

Climate change litigation: A new class of action

With the growing trend in climate change litigation, pressure is mounting to ramp up action



Climate change litigation: A new class of action

As the number and type of climate-related claims against companies, governments and individuals increase worldwide, pressure is mounting on businesses to ramp up action.

Mark Clarke and **Tallat Hussain** of global law firm White & Case take a look at recent trends

An increased sense of global urgency and public awareness around climate change-related risks, along with national laws and international commitments, is driving a new class of litigation.

Crucially, the science of climate change is developing linkages to potential duties of care, facilitating alternative approaches for those seeking to demonstrate responsibility for climate change risks and increasing pressure on governmental and non-governmental actors to propel the transition to decarbonisation. This has implications for entities in carbon-intensive sectors, energy production and infrastructure development.

Climate change is now firmly on the global agenda, prompting action by political and business leaders around the world. The October 2018 report from the Intergovernmental Panel on Climate Change (IPCC) on the impacts of global warming concluded that reduction of carbon emissions below

1.5°C pre-industrial levels would require 'rapid and far-reaching transitions in land, energy, industry, buildings, transport and cities'.

The two biggest players on the global stage—the 2015 Paris Agreement on Climate Change and the UN Sustainable Development Goals (Goal 13)—both target greenhouse gas emissions. Government action to meet these commitments has the domino effect of changing expectations for corporate action, investor diligence on climate change risk, and the role of state and local authorities. A further effect is the casting of a wide net for potential liability and, by extension, climate-related justice.

Climate change litigation

The term 'climate change litigation' is shorthand for a range of different proceedings connected to climate change matters. It can be directed at public and private companies, federal governments, city administrations and insurance companies. Although climate change may not always be the central issue in environmental litigation, even when it arises peripherally, judges are increasingly being asked to deal with arguments and facts related to climate change and climate science that were previously not presented before courts.

Climate change litigation has two broad categories:

- Public law actions against governments and public authorities, raising human rights, constitutional and administrative law arguments
- Private law actions based in areas of law such as tort, fraud, planning and company law.

Almost 1,000 climate change-related cases have been filed to date around the world, covering 25 countries. Overall, corporations and industrials are the most common claimants or plaintiffs in these cases, with governments being the most common defendants. In the United States, claims related to duty of care or failure to warn are analogous to the scope of

Key drivers for climate change litigation

- Compensation for the costs of adaptation to climate change
- Challenging climate change-related legislation and policies, or their application
- Preventing future emissions and contributions to climate change
- Requiring governments or regulators to take action to meet national or international commitments
- Raising awareness and exerting pressure on corporate actors, regulators or investors



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past litigation over tobacco or asbestos. The experience gained in those cases makes litigation more accessible as a means to achieve remedy for potential adverse effects of climate change and target accountability.

Constitutional law and human rights claims

In the much-publicised case of *Urgenda Foundation v. The State of the Netherlands* (2015), the court accepted claims by hundreds of citizens and the Urgenda Foundation that the Dutch government has a constitutional duty to protect its citizens from climate change. The Dutch government was ordered to take more ambitious action by reducing carbon emissions by at least 25 percent by 2020. The government appealed the decision, and on 9 October 2018, the High Court decision was released, upholding the 2015 decision. The Court confirmed that 'the State is acting unlawfully (in contravention of the duty of care under Articles 2 and 8 [European Convention on Human Rights]) by failing to pursue a more ambitious reduction as of end-2020', and that the State should reduce emissions by at least 25 percent by the end of 2020.

The *Urgenda* case has served as the impetus for numerous other cases. In 2017, Friends of the Irish Environment brought an action against the Irish government in the first Irish case trying to hold the government accountable for its role in contributing to climate change. The action claims that by approving the 2017 National Mitigation Plan (referred to as 'very weak and full of gaps'), the Irish government violates Ireland's Climate Action and Low Carbon Development Act 2015 as well as the Constitution and its human rights obligations, and does not meet Ireland's commitments under the Paris Agreement. The case has been set down for a full hearing in January of 2019.

In May of 2018, the European Court of Justice determined that the UK significantly breached air-quality limits for nitrogen dioxide from diesel vehicles, and had failed to provide 'credible, effective and timely' plans to cut pollution in 16 urban areas (the largest breaches being in London, Birmingham, Leeds and Glasgow). With the threat of significant fines, the UK has committed to develop a comprehensive clean air strategy to reduce air pollution from various sources.

One case that has received notoriety was brought by and on behalf of young people. In *Juliana v. United States of America* (2015), the US government was sued by 21 young plaintiffs on the grounds that it has failed to protect the right to life, liberty and property of young people by promoting and subsidising the use of fossil fuels despite knowing their effects. The claim has survived multiple applications for dismissal as well as the addition of defendants and even the substitution of current US president Donald J. Trump for then US president Barack H. Obama, as originally filed.

Like *Urgenda*, *Juliana* has encouraged similar lawsuits outside of the US, such as the Supreme Court proceeding in Colombia, where 25 young plaintiffs successfully sued the Colombian government on the basis that climate change and the government's failure to reduce deforestation in the Colombian Amazon had breached their fundamental rights.

In a judgment delivered on 5 April 2018, the Supreme Court held that the Colombian government had not efficiently tackled the problem of deforestation in the Amazon, in breach of the fundamental rights to water, air, a dignified life and health, among others, in connection with the environment. The Supreme Court recognised the Colombian Amazon as a 'subject of rights', entitled to protection, conservation, maintenance and restoration led by the government and its territorial agencies. The Colombian government was ordered to formulate a short-, medium- and long-term plan within four months to counteract the rate of deforestation in the Colombian Amazon and the impact of climate change, with the participation of the plaintiffs and affected communities.

In *Armando Ferrão Carvalho and Others v. The European Parliament and the Council* (2018), ten families from Portugal, Germany, France, Italy, Romania, Kenya and Fiji, and Sáminuorra (a Swedish Youth Association), brought an action in the EU General Court. The action seeks to compel the EU to make more stringent greenhouse gas emissions reductions than the 40 percent target by 2030 (compared to 1990 levels) to avoid climate change impacts and threats to fundamental rights to life, health, occupation and property.

In 2015, a German civil court was asked for the first time to rule on



1,500+

laws and policies on climate change globally

whether a German energy company could be held financially responsible for its contribution to the effects of climate change in another country (in this case, Peru).

Claimants are also increasingly looking for links between climate change and human rights.

Recently, the Philippine Commission on Human Rights has commenced an investigation into the 47 oil, gas, coal, cement, power and other companies (referred to in the investigation as 'Carbon Majors') for alleged human rights violations based on their contribution to climate change, linking climate change to a series of typhoons that have caused deaths and property damage on a large scale. Petitioners invoked the State duty to protect the human rights to life, health, food, water, sanitation and housing. The first public hearing was held in March of 2018, which Carbon Majors did not attend, claiming lack of jurisdiction of the Philippine Commission over the companies.

Administrative law claims

Claims against federal and regional governments have been brought by companies, NGOs and other levels of government challenging the application and enforcement of climate change legislation and policy. This includes corporations challenging emissions limits for particular facilities, zoning amendments restricting fossil fuel terminals and renewable fuel obligations.



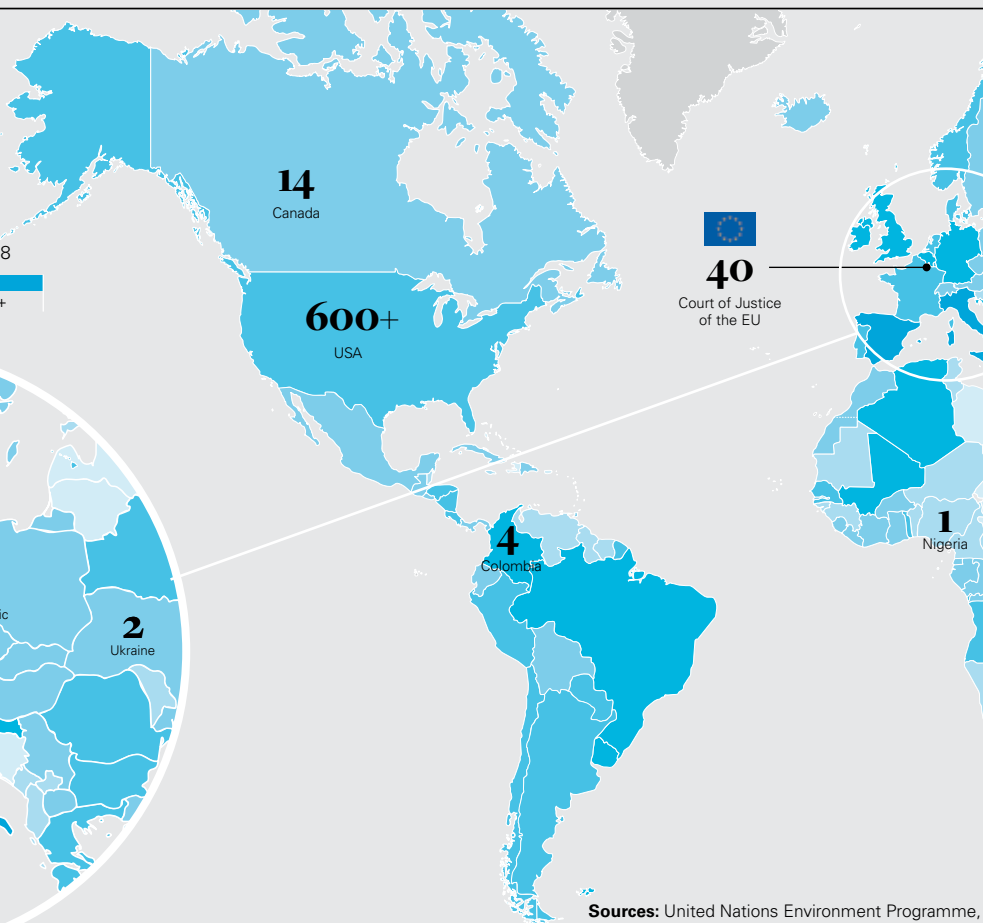
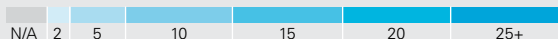
Although climate change may not always be the central issue, judges are now increasingly being asked to deal with arguments and facts related to climate change and climate science

Climate change litigation: A global snapshot

Global climate change litigation* and laws**

*Numbers indicate climate change cases as of 2018

**Colours indicate climate change laws and policies as of 2018



Sources: United Nations Environment Programme,

Legal issues for climate change litigation

Standing

Greenhouse gas emissions mingle with other emissions to cumulatively cause climate change effects. Impacts may result from numerous factors and it may be difficult to pinpoint emissions as the cause. Claimants may have difficulty demonstrating that they have sufficient connection, and have suffered, as a result.

Causation

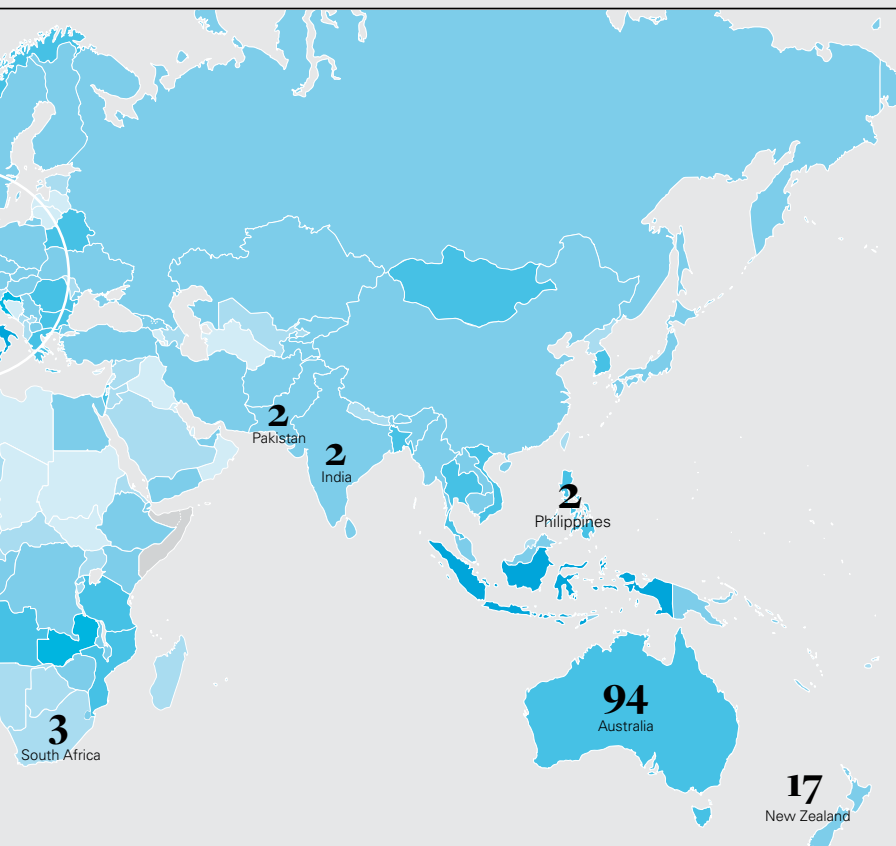
Climate science is rapidly developing and improving, but it remains difficult to pinpoint the effects of particular emissions and connect them to a specific event or damage. Demonstrating a direct link between actions (such as emissions from operations) and specific climate change-related harm is essential for claimants to prove causation.

Justiciability

Many courts have ruled that climate change is a political or global policy issue and therefore inappropriate to address in a lawsuit. Recently, some courts have started to accept that issues related to climate change can be considered.

Apportionment

Although there may be sufficient evidence to prove causation in a particular case, the question of how to attribute or apportion liability to a particular state, company or individual remains a significant issue for climate change litigation.



Climate change is giving rise to a new class of litigation driven by government policy, investors and the public

Grantham Research Institute on Climate Change and the Environment and Sabin Center for Climate Change Law

Types of claims and actions



Public and private nuisance

Claim for damages by **New York City** against four oil & gas companies for protection against climate change impacts and adaptation



Rights-based claims

Juliana human rights claim against the US government for failing to take action against climate change and violating constitutional rights to life and liberty of the younger generation



Constitutional claims

Urgenda claim against the Dutch government for breach of constitutional duty to protect its citizens from climate change, requiring more ambitious action to reduce domestic carbon emissions



Failure to warn

County of **Santa Cruz** claim against an oil company alleging injuries to the city and county from production, promotion and marketing of products, along with concealment of known hazards and 'championing of anti-regulation and anti-science campaigns'



Company and financial risks

Climate change-related actions under company and financial regulation have included shareholder action for example, alleging breach of company law where annual reports fail to disclose climate change-related business risks



Fraud and consumer protection

Lawsuits against **Volkswagen** in respect of green advertising and claims of carbon neutrality relating to diesel emissions from vehicles, and the use of 'defeat devices' for emissions standards tests



Shareholder activism

Companies may face **shareholder activism** and pressure to disclose climate change-related risks to their businesses



Planning and permitting

Regulatory processes for permitting and renewal at local government levels are putting greater emphasis on future carbon emissions of proposed projects or activities, and planning decisions are increasingly including climate change adaptation and mitigation factors



Challenges to climate legislation and policy

Increasingly, claims are being brought against **governments** challenging development, application and enforcement of new climate change legislation and policies



Claimants are bringing novel and creative legal arguments, and, in some cases, courts are demonstrating a willingness to take creative approaches to these issues

In England, the NGO Plan B launched a judicial review claim in September of 2017 challenging the government's emissions-reduction target. It seeks to force ministers to reduce the UK's emissions to zero by 2050. The High Court denied permission to bring the claim, but on 26 July 2018, Plan B filed an appeal, which is currently being considered.

A claim was brought in October 2018 against the German government, seeking the enactment of sufficient measures to comply with the National Climate Protection Target for 2020 and Germany's minimum obligations under the EU Effort Sharing Decision (406/2009/EC) as well as its obligations under the Paris Agreement.

Planning and permitting

There have been a number of challenges related to climate change in the context of planning and permitting decisions. Based on potential emissions and cumulative environmental impacts, the extractives sector, pipelines, power plants and other infrastructure are common targets.

In Norway, Greenpeace has brought a claim arguing that Norway's Ministry of Energy has violated the Norwegian constitution by issuing deep sea oil & gas licences. Although the claim was rejected by the Oslo District Court on 4 January 2018, it is now being appealed by Greenpeace.

In the UK, a longstanding contest surrounding the proposed Banks Mining coal mine at a site near Druridge Bay in Northumberland ended in March of 2018 with a formal rejection of the plans by the UK government, having given significant weight to the effect of greenhouse gas emissions from the coal that would be

extracted from the mine. Banks Mining has challenged the government's decision and High Court proceedings have commenced.

In the Irish case of *Friends of the Irish Environment CLG v. Fingal County Council* (2017), Friends of the Irish Environment brought a legal action challenging a five-year planning permission for a Dublin runway expansion. Dismissing the planning permission in a judgment delivered on 21 November 2017, Ireland's High Court held that 'Right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights'. This was the first time that the court had recognised an implied right to environmental protection in the Irish Constitution.

Private law claims

Tort claims may be brought on grounds such as public and private nuisance, negligence, failure to warn, trespass and unjust enrichment. In the US, several claims have been based on the argument that discharge of carbon dioxide and other greenhouse gases causes unreasonable interference with public rights to air and water.

In *Kivalina v. ExxonMobil Corp.* (2012), individuals from an Alaskan island facing extreme erosion and weather events claimed damages from energy companies, claiming the weather patterns were due to climate change which had been caused by the defendant's actions. This case was dismissed, with the court finding that the question of how best to address climate change is a political question and that the plaintiffs could not demonstrate that the companies' specific emissions had caused them injury. The Ninth Circuit Court of Appeals also found that the plaintiffs could not sue under public nuisance statutes because the federal Clean Air Act displaces that avenue of recourse.

Many claims brought against energy companies have been on grounds such as nuisance, failure to warn and unjust enrichment. Lawsuits brought by the cities of Oakland, San Francisco and New York against fossil fuel companies have been dismissed on the basis that responsibility for addressing climate change impacts falls to the US Congress and the executive branch.

The recent case of *Rhode Island v. Chevron Corp.* (2018) may be a new starting point. The State of Rhode

Island has submitted the first claim by a US state against 21 energy companies for climate change impacts that the state 'has experienced and will experience in the future'. The basis of the claim is public nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect, negligent failure to warn, trespass, impairment of public trust resources and violations of the Environmental Rights Act. The alleged harms include a rise in sea levels, increased frequency and severity of flooding, extreme precipitation events, and drought and ocean warming and acidification.

Rhode Island claims that production, promotion and marketing of fossil fuel products along with 'simultaneous concealment of the known hazards of these products, and their championing of anti-science campaigns' actually and proximately caused Rhode Island's injuries. Rhode Island is seeking compensatory damages, equitable relief (including abatement of nuisances), punitive damages, disgorgement of profits and costs.

Company law and shareholder activism

Climate change-related issues are increasingly arising in areas of company and financial law, particularly related to climate change risk and disclosure. The inclusion of climate change matters in company reporting is a developing issue in several jurisdictions, and may prompt disputes in the future. Activist shareholders are also emerging, often seeking to provoke transparency and action from corporates around the effect of climate change risks on the business and the organisation's greenhouse gas emissions.

In *Abrahams v. Commonwealth Bank of Australia*, shareholders sued the Commonwealth Bank of Australia (CBA), alleging that its 2016 annual report violated Australian company law by failing to disclose climate change-related business risks—specifically risks related to possible investment in a controversial coal mine. The shareholders withdrew the claim following publication of CBA's 2017 annual report, which included an acknowledgment from the directors that climate change posed a risk to CBA's operations—the first time such a statement was included in its annual reporting. CBA has since also published its first climate policy position

statement, and has pledged not to lend money to the coal mine project that triggered the litigation.

Fraud and consumer protection

Another avenue for claims is consumer protection or fraud laws. In the US, the New York and Massachusetts attorneys general are carrying out investigations into an oil major and seeking production of documents relating to alleged potential violations of state consumer protection statutes, misleading consumers and investors with respect to the impact of the fossil fuel products marketed and sold by the company and the climate change-driven risks to its business.

Several cases in the past decade have related to misleading green advertising claims, such as carbon neutrality or offsetting of emissions. For example, in two cases brought by the Australian Competition and Consumer Commission in the Federal Court in 2008, GM Holden Ltd and Goodyear Tyres were found to have made misleading and deceptive claims about the environmental benefits of their products, asserting claims to 'carbon-neutral motoring' and low-emission tyres, respectively. Both companies were fined and, pursuant to a court-enforceable undertaking, Goodyear agreed to partially reimburse customers who had relied upon the environmental claims. GM Holden undertook to retrospectively plant thousands of trees to offset the emissions from vehicles sold during its 'carbon-neutral' advertising campaign.

Key cross-cutting issues

A paradigm shift is occurring through the courts to crystallise the right to bring climate-related actions and facilitate claimants using the threat of legal action. This is evidenced by implementation of non-financial disclosure requirements, UN standards and guidelines such as the Guiding Principles on Human Rights, UN Global Compact, Principles for Responsible Investment and other initiatives driving the low-carbon transition.

Five trends in climate change litigation globally

- 1 Holding government to their legislative and policy commitments
- 2 Linking the impacts of resource extraction to climate change and resilience
- 3 Establishing that particular emissions are the proximate cause of particular adverse climate change impacts
- 4 Establishing liability for failures (of efforts) to adapt to climate change
- 5 Applying the public trust doctrine to climate change

Source: Status of Climate Change Litigation, UNEP May 2017

These form the building blocks of access to climate justice—using the courts to achieve commitments that governments or corporates may not otherwise be able to pursue, or prioritise.

Consequences and impacts of climate litigation

Companies should be ready to respond to the changing regulatory landscape and the effects it has on potential climate change litigation. As the scope of this new class of action continues to develop, companies may find themselves facing legal challenges related to the transition to a lower-carbon global economy. The pressure created by litigation, regardless of its success or failure, may also affect the regulatory and



197

signatories to the Paris Agreement

operating environment. A growing body of jurisprudence can drive policy changes that facilitate disclosure and this, in turn, may result in climate-related data held by governments and corporations regarding climate change becoming publicly available and potentially driving climate-related claims.

Despite the difficulties and mixed success of climate change litigation to date, this global trend is pushing boundaries, prompting policy and behavioural change, and creating a growing body of precedent around the world. Claimants are bringing novel and creative legal arguments, and, in some cases, courts are demonstrating a willingness to take creative approaches to these issues.

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