

Global trends in climate change litigation: 2021 snapshot

Joana Setzer and Catherine Higham

Policy report

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This policy report is intended to inform decision-makers in the public, private and third sectors. It has been reviewed by internal and external referees before publication. The views expressed in this report represent those of the authors and do not necessarily represent those of the host institutions or funders.

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Key messages

- Climate change litigation continues to grow in importance as a way of either advancing or delaying effective action on climate change.
- Globally, the cumulative number of climate change-related cases has more than doubled since 2015. Just over 800 cases were filed between 1986 and 2014, while over 1,000 cases have been brought in the last six years.
- The number of 'strategic' cases is dramatically on the rise. These are cases that aim to bring about some broader societal shift.
- Not all strategic litigation is aligned with climate goals. However, not all strategic cases that are not aligned with climate goals are motivated by an intention to prevent climate action.
- Litigation that is aligned with climate goals is on balance seeing success and there has been a run of important wins in the last 12 months, such as the *Milieudefensie v. Shell* case.
- The number of cases challenging government inaction or lack of ambition in climate goals and commitments continues to grow, with 37 'systemic mitigation' cases identified around the world.
- Cases are targeting a wider variety of private sector and financial actors and there is more diversity in the arguments being used, incorporating, for example, themes of greenwashing and fiduciary duty. Businesses need to be aware of litigation risk.
- Three areas to watch in the future are value chain litigation, cases of government support to the fossil fuel industry (e.g. through subsidies or tax relief), and cases focused on the distribution of the burdens associated with action, which may be classed as 'just transition' cases.

Summary

This report reviews key global developments in climate litigation over the period May 2020 to May 2021. The primary source for the report is the *Climate Change Laws of the World (CCLW) database*, maintained by the Grantham Research Institute on Climate Change and the Environment, which includes cases filed before courts in 39 countries and 13 international or regional courts or tribunals. This data has been supplemented by the *United States Climate Litigation Database*, maintained by the Sabin Center for Climate Change Law, to provide aggregated global figures.

Overall observations and trends

- The databases contained 1,841¹ ongoing or concluded cases of climate change litigation from around the world, as of May 2021. Of these, 1,387 were filed before courts in the United States, while the remaining 454 were filed before courts in 39 other countries and 13 international or regional courts and tribunals (including the courts of the European Union).
- Cases were filed for the first time in Guyana and Taiwan, as well as the East African Court of Human Rights and the European Court of Human Rights.
- While the overwhelming majority of cases identified continue to be cases from the Global North, the number of climate litigation cases in the Global South continues to grow. There are at least 58 cases in 18 Global South jurisdictions.²
- Most cases have been brought against governments, typically by corporations, non-governmental organisations (NGOs) and individuals.
- The number of ‘strategic’ cases is dramatically on the rise, suggesting that climate litigation as an activist strategy is becoming more popular than ever. A small but significant number of these strategic cases are targeted at corporations.
- Litigation that may weaken or undermine mitigation or adaptation efforts is also a growing phenomenon. This may include cases that have an intentional goal of opposing climate action, or cases that may not have such opposition as their main objective but may nonetheless result in delays or rollbacks of climate action or policies.
- Some of these cases may challenge the way in which climate action is carried out or its impact on the enjoyment of human rights, and can be seen as part of a new wave of ‘just transition’ litigation.
- A quantitative review of the outcomes of all decided cases in the CCLW database found that 58% of cases (215) had outcomes favourable to climate change action, 32% (118) had unfavourable outcomes, and 10% (36) had no discernible likely impact on climate policy.
- Beyond the numbers, an unprecedented number of key judgments with potentially far-reaching impacts were issued in the past 12 months, including cases decided by the apex courts of Ireland, France, Germany and Pakistan.

¹ 1,006 of the cases have been filed since 2015 and 834 were filed between 1986 and 2014. One case has an unknown filing date, hence the total of 1,841 is one more than the sum of these two figures.

² The distinction between the terms ‘Global South’ and ‘Global North’, terms favoured by many scholars and policymakers, is based on economic inequalities, but crucially for this report it must be noted that the ‘Global South’ is not a homogeneous group of countries, and that legal development and legal capacity may vary from country to country.

Trends in strategies

A number of trends in claimants' grounds of argument can also be identified. There is also significant overlap between these categories, with many cases spanning more than one.

Compliance with climate commitments

- Climate litigation has become an instrument used to enforce or enhance climate commitments made by governments. We identified 68 cases challenging the adequacy of climate action that concerned direct acts or omissions by government, 37 of which can be described as *Urgenda*³-style 'systemic mitigation' cases. In addition, we found 25 cases focused on challenging government authorisation for third party activities. (This part of the analysis excludes the United States.⁴)
- The most common grounds of argument were based in constitutional or administrative law. These grounds were identified in 69 of the 93 cases analysed. Human rights arguments and reliance on international obligations were identified in 48 and 29 cases, respectively. Only seven of these cases relied explicitly on tort law.
- We identified a related group of 13 cases that may undermine government action taken to meet climate commitments or obligations. These cases involve either express challenges to the introduction of climate regulations, challenges to the permitting decisions where fossil-fuel-intensive projects have been denied or delayed on climate grounds, or claims for compensation under international investment agreements.

Constitutional and human rights cases

- The use of human rights arguments in climate cases continues to rise. Over 100 (112) human rights cases have now been identified globally, including in the US, with 29 of these cases filed in 2020 and a further five up to May 2021.
- The majority (93) of these cases have been brought against governments and a small but significant minority (16) brought against companies.
- Positive judgments have been delivered in 25 of these cases and negative judgments in 32 (with other cases pending or settled).

Corporate and financial market cases

- Cases against private parties continue to be brought and the arguments and strategies continue to develop.
- Some seek to establish *corporate liability* and seek billions of dollars in damages to pay for infrastructure investments for climate adaptation.
- But an increasing number of claims focus on *financial risks*, *fiduciary duties*, and *corporate due diligence*, which directly affect not only fossil fuel and cement companies, but also banks, pension funds, asset managers, insurers and major retailers, among others.
- Examples include claims raising issues around *deliberate disinformation* (e.g. 'greenwashing' cases), *failure to disclose and manage climate change risk*, cases seeking the recognition of *corporate human rights responsibilities* (e.g. corporate duty of care and the alignment of major emitters' activities with climate change targets), and cases that challenge *specific projects or developments* (e.g. carbon-intensive projects or technologies).

³ A Dutch environmental group, the Urgenda Foundation, and 900 Dutch citizens sued the Dutch government to require it to do more to prevent global climate change and the court in the Hague ordered the state to limit greenhouse gas emissions to 25% below 1990 levels by 2020. This landmark case may be considered almost as significant for the work done outside the courtroom as for the decisions taken within it.

⁴ See Appendix 2 for more detail.

- Cases against governments, including a small but growing number of cases against financial government institutions, may also impact the private sector.

Adaptation-focused cases

- Although cases concerning climate change adaptation remain less common than those concerning mitigation, over 180 cases globally touch on the issue of adaptation.
- Of these, 100 were filed in the US and 61 were brought before the Australian courts, often relating to the application of principles and standards relating to climate change adaptation in planning and environmental impact assessments.

Future trends

We expect that climate change litigation will continue to grow, reflecting the increasing urgency with which the climate crisis is viewed by the general public. We also expect the range of claims and defendants to continue to diversify, reflecting an increased understanding of the role that multiple actors will need to play in the transition to a net-zero global economy. In particular, it is likely that more litigation will be brought against financial market actors.

Also anticipated is a continued rise in litigation against governments and major emitters that fail to adopt serious long-term strategies underpinned by concrete plans and short-term emissions reduction targets (including for acts and omissions up and down their value chains). Entities that act inconsistently with commitments and targets, or that mislead the public and interested parties about their products and actions, are also likely to continue to face increased volumes of litigation.

Introduction

This is the Grantham Research Institute's third report in our *Global trends in climate change litigation* series. The report provides a synthesis of global trends in climate change litigation (or simply 'climate litigation'). Climate litigation is generally recognised to have started in the United States in the late 1980s but has since emerged as a growing global phenomenon.

This report provides an update of known case numbers, metrics and categorisations, and considers some of the most relevant trends in the arguments and strategies employed by litigants. The focus is on cases filed or concluded between May 2020 and May 2021.

We explore the continued growth in the number of 'strategic' cases, considering the use of litigation as a strategy by activists seeking to raise ambition on climate issues, as well as an increasing number of cases that seek to challenge or undermine climate-aligned policymaking. Critical trends in climate litigation against governments and the private sector brought since the Paris Agreement in 2015 are also reviewed and described. A selection of significant recent cases is used to illustrate the discussion.

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. The database is a joint initiative with the Sabin Center for Climate Change Law at Columbia Law School and it uses 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 & Porter Kaye Scholer.

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 2021 the CCLW database featured 454 court cases in 39 countries (excluding the US) and 13 regional or international jurisdictions, as well as 2,247 climate laws and policies in 198 jurisdictions. The Sabin Center's database for the United States featured 1,387 climate lawsuits.
- **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 every court around the world. The Sabin Center/Arnold & Porter Kaye Scholer database benefits from the assistance of commercial litigation databases in the US and is therefore likely to be more comprehensive. 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 and argument, allowing observations about trends in high-profile cases, which often inform and inspire new litigation efforts.

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

Defining 'climate [change] litigation'

Climate litigation broadly defined 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 and Gundlach, 2017). For the purpose of the databases, we

adopt a narrower definition, both to facilitate the process of data collection and to emphasise the distinct nature and importance of cases that explicitly raise climate issues.

To fall within the scope of the databases, cases must satisfy two key criteria:

- Firstly, cases must generally be brought before judicial bodies (though in some exemplary instances matters brought before administrative or investigatory bodies are also included).⁵
- Secondly, included cases must raise an issue of law or fact regarding the science of climate change and/or climate change mitigation and adaptation policies or efforts as a main or significant issue.

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 not included; nor are cases that may have a direct impact on climate change, but do not explicitly raise climate issues.⁶ An exception to this rule is made for cases under international investment treaties concerning climate-justified policies and actions (see Fermeglia et al., 2021).

Structure of the report

Part I of the report provides an update on overall global trends in climate litigation, including global case numbers, the ‘when and where’, as well as the ‘who and what’ of climate change litigation. Part I also discusses the growing number of cases in which climate change is central to the arguments, the increased use of strategic climate litigation, and some of the strategies employed by litigants. We review the known outcomes of litigation and provide a discussion on the broader impacts and costs that litigation can entail.

Part II contains a deeper dive into three key trends in litigation:

- A. The growing number of cases concerning national level ‘climate commitments’. Such cases may involve challenges to the adequacy of climate commitments and targets, challenges to the adequacy of implementation measures, or challenges to government action inconsistent with those commitments. This section also considers the growing trend in cases that challenge government action taken in pursuit of commitments and targets.
- B. The small but growing number of cases brought against companies and the financial sector.
- C. Cases brought on human rights grounds, considering the type of human rights obligations engaged and evolving norms and standards.

Then, in Part IID, we look into potential future directions for new litigation, considering how and where in the corporate ‘value chain’ litigation may arise and discussing the likely growing importance in the coming years of the 1.5°C temperature target set out in the Paris Agreement. This section also identifies a potential for a new emphasis on cases targeting government subsidies and tax breaks for the fossil fuel industry.

⁵ The database also contains a small number of advisory opinions from judicial or quasi-judicial bodies, such as the Inter-American Court of Human Rights Advisory opinion on the right to a healthy environment, issued in November 2017.

⁶ There are a few earlier cases to which these criteria have been applied less strictly, such as the case of *Gbemre v. Shell* (2005).

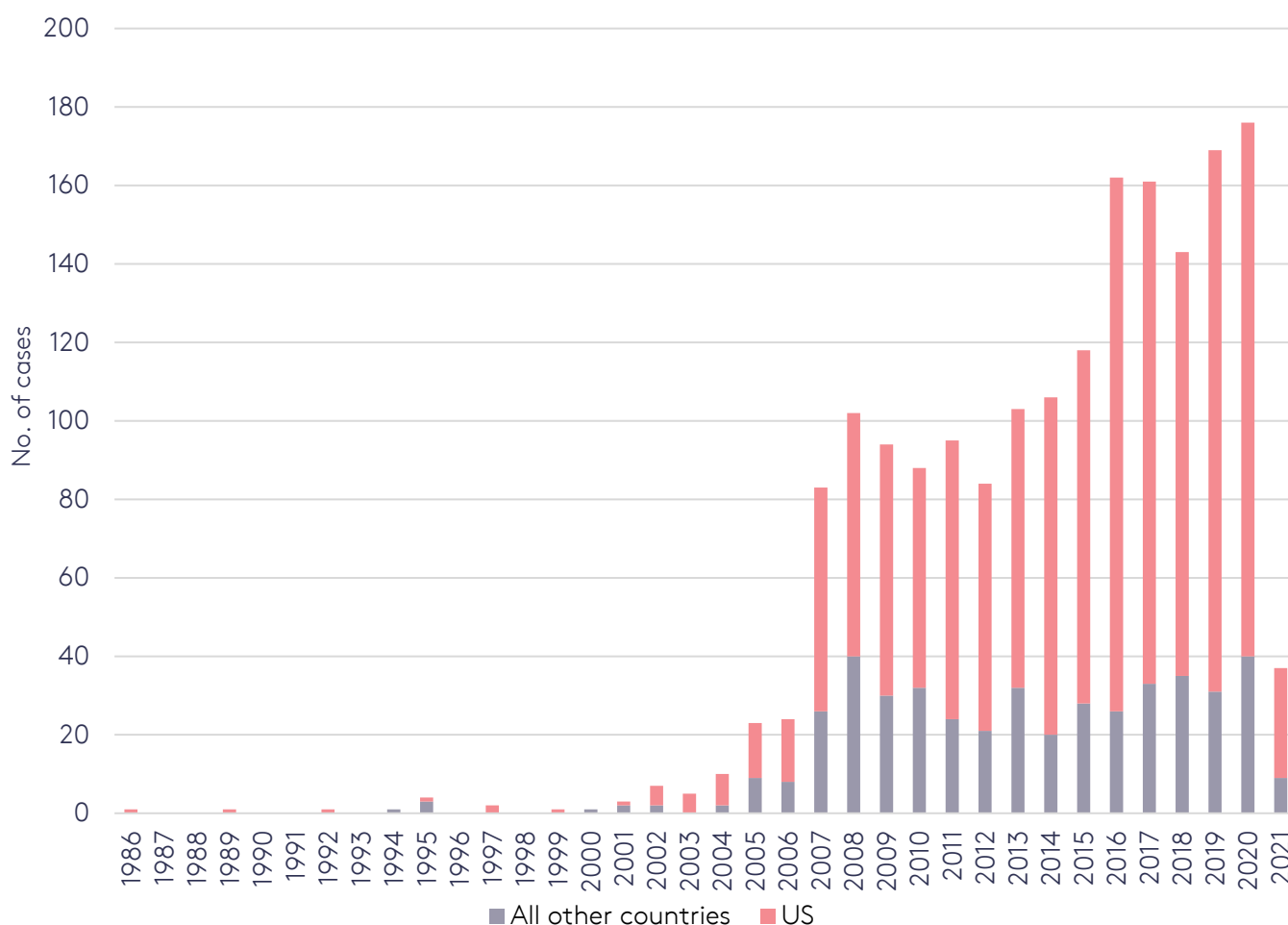
Part I: Understanding overall trends

Overall figures: the 'when' and the 'where' of climate change litigation

As of 31 May 2021, 1,841 cases of climate change litigation from around the world had been identified (see Figures 1.1 and 1.2). Of these, 1,387 were filed before courts in the United States, while the remaining 454 were filed in 39 other countries and 13 international or regional courts and tribunals (including the courts of the European Union). Outside the US, Australia (115), the UK (73) and the EU (58) remain the jurisdictions with the highest volume of cases. 1,006 cases have been filed since 2015 – the year of the Paris Agreement and the landmark case of *Urgenda Foundation v. State of the Netherlands* – while 834 were filed between 1986 and 2014.⁷

While we attempt to give combined figures for cases in the US and outside the US throughout this report where relevant, in some instances we treat these groups of cases separately, as differences in the volume and nature of the data have required us to adopt different methodologies when reviewing the cases.

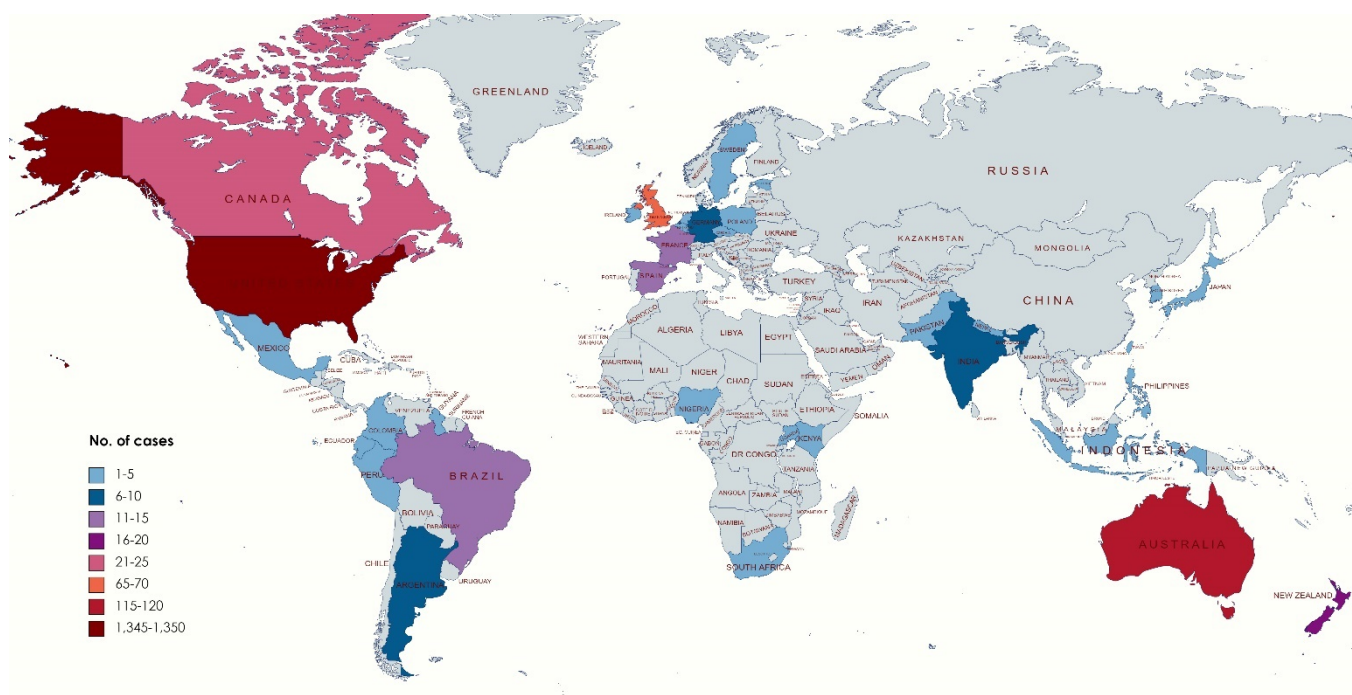
Figure 1.1. Total cases over time, US and non-US, to 31 May 2021



Note: These data are from the databases and may be incomplete, as discussed in the Introduction.
Source: Authors based on CCLW and Sabin Center data

⁷ One additional case is not included in the total figure of 1,841 as the date of filing is unknown.

Figure 1.2. Number of cases around the world, per jurisdiction, to May 2021



Notes: Cumulative figures to May 2021. Map created with mapchart.net.
Source: Authors based on CCLW and Sabin Center data

New cases, 1 May 2020 to 31 May 2021

Globally, 191 new cases were filed in this period. Cases were filed for the first time in Guyana and Taiwan, as well as the East African and European Courts of Human Rights. In addition to new cases filed in this period, a number of cases filed in previous years were added to the databases, including cases from jurisdictions such as Nepal, the International Centre for Settlement of Investment Disputes, the Stockholm Chamber of Commerce, and the Permanent Court of Arbitration. Figure 1.2 shows the numbers of cases per jurisdiction. A further representation of the regional distribution of cases can be found in Appendix 1.

Outside the US, at least 10 decisions were issued by apex courts during the relevant period of focus. Many of these, such as the case of *Neubauer et al. v. Germany*, which was decided by the German Federal Constitutional Court on 29 April 2021, may have significant implications for the future of climate litigation (see further discussion below).

Cases in the Global South⁸

While the overwhelming majority of cases identified continue to be cases from the Global North, the period between May 2020 and May 2021 also saw the continued growth in climate litigation cases in the Global South. Fifty-eight cases have now been identified in 18 Global South jurisdictions,⁹ with at least 11 of these filed in 2020 alone. The majority (32) were filed in jurisdictions in Latin America and the Caribbean, 18 cases in Asia and eight in Africa. It should be noted that the cases from the Global South so far identified in the databases may not be

⁸ As Setzer and Benjamin note, defining the groupings of poorer countries in the world has been subject to much debate. We use the terms 'Global South' and 'Global North' as the options favoured by many scholars and policymakers. The distinction between the two groups is based primarily on economic inequalities, although there is also a spatial element to the term. In the context of this report, it is crucial to note that the term 'Global South' does not denote a homogeneous group of countries, and that legal development and legal capacity may vary from country to country (Setzer and Benjamin, 2019).

⁹ This includes one case before the East African Court of Justice filed against Tanzania and Uganda.

exhaustive, as these cases can fly ‘below the radar’ of scholarly attention (Peel and Osofsky, 2020), or may be difficult to unearth due to other constraints.

Claimants and defendants: the ‘who’ of climate change litigation

Over time, climate change cases have been brought by a diverse set of actors. Outside the US, just over half of all documented cases from the early 1990s to the present were brought by NGOs (21%), individuals (23%), or both acting together (4%).¹⁰ The remainder were brought primarily by companies (32%) and governments (15%).

It is, however, possible to see an upward trend in the number of cases brought by NGOs and individuals over the years, particularly since 2017 (see Appendix 1, Figure A1.3). This trend continued in 2020, with 19 of the 42 cases filed in the study period filed by NGOs, seven by individuals, and six by NGOs and individuals together.

Over time, the majority of climate cases outside the US have been brought against governments (76%) and this trend also continued over the study period, during which governments were the defendants in 37 of the 42 cases. Nonetheless, a small but significant number of cases continue to be filed against corporations, either alone or alongside governments or named individuals (see further discussion in Part II.B).

This data can be compared with data for the US provided by the Sabin Center for Climate Change Law. The Sabin data shows that of the 149 cases filed in the US in the study period before both state and federal courts, most cases (60%) were brought by NGOs. Sub-national governments were responsible for 22% of cases, with individuals and corporations and trade associations responsible for only a fraction. The federal government was the most frequent defendant (in 73% of the cases). The remainder of cases were brought against sub-national governments (17%) and corporations (10%). Further in-depth analysis of US cases has recently been published by the Sabin Center (Silverman-Roati, 2021). See Appendix 1 of this report for figures representing the proportion of claimant and defendant types.

Case characteristics: the ‘what’ of climate change litigation

The term ‘climate change litigation’ continues to denote a heterogeneous group of cases. Cases can be distinguished in a variety of different ways, as discussed below. For this section we classify cases according to the strategic intent of the claimants, the issues raised, and the centrality of climate change.

Strategic litigation is on the rise

Climate litigation cases are often divided into two categories. The first category consists of ‘strategic’ cases, where the claimants’ motives for bringing the cases go beyond the concerns of the individual litigant and aim to bring about some broader societal shift. For the most part, the goals of the claimants in such cases will include advancing climate policies, creating public awareness, or changing the behaviour of government or industry actors (Setzer and Byrnes, 2020). This type of litigation is widely studied as academics and activists alike seek to understand the potential regulatory impact of such litigation, which can often be costly to claimants and may direct resources away from other efforts (Bouwer and Setzer, 2020; Peel and Osofsky, 2020).

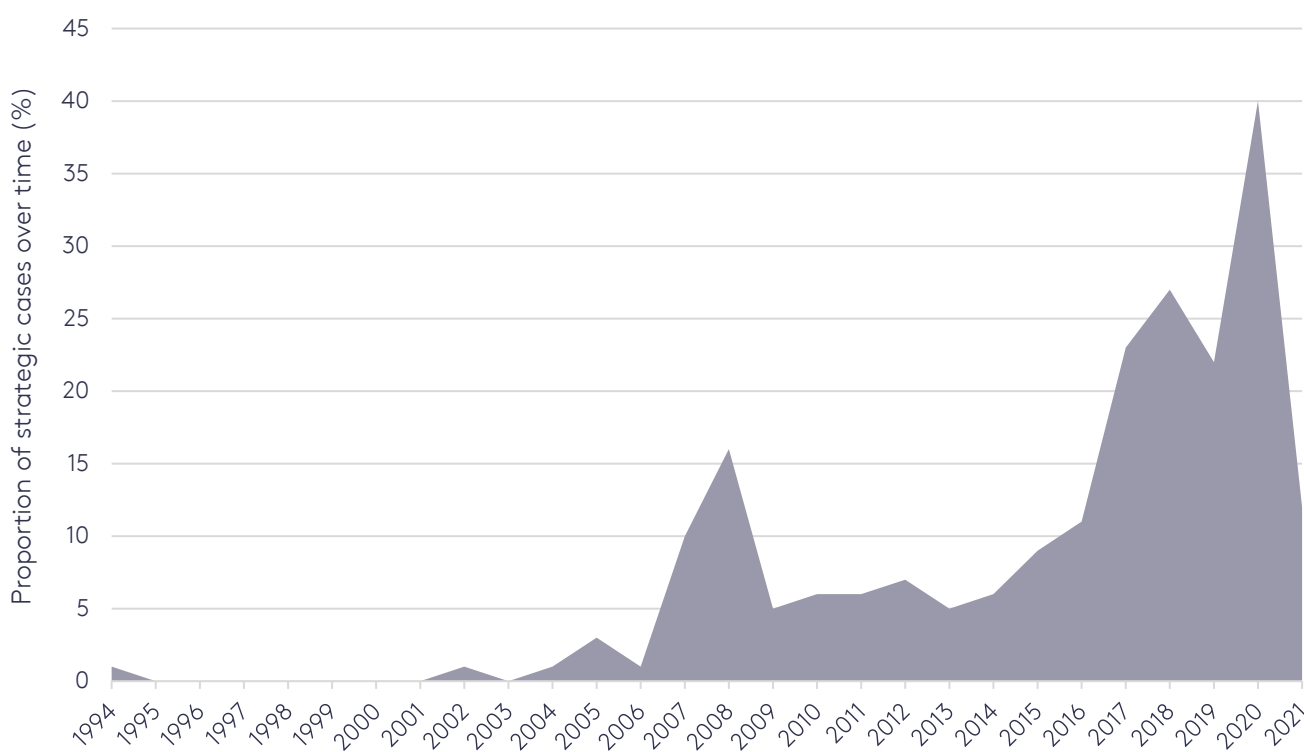
However, it is important to note that not every case identified in the databases falls into this category. Many cases instead involve issues that are primarily of relevance only to the parties involved. An example of such a case would be a dispute over planning permission for a new property in an area at risk from flooding or sea level rise, where climate change adaptation policies may be considered in the decision-making process.

¹⁰ The past year has also seen several cases filed by other actors, including political parties and public prosecutors (particularly in Brazil). These cases are currently classified as ‘other’ in the charts above, along with cases filed by Tribal Governments and by multiple claimants.

Classifying a case as non-strategic or strategic entails a subjective assessment, often made on admittedly imperfect or incomplete information, about parties' intentions. It does not imply a judgment of one being better or more impactful than the other. Cases brought to achieve a relief that will apply to an isolated situation (i.e. non-strategic) can be as important as cases that seek the realisation of broader changes in society (i.e. strategic litigation). Courts rarely have regard for the broader intentions of the parties when determining a case, meaning that cases brought with little or no strategic intent may nonetheless provide opportunities for courts to issue far-reaching judgments on novel legal issues.

Despite these challenges in classification, a review of non-US cases conducted for this report shows that the number of 'strategic' cases is dramatically on the rise (see Figure 1.3).¹¹ These findings suggest that climate litigation is becoming more widely used as an advocacy or governance strategy. However, this does not necessarily suggest a corresponding drop in non-strategic cases. While strategic cases are likely to be captured in the database, non-strategic cases may be less likely to be captured. Given that the impacts of climate change are becoming both more extreme and more frequent, it is nonetheless fairly likely that the significant rise in strategic cases seen in Figure 1.3 in reality is also accompanied by a rise in non-strategic cases.

Figure 1.3. Proportion of strategic cases over time (%), outside the US, to 31 May 2021



Source: Authors based on CCLW

Climate change is 'central' in a growing number of cases

In step with the growing number of strategic cases recorded in the databases, the number of cases where climate change is a 'central' issue has also increased over time – see Figure 1.4. For the purposes of this report, the centrality of climate change was determined by assessing the extent to which the case raises specific issues of climate fact or law relating to climate science or climate adaptation or mitigation efforts. We categorise cases where an explicit reference to climate change

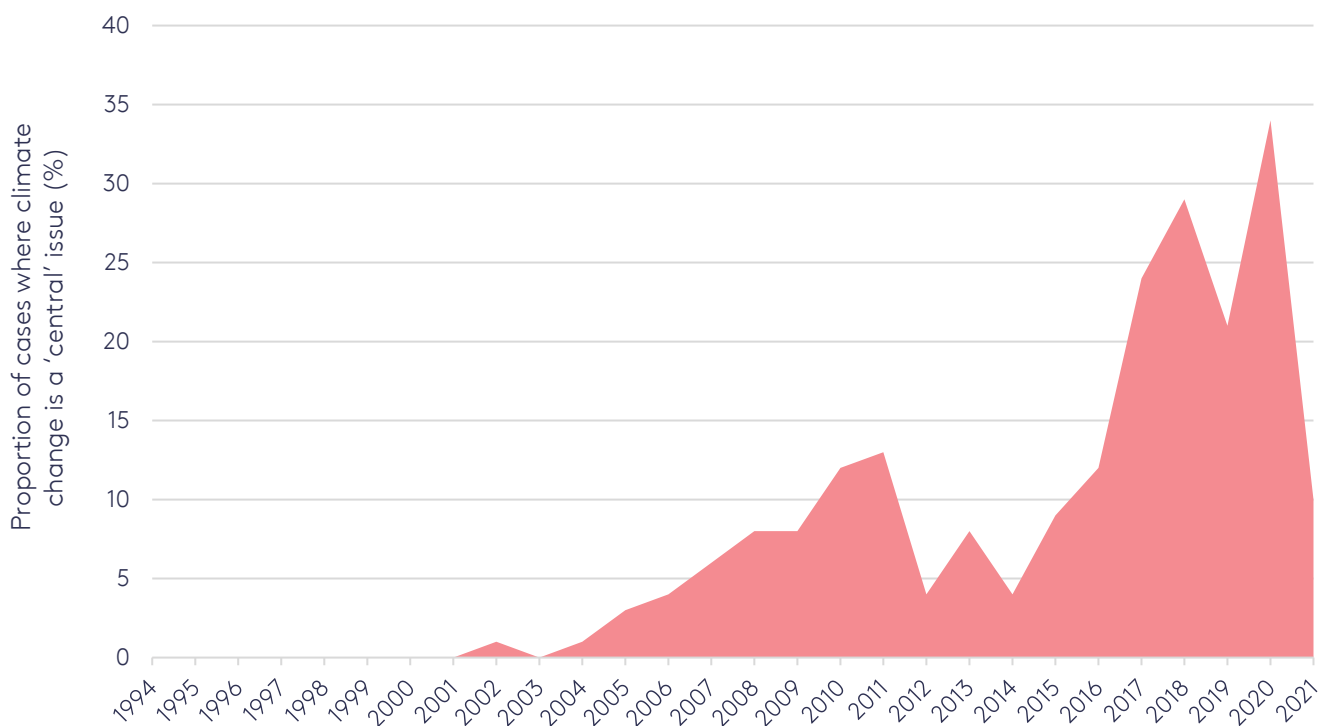
¹¹ Although US cases were not individually assessed to determine the number of strategic cases, the high number of cases brought by NGOs and local governments suggests a similar trend there.

forms a relevant part of the decision, but where the arguments of law and fact primarily concern other issues, as 'peripheral'.

Recent examples of cases where climate change was considered to be central include *Greenpeace Netherlands v. State of the Netherlands*, in which Greenpeace challenged the Dutch Government's provision of a Coronavirus bailout package to the airline KLM on the basis that the Government had violated its duty of care to prevent dangerous climate change by failing to attach stringent conditions; and *O'Donnell v. Commonwealth*, in which the claimant sued the Australian Government, Treasury and CEO of the Office of Financial Management for a failure to disclose climate change risks in relation to its issuance of sovereign bonds.

Examples where climate change was considered to be peripheral include cases concerning deforestation (e.g. *Hanuman Laxman Aroskar v. Union of India*; *PSB et al. v. Brazil (on Amazon Fund)*), cases concerning procedural obligations of government entities in environmental decision-making (e.g. *ClientEarth v. European Investment Bank*) and cases concerning the appropriate sanctions to be levelled against climate protesters engaged in acts of civil disobedience (e.g. *EH v. Queensland Police Service*; *GS v. Queensland Police Service*).

Figure 1.4. Centrality of climate change in cases over time, outside the US, to 31 May 2021



Source: Authors based on CCLW

Box 1.1. When strategic climate litigation is not aligned with climate goals

To date, most study of climate litigation has been focused on cases with a ‘pro-regulatory’ intent, i.e. cases that aim to enhance and accelerate countries’ mitigation or adaptation efforts. However, this is only part of the story (Markell and Ruhl, 2012; Savaresi and Setzer, 2021). Litigation with potential negative impacts for climate action and policy is also a growing phenomenon. Early studies referred to this type of litigation as ‘anti-regulatory’ (Peel and Osokfsy, 2015), ‘defensive’ (Ghaleigh, 2010) or simply ‘anti climate litigation’ (Hilson, 2010). However, cases that are not aligned with climate goals can have very different motives and objectives, and as climate policies and litigation evolve it is important to understand the full spectrum of cases.

Some cases directly aim at obstructing or opposing climate action. Examples include lawsuits filed by Republican Attorneys General in the United States challenging new climate regulations, such as *West Virginia v. Environmental Protection Agency*, and similar cases filed by the Canadian provinces of Alberta and Saskatchewan challenging the federal government’s Greenhouse Gas Pollution Pricing Act. Cases that may have an intentional goal of opposing climate action also include Investor-State Dispute Settlement (ISDS) cases filed by companies and investors claiming compensation for predicted losses caused by the introduction of climate-justified policy measures, which might even respond to previous climate-aligned litigation (see e.g. *RWE v. Kingdom of the Netherlands*; *Uniper v. Netherlands*). Cases may also be brought only on procedural grounds (e.g. right to access to public participation or to information), but may nonetheless have a hampering effect on efforts to advance climate protection. This includes recent cases filed by US group Energy Policy Advocates, seeking access to correspondence between States’ Attorneys General and pro-climate non-profit organisations, which may be aimed at deterring further litigation against major emitters (see e.g. *Energy Policy Advocates v. Ellison* and *Energy Policy Advocates v. Attorney General’s Office*).

There are also cases that might not have opposition to climate action as their main objective, and yet ultimately might lead to such outcomes. For example, individuals bringing rights-based climate cases might not object to climate action, but rather to the way in which such action is carried out or its impacts on the enjoyment of human rights (Savaresi and Setzer, 2021).

Some of the cases challenging the development of wind farms or the expansion of biomass can be understood as part of a potential new wave of **‘just transition litigation’**. Just transition is a concept that captures the challenges for workers, communities and countries associated with a shift to a resilient, low-carbon economy. The concept of just transition emphasises the need to consider the processes by which climate-related decisions are made and how the burdens and benefits of climate action are distributed across society. Just transition litigation is likely to become more prominent in the coming years, as action to meet the Paris Agreement temperature goals will result in both gains and losses (e.g. new jobs and lost jobs, technologies that reduce emissions but create other risks, etc.). Currently, much of this litigation is not tracked in the climate litigation databases as the cases may not explicitly engage with climate issues. Nevertheless, some of the rights-based cases tracked by the Business and Human Rights Resource Centre through their Corporate Legal Accountability Portal provide some early examples of this type of case.

Other climate-relevant cases

The databases relied on for this report typically exclude cases in which climate change is an ‘incidental’ or relevant issue but not explicitly mentioned. Nonetheless, it is important to note that such legal cases have significant potential to impact on climate change adaptation and mitigation efforts at the domestic level (Bouwer, 2018). In some such cases climate change may be one explicit secondary motive for bringing the case – such as cases challenging dangerous levels of air pollution on public health grounds even though climate change may not be raised in the pleadings. In others, litigation may have no specific climate change framing but may yet have implications for climate mitigation or adaptation, such as cases concerning the use of fracking (Peel and Osofsky, 2020). Indeed, given the pervasive nature of the climate crisis, climate change touches on a wide number of areas.

Box 1.2. Activism and advocacy

One potential driver for (and effect of) the rise in strategic cases in which climate change plays a central role may be the growing interest of climate change activists and the general public in resorting to court action. The clearest example of this can be found in the case of *Notre Affaire à Tous and others v. France*, also referred to as *L’Affaire du Siècle* or *The Case of the Century*. This case, brought by four French NGOs, was supported by over 2.3 million members of the public who signed a petition submitted with the court filings. While this is not the first case to enjoy widespread public support – the Belgian case of *VZW v. Kingdom of Belgium, et al.* filed in 2015 had almost 60,000 citizens registered as co-claimants – it is nonetheless the greatest level of support known to date.

Such cases suggest that citizens may be taking to the courts rather than to the streets to demonstrate anger over government inaction on climate change – with the latter course of action becoming more challenging than ever during the COVID-19 pandemic. This trend can also be seen by the prevalence of cases supported by crowd-funding campaigns; a review of UK based website ‘CrowdJustice’ from March 2021, for example, revealed 18 climate change-related entries.



Strategies

While climate litigants increasingly are bringing cases with strategic intent, centred directly on climate change, several trends in claimants' grounds of argument can also be identified. It should be noted that this list is not an exhaustive sample of the myriad strategies employed by litigants. There is also significant overlap between these categories, with many cases spanning more than one.¹²

- **Compliance with climate commitments:** Following the successful negotiation of the Paris Agreement in 2015, it was noted that the numbers of cases seeking to “show the potential force of NDCs [Nationally Determined Contributions] and domestic measures” were likely to rise (Carnwath, 2016). As we discuss in Part II of this report, among the non-US cases we have identified over 90 cases brought against governments seeking to enforce or enhance climate commitments.¹³
- **Challenging projects or policies:** One of the strategies most consistently employed by litigants over time has been to challenge specific projects or policies – often high-profile projects, such as in recent challenges to proposals for a new metallurgical coal mine in West Cumbria in the UK. While these cases can provide a focal point for public debate, it has been noted that as they are based on procedural grounds (e.g. a failure to consider a relevant issue in an environmental impact assessment) they often result only in delays to the projects in question and may be subject to ministerial override or to the subsequent correction of procedural errors (Bouwer and Setzer, 2020).
- **Constitutional and human rights cases:** Climate change is now widely recognised as the “greatest human rights issue of our time”.¹⁴ The use of human rights arguments in climate cases continues to rise, with a record 29 cases filed in 2020 and at least five from January to May 2021.
- **Liability claims:** Although these cases remain relatively few outside the US, claimants continue to seek new legal arguments to hold governments and companies accountable for their past and ongoing contributions to climate change (Setzer, forthcoming).
- **Corporate and financial market cases:** Cases against private parties continue to be brought and the arguments and strategies continue to develop. Some challenge insufficient or inappropriate communication of climate change; others challenge corporate action, inaction and responsibility. A small but significant group of cases aimed at contributing to efforts at ensuring a climate-compatible shift in financial market decision-making has also started to develop (Solana, 2018). This group of cases is highly heterogeneous, with cases ranging from investor-led challenges to investment decisions to cases seeking to compel disclosure of climate-related risks.
- **Adaptation-focused cases:** Although cases concerning adaptation remain less common than those concerning mitigation, we have identified over 180 cases that touch on this issue. Of these, 100 were filed in the US and 80 outside the US, the majority of which (61) were brought before the Australian courts, and many relate to the application of principles and standards relating to climate change adaptation in planning and environmental impact assessments.

Part II of this report provides a more in-depth overview of several of these trends.

¹² See also the UNEP *Global Climate Litigation Report: 2020 Status Review*, which provides an alternative but complementary approach to considering litigation trends, building on a previous report launched in 2017.

¹³ Cases from the US were not analysed for this section of the report (see Appendix 2 for further explanation).

¹⁴ Quote attributed to Mary Robinson, Former UN High Commissioner for Human Rights (see Office of the High Commissioner for Human Rights, 2015).

Does litigation advance or undermine climate action?

Climate change litigation has been demonstrated to have direct regulatory impact – where formal legal change results from a judicial decision – in both the Global North and the Global South (Peel and Osofsky, 2015; Setzer and Benjamin, 2019). Judicial decisions are particularly material in ‘climate commitment’ cases brought against governments, but it should be noted that climate-related cases of all types – even those that contain no explicit mention of climate change – may have important regulatory consequences (Bouwer, 2018).

There are several ways to approach the question of whether a specific example of litigation advances or undermines climate action. The first is to consider the final verdict of the case in the context of the case driver (i.e. the motivations of the parties) and to determine whether that outcome, on the face of the text, advances or undermines climate action.¹⁵ This approach centres on an assessment of the ‘direct outcome’ of the case. The second, broader approach is to try to understand the ‘overall impact’ of the case, both inside and outside of the legal proceedings and before, during and after the case has been brought and decided (Setzer and Vanhala, 2019). These impacts may include (but are not limited to) changes to the behaviour of the parties, changes to public opinion, financial and reputational consequences for a variety of actors, and further litigation.

Cases against the ‘Carbon Majors’,¹⁶ for example, may have ‘indirect’ impacts on company share prices, drawing attention to the potential for these companies to find themselves with ‘stranded assets’ (Setzer, 2020). The likelihood of such ‘indirect’ impacts appears to have been borne out by the case of *ClientEarth v. Enea*, in which ClientEarth, a shareholder in Enea, filed a claim against the company seeking an annulment of a resolution approving the construction of a new coal-fired power plant in Poland, challenging the financial viability of the project in the context of the transition to a low-carbon economy. It has been suggested that the markets appeared to vindicate ClientEarth’s position, since the share price rose 3.2% the day after the successful outcome of the case (Shotter, 2019).¹⁷

Similarly, cases like the landmark *Urgenda Foundation v. State of the Netherlands* may be considered almost as significant for the work done outside the courtroom as for the decisions taken within it. Simultaneously with its pursuit of the litigation, the Urgenda Foundation developed and implemented a comprehensive strategy of public advocacy, conducting extensive work with about 750 organisations and businesses to develop 50 measures that would be sufficient to close the emissions gap to which the judgment relates (Urgenda Foundation, 2020). The success of these strategies can be seen in the level of engagement with climate issues by Dutch policymakers in both 2015, following the initial ruling, and 2019, around the time of the Supreme Court decision (Khan, 2020; Wonneberger and Vliegthart, 2021).

While these diverse types of ‘indirect’ impacts have been the subject of several recent studies by both academics and practitioners, they are yet to be fully understood. The financial costs of litigation to defendants may also remain under-appreciated (Solana, 2020). Direct costs to the parties involved in litigation may include pay-outs and fines, legal and administrative costs, insurance costs, financing costs and reputational costs. There may be also indirect costs to third parties, such as an entity’s creditors and to other companies in the same industry as the defendant in the case. While some of

¹⁵ As is the case when determining whether a case should be considered ‘strategic’, conducting this type of assessment often involves subjective judgements based on limited information. As such, we have taken the intention of the parties as stated in the pleadings or described in case summaries at face value. For example, in the case of *Korean Biomass Plaintiffs v. South Korea*, in which the plaintiffs sought to challenge regulations promoting biomass as a source of renewable energy on the basis that biomass generation leads to higher greenhouse gas emissions than coal, we have assessed the case driver as being to increase the level of climate protection afforded by the regulation. This is despite the fact that as operators of solar power plants, many of the claimants may also be seeking to create a competitive advantage for themselves.

¹⁶ See further explanation in Part II B.

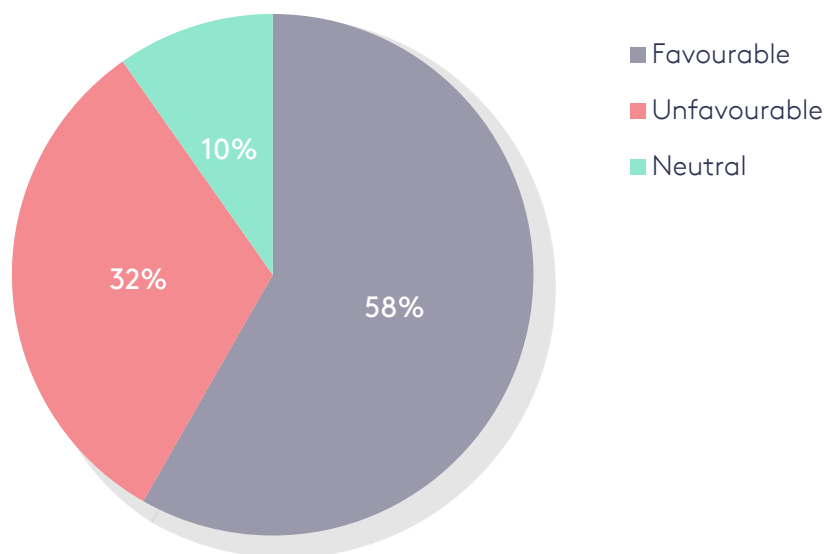
¹⁷ It should be noted that there are many other potential factors that may have influenced this change in share price, and a causal relationship between the litigation and this outcome has yet to be proven.

these costs may arise prior to litigation being filed or during the course of legal proceedings, the most significant costs may be felt after the case has concluded (ibid).

Cases with outcomes 'favourable' to climate action are in the majority

This report builds on the analysis of previous years and assesses the direct outcome, in the narrower sense, of all cases in the CCLW database where proceedings have concluded (see Box 1.3 for details of how this assessment was conducted). We find that 58% of all cases in the databases had judicial outcomes 'favourable' to climate change action, 32% of cases had outcomes 'unfavourable' to climate change action, and 10% had 'neutral' outcomes (Figure 1.5).

Figure 1.5. The proportion of outcomes favourable, unfavourable and neutral for climate action (in cases outside the US)



Source: Authors based on CCLW

While a quantitative analysis can help us to identify a broad trend in the outcomes of climate litigation cases, this can mask the disproportionate impact that some key judgments addressing novel issues may have on the field of climate governance as a whole. The period between May 2020 and May 2021 saw an unprecedented number of these cases, including: *Notre Affaire à Tous v. France* (see Box 1.4), *Commune de Grande-Synthe v. France* (Box 1.4), *Friends of the Irish Environment v. Ireland* (Box 1.4), *Neubauer v. Germany* (Box 2.1), *Sharma and others v. Minister for the Environment* (Box 2.2), *DG Khan Cement v. Government of Punjab* (Box 2.3) and *Milieudefensie v. Shell* (Box 2.4). Many of these cases are likely to be highly significant both in terms of the novel legal principles that they affirm or establish and for the wider impact they may have on public policy and debate.

In the case of *Neubauer v. Germany*, for example, the Court upheld a claim by youth plaintiffs challenging the constitutionality of certain provisions of the German Climate Protection Law on constitutional and human rights grounds. Just weeks after the judgment was issued, the German Cabinet approved proposals to raise their climate mitigation targets to net-zero greenhouse gas emissions by 2045, with targets to reduce emissions by 65% by 2030 (Franke and Parashar, 2021).¹⁸ This represents an increase in ambition far beyond what was required by the court.

¹⁸ As of the time of writing, the new targets have not yet become law as they are still subject to approval by the Parliament.

Box 1.3. 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 invalidating a regulation that would have led to an increase or insufficient decrease in greenhouse gas emissions (e.g. Ruling on Modification to Ethanol Fuel Rule) or ruling that a development approval was not valid because it failed to adequately consider climate change (e.g. *Hanuman Laxman Aroskar v. Union of India.*).

An **unfavourable outcome** of a case is one that undermines climate regulation or is likely to result in greater greenhouse gas emissions – e.g. failed challenges to approvals for new high-emission developments (e.g. *Plan B Earth v. Secretary of State for Transport*).

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 (Setzer and Yoshida, 2020).

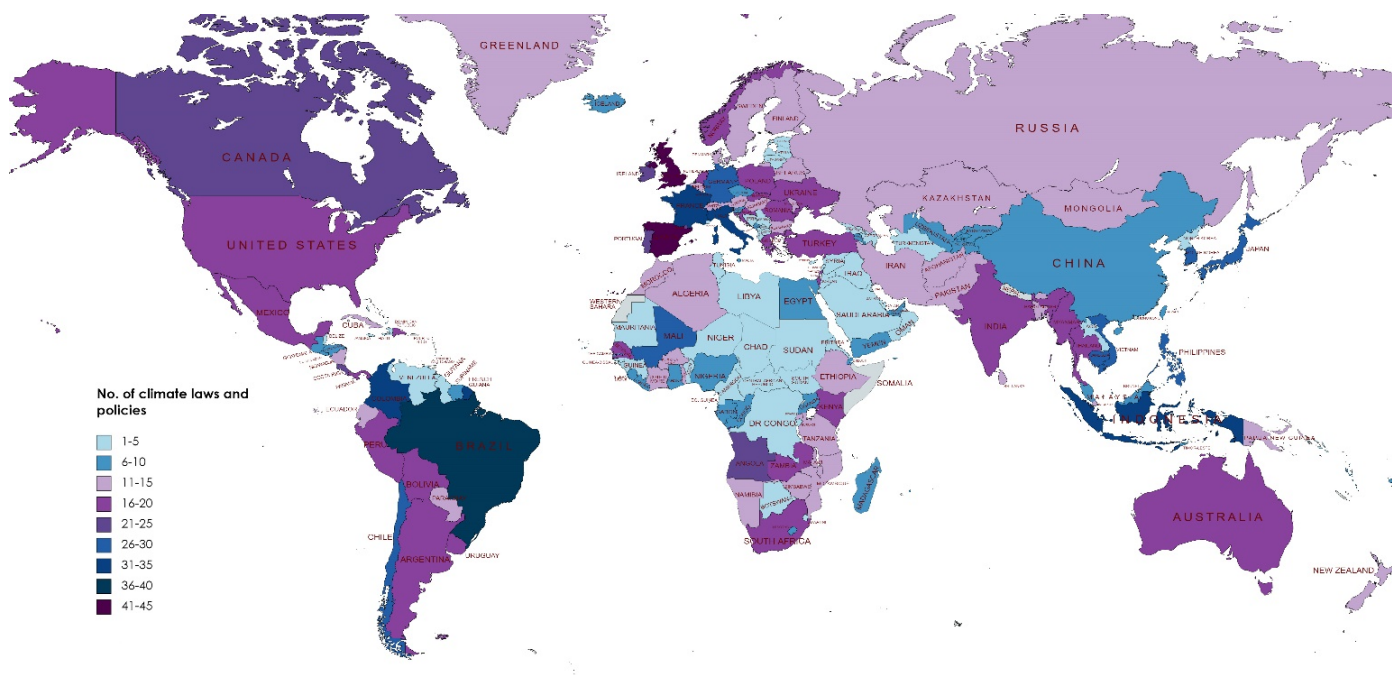
Similarly, the case of *Milieudefensie v. Shell*, in which the District Court of the Hague found that oil major Shell owed a duty of care to the plaintiffs to reduce emissions from its operations by 45% by 2030 relative to 2019 emission levels, is likely to have major ramifications across the corporate community. The case represents a global first, with the court taking the unprecedented step of holding a company legally responsible for its individual contribution to global greenhouse gas emissions. While the case is likely to be subject to appeal, Shell has nonetheless announced its intention to increase the speed of its planned transition in line with the judgment (Raval, 2021). Representatives of other businesses in high-emitting industries have confirmed that they too will be increasing their climate change mitigation efforts (*Financial Times*, 2021).

The relationship between climate litigation and climate-focused laws and policies

Although climate litigation is now established as one relevant component of national climate change governance responses, the relationship between litigation and other critical elements of that response, i.e. climate-specific legislation and policy, remains under-explored (Setzer and Byrnes, 2020). Previous analyses have suggested that climate litigation can aim to ‘fill the gaps’ in domestic climate governance regimes (Eskander et al., 2020). Early cases, such as the landmark *Massachusetts v. Environmental Protection Agency*, focused on the need to extend the interpretation of existing environmental law to anthropogenic greenhouse gas emissions, even in the absence of climate-specific legislation.

However, over the past few decades national-level climate-focused laws and policies have expanded to include more than 2,200 laws and policies worldwide (see Figure 1.6).

Figure 1.6. Number of climate laws and policies around the world, per jurisdiction, to May 2021



Notes: Cumulative figures to May 2021. Map created with mapchart.net
Source: Authors based on CCLW

As a result of this increase in laws and policies, the emphasis of many lawsuits has shifted. Suits such as the German case discussed above and the French and Irish cases discussed in Box 1.4 below focus not on the absence of regulation but on the challenges surrounding the adequacy or implementation of climate-specific policies. Commentators have noted the increased potential for the success of climate litigation against governments in countries with climate change framework legislation (Carnwath, 2021). Success is more likely as litigants focus on specific issues, such as the need for actionable plans and short-term targets to meet the long-term goals adopted in the legislation, or the apparent inconsistency of government decision-making with those goals. While this type of litigation still aims to fill the gaps in government action, it reflects the fact that the nature of those gaps has changed.

Building Back Better? Climate conditions in COVID-19 responses

A small but growing number of national-level laws and policies developed in response to the COVID-19 pandemic and its impacts have explicitly incorporated climate and environmental provisions, in recognition of the potential impact that current unprecedented levels of stimulus spending may have on accelerating or delaying the transition to net-zero by 2050. Nevertheless, numerous governments have failed to make adequate connections between their responses to the twin crises of climate change and the pandemic (Vivid Economics, 2021). Such inconsistencies in government policymaking may result in a new strand of litigation, with early evidence provided by the case of *Greenpeace Netherlands v. State of the Netherlands*, in which the claimants sought a preliminary injunction from the court to prevent the Dutch Government violating its duty of care to prevent dangerous climate change by failing to attach stringent climate conditions to its bailout of the airline KLM. Although the petition was unsuccessful, in part due to the fact that cross-border aviation emissions are not currently covered by the Paris Agreement, and was not ultimately considered on the merits, claimants in other jurisdictions may yet follow the example.



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Box 1.4. An emphasis on achieving climate ambition

The last 12 months have seen several seminal judgments in cases that emphasise not only the need for climate action *per se*, but the effectiveness of legislation, policies and plans aimed at achieving climate goals. *Commune de Grande-Synthe v. France*, for example, concerned the adequacy of government measures designed to meet the domestic target of achieving carbon neutrality by 2050, which was enshrined in legislation passed in 2019. The municipality of Grande-Synthe claimed that, given its low-lying coastal location, it was particularly impacted by this failure. In a landmark judgment issued in 2020, the French Conseil d'Etat ruled on the admissibility of the case, embarking on a full investigation to determine whether the Government's actions are sufficient to meet the goals set out in the legislation.

The French case has parallels with the case of *Friends of the Irish Environment v. Ireland*, decided by the Irish Supreme Court in July 2020. In that case, the NGO Friends of the Irish Environment challenged the national government's approval of the National Mitigation Plan on two grounds – for being insufficient to give effect to the Ireland's 2015 Climate Act, and for violating the state's duty to prevent harm to human rights. The Irish Supreme Court dismissed the second claim but quashed the Mitigation Plan on the basis of the first claim, noting that the plan was not detailed enough about what action would be taken over the whole period until 2050.

The question of the effectiveness of government action to meet climate targets was also raised before the Paris Administrative Court in the case of *Notre Affaire à Tous v. France*. The plaintiffs argued that the French state had violated a legal obligation to tackle climate change stemming from its obligations to protect the human environment, health and security by failing to implement measures to ensure a reduction in greenhouse gas emissions in line with commitments and objectives adopted into French law and policy. The Court accepted the plaintiffs' arguments that climate change has already caused significant ecological damage in France, and that the Government has "failed to carry out the actions that it had itself recognised as likely to reduce greenhouse gas emissions". As a result, the court found the Government liable for part of the alleged ecological damage and ordered it to pay each plaintiff a symbolic one euro in compensation to account for the "moral damage". However, the court declined to order the Government to repair the ecological harm until a further investigation into the damage caused could determine what appropriate measures to do so would be.

Part II: Litigation trends in focus

Previous analysis has identified three distinct waves of climate litigation: first-wave cases (pre-2007), which primarily consisted of administrative cases against government bodies aimed at raising environmental standards and occurred mainly in the US and Australia; second-wave cases (2007–15), which saw an expansion of climate litigation to European countries and a growing awareness of litigation as a ‘gap-filler’ in the absence of ambitious international action; and third-wave cases (2015 to present), which demonstrate a further expansion and diversification in terms of the type of claim, the volume of cases, the type of defendants, and the number of jurisdictions in which cases are being brought (Golnaraghi et al., 2021). In this part of the report we analyse several important developments in **third-wave cases** in more detail.

A. Climate commitments: domestic accountability

Many of the most significant third-wave cases seek to hold governments to account for a failure to act in a manner that is consistent with their share of the global responsibility to mitigate and/or adapt to climate change. Such cases often centre on climate commitments or targets; recent examples have built on the emerging consensus around global temperature limits represented by the Paris Agreement and reinforced by the publication in 2018 by the Intergovernmental Panel on Climate Change (IPCC) of the *Special Report on 1.5 Degrees*, as well as the growing popularity of the concept of ‘net-zero’.¹⁹ These cases can be divided into two distinct categories, described below: claims regarding government action or omission, and those regarding authorisation of third-party activity.

Claims regarding government action or omission

This category involves claims against States or subnational governments for actions or omissions that allegedly led to an increase in greenhouse gas emissions, an insufficient decrease in emissions, or a failure to adapt to climate change. We have identified 68 cases in this category, filed in 31 jurisdictions. Our analysis shows that this type of case has been brought against a diverse group of government actors, with cases against national governments (e.g. *Plan B Earth et al. v. Prime Minister; Klimatická žaloba ČR v. Czech Republic*), sub-national governments (e.g. *Burgess v. Ontario Minister of Natural Resources and Forestry; Friends of the Irish Environment CLG v. Fingal County Council*), specific agencies (e.g. *Friends of the Earth v. UK Export Finance*), and even central banks (e.g. *ClientEarth v. Belgian National Bank*).

More than half of this group of cases (37) build on the approach taken in the landmark case of *Urgenda Foundation v. State of the Netherlands*,²⁰ which was the first piece of litigation to successfully challenge the adequacy of a national government’s overall approach to reducing emissions. The whole-of-system approach taken by litigants in these cases has led them to be described as ‘systemic mitigation’ cases (Jackson, 2020; Maxwell et al., forthcoming).

Despite the success of human-rights informed tort arguments in the *Urgenda* case, we identified only six of these cases that relied explicitly on tort law (see Figure 2.1). These included *Sharma v. Minister of Environment* (Box 2.2 below) and *Notre Affaire à Tous and Others v. France* (see Section I), which was based on a provision of the French civil code, which operates in a manner similar to tort law. As in the *Urgenda* case, the duty established on the part of the French state was heavily informed by the state’s human rights obligations.

¹⁹ See the Grantham Research Institute’s ‘Explainer’ on net-zero for more on this:

<https://www.lse.ac.uk/granthaminstitute/explainers/why-is-net-zero-so-important-in-the-fight-against-climate-change/>

²⁰ This case is described in detail in our 2020 snapshot: <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2020-snapshot/>



Box 2.1. The rights of future generations

One of the most significant judgments of the past year is the German Constitutional Court's ruling in the case of *Neubauer et al. v. Germany*, in which a group of youth plaintiffs challenged the constitutionality of emissions reduction targets in the German Climate Protection Law (see photo). The claimants argued that the targets violated Article 20a of the German Basic Law, which guarantees the natural foundations of life in responsibility for future generations. The youth plaintiffs claimed that by introducing a legal requirement to meet the overall goals of the Paris Agreement but setting insufficiently strict 2030 emissions reduction targets and providing insufficient detail on plans to meet these targets, the law violated the rights of future generations.

The Court found that the current provisions of the law place an unreasonable burden on future generations to reduce emissions at a rate that would be unacceptable today. The judges noted "Virtually every freedom is potentially affected by these future emission reduction obligations because almost every area of human life is associated with the emission of greenhouse gases and is therefore threatened by drastic restrictions [on emissions] after 2030." As a result, the Court ordered the federal government to reconsider the targets, clarifying the emissions reduction targets from 2031 onward by the end of 2022.

The limited number of cases relying on tort arguments may in part be explained by the numerous hurdles faced by claimants seeking to rely on the torts of negligence and nuisance in the climate context, particularly in common law jurisdictions (Kysar, 2011). While the claimants in the *Urgenda* case were able to surmount several of these common obstacles in the context of the Dutch legal system, legal scholars have cautioned on the ‘exportability’ of this decision, which may explain why claimants have turned to arguments based in constitutional or administrative law when seeking to establish a non-statutory duty to take climate action on the part of governments elsewhere (van Zeven, 2015).

Another subset of these cases involves challenges to specific acts or omissions which claimants allege to be incompatible with government emissions reduction obligations. These cases include challenges to individual policies, such as *Greenpeace Mexico v. Ministry of Energy and Others (on the National Electric System policies)* and *Transport Action Network v. Secretary of State for Transport (on National Policy Statement)*, as well as challenges surrounding alleged failures to implement existing policies, schemes or decisions that would be critical to meeting climate obligations, such as *PSB et al. v. Brazil (on Climate Fund)*.

Claims regarding authorisation of third-party activity

The second category of third-wave cases involves cases against governments or other public authorities for authorising third party activity that leads to increased greenhouse gas emissions, in violation of commitments or obligations to establish a safe limit on emissions. We identified 25 such cases for this report, filed in 17 jurisdictions. These cases typically include challenges to the approvals processes for new fossil-fuel-intensive projects such as coal mines (e.g. *Sharma v. Minister for the Environment*, discussed in Box 2.2 below) or airport expansions (e.g. *Plan B v. Secretary of State for Transport* – the ‘Heathrow case’).

Box 2.2. A common law duty of care

On 27 May 2020 the Federal Court of Australia delivered an important judgment explicitly recognising a novel duty of care under the law of negligence owed by federal government ministers to the children of Australia. The case centred on a decision due to be taken by the Federal Environment Minister on whether to approve an extension to the Vickery Coal Mine that would result in additional greenhouse gas emissions estimated at 100 Mt CO₂-equivalent. The duty has been described as “the duty of the Minister to exercise her power under s.130 and s.133 [of the Environment Protection and Biodiversity Conservation Act] with reasonable care to not cause the Children harm resulting from the extraction of coal and emission of CO₂ into the Earth’s atmosphere”.

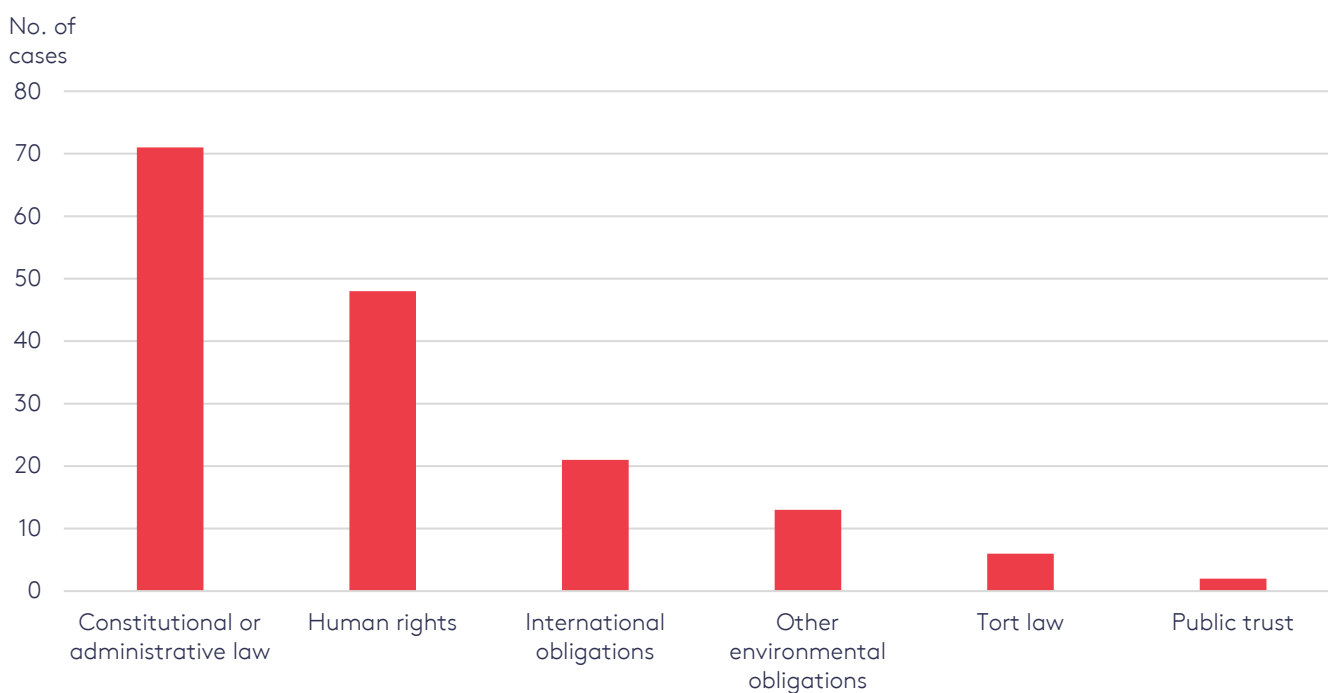
In determining the existence of the duty, the court concluded that the factors in favour of the imposition of the duty outweighed those against it. Among the factors considered was the nature and extent of the harms likely to be suffered by the plaintiffs, including heat stress and premature death from heat stress or from bushfire smoke. Despite recognising the existence of the duty, the court has so far refrained from issuing an injunction against the Minister as it has yet to be convinced that there are reasonable grounds to believe that the Minister will breach the duty.

Although the duty in this case is narrowly framed as relating to the Minister’s exercise of specific statutory powers, the case could yet pave the way for further recognition of similar common law duties of care in a host of other climate-relevant decision-making across multiple jurisdictions.

Grounds of argument

The most common grounds of argument used in both categories of cases are based on constitutional or administrative law, with these grounds identified in 69 of the 93 cases analysed. Human rights arguments and reliance on international obligations were identified in 48 and 21 cases respectively (see Figure 2.1).

Figure 2.1. Grounds of review in third-wave, pro-climate-commitment cases against governments (since 2015)



Source: Authors based on *Sindico and Mbengue (2021)*, using CCLW and Sabin Center data

Cases challenging climate-aligned policy or action

Not all climate litigation is aligned with climate goals, as discussed in Box 1.1. A minority of third-wave cases against governments also involve challenges to government actions or decisions taken in pursuit of climate commitments. Such cases may specifically aim to undermine or prevent the passage of climate laws and policies, or they may involve significant claims for compensation following climate-aligned action. We have identified at least 13 such cases to date filed outside the United States.²¹

Of these cases, seven are based on constitutional or administrative grounds (including two that rely on constitutional protections for property rights – *IPC Petroleum v. France*; *DG Khan Cement v. Government of Punjab*), and five are based on an alleged breach of international investment agreements.²² This second group of cases, filed by companies and investors, typically involve requests for compensation for predicted losses caused by the introduction of climate-justified policy measures (Fermeglia et al., 2021). An important recent example can be found in the case of *RWE v. State of the Netherlands*, which saw German energy giant RWE bringing a claim for compensation following the Dutch Government’s plans to phase out all coal power plants by 2030. The company claims that the Government’s action – taken in part in response to the decision in the *Urgenda* case – amounts to an expropriation of its investment in the coal-fired Eemshaven power plant, in violation of the provisions of the Energy Charter Treaty. Such cases are of particular importance given the scale of the arbitral

²¹ As above, US cases were not reviewed for this report.

²² This includes all relevant ISDS cases filed since 2015 and those cases where the date of filing is unknown.

awards sought by companies, and the potential hampering effect they may have on climate policy and regulation (Lobel and Fermeleglia, 2018).

We also see a number of cases challenging denials of development permits or approvals (e.g. *H.J. Banks and Co v. Secretary of State for Housing; R [On the Application of West Cumbria Mining] v. Cumbria County Council*) and several disputes between Canadian provinces and the Canadian Federal Government regarding the constitutionality of federal government policies aimed at curbing global warming.

These cases demonstrate the need to look at climate litigation in the round, considering the impacts of litigation that is aligned with climate action and litigation that is not. Further scrutiny of such cases may also contain lessons for policymakers regarding the design of climate policy or areas of existing legal systems that may need reform.²³

Box 2.3. The right(s) balance

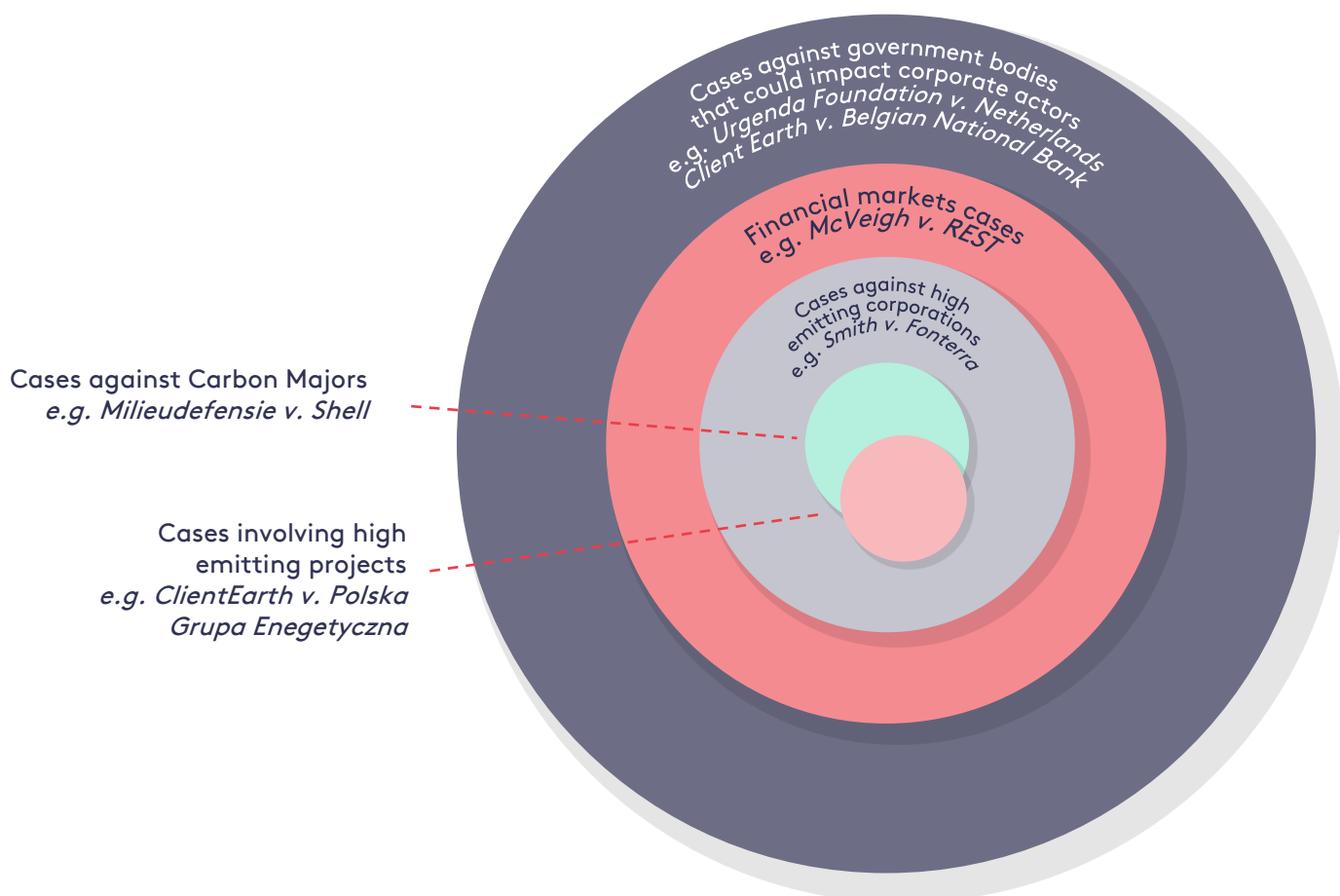
The vast majority of 'rights-based' climate litigation included in the databases involves the use of human rights and/or constitutional rights to challenge governments and corporations for taking inadequate climate protection measures. However, cases brought by corporations challenging climate protection measures based on constitutionally protected property rights or rights to trade may also be on the rise. In April 2021, the Supreme Court of Pakistan rejected a petition by DG Khan Cement that challenged new restrictions imposed by a provincial government on the expansion or establishment of cement plants. The complaint relies in part on an alleged infringement of the company's constitutional right to freedom to trade. The court noted that as climate resilience measures, the restrictions served the public interest. Emphasising the importance of responding to the threat of climate change for both present and future generations, the court noted: "The tragedy is that tomorrow's generations aren't here to challenge this pillaging of their inheritance. The great silent majority of future generations is rendered powerless and needs a voice." Despite the court's firm dismissal of the company's arguments in this case, we may nonetheless see an increase in similar claims over the years to come.

B. Third-wave litigation and the private sector

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 the responsibility of major emitters. This type of climate change litigation has been dominated by claims against fossil fuel companies (involved in the extraction, refining and sale of fossil fuels) and tends to be based on arguments that the activities of these companies directly relate to emissions associated with climate change. However, we are now starting to see wider diversity in the approaches taken in cases seeking to influence corporate practice. As illustrated in Figure 2.2, these range from direct cases against the companies with the highest historical emissions (i.e. the Carbon Majors), pictured in the centre of the figure, to cases against high emitting projects, and cases against other types of companies with a high carbon footprint, pictured in the next ring. Other types of cases may also have more indirect effects for high emitting businesses. These include cases against financial market actors, which may increase the cost of capital for these businesses, and cases against governments, which may lead to increased regulation of their activities. These two types of indirect cases are pictured in the outer two rings.

²³ Such reform is already being considered in the case of the Energy Charter Treaty, following a proposal by the EU to phase out the investment protection of fossil fuels from the Treaty in current negotiations on the modernisation of the Treaty (EU Commission, 2021).

Figure 2.2. Direct and indirect cases involving the private sector



There are currently at least 33 ongoing climate cases worldwide against the largest fossil fuel companies – the so-called Carbon Majors, a term that refers to a list of energy and cement companies identified by Richard Heede (2014) and the Climate Accountability Institute through an assessment of the historical contributions of these companies to greenhouse gas emissions.²⁴ Heede attributed 63% of the carbon dioxide and methane emitted between the years 1751 and 2010 to a mere 90 entities. Out of these, 50 are investor-owned companies, 31 are state-owned and the remaining nine are government-run.

At least 23 of these cases seek to establish *corporate liability* for past contributions to climate change, often including arguments about deception and disinformation on the part of the companies. Examples include the series of high-profile cases that have been brought since 2017 by states and municipalities in the US, seeking billions of dollars in damages to pay for infrastructure investments for climate change adaptation, such as sea walls to protect coastal property (Golnaraghi et al., 2021). New cases have been filed in the past year, including *Anne Arundel County v. BP*, *City of Annapolis v. BP*, *County of Maui v. Sunoco LP*, *City of Charleston v. Brabham Oil Co.*, *Delaware v. BP America Inc.* and *City & County of Honolulu v. Sunoco LP*. Examples outside of the US include *Lliuya v. RWE*, which remains in the evidentiary phase.

A further case filed in the New Zealand High Court in 2020, *Smith v. Fonterra Co-Operative Group Limited et al.*, seeks to extend this type of argument beyond the Carbon Majors to new types of corporate defendants, in this case major emitters in the meat and dairy industry. The court

²⁴ <https://climateaccountability.org/>

concluded that Smith, an individual of Ngāpuhi and Ngāti Kahu descent and climate change spokesman for the Iwi Chairs' Forum, could not demonstrate public nuisance, but a claim grounded in a duty of care to reduce emissions has been allowed to proceed to trial.

Not all claims against major emitters seek compensation for loss and damage caused by climate change. An increasing number of claims focus instead on *financial risks*, *fiduciary duties* and *corporate due diligence*, which directly affect not only fossil fuel and cement companies, but also banks, pension funds, asset managers and major retailers, among others. Moreover, there are several lawsuits against governments that might have an indirect impact on companies and financiers.

Claims with direct impact on companies, fund managers and/or their fiduciaries have raised issues around inadequate disclosure and disinformation. Combating these practices is the underlying driver in cases that challenge corporate strategy and governance regarding climate risks. Many of these cases consist of claims raising the lack of, or insufficient disclosure of, climate-related information to protect shareholders, consumers and investors (Solana, 2018). In this past year we saw that such cases can also be brought against governments in their role as economic actors. In *O'Donnell v. Commonwealth*, the Australian government is facing a class-action lawsuit from investors who allege it has failed to disclose the material climate risks associated with its government bonds.

Intentional, deceptive action also constitutes the basis for the so-called 'greenwashing' cases. These are based on inconsistencies between discourse and action on climate change and arise when marketing campaigns are said to be misleading and/or overstate advertised performance or benefits. These claims have been seen particularly against energy companies, relating to, for example, how advertising campaigns have portrayed the scale of businesses' carbon activities or, conversely, of their renewable and low-carbon activities. In April 2021 ClientEarth launched a resource highlighting how the advertising of some of the world's biggest fossil fuel companies is misleading the public over climate change (the companies including BP, ExxonMobil, Aramco, Chevron, Shell, Equinor, Total, RWE, Drax and Ineos). In some instances, these issues can give rise to allegations of fraud. In June 2020, for example, the State of Minnesota filed a case against Exxon Mobil, Koch Industries Inc. and the American Petroleum Institute alleging that these organisations had engaged in a 'campaign of deception' and brought common law claims for fraud and misrepresentation, as well as claims under the state's Consumer Fraud Act (*State v. American Petroleum Institute*).

Other private law claims have been brought over the failure of some companies, fund managers and/or their fiduciaries to manage *climate change risk*. These claims highlight that climate change risk involves physical risks (e.g. claims for failure to adapt operations and physical infrastructure to extreme weather events) and transition risks (e.g. claims challenging the construction or financing of long-term carbon-intensive assets without consideration of emerging laws and policies designed to restrict high emitting activities), which might give rise to litigation. Such claims also target the potential failure of directors, officers and fiduciaries to adapt investment strategies in line with climate risks. An important case concluded this past year is *McVeigh v. REST*, brought by a 23-year-old member of an Australian pension fund, who claimed that the fund's trustees were not doing enough to disclose and manage climate change risks. In November 2020 the fund settled the claim, acknowledging that "climate change is a material, direct and current financial risk to the superannuation fund across many risk categories, including investment, market, reputational, strategic, governance and third-party risks".

Other cases against companies have a broader scope, seeking the recognition of *corporate human rights responsibilities*. *Milieudefensie et al. v. Royal Dutch Shell plc.* relied on human rights law to define the scope of corporate duty of care and due diligence obligations under national tort law (see Box 2.4). As 'forward looking' cases focused on major emitters' activities and investment decisions from the present day and into the coming decades, cases like this seek a declaration from courts that fossil fuel companies' climate change targets should be aligned with those of the Paris Agreement. In France, NGO Notre Affaire à Tous and citizens relied on France's corporate due diligence legislation that

requires corporate actors to adopt measures to protect human rights and the environment, to ask the court to order oil and gas company Total to recognise the risks generated by its business activities and align its conduct with the goal of limiting global warming to 1.5°C. At the same time, we continue to see cases that challenge *specific projects or developments*. Some of these cases target carbon-intensive projects or technologies and are brought in the context of planning and permitting decisions. Relevant precedents include *ClientEarth v. Enea*, which resulted in the annulment of a resolution consenting to the construction of a coal-fired power plant in Poland. In this past year, a ruling was issued in *ClientEarth v. Polska Grupa Energetyczna*, determining that Europe's largest power plant, Belchatow, will have to reduce its greenhouse gas emissions. However, 'just transition litigation' might also oppose climate change adaptation and/or mitigation projects that have an impact on the environment or local communities. This type of case is symptomatic of the complex justice questions associated with sharing the benefits and burdens of the transition away from fossil fuels and of coping with a changed climate (Savaresi and Setzer, 2021).

Finally, cases against government bodies – particularly central banks – suggest we may soon start to see more litigation against financial market regulators and supervisors, which may impact on private sector activities, particularly in high emitting industries. As noted in Part II.A, cases concerning government climate 'commitments' have now been brought against a range of government actors, including central banks. In April 2021, for example, ClientEarth filed a case against the Belgian National Bank, challenging the Bank's administration of the European Central Bank's Corporate Sector Purchase Programme, which is aimed at lowering the cost of debt to improve financing for eligible companies. Over half of the bonds purchased so far under the scheme have been purchased from high emitting companies, and studies suggest there may be a structural bias towards these firms. While this case and previous cases against government-owned financial institutions have concerned the institutions' functions as financiers, it is possible that in the absence of strong action to ensure that climate risks are adequately addressed by financial market actors, cases may soon start to be brought concerning their regulatory functions as well.

The growth of litigation in the private sector in the past few years has demonstrated that the need for corporate decision-makers to take a proactive stance on understanding and managing their climate impacts and risks is greater than ever. It is increasingly important for companies not only to disclose but also to manage both physical and transition risk. They also need to demonstrate that they are adopting actions that reflect a recognition of their contribution to historical emissions and detail immediate and relevant efforts to remediate them. As both litigation and regulatory action to mitigate emissions across all aspects of the economy increases over the coming decade, business models will need to adapt accordingly.

Box 2.5. Litigation risk as a category of climate-related financial risk

Thinking on climate change-related financial risks and opportunities usually distinguishes two risk categories: physical risks and transition risks. Understanding of the relationship of litigation risk to these two categories has changed over time, with climate-related litigation risk sometimes referred to as 'cutting across' or as a sub-category of physical and transition risks (MinterEllison, 2017) or sometimes considered as a risk category in itself (UNEP, 2021).

As a type of financial risk, climate litigation risk has been defined as "any risk related to litigation pertaining to climate change and breach of the underlying legal frameworks on both the business and corporate levels" (ibid.). Climate change-related litigation risks potentially affect a large group of companies from the productive or real sectors of the economy, as well as from the financial sector.

To determine whether and to what extent climate litigation is material, it will be necessary to develop frameworks to quantify this risk. At the same time, once climate litigation is recognised as a financial risk, corporations, investors, banks and insurers will be expected to disclose climate litigation risk in line with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). Not disclosing litigation risk could thus be understood as a breach of disclosure obligations, which in turn will increase litigation risk (Solana, 2020).



Box 2.4. Historic ruling against Shell

In May 2021 the District Court of the Hague, the same court that six years before gave the groundbreaking decision in the *Urgenda* case, again changed the course of history, ordering Dutch-based oil and gas multinational Shell to reduce its carbon dioxide emissions by 45% from 2019 levels by 2030, as a way to secure that global warming is limited to 1.5°C. The lawsuit, brought by several environmental NGOs and led by Friends of the Earth Netherlands (Milieudefensie) with more than 17,000 co-plaintiffs, claimed that Shell's business operations are unlawful, and that the company should reduce its emissions in accordance with the goals of the Paris Agreement.

The court did not find that Shell is acting unlawfully but it ruled that the company has an obligation of result to reduce its own emissions, and a 'significant best-efforts obligation' to reduce emissions along its entire value chain, including those of its suppliers and consumers.

Commentators observed the importance of the court's reliance on the 'unwritten duty of care' under Dutch tort and the use of non-binding goals (of the Paris Agreement) as well as non-binding instruments (the UN Guiding Principles on Business and Human Rights and the OECD's Guidelines for Multinational Enterprises) (Van Asselt et al., 2021). These international standards and the common facts that comprise the basis of the case arguably make this case replicable, increasing the risk of litigation against companies that set net-zero targets without credible short-term action, with knock-on effects expected for the cost of capital for oil and gas projects (Khan, 2021).

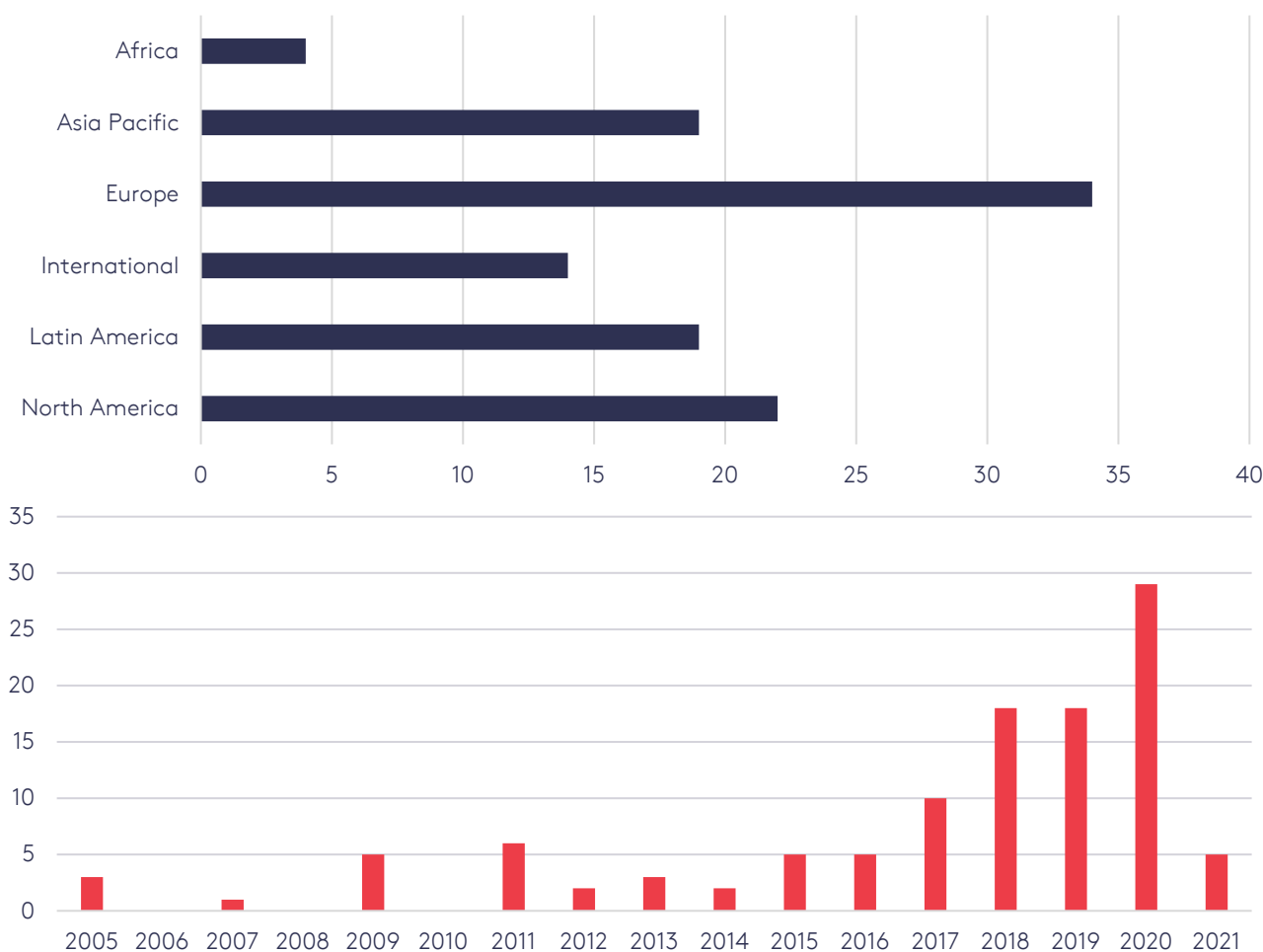
C. Digging deeper into the ‘rights-turn’ in climate litigation

Commentators have noted a ‘rights-turn’ in climate litigation, through which claimants seek to use human rights arguments to hold governments and corporations accountable for climate change (Osofsky and Peel, 2018). Over the past 12 months, this trend has continued. More than 100 (112) human rights cases have now been captured in the US and non-US databases, with 29 of these cases filed in 2020 and a further five in 2021. Significant new developments over the past year have included the filing of three cases before the European Court of Human Rights, the first of their kind to come before the Court.

The majority (93) of human rights cases have been brought against governments and a small but significant minority (16) brought against companies. In addition, human rights arguments have been used on at least one occasion by protesters seeking to defend their efforts to block new fossil fuel infrastructure (*Trans Mountain Pipeline v. Misavair*).

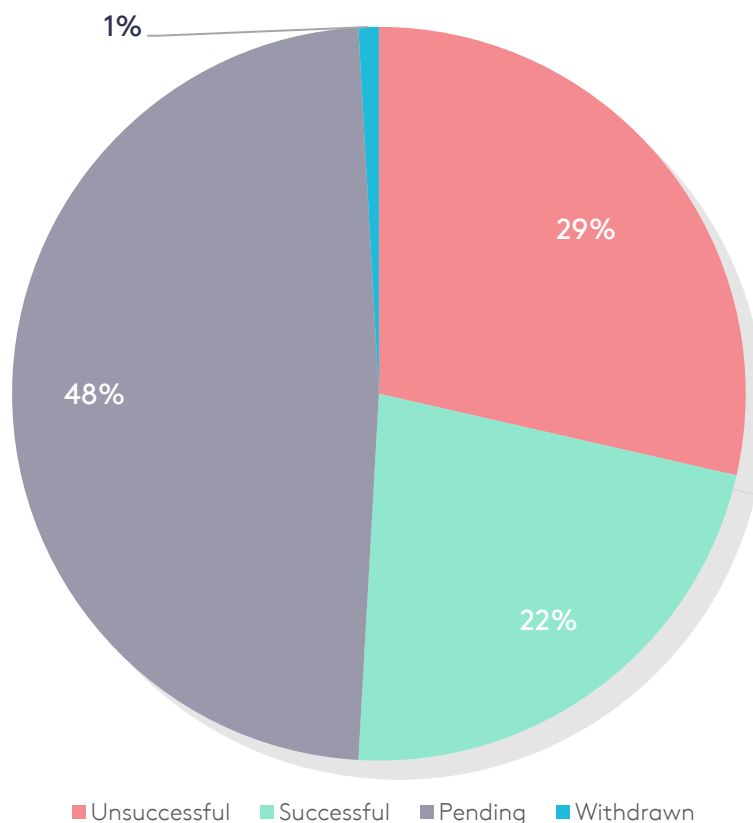
As many of these cases have been filed in recent years, almost half have yet to be decided; 32 decided cases have had negative outcomes, and 25 have had positive outcomes (Figure 2.4). However, as these cases deal with fundamental questions of societal norms and values and are frequently accompanied by media campaigns, it is particularly important to consider their wider potential impacts, which may often be most significant outside the courtroom.

Figure 2.3. Geographical and chronological distribution of rights-based climate cases (% of cases, to May 2021)



Source: Updated from Savaresi and Setzer (2021), based on CCLW and Sabin Center data

Figure 2.4. Outcomes in human rights cases



Source: Updated from Savaresi and Setzer (2021), based on CCLW and Sabin Center data

There is a growing international consensus, as illustrated in the decisions of numerous national courts, that human rights obligations may apply in the context of both climate change mitigation and adaptation. Nevertheless, arguments about adaptation featured in only 29 of the cases, with just nine focused exclusively on this issue. These cases include a complaint against the US submitted to the UN Special Procedures by the Alaska Institute for Justice on behalf of five Tribes in Alaska and Louisiana faced with climate-forced displacement. The complaint alleges that the US Government has failed to protect the human rights of the Tribes by failing to introduce the necessary adaptation measures to allow the Tribes to continue to inhabit their ancestral territory, and by failing to include the Tribes in the ongoing development of current adaptation plans. Among the requested recommendations, the complaint includes requests that sufficient funding should be allocated to adaptation and recovery measures.

Box 2.6. The evolving right to a stable climate

Early cases seeking to ground climate protection obligations in human and constitutional rights, such as *Leghari v. Pakistan*, centred on a new reading of traditional rights. The case of *Juliana et al. v. US* took this a step further, implicitly asking for the recognition of a right to a stable climate as an extension of existing rights under the US Constitution. The case of *IEA v. Brazil*, filed in October 2020, however, marks a significant departure from these early cases, centring on the need for recognition of a standalone right to a stable climate under the Brazilian Constitution (Setzer and Carvalho, forthcoming). This case can be seen as part of a broader movement towards 'climate constitutionalism', a movement that has already seen explicit references to the duty of climate protection in a small but growing number of national constitutions (Singh-Galeigh and Welikala, 2021).

Much commentary on the intersection of human rights and climate change to date has focused on cases aiming to hold states and corporations accountable for climate-related harm to human rights. However, there is also a growing awareness of cases in which claimants who may otherwise support climate action seek to prevent human rights harms associated with measures connected to climate policies, such as renewable energy projects that might affect the rights of local communities (Savaresi and Setzer, 2021). A representative example can be found in the *Backcountry Against Dumps v. U.S. Bureau of Indian Affairs*, in which an NGO claimed that the authorisation of renewable energy generation facilities, including 60 wind turbines, threatened a host of rights, human health and safety. These cases typically rely on 'negative' human rights obligations, arguing that states should refrain from taking actions that could result in human rights harms (ibid.). Such cases demonstrate the need for considered and informed policymaking that puts human rights at its centre, considering both the positive and negative implications of a given action and developing processes to mitigate any potential human rights risks.

D. Where next for climate litigation?

Value chain litigation

It is increasingly clear that an understanding of value chains is important for both climate change mitigation and adaptation action. In this context, it is possible to anticipate a growing trend towards 'value chain climate litigation', where claimants seek to hold companies responsible for acts and omissions in their value chains and/or supply chains.

Decarbonising supply chains is key to meeting ambitious climate goals (CDP, 2020). For instance, the causes of deforestation – and how to fight it – are deeply connected to the supply chains of the beef, palm oil and soy businesses (Lambin et al., 2018). An example is the case recently brought by Indigenous peoples from the Brazilian and Colombian Amazon and NGOs from France and the US against the French supermarket chain Casino.²⁵ The case used evidence from the Center for Climate Crime Analysis, which suggests that Casino sourced beef from three slaughterhouses that used 592 primary suppliers that were "responsible for at least 50,000 hectares of deforestation between 2008 and 2020". The case is explicitly grounded in the French "duty of vigilance" in the French Commercial code, which requires companies to conduct human rights and environmental due diligence across their operations and supply chains. It also seeks comparatively little in damages (US\$3.7 million, while Casino's Latin American revenues topped US\$15 billion in 2020). Nevertheless, it is possible that the lawsuit may open the door to increasing legal action against companies that violate deforestation laws (Chain Reaction Research, 2021).

Cases involving high emitting companies from the energy sector are also affected by this understanding of the importance of considering the value chain, rather than just one corporation. The landmark decision in *Milieudefensie et al. v. Shell*, for instance, distinguished between emissions of the Shell group and the wider group of entities within Shell's business network, including end-users. The court concluded that Shell had an obligation to reduce CO₂ emissions from the Shell group's activities (including 'Scope 3' emissions by third parties resulting from those activities) by 45% by the end of 2030 relative to 2019.²⁶ Nonetheless, it recognised that Shell bore a higher degree of responsibility for its own operations – where the court expected reduction obligations to be met – than for those of customers and suppliers, for which it lowered the standard of Shell's obligation to "significant best efforts". The emphasis on Scope 3 emissions in the judgment can be seen as part of a growing consensus around the need to limit cumulative greenhouse gas emissions by 2050 in order to ensure that warming stays within safe global temperature limits (see further discussion in Box 2.6).

²⁵ Supply chain litigation has been common in other fields (e.g. environmental law, human rights and protection against child and slave labour), but this is the first case where these types of legal arguments have been expressly applied to climate issues.

²⁶ There are several ways of accounting for the greenhouse gas emissions that can be attributed to a given entity. One approach classifies emissions into three scopes: Scope 1 covers direct emissions from owned or controlled sources of greenhouse gases, Scope 2 covers indirect emissions from the generation of energy purchased from external sources, and Scope 3 covers all other emissions that occur within a company's value chain. See Anthesis Group, *Understanding Scope 1, 2 and 3 Emissions*: www.anthesisgroup.com/scope-1-2-3-emissions/.

In the context of the Shell case, it can also be viewed as part of a growing focus on upstream emissions and supply-side regulation of fossil fuels.²⁷

Box 2.6. The 1.5 degree temperature limit

Article 2.1(a) of the Paris Agreement states that one of the key goals of the agreement is to limit global temperatures to “well below 2°C” and to “pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change”. In October 2018, the IPCC released its landmark *Special Report on 1.5 Degrees*, affirming the imperative to limit warming to this level to avoid severe and potentially irreversible impacts.

The judgment of the Hague district court in the case of *Shell v. Milieudefensie* represents one of the first clear judicial determinations that the 1.5°C temperature limit should be used to inform a legal standard of conduct, even in the absence of explicit legislation. In taking this approach, the court noted that although “non-binding”, the “goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change”. The case may provide an important precedent for other ongoing actions where the Paris temperature goals and the need to reach net-zero emissions should inform legal obligations and standards. *Duarte Agostinho and Others v. 33 States*, filed in September 2020 before the European Court of Human Rights, might be one such case.

Understanding global supply chains is also necessary to increase resilience and protect companies and broader value chains from financial losses. In this case, as climate change makes extreme weather more frequent and/or severe, it increases the annual probability of events that are more intense than physical assets are constructed to withstand, increasing the likelihood of supply-chain disruptions. A lack of attention to supply chain resilience could expose directors and officers to potential claims by shareholders and other stakeholders (Ghadge et al., 2020).

Subsidies in the spotlight

Another issue that may be subject to fresh litigation over the course of the coming year is the issue of government subsidies for high emitting industries such as the oil and gas sector. The past 12 months have seen a major shift in global consensus around the need to curb fossil fuel production and place strict limits on the exploration of hydrocarbon reserves. A report by the UN Environment Programme and leading international research institutions published in December 2020 estimated that there is a significant gap between the 6% annual decrease in fossil fuel production required to meet the goal of limiting global warming to 1.5°C and countries’ current plans, which would lead to a 2% average annual increase (SEI et al., 2020). That report was followed by the International Energy Agency’s landmark report *Net-zero by 2050*, which sets out a roadmap to reaching net-zero emissions by 2050 in which no new investment in fossil fuel supply projects is required (IEA, 2021). Acting in line with these reports will require a rapid policy shift from governments around the world, which provided an estimated US\$320 billion in fossil fuel subsidies in 2019 (ibid.).

While there have been multiple cases against governments challenging permitting and approvals processes for new hydrocarbon projects, relatively few cases have focused on government incentives

²⁷ Further discussion of this trend can be found in a recent special issue of *Climatic Change*, edited by Harrow van Asselt and Michael Lazarus.

to fossil fuels.²⁸ However, a recent high-profile case filed in the UK suggests that this may be starting to change. On 12 May 2021, campaigners launched a legal challenge to the state-owned Oil and Gas Authority's new strategy, which sets out plans to support ongoing efforts to exploit North Sea oil and gas reserves. The claimants argue that such plans are irrational and inconsistent with the UK Government's net-zero target because they will lead to more oil and gas being extracted than would otherwise be the case. The case is accompanied by an extensive media campaign launched under the tag line 'Paid to Pollute'²⁹ and a petition for citizens to express their support. As such, the case is one of the first to bring together the narratives about the need for comprehensive and consistent government action established by the climate commitments cases, as well as those about 'big oil's' historic responsibility for both emissions and disinformation established by the cases against the Carbon Majors. Although it is still too early to say what the outcome of the case may be, the action may suggest we will see more cases targeting specific government policies inconsistent with net-zero targets over the coming year.

Such cases demonstrate the need for government actors to develop mechanisms to show that potential climate and human rights impacts are adequately and consistently factored into all decision-making processes if they are to avoid the risk of litigation.

²⁸ Some landmark cases, such as that of *Juliana et al. v. United States*, highlight the ongoing provision of subsidies and tax incentives to the fossil fuel industry as part of a pattern of systemic inaction on climate over many years, but these do not necessarily target specific policies or programmes on this issue.

²⁹ See <https://paidtopollute.org.uk/>

Conclusion

Climate change litigation continues to grow and diversify, spreading to increasing numbers of jurisdictions and areas of law. This growth and diversity reflect the increasing urgency with which the climate crisis is viewed by the general public around the world and the growing understanding of the role that different actors – particularly those in the financial markets – will need to play in the transition to a net-zero global economy.

Recent cases against both companies and governments have been able to rely on an increasingly strong consensus among the global climate policy community on global temperature limits, allowing the focus to shift to questions about the roles and responsibilities of different institutions in a rapidly changing global economy. Cases like *Milieudefensie v. Shell* suggest there is a growing expectation that those with historical responsibility for emissions will take action to address the climate crisis, and that this expectation is starting to inform perceptions of reasonable standards of conduct. Actors that do not take notice of this development, either by failing to adopt serious long-term strategies and targets, or by failing to make serious efforts to achieve their targets once set, may find themselves at increasing risk of litigation. Similarly, where some actors may previously have been tempted to avoid engaging in a fully transparent appraisal of climate risks to avoid being held to account for a failure to address them, such an approach may now be becoming increasingly untenable.

The ongoing expansion of human rights arguments in climate cases continues to emphasise the high stakes involved in climate action or inaction, and the reality of a climate crisis that is already impacting the lives and livelihoods of communities around the world. The existence of growing numbers of cases that are not aligned with climate objectives, whether ‘just transition litigation’ grounded in rights-based arguments or Investor-State Dispute Settlement cases grounded in international trade law, also demonstrates that climate policy and the often-radical changes it requires can create both winners and losers. Courts and tribunals provide a natural forum in which the fair allocation of burdens of climate actions can be debated, highlighting distributive justice questions over who can and should bear the costs of the transition.

References

- Adler D (2019) *US Climate Change Litigation in the Age of Trump: Year Two*. Sabin Center for Climate Change Law. www.columbiaclimatelaw.com/files/2019/06/Adler-2019-06-US-Climate-Change-Litigation-in-Age-of-Trump-Year-2-Report.pdf
- Bouwer K (2018) The unsexy future of climate change litigation. *Journal of Environmental Law* 30(3): 483–506. doi.org/10.1093/jel/eqy017
- Bouwer K (2020) Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation. *Transnational Environmental Law*: 1-32. [/doi.org/10.1017/S2047102520000114](https://doi.org/10.1017/S2047102520000114)
- Bouwer K and Setzer J (2020) New trends in Climate Litigation: What works? *British Academy COP26 Briefings Series*. www.thebritishacademy.ac.uk/documents/2701/Climate-Litigation-as-Climate-Activism-What-Works.pdf
- Burger M and Gundlach J (2017) *The Status of Climate Change Litigation: A Global Review*. UN Environment Programme. www.wedocs.unep.org/handle/20.500.11822/20767
- Burger M and Metzger J (2021) *Global Climate Litigation Report: 2020 Status Review*. UN Environment Programme. www.unep.org/resources/report/global-climate-litigation-report-2020-status-review.
- Carnwath R (2016) Climate Change Adjudication after Paris: A Reflection, *Journal of Environmental Law* 28(1):5-9.
- Carnwath R (2021) Climate Change and the Rule of Law. Lecture, *Bucerius Law School Luther Lecture Series*, Hamburg, 22 March 2021. www.lse.ac.uk/granthaminstitute/publication/climate-change-and-the-rule-of-law/
- CDP (2020) *Global Supply Chain Report*. www.cdp.net/en/research/global-reports/transparency-to-transformation
- Chain Reaction Research (2021) *The Chain: Casino Group Faces Increasing Legal Pressure Over Deforestation Links After New Indigenous Lawsuit*. www.chainreactionresearch.com/the-chain-casino-group-faces-increasing-legal-pressure-over-deforestation-links-after-new-indigenous-lawsuit/
- Eskander S, Fankhauser S and Setzer J (2021) Global Lessons from Climate Change Legislation and Litigation. National Bureau of Economic Research – NBER Chapters. *Environmental and Energy Policy and the Economy* 2: 44-82. www.journals.uchicago.edu/doi/10.1086/711306
- European Commission (2020) *Proposal for Reform to the Energy Charter Treaty*. www.trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf
- Fermeglia M, Higham C, Silverman-Roati K, Setzer J (2021) *Investor-State Dispute Settlement' as a new avenue for climate change litigation*. Commentary, Grantham Research Institute on Climate Change and the Environment. www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/
- Financial Times (2021) Shell verdict sets scene for more corporate climate cases. *Financial Times*, 28 May. www.ft.com/content/f18269ee-c9d8-45c4-bbee-28561b065e6b
- Franke A and Parashar M (2021) Germany brings net-zero forward to 2045, power sector hit hardest by new 2030 target. *S&P Global Platts*, 12 May. www.spglobal.com/platts/en/market-insights/latest-news/coal/051221-germany-brings-net-zero-forward-to-2045-power-sector-hit-hardest-by-new-2030-target

- Ghadge A, Wurtmann H and Seuring S (2020) Managing climate change risks in global supply chains: a review and research agenda. *International Journal of Production Research*, 58(1): 44-64.
- Ghaleigh NS (2010) "Six honest serving-men": climate change litigation as legal mobilization and the utility of typologies. *Climate Law*, 1(1):31-61.
- Golnaraghi M, Setzer J, Brook N, Lawrence W and Williams L (2021) *Climate Change Litigation – Insights into the evolving global landscape*. Geneva Association. www.genevaassociation.org/research-topics/climate-change-and-emerging-environmental-topics/climate-litigation
- Heede R (2014) Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010. *Climatic Change* 122(1–2): 229–241. doi.org/10.1007/s10584-013-0986-y
- Hilson C (2010) Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In). *Climate change: la riposta del diritto*, pp.421-436.
- Intergovernmental Panel on Climate Change [IPCC] (2018) Summary for Policymakers. *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte V, P Zhai, H-O Pörtner, D Roberts, J Skea et al. (eds.)]. World Meteorological Organization, Geneva, Switzerland
- International Energy Agency [IEA] (2021) *Net Zero by 2050*. IEA, Paris. www.iea.org/reports/net-zero-by-2050
- Jackson A (2020) Ireland's Climate Action and Low Carbon Development Act 2015: Symbolic Legislation, Systemic Litigation, Stepping Stone?. in Muinzer, T. (Ed.) *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation*. ssrn.com/abstract=3680002
- Khan T (2020) Remarks offered during panel event 'Strategic Climate Litigation: insights from global experience'. Grantham Research Institute on Climate Change and the Environment. www.lse.ac.uk/granthaminstitute/events/strategic-climate-litigation-insights-from-global-experience/
- Khan T (2021) Shell's historic loss in The Hague is a turning point in the fight against big oil. *The Guardian*, 1 June. www.theguardian.com/commentisfree/2021/jun/01/shell-historic-loss-hague-fight-big-oil
- Kysar DA (2010) What Climate Change Can Do About Tort Law. Yale Law School, Public Law Working Paper No. 215. *Environmental Law*, 41(1): 2011 ssrn.com/abstract=1645871
- Lambin EF, Gibbs HK, Heilmayr R, Carlson KM, Fleck LC, et al. (2018) The role of supply-chain initiatives in reducing deforestation. *Nature Climate Change*, 8(2): 109-116.
- Lobel N and Fermeglia, M (2018) Investment Protection and Unburnable Carbon: Competing Commitments in International Investment and Climate Governance, *Diritto del Commercio Internazionale* 4: 945–976. ssrn.com/abstract=3372403
- Markell D and Ruhl JB (2012) An Empirical Assessment of Climate Change in the courts: A New Jurisprudence or Business as Usual? *Florida Law Review* (64)15.
- Maxwell L, Van Berkel D, Mead S (forthcoming) *Adjudicating the next generation of Urgenda-style cases: judicially manageable standards for climate litigation*. Working Paper.
- McCormick S, Glicksman RL, Simmens SJ, Paddock L, Kim D and Whited B (2018) Strategies in and outcomes of climate change litigation in the United States. *Nature Climate Change*, 8(9), 829–833.
- MinterEllison (2017) *The Carbon Boomerang – Litigation Risk as a Driver and Consequence of the Energy Transition*. <https://2degrees-investing.org/wp-content/uploads/2017/09/Carbon-boomerang.pdf>

- Office of the High Commissioner for Human Rights (2015) *Understanding Human Rights and Climate Change. Submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change*. www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf
- Peel J and Lin J (2019) Transnational climate litigation: the contribution of the global South. *American Journal of International Law*, 113(4): 679–726.
- Peel J and Osofsky HM (2015) *Climate change litigation regulatory pathways to cleaner energy*. Cambridge, MA: Cambridge University Press.
- Peel J and Osofsky HM (2018) A rights turn in climate change litigation? *Transnational Environmental Law* 7(1): 37–67. doi.org/10.1017/S2047102517000292
- Peel J and Osofsky HM (2020) Climate Change Litigation. *Annual Review of Law and Social Science* 2020 16:1. doi.org/10.1146/annurev-lawsocsci-022420-122936
- Raval A (2021) Shell to speed up energy transition plan after Dutch court ruling. *Financial Times*, 9 June. www.ft.com/content/878cb5cd-9814-4cb2-bbfb-c3f7b8927716
- Savaresi A and Setzer J (2021) *Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation*. ssrn.com/abstract=3787963
- SEI, IISD, ODI, E3G and UNEP (2020) *The Production Gap Report: 2020 Special Report*. www.productiongap.org/2020report
- Setzer J (forthcoming) Impacts of high-profile litigation against major fossil fuel companies. In César Rodríguez-Garavito (ed). *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*. Cambridge University Press.
- Setzer J and Benjamin L (2019) Climate Litigation in the Global South: Constraints and Innovations. *Transnational Environmental Law*
- Setzer J and Byrnes R (2019) *Global trends in climate change litigation: 2019 snapshot*. Grantham Research Institute on Climate Change and the Environment. <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot/>
- Setzer J and Byrnes R (2020) *Global trends in climate change litigation: 2020 snapshot*. Grantham Research Institute on Climate Change and the Environment. <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2020-snapshot/>
- Setzer J and Carvalho D (forthcoming) *Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate*. RECIEL.
- Setzer J and Vanhala LC (2019) Climate change litigation: A review of research on courts and litigants in climate governance. *WIREs Climate Change* 10: e580. doi.org/10.1002/wcc.580
- Setzer J and Yoshida K (2020) The Trends and Challenges of Climate Change Litigation and Human Rights. *European Human Rights Law Review*, 2: 161-173.
- Shotter J (2019) Polish Court rules against Enea Coal Plant Plan. *Financial Times*, 1 August. www.ft.com/content/e43d96a6-b44c-11e9-bec9-fdcab53d6959
- Silverman-Roati K (2021) *U.S. Climate Litigation in the Age of Trump: Full Term*. Sabin Center for Climate Change Law, Columbia Law School. <https://climate.law.columbia.edu/sites/default/files/content/docs/Silverman-Roati%202021-06%20US%20Climate%20Litigation%20Trump%20Admin.pdf>

- Sindico F and Moïse Mbengue M (2021) *Comparative Climate Change Litigation: Beyond the Usual Suspects*. Switzerland: Springer.
- Singh-Ghaleigh N and Welikala A (2021) Need for a constitutional and statutory framework on the environment and climate change in Sri Lanka. *Daily FT*, 23 March. www.ft.lk/opinion/Need-for-a-constitutional-and-statutory-framework-on-the-environment-and-climate-change-in-Sri-Lanka/14-715165
- Solana J (2019) Climate Litigation in Financial Markets: A Typology. *Transnational Environmental Law*: 1-33.
- Solana J (2020) Climate change litigation as financial risk. *Green Finance*, 2(4): 344-372.
- United Nations Environment Programme [UNEP] (2021) *Insuring the climate transition: Enhancing the insurance industry's assessment of climate change futures*. www.unepfi.org/psi/wp-content/uploads/2021/01/PSI-TCFD-final-report.pdf
- Urgenda Foundation (2020) Climate verdict leads to 75% reduction in use of coal-fired plants + €3 billion for Urgenda's '54 climate solutions' plan. Press release, 24 April. Urgenda Foundation. news.pressmailings.com/urgenda/dutch-climate-verdict-measures
- Van Asselt H and Lazarus M (2018) Fossil fuel supply and climate policy: exploring the road less taken. *Climatic Change* 150(1-2): 1-13
- Van Asselt H, Kulovesi K, Rajavuori M and Savaresi A (2021) *Shell-shocked: a watershed moment for climate litigation against fossil fuel companies*. Centre for Climate Change, Energy, and Environmental Law. sites.uef.fi/cceel/shell-shocked-a-watershed-moment-for-climate-litigation-against-fossil-fuel-companies/
- Van Zeven J (2015) Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide? *Transnational Environmental Law*, 4(2), 339-357.
- Wonneberger A and Vliegthart R (2021) Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government. *Environmental Communication*, 1-16 doi.org/10.1080/17524032.2021.1889633

Appendix 1. Figures representing types of claimant and defendant

Figure A1.1. Regional distribution of cases

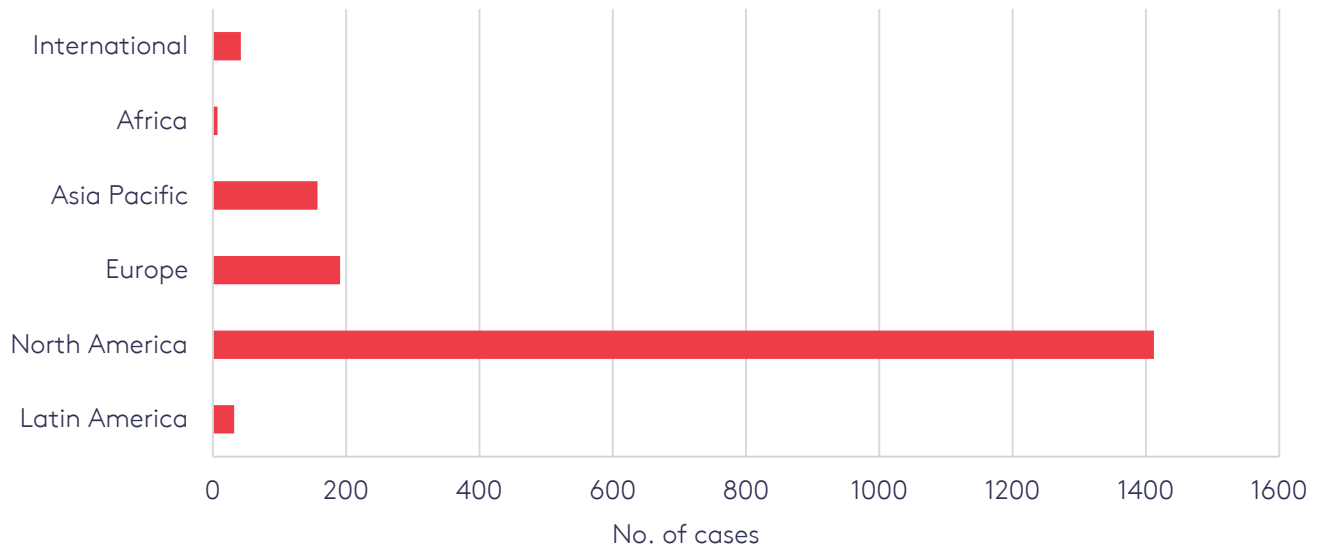


Figure A1.2. Non-US cases by type of applicant over time

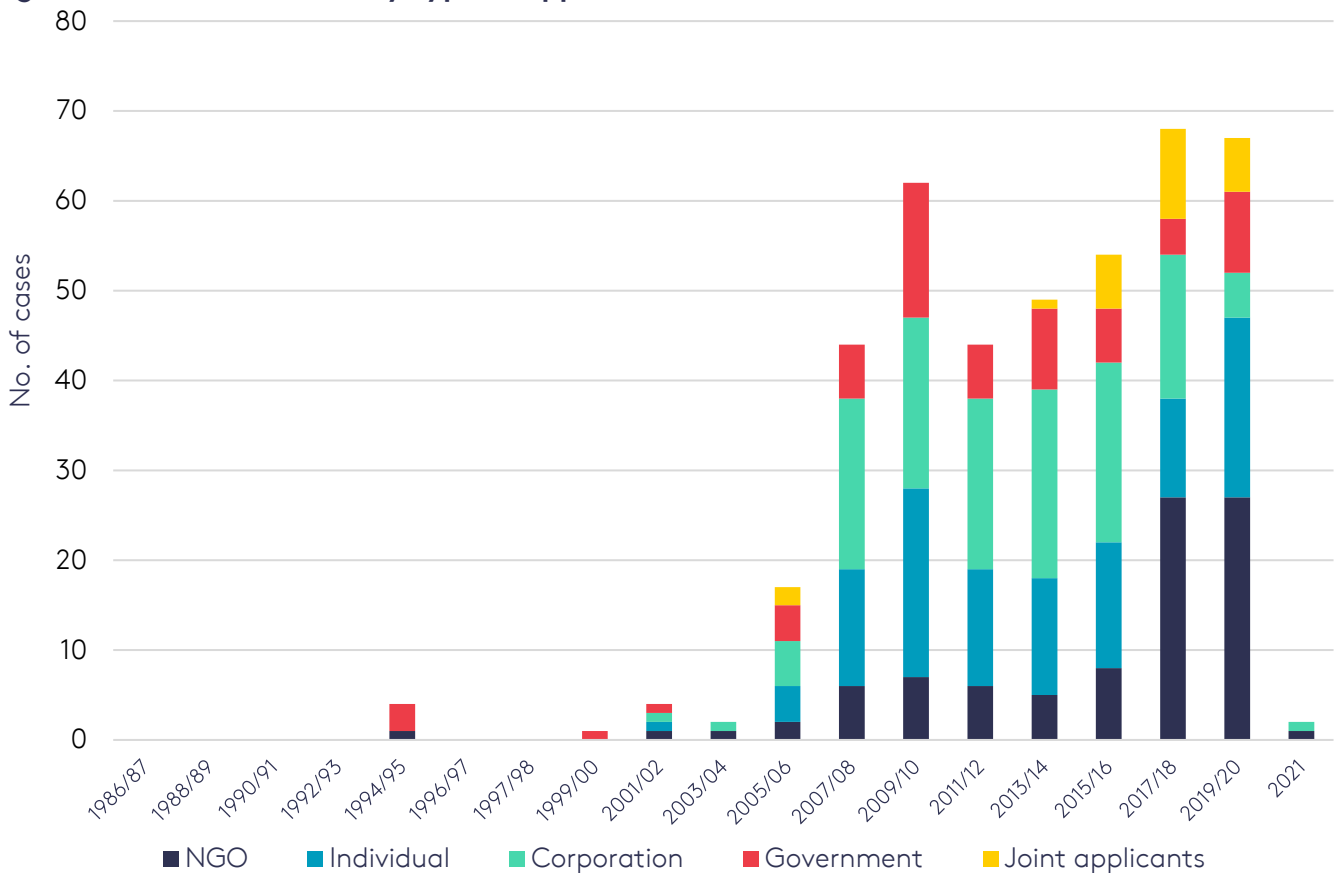


Figure A1.3. Non-US cases by type of applicant

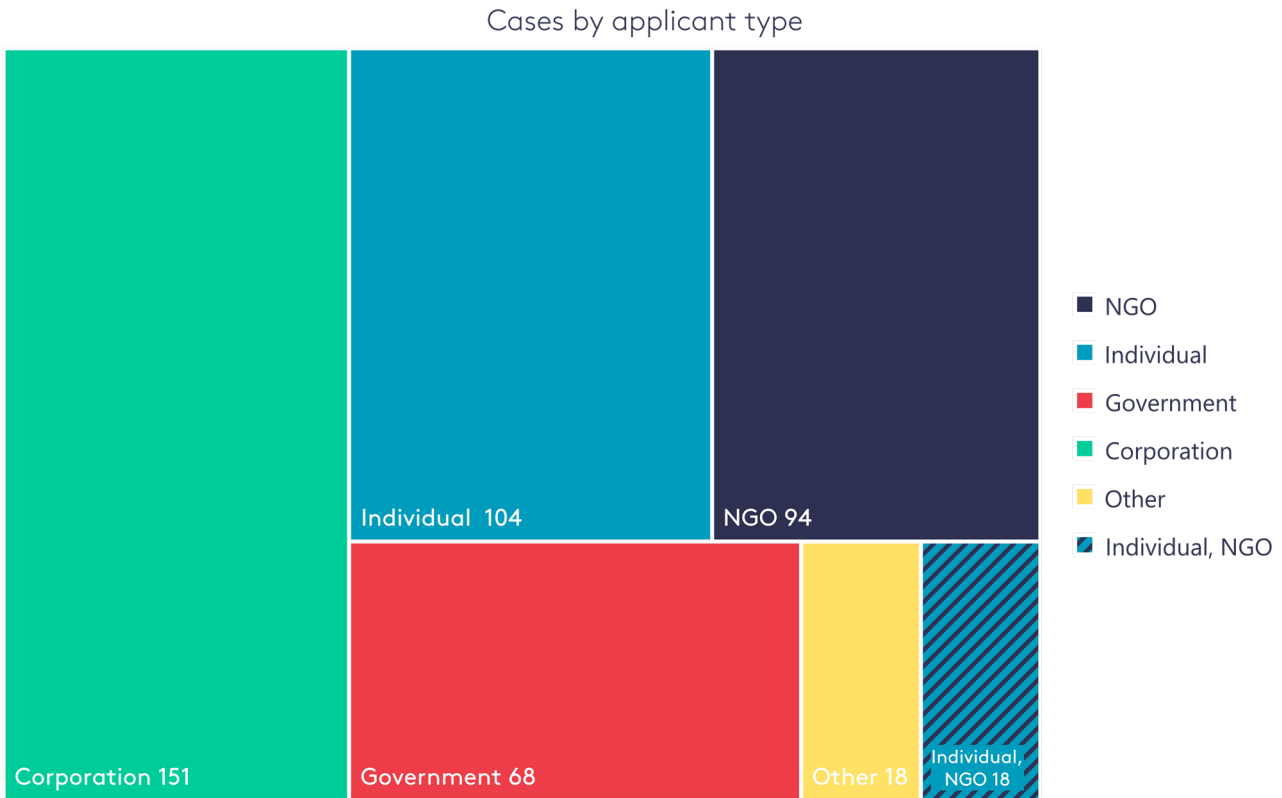


Figure A1.4. Non-US cases by type of defendant

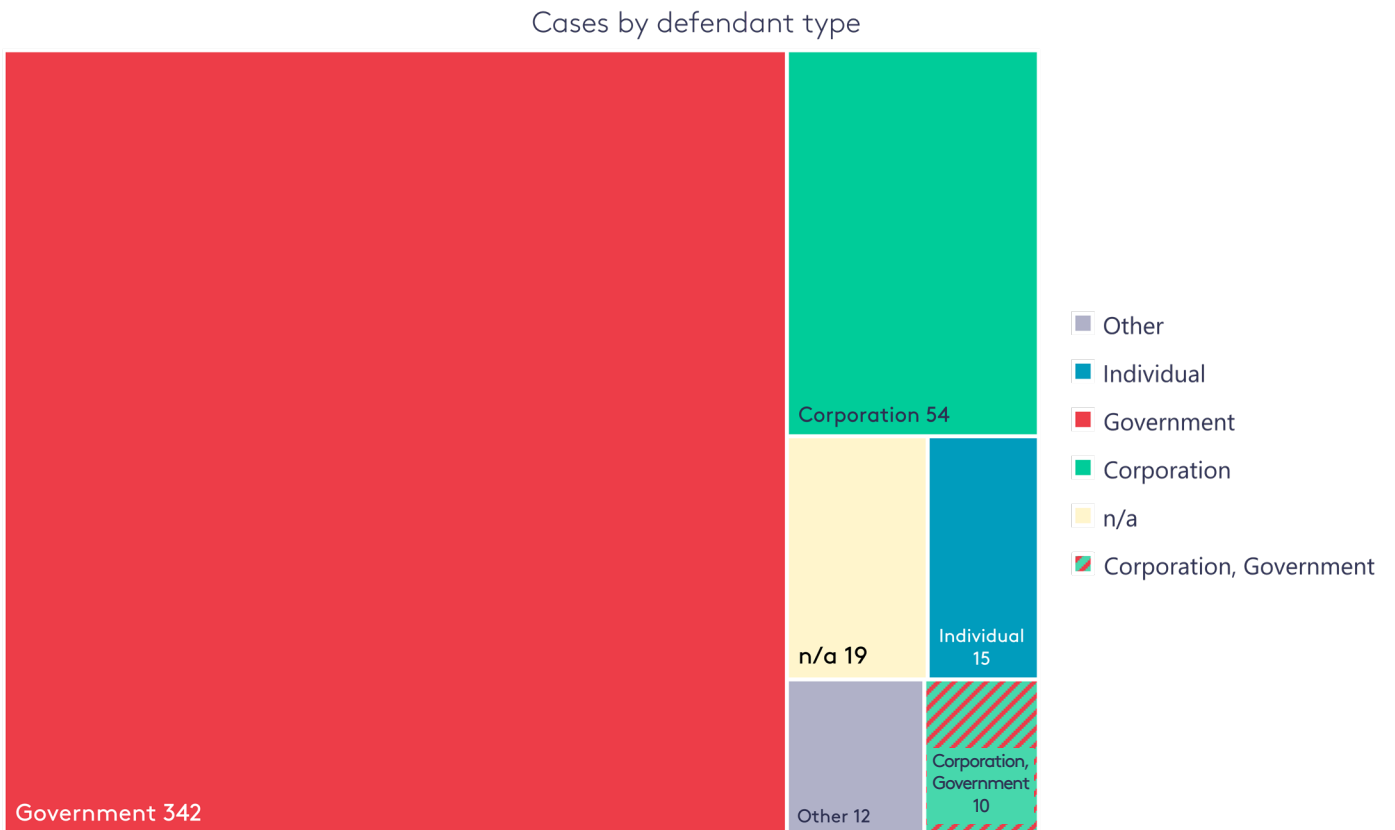


Figure A1.5 US cases by type of applicant

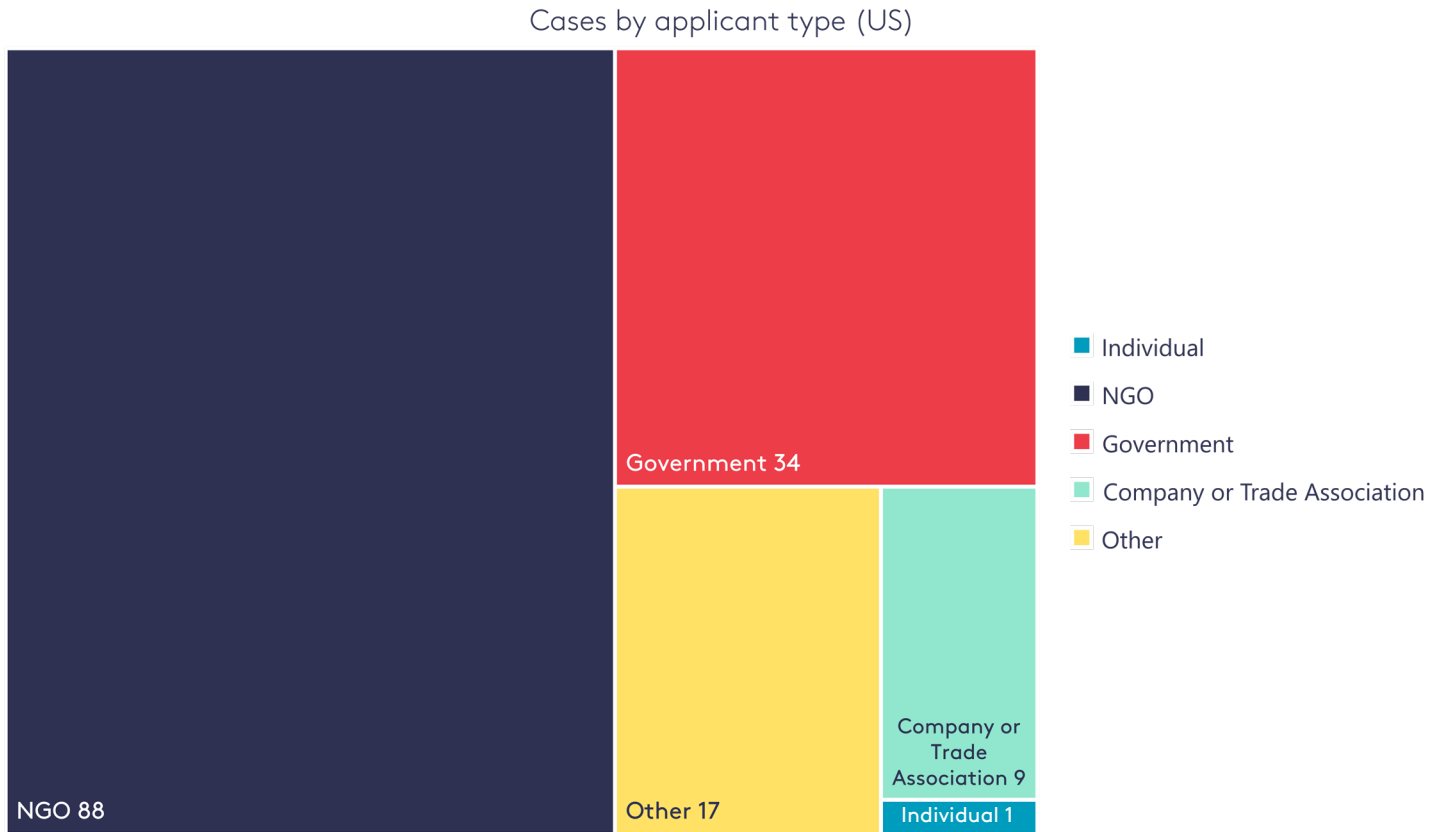
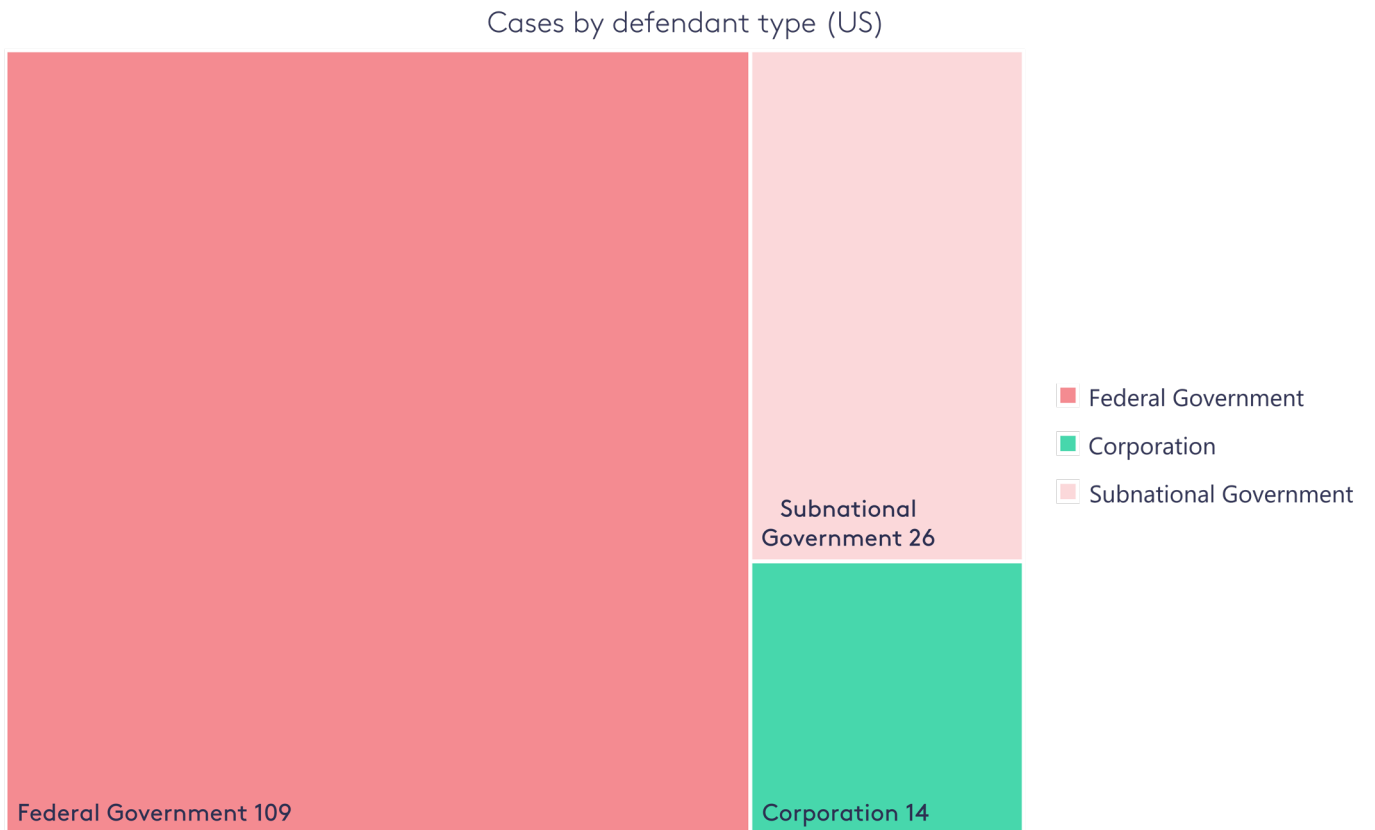


Figure A1.6. US cases by type of defendant



Appendix 2. Methodology for climate commitments analysis

This Appendix provides an overview of the methods used in the identification and classification of over 100 ‘climate commitment’ cases against non-US government actors since 2015. A full review of US cases was not conducted for this report. Previous analysis of climate litigation in the first two years of the Trump Administration has identified that 79% of the 159 cases filed in the US in 2017 and 2018 were filed against the federal government and provides a detailed analysis of the aims of the litigants and the legal grounds on which they relied (Adler, 2019). Further in-depth analysis of US cases was recently published by the Sabin Center (Silverman-Roati, 2021), which provides additional details on the nature of cases filed against the federal government seeking to advance or challenge pro-climate regulation.

For the initial review, we considered all cases in the CCLW database brought against governments since 2015. A subjective assessment of cases was used to determine whether reference was made to governmental obligations to mitigate or adapt to climate change, or whether a case had been brought challenging a climate-aligned policy or action or seeking compensation as a result of that action.

To better understand the diversity of arguments employed in these cases, cases were subsequently categorised according to three applicable scenarios, as shown in Table A2.1. We then identified the specific grounds for review relied on for cases falling within each of these scenarios. Claims in scenario 1 were then sorted into two types: systemic mitigation cases, looking at government action holistically, and cases challenging specific policies or decisions and their implementation.

Table A2.1. Applicable scenarios in ‘climate commitments’ cases against governments

Applicable scenarios	Key examples	Grounds of review*
Claim against the State or subnational government for actions or omissions that allegedly led to an increase in greenhouse gas (GHG) emissions, insufficient decrease in GHG emissions, or a failure to adapt to climate change, either in contradiction to or absence of climate commitments.	<ul style="list-style-type: none"> • <i>Urgenda v. the Netherlands</i> • <i>Neubauer et al. v. Germany</i> • <i>Notre Affaire à Tous et al v. France (‘L’Affaire du Siecle’)</i> • <i>Friends of the Irish Environment v. Ireland</i> • <i>Do-Hyun Kim et al. v. South Korea</i> 	<ul style="list-style-type: none"> • Breach of international law obligations • Human rights • Tort law • Public trust doctrine • Breach of other environmental obligations (e.g. breach of the precautionary principle, violation of environmental permitting rules, or inconsistency with other environmental statutes) • Constitutional or administrative law (including non-compliance with relevant climate legislation or policy)
Claims against the government or other public authority for authorising activity/project that leads to increased GHG emissions, in violation of commitments or obligations to establish a safe limit on emissions.	<ul style="list-style-type: none"> • <i>ClientEarth v. Secretary of State (‘Drax natural gas plant’)</i> • <i>Plan B Earth v. Secretary of State for Transport (‘Heathrow case’)</i> • <i>Greenpeace Norway v. Government of Norway (‘People v. Arctic oil’)</i> • <i>Sharma et al. v. Minister for the Environment (‘Vickery coal mine extension’)</i> 	<ul style="list-style-type: none"> • Human rights • Tort law • Constitutional or administrative law (including non-compliance with relevant climate legislation or policy) • Breach of other environmental obligations (e.g. breach of the precautionary principle, violation of environmental permitting rules, or inconsistency with other environmental statutes)
Claims against the State or subnational governments challenging policies or actions aimed at the achievement of climate commitments or seeking compensation as a result of such policies or actions.	<ul style="list-style-type: none"> • <i>RWE v. Kingdom of the Netherlands</i> • <i>West Cumbria Mining v. Cumbria County Council</i> • <i>IPC Petroleum v. France</i> 	<ul style="list-style-type: none"> • Anti-competitive grounds • Breach of international investment agreements • Constitutional or administrative law • Property rights

Notes: *Grounds of review were identified from existing case summaries. While this analysis captures the primary grounds of review relied on for each case, additional grounds may also be present in some cases that have not been captured here. This table was adapted from a set of scenarios first developed by Sindico and Moïse Mbengue (2021). See also section II.C of the main report.