareholder in Enea, filed a claim against Enea seeking annulment of Enea's resolution that approved the construction of a coal-fired power plant in Poland. While ultimately the case resulted in avoided greenhouse gas emissions and raised attention of the legal responsibility of companies and their directors for managing climate-related risks, the case was grounded in corporate law and challenged the financial viability of the project.

b) Cases outside the United States, by plaintiff type, 1986–May 2020



c) Total global cases over time, United States and other countries, 1986–May 2020



Source: Authors based on CCLW and Sabin Center data

Who is bringing lawsuits and against what type of defendant?

Over the past year, cases have been brought by a variety of plaintiffs. Figure 1.2 maps cases outside the United States between 1994 and the end of May 2020 that are included in the CCLW database. There have been no major trends in the types of plaintiffs initiating cases over time.[5]

In terms of defendants, almost 75 per cent of cases have been brought against governments, typically by corporations or individuals. An analysis of US case statistics up to 2017 also showed that governments made up over 80 per cent of defendants in the US (Eskander et al., 2020, drawing on a dataset compiled by McCormick et al., 2018).

The relationship between climate-related legislation and litigation

Every country in the world now has at least one climate law or policy, as defined by CCLW, and in some jurisdictions there are well over 20 of these (see Figure 1.2 below). The number of climate laws a country has passed, however, is not a perfect indicator of actual policy implemented on the ground (Eskander et al., 2020), nor does it indicate the number of climate-related cases brought to court.

For example, in the United States, although dedicated climate change legislation remains politically challenging, more than half of the 1,200 climate-related lawsuits identified there by the Sabin Center have been brought under just four areas of legislation: the National Environmental Policy Act, the Clean Air Act, state Impact Assessment laws and wildlife protection statutes. In contrast, Brazil has 28 climate change laws, including a national Climate Act (Law No. 12,187, passed in 2009), which created a comprehensive framework for tackling climate change. Yet, as of May 2020 the country had only two cases that were predominantly grounded in climate legislation (Setzer et al., forthcoming).

While the relationship between climate legislation and litigation is still unclear (Setzer and Vanhala, 2019), the two appear to serve broadly complementary functions, however. Litigants may pursue legal action in order to compel governments to implement more ambitious policies in countries with limited or perceived-to-be inadequate climate action (e.g. *Lho'imggin et al v. Her Majesty the Queen*, filed in February 2020 by a First Nations group against the Canadian government). Meanwhile, in countries with more progressive legal or policy frameworks on climate change, these frameworks can also provide grounds for litigation, such as to fill in enforcement gaps (e.g. *Alvarez et al. v. Peru*, filed in December 2019 by seven young Peruvians against their government for its alleged failure to adequately halt deforestation in the Amazon rainforest).

Litigation complements or relates to legislation in a variety of ways across different Global South jurisdictions, (Setzer and Benjamin, 2020). For example:

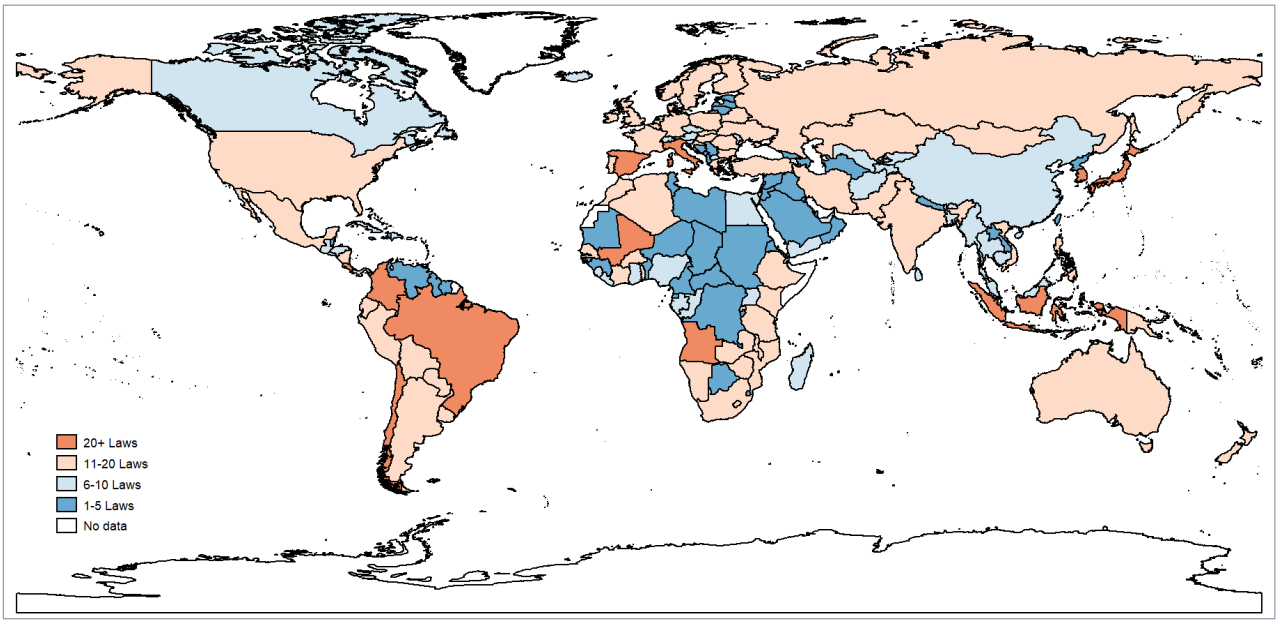
- In China, courts are acting as collaborators in the regulatory process, interpreting and engaging with strong government-led efforts to mitigate climate change (Zhao et al., 2019).[6]
- In South Africa, not only do courts enforce existing legislation, but also they establish new goals by interpreting existing legislation to require additional climate considerations (Kotzé and du Plessis, 2019).

[5] Note that in this report we count each case only once, meaning, for example, that where there are multiple individual plaintiffs this is counted as one individual as we are interested in the number of *cases* brought by and against each category, not the number of parties to each case. There are only a limited number of cases which included a combination of different categories (e.g. both individual and NGO plaintiffs).

[6] This is observed in 177 cases of incidental litigation (which are not captured in the CCLW database), consisting mainly (69 per cent) of civil actions related to contract disputes between energy enterprises and low-carbon industries. About a fifth (21 per cent) are cases related to intellectual property disputes concerning the protection and transfer of environmental and biodiversity-related technologies.

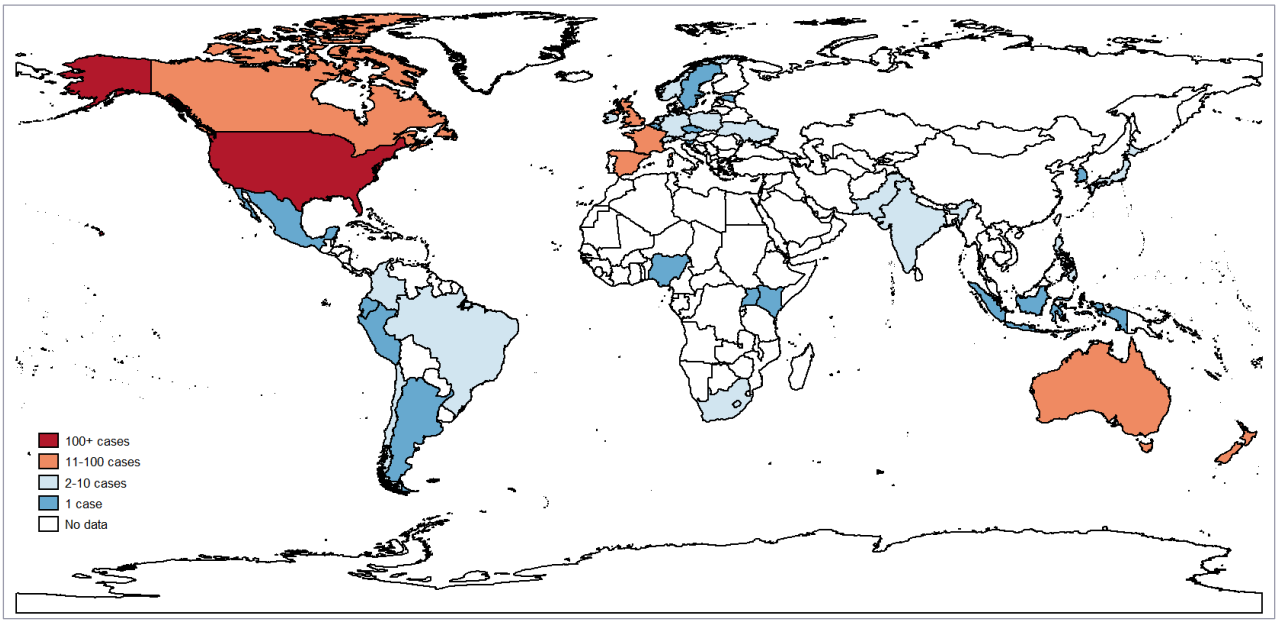
- In **India**, courts have issued orders in the areas of tourism and transport to ensure more climate-friendly outcomes (Ghosh, 2020).
- In **Pakistan**, dynamic judicial and legislative interactions exemplify how courts can advance climate action in highly vulnerable countries (Barritt and Sediti, 2019).
- In **Colombia,** courts are building a jurisprudence around 'rights of nature', declaring the Colombian Amazon to be a subject of rights (Rodríguez-Garavito, 2020a).
- In **Brazil**, despite the existence of constitutional provisions establishing a duty of care towards the environment and domestic climate change laws and policies, litigants are yet to file a climate-specific case to protect the Brazilian Amazon (Setzer et al., forthcoming).

Figure 1.3. Climate legislation (number of laws at the end of May 2020), based on CCLW data



Note: Covers 1,872 climate laws and policies in 198 jurisdictions

Figure 1.4. Climate litigation (no. of cases at the end of May 2020), based on CCLW and Sabin Center data



Note: Geographical distribution of 1,587 cases worldwide (1,213 climate lawsuits in the United States and 374 court cases in 37 countries)

The role of climate litigation in advancing or undermining climate change action

Climate change litigation is 'regulatory' in that it can be an intentional activity attempting to control or influence the behaviour of governments, corporations and individuals. The regulatory function of climate litigation has mostly been observed in developed countries (Peel and Osofsky, 2015; Fisher et al., 2017), but more recently also in developing countries (Peel and Lin, 2019; Setzer and Benjamin, 2019).

The way courts rule is particularly material in the case of strategic litigation against governments. These cases play an important supporting role in ensuring the national implementation of international emissions-reduction commitments, the alignment of national laws with the Paris Agreement and the enforcement of laws and policies relating to climate resilience. Low-profile cases can also have implications for enhancing or weakening climate policies, though these are often unacknowledged or undefined (Bouwer, 2018).

Analysis of 534 cases brought in the United States between 1990 and 2016 found that 42 per cent had favourable outcomes (Eskander et al., 2020, based on data from McCormick et al., 2018; see Box 1.2 for a definition of 'favourable' and 'unfavourable'). Cases relating to renewable energy and energy efficiency have tended to have favourable outcomes, while cases concerning coal-fired power plants have tended to have unfavourable outcomes (McCormick et al., 2018). However, this balance could change, as in the past three years the courts have largely constrained extra-legal rollbacks and other attempts by the Trump Administration to undermine climate protections in the United States (see Adler, 2019).

Box 1.2. Outcomes 'favourable' and 'unfavourable' to climate change action

In our interpretation, a 'favourable' outcome is one in which the judge ruled in favour of more effective climate regulation – e.g. by ruling against a challenge to a carbon pricing scheme on the basis of its constitutional validity (see *Saskatchewan v. Canada re Greenhouse Gas Pollution Pricing Act*), **or ruled against an outcome that would have resulted in increased greenhouse emissions** – e.g. by finding that a government had not upheld its obligation to protect forests or the natural environment (see *Sheikh Asim Farooq v. Federation of Pakistan* etc.), or that a development approval was not valid because it failed to adequately consider climate change (see *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.*).

An unfavourable outcome is one where the outcome of the case undermines climate regulation or is likely to result in greater greenhouse gas emissions – e.g. failed challenges to approvals for high-emission new developments (see *Grez et al. v. Environmental Evaluation Service of Chile*).

Note that in some cases the immediate outcome of the case could be considered unfavourable, but the ruling by the court on matters of law could have been favourable in that they might have created new rights or obligations that would result in further or more stringent climate regulation in the future. For example, in the *Teitiota Communication*, the UN Human Rights Committee rejected the argument that the applicant's particular circumstances warranted refugee status but found that states have an obligation to protect the right to life, opening a potential pathway to future individuals who face a more imminent climate threat to seek sanctuary in another country on a human rights basis (see p17 for more detail on this case).

To inform this issue, cases in the CCLW database have been analysed on the basis of whether their outcome was favourable or unfavourable, under the definitions provided in Box 1.2. Outside of the United States, judges appear more inclined to support more effective climate action. For non-US cases, of those that have been decided (and excluding cases that were settled or withdrawn) we find:

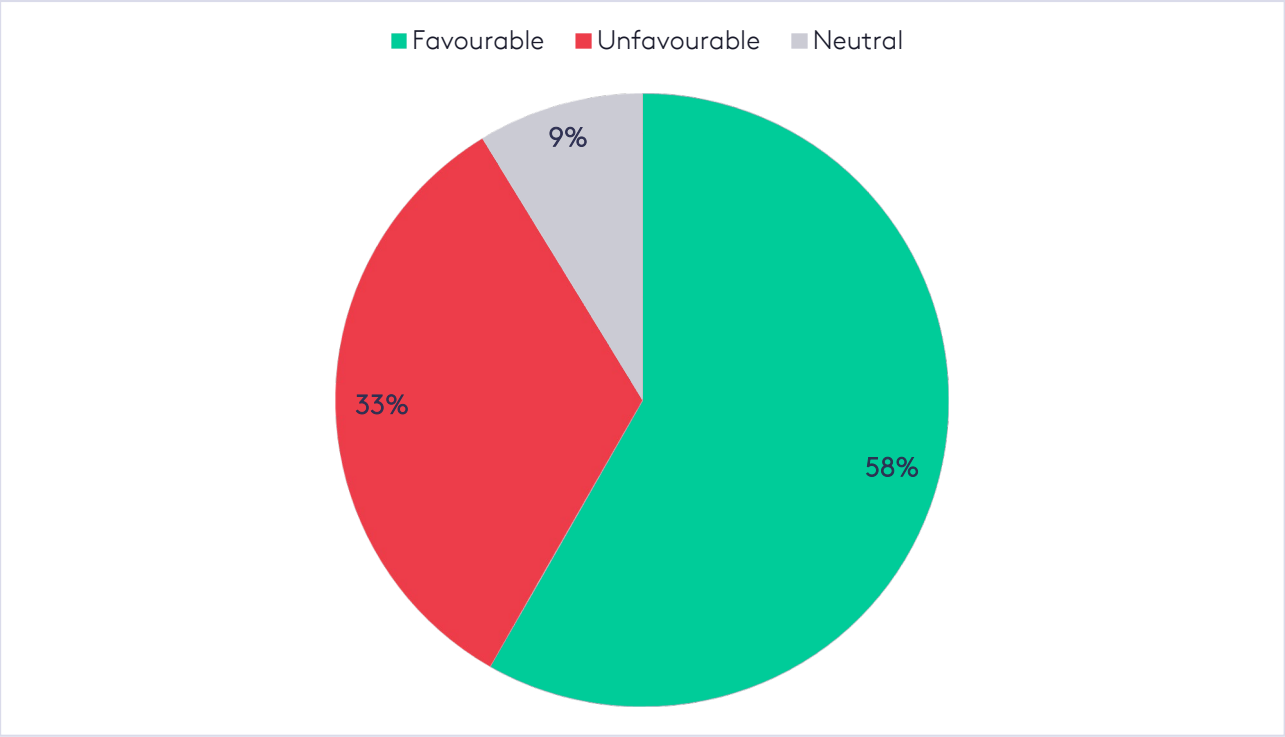
- 58 per cent (187) of cases had outcomes favourable to climate change action
- 33 per cent (106) had unfavourable outcomes

- 9 per cent (28) had no discernible likely impact on climate policy

However, even in cases that result in favourable outcomes, litigants still have to focus on effective implementation of the decision and on the avoidance of legislative or other kinds of backlash.

Questions around the regulatory impact and implementation of decisions are further discussed in Part 3 of this report.

Figure 1.4. Proportion of climate change litigation cases outside the United States with outcomes favourable and unfavourable to climate change action, April 1994 – May 2020



Source: CCLW database

2. Litigation trends, May 2019 to May 2020

COVID-19 has created an unprecedented global crisis that is changing every aspect of society, including litigation. Although 2020 has not been a typical year in any sense, we can still look back on the year to understand key developments and trends, and to consider how climate change litigation strategies might evolve in coming years.

In this section, after considering the impacts of COVID-19 on climate litigation, we highlight three aspects that we consider particularly relevant: the use of litigation as part of a protesting strategy, the continued focus on human rights, and the different strategies used in recent litigation against major private sector emitters (the so-called 'Carbon Majors').

How is COVID-19 impacting climate change litigation?

In general, the COVID-19 pandemic and its accompanying economic downturn are likely to result in an increase in some types of litigation. The insurance industry, for example, is already facing a huge surge in cases, ranging from lawsuits dealing with business losses caused by social distancing and lockdown orders to cases of life insurance (Ralph, 2020).

With respect to climate litigation, it is possible that COVID-19 will lead to a decrease in new filings and a slower pace in the determination of ongoing litigation, as attention in society shifts to more immediate health and financial matters. In many countries litigation is already being affected by an increased use of remote hearings due to court closures. Alternatively, the COVID-19 crisis could motivate litigants to find new grounds for bringing cases, linking the current health emergency to the climate emergency. The argument is already being made that economic recovery packages should focus on low-carbon work programmes (see for example Hepburn et al., 2020; Barbier, 2020).

There is also growing concern that the COVID-19 crisis is being used to roll back environmental regulations, potentially causing an increase in emissions in both the short and long term. For instance, there are reports of environmental assessments for high-emitting developments being relaxed in India (Chandrashekhar, 2020), and reduced law enforcement to combat deforestation in Brazil (Philipps, 2020), imposing additional adverse impacts on rural communities and Indigenous peoples. In this regard, litigation could have an important role in preventing further erosion of the environmental rule of law in the midst of the global pandemic. Another possible source of climate litigation could be challenges to government bailouts of the oil, airline and car industries.

Climate litigation and the 2019 climate protests

There was intense climate and environmental advocacy around the world during 2019, with school strikes and protests by Extinction Rebellion and other groups generating greater public awareness and pressuring policymakers into enacting and implementing more ambitious climate policies. In some countries, litigation and direct protest were blended, forming part of a broader strategy of environment and climate advocacy.

Extinction Rebellion, for instance, explicitly encouraged public order offences leading to arrest and prosecution as an extreme form of climate activism (Griffiths, 2019; Bouwer and Setzer, 2020). Protesters were encouraged to present particular messaging in their statements to the police and the courts, with the ultimate aim of influencing how courts address climate change more broadly.[7] Some protesters, from Extinction Rebellion and other groups, have attempted to rely on different jurisdictional variants of a defence of 'extraordinary emergency' or 'necessity', in which it

[7] See 'Legal Strategies' on Extinction Rebellion's website: https://rebellion.earth/act-now/resources/legal-info/

is argued that the protesters' actions are justified on the basis of the extraordinary circumstances and threat posed by climate change.

More than 2,800 people were arrested over two periods of mass protest in the UK, in April and October 2019, with hundreds more arrested around the world. These resulted in many prosecutions, with a range of outcomes, and many more cases still pending trial or sentencing. In August 2019, three protestors were convicted of obstructing a highway and obstructing police in London, but at least 105 other protesters had their charges dropped when the city-wide protest ban instituted by the Metropolitan Police was found to be unlawful.

In January 2020 in Switzerland, a dozen climate activists who had been charged with trespassing for occupying a Credit Suisse branch to protest against the bank's fossil fuel investments had their convictions overturned. On appeal, the judge concluded that because of the imminent danger of the climate crisis, the protesters' actions were necessary and proportional. In his ruling, Judge Philippe Colelough said: "Because of the insufficient measures taken to date in Switzerland, whether they be economic or political, the average warming will not diminish nor even stabilize, it will increase. In view of this, the tribunal considers that the imminence of danger is established...The act for which they were incriminated was a necessary and proportional means to achieve the goal they sought" (see *Credit Suisse Protesters Trial*).

Similar defences have had some success, with historic decisions made in France and in the UK. In France, a criminal court in Lyon found that climate activists had stolen portraits of the French President, Emmanuel Macron, out of necessity to call attention to France's failure to meet its climate targets (*State v. Delahalle and Goinvic*). In the UK a protester arrested after spray-painting two 'XR' symbols onto the headquarters of Cambridgeshire County Council was found not guilty on the grounds that she was acting to protect her land and home (*Trial of Angela Ditchfield*). However, most defendants over the past year have not been so lucky.

With the current COVID-19 pandemic, major climate protests are unlikely to occur for some time, limiting the number of test cases available to fully assess the outcome of protest strategies by Extinction Rebellion and others.

Continued focus on human rights

The success of a small number of high-profile climate cases has led to an uptick in litigation relying on human rights arguments over the past 12 months. This follows the trend of human rights-related cases emerging as a dominant climate litigation strategy.

Between 2015 and May 2020, litigants brought 36 lawsuits against states, as well as three lawsuits and one investigation against corporations for human rights violations related to climate change. These cases were filed in 23 national jurisdictions and two regional and three global judicial or quasi-judicial bodies (Rodríguez-Garavito, 2020a). Prior to 2015, only five rights-based climate cases had been filed in the world. Such rights-based climate cases form part of a so-called "human rights turn" in climate litigation (Peel and Osofsky, 2018).

The use of human rights norms has been particularly important in climate litigation in the Global South. Many of the developing suite of cases in the Global South have relied on a rights-based strategy to hold governments and corporations to account (Peel and Lin, 2019; Setzer and Benjamin, 2019). In some developing countries, climate litigation follows a path opened over the past 30 years by lawsuits based on constitutional rights in general and socioeconomic rights in particular (Rodríguez-Garavito, 2020b).

In this section we examine the use of human rights as a basis for cases that oblige states to reduce their emissions, or involve 'climate refugees' affected by climate change, or are brought by young people who represent current and future generations. In the following section we consider how human rights are also being used as a basis for litigation against major emitting companies.

Human rights as a basis for obliging states to reduce their emissions

Litigants using these strategies argue that to comply with human rights obligations states need to reduce greenhouse gas emissions with the highest possible level of ambition. Upon winning a sequence of court decisions, with its final appeal concluded in December 2019, the *Urgenda case* became the first in the world in which a highest level domestic court established a state's duty to reduce emissions by an absolute minimum amount (see Box 2.1).

The *Urgenda* case forms part of a rapidly evolving body of norms at the national, regional and international level regarding states' human rights obligations to urgently mitigate climate change. Since the first decision in the *Urgenda* case was issued in 2015, individuals and communities around the world have initiated proceedings against states seeking to achieve similar rulings. There are ongoing legal proceedings regarding states' human rights obligations to mitigate climate change in Ireland, France, Belgium, Sweden, Switzerland, Germany, the United States, Canada, Peru and South Korea. Arguments relied on by litigants in these cases often centre on the idea that reducing emissions with the highest possible level of ambition amounts to a due diligence standard for complying with human rights obligations and that this is informed by the notion of 'fair share' or 'common but differentiated responsibilities'.

One of the latest examples is *Kim Yujin et al. v. South Korea,* which was filed in March 2020 by 19 young people. They allege that South Korea's emissions reduction target for 2030 is inadequate to keep the rise in global average temperature to below 2°C, and that this violates their constitutional rights to life, to human dignity, to a healthy environment and to equality before the law and non-discrimination. The case has been filed in the Constitutional Court and, if successful, would potentially require the government to revise its national emissions reduction targets to bring them in line with the Paris Agreement's temperature goal. This would be similar in outcome to the *Urgenda* case. *Kim Yujin et al. v. South Korea* is the first case of its kind in East Asia and will also provide a precedent for how litigants can bring cases and how courts are able to manage and hear climate litigation during the COVID-19 era.

***Youth plaintiffs in the Kim Yujin et al. v. South Korea case**, pictured on the day they filed the lawsuit with the Constitutional Court.*

Photo credit: Youth 4 Climate

Box 2.1. Landmark ruling of the Supreme Court in the Urgenda case

Celebrating success of the Urgenda case. Photo credit: Chantal Bekker

The landmark litigation of *Urgenda v. State of the Netherlands* has been the subject of much interest and public attention since its first success in 2015, when it became the first case in the world to establish a legal duty on a government to prevent dangerous climate change. The case has been subject to two levels of appeal, but on 20 December 2019 the Supreme Court of the Netherlands confirmed the lower court's decision and followed the advice of the Procurator General that the Dutch Government is under an obligation to significantly reduce its greenhouse gas emissions in the short-term to prevent dangerous climate change (see Setzer and van Berkel, 2019 for an analysis of the Advisory Opinion).

The Supreme Court rejected all of the state's arguments, including the claim that emissions from the Netherlands are small – roughly around 0.4 per cent of global emissions – and therefore the impact of tightening its emissions reduction policies would just be a "drop in the ocean". Instead, the Supreme Court determined that "a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a further reduction of its own emissions would have very little impact on a global scale. The state is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility" (Supreme Court's summary of the decision).

Lessons for other cases

There are several aspects of the judgment that offer possible lessons for future cases (for a more detailed discussion, see Setzer and Yoshida, 2020).

Firstly, the Supreme Court affirmed the judgment of the Court of Appeal, which held that the risks of climate change fell within the scope of the European Convention on Human Rights (ECHR), particularly within Article 2 (right to life) and Article 8 (private and family life). In so doing, the Court created the basis for the argument that climate change is a human rights issue. Moreover, the Supreme Court confirmed that the absence of a definitive answer in the ECHR or in existing case law did not prevent the national court from providing an opinion on the precise scope of the state's positive obligations. Conversely, the Supreme Court accepted that the practice of the Contracting States to the ECHR, international treaties, *soft law* sources and principles of international law, such as the 'no harm' principle and the precautionary principle, offered enough common ground to answer such new questions of law.

Secondly, the decision noted that while there might be uncertainty around what climate risks will materialise in the Netherlands and when, without significant emissions reductions in the short term the combined impact of such risks is likely to lead to hundreds of thousands of victims in Western Europe in the second half of this century alone (at [2.1]). The fact that these risks would only become apparent in the future and that there is a degree of uncertainty, therefore, is not an obstacle for applying Articles 2 and 8 of the ECHR in the present, when interpreted in light of the precautionary principle (at [5.6.2]). Moreover, the Supreme Court confirmed that it is not necessary to individually identify prospective victims of climate change, but that the state owes obligations to the general population (at [5.3.1] and [5.6.2]).

Finally, the Supreme Court determined that the state was required to do its "part" to counter the risk of climate change and to reduce emissions in line with its "fair share" of global emissions reductions. This reflects the Netherlands' commitment as a developed country to take the lead in mitigating climate change under international climate change law. In establishing this duty, the Supreme Court took into account the global nature of climate change and the "individual responsibility" of states to mitigate dangerous climate change, pursuant to their common but differentiated responsibilities, as established under the United Nations Framework Convention on Climate Change (UNFCCC) and the "no harm principle" of international law.

Climate refugees[8]

Another important development in climate litigation involves the circumstances of 'climate refugees' – individuals seeking refuge or asylum having fled their home for fear of the threat of climate change impacts to their livelihoods.

Teitiota v. New Zealand is the first case to tackle the issue of rising sea levels and its implications for low-lying islands, coasts and communities presented to the UN Human Rights Committee (*UN Human Rights Committee on the Teitiota Communication*). Ioane Teitiota is a national of the Republic of Kiribati who fled to New Zealand. Following the rejection of the application that he filed for refugee status in New Zealand, and his removal to Kiribati in September 2015, Teitiota filed a Communication before the UN Human Rights Committee. Teitiota relied upon the well-established principle in international law that states have an obligation not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm. The case raises a discussion on the scope of the right to life, climate migration and how the so-called 'slow violence' of climate change is understood in that context.

In January 2020 the UN Human Rights Committee held that ultimately it was not in a position to conclude that the claimant's rights under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) were violated upon his deportation (at [9.14]). However, this finding was made without prejudice to future changes. Significantly, the Committee made important statements in the decision relating to the non-refoulement obligation of states (such as New Zealand, in this case) in relation to climate change-related harm. The first is that state parties have an obligation to respect and ensure the right to life that extends to "reasonably foreseeable" threats and life-threatening situations that result in a loss of life. The Committee makes it clear that severe environmental degradation can adversely affect an individual's wellbeing and lead to a violation of the right to life. Both sudden onset and slow onset events (such as sea level rise) could propel migration on the basis of climate change-related harm, thereby triggering the non-refoulement obligations of sending states.

The decision shows that the UN Human Rights Committee is aware of the changing nature of the effects of climate change. However, it reiterates that there is a high threshold in order to satisfy the test of 'imminence' of human rights harms in climate-vulnerable states: the Committee accepted the litigant's claims that sea level rise is likely to render Kiribati uninhabitable in 10–15 years' time, but found this is enough time for the state to take affirmative measures, including where necessary relocating its population, thus rendering New Zealand's decision to deport the claimant not inconsistent with Article 6 of the ICCPR.

The Committee's decision contrasts with the Dutch Supreme Court decision in the *Urgenda* case, which concluded that states may owe obligations to members of the general public in relation to risks of future harm posed by climate change. Nevertheless, the *Teitiota* decision comes in the context of a very limited international regulatory framework on climate migration, and states'

[8] This subsection summarises an analysis of climate refugees and climate litigation developed in Setzer and Yoshida (2020).

obligations of non-refoulement under the ICCPR, rather than their obligations with respect to climate change migration. The UNFCCC Taskforce on Displacement created an expert dialogue between relevant major UN organisations, but it has no mandate to regulate or create legal obligations with respect to climate-induced migration, and no such mandate exists within other international instruments.

In addition, this decision comes at a time where pronouncements are awaited in other high-profile cases alleging climate-related violations of human rights, such as a complaint brought before UN Human Rights Committee by a group of Torres Strait Islanders against the Australian government over its inaction on climate change. The complaint sets out how climate change is triggering life-threatening adverse impacts, including risks to food and water security, mass migration and the destruction of species and the environment.

Future generations[9]

Another observable trend in human rights and climate litigation is a proliferation of cases involving young people who are using the courts to hold governments and states to account for the effects of climate change now and for future generations. An example is the legal complaint filed on 23 September 2019 before the UN Committee on the Rights of the Child by 16 young people, including youth climate activist Greta Thunberg, against the states of Argentina, Brazil, France, Germany and Turkey (*Sacchi et al v. Argentina et al*).

There was also an important decision in the past year in the *Juliana v. United States* case. In this constitutional claim, 21 children assert that the US federal government violated their constitutional rights by causing dangerous carbon dioxide concentrations. The plaintiffs sought declaratory relief and an injunction ordering the Government to implement a plan to phase out fossil fuel emissions and draw down excess atmospheric carbon dioxide. On 17 January 2020, the US Court of Appeals for the Ninth Circuit, by majority, dismissed the case, although opinion was sharply divided. The majority found that the federal government "has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse", but the Court ultimately found against the plaintiffs on the basis of institutional competence and non-justiciability (i.e. being unsuitable for judicial determination because of its subject matter). The Court concluded that the relief was a matter for the legislature, and on 2 March 2020 attorneys for the youth plaintiffs filed a petition (rehearing *en banc*), in which they asked the full Ninth Circuit Court of Appeals to convene a new panel of 11 circuit court judges to review January's opinion.

While the decision in the *Juliana* case was disappointing for the plaintiffs, importantly the majority judgment recognises that the "record leaves little basis for denying that climate change... is approaching the 'point of no return'". The Court noted that the US government contributes to climate change not only through inaction but also affirmatively by promoting fossil fuel use. Importantly, the Court upheld the district court's finding that the causation requirement was satisfied and that the plaintiffs' injuries were caused by carbon emissions from fossil fuel production, extraction and transportation. In a strong dissent Judge Staton opened with the words: "It is as if an asteroid were barrelling toward Earth and the government decided to shut down our only defences... the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution."

Litigation against the Carbon Majors

Strategic climate change litigation continues to be used with the explicit aspiration to influence corporate behaviour in relation to climate change and/or raise public awareness about fossil fuel companies. Following a first wave of unsuccessful lawsuits against oil, gas and electric companies in the early 2000s in North American courts, over the past five years a new wave of climate

[9] This subsection also summarises an analysis developed in Setzer and Yoshida (2020).

change lawsuits have been filed against major fossil fuel companies – the so-called 'Carbon Majors' (see Figure 2.1 below).

The *Carbon Majors research* (Heede, 2014) continues to drive efforts around the world aiming to hold the fossil fuel industry to account for climate change. The research has been widely cited in climate litigation, including in (i) damage cases (e.g. the liability suits filed by state and local governments in the United States); (ii) technical disclosure claims; and (iii) human rights procedures. These different types of cases filed against major fossil fuel companies will be further discussed in this section.

Litigation against Carbon Majors also continues to benefit from advancements in *climate attribution* research. Over the past year, there has been a clear effort from legal scholars and climate scientists to make these findings more accessible to litigants. In terms of the science, there is robust evidence to establish a strong causal connection between historic and future anthropogenic greenhouse gas emissions, an increase in the global mean surface temperature and the likelihood of individual severe weather and climate-related events.

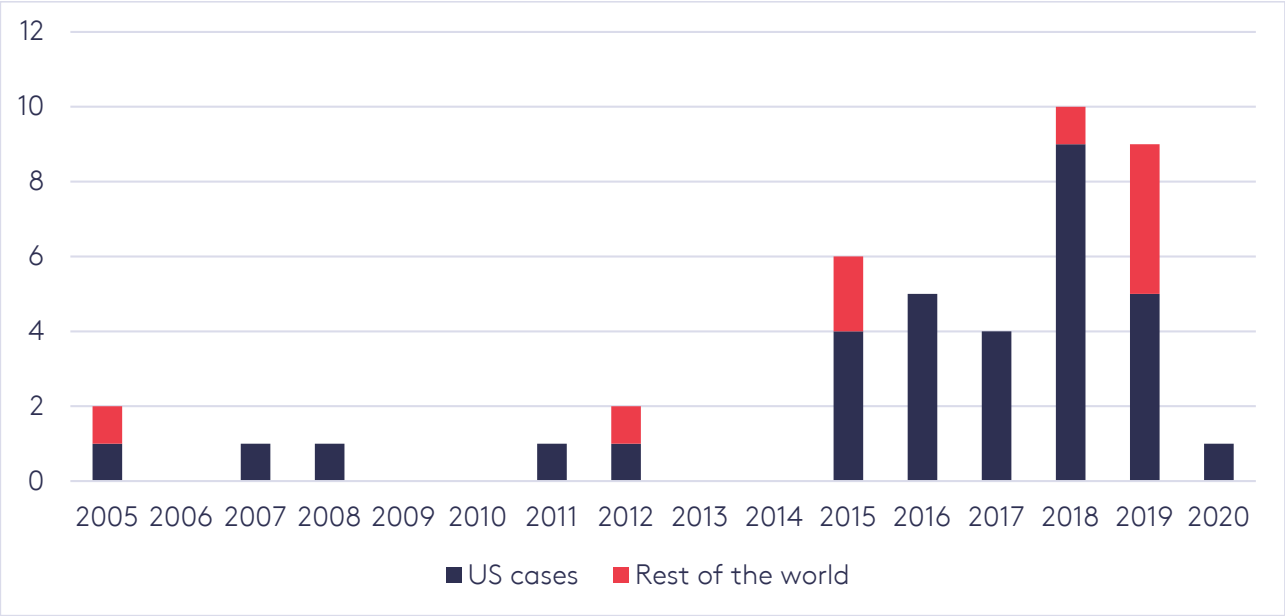
But to be used in courts, law and climate science need to be connected. In an increasing number of climate litigation cases, challenges remain when attributing specific climate-related events to global greenhouse gas emissions or specific emitters (Burger et al., 2020; Minnerop and Otto, 2020). Interdisciplinary research has now started to offer approaches that enable causal statements to be made in law about the physical reality of climate phenomena, side by side with the presentation of probabilistic evidence that defines the relationships between factors in and events caused by our changing climate (see Minnerop and Otto, 2020).

There are currently at least 40 ongoing climate cases worldwide against Carbon Major companies, the majority of which have been brought since 2005 (see Figure 2.2):

- 33 lawsuits in the United States
- Two lawsuits in France: *Friends of the Earth et al. v. Total* and *Notre Affaire à Tous and Others v. Total*
- One lawsuit in Argentina: *Mapuche Confederation of Neuquén v. YPF et al.*
- One lawsuit in Germany: *Lliuya v. RWE*
- One lawsuit in the Netherlands: *Milieudefensie et al. v. Royal Dutch Shell plc.*
- One lawsuit in Nigeria: *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd et al.*
- One inquiry in the Philippines: *Carbon Majors Inquiry, Human Rights Commission*
- One lawsuit and one complaint in the United Kingdom: *Deutsche Bank AG v. Total Global Steel Ltd,* and *Complaint against BP in respect of violations of the OECD Guidelines.*

Climate litigation cases are filed against Carbon Majors on a variety of grounds: liability suits seeking damages triggered by climate change, claims that companies have defrauded shareholders and misrepresented the impacts of climate change on their business, greenwashing (misleading advertisement) claims, claims related to inadequate environmental assessment of projects, and claims dealing with the violation of human rights obligations.

Figure 2.2. Numbers of cases against the Carbon Majors, January 2005–May 2020



Source: Authors based on CCLW and Sabin Center data

Cases seeking damages for climate change

Several high-profile cases against Carbon Majors are sought in tort, for instance public nuisance, private nuisance and negligence. The premise of such cases is that Carbon Majors have contributed a significant amount to the greenhouse gases that cause climate change and that they understood the consequences of burning fossil fuels and yet continued to do so, and therefore should be held liable for the consequent damages (Sher, 2020). Some litigants argue that Carbon Major corporations took actions to confound or mislead the public about climate science (Supran and Oreskes, 2017; Marjanac and Patton, 2018). These cases typically rely on tort law and advancements in climate science, particularly climate attribution. Notably, some of these lawsuits focus not on the defendant's own emissions, but rather on the sale of the fossil fuels they extract to those who will eventually burn them (Varvastian and Kalunga, 2020).

Liability cases against major emitters include *Lliuya v. RWE AG,* the case brought in Germany by a Peruvian farmer against RWE, the German electric utilities company, and the 13 lawsuits brought in the United States by sub-national governments – cities, counties and one state – against a number of Carbon Major companies.

Over the past year the case against RWE has remained in the evidentiary phase, with the Higher Regional Court of Hamm awaiting the State of Peru to authorise an inspection of the premises that are the subject of the lawsuit. Under German procedural law, this means that the Hamm court has accepted that the case is plausible, and its decision will depend on the scientific evidence provided.

Some important developments have taken place in the US sub-national government cases over the past year. These cases deal with an alleged nuisance and product liability arising from the role of fossil fuel products in global warming. In *Rhode Island v. Chevron Corp* and *Mayor and City Council of Baltimore v. BP* the plaintiffs successfully argued that the case should be heard by the state court. Following the decision, the defendants appealed to the US Supreme Court, though it is not clear if it will accept the case. Similarly, in May 2020 the US Court of Appeals for the Ninth Circuit allowed San Francisco, Oakland, San Mateo County, and five other cities and counties to pursue their lawsuits in state court. In 12 of the 13 cases, the cities and counties argue that the cases belong in state court as they raise classic local-level concerns, such as the costs of local

infrastructure damage linked to sea level rise.[10] The companies, in turn, countered that climate change is a global issue, putting the litigation beyond the jurisdiction of state courts, which could limit the cities' chances of success.

Climate risk, fraud and disclosure

In addition to cases that focus on the impacts of past emissions, litigants have pursued changes in current and future corporate behaviour. More cases of climate litigation affecting the financial sector were filed last year than in any previous year (Solana, 2019). Some cases arose from financial investments in the fossil fuel industry (see *Harvard Climate Justice Coalition and Others v. Harvard Corporation and Others*), and from shareholders' claims against banks, pension funds and investment funds for failing to incorporate climate risk into their decision-making and for failing to disclose climate risk to their beneficiaries (see *Mark McVeigh v. Retail Employees Superannuation Pty Ltd*). Such cases are brought as a way to force these institutions to make changes to their business and investment models in the face of altered risk.

Several lawsuits have also asserted that these companies are misleading consumers about the central role their products play in causing climate change and/or intentionally misleading investors about material climate-driven risks to its business. One of these cases – *State of New York v. Exxon Mobil Corporation* – was recently closed. The New York state judge handed Exxon a victory in the civil case brought by the state's Attorney General, who had argued that the company had engaged in fraud through its statements about how it accounted for the costs of climate change regulation. The case started in 2015, with a four-year investigation that led ultimately to a lawsuit alleging that Exxon's publicly disclosed projections of climate change-related costs were inconsistent with its internal projections and were therefore fraudulent. The court held that the majority of investment decisions are not based on climate change cost assumptions and therefore the Attorney General had not been able to prove material misrepresentation. However, the Court was careful to note that its decision did not excuse Exxon from any responsibility it may have for causing climate change as the case related only to issues of fraud and not to climate change more broadly.

In October 2019, before the New York Exxon ruling but after a similar investigation, the Massachusetts Attorney General also filed a claim against Exxon for failing to disclose its climate change-related business risks (*Commonwealth v. Exxon Mobil Corp.*). The case resembles New York's case in some aspects, but relies on Massachusetts state's laws, and a broader ambit of accusations concerning fraud and advertising. In May 2020 the Attorney General amended the complaint to highlight that the COVID-19 pandemic gives a 'preview' of how shocks to the economy, including sudden drops in fossil fuel demand, have potentially dire consequences for companies like Exxon and their investors, but that Exxon continues to fail to disclose to investors the systemic financial risks from climate change nonetheless.

In a more recent trend, lawsuits have been launched against Carbon Major companies for inconsistencies between discourse and action. In *Milieudefensie et al. v. Royal Dutch Shell* the plaintiffs claim that Shell committed to support the Paris Agreement and at the same time continued to lobby against climate policy and to invest in oil and gas extraction.

One modality of this discrepancy, sometimes referred to as 'greenwashing', manifests when products, services or advertising campaigns mislead consumers about their overall environmental performance or benefits. In December 2019, the environmental law firm/NGO ClientEarth filed a *Complaint against BP* to the UK Contact Point under the OECD Guidelines for Multinational Enterprises. The Complaint alleged that a BP advertising campaign had misrepresented the scale of BP's low-carbon activities, provided inaccurate information about the emissions savings from its natural gas activities, and overemphasised the importance and desirability of increasing primary energy demand. The complaint did not proceed due to BP ending its ad campaign.

[10] The exception is *City of New York v. BP p.l.c.*, which was filed before a federal court.

Nevertheless, the UK Contact Point analysed the filing and found that the complaint was material and substantiated. Another case of climate-related 'greenwashing' was filed against Exxon before the D.C. Superior Court in May 2020. In the lawsuit *Beyond Pesticides v. Exxon Mobil Corp.*, the NGO Beyond Pesticides claims that Exxon is using false and deceptive marketing and misrepresenting its investments in clean energy, therefore violating the Consumer Protection Act.

Human rights as a basis for Carbon Majors litigation

While climate litigation against the Carbon Majors has largely been argued on the basis of tort law, plaintiffs have started to argue that corporations hold specific human rights responsibilities in this connection. However, private law is an area where human rights law is not clear-cut (Savaresi and Auz, 2019), unlike states' duties to protect (as discussed above). The so-called business and human rights regime is only specified in *soft law* instruments, such as the UN Guiding Principles on Business and Human Rights.

The first climate case claiming that fossil fuel companies' activities constitute a violation of human rights was the inquiry initiated by the Human Rights Commission of the Philippines, a petition filed by Greenpeace Southeast Asia and Philippines in 2015. In December 2019, at an event held during the UN climate negotiations (COP25), the Human Rights Commission anticipated the result of the investigation – that Carbon Major companies could be found legally and morally liable for human rights violations arising from climate change. The final report and recommendations have not yet been published.

Litigants have also been trying to expand strategies for Carbon Major litigation based on the concepts of duty of care and duty of vigilance. For example, in *Notre Affaire à Tous and Others v. Total*, an alliance of French NGOs and local governments filed a complaint against oil major Total. The complaint is based on the 2017 French Law of Vigilance, which requires a company to produce a "plan of vigilance" that identifies and seeks to mitigate risks to human rights, fundamental freedoms, the environment, and public health that could result directly or indirectly from the operations of the company and of the companies it controls. The plaintiffs sought a court order forcing Total to issue a new vigilance plan that considered the risks related to global warming beyond 1.5°C, Total's contributions to those risks, and a plan aligning the company's activities with a greenhouse gas emissions reduction pathway compatible with limiting warming to 1.5°C. Although the complaint was dismissed, with the court concluding that the case should have been brought before a commercial court, the case could inspire other similar legal actions aiming to hold Carbon Major corporations to higher standards of climate responsibility.

3. Litigation strategy: understanding the potential impacts

As climate change litigation is increasingly seen as a tool for climate governance, it is important for potential litigators to understand the possible regulatory impact that it can have in order to assess its resonance in different circumstances.

Climate change litigation can have *direct* and/or *indirect* regulatory impacts (Peel and Osofsky, 2015):

- *Direct regulatory impacts* occur where formal legal change results from the litigation. This may be manifested through targeted rules, policies or decision-making procedures that are mandated by a judgment or arise out of the legal interpretation developed by the court. Direct regulatory impacts will depend on litigants having access to justice and overcoming technical legal hurdles including standing, costs and separation-of-powers.
- *Indirect regulatory impacts* are diffuse and describe pathways flowing from litigation that arise due to the incentives that judgments provide for behavioural change by governmental and non-governmental actors. Indirect regulatory impacts include increased sensitisation of legal institutions to the nature of climate change, increased public awareness of climate change and its impacts, and increased perception of 'litigation risk' on the part of governments and/or corporate actors.

While direct and indirect regulatory impacts can be observed among all types of climate litigation, questions about whether the outcomes of these cases actually help to address climate change in a meaningful way as yet remain unanswered (Bouwer, 2018; Setzer and Vanhala 2019).

Assessing the significance of climate change litigation involves questions of how to define impact; which evidence sources to consider; and the relevant timeframe for assessment (Setzer and Vanhala, 2019). Timeframe is particularly important given that legal cases may take several years to journey through the courts and the full effects may be manifested much later down the line. At the same time, an evaluation of the effectiveness and impacts of climate litigation does not end with the result in the courts; a consideration of what cases or strategies work must include an understanding that a win or loss in litigation may have implications that are complex and difficult to understand (Bouwer, 2020). Moreover, litigation strategies do not take place in isolation from other political and social mobilisation efforts. Socio-legal research suggests that litigation strategies need to be combined with other strategies, such as policy advocacy and public campaigns (Cummings and Rhode, 2009). As well as qualitative assessments of impacts, it is important to add a quantitative assessment of the economic costs and impacts of climate litigation (Setzer, 2020). Research on the financial costs of litigation is only starting to produce results.

Ways in which litigation can impact governments

Strategic litigation against governments has varied aims. Some cases seek increased ambition, e.g. initiating climate change mitigation measures or challenging existing government emissions reduction measures. Some seek the enforcement of existing legislation, e.g. national climate change laws or the implementation of countries' international emissions-reduction commitments, as well as aligning national laws with the Paris Agreement's targets. Others focus on challenging environmental assessment and permitting decisions, e.g. requiring that administrative decision-makers consider climate change impacts in the approval of large-scale projects.

A handful of successful landmark cases indicates the type of pro-regulatory impacts that can result from climate litigation. The 2007 landmark judgment of the US Supreme Court in *Massachusetts v. EPA* established a regulatory mandate for measures to control greenhouse gas emissions in the United States (Fisher, 2013). The decision was later used by the government to justify the regulation of motor vehicle and power plant emissions. In Pakistan, the 2015 ruling in *Ashgar Leghari v. Federation of Pakistan* led to the establishment of a joint expert–government Climate Change Commission to effectively implement the National Climate Change Policy (Setzer and Benjamin, 2019).

More recently, following the Supreme Court decision in *Urgenda v. State of the Netherlands* in April 2020, the Dutch government announced its plan to comply with the ruling. The plan includes reducing the capacity of its remaining coal-fired power stations by 75 per cent and implementing a €3 billion package of measures to reduce Dutch emissions by 2020. Most of these actions were taken from the '54 Climate Solutions Plan' submitted by Urgenda.[11] The case also motivated a wave of climate change litigation across the world (see Box 2.1).

Yet many attempts to reproduce these landmark cases in other jurisdictions have been unsuccessful (Bouwer 2020). For example, in *Armando Ferrão Carvalho and Others v. The European Parliament and the Council* the court dismissed the case on justiciability grounds, finding that the plaintiffs could not bring the case since they are not sufficiently and directly affected by these policies (an appeal for this case is pending). In *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others* the Swiss Federal Court dismissed the case based on the assertion that the protection of fundamental rights requested by the appellants cannot be claimed until the Paris Agreement's long-term temperature goal is exceeded.[12]

At the same time, there are regulatory challenges that can be considered successful in regulating emissions. Many of the challenges to permits authorising high-emitting projects fall into this category. For instance:

- In a recent decision of the UK Court of Appeal in *Plan B Earth v. Secretary of State for Transport*, the court concluded that the Government needed to consider the Paris Agreement goals in its policy framework for the expansion of Heathrow Airport. The court concluded that the process was invalid and therefore had to be redone.
- In the *Save Lamu* decision, Kenya's National Environmental Tribunal set aside the issuance of a licence for the construction of the Lamu coal-fired power plant, which would be the first coal-fired power plant in Kenya. The Tribunal ordered the developers to present a new Environmental Impact Assessment (EIA) which, among other legislation, considered the Kenyan 2016 Climate Change Act and the 2019 Energy Act 2019.
- In *Gloucester Resources Limited v. Minister for Planning*, the Land and Environment Court of New South Wales, Australia, upheld the Government's denial of the application for the Rocky Hill Coal Project, finding that its negative impacts (including climate change impacts), would outweigh the economic and other public benefits.
- Finally, in the *Earthlife decision* in South Africa, the High Court in Pretoria concluded that climate change is a relevant consideration for the environmental review of a coal-fired power plant (the Thabametsi Project).

These decisions could lead to effective mitigation, provided that the Court mandates are not overturned by ministerial action or inaction, as happened in South Africa (Humby, 2018) and

[11] Available at www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan/

[12] At the time of writing the plaintiffs' board was yet to decide whether to appeal to the European Court of Human Rights (www.greenpeace.org/international/press-release/43390/swiss-federal-court-human-rights-climate-crisis-health/).

Colombia (Rodríguez-Garavito, 2020a), or are reversed via legislative reform, as was attempted following the *Gloucester* decision in Australia (Bouwer and Setzer, 2020).

But even in cases that are ultimately lost in courts, litigants might claim some success. This can be found in building narratives to fight climate change (Hilson, 2019; Nosek, 2018; also see Bouwer, 2020), in a strong dissenting judgment decision, in a potential precedent set for future cases with a different sets of facts, or simply in how the case contributed to the engagement of certain groups in society (see, for example the *Juliana* and *Teitiota* cases described above).

Ways in which litigation can impact companies

An assessment of the economic impacts of litigation also involves measuring both direct and indirect impacts.

Direct impacts

Direct financial impacts are easier to calculate. As with other types of litigation, for the defendants direct costs usually include legal and administrative costs, legal fees and fines and awards of damages. These financial impacts can occur at a pre-filing stage, during the legal proceeding itself, and after the final judgment, award or decision (Solana, 2020). The exponential increase in harmful climate impacts globally means that Carbon Major corporations may be liable to pay billions of dollars' worth of damages for existing as well as future climate impacts, and not all climate change damage is covered by insurers (Ganguly et al, 2018).

Indirect impacts

Litigation has indirect financial impacts too, and these costs are harder to measure than the direct impacts. They include increasing premiums under liability insurance policies, increasing capital costs, and impacts on market valuation (Solana, 2020). Another indirect impact of strategic litigation is that it can affect the market valuation of listed companies. Indirect economic impacts resulting from climate litigation are still speculative (Setzer 2020), but in theory investors may react to the direct cost of the lawsuit and/or perceive that climate cases could undermine companies' reputation, and they may try to anticipate potential reputational losses by selling their shares. In addition, investors may react if they expect an increase in climate litigation against the entity and try to anticipate potential costs by selling their shares in it.

Impacts on stock prices

The impact of litigation on stock prices is measured through *event studies*. The event study methodology has been widely used to examine shareholder wealth consequences of different types of lawsuits against a range of corporations. Event studies assessing the impacts of litigation have been undertaken for tobacco, asbestos and environmental litigation in the United States. These studies paint a picture of how a group of industries have been shaped by a wave of lawsuits.

Event studies have not yet been carried out to assess the eventual impact of climate litigation against major oil companies. Once the outcomes are known, depending on the findings, event studies of the effects of climate litigation on share prices could help litigants to decide what strategies to use and raise companies' awareness of the potential costs of losing.

Previous event studies suggest that strategic litigation can impose detrimental financial impacts on share prices of the industries against which cases are brought. These financial impacts were, in the tobacco and asbestos cases, exacerbated by additional suits or disclosure of internal documents tracing a pattern of concealment and misrepresentation (Rabin, 1992). The impact of disclosure has also been particularly severe, as it might reveal greenwashing, which in turn is found to lead to additional litigation, losses in reputation and consumer trust, and corresponding losses in market share (Mitchell and Ramey, 2010). The law and finance literature suggests that litigation risk and actual litigation can have significant long-lasting effects on the defendant

company, its executives and directors, with further ramifications for corporate activities, policies, behaviours and outcomes (see Arena and Ferris, 2017).

Impacts on the Carbon Majors

The climate lawsuits filed against companies that are major emitters of greenhouse gases have already imposed significant direct costs on both plaintiffs and defendants. An assessment of indirect costs incurred by Carbon Major companies is needed to verify if, in addition to the direct costs, these companies are experiencing drops in share values that are significant enough to drive shifts in their policies and behaviour. Such assessment is not easy to do and has become particularly challenging now that the COVID-19 pandemic has reduced demand for oil, leading to a drop in oil prices. Nevertheless, developing an understanding of the costs and impacts of climate litigation is still crucial, not only within academic circles, but also for the legal professionals, claimants, defendants, funders and individuals that are involved in or affected by the outcomes of these cases. The indirect impacts of climate litigation against Carbon Major corporations constitute one piece of a larger puzzle that needs to be put together when considering if and to what extent litigation can operate as a governance tool capable of driving change in corporate policies and behaviours.

Conclusion

The number of climate change lawsuits has been increasing in many countries. Litigation is spreading across the world, with at least 37 countries and eight regional and international jurisdictions now having experienced at least one climate lawsuit. Outside of the United States, climate litigation is more likely than not to lead to favourable outcomes for climate policy.

Unlike legislation, litigation as a policy tool is necessarily reactive and undertaken on a case-by-case basis. Further, use of the courts to address climate change faces many well-known hurdles, including barriers to accessing justice, difficulties in dealing with scientific evidence, and the conservatism of many courts when confronted with contentious policy issues. There are also questions around the efficiency and effectiveness of enforcing judgments. All of these factors need to be considered when determining whether or not litigation is an appropriate pathway to achieving action on climate change.

Finally, it is likely that after the COVID-19 pandemic, future reviews of climate litigation are likely to reflect stark changes in both the types of new cases being brought, and the practicalities of hearing cases in a socially distant world. Yet, climate litigation may remain as important as ever, with economic recovery packages from the pandemic presenting the opportunity to completely overhaul political, economic and social systems, and in so doing, having the potential to be either extremely harmful or extremely beneficial for the climate. Understanding the impacts of climate litigation will help to inform how it can be best used to hold governments and companies to account about their efforts to ensure a safer and more sustainable world after the COVID-19 pandemic.

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