Climate Change Litigation: Global Perspectives

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Edited by

Ivano Alogna, Christine Bakker and Jean-Pierre Gauci

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Foreword

As we approach the 26th UN Climate Change Conference (COP26) in Glasgow, now scheduled for 2021, it is a good time to examine where we are at and map out some of the prospects for moving forward. This volume is a contribution to that process. It focuses on the way litigation can help avoid inaction, trigger action and improve the global response to a most urgent concern impacting us all: climate change.

In 2015, in advance of the crucial Paris meeting, I helped to organize a conference in London on Climate Change and the Law, in conjunction with the Foreign Office and King's College London. At the time, the number of cases was very limited. We had the precedent of the US Supreme Court case of *Massachusetts v EPA* (2007), which—though under the Bush Administration—provided the legal basis for the climate change policies subsequently developed by President Obama. His strong leadership in Paris was critical, and without it the agreement might never have happened. In that same year, two seminal climate change litigation cases were decided: the first instance of the *Urgenda* case in the Netherlands, and the *Leghari* case in Pakistan.

Five years on, we need to examine critically the part played by national and international law, through legislation and the courts, in advancing efforts to tackle climate change, and what needs to be done in the future. There have been some major setbacks but also positive developments, as the chapters in this volume helpfully illustrate. There is room for cautious optimism, both from the evolving body of cases (most recently the decision by the Irish Supreme Court) that is advancing climate justice, and the innovative approaches adopted by both Courts and activists alike. COP26 is an opportunity for the UK to advance the case for effective legal remedies including by examining the role of the courts in different jurisdictions in developing and enforcing climate change laws.

This volume provides analyses from experts around the globe, offering a variety of perspectives that could help to inform this process. It builds on an event convened at the British Institute of International and Comparative Law (BIICL) in January 2020, which I was delighted to introduce. It brings together analysis from a range of jurisdictions, covering national, regional and international courts and quasi-judicial bodies. In the way BIICL is so well suited to do, it brings together academics and practitioners as well as insights into existing decisions and discussion of prospects for the future.

I trust that this volume will be of interest to legal practitioners and policy-makers, as well as activists and all those who are seeking to achieve change for the better in this field.

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACT	Australian Capital Territory
ACtHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ANPS	Airports National Policy Statement (UK)
AOSIS	Alliance of Small Island States
APPCL	Air Pollution Prevention and Control Law (China)
APRA	Australian Prudential Regulation Authority
ASCM	Agreement on Subsidies and Countervailing Measures
ASIC	Australian Securities and Investment Commission
AU	African Union
BCA	Border Carbon Adjustment
BIT	Bilateral Investment Treaty
BRICS	Brazil, Russia, India, China and South Africa
CCC	Committee on Climate Change (UK)
CCL	Climate Change Litigation
CER	Centre for Environmental Rights (South Africa)
CESE	Conseil économique, social et environnemental (France)
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CO_2	Carbon Dioxide
CO_2e	Carbon Dioxide Equivalent
COP	Conference of the Parties
CPL	Civil Procedure Law (China)
CSIRO	Commonwealth Scientific and Industrial Research Organization
DEFRA	Department for Environment, Food and Rural Affairs (UK)
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECL	Energy Conservation Law (China)
ECOWAS	Economic Community of West-African States
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
EPA	Environmental Protection Agency

EPBC Act	Environment Protection and Biodiversity Conservation Act (Australia)
EPL	Environmental Protection Law (China)
ESD	Ecologically Sustainable Development
EU	European Union
EU-ETS	European Union Emission Trading System
FAO	Food and Agricultural Organization
GATT	General Agreement on Tariffs and Trade
GESAMP	Group of Experts on the Scientific Aspects of Marine Environmental Protection
GHG	Greenhouse gas
IAC	International Armed Conflict
IACtHR	Inter-American Court of Human Rights
IBA	International Bar Association
IBAMA	Brazilian Institute of Environment and Renewable Resources
ICC OTP	Office of the Prosecutor of the International Criminal Court
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IEA	International Energy Agency
ILC	International Law Commission
ILO	International Labor Organization
ILUC	Indirect Land-Use Change
IMCO	International Maritime Consultative Organization
IPCC	Intergovernmental Panel on Climate Change
IPP	Independent Power Producer
IRP	Integrated Resources Plan (South Africa)
ISDS	Investment-State Dispute Settlement
ITLOS	International Tribunal on the Law of the Sea
MEA	Multilateral Environmental Agreement
MEC	Member of the Executive Council (South Africa)
MEE	Ministry of Ecology and Environment (China)
NAPCC	National Action Plan on Climate Change (India)
NCP	National Contact Points
NDC	Nationally Determined Contribution
NEMA	National Environmental Management Act (South Africa)
NEP	National Environmental Policy (Brazil)

NEPA	National Environmental Policy Act (USA)
NERSA	National Energy Regulator of South Africa
NGO	Non-Governmental Organization
NGT	National Green Tribunal (India)
NIAC	Non-International Armed conflict
NPCC	National Policy on Climate Change (Brazil)
NPDES	National Pollutant Discharge Elimination System (USA)
NPPF	National Planning Policy Framework (UK)
NRMM	Non-Road Mobile Machinery
NSW	New South Wales
NWA	National Water Act (South Africa)
ODS	Ozone Depleting Substances
OECD	Organization for Economic Cooperation and Development
OEP	Office for Environmental Protection (UK)
PA	Paris Agreement on Climate Change
PAIA	Promotion of Access to Information Act (South Africa)
PAJA	Promotion of Administrative Justice Act (South Africa)
PCA	Permanent Court of Arbitration
PHA	Philippi Horticultural Area (South Africa)
PIF	Pacific Islands Forum
PIL	Public Interest Litigation
PIL	Public International Law
PISFCC	Pacific Islands Students Fighting Climate Change
RDC	Reform and Development Council (China)
REI4P	Renewable Energy Independent Power Producer Procurement Programme (South Africa)
RF	Russian Federation
RMB	Renminbi (Chinese currency)
RPL	Renewable Energy Promotion Law (China)
SCSL	Special Court for Sierra Leone
SERAC	Social and Economic Rights Action Center (Nigeria)
SIDS	Small Island Development States
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIM	Trade-Related Investment Measure
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCRC OPIC3	Optional Protocol to the Convention on the Rights of the Child on a Comminications Procedure
UNCRC	United Nations Convention on the Rights of the Child

UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGP	United Nations Guiding Principles on Business and Human Rights
VCAT	Victoria Civil and Administrative Tribunal (Australia)
WHO	World Health Organization
WMO	World Metereological Organization
WTO DSU	WTO Dispute Settlement Understanding
WTO	World Trade Organization
XR	Extinction Rebellion

CHAPTER 1

Climate Change Litigation: Global Perspectives—An Introduction

Ivano Alogna, Christine Bakker** and Jean-Pierre Gauci****

1 Origin, Aims and Specificity of This Volume

When observing global developments in climate change litigation, a comparison that may come to mind is with a musical 'experiment' of an orchestra without a conductor, in which individual musicians each play their part, using their own instruments and introducing variations to a common theme. Both for the audience, and for the musicians themselves, the sounds may at times be exhilarating, at times disconcerting, but with more and consistent practice the performance should become more harmonious and effective.

This edited volume aims to contribute to the discussion on how climate change litigation evolves, and how it should be further developed, in a global perspective. It builds on an event entitled *Climate Change Litigation: Comparative and International Perspectives* held at the British Institute of International and Comparative Law (BIICL) in London on 16 January 2020, as part of the Arthur Watts Seminar Series in Public International Law.[1] The event discussed both developments in climate change-related cases before national courts, and prospects for climate litigation at the international level, bringing together academics, legal practitioners and NGO representatives, many of whom have been involved in climate change lawsuits. Considering the broad range of jurisdictions and (quasi-)judicial bodies that might play a role in climate change litigation, we solicited additional contributions with a view to presenting a

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The editors would like to thank Anthony Wenton, BIICL Researcher, for his excellent work copyediting this volume.

1 The event report is available at <https://www.biicl.org/publications/climate-change-litigation-comparative-and-international-perspectives> accessed 8 March 2021.

more complete picture of how climate change litigation is evolving in a global perspective, highlighting both opportunities, and constraints.

The contributions in this volume span, in its first part, a wide range of national jurisdictions with examples from both the Global South and the Global North, including some countries for which the analysis in this field is still underrepresented in international legal literature. The second part, focusing on the potentialities and limitations for climate change-related cases at the regional and international levels, covers various fora, ranging from regional human rights courts and United Nations Treaty Bodies to the International Court of Justice, the World Trade Organization, the International Tribunal on the Law of the Sea, the International Criminal Court and international arbitration.

Through these chapters, this volume aims to contribute to the growing efforts by civil society, lawyers, policy-makers and academia to map, explore and analyze the ways in which litigation, or 'legal action', can play a role in global governance strategies addressing climate change. In this regard, we understand global governance as encompassing, besides action taken by international organizations and by States at the legislative and executive levels, also the role of domestic and international courts—as well as 'quasi-judicial' human rights bodies—when addressing issues of a transnational and international nature.[2] The particular contribution of this volume compared to other publications in the field is two-fold. First, it covers a variety of perspectives, combining chapters presenting a purely academic analysis, with contributions providing detailed insights from legal practitioners based on their direct experience in climate litigation. Second, it covers both developments in national jurisdictions, and (potential) developments before regional and international fora whereas, with some notable exceptions,[3]

2 See, generally, CA Whytock, 'Domestic Courts and Global Governance' (2009) 84 *Tulane Law Review* 67; A von Bogdandy and I Venzke, *International judicial lawmaking: on public authority and democratic legitimation in global governance* (Springer 2012); A Akhtarkhavari, *Global governance of the environment: environmental principles and change in international law and politics* (Edward Elgar 2010); A Marx and J Wouters (eds), *Global governance* (Edward Elgar 2018). For publications that specifically address the role of climate litigation in transnational governance, see J Peel and J Lin 'Transnational Climate Litigation: The Contribution of The Global South' (2019) 113 American Journal of International Law 679; HM Osofsky 'The Continuing Importance of Climate Change Litigation' (2010) 1 Climate Law 3; J Lin 'Climate Change and the Courts' (2012) 32 Legal Studies 35; HM Osofsky and J Peel 'The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?' (2013) 30 Environmental and Planning Law Journal 303.

3 In particular, the reports based on the two main databases of climate litigation: 'Climate Change Litigation Databases' (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/> accessed 29 September 2020; 'Climate Change Laws of the World' (*Grantham Research*

other publications often tend to focus on either the national, or the international perspective.

We first present some reflections on the epistemological approach, the context and the definition of the particular topic on which this volume is based (II), before introducing its content in more detail (III).

II Epistemological Approach, Context and Definition

Climate change litigation is a relatively new phenomenon having come into existence during the last two decades, in response to the failure by national and international policymakers to achieve the goals enshrined in the global climate change regime.[4] This failure has required citizens and non-governmental organizations (NGOs) to react in order to tackle climate change, and it has created a global momentum whereby the courts are identified as fundamental actors for exerting pressure 'on the executive and legislative branches of government to act on the climate change issues'.[5]

In order to provide a comprehensive understanding of this complex phenomenon, as 'an important component of the governance framework that has emerged to regulate how states respond to climate change at the global, regional and local levels',[6] it is critical to adopt an epistemological approach which is *global* in its dimensions and capable to apprehend the *complexity* of the context around climate change and the response thereto. Indeed, the approach of this volume is to select a representative sample of countries and international jurisdictions, in order to stimulate the debate worldwide (A). Furthermore, the context taken into consideration necessarily needs to combine the scientific and legal frameworks in which climate change litigation takes place (B). Finally, climate change litigation cannot be analyzed properly without a preliminary identification of its definition, goals and parties involved (C).

Institute on Climate Change and the Environment) <https://climate-laws.org/cclow> accessed 29 September 2020. See, for example, J Setzer and R Byrnes, 'Global trends in climate change litigation: 2020 snapshot' (Grantham Research Institute on Climate Change and the Environment, 3 July 2020) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf> accessed 29 September 2020.

4 See D Bodansky and L Rajamani, 'The Evolution and Governance Architecture of the United Nations Climate Change Regime' in U Luterbacher and D Sprinz (eds), *Global Climate Policy: Actors, Concepts, and Enduring Challenges* (MIT Press 2018).

5 J Lin, 'Climate Change and the Courts' (2012) 32(1) Legal Studies 35, 36.

6 ibid.

A *Why 'Global Perspectives'?*

Climate change is clearly an example of the human imprint on the global environment. Since the advent of the Industrial Revolution, we have entered a new geological epoch: the *Anthropocene*.[7] While this term 'has yet to be accepted formally as a new geological epoch or era in Earth history',[8] it denotes that we are living in a time in which human beings have become capable of impacting the functioning of the global ecosystem, creating global environmental problems. Therefore, in order to tackle global problems such as climate change (a 'common concern of humankind', according to the United Nations Framework Convention on Climate Change, Preamble, para 1),[9] individual States and their legal and governance structures must be considered as part of a bigger collective political and normative response.[10] It is for this reason that we decided to consider 'global perspectives', combining both comparative and international experiences and future prospects.

This global perspective includes not only legal systems in which climate change litigation has flourished, such as the United States and Australia, or whose tribunals have issued landmark decisions, namely the Netherlands and Pakistan, but also countries where the developments in this field are ripe for judicial intervention. Moreover, our inquiry spans the most significant examples of international litigation and the possibilities originating from regional and global fora yet to engage with climate issues. The combination of both dimensions—domestic and international—of climate change litigation is in line with an always more important and comprehensive epistemological approach for thinking about environmental and climate change law: Global Environmental Law.[11]

'A field of law that is international, national, and transnational in character all at once',[12] Global Environmental Law is the fruit of interaction and cross-fertilization among a multi-level plurality of legal orders and among different areas of environmental law.[13] The reasons for the emergence of this

7 PJ Crutzen and EF Stoermer, 'The "Anthropocene" '(2000) 41 Global Change Newsletter 17.

8 W Steffen et al, 'The Anthropocene: conceptual and historical perspectives' (2011) 369 Philosophical Transactions of the Royal Society Series A 842–67.

9 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

10 LJ Kotzé, 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32(2) Journal of Energy & Natural Resources Law 121–56.

11 T Yang and RV Percival, 'The Emergence of Global Environmental Law' (2009) 36 Ecology Law Quarterly 615–64.

12 ibid 616.

13 E Morgera, 'The Future of Law and the Enviroment: The Emergence of Global Enviromental Law' in S Muller et al (eds), *The Law of the Future and the Future of Law: Volume II* (Torkel Opsahl Academic EPublisher 2012) 42.

epistemological framework are manifold and have existed since the beginning of international environmental protection. Indeed, already in 1974, Maurice Strong, Executive Director of the then just founded United Nations Environment Programme (UNEP), stated that 'the interfaces between national and international action inevitably merge in a complex of interacting relationships. One cannot be effective without the other'.[14] Moreover, the field is influenced by four common phenomena to be found in every jurisdiction: 1) a shared body of knowledge related to ecology and environmental sciences; 2) environmental externalities (which are also at the core of climate change) that are caused by the same globalized technological systems; 3) a similar administrative and modern State in the realm of environmental protection; and 4) global interconnectedness thanks to rapid transmission of news, trade between continents and world-wide collaborations.[15] These phenomena are the basis of the evolution of environmental and climate change law, which is the product of globalization, and in particular of the globalization of law.[16]

The literature underlines the rapidity of the development of environmental law in general, and climate change law in particular, which is intrinsically linked with the circulation of its rules between international and domestic law, and with the legal borrowing between different national legal systems.[17] Today, this rapidity of circulation of legal knowledge around the world allows a ubiquitous accessibility to decisions concerning climate change in cases before tribunals and courts in other continents and international fora. Therefore, it gives shape to this Global Environmental Law (or more precisely Global Climate Change Law), as a laboratory of experiences and lessons learned from other legal orders, as imitation of ratio decidendi, cross-fertilization of ideas or possible legal models of climate litigation, and also through a dialogue between courts. This dialogue should continue and always keep in consideration the

14 M Strong, 'The Scramble for the Oceans: Towards Anarchy or Order' (Gabriel Silver Memorial Lecture, Columbia University School of International Affairs, NewYork, 1974).

15 N Robinson, 'Preliminary Materials' in N Robinson et al (eds), *Comparative Environmental Law and Regulation* (Thomson Reuters 1996) 5–6.

16 T Yang, 'The Emerging Practice of Global Environmental Law' (2012) 1(1) Transnational Environmental Law 54. More generally, on the globalization of law, see N Walker, *Intimation of Global Law* (CUP 2015); P Muchlinski, 'Globalization and law' *in* P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008) 502–03; W Twining, *Globalisation and Legal Theory* (Butterworths 2000).

17 JB Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecology Law Quarterly 1295; see also J Verschuuren, 'Global Environmental Law' in S Musa and E de Volder (eds), *Reflexions on Global Law* (Brill 2013); E Hey, 'Global Environmental Law' (2008) 19 Finnish Yearbook of International Law 5.

voices of international and domestic lawyers, academics and practitioners, both regarding the analysis of past cases and the prospects for possible future litigation. It is on this basis, and building on existing research,[18] that we are developing our collective analysis on climate change litigation through the lens of a global approach, taking heed of its scientific and legal context, which is also global.

B *Scientific and Legal Context Related to Climate Change*

1 Scientific Context

Climate Change has been characterized as the 'defining issue of our time' by the last two United Nations Secretaries-General.[19] Even more recently, the Secretary-General of the World Meteorological Organization (WMO) highlighted the fact that during the last year 'greenhouse gas concentrations – which are already at their highest levels in 3 million years – have continued to rise, reaching new record highs',[20] and 2016–20 is set to be the warmest 5-year period on record. The consequences of climate change are now well known and global in terms of effects and scale: from accelerating sea level rise, to greater frequency of extreme weather events,[21] such as heat waves, floods and droughts, to melting of glaciers and redistributions of species and vectors of diseases, etc. All of this clearly shows how the term 'climate change' is not only limited to the issue of 'global warming'. More precisely, according to Article 1 of the United Nations Framework Convention on Climate Change:

> "Climate change" means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global

18 S Eskander, S Fankhauser and J Setzer, 'Global Lessons from Climate Change Legislation and Litigation' (2020) NBER Working Paper No w27365 <https://ssrn.com/abstract=3626866> accessed 29 September 2020; M Burger and J Gundlach, *The Status of Climate Change Litigation: A Global Review* (United Nations Environment Programme 2017).

19 B Ki-moon, 'Opening Remarks' (2014 Climate Summit, New York, 23 September 2014); A Guterres, 'Remarks on Climate Change' (United Nations Headquarters, New York, 10 September 2018).

20 P Taalas, 'Foreword' in J Luterbacher, L Paterson, K Solazzo and S Castonguay (eds), *United in Science 2020: A multi-organization high-level compilation of the latest climate science information* (World Meteorological Organization 2020).

21 A clear picture of this phenomenon can be found in a recent UN report, confirming how extreme weather events have come to dominate the disaster landscape in the 21st century and registering their sharp increase over the last 20 years, because of a rise in climate-related disasters: *The Human Cost of Disasters: An overview of the last 20 years – 2000–2019* (Centre for Research on the Epidemiology of Disasters and UN Office for Disaster Risk Reduction 2020).

> atmosphere and which is in addition to natural climate variability observed over comparable time periods.

This human-induced climate change is not only affecting life-sustaining systems but also has cascading effects for ecosystems and human security, challenging efforts towards adaptation and risk management responses.

Although the development of knowledge about past climatic variation can be traced back to the early nineteenth century, with the works of the French natural philosopher Joseph Fourier and of his compatriot physicist Claude Pouillet, it was around 1890 that a group of Swedish scientists led by Svante Arrhenius addressed the possibility that human emissions of carbon dioxide might bring about global warming.[22] Unfortunately, it wasn't until the 1980s that research programmes developed within the WMO drew attention to that possibility, and it was in 1988 that the same WMO, in collaboration with the UN Environment Programme and the International Council for Science (ICSU), established the Intergovernmental Panel on Climate Change (IPCC), the scientific institution of the future international climate change regime. The IPPC was created with the aim of assessing the science relating to climate change (including technical and socio-economic knowledge about the causes, potential repercussions and strategies for coping). It had to consider a cacophony of scientific arguments existing at that time due to 'junk science' funded by lobbies who felt threatened by possible regulation in this field.

During its three decades of work, the IPCC has issued five comprehensive assessment reports, each one organized in three volumes: the scientific elements of climate system and climate change (vol I); the consequences, the adaptation options and the vulnerability of socio-economic and natural systems to climate change (vol II); and the mitigation measures (vol III). Moreover, IPCC reports contain a 'Summary for decision makers', each line of which must be approved by the representatives of the States Parties to the IPCC. The next IPCC report (the sixth) is expected to be released in April 2022. Whilst each report has contributed to the scientific certainty of climate change, its fifth assessment report (issued in 2014) was critical in that it clarified the role of human activities in this phenomenon. Its conclusion is categorical: climate change is real and human activities are the main cause.[23] Finally, in October

22 B Bolin, *A History of the Science and Politics of Climate Change: The Role of the Intergovernmental Panel on Climate Change* (CUP 2007).

23 'The IPCC is now 95 percent certain that humans are the main cause of current global warming'. RK Pachauri et al (eds), *Climate Change 2014: Synthesis Report* (IPCC 2015) <https://www.ipcc.ch/report/ar5/syr/> accessed 29 March 2021.

2018, the IPCC released a special report on the effects of global warming of 1.5°C above pre-industrial levels,[24] which explained that limiting global warming to 1.5° C instead of 2°C (the limit taken into account in previous estimates) is required in order to avoid larger climate change-related risks and that climate models project 'robust differences in regional climate characteristics between present-day and global warming of 1.5°C, and between 1.5°C and 2°C.' In order to attain this limitation, rapid and far-reaching changes would be necessary in all aspects of society, such as land use planning, energy, industry, building, transport and town planning, reducing CO_2 by about 45% from 2010 levels by 2030, and achieving a 'zero balance' of emissions by 2050. Moreover, the urgency of such action against the effects of climate change was more recently highlighted in the WMO Statement on the State of the Global Climate in 2019,[25] and in the World Energy Outlook 2020 by the International Energy Agency.[26]

Last but not least, the scientific context related to climate change has been enriched by progress in the science of 'detection and attribution': 'scientific terms for tools for the lawyer's task of showing the existence, causes and effects of climate change'.[27] Detection and attribution is defined as 'a two-step process used to identify a causal relationship between one or more drivers and a responding system',[28] where detection demonstrates that a particular variable has changed, and attribution helps determine the role of one or more drivers with respect to that change. The necessary dialogue between this area of science and the law deserves attention. Indeed, it helps both for understanding the causes behind the global phenomenon of climate change and for enlightening the debates on the responsibility and accountability for its impacts.

This branch of research, which can be usefully applied both to domestic and international climate change litigation,[29] explores and tries to clarify the

24 V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) <https://www.ipcc.ch/sr15/> accessed 29 September 2020.

25 World Meteorological Organization, *Statement on the State of the Global Climate in 2019* (WMO-No 1248, 2020) <https://library.wmo.int/doc_num.php?explnum_id=10211> accessed 29 September 2020.

26 International Energy Agency, *World Energy Outlook 2020* (IEA October 2020) <https://www.iea.org/reports /world-energy-outlook-2020> accessed 29 September 2020.

27 M Allen, 'The scientific basis for climate change liability' in R Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (CUP 2012) 8.

28 M Burger, J Wentz and R Horton, 'The Law and Science of Climate Change Attribution' (2020) 45(1) Columbia Journal of Environmental Law 66.

29 M Banda, *Climate Science in the Courts: A Review of US and International Judicial Pronouncement* (Environmental Law Institute 2020).

issue of what level of government action is necessary for effectively mitigating greenhouse gas emissions or for adapting territories and populations to the consequences of climate change. At the same time, it considers the anthropogenic contribution to this phenomenon and the related liability of States and corporations. In fact, attribution science—like Richard Heede's landmark work tracing carbon dioxide and methane emissions from the major fossil fuel and cement producers[30]—has been critical for establishing the causal link between corporate activity and climate change, thus fostering litigation. Moreover, attribution science can help determine whether plaintiffs have standing to sue, or to challenge government failure to protect public health or other public goods, including a stable climate. However, this new interdisciplinary field of research shouldn't be seen as a panacea: not only because of the complexity and limitations of science, but also because of general issues typical of each legal system, relating to political decision-making, as well as constitutional and legal hurdles.[31] The international legal context created to collectively tackle climate change and its effects is ever more important in helping overcome some of these domestic legal challenges.

2 International Legal Context of Climate Change

With the advance of climate science and the growing awareness of the severity of climate change and its consequences, international efforts to respond to these global threats have led to the gradual development of a complex web of regulatory approaches. As formulated by Bodanski, Brunnée and Rajamani:

> international climate change law … includes not only the UN regime, but also rules and principles of general international law relevant to climate change; norms developed by other treaty regimes and international bodies; regulations, policies, and institutions at the regional, national and sub-national levels; and judicial decisions of national, regional and international courts.[32]

Despite this multi-level normative framework, the exact responsibilities of States and non-State actors (eg corporations, financial institutions) with regard to climate change mitigation and adaptation are far from clear. Together

30 R Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions from Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 Climatic Change 229.

31 Burger et al (n 28) 142.

32 D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (OUP 2017) 10–11.

with growing protests, mass demonstrations and political pressure from civil society, in which children and young people have taken a leading role in recent years, climate change-related cases are increasingly brought before courts at the domestic and international levels. While domestic climate litigation mainly relies on obligations or liability based on national law, international law is increasingly used to support such claims. At the same time, (potential) climate change-related claims before regional or international adjudicatory bodies will rely exclusively on international legal sources. Therefore, it is worth recalling briefly the main applicable instruments and principles of international law.

The international legal context related to climate change primarily consists of three core instruments: the 1992 United Nations Framework Convention on Climate Change (UNFCCC),[33] the 1997 Kyoto Protocol,[34] and the 2015 Paris Agreement on Climate Change.[35] Moreover, numerous decisions and resolutions have been adopted in the context of the international climate negotiations, dealing with the implementation of specific aspects of these core texts. Taken together, these normative instruments and the institutional arrangements adopted to implement them, are often referred to as the 'UN climate regime'.[36]

As the first international legal instrument addressing climate change, the UNFCCC, adopted at the 1992 United Nations Rio Conference on Environment and Development, sets out some general objectives and principles, and establishes institutions which could facilitate further negotiations. As a framework convention, it does not contain any specific commitments of States, and the predominantly general wording of its provisions renders their legal enforcement difficult but, as noted by some distinguished scholars,[37] not entirely impossible. For example, Article 4(2) UNFCCC, provides that each Party 'shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases.'

33 UNFCCC (n 9).

34 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

35 Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740.

36 See for example, Bodansky et al (n 32) 10. Others use the term 'UNFCCC regime', including B Mayer, *The International Law on Climate Change* (CUP 2018) 12.

37 S Maljean-Dubois, 'Climate Change Litigation' in *Max Planck Encyclopedia of International Procedural Law* (OUP 2018), also referring to C Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 Nordic Journal of International Law 1; and to MG Faure and A Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 26A Stanford Journal of Environmental Law 123.

As noted by Maljean-Dubois, '[a]lthough vague, this provision "stipulate[s] a commitment" and "arguably could be the basis of a liability claim" '.[38]

In contrast to the 'vague' and general terms of the UNFCCC, the Kyoto Protocol, adopted in 1997 to complement this framework convention, established concrete, legally binding GHG emission reduction targets for 36 States and the European Union as a regional organization, for a commitment period from 2008 to 2012.[39] Based on the principle of 'common but differentiated responsibilities',[40] such targets were not adopted for 'developing' countries. Moreover, the combined reduction targets of the first commitment period were quite limited, since they aimed at a total reduction of 5 percent below 1990 levels in the GHG emissions of developed States. The Doha Amendment,[41] adopted in 2012 to cover a second commitment period running from 2013 to 2020 has, at the time of writing, not yet entered into force. This 'disengagement' of several States with the Kyoto Protocol clearly demonstrates a reluctance to pursue the adoption of legally binding, quantified and enforceable emission reduction targets.

The 2015 Paris Agreement on Climate Change reflects this same reluctance on the part of many States,[42] by adopting a 'hybrid' approach, combining legally binding and non-binding elements. In particular, the commitments taken by each individual State Party (the 'Nationally Determined Contributions', or 'NDCs') in terms of their GHG emission reductions and other climate policies, are explicitly *voluntary*. At the same time, the Paris Agreement sets a number of collective goals,[43] collective obligations,[44] obligations for 'developed'

38 ibid.

39 Kyoto Protocol (n 34) Annex B.

40 UNFCCC (n 9) art 3(1): 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.'

41 UNFCCC Conference of the Parties, 'Decision1/CMP.8 Amendment to the Kyoto Protocol' (28 February 2013) UN Doc FCCC/KP/CMP/2012/13/Add.1 (Doha Amendment).

42 In particular States with the highest GHG emission levels, including the United States (which is a Party to the UNFCCC, but has never ratified the Kyoto Protocol, and after first becoming a Party to the Paris Agreement, announced its withdrawal therefrom in June 2017), China, Russia, Brazil and India (which are all Parties to the UNFCCC, 'non-Annex B' Parties to the Kyoto Protocol, and Parties to the Paris Agreement).

43 For example, Paris Agreement (n 35) art 2(1)(a): the goal to keep the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit it to 1.5°C; art 4(1): the aim to reach global peaking of greenhouse gas emissions as soon as possible …; art 7(1): the aim to contribute to sustainable development and ensure an adequate adaptation response.

44 For example, Paris Agreement (n 35) art 14: to have a 'global stocktake' every five years to evaluate progress and to set progressively ambitious targets through Nationally Determined

States only[45] and several procedural obligations for individual States.[46] Since many of these obligations are in fact legally binding, depending on their terminology—using either 'shall' or 'should', and containing either specific or general wording—the prospects for successfully invoking provisions of the Paris Agreement in legal proceedings appear to be more favourable than, for example, provisions of the UNFCCC. However, the deliberate decision not to include any dispute settlement mechanisms in the Paris Agreement, but rather to adopt a 'facilitative, non-controversial, and non-punitive' transparency framework,[47] as well as a similarly characterized 'implementation and compliance' mechanism,[48] reconfirms States' reluctance to accept any formalized, legally binding oversight. However, significant progress has been made in the adoption of the modalities of these transparency and compliance mechanisms.[49]

In addition to the UN regime, other treaties, as well as customary international law, are of direct relevance in this context. In particular, treaties adopted for the protection of the ozone layer, such as the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer[50] and its amendment of 2016,[51] have significantly contributed to climate change mitigation by coordinating efforts to phase out the production of certain chemical substances which are also greenhouse gases.[52] Moreover, treaties adopted in specialized fora for the facilitation of international transport, such as the International Maritime

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Contributions (NDCs); art 13: to establish a transparency framework for reporting to each other and the public on the progress achieved in implementing the national targets.

45 Paris Agreement (n 35) arts 9(1), 10(6) and 11(3): the duty to provide continued and enhanced international support to developing countries' mitigation and adaptation efforts, through financial support, transfer of technologies and capacity-building.

46 Paris Agreement (n 35) art 4(2): the obligation to prepare, communicate and maintain successive NDCs that it intends to achieve; art 4(3): the obligation to communicate a successive NDC every five years, which will represent a progression beyond the Party's current NDC; art 4(8): the obligation to provide the information necessary for clarity, transparency and understanding, when communicating their NDCs; and art 13(7)(b): the obligation to regularly provide the information necessary to track progress in implementing and achieving its NDC. For further details, see C Bakker, 'The Paris Agreement on Climate Change: Balancing "Legal Force" and "Geographical Scope" ' [2016] *Italian Yearbook of International Law* 299.

47 Paris Agreement (n 35) art 13.

48 Paris Agreement (n 35) art 15.

49 See the Decision adopted at COP24 in Katowice, Poland 2–15 December 2018 <https://unfccc.int/sites/default/files/resource/CMA2018_03a02E.pdf>, and see also <https://unfccc.int/sites/default/files/resource/ETFReferenceManual.pdf> accessed 8 March 2021.

50 Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3 (Montreal Protocol).

51 Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 15 October 2016) (2017) 56 ILM 196.

52 Such as Chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs).

Organization (IMO)[53] and the International Civil Aviation Organization[54] also form part of the international normative framework regulating emissions of CO_2 and other greenhouse gases.[55] Other examples of treaties that are relevant to the obligations of States in relation to climate change, are the United Nations Convention on the Law of the Sea (UNCLOS)[56]—in particular its provisions on the protection of the marine environment—and human rights treaties adopted both at the international and at regional levels. Indeed, it is increasingly recognized in legal literature, international policy statements and in judicial practice that States have positive obligations under human rights law to prevent and address the negative consequences of climate change for the enjoyment of human rights.[57]

Beyond treaties, a number of principles are directly relevant in relation to climate change. Some are considered to meet the requirements of customary international law. In particular, the 'no-harm' principle, according to which States have 'the responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction',[58] could be invoked to support claims that States with high emission levels cause harm to other States. Moreover, recent international jurisprudence has clarified that the 'no-harm' principle must be understood as 'a positive obligation, a duty of due diligence',[59] which requires States to *prevent* harm to the environment of other States or to the global commons.[60] The ICJ also held that the obligation to act with due diligence

53 For example, the 1997 Protocol to amend the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the 1978 Protocol (adopted 26 September 1997), and its subsequent amendment of 15 July 2011, IMO Doc MEPC 62/24/Add.1.

54 Agreement on the creation of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), ICAO Assembly Resolution A39-3 (27 September–7 October 2016) para 5.

55 For more details on these instruments, see Mayer (n 36) 14–15.

56 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), especially art 194(1). See also J Harrison, 'Litigation under the United Nations Convention on the Law of the Sea', Chapter 18 in this volume.

57 See, in particular, the chapters by A Savaresi, S Adelman, M Feria-Tinta and M Willers in this volume.

58 Principle 21 of the 'Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/rev 1, 3, reprinted in (1972) 11 ILM 1416 (Stockholm Declaration).

59 Maljean-Dubois (n 37) para 19; see also Bodansky et al (n 32) 40–4.

60 *Case concerning Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment) [2010] ICJ Rep 14, para 101 (emphasis added).

entails 'not only the adoption of appropriate measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators.'[61] Several authors have pointed to the significance of the obligation of due diligence in relation to climate change mitigation and adaptation, including through its procedural dimension,[62] as confirmed by the ICJ and ITLOS.[63] Despite these jurisprudential developments, uncertainties about the exact content of the 'standard of care' required by this principle remain.[64] In this regard, it is interesting to note a parallel development in the case law of regional human rights courts in cases concerning environmental harm, in which increasing attention is also given to clarifying the 'due diligence obligations of States' to prevent such harm, and to protect citizens from the adverse effects of environmental degradation or severe pollution on their human rights.[65] Despite the fundamental differences between the ambit of human rights law on the one hand, and that of State responsibility on the other, there nevertheless appear to be significant similarities in the judgments of regional human rights courts on the one hand, and international courts and tribunals on the other, with respect to the content of the due diligence obligations of States to prevent environmental harm, and to ensure certain procedural guarantees, such as information, consultation and Environmental Impact Assessments.[66] Another relevant rule is the principle of international cooperation in addressing transnational environmental issues.[67] However, considering the lack of clarity about the exact content of this, and other principles of customary international law, their applicability in climate litigation may be limited, even though they can support arguments based on treaty rules, or other legal grounds.

The ways in which international law is applied in climate litigation, either to support national legal grounds in domestic cases, or in climate change-related cases before regional or international courts and monitoring bodies, is a *fil rouge* across this edited volume. Another common thread throughout the

61 ibid para 197.

62 Maljean-Dubois (n 37) para 19 ; Bodansky et al (n 32) 44–8.

63 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, 10; *Pulp Mills* (n 60).

64 See Voigt (n 37).

65 See also M Willers, 'Climate Change Litigation in European Courts', Chapter 13 in this volume; M Feria-Tinta, 'Climate Change as a Human Rights Issue', Chapter 14 in this volume, and S Adelman, 'Climate Change Litigation in Africa', Chapter 12 in this volume.

66 *Responsibilities in the Area* (n 63); *Pulp Mills* (n 60).

67 Principle 22 of the 1972 Stockholm Declaration, and Principle 13 of the Rio Declaration.

volume is to examine how climate litigation, by bringing claims before courts in a multi-level perspective, will help to fill the gap in the availability of specialized enforcement mechanisms for international environmental law in general, and for climate change law more specifically.

C *Climate Change Litigation: Definition, Parties and Goals*

1 Definition

Since the question of how climate change litigation should be defined is still actively debated among scholars and practitioners,[68] and considering the diverse contexts addressed in this volume—domestic jurisdictions from both civil law and common law traditions, as well as various regional and international jurisdictions—contributors were not requested to adhere to any particular definition. By clarifying how they have applied the term for the specific context addressed in each chapter, the authors—either directly, or indirectly—contribute to the ongoing debate.

In international legal literature, two main approaches dominate this debate, both of which are also reflected in this volume. On the one hand, a 'narrow definition' is adopted, according to which climate change litigation only covers litigation which *directly and expressly* raises an issue that is related to climate change or climate change policy. For example, the often-cited definition used by Markell and Ruhl refers to:

> any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions *directly and expressly* raise an issue of fact or law regarding the substance or policy of climate change causes and impacts.[69]

Or, as formulated by Gerrard[70] for the purpose of his chapter on climate change litigation in the United States in this volume:

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68 For example, see J Setzer and L Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) WIREs Climate Change 6: 'There are as many understandings of what counts as "climate change litigation" as there are authors writing about the phenomenon ….'

69 D Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64 Florida Law Review 15, 27 (emphasis added).

70 Michael Gerrard is the Director of Columbia University's Sabin Center for Climate Change Law, which maintains a comprehensive global database on climate change-related judicial cases. See (n 3).

> climate change litigation refers to litigation where climate change or greenhouse gases are an *explicit* subject of the case, though not necessarily the only subject. Not included are cases that may have been motivated by climate change but do not explicitly talk about it, such as an effort to stop a coal-fired power plant on non-climate legal grounds.[71]

On the other hand, broader definitions are increasingly being put forward, which in addition to the explicit reference to climate change in the proceedings or decisions, also consider the motivations of plaintiffs,[72] as well as cases where climate change is not the central, but rather an 'additional' or 'secondary' concern, even when not expressly mentioned. In this regard, Peel and Lin argue that 'there is a need for concepts of climate litigation that are able to capture lower-profile cases where climate change is more peripheral to arguments in, or the motivation for, the lawsuit.'[73] In their view, such a broader definition is especially required when considering litigation in the Global South, 'where a significant number of the cases reflect a "peripheral" focus on climate change rather than having the issue at the "core" of the litigation.'[74]

In this volume, several authors confirm this analysis, and have adopted this broader approach. Specifically, Ohdedar defines climate change litigation as 'cases that have a clear climate component in their language or reasoning', which 'may include cases where climate change appears as a 'core' or 'peripheral' concern.'[75] Moreover, referring to a concept put forward by Kim Bouwer, the analysis also covers a broader sphere of 'litigation in the context of climate change',[76] which includes litigation that brings forward issues that deal with

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71 See MB Gerrard, 'Climate Change Litigation in the United States', Chapter 2 in this volume (emphasis added).

72 For a more detailed discussion of these definitions, see Peel and Lin, 'Transnational Climate Litigation: The Contribution of The Global South' (n 2), referring also to Chris Hilson (who argued that 'in order to count as climate litigation, cases should be framed as such'), and Navraj Singh Ghaleigh (who distinguishes different kinds of motivations for climate litigation: 'promotive', 'defensive', 'boundary-testing' and 'perfecting'). See N Singh Ghaleigh, ' "Six Honest Serving-Men": Climate Change Litigation as Legal Mobilization and the Utility of Typologies' (2010) 1(1) Climate Law 31.

73 Peel and Lin 'Transnational Climate Litigation: The Contribution of The Global South' (n 2) 691. In this same sense, see also K Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) Journal of Environmental Law 483.

74 Peel and Lin 'Transnational Climate Litigation: The Contribution of The Global South' (n 2) 692.

75 See B Ohdedar, 'Climate Change Litigation in India and Pakistan', Chapter 5 in this volume.

76 Bouwer (n 73).

mitigation and adaptation but do not necessarily expressly deal with climate change. The chapter on South Africa relies on Peel and Osofsky's typology of climate change litigation,[77] which categorizes climate change litigation as a series of concentric circles:

> At the core are cases where climate change is the central focus. Moving outward is litigation where climate change is a peripheral issue; cases where climate change is a motivating factor, although not raised as a central issue (e.g. coal cases brought on environmental grounds); and litigation with no explicit climate change framing, but with implications for mitigation or adaptation.[78]

When applying the typology of concentric circles proposed by Peel and Osofsky, the following picture emerges. Whereas all authors in this volume address cases which fall within the most narrow definition as mentioned above—corresponding to the core of the concentric circles (climate change as the central issue); some focus their analysis on cases within the first and second circles (climate change as a central or peripheral, but explicitly mentioned issue);[79] others include also cases in the third circle (climate change as a motivating factor, but not a central issue);[80] while a few consider the whole range of climate litigation in their analysis, including (potential) cases where climate change is not explicitly mentioned, but which have implications for climate policies.[81]

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77 J Peel and HM Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2015).

78 See T-L Field, 'Climate Change Litigation in South Africa', Chapter 8 in this volume, citing Peel and Osofsky (ibid): 'At the core are cases where climate change is the central focus. Moving outward is litigation where climate change is a peripheral issue; cases where climate change is a motivating factor, although not raised as a central issue (e.g. coal cases brought on environmental grounds); and litigation with no explicit climate change framing, but with implications for mitigation or adaptation.'

79 See the chapters in this volume by MB Gerrard, 'Climate Change Litigation in the United States', Chapter 2; N Pleming and R Keating, 'Climate Change Litigation in the United Kingdom', Chapter 4; M Torre-Schaub, 'Climate Change Litigation in France', Chapter 6.

80 See the chapters in this volume by B Ohdedar, 'Climate Change Litigation in India and Pakistan', Chapter 5; T-L Field, 'Climate Change Litigation in South Africa', Chapter 8; C Bakker, 'Climate Change Litigation in the Netherlands', Chapter 9; AY Kapustin, 'Prospects for Climate Change Litigation in Russia', Chapter 10.

81 See the chapters in this volume by L Schuijers and MA Young, 'Climate Change Litigation in Australia', Chapter 3; J Setzer, GJS Leal and C Borges, 'Climate Change Litigation in Brazil', Chapter 7; C Zhou and T Qin, 'Prospects for Climate Change Litigation in China', Chapter 11.

The question of what falls within the scope of 'climate change litigation' at the international level is perhaps even more difficult to answer, due to the multiplicity of potential fora, and the related diversity of applicable law and of procedural rules. Indeed, as reflected in the second part of this volume, several types of (potential) international climate change litigation can be distinguished, inter alia: (i) individual complaints against governments brought before regional human rights courts/commissions or before UN treaty bodies, claiming that the defendant States violate their obligations under human rights law by failing to take sufficient action to address climate change; (ii) inter-State cases that could potentially be brought before several fora (ICJ, ITLOS, WTO) for violations of commitments set out in the relevant international instruments; (iii) investor-State or commercial disputes before specialized international tribunals seeking damages resulting from 'restrictive' climate laws or policies; and possibly (iv) prosecutions for climate change-related international crimes.

2 Types, Goals and Parties of Climate Change Litigation

When considering the possible parties in domestic climate change litigation, a variety of both claimants and defendants can be identified, depending on the goals pursued by the legal action. In this regard, several types of climate change litigation have been distinguished. Setzer and Byrnes mention two main categories: on the one hand, '*strategic cases*, with a visionary approach, that aim to influence public and private climate accountability', and on the other hand, '*routine cases*, less visible cases, dealing with, for example, planning applications or allocation of emissions allowances under schemes like the EU emissions trading system.'[82] Savaresi refers to a distinction that is made in the literature between:

> '*pro-' litigation* – initiated in order to engender policy change, for example, by requesting the adoption or reform of legislation; and *'anti-' litigation* – initiated to resist such change, for example, by challenging the adoption of new or reformed legislation.[83]

Within these broad categories, various types of litigation exist, pursuing different aims. For example, strategic or 'pro-' litigation can aim at the adoption

82 J Setzer and R Byrnes, 'Global Trends in Climate Change Litigation: 2019 Snapshot' (Grantham Research Institute on Climate Change and the Environment, 4 July 2019) 2 (emphasis added) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> accessed 9 August 2020.

83 See A Savaresi, 'Inter-State Climate Change Litigation', Chapter 16 in this volume.

of more ambitious climate legislation; implementation of existing climate laws or policies; or recognition of climate action as a human rights issue, including liability for a failure to protect these rights. In this context, 'rights-based' climate litigation, relying on constitutional rights or human rights claims, including alleged violations of rights to life or environmental rights, is increasingly gaining momentum. Whereas such cases are more common in the Global South, 'there is increasing interest in this legal avenue as a way of putting a "human face" to the climate change problem'[84] also in the Global North. In such strategic or pro-active cases, claimants are typically individuals and/or civil society organizations, and the defendants are mostly governments. A limited number of strategic cases have also been initiated by individuals and NGOs against private companies, especially significant GHG emitters.[85]

'Anti-' litigation can aim, as mentioned above, at resisting policy change and opposes the adoption of new climate laws or policies by claiming their unconstitutionality, or violation of other rights or interests. Such cases may be brought, inter alia, by individuals, private companies, investors, against governments at various levels (local, regional, state, federal). Other types of 'anti-' climate litigation include lawsuits by private actors against governments claiming damages for (economic) harm resulting from stringent climate laws or policies.

Depending on the definition adopted, as discussed above, many other types of legal action can be included under the heading of climate litigation. As summarized by Pleming and Keating:

> Traditionally defendants in these types of cases have been governments. However, litigation is increasingly being brought against commercial operators, companies or corporations. The consequences of climate change are numerous and varied, the legal consequences and therefore the myriad of ways in which litigation can be brought increasingly reflect this. It is therefore unsurprising that climate change litigation will spread across many different areas of the law.[86]

It is our hope that the chapters in this edited collection will provide further insights into this 'myriad of ways' of climate change litigation and how, like the

84 Peel and Lin, 'Transnational Climate Litigation: The Contribution of The Global South' (n 2) 685.

85 For example, in the Netherlands: *Milieudefensie v Shell*, Hague District Court, filed 5 April 2019.

86 See N Pleming and R Keating, 'Climate Change Litigation in the United Kingdom', Chapter 4 in this volume.

orchestra we started with, they can come together towards the enactment of improved responses to climate change.

III Structure and Content

As noted above, this volume is organized in two parts. Part I, 'Climate Change Litigation: Comparative Perspectives' presents and critically examines the development of climate change litigation in 11 countries across all regions. Part II, 'Climate Change Litigation: Regional and International Perspectives' provides analytical insights on emerging cases, but also on opportunities and obstacles for climate change-related complaints and cases in various fora at the regional and international levels.

A *Part I: Comparative Perspectives*

Part 1 of this volume focuses on some of the most significant climate change litigation developments in domestic legal systems around the world. The selection of countries for this section, and the order in which they are presented in the book, follows three criteria: quantitative, geographical and diversity of legal families. We focus on countries in a descending order based on the number of climate change litigation cases reported,[87] and finishing with two legal systems that are new yet critical to the global fight against climate change (Russia and China), and their future prospects in this field. Geographically, we wanted to provide a global perspective reflecting the developments of climate change litigation in every continent, through important legal experiences from Asia, Europe, the Americas, Africa and Oceania,[88] and reflecting the balance in developments between countries in the Global North and the Global South.[89]

87 According to the databases provided by the Sabin Center and the Grantham Research Institute, including its policy report 'Global trends in climate change litigation: 2020 snapshot' (n 3), the order follows the number of cases reported as follows: the United States (1,213), Australia (98), the United Kingdom (62), Pakistan/India (4+9=13), France (11), Brazil (6), South Africa (4) and the Netherlands (2).

88 Asia and Europe are the most represented continents, with India, Pakistan and China for the former, and France, the Netherlands and the United Kingdom for the latter, as well as Russia which is part of both continents. The Americas' experience is analyzed through a northern country (the United States) and a southern one (Brazil), while Africa and Oceania are taken into account through two very critical legal systems: South Africa and Australia.

89 According to the traditional (and debatable) definition of the Global North-South divide, we have taken into consideration six countries from the North (the US, Australia, the UK, France, the Netherlands and Russia) and five countries from the South (Pakistan, India,

Finally, we tried to reflect the traditional comparative law classification of legal families:[90] common law (the US, Australia and the UK), countries with a strong common law influence (India and Pakistan), civil law (France, Brazil, the Netherlands and Russia) and finally China as a mixed system or as a separate and particular legal system on its own.[91] The framework of the different legal families is completed by South Africa, a typical mixed system of common law and civil law.[92]

In the second chapter (immediately following this introduction), Gerrard analyzes developments in the United States, the most prolific country in terms of cases, with 78 per cent of the total climate cases filed in courts or other tribunals worldwide (as recorded in the Sabin Centre Database). He focuses on the principal sources of climate litigation in the US, including federal statutory cases (such as those brought under the National Environmental Policy Act (NEPA), the Clean Air Act or the Endangered Species Act); and the prominent common law cases, such as the famous *Native Village of Kivalina v Exxon Mobil*. The chapter also explores cases brought under the public trust doctrine (such as *Juliana v United States*) as well as securities litigation and cases concerning the alleged failure to adapt to climate change, in particular holding corporations to account.

Schuijers and Young then focus on Australia, a country highly vulnerable to climate change. They consider Australian jurisprudence involving mitigation, its evolution and its role in fostering better governmental decisions concerning proposed projects that would contribute to increasing greenhouse gas emissions. The chapter then explores adaptation cases focusing on planning decisions that ignored climate change and extreme weather events. Finally, they examine climate change litigation cases related to corporate accountability, and they conclude by comparing these three types of climate litigation and the possible prospects ahead.

Brazil, South Africa and China). For a graphic representation of this human geography dichotomy, see <https://commons.wikimedia.org/wiki/Category:North-South_divide#/media/File:North_South_divide.svg> accessed 29 September 2020.

90 HP Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006).

91 As considered by René David and other authors. See R David and JEC Brierley, *Major Legal Systems in the World Today* (3rd edn, Stevens and Sons 1985); K Zweigert and H Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

92 For the classification of legal systems used, see the tools and lists provided by the research group JuriGlobe <http://www.juriglobe.ca/eng/sys-juri/index-syst.php>accessed 29 September 2020.

In their chapter on the United Kingdom, Pleming and Keating guide the reader through the statutory context for climate change-related litigation: from the Climate Change Act 2008 (the overall domestic framework for climate change policy and legislation) to the Environmental Bill, introduced in October 2019 and halted in its progress by the election and then by COVID-19. The authors analyze the different categories of climate change litigation cases developed in the UK: from planning cases, such as *R v Secretary of State for Transport* (a landmark decision concerning the building of a third runway at Heathrow Airport, involving 'the first major ruling in the world to be based on the Paris climate agreement');[93] to energy cases, concerning solar panels, wind farms and wind turbines; and to criminal cases, where climate change activism has been used as a defense for criminal activity by organizations such as Greenpeace and Extinction Rebellion.

In the next chapter, Ohdedar analyzes climate change litigation in India and Pakistan, with reference to the broader socio-political dimensions of litigation, environment and climate change in the region. He draws on the strong potential for climate litigation, discussing the background to climate change and the courts in the region before analyzing both recent litigation concerning 'climate-specific' policies and litigation attempting to enforce existing environmental laws and policies. He examines cases such as the landmark *Asghar Leghari v Federation of Pakistan*, in which the government of Pakistan was sued by a farmer for failure to implement its 2012 National Climate Policy and Framework, and *Gaurav Bansal*, in which the National Green Tribunal in India was petitioned to act against State and central governments over the lack of implementation of climate policies. The author also considers that narrowing the focus on climate change and emission reductions can produce potential hazards to justice, overlooking ecological damage and human rights issues and obscuring material, social and environmental justice issues. He concludes by analyzing the opportunities and challenges for future climate change litigation in the region, such as alleviating people's vulnerability to climate change and contributing to better adaptation efforts.

Starting from the social and political context, in a period in which 'yellow vests' and youth protests are influencing the debate, Torre-Schaub describes the emergence of climate change litigation in France. She traces the origin of climate change litigation to the need to reflect on climate justice. Then she examines the main climate cases against the State, such as the *Affaire du Siècle*

93 D Carrington, 'Heathrow third runway ruled illegal over climate change' *The Guardian* (London, 27 February 2020) <https://www.theguardian.com/environment/2020/feb/27/heathrow-third-runway-ruled-illegal-over-climate-change> accessed 29 September 2020.

(the Case of the Century). The author examines possibilities, limits and potential legal consequences of this kind of litigation. The chapter also explores the use of environmental legal tools, such as the environmental impact assessment, in the context of climate litigation in France, and analyzes the possibilities of litigation against private actors, such as fossil fuel companies. Finally, the author discusses some examples of climate change litigation based on criminal activity perpetrated by environmental activists.

Setzer, Leal and Borges focus on Brazil. They examine the institutional and legal shifts underlying the trend towards increased *direct* and *indirect* climate change litigation. They analyze the legal foundations for climate change litigation in Brazil, through its legal regime and key national environmental and climate change legislation, before providing an overview of its 'green court' (High Court) and environmental case law, which may influence prospective climate lawsuits. Then the authors analyze the *direct* climate change cases, such as the *Airline Companies cases*, involving claims against aviation companies seeking compensation for climate damages, and the *Steel Company case*, filed by Brazil's Attorney-General's Office for environmental and climate damages allegedly caused by a steel company's fraudulent use of illegal charcoal in its plants. The *indirect* climate litigation is examined through cases relating to forestry and land-use change in the Brazilian Amazon, also providing some examples of precedents from Colombia and Peru. The creation of an 'Amazon Task Force' within the Brazilian Public Prosecutor's Office and the activism of NGOs and political parties are critical for the development of the legal and institutional context in Brazil, including increased efforts in climate litigation.

In her overview of climate change litigation in South Africa, Field shows the potential of this legal system, thanks to its constitutional framework and litigation landscape, which provide fertile ground for public interest litigation. However, South Africa seems to find itself in a paradoxical situation given that the necessary and robust measures to address climate change are not yet in place. After exploring this context, the chapter discusses the most important cases in climate change litigation, both decided and pending. Analyzing both cases in which climate change has featured as a central issue (such as the landmark *Thabametsi* case, on environmental impact assessment regimes for all major infrastructure projects) or as a peripheral concern (like in the Life After Coal campaign's 'deadly air' case, joined as amicus curiae by the UN Special Rapporteur on Human Rights and the Environment), shows that 'South Africa's climate change litigation potential is only starting to be tapped', and it could be extended to different areas such as mining, biodiversity, protected areas, marine, resources and forests, 'advancing a climate agenda through the courts'.

In her contribution on climate change litigation in the Netherlands, Bakker provides an overview of the developments in the field, focusing on and building from the famous *Urgenda case*, in which the Dutch Supreme Court confirmed the earlier judgements of the District Court and of the Court of Appeal of The Hague, ordering the State to reduce its greenhouse gas emissions by at least 25 per cent below 1990 levels by the end of 2020. The chapter focuses on the role of human rights as a legal basis for climate change litigation, highlighting some innovative approaches adopted by the Dutch courts, in particular with regard to the scope of the positive obligations based on Articles 2 (right to life) and 8 (right to a private and family life) of the European Convention on Human Rights (ECHR) on which the Supreme Court based its final judgment. The author also discusses, inter alia, how the Dutch courts accorded a central role to climate science in the evaluation of the risks that climate change poses for the enjoyment of human rights, and highlights the Supreme Court's application of the concept of 'partial responsibility of States' for causing climate change. The chapter concludes by examining the potential impact of the *Urgenda* judgment on climate litigation both in the Netherlands and abroad.

Kapustin examines the prospects for climate change litigation in the Russian Federation. After stressing the importance of improving the critically insufficient climate policies in Russia, especially considering the urgency of the issue and the vulnerability of its large territory, the author analyzes Russia's international commitments to the climate regime. Then, he discusses the applicability of international law to the domestic legal order, and the difficulties of implementation of the Paris Agreement, before examining the national legal framework for environmental protection and the doubts expressed by commentators about the possibility of specific climate legislation (although a draft federal law 'On State Regulation of Greenhouse Gas Emissions' is under consideration). Finally, the author discusses the prospects for climate litigation, through the applicability of general environmental litigation, or facilitated by the recent amendment of the Civil Procedure Code, notably concerning the regulation of class actions, which could provide a new instrument for the protection of citizens' rights, including climate change-related rights.

Finally, Zhou and Qin provide an overview of the developments and future prospects for climate change litigation in China, the largest greenhouse gas emitter worldwide. They note that despite the inadequacy of the legal framework, the introduction of public interest litigation has become an important tool for tackling environmental and climate change-related issues in China and that the 'Ecological Civilization Reform' and the development of 'Judicial Activism' have resulted in strengthened environmental governance. The authors discuss critical examples demonstrating the practice of climate

change litigation in China: they are mostly cases in which climate change is at the periphery, such as tort-based cases against private companies, often petrochemical, vehicle producers or manufacturers for their unlawful emissions of air pollutants. However, in 2016, Friends of Nature sued the Gansu Branch of State Power Grid, thus initiating the first litigation case where climate change is at the core of the lawsuit.

B *Part II: Regional and International Perspectives*

The second part of this volume focuses on regional and international perspectives of climate change litigation. The regional dimension refers to the European courts (both the courts of the European Union, and the European Court of Human Rights), and to the African and Inter-American human rights systems. Even though these regional bodies also fall within the broader ambit of 'international perspectives', their specificity, both in terms of their geographical scope, and of their role in the monitoring and enforcement of States' human rights obligations, justifies a particular focus on this regional component.

In his chapter, Adelman connects the national and regional levels by discussing both the prospects and limitations for climate change litigation in several African countries,[94] and in the African regional human rights system, including the landmark *actio popularis* brought by SERAC in 2001 on the right to a healthy environment in the African Charter on Human and Peoples' Rights. He examines how several types of climate change-related litigation have been applied by these various courts, including rights-based litigation, environmental impact assessments, and public trust cases, and considers avenues and future directions for climate change litigation in a multi-level perspective.

Focusing on the European context, Willers examines the legal context for climate change litigation before regional and sub-regional courts in Europe. He starts by focusing on *The People's Climate Case*[95] *and* the *EU Biomass case*[96] before the courts of the European Union (EU), in which the applicants sought the annulment of several pieces of EU legislation based on climate change-related arguments. He then discusses the potential for cases to be brought in the separate jurisdiction of the European Court of Human Rights, highlighting possible admissibility hurdles and how they can be overcome.

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94 However, considering the significant developments before national courts in South Africa, we have asked T-L Field to contribute a separate chapter on this country in the first part of this volume.

95 Case T-330/18 *Carvalho and Others v European Parliament and Council* EU:T:2019:324.

96 Case T-141/19 *Sabo and Others v European Parliament and Council* EU:T:2020:179.

Feria-Tinta then connects the regional and international 'spheres' by analyzing some key jurisprudential developments in the Inter-American system of Human Rights, and before the United Nations Human Rights Committee based, in part, on her direct involvement as a practitioner in some key cases before these bodies. The author identifies a common thread in the evolutive approach of these two systems, arguing that the Inter-American system has developed notions, in particular related to the right to life in the context of environmental degradation, which have influenced the approach of the Human Rights Committee. The analysis covers the environmental case law of the Inter-American Commission and Court of Human Rights with a particular focus on the landmark Advisory Opinion of 15 November 2017, as well as two climate change-related claims that have been brought before the UN Human Rights Committee, one decided in January 2020, *Ioane Teitiota v New Zealand,*[97] and one that is still pending, *Torres Strait Islanders v Australia.*[98]

The volume then moves on to consider the international dimension of climate change litigation, which covers the main fora that exist at the 'universal' level, including the two United Nations Human Rights Treaty Bodies where climate change-related claims have been initiated or decided in recent years: the UN Human Rights Committee and the UN Committee on the Rights of the Child. Subsequent chapters address the possibilities and limitations for climate change-related claims to be brought before the International Court of Justice, the International Tribunal for the Law of the Sea (ITLOS),[99] the Dispute Settlement Mechanism of the World Trade Organization, the International Criminal Court and various forms of international arbitration.

Gubbay and Wenzler present the first climate change-related communication to the UN Committee on the Rights of the Child (CRC Committee),[100] which was introduced by 16 children from around the world in September 2019. After recalling the context of youth climate activism in the courts, the authors discuss the strategic ambition of this claim and summarize the position adopted in four key legal areas: choosing the Respondents; the jurisdiction of the CRC Committee; causation; and exhaustion of domestic remedies. They argue that 'these areas will consistently arise for those seeking to use the international human rights treaty body system in global climate-related

97 *Ioane Teitiota v New Zealand* (7 January 2020) UN Doc CCPR/C/127/D/2728/2016.

98 *Torres Strait Islanders v Australia,* Communication 3624/2019 (filed May 2019).

99 As well as other forms of dispute settlement foreseen in the UN Convention on the Law of the Sea (UNCLOS).

100 *Sacchi et al v Argentina et al,* Communication nos CRC 104/2019-108/2019 (filed 23 September 2019) ('the Petition').

matters.'[101] This chapter clearly demonstrates how this complaint is likely to pave the way for a continuing role of children and youth in climate change litigation based on the obligations of States under human rights law, including the State's obligations deriving from the Convention on the Rights of the Child.

Moving away from the ambit of individual complaints against States, the following four contributions focus specifically on inter-State claims. Savaresi introduces this perspective by suggesting an analytical framework for analyzing the prospects for inter-State climate change litigation at the international level. With a view to ascertaining whether inter-State 'pro-' climate change litigation could make a difference and, assuming it could, its added value, she critically engages with the main arguments put forward in legal scholarship. Distinguishing between disputes over breaches of international obligations concerning climate change; disputes over harm associated with climate change; and an advisory opinion interpreting international obligations on climate change, the author considers the opportunities and constraints of each scenario categorized into three groups: technical, substantive and existential. She concludes that 'whilst not a solution, international litigation could be instrumental in bringing about a change in attitude by courts and lawmakers, eventually triggering inter-State cooperation that is sorely needed to address the plight of those vulnerable to the devastating impacts of climate change.'[102]

Subsequently, Wewerinke-Singh, Aguon and Hunter critically examine the prospects for contentious cases and advisory opinions before the International Court of Justice. In relation to contentious cases, the chapter considers a range of jurisdictional, procedural and substantive obstacles that would need to be overcome. The authors argue that requesting an advisory opinion instead could be a way to overcome some of these obstacles, while also recognizing that this option has its own challenges, such as *by whom* a request for such an opinion should be made, and *how* the question to be presented to the ICJ should be formulated in order to avoid negative impacts, in particular on the multilateral climate negotiations. The authors conclude by discussing factors that could help or hinder the prospects for a meaningful intervention on climate change from the ICJ.

In the next contribution on inter-State litigation, Harrison addresses the question of how the law of the sea regime can contribute to tackling climate change, and particularly how the dispute settlement system under the United

101 See I Gubbay and C Wenzler, 'Intergenerational Climate Change Litigation', Chapter 15 in this volume.

102 See A Savaresi, 'Inter-State Climate Change Litigation', Chapter 16 in this volume.

Nations Convention on the Law of the Sea (UNCLOS)[18] may be used to promote action on this front. He analyzes the possible role of the various options of dispute settlement set out in Part XV of UNCLOS from two different angles. On the one hand, he considers how UNCLOS can be invoked to *support* action under the climate change regime, examining, inter alia, how the due diligence obligations of States under UNCLOS to prevent pollution of the marine environment can reinforce State obligations under the international climate change regime. On the other hand, the chapter discusses how UNCLOS can be invoked to *supplement* action under the climate agreements, in particular to ensure that States take broader environmental issues into account when developing their climate change policies.

Van Asselt focuses on the prospects of climate disputes before the World Trade Organization (WTO). After recapitulating the relationship between the WTO and the environment in general, and climate change in particular, he analyzes the main climate change-related disputes that have been brought before the WTO dispute settlement mechanism so far, distinguishing between disputes regarding renewable energy support measures and disputes related to biofuels. The chapter further discusses possible future climate change-related disputes focusing on border carbon adjustments (BCAs) and fossil fuel subsidies. The author argues that the WTO dispute settlement system is not well placed to deal with the precarious balancing act involved in a trade and climate dispute and concludes with a discussion of possible ways forward.

Thieffry attempts to anticipate the prospects for resolving climate change-related disputes through international arbitration, addressing both investor-State dispute settlement (ISDS), and the less publicized arbitration of 'commercial' disputes. The author develops his analysis starting from the observation that 'international arbitration is more often than not perceived as a "shield" against climate action, geared at challenging its validity or its extent, rather than as a "sword" for climate action, aiming to cause the adoption or the strengthening of environmental measures.'[103] He concludes that while national courts will continue to be perceived as the main fora for the settlement of investment or commercial disputes, it is not excluded that international arbitration may provide better responses in certain situations, for example 'where complex cross-border scientific, financial or legal issues require transnational specialized expertise, or where enforcement of the forthcoming decision will take place in another jurisdiction or in other jurisdictions than that of the forum.'[104]

103 See P Thieffry, 'International Arbitration of Climate-Related Disputes', Chapter 20 in this volume.

104 ibid.

Finally, Milaninia and Aparac analyze different legal options for prosecuting climate change as an international crime before the International Criminal Court (ICC), as well as challenges to such prosecutions. The authors first consider the nexus between climate change and international crimes, examining whether acts or omissions that contribute to climate change could fall within the scope of the crimes set out in the Rome Statute.[105] While the analysis identifies several ways in which the harmful effects of climate change might, in theory, amount to international crimes, the authors acknowledge that there are significant limitations for prosecuting individuals for such crimes before the ICC. These limitations are especially related to the strictly defined 'elements of the crimes' that need to be fulfilled for such prosecutions. Moreover, the authors also consider the possibilities of reparation, arguing that if individuals were nevertheless to be held accountable, the award of *collective* reparations could be a suitable option in relation to environmental, or climate change-related harm.

Climate change litigation is ever evolving. Despite the breadth of chapters in this volume and despite the chapters coming together within just a few months, a number of other notable cases have been filed and decided in the interim. This includes the decision by the Irish Supreme Court[106] quashing the National Mitigation Plan in determining that the plan fell short of the level of specificity required under the Climate Action and Low Carbon Development Act 2015, because a reasonable reader of the Plan would not understand how Ireland will achieve its 2050 goals.[107] Moreover, two promising climate cases have recently been launched before the European Court of Human Rights. The first case was brought by six Portuguese children and young adults, against 33 Member States of the Council of Europe, claiming that the failure of these States to adequately address climate change amounts to a violation of their human rights, both today and in the future.[108] The second case was initiated by

105 War crimes, crimes against humanity, genocide and aggression.

106 *Friends of the Irish Environment v Ireland*, 2017 No 793 JR, 31 2020.

107 See: '*Friends of the Irish Environment v Ireland*, Climate Case Chart' (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/> accessed 1 November 2020.

108 *The Portuguese Youth Case* filed before the ECtHR on 3 September 2020. The applicants claim that the Respondent States have violated their right to life (art 2 ECHR), their right to a private and family life (art 8 ECHR), and their right to freedom from discrimination (art 14 ECHR), arguing that they are being discriminated based on their age. See also P Clark, G Liston and I Kalpouzos, 'Climate change and the European Court of Human Rights: The Portuguese Youth Case' (*EJIL:Talk!*, 6 October 2020) <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/> accessed 1 November 2020.

a group of female senior citizens from Switzerland, alleging that Switzerland's inadequate climate policies violate the women's right to life and health under Articles 2 and 8 of the ECHR, and that their rights to a fair trial and to an effective remedy have been violated by the Swiss courts.[109] Finally, in February 2021, a group of children brought a petition before the Inter-American Commission on Human Rights against Haiti, alleging violations of their rights under the American Convention on Human Rights, stemming from waste disposal in their residential district, and also discussing how climate change worsens the harms to children through environmental displacement and increased waterborne diseases.[110]

This serves as a reminder that this volume is necessarily an incomplete snapshot in time. More cases, by more groups are likely to come through the courts over the coming months and years which will merit further analysis. Each of the decisions, cases and prospects discussed in this volume will likely inform, in different ways and to different degrees, the future development of such cases. It is with this perspective of the potential impact of a single decision that we also selected the painting for the cover of this volume—*Butterfly Blues* by Marianne Benkö. The painting reflects the 'butterfly effect', according to which the slightest tremble of a butterfly's wing may cause a hurricane on the other side of the globe. It also evokes nature itself, continuous movement, perhaps a looming risk of destruction, but especially a positive and hopeful energy to keep moving, to preserve nature, the Earth, everything, now, and into the future.

In conclusion, we return to the metaphor with which we opened, that of an orchestra without a conductor, in which individual musicians each play their part, using their own instruments and introducing variations to a common theme. At the domestic and international level, we see a range of actors using litigation to promote their interests and different courts and tribunals using their own processes, principles and acting within their own limitations in pursuing enhanced responses to climate change. Some decisions are notable and rightly instill within activists and commentators a hope for a positive trajectory. The chapters identify a range of barriers to be overcome but overall present a hopeful picture for a more harmonious and effective judicial response to the failure of legislatures and executives to adequately address climate change.

109 *Klimaseniorinnen v Switzerland*, presented to the ECtHR on 26 November 2020. The ECtHR communicated the case to the Swiss government on 26 March 2021.

110 Petition to the Inter-American Commission on Human Rights, *Six Children of Cité Soleil, Haiti and Sakala Community Center for Peaceful Alternatives* (4 February 2021), see <http://blogs2.law.columbia.edu/climate-change-litigation/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-to-redress-violations-of-the-rights-of-children-in-cite-soleil-haiti/> accessed 14 April 2021.

PART 1

Climate Change Litigation: Comparative Perspectives

CHAPTER 2

Climate Change Litigation in the United States: High Volume of Cases, Mostly About Statutes

*Michael B Gerrard**

1 Introduction

The United States has more climate change litigation than the rest of the world combined. For the purpose of this chapter, climate change litigation refers to litigation where climate change or greenhouse gases are an explicit subject of the case, though not necessarily the only subject. Not included are cases that may have been motivated by climate change but do not explicitly talk about it, such as an effort to stop a coal-fired power plant on non-climate legal grounds. According to a database of the world's climate change litigation maintained by Columbia Law School's Sabin Center for Climate Change Law,[1] as of 31 December 2019, a total of 1,452 climate cases had been filed in courts or other tribunals worldwide. Of these, 1,134 (78 per cent) were from the United States, Australia was a distant second, with 95, followed by the United Kingdom with 56. No other country had more than 20. The cases were filed in 37 countries and eight international tribunals, led by the Court of Justice of the European Union, which had 48.

This chapter organizes the US cases it discusses according to the following five topics: federal statutory litigation (II); common law cases (III); public trust doctrine cases (IV); securities cases (V); and failure to adapt cases (VI).

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1 'Non-US Climate Change Litigation' (*Sabin Center for Climate Change Law*) <http://climate-casechart.com/non-us-climate-change-litigation/> accessed 31 December 2019.

II Federal Statutory Litigations

In the United States, according to another Sabin Center database,[2] the largest number of cases (163) were brought under the National Environmental Policy Act (NEPA),[3] the statute that requires environmental impact statements for federal actions that could have a significant impact on the environment. Similarly, there were 139 cases brought under state equivalents of NEPA.[4] The great bulk of these were brought under the California Environmental Quality Act[5] and challenged the environmental review[6] for specific projects on the grounds that they had insufficiently studied the project's impacts on climate change, or climate change's impacts on the project. One prominent climate change decision under NEPA held that before the National Highway Traffic Safety Administration may set fuel economy standards for passenger automobiles, it must prepare an environmental impact statement that discloses the greenhouse gas (GHG) emissions and would result from several possible standards.[7] Another case held that before approving a natural gas pipeline, the Federal Energy Regulatory Commission must consider the greenhouse gas emissions that will result when power generating plants burn the gas carried by the pipeline.[8]

Another large category of cases (151 cases) were those brought under the Clean Air Act,[9] which is the principal federal statute that can be used to regulate GHGs. In *Massachusetts v EPA*,[10] the most important US climate change decision to date, the Supreme Court ruled by a 5-4 vote that the Clean Air Act gives the US Environmental Protection Agency (EPA) the authority to regulate GHGs, if it first makes an 'endangerment finding' that GHGs pose a threat to

2 'US Climate Change Litigation' (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/us-climate-change-litigation/> accessed 31 December 2019.

3 42 USC §§ 4321–70h.

4 'US Climate Litigation' (n 2).

5 Cal Pub Res Code §§ 21000–177.

6 Environmental review under NEPA, the California Environmental Quality Act, and most other similar law consists of the preparation of detailed documents, called environmental impact statements or reviews, that describe the governmental actions under consideration; their environmental impacts; ways to mitigate any negative impacts; and alternatives to the proposed action. These statements are subject to public review and comment and are intended to inform governmental decision-making.

7 *Center for Biological Diversity v National Highway Traffic Administration*, 538 F 3d 1172 (9th Cir 2008).

8 *Sierra Club v Federal Energy Regulatory Commission* (*Sabal Trail*), 867 F 3d 1357 (DC Cir 2017).

9 42 USC §§ 7401–671q.

10 549 US 497 (2007).

public health and welfare. The decision was issued during the presidency of George W Bush, whose administration did little to act under this authority. But when Barack Obama took office in January 2009, he directed the EPA to begin regulating GHGs. Within a few months the EPA issued the required endangerment finding.[11] It was challenged in court by several industry groups and by states that oppose climate regulation, led by Texas and West Virginia. They argued that the scientific evidence supporting the finding was flawed. The US Court of Appeals for the District of Columbia Circuit, in a strongly worded opinion, upheld the Endangerment Finding and found that EPA had ample support in the administrative record for having issued it.[12]

Having issued the Endangerment Finding, the EPA issued regulations under the Clean Air Act's New Source Review Program,[13] which requires permits for the construction or major modification of major new sources of air pollution. Most but not all of these regulations were upheld by the courts.[14] The EPA and the National Highway Traffic Safety Administration also issued regulations limiting the GHGs that could be emitted from passenger vehicles. These too were upheld by the courts.[15] The Trump administration weakened those standards,[16] and the Biden administration is moving to reverse its predecessor's actions and adopt stronger standards.

The EPA's next major move after adopting the motor vehicle standards was the issuance of the Clean Power Plan[17] which aimed to reduce emissions from coal-fired power plants, which were then the largest source of GHGs in the US[18] The Clean Power Plan was issued under an obscure provision of the

11 US Environmental Protection Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: Final Rule, 74 Fed Reg 66496 (December 15, 2009).

12 *Coalition for Responsible Regulation v EPA* 684 F 3d 102 (DC Cir 2012), aff'd in part, rev'd in part sub nom *Utility Air Regulatory Group v EPA* 573 US 302 (2014).

13 42 USC §§ 7470–514a.

14 *Utility Air Regulatory Group v EPA* 574 US 302 (2014).

15 *Coalition for Responsible Regulation v EPA* 684 F 3d 102 (DC Cir 2012), aff'd in part, rev'd in part sub nom *Utility Air Regulatory Group v EPA* 573 US 302 (2014).

16 J Goffman, J McCabe and W Niebling, 'EPA's Attack on New Source Review and Other Air Quality Protection Rules' (Harvard Law School Environmental & Energy Law Program 2019) <http://eelp.law.harvard.edu/wp-content/uploads/NSR-paper-EELP.pdf> accessed 31 May 2020.

17 'Fact Sheet: Overview of the Clean Power Plan' (*US Environmental Protection* Agency) <https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html> accessed 31 May 2020.

18 These emissions have since declined, largely due to the substitution of natural gas for coal in many markets, owing mostly to the inexpensive natural gas that was made available by hydraulic fracturing.

Clean Air Act, Section 111(d), which allowed controls over existing sources of air pollution under very limited conditions. Using that provision's complicated requirements, the EPA set emission reduction targets for each state, and directed the states to devise binding plans to meet those targets. For many states, this would require electric utilities not only to improve the efficiency of their power plants, but also to go 'beyond the fenceline' and act on matters outside the power plants, such as the construction of new renewable energy facilities, and improving customers' energy efficiency. The Clean Power Plan was widely attacked as exceeding the EPA's authority under the statute. In February 2016, the Supreme Court by a 5-4 vote but without explanation stayed the implementation of the Clean Power Plan until litigation over it was complete.[19] The US Court of Appeals heard oral argument on the case in September 2016 but had not issued a decision before the inauguration of Donald Trump, who had campaigned for the presidency on a pledge that he would revoke the Clean Power Plan. The EPA under President Trump carried out that pledge and replaced the Clean Power Plan with a far weaker regulation,[20] which was in turn vacated by the US Court of Appeals in January 2021.[21]

The next largest subject matter of US climate change litigation, with 75 cases, is species protection, mostly under the Endangered Species Act.[22] Most of these cases concerned federal decisions to list (or not to list) certain species as threatened or endangered, as well as federal decisions to designate (or not designate) certain geographic areas as 'critical habitat areas' for listed species. Many of these cases have led to orders that the Fish and Wildlife Service or the National Marine Fisheries Service move forward with actions to protect species whose habitat is threatened by climate change.[23]

The nature of the federal statutory litigation varies depending on the party in power. During the presidency of George W Bush (2001–09), a Republican, most of the cases were brought by environmental groups and by those states that favoured climate regulation (typically led by New York, California and

19 *West Virginia v EPA* 136 S Ct 1000 (2016).

20 US Environmental Protection Agency, Repeal of the Clean Power Plan; emission Guidelines for Greenhouse Gas Emisisons from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed Reg 32520 (July 8, 2019).

21 *American Lung Association v US Environmental Protection Agency*, No 19-1140 (DC Cir January 19, 2021).

22 16 USC §§ 1531–44.

23 For example, *In re: Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F 3d 1 (DC Cir, 2013); *Alaska Oil and Gas Ass'n v Pritzker*, 840 F 2d 671 (DC Cir 2016).

Massachusetts), challenging the failure of the federal government to act. During the presidency of Barack Obama (2009–17), a Democrat, most of the cases were brought by corporations and industry groups and by those states that opposed climate regulation (typically led by Texas and West Virginia), saying the EPA and other federal agencies had gone too far in regulating climate change. With the inauguration of Donald Trump, a Republican, in January 2017, the administration moved to repeal or weaken almost all of the climate regulations that had been adopted during the Obama administration, and virtually all of these actions were challenged in court by the same coalition that had opposed President Bush.[24] When Joe Biden, a Democrat, was inaugurated in January 2021, the policy of the executive branch reversed once again, and it may be anticipated that most of his administration's actions on climate change will be challenged in court by many of the same groups that sued the Obama administration.

Much of the litigation challenging the Trump administration was successful. This is primarily because courts have found that the administration has often failed to observe the procedural requirements of the Administrative Procedure Act,[25] the National Environmental Policy Act,[26] and other laws that require detailed analyses and explanations, public consultation, and other procedures before regulations can be repealed or significantly altered.[27]

As a result of this litigation, many of the efforts by the Trump administration were halted by the courts. These include a delay in the EPA's methane standards for the oil and gas sector,[28] delay in the effective date of a Bureau of Land Management rule on methane waste,[29] repeal of a rule on the valuation of coal, oil and gas under federal lands,[30] weakening of the protections

24 J Wentz and MB Gerrard, 'Persistent Regulations: A Detailed Assessment of the Trump Administration's Efforts to Repeal Federal Climate Protections' (Sabin Center for Climate Change Law, June 2019) <http://columbiaclimatelaw.com/files/2019/06/Wentz-and-Gerrard-2019-06-Persistent-Regulations.pdf> accessed 31 May 2020.

25 5 USC §§ 551–9.

26 42 USC §§ 4321–70h.

27 DP Adler, 'U.S. Climate Change Litigation in the Age of Trump: Year Two' (Sabin Center for Climate Change Law, June 2019) <http://columbiaclimatelaw.com/files/2019/06/Adler-2019-06-US-Climate-Change-Litigation-in-Age-of-Trump-Year-2-Report.pdf> accessed 28 February 2021; J Wentz and MB Gerrard, 'Persistent Regulations: A Detailed Assessment of the Trump Administration's Efforts to Repeal Federal Climate Protections' (Sabin Center for Climate Change Law, June 2019) <http://columbiaclimatelaw.com/files/2019/06/Wentz-and-Gerrard-2019-06-Persistent-Regulations.pdf> accessed 31 May 2020.

28 *Clean Air Council v Pruitt* 862 F 3d 1 (DC Cir 2017).

29 *California v BLM* 277 F Supp 3d 1106 (ND Cal 2017).

30 *California v US Department of the Interior* 381 F Supp 3d 1153 (ND Cal 2017).

given to the sage-grouse (an endangered bird) that inhibited fossil fuel production,[31] revisions to procedures for oil and gas leasing,[32] delays in the issuance of energy efficiency standards,[33] allowance of oil and gas drilling in the Arctic and Atlantic oceans,[34] the lifting of a moratorium on the leasing of federal lands for coal development,[35] the weakening of hydrofluorocarbon regulations,[36] and the removal from EPA scientific advisory boards of scientists who had received EPA grants.[37] In many of these cases, the government was given an opportunity to go back and follow the proper procedures. That is usually very time-consuming, and in many instances the process was not completed before the end of President Trump's term in January 2021. Joe Biden, who took office in January 2021, has vowed to revoke most of the deregulatory actions of the Trump administration—though that, too, will probably be met with considerable litigation.

At the end of the Trump presidency, litigation was pending against several of the most important acts of environmental deregulation by the Trump administration, including the repeal of the Clean Power Plan;[38] the weakening of standards for greenhouse gas emissions from motor vehicles;[39] reductions in regulatory coverage of the Clean Water Act (the 'Waters of the United States Rule');[40] and weakening of the rules under the Endangered Species Act.[41] The Biden administration is moving to put most or all of these cases on hold as it reconsiders the challenged rules.

III Common Law Cases

A smaller but very prominent set of cases were brought under the common law, in particular the public nuisance doctrine, under which a person can be

31 *Western Watersheds Project v Schneider* 417 F Supp 3d 1319 (D Idaho 2019).

32 *Western Watersheds Project v Zinke* 2020 WL 959242 (D Idaho February 27, 2020).

33 *NRDC v Perry* 940 F 3d 1072 (9th Cir 2019).

34 *League of Conservation Voters v Trump* 363 F Supp 3d 1013 (D Alaska 2019).

35 *Citizens for Clean Energy v US Department of the Interior* 384 F Supp 3d 1264 (D Mont 2019).

36 *NRDC v Wheeler* 955 F 3d 68 (DC Cir 2020).

37 *Physicians for Social Responsibility v Wheeler* 956 F 3d 634 (DC Cir 2020); *NRDC v EPA* 2020 WL 615072 (SDNY Feb 10, 2020).

38 *American Lung Association v US Environmental Protection Agency*, No 19-1140 (DC Cir No 19-1140). 16 USC §§ 1531–44.

39 *State of California v Chao*, No 1:19-cv-2826=KBJ (DDC).

40 *State of California v Wheeler*, No 3:20-cv-03005 (ND Cal).

41 *Center for Biological Diversity v Bernhardt*, No 19-cv-05206-JST (ND Cal).

liable for unreasonable actions that cause injury to the public. One of those cases, *American Electric Power v Connecticut,* sought an order that the coal-fired power plants of six electric utilities reduce their GHG emissions. The other cases sought money damages. The most prominent of these, *Native Village of Kivalina v Exxon Mobil,* sought the costs of relocating an Alaska village that was threatened by melting ice. In 2011, the Supreme Court ruled in *American Electric Power* that the Clean Air Act gave the EPA exclusive federal control over GHG emissions, leaving no room for action under the federal common law.[42] With this, the *Kivalina* lawsuit was also dismissed, on the same theory.[43]

The Supreme Court left open the question of whether state common law cases could be brought over climate change. No case raised this question until 2017, when several suits were brought against the major energy companies by a number of counties, cities, the State of Rhode Island, and a fishermen's association, seeking money damages. At latest count, there were 18 such suits. All of the governmental plaintiffs are situated along the Atlantic or Pacific oceans (except for Boulder, Colorado). Their cases claim that they will need to undertake major expenditures to protect against sea level rise and coastal storms. Almost all of the cases are against Exxon Mobil, Chevron, BP, Shell and Conoco Phillips and some of the cases name other energy companies. Almost all are based on public nuisance theories, and some also have claims arising under the common law theories of trespass, product defect, negligence, and failure to warm.[44] Several also claim that some or all of the defendants engaged in deceptive behaviour by denying or minimizing the risks of anthropogenic climate change, while having actual knowledge of such risks.

In attempting to allocate damages among the energy companies, most of these cases rely on a series of studies that have examined the quantities of coal, oil and natural gas extracted by the world's major fossil fuel companies and their predecessors, and translated that into estimates of the percentage of greenhouse gases now in the atmosphere as a result of the fuels extracted by these companies.[45]

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42 564 US 410 (2011).

43 696 F 3d 849 (9th Cir 2012).

44 Trespass is entering a person's land or property without their permission. Product defect liability arises when a person designs or manufactures a defective product that causes injury. Negligence is a failure to take proper care in doing something, resulting in injury. Failure to warn liability arises from failure to provide adequate warnings or instructions about a product's proper use, leading to injury.

45 For example, R Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010' (2014) 122 Climatic Change 229.

Two of these cases were dismissed by the trial courts;[46] a Court of Appeals ruling reinstated one of them, and the other case is still under appeal before a different Court of Appeals.[47] In most of the rest, litigation is now pending over whether the cases should be heard in federal court or in state court. The defendants tend to prefer federal court, in part because this would make it more likely that the displacement doctrine[48] announced in *American Electric Power v Connecticut* applies, while the plaintiffs would rather be in state court, where this doctrine might not apply. In January 2021, the Supreme Court heard argument in one of the cases, but only on a very narrow issue of appellate procedure.[49] It is possible that the Supreme Court's decision in this case will have major implications for the other pending cases; it is also possible that the Court will rule narrowly and leave the other cases untouched.

If any of these cases do survive the motions to dismiss and other preliminary litigation matters, the plaintiffs will no doubt seek extensive discovery (documents, interrogatories and possibly depositions) from the defendants. The plaintiffs will also have to deal with serious unresolved issues concerning the attribution of particular climate injuries to climate change, and to the actions of particular companies.[50]

IV Public Trust Doctrine Cases

Another small but prominent number of cases were brought under the public trust doctrine, a legal doctrine stemming from the Justinian Code providing that the State has an obligation to hold certain aspects of the natural environment in trust for the public.[51] Utilizing this theory, a nonprofit group formed in Oregon called Our Children's Trust. It organized efforts to bring lawsuits all around the United States that claimed that the public trust doctrine applies to the atmosphere, and not just rivers, parks and other more conventional targets. The suits argued that state or federal governments were thereby compelled to reduce GHG emissions within their jurisdictions. A total of 20 such

46 *City of New York v BP plc* 325 F Supp 3d 466 (SDNY 2018); *City of Oakland v BP plc* 325 F Supp 3d 1017 (ND Cal 2018).

47 *City of Oakland v BP plc* 2020 WL 2702680 (9th Cir May 26 2020).

48 Displacement of federal common law occurs when the relevant field has been occupied by an Act of Congress.

49 *Mayor and City Council of Baltimore v BP plc*, No 19-1644 (4th Cir 2020).

50 M Burger, J Wentz and R Horton, 'The Law and Science of Climate Change Attribution' (2020) 45 Columbia Journal of Environmental Law 57.

51 See MC Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (CUP 2013).

suits were brought in federal and state courts, and several more proceedings were launched in administrative agencies. Almost all of these suits were ultimately dismissed, primarily on the grounds that the public trust doctrine does not apply to the atmosphere; the plaintiffs are not affected by climate change differently than the general public, and do not have standing to sue; the case raises political questions that are not suitable for judicial resolution; or the courts do not have the power to issue the requested relief.

However, one of these cases survived, and became quite celebrated in the United States and around the world—*Juliana v United States*. It was brought against several federal agencies and officials in federal district court in Oregon. Its complaint asked the court to '[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.'

The suit was filed in September 2015. On 10 November 2016 (two days after Donald Trump was elected), Judge Ann Aiken denied the federal government's motion to dismiss.[52] She held not only that the public trust doctrine could apply to GHG emissions, but also that it was grounded in the Due Process Clause of the US Constitution. This finding surprised many legal scholars, as no previous federal court had found there to be a federal constitutional right to a clean environment (several state constitutions do have such provisions, including Pennsylvania, Montana, Illinois, Massachusetts, Hawaii and Rhode Island). On 13 January 2017, a week before President Trump was inaugurated, the Department of Justice answered the complaint and admitted many of its factual allegations about the causes and negative consequences of climate change (though not admitting federal government responsibility). The court scheduled a trial. The US Department of Justice made several efforts at the Court of Appeals for the Ninth Circuit and the Supreme Court to prevent the trial from going forward.[53] The Ninth Circuit ultimately accepted an interlocutory appeal of the case—an unusual procedure for a civil case on the verge of trial.

On 17 January 2020, the Ninth Circuit issued its decision and dismissed the lawsuit by a vote of 2-1.[54] The two judges in the majority declared:

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52 *Juliana v United States* 217 F Supp 3d 1224 (D Or 2016). See also *Juliana v United States* 339 F Supp 3d 1062 (D Or 2018).

53 The key documents in this litigation can be found at this site: <http://climatecasechart.com/case/juliana-v-united-states/> accessed 31 May 2020.

54 *Juliana v United States* 947 F 3d 1159 (9th Cir 2020).

> The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action … We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

The dissenting judge stated:

> Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies,* prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?
>
> I would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial. I would therefore affirm the district court.

The plaintiffs filed for en banc review—in other words, a hearing before all the active judges of the Ninth Circuit, not just the three judges who heard the appeal. The Ninth Circuit denied this request in February 2021. The plaintiffs' counsel have indicated that they plan to seek review by the Supreme Court. However, many of their allies are urging them not to seek such review, out of concern that the Supreme Court, as currently constituted, might issue a decision that not only affirms the dismissal but also restricts the scope of climate litigation more generally.

V Securities Litigation

Yet another prominent set of cases concerns investigations by several state attorneys general, led by New York, into whether Exxon Mobil Corp misled

investors and regulators by publicly claiming that climate change is not a severe problem, while internally being advised otherwise by its own scientists. Exxon made various efforts in state and federal courts to halt such investigations, all without success.[55] In 2018, the New York Attorney General finally brought the long-anticipated lawsuit. After extensive document discovery and depositions, the case went to trial in October 2019.

After a 12-day trial, the court found that the New York Office of the Attorney General failed to establish by a preponderance of the evidence that Exxon Mobil made any material misstatements or omissions that misled any reasonable investor about its practices or procedures for accounting for climate risk. The court therefore denied claims asserted under the Martin Act—New York's securities fraud statute—and a state law—Executive Law § 63(12)—which prohibits repeated or persistent fraudulent acts. Although the court granted the attorney general's request to discontinue its common law and equitable fraud claims with prejudice, the court also said its decision established that Exxon would not have been held liable on any fraud-related claims since the attorney general failed to establish Exxon's liability even for causes of action that did not require proof of the scienter and reliance elements of fraud. The court found that Exxon's public disclosures in the 2013 to 2016 time period at issue in the case—including Form 10-K disclosures and March 2014 reports specifically addressing climate change risk and regulations that were prepared in consideration for withdrawal of shareholder proposals—were not misleading. The court said one of the March 2014 reports identified proxy costs of carbon and GHG costs as 'distinct and separate metrics', one of the factors leading the court to reject the premise of the attorney general's case that Exxon's disclosures 'led the public to believe that its GHG cost assumptions for future projects had the same values assigned to its proxy cost of carbon.' The court also found that an analyst's testimony undercut the attorney general's assertion that information in the March 2014 reports was material to investors and found the attorney general's expert testimony on materiality to be unpersuasive, 'flatly contradicted by the weight of the evidence', and 'fundamentally flawed.'[56]

While the New York trial was underway, the Attorney General of Massachusetts brought another lawsuit against Exxon. The suit claims that Exxon committed deceptive practices against Massachusetts investors and consumers by failing to disclose climate change risks, misrepresenting its

55 For example, *Exxon Mobil Corp v Schneiderman* 316 F Supp 3d 679 (SDNY 2018); *Exxon Mobil Corp v Attorney General* 94 NE 3d 786 (2018), cert denied, 139 S Ct 794 (2019).

56 *People v Exxon Mobil Corp* 119 NYS 3d 829 (NY Sup Ct 2019).

business practices related to use of proxy costs of carbon, misleadingly advertising its products, failing to disclose its products' impacts on climate change, and engaging in greenwashing campaigns. The complaint said Exxon's actions and practices violated the Massachusetts Consumer Protection Act.[57] Exxon's attempt to remove the case from state to federal court on the grounds that it presented federal issues was rejected by the federal district court in Boston.[58] This suit is pending in state court.

Several other lawsuits are pending against Exxon alleging that the company issued misleading statements about climate change.[59]

The Biden administration has indicated that it will strengthen the requirements for disclosure of climate issues under the federal securities laws.

VI Failure to Adapt

An emerging category of cases concerns alleged failure to adapt to climate change—to prepare for the extreme weather events and other impacts that are coming. Most prominent of these is *Conservation Law Foundation v Exxon Mobil*.[60] This case alleges that defendants violated the National Pollutant Discharge Elimination System (NPDES)[61] permit under the Clean Water Act for their 110-acre petroleum storage and distribution terminal in Everett, Massachusetts, including by failing to consider flooding and severe storms caused by climate change in their maintenance of the terminal. The plaintiff also asserted that the permit violations posed an imminent and substantial endangerment to human health and the environment in violation of the Resource Conservation and Recovery Act.[62]

Citing the doctrine of primary jurisdiction,[63] the federal district court for the District of Massachusetts stayed the lawsuit in March 2020. The terminal has

57 *Commonwealth v Exxon Mobil Corp*, No 19-3333 (Mass Super Ct).

58 *Commonwealth v Exxon Mobil Corp*, No 19-12430 (D MA May 28, 2020).

59 *In re: Exxon Mobil Corp Derivative Litigation*, No 2:19-cv-16380 (DNJ); *Ramirez v Exxon Mobil Corp*, No 3:16-cv-3111 (ND Tex).

60 *Conservation Law Foundation v ExxonMobil Corp* 2020 WL 1332949 (D Mass Mar 21, 2020).

61 40 CFR Part 122.

62 42 USC §§ 6901–92k.

63 'The doctrine of primary jurisdiction applies where a claim can originally be addressed in a court but would be better addressed first by an administrative body. It is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It applies to claims that contain some issue within the special competence of an administrative agency. Thus, under the primary jurisdiction

a NPDES permit issued by the EPA that expired in 2014 but which the EPA has administratively continued so that its terms remain in effect. The EPA informed the court that the agency is working in good faith to renew the permit by 2022. The court found that the precedent against applying primary jurisdiction in citizen suits was 'not overwhelming', and that, in any event, this case was not a 'typical' citizen suit, both because it involved 'ambiguous, narrative permit conditions' and would require the court to determine to what extent weather patterns were changing in the Boston area, an inquiry implicating scientific and policy issues. Although the court acknowledged that the doctrine of primary jurisdiction should be applied 'sparingly' in citizen suits, it concluded that this case 'involves a rare set of circumstances in which deferring to the primary jurisdiction of the EPA is justified and appropriate.' Considering the factors for applying primary jurisdiction, the court first said that 'determining permit conditions' was 'at the heart of the EPA's authority' under the Clean Water Act. Second, the court noted again that the question of how Exxon should consider 'predictable weather patterns' raised 'scientific and policy issues that the EPA is better equipped to decide than the court.' Third, the court noted that the EPA's issuance of the renewed permit would 'generate a fuller administrative record' to which the court could refer to interpret the permit and could moot the plaintiff's request for injunctive relief. Fourth, the court said that allowing the EPA the opportunity to issue the permit would further regulatory uniformity. The court also concluded that the potential for delay did not outweigh other factors. It noted that resolving the case on the merits could require as much time as the EPA had estimated for the permit's renewal. The court therefore stayed the case, directing the parties to confer within 30 days of issuance of a new permit regarding whether the stay should be lifted and, if so, how the case should proceed. The court further directed that if a new permit was not issued by 1 November 2021, the parties should confer and report to the court on the status of the permitting process and on whether the stay should be lifted.[64]

The Conservation Law Foundation also sued Shell Oil Products on similar grounds related to its oil terminal in Providence, Rhode Island. That suit is pending.

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doctrine, courts, even though they could decide, will in fact not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.' ('Primary Jurisdiction Doctrine' (*US Legal*) <https://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/primary-jurisdiction-doctrine/> accessed 31 May 2020).

64 *Conservation Law Foundation v ExxonMobil Corp* 2020 WL 1332949 (D Mass Mar 21, 2020).

VII Conclusion

The United States has a litigious culture. In the great majority of cases, each side bears its own costs of litigation, so a party that files a lawsuit has little risk of having to pay the defendants' lawyers' fees if it loses. Most important government actions concerning climate change are challenged in court by those interests that feel they would be harmed by the actions.

To date, climate change litigation in the United States has spurred the federal government to take some actions against climate change and held back many efforts by the Trump administration to revoke or weaken the climate regulations adopted by previous administrations. Litigation has also impeded the construction of many facilities that would extract, transport or burn fossil fuels. Litigation has so far not led to money damages against fossil fuel producers or greenhouse gas emitters related to the impacts of climate change or led to overarching orders that the government do more to combat climate change. It is certain, however, that litigation will continue to be an important tool used by those supporting and opposing vigorous action on climate change.

CHAPTER 3

Climate Change Litigation in Australia: Law and Practice in the Sunburnt Country

Laura Schuijers and Margaret A Young***

1 Introduction

Australia is 'a sunburnt country … of droughts and flooding rains', as lovingly depicted by poet Dorothea Mackellar in the early 20th century.[1] Australia's constitution, agreed around the same time, established the federation and affirmed the separation of powers between the legislative, executive and judicial branches.[2] Over a century later, the growing need for each branch to respond to climate change is dramatically in evidence. Australia is highly vulnerable to the impacts of climate change.[3] The catastrophic fires of 2020 gained world-wide attention and a group of survivors has sought redress through the courts.[4] The

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1 D Mackellar, 'My Country', originally published as 'Core of My Heart', *The Spectator* (London, 5 September 1908). Cf ancient approaches of indigenous Australians: see, for example, D Green, J Billy and A Tapim, 'Indigenous Australians' Knowledge of Weather and Climate' (2010) 100 Climatic Change 337.

2 Commonwealth of Australia Constitution Act (Cth) (1900).

3 Australian Government Bureau of Meteorology, *State of the Climate 2020* (Australian Government Bureau of Meteorology 2020) <http://www.bom.gov.au/state-of-the-climate/> accessed 3 March 2021; MD Keywood, MF Hibberd and KM Emmerson, *Australia, State of the Environment 2016: Atmosphere* (Australian Government Department of the Environment and Energy 2017) vii–viii; 18–22; 31–2; 52–65. For analysis that Australia ranks as second most vulnerable developed market economy globally, see A Paun, L Acton and W-S Chan, *Fragile Planet: Scoring Climate Risks Around the World* (HSBC Global Research 2018).

4 *Bushfires Survivors for Climate Action Inc v Environment Protection Authority* [2020] NSWLEC 152. The fires were preceded by record-breaking drought and heat: ' "This is Not Normal": Climate Change and Escalating Bushfire Risk' (*Climate Council of Australia*, 12 November 2019) <https://www.climatecouncil.org.au/wp-content/uploads/2019/11/CC-nov-Bushfire-briefing-paper.pdf> accessed 30 March 2021. Up to a billion animals are estimated to have perished nationally: 'More than one billion animals killed in Australian bushfires' (*The University of Sydney*, 8 January 2020) <https://www.sydney.edu.au/news-opinion/news/2020/01/08/australian-bushfires-more-than-one-billion-animals-impacted.html> accessed 3 March 2021.

coral bleaching of the Great Barrier Reef similarly illustrates the degradation caused by global warming to Australia's world-famous natural heritage,[5] and has prompted domestic litigation.[6] Australia's unique biodiversity is under threat from climate change. So, too, is Australia's social and economic prosperity—the predicted economic loss associated with climate change by 2050, assuming current global emissions patterns continue, is $1.19 trillion.[7] Corporations are defendants in an increasing number of proceedings brought by their shareholders, and the Australian government is being sued by investors in sovereign bonds for failing to disclose climate risks.[8]

With so much to lose, outside observers might expect that Australia's legislature and executive are politically and legally ready to address climate change. Australia has ratified the United Nations Framework Convention on Climate Change (UNFCCC),[9] the Kyoto Protocol[10] and the Paris Agreement.[11] Although Australia's emissions are lower than larger economies, its per-capita footprint is inequitably high.[12] Yet measures to respond to climate change are still thoroughly contested in Australia. Multiple efforts at a legislatively imposed carbon price have failed or been repealed at the federal level. A review of climate change policy of the last decades[13] reveals a reluctance of political leaders to

5 L Hughes et al, *This is What Climate Change Looks Like* (Climate Council of Australia 2019).

6 *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* [2017] FCAFC 134.

7 T Kompas, VH Pham and TN Che, 'The Effects of Climate Change on GDP by Country and the Global Economic Gains from Complying with the Paris Accord' (2018) 6 Earth's Future 1153.

8 *Kathleen O'Donnell v Commonwealth of Australia & Others*, Amended Concise Statement, lodged in the Federal Court of Australia on 23 December 2020, available at <https://equitygenerationlawyers.com/wp/wp-content/uploads/2021/01/201223-ODonnell-SOC-stamped.pdf> accessed 3 March 2021.

9 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

10 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

11 Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 (Paris Agreement).

12 'Australia' (*Paris Equity Check*) <http://paris-equity-check.org/multi-equity-map.html#open-graph> accessed 30 March 2021; see Y Robiou du Pont et al, 'Equitable Mitigation to Achieve the Paris Agreement Goals' (2017) 7 Nature Climate Change 38.

13 For selected years, see E Jukic and MA Young, 'Country Report: Australia' in (2017) 28 Yearbook of International Environmental Law 404; (2016) 27 Yearbook of International Environmental Law 399; (2015) 26 Yearbook of International Environmental Law 390; (2014) 25 Yearbook of International Environmental Law 471; (2013) 24 Yearbook of International Environmental Law 512; (2012) 23 Yearbook of International Environmental Law 512; (2011) 22 Yearbook of International Environmental Law 566.

devise solutions at the national level. One explanation is the heavy dependence of Australia on fossil fuel reserves, both for its own electricity generation and for export revenue.[14] Another is that Australia's colonial-settler foundations have long encouraged and acquiesced to land-clearing and the reduction of carbon sinks at a massive scale. When Dorothea Mackellar evoked Australia's 'stark white ring-barked forest / All tragic to the moon', remorse was not apparent.[15] There are doubtless still fragments of the Australian population who consider carbon-intensive extraction and other activities as necessary and fixed.[16] As in other countries, the moribund legislative and executive response to climate change has led to a shift in attention to the courts.

This chapter investigates climate change litigation in Australia. We draw on the case law, which began in the 1990s and is now proliferating, together with associated legislation and principles at the Commonwealth level and at the state or territory level. We also draw on the long-standing scholarly engagement by legal academics (who have documented a chronology of approaches in Australian litigation),[17] and broader literature about Australia's legal and historical context. High profile cases such as the 2019 refusal by New South Wales judge Preston CJ to approve a new coal mine for being 'in the wrong place in the wrong time'[18] resonate closely with the views of scientists. The Intergovernmental Panel on Climate Change (IPPC) has shown that global and regional coal phase-outs are necessary to avoid a temperature global average

14 Claims about Australia's special position as an emissions-intensive economy accounted for the long time-lag between signing the Kyoto Protocol and its ratification. See N Durrrant, 'The Australian response to climate change: business as usual or legal innovation' (2010) 22(3) Environmental Law and Management 105.

15 Mackellar (n 1). But see the grieving contemporary poem by A Whittaker, 'A Love like Dorothea's', published in A Whittaker, *Blakwork* (Magabala Books 2018) 5.

16 R Huntley, 'Australia Fair: Listening to the Nation' (2019) 73 Quarterly Essay 1; R Huntley, 'Climate change splits the public into six groups' (Melbourne Sustainable Society Institute Oration, Melbourne, 21 November 2019) <https://www.abc.net.au/news/2020-01-29/climate-change-global-warming-six-groups-rebecca-huntley/11893384> accessed 3 March 2021.

17 See, for example, J Peel, H Osofsky and A Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41 Melbourne University Law Review 793; B Preston, 'Mapping Climate Change Litigation' (2018) 92 Australian Law Journal 774; J Bell-James and B Collins, 'Queensland's Human Rights Act: A New Frontier for Australian Climate Change Litigation?' (2020) 43 University of New South Wales Law Journal 36. See also the database 'Australian Climate Change Litigation' (*University of Melbourne*) <https://apps.law.unimelb.edu.au/climate-change/index.php> accessed 3 March 2021.

18 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, 699.

increase above 1.5°C.[19] We examine whether Preston CJ's approach to the threat of global warming is representative of Australian climate change litigation. While events such as Australia's mass coral bleaching can and do lead to actions in international courts and quasi-judicial international forums,[20] it is domestic litigation that forms the focus of the current chapter.

Our chapter is in three main sections. Following this introduction, we consider Australian jurisprudence involving mitigation (Section II). We review cases in which Australia's obligations to contribute to a reduction in greenhouse gas emissions (GHGs) have been at issue. These cases have been principally targeted at government decisions to approve proposed projects that would contribute to GHGs. Courts have grappled with the disparity in scale between climate change and the singular project that contributes to, or is impacted by, it.[21] Courts have also grappled with the limited scope of human rights protections in Australia, although new state-based legislation may lead to significant change.[22] Next, we examine cases involving adaptation (Section III). We review cases challenging planning decisions that ignored changes in climactic patterns and the risk of extreme weather events. We ask whether courts have been more 'adaptable' in dealing with adaptation than mitigation. Finally, we move from the state-centred context of mitigation and adaptation to examine climate change litigation to pursue corporate accountability (Section IV). We investigate Australian courts' receptiveness to claims relating to disclosure duties and other corporate law duties. Suits against private enterprises are discussed, alongside the innovative claim against the Australian government based on its duties to investors when issuing sovereign bonds. In Section

19 J Rogelj et al, 'Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development' in V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) 96–7 <https://www.ipcc.ch/sr15/> accessed 30 March 2021.

20 See, for example, Australian petitioners to the World Heritage Committee, discussed in E Thorson, 'The World Heritage Convention and Climate Change: The Case for a Climate-Change Mitigation Strategy beyond the Kyoto Protocol' in W Burns and H Osofsky, *Adjudicating Climate Change: State, National, and International Approaches* (CUP 2009) 255.

21 On law's deficiencies regarding cumulative impacts, see L Schuijers, 'Environmental Decision-Making in the Anthropocene: Challenges for Ecologically Sustainable Development and the Case for Systems Thinking' (2017) 34 Environment and Planning Law Journal 179.

22 See the 2020 youth-led challenge to the Galilee Coal Project in Queensland at the Queensland Land Court, based on alleged violations of human rights, currently on foot: <https://www.edo.org.au/young-people-and-landholders-unite-to-challenge-clive-palmers-coal-mine//> accessed 3 March 2021. A motion to strike out the objections to the mine was dismissed: *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33.

v, we conclude on differences between mitigation, adaptation and corporate accountability, contextualizing likely further legal challenges and change.

II Mitigation and the State

Australia's duty to mitigate climate change 'by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases' is entrenched in international law.[23] Australia is an original party to the UNFCCC, and it ratified the Kyoto Protocol in 2007 and the Paris Agreement in 2016. Pursuant to the Paris Agreement, Australia has pledged to lower its territorial emissions by 26 to 28 per cent below 2005 levels by 2030.[24] This is an economy-wide target, applying to sectors including energy, transport, agriculture, industrial processes and product use (such as iron and steel production), land-use change, and waste.[25] Aside from territorial emissions from these sectors, it is also important to consider Australia's role in generating global GHG s. Australia is the largest exporter of coal in the world.[26] Scientists have deemed most of Australia's coal 'unburnable' if the world is to secure a chance at halting catastrophic climate change.[27] The 'global' dimension of Australia's mitigation activities are particularly difficult to target in domestic litigation, as we discuss in this section. We argue that that there are four main constraints to litigation establishing Australia's duty to mitigate climate change. First, we point to the lack of legislative bases for action. This relates to Australia's federal structure, and we point to state legal frameworks and local planning. Secondly, we show the familiar constraints on courts in judicial review settings. Thirdly, we discuss the way in which legal challenges to Australia's energy projects have faced conceptual difficulties in the face of Australia's emissions-intensive economy

23 UNFCCC (n 9) art 4(1)(b).

24 'Australia's First NDC – Updated Submission' (UNFCCC 2020) <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australia%20NDC%20recommunication%20FINAL.PDF> accessed 3 March 2021.

25 These sectors are listed in order of share of current annual emissions: 'Quarterly Update of Australia's National Greenhouse Gas Inventory: June 2020' (Australian Government Department of Industry, Science, Energy and Resources, June 2020).

26 Australia is the second largest exporter of coal in weight, but the largest exporter in terms of economic value: International Energy Agency, 'Coal Information: Overview 2020' (IEA 2020) 11-12 <https://www.iea.org/reports/coal-information-overview> accessed 3 March 2021; International Energy Agency, 'Coal 2020: Analysis and Forecast to 2025' (IEA 2020) 43 <https://www.iea.org/reports/coal-2020> accessed 3 March 2021.

27 M Jakob and J Hilaire, 'Unburnable Fossil-Fuel Reserves' (2015) 517 Nature 150.

(especially when legal challenges relate to 'extraterritorial emissions', such as the emissions that occur when Australian coal is exported to other countries). We consider legal arguments surrounding cumulative impacts, downstream emissions and market substitution. Fourthly, we consider the absence in Australia of the rights-based jurisprudence that is emerging in other countries' climate change litigation. In the face of these constraints, however, we point to possibilities and potential uses of litigation, which we predict will continue to grow.

A *Legislative Shortcomings*

There have been various attempts to implement Australia's international climate commitments into domestic law, as would normally be required under a dualist system. Most notably, Australia had a short-lived carbon pricing mechanism, where high-emitting companies were subject to a fixed price on carbon pollution from 2012 to 2014.[28] This mechanism was repealed, and other attempts to create a national climate or energy statute have been unsuccessful.[29] Moreover, Australia does not have a separate 'clean air' law. As such, litigation that seeks to enforce Australia's obligations to mitigate climate change is commonly based on Australia's principal national environmental statute, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), as well as on state-level legislation.

The EPBC Act is the main vehicle for the implementation of Australia's foreign conservation commitments, including to protect World Heritage places, Ramsar wetlands, and endangered species. Australia's commitment to the UNFCCC is a notable (and long-recognized) omission: the EPBC Act does not mention climate change once in its more than 500 provisions. The EPBC Act is an environmental impact assessment or 'EIA' law, based on procedural obligations with which the federal environment minister must comply when faced with a decision to approve a project or activity in light of likely and significant environmental risk. Climate-related risk may be relevant to an assessment in some circumstances, but a link must always be established between climate change and one of the environmental concerns within the Act's ambit.[30]

28 Clean Energy Act 2011 (Cth) (commenced in 2012; repealed in 2014 after change of government).

29 Carbon Pollution Reduction Scheme Bill 2009 (Cth) (failed, causing a double dissolution in parliament and an election trigger); National Energy Guarantee 2017 (failed, triggering a leadership challenge and change in Prime Minister).

30 There are currently nine such concerns, which can be found in Part 3 of the EPBC Act.

Australia is jurisdictionally divided into the national or federal level (Commonwealth), and the state and territory level (Queensland, New South Wales (NSW), Victoria, South Australia, Western Australia, Tasmania, the Northern Territory, and the Australian Capital Territory (ACT)). Local governments are delegated certain powers by the state and territory governments, including over planning and waste. The Commonwealth Constitution, which lists express powers for the Commonwealth,[31] does not mention the environment or conservation, but the external affairs power has been drawn upon to validate federal environmental laws,[32] including the EPBC Act.

At the level of the states and territories, EIA laws operate alongside a suite of other laws that directly or indirectly concern environmental protection. Victoria, Tasmania and South Australia have climate laws which set a policy process for emission reduction, and which codify or support renewable energy targets.[33] State-level courts have been active, in particular, in wind-farm litigation. Courts have adjudicated upon the desirability of pursuing large-scale renewable energy to further climate change mitigation, typically in the midst of community concerns regarding noise impacts, visual amenity, and threats to bird and bat populations. In *Taralga*, Preston J (as he then was) cited the work of the IPCC in holding that the sustainability benefits outweighed potential adverse impacts, noting, '[r]enewable energy sources are an important method of reducing greenhouse gas emissions'.[34] These comments were later endorsed, with the Court explicitly observing the scientific evidence supporting climate change, because 'several of the submissions made in objection to the wind farm modification were made on the basis of either climate change scepticism or denial.'[35] Other cases have also found in favour of the broad-scale sustainability benefits of wind energy,[36] which is supported by state-level government energy policy.

Overall, however, state-level law has not made up for the EPBC Act's deficiencies with respect to climate change. State governments are currently exploring how emission reduction targets can be met (all have committed to a net zero

31 Commonwealth Constitution s 51.

32 *Commonwealth v Tasmania* [1983] HCA 21.

33 Climate Change Act 2017 (Vic); Climate Change (State Action) Act 2008 (Tas); Climate Change and Greenhouse Emissions Reduction Act 2007 (SA).

34 *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59, para 75.

35 *RES Southern Cross v Minister for Planning and Taralga Landscape Guardians Inc* [2008] NSWLEC 1333, para 46.

36 *Acciona Energy Oceania Pty Ltd v Corangamite Shire Council*; *Russell & Ors v Surf Coast SC & Anor* [2009] VCAT 1324; *Synergy Wind Pty Ltd v Wellington SC* [2007] VCAT 2454.

emission economy by 2050), but there is a constant to-and-fro over which level of government should bear responsibility over mitigation. The body of statute and common law relevant to climate change litigation is very broad in scope, given the extensive ways in which climate change impacts upon Australian society and its environment, and the multitude of causal factors that contribute to the problem. The courts are not always primed to consider emissions in sectors other than energy and electricity. For example, provisions in state and local-level planning schemes provide avenues for review relating to building design[37] or transport-related planning provisions,[38] but these have not been sufficiently applied.

To conclude this subsection, we note that without clear guidance for decision-makers or an explicit requirement to take climate change into account at a federal level, climate change has tended to be treated by courts and tribunals as a potentially relevant consideration to decision-making, rather than as a mandatory, critical or central one. Consequently, in many cases there has had to be some other reason for bringing the litigation in order to establish a ground of review. Coal mines, for example, have been argued by litigants to be detracting from amenity and noisy, changing the social fabric of towns and regions.[39] The burning of Australian-mined coal in India has been argued by litigants to impact the Queensland habitat of an endangered snake.[40] Although the EPBC Act has recently been reviewed,[41] the current Australian government has given no sign that it intends to strengthen its purview.

Notwithstanding the EPBC Act's weaknesses, however, creative legal argumentation and judicial interpretation have applied the 'principles of ecologically sustainable development' in early and contemporary climate cases. These 'ESD' principles derive from international law,[42] and are codified at federal and

37 See, for example, the challenge related to building design and energy reductions in *Pepperwood Ridge v Newcastle City Council* [2009] NSWLEC 1046.

38 But see *Chaucer Enterprises Pty Ltd v Moreland City Council* [2015] VCAT 1615, paras 112–18 (where the tribunal overturned a waiver from a requirement to build car spaces by noting the enduring convenience of private car ownership in Melbourne).

39 *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48.

40 *Australian Conservation Foundation v Minister for the Environment* [2016] FCA 1042.

41 Professor Graham Samuel AC, *Independent Review of the EPBC Act – Final Report* (Commonwealth of Australia 2020) <https://epbcactreview.environment.gov.au/resources/final-report> accessed 3 March 2021.

42 See, in particular, 'Rio Declaration on Environment and Development' United Nations Conference on Environment and Development (Rio de Janeiro 3 June–14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (vol I), (1992) 31 ILM 874.

state levels.[43] Government ministers charged with environment-related legislative decision-making powers are typically required to have regard to them. Whilst this has not rendered the principles instructive or prescriptive, it has given fragmentary case law a unifying thread, and provided decision-makers a broader set of values around which to base their thinking. Two particular principles have been important in Australian climate jurisprudence—the precautionary principle, which seeks to ensure that uncertain science does not prohibit a prudent approach toward minimizing the risk of potentially serious impacts, and the principle of intergenerational equity, which seeks to heed the welfare of future as well as present generations. Courts have rarely found that a decision-maker failed to take either of these principles into account, particularly as decision-makers are free to prioritize other considerations after having done so.[44] Yet their existence in law has facilitated judicial and academic discussions over what it means to be careful, what it means to consider the links between a developing science and the trade-offs that it forces Australians to confront. In short, although climate change litigation in Australia would benefit from a more concrete legislative entrenchment of mitigation duties, and of relevant international obligations,[45] the courts have played an important role in applying key principles.

B *Administrative Law Limitations*

A related point to the limited legislative framework is the jurisdictional constraints on the courts. Although the standing provisions of the EPBC Act are wide enough to allow concerned litigants to mount legal challenges (though the present government has threatened to narrow them),[46] the substantive provisions are limited. The avenue to challenge government approvals is administrative law. Except in rare merits review cases, judges cannot step into the shoes of the ministerial decision-makers whose decisions they are reviewing—rather, they must observe whether the process by which the decision was made was within the bounds of the law. Substantive arguments about

43 See, for example, EPBC Act s 3A.

44 See, for example, *Minister for Planning v Walker* [2008] NSWCA 224; *Drake-Brockman v Minister for Planning (No 2)* [2007] NSWLEC 777.

45 See, especially, the entrenchment of precaution and inter-generational equity in the draft Global Pact for the Environment, which, if agreed in treaty form and ratified by Australia, would provide Australian courts with further interpretative tools: UNGA Resolution 72/277 of 10 May 2018 entitled 'Towards a Global Pact for the Environment'. See further <https://globalpactenvironment.org/en/> accessed 3 March 2021.

46 EPBC Act s 487. See further B Murphy and J McGee, 'Lawfare, Standing and Environmental Discourse: A Phronetic Analysis' (2018) 37 University of Tasmania Law Review 131.

climate change and the nature of an appropriate response thus have limited influence in court. Such arguments may have weight where it is submitted that the minister should have considered climate change and the need to mitigate, but did not, but these are relatively constrained in claims under the EPBC Act, as we have mentioned above.

In *Anvil Hill*,[47] the Federal Court examined a decision made by a ministerial delegate to permit a coal mine. The delegate had concluded that the relatively small contribution of the proposed emissions from the mine to total global emissions did not amount to a significant impact. Stone J upheld the reasoning of the delegate, noting that the EPBC Act did not contain a prescriptive framework.[48] Regarding impacts to biodiversity, Stone J found no legal error in the delegate's conclusion, noting that whether it was correct or not was not in issue.[49] The limited role of the judiciary compared to the primary decision-maker was therefore emphasized.

Though courts are necessarily constrained by the separation of powers, the increasing societal knowledge about climate change and the escalating impacts in Australia may well alter the underlying judicial sensibility. What is 'reasonable' conduct of the executive is by no means fixed. Judicial review is expected to continue to be sought. Of the approximately 70 mitigation cases brought in Australian courts,[50] the vast majority have involved challenging government approvals of coal mines, coal-fired power stations, and more recently, coal-seam gas fracking operations. These are major sources of fossil fuel emissions, so the fewer approvals upheld, the greater the contribution of climate change litigation to climate change mitigation.

In addition, the merits review jurisdiction of a number of state-based courts has a guiding role. Preston CJ's refusal to grant Gloucester Resources Ltd approval for an open cut coal mine in the Hunter Valley region of NSW, mentioned above,[51] is a case in point. Being an appeal challenging the Minister's refusal of consent, Preston CJ was afforded a greater opportunity than other cases to discuss the merits of climate change arguments. While state court decisions are not binding in other jurisdictions and do not need to be followed in other cases, the reasoning applied with respect to climate change is not

47 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480.

48 ibid paras 40 and 44.

49 ibid para 58. An appeal was dismissed: see *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3, para 39.

50 These can be found on the 'Australian Climate Change Litigation' database (n 17).

51 *Gloucester* (n 18).

particular to the NSW context. Indeed, Preston CJ's findings were based on reasoning from which it would be difficult to now depart. These findings relate to difficulties in challenging global emissions from Australian fossil fuels, which we now address.

C *Difficulties in Challenging Emissions from Australian Fossil Fuels*

Australian case law has revealed major difficulties for litigants in challenging emissions from Australian fossil fuels, in the context both of direct and indirect GHGs. We demonstrate in this subsection the barriers relating to cumulative impacts, market substitution, and downstream emissions. However, in the face of the general Australian trends, Preston CJ's engagement with peer-reviewed science and a clearly demonstrable global political trajectory has lowered these barriers. In deciding against the NSW coal mine, he dismissed the notion that one mine in Australia represents only a small fraction of global emissions. Drawing on the Paris Agreement, the carbon budget concept and resultant unburnable Australian coal, he found that '[a]ll of the direct and indirect GHG emissions of the Rocky Hill Coal Project will impact on the environment'.[52] We provide a closer examination of the barriers to confronting fossil fuel reserves in the paragraphs that follow.

1 Cumulative Impacts

Climate change is caused by incremental actions that have occurred over a long period of time, across geographic space, and which continue to compound. Law can intervene in such change systemically, so as to reduce the likelihood of such incremental actions, or case-by-case, dealing with each action one at a time. Examples of the former are to mandate the withdrawal of subsidies from fossil fuels, legislate to incentivize energy efficiency and renewable energy, or require strategic assessments of industry in a particular locality—such that fracking projects must all be subjected to particular standards in order to obtain approval. EIA—the law that governs environmental impact-based decision-making—is concerned with the latter case-by-case approach.[53]

There is a persistent problem in determining the significance of a single project in the context of all other contributing factors. Causation is an essential

52 *Gloucester* (n 18) para 514.

53 See The Hon Justice Brian J Preston, 'Contemporary Issues in Environmental Impact Assessment' ('Are Climate Impacts Environmental Impacts? Climate Science in the EIA and Judicial Review' seminar, Helsinki, 27 February 2020) 14-23 <https://lec.nsw.gov.au/lec/publications-and-resources/judicial-speeches-and-papers.html> accessed 3 March 2021.

component of legal liability, but it is hard to argue that one power station will cause future catastrophic global warming, and that the proponent of that project should be prohibited from operating in a context where there remains a market demand for power, and in which there is no ban on power stations. When addressing causation, it is possible, within the bounds of EIA law, to adopt a narrow view that considers only the incremental and relative contribution of a project in terms of emissions, or a broader view that considers the systemic effects of that project, including the flow-on social, political, economic and environmental consequences.

25 years before *Gloucester,* a decision of the NSW Land and Environment Court considered the proposed emissions of a coal-fired power station.[54] Pearlman J found that, '[i]n absolute terms, the project will emit CO_2. But what impact that will have on global warming, within the state, or nationally or internationally, is very uncertain'.[55] By contrast, Preston CJ in *Gloucester* readily recognized the proposed project's indirect impacts, and found that the approval of the project would run counter to the actions required to achieve net zero emissions in the second half of this century, a goal agreed by States in the Paris Agreement.[56]

2 Downstream Emissions

Under the Paris Agreement, GHGs of a country are attributed when they are emitted in that country. Emissions released as a direct result of an activity, such as extracting coal from an open cut coal mine, and indirectly associated with an energy commodity, such as the use of electricity in another facility, are accounted for in emissions reporting.[57] Downstream emissions generated by the coal when it is converted into energy offshore are not accounted for. This does not mean that Australia cannot or should not consider downstream emissions that occur overseas in the context of mitigation obligations, especially as the obligations evolve under international law.[58] Even now, managing

54 *Greenpeace Australia Limited v Redbank Power Company Limited* [1994] NSWLEC 178.

55 ibid (paragraph numbers not provided). Pearlman J found that CO_2 emissions should not outweigh other factors relevant to the decision to grant approval.

56 *Gloucester* (n 18) paras 525–6.

57 National Greenhouse and Energy Reporting Act 2007 (Cth); National Greenhouse and Energy Reporting (Measurement) Determination 2008. Such emissions are described as scope 1 and 2 emissions. Downstream emissions generated by indirect consumption in the wider economy are scope 3 emissions.

58 MA Young, 'Legal Responses to Climate Change: The Audacity of International Adjudication' (inaugural lecture at the European University Institute Law Department, Florence, 19 September 2019) (on file with authors).

risk requires strategic divestment from fossil fuels and investment into cleaner sources, and this is something over which each branch of government can take a certain amount of responsibility, including the courts.[59]

Taking a simple chain-of-causation view, burning coal would not be possible without mining coal, and thus, the decision to approve a coal mine is one that directly impacts whether or not that coal will ultimately be burned, as opposed to remaining in the ground. Yet in terms of liability, one might argue that the decision to burn the coal is more directly connected to the emissions than the decision to mine it—that there is an opportunity for the causal chain to be broken. If the countries to which Australia exports its coal did not want to burn the coal, that would be reflected in the market demand and in turn the appetite for a new coal mine. According to this view, it is the countries burning the coal that are responsible for it being mined. Australia could theoretically achieve its net zero goals and still mine coal.

In *Wildlife Whitsunday*, Dowsett J accepted that burning Australian coal might 'arguably' have a climate-related impact, but was 'far from satisfied' that burning the coal from the proposed mine could be causally linked to an impact on a matter protected by the EPBC Act, given that it would occur at 'some identified place in the world' and would have an impact at 'some unspecified future time'.[60] He considered that legal arguments hid the applicant's real assertion that the Australian government should ban new coal mines. This view contrasts with Preston CJ's judgment in *Gloucester*.[61] Preston CJ found that both direct and indirect GHG emissions should be considered in the context of a coal mine approval.[62]

3 Market Substitution

If Australian coal mine approvals are successfully challenged in the courts, a question is sometimes raised as to whether the avoided emissions will simply be generated elsewhere, substituted at least in some part by the market. The Paris Agreement's inclusion of all countries as having responsibility over climate change mitigation perhaps weakens the argument for market

59 The NSW legislature, however, is currently considering the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 (NSW), which would prohibit the imposition of conditions of development consent under the state's planning legislation which relate to impacts occurring outside the territorial limits of Australia.

60 *Wildlife Preservation Society of Queensland Prosperine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 at para 72. See also *Anvil Hill* (n 47).

61 We note that the EPBC Act was not directly applicable to the NSW application in *Gloucester* (n 18).

62 *Gloucester* (n 18) paras 486–513.

substitutibility. In Australian case law, courts increasingly require evidence of market conditions before ruling on counterfactuals or evaluating administrative decision-making.

In *Adani*,[63] Griffith J relied on the market substitution argument in upholding one of the many approvals ultimately granted to Indian coal company Adani to build a new mine in Queensland. He accepted that although the mine would be the largest in the Southern Hemisphere, it may not have a 'net' impact on climate change, because the market would replace the coal not mined by Adani with a perfect substitute—without other material flow-on effects.[64] On the Minister's difficulty in identifying a relationship between the proposed mine and dangers to the Great Barrier Reef from a rise in global temperature, the Full Court observed that '[t]here may be good grounds for disagreeing with the Minister's decision, but that is not our concern in an appeal limited to the lawfulness of that decision'.[65] A group of Queensland teenagers has written to the Environment Minister to seek a revocation of the approval.[66]

Addressing the market substitute argument in *Gloucester*, Preston CJ noted that there had been no evidence provided to him about the existence and effect of market forces on substitutability, and referred to a US precedent which has also found the argument to be 'lack[ing] support in the administrative record'.[67] He noted, '[t]he potential for a hypothetical but uncertain alternative development to cause the same unacceptable environmental impact is not a reason to approve a definite development that will certainly cause the

63 *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1042. This finding was not disrupted by the appeal to the Full Federal Court: see *Australian Conservation Foundation* (n 6), although Dowsett, McKerracher and Robertson JJ considered it 'curious' that the ACF did not assert 'as a ground of appeal, that the Minister failed to take account of relevant matters, or took into account irrelevant matters' (para 49).

64 See further L Schuijers, 'Australian Climate Change Law After the Adani Coal Mine Case' (2017) 11 Carbon and Climate Law Review 64.

65 *Australian Conservation Foundation* (n 6) para 61. For further discussion of the impact of coal mines on the Reef, see B Boer and S Gruber, 'Legal Frameworks for World Heritage and Human Rights in Australia' in P Bille Larsen (ed), *World Heritage and Human Rights: Lessons from the Asia-Pacific and global arena* (Routledge 2017) 228–9. Australian banks have not supported the Adani mine as they are increasingly concerned with carbon risk: for further discussion, see below (n 146) and surrounding text.

66 Request for the revocation of EPBC Approval No 2010/5736 – Carmichael Coal Mine and Rail Infrastructure Project, Queensland, Letter from Ariane Wilkinson to The Hon Sussan Ley, 21 October 2020 <https://www.envirojustice.org.au/wp-content/uploads/2020/10/2020-10-21-Letter-to-Minister-for-the-Environment-on-behalf-of-Ms-Galvin-and-Ms-OHearn-re-revocation-of-EPBC-Approval-No-2010_5736.pdf> accessed 3 March 2021.

67 *Gloucester* (n 18) paras 542–4.

unacceptable environmental impacts.'[68] This reasoning aligns with cases from other jurisdictions such as *Urgenda.*[69] It sits well with other developments, including the Paris Agreement-imposed 'nationally determined contributions' from all countries, the goal of net zero by mid-century, and technological transformations. The global market for energy production is changing dramatically, and courts following *Gloucester* will, in all likelihood, demand evidence before accepting perfect substitution between fossil fuels.

D *Rights and Duty-Based Litigation*

Calls for an Australian challenge to mirror the *Urgenda* litigation[70] need to heed the very different place of human rights in the domestic legal setting. Australia's *Constitution* includes only a very limited set of rights protections and Australia lacks a significant rights-based jurisprudence. Yet relatively new protections at the state-level may change this situation. Victoria, the ACT and most recently Queensland have human rights charters.[71] Scholars and jurists are increasingly recognizing the link between human rights and climate change.[72] Aside from actions brought in courts and tribunals on the basis of human rights, there are also opportunities to pursue climate justice through other avenues. These avenues include adaptation cases and disclosure duties, as we discuss later. In this subsection, we briefly discuss human rights, the public trust, and the two cases thus far that have tested constitutional rights.

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68 *Gloucester* (n 18) para 545. For commentary, see J Bell-James and B Collins, ' "If We Don't Mine Coal, Someone Else Will": Debunking the "Market Substitution Assumption" in Queensland Climate Change Litigation' (2020) 37 Environmental and Planning Law Journal 167.

69 *Urgenda Foundation v The State of the Netherlands,* Hague District Court, Case No C/09/456689 / HA ZA 13-1396, 24 June 2015; *The State of the Netherlands v Urgenda Foundation*, Hague Court of Appeal, Case No C/09/456689 / HA ZA 13-1396, 9 October 2018. Both cases were cited with approval by Preston CJ. See also *The State of the Netherlands v Urgenda Foundation,* Supreme Court, Case No 19/00135, 20 December 2019; C Bakker, 'Climate Change Litigation in the Netherlands', Chapter 9 in this volume.

70 ibid.

71 Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2004 (ACT); Human Rights Act 2019 (Qld).

72 B Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer 2018); J Peel and H Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) Transnational Environmental Law 37, 40; The Hon Justice Brian Preston SC, 'Using Environmental Rights to Address Climate Change' (Presentation to the Law Council of Australia, Future of Environmental Law Symposium, Sydney, 19 April 2018) 25; Bell-James and Collins (n 17).

1 Human Rights, Government Duty, and the Public Trust

Internationally, it is acknowledged that climate change is a human rights issue, affecting the enjoyment of universally declared rights including the rights to life, health, an adequate standard of living, private and family life, and property.[73] Human rights, as conceptualized in international and European law, have not yet formed the basis of Australian judgments. Yet the state-level human rights charters,[74] notwithstanding limited enforceability, may change this situation, and proceedings have been filed against a Queensland coal mine based on the human rights of Queensland young people.[75]

According to the human rights charters in Victoria, the ACT and Queensland, public authorities are required to act consistently with human rights, and courts are also required to interpret legislation consistently with rights. In Victoria and the ACT, plaintiffs have not used these statutes to ask for action on climate change, nor has the environment featured as the subject litigation.[76] Yet resource-rich Queensland is now the focus of a human rights case, which rests for its success on a finding that the right to life is incompatible with climate change-exacerbating decisions in Queensland.[77]

In addition to domestic cases, human rights of Australians are being pursued on the international plane. A complaint by Torres Strait Islanders to the Human Rights Committee is attracting much attention.[78] The claim seeks a

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73 UN Human Rights Council, 'Human Rights and Climate Change' Res 7/23 (28 March 2008) UN Doc A/HRC/RES/7/23 <https://www2.ohchr.org/english/issues/climatechange/docs/Resolution_7_23.pdf> accessed 30 March 2021; OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61 (OHCHR Report); Lewis (n 71). See also UN Special Rapporteur on human rights and the environment, 'Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (15 July 2019) UN Doc A/74/161; UN Special Rapporteur on Extreme Poverty and Human Rights, 'Climate Change and Poverty' (25 June 2019) UN Doc A/HRC/41/39; see further Young (n 58).

74 Above (n 71).

75 See above (n 22).

76 See 'Human Rights – Charter Cases' (*Victorian Government Solicitor's Office*) <http://humanrights.vgso.vic.gov.au/resources/charter-cases/> accessed 30 March 2021; 'Human Rights Cases of the ACT' (*Australian National University*) <acthra.anu.edu.au/cases/#> accessed 30 March 2021.

77 Above (n 22); see also Bell-James and Collins (n 17).

78 For more information about the claim, see the dedicated website <https://ourislandsourhome.com.au/> accessed 30 March 2021. Australia has requested that the UN dismiss the claim; however, the UN Special Rapporteur on Human Rights and the Environment and his predecessors, Professors David Boyd and John Knox, have now filed a joint amicus brief supporting the Islanders: M Faa, 'Torres Strait Islander complaint against climate change

change in policy of Australia to improve its emission reduction target, go net zero by 2050 and phase out coal. In addition, it is possible to conceive of indigenous peoples' right to manage country (which could involve climate-related activities, such as controlled burning of savanna lands) being pursued through native title litigation.[79]

Aside from concrete human rights guarantees such as the right to life, some foreign jurisdictions have recognized that the public has a right to enjoy a healthy environment which is to be protected and held in trust including for future generations; alternatively put, that governments owe a fiduciary duty to protect the environment for the benefit of the public.[80] Australian scholars have argued that this 'public trust' doctrine could be used in relation to climate change impacts—such as with respect to the protection of coastal areas.[81] This remains an avenue to be potentially explored in future.

With respect to such public duties, two pending cases may prove significant. In NSW, a bushfire survivors group is challenging the NSW Environment Protection Authority, seeking orders that it 'perform its duty to protect the people and environment of NSW from global warming'.[82] The ground of a statutory duty to take policy action differentiates this case from litigation that seeks change via negligence, as was applied by the lower courts in the Netherlands' *Urgenda* case. That case led to questions about whether an Australian government might be deemed by a court through litigation to hold a duty of care to Australian citizens, breached by climate action failure, and able to be remediated through a requirement to take stronger steps toward mitigation.[83] Scholars considered duty-based tort claims against governments to face significant challenges in Australia.[84] Yet in September 2020, a group of young Australians and their guardian filed a class action in the Federal Court arguing that the federal Environment Minister owes them a duty of care to protect against the harmful

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inaction wins backing of UN legal experts' (*ABC News*, 11 December 2020) <https://www.abc.net.au/news/2020-12-11/torres-strait-islander-complaint-against-climate-change-inaction/12972926> accessed 3 March 2020.

79 M Tehan et al, *The Impact of Climate Change Mitigation on Indigenous and Forest Communities* (CUP 2017) 302–03.

80 Preston (n 71).

81 B Thom, 'Climate Change, Coastal Hazards and the Public Trust Doctrine' (2012) 8 Macquarie Journal of International and Comparative Environmental Law 21.

82 *Bushfires Survivors* (n 4). The case is brought under the Protection of the Environment Administration Act 1991 (NSW), which requires the EPA to 'develop environmental quality objectives, guidelines and policies to ensure environment protection'.

83 Peel, Osofsky and Foerster (n 17) 805.

84 Peel, Osofsky and Foerster (n 17) 805; T Baxter, 'Urgenda-Style Climate Litigation Has Promise in Australia' (2017) 32 Australian Environment Review 70.

impacts of climate change, and that approval of the proposed Whitehaven Vickory Coal Mine extension would breach that duty.[85] The *Bushfires Survivors* case may build on alternative bases for duties in mitigation case law, while the *Sharma* case brought by the young Australians echoes aspects of *Urgenda* as well as the high-profile US *Juliana* case. [86] In addition, the pending federal case that seeks to hold the Australian government to account for violations of climate disclosure obligations relating to sovereign bonds, which we discuss in Section IV,[87] may also recognize public duties of officials in the climate context.

2 Constitutional Rights

Although there is no Bill of Rights in Australia, the Constitution establishes obligations on the Australian government which in turn create entitlements, such as not to have property acquired unjustly. Two cases so far have considered constitutional provisions. *Queensland Nickel*[88] concerned the obligation on the federal government not to give preference to any state based on a law or regulation of trade, commerce, or revenue.[89] In that case, a nickel and cobalt producer unsuccessfully argued that a now-repealed 'clean energy' law unfairly favoured its competitors in Western Australia, because, due to location-based circumstances, its methods of production were necessarily different and yet it received the same number of free carbon units under the legislation per unit volume of production. The High Court held that a law is not unconstitutional just because it might have different practical effects in different states.

In *Spencer v Commonwealth of Australia*,[90] a farmer challenged NSW laws restricting the clearing of vegetation. Mr Spencer considered the laws made his land unsuitable for commercial farming, effectively amounting to an

85 *Sharma and others v Minister for the Environment.* See the amended concise statement of claim <https://equitygenerationlawyers.com/wp/wp-content/uploads/2021/02/201214-Amended-Concise-Statement-stamped-Sharma-v-Minister-for-the-Environment.pdf> accessed 3 March 2021; L Schuijers, 'These Aussie teens have launched a landmark climate case against the government. Win or lose, it'll make a difference' (*The Conversation,* 10 September 2020) <https://theconversation.com/these-aussie-teens-have-launched-a-landmark-climate-case-against-the-government-win-or-lose-itll-make-a-difference-145830> accessed 3 March 2021.

86 *Juliana et al v United States of America* 339 F Supp 3d 1062 (D Or 2018). See also the foundational case *Massachusetts v Environmental Protection Agency* 549 US 497 (2007); M Gerrard, 'Climate Change Litigation in the United States', Chapter 2 in this volume.

87 *O'Donnell* (n 8).

88 *Queensland Nickel Pty Limited v Commonwealth of Australia* [2015] HCA 12; 255 CLR 252.

89 Commonwealth Constitution s 99.

90 [2018] FCAFC 17; 262 FCR 344.

acquisition or expropriation of his interests in it. He was concerned that the Commonwealth was attempting to fulfil international obligations relating to climate change mitigation through the land clearing laws, and that his proprietary interests had been accordingly acquired other than on just terms. The Federal Court dismissed his arguments.

These constitutional cases serve as a reminder that policy to mitigate climate change needs to be designed and implemented carefully so as to avoid challenge. A different kind of climate change litigation could indeed rely upon constitutional provisions in a manner that challenges, and potentially frustrates, the implementation of Australia's mitigation obligations.[91] As part of any judicial deliberation, Australian courts may need to evaluate an evolution in Australian attitudes and rights-based conceptions since the constitutional origins that were contemporaneous with Mackellar's 'stark white ring-barked forest'.[92]

III Adaptation and Subnational Entities

The Paris Agreement incorporates the global adaptation goal 'of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change'.[93] In the Australian context, this means extending the existing appreciation of the harsh conditions of the 'sunburnt country'. To Dorothea Mackellar's famed 'droughts and flooding rains', we now add rising sea levels,[94] massive bushfires and other extreme weather events.[95] In this section, we demonstrate that the litigation on adaptation is more established than litigation on mitigation in Australia. This is apparent in three main areas. First,

91 Similar conceptual issues arise in the context of Australian domestic measures that may impact on trading partners: see generally MA Young, 'Trade measures to Address Climate Change: Territory and Extraterritoriality' in P Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016) 329–51.

92 Mackellar (n 1).

93 Paris Agreement (n 11) art 7.

94 85 per cent of Australians live within 50 kilometres of the surrounding oceans and seas: Australian Bureau of Statistics, 'How Many People Live in Australia's Coastal Areas?' [2004] Year Book Australia 96 <https://www.abs.gov.au/Ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article32004> accessed 3 March 2021.

95 The frequency and intensity of extreme weather events has steadily and progressively increased globally: Ove Hoegh-Guldberg et al, 'Impacts of 1.5C of Global Warming on Natural and Human Systems' in V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) 175 <https://www.ipcc.ch/sr15/> accessed 5 March 2021.

we show that the federal, state and local divisions of power have led to clearer responsibilities than in the mitigation context. Secondly, we point to a willingness of (subnational) courts to engage in a dialogue about development, including accepting the need for precaution. Thirdly, we examine the changing divide between public and private liabilities. These areas are each important beyond litigation on adaptation; indeed, adaptation litigation may merge with litigation on mitigation in the future. The fires that raged over the entire summer of 2020 palpably changed the public perception of climate risk in Australia, and the *Bushfires Survivors* litigation shows how extreme weather events and the need to improve Australia's adaptive capacity is inextricably linked to legal claims for mitigation.[96] In November 2020, the NSW Land and Environment Court held that expert evidence from Australia's former Chief Scientist linking NSW's, Australia's, and global emissions to climate change and the temperature mitigation goal under the Paris Agreement could be heard at trial.[97]

A *Federal, State and Local Responsibilities*

Adaptation cases are generally heard in state-level forums. Planning matters, including decision-making on the approval of new developments, and modifications to existing developments, are within the jurisdiction of state and local level governments. Thus, it is state courts and tribunals which have taken responsibility over the judicial component of adaptation law. The Victorian Civil and Administrative Tribunal (VCAT), the NSW Land and Environment Court, and Queensland's Planning and Environment Court have played particularly instructive roles—albeit largely limited in scope to the interpretation and application of the provisions of the applicable local planning schemes. However, federal responsibilities are emerging in two key areas relating to adaptation: in national emergencies, and in claims from people who are displaced by climate change.

1 Commonwealth Leadership and Strategy

Rather than in direct litigation, the federal government has felt the figurative political heat after extreme weather events, as the public turns to its national leadership in times of crisis. The federal government has committed to the international community that it will take action on adaptation as required by the Paris Agreement.[98] In 2015, it produced a *National Climate Resilience and*

96 Above (n 81) and surrounding text.

97 Above (n 4).

98 Paris Agreement (n 11) art 7.

Adaptation Strategy which articulates how Australia is managing the risks of a changing climate.[99] This Strategy communicates, at a general level, the responsibilities of different levels of government in Australia for adaptation. The federal government is represented as being best placed to provide information as well as natural resource management, infrastructure planning and economy-wide strategic decision-making (including welfare provision). State and territory governments ensure appropriate regulatory and market frameworks including in delivering services and infrastructure, while local governments are 'on the frontline of dealing with the impacts of climate change.'[100] The Strategy notes that different levels of government 'continue to work together to understand the cost-benefits, optimal timing, and appropriate scale of adaptation actions'.[101]

In 2009, a year in which Victoria was ravaged by large-scale bushfires known as the 'Black Saturday fires',[102] the Australian Government commissioned modelling which forecast that by 2020, there would be a substantial increase in fire risk on account of climate change.[103] This was consistent with a broad-scale review in 2008 which predicted that the increased intensity of bushfire seasons should be 'directly observable' by 2020.[104] The fires of 2020 caused a devastating loss of life, property and wildlife.[105] On 20 February 2020, a Royal Commission into National Natural Disaster Arrangements inquired into 'whether changes are needed to Australia's legal framework for the involvement of the Commonwealth in responding to national emergencies'. It found that a clearer and more cohensive whole-of-government approach, with a

99 'National Climate Resilience and Adaptation Strategy' (Australian Government 2015) <https://www.environment.gov.au/system/files/resources/3b44e21e-2a78-4809-87c7-a1386e350c29/files/national-climate-resilience-and-adaptation-strategy.pdf> accessed 3 March 2021. An updated strategy is due in 2021.

100 ibid 6.

101 ibid 7.

102 Parliament of Victoria 2009 Victorian Bushfires Royal Commission *Final Report: Summary* (July 2010) <http://royalcommission.vic.gov.au/finaldocuments/summary/PF/VBRC_Summary_PF.pdf> accessed 21 July 2020. See also T Griffiths, 'We have still not lived long enough' (*Inside Story*, 16 February 2009) <http://insidestory.org.au/we-have-still-not-lived-long-enough/> accessed 21 July 2020.

103 RJ Williams et al, *Interactions Between Climate Change, Fire Regimes and Biodiversity in Australia: A Preliminary Assessment* (Australian Government Department of Climate Change 2009) <https://www.environment.gov.au/system/files/resources/ab711274-004c-46cb-a9f1-09dba68d98c3/files/20100630-climate-fire-biodiversity-pdf.pdf> accessed 21 July 2020.

104 R Garnaut, *The Garnaut Climate Change Review* (Commonwealth of Australia 2008) 118.

105 Climate Council of Australia (n 4) and surrounding text.

greater role for the federal government in supporting states and territories, is required to manage future bushfires in Australia.[106]

2 Commonwealth Granting of Asylum

It is predicted that hundreds of millions of people will be displaced as a result of climate change if adaptation measures do not significantly improve.[107] The low-lying countries of Oceania and the Asia-Pacific region are particularly vulnerable. This leads to a separate jurisprudence at the federal level relating to claims for resettlement under the Refugee Convention[108]—which, though outside climate change litigation as normally conceived, bears upon Australia's adaptation responsibilities.

People displaced by climate change do not fall within the ambit of the Refugee Convention,[109] as confirmed in decisions by Australia's Refugee Review Tribunal. In 2009, a Kiribati national brought a case seeking review of an immigration decision refusing to grant him a protection visa under the *Migration Act 1958* (Cth). Describing life in Kiribati, the applicant noted that it is 'getting harder and harder', with sea level rise spoiling the drinking water, engulfing islands, and destroying the fruit trees that are his livelihood.[110] The Tribunal found that the persecution element of the definition of refugee could not be satisfied.[111] This case was preceded by three cases concerning applicants seeking to move to Australia from Tuvalu, including a 1996 case in which the Tribunal found that, 'the environmental problem of the rise in the sea level around Tuvalu is not Convention related',[112] a sentiment essentially followed in the subsequent cases.[113] A January 2020 decision by the UN Human Rights Committee concerning New Zealand has signalled a potential change

106 *Royal Commission into National Natural Disaster Arrangements – Report* (Commonwealth of Australia 2020) <https://naturaldisaster.royalcommission.gov.au/publications/royal-commission-national-natural-disaster-arrangements-report> accessed 3 March 2021.

107 CB Field et al (eds), *Climate Change 2014 – Impacts, Adaptation, and Vulnerability, Working Group II Contribution to the Fifth Assessment Report of the IPCC* (CUP 2014).

108 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

109 See T Philip, 'Climate Change Displacement and Migration: An Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a Way Forward for Australia' (2018) 19 Melbourne Journal of International Law 639.

110 0907346 [2009] RRTA 1168, para 19.

111 ibid para 51.

112 N95/09386 [1996] RRTA 3191 (7 November 1996).

113 N00/34089 [2000] RRTA 1052; N99/30231 [2000] RRTA 17 (10 January 2000).

in direction,[114] and the anticipated Committee ruling in the case brought by Australian citizens in the Torres Strait[115] will also have relevance to rights where sea level rise causes grave problems for habitation and the practicing of local culture.

B *Future Development and Precaution*

Australia's adaptation jurisprudence at the subnational level has been informed by, and has in turn also been influential on, government planning policy. Cases have involved dialogue between governments, private property owners and others about future acceptable development.[116] In a sense, adaptation jurisprudence is itself adaptive, answering to and evolving out of changes in the relevant socio-political and environmental contexts—including climate change as an important driver.[117] In order to effectively adapt to climate change, development that is ill-suited to withstand climate change's future physical impacts may be deemed inappropriate; cities, towns, and regions without resilience will not support populations into the future.

The Shire of Murrindindi in rural Victoria was one of many devastated by the 2009 Black Saturday fires.[118] In *Doherty v Murrindindi SC*[119] an applicant wanted to retain a temporary shelter that he had built on his property after his home was destroyed, but VCAT denied him permission, taking into account the advice of the local fire authority that the land was not suitable for a dwelling on account of future fire risk. VCAT approved the building of a community hall in the area in *Carey v Murrindindi SC*,[120] but imposed conditions requiring the installation of a water tank for fire purposes given that 'climate change predictions at this point suggest that Victoria will get more extreme fire danger days as time goes on.'[121] The local planning scheme was subsequently amended to recognize the 'potential for extreme fire behaviour arising from drought and

114 UN Human Rights Committee, *Ioane Teitiota v New Zealand* (7 January 2020) UN Doc CCPR/C/127/D/2728/2016, para 9.11. On this case, see also M Feria-Tinta, 'Climate Change as a Human Rights Issue', Chapter 14 in this volme.

115 See above (n 77) and surrounding text.

116 J Peel and H M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge 2015) 122.

117 R Lyster, *Climate Justice and Disaster Law* (Cambridge 2015) 157.

118 Of the 173 people who died as a result of the fires, 40 people were killed by the fire at Murrindindi: see 2009 Victorian Bushfires Royal Commission (n 99) 4.

119 [2013] VCAT 1185.

120 [2011] VCAT 76.

121 ibid para 114.

climate change', and the objective of encouraging development 'only when the risk to life and property from bushfire can be reduced to an acceptable level'.[122]

The precautionary principle is as important in adaptation cases as it has been in mitigation cases. Scientific uncertainty has not prevented courts and tribunals from finding that a development is inappropriate in light of potential risks. A good example is the uncertainty over future groundwater resources, cited as a reason not to approve an extraction license in a series of cases.[123] The most recent challenge to the Adani mine relates to concerns over groundwater, which were not treated as relevant when its pipeline was approved. The Australian Conservation Foundation plans to argue in the Federal Court that this was erroneous.[124]

One of the more extensive discussions of the precautionary principle can be found in the judgment of the *Walker* case.[125] Justice Biscoe in the NSW Land and Environment Court said that the principle 'should not be used to try to avoid all risks', because 'a zero risk precautionary standard is inappropriate',[126] but nonetheless underscored its importance where there is a threat of serious or irreversible environmental damage, in spite of a lack of full scientific certainty regarding that threat. He found that the ministerial decision-maker in the case before him was required to consider ESD and the precautionary principle with respect to the heightened flood risk to a development as a result of climate change. Climate change was seen to be a 'deadly serious issue.'[127]

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122 Murrindindi Planning Scheme, 'Strategic Directions' (clause 02.03); see generally Victorian Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (last amended 29 May 2020, bushfire amendments updated 31 July 2018), available at <https://planning-schemes.delwp.vic.gov.au> accessed 23 July 2020. The Royal Commission recommended municipal councils take a more active role in planning for bushfires: Parliament of Victoria (n 99) 6. On 12 December 2017, the Murrindindi Planning Scheme was amended to reflect a state-wide policy for a resilient response to settlement planning for bushfires (VC 140) <https://planning-schemes.delwp.vic.gov.au/schemes/murrindindi/ordinance/amlist_s_muri.pdf> accessed 3 March 2021.

123 *Alanvale Pty Ltd v Southern Rural Water* [2010] VCAT 480; *David Kettle Consulting Pty Limited v Gosford City Council* [2008] NSWLEC 1385; *Maxwell Castle v Southern Rural Water Authority* [2008] VCAT 2440.

124 Documents filed with the Federal Court on 16 March 2020: 'ACF Challenges Morrison Government Decision Not to Apply Water Trigger to Adani Pipeline' (*Australian Conservation Foundation*, 16 March 2020) <https://www.acf.org.au/acf_challenges_morrison_govt_decision_to_not_apply_water_trigger_to_adani_pipeline> accessed 3 March 2021.

125 *Walker v Minister for Planning* [2007] NSWLEC 741.

126 ibid para 110.

127 ibid para 161. Note other cases that show that it is possible to adequately consider risk without rejecting a proposal: *Tauschke v East Gippsland SC* [2009] VCAT 2231 (26 October

This recognition also informs the connection between mitigation and adaptation, as reflected in the *Bushfires Survivors* litigation: in the future, breach of a duty to mitigate might arise from inappropriate development approvals, inadequate building standards for extreme weather events, inadequate emergency procedures, or inadequate disease prevention measures.[128]

C *Public-Private Divide*

Because adapting to climate change involves reducing vulnerability to risk, adaptation raises questions over the allocation of risk and responsibility between public and private entities.[129] Although this allocation is not settled and is still being tested through litigation, it is clear that developers, governments, property-owners, expert advisers, body corporates, and insurers all share some level of responsibility with respect to managing and adapting to climate-induced risk in Australia. Councils are advised not to approve developments where there is foreseeable harm, and of liability if they fail to include protective standards in planning schemes, or fail to build or maintain appropriate infrastructure.[130] Body corporates are not compelled to engage in works, but should do 'what is reasonable to establish whether work should be carried out and if so, when'.[131] In the wake of disaster, the costs of damage will inevitably be spread. This was demonstrated after the Brisbane 2010–11 floods which led to $1.5 billion in insurance claims,[132] a successful class action in negligence against dam operators,[133] and effects on agriculture, food prices, railway lines, and coal exports.

2009); *Smith v Pittwater Council* [2013] NSWLEC 1145; *Dougherty Bros Pty Ltd v Outline Planning Consultants Pty Ltd* [2016] NSWLEC 72.

128 BJ Preston, 'Climate Change Litigation (Part 1)' (2011) 1 Carbon and Climate Law Review 3, 9; J McDonald, 'The Adaptation Imperative: Managing the Legal Risks of Climate Change Impacts' in T Bonyhady and P Christoff (eds), *Climate Law in Australia* (Federation Press 2007) 124.

129 L Godden et al, 'Law, Governance and Risk: Deconstructing the Public-Private Divide in Climate Change Adaptation' (2013) 36 UNSW Law Journal 224.

130 Baker & McKenzie, 'Local Council Risk of Liability in the Face of Climate Change – Resolving Uncertainties: A Report for the Australian Local Government Association' (22 July 2011) 5–9 <https://www.environment.gov.au/climate-change/adaptation/publications/local-council-risk-liability> accessed 5 March 2021.

131 *Freshwater Terrace* [2010] QBCCMCmr136 (22 March 2010).

132 P Hooke, 'Queensland Flood Claims Reach $1.5b' *The Sydney Morning Herald* (1 February 2011) <https://www.smh.com.au/business/queensland-flood-claims-reach-1-5b-20110131-1abag.html> accessed 5 March 2021.

133 *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater* (*No 22*) [2019] NSWSC 1657. One of the defendants in these proceedings is the State of Queensland.

In 2010, 14 property-owners sued the Byron Shire Council on the basis that encroaching seas had threatened their property values and resulted in a need to construct shoreline protections. They alleged that the Council should not have constructed an artificial headland protected by a rock seawall which they said caused beach erosion and subsequent exposure of their properties to sea level rise, and complained that the Council should have at least modified or removed the structure, or built further seawalls to protect the beach. Six years later after surviving a Supreme Court motion to dismiss the action,[134] the plaintiffs settled with the Council's insurers—meaning the court never determined legal liability. Even without a published settlement amount, the case demonstrates the courts' role in navigating the relationship between the individual and the State in complex contexts of personal responsibility, corporate management of risk and State planning. The enmeshing of public and private duties are apparent, too, in litigation involving corporate accountability for risk management and risk disclosure, to which we now turn.

IV Accountability for Risk Management and Risk Disclosure

Under private law, plaintiffs may seek to hold corporations and their leadership to account for the way in which they contributed or responded to climate change. Litigation is growing in volume and influence.[135] Options include nuisance or negligence in tort, and breaches of duties of company directors.[136] The duties and accountability of public officials[137] may also be relevant for private investors whose sovereign bond holdings are affected by climate change. For suits against private enterprises, there are two main areas that will place Australian courts as arbiters of accountability. First, duties relating to risk assessment and disclosure is a current focus for climate change litigation in Australia. Secondly, a small area of consumer law targets 'greenwashing' claims. This section discusses each of these areas before moving to a third

134 *Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169.

135 S Barker et al, 'The Carbon Boomerang: Litigation Risk as a Driver and Consequence of the Energy Transition' (*The 2° Investing Initiative*, 2017) <https://2degrees-investing.org/resource/the-carbon-boomerang-litigation-risk-as-a-driver-and-consequence-of-the-energy-transition/> accessed 3 March 2021.

136 See S Barker, 'Directors' Liability and Climate Risk: Australia – Country Paper' (Commonwealth Climate and Law Initiative 2018) <https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/04/CCLI-Australia-Paper-Final.pdf> accessed 3 March 2021.

137 See, for example, for Commonwealth public entities, the Public Governance, Performance and Accountability Act 2013 (Cth).

set of disclosure duties, namely those held by sovereigns and public officials. A pending case points to the risk assessment and disclosure duties held by public officials, and alleges the duties owed to a class of investors who trade in Australian government bonds are being breached due to failures to disclose climate risk, as we discuss below.

A *Duties of Companies, Directors, Banks, and Fund Managers*

Plaintiffs can take proceedings based on their financial interests as shareholders in a company, or as investors in a bank or fund, because directors or fund managers did not take into account the foreseeable risks posed by climate change. Channels through which climate change might affect a corporation financially include physical risks impacting insurance liabilities and the value of financial assets; liability risks relating to compensating loss or damage; and transition risks resulting from the shift toward a low-carbon economy.[138] The nature and extent of risk associated with achieving the transition to net zero will depend upon a number of factors including the swiftness and smoothness of what has been termed the 'inevitable policy response'.[139]

The *Corporations Act* imposes a statutory duty of care and diligence on company directors and other officers.[140] Fiduciary duties also exist under common law. In 2016, legal experts opined that Australian companies could be found liable for failing to consider the risks of climate change, noting that such risks may be relevant to directors' duties 'to the extent that [they] intersect with the interests of the company, for example in so far as they present corporate opportunity or foreseeable risks to the company or its business model'.[141] The Australian Securities and Investment Commission (ASIC) Commissioner has considered that directors 'would do well' to consider this advice.[142]

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138 A Foerster et al, 'Keeping Good Company in the Transition to a Low Carbon Economy? An Evaluation of Climate Risk Disclosure Practices in Australia' (2017) 35 Corporate and Securities Law Journal 154.

139 'The Inevitable Policy Response: Policy Forecasts' (UN Principles for Responsible Investment, December 2019).

140 Corporations Act 2001 (Cth) s 180(1).

141 N Hutley SC and S Hartford Davis, 'Climate Change and Directors' Duties' (Memorandum of Opinion of 7 October 2016, for the purposes of the business roundtable to be hosted by the Centre for Policy Development and the Future Business Council) para 3.2; updated on 29 March 2019 ('Supplementary Memorandum').

142 J Price, 'Keynote Address: Financing a Sustainable Economy' (Climate Horizons Report Launch Event, Sydney, 18 June 2018) <https://asic.gov.au/about-asic/news-centre/speeches/climate-change/> accessed 21 July 2020. 2019 updates to two of ASIC's Regulatory Guides, RG228 and RG247, provide guidance on climate-risk disclosure.

The global transparency movement encouraging companies to report on climate-related risks has had significant influence in Australia.[143] This influence is observable in the behaviour of regulators such as ASIC, rather than through proposals to change legislation.[144] The depth of the required reporting will likely increase, and voluntary action by companies, influenced in part by foreign best-practice, is strengthening standards and norms. It will be increasingly difficult for companies to argue that they have acted responsibly if they have not seriously considered the risks of climate change and how these risks will impact stakeholders.[145]

Three cases so far have sought to establish breach of a duty to disclose risks by private enterprises (a separate case alleging breaches of disclosure duties by public officials is discussed at the end of this section). The first was a 2015 case in which it was argued that one of Australia's four major banks breached a duty to report on risk exposure by not addressing its financed emissions.[146] The plaintiff was unsuccessful in persuading the Federal Court that proposed resolutions could be validly moved at an annual general meeting. In a 2017 case, the same bank was sued for not including certain risks in its annual report.[147] The proceedings were withdrawn after the bank made changes to its annual report acknowledging and pledging to estimate climate-related risks. In 2018, a third action was brought against an Australian superannuation (pension) fund by one of its members. The plaintiff argued that the fund did not provide him with sufficient information regarding the climate change risks associated with its investments, and that a prudent trustee would have required investment managers to disclose climate risks. In November 2020, the case settled, with the fund acknowledging that climate change 'is a material, direct and current financial risk' to the fund and promising initiatives: to implement a long-term objective toward a net zero carbon footprint by 2050; to measure, monitor and report climate-related progress in line with the Task Force for Climate-Related Financial Disclosures' recommendations; and to encourage

143 The recommendations of the Task Force for Climate-Related Financial Disclosures have been endorsed by the global Network for Greening the Financial System, which Australia's Reserve Bank joined in 2018, and have motivated the work of the Australian Sustainable Finance Initiative.

144 No legislative change was recommended by the Senate Economics Reference Committee, *Carbon Risk: A Burning Issue* (Commonwealth of Australia 2017).

145 C Barrett and A Skarbek, 'Climate Risk and the Financial System: Lessons for Australia from International Experience' (Monash Sustainable Development Institute 2019).

146 *Australasian Centre for Corporate Responsibility* (ACCR) *v Commonwealth Bank of Australia* [2015] FCA 785; 325 ALR 736.

147 *Guy Abrahams v Commonwealth Bank of Australia* VID879/2017.

its investee companies to also disclose in line with those recommendations.[148] These cases are responsive to, and influential on, the attitudes of regulators. Australia's Prudential Regulation Authority (APRA) is currently preparing to undertake assessments of Australia's major banks regarding their vulnerability to risk, to ensure that climate-related risk is being properly considered and disclosed.[149] It will design and conduct the assessments together with ASIC, the Commonwealth Scientific and Industrial Research Organization (CSIRO) and the Bureau of Meteorology.[150]

B *Misleading and Deceptive 'Greenwashing'*

Under Australian consumer law, corporations are prohibited from engaging in trade or commerce which is misleading or deceptive, or which is likely to mislead or deceive.[151] A similar prohibition also applies to the provision of financial services.[152] A small suite of cases discussing this issue in the climate context were brought by the Australian Competition and Consumer Commission from 2008–10. These cases concerned various instances of 'greenwashing'. In *Australian Competition and Consumer Commission v GM Holden Ltd*,[153] a car manufacturer was held liable for promoting carbon-neutral cars, when the cars were not carbon neutral on a total life-cycle analysis, and for suggesting that it would plant trees to offset emissions for the life of each vehicle, when the number of trees planted per car would not offset emissions for more than a year. Statutes can create specific liability for providing false information in a particular context. The *Renewable Energy* (*Electricity*) *Act 2000* (Cth) is one example, which grounded the claim in *MT Solar*.[154] The regulator successfully sued a solar company for providing false information upon which it had relied to issue renewable energy certificates. The Federal Court ordered pecuniary penalties and interlocutory injunctions against future misleading conduct.

148 *McVeigh v Retail Employees Superannuation Trust* 2018 NSD1333/2018; 'Statement from Rest (media release)' (*Equity Generation* Lawyers, 2 November 2020) <https://equitygenerationlawyers.com/wp/wp-content/uploads/2020/11/Statement-from-Rest-2-November-2020.pdf> accessed 3 March 2020

149 See further APRA's 24 February 2020 open letter to regulated entities, in which it reiterated that it encourages entities to disclose under the TCFD recommendations framework.

150 J Eyers, 'APRA to assess banks' vulnerability to climate risk' *Australian Financial Review* (24 February 2020) <https://www.afr.com/companies/financial-services/apra-to-assess-banks-vulnerability-to-climate-risk-20200224-p543uj> accessed 5 March 2021.

151 Corporations Act 2001 (Cth) s 1041H.

152 ASIC Act 2001 (Cth) s 12DA.

153 (CAN 006 893 232) [2008] FCA 1428.

154 *Clean Energy Regulator v MT Solar Pty Ltd* [2013] FCA 205.

This litigation demonstrates the role of the courts in ensuring integrity in corporate climate-related claims.

C *Duties of Australian public officials when issuing sovereign bonds*

A pending Federal Court case, launched in July 2020, seeks declarations that the Australian government has breached its duties when issuing Australian sovereign bonds.[155] The applicant is an Australian law student and holder of bonds, who is seeking to represent a class of bond holders who have the same interest. She claims that the Commonwealth breached its duty to act with the utmost candour and honesty as a promoter, and engaged in misleading or deceptive conduct in trade and commerce,[156] because it did not adequately disclose climate risks associated with government bonds. The claim alleges that the Secretary to the Treasury and the Chief Executive Officer of the Australian Office of Financial Management breached their public duties[157] by not disclosing those risks.[158] The case places the Federal Court in a unique position to connect sovereign climate change responses to reputational risks in the sovereign bond market.[159] The judgment will assess how a State is viewed by central banks, pension funds, investors, credit ratings and others for its actions in mitigating climate change and cooperating with other States. Any declaratory relief could impact the disclosure by States about their responses to climate change when issuing bonds, leading to a material and enduring change in such responses.

V Conclusion

Litigation is an important part of Australia's engagement with climate change. Through the interpretation of legislative goals and principles, the stories of plaintiffs and the arguments of defendants, it gives an insight into what Australians value and aspire to, the way in which responsibility is apportioned, and how leadership is called to account. Regardless of where or how greenhouse

155 *O'Donnell* (n 8).

156 Australian Securities and Investments Commission Act 2001 (Cth) s 12DA.

157 Public Governance, Performance and Accountability Act 2013 (Cth) s 25.

158 *O'Donnell* (n 8).

159 The case is stated by lawyers for the applicants to be a world-first in treating climate as a material risk to the sovereign bond markets: see 'O'Donnell v Commonwealth and Ors' (*Equity Generation Lawyers*) <https://www.equitygenerationlawyers.com/odonnell-v-commonwealth/> accessed 3 March 2020.

gas emissions are generated, Australia faces significant losses associated with the impacts of climate change, and its coal-reliant economy is threatened by the global transition away from fossil fuels. The problem of who should bear the costs of preventing future damage and remediating the damage already suffered has not yet been adequately addressed. This is a problem which spans levels of government and the public and private spheres, evident in Australia's climate change litigation. Courts have provided a forum through which to test the limits of executive, judicial and legislative power, investigate the roles of government and corporate actors with respect to citizens, and illuminate gaps and limitations in Australia's ability to meet its foreign commitments on climate change mitigation and adaptation within the current political context.

We have shown an evolution in mitigation cases. Legal submissions on Australia's fossil fuel extraction have succeeded in spite of competing claims about causation and market substitution, either because of a maturing of judges' approaches, or because of different founding statutes and principles in different jurisdictions. In 2006, a Federal Court judge dismissed arguments that a coal mine should be rejected on the basis of 'the possibility that at some unspecified future time', climate change would impact Australia's environment in some 'unidentified' way.[160] Just over a decade later, Preston CJ of the NSW Land and Environment Court ruled on the dire consequences of coal mine approval 'when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions'.[161] How human rights will feature in this jurisprudence is an ongoing question, to which a partial answer will be given when the Queensland Land Court rules on whether the Galilee Coal Project violates the right to life of youth litigants,[162] the Federal Court rules on whether the Whitehaven Vickory Coal Project represents a breached duty of care owed by the Federal Government to the young Australians,[163] and when the Human Rights Committee rules on the Torres Strait complaint.[164]

Australia's adaptation jurisprudence has been responsive to environmental and social realities for a longer time. Such cases are more prevalent in the state rather than federal courts. Moreover, local governments are prepared to take action with respect to increased risk of extreme weather events impacting communities and the built environment. Yet the catastrophic 2020 fires

160 *Wildlife Preservation Society* (n 60).
161 *Gloucester* (n 18) para 699.
162 See above (n 22).
163 See above (n 84).
164 See above (n 77) and surrounding text.

showed the Commonwealth to be lacking in adaptive capacity and leadership, and the recommendations of the Royal Commission may reshape multi-level governance. Asylum claims, too, are starting to expose the need for a federal response.

At the same time, private law actions are a growing part of Australian climate change litigation. Cases seek to enforce liability against individuals and corporations through company and commercial law, tort, property, and consumer protection. Federal regulators are responding to transnational trends and assuming a more active role, particularly in clarifying corporate responsibilities over risk disclosure and liability for climate-induced harm. The pending class action against the Australian government for failing to disclose climate risks when issuing sovereign bonds frames corporate accountability in novel and significant ways.[165]

Australian climate change litigation is expanding in the contemporary context of rising community awareness, escalating harm and ongoing legal and political change. The federal government is currently debating whether and how to codify a net zero economy target into legislation. The EPBC Act's statutory review provoked demands from civil society for the Act to include climate change. Mapping the economic recovery from the impacts of COVID-19 is hotly discussed, and the lessons of the pandemic may lead to a greater acceptance of—and deference to—climate science. Physical impacts will continue to be the subject of litigation. This could occur through suits seeking to mitigate future harm to biodiversity and protected areas, or complaints of a failure to adapt. More fundamentally, changes in awareness about indigenous land-practices and historical injustices may lead to rights-based challenges, especially from those who have seen the sunburnt country 'traced in fetish verse'.[166] As the stakes for current and future generations rise ever more dramatically, Australian courts will forge an important jurisprudential identity.

165 See above (n 154) and surrounding text.

166 Whittaker (n 15).

CHAPTER 4

Climate Change Litigation in the United Kingdom: Planning, Energy and Protest

Nigel Pleming and Ruth Keating***

1 Introduction

In 2008, in the Explanatory Notes to the UK's Climate Change Act, it was said: 'It is widely accepted that urgent action is required to address the causes and consequences of climate change'.[1] That understatement could now be re-written in stronger language—the International Bar Association (IBA), in its 2014 report 'Achieving Justice and Human Rights in an Era of Climate Disruption' said 'global climate change is a defining challenge of our time'.[2] That is now accepted as closer to the truth—we have moved from the need to take urgent action, to a position where most if not all public (and commercial, and even personal) decisions have to have regard to the effect of those decisions, on global climate change.

In the UK (and world) media it has been widely reported that the oceans had 'reached their highest temperature last year since modern records began more than 60 years ago' (*The Times*).[3] The piece in *The Times* continues:

> 'The oceans are really what tells you how fast the Earth is warming', Professor Abraham [an author of the study on sea temperatures] told The Guardian. 'We see a continued, uninterrupted and accelerating warming rate of planet Earth. This is dire news'.

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1 Explanatory Notes to the Climate Change Act 2008, para 4.

2 International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*: *International Bar Association Climate Change Justice and Human Rights Task Force Report* (IBA 2014).

3 B Webster, 'Warming oceans "warn of looming climate disaster"' *The Times* (London, 14 January 2020).

> When the world and the oceans heat up, it changes the way rain falls and evaporates. There's a general rule of thumb that drier areas are going to become drier and wetter areas are going to become wetter.
>
> Michael Mann, from Penn State University, another author of the study, said: 'We found that 2019 was not only the warmest year on record, it displayed the largest single-year increase of the entire decade, a sobering reminder that human-caused heating of our planet continues unabated'.

This report is mentioned not to add yet more information, but to make the obvious and important point that the understanding of climate change is a question of science, not a question of law. Applying that understanding is primarily for politicians and governments. However, holding governments (at the local, national and international level) to account is the area where law comes in. Where lawyers come in, is in understanding and improving legal frameworks relevant to climate change issues—applying and creating legal principles to add pressure on those who can do something about climate change. Whether this is based on reliance on existing rights and duties, or the recognition of 'climate change justice' (also a central theme in the 2014 IBA report), does not perhaps really matter. However, recent events have underlined the need for a real focus on climate change.

During the COVID-19 crisis, the process of listening to scientists, those in the medical profession and to a lesser extent those working in technology, is proving to be of the utmost importance. It is hoped by the authors of this chapter that this will continue, with those in government, and in society more widely, listening to and acting on the warnings given by experts in the field of climate change. In the aftermath of the COVID-19 crisis and as the world economy rebuilds itself, an easy default would be to rely on actions which would lock the world into a high-carbon future. However, the preferred view is that this provides an opportunity to address the causes and consequences of climate change. Climate change litigation is increasingly being used as a tool to pressure governments to adopt more ambitious climate policies, or at least hold them to existing obligations. The cases discussed in this chapter reflect that. This chapter considers the following in the UK context: statutes (Section II), litigation (Section III) and concluding remarks (Section IV).

II Statutes

A UK caveat—the UK has left the EU.[4] Much of our environmental law, including law relating to control of greenhouse gas emissions, is EU driven—in Directives, Regulations and decisions of the CJEU. How our environmental law, particularly climate change law, will develop (or not) over the next few years is unknown.

The focus of this chapter therefore is on the existing position. In terms of explaining climate change litigation in the UK, it is important briefly to outline the statutory context for climate change-related litigation. There are two important areas to address namely: (A) the Climate Change Act 2008 (the 2008 Act) and (B) the Environment Bill.

A *The Climate Change Act 2008*

The 2008 Act has a variety of impacts, with some legislative provisions only affecting certain, primarily high-energy, businesses. However, an emerging development in the UK is for climate change legislation to have a far wider application. The 2008 Act is divided into five main parts: (1) targets and budgeting; (2) the Committee on Climate Change (CCC); (3) emissions trading schemes; (4) adaptation to climate change and (5) other policy measures.

By way of summary, the main provisions of the 2008 Act are outlined below.

The net zero carbon target:[5] The 2008 Act provides the overall framework for the UK's climate change policy and legislation. This includes, by amendment in 2019,[6] imposing a legally-binding duty on the government to reduce the UK's greenhouse gas emissions by 100% by 2050 through a series of *'carbon budgets'*[7]—the so-called *'net zero carbon target'*.

The Committee on Climate Change:[8] Section 32 of the Act created a new (in 2008) independent body, the Committee on Climate Change (CCC). Its purpose is to advise the Government on how best to achieve its targets and on setting carbon budgets. The CCC is required to deliver annual progress reports to

4 This process became complete on 31 December 2020. The European Union (Withdrawal Agreement) Act 2020 implements the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union, which sets out the arrangements for the United Kingdom's withdrawal from the EU.

5 The 2008 Act, ss 1–31.

6 The 2008 Act originally required the UK to achieve an 80% reduction in greenhouse gas levels by 2050, below 1990 levels. In June 2019, the Climate Change Act 2008 (2050 Target Amendment) Order 2019 – SI 2019/1056 revised this target upward, from 80% to 100%.

7 Climate Change Act 2008, pt 1.

8 The 2008 Act, ss 32–43.

Parliament. In October 2019, the Prime Minister announced that he will chair a new Cabinet Committee on Climate Change, as indicated in the government's response to the CCC's progress report on reducing UK emissions.[9]

Emissions trading scheme:[10] The 2008 Act gives the government the power to introduce new national emissions trading schemes to help the UK meet its emissions reduction targets, imposed by various EU directives and regulations.

Reporting authorities:[11] The fourth part of the 2008 Act gives the government an adaptation reporting power which enables the Secretary of State to direct *'reporting authorities'* to prepare a report on the impacts of and their proposals for adaptation to climate change.

Duties on companies: The fifth part, on other policy measures, includes for example duties on companies to report on greenhouse gas emissions,[12] charges for plastic bags,[13] Renewable Transport Fuel Obligations[14] and energy performance.[15]

Two other points to note are the following: (i) climate change levies; and (ii) energy and carbon reporting.

Climate change levies: The climate change levy was introduced under the Finance Act 2000 and came into force on 1 April 2001. A carbon tax that adds around 15% to the energy bills of businesses and public sector organizations and is levied on non-domestic consumers of certain energy supplies. The levy forms part of the government's climate change strategy,[16] aimed to help the UK meet its targets for the reduction of greenhouse gases.

Energy and carbon reporting: The government has also introduced streamlined energy and carbon reporting. Since April 2019 large UK companies are required to report publicly on their UK energy use and carbon emissions within their Directors' Report.[17]

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9 Prime Minister's Office, 10 Downing Street, Department for Business, Energy & Industrial Strategy, and The Rt Hon Boris Johnson MP, 'Press Release: PM to chair new Cabinet Committee on Climate Change' (*Gov.uk*, 17 October 2019) <https://www.gov.uk/government/news/pm-to-chair-new-cabinet-committee-on-climate-change> accessed 30 March 2021.

10 The 2008 Act, ss 44–55.

11 The 2008 Act, ss 56–70.

12 The 2008 Act, ss 83–5.

13 The 2008 Act, s 77.

14 Schedule 7 which allows amendments to the Energy Act 2004.

15 The 2008 Act, s 86.

16 UK Government, 'Environmental taxes, reliefs and schemes for businesses – Climate Change Levy' (*Gov.uk*) <https://www.gov.uk/green-taxes-and-reliefs/climate-change-levy> accessed 28 May 2020.

17 The Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 (SI 2018/1155).

B *The Environment Bill*

The Environment Bill could be discussed in its own chapter but there is only space here for an overview. An Environment Bill was introduced in October 2019, before the December election, intended to replace EU-based environment law. The Environment Bill's progress has been halted, first by the election and then due to COVID-19.

In the Queen's Speech of 2019, the UK's commitment to an environment bill was reiterated:

> My government will continue to take steps to meet the world-leading target of net zero greenhouse gas emissions by 2050. It will continue to lead the way in tackling global climate change, hosting the COP26 Summit in 2020.[18] To protect and improve the environment for future generations, a bill will enshrine in law environmental principles and legally-binding targets, including for air quality.[19]

The Environment Bill fell with the dissolution of Parliament, but was reintroduced to Parliament in January 2020 in substantially the same form. It then passed its second reading at the end of February, and entered into a Public Bill Committee in March. However, as announced by the Department for Environment, Food and Rural Affairs (DEFRA) Environment Minister, Rebecca Pow, at a Public Bill Committee meeting, the Bill was suspended due to the Covid-19 pandemic.[20] At the time of writing the Environment Bill is completing its passage through parliament.

The timeline of the Environment Bill is in some doubt; however, it is likely it will be introduced, debated and enacted in some form, and will have an important role in filling the gaps in domestic environmental law left by Brexit by, for example, creating the Office for Environmental Protection (OEP). These main provisions of the Environment Bill, in its current form, are summarized below.

Establish the OEP: It has been said that the Government's ambition is to create 'a new, world-leading, independent environmental watchdog' to hold

18 COP26 has now been postponed to November 2021.

19 Queen's Speech HL Deb 19 December 2019, vol 801, col 7 <https://hansard.parliament.uk/lords/2019-12-19/debates/C9EB1C3B-3551-473B-8C30-864B8B020409/Queen%E2%80%99SSpeech> accessed 26 April 2020.

20 Department for Environment Food & Rural Affairs, 'Environment Bill 2019–21' (*UK Parliament*) <https://services.parliament.uk/bills/2019-21/environment.html> accessed 28 May 2020.

Government to account on its environmental ambitions and obligations.[21] The OEP's constitution is not set out in the Bill, but the statement of impacts explained that it will be an arm's length body, with the explanatory notes setting out that the OEP is to be a non-Departmental public body.[22] The current draft of the Environment Bill states that the OEP must '(a) act objectively and impartially, and (b) have regard to the need to act proportionately and transparently'. There have been concerns raised about how independent the OEP will be in practice.[23]

Introduce measures: The Environment Bill introduces measures to improve air and water quality, tackle plastic pollution, extend producer responsibility, increase resource efficiency and improve biodiversity gains in planning.

Sets provisions for environmental targets: One of the most important aspects of the Environment Bill are the environmental target provisions. These were introduced in response to concerns raised after publication of the draft Environment Bill in December 2018 that the absence of legally binding targets left a significant gap in the framework for environmental protection. The Environment Bill provides that the Secretary of State may by regulations set long-term targets in respect of any matter which relates to '(a) the natural environment, or (b) people's enjoyment of the natural environment'. However, the Environment Bill does not itself introduce legally binding targets. Rather, it imposes an obligation on the Secretary of State to introduce one long-term target in each of the four priority areas of air quality, water, biodiversity and resource efficiency and waste reduction and a further target in respect of particulate matter (PM2.5).[24]

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21 House of Commons Environmental Audit Committee, *Scrutiny of the Draft Environment (Principles and Governance) Bill* (HC 2017–19, 1951) para 61 <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf> accessed 3 March 2021.

22 Draft Environment (Principles and Governance) Bill, cl 11 draft explanatory note; DEFRA, 'Draft Environment (Principles and Governance) Bill Statement of Impacts' (December 2018) 8; R Hogarth and J Rutter, 'Institute for Government submission on the Draft Environment (Principles and Governance) Bill' (DEB0030).

An arm's-length body is an organization that delivers a public service, is not a ministerial Government Department, and which operates to a greater or lesser extent at a distance from Ministers. The term can include non-Departmental public bodies (NDPBs). The Environment Agency is an example of an executive NDPB. See G Freeguard et al, 'Whitehall Monitor 2019' (Institute for Government 2019) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Whitehall%20Monitor%202019%20WEB1.pdf> accessed 30 March 2021.

23 *Scrutiny of the Draft Environment (Principles and Governance) Bill* (n 21).

24 The Secretary of State must by regulations set a target ('the PM2.5 air quality target') in respect of the annual mean level of PM2.5 in ambient air.

The Secretary of State then has a discretion as to whether to introduce further targets and what targets to set. This discretion is, currently, only subject to the limitation that the Secretary of State is satisfied that the target can be met. The Secretary of State must seek independent expert advice in doing so. The Environment Bill currently reads: 'Before making regulations under section 1 or 2 the Secretary of State must seek advice from persons the Secretary of State considers to be independent and to have relevant expertise'. However, there is no obligation to follow that expert advice.

There is also discretion afforded to the Secretary of State to lower or revoke targets for a range of reasons, including if the Secretary of State is satisfied that, due to a change in circumstances, the social, economic or other costs of meeting it would be disproportionate to the benefits.

Environmental principles: Concern has been expressed regarding the loss of environmental principles from UK law. Any question as to the validity, meaning or effect of any retained EU law is to be decided in accordance with 'retained general principles of EU law' (section 6(3) of the European Union (Withdrawal) Act 2018), these principles will not affect the interpretation or application of future legislation. Section 16 of the European Union (Withdrawal) Act 2018 concerns maintenance of environmental principles. In terms of the Environment Bill the obligation is to *'have due regard to'* a policy statement which the Secretary of State must publish. However, currently, that obligation to have due regard to the policy statement only applies to Ministers of the Crown.

In terms of the future of climate change litigation in the UK it is likely that these provisions will play an increasingly central role in future litigation.

III Litigation Position in the UK

We are seeing the rise of climate related litigation in various jurisdictions—the United Kingdom is no exception. Joanna Setzer and Rebecca Byrnes's report, 'Global trends in climate change litigation: 2019 snapshot', highlights that climate change cases have been brought in at least 28 countries around the world. Of the recorded cases, more than three quarters have been filed in the United States. However, the UK stands out in the world picture with the leading number of cases (53) after the US and Australia.[25]

25 J Setzer and R Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (Grantham Research Institute on Climate Change and the Environment, 4 July 2019) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> accessed 30 March 2021.

The trends in those cases are interesting. Traditionally defendants in these types of cases have been governments. However, litigation is increasingly being brought against commercial operators, companies and corporations. The consequences of climate change are numerous and varied, the legal consequences and therefore the myriad of ways in which litigation can be brought increasingly reflect this. It is therefore unsurprising that climate change litigation will spread across many different areas of the law.

Although, globally there are examples of climate change-related damages claims being pursued by individuals, investors, shareholders, cities and States, there is little evidence in the UK of any civil litigation claims seeking damages for alleged climate change related losses at this stage. However, this is evidently not the only way in which litigation can be used to compel or nudge both governments and companies to adopt more ambitious climate policies—the cases selected below reflect that.

This chapter discusses climate change civil litigation in the UK as mainly falling under three broad (but overlapping) headings: (A) planning cases; (B) energy cases, and (C) criminal cases.

A *Planning Cases*

Planning cases are increasingly being used as a means through which to oppose the grant or refusal of development permission (or conditions) on climate change grounds. The cases highlighted are *R* (*on the application of Friends of the Earth Ltd*) *v Heathrow Airport Ltd*; *Stephenson v Secretary of State for Housing, Communities and Local Government*; and *HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government.*

1 *R* (*on the application of Friends of the Earth Ltd*) *v Heathrow Airport Ltd*[26]

A recent account of climate change litigation in the UK would not be complete without referring to the Supreme Court's judgment in *R* (*on the application of Friends of the Earth Ltd*) *v Heathrow Airport Ltd*.

The Court of Appeal decision had held that government policy favouring the development of a third runway at Heathrow Airport was unlawful because the Secretary of State for Transport had failed to adequately consider the United Nations Framework Convention on Climate Change (the Paris Agreement). The Supreme Court overturned the Court of Appeal's decision and held that the Secretary of State had taken the Paris Agreement into account and lawfully exercised his discretion as to how much weight to attribute to it.

26 [2020] UKSC 52.

It is a landmark decision on the intersection of planning and climate change and the judgment itself covered many issues of environmental significance.

a) *Background*

In June 2018, the Secretary of State for Transport designated the Airports National Policy Statement (ANPS) a 'national policy statement' pursuant to the Planning Act 2008, section 5(1). The ANPS outlined the identified need for new airport capacity in south-east England, that would maintain the UK's status as a leading global 'hub' for air transport. The suggested alternative solution of a second runway at Gatwick was rejected, concluding that it would not fulfil the 'hub' requirement. The ANPS said that that this need would be met by a new third runway at Heathrow.

The ANPS was designated as a national policy statement for the purposes of the Planning Act 2008 by the Secretary of State for Transport. The ANPS provided for the proposed expansion of capacity at Heathrow Airport by the addition of a third runway, which would significantly increase greenhouse gas emissions.

The Court of Appeal of England and Wales unanimously ruled that the ANPS was invalid and its designation as a national policy statement was unlawful on several climate change grounds. These all related to a failure to take into account the UK Government's commitment to the provisions of the 2015 Paris Agreement.

The issues in the various challenges concerned the operation of Directive 92/43 (the Habitats Directive) and Directive 2001/42 (the SEA Directive) as well as the UK's commitments in respect of climate change. Applications to the Supreme Court by Heathrow Airports Limited, and a supporting developer for permission to appeal were successful, and the appeal was heard by the Supreme Court.[27]

b) *The Supreme Court judgment—climate change issues*

The Supreme Court overturned the Court of Appeal's decision that government policy favouring the development of the third runway at Heathrow Airport was unlawful because the Secretary of State for Transport had failed to adequately consider the Paris Agreement. The Supreme Court held that the Secretary of State for Transport had taken the Paris Agreement into account and lawfully exercised his discretion as to how much weight to attribute to it.

This chapter considers the Supreme Court's judgment in respect of climate change issues.

27 Applications for permission to appeal by the losing parties in the Habitats and SEA Directives cases were dismissed.

As this case provided the first opportunity for the UK Supreme Court to consider climate change legislation, the judges went through the provisions in some detail.

The Supreme Court acknowledged that at the heart of the challenge to the ANPS was the Paris Agreement.[28] However, the Supreme Court also emphasized that notwithstanding the common objectives set out in the Paris Agreement, it did not impose an obligation on any State to adopt a binding domestic target to ensure that those objectives were met.[29]

The principal question for determination was the meaning of 'Government policy' in section 5(8) of the Planning Act 2008. In the Supreme Court's view, the epitome of 'Government policy' is a formal written statement of established policy. In so far as the phrase might in some exceptional circumstances extend beyond such written statements, it was appropriate that there be clear limits on what statements count as 'Government policy', in order to render them readily identifiable as such.[30] The statements made by Members of Parliament did not constitute 'Government policy' for the purposes of section 5(8)[31] and nor was the fact that the United Kingdom had ratified the Paris Agreement of itself a statement of Government policy in the requisite sense.[32] The court held that on the facts of the appeal, it was clear from the narrative of events that in June 2018, when the Secretary of State for Transport designated the ANPS, the Government's approach on how to adapt its domestic policies to contribute to the global goals of the Paris Agreement was *'still in a process of development'*.[33] It was not in dispute that the internationally agreed temperature targets played a formative role in the development of government policy—however, in short, the court held that *'policy commitment'* was not the same as *'Government policy'*.[34]

The Supreme Court held that on a correct understanding of the ANPS and the Secretary of State's evidence, this was not a case in which the Secretary of State omitted to give any consideration to the Paris Agreement; nor is it one in which no weight was given. The court held that on the contrary, the Secretary of State took the Paris Agreement into account and, to the extent that the obligations under it were already covered by the measures under the Climate

28 At para 70.
29 At para 71.
30 At para 106.
31 At para 107.
32 At para 108.
33 At para 111.
34 At para 112.

Change Act 2008, he gave weight to it and ensured that those obligations would be brought into account in decisions to be taken under the framework established by the ANPS. On proper analysis the question was whether the Secretary of State acted irrationally in omitting to take the Paris Agreement further into account, or give it greater weight, than in fact he did.[35] The view formed by the Secretary of State, that the international obligations of the UK under the Paris Agreement were sufficiently taken into account for the purposes of the designation of the ANPS by having regard to the obligations under the Climate Change Act 2008 was, in the view of the Supreme Court, rational.[36]

The respondents in the appeal also argued that the Secretary of State failed in his duty to have regard to (i) the effect of emissions created after 2050 and (ii) the effect of non-CO2 emissions from that scheme.

The court held that the Secretary of State did not act irrationally in not attempting in the ANPS to assess post-2050 emissions against policies which had yet to be determined. The court held that the Department for Transport had modelled the likely future carbon emissions of both Heathrow and Gatwick airports, covering aircraft and other sources of emissions, to 2085/2086 and further, that policy in response to the global goals of the Paris Agreement was in the course of development in June 2018 when the Secretary of State designated the ANPS and remains in development.[37]

On the second point, the court held that it was not reasonably arguable that the Secretary of State acted irrationally in not addressing the effect of the non-CO2 emissions in the ANPS for six reasons. (i) His decision *'reflected the uncertainty over the climate change effects of non-CO2 emissions and the absence of an agreed metric which could inform policy'*. (ii) It was consistent with the advice which the Secretary of State had received from the Climate Change Committee. (iii) It was taken in the context of the Government's *'inchoate response'* to the Paris Agreement. (iv) The decision was taken in the context in which his department was developing as part of that response its Aviation Strategy, which would seek to address non-CO2 emissions. (v) The designation of the ANPS was only the first stage in a process in which the Secretary of State had powers at the development consent order stage to address those emissions. (vi) It is clear that the applicant for a development consent order would have to address the environmental rules and policies which were current when its application would be determined.[38]

35 At para 125.
36 At para 132.
37 At para 156.
38 At para 166.

For these reasons the Supreme Court allowed the appeal. The judgment serves as a reminder of the remaining gulf between *'policy commitment'* on climate change and *'Government policy'* on climate change in the UK context – the importance of bridging that gap for successful climate change challenges is left open.

2 *Stephenson v Secretary of State for Housing, Communities and Local Government*[39]

The background to the case is that in March 2012 the defendant, the Secretary of State, published the National Planning Policy Framework (NPPF). The defendant subsequently carried out a consultation on proposed revisions to the NPPF including a proposed paragraph on oil, gas and coal exploration and extraction, which read:

> Minerals planning authorities should: (a) recognise the benefits of onshore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction.

This proposed paragraph subsequently became paragraph 209(a) of the revised version of the Framework published on 24 July 2018.

The claimant, a supporter of an organization known as 'Talk Fracking', sought judicial review challenging the lawfulness of paragraph 209(a). The claimant brought the case on four grounds:

First, that the defendant unlawfully failed to take into account material considerations, namely scientific and technical evidence, which had been produced following the adoption of a written ministerial statement by the Secretary of State for Energy and Climate Change and the defendant on 16 September 2015.

Second, and importantly for the purposes of climate change litigation, that the defendant failed, in publishing the policy in paragraph 209(a) of the Framework, to give effect to the Government's long-established policy in relation to the obligation to reduce greenhouse gas emissions under the Climate Change Act 2008.

Third, that in adopting paragraph 209(a) the defendant unlawfully failed to carry out a strategic environmental assessment. The issues raised in relation to

39 *Stephenson v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin).

this ground of challenge were essentially identical to those being addressed in *R* (*Friends of the Earth Ltd*) *v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 1540.

Fourth, and finally, the claimant argued that the defendant failed to carry out a lawful consultation exercise in relation to the revisions to the Framework which were published on 24 July 2018.

The High Court (Queen's Bench Division—Administrative Court) allowed the claim in part and held that the defendant had to take into account any considerations which were obviously material. A summary of the reasoning of Mr Justice Dove is as follows:

i. As to the consultation exercise the reasonable reader would have concluded that the contents and substance of paragraph 209(a) were matters which were within the scope of the consultation and about which the defendant was interested. However, in this case (applying familiar public law principles on a fair consultation) the consultation exercise was legally flawed because the defendant was not undertaking the consultation at a formative stage and had no intention of changing his mind about the substance of the revised policy.[40]

ii. In respect of the second ground, it was the claimant's case that Talk Fracking's scientific evidence as described in their consultation response was never in fact considered relevant or taken into account. The court held that that information clearly was material on the basis that it was capable of having a direct bearing upon a key element of the evidence base for the proposed policy and its relationship to climate change effects. The defendant, therefore, unlawfully left out of account obviously material considerations relevant to the decision which he had led the public to believe he was taking.[41]

iii. Finally, as to the Climate Change Act 2008 the CCG had put forward three tests which had to be met in order for shale gas extraction to be consistent with the requirements of the Climate Change Act 2008. The revisions to the NPPF had no bearing at all on the government's commitment to satisfying those three tests, which remained in place. The court emphasized that nothing in the revisions altered or diminished the requirement to meet those tests and the government's commitment to doing so. That ground of challenge was therefore unarguable, and permission was refused.[42]

40 [2019] EWHC 519 (Admin) para 58.

41 ibid paras 66–9.

42 ibid paras 70–3.

Here the High Court again emphasized, in ways which the Court of Appeal later would in *R* (*on the application of Plan B Earth*) *v Secretary of State for Transport* [2020] EWCA Civ 214, the importance of climate change considerations. The defendant had failed, in publishing the policy in paragraph 209(a) of the Framework, to give effect to the Government's long-established policy in relation to the obligation to reduce greenhouse gas emissions under the Climate Change Act 2008.

3 *HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government*[43]

This case concerned a surface mine. The claimant was a mining company who applied to quash a decision of the defendant, refusing planning permission for a surface mine for the extraction of coal. In this case, the local authority had resolved to grant permission, but the defendant had exercised his statutory power to make his own determination.

The High Court (Queen's Bench Division—Administrative Court) held that the Secretary of State for Housing Communities and Local Government had erred in refusing planning permission for a surface mine for the extraction of coal after giving very considerable weight to the adverse effects of the emission of greenhouse gases. In particular, the defendant had erred in his approach to the NPPF paragraph 149, and had given inadequate reasoning on the critical issue—which was how a proposal for coal required to meet the country's energy needs could be refused on the basis of the adverse impact of greenhouse gases, unless the gap was filled by renewables or low carbon sources.

The background to the case was that the NPPF paragraph 149 stated that:

> Permission should not be given for the extraction of coal unless the proposal is environmentally acceptable, or can be made so by planning conditions or obligations; or if not, it provides national, local or community benefits which clearly outweigh the likely impacts to justify the grant of planning permission.

In this case the defendant Secretary of State had concluded that the benefits of the proposal would not clearly outweigh the likely adverse impacts and determined that overall, the scheme would have an adverse effect on greenhouse gas emissions and climate change.

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43 *HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 (Admin).

The court considered the correct approach to adopt in respect of NPPF paragraph 149.[44] Paragraph 149 contained a two-stage test, but there was an issue about which benefits fell for consideration at stage 1, and the scope of 'national, local and community benefits' considered at stage 2. There were at least two ways of approaching the two-stage question:

i. The first was to consider, at stage 1, all that might be described as *'environmental'* impacts after allowing for mitigation achieved by conditions and agreements, before considering, at stage 2, all the adverse impacts as mitigated, environmental or not, and all the benefits, including any which had already been considered at stage 1.
ii. Alternatively, the two-stage question could be approached by applying the same approach at stage 1 before considering, at stage 2, only the residual balance of the adverse effects, as mitigated and after allowing for environmental benefits, then balancing that 'net harm' against the national, local or community benefits. Neither of these two approaches would be unlawful or misinterpret paragraph 149.

However, what mattered was that all the benefits and adverse effects were taken into account without double counting or discounting. In this case the defendant incorrectly submitted that he had taken the second approach, adopting the 'net harm', residual approach at stage 2. At stage 2, he had taken account again of all the environmental harm considered at stage 1. All the harm had been brought forward into the second stage. Further, he had ignored the biodiversity benefits in his overall conclusions, failing to carry them forward to the stage 2 exercise. Paragraph 149 did not permit all the harm to be considered at stage 2, with only part of the benefits.

A further point of interest from the case is that it was argued that the defendant had made a countervailing error in favour of the claimant, which cancelled out the biodiversity error, because he had taken account of irrelevant benefits to which he attached the same weight. In this case those benefits were a Community Infrastructure Levy obligation and an obligation under the Town and Country Planning Act 1990, section 106, as he would have attached to the biodiversity benefits. The court held that such benefits might not be accorded the same weight as a moderate biodiversity benefit.[45]

As to the correctness of the conclusion on the increase in greenhouse gas emissions—the defendant had explicitly accepted all of the inspector's conclusions, including that there was a need for coal to meet the UK's energy needs, and that the mine would result in savings in greenhouse gas emissions

44 [2018] EWHC 3141 (Admin) paras 21–49.

45 ibid paras 50–61.

compared to the burning of imported coal.[46] In light of those findings, the defendant should have explained how a proposal needed for the country's energy could be refused on the basis of the adverse impact of greenhouse gases, unless the gap was filled by renewables or low carbon sources. The decision letter had failed to provide adequate reasoning about that. For instance, the defendant had not expressed a view about how any need left unmet by those possibilities would be sourced, and how that affected the overall level of greenhouse gas emissions. His reasoning was wholly unclear and inadequate on a critical issue. There was no suggestion that the Secretary of State had disagreed that the proposal was consistent with the climate change policies in chapter 10 of the NPPF. Importantly, as a lesson for future decision-making the judgment highlighted that the defendant had identified no policy statement on reducing coal use or on increasing the use of renewables with which the proposal would be inconsistent.

The claimant argued that the defendant had acted inconsistently with previous decisions which had excluded the significance of greenhouse gases emitted by the burning of coal, without giving adequate reasons for doing so.[47] The court clarified that the deliberate adoption of a different approach from earlier decisions did not of itself call for specific reasoning. The cases in question were not indistinguishable on a critical issue; they were distinguishable by reference to the arguments raised and addressed, and by the passage of time.

The case emphasizes two important points for future cases: (1) that clear reasoning is required by decision-makers where decisions are made in favour of renewables; and (2) that it will not be enough for a claimant to argue that a defendant has acted inconsistently with a previous decision. The clarification of this point is important as decision-makers increasingly make decisions with climate change in mind, which may not hitherto have been a central consideration.

B *Energy Cases*

Another important area of the law where issues touching on climate change arise relates to energy cases. The examples discussed are *R.* (*on the application of McLennan*) *v Medway Council*; *Sustainable Shetland v Scottish Minister* and *North Cote Farms Ltd v Secretary of State for Communities and Local Government*. The cases, as will be outlined below, in their own way demonstrate the ways in which climate change can be a consideration even in local cases.

46 ibid paras 93–108.

47 ibid para 121.

1 *R* (*on the application of McLennan*) *v Medway Council*[48]

This case concerns solar panels. The claimant, a homeowner, applied for judicial review of his local authority's decision to grant his next-door neighbour planning permission for an extension. In summary, in September 2018, the claimant's neighbour applied to Medway Council for planning permission for the construction of a substantial extension. The claimant objected on the ground that the proposed development would block the sun, and adversely affect his ability to generate electricity from his solar panels. The court ruled that a local planning board had erred in granting a development permit without considering whether the proposed project would in fact affect the neighbour's ability to generate electricity.

The essential point was that both the local plan and, more recently and much more particularly, the NPPF recognized the positive contribution that could be made to resisting climate change by even small-scale renewable energy schemes. The effect that a development proposal might have on a renewable energy system such as the solar panels on an individual's residential property was a material planning consideration that local authorities had to take into account in deciding whether to grant planning permission. That conclusion was based on the part solar panels played in addressing issues of climate change, however modestly on an individual scale.

For this and other cases it is helpful to note that the court commented that the Planning and Compulsory Purchase Act 2004, section 19(1A)[49] and the NPPF demonstrated that mitigation of climate change was a legitimate planning consideration. The fact that they spoke in broad terms did not mean that their message vanished at the very point where consideration had to be given to a specific proposal, nor did the fact that they related to new rather than existing development. It followed that the local authority's conclusion that any interference with the claimant's solar panels involved a purely private interest that did not require protection in the public interest could not stand. That conclusion failed to appreciate that interference with the solar panels was a material planning consideration by reason of the part they played in addressing issues of climate change. Although the panels were for a single domestic use, on an individual scale, they made a contribution to the reduction in reliance on non-renewable energy. The grant of planning permission to the neighbour was therefore quashed.

48 *R* (*on the application of McLennan*) *v Medway Council* [2019] EWHC 1738 (Admin).

49 '(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.'

There are other cases which demonstrate the interaction between energy cases and climate change, picking just two more examples.

2 *Sustainable Shetland v Scottish Ministers and Others*[50]

In this case the appellant appealed against a ruling upholding a decision of the respondent Scottish Ministers[51] to give consent for the construction of a wind farm in the Shetland Islands.[52] The Supreme Court held that the Scottish Ministers had not erred in their approach to the likely effect on the whimbrel, a protected migratory wading bird. The letter granting consent stated that the ministers had had regard to 'their obligations under EU environmental legislation' and to 'the potential for impact on the environment, in particular on species of wild birds'. The ministers stated that they were not satisfied that the development would have a significant effect on whimbrel. They considered that the potential beneficial effects of the Habitat Management Plan could reasonably be expected to provide some counterbalancing positive benefits and that, in any event:

> the level of impact on the conservation status of the whimbrel [was] outweighed by the benefits of the project, including the very substantial renewable energy generation the development would bring and the support this offer[ed] to tackling climate change and meeting EU Climate Change Targets.

The issues were (i) the role of the ministers in considering a proposal of this kind; (ii) whether the ministers had complied with their obligations under Directive 2009/147 Article 4(2). The appellant had alleged that they should have appreciated that the mainland territory of the Shetland Islands now appeared to be the most suitable territory for classification as a *'special protection area'* under Article 4(2), and that they should have considered what further *'special conservation measures'* were required, for example the closing down of the wind farm during whimbrel migratory or breeding months; (iii) whether the

50 *Sustainable Shetland v Scottish Ministers and others* [2015] UKSC 4.

51 'The Scottish Ministers' is the collective term used in the Scotland Act 1998 for the members of the Scottish Executive who exercise statutory functions.

52 The decision at issue was that of the Scottish Ministers, dated 4 April 2012, which granted consent to Viking Energy Partnership under the Electricity Act 1989, s 36, for the construction and operation of the Viking Wind Farm on central Shetland, and a direction under the Town and Country Planning (Scotland) Act 1997, s 57(2), that planning permission be deemed to be granted in respect of the generating station and any ancillary developments.

ministers had erred when relying on the *'balancing'* factors referred to, such as tackling climate change.

The appeal was dismissed. The court held that the ministers' functions in this case derived, not from the Directive, but from their statutory duty to consider a proposal for development under the Electricity Act 1989. Their duty was to determine whether to grant consent to a particular development proposal, taking account of all material considerations, one of which was the Directive.[53]

Second, the specific obligations under Article 4(2) of the Directive had not been raised by anyone, whether expert bodies or others, in the representations on the proposal. The court held that the ministers were entitled to regard the limited anticipated impact on the whimbrel population, combined with the prospect of the Habitat Management Plan achieving some improvement to their conservation status more generally, as a sufficient answer to the objections under this head.[54] Finally, the balancing factors referred to represented a *'fall-back position'* which would only come into play if the ministers' primary reasoning was not accepted, and it had been.[55]

3 *North Cote Farms Ltd v Secretary of State for Communities and Local Government*[56]

Finally, a further example of climate change considerations clashing with other considerations. There are many such cases. In this case the applicant applied to quash a decision of the Secretary of State, by his planning inspector, to uphold the refusal of planning permission for a wind turbine. The High Court held that a planning inspector had been entitled to uphold the refusal of planning permission for a wind turbine in the vicinity of a Grade II listed building which was a designated heritage asset.[57] That decision was not vitiated by the fact that she had not expressly addressed section 38(6) of the Planning and

53 [2015] UKSC 4, paras 30–2.

54 ibid paras 33–6.

55 ibid paras 37–8.

56 *North Cote Farms Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 292 (Admin).

57 [2015] EWHC 292 (Admin) para 64. For those readers not familiar with listed buildings in the United Kingdom, a building is listed when it is of special architectural or historic interest considered to be of national importance and therefore worth protecting. Listed buildings come in three categories of 'significance': (i) Grade I for buildings of the highest significance; (ii) Grade II*; and (iii) Grade II. Further details are available at Historic England, 'Living in a Grade I, Grade II* or Grade II Listed Building' <https://historicengland.org.uk/advice/your-home/owning-historic-property/listed-building/> accessed 29 May 2020.

Compulsory Purchase Act 2004 or made any express finding as to whether the proposal was in accordance with the development plan.

In this case planning permission was refused because of the effect on the setting of the building and the local planning authority held that the identified harm to heritage assets was not outweighed by the benefits associated with renewable energy development; therefore, the application was contrary to policy EC5 of the draft local plan concerning the development of the energy sector.[58]

The above cases demonstrate the increasing manner in which climate change is a relevant consideration in the energy context.

C *Criminal Cases*

The activities of organizations such as Greenpeace and Extinction Rebellion have led to criminal law cases where climate change activism has been used as a defence for criminal activity.

Criminal cases are dealt with briefly. However, it is worth keeping these cases in mind, as there may be judicial comments with possible wider application. These criminal cases, are (for example) where environmental protesters rely on public duty defences, in relation to guilt/innocence or sentence. In *R v Roberts*[59] the court commented on the appropriate sentence level, in that case the appellants were climate change activists. Further, hundreds of prosecutions were abandoned in November 2019 after a successful judicial review challenge to police powers—*R* (*on the application of Jones, and others*) *v Commissioner of Police of the Metropolis*[60] . Both of these cases are outlined below.

The intersection between the criminal law and climate change activism is not new. The *Kingsnorth Six Trial* (Maidstone Crown Court—October 2007).[61] Six Greenpeace climate change activists were cleared of causing £30,000 of

58 [2015] EWHC 292 (Admin) para 56: 'In paragraph 2.4 of its statement of case the Claimant referred to draft policy EC5 and stated that it was being afforded significant weight'. In this decision, weight was being placed on the draft plan because the plan which was in place, and part of the local development plan, was out of date at that time (1997). Policy EC5 was more favourable to a developer and stated that a proposal would be supported where any significant adverse impacts were satisfactorily minimized and the residual harm outweighed by the public benefits of the proposal.

59 *R v Roberts* [2018] EWCA Crim 2739.

60 *R* (*on the application of Jones, and others*) *v Commissioner of Police of the Metropolis* [2019] EWHC 2957 (Admin), discussed further below.

61 J Vidal, 'Not guilty: the Greenpeace activists who used climate change as a legal defence' *The Guardian* (11 September 2008) <www.theguardian.com/environment/2008/sep/11/activists.kingsnorthclimatecamp> accessed 26 April 2020.

criminal damage at a coal-fired power station. They painted 'Gordon'[62] on the side of the tower and occupied it for 30 hours in an attempt to shut down the power station. They argued that they believed that by causing (over £30,000) damage to the Kingsnorth power station they would protect other property globally from the effects of climate change caused by carbon dioxide emissions from such coal-fired power stations. On 10 September 2008, the jury at Maidstone Crown Court accepted the defendants' defence of 'lawful excuse' and they cleared the six by a majority verdict. Consequently, they were all acquitted of charges of criminal damage. It was the first case in which preventing property damage caused by climate change had been used as part of a 'lawful excuse' defence in court. As the rise of climate activism continues such defences may become more common.

Similarly, in November 2019 Extinction Rebellion (XR) protester Angela Ditchfield was acquitted of a criminal damage charge that arose when she sprayed graffiti on a Shire Hall wall in Cambridge—spray-painting of the XR logo and 'RIP??' just to the side of the main door at Shire Hall on December 15, 2018. Ms Ditchfield gave evidence that she had tried to persuade local councils to act to prevent climate change for many years through peaceful actions including standing for the Green Party, and arranging meetings. She said that the council continued to promote unsustainable economic growth and pursue destructive policies.

In acquitting Ms Ditchfield the Magistrates said:

> We find that you have a very strong and honestly held belief that we are facing a climate emergency, and that you acted on the spur of moment to protect land and homes under threat from climate change, believing that immediate protection was necessary, and the action could be said to have been taken to protect property, and that you believed action chosen was reasonable in all circumstances. We applied the four-part test in the Jones' decision and we find you not guilty.[63]

Cases like that of Ms Ditchfield demonstrate the increasing importance of the criminal law in climate change activism. Two further examples are provided below.

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62 The then UK Prime Minister, Gordon Brown.

63 M Scialom, ' "We find you not guilty": XR protester cleared of criminal damage charge' *The Cambridge Independent* (31 October 2019) <www.cambridgeindependent.co.uk/news/we-find-you-not-guilty-xr-protester-cleared-of-criminal-damage-charge-9087961/> accessed 26 April 2020.

1 *R v Roberts and Others*[64]

The appellants had been protesting against an authorization which had been granted to an oil and gas exploration company to begin fracking at a site near Blackpool. For between 2½ and 3½ days the appellants sat on top of the lorries which had been delivering equipment to the site. The result of their actions was that one of the road carriageways was blocked and substantial disruption was caused to thousands of people. The first two appellants were sentenced to 16 months imprisonment, and the third was sentenced to 15 months imprisonment.

On appeal the appellants argued that an immediate custodial sentence was never appropriate for a non-violent crime committed as part of a peaceful protest and that such a sentence would breach Article 10 of the European Convention on Human Rights.[65] The court was unable to accept that submission as a matter of principle. The court held that there was a wide range of offences that may be committed in the course of peaceful protest of differing seriousness; and within the offending very different levels of harm may be suffered by individuals or groups of individuals. Lord Burnett of Maldon, Lord Chief Justice of England and Wales, held that:

> The motivation of an offender can go to increase or diminish culpability. It forms no part of a court's function to adjudicate, even sub silentio, on the merits of controversial issues but it is well established that committing crimes, at least non-violent crimes, in the course of peaceful protest does not generally impute high levels of culpability.[66]

The court continued: '[w]hen sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing'.[67]

The court stated that a community sentence, with a punitive element involving work (or perhaps a curfew) would have met the justice of the cases.[68] However, despite this conclusion, by the time the appeals came on for hearing, the defendants had spent three weeks in custody, the equivalent of serving a sentence of six weeks. In those circumstances, the court concluded that it would not be appropriate at that stage to impose a community order with a punitive element. The time in custody represented adequate punishment.[69]

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64 [2018] EWCA Crim 2739.

65 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10; [2018] EWCA Crim 2739, para 31.

66 [2018] EWCA Crim 2739, para 32.

67 [2018] EWCA Crim 2739, para 34.

68 [2018] EWCA Crim 2739, para 52.

69 [2018] EWCA Crim 2739, para 54.

2 *R (on the application of Jones, and others) v Commissioner of Police of the Metropolis*[70]

In 2019 in London the Extinction Rebellion Autumn Uprising took place at multiple sites in London between 7 and 19 October 2019—this involved gatherings of protestors engaging in 'disruptive actions'.

On 14 October 2019 a superintendent in the Metropolitan Police Service,[71] acting in purported exercise of the power conferred on 'the senior police officer' by section 14(1) of the Public Order Act 1986, decided to impose a condition on the event by requiring any assembly linked to it within the Metropolitan and City of London police areas to cease by 9pm that day. This decision was made on the basis that the event was a 'public assembly' that might 'result in serious disruption to the life of the community'. The claimants, various supporters of the event, sought judicial review of the condition on the ground that the event was not a 'public assembly' to which section 14 applied.

The court allowed the claim and held that sections 14 and 16 of the Public Order Act 1986, applied to a particular location to which the public or any section of the public had access, which was wholly or partly open to the air, and which could fairly be described as a scene. Separate gatherings, separated both in time and by many miles, even if co-ordinated under the umbrella of one body, were not one 'public assembly' within the meaning of section 14(1) of the Public Order Act 1986. The Extinction Rebellion Autumn Uprising intended to be held from 14 to 19 October 2019 was therefore not a public assembly.[72]

The case emphasizes the importance of how government, and enforcement agencies, should address protesters in a proportionate and lawful way.

IV Concluding Remarks

Globally there is a move to tackle climate change through litigation. This is also the position in the UK. In the coming months and years this type of litigation is poised to break new ground. Through a multi-pronged approach to climate change litigation, companies and governments may be encouraged (or even compelled) to reinvent themselves.

Courts and lawyers should demonstrate a willingness to consider these issues in new and creative ways. To paraphrase, in the context of climate

70 [2019] EWHC 2957 (Admin).

71 The decision of Superintendent Duncan McMillan to impose a condition on the 'Extinction Rebellion Autumn Uprising' (XRAU) on Monday 14 October 2019.

72 [2019] EWHC 2957 (Admin) paras 72–7.

change, with some honourable exceptions, our responses are too few, too little, and too late.[73] We can hope some of our legal responses might come just in time.

73 KA Annan, *'We the Peoples': The Role of the United Nations in the 21st Century* (United Nations 2000).

CHAPTER 5

Climate Change Litigation in India and Pakistan: Analyzing Opportunities and Challenges

*Birsha Ohdedar**

1 Introduction

In 2018, the case of *Asghar Leghari v Pakistan*[1] put a global spotlight on South Asia as a leading region for climate change litigation. In *Leghari,* an agriculturalist brought a petition for the enforcement of his fundamental rights demanding that the Government of Pakistan take more action on climate change. Judge Shah in the Lahore High Court (a judge with a pro-environment record both as a judge and lawyer) ordered the establishment of a committee to begin the operationalization of Pakistan's climate policies.[2] The order carefully weaved together human rights, climate change adaptation and justice. The courts in Pakistan and India are often identified for their climate change litigation potential because of a history of public interest litigation and a reputation for an 'activist' judiciary.[3] Not long after *Leghari*, similar new petitions were filed in both Pakistan and India.[4] Thus, both jurisdictions are now of interest

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1 *Asghar Leghari v Federation of Pakistan,* Writ Petition 22501/2015, Lahore High Court, judgment of 25 January 2018.

2 B Shah, 'Shah's Revolution' *Newsweek Pakistan* (25 September 2016) <http://www.newsweekpakistan.com/revolutionary-justice/> accessed 1 April 2020.

3 See, for example, J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679; J Setzer and L Benjamin, 'Climate Change Litigation in the Global South: Filling in Gaps' (2020) 114 AJIL Unbound 56; J Lin, 'Litigating Climate Change in Asia' (2014) 4 Climate Law 140.

4 *Ridhima Pandey v Union of India,* Application No 187/2017, National Green Tribunal. Petition available from: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-___-of-2017_petition.pdf> accessed 22 April 2020; *Rabab Ali v Federation of Pakistan & Another* (Petition filed at Supreme Court, April 2016) petition available from: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160401_Constitutional-Petition-No.-___-I-of-2016_petition-1.pdf> accessed 22 April 2020.

to academics, lawyers and activists tracking and analyzing the expansion of climate change litigation around the world.

This chapter analyzes climate change litigation in India and Pakistan and the opportunities and challenges that exist going forward. It traces the limited case law that has developed to date expressly incorporating climate considerations. The chapter analyzes the development of litigation with reference to broader socio-political dimensions of litigation, environment and climate change in the region.

The chapter goes on to analyze a broader sphere of 'litigation in the context of climate change',[5] rather than only what is generally defined as 'climate change litigation'.[6] This includes litigation that brings forward issues that deal with mitigation and adaptation but do not necessarily use climate language. Indeed, a rich jurisprudence has developed where litigation has partially been successful in linking issues of rights, livelihoods, ecology and justice. Tracing this jurisprudence provides a broader understanding of litigation on climate change in the region.

While legal commentators have identified the region for its climate change litigation potential, this is often discussed in a decontextualized manner.[7] Much of the literature is comparative, or solely focuses on the *Leghari* judgment as a standalone leading case.[8] Authors have often claimed a strong potential for climate change litigation in the region, drawing upon the legacy of the courts. While this may be true, as will be argued, the picture is slightly more complex and nuanced. The politics of climate change, discourse around climate change, the politics of the court, as well as developments in different

5 K Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 Journal of Environmental Law 483, 485.

6 To be clear, 'climate change litigation' in this article is defined as cases that have a clear climate component in their language or reasoning. These may include cases where climate change appears as a 'core' or 'peripheral' concern. This can be contrasted with many of the cases discussed in Section IV that go beyond 'climate change litigation'.

7 See, for example, Peel and Lin (n 3); Setzer and Benjamin (n 3); Lin (n 3); LJ Kotzé and A du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' Journal of Environmental Law and Litigation (forthcoming); E Barritt and B Sediti, 'The Symbolic Value of *Leghari v Federation of Pakistan:* Climate Change Adjudication in the Global South' (2019) 30 King's Law Journal 203.

8 Some exceptions are: S Ghosh, 'Litigating Climate Claims in India' (2020) 114 AJIL Unbound 45; E Pluchon, 'Leading from the Bench: The Role of Judges in Advancing Climate Justice and Lessons from South Asia' in T Jafry, M Mikulewicz and K Helwig (eds), *Routledge Handbook of Climate Justice* (Routledge 2018); P Hassan, 'Judicial Commissions and Climate Justice in Pakistan' (Asia Pacific Judicial Colloquium on Climate Change, Lahore, 26-27 February) <https://bit.ly/31kCkfz> accessed 20 March 2020.

types of litigation, are also important in explaining the opportunities and challenges for climate change litigation in Pakistan and India. Ultimately, through understanding this context we can assess how future litigation can enact and implement substantive change. The lessons drawn in this chapter are also relevant to the growing literature on climate change litigation in the Global South where similar challenges are faced.

This chapter has four substantive sections. Section II discusses the background to climate change and the courts in the region. Section III examines recent 'climate change litigation' analyzing litigation that concerns 'climate-specific' policies and litigation that attempts to enforce existing environmental laws and policies. This section also highlights climate change litigation that is potentially hazardous from a broader justice perspective because of a narrow climate framing. Section IV examines litigation 'in the context of' climate change, highlighting how the courts have been dealing with climate issues, often without climate language. Finally, Section V analyzes the challenges and opportunities for future climate change litigation in the region.

II Background: Climate and the Courts in India and Pakistan

A *Contextualizing Climate Change*

At the international level, Pakistan and India have traditionally taken a stance that climate change is an issue for developed countries who need to mitigate their emissions and provide financial and technical support for adaptation.[9] The position is based on notions of climate justice and equity. For example, India played a leading role in framing differential treatment under the climate regime, anchoring the principle of common but differentiated responsibility and respective capabilities into the UN Framework Convention on Climate Change.[10] This position has slightly shifted over time. But, by and large, both

9 Both countries are part of the 'Like Minded Developing Countries' negotiating bloc, who are identified for key negotiating positions based on mitigation based on historic responsibility and the provision of finance and technology transfer to developing countries. See L Blaxekjær and TD Nielsen, 'Mapping the Narrative Positions of New Political Groups in the UNFCCC' (IECGN Amsterdam Conference, 20 November 2014) 10–11 <https://www.indiaeu-climategovernance.org/Reports/Blaxekjaer-and-Nielsen-_IECGN_-Mapping-the-narrative-positions-of-new-political-groups-under-the-UNFCCC.pdf> accessed 16 June 2020.

10 S Sengupta, 'India's Engagement in Global Climate Negotiations from Rio to Paris' in NK Dubash (ed), *India in a Warming World: Integrating Climate Change and Development* (OUP 2019) 116–19.

countries maintain policy positions that conserve a (carbon-intensive) development space and ensure that the obligations imposed on developing countries like itself are kept at a minimum.[11]

Nevertheless, both countries have significant mitigation and adaptation concerns. Pakistan, for example, faces energy deficits, poverty and developmental challenges.[12] It has set itself a vision of becoming an upper-middle-income country by 2025 and being among the ten largest economies in the world by 2047.[13] At the same time, Pakistan has to contend with being one of the most climate-vulnerable countries in the world.[14]

The international context explains the slow development of climate-specific law and policy in Pakistan and India. Domestically, climate change has often been viewed as an issue of foreign policy concern. Hence, for most of the last three decades, the public discussion in India was limited and focused on *whether* to engage on climate change.[15] Given the international climate justice arguments, India's civil society has been sympathetic to the Government's international position. At the same time civil society has found it difficult to 'scale back' claims of climate justice to the local level.[16] In other words, the discourse on climate change, among civil society activists and NGOs, has remained at this international level. Articulating local concerns around developmental and environmental challenges like education, health, access to water and sanitation, in the language of climate change has not been

11 ibid 118.

12 According to the UNDP, 38 per cent of the population of Pakistan experience Multidimensional Poverty, see United Nations Development Programme and Oxford Poverty & Human Development Initiative, 'Multidimensional Poverty in Pakistan' (2016) xi <https://www.pk.undp.org/content/pakistan/en/home/library/development_policy/Multidimensional-Poverty-in-Pakistan.html> accessed 16 June 2020. On Pakistan's energy shortages, see M Mujahid Rafique and S Rehman, 'National Energy Scenario of Pakistan – Current Status, Future Alternatives, and Institutional Infrastructure: An Overview' (2017) 69 Renewable and Sustainable Energy Reviews 156.

13 Ministry of Planning, Development and Reform, 'Pakistan 2025: One Nation- One Vision' (Government of Pakistan) <http://fics.seecs.edu.pk/Vision/Vision-2025/Pakistan-Vision-2025.pdf> accessed 12 April 2020.

14 For example, a study of countries most affected by climate risks between 1994–2013 found Pakistan in the 10 most climate affected countries in the world. See S Kreft and others, *Global Climate Risk Index 2015 Who Suffers Most From Extreme Weather Events? Weather-Related Loss Events in 2013 and 1994 to 2013* (Germanwatch Nord-Süd Initiative eV 2014).

15 NK Dubash, 'An Introduction to India's Evolving Climate Change Debate' in NK Dubash (ed), *India in a Warming World: Integrating Climate Change and Development* (OUP 2019) 23.

16 Sengupta (n 10) 133; S Fisher, 'The Emerging Geographies of Climate Justice' (2015) 181 The Geographical Journal 73, 79–80.

forthcoming.[17] For example, in India, large-scale activism on issues such as big dams and deforestation were framed as social justice or environmental justice issues without bringing in the links to climate change and climate justice. This context foregrounds the discussion of climate change litigation in this chapter. Overall, there has not been widespread engagement with 'climate change' by civil society activists at the local level, even if they are dealing with its associated social and environmental impacts.

B *The Role of the Courts in Environmental and Rights-based Litigation*

Despite expressly 'climate change-related' activism being limited at the local level, India and Pakistan have a history of using the judiciary for environmental rights-based claims more broadly. Commentators have identified Pakistan and India as jurisdictions with strong potential for future climate change litigation, based on a history of progressive judgments that have borne from public-interest litigation (PIL).[18] Rajamani and Ghosh state that India had an 'engaged and proactive civil society, an activist judiciary, a progressive body of enviro-legal jurisprudence and an unparalleled culture of public interest litigation' that meant it was ripe for climate change litigation.[19] Similarly, Lin states that it is 'perhaps just a matter of time before climate change becomes a subject of litigation in the Indian courts'.[20] Setzer and Benjamin note that in Pakistan, 'dynamic judicial and legislative interactions illustrate new opportunities for advancing climate action in highly vulnerable countries'.[21]

With the growth of climate change litigation in recent years, there has been an emerging interest in the Global South for rights-based climate change litigation.[22] Commentators have also identified the judiciary as being uniquely positioned to link climate change with human rights. Peel and Lin, in their analysis of climate change litigation in the Global South, argue that India and Pakistan have progressive judiciary that generates judgments that protect the rights of

17 P Swarnakar, 'Climate Change, Civil Society, and Social Movement in India' in NK Dubash (ed), *India in a Warming World: Integrating Climate Change and Development* (OUP 2019) 254.

18 Lin (n 3); Pluchon (n 8); J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37, 52–3.

19 L Rajamani and S Ghosh, 'India' in Richard Lord and others (eds), *Climate Change Liability: Transnational Law and Practice* (CUP 2011) 176.

20 Lin (n 3) 142.

21 Setzer and Benjamin (n 3) 59.

22 See, for example, Peel and Lin (n 3); Setzer and Benjamin (n 3); J Setzer and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 Wiley Interdisciplinary Reviews: Climate Change e580, 5.

vulnerable social groups and the environment.[23] Pluchon writes that 'judges in South Asia have responded courageously, clear-eyed in the view they can and must play a crucial role in advancing environmental rights and climate justice'.[24] However, to assess such potential, it is important to first analyze the historic and contemporary context of environmental and rights-based litigation and the judiciary in India and Pakistan.

A major reason for the growth of rights-based litigation has been public interest litigation ('PIL'). PIL brought forward several technical and procedural flexibilities. Standing rules were transformed to allow for claims to be brought on behalf of a public grievance, and to allow any person, acting bona fide, to advance claims of human rights violations on behalf of victims who could not do so themselves as a result of their poverty, disability or socially or economically disadvantaged positions.[25] From an environmental justice and rights perspective, this allowed petitioners (such as civil society activists) to bring forward cases on behalf of communities affected by environmental harm, or to address a general environmental justice grievance. At its core, the relaxation of standing rules allowed for petitions on 'public interest' grounds, giving rise to PIL.

The courts have also expanded their mandate, allowing for the appointment of fact-finding commissions and experts, transforming the judiciary's role in PILs from adversarial to investigatory. The use of the doctrine of *continuous mandamus*, where the court leaves cases open for long periods has also been important in the growth of rights-based environment cases, allowing for the courts to issue multiple orders over time to oversee the implementation of rights.[26]

Accordingly, judicial flexibilities and techniques have given rise to a rich and unique jurisprudence on environmental, development and human rights issues. In both countries, the judiciary has expanded the constitutional right

23 Peel and Lin (n 3) 706.

24 Pluchon (n 8) 139.

25 For example, in Pakistan, the foundations of PIL are based on art 199(1) of the 1973 Constitution that allows a High Court to hear cases regarding the 'enforcement of any Fundamental Right' if satisfied that there is 'no other adequate remedy provided by law' on the application of 'any aggrieved person'. For a more complete discussion, see MS Khan, 'Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization' (2014) 28 Temple International and Competition Law Journal 285, 298–9. Similarly, art 226 of the Indian Constitution (for the High Court) and art 32 (for the Supreme Court).

26 J Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004) 190–8.

to life to produce new derivative rights to water, food and a healthy environment.[27] The judiciary has also incorporated core principles of international environmental law into its jurisprudence, for example, the polluter pays, sustainable development, and the precautionary principle.[28]

Moreover, green courts and benches play an increasing role: a National Green Tribunal (NGT) was established in India in 2010 and environmental tribunals have existed in Pakistan since 1999. To be clear, in this chapter, references to courts and judiciary include the role of the tribunals and their members.

C *The Complex Legacy and State of the Judiciary*

PIL has historically been lauded as a pillar of hope, protecting the rights of the poor and radically shifting the relationship between citizen and State.[29] However, today, the reputation of the judiciary on issues of environmental and social justice is mixed. Particularly in India, there has been a well-established critique of the judiciary's approach over the last twenty years.[30] While examining these in detail is beyond the scope of this chapter, a few short points are important to contextualize the role of the judiciary in recent times.

First, there is a critique of an 'activist' judiciary and the over extension of powers that are normally reserved for democratically elected governments.[31] Second, in India, commentators have noted how the judiciary's rulings have reflected the broader neoliberal ideologies of the State since the 1990s.[32] Thus,

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27 See ibid 94–122.

28 In India, see *Indian Council for Enviro-legal Action v Union of India and Others* (1996) 3 SCC 212 (polluter pays principle) and *Vellore Citizens Welfare Forum* (1996) 5 SCC 647 (sustainable development and precautionary principle). In Pakistan, see *Shehla Zia v WAPDA, Pakistan* PLD 1994 SC 693 (sustainable development and precautionary principle). The polluter pays principle has not been incorporated to the same extent in Pakistan. There are only a few cases that expressly refer to the principle such as: *Mohammad Ayaz v Government of Punjab* (2017) CLD 772, where the Lahore High Court made reference to it. For a more complete discussion on the incorporation of principles of international environmental law into the jurisprudence of India and Pakistan see ibid 317–69; Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan 2019).

29 M Suresh and S Narrain, 'Introduction' in M Suresh and S Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-liberal India* (Orient BlackSwan 2014).

30 See, for example, B Rajagopal, 'Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 8 Human Rights Review 157; M Suresh and S Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India* (Orient BlackSwan 2014).

31 See, for example, A Bhuwania, *Courting the People: Public Interest Litigation and Political Society in Post-Emergency India* (CUP 2017).

32 See, for example, P Bhushan, 'Supreme Court and PIL' (2004) 39 Economic & Political Weekly 1770; Suresh and Narrain (n 30).

the court has often issued judgments that protect 'economic development' over the rights of the poor and marginalized. For example, in the *Narmada*[33] judgment, the rights of local people were seen as a 'justifiable sacrifice' for the development of a large hydropower dam.[34] In other cases, the courts have utilized the justification of 'protecting the environment' to demolish slums and render people homeless, based on the 'unhygienic' conditions, such as poor drainage infrastructure (that was never provided by the State).[35] Third, the implementation of judicial orders is an ongoing issue that has weakened the judiciary. As Singh highlights, in India, while there may be 'consensus on the legitimacy of judicial activism' the judiciary neither has 'the purse nor the sword' and 'remains the weakest wing of the government'.[36] With a well-documented apathetic attitude towards implementation of environmental law, the role of the petitioner does not end with filing the petitions and getting the decision in their favour, rather there is a responsibility to keep monitoring the implementation of the judicial decision.[37] Indeed, it means there can be a continuous back and forth with the judiciary to try to implement an order.

Finally, it is important to keep in mind the changing political context that the judiciary operates in, including its relationship with the executive. In Pakistan, the executive and judiciary have had a long fraught relationship, given periods of military dictatorship. Environmental tribunals in Pakistan have suffered from long periods of not operating, due to vacancies, interference and other bureaucratic impairments.[38] In India, in recent years the central government has interfered with both the NGT and the Supreme Court impacting

33 *Narmada Bachao Andolan v Union of India and Others* (2000) 10 SCC 664 (Supreme Court of India).

34 B Rajagopal, 'The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India' (2005) 18 Leiden Journal of International Law 345, 376–8.

35 A Baviskar, 'The Politics of the City' (*Seminar*, 2002) <http://www.india-seminar.com/2002/516/516%20amita%20baviskar.htm> accessed 2 April 2018; R Véron, 'Remaking Urban Environments: The Political Ecology of Air Pollution in Delhi' (2006) 38 Environment and Planning 2093.

36 P Singh, 'Promises and Perlis of Public Interest Litigation in India' (2010) 52 Journal of the Indian Law Institute 172, 184.

37 G Sahu, 'Implementation of Environmental Judgements in Context: A Comparative Analysis of Dahanu Thermal Power Plant Pollution Case in Maharashtra and Vellore Leather Industrial Pollution Case in Tamil Nadu' (2010) 6 Law Environment and Development Journal 335, 340.

38 M Lau, 'The Role of Environmental Tribunals in Pakistan: Challenges and Prospects' [2019] Yearbook of Islamic and Middle Eastern Law Online 1, 17.

its independence and functioning.[39] Accordingly, many prominent lawyers, commentators and even former-judges, have questioned recent actions of the Supreme Court and the NGT and whether they can still effectively take action against the unbridled powers of the State.[40]

III Climate Change Litigation in Pakistan and India

A *Litigating Climate Policy through the Courts*

The traditional 'international' framing of climate issues, referred to earlier, has meant a very slow development of climate-specific laws and policies. Climate-specific laws and policies are a nascent area in both India and Pakistan. In India, the main climate policy at a national level is the National Action Plan on Climate Change (NAPCC).[41] The NAPCC puts forward a 'co-benefits' approach to addressing climate change. A co-benefits approach, under the NAPCC, is to take 'measures that promote our development objectives while also yielding co-benefits for addressing climate change effectively'.[42] In other words, maintain a space for climate action, while not sacrificing India's position of being able to pursue (carbon-intensive) economic development. Nevertheless, the development and implementation of climate policy has been slow, particularly at the sub-national (state) level in India.[43] Nor has there been climate-specific legislation enacted in India.

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39 On the executive interference and functioning of the NGT, see G Sahu, 'Ecocide by Design? Under Modi, Vacancies At National Green Tribunal Reach 70%' (*The Wire*, 15 February 2018) <https://thewire.in/featured/ngt-political-apathy-vacancies> accessed 25 May 2019; GN Gill, 'Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?' [2018] Asian Journal of Law and Society 1. On the Supreme Court, see AP Kumar, 'A Decade of Decay' (2020) 55 Economic & Political Weekly.

40 Kumar (n 39); K Thapar, 'Justice Lokur: 'SC Not Fulfilling Its Constitutional Role Adequately, Needs to Introspect' (*The Wire*, 30 April 2020) <https://thewire.in/law/justice-lokur-sc-not-fulfilling-its-constitutional-role-adequately-needs-to-introspect> accessed 4 May 2020; P Bhushan, 'The Supreme Court Is Locked Down and Justice Is in "Emergency" Care' (*The Wire*, 28 April 2020) <https://thewire.in/law/lockdown-supreme-court-justice> accessed 4 May 2020.

41 Government of India, 'National Action Plan on Climate Change' (Prime Minister's Council on Climate Change 2008).

42 ibid 2.

43 Oxford Policy Management, 'India's State Action Plans on Climate Change: Towards Meaningful Action' (2015) <http://www.opml.co.uk/sites/default/files/india_state_action_plans_climate_change.pdf> accessed 12 April 2018.

In *Gaurav Bansal,*[44] the NGT in India was petitioned to act against state and central governments over the lack of implementation of climate policies. The government argued that as climate change was the subject of international conventions, it does not lie within the ambit of the NGT. However, the NGT held that it was within its ambit to scrutinize national climate policies. States that did not yet have action plans on climate change were ordered to expedite the drafting of such plans. The NGT also confirmed it could hear petitions that concerned specific violations of the national or state action plans on climate change.

Accordingly, India's main climate-specific policy instruments were justiciable, providing an avenue for future climate change litigation. This led to *Mahendra Pandey*,[45] where the Government of Delhi had not enacted a state action plan on climate change. The NGT disposed of the matter once an action plan was submitted. As Ghosh remarks, although the NGT did not play a role in the formulation of the Government of Delhi's plan, its interventions 'expedited' the matter.[46]

In Pakistan, the main climate-specific policy is the National Climate Change Policy 2012.[47] The federal government also released a Framework for the Implementation of Climate Change Policy in 2013, to institutionalize and operationalize climate policy.[48] This policy development led to the most significant case in South Asia regarding climate change, to date: *Asghar Leghari v Federation of Pakistan*.[49] In *Leghari*, the petitioner, a farmer, took the Government of Pakistan to the Lahore High Court over failing to implement its national climate policy. The petitioner submitted that climate change posed an 'immediate and serious threat' to his fundamental rights.[50] The petition drew attention to the government's inaction of implementing adequate adaptation measures in accordance with the Framework of Implementation of Climate Change Policy. The petitioner asserted a breach of fundamental rights under Article 9 (the right to life) and Article 14 (the right to dignity).

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44 *Gaurav Bansal v Union of India,* Application No 498/2014, National Green Tribunal (23 July, 2015).

45 *Mahendra Pandey v Union of India*, Application No 470/2016, National Green Tribunal (2 January 2019).

46 Ghosh (n 8) 47.

47 Ministry of Climate Change (MOCC), 'National Climate Change Policy' (Government of Pakistan 2012) s 1.

48 Climate Change Division, 'Framework for Implementation of Climate Change Policy' (Government of Pakistan 2013).

49 *Asghar Leghari v Federation of Pakistan* (n 1).

50 *Asghar Leghari v Federation of Pakistan* (n 1) para 10.

As with many other instances of PIL, the Court took it upon itself to push the executive into action. It treated the petition as a rolling review, or *continuing mandamus,* and thus took a role as overseeing the implementation of Pakistan's climate policies that were in question. The Court created a Climate Change Commission, made up of members of various government departments at both federal and provincial level, lawyers, academics, representatives from the media and environmental NGOs.[51] The Court noted that the role of the Commission was to shift government departments towards 'climate-resilient development'.[52]

Over three years, the Commission oversaw the training and sensitizing of different government departments. In its final report in 2018, it noted that two-thirds of the priority items in the Framework of Implementation of Climate Change Policy were now completed.[53] Accordingly, the Court (having kept the case open all this time, under a *continuing mandamus*) disbanded the Climate Change Commission.[54] However, the Court did not stop there. Instead of closing the case and leaving it to the executive going forward, it constituted a Standing Committee on Climate Change (with a smaller membership than the Commission) that is seen as a 'link between the Court and the Executive'.[55] The case has been left open, to specifically allow the Standing Committee to approach the Court for enforcement if required.

Leghari largely focusses on climate adaptation policies in Pakistan. Judge Shah mentioned the vital importance of adaptation in Pakistan, reflecting Pakistan's position as a developing country.[56] However, building on the success of *Leghari,* another petition was brought forward to challenge the lack of climate mitigation action in Pakistan.[57] The petition in *Maria Khan* centres upon lack of action and support for renewable energy projects. *Maria Khan* is still pending; however, it creates a real test for the Supreme Court of Pakistan of whether it does continue in the trajectory of *Leghari* regarding mitigation. In many ways, a successful judgment for petitioners in *Maria Khan* could be

51 *Asghar Leghari v Federation of Pakistan* (n 1) para 13.

52 *Asghar Leghari v Federation of Pakistan* (n 1) para 19.

53 The Commission met 12 times between 2015 and 2018, it set up implementation committees along six climate-relevant priority areas. These were: (1) Water resources management; (2) Agriculture; (3) Forestry, Biodiversity and Wildlife; (4) Coastal and Marine Areas; (5) Disaster Risk Management; (6) Energy. See Hassan (n 8).

54 *Asghar Leghari v Federation of Pakistan* (n 1) para 19.

55 *Asghar Leghari v Federation of Pakistan* (n 1) para 25.

56 *Asghar Leghari v Federation of Pakistan* (n 1) para 21.

57 *Maria Khan et al v Federation of Pakistan et al,* Writ Petition 8960/2019, Lahore High Court.

ground-breaking in focusing on broad mitigation policy in a country in the Global South.

B *Climate Change and the Enforcement of Existing Environmental Laws and Policies*

Aside from climate-specific policies, petitions have also been brought to ensure that existing environmental policies consider climate change. In India, nine-year-old petitioner Riddhima Pandey petitioned the NGT that existing domestic and international environmental and climate change policies compel the national government to take climate action. The arguments put forward in *Pandey*,[58] were extensive and comprehensive. They invoked, among other things, the need for climate change to be integrated into environmental impact assessments, the proper enforcement of national forestry and air pollution laws, and the public trust doctrine.

The *Pandey* petition received much international attention.[59] However, the NGT's final order ignored most of the main points of the case. The NGT stated that there is no reason to presume that (international) climate laws were not reflected in policies and taken into consideration in granting environmental clearances, but it left it at that in a short two page judgment.[60] The abrupt end to this petition reflects the ad-hoc nature of how some PIL petitions are dealt with by the courts. The petitioners are appealing the decision.[61]

Nevertheless, on other instances where climate change considerations have been peripheral, the judiciary has passed orders regarding the implementation of environmental laws incorporating climate considerations and climate language. For example, in *Indian Council for Enviro-legal Action*,[62] the applicant had sought directions to stop industries emitting HFC-23 (a greenhouse gas). The NGT recognized that HFC-23 emissions were an important consideration

58 *Ridhima Pandey v Union of India* (n 4).

59 Reuters, 'Nine-Year-Old Sues Indian Government over Climate Change Inaction' *The Guardian* (7 April 2017) <https://www.theguardian.com/environment/2017/apr/07/nine-year-old-ridhima-pandey-sues-indian-government-over-climate-change-inaction> accessed 22 April 2020.

60 *Ridhima Pandey Ridhima Pandey v Union of India* (n 4) para 3.

61 R Chakrabarty, '11-Year-Old Climate Activist Ridhima Pandey on Fighting Climate Change and Why India Is Vulnerable' *India Today* (16 December 2019) <https://www.indiatoday.in/education-today/how-i-made-it/story/india-s-11-year-old-climate-activist-ridhima-pandey-on-her-own-action-against-climate-change-and-why-india-is-vulnerable-1628706-2019-12-16> accessed 14 March 2021.

62 *Indian Council for Enviro-legal Action v MoEFCC & Others*, Application No 170/2014, National Green Tribunal (Judgment, 10 December 2015).

for climate change, as well as ozone depletion and environmental harm. The NGT directed the State to issue measures to regulate the gas, pursuant to the Environment Protection Act.[63] In *Sheikh Asim Farooq*[64] a case was brought regarding the implementation of urban tree protection and planting in Lahore. Both forestry and climate considerations were brought to the Lahore High Court's attention. The Court implemented tree planting and protection in Lahore, justifying this on the bases of forestry laws, environmental and climate change policy.[65]

For countries in the Global South, energy and infrastructure are crucially tied to economic growth and poverty alleviation agendas. India's 'co-benefits' approach to climate change, under its National Action Plan on Climate Change, puts forward the idea that it will marry its climate objectives with economic development (based on increasing energy use and developing infrastructure). While both Pakistan and India have traditionally been heavily reliant on fossil fuels, wind, solar and hydropower are critical for future energy planning in both countries. Such a transition will bring into focus both local concerns (regarding livelihoods and the environment) and global concerns (regarding climate change), with litigation playing a critical role. Not surprisingly, given the resource extraction burden on countries in the Global South, most lawsuits in the Global South have focussed on mitigation issues such as preventing construction of coal fired plants, or deforestation.[66]

A recent example in Pakistan is *Rabab Ali*,[67] where the Lahore High Court has been petitioned to examine, among other things, the approval of a coal-fired power station in the Thar Desert. The petition considers fundamental rights, the public trust doctrine, climate change policies, and various environmental laws and policies. The petitioner in *Rabab Ali* is a 7-year-old girl, and, like *Pandey,* the petition is linked to the globally co-ordinated youth climate activists that are bringing lawsuits around the world.[68] As with *Pandey*, this petition involves a long list of laws and policies, from the international to the domestic level, that are allegedly breached by the project.[69] Among

63 Environment (Protection) Act 1986.

64 *Sheikh Asim Farooq v Federation of Pakistan etc,* Writ Petition 192069/2018, Lahore High Court, Judgment of 30 August 2019.

65 ibid paras 46-50.

66 Peel and Lin (n 3) 685.

67 *Rabab Ali v Federation of Pakistan & Another* (n 4).

68 These are co-ordinated by Our Children's Trust, a US based non-profit organization. See 'Our Children's Trust' (*Our Children's Trust*) <https://www.ourchildrenstrust.org> accessed 22 April 2020.

69 *Rabab Ali v Federation of Pakistan & Another* (n 4).

other things, the petition demands that untapped coal reserves are kept 'in the ground' and finances are redirected towards alternative (renewable) energy. At the time of writing, the litigation remains pending.

C *Emissions Framings as a Potential Hazard to Justice*

While the cases discussed above represent largely positive developments in climate change litigation, albeit at times limited in scope, it is also noticeable that a narrow focus on climate change and emissions reductions can lead to overlooking ecological damage and human rights issues. This is most noticeable in the cases concerning renewable and clean energy projects. Globally, many of these projects have clashed with the rights of local populations and drastically changed the environment.[70] A significant concern is that 'clean energy' and technological 'climate fixes' can camouflage other environmental and social injustices.[71]

Take the example of wind power in India, which is exempted from requiring and Environmental Impact Assessment (EIA). In 2013, a challenge against the construction of a wind energy project was brought to the NGT in India.[72] The development of the wind farm, a Clean Development Mechanism project under the Kyoto Protocol, and its surrounding infrastructure saw significant changes being made to the surrounding ecology, impacting environment and livelihoods of residents.[73] The petitioners sought, among other things, a direction from the tribunal that wind projects require EIAs and environmental approvals. The NGT agreed with the overall premise that wind power did not need EIAs, agreeing with the government's position that as a 'green energy' source there was no 'adverse environmental impact'.[74] However, the NGT did order that compensatory payments be made for afforestation, to mitigate the

70 See, for example, M Finley-Brook and C Thomas, 'Renewable Energy and Human Rights Violations: Illustrative Cases from Indigenous Territories in Panama' (2011) 101 Annals of the Association of American Geographers 863; A Dunlap, 'The "Solution" Is Now the "Problem:" Wind Energy, Colonisation and the "Genocide-Ecocide Nexus" in the Isthmus of Tehuantepec, Oaxaca' (2018) 22 The International Journal of Human Rights 550.

71 R Ahlers and others, 'Framing Hydropower as Green Energy: Assessing Drivers, Risks and Tensions in the Eastern Himalayas' (2015) 6 Earth System Dynamics 195.

72 *Kallpavalli Vrishka Pempakamdarula Paraspara Sahayaka Sahakara Sangam Ltd & Others v Union of India*, Application No 92/2013, National Green Tribunal (Judgment, 1 July 2015).

73 M Suchitra, 'Green Energy Takes Toll on Green Cover' *Down to Earth* (3 October 2011) <https://www.downtoearth.org.in/news/green-energy-takes-toll-on-green-cover-34164> accessed 22 April 2020.

74 *Kallpavalli* (n 72) para16.

roads that were built alongside the windmills (hence acknowledging, in part, that there was damage).

Similar trends can be seen for hydropower projects. Hydropower has a reputation for being 'clean' or 'green' energy generation. However, such a framing is disputed, with recent studies showing significant greenhouse gas emissions from large hydropower reservoirs.[75] In addition, nationalistic discourses around nation-building, modernization and development can accompany large hydropower projects, obfuscating the environmental and social costs.[76] The judiciary has on many instances showed its reverence for large hydropower. For example, the Supreme Court of Pakistan has set up a fund itself (with the chief justice contributing a large amount) to the building of the controversial and expensive Daimer-Bhasha dam.[77] A much earlier example is the *Narmada*[78] case in 2000, when the Supreme Court of India justified the approval of the project (which displaced hundreds of thousands of people, transformed the landscape and ecology of the region) on, among other things, the need for cleaner energy sources.[79]

This reflects a potential hazard for 'climate change litigation', because if climate framings are reduced into a battle against carbon emissions, it can obscure the questions of livelihoods, environment, poverty and rights. Climate framings can be exploited to fetishize technological solutions at any cost. A relevant example is climate policy in the water sector in India. Matthew England's empirical work on climate policy in India found that the 'plasticity' of discourses around climate change has meant that civil servants have utilized climate discourses as an additional justification to mobilize large projects that they had always supported.[80] That is, bureaucrats have used the flexibility

75 G Abril and others, 'Carbon Dioxide and Methane Emissions and the Carbon Budget of a 10-Year Old Tropical Reservoir (Petit Saut, French Guiana)' (2005) 19 Global Biogeochemical Cycles <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2005GB002457> accessed 14 March 2021; IBT Lima and others, 'Methane Emissions from Large Dams as Renewable Energy Resources: A Developing Nation Perspective' (2008) 13 Mitigation and Adaptation Strategies for Global Change 193.

76 M Nusser, 'Technological Hydroscapes in Asia: The Large Dams Debate Reconsidered' in M Nusser (ed), *Large dams in Asia: contested environments between technological hydroscapes and social resistance* (Springer 2013).

77 E Ingram, 'Fund to Build Diamer Basha and Mohmand Dams in Pakistan Reaches Nearly INR1 Billion' *Hydro Review* (17 August 2018) <https://www.hydroreview.com/2018/08/17/fund-to-build-diamer-basha-and-mohmand-dams-in-pakistan-reaches-nearly-inr1-billion/> accessed 13 May 2020.

78 *Narmada Bachao Andolan v Union of India and Others* (n 33).

79 *Narmada Bachao Andolan v Union of India and Others* (n 33) para 768.

80 MI England, 'India's Water Policy Response to Climate Change' (2018) 43 Water International 1.

of what climate change means, from a 'solution' point of view, to justify developing more large hydropower dams and other interventions. Moreover, as mentioned earlier, a key criticism of the judiciary in recent times has been its adherence to the economic ideology of the State, that includes decisions on energy and infrastructure development. Accordingly, these cases demonstrate a risk for litigants where a narrow climate framing is adopted in litigation. If climate language creates an opportunity to obscure material, social, and environmental justice issues, then there is very little reason for claimants to invoke climate change.

IV Beyond 'Climate Change Litigation': Litigation in the Context of Climate Change

A *Litigation without Emissions: Mitigation and Adaptation*

At the same time the judiciary has also been engaged with litigation 'in the context' of climate change. Bouwer draws attention to this line of thinking, stating 'it is time to look beyond actions that are overtly about climate change, and to pay attention to the multiple ways in which climate change issues might be present but invisible.'[81] Indeed, on many instances, the courts have been dealing with the fundamental issues that climate change brings forth, without necessarily doing it under the language of climate change or emissions that is the focus of the majority 'climate change litigation' literature. It is important to analyze these cases because, as mentioned in Section II, civil society activists have struggled in scaling back climate discourses from the international to the local level.[82] Yet, climate issues still persist on the ground and are being litigated in the courts.

When one scratches below the surface of any particular climate cause or impact (or mitigation and adaptation concern), a wide array of litigation can be found. Take, for example coal and mining issues in India. To date, there has been one decision of note that mentions 'climate change' and falls under the cap of 'climate change litigation'. In *Ratandeep Rangari*,[83] the NGT heard an application regarding violations of a permission granted to a coal-based power station. The case was heard on air pollution grounds, regarding the ash content of the coal. Climate change was a peripheral issue, the NGT held that enforcing

81 Bouwer (n 5) 502.

82 Fisher (n 16).

83 *Ratandeep Rangari v State of Maharashtra & Others*, Application No 19/2014 (WZ), National Green Tribunal (Judgment, 15 October 2015).

rules around maximum ash content were an important way to ensure 'co-benefits' of reductions in greenhouse gas emissions.[84] The NGT ordered that the state government implement monitoring and compliance protocols for thermal power plants, based on this justification.[85]

Although this is one the few cases to mention climate change and coal, there has been a rich jurisprudence developed through the courts drawing attention to many of the concomitant issues that arise from mining and coal that are particularly relevant from a climate justice perspective. For example, in *Goa Foundation*,[86] the Indian Supreme Court took strong regulatory action against rampant mining of iron ore in the state of Goa, where the state government had effectively turned a blind eye to environmental violations. The Court drew attention to the rights issues related to extraction (including the rights of people's livelihoods who worked on the mines). Most notably, the Court ordered that any future mining would have to contribute royalties to a Permanent Fund, that it established, to further intergenerational equity and sustainable development.[87] To be sure, the *Goa Foundation* case has global relevance, including in terms of furthering climate justice, for providing a novel approach to intergenerational equity.[88]

Litigation has also been brought to fight against exploitative and harmful extractive practices. The NGT put in measures to prevent the practice of 'rat hole mining', an extremely controversial method that involves digging small holes sideways (around 3–4 feet in diameter) into hills and crawling into the holes to manually extract coal.[89] The practice has a significant human cost, such as deaths, accidents, the use of child labour, and human trafficking.[90] The method of mining also leads to significant water and environmental issues around the mining sites (and of course greenhouse gas emissions down the line in using the coal extracted).[91] Implementation of the NGT's ban remained a problem because of the nexus between the mine operators and the state.[92]

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84 ibid para 34.

85 ibid para 40.

86 *Goa Foundation v Union of India* (2014) 6 SCC 590.

87 ibid 636.

88 E Brown Weiss, 'Intergenerational Equity in a Kaleidoscopic World' (2019) 49 Environmental Policy and Law 3.

89 *Impulse NGO Network and All Dimasa Students Union Dima Hasao Dist Committee v State of Meghalaya and Others,* Application no 13/2014, National Green Tribunal (Judgment, 9 June 2014).

90 B Majaw, 'Ending Meghalaya's "Deadly Occupation": India's National Green Tribunal's Ban on Rat-Hole Mining' (2016) 49 Law and Politics in Africa, Asia and Latin America 34, 41.

91 ibid.

92 ibid 49–51.

Nevertheless, in 2019, the Supreme Court upheld the NGT's ban on the practice of rathole mining.[93]

Litigation has also been critical to alleviating vulnerability to climate change, contributing to climate (adaptation) policy. For example, in *Swaraj Abhiyan v Union of India,*[94] a petition was brought against state governments that were refusing to declare a drought, as well as the central government for the lack of implementation of essential aspects of the Disaster Management Act 2005 and several aspects of drought relief measures. The facts in *Swaraj Abhiyan* highlight the common failings of governments in responding to droughts that show blatant disregard for lives and livelihoods.[95]

In *Swaraj Abhiyan*, the Court commented on the 'ostrich-like attitude' of state governments towards the drought situation crisis that causes suffering to millions.[96] The Supreme Court passed orders that mandated the operationalization of critical aspects of the Disaster Management Act[97] that were yet to be implemented, such as setting up a relief fund and the development of a national plan. The Court paid detailed attention to policy documents like 'drought manuals', that were the main instrument to guide state governments before, during and after a drought. The Court oversaw, through a *continuing mandamus,* the mandatory revision of drought manuals. The manuals were held to be out of date and allowing states to circumvent their relief obligations. Accordingly, while the judgment in *Swaraj Abhiyan* did not mention climate change, the substance of the ruling has a significant impact on the governance of climate adaptation in the country through shifting the paradigm on drought relief and management.

These cases demonstrate how material shifts in adaptation and mitigation can be made without having to use a climate framing (that may at times obscure the justice issues). The courts in India and Pakistan are familiar with the many issues that arise from the impacts of climate change, such as floods and droughts. Given the complexity of climate framings, discussed earlier, petitioners will remain careful in whether choosing to bring attention to

93 *State of Meghalaya v All Dimasa Students Union, Dima Hasao District Committee & Others,* Civil Appeal No 2968 of 2019, Supreme Court of India (Judgment, 3 July 2019).

94 *Swaraj Abhiyan v Union of India & Others* (2016) 7 SCC 498 (Supreme Court of India). This was one of six judgments that the Supreme Court issued from a single petition in *Swaraj Abhiyan v Union of India* (2015) WP (C) 857).

95 See for example: Jitendra, 'Farmers Suffer as States yet to Declare Drought' *Down to Earth* (9 November 2018) <https://www.downtoearth.org.in/news/agriculture/farmers-suffer-as-states-yet-to-declare-drought-62079> accessed 22 April 2020.

96 *Swaraj Abhiyan v Union of India & Others* (n 94) 498.

97 Disaster Management Act 2005.

climate issues. The importance of human rights, intergenerational equity, in these cases demonstrate also the development of litigation in the context of climate justice in the region.

V Conclusion

The discussion above has highlighted both challenges and opportunities for litigation on climate change in India and Pakistan. Despite the complex and conflicting legacy of the judiciary, it remains a forum that will be utilized to advance claims concerning climate change-related issues. As Hilson highlights, for social and environmental movements, a lack of political opportunity may influence the adoption of litigation as a strategy in place of lobbying and participation.[98] In Pakistan and India, there are often limited or ineffective political opportunities to enact change. Many of the cases discussed above illustrate the continuing potential for the courts to affect change.

This chapter has analyzed the development of climate change litigation in India and Pakistan. The international framing of climate change, as pointed out earlier, has hindered the development of capturing climate language and climate justice challenges at the local level. Litigation that expressly incorporates climate language or reasoning has accordingly been limited. Where it has appeared, climate change has largely been a peripheral issue.

Nevertheless, there are a number of emerging petitions that demonstrate potential. In Pakistan, the legacy of *Leghari*[99] has already inspired further action through the courts, such as *Maria Khan*[100] and *Rabab Ali*.[101] Indeed, the use of PIL will remain an important part of the ongoing transnational climate activism aimed at 'flooding the courts' and utilizing judicial flexibilities.[102] At the same time, the chapter has also argued that there are hazards to narrow climate framings in litigation. An overly narrow focus on emissions, for example, can produce results that ignore wider livelihoods, rights and ecological issues as seen in the cases in India concerning hydropower and wind energy.

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98 C Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9 Journal of European Public Policy 238.

99 *Asghar Leghari v Federation of Pakistan* (n 1).

100 *Maria Khan et al v Federation of Pakistan et al* (n 57).

101 *Rabab Ali v Federation of Pakistan & Another* (n 4).

102 A Suliman, 'Citizens Must "Flood the Courts" in Fight for Climate Justice: Economist' *Reuters* (4 October 2017) <https://www.reuters.com/article/us-global-climatechange-lawsuit/citizens-must-flood-the-courts-in-fight-for-climate-justice-economist-idUSKBN1C929Z> accessed 20 April 2020.

This chapter also demonstrates that climate change has indeed been alive in the courts in other ways. The integral issues associated with mitigation and adaptation, even if the language of 'climate change' has been absent, have been litigated regularly. These cases, in fact, have produced some of the more innovative judgments from a rights and (climate) justice perspective.

Finally, the lasting challenge of litigation will be whether it can deliver practical and substantive change to alleviate the suffering or climate impacts and/or deliver just transitions. Although the *Leghari* case has been noted for its 'symbolic value'as a leading case at a global level, the more important question from a domestic perspective is how climate change litigation will go from symbolic to transformational.[103] The courts in India and Pakistan have a legacy of incorporating numerous principles of international environmental law and of expanding constitutional rights to incorporate environmental rights. The courts may in time incorporate principles of climate change law and climate language, in the way *Leghari*[104] has begun to do. It may also provide numerous examples of cases concerning climate change that provide important rights language and justice principles. However, there are reasons to be cautious about such potential too, given the history of environmental litigation in the region.

An analogous example is the case of water law and policy in India. Courts in India have provided a rich jurisprudence that draws attention to the human and environmental aspects of water, in a way legislation and policy have failed to. The judiciary has expanded the right to life to include the human right to water, as well as drawn upon the relevance of principles of international environmental law, such as the precautionary principle, polluter-pays, and sustainable development in cases concerning water.[105] However, beyond pronouncements of principles and rights, the judiciary have not provided much detail of 'how' these principles apply. Moreover, the legislature and the executive have largely ignored these principles in formulating new legislation and policies. Thus, while there have been progressive pronouncements by the courts, and at times they have taken strong action to prevent acts of environmental harm, there have been limited improvements in shifting the overall framework

103 Barritt and Sediti (n 7).

104 *Asghar Leghari v Federation of Pakistan* (n 1).

105 For an overview see P Cullet and S Koonan, *Water Law in India: An Introduction to Legal Instruments* (2nd edn, OUP 2017) 9–13 and 47–67.

of water law and policy to make a more structural difference in the lives of people.[106]

This outlines the challenge for lawyers, academics and activists interested in climate change litigation, to analyze and ensure the impacts of such litigation, on whether it provides more than symbolic value. Ultimately, litigation will remain just one avenue of change. But, unless litigation can become a tool for broader legislative and political change, its impacts may remain removed from the daily lives and struggles of hundreds of millions across India and Pakistan who will bear the brunt of the climate crisis.

106 P Cullet, 'A Meandering Jurisprudence of the Court' in M Suresh and S Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-liberal India* (Orient BlackSwan 2014) 144.

CHAPTER 6

Climate Change Litigation in France: New Perspectives and Trends

*Marta Torre-Schaub**

1 Introduction

Since 2018, several events have contributed to the social and political context that triggered an increase in climate change lawsuits in France.[1] The most relevant include the resignation of Nicolas Hulot, the former Minister for the Ecological and Inclusive Transition, due to government inaction on climate change and environmental issues; youth protests in September 2018; and the 'yellow vests' protests in response to the government's fuel tax increases. The context is also, of course, strongly influenced by the increase in the number of countries around the world bringing climate change issues before the courts.[2] It also involves further factors, such as the European Court of Justice decision

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1 See M Torre-Schaub, *Justice climatique: Procès et actions* (CNRS 2020) especially Chapters 4 and 5; also, A van Lang, 'L'hypothèse d'une action en responsabilité contre l'Etat' [2019] Revue Française de Droit Administratif 652; M Torre-Schaub and B Lormeteau (eds), 'Les recours climatiques en France: influences et convergences de la décision Urgenda et du rapport du GIEC à 1,5 °C sur l'avenir du contentieux français' [2019] (5) Energie, Environnement, Infrastructures 13; C Huglo, 'Procès climatiques en France: la grande attente. Les procédures engagées par la commune de Grande-Synthe et son maire' [2019] AJDA 1861.

2 D Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64 Florida Law Review 15; E Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (2013) 35 Law & Policy 236; S Varvaštian, 'Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-making Become a Game-changer?' (Transformative Global Climate Governance après Paris conference, Berlin, May 2016) <https://refubium.fu-berlin.de/bitstream/handle/fub188/18585/Varvastianxclimatexchangexlitigation.pdf?sequence=1&isAllowed=y> accessed 10 March 2021; M Torre-Schaub, 'La justice climatique: À propos du jugement de la Cour de district de la Haye du 24 juin 2015' (2016) 68 Revue internationale de droit comparé 699; M Torre-Schaub, 'Les procès climatiques gagnent la

on France's excessive air pollution levels since 2010;[3] the reaffirmation of justiciability of climate change cases in *Urgenda*;[4] and the influence of the doctrine of the 'rights of nature' (recognized recently in the *Future Generations* case in Colombia)[5] on the French legal concept of 'ecological damage'.[6] Additionally,

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France: quatre initiatives à suivre de près' (*The Conversation*, 10 January 2019) <https://theconversation.com/les-proces-climatiques-gagnent-la-france-quatre-initiatives-a-suivre-de-pres-109543> accessed 15 June 2020; M Torre-Schaub, 'Les procès climatiques à l'étranger' [2019] Revue Française de Droit Administratif 660.

3 Case C-636/18 *European Commission v France* EU:C:2019:900. See 'France has systematically and persistently exceeded the annual limit value for nitrogen dioxide since 1 January 2010' (Press Release No 132/19, Court of Justice of the European Union, 24 October 2019) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/cp190132en.pdf> accessed 17 February 2020; Conseil d'Etat, 12 July 2017, *Association Les amis de la Terre France*, n° 394254; Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1.

4 *Urgenda Foundation v The State of the Netherlands*, Hague District Court, Case No C/09/456689 / HA ZA 13-1396, 24 June 2015; *The State of the Netherlands v Urgenda Foundation*, Hague Court of Appeal, Case No C/09/456689 / HA ZA 13-1396, 9 October 2018; *The State of the Netherlands v Urgenda Foundation,* Supreme Court of the Netherlands, Case No 19/00135, 20 December 2019. See also C Bakker, 'Climate Change Litigation in the Netherlands', Chapter 9 in this volume.

5 *Future Generations v Ministry of the Environment and Others,* No 11001-22-03-000-2018-00319-01, Supreme Court of Colombia, 5 April 2018. See 'Future Generations v. Ministry of the Environment and Others' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/cclow/geographies/37/litigation_cases/7304> accessed 17 February 2020. See M Torre-Schaub, 'La protection du climat et des générations futures au travers des « droits de la nature »: l'émergence d'un droit constitutionnel au « buen vivir »' [2018] Droit de l'Environnement 171.

6 See I Alogna, 'Environmental Law of France' in NA Robinson, E Burleson and L-H Lye (eds), *Comparative Environmental Law and Regulation* (Thomson Reuters 2018) ch 21, para 38: 'Recently, with the adoption of the 2016–1087 law of 8 August 2016 on the conquest of biodiversity, nature and landscapes, the concept of "ecological damage" ("*préjudice écologique*") became formally recognized in the French Civil Code. Thus, article 1247 consecrated a "non-negligible damage to the elements or the ecosystem functions or the collective benefits obtained by man from the environment," whose remedy is supported by "anyone liable for ecological damage" (article 1246) … The recognition of "pure" ecological damage, suffered exclusively by nature, allows for expansion of the system of civil liability for environmental damage, which was traditionally based on indirect damage suffered by the environment (damage to property, economic loss, personal injury), focusing on the media rather than the "victim".' See also M Torre-Schaub, 'La réparation du dommage du fait du changement climatique réflexions à l'aune du préjudice écologique' (Actes du colloque Justice et Environnement, Assemblée Nationale, Paris, 30 January 2019) <https://www.berangereabba.fr/blog/assemblee-nationale/save-the-date-colloque-justice-environnementale.html> accessed 15 April 2020. For further information about this prejudice applied to climate change, see M Torre-Schaub, 'L'affaire du siècle, une affaire à suivre' [2021] (3) Energie, Environnement, Infrastructures 11; M Torre-Schaub, 'L'affaire du siècle, une révolution pour la justice climatique?' [2021] La Semaine Juridique (Edition Générale) 247.

there has been a push by the Green Party to include a reference to climate change in Article 1 of the French Constitution,[7] a declaration by the French Parliament of a climate emergency, and a new Climate Change Act.[8]

As a consequence of this dynamic context, both legal and political, national and international, several climate cases have emerged in France since 2019.[9] This emergent dynamic is the result of a combination of French legal innovation, more climate change-adapted environmental legal tools and the multiplication of climate change litigation in other countries. The hybridization of these elements[10] has resulted in a new and interesting climate change litigation context in France that could result in changes to the courts' procedural paradigm.[11]

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7 French Constitution of 1958, Art 1. See the English translation on the French Constitutional Council website: <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf> accessed 19 February 2020.

8 Climate emergency declaration passed by Parliament on 27 June 2019 <http://www.assemblee-nationale.fr/dyn/15/textes/l15b1943_proposition-resolution#> accessed 12 March 2021. See also, 'L'Assemblée nationale vote «l'urgence écologique et climatique»' *Le Figaro* (27 June 2019) <https://www.lefigaro.fr/flash-eco/l-assemblee-nationale-vote-l-urgence-ecologique-et-climatique-20190627> accessed 12 March 2021; Climate and Energy Act of 8 November 2019, Loi n° 2019–1147 <https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=BD575E23B610C988E8E663D10B90C9AD.tplgfr37s_1?cidTexte=JORFTEXT000039355955&categorieLien=id> accessed 15 June 2020.

9 Torre-Schaub and Lormeteau (eds), 'Les recours climatiques en France: influences et convergences de la décision Urgenda et du rapport du GIEC à 1,5 °C sur l'avenir du contentieux français' (n 1); 'Le contentieux climatique devant le juge administratif' [2019] Revue Française de Droit Administratif 629.

10 M Torre-Schaub, 'La gouvernance du climat: vieilles notions pour nouveaux enjeux' in M Torre-Schaub (ed), *Cahiers de Droit, Sciences et Technologies: Dossier Thématique Droit et Climat* (n° 2, CNRS 2009) 143; M Torre-Schaub, 'Le contentieux climatique: quels apports pour le droit de l'environnement? (ou comment faire du neuf avec de l'ancien)' [2018] Droit de l'Environnement 6; M Torre-Schaub, 'L'affirmation d'une justice climatique au prétoire (quelques propos sur le jugement de la cour du district de La Haye du 24 juin 2015)' (2016) 29 Revue québécoise de droit international 161; J Lin, 'The First Successful Climate Negligence Case: A Comment on *Urgenda Foundation v. the State of the Netherlands'* (2015) 5 Climate Law 65; KJ de Graaf and JH Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 Journal of Environmental Law 517; J van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4 Transnational Environmental Law 339; R Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v. the State of the Netherlands'* (2016) 34 Journal of Energy and Natural Resources Law 143.

11 We use here the term 'paradigm' in the sense of Thomas Kuhn. He suggested replacing it by 'disciplinary matrix'. It tends to designate the set of beliefs, values and techniques which are shared by the members of a scientific community, during a period of theoretical consensus. For further developments on this aspect, see M Torre-Schaub (director), 'Les Dynamiques du contentieux climatique: usages et mobilisations du droit pour la cause

This chapter describes the emergence of climate change litigation in the Hexagone. Section II studies the origins of climate justice and climate change litigation in France. Section III examines the requirements for bringing the State before its courts with a special focus on the analysis of the most publicized case: '*L'Affaire du Siècle*'. The study focuses on its potential, its limits and its possible legal consequences. In this respect, special attention is given to the 'ecological damage' concept. Section IV considers the use of environmental law tools (mostly environmental impact assessments) as a new trend of climate change litigation in France. Section V focuses on climate change litigation against private actors and French fossil fuel companies. This chapter concludes in Section VI by considering other new possibilities for climate change litigation in France as a consequence of the declaration of climate emergency.

II The Origins of Climate Justice and Climate Change Litigation in France

Climate change litigation in France can be traced back to an opinion published in 2017 by the *Conseil Economique, Social et Environnemental* (CESE) arguing for the need to reflect on climate justice in France.[12] On the basis of that report, parliamentary committees set out to work around this notion, notably at the initiative of Maina Sage, MP for Polynesia, a French territory particularly vulnerable to climate change and the inequalities engendered by it. This first initiative was not successful, in part arguably due to the parliamentary majority's lack of interest in this subject. Since then, several forms of climate justice action have appeared in France. In this regard, the year 2019 is particularly significant: four appeals were launched against the State and one against the fossil fuel company TOTAL. These actions have all been brought by environmental NGOs and some of those organizations were accompanied by local authorities and elected city officials.[13]

climatique' (Final Research Report, Mission Droit et Justice, December 2019) <http://www.gip-recherche-justice.fr/publication/les-dynamiques-du-contentieux-climatique-usages-et-mobilisation-du-droit-face-a-la-cause-climatique-2/> accessed 17 February 2020; M Torre-Schaub and B Lormeteau (eds), *Le contentieux climatique: dynamiques en France et dans le monde* (Mare & Martin 2021).

12 J Jouzel and A Michelot, *La justice climatique: enjeux et perspectives pour la France* (Conseil Economique, Social et Environnemental 2016) <https://www.lecese.fr/sites/default/files/pdf/Avis/2016/2016_10_justice_climatique.pdf> accessed 15 April 2020.

13 See Torre-Schaub and Lormeteau (eds), 'Les recours climatiques en France: influences et convergences de la décision Urgenda et du rapport du GIEC à 1,5 °C sur l'avenir du

Even if the practice of litigation is not as common in France as in the Anglo-Saxon world, the fact remains that recourse to the courtroom is spreading, in particular in environmental matters. Two reasons can explain this: first, the applicants' interest in bringing actions based on general standards is quite widely recognized in France.[14] Second, citizens are increasingly mobilizing the law in order to challenge failure of, or inadequate action on the part of, the public authorities in environmental matters.

The first major climate change cases in France covered issues such as climate change adaptation plans,[15] climate change impact assessments,[16] and human rights due diligence.[17] The first case was the '*Grande-Synthe*' case introduced before the *Conseil d'Etat* (Administrative Supreme Court) for 'illegal action of the administration' ('*excès de pouvoir*') and 'failure to adapt'.[18] Introduced in the same period, '*L'Affaire du Siècle*'[19] ('the Case of the Century') inspired by *Juliana v United States*[20] is expected to produce important contributions

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contentieux français' (n 1); Torre-Schaub (director), 'Les Dynamiques du contentieux climatique: usages et mobilisations du droit pour la cause climatique' (n 11) 20; Torre-Schaub and Lormeteau (eds), *Le contentieux climatique: dynamiques en France et dans le monde* (n 11).

14 See Conseil d'Etat, 3 July 1998, *Bitouzet*, n° 158592 (*Recueil Lebon* 1998) 228; also *Motais de Narbonne v France* App no 48161/99 (ECtHR, 2 July 2002); P Soler-Couteaux and E Carpentier, *Droit de l'urbanisme* (6th edn, Dalloz 2015) 904; Cour Administrative d'Appel de Nantes, 2ème Chambre, 10/11/2009, n° 08NT02570, Inédit au *Recueil Lebon*; Cour Administrative d'Appel de Nantes, 2ème Chambre, 5/10/2017, n° 16NT01991.

15 Conseil d'Etat, 19 November 2020, *Commune de Grande-Synthe v France*, n° 427301. See 'Commune de Grande-Synthe v. France' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/cclow/geographies/62/litigation_cases/7321> accessed 19 February 2020.

16 Attempts to stop oil exploration projects in French Guiana, see (n 41); Attempts to stop construction of the 'EuropaCity' retail development near Paris, see 'Macron scraps giant EuropaCity project for Paris suburb' (*Radio France Internationale*, 8 November 2019) <https://www.rfi.fr/en/france/20191108-macron-abandons-europacity-project-paris-ecology-employment-gonesse> accessed 11 March 2021.

17 *Les Amis de la Terre v Total* (2019–20). See 'Friends of the Earth et al. v. Total' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/cclow/geographies/62/litigation_cases/7362> accessed 19 February 2020. See also the French Duty of Vigilance Law (Loi n° 2017-399 du 27 mars 2017) <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte.> accessed 19 February 2020.

18 *Commune de Grande-Synthe v France* (n 15).

19 *Notre Affaire à Tous and Others v France* (2018, France). See 'Notres Affaire a Tous and Others v. France' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/cclow/geographies/62/litigation_cases/7316> accessed 19 February 2020.

20 *Juliana v United States*, 339 F Supp 3d 1062 (D Or 2018). cf M Gerrard, 'Climate Change Litigation in the United States', Chapter 2 in this volume.

to climate change law in France. The case, a legal initiative launched by four NGOs (*Notre Affaire à Tous, la Fondation pour la Nature et l'Homme,* Greenpeace France and Oxfam France) before the Administrative Court of Paris, requests the French government to remedy its inaction on climate change (so called '*carence fautive*'). The plaintiffs are arguing for the recognition of a new general principle of law relating to the 'right to live in a sustainable climate system', also based on the concept of 'pure ecological damage'. They are doing so by asking the Court to issue an injunction for the government to take all necessary steps to contain global warming below 1.5°C.

The status of climate change litigation in France requires consideration of the national judge as an 'effective' adjudicator of international law obligations, in order to enforce this body of law against the domestic government. Additionally, the application of the uniquely French concept of 'pure ecological damage'[21] (described as any harm or damage to ecosystems' functions) to the climate change field is an important legal development and a new avenue for challenging government and corporate acts that are detrimental to mitigating climate change.

It is also important to note that there has been much discussion lately in France, especially in the context of some academic events and recent publications, on expanding the right to a healthy environment to entail certain duties with respect to climate change,[22] and the recognition of a general climatic obligation based on general principles of law.

III Climate Cases Against The State

A *Taking the French State to Court: Types of Actions*

There are two types of actions that can be brought under French law to challenge the administration for deficiencies in climate matters: actions for the illegality of an administrative act and actions for liability for harm caused.[23] As noted above, in France, two cases—in February and March 2019 respectively—illustrate these types of contentious proceedings.

21 Art 1386-20 of the Code civil has been replaced by art 1247 since 1 October 2016.

22 See M Torre-Schaub, 'L'émergence d'un droit à un climat stable. Une construction interdisciplinaire' in M Torre-Schaub (director), *Droit et Changement Climatique. Quelles réponses à l'urgence climatique? Regards interdisciplinaires* (Mare & Martin 2020) 63.

23 Y Aguila, 'Petite typologie des contentieux climatiques contre l'État' [2019] AJDA 1853.

The first case was filed in February 2019 before the *Conseil d'Etat* by the mayor of Grande-Synthe for climate inaction, on the basis of an 'excess of power'.[24] The decision was handed down in November 2020. This kind of action seeks to annul an administrative act. In this particular case, the climate change adaptation plan was deemed insufficient by the applicants. In this case, standing is relatively simple to prove. The municipality of Grande-Synthe can demonstrate that climate policies have a direct impact on it—for example, given its geographical location as a coastal municipality, which is particularly vulnerable to the risk of submersion linked to sea level rise. The judgment ruled on the State's climate change obligation stating that this was mandatory for the administration but gave the Environment Agency more months to respond to the accusations.[25]

A second case, known as the '*Affaire du Siècle*', was filed before the Paris Administrative Court for wrongful acts of the State and for ecological damage due to climate change, therefore engaging its liability.[26] The Court ruled on the case in February 2021, finding partially in favour of the NGOs and accepting the State's liability on the basis of ecological climate prejudice.[27]

B *L'Affaire du Siècle*

1 The Real Issues, the Real Limits

L'Affaire du Siècle (the Case of the Century) is an action brought against the French Administration for its failure to comply with its obligation to tackle climate change.[28] The plaintiffs claimed from the State symbolic damages (a

24 See 'Le contentieux climatique devant le juge administratif' (n 9); C Huglo, 'Le recours de la commune de Grande-Synthe contre l'insuffisance des actions mises en œuvre par l'Etat pour lutter contre le changement climatique' in M Torre-Schaub and B Lormeteau (eds), 'Les recours climatiques en France: influences et convergences de la décision Urgenda et du rapport du GIEC à 1,5 °C sur l'avenir du contentieux français' [2019] (5) Energie, Environnement, Infrastructures 36; C Huglo, 'Procès climatiques en France: la grande attente. Les procédures engagées par la commune de Grande-Synthe et son maire' (n 1).

25 *Commune de Grande-Synthe* (n 15); M Torre-Schaub, 'L'affaire de Grande Synthe: une première décision emblématique dans le contentieux climatique français' [2020] (12) Energie, Environnement, Infrastructures 13.

26 Van Lang (n 1).

27 Tribunal Administratif de Paris, 4ème section – 1ère chambre, 3 February 2021, n° 1904967, 1904968, 1904972 et 1904976/4-1.

D Mazeaud, 'L'affaire du siècle: un petit pas vers le solidarisme climatique' [2021] La Semaine Juridique (Edition Générale) 139; M Torre-Schaub, 'L'affaire du siècle, une révolution pour la justice climatique' (n 6).

28 C Broyelle, 'L'affaire du siècle, le recours peut-il aboutir?' (*Blog du Club des juristes*, 26 March 2019) <https://blog.leclubdesjuristes.com/laffaire-du-siecle-le-recours-peut-il-aboutir/> accessed 15 June 2020.

token amount of one euro) for non-material harm to their collective interests.[29] In other words, the State was accused of having committed a fault by its legislative and regulatory 'failures' in climate matters. The French State, according to the plaintiffs, had not done enough, or not enough in time, in the fight against climate change. As a result of this 'failure', the State was considered responsible for 'ecological damage'. 'Ecological damage' is defined by the Biodiversity Act of 8 August 2016—which introduced the concept into the French Civil Code—as 'consisting of a significant damage to the elements or functions of the ecosystems or to the collective benefits humans derive from the environment'.[30] The case argues that the degradation of an ecosystem constitutes a real harm,[31] which can be equated with damage falling under civil liability and thus can be brought before the civil courts. If such damage is identified, it can then justify material or financial compensation (as necessary when the repair of the natural environment is factually impossible).[32]

A number of challenges have been overcome in order for the *Affaire du Siècle* action to succeed (even though the results of the judgment are for the moment pending as the State has two months to respond to the ruling before the Court determines the remedy to be imposed). First of all, the judge has determined that climate change is a 'systemic and ecological damage'. Secondly, in the *Affaire du Siècle*, the request was filed before the administrative judge, while the concept of ecological damage falls within the civil sphere. It has been therefore necessary for the administrative judge to demonstrate a willingness to broadly interpret what is meant by ecological damage, and to accept its applicability in this case and the Court's competence to address it.

Even though French administrative law holds a fairly 'broad' concept of fault, in this case, it seems it will be difficult for the judge (in the next steps of the process) to establish the extent of the State's liability. For the moment, the tribunal has only recognized a 'partial fault' for a very limited time (the

29 C Baldon, 'L'affaire du siècle: une action juridique inédite pour contraindre l'Etat à lutter efficacement contre le changement climatique' in M Torre-Schaub and B Lormeteau (eds), 'Les recours climatiques en France: influences et convergences de la décision Urgenda et du rapport du GIEC à 1,5 °C sur l'avenir du contentieux français' [2019] (5) Energie, Environnement, Infrastructures 38.

30 Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la nature, de la biodiversité et des paysages, art 1247 of the Civil Code. See (n 6).

31 M Latina, 'La réparation du préjudice écologique' (*Dalloz Actu Étudiant*, 12 September 2016) <https://actu.dalloz-etudiant.fr/le-billet/article/la-reparation-du-prejudice-ecologique/h/614de84395c17d3048a43efcc072f84d.html> accessed 19 February 2020.

32 Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la nature, de la biodiversité et des paysages, art 1247 of the Civil Code. See (n 6).

period of time between 2015 and 2018). Such determination has been done in two phases. First, the judge defined the contours of this 'pre-existing climate obligation'. Second, the judge assessed the actions of the public administration in relation to the alleged acts. According to an already well-established French doctrine, a 'simple' fault is enough to engage State liability. Such a fault can result from a legal act or from a certain behaviour of the administration. It can result from an action or an omission. Under French Law, any illegality tainting an administrative act is considered a fault. Therefore, the issuance of an administrative authorization may constitute a fault—for example, if it has not fulfilled the legal conditions which are imposed thereon. A deficient act can also be considered a 'fault', as a form of omission which has been in fact the case in the *Affaire du Siècle*.

The problem facing the judge was to show that the State has committed a fault through its inaction—either total or partial. The appreciation of a fault of this nature is not new, having been identified in previous cases such as those concerning asbestos exposure, and those regarding green algae in Brittany or the Mediator drug.[33]

In the asbestos cases, the judge clarified the extent of the obligation on the State, explaining that the public authorities responsible for risk prevention should keep workers informed in the context of their professional activity.[34] Furthermore, the *Conseil d'Etat* affirmed that the State had the obligation to adopt, on the basis of scientific knowledge, the most appropriate measures in order to limit or, if possible, to eliminate these dangers. This judgment created the link between the duty to inform and the duty to act. Could this link, which therefore exists in French case law, be extrapolated to the climate issue? Therein lies the greatest legal question to be determined by the *Affaire du Siècle*.

Moreover, it is worth recalling the decisions of 2017 and 2019, respectively concerning air pollution and the deficiency for which the French State was deemed to be at fault.[35] The Council of State (*Conseil d'Etat*) twice considered that the State had violated an obligation to achieve certain results in line with the objectives set by the European directive on air quality.[36] The judges clarified that an obligation to act was clearly a requirement of the European directive,

33 Aguila (n 23); see 'Le contentieux climatique devant le juge administratif' (n 9); Van Lang (n 1); C Broyelle (n 28).

34 Conseil d'Etat, 3 March 2004, n° 241150, n° 241151, n° 241152 and n° 241153.

35 Case C-636/18 (n 3). See Press Release No 132/19 (n 3); Conseil d'Etat, n° 394254 (n 3); EU Directive 2008/50/EC (n 3).

36 EU Directive 2008/50/EC (n 3).

and concluded that the lack of results achieved was the consequence of a lack of 'effective' measures to improve air quality, which should have been—but had not been—taken. Accordingly, they determined the existence of a fault on the part of the State.

In climate matters, it was up to the applicants of the *Affaire du Siècle* to prove this 'lack of results', and they partially succeeded. However, although the judge has accepted that a 'delay' in State action thereby created a 'fault of the administration', the judge will now at most have to determine the obligation to achieve 'a' result (such as lowering greenhouse gas emissions), but in no case will the judge be able to determine obligations of 'means'. In other words, even if the *Affaire du Siècle* has been partially a success at this stage, this success will be limited because the French judge himself is constrained in his power to give orders to the administration. The judge cannot determine what precise measures or means the State should take, because it would interfere with the principle of separation of powers.[37]

2 The Recognition of Ecological Damage as a Basis for Climate Justice

So far, the French administrative courts have only three times ruled on the basis of ecological damage: in the recent case concerning illegal fisheries in the Mediterranean, in another case concerning illegal toxins, and in the *Affaire du Siècle*.[38] This new concept and its related civil liability is enshrined in Article 1246 of the French Civil Code, which provides that anyone responsible for ecological harm is required to remedy the damage. The basis for the obligation to make reparations is thus clearly laid down. Under the Code, the action for compensation for ecological damage is open to anyone with the standing and interest to act, including registered environmental NGOs, recognized as legal persons. They can therefore claim a remedy for having been injured by this damage. Despite its inclusion in the Civil Code, the administrative judge has taken this opportunity to expressly recognize the applicability of the ecological damage provisions to climate change.

37 Torre-Schaub (director), 'Les Dynamiques du contentieux climatique: usages et mobilisations du droit pour la cause climatique' (n 11).

38 *Parc national de Calanques*, Tribunal judiciaire de Marseille, 6 March 2020. See L Radisson, 'Préjudice écologique: quatre braconniers marseillais condamnés à 350 000 euros de réparation' (*ActuEnvironnement.com*, 6 March 2020) <https://www.actu-environnement.com/ae/news/prejudice-ecologique-braconnage-parc-calanques-marseille-35111.php4> accessed 15 June 2020.

Clearly, the probabilities of success do not lie so much in the existence or non-existence of a French law 'adapted' to climate change, but in the will of the judges to interpret and apply the law in a flexible way, as the Dutch judges did in the *Urgenda* case.

3 The Consequences of the Decision in *L'Affaire du Siècle*

In this first judgment, the judges decided to interpret the State's 'fault' broadly, but the conviction has not yet resulted in an injunction to 'act'. The judge will decide in two months' time if the State should do more. But in no case will the judge be able to tell the government exactly what to do and by what means.

As the ecological damage has been recognized, it is indeed a success for Environmental Law in general and in particular for the fight against climate change. However, the compensation sought is only of a symbolic nature, since the requesting NGOs only ask for one euro in damages. The judge has not yet decided about compensatory measures for the damage recognized. What kind of compensation should be envisaged in the following steps of the case? Should the judge grant compensation for CO_2 emissions by planting trees, for example? And, if yes, where? In what proportion? At what time? Can we 'compensate' for an overflow of CO_2 emissions in a place 'X' at a time 'T' by planting trees in a place 'Y' which will grow at a time 'T + 10'?[39]

The success of the partially positive decision in *L'Affaire du Siècle* is both symbolic and political. However, while the judge has accepted the existence of the ecological damage, the question of appropriate compensation has yet to be decided. This is why consideration must be given to the potential effects of 'negative case law' in an area where there is still very little jurisprudence and only a limited number of cases. This would indeed risk undermining future environmental decisions on that matter for an indefinite period. However, politically, the value of this action is obvious. First of all, the participating NGOs, now recognized as 'pioneers' in French climate justice are more committed to a Green political path. Their political visibility has increased considerably since the filing of this case.

Furthermore, in terms of public policy, it may show the way for more and better climate action by the State. This appeal could speed up the legislative process in favour of more effective provisions in the fight against climate change. As proof, in June 2019, barely three months after filing two appeals

39 Torre-Schaub (director), 'Les Dynamiques du contentieux climatique: usages et mobilisations du droit pour la cause climatique' (n 11); Torre-Schaub, *Justice climatique: Procès et actions* (n 1).

on climate justice in France, the first Climate-Energy Act was passed by the Parliament, setting the goal of 'carbon neutrality' as one of the flagship measures of French public policy on climate change. And just a few weeks before, the National Assembly had voted a declaration of 'climate emergency'.[40] The political petition leading to the judicial request of the *Affaire du Siècle* has already been an unprecedented popular success, with more than 2,000,000 electronic signatures; even supposing that it did not succeed judicially, this initiative can already be considered a political and social success.

IV The Need for More Environmental Control and Assessments: A New Litigation Trend in France

In addition to these cases, a decision was rendered by the Administrative Court of Cergy-Pontoise on 1 February 2019. The decision originated from an emergency appeal by the NGO Greenpeace France, contesting the authorization given to the fossil fuel company TOTAL by the prefect of Guyana to carry out offshore drilling.[41]

The ultimate objective of the procedure before the Cergy-Pontoise Administrative Court requesting the cancellation of the drilling license in Guyana was to require the State to declare its commitment to a policy of 'disengagement' from fossil energy. The judge, however, decided against the cancellation of the license. In the meantime, the company had given up on its project, for lack of sufficient economic interest.

Whatever was the judge's decision on the merits of the procedure (in this case he decided that the license should carry on), one might think, from an optimistic point of view, that this kind of appeal involves a change in mentality in climate matters. That is to say that, even though in this particular case, the judge did not rule in favour of the protection of the fight against climate

40 Climate emergency declaration (n 8).

41 Tribunal Administratif de Cergy-Pontoise, 1 February 2019, *Association Greenpeace France et autres*, Ordonnance n°1813215. See 'Environnement: le tribunal administratif de Cergy-Pontoise rejette les référés tendant à la suspension des arrêtés relatifs aux forages en Guyane' (*Tribunal Administratif de Cergy-Pontoise*, 1 February 2019) <http://cergy-pontoise.tribunal-administratif.fr/A-savoir/Communiques/Environnement-le-tribunal-administratif-de-Cergy-Pontoise-rejette-les-referes-tendant-a-la-suspension-des-arretes-relatifs-aux-forages-en-Guyane> accessed 15 June 2020. See also L Monnier, 'Quel rôle pour la justice administrative dans la lutte contre les projets climaticides? Le cas de Guyane Maritime' [2019] (5) Energie, Environnement, Infrastructures 32.

change, the petition was based on shortcomings of the initial environmental assessment study, which had not taken sufficient account of the climate issue. It is worth noting that this type of case law, based on the reproach of insufficient attention paid to the climate issue in the environmental impact assessment prior to the granting of any licence, reflects a new trend in climate change litigation in France.

Similar legal actions are being prepared against palm oil exploitation activities in the South of France and against projects that may have a significant impact on the increase in GHG emissions, for example the enlargement projects for Charles de Gaulle airport in Paris or the Nice-Côte d'Azur airport.[42] In this sense and following this new trend, many promising new climate change cases have been emerging in France in the last few months.[43]

V Multinationals Called to Order: The Fossil Fuel Company Total on Trial

A lawsuit against the company TOTAL was launched in France in January 2020 accusing it of not having updated its vigilance plan based on a mapping of climate risk.[44] At the heart of this litigation are the duty of vigilance and the climate risk, which must now be taken into account in the extra-financial reporting of certain transnational companies.

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42 15 NGOS recently prepared a legal action against the enlargement of the CDG airport: <https://www.batiactu.com/edito/recours-contre-extension-aeroport-roissy-58840.php> accessed 15 June 2020; and another legal action against the enlargement of Nice International airport was presented before the Tribunal Administratif de Nice in February 2020 but failed in the first hearing: <https://www.francebleu.fr/infos/faits-divers-justice/le-projet-controverse-d-agrandissement-de-l-aeroport-de-nice-valide-par-la-justice-1582902699> accessed 15 June 2020.

43 Torre-Schaub (director), 'Les Dynamiques du contentieux climatique: usages et mobilisations du droit pour la cause climatique' (n 11); Torre-Schaub, *Justice climatique: Procès et actions* (n 1).

44 *Sherpa, NAAT et autres v Total* (complaint filed with the Tribunal Judiciaire de Nanterre on 28 January 2020); see S Mabile and F de Cambaire, 'L'affirmation d'un devoir de vigilance des entreprises en matière de changement climatique' in M Torre-Schaub and B Lormeteau (eds), 'Les recours climatiques en France: influences et convergences de la décision Urgenda et du rapport du GIEC à 1,5 °C sur l'avenir du contentieux français' [2019] (5) Energie, Environnement, Infrastructures 40; S Mabile, 'Une action climatique contre l'entreprise Total sur la base du devoir de vigilance' in Torre-Schaub and Lormeteau (eds), *Le contentieux climatique: dynamiques en France et dans le monde* (n 11).

The question of the 'justiciability' of businesses' climate obligations is complex and shows another new trend for climate change litigation rising presently in France.[45]

Business climate obligations that should be imposed on companies don't rely on international obligations flowing from the Paris Agreement, which currently covers only States.[46] In addition to self-regulatory mechanisms or voluntary commitments such as CSR (social and environmental responsibility), and apart from other legal remedies,[47] it has become urgent to find legal mechanisms capable of creating binding obligations for large multinationals on environmental and social questions.

It is in this sense that the law on the Corporate duty of vigilance was adopted in France on 21 February 2017.[48] Article 1 of this law, codified in Article L 225-102-4 of the French Commercial Code, specifies that companies with at least 5,000 employees within their direct or indirect subsidiaries, whose head office is located in France, are required to establish and effectively implement a vigilance plan. Those who have at least 10,000 employees in their value chains are also subject to the same obligations. Among those obligations and in the name of this duty, they must implement risk 'mapping', regular evaluation procedures, appropriate actions to mitigate risks or prevent serious harm, an alert mechanism, and a system for monitoring the measures implemented and evaluating their effectiveness.[49] This law creates a duty for these large companies to carry out a risk analysis by identifying and assessing risks, and describing the measures implemented to address them. This duty can thus be defined as a new 'standard' of business behaviour fuelled by the principles of prevention and precaution in order to contain, among other risks, the climate risk. This

45 F-G Trebulle, 'Le rôle des acteurs privés' in M Torre-Schaub (ed), *Bilan et perspectives de l'Accord de Paris* (*COP 21*)*: Regards croisés* (IRJS 2017); L d'Ambrosio, 'La responsabilité climatique des entreprises: une première analyse à partir du contentieux américain et européen' in M Torre-Schaub et al (eds), 'Changement climatique et responsabilité, quelles normativités' [2018] (8–9) Energie, Environnement, Infrastructures 39.

46 F-G Trebulle, 'Responsabilité et changement climatique: quelle responsabilité pour le secteur privé?' in M Torre-Schaub et al (eds), 'Changement climatique et responsabilité, quelles normativités' [2018] (8–9) Energie, Environnement, Infrastructures 20.

47 Like those taking place in the United States currently against ExxonMobil and Chevron, founded on the violation of the duties of information or on fraud against consumers and shareholders, See, for example, *re ExxonMobil Corp Derivative Litigation* (2019), *Commonwealth v ExxonMobil Corp* (2019), *People of the State of New York v ExxonMobil Corp* (2018) <http://climatecasechart.com/case-category/securities-and-financial-regulation/> accessed 15 June 2020.

48 Loi n° 2017-399 du 27 mars 2017 (n 17).

49 S Mabile and F de Cambaire (n 44); S Mabile (n 44).

has the consequence of enrolling these companies in a process of constantly reducing emissions, as indicated in Article 2 of the Paris Agreement (to keep the increase in the global average temperature well below 2°C and, if possible, at less than 1.5°C).[50]

More precisely, the existence of this provision in the French legal system, which is unique in the world, has made it possible to file two climate justice claims against one of the largest French companies in the fossil fuel sector. In this sense, anyone demonstrating an interest in taking action can put this company on notice, in order to ensure the respect of its climate-related obligations under its duty of vigilance. This is what was sought on 28 January 2020 in a case brought before the Court of Nanterre.[51] The claim was based both on the aforementioned French law and on a report produced by one of the plaintiff NGOs, substantiating practices and activities contrary to the duty of care and vigilance by several oil groups in the world. The company TOTAL was asked to comply with and respect this duty, eventually through a court order.

The Court of Nanterre, however, declared itself incompetent a few weeks after the filing of the case, justifying its position by the fact that the complaint should have been brought before a commercial court. The Court, in this disappointing decision, highlighted the fact that the very basis of the complaint—the law on the duty of vigilance—is codified in the Commercial Code and therefore lies within the competence of the commercial courts.[52]

A second appeal was brought in January 2020 against the same group and also on the basis of the duty of vigilance.[53] This second appeal relates more to the activities of the TOTAL group which may infringe human rights in the exercise of its activities in Africa, but environmental repercussions are also expected, in particular concerning the obligation to rework a vigilance plan for the company. This new plan will have to contemplate the possible risks that could jeopardize human rights in Tanzania, as well as the environmental risks, including climate change.

We can see that in France presently and in the name of this duty of vigilance '*à la française*', the stakeholders (shareholders, consumers, investors), victims of climate change or exposed to its effects, can force a company to take the necessary measures to reduce its emissions. A hope that remains open to future trials.

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50 S Mabile and F de Cambaire (n 44).

51 *Sherpa, NAAT et autres* (n 44).

52 *Sherpa, NAAT et autres* (n 44).

53 Tribunal Judiciaire de Nanterre, 30 January 2020, *Les Amis de la Terre et autres v Total*, n° 19/02833.

VI Climate Justice and 'Civil Disobedience': Towards a 'New Turn' on Climate Change Litigation?

Climate change litigation in France has recently presented another aspect which is undoubtedly less 'emblematic' and more complex than that created by the major cases previously discussed. This is the 'criminal' aspect of climate justice.

In February 2019, 11 activists took down a presidential portrait in the town hall of the second *arrondissement* of Lyon. The mayor lodged a complaint and the prosecution requested a fine of 500 euros. Released in September 2019 by a judgment rendered by the Correctional Tribunal of Lyon,[54] the same activists were however considered guilty of theft of public property on 17 October 2019 by the Correctional Tribunal of Bonneville for another act. The cases are part of a campaign called '*Décrochons Macron*', in which environmental activists have been denouncing the French government's lack of climate action for more than a year and have decided to take action. Today there are up to approximately 133 portraits of President Emmanuel Macron unhooked all over France to denounce the 'emptiness' of government environmental policy. This time, it was not a matter of bringing a legal action, as shown previously, but of acting outside the framework of the law, through activism close to civil disobedience. These various actions have given rise to some court decisions.

As part of this new form of citizen mobilization for the climate, on 25 August 2019, for example, environmental activists exhibited in Bayonne portraits of the President of the Republic that had been unhooked from the walls of various town halls. The militant action—carried out in particular by *Alternatiba*, ANV-COP21 and the *Bizi* movement—aimed to denounce, also through the international press, the inadequacies of government action in the field of ecology, energy transition and social justice. This media exposure also allowed environmental activists to shed light on the prosecutions of their 'unhooking' colleagues: to date there have been approximately 74 searches and 93 people taken into police custody, which has resulted in at least 57 criminal prosecutions. Some of these activists have been prosecuted for taking off the walls presidential portraits in town halls ('*Mouvement Décrochons Macron*').[55] However, they received support from public figures, such as the former French

54 Tribunal Correctionnel de Lyon, 16 September 2019, n° 19168000015.

55 'Selon le tribunal de Lyon, décrocher un portrait de Macron est une interpellation « légitime » du président' *Le Monde* (16 September 2019) <https://www.lemonde.fr/societe/article/2019/09/16/selon-le-tribunal-de-lyon-decrocher-un-portrait-de-macron-est-une-interpellation-legitime-du-president_5511134_3224.html> accessed 27 September 2020.

Minister for the Ecological and Inclusive Transition and some scientists, who tried to demonstrate how government action was insufficient both considering the climate emergency and the international and European commitments binding on France. The defendants stressed the idea that 'the use of legal channels and the warnings of scientists were not sufficient leverage and that raising public awareness for political change seemed to them to require non-violent civil disobedience'. The acquittal was therefore requested in the name of a state of necessity: 'legitimizing a criminal act proportionate to the removal of a serious and imminent danger, the defendants having had no other choice within their reach than to confront the authorities with a measured reaction'.[56]

The Correctional Tribunal of Lyon, in a decision dated 16 September 2019, acquitted the defendants.[57] The main argument of the defence was the state of necessity stated in Article 122–7 of the Penal Code according to which 'a person is not criminally responsible if, faced with the threat of current or imminent danger, he performs an act necessary for the safeguarding of his person or property, unless the means employed are disproportionate to the gravity of the threat'.[58] The Tribunal therefore had to assess the proportionality between a current or imminent danger and the means employed in relation to the seriousness of the threat (taking a portrait off the walls). In its decision, the Tribunal seems to have considered that the current danger was characterized by a 'failure by the State to respect objectives which can be perceived as minimal in a vital area'.[59] In acquitting the defendants, the Tribunal showed great flexibility in the legal argument. It concluded that the activists' gesture should be 'interpreted as the necessary substitute for the impracticable dialogue between the President of the Republic and the people', within the framework of a representative regime introducing a special relationship between the Head of State and his fellow

56 Tribunal Correctionnel de Lyon (n 54); see M Harscouët de Keravel, 'Tu ne voleras point le portrait de ton président sauf en cas d'urgence climatique' (*Dalloz Actu Étudiant*, 23 September 2019) <https://actu.dalloz-etudiant.fr/a-la-une/article/tu-ne-voleras-point-le-portrait-de-ton-president-sauf-en-cas-durgence-climatique/h/7ce0bf7da9e5444dfa91b50e301d2a76.html> accessed 15 April 2020; also 'Le tribunal correctionnel de Lyon relaxe les « décrocheurs » des portraits d'Emmanuel Macron' (*Lexis Veille*) <https://www.lexisactu.fr/le-tribunal-correctionnel-de-lyon-relaxe-les-decrocheurs-des-portraits-demmanuel-macron> accessed 15 June 2020. Torre-Schaub (director), 'Les Dynamiques du contentieux climatique: usages et mobilisations du droit pour la cause climatique' (n 11).

57 Tribunal Correctionnel de Lyon (n 54).

58 Tribunal Correctionnel de Lyon (n 54); Harscouët de Keravel (n 56).

59 Tribunal Correctionnel de Lyon (n 54); Harscouët de Keravel (n 56).

citizens, who are 'admitted to exercise control over national policy without being able to question this authority individually'.[60]

Although legal, the debate quickly becomes political, even more than in other climate cases analyzed above. Indeed, the link between unhooking a portrait in a town hall and climate change and/or the ineffectiveness of environmental policies is not obvious. This judgment is surprising since it is contrary to the strictness consubstantial with criminal matters.[61] If this judgment is indeed legally questionable, it is no less daring. It has received as much (or even more) media coverage as the *Affaire du Siècle*. Nevertheless, its possible scope should be considered: it is uncertain whether it will be confirmed on appeal, or before the *Cour de cassation*. And even in the case of a positive outcome, it would not guarantee systematic impunity for any form of civil disobedience, or for future citizen actions in the name of climate justice. That would undoubtedly be a risk of 'denaturing' the primary function of justice, which is to restore a balance of responsibilities in order to address the inequalities created by climate change.

Following the latest events in London, Brussels and other places all over the world, the possibility cannot be excluded that these acts of peaceful disobedience will multiply, thus giving rise to other trials. A shift could occur, going from the search for climate justice to the search 'at all costs' for measures to fight against the 'climate emergency'. This new interesting turn of climate change litigation should be carefully observed in the future.[62]

VII Conclusion

It is quite clear that, today, civil society (NGOs, unions and citizens) has the capacity to emerge as a counterbalance to State activities regarding fossil fuel and also private industrial projects. Climate change litigation, even in France, can be an interesting way to show new paths to fight against climate change.

In general, the different climate change cases around the world and in France recall both the commitments made under the Paris Agreement as well

60 Tribunal Correctionnel de Lyon (n 54).

61 Harscouët de Keravel (n 56); Torre-Schaub (director), 'Les Dynamiques du contentieux climatique: usages et mobilisations du droit pour la cause climatique' (n 11).

62 M Torre-Schaub and B Lormeteau, 'Aspects juridiques du changement climatique: de la justice climatique à l'urgence climatique' [2019] La Semaine Juridique (Edition Générale) 2382.

as the data from the latest IPCC reports. These legal actions are also part of a favourable context, against the backdrop of the Dutch *Urgenda* decision of December 2019, the latest youth movements led by Greta Thunberg and other young activists, and the actions of supporters of civil disobedience.

More specifically and to conclude, in France the different emerging climate change cases are characterized by five traits. First, in the most publicized disputes (*L'Affaire du Siècle*, *Grande-Synthe*), we find the same 'climate change litigation pattern' used in other major climate disputes such as *Urgenda* in the Netherlands or *Leghari* in Pakistan: searching for public responsibility and more ambitious carbon reduction targets. Second, we note that climate change litigation in France takes particular forms, better adapted to French law. This is evidenced by the characterization of the State's fault and the emergence of the ecological damage recognition. Even if a negative decision on compensation in the *Affaire du Siècle* could set a bad precedent, we are nonetheless seeing a new trend in a 'French-style' climate change litigation. Thirdly, there is a new trend in French climate disputes of persevering on an already open road by invoking more 'classic' environmental tools such as environmental impact assessments. Fourthly, the path opened in France by actions based on 'civil disobedience' seems also promising. Finally, the last feature, the law on the duty of vigilance (*devoir de vigilance*) applied to fossil fuel companies, could also be at the origins of a new climate change litigation trend, full of promise in France and abroad. Such a new trend could especially emerge in EU countries, if the adoption of a new EU Directive on the Duty of Care, establishing new obligations for fossil fuel companies, becomes a reality in the near future.

CHAPTER 7

Climate Change Litigation in Brazil: Will Green Courts Become Greener?

Joana Setzer, Guilherme JS Leal** and Caio Borges****

1 Introduction

Climate change litigation is a broad and still evolving term that refers to the rapidly growing body of lawsuits identified worldwide, in which climate change, its causes and impacts are either a contributing or key consideration in legal rationale and adjudication.[1] Over 1,525 climate change-related cases have been identified by the Sabin Center for Climate Change Law at Columbia University and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science—1,213 in the US and 374 in at least 37 other countries and eight regional or international jurisdictions.[2] In most of these cases, climate change is at the periphery of the argument and the filing and/or decision acknowledges the issue as relevant but not determinative.[3]

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1 J Setzer and L Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) *WIREs Climate* Change <https://onlinelibrary.wiley.com/doi/abs/10.1002/wcc.580> accessed 14 March 2021.

2 Non-US cases can be found in a database maintained by both institutions, namely, 'Climate Change Laws of the World Database' (2020) <https://climate-laws.org/> accessed 5 June 2020. US cases are listed in the Climate Change Litigation Database maintained by the Sabin Center <http://climatecasechart.com/us-climate-change-litigation> accessed 5 June 2020.

3 For this and other trends in climate change litigation, see J Setzer and R Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (Grantham Research Institute on Climate Change and the Environment, 4 July 2019) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> accessed 5 April 2020.

Up to April 2020, these two databases had recorded only six cases of climate change litigation in Brazil.[4] Two of these have climate change as a central component to the case, and both have been filed by the Public Prosecutor's Office against private companies: the first against a group of 35 airline companies and the second against a steel company. The remaining cases have climate change as a secondary component of the argument. These cases consist of enforcement actions against companies and environmental agencies for violations of natural resource management laws or the failure to implement environmental policies. Following a visible trend in growing numbers of climate cases across the world, and in the Global South specifically we are likely to see a continued growth in climate change litigation in Brazil, including the continued evolution of strategies and legal arguments underpinning the cases brought.[5]

This chapter examines the context and specificities of climate change litigation in Brazil. We explore the courts' potential leverage over climate change litigation *vis-à-vis* its historical contributions to the shaping of Brazilian environmental law. We take the two existing cases of *direct* climate change litigation as our focal point. The analysis is complemented by an examination of the institutional and legal shifts underlying the rapidly evolving trend of *indirect* climate change litigation that addresses the causes and consequences of the main driver of GHG emissions in Brazil: land-use change and, more specifically, the (illegal) deforestation of the Brazilian Amazon. The analysis suggests that while still incipient (i) climate change litigation in Brazil does not take place in a regulatory vacuum, and (ii) climate change claims rely, to a great extent, upon existing environmental statutory and case law. These two aspects are likely to be reflected in the courts' interpretation and application of the legislation governing climate change.

The chapter is structured as follows: Section II provides an examination of the legal foundation for climate change litigation in Brazil. Section III investigates two cases of direct climate change litigation in Brazil. Section IV explores how climate change is being addressed as a peripheral argument

4 Note that while the two datasets are the most comprehensive resources available on the subject, they are not exhaustive. Moreover, this is a rapidly evolving field. Following the submission of this article in April 2020, four new lawsuits which address climate change in a more direct manner were filed (see Section V). Owing to the cases' relevance to this article the authors have provided a short overview. A summary of the ten cases of climate change litigation in Brazil is available in Annex 1.

5 J Setzer and L Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9(1) Transnational Environmental Law 77.

in other cases. The analysis focuses on cases relating to forestry and land-use change in the Brazilian Amazon. Brazil's experience is compared with that of Colombia and Peru, where climate specific cases have been filed with the direct objective of combating the destruction of the Amazon biome. Section V reflects on the shifting dynamics and emerging actors that could lead to Brazil soon seeing its own paradigmatic direct climate judicial decision. Section VI concludes by considering the opportunities for strategic climate change litigation to address the failure of the federal and state governments to implement measures to uphold Brazil's commitments under the Paris Agreement.

II The Legal Foundation for Climate Change Litigation in Brazil

In Brazil, climate change law is generally understood within the broader context of environmental law.[6] Climate change issues have been incorporated, explicitly and implicitly, into national and subnational legislation, as either a central or incidental element. In addition, climate law in Brazil coincides, to different degrees, with environmental issues that have already been substantially investigated by scholars and examined within the courts. An understanding of the close connection between environmental and climate change topics in Brazil is central to an exploration of how the judiciary might leverage climate change litigation *vis-à-vis* courts' ground-breaking contributions to shaping Brazilian environmental law.[7]

In this vein, this section presents some basic aspects for understanding climate change litigation in Brazil. Firstly (A) we highlight two principles upon which Brazil's legal regime is founded: the *civil law system* and *federalism.* Secondly (B) we introduce key national environmental and climate change legislation, to outline the legal background against which the judiciary has been asked to resolve climate change-driven disputes. And, thirdly (C) we provide a short overview of Brazil's environmental case law, drawing attention to precedents that may influence future decisions in climate change lawsuits, particularly as regards liability for climate damages.

6 The discussion around climate law as an autonomous field is incipient amongst Brazilian scholars. However, whilst the authors recognize the importance of this topic, it is not this chapter's intention to engage with this discussion within this specific paper.

7 N Bryner, 'Brazil's Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil)' (2012) 29 Pace Environmental Law Review 470, 485–6.

A *Brazil's Legal Regime*

For a context-based understanding of Brazil's climate change legislation and litigation, it is worth considering what is the country's system of law and system of government.[8] These two aspects of Brazil's legal system also help to explain the profuse body of national and subnational acts and regulations that characterizes Brazil's environmental law.

Firstly, its system of law. Because Brazil is rooted in the civil law tradition, its laws emerge primarily from a body of written acts (or statutes) adopted by legislative assemblies, to which the Constitution grants exclusive law-making powers.[9] Although the executive branch is not a law-making body per se, the Constitution vests in the president some limited regulatory powers, exercised within the boundaries established by the legislative branch.[10] Administrative agencies, bodies and councils may also enjoy some normative prerogatives, if duly authorized by a legislative act (delegated powers).[11]

Following the civil law tradition, the judicial branch does not create laws, but rather construes the acts and regulations passed by the legislative and executive branches, ordering their application according to its interpretation. Yet, despite its basis in the civil law tradition, Brazil's judicial system has been influenced by the common law's use of precedent. The use of precedent has, in turn, contributed to the development of Brazilian environmental law.

Secondly, its system of government. In Brazil's federalism,[12] each of the republic's units (ie the Union, the states, the municipalities, and the Federal District) is empowered, within its constitutional competence,[13] to pass its own

8 The 1965 Forest Code (Law no 4,771/1965) was one of the most enduring acts in Brazil's Environmental Law (47 years in force), being repealed by the 2012 Forest Code (Act no 12,651/2012).

9 Constitution of the Federative Republic of Brazil of October 5, 1988 (hereafter: 'Constitution'). Art 5(II) of the Constitution states that, 'no one shall be obliged to do or refrain from doing something except by virtue of law' ('law' here meaning '*lei*', an act passed by the Legislative branch).

10 Governors (at the state level) and Mayors (at the municipal level) hold the same power, exercised within their jurisdiction, according to their own Constitutions and Organic Acts, respectively.

11 Particularly in the environmental law field, the National Environmental Council (*Conselho Nacional do Meio Ambiente*—CONAMA), headed by the Ministry of the Environment, was granted some relevant regulatory powers to set forth, inter alia, environmental quality standards and environmental permit proceedings, pursuant to Act no 6,938/1981, which established the National Environmental Policy—NEP.

12 Constitution arts 1 and 60(4).

13 Such competences are delimited by arts 22, 24 and 30(I) and (II) of the Constitution.

acts and regulations.[14] Environmental protection, in particular, is treated as a matter of common interest by the Constitution,[15] thereby falling within the scope of the shared competence of all federative entities.[16]

B *Environmental and Climate Change Legislation*

We now turn to some of the main environmental and climate laws and regulations enacted over the past sixty years. At the national level,[17] three acts passed in the 1980s stand as important milestones in the development of Brazilian environmental law. First, the 1981 National Environmental Policy (NEP),[18] which laid down a nationwide framework for a comprehensive protection of the environment. The NEP provides, inter alia, for a strict civil liability regime for environmental damages, whereby direct and indirect polluters may be obliged to bear the cost of repairing environmental damages and compensating those affected. Second, the 1985 Public Civil Action Act,[19] which granted both the Public Prosecutor's Office and non-governmental organizations—amongst other parties—the right to file public civil actions against public and private persons, seeking, for instance, compliance with environmental rules and compensation for diffuse damages. And, third, the 1988 Constitution, which recognized present and future generations' fundamental right to an 'ecologically balanced environment'.[20]

None of these landmark instruments, even after several amendments, addresses climate change in a direct, explicit manner. Still, the NEP, the Public Civil Action Act and the Constitution have paved the way towards the development of climate change litigation in Brazil, establishing (i) the possibility of holding direct and indirect polluters strictly liable for environmental damages caused by their activities; (ii) the far-reaching rule of standing that enables public access to the judiciary as a means to resolve environmental disputes; and (iii) the constitutional recognition of the principle of intergenerational equity. Therefore, these norms may be regarded as examples of what Scotford

14 For further discussions on this topic: G Leal, 'Allocation of law-making powers in Brazil' in L Paddock, R Glicksman and N Bryner (eds), *Decision making in environmental law* (Edward Elgar 2016).

15 Constitution art 225.

16 Constitution arts 24(VI), (VII) and (VIII), and 30(I) and (II).

17 For the current purposes, we will not explore subnational legislation.

18 Law no 6,938/1981.

19 Law no 7,347/1985.

20 Constitution art 225.

and Minas describe as 'indirect climate legislation', for they arguably 'intersect with climate change but [do] not address it explicitly'.[21]

Other norms govern climate change more directly. Apart from the legislative and executive decrees that incorporated the United Nations Framework Convention on Climate Change (UNFCCC)[22] and the Kyoto Protocol[23] into Brazil's domestic legislation in the 1990s and early 2000s, climate change started to be regulated at the national level in 2009 via the National Policy on Climate Change (NPCC).[24] This act constitutes the most obvious example of 'direct climate legislation' which, as Scotford and Minas put it, 'includes legislation and regulation the primary purpose of which is to achieve climate policy objectives'.[25] Indeed, the NPCC created a comprehensive framework for tackling climate change in Brazil, establishing key concepts, principles, guidance, objectives, directives, instruments, institutional arrangements and mitigation targets.[26] Direct climate legislation also comprises 'laws designed for non-climate purposes that explicitly take into account climate change issues or impacts within their legislative framework'.[27] The 2012 Forest Code is such an example.[28] It includes Brazil's sovereign commitment to preserving the integrity of the climate system for the benefit of present and future generations, as one of its guiding principles (Article 1-A, sole paragraph, I).

Two NPCC provisions are particularly relevant to a discussion on the role of courts in enforcing climate legislation in Brazil: Articles 3 and 5.[29] Article 3 enshrines in its chapeau the principles of precaution, prevention, participation, sustainable development and common but differentiated responsibilities—the latter gesturing towards climate action at the international level. Article 3 determines that when carrying out measures to achieve the NPCC's goals,[30]

21 E Scotford and S Minas, 'Probing the hidden depths of climate laws: Analysing national climate change legislation' (2018) 28(1) Review of European, Comparative & International Environmental Law 67.

22 Legislative Decree no 01/1994 and Executive Decree no 2,652/1998.

23 Legislative Decree no 144/2002 and Executive Decree no 5,445/2005.

24 Law no 12,187/2009.

25 E Scotford and S Minas (n 21) 33.

26 This Act is regulated by the Executive Decree no 9,578/2018.

27 E Scotford and S Minas, (n 21) 33.

28 Law no 12,651/2012.

29 Art 12's mitigation targets (ie a reduction between 36.1% and 38.9% of GHG emissions projected until 2020) may give rise to an interesting debate about the government's duty to meet such goals, but, due to the limitations of this work, we will not engage on this discussion.

30 The NPCC aims at achieving, inter alia, (i) a balance between socioeconomic development and the protection of the climate system; (ii) a reduction of anthropogenic emissions of

the government will take into account a general duty to act on reducing the impacts deriving from anthropogenic interference with the climate system. In addition, the government is required to take measures to anticipate, prevent and minimize human contributions to climate change, where there is reasonable scientific and technical consensus. Such measures must take into consideration (i) the different socioeconomic contexts in which they are implemented, (ii) the different burden suffered by corporations and affected communities, and (iii) the individual responsibilities of those who emit GHG s and those who suffer the impacts of climate change. Article 5 lists the NPCC's directives, which include Brazil's international commitments undertaken under the UNFCCC, the Kyoto Protocol, and other documents on climate change signed by the government, such as the Paris Agreement.[31]

The NPCC makes explicit reference to the intergenerational principle enshrined in the 1988 Constitution, but, unlike the NEP, it does not provide a rule on liability for loss and damage. Nevertheless, it acknowledges a duty (for both government and society in general) to act to reduce the human impacts on the climate system and stresses the importance of weighting individual responsibilities to achieve the policy's objectives. The precise scope of these provisions is still unclear; their enforceability, and their connection with commitments undertaken in the context of international treaties—particularly the Nationally Determined Contributions—is yet to be tested. In defining the reach and applicability of such provisions, Brazilian courts are likely to consider the environmental case law where the legal concepts of damages, causation and liability have been extensively examined in cases involving pollution.

C *Environmental Case Law in Brazil*

In Brazil, disputes around alleged breaches of environmental legislation (eg illegal emission of pollutants into the atmosphere, failure to mitigate environmental damages) are often resolved in courtrooms. In judging such disputes, Brazilian courts have been fairly open to innovative interpretations of the law.[32]

Over the last twenty years, Brazilian courts have formed a 'green' case law, particularly in the High Court, where, as Bryner notes, there is a 'trend toward interpretations that give stronger effect to constitutional and statutory

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GHG regarding their different sources; and (iii) increments of anthropogenic removals by sinks of GHG (Art 4).

31 The Paris Agreement was incorporated into Brazil's domestic legislation in 2017, pursuant to Legislative Decree no 140/2016 and Executive Decree no 9,073/2017.

32 N Bryner (n 7) 496.

provisions on environmental protection'.[33] As a result, the High Court has 'developed itself as Brazil's 'green court', demonstrating through its jurisprudence a commitment to environmental rights as an essential element of the public order'.[34] Over the past few decades, the judicial branch has thereby begun to influence the understanding, development and enforcement of Brazil's environmental law.

The emergence of the judicial branch as a champion of environmental protection may well be understood through a reading of the Brazilian legal system as influenced by common law systems, one that recognizes the importance of judicial precedent in ensuring legal uniformity, foreseeability and effectiveness.[35] As important as this debate may be, however, it falls beyond the scope of this chapter. Instead, the focus here is on the development of Brazil's environmental case law as seen from two angles. First, the High Court Rules (*Súmulas*), which consolidate the Court's understandings on environmental issues and are regularly raised in decisions, and second, the body of High Court decisions delivered in environment-related cases.

Regarding the High Court's Rules, out of more than 600 existing Rules, only six address environmental issues directly, putting forward strong, pro-environmental protection understandings. Though they are intended to clarify the High Court's ultimate view on certain issues, in practice, the Rules themselves tend to introduce further questions. Two examples are worth noting. The 2018 Rule 618 states that the 'shifting of the burden of proof' applies to lawsuits involving environmental damages. This precept raises doubt as to whether such an application must meet certain conditions, and, if so, what these might be. The 2019 Rule 623 establishes that environmental obligations are attached to land (*propter rem*) and that a plaintiff may seek compliance with such obligations from current and/or past landowners or land-users. This Rule, however, raises questions as to whether these obligations would comprise the remediation of contaminated sites, regardless of a causal link between damage and a defendant's activity.

The High Court has also strengthened environmental protections through its interpretations and decisions, particularly in cases involving civil liability for environmental damages under the NEP. As mentioned, the NEP establishes a strict liability or liability irrespective of fault to trigger the obligation to redress the environmental damage.

33 N Bryner (n 7) 485–6.

34 N Bryner (n 7) 532.

35 This trend becomes more evident after the 2015 Civil Procedure Reform.

The High Court's reading of this rule recognizes four key characteristics. First, the strict liability regime must be applied based on a comprehensive risk doctrine. According to this doctrine, typical exclusions of liability based on intervening causes (such as third-party conduct, fortuitous event or force majeure, foreseeability) are not admitted as defences. Second, civil liability for environmental damages is joint and several. This provision derives from both the NEP's conceptualization of a 'polluter' (comprising both direct and indirect polluters),[36] and the Civil Code's rule that joint and several liability should be applied when more than one person contributes to the same, indivisible damage.[37] Third, the notion of an indirect polluter is very flexible. For determining causation in environmental damage, the High Court considers as equivalent those who act, those who did not act when they should have, those who allow the action, those who do not care that others act, those who finance the action performed by others and those who benefit when others act.[38] Therefore, anyone who falls within any of these categories may be held liable, not only strictly, but also jointly and severally. And fourth, the definition of environmental damages is broad, comprising not only ecological harms, but also individual and social/collective harms, including material and non-material damages, which comprise punitive damages (ie civil fines).[39]

As will be discussed below, the NEP is the legal foundation for Brazil's main climate change lawsuits. Thus, all of the abovementioned approaches are likely to be considered by courts in their judgements. Whether and how they will be considered in the climate change context remains to be seen.

III Direct Climate Change Litigation in Brazil

By the end of April 2020 there were only two cases of direct climate change litigation in Brazil, that is, where climate change figured at the core of the case: the airline companies cases and the steel company case. These two cases

36 Law no 6,938/1981, art 3, IV: polluter means 'the natural or legal, public or private person, directly or indirectly responsible for an activity that causes environmental degradation'.

37 Civil Code art 942: '… if there is more than one offender, all of them shall be jointly and severally liable for reparation'.

38 High Court, 2nd Panel, Resp 650728-SC, Justice Herman Benjamin, 23 October 2007.

39 High Court, 2nd Panel, Special Appeal no 1.374.284-MG, Justice Luis Felipe Salomão, 27 August 2014; 2nd Panel, Special Appeal no 1.367.923-RJ, Justice Humberto Martins, 27 August 2013; 4th Panel, Special Appeal no 1.346.430-PR, Justice Luis Felipe Salomão, 18 October 2012; and 2nd Panel, Special Appeal no 965.078-SP, Justice Herman Benjamin, 27 April 2011.

are described and analyzed in this section. A summary of these two cases and other cases of indirect climate change litigation in Brazil can be found in Annex 1 below.

A *The Airline Companies Cases*

Lawsuits involving the aviation sector have already been filed in other jurisdictions. These cases challenged planning applications for airport expansions (eg Vienna airport,[40] Stansted and Heathrow airports in London,[41] Dublin airport)[42] or climate change law and regulation (eg the application of the EU-ETS for the aviation sector).[43] Compared with these actions, the Brazilian airline companies case is unique, in that it involves claims against aviation companies seeking compensation for climate damages.

In 2010 the Public Prosecutor Office of Guarulhos, a municipality located in the state of São Paulo, filed 35 lawsuits against airlines operating out of Brazil's international airport, seeking compensation for the GHG emissions produced by the daily landing and take-off of aircrafts. Under the NEP's civil liability regime, the plaintiff argued that there was a direct link between the activity of these companies and the GHG emissions causing damages to climate stability and asked for compensation for the damages caused. The main evidence brought by the Public Prosecutor were estimates of carbon dioxide released by aircrafts in the airport in 2009. This was estimated to be 14 million tonnes, to compensate for which one would have to plant 7 billion trees (based on data from the United Nations and the National Agency of Civil Aviation). The

40 Vienna-Schwechat Airport Expansion < https://climate-laws.org/cclow/geographies/austria/litigation_cases/in-re-vienna-schwechat-airport-expansion> accessed 7 April 2020.

41 *Barbone and Ross* (*on behalf of Stop Stansted Expansion*) *v Secretary of State for Transport* [2009] EWHC 463 (Admin) <https://climate-laws.org/cclow/geographies/united-kingdom/litigation_cases/barbone-and-ross-on-behalf-of-stop-stansted-expansion-v-secretary-of-state-for-transport-queen-s-bench-division-administrative-court-2009> accessed 7 April 2020. Challenging Heathrow expansion: *R* (*on the application of the London Borough of Hillingdon and Others*) *v Secretary of State for Transport* [2010] EWHC 626 (Admin) <https://climate-laws.org/cclow/geographies/united-kingdom/litigation_cases/r-on-the-application-of-the-london-borough-of-hillingdon-others-v-secretary-of-state-for-transport-queen-s-bench-division-high-court-2010> accessed 7 April 2020; and *R* (*on the application of Plan B Earth*) *v Secretary of State for Transport* [2020] EWCA Civ 214 <https://climate-laws.org/cclow/geographies/united-kingdom/litigation_cases/plan-b-earth-v-secretary-of-state-for-transport> accessed 7 April 2020.

42 *Friends of the Irish Environment CLG v Fingal County Council*, 2017 No 344 JR, 21 November 2017 <https://climate-laws.org/cclow/geographies/ireland/litigation_cases/friends-of-the-irish-environment-clg-v-fingal-county-council> accessed 7 April 2020.

43 C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755.

plaintiff claimed that compensation could be made through reforestation and conservation of urban or rural lands in Guarulhos, or through a payment per passenger scheme, whereby compensation for airline activity would be managed by a local fund for the restoration of permanent protected areas, watercourses and streams.

The airlines challenged the case arguing that there was no form of compensation established by law, that no rules had been breached and, thus, that there was no legal basis for the claims. They also asserted that air transport was responsible for only a small percentage of air pollutants and the case was unfair in singling out air transport from other types of transport, as well as from other large emission sectors or activities (eg energy, industry, deforestation). In addition, the airlines argued that they used the best technologies, followed international standards and were regulated by the Brazilian government.[44]

The claims were initially distributed to different state lower courts. Some of the judges dismissed the claims, not on merits, but for failing to meet minimum legal requirements. Other judges rejected the claims—deciding on merits—arguing that emitters could not be considered liable solely on the basis that their activity produced pollution, and that compensation could be sought only if previously established by a specific law. The use of motor vehicles was given as an example of a regular activity that causes pollution without raising an obligation to compensate.[45]

The Public Prosecutor's Office appealed, and the state Court of Appeal of São Paulo dismissed the case based on the argument that the federal Court of Appeal (3rd Regional) had jurisdiction.[46] Yet, on reaching the Regional Federal Court of Appeal, some of the judges disagreed with the state court's dismissal, creating a negative jurisdiction conflict. The conflict of jurisdiction was decided in 2014 by the High Court of Brazil, with the federal courts given jurisdiction to decide on the case.[47]

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44 Observatório Eco—Direito Ambiental, 'MP cobra compensação ambiental de empresas aéreas em Guarulhos' (*Jusbrasil*, August 2010) <https://observatorio-eco.jusbrasil.com.br/noticias/2524243/mp-cobra-compensacao-ambiental-de-empresas-aereas-em-guarulhos> accessed 1 June 2020.

45 *Public Prosecutor Office of Sao Paulo v Pluna Lineas Aereas Uruguayanas S/A*, no 0003860-36.2011.8.26.0224, 10th Civil Lower Court of Guarulhos, decided on 16 July 2013.

46 *Public Prosecutor Office of Sao Paulo v United Airlines, Taag Linhas Aereas, Aerolineas Argentinas, British Airways, South African, Emirates Airline, Compania Mexicana, Delta Airlines, Deutsche Lufthansa, Swisss International, Oceanair Linhas Aereas, Passaredo Transportes Aereos, Trip Linhas Aereas, Al El Israel Airlines, VRG Linhas Aereas S/A Grupo Gol, TAM Linhas Aereas, inter alia*, no 000292010.2014.4.03.9999.

47 High Court, CC 135.427, 1st Section, Justice Mauro Campbell, 18 September 2014.

The claims proceeded within the federal jurisdiction, wherein the Conciliation Centre of Guarulhos supported the parties in negotiating a joint agreement. The negotiations, however, were not successful. In June 2016, the Conciliation Centre closed the negotiations, identifying three contentious matters that still needed to be addressed. First, the standing of the Public Prosecutor's Office of São Paulo State to bring the case. Second, whether the claims should be combined and sent to one judge in order to avoid conflicting decisions. Third, whether the Association of Air Transportation should be kept as an interested party in all cases in order to ensure consistency.[48]

The outcome was three lawsuits in which judges examined the merits of the case, and so far one case made it all the way to the High Court (namely, a claim against the Dutch airline company KLM).[49] The Court of Appeals rejected the motion, finding that as GHG emissions are inherent to airlines' activities, and that installation and operation of the airport were lawfully approved through the environmental licensing process, their activity was legal. In response, the Public Prosecutor's Office filed a motion for clarification, claiming that in recent years there had been a significant increase in the airport's operational volume and that the NPCC requires the reduction of GHG emissions. The Court of Appeals rejected the motion again based on the understanding that there is no legal requirement that airlines mitigate the damage caused by emissions from their activities. In September 2018 the Public Prosecutor's Office appealed to the High Court, and the case was received in January 2020.[50] The case is yet to be decided, and will likely be the first case where the High Court decides on the applicability of the NEP's civil liability regime in the context of climate change disputes.

B *The Steel Company Case*

In July 2019, Brazil's Attorney-General's Office, representing the federal Environment Agency (IBAMA), filed a public civil action against a steel company (Siderúrgica São Luiz Ltd.) and its managing partner (Mr. Martins) for environmental and climate damages allegedly caused by the company's

48 Decision extracted from *Public Prosecutor Office of Sao Paulo v VRG Linhas Aereas S/A Grupo GOL,* no 0001888-04.2013.4.03.6119, 1st Federal Lower Court of Guarulhos, 01.06.2016 (ongoing).

49 *Federal Public Prosecutor Office v KLM,* Special Appeal no 185031 (2020/001750-7), received by the High Court of Justice on 10 January 2020.

50 *Federal Public Prosecutor Office v KLM,* Special Appeal no 185031 (2020/001750-7), received by the High Court of Justice on 10 January 2020.

continuous and fraudulent use of illegal charcoal in its plants in the State of Minas Gerais.[51]

According to the plaintiff, the certificates of origin relating to the charcoal being acquired for the company's plants contained false information on the material's volume and place of origin. The defendants had also consistently failed to exercise due diligence in this area. IBAMA further claimed that the defendants had led a scheme of illegal charcoal production, from which they had profiteered. Highlighting the defendants' key role as consumer of the charcoal, IBAMA contended that the defendants should be held strictly, jointly and severally liable for both the environmental damages caused by illegal deforestation linked to charcoal production, as well as the contribution to climate damage resulting from the burning of charcoal in the steel production process.

Grounded on the NEP and the NPCC, IBAMA asked for the (i) reforestation of an equivalent area; (ii) compensation for interim and residual environmental damage; (iii) compensation for climate damages based on the social cost of carbon, to be invested in the creation of carbon sinks; (iv) collective non-material (moral) damages, to be valued according to the defendants' profits yielded from their illegal activities (disgorgement of profits); (v) participation in environmental compliance programmes; and (vi) loss or restriction of tax benefits and incentives and loss or suspension of financing from official credit establishments. This case is relatively new, and a decision is yet to be delivered. Decisions on the merits of the dispute are expected to address the connection between the NEP, the NPCC and liability for climate damages.

IV Indirect Climate Change Litigation in Brazil

This section focuses on *indirect* climate change litigation, exploring how climate change is being addressed as a peripheral argument in lawsuits filed in Brazil, particularly on cases relating to forestry and land-use change in the Brazilian Amazon. As mentioned, land-use change is the main driver of emissions in Brazil. Emissions measurements have shown that in 2018 land-use change contributed to 44% of the total emissions of the country, followed by agriculture, which amounted to 25%.[52] Brazil's experience is here compared

51 *Federal Environmental Agency* (*IBAMA*) *v Siderúrgica São Luiz Ltd. and Martins*, no 1010603-35.2019.4.01.3800, Federal Court 1st Region, filed 2 July 2019.

52 C Angelo and C Rittl, 'Análise das emissões brasileiras de GEE e suas implicações para as metas do Brasil (1970–2018) – Relatório-síntese' (SEEG, November 2019) <https://www.oc.eco.br/wp-content/uploads/2019/11/OC_SEEG_Relatorio_2019pdf.pdf> accessed 14 March 2021.

with that of two neighbouring countries, Colombia and Peru, where climate specific cases have been filed with the direct objective of combating the destruction of the Amazon biome. This chapter contributes to this discussion with a reflection on current shifts in institutional dynamics and their intersection with the 'legal foundation' for climate change litigation. These reflections support the prognosis that Brazil could soon see its own direct climate cases in this area, which, much like its neighbours, may address the failure of the State to implement legal and administrative frameworks to combat deforestation and safeguard protected areas in the Amazon.

A *Legal Strategies to Protect the Amazon in Brazil*

Attempts to address deforestation in the Brazilian Amazon through both legal and non-legal strategies have been made for several decades.[53] On the legal side, thousands of cases have been filed before Brazilian courts on issues relating to management and/or conversion and clearing of land, including illegal logging and forest-clearing restoration of degraded areas. More recently, political disputes have led litigants to seek judicial review of legislative and administrative measures that affect the legal status, or the level of legal protection afforded to conservation units and other types of protected areas (eg indigenous peoples' lands and legal reserves).[54]

There have been cases where legal and non-legal strategies have mutually reinforced each other. In 2009, the Federal Prosecutor's Office filed several lawsuits against meatpackers who had purchased cattle from areas that had been embargoed by IBAMA due to illegal deforestation. In the same year, Greenpeace published a report exposing the linkages between the expansion of cattle herding and the soaring rates of deforestation in the Brazilian Amazon.[55] The ensuing outcry amongst domestic and international publics, coupled with warnings

53 J Kellman, 'The Brazilian Legal Tradition and Environmental Protection: Friend or Foe' (2002) 25(2) Hastings International & Comparative Law Review 145, 145.

54 In 2016 and 2017, under President Michel Temer's administration, there were attempts to 'downgrade' the status of some national parks and national forests to designate them as 'Permanent Preservation Areas', a legal category with less restrictive conservation requirements. Most initiatives ended up being rejected by the President after domestic and international pressure. In 2019, the Federal Supreme Court concluded the judgment of a constitutional review case in which it laid out the interpretation that conservation units can only have their legal status altered through the regular legislative process and not through fast-track measures. See *The Republic's Federal Prosecution Service v Federal Union*, Federal Supreme Court, *Ação Direta de Inconstitucionalidade* (*ADI*) N 4717, decided on 13 April 2019.

55 Greenpeace, 'A farra do boi na Amazônia' (June 2009), available at: <http://greenpeace.org.br/gado/farradoboinaamazonia.pdf> accessed 4 April 2020.

from the Federal Prosecutor's Office that it would take further legal action against retailers and supermarkets, prompted the parties—environmental groups, international buyers/traders and the meatpacking industry—to sign a legally binding agreement,[56] mediated by the Federal Prosecutor's Office. The agreement required meatpackers to submit periodical reports signed by third-party auditors attesting that no cattle has been supplied from ranches utilizing illegally deforested areas.[57] In 2019, the Federal Prosecutor began filing the first lawsuits against meatpackers refusing to abide by and/or breaching the terms of the agreement.[58]

In the example above, litigants have not yet explored, through direct reference to climate science or climate policies, the links between deforestation and climate change.[59] Similarly, not one single case out of the approximately 3,500 cases initiated by the Federal Prosecutor's Office since 2017 under the 'Protect the Amazon' Programme[60] raised the consequences of deforestation for climate change as a source of material legal obligations. The Brazilian NDC is referenced solely for the purposes of establishing federal jurisdiction, on the grounds that the obligation to formulate and implement the country's international climate commitments falls under the competence of the federal government.

Meanwhile, NGOs in neighbouring countries have started filing constitutional actions against their respective States for failure to take adequate action

56 Dozens of such agreements were signed between the Public Prosecutors and meatpackers. An example (signed by the company *Marfrig Alimentos S/A*) can be found at: <http://www.mpf.mp.br/mt/atos-e-publicacoes/tacs/tacs-cuiaba/TAC%20-%20MARFRIG.PDF/at_download/file> accessed 14 June 2020.

57 Other obligations of the agreement include not buying from suppliers found using forced labour or who have been judicially convicted of invasion of indigenous lands, agrarian violence or land grabbing.

58 'MPF requer multa de R$ 3,8 milhões a frigoríficos que descumpriram acordo do Carne Legal no AM' (*Ministério Público Federal*, 21 October 2019) <http://www.mpf.mp.br/am/sala-de-imprensa/noticias-am/mpf-requer-multa-de-r-3-8-milhoes-a-frigorificos-que-descumpriram-acordo-do-carne-legal-no-am> accessed 5 April 2020; 'MPF no Amazonas pede indenização de R$ 1,9 milhão do frigorífico Bovinorte por comercializar carne de origem ilegal' (*Ministério Público Federal*, 21 January 2020) <http://www.mpf.mp.br/am/sala-de-imprensa/noticias-am/mpf-no-amazonas-pede-indenizacao-de-r-1-9-milhao-do-frigorifico-bovinorte-por-comercializar-carne-de-origem-ilegal> accessed 28 April 2020.

59 V Masson-Delmotte et al (eds), *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* (IPCC 2019) 37 'Technical Summary'.

60 The lawsuits rely on satellite imagery to present credible evidence of deforestation. More information about the Programme can be found at the webpage: <http://www.amazoniaprotege.mpf.mp.br/> accessed 15 August 2019.

on tackling climate change in accordance with national and international obligations.[61] These efforts link ongoing deforestation to in-country climate change impacts, which, they argue, violate the fundamental rights of Peruvian and Colombian citizens, as well as their indigenous territorial and cultural rights.

B *Precedents from Colombia and Peru*

In Colombia, a group of 25 children and young adults, between the ages of 7 and 26, brought a case against the national government requiring them to comply with their prior commitment to stop deforestation in the Amazon region by 2020. *Future Generations v Ministry of the Environment and Others* was the first climate change and future generations lawsuit in Latin America.[62]

The plaintiffs argued that the government had failed to respect children's constitutional rights to a healthy environment, life, health, nutrition and water, as well as failing to protect the rights of future generations. The Supreme Court's decision relied on the future generations argument to order the government to take action on climate change, including to mandate the formulation and implementation of action plans to address deforestation in the Amazon.[63] With respect to standing, the decision applied the same constitutional provisions used for the protection of the environment for current generations, but applied it to the protection of future generations, thereby substantially expanding the limits of such rights.[64] The ruling also suggests a receptiveness of courts to climate change litigation on the grounds of socio-economic rights.[65] In this case, doctrines and remedies developed to protect social rights (including the right to health, food and housing) were extended to protect the socio-economic rights of citizens affected by climate harms. In its decision, the Colombian Supreme Court replicated an approach used in public interest

61 In Colombia, the case was brought by the NGO Dejusticia and, in Peru, by the Legal Defense Institute, both representing children plaintiffs.

62 *Future Generations v Ministry of the Environment and Others*, No 11001-22-03-000-2018-00319-01, Supreme Court of Colombia, 5 April 2018 <https://climate-laws.org/geographies/colombia/litigation_cases/future-generations-v-ministry-of-the-environment-and-others> accessed 14 March 2021.

63 Supreme Court Decision in Spanish and unofficial translation of excerpts to English available at: <https://climate-laws.org/geographies/colombia/litigation_cases/future-generations-v-ministry-of-the-environment-and-others> accessed 14 March 2021.

64 PAA Alvarado and D Rivas-Ramírez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30(3) Journal of Environmental Law 524.

65 C Rodriguez-Garavito, 'International Human Rights and Climate Governance: Analyzing the Global 'Rights Turn' in Climate Litigation' (forthcoming).

litigation on socio-economic rights, instructing the government to create an action plan for complying with the country's international climate pledges to cut down deforestation to net zero by 2020, keeping supervisory jurisdiction and promising to convene future public hearings.[66]

The outcome in this case is distinct from the traditionally moderate jurisprudence on applying public-interest oriented constitutional rights. The decision discussed 'intergenerational equity and solidarity, private liability and accountability for climate change, and human dependence on the environment—topics rarely, if ever, debated by the Supreme Court'.[67] However, the implementation of ambitious judicial orders remains challenging. Despite the decision, over the past year deforestation in the Colombian Amazon increased, prompting the plaintiffs to seek a declaration that the government and other defendants have failed to fulfil the orders of the Supreme Court.[68]

In Peru, a similar climate case was filed against the government in December 2019. Seven plaintiffs, represented by their parents, argued that their fundamental rights were being harmed by the failure of the State to formulate and implement a nationwide policy, as well as regional action plans, with concrete measures to stop the deforestation of the Peruvian Amazon. The complaint focused specifically on five districts: Loreto, Ucayali, Madre de Dios, Amazonas and San Martín.[69]

The plaintiffs held that the State has failed to protect their right to an adequate, healthy and balanced environment, enshrined in Article 12.2 of the International Covenant for Economic, Social and Cultural Rights,[70] Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,[71] and in Article 2.22 of

66 ibid.

67 PAA Alvarado and D Rivas-Ramírez (n 64) 522–4. Nevertheless, the Columbian courts have a judicial history in innovative approaches to environmental protection. For example, in 2016, the Sixth Chamber of Review of the Constitutional Court of Columbia granted rights to the Atrato River, its basin and tributaries (T-622 of 2016, May 2017).

68 SA Sierra, 'The Colombian government has failed to fulfil the Supreme Court's landmark order to protect the Amazon' (*Dejusticia*, 5 April 2019) <https://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/>, accessed 3 April 2020.

69 The original complaint in Spanish is available at: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191216_NA_complaint-1.pdf> accessed 3 April 2020.

70 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> accessed 15 June 2020.

71 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted 17 November

the Peruvian Constitution.[72] The complaint also refers to other constitutional rights threatened by the omission of the State, such as the right to life and human dignity, right to health and right to water. It also refers to breaches of constitutional principles, including the principles of solidarity and intergenerational equity.

The complaint seeks different orders across the administration. From the President, the Ministry of Environment, the Ministry of Agriculture and Irrigation, and the Ministry of Finance it asks for concrete goals and objectives to reduce net deforestation in the Peruvian Amazon to zero by 2025. From the five regional governments, it asks for the development of action plans to reduce net deforestation to zero by 2025, and to take climate change adaptation measures. From the Ministry of Agriculture and Irrigation, it asks for the suspension of deforestation permits granted on public lands in the five regions at issue until the national and regional plans have been created. Finally, it asks for the Peruvian Amazon to be recognized as a legal entity subject to the rights of protection, conservation, maintenance and restoration, and for a declaration that the current state of environmental conservation in the Peruvian Amazon is unconstitutional.[73]

Similar to other climate change litigation cases in the Global South, these two cases challenged specific government actions and/or lack of action that led to failures in enforcing the minimum level of mitigation efforts—in this case, reduction of deforestation—that are necessary to avert the most extreme climate change scenarios. These two lawsuits were framed in terms of the climate impacts that result from deforestation and brought as climate cases. By doing this, litigants gave continuity to the environmental movement's agenda on deforestation, whilst at the same time framing those arguments in terms of climate change.[74] These examples of cases aimed at protecting the Amazon forest in Colombia and Peru could influence a potential equivalent case in Brazil.

1988, entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992) <https://www.oas.org/juridico/english/treaties/a-52.html> accessed 15 June 2020.

72 Political Constitution of Peru, enacted 29 December 1993. Available at: <http://www.congreso.gob.pe/Docs/files/CONSTITUTION_27_11_2012_ENG.pdf> accessed 15 June 2020.

73 A summary of the case is available at: <https://climate-laws.org/cclow/geographies/peru/litigation_cases> accessed 3 April 2020.

74 J Setzer and L Benjamin (n 5).

V The Future of Forestry and Land-Use Change Litigation to Protect the Brazilian Amazon: From Indirect to Direct Climate Change Litigation?

As discussed above, despite Brazil's progressive environmental law framework and its domestic climate change laws and policies, courts are yet to rule on a climate specific case to protect the Brazilian Amazon. However, recently filed lawsuits reflect a shift in the institutional, legal and political factors that may herald the beginning of a new era of climate change litigation in Brazil.

The backdrop is a rapidly developing environmental crisis, which has only intensified since President Jair Bolsonaro took office in January 2019. The increase in forest fires in the Amazon in mid-2019 opened a significant national and international debate on the environmental crisis facing the country. There are two key aspects at the core of this crisis. First, the Brazilian protected biomes—Amazon, *Cerrado, Pantanal* (wetlands) and the *Mata Atlântica* (Atlantic rainforest)—constitute the largest expanse of tropical biomes in the world. It houses a remarkable biodiversity and plays an important role in regulating regional, as well as global, weather and climate patterns. Second, under the current administration, the State has increasingly been absent from its role as monitor and enforcer of environmental policies. Already during his electoral campaign, Bolsonaro advocated for merging the Ministry of the Environment with the Ministry of Agriculture and Livestock. He also advocated for Brazil to abandon the Paris Agreement.[75] Ultimately, the two electoral promises were dropped in response to internal and external pressure, including from more progressive segments of the agribusiness sector. Nevertheless, several concrete measures adopted by the government reveal a strong anti-environmental stance. On Bolsonaro's first day in office, relevant ministerial departments in charge of formulating and implementing climate change and anti-deforestation policies were removed from the federal administrative structure.[76] Since then, the government has proposed, or supported, several legislative bills that would provide amnesty to criminal activities and

75 D Bragança, 'Bolsonaro defende o fim do Ministério do Meio Ambiente' (((*o*))eco, 1 October 2018) <https://www.oeco.org.br/reportagens/bolsonaro-defende-o-fim-do-ministerio-do-meio-ambiente/> accessed 10 June 2020.

76 For a comprehensive list of deregulatory environmental and climate change measures enacted by the current administration, see C Angelo and C Rittl, 'Is Brazil on the way to meet its climate targets? Explainer note by the Climate Observatory' (Observatório do Clima, 27 September 2019) <https://www.oc.eco.br/wp-content/uploads/2019/09/Is-Brazil-on-the-way-to-meet-its-climate-targets_-1.pdf> accessed 14 March 2021.

other illegal activities relating to land-use in the country.[77] More generally, environmental and climate policies and institutions have been dismantled, environmental science questioned and civil society threatened.

The on-the-ground impacts of the federal government's policy choices are being felt across many areas. The capacity of authorities to respond to environmental threats and disasters, such as oil spillages[78] and deforestation, has been significantly weakened. Deforestation in the Brazilian Amazon is on a steep ascendant curve: 34% more deforestation occurred in 2019 compared to 2018, an annual growth rate not seen since 1995. The cleared forest area has exceeded 10,000 sq km, an 11-year high.[79]

This challenging scenario is fuelling legal action, amongst Public Prosecutors, NGOs and political parties. The profile of these actors and the actions they have initiated are discussed in the following subsections. Since the submission of the first draft of this article four new lawsuits have been filed in this area. We summarize the cases but refrain from delving into the details of these cases, leaving this exploration to future research.

A *Public Prosecutors*

Public Prosecutors—state and federal—enjoy a high degree of autonomy and independence in Brazil. Prosecutors have, for example, exclusive prerogatives in handling the so-called 'public civil action', a Brazilian version of common law countries' class-action, but with very peculiar characteristics.[80] However, the same functional independence that shields its members from undue

77 The most controversial was the Provisional Measure no 910 (Act on Land Regularization). For a complete analysis on the proposed law, see J Chiavari and C Lemes Lopes, 'Medida Provisória Recompensa Atividades Criminosas' (Technical Note, Climate Policy Initiative, February 2020) <inputbrasil.org/publicacoes/medida-provisoria-recompensa-atividades-criminosas/>, accessed 12 June 2020.

78 In the second semester of 2019, thousands of tons of oil washed up in beaches and mangroves in northeast Brazil. Investigations have, until the time of writing, not been conclusive about the origin of the crude oil.

79 Until 2004, deforestation was admittedly out of control and lacked any coordinated response or action plans. That year, the government adopted a Plan for the Prevention and Combat of Deforestation in the Amazon. From 2004 through 2012, deforestation in Brazil gradually decreased, until 2012 when it started rising again. G Girardi, 'Desmatamento consolidado da Amazônia em 2019 superou 10 mil km², afirma Inpe' *Estadão* (São Paulo, 9 June 2020) <https://www.msn.com/pt-br/noticias/meio-ambiente/desmatamento-consolidado-da-amaz%C3%B4nia-em-2019-superou-10-mil-km%C2%B2-afirma-inpe/ar-BB15g5Mj> accessed 12 June 2020.

80 Law no 7.347/1985, as mentioned, governs the Public Civil Action in relation to damages perpetrated against the environment, among other types of damages to public interests or vulnerable groups, such as consumers and artistic, aesthetic, touristic and town planning.

political interference has hindered the development of coordinated and strategic actions to respond to systemic problems such as deforestation.

One of the Public Prosecutor's most important efforts to combat deforestation has been taking place under a special task force of Federal Public Prosecutors.[81] The 'Amazon Task Force' was established in 2018 in recognition that members of the Federal Prosecutor's Office of the ten states that comprise the 'Legal Amazon'[82] should shift from a fragmented to a strategic approach to curb illegal and criminal activities driving deforestation and other environmental and social transgressions (illegal logging and mining, deforestation, forced labour, land dispossession, and so forth).[83] The creation of the Task Force was underpinned by the realization that the reactive action by Public Prosecutors located in different states was out of touch with the dynamics of deforestation and other illegalities in the region, and that most forest clearing and forest degradation in the Brazilian Amazon could be attributable to few individuals and their interconnected criminal networks.

By joining efforts under one task force, members of the Federal Public Prosecutor's Office became better equipped to share information and work collaboratively on criminal, civil and administrative investigations. Hence, the Task Force helped to circumvent organizational and cultural constraints that limited a Prosecutor's ability to work on cases beyond the geographical boundaries of a single state of the federation. Additionally, the Amazon Task Force was able to undertake a selective approach regarding the scope of its mandate, working on issues that sit at the intersection of environmental crimes, corruption and human rights violations.

In a recent development, the Amazon Task Force started placing greater emphasis on the implications of the dismantlement of anti-deforestation policies to climate change. In April 2020, the Task Force requested a court injunction to curb deforestation and other environmental harms caused by land-grabbers, loggers, gold-diggers and other perpetrators of illegal activities in the Amazon. The Prosecutors argued that the federal government and the environmental, biodiversity and indigenous rights' agencies are failing to implement

81 The Amazon Task Force was established by an act of the Chief Federal Prosecutor, Portaria no 675 (13 August 2018). Available at: <http://bibliotecadigital.mpf.mp.br/bdmpf/bitstream/handle/11549/157760/DOU2_20180822.pdf?sequence=1&isAllowed=y> accessed 12 June 2020.

82 The 'Legal Amazon' is defined by law as the area encompassing the states of Amazonas, Rondônia, Roraima, Tocantins, Acre, Pará, Amapá, Maranhão and Mato Grosso.

83 Further information about the Amazon Task Force is available at: <http://www.mpf.mp.br/grandes-casos/ft-amazonia/sobre-a-ft/historia-da-forca-tarefa> accessed 6 April 2020.

measures to contain the unprecedented surge of deforestation rates in ten hot spots. By doing so, the government is arguably paving the way to the country missing the climate targets of the NPCC and the Brazilian NDC submitted to the Paris Agreement, including their commitment to reducing the annual rate of deforestation by 80%.[84]

The first ruling by the lower court invoked the precautionary principle and the principle of non-regression in environmental law to order the defendants to submit a plan of action to stop the surge in illegal deforestation in the ten hotspots and to ensure that indigenous and traditional communities are not exposed to the Coronavirus (SARS-COV-2). Yet the court refrained from referring to national or international climate change law.[85] The ruling was later overturned by the Court of Appeal, which privileged the separation of powers and the autonomy of the environmental bodies to deploy the scarce resources allocated to environmental inspection operations, especially in the context of an unprecedented global pandemic.[86]

B *Non-Governmental Organizations* (*NGOs*)

Brazilian human rights and environmental NGOs have recently started to consider the use of litigation as a climate action and governance tool. Non-profit entities, in partnership with academics and the Brazilian Bar Association, have been promoting awareness-raising and educational events and publications about strategic climate change litigation.[87] While so far few NGOs have initiated and filed climate cases in Brazil, the slow pace of their engagement does not reflect the full potential of mobilizing legal tools to further climate ambition and push back against the government's efforts to weaken existing policies. It is possible that NGOs will become increasingly involved in Brazilian climate change litigation, and that their legal action could take place in coordination with Public Prosecutors.

A concrete example is a case brought in June 2020 by two NGOs (*Greenpeace Brazil* and *Instituto Socioambiental*—ISA) and the Brazilian Association of Members of the Environmental Public Prosecutors (*Abrampa*), seeking to

84 *Public Prosecutor Office of Manaus* (*Amazon Task Force*) *v Ibama et al,* no 1007104-63.2020.4.01.3200, 7th Federal Lower Court of Manaus, 23 April 2020.

85 7th Federal Lower Court of Manaus [1007104-63.2020.4.01.3200], 21 May 2020.

86 Federal Appeals Court of the 1st Region, *Suspension of Interlocutory Decision and Sentence* no 1016745-72.2020.4.01.000, 9 June 2020.

87 C Borges, J Nabuco and G Mantelli, *Guia de Litigância Climática* (Conectas Direitos Humanos 2019). Available at: <https://www.conectas.org/publicacoes/download/guia-de-litigancia-climatica> accessed 4 March 2020.

revert a measure by the federal environmental agency that eased requirements for the export of timber.[88] The entities argued that such measure put at risk the integrity of the Amazon biome, which is already on the verge of reaching the *tipping point* of becoming a savannah.[89]

C *Political Parties*

Political parties have the constitutional privilege of pursuing judicial relief on alleged violations of constitutional and human rights directly before the Supreme Court.[90] Since the process of democratization in the 1980s, political parties have made extensive use of their power to request judicial review of legal and administrative measures of the legislative or the executive branches, either through declaratory or injunctive instruments. With a long history of constitutional litigation, political parties now seem to be turning their focus to the adjudication of climate change.

A recent example of political parties litigating on climate change grounds saw four political parties[91] (all sitting in the opposition) file two lawsuits before the Supreme Court in June 2020. The first case calls the government to use funds from the Amazon Fund (a fund created with donations from Norway and Germany) to curb deforestation.[92]

The second case seeks to compel the Ministry of the Environment to resume the disbursement of the National Fund on Climate Change ('Climate Fund') and to reactivate its governance bodies.[93] The Climate Fund was established in 2009 to finance mitigation and adaptation projects.[94] Its funding comprises royalties from oil exploration, among other sources. The government agency responsible for the Climate Fund was dissolved by the Minister of the Environment,

88 *Greenpeace Brasil, Instituto Socioambiental & Abrampa v Ibama and the Federal Union*, 7th Federal Lower Court [1009665-60.2020.4.01.3200], 4 June 2020.

89 On the *tipping point* of the Amazonian rainforest, see C Nobre and TE Lovejoy, 'Amazon Tipping Point' (2018) 4(2) Science Advances <https://advances.sciencemag.org/content/4/2/eaat2340> accessed 14 June 2020.

90 Article 103 of the Brazilian Constitution lists the entities with powers to initiate the *Action of Declaration of Constitutionality* and *Action of Declaration of Unconstitutionality*. They include, inter alia, the President, Governors, the Republic's Chief Prosecutor and the Federal Council of Brazil's Bar Association.

91 Worker's Party (PT), Brazilian Socialist Party (PSB), Liberty and Socialism Party (PSOL) and the Sustainability Network (*Rede Sustentabilidade*).

92 *PT et al v Federal Union*, Federal Supreme Court, Direct Action of Unconstitutional Omission regarding the Amazon Fund.

93 *PT et al v Federal Union*, Federal Supreme Court, Direct Action of Unconstitutional Omission regarding the Climate Fund.

94 The Climate Fund was established by Law no 12.114/2009.

Mr. Ricardo Salles, during the first months of President Bolsonaro's administration. In April 2019, a decree by President Bolsonaro extinguished the steering committee of the Fund, leaving it inactive. In response, the plaintiffs seek a declaration of 'unconstitutional omission' against the government for its refusal to lend or grant more than 300 million reais (nearly 60 million USD) from the Fund and to prepare an annual plan on the utilization of resources. They request that the court order the government to submit such a plan and to refrain from freezing the assets of the fund in future budgetary proposals. At the time of writing the court has yet to rule on the case.

VI Conclusion

Scholarly work on climate change litigation in the Global South has shown that cases brought in developing countries tend to include climate change—as a matter of law or fact—as a peripheral issue. In this type of indirect 'stealthy' litigation, climate change is often embedded into broader concerns about sustainable development, human rights, and social and environmental justice.[95] In Brazil, such indirect approaches to climate change litigation prevail. However, as this chapter has shown, the legal and institutional foundations for more direct climate legal action are solidifying.

It is indeed possible that Brazil will become the next big battleground for climate change litigation. The country hosts the largest expanse of tropical biomes in the world but is currently witnessing a dismantling of the institutional governance framework on environmental protection, resulting in a sharp increase in deforestation and GHG emissions. Moreover, Brazil is already the seventh largest emitter of greenhouse gases in the world.[96]

The most obvious path forward is likely to consist of legal action addressing the failures of federal and state governments to implement measures upholding Brazil's NDC to the Paris Agreement, specifically in relation to land-use change and forestry.[97] Brazil's NDC commits to a reduction of GHG emissions by 37% by 2025, aiming for a reduction of 43% by 2030. In the document submitted to the UNFCCC Secretariat, Brazil specified that this goal will be achieved, along with several other actions, through measures in the area of land-use change

95 J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679; HM Osofsky, 'The Geography of Emerging Global South Climate Change Litigation' (2020) 114 AJIL Unbound 61.

96 According to the SEEG (n 52).

97 On the geography of climate change litigation in the Global South, see HM Osofsky (n 95).

and forestry, including an 80% reduction in illegal deforestation.[98] Instead, deforestation has now increased by more than 34% between 2018 and 2019. The annual rate, which should not exceed 4,000 square km to remain within target, has surpassed 10,000 square km. Moreover, recent and abrupt shifts in the federal government's political attitude towards the global climate change agenda have been seen by many analysts as a route to emboldened legal action on Brazilian environmental policy both at the national and the international spheres.[99]

Public Prosecutors, political parties and some prominent NGOs are well-positioned to further extend their current work on environmental and human rights strategic litigation to include climate change concerns. The creation of the 'Amazon Task Force' within the Brazilian Public Prosecutor's Office and the growing assertiveness of NGOs and political parties in using climate change arguments to counter the dismantlement of environmental and climate governance are key developments in Brazil's legal and climate context. These developments reflect a steady move towards the consolidation of the institutional and legal foundations for increased efforts in the area of climate change litigation.

Only time will tell whether Brazilian courts will display a progressive 'green' attitude, by unpacking the latent climate change dimension underlying the Brazilian NEP and the Forest Code, as they have done in the past. Despite the considerable volume of judicial disputes concerning compliance with environmental duties, using litigation as a means to enforce climate change laws is rare and the positions of the High Court (*Superior Tribunal de Justiça*) and the Supreme Court (*Supremo Tribunal Federal*) on climate-related obligations are still unknown. Although the High Court has implicitly and indirectly tackled climate change concerns in some cases (eg the use of fire as a harvesting method for sugar cane, clearing of a mangrove forest to build a landfill),[100] the Court is yet to address climate change in a more substantial way.[101] In particular, the

98 The 'Brazilian Intended Nationally Determined Contribution Towards Achieving the Objective of the United Nations Framework Convention on Climate Change' can be found at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Brazil%20First/BRAZIL%20iNDC%20english%20FINAL.pdf> accessed 7 April 2020.

99 J Setzer and L Benjamin, 'Climate Change Litigation in the Global South: Filling in Gaps' (2020) 114 AJIL Unbound 56.

100 Peel and Lin (n 95). These cases of indirect climate change litigation in Brazil have been analyzed in detail by G Wedy, 'Climate Legislation and Litigation in Brazil' (2017). Available at SSRN: <https://ssrn.com/abstract=3052226> accessed 14 March 2021.

101 In January 2020, one of the claims against airline companies reached the High Court, but until that case is decided the relatively few cases in dispute are still running before the lower courts.

Judiciary is yet to provide a climate-oriented interpretation to the civil liability regime for environmental damages (established by the NEP) and landowners' obligations towards protected areas (established by the Forest Code).

Either way, addressing climate change laws and climate science in new or existing proceedings could expand the menu of possibilities for litigants interested in holding the government—and private actors—accountable for actions and omissions that deviate from Brazil's commitment, under the Paris Agreement, to a sustainable and climate-responsible path in the area of land-use change and forestry.

ANNEX 1 Summary of cases of climate change litigation in Brazil (up to June 2020)

Case and filing date	Summary	Outcome
Public Prosecutor's Office v Oliveira & Others, filed in 1995.	Sao Paulo's state prosecutor sought to stop farmers from setting fires to clear land as part of sugar cane harvesting. Arguments against the practice included air pollution and greenhouse gas emissions.	In 2009 the High Court of Justice ruled in favour of the prosecutor. The Court acknowledged the appellants' argument that burning cane does not add greenhouse gases to the atmosphere on a net basis over a multi-year timeframe, as it releases gases absorbed by the cane over the prior 12–18 months.
Maia Filho v Environmental Federal Agency (*IBAMA*), filed in 1995	The plaintiff questioned the validity of a fine imposed by the Environmental Federal Agency regarding the burning of 600 hectares of his property for grazing land.	In 2009 the High Court of Justice upheld the Environmental Federal Agency's fine—partially due to the contribution of the emissions from burning vegetation to climate change.
Public Prosecutor's Office v H Carlos Schneider S/ A Comércio e Industria & Others, filed in 2004.	The Federal Public Prosecutor's Office claimed that the defendants removed mangrove forest. The Federal Court judge condemned the defendants to remove all buildings from the area and restore the mangrove. The decision was confirmed by the Regional Federal Court and the defendants appealed to the Superior Court of Justice.	In 2007 the High Court of Justice upheld the original decision, noting that mangroves serve a variety of functions—ecological, social and economic—and their preservation is particularly important in face of sea level rise resulting from climate change.

ANNEX 1 Summary of cases of climate change litigation in Brazil (up to June 2020) (*cont.*)

Case and filing date	Summary	Outcome
Chiaradia v Environmental Federal Agency (IBAMA), filed in 2011.	The plaintiff pursued a declaration of nullity of the administrative penalty (fine) issued by the Environmental Federal Agency.	In 2011 the High Court of Justice upheld the fine, recognizing the unlawful conduct of the plaintiff. The decision states that rural owners should seek a balance between economic activities and the conservation of natural resources, particularly in the context of fighting climate change, disappearance of species, soil degradation and the depletion of water resources.
Sao Paulo Public Prosecutor's Office v United Airlines and Others, filed in 2010.	35 lawsuits against the airlines operating at the international airport, These sought compensation for GHG emissions produced by aircrafts' take-off and landing.	In three lawsuits the judges examined the merits of the case. One case (against KLM) made it all the way to the High Court, where a decision is pending.
Federal Environmental Agency (IBAMA) *v Siderúrgica São Luiz Ltd. and Martins*, filed in 2019	The Attorney-General's Office filed an environmental class-action against a steel company and its managing partner for environmental and climate damages allegedly caused by the company's continuous and fraudulent use of illegally sourced coal.	First decision pending.

ANNEX 1 Summary of cases of climate change litigation in Brazil (up to June 2020) (*cont.*)

Case and filing date	Summary	Outcome
Public Prosecutor Office of Manaus (*Amazon Task Force*) *v Ibama et al,* filed in 2020.	The Task Force requested a court injunction to curb deforestation and other environmental harms, which are arguably contributing to the country missing the climate targets of the NPCC and the Brazilian NDC submitted to the Paris Agreement.	The first ruling by the lower court ordered the defendants to submit a plan of action to stop the surge in illegal deforestation and to ensure that indigenous and traditional communities are not exposed to COVID-19. The ruling was later overturned by the Court of Appeal. The plaintiffs are yet to appeal this decision.
Greenpeace Brasil, Instituto Socioambiental & Abrampa v Ibama and the Federal Union, filed in 2020	Two NGOs and the Brazilian Association of Members of the Environmental Public Prosecutors filed a lawsuit seeking to revert a measure by the federal environmental agency that eased requirements for the export of timber.	Decision pending.
PT et al v Federal Union, filed in 2020	Four political parties filed a Direct Action of Unconstitutional Omission to the Federal Supreme Court to compel the Ministry of the Environment to resume the activities of the Amazon Fund.	Decision pending.

ANNEX 1 Summary of cases of climate change litigation in Brazil (up to June 2020) (*cont.*)

Case and filing date	Summary	Outcome
PT et al v Federal Union, filed in 2020	Four political parties filed a Direct Action of Unconstitutional Omission to the Federal Supreme Court to compel the Ministry of the Environment to resume the disbursements of the National Fund on Climate Change and to reactivate its governance bodies.	Decision pending.

Note: The first six cases were listed on the climate change litigation databases maintained by the Sabin Center and by the Grantham Research Institute in April 2020, when this article was written and submitted. The last four cases were filed in June 2020, and due to their importance they were added to the reviewed version of this chapter.

CHAPTER 8

Climate Change Litigation in South Africa: Firmly Out of the Starting Blocks

*Tracy-Lynn Field**

I Introduction

South Africa is one of the larger greenhouse gas (GHG) polluters and is already experiencing significant climate change-induced impacts, particularly relating to water security. Emerging after hundreds of years of colonial, and then decades of apartheid rule, it is now a lively democracy based on the rule of law with a constitutional framework conducive to climate change litigation. While the climate change litigation potential of this jurisdiction is far from being realized, an overview of decided and pending climate change cases clearly shows that the country is firmly out of the starting blocks. This chapter outlines South Africa's climate change context and response (Section II), the litigation landscape (Section III) and the current suite of decided and pending climate change-related cases (Section IV).

II South Africa's Climate Change Context and Response

South Africa is one of the most fossil fuel-dependent developing countries, and as a result, the 14th largest emitter of GHG emissions in the world.[1] Fossil fuels still make up 88% of the primary energy mix, with coal being the dominant contributor at 70%.[2] In 2019, South Africa's GHG emissions per capita

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1 R McSweeney and J Timperley, 'The Carbon Brief Profile: South Africa' (*Carbon Brief*, 15 October 2018) <https://www.carbonbrief.org/the-carbon-brief-profile-south-africa> accessed 21 August 2020.

2 Climate Transparency, 'Brown to Green: The G20 transition towards a net-zero emissions economy – South Africa' (2019) 4 <https://www.climate-transparency.org/wp-content/uploads/2019/11/B2G_2019_South_Africa.pdf> accessed 21 August 2020.

stood at 9.0 Mt,[3] which is far below countries such as Australia, the United States or Saudi Arabia, but higher than the G20 average and other developing countries such as Brazil, India or China. Also the energy intensity of the South African economy is much higher than the G20 average,[4] and the second-highest in the BRICS group.[5] Until 2008–09, South Africa's abundant coal reserves allowed it to offer comparatively low industrial electricity tariffs, which attracted significant investments in energy-heavy sectors such as mining and automotive manufacturing.[6] These large industrial users even established their own voluntary non-profit association – the Energy Intensive Users Group of Southern Africa – to advocate for reliable, quality electricity supply at affordable prices.[7] The Energy Intensive Users Group includes the 'carbon majors' Glencore, Sasol Pty Ltd and Anglo American[8] amongst its membership.[9] The State-owned entity, Eskom, operates a largely ageing and inefficient fleet of coal-fired power stations to supply these industrial customers and residential users.[10] 90 per cent of the electricity generated by Eskom uses coal,[11] the highest level in the G20. This makes the energy sector the largest emitter of GHG emissions by far.

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3 ibid 1.

4 In 2018, the energy intensity of the South African economy was 8.31 (TJ/PPP) compared to the G20 average of 4.86 Climate Transparency (n 2) 6.

5 BRICS is a bloc of emerging economies (Brazil, Russia, India, China and South Africa) that aim to foster South-South cooperation. South Africa has the smallest economy in this bloc, but its energy intensity score of 8.31 is higher than Brazil (4.06), China (5.88) and India (4.17), but lower than Russia (8.9).

6 R Inglesi-Lotz 'How South Africa can transition to a less energy-intensive economy' (*The Conversation*, 7 July 2015) <https://theconversation.com/how-south-africa-can-transition-to-a-less-energy-intensive-economy-44240> accessed 21 August 2020.

7 Energy Intensive Users Group of Southern Africa <https://eiug.org.za/> accessed 21 August 2020. Notwithstanding their lobbying efforts, the price of electricity has increased 523% over the past decade (see N James, 'Mixed picture: SA mining showing "steady improvement" but concerns linger' (2019) 25(48) Mining Weekly 11).

8 See the Climate Accountability Institute, 'The Carbon Majors Database' (2017).

9 'Membership' (*Energy Intensive Users Group of Southern Africa*) <https://eiug.org.za/membership/> accessed 21 August 2020.

10 Eskom operates 14 coal-fired power stations and one ageing nuclear power station to deliver baseload capacity. These facilitates have been augmented by two new coal-fired power stations (Medupi and Kusile). To deal with peak demand Eskom operates a few small hydroelectric and pumped storage schemes and a gas open turbine cycle. The company has very small investments (100MW each in a wind farm and solar concentrated power). See 'Map of Eskom power stations' (*Eskom*) at <https://www.eskom.co.za/Whatweredoing/ElectricityGeneration/PowerStations/Pages/Map_Of_Eskom_Power_Stations.aspx> accessed 15 March 2021.

11 Department of Energy, 'Integrated Energy Plan' (2016) 44.

South Africa's GHG emissions have increased by 41% since 1990.[12] According to the country's latest greenhouse gas inventory (2000–15), GHG emissions in 2015 were estimated at 540 Mt of CO_2e (carbon dioxide equivalent).[13] Unsurprisingly, the energy sector was responsible for 85% of increased emissions over the 2000–15 reporting period.[14] Emissions are expected to peak between 2020 and 2025 at about 614 Mt of CO_2e per annum, plateau for a decade and decline in absolute terms thereafter. This 'peak-plateau-decline' trajectory forms the basis of South Africa's mitigation commitment in its Nationally Determined Contribution (NDC) under the Paris Agreement.[15]

Climate Action Tracker has rated South Africa's NDC as 'highly insufficient', ie outside of the country's 'fair share' range and inconsistent with holding global warming below 2 degrees Celsius.[16] Yet South Africa's climate change commitments must be understood within a context of low economic growth and very high levels of unemployment, inequality, and poverty – challenges that have only worsened as a result of the COVID-19 pandemic and associated lockdown measures.[17] The South African government has consistently stressed the need to balance GHG mitigation with the need for development, economic growth and poverty alleviation.[18]

Government, the private sector and civil society also recognize South Africa's vulnerability to climate change impacts. South Africa sits at 95 out of 181 countries on the Global Climate Risk Index 2019, and has already been exposed to extreme weather events such as droughts, heat waves, dry spells, fires and heavy rainfalls.[19] South Africa is a water-stressed country, and the impact of

12 Climate Transparency (n 2) 3.

13 Department of Environmental Affairs, 'GHG National Inventory South Africa: 2000–2015' (2015) viii.

14 ibid.

15 Government of South Africa, 'South Africa's intended nationally determined contribution' <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/South%20Africa%20First/South%20Africa.pdf> accessed 21 August 2020.

16 'South Africa' (*Climate Action Tracker*) <https://climateactiontracker.org/countries/south-africa/> accessed 21 August 2020.

17 The Coronavirus Rapid Mobile Survey (CRAM), a research initiative spear-headed by three public South African universities, has been tracking the socio-economic impact of COVID-19 in South Africa. The COVID crisis has precipitated a 40% reduction in active employment, with approximately half of this decline comprising job terminations. This adds to pre-lockdown unemployment levels of nearly 30%. See R Jain et al 'The labour market and poverty impacts of Covid-19 in South Africa' (15 July 2020) Working Paper 5 NIDS-CRAM <https://cramsurvey.org/wp-content/uploads/2020/07/Jain-The-labour-market-and-poverty-impacts.pdf> accessed 21 August 2020.

18 Government of South Africa (n 15).

19 Climate Transparency (n 2) 14.

climate change on already scarce water resources is of particular concern.[20] In 2018, for example, the City of Cape Town came close to facing #DayZero: the day taps would run dry as the City suffered its worst drought in history.[21] The burning of coal is also contributing to extremely poor air quality on the South African Highveld. In 2018, Greenpeace identified Mpumalanga province, home to a dozen of Eskom's coal-fired power stations, as the largest single NO_2 hotspot in the world.[22] The government's failure to enact regulations to enforce an Air Quality Priority Area Management Plan for this region is the subject of current High Court litigation, which the UN Special Rapporteur for the Right to Environment has joined as a friend (amicus) of the court.[23]

The South African government has promoted the idea of a 'just transition' to a climate-resilient, low carbon economy for more than a decade. The 2011 *National Climate Change Response White Paper*, for example, presented the government's vision for a 'long-term, just transition to a climate-resilient and lower-carbon economy and society.'[24] The *National Development Plan 2030*, adopted by the South African Parliament in 2012, supports the 'transition to an environmentally-sustainable, low-carbon economy' as a cross-cutting policy objective that needs to be integrated into all government plans.[25] And in a 2019 'roadmap' outlining governance reforms to Eskom, the national Department of Public Enterprises, outlined the key pillars of South Africa's 'Just Transition process'.[26] In June 2019, the South African government also

20 Climate Transparency (n 2) 14.

21 See further the discussion of the *Philippi Horticultural Area* case in Section IV A below. #DayZero was a term first coined by officials of the City of Cape Town in 2017 to refer to the situation when the supply of municipal water would no longer be available as dams in the metropolitan region ran dry. See P de Lille, 'Day Zero: When is it, what is it, and how can we avoid it' (*City of Cape Town*, 15 November 2017) <http://www.capetown.gov.za/Media-and-news/Day%20Zero%20when%20is%20it,%20what%20is%20it,%20and%20how%20can%20we%20avoid%20it> accessed 22 September 2020.

22 L Chutel 'This picturesque corner of South Africa has the world's deadliest air pollution' (*Quartz Africa*, 29 October 2018) <https://qz.com/africa/1441504/highest-concentration-of-deadly-air-pollution-found-in-south-africa/#:~:text=One%20of%20the%20world's%20most,by%20Greenpeace%20on%20Monday%20(Oct.> accessed 21 August 2020.

23 See further Section IV A below.

24 Government of the Republic of South Africa, *National Climate Change Response White Paper* (2011) 5.

25 National Planning Commission, *National Development Plan, 2030: Our Future – Make it Work* (National Planning Commission 2012) 212.

26 The pillars are creating an inclusive economy based on the cheapest energy available; protecting and growing jobs on the back of low-cost energy; and enabling energy access and security to all South Africans. See Department of Public Enterprises, 'Roadmap for Eskom in a Reformed Electricity Supply Industry' (2019) 18.

introduced a carbon tax,[27] and a Climate Change Bill was published in 2018, although it has not yet been enacted by the South African Parliament.[28]

However, because the energy sector is the largest contributor to GHG emissions, it is here where policy and legislative reform and implementation matters the most. Despite world-class renewable energy resources,[29] and the job creation associated with developing these resources, the South African government's promotion and facilitation of renewable energy investment has been slow-footed. This has been apparent from the place of renewables in the country's integrated planning for new electricity generation, and the consistency of State support for a largely successful Renewable Energy Independent Power Producer Procurement Programme (or REI4P).

Integrated electricity planning was introduced in 2010 with the launch of the country's first Integrated Resources Plan (IRP). In the 2010 IRP, the Department of Energy identified the need for an additional 38GW of generation capacity sourced from renewables (17.8GW), nuclear (9.6GW), gas (6.3GW), new coal (6.3GW), and imported hydro (2.6GW).[30] With these commitments in place by 2030 the top three energy sources for electricity generation would have been coal (65%), nuclear (20%) and renewables (9%).[31] Despite the increase in renewable energy generation, the plan therefore approved new fossil fuel projects (12.6GW from gas and coal) and rested upon an ill-founded reliance on new nuclear power.[32] The pre-eminence of coal (currently at 70%) would have been reduced by a mere 5%. After much delay, a second generation IRP was finally gazetted in October 2019. The 2019 IRP assigns a larger share of electricity generation capacity to solar photovoltaic, wind and concentrated solar power facilities: from current installed capacity of almost 4GW to planned

27 The Carbon Tax Act 15 of 2019 provides for the imposition of a tax on the CO_2 equivalent on GHG emissions.

28 See GN 580 *Government Gazette* 41689 of 8 June 2018.

29 South Africa has a globally pre-eminent solar power resource, with daily solar radiation varying between 4.5 and 6.5 kilowatt hours per square metre, and a total area of high radiation in the order of 194 000km^2. Wind power potential is generally good along the entirety of South Africa's 2850km-long coastline, with a few areas having very good potential. See Department of Energy, 'Integrated Energy Plan' (n 11) 52 and 55–7.

30 Department of Energy, 'Integrated Resource Plan for Electricity: 2010–2030' (2011) 7.

31 ibid.

32 The nuclear build programme was widely perceived as corrupt. The now-discredited Zuma administration lobbied aggressively for this R1 trillion project (see K Gottschalk, 'Will Zuma's allies get their way on nuclear?' (*The Citizen*, 10 November 2017) <https://citizen.co.za/news/south-africa/1723570/will-zumas-allies-get-their-way-on-nuclear/> accessed 21 August 2020. It has since been abandoned in the country's latest Integrated Resource Plan.

capacity of 26.5GW, bringing the renewable contribution to total installed generation capacity by 2030 up to 33.8%.[33] The percentage of installed coal capacity is planned to drop to 43%[34] with the decommissioning of 11GW of coal-fired power by 2030.[35] However, over the same period, a projected 7.2GW of new coal-fired power must be added. Some of the new renewable energy capacity will only be used for peak demand which means that the contribution of coal-fired power to baseload supply will remain at about 59%.[36]

The REI4P was introduced in 2011 to facilitate the procurement of 17.8GW of renewable energy, as per the 2010 IRP. The model is based on procuring private sector investment in renewables through an open and transparent bidding programme.[37] Renewable independent power producers sign a 20-year power purchase agreement with Eskom and obtain a generation licence from the National Energy Regulator of South Africa (NERSA). There is no government support for these projects, other than support for Eskom in the event that it defaults on its buying obligations.[38] The projects are cost neutral to Eskom as prices are passed on to consumers.[39]

The REI4P project has been very successful. The four bid windows held between 2011 and 2018 were all fiercely contested and 6.3GW of power was procured.[40] Ninety-two bidders were selected attracting R209,4 billion ($12.6 billion) in private investment and creating 38 000 jobs.[41] Climate change gains have been calculated at 33.2 Mt of CO_2e and 39.2 million kiloliters of water savings.[42] The price of renewable energy has also consistently trended downwards and is now at a level where some technologies (eg wind power)

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33 Department of Energy, 'Integrated Resource Plan (IRP2019)', GN 1359 *Government Gazette* 42778 of 18 October 2019, 39 (henceforth: 'IRP2019').

34 Although variability of renewable energy supply still puts the total energy contribution of coal to the electricity mix at 58.8% by 2030.

35 IRP2019 (n 33) 39.

36 IRP2019 (n 33) 39.

37 J Radebe, 'Media statement by the Minister of Energy Jeff Radebe, on the Renewable Energy Independent Power Producer Procurement (REIPPP) programme' (*South African Government*, 24 February 2019) <https://www.gov.za/speeches/media-statement-minister-energy-jeff-radebe-renewable-energy-independent-power-producer> accessed 11 January 2020.

38 V Ndlovu and R Inglesi-Lotz, 'Positioning South Africa's energy supply mix internationally: Comparative and policy review analysis' (2019) 30(2) Journal of Energy in Southern Africa 14, 15.

39 Radebe (n 37).

40 L Nomjana, 'REIPPP comes of age' (*Futuregrowth Asset Management*, 14 May 2019) <https://futuregrowth.co.za/newsroom/reippp-comes-of-age/> accessed 11 January 2020.

41 ibid.

42 Radebe (n 37).

are cheaper than coal.[43] Between 2016 and 2018, however, the programme went into a stalemate after Eskom refused to sign any further power purchase agreements and the government failed to intervene.[44] While the REI4P got back on track to a certain extent thereafter, the President's pledge to open bid window 5 in his February 2020 State of the Nation Address has not yet been actioned by the Department of Mineral Resources and Energy.[45] The brake on new renewable energy investment has also taken place at a time when corruption, maladministration and the ongoing efforts to avoid load shedding have placed Eskom in a perilous cycle of loss and debt: the utility reported a R20.7 billion ($1.24 billion) after-tax loss for the 2018 financial year and its non-current liabilities have climbed to an unsustainable R495 billion ($29.7 billion).[46]

What is clear, therefore, is that South Africa needs to focus primarily on mitigating GHG emissions in the energy sector and crafting adaptation interventions in the water sector. While the government has certainly not been idle in developing a climate change policy and legislative response, the robust measures to really address South Africa's contribution and vulnerability to climate change are not yet in place. The context is therefore ripe for public interest litigation aimed at pursuing more ambitious climate change commitments and implementation.

III The Litigation Landscape

South Africa is a relatively young, constitutional democracy based on the rule of law. In 1994, the country transitioned to democratic rule after centuries of colonial oppression and decades of invidious apartheid government. The 1996 Constitution, enacted by a constitutional assembly, contains a justiciable Bill of Rights that protects a range of substantive and procedural rights. For

43 J Miller (Senior Associate, Cullinan & Associates), 'NERSA should take Eskom to task over illegal refusal to sign PPAs' (*Polity*, 11 November 2016) <https://www.polity.org.za/article/nersa-should-take-eskom-to-task-over-illegal-refusal-to-sign-ppas-2016-11-11> accessed 21 August 2020.

44 ibid.

45 N Bhengu 'Could accelerating the development and construction of renewable energy projects assist in rebuilding the economy?' (*Werksmans*, 15 May 2020 <https://www.werksmans.com/legal-updates-and-opinions/could-accelerating-the-development-and-construction-of-renewable-energy-projects-assist-in-rebuilding-the-economy/> accessed 21 August 2020.

46 Eskom, 'Integrated Report' (31 March 2019) 1 and 82.

example, in addition to protecting the rights to equality,[47] human dignity[48] and life,[49] the Bill of Rights enshrines children's rights[50] and socio-economic rights, including a right of access to sufficient water.[51] A right to environment is protected in section 24 that establishes (a) the right of everyone to an environment that is not harmful to health or well-being; and (b) the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Important procedural rights include a right of access to information[52] and the right to administrative justice.[53] The latter rights have been fleshed out in constitutionally-mandated legislation, namely the Promotion of Access to Information Act[54] and the Promotion of Administrative Justice Act.[55] These two Acts can greatly facilitate climate change litigation.

There are a variety of features of the litigation landscape in South Africa that make it fertile ground for public interest litigation. First, the South African judiciary, with the Constitutional Court at its apex,[56] is perceived as independent (*Judicial independence*).[57] Second, the Constitution is the supreme law and all rights are justiciable (*Constitutional supremacy*). The higher courts are empowered to declare law and/or conduct inconsistent with the Constitution and to strike such law or conduct down to the extent of its inconsistency[58] Courts are further empowered to make any order that is 'just and equitable'

47 Section 9, Constitution of the Republic of South Africa, 1996 (henceforth: 'Constitution, 1996').

48 Section 10, Constitution, 1996.

49 Section 11, Constitution, 1996.

50 Section 28, Constitution, 1996.

51 Section 27(1)(b), Constitution, 1996.

52 Section 32, Constitution, 1996.

53 Section 33, Constitution, 1996.

54 Act 2 of 2000.

55 Act 3 of 2000.

56 The judicial system comprises a system of lower courts (regional and district magistrates courts and customary law courts) and higher courts (a number of High Courts, the Supreme Court of Appeal, and the Constitutional Court).

57 For example, on the Mo Ibrahim Index of African Governance, the independence of South Africa's judiciary has consistently ranked in the 80s and 90s (92.6 in 2017). See 'Independence of the Judiciary: South Africa' (*IIAG*) <http://iiag.online/> accessed 21 August 2020.

58 Section 2, Constitution, 1996 read together with s 172(1)(a).

in constitutional matters.[59] *Third,* the Constitution applies both vertically and horizontally (*Vertical and horizontal application of the Constitution*). The State must respect, protect, promote and fulfil the rights in the Bill of Rights.[60] The Bill of Rights applies to all law, and binds the legislature, executive, judiciary and all other organs of State.[61] But the Bill of Rights also binds natural and legal persons if, and to the extent, that the right in question 'is applicable', taking into account 'the nature of the right and the nature of any duty imposed by the right.'[62] The Constitution expressly acknowledges that imposing duties related to constitutional rights on natural and legal persons may take place directly, or by developing the common law.[63]

Fourth, the Constitution nudges the legal system away from the formalistic and legalistic approach to interpretation that largely characterized the jurisprudence of the apartheid era (*Purposive interpretation*). When interpreting the Bill of rights, interpreting any legislation, or developing the common or customary law, all courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[64] Courts must also consider international law and may consider foreign law.[65]

Fifith, standing to approach a court alleging that a constitutional right has been infringed or threatened is broad (*Broad standing provisions*). The categories of persons with standing include anyone acting in their own interest or on behalf of another person who cannot act in their own name; an association acting in the interest of its members; anyone acting as a member of, or in the interests of, a group or class of persons (new basis for class actions); and anyone acting in the public interest.[66] Class actions are a relatively new phenomenon in South Africa. The Supreme Court of Appeal and Constitutional Court have developed the law to identify the factors that need to be considered when deciding whether it is in the interests of justice to certify a class action.[67] Although used with success in a number of matters, including an historic judgment dealing with silicosis claims in the mining industry,[68] a class action has

59 Section 172(1)(b), Constitution, 1996.
60 Section 7(2), Constitution, 1996.
61 Section 8(1), Constitution, 1996.
62 Section 8(2), Constitution, 1996.
63 Section 8(3), Constitution, 1996.
64 Section 39(1)(a) and (2), 1996.
65 Section 39(1)(b) and (c), 1996.
66 Section 38, Constitution, 1996.
67 See *Children's Resources Centre Trust v Pioneer Foods* 2013 (2) SA 213 (SCA) and *Mukkadam v Pioneer Foods* 2013 (5) SA 89 (CC).
68 *Nkala v Harmony Gold Mining Company Limited* 2016 (5) SA 240 (GJ).

not yet been launched in relation to environmental or climate change issues. Legal standing to enforce environmental laws is broadened even further by the National Environmental Management Act (NEMA).[69] In addition to the category of persons acting in the 'public interest', the Act allows for persons acting in the interest of 'protecting the environment' to seek appropriate relief for a breach or threatened breach of national environmental management principles or laws.[70]

Sixth, in South Africa, the ordinary rule of costs under the common law is that costs follow the result. However, in the *Biowatch* case[71] the Constitutional Court lowered the barrier the threat of costs usually imposes by laying down the principle that in constitutional litigation between a private party and the State, the State bears the costs of litigants who have been successful against it (*favourable costs regime for constitutional matters*). If the State wins, each party bears their own costs.

The Promotion of Access to Information Act (PAIA) gives effect to the constitutional right of access to information and establishes a right to access the records of both public and private bodies. Proactive disclosure is mandated and encouraged. Public bodies must publish the categories of information available without the need for an information request at least annually.[72] For private bodies, proactive disclosure is voluntary.[73] Other than these voluntary disclosures, requesters can obtain information by submitting an information request. For public bodies, the right applies to any information held by the State; for private bodies, the information must be required for the exercise or protection of any rights.[74] Both forms of request may be refused on specified grounds which include the protection of privacy, safety, confidential information, commercial information and privileged information.[75] The PAIA also outlines the process for submitting information requests to public and private bodies. For public access to information requests, there is an internal appeal process.[76]

The PAIA is important for public interest climate change litigation, as evidenced by the Centre for Environmental Rights' (CER) recent successful

69 Act 107 of 1998.
70 Section 32(e), National Environmental Management Act 107 of 1998.
71 *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).
72 Section 15, Promotion of Access to Information Act 2 of 2000 (henceforth: 'PAIA, 2000').
73 Section 52, PAIA,2000.
74 Section 9(a), PAIA, 2000.
75 Chapter 4, PAIA, 2000.
76 Section 74, PAIA, 2000.

internal appeal to the Department of Environment, Forestry and Fisheries for the GHG emission data of some of South Africa's largest emitters.[77] In February 2019, the CER submitted a PAIA request to the Department, asking for the list of data providers registered in terms of the National Greenhouse Gas Reporting Regulations,[78] along with the GHG emission data, pollution prevention plans and annual progress reports for the 16 biggest emitters. This request was made in terms of section 11 of the PAIA, which affords a right of access to the records of public bodies. The information access request was partially granted, but with redactions of various portions of the GHG emission reports and pollution prevention plans.[79] The Department redacted the information as it considered that the release of anticipated GHG emissions would compromise the financial or commercial interests of the emitters.[80] On 5 April 2020, Honorable Barbara Creecy, Minister of Forestry, Fisheries and the Environment upheld the appeal, largely on the basis that the Department did not provide adequate reasons for its decision.[81]

The Promotion of Administrative Justice Act (PAJA) gives effect to the constitutional right to administrative justice. The PAJA expands on the meaning of procedural fairness and the reasons that must be provided for administrative action, but its major value for climate change litigation are the grounds of judicial review set out in section 6. In addition to traditional grounds recognized in the common law (lack of authority or delegated authority, error of law, procedural unfairness) it allows for judicial review on the basis of failure to take relevant reasons into account, irrationality, unreasonableness and the constitutionality or legality of the decision.

There is a plethora of statutory provisions that could be used in conjunction with the PAIA and the PAJA to launch climate change litigation. Foremost amongst these is the environmental impact assessment (EIA) regime

77 'Successful appeal to the Department of Environment, Forestry and Fisheries regarding greenhouse gas emission data' (*Centre for Environmental Rights*) <https://cer.org.za/paia/appeal-to-the-department-of-environment-forestry-and-fisheries-regarding-greenhouse-gas-emission-documents> accessed 21 August 2020.

78 GN 275 of 2017.

79 *Centre for Environmental Rights v Deputy Information Officer, Department of Environmental Affairs, Forestry and Fisheries* (Internal Appeal subject to the Promotion of Access to Information Act) 5 <https://cer.org.za/wp-content/uploads/2020/01/Annexure-A-PAIA-Appeal-CER-13-12-19.docx.pdf> accessed 21 August 2020.

80 Minister of Forestry, Fisheries and the Environment, 'Appeal Decision' (5 April 2020) 4 <https://cer.org.za/wp-content/uploads/2019/12/PAIA-Appeal-Decision-Minister-Creecy-GHG-Reports-LSA190924.pdf> accessed 21 August 2020.

81 ibid 6 and 10.

established under Chapter 5 of the NEMA and accompanying environmental impact assessment regulations, which were challenged in South Africa's first climate change case, *Earthlife Africa v Minister of Environmental Affairs* (the *Thabametsi* case).[82] Other than the EIA regime, principles and rules set out in specific legislation relating to water,[83] biodiversity, air pollution, protected areas, and natural resources could easily be given a climate change twist.

South Africa has a vibrant civil society and a number of organizations work in, or support climate change advocacy and public interest litigation.[84] The Life After Coal/Impilo Ngaphandle Kwamalahle initiative is a joint campaign between Earthlife Africa, groundWork and the Centre for Environmental Rights.[85] The campaign aims to discourage the development of new coal-fired power stations and mines; encourage a coal phase-out and reduce emissions from existing coal infrastructure; and enable a just and democratic energy transition.[86] A number of these organizations have already been involved in climate change litigation, as detailed below.

IV Decided and Pending Litigation

Despite a conducive landscape for public interest litigation, the number of decided and pending climate change-related cases in the courts and administrative tribunals is relatively small, although momentum is growing. Relying on Peel and Osofsky's typology of climate change litigation,[87] the court and

82 [2017] ZAGPPHC 58 (henceforth: '*Thabametsi*').

83 National Water Act 36 of 1998.

84 See, for example, the Centre for Environmental Rights' Pollution & Climate Change Programme <https://cer.org.za/programmes/pollution-climate-change> accessed 22 September 2020; groundWork's campaign on climate and energy justice <https://www.groundwork.org.za/cejustice.php> accessed 22 September 2020; Earthlife Africa's climate change campaign <https://earthlife.org.za/campaign-climate-change/> accessed 22 September 2020; and Greenpeace Africa's #coal campaign <https://www.greenpeace.org/africa/en/tag/coal/> accessed 22 September 2020.

85 See <https://lifeaftercoal.org.za/> accessed 21 August 2020.

86 ibid.

87 See J Peel and HM Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2015). The authors offer a useful way of categorizing climate change litigation as a series of concentric circles. At the core are cases where climate change is the central focus. Moving outward is litigation where climate change is a peripheral issue; cases where climate change is a motivating factor, although not raised as a central issue (eg coal cases brought on environmental grounds); and litigation with no explicit climate change framing, but with implications for mitigation or adaptation.

administrative tribunals have finalized three cases in which climate change has featured as a central issue. (*Thabemetsi*[88] and *Philippi Horticultural Area*[89] in the High Courts and the *Khanyisa* Water Tribunal case).[90] A further nine cases in which climate change is a key focus have already been launched in administrative and judicial proceedings. Climate change features peripherally in a number of air quality cases, including the 'deadly air' case which the UN Special Rapporteur for the Environment has joined as an amicus of the court.[91] A matter launched to compel the Minister responsible for Energy and the National Energy Regulator of South Africa to provide reasons for their decisions relating to the 2019 IRP rests on climate change as a motivating factor. A further two cases have no explicit climate change framing but are significant for mitigation or adaptation.

A brief exposition of decided and pending climate change litigation is set out in the sections below. This corpus of litigation can largely be categorized as 'first generation' climate change litigation. As outlined by Peel, Osofsky and Foerster, first generation climate change litigation tends to focus on administrative challenges to government decision-making under environmental or planning legislation.[92] The broader underlying theory of change is to mainstream climate change into government decision-making. 'Next-generation' climate change litigation focuses on challenging and changing more sweeping State powers (such as the EPA's authority to regulate motor vehicle GHG emissions in *Massachusetts v EPA*[93] or the adequacy of the State's efforts to address climate change in *Urgenda*),[94] repurposing well-established doctrines in common law (public nuisance), or galvanizing mechanisms to hold corporate actors accountable for their disclosure and management of climate change risks.[95] The ambition of litigants in South Africa has not yet extended to these kinds of cases, although there are indications of bolder challenges in the near future.

88 *Thabametsi* (n 82).

89 2020 (3) SA 486 (WCC) (henceforth: '*Philippi Horticultural Area*').

90 *Trustees of the groundWork Trust v Acting Director-General: Department of Water and Sanitation* WT/02/18/MP, para 143 (henceforth: '*Khanyisa*').

91 Discussed in Section IV B below.

92 J Peel, H Osofsky and A Foerster 'Shaping the "next generation" of climate change litigation in Australia' (2017) 41 Melbourne University Law Review 793, 795.

93 *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007).

94 *Urgenda Foundation v The State of the Netherlands*, Hague District Court, Case No C/09/456689 / HA ZA 13-1396, 24 June 2015.

95 Peel, Osofsky and Foerster (n 92) 797 and 798.

A *Core Climate Change Litigation*

1 The *Thabemetsi* Case

South Africa's first core climate change case, *Earthlife Africa, Johannesburg v Minister of Environmental Affairs* (*Thabemetsi*)[96] was decided in 2017. The matter dealt with the State's plans to procure a new 1200MW coal-fired power station near the town of Lephalale in South Africa's water-stressed Waterberg region.

The *Thabametsi* case challenged administrative decision-making under the environmental impact assessment laws. To source 6.3GW of coal-fired power under the 2010 IRP, the government launched an Independent Power Producer (IPP) procurement programme for coal baseload power, and the Thabametsi Power Company (Pty) Ltd won the bid for the planned Lephalale facility. To construct a coal-fired power plant in South Africa, a proponent must obtain an environmental authorization from the competent State authority by submitting environmental impact assessment reports compiled by an independent environmental assessment practitioner. However, neither NEMA (as the overarching framing environmental law), nor the implementing regulations[97] expressly require the submission of a climate change impact assessment report, or even the express consideration of climate change. The Thabametsi Power Company followed the requisite procedures to conduct the environmental impact assessment, and in March 2015 the Chief Director of the Department of Environmental Affairs granted the authorization. However, the final Environmental Impact Report for the project failed to quantify the anticipated GHG emissions from the power station and did not address the impact that the development would have on water scarcity in the Waterberg region. It noted, in particular, that the 'relative contribution' of the project to global warming was 'considered to be relatively small in the national and global context.'[98] After an unsuccessful appeal to the Minister of Environmental Affairs, non-governmental organization Earthlife Africa applied to the High Court for a judicial review of this decision, relying on the grounds that the decision-maker had overlooked relevant considerations, had taken a decision that was not rationally connected to the information before him, and had 'failed to apply his mind.'[99]

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96 See (n 82).

97 Department of Environmental Affairs, 'Environmental Impact Assessment Regulations 2014' GNR 982 *Government Gazette* 38282 of 4 December 2014 (henceforth: 'EIA Regulations').

98 *Thabametsi* (n 82) para 42.

99 Section 6(2)(e)(iii) and 6(2)(f)(ii) and Promotion of Administrative Justice Act 3 of 2000.

Earthlife Africa won the case, securing a significant precedent: that climate change was a relevant consideration when granting an environmental authorization, and a formal expert report on climate change impacts would be the best evidentiary means to consider climate change impacts in their multifaceted dimensions. The court ordered the Minister to constitute the appeal afresh, now taking climate change impact assessment reports into account. The court also made powerful statements associating climate change impact assessment with sustainable development, inter-generational justice, and the precautionary principle.[100] It said that climate change poses a substantial risk to sustainable development in South Africa.[101] Taking into account the integral linkages between sustainable development and intergenerational justice, affirmed by the right to environment enshrined in section 24 of the Constitution, short-term needs had to be evaluated and weighed against long-term consequences.[102] This duty, bearing upon the State (and by extension the decision of the Minister on the appeal *de novo*), was reinforced by the provisions of the United Nations Framework Convention on Climate Change (UNFCCC) requiring States Parties to take precautionary measures, and to take climate change considerations into account in their relevant environmental policies and actions.[103]

After reconsidering the appeal, on 30 January 2018 the Minister nevertheless still decided to confirm the environmental authorization. While noting that the risks associated with the Thabametsi power station's GHG were high, she held that they did not constitute a 'fatal flaw'; that extensive mitigation measures had been added to the environmental management programme; and that the benefits associated with the facility could be justified.[104] This decision is currently the subject of a further judicial review.

2 The *Philippi Horticultural Area* Case

In *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape*[105]

100 The precautionary principle is enshrined in s 2(4)(a)(vii) of the NEMA.

101 *Thabametsi* (n 82) para 82.

102 *Thabametsi* (n 82) para 82.

103 See United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) arts 3(3) and 4(1)(f); *Thabametsi* (n 82) para 83.

104 Minister of Environmental Affairs, 'Appeal Decision: Reconsideration of the appeal against the environmental authorization issued for the proposed establishment of the 1200MW Thabametsi coal-fired power station and associated infrastructure near Lephalale, within the jurisdiction of the Waterberg district municipality, in the Limpopo province' (30 January 2018) <https://cer.org.za/wp-content/uploads/2018/01/Thabametsi-Appeal-Decision-30-January-2018-2.pdf> accessed 21 August 2020.

105 *Philippi Horticultural Area* (n 89).

climate change considerations also loomed large in challenges to the granting of environmental and planning authorizations. The development of farmlands known as the Philippi Horticultural Area (PHA) formed the bone of contention between a voluntary association (the Philippi Horticultural Area Food and Farming Campaign) on the one hand, and the developer (Oaklands), and the environmental and planning authorities of the City of Cape Town and the Western Cape, on the other. Oaklands owned land that overlapped with about 20% of the PHA. It proposed developing this land to build housing for 15 000 families, schools, commercial and industrial facilities and a conservation and wetland area. The PHA Food and Farming Campaign vociferously opposed the development on the grounds that it threatened food security, heritage, and the integrity of the Cape Flats aquifer, which sustained irrigation for the PHA. The proposed development overlay the deepest parts of the aquifer, with the land being one of the few remaining areas for recharge. The importance of protecting the aquifer was further heightened in a context of water scarcity and climate change.[106] It bears mentioning that from 2015 to 2018 Cape Town experienced the most severe drought in South Africa's history. After three consecutive dry winters the city of nearly four million people faced the prospect of municipal tap water running completely dry. This 'Day Zero' scenario was narrowly averted after draconian water restrictions were imposed and good rains fell in 2018.[107]

The provincial and municipal planning and environmental authorities had given the development a green light by approving a change to the urban edge, approving the rezoning and subdivision of the Oakland land, and granting an environmental authorization under NEMA. The environmental and planning authorizations were granted without a specialist aquifer impact assessment, or a specialist study undertaken to assess the impact of the proposed development on the aquifer, its state and recharge requirements.[108] The Director of the Western Cape Department responsible for environmental affairs and planning, and the Member of the Executive Council (MEC) had relied on groundwater studies and geohydrological studies dating from 2001 to 2013.[109] These reports and studies were in favour of the Oakland development as a means

106 *Philippi Horticultural Area* (n 89) para 100.

107 NJ Burls et al, 'The Cape Town "Day Zero" drought and Hadley cell expansion' (2019) Climate and Atmospheric Science art no 27; S Robins, ' "Day Zero": Hydraulic citizenship and the defence of the commons in Cape Town: A case study of the politics of water and its infrastructures' (2019) 45(1) Journal of Southern African Studies 5.

108 *Philippi Horticultural Area* (n 89) para 95.

109 *Philippi Horticultural Area* (n 89) para 97.

to limit further horticultural development, thus limiting additional groundwater abstraction and pollution associated with agricultural activities. The information relating to the aquifer on which the political authorities relied related, therefore, to pollution from farmed areas, the risk of exploitation of the aquifer, and mechanisms for stormwater management.[110] The PHA Food and Farming Campaign maintained that the studies were wholly inadequate for the purpose of assessing the development's impact on the aquifer in a context of water insecurity and climate change.

The court agreed. It found that although a specialist aquifer study was not required, and although the MEC (as the appeal authority) had appreciated the significance of the aquifer, the information placed before the decision-maker was inadequate: the hydrological studies were all 'many years old' when the MEC decided to dismiss the appeal against the granting of the environmental authorization.[111] The focus of the reports was also inadequate as none had focused on the broader consideration of the preservation, recharge and health of the aquifer in the context of water scarcity and climate change.[112] A 'more recent' assessment of the impact of the development on the health of the aquifer was required.[113] The lack of adequate information meant that the MEC had failed to consider relevant considerations, and arrived at a decision that was neither rational nor reasonable.[114]

The lack of a recent professional report on the impact of the proposed development on the aquifer also tainted the City of Cape Town's rezoning decision. Here the court added that 'a risk-averse and careful approach' should be adopted, especially in the face of incomplete information; and that what was required was a recent assessment of the impact of zoning and subdivision on the aquifer as a large, underground natural resource, taking into account water scarcity and climate change.[115]

The *Philippi Horticultural Area* case thus expanded the success of climate change litigation from a mitigation to an adaptation context. It affirmed the mainstreaming of climate change considerations in the environmental impact assessment process as per *Thabametsi*, and extended climate change considerations into planning law. It also added a welcome

110 *Philippi Horticultural Area* (n 89) para 98.
111 *Philippi Horticultural Area* (n 89) para 100.
112 *Philippi Horticultural Area* (n 89) para 101.
113 *Philippi Horticultural Area* (n 89) para 102.
114 Invoking ss 6(2)(e)(iii) and 6(2)(f)(ii) of the Promotion of Administrative Justice Act (henceforth: 'PAJA').
115 *Philippi Horticultural Area* (n 89) para 103.

precedent relating to the currency and focus of professional reports assessing the impact of climate change-related developments on the natural environment: These must be properly focused on the natural environment itself, and should be 'recent', which in the case at hand was no older than three years.

3 The *Khanyisa* Case

The final case in the suite of 'core' climate change litigation is a Water Tribunal[116] decision handed down in the *Khanyisa* matter in July 2020. Falling under the same IPP coal baseload power procurement programme as Thabametsi, the Khanyisa project is for a 600MW independent coal-fired power station and associated infrastructure, located near to eMalahleni in Mpumalanga province, South Africa. Following Earthlife Africa's success in *Thabametsi*, in 2013 the groundWork Trust instituted appeal and review proceedings to set aside the environmental authorization granted to the Khanyisa project proponent (ACWA, formerly Anglo Operations (Pty) Ltd).[117] GroundWork also challenged a water use licence granted by the Minister of Water Affairs to ACWA in December 2017. The authorized water uses for the project included disposing of waste in a manner that may detrimentally impact on a water resource, as the infrastructure associated with the construction of the plant included an Ash Disposal Facility and Site.

The National Water Act, 1998 (NWA) establishes the National Government as the public trustee of South Africa's scarce water resources.[118] The National Minister responsible for water is 'ultimately responsible' to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.[119] The Act establishes a regulatory framework for water use entitlements, including the criteria and processes for the granting of a water use licence. Similar to the NEMA, however, the NWA contains no reference to climate change and climate change considerations do not expressly feature in the criteria that must be considered for the granting of a water use licence. However, these criteria, set out in section 27 of the Act, require that in

116 The Water Tribunal, which heard the appeal in the *Khanyisa* matter (n 90), is an independent body established under the NWA. It is not a court of law, but its decisions are binding between the parties. Its decisions can be compared to those of the magistrates' (lower) courts. An appeal to the High Court may be made against a decision of the Water Tribunal (see ss 146 and 149, National Water Act 1998).

117 See Table 8.1: 'Pending litigation in South Africa: Climate change as central focus' below.

118 Section 3(1), National Water Act, 1998.

119 Section 3(2), National Water Act, 1998.

issuing a licence relevant factors include 'efficient and beneficial use of water in the public interest.'[120]

The groundWork Trust relied on numerous grounds of appeal, and were ultimately successful on the ground that the decision was procedurally unfair.[121] Although the grounds included numerous arguments related to energy policy and continued investment in new coal-fired power, the Tribunal emphasized that if had no competence to decide these energy-related matters.[122] Climate change nevertheless featured in the Tribunal's reasoning in three ways. Firstly, the panel pointed out that whether or not a climate change impact assessment ought to have been conducted was not necessarily a matter for decision by the Water Tribunal. Following *Thabametsi*, this was a matter that the competent authority under the NEMA needed to consider.[123] This was appropriate because a project of the nature of *Khanyisa* required several permits. Since any activity that requires a water use licence is subject to the Environmental Impact Assessment Regulations, an environmental authorization must invariably precede and be submitted with a water use licence application.[124] The Tribunal's reasoning on this point seems sound.

Secondly, the Tribunal made a passing remark that 'the effects of climate change are a relevant factor to be considered under s 27(1) of the NWA…'. Section 27(1) states that when issuing a water licence a responsible authority must take into account 'all relevant factors, including', and then proceeds to articulate specific criteria. The use of the word 'including' establishes that the list of articulated criteria is not a closed one – other factors (such as the effects of climate change) may also be relevant. It is a pity, however, that the Tribunal relegated the inclusion of climate change effects to the list of licensing criteria to a passing remark. Climate change jurisprudence would have benefitted from an extended and more thorough justification.

Thirdly, the Tribunal found that the responsible authority had not properly considered whether the water use licence promoted the 'beneficial and sustainable use of water in the public interest.'[125] This criterion requires the responsible authority to consider the interests of all South Africans, future generations, ecosystem and aquatic needs, and the right of all to have the environment protected and to secure ecologically sustainable development.[126] It

120 Section 27(1)(c), National Water Act, 1998.
121 *Khanyisa* (n 90).
122 *Khanyisa* (n 90) para 16.
123 *Khanyisa* (n 90) para 20.
124 *Khanyisa* (n 90).
125 This is a licensing criterion set out in s 27(1)(c) of the National Water Act, 1998.
126 *Khanyisa* (n 90)) paras 78–9.

was not in dispute, the panel said, that building new coal-fired power stations would increase South Africa's GHG emissions, and that one of the key impacts of climate change in Southern Africa will be water security.[127] These factors, the panel seemed to suggest, must be included when considering whether authorizing a particular water use is beneficial and sustainable in the public interest.[128]

4 Further Pending Cases with Climate Change as a Core Focus

On the back of *Thabametsi*, civil society organizations are challenging environmental impact assessments and water use licences relating to a further five new coal-fired power plants under the IPP coal baseload procurement programme. Table 8.1 below provides further details of pending litigation in which climate change is a core focus. The recent wins in *Philippi Horticultural Area* and *Khanyisa* strengthen the scope of potential challenge.

B *Litigation Where Climate Change Is a Peripheral Factor*

A number of pending administrative appeals are challenging administrative decisions to grant provisional atmospheric emissions licences to coal IPPs and to the State-owned electricity utility, Eskom. Atmospheric emissions licences (AELs) are mandatory under the National Environmental Management: Air Quality Act, 2004. The main target of attack in these cases is the effect such licences will have on exceeding standards for ambient air quality, with climate change as a peripheral issue. To date, administrative appeals have been filed with the Minister of Environment challenging the provisional AEL granted to the Thabametsi IPP and with district municipalities for AELs granted to the Khanyisa IPP and four Eskom power stations.[129]

Climate change also features peripherally in the Life After Coal campaign's 'deadly air' case. In pushing for the phase-out of coal, one of the goals of this campaign is to advocate for reducing polluting emissions from coal-fired power stations. The applicants, groundWork Trust and the Vukani Environmental Justice Alliance Movement in Action are suing the Minister of Environmental Affairs, the Chief Air Quality Officer and the President of the Republic, amongst others, for their failure to promulgate regulations to give effect to the Highveld Air Quality Management Plan. The Highveld region, which straddles South

127 *Khanyisa* (n 90) para 81.

128 *Khanyisa* (n 90) para 82.

129 Hendrina, Komati, Camden and Lethabo. See 'Pollution and Climate Change: Litigation' (*Centre for Environmental Rights*) <https://cer.org.za/programmes/pollution-climate-change/litigation> accessed 21 August 2020.

TABLE 8.1 Pending litigation South Africa: climate change as central focus[a]

Case	Coal Station	Applicants	Forum	Remedy	Status
Review of environmental authorization	Thabametsi IPP (*Thabametsi II*)	Earthlife Africa & groundWork Trust	North Gauteng High Court	Remitting decision back to decision-maker	Court papers filed
Appeal of environmental authorization	Colenso IPP	GroundWork Trust & South Durban Community Environmental Alliance	Minister of Environment	Setting the environmental authorization decision aside	Appeal lost; considering whether to review
Review of environmental authorization	KiPower IPP	GroundWork Trust	North Gauteng High Court	Remitting decision back to decision-maker	Court papers filed; company indicated it will amend its authorization
Appeal of water use licence	KiPower IPP	GroundWork Trust	Water Tribunal	Setting the water use licence aside	Appeal papers filed, not decided
Appeal of environmental authorization	Namane IPP	Earthlife Africa & GroundWork Trust	Minister of Environment	Setting the environmental authorization aside	Appeal papers filed

TABLE 8.1 Pending litigation South Africa: climate change as central focus (*cont.*)

Case	Coal Station	Applicants	Forum	Remedy	Status
Review of environmental authorization	Khanyisa IPP	GroundWork Trust	North Gauteng High Court	Remitting decision back to decision-maker	Court papers filed
Review of environmental authorization	Water transfer infrastructure project to support Thabametsi and Khanyisa IPPs	Earthlife Africa & groundWork Trust	Minister of Environment	Setting the environmental authorization aside	Appeal papers filed

[a] The table is compiled by the author on the basis of information sourced from Centre for Environmental Rights 'Litigation: Challenges of decisions in relation to coal-fired independent power producers' <https://cer.org.za/programmes/pollution-climate-change/litigation> accessed 21 August 2020.

Africa's Gauteng and Mpumalanga provinces, is home to 12 of Eskom's coal-fired power stations and a coal-to-liquid refinery operated by Sasol.[130] The case is based on the argument that the failure to promulgate regulations violates the constitutional right to an environment not harmful to health or well-being.[131] The UN Special Rapporteur for the Right to Environment has joined as a friend (amicus) of the court to frame the issue of poor air quality within the broader framework of the emerging international human right to environment.[132]

C *Litigation where Climate Change is a Motivating Factor*

Climate change is a clear motivating factor behind pending litigation compelling the Minister of Minerals and Energy to furnish written reasons for decisions taken in the 2019 IRP. GroundWork requested written reasons from the Minister in November 2019, a month after the IRP was promulgated. Their request for written reasons relates to, amongst others, the procurement status of the Thabametsi and Khanyisa IPPs, the decision to exempt these facilities from using clean coal technology, the decision to impose annual build limits on renewable energy (wind and solar photovoltaic), and the inclusion of new sources of fossil-fuel based energy.[133] The Minister simply failed to respond to the request for written reasons, compelling groundWork to turn to the courts. The NGO is also tackling the NERSA's refusal to provide its comments on the 2019 IRP.

D *Litigation Impacting Mitigation or Adaptation*

In the category of litigation impacting mitigation or adaptation, two cases are worthy of mention. The first, *Coal Transporters Forum v Eskom Holdings Ltd*,[134] illustrates social resistance to a movement away from fossil fuels. The case was launched by the Coal Transporters Forum, a voluntary association representing the interests of companies that transport coal, against Eskom holdings. The Forum sued Eskom in a bid to stop the utility from signing any further power purchase agreements with independent renewable energy power producers,

130 *The Trustees for the time being of groundWork Trust v Minister of Environmental Affairs* (pleadings submitted to the Gauteng High Court) <https://cer.org.za/wp-content/uploads/2019/07/DA-Court-Papers_pagenumber-1.pdfpara78> accessed 21 August 2020.

131 Section 24, Constitution of the Republic of South Africa, 1996.

132 See the amicus application at <https://cer.org.za/wp-content/uploads/2020/06/Groundwork-Trust-Amicus-Admission-Application_V1.pdf> accessed 21 August 2020.

133 *Trustees for the time being of groundWork Trust v Minister of Mineral Resources & Energy* Notice of Motion and Affidavit filed in the Gauteng High Court, Case No 32200/20 <https://cer.org.za/wp-content/uploads/2020/07/IRP-application-papers_gW-v-MinisterNERSA.pdf> accessed 21 August 2020.

134 [2019] ZAGPPHC 76 (26 March 2019) (henceforth: '*Coal Transporters Forum*').

and to have all previous power purchase agreements with renewable energy producers declared invalid. According to the South African Minerals Council, the coal industry employed more than 92 000 people in 2019, representing 19% to total employment in the mining sector.[135] A just transition that includes reskilling workers in the coal sector is key to the process of weaning South Africa off fossil fuels, (although this will also undoubtedly also require changing the mindset of investors and companies with vested coal sector interests). The Forum's application against Eskom was dismissed in March 2019. The court acknowledged that coal has significant detrimental impacts on the environment, of which the most significant was the emission of GHGs contributing to climate change.[136] It also noted the government's policy to move to a low-carbon economy.[137] But the case was largely dismissed because the court found that the Forum's claims had no merit or evidential basis.

The second case, *City of Cape Town v National Energy Regulator of South Africa* (*NERSA*) *& Another* is a potential game-changer for the uptake of renewable energy in South Africa. It is a challenge brought by the City of Cape Town against NERSA and the Minister of Minerals to test whether new electricity generation can be legally procured absent a 'determination' granted by the Minister of Energy in terms of section 34 of the Electricity Regulation Act, 2006.[138] Success in this case would enable metropolitan or district municipalities to procure energy from renewable energy power producers. The latter, in turn, would not be limited in needing to sell their power to Eskom under the REI4P project. The Centre for Applied Legal Studies applied to be admitted as an amicus of the court to highlight the importance of the judgment for the realization of the right to environment in the context of the climate change emergency. The case is still pending.

v Conclusion and Future Prospects

This chapter has provided a brief overview of South Africa's climate change context, the litigation landscape, and the current state of decided and

135 'Coal: Key facts and figures' (*Minerals Council, South Africa*) <https://www.mineralscouncil.org.za/sa-mining/coal#:~:text=The%20coal%20sector%20employs%2092%2C230,9%20billion> accessed 21 August 2020.

136 *Coal Transporters Forum* (n 134) para 4.

137 *Coal Transporters Forum* (n 134) para 5.

138 *City of Cape Town v NERSA* Notice of Motion and Affidavit filed in the Gauteng High Court, Case No 51765/17 <https://cer.org.za/wp-content/uploads/2019/05/City-of-CT-Notice-of-motion-Founding-Affidavit.pdf> accessed 21 August 2020.

pending climate change litigation. It shows that while South Africa has a deeply entrenched dependence on fossil fuels, the country has made progress in developing the policy and regulatory frameworks to shift to a low-carbon economy and promote renewable energy. However, until there are more transformative and far-reaching changes in the energy sector, South Africa's addition to coal is unlikely to wane.

The review of decided and pending climate change cases establishes that South Africa is firmly out of the starting blocks. *Thabametsi* was a keystone judgment, firmly positioning climate change considerations in the country's EIA regime, which covers all major infrastructure projects. *Thabametsi* is not only authority for mainstreaming climate change considerations in the EIA process, but also for the rule that a formal expert report on climate change impacts is the best evidentiary means to consider climate change impacts in their multifaceted dimensions. To this, the *Philippi Horticultural Area* case add that professional reports must be properly focused on the natural resource itself and should be 'recent' (ie no older than three years). The recent decision in the *Khanyisa* Water Tribunal case has established that the requirement of a climate change impact assessment sits with the authorities overseeing the EIA process, and not with the authorities responsible for granting water use licences. The impacts of climate change are nevertheless a 'relevant consideration' when granting a water use licence, featuring prominently in considering whether authorizing a water use is beneficial and sustainable in the public interest.

The three decided cases that now constitute the core of South Africa's climate change litigation jurisprudence are all examples of first-generation climate change litigation: ensuring the mainstreaming of climate change considerations in administrative decision-making in environmental and planning laws. The grounds of review set out in the PAIA – particularly the grounds that relevant considerations must be taken into account, and that the decision must be rational – have facilitated achieving this mainstreaming objective. There is now a need to ensure that the principles and rules established by *Thambametsi*, *Philippi Horticultural Area* and *Khanyisa* are widely publicized, complied with, and implemented. The manner in which civil society organizations immediately seized the opportunity to challenge the lack of express climate change considerations in the environmental authorizations granted to a number of newly-commissioned private coal-fired power stations following *Thabametsi,* evinces an understanding that these novel first-generation victories must be more firmly entrenched.

It is also clear, however, that South Africa's climate change litigation potential is only starting to be tapped. There is a need to extend climate change

mainstreaming into the full suite of environmental and planning legislation. A more extended treatment of the role of climate change considerations under the National Water Act would be welcome, as would challenges to decisions relating to mining, biodiversity, protected areas, marine resources, and forests. The South African planning law landscape is complex, comprising national and provincial laws. A clearer climate change win, for example, is needed in relation to a framing law such as the Spatial Planning and Land Use Management Act, 2013. There is also a need to heighten ambition for second-generation climate change cases. The obvious target in this regard is the country's 2019 IRP, which still mandates significant investments in fossil fuel-based sources of energy and caps investment in renewables. The pending litigation compelling the Minister of Mineral Resources and Energy to provide written reasons relating to this plan is the start of a more ambitious litigation journey. Other than the IRP, South Africa's conducive public interest litigation landscape – a rich normative framework of political and socio-economic rights, horizontal application, broad standing provisions, favourable costs rules, the potential for class actions, numerous grounds for administrative review – offer myriad opportunities for advancing a climate change agenda through the courts.

CHAPTER 9

Climate Change Litigation in the Netherlands: The *Urgenda* Case and Beyond

*Christine Bakker**

1 Introduction

While the Dutch Supreme Court's judgment in the *Urgenda* case[1] is still resonating loudly and clearly, a second climate change lawsuit in the Netherlands, *Milieudefensie v Shell,* is playing its first notes.[2] Although this case is still in its initial phase, it already shows that human rights will continue to be a central theme of climate change litigation before Dutch courts.[3]

As is now well-known, in the *Urgenda* case, the Supreme Court upheld the claim by the Non-Governmental Organization (NGO) Urgenda Foundation and some 900 citizens against the Dutch State, confirming the earlier judgments of the District Court (2015)[4] and the Court of Appeal of The Hague (2018),[5] and ordering the State to reduce its greenhouse gas (GHG) emissions

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1 Supreme Court of the Netherlands, *The State of the Netherlands v Urgenda Foundation*, Case No 19/00135, 20 December 2019 (unofficial translation available at: < <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007 accessed on 11 March 2021) (hereafter: 'Urgenda, SC Judgment').

2 See: <https://en.milieudefensie.nl/climate-case-shell>accessed 11 March 2021. However, one other case was dismissed in December 2020 (see below, Section V).

3 This chapter will focus its analysis on climate change litigation in a 'narrow sense', and only consider cases which explicitly raise an issue that is directly related to climate change or climate change policy. (For further details on the different approaches to the definition of climate change litigation, see the Introduction, Chapter 1, to this edited volume).

4 District Court of The Hague, *Urgenda Foundation v The State of the Netherlands*, Case No C/09/456689 / HA ZA 13-1396, 24 June 2015 (unofficial translation available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196> accessed 11 March 2021) (hereafter: 'Urgenda, DC Judgment').

5 Court of Appeal of The Hague, *The State of the Netherlands* (*Ministry of Infrastructure and the Environment*) *v Urgenda Foundation,* Case No C/09/456689 / HA ZA 13-1396, 9 October 2018 (unofficial translation available at: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> accessed 11 March July 2021) (hereafter: 'Urgenda, CoA Judgment').

by at least 25 per cent below 1990 levels, by the end of 2020. While the District Court had essentially based its judgment on Dutch tort law, the Supreme Court confirmed the legal reasoning followed by the Court of Appeal that the Netherlands had failed to comply with its obligations under the European Convention on Human Rights (ECHR),[6] by failing to adopt sufficient measures to prevent climate change. In the second climate change-related case brought before a Dutch court, another environmental NGO, *Milieudefensie* (Friends of the Earth Netherlands), together with six other organizations and 17.000 citizens launched proceedings against the oil and gas company Royal Dutch Shell, claiming breaches of both Dutch tort law and of human rights protected by the ECHR. The first hearings before the Hague District Court were held in December 2020, and the court's judgment is expected in May 2021.

This chapter provides an overview of climate change litigation in the Netherlands, focusing on the role attributed to human rights as a legal basis, and highlighting 'innovative' approaches adopted by the Dutch courts on the interpretation of the State's obligations under human rights law and their application to the risks caused by climate change. To this end, the chapter first briefly presents the judgments of the District Court and the Court of Appeal in the *Urgenda* case (Section II), before critically examining how the Supreme Court has dealt with the human rights arguments in its judgment of 20 December 2019 (Section III). Specific attention is paid to the role of climate science for establishing risks to human rights, the recognition of a 'collective' dimension of individual human rights in an environmental context, and the concept of 'partial responsibility of individual States' for the joint internationally wrongful act of causing climate change. Finally, the potential impact that this judgment may have on future climate change-related cases will be discussed, especially in the Netherlands, but also in other jurisdictions (Section IV). In this context, the chapter considers how the claim in *Milieudefensie v Shell* has relied on human rights protected by the ECHR, and their applicability to Shell as a private actor. The chapter concludes with some final remarks on the impact of the *Urgenda* case, both in legal terms, and on Dutch climate policy, also considering the government's stated intent to keep its policies on track despite the effects of the Covid 19 crisis.

6 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

II The *Urgenda* Case: Developments Prior to the Supreme Court's Judgment

Before discussing the Supreme Court's main legal arguments in the *Urgenda* case, this section briefly presents the context in which this case was launched, the legal bases of the claim, and the defense by the Dutch State (A) and summarize the judgments of the District Court (B) and the Court of Appeal (C), highlighting how human rights progressively emerged as the main theme in these proceedings.

A *Context, Legal Bases, and Defense*

1 Context and International Climate Commitments of the Netherlands

The *Urgenda* case was initially launched in 2013, two years before the adoption of the Paris Agreement on Climate Change.[7] Therefore, the applicable international commitments of the Netherlands to address climate change were essentially based on (1) the United Nations Framework Convention on Climate Change (UNFCCC),[8] (2) the Kyoto Protocol,[9] and (3) the legally binding targets agreed in the context of the European Union.[10] Whereas the UNFCCC does not provide any quantified GHG emission reduction targets for individual States, under the Kyoto Protocol, the Netherlands initially agreed to a reduction of its emissions by 6 per cent compared to 1990 levels by 2012. With evolving scientific evidence indicating that these targets were insufficient to avoid 'dangerous' levels of global warming, a new reduction target for developed countries of 25–40 per cent by 2020 compared to 1990 levels was then agreed, based on the 2007 Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC).[11] In the international climate negotiations this target was first mentioned in the 2007 Bali Action Plan,[12] but it was only formally adopted in

7 Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 (Paris Agreement).

8 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 December 2005) 2303 UNTS 162 (Kyoto Protocol).

10 Directive 2003/87/EC establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32 (ETS Directive).

11 RK Pachauri et al (eds), *Climate Change 2007: Synthesis Report* (IPCC 2008) <www.ipcc.ch/assessment-report/ar4/> accessed 11 March 2021.

12 UNFCCC Conference of the Parties, 'Report of the Conference of the Parties on its 13th session, Bali, 3 to 15 December 2007' (14 March 2008) UN Doc FCCC/CP/2007/6/Add.1.

the 2010 Cancún Pledges[13] and subsequently in the Doha Amendment to the Kyoto Protocol, adopted in 2012.[14] While the EU Member States, including the Netherlands, formally agreed to a common new reduction target of 20 per cent by 2020, they made a conditional declaration, stating their aim to reduce GHG emissions by 30 per cent by 2020, provided that other developed countries commit themselves to comparable emission reductions and developing countries contribute adequately according to their responsibilities and respective capabilities.[15] However, the Dutch government subsequently announced that it would not meet either of these targets, and that it would aim for a 14–17 per cent reduction instead.[16]

The Dutch NGO Urgenda Foundation (generally referred to as 'Urgenda', a contraction of 'urgent agenda'), created in 2008 with the mission of contributing to sustainability and energy transition, first urged the Dutch State, in a letter of November 2012, to reduce its emissions by 40 per cent by 2020. After receiving a reply in which the government acknowledged the need for further emission reductions but disagreed with the level and timing proposed by the NGO, in 2013 Urgenda, supported by 886 citizens initiated a lawsuit against the Dutch State. The competent court in first instance was the Hague District Court.

2 Legal Bases of Urgenda's Claim

Urgenda requested the District Court to order the Dutch State to reduce GHG emissions by 40 per cent, or at least by 25 per cent compared to 1990 by the end of 2020. It also requested the court to rule, in essence, that: the joint volume[17] of current annual GHG emissions in the Netherlands is unlawful; that the State is liable for the joint volume of GHG emissions in the Netherlands

13 UNFCCC Conference of the Parties, 'Decision 1/CMP.6 The Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its Fifteenth Session' (10–11 December 2010) UN Doc FCCC/KP/CMP/2010/12/Add.1, recital 6.

14 UNFCCC Conference of the Parties, 'Decision 1/CMP.8 Amendment to the Kyoto Protocol' (28 February 2013) UN Doc FCCC/KP/CMP/ 2012/13/Add.1 ('Doha Amendment'). The Doha Amendment has not yet entered into force, but it was ratified by the EU and its Member States on 21 December 2017.

15 ibid in note 7 under revised Annex B.

16 Urgenda, DC Judgment (n 4) para 4.26.

17 The term 'joint volume' is used in the unofficial translation of the judgment (n 4), which is indeed a literal translation of the Dutch term 'gezamenlijk volume' used in the original judgment. Perhaps 'total volume' would be more correct in this context, but in this chapter all citations to the three judgments will stick to the terms used in the unofficial translations mentioned in footnotes 1, 4, and 5.

and that the State would be acting unlawfully if it fails to reduce its GHG emissions by 40, or at least by 25 per cent by the end of 2020, compared to 1990.

The lawsuit was initiated on the basis of domestic tort law,[18] but the legal arguments supporting the claim were based on both national and international law. The main *national* legal bases that Urgenda invoked are Dutch Civil Code, Article 5:37 on the prohibition of nuisance, and Article 6:162, according to which the creation of a 'dangerous situation' can amount to a tortious act), and the constitutional law obligation of the State to protect the environment (Article 21 of the Dutch Constitution). Among the *international* legal bases on which the claim relied, three different types of international rules can be distinguished. *Firstly,* the international law on climate change (UNFCCC, Kyoto Protocol and its 2012 Doha Amendment, and the Cancún Agreements), *secondly,* principles of public international law (particularly the 'no-harm' and the precautionary principles); and *thirdly,* human rights protected by the ECHR, specifically the rights to life (Article 2, ECHR) and to a private and family life (Article 8, ECHR). These legal arguments were informed by the Fourth Assessment Report of the IPCC.

3 Defense of the Dutch State

The main arguments put forward by the State concerned (i) inadmissibility of the claim due to Urgenda's lack of standing, (ii) absence of legal obligations to achieve the emission reduction targets invoked by Urgenda; (iii) absence of a breach of Articles 2 and 8 of the ECHR, and (v) interference with the principle of separation of powers.

Regarding admissibility, the State argued that Urgenda had no locus standi since there was no unlawful action towards Urgenda attributable to the State. Moreover, the plaintiffs were not entitled to invoke Articles 2 and 8 of the ECHR, since they did not meet the admissibility criteria of Article 34 of the ECHR. The State also argued that it had no legal obligation to achieve a reduction target of 25–40 per cent. It acknowledged the need to limit the global temperature rise up to (less than) 2°C, but argued that its efforts were, in fact, aimed at achieving this objective. Finally, the State argued that allowing the claims would be contrary to the separation of powers, and that it would harm its negotiation position in international fora.

18 Burgerlijk Wetboek (Dutch Civil Code) art 6:162.

B *The Judgment of the District Court of The Hague*

As has been widely reported, the Court upheld Urgenda's claim and ordered the State to reduce its GHG emissions by at least 25 per cent compared to 1990 levels by 2020. At the same time, the Court rejected most of the legal arguments put forward in the claim, and came to its conclusion following a different reasoning, based on a legal construction of the State's duty of care under Dutch tort law.

The District Court confirmed Urgenda's standing in this case, since it fulfilled the conditions for legal action by non-profit organizations set out in Article 3:305a of the Dutch Civil Code. However, the Court upheld the argument of the State that neither the Urgenda Foundation, nor the individual plaintiffs were entitled to invoke the human rights provisions of the ECHR, considering that they did not fulfill the admissibility criteria of Article 34 of that Convention. In particular, the Court found that the individual plaintiffs had not provided evidence that they were actual or potential victims of the alleged violations of their human rights. As will be shown below, this conclusion was later reversed by the Court of Appeal which upheld the State's obligations deriving from the ECHR as the principal legal basis for its own judgment.

The District Court also rejected the direct applicability of the other international legal sources that the plaintiffs had put forward in their claim, stating that they all constituted inter-State obligations, none of which can be directly invoked by natural or legal persons.[19] In this regard, the Court affirmed that the UNFCCC, the Kyoto Protocol and its Doha Amendment, but also the EU's ETS Directive, as well as the principle of no-harm and the precautionary principle, could not be considered to have any 'directly binding effect' in the sense of Article 93 of the Dutch Constitution.[20]

Nevertheless, the District Court considered that all these international legal instruments, including the human rights provisions, were relevant when examining whether the State had complied with its obligations towards its citizens based on the duty of care, in accordance with Dutch tort law.[21] The Court held that 'when applying and interpreting national-law open standards and concepts … the court takes account of such international-law obligations.'

19 Urgenda, DC Judgment (n 4) para 4.42.

20 According to art 93 of the Dutch Constitution, individuals or legal persons can only invoke before a national court a provision of an international treaty or resolution when this provision, 'may be binding on all persons by virtue of its content'.

21 Dutch Civil Code (n 18) art 6:162. See E Stamhuis, 'A Case of Judicial Intervention in Climate Policy: The Dutch Urgenda Ruling' (2017) 23 Comparative Law Journal of the Pacific 43, 56.

On this basis, the District Court concluded that the State had an obligation 'to take measures in its own territory to prevent dangerous climate change.'[22]

In its final decision, the District Court observed some restraint: it ordered the State to reduce its GHG emissions by at least 25 per cent compared to 1990 levels, whereas Urgenda had claimed, *in primis*, a reduction of 40 per cent. The necessity of restraint was, more generally, clarified in relation to the State's defense regarding the separation of powers. The Court considered that since the division of powers within a State intends to achieve a *balance* between these powers, '[i]t is an essential feature of the rule of law that the actions of … political bodies, such as the government and parliament can – and sometimes must – be assessed by an independent court.'[23] The District Court concluded that it can and must provide for the protection that the plaintiffs seek, as long as it observes the necessary restraint. It does so, by refraining from indicating *how* the government should comply with the order, leaving it full freedom to make the policy choices that it deems appropriate to achieve the given reduction target.[24]

C *The Judgment of the Court of Appeal*

The State appealed the judgment to the Court of Appeal of The Hague. As the Court of Appeal stated: '[w]ith its 29 grounds of appeal … the State seeks to submit the dispute to the Court in its entirety.'[25] Moreover, Urgenda introduced a cross-appeal, in which it objected to the District Court's conclusion that based on Article 34 ECHR, it did not have standing to rely on the human rights enshrined in that convention.

Whereas the Court of Appeal rejected all grounds submitted by the State, it upheld Urgenda's cross-appeal, confirming that Article 34 ECHR only applies to proceedings before the European Court of Human Rights (ECtHR), and not to those before national courts. Based on Dutch law, which provides for class actions by interest groups, Urgenda was entitled to bring a claim against the Dutch State for alleged violations of the human rights protected in the ECHR, which have a direct effect in the Dutch legal order.[26] The Court of Appeal then proceeded to examine Urgenda's claim that the State had acted unlawfully against it, based on Articles 2 and 8 ECHR. The Court of Appeal considered that States Parties to the ECHR have 'positive' or 'due diligence' obligations to

22 Urgenda, DC Judgment (n 4) para 4.65.
23 Urgenda, DC Judgment (n 4) para 4.95.
24 Urgenda, DC Judgment (n 4) para 4.101.
25 Urgenda, CoA Judgment (n 5) para 31.
26 Urgenda, CoA Judgment (n 5) para 36, referring to art 3:305, Dutch Civil Code.

prevent threats to the right to life, and to a private and family life, of persons within their jurisdiction. These obligations can be seen as a 'duty of care' of the State.[27] The Court of Appeal referred to the jurisprudence of the ECTHR which affirmed that these obligations also apply in relation to environmental harm, including *Öneryildiz v Turkey, Budayeva and Others v Russia, Fadeyeva v Russia and Kolyadenko and Others v Russia.*[28] The Court of Appeal recalled the ECtHR's recognition that the due diligence obligations of States deriving from these Articles may, under certain conditions, also apply to the prevention of *future* infringements of the protected interests. However, for these obligations to arise, the concrete infringement must meet a minimum level of severity.[29] Moreover, the Court of Appeal affirmed that the State's duty of care 'applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous',[30] adding that '[i]f the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible'[31]

The Court of Appeal then assessed the (imminent) climate dangers, based on the facts and circumstances established in the proceedings, and concluded that 'it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life.'[32] Thus, the Court of Appeal determined the existence of the 'real and imminent threat' caused by climate change mainly on the basis of climate science,[33] an approach that the Supreme Court later confirmed (see Section III). After examining the relevance of the other international legal sources, the Court of Appeal concluded

27 Urgenda, CoA Judgment (n 5) para 41.

28 *Öneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004); *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008); *Kolyadenko and Others v Russia* App nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, 28 February 2012); and *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005).

29 ibid. For a more detailed discussion of the relevant case law see I Leijten, 'Human rights v. Insufficient climate action: The Urgenda case' (2019) 37 Netherlands Quarterly of Human Rights 2 112. See also <https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf> accessed 11 March 2021.

30 Urgenda, CoA Judgment (n 5) para 43.

31 Urgenda, CoA Judgment (n 5).

32 Urgenda, CoA Judgment (n 5) para 45.

33 See B Mayer, 'The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8 Transnational Environmental Law 1, 167–92.

that based on its obligations under Articles 2 and 8 of the ECHR, 'a reduction obligation … as ordered by the District Court is in line with the State's duty of care.'[34] Thus, while the Court of Appeal upheld the judgment of the District Court, it based its decision on a different legal basis. As formulated by one commentator, the Court of Appeal's judgment 'confirmed a 'rights turn' in climate change adjudication by basing its approach to the case not on tort law but entirely on human rights law.'[35]

The Court of Appeal also rejected the grounds put forward by the State claiming that (i) the ETS system stands in the way of the Netherlands taking measures to further reduce CO2 emissions, and (ii) the weakness of the causal link between GHG emissions in the Netherlands and global climate change. On the first point, the Court of Appeal recalled that more ambitious emission reduction targets than those agreed in the ETS are permitted, 'as long as they do not interfere with the functioning and the system of the ETS in an unacceptable manner.'[36] Regarding the State's second argument, the Court of Appeal acknowledged that the relative contribution of Dutch GHG emissions to the global problem of climate change is very small. However, this 'does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other States provide protection from the hazards of dangerous climate change.'[37] The Court also held that since the claim in this case concerned the imposition of an order on the State, and not the award of damages, causality only plays a limited role. In fact, for giving an order 'it suffices (in brief) that there is a real risk of the danger for which measures have to be taken.'[38] Thus, in this judgment the Court of Appeal addressed various points which are at the heart of the ongoing debate on the relationship between climate change and human rights. Since these points were also addressed by the Supreme Court, they will be further discussed below. After this verdict, the State instituted an appeal on cassation before the Supreme Court of the Netherlands, which led to the third and final part of the *Urgenda* case. In Dutch law, cassation is a check on the quality of judgments given by

34 Urgenda, CoA Judgment (n 5) para 53.

35 Mayer (n 33) 179; see also J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37.

36 Urgenda, CoA Judgment (n 5) para 54.

37 Urgenda, CoA Judgment (n 5) para 62.

38 See J Verschuuren, 'The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal upholds judgment requiring the Netherlands to further reduce its greenhouse gas emissions' (2019) 28 Review of European, Comparative & International Environmental Law 94, 96–7.

the courts of appeal as regards both the application of law and the legal reasoning behind it.

III The Supreme Court's Judgment in the *Urgenda* Case

In its judgment of 20 December 2019, the Dutch Supreme Court upheld the decision of the Court of Appeal of The Hague, providing the final confirmation of the judicial order to the State to reduce its emissions by at least 25 per cent compared to 1990 by the end of 2020. The Supreme Court also upheld the Court of Appeal's conclusion that the Dutch State had failed to comply with its positive obligations under human rights law, in particular Articles 2 and 8 of the ECHR.

This section undertakes a critical examination of the Supreme Court's judgment, focusing on four points: (A) the scope of the State's positive obligations under Articles 2 and 8 ECHR, including the 'real and immediate risk' criterion; (B) the application of these obligations to the risks caused by climate change and the role of science; (C) the concept of 'partial responsibility' of States considering the limited contribution of Dutch emissions to global climate change; and (D), the 'common ground method' for establishing the existing international consensus on the required emission reduction level.

A *Scope of the positive obligations based on Articles 2 and 8 of the ECHR*

In its grounds for cassation, the State asserted that no protection can be derived from Articles 2 and 8 ECHR since the danger caused by global climate change is not specific enough to fall within the scope of these provisions. The State also claimed that these articles only guarantee individual rights, and do not protect society as a whole. The Supreme Court rejected these arguments and confirmed the conclusion of the Court of Appeal that the Netherlands, as a State Party to the ECHR, must comply with certain positive obligations in order to guarantee the enjoyment, by everyone within its jurisdiction,[39] of the right to life[40] and to a private and family life.[41]

39 Urgenda, SC Judgment (n 1) para 5.2.1, referring to art 1 ECHR.

40 Urgenda, SC Judgment (n 1) para 5.2.2.

41 Urgenda, SC Judgment (n 1) para 5.2.3.

1 Article 2, ECHR: The 'real and immediate risk' Requirement

By referring to the established case law of the ECtHR, the Supreme Court recalled that a violation of this article has also been repeatedly found in relation to a natural disaster and to environmental harm.[42] Regarding the positive obligations of States, the ECtHR determined that in order to protect the right to life, States are 'obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk.'[43] In this regard, the ECtHR has clarified that the term 'real and immediate risk' refers to a risk that is both genuine and imminent. The Supreme Court affirmed that the term 'immediate' does not refer to imminence in a temporal sense, but rather that the risk in question is 'directly threatening the persons involved.'[44]

This is one of the crucial points for establishing a link between the positive obligations under Article 2 ECHR and the risks resulting from climate change. The ECtHR has, indeed, repeatedly confirmed that the criterion of 'immediacy' of the risk to life does not refer to its *timeframe* (ie *when* it may lead to a loss of life); such a risk is also considered to exist when its materialization is expected in several years' time.[45] However, the interpretation of the second element to which the Supreme Court referred may be less clear, namely that the risk in question is *directly threatening the persons involved*. This criterion appears to be in line with the more 'traditional' interpretation of the 'real and immediate risk' threshold in the context of Article 2, according to which, for a positive obligation to arise it must be established that the authorities knew or ought to have known at the time of the existence of a risk to the life of *an identified individual or individuals*.[46] However, as the Supreme Court recalled, for the purpose of determining the scope of the positive obligations related to the right to life, the ECtHR distinguishes between different contexts in which this right must be protected. Indeed, when the right to life is threatened as a result of environmental harm or natural disaster, these positive obligations are considered to have a more 'collective' dimension, in the sense that the State must take measures to protect a larger group of persons, such as a community or the population of a region where a certain risk occurs that may directly threaten their lives. This interpretation is also better suited for examining the

42 Urgenda, SC Judgment (n 1) paras 5.2.2 and 5.2.3.

43 Urgenda, SC Judgment (n 1) para 5.2.2.

44 Urgenda, SC Judgment (n 1). The Supreme Court does not further elaborate on the question of what the term 'real' exactly means in this context, other than mentioning the ECtHR's affirmation that it refers to a threat that is 'genuine'.

45 *Oneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004).

46 *Osman v The United Kingdom* App no 23452/94 (ECtHR, 28 October 1998).

risks posed by climate change, which arguably threaten the world's population as a whole.

The Supreme Court also refers to the case law in which the ECtHR has affirmed that 'protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole.'[47] However, the question remains what is left of the criterion of an 'immediate risk', if it neither refers to a *timeframe*, nor to any *identified persons involved*. Even if the term 'persons involved' refers to a population as a whole, one would assume that in order for a positive obligation to arise (and thus for a State to be held accountable for its failure to comply with that obligation), there must still be a concrete, determinable link between a specific risk and the population whose life might be in danger.[48] Importantly, when examining if the obligations under Articles 2 and 8 could be applied to the threats of climate change, the Supreme Court considered that the determining factor to establish this link is climate science, as further discussed below (Section B.1.).

2 Article 8, ECHR: Positive Obligations Related to Environmental Harm

Regarding article 8 ECHR, the Supreme Court cited the case law of the ECtHR establishing that 'the obligation to take measures exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.'[49] Here too, the risk does not need to exist in the short term. The Supreme Court affirmed that, in line with the ECtHR's approach, 'in the case of environmentally hazardous activities, the state is expected to take the same measures pursuant to Article 8 ECHR that it would have to take pursuant to Article 2 ECHR.'[50] This is of particular relevance in the context of climate change. It implies that even when a risk related to environmentally hazardous activities does not meet all the criteria required by Article 2 and does not entail an immediate threat to the *life* of a group of persons, or of a State's population, the State may nevertheless be obliged to provide the same level of protection, as long as the risk in question falls within the scope of Article 8. This clearly lowers the threshold for holding a State accountable for its failure to take adequate measures to mitigate environmental risks. Finally,

47 Urgenda, SC Judgment (n 1) 5.3.1.

48 As confirmed in *Cordella and others v Italy* App nos 54414/13 and 54264/15 (ECtHR, 24 January 2019).

49 Urgenda, SC Judgment (n 1) para 5.2.3.

50 Urgenda, SC Judgment (n 1) para 5.2.4.

the Supreme Court cites the ECtHR's approach, stating that positive obligations deriving from Articles 2 and 8 'must not result in an impossible or, under the given circumstances, disproportionate burden being imposed on a state.'[51]

B *Application of the Positive Obligations to the Dangers Posed by Climate Change*

1 The Role of Climate Science

The Supreme Court concluded that, based on the abovementioned findings, 'the State is required, pursuant to Articles 2 and 8 ECHR, to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem.'[52] It confirmed that climate change constitutes a 'real and immediate risk' and that it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardized. In substantiating this conclusion, the Supreme Court referred to the findings deriving from climate science, especially the 5th IPCC Assessment Report, COP decisions, and UNEP reports.[53]

By exclusively relying on these scientific reports, the Supreme Court neither provided any further analysis on *how* dangerous climate change meets the criterion of a real and immediate risk as required by Article 2, nor does it explain how the 'severity test' of Article 8 (requiring a 'significant impairment of the applicant's ability to enjoy his or her home or private or family life')[54] is met. The Supreme Court clearly considers that these criteria are fulfilled by the predictions offered by climate science, thereby recognizing that science may constitute a deciding factor in establishing accountability of States for breaching their human rights obligations. This is another significant outcome of this judgment, which effectively helps to overcome one of the main obstacles for climate change litigation based on human rights. One question that could be raised, however, is whether these *general* scientific reports also provide sufficient evidence for the materialization of risks to the lives and welfare of those who fall within the jurisdiction of a particular State.

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51 Urgenda, SC Judgment (n 1).

52 Urgenda, SC Judgment (n 1) para 5.6.2. In this author's view, a more correct translation of this sentence from the original judgment is as follows: '… the State *would have been* required, pursuant to Articles 2 and 8 ECHR, to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem.' Indeed, in the following paragraph (5.6.2) the Supreme Court then elaborates on the *global* scope of both the causes, and the threats posed by climate change, as is further discussed below, in para C.

53 Urgenda, SC Judgment (n 1) paras 4.2–4.7.

54 *Denison v Ukraine* App no 76639/11 (ECtHR, 25 September 2018).

In this regard, the Supreme Court refers to the possible sharp rise in the sea level, which could render parts of the Netherlands uninhabitable. The Court adds that '[t]he fact that this risk will only be able to materialize a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean … that Articles 2 and 8 ECHR offer no protection from this threat.'[55] It concludes, by referring to the precautionary principle, that '(t)he mere existence of a sufficiently genuine possibility that this risk will materialize means that suitable measures must be taken.'[56] By adopting this approach, the Supreme Court has, arguably, interpreted the principles elaborated by the ECtHR in an expansive manner.

2 Towards a 'collective' or 'public interest' Dimension of Individual Human Rights

By applying this expansive interpretation, as mentioned above, the Supreme Court has made a significant contribution to the progressive recognition of a 'collective' dimension of individual human rights in an environmental context.[57] However, this judgment goes beyond what the ECtHR itself has ever done. The absence of any climate change-related judgment by the ECtHR may be related to the strict admissibility criteria of Article 34, ECHR,[58] which not only exclude public interest litigation[59] before the ECtHR, but also contain a strict 'victim requirement' for individual complainants. Based on this latter criterion, only persons who are directly or indirectly affected in the enjoyment of their human rights can bring a complaint before the Court.[60] Considering the

55 Urgenda, SC Judgment (n 1) para 5.6.2.

56 Urgenda, SC Judgment (n 1).

57 On this point, see F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 European Journal of International Law 41; R Pavoni, 'Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight' in F Lenzerini and A F Vrdoljak (eds), *International Law for Global Common Goods: Normative Perspectives on Nature, Culture and Human Rights* (Hart 2014).

58 Art 34 ECHR states: 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto…'.

59 'Public interest litigation', or *actio popularis*, is used here to refer to litigation initiated by persons or organizations (whose own rights are not alleged to be infringed) on behalf of individuals whose rights are alleged to be infringed, pursuing an interest of society as a whole. According to art 34, NGOs can only initiate a claim before the ECtHR with regard to an alleged violation of a Convention right of which the NGO *itself* is a victim.

60 See European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (30 April 2020) <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed

difficulties inherent in proving that the rights of specific, identified individuals are at risk from climate change, it will be interesting to see how the ECtHR will decide on the admissibility of two climate change-related cases that have recently been presented to it. [61]

At the same time, the ECtHR's environmental jurisprudence clearly indicates a progressive acceptance of the idea that human rights, in addition to the protection of individuals, also have a more collective dimension, for the benefit of society as a whole. Whereas the idea that human rights can also be considered to pertain to 'groups' of people, or to a population as a whole, seems to be progressively accepted with regard to economic, social and cultural rights, its application to civil and political rights, such as the right to life and to a private and family life, is much more debated.[62] By extending the ECtHR's approach regarding Articles 2 and 8 to the danger of climate change, the Supreme Court has contributed to the evolution of such an increasingly collective interpretation of individual human rights, thereby confirming, as it were, a 'public interest dimension' of these rights.[63]

C *The Concept of 'partial responsibility' of States*

The Supreme Court then addressed the question whether the global nature of climate change means that no protection can be derived from Articles 2 and 8 ECHR.[64] The Supreme Court affirmed that 'the Netherlands is obliged to do "its part" in order to prevent dangerous climate change, even if it is a global problem.'[65] This conclusion is based on three main considerations. *First,* the recognition that climate change is a global problem which needs to be addressed by all States including through the principle of common but differentiated responsibilities as laid out in the UNFCCC. *Second,* in accordance with the 'no harm principle', a general principle of international law, States must contribute to reducing GHG emissions.[66] *Finally,* the Supreme

11 March 2021. See also M Willers, 'Climate Change Litigation in European Courts', Chapter 13 in this volume.

61 *Duarte Agostinho and Others. v Portugal and Others* App no 39371/20 (ECtHR, 7 September 2020); and *Klimaseniorinnen v Switzerland,* presented to the Court on 26 November 2020.

62 In this sense, see also Francioni (n 57), and Pavoni (n 57).

63 For a discussion on how the Supreme Court's judgment constitutes an example of 'public interest litigation' see O Spijkers, 'Pursuing climate justice through public interest litigation: the Urgenda case' (*Völkerrechtsblog*, 29 April 2020) <https://voelkerrechtsblog.org/pursuing-climate-justice-through-public-interest-litigation-the-urgenda-case/> accessed 11 March 2021.

64 Urgenda, SC judgment (n 1) para 5.6.3.

65 Urgenda, SC judgment (n 1) para 5.7.1.

66 Urgenda, SC judgment (n 1) para 5.7.5.

Court referred to Article 47(1) of the International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts[67] and to the Commentaries thereto, which mention that situations can arise where several States by separate internationally wrongful conduct have contributed to causing the same damage, for example the pollution of the same river by more than one State. In such cases, 'the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.'[68] While these articles, drafted by the ILC and adopted by the United Nations General Assembly, are not legally binding per se, both national courts and international courts and tribunals have referred to several of these Articles as reflecting customary international law.[69] The Supreme Court also referred to the Principles of European Tort Law, compiled by the European Group of Tort Law, to support its conclusion that 'partial causation justifies partial responsibility'.[70] The conclusion that the Netherlands—and by implication any other individual State too, at least those States that are Parties to the ECHR—has a legal obligation to take measures to prevent climate change, regardless of its 'limited contribution' to this global problem, may well have an impact on ongoing or future climate change cases, as will be further discussed below (Section IV).

D *The Legal Grounds for the 25 per cent Reduction Target: The 'common ground' Method*

Having concluded that the Netherlands has a partial responsibility to prevent dangerous climate change, the Supreme Court applied what it called the 'common ground' method in its examination of whether the emission reduction target of 25 per cent as ordered by the lower courts was appropriate. To this end, the Court considered (i) the existing international support for the 25–40 per cent target, and (ii) whether this target also applies to the Netherlands. It held

67 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' [2001] vol II(2) Yearbook of the International Law Commission 31 (ILC Draft Articles).

68 Urgenda, SC judgment (n 1) para 5.7.6.

69 See S Olleson, 'The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts' (British Institute of International and Comparative Law) <https://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminary-draftfinal.pdf> accessed 11 March 2021.

70 See also A Nollkaemper and L Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (*EJIL: Talk!*, 6 January 2020).

that according to the ECtHR, when interpreting the terms of the Convention, the Court must take into account 'elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.'[71] The ECtHR held that it is sufficient:

> that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies…[72]

As noted by Nollkaemper and Burgers, '[t]he *Urgenda* judgment shows that when an accumulation of resolutions (that States did not intend to be legally binding) can be hooked onto a positive obligation of the ECHR, repetition can actually transmute non-binding norms into binding law.'[73] Indeed, the Supreme Court considered the existing binding and non-binding international instruments concerning emission reduction targets[74]1 and scientific reports,[75] concluding that 'there is a high degree of international consensus on the urgent need for the Annex I countries to reduce greenhouse emissions by at least 25–40 per cent by 2020 compared to 1990 levels…'.[76] According to the Court, this can be regarded as common ground, which must be taken into account when interpreting and applying the ECHR. This statement may also have an impact on future cases when soft-law standards are invoked to interpret obligations under the ECHR (see below, Section IV). The Supreme Court further considered that the emission reduction target of 25–40 per cent also applied to the Netherlands, based on its individual responsibility to do its part, and because it has one of the highest levels of per capita GHG emissions of Annex I countries.[77]

71 Urgenda, SC judgment (n 1) para 5.4.2.
72 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) para 86.
73 Nollkaemper and Burgers (n 70).
74 Urgenda SC judgment (n 1) paras 7.2.1–7.2.3, and 7.2.6–7.2.7.
75 Urgenda SC judgment (n 1) paras 7.2.4–7.2.5.
76 Urgenda SC judgment (n 1) para 7.2.11.
77 Urgenda SC judgment (n 1) para 7.3.4.

IV Potential Impact of the *Urgenda* Judgment on Climate Change Litigation in the Netherlands and Beyond

There is little doubt that the *Urgenda* judgment will have an influence on other climate cases, both in the Netherlands and beyond, especially before national courts, but possibly also in potential cases to be brought before courts and other (quasi)judicial bodies at the regional and international levels. In particular, the application of positive human rights obligations to the mitigation of climate change, and the use of the 'common ground' method to interpret the content of these obligations provide significant precedents. The confirmation of the human rights dimension in climate change litigation supports an emerging case law around the globe, which is increasingly debated in international legal scholarship.[78] Although many of the human rights related arguments were first put forward by Court of Appeal of The Hague, in this section reference will especially be made to the judgment of the Supreme Court since it constitutes the final decision, provided by the highest Court in the Dutch legal order.

A *Potential Impact on Climate Change Litigation in the Netherlands*

1 The Second Dutch Climate Case: *Milieudefensie v Shell*

As mentioned above (Section I), another complaint has been brought before the District Court of The Hague, in which the NGO *Milieudefensie*, together with 6 other NGOs[79] and more than 17.000 citizens launched proceedings against Royal Dutch Shell (RDS), claiming breaches of both Dutch tort law and of human rights protected by the ECHR. The plaintiffs demand that RDS immediately starts reducing its CO2 emissions by at least 45 per cent by 2030 (compared to 2010) and to net zero by 2050.[80]

78 For example, A Savaresi and J Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) Climate Law 244; J Setzer and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 Wiley Interdisciplinary Reviews: Climate Change 580; S Duyck, S Jodoin and A Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018); K Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 Journal of Environmental Law 483; O Quirico and M Boumghar (eds), *Climate Change and Human Rights: An International Law Perspective* (Routledge 2016).

79 Action Aid NL, BothEnds, Fossielvrij NL, Greenpeace NL, Jongeren Milieu Actief and the Waddenvereniging.

80 For a summary of the claim, see 'The summons of the climate case against Shell summarized in 4 pages' (*Friends of the Earth International*): <www.foei.org/wp-content/uploads/2019/04/english-summary-of-legal-summons.pdf> accessed 11 March 2021.

The two main legal bases of the claim, which were also relied on in the *Urgenda* case, are *first,* Article 6:162 of the Dutch Civil Code, which prohibits anyone, including private actors, from causing major danger to others when measures can be taken to prevent that danger from occurring ('unlawful endangerment') and *second,* the responsibility of RDS for its failure to protect human rights based on Articles 2 and 8 ECHR. Referring to the Court of Appeal's *Urgenda* judgment, the claimants assert that besides States, companies also have due diligence obligations under human rights law, arguing that through the production and selling of fossil fuels, RDS's share in global GHG emissions is twice as high as that of the Dutch State as a whole. The plaintiffs recall that RDS has declared that its policies will be guided by international human rights standards for the private sector, including the UN Guiding Principles on Business and Human Rights (UNGPs)[81] and the OECD Guidelines for Multinational Enterprises (OECD Guidelines).[82] They argue that with its current policy, RDS does not live up to its own commitments, even though it has known since the 1980s about the severe risks caused by climate change.

In keeping with the main focus of this chapter, the human rights argument merits some discussion. This raises two questions: *first,* whether private corporations can, in general, be held legally accountable for human rights violations or their failure to prevent them; and *second*, more specifically, whether corporations can be considered to have positive obligations derived from Articles 2 and 8 of the ECHR, in relation to the dangers caused by climate change. The first question is still debated, and in the absence of any general, legally binding international convention addressing this question,[83] it has led to different answers in various jurisdictions.[84] However, there are several examples of cases in which companies have been held accountable for violations of human

81 UN Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework' (2011) (UNGPs).

82 OECD, 'Guidelines on Multinational Enterprises' (2011) (OECD Guidelines).

83 However, several initiatives are ongoing in this regard, including the drafting of an international legally binding instrument on transnational corporations and human rights by the 'Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', established by the Human Rights Council in its resolution 26/9 of 26 June 2014.

84 For example, for the situation in France since the adoption of the law on the duty of vigilance, Loi n° 2017-399 27 March 2017, see M Torre-Schaub, 'Climate Change Litigation in France', Chapter 6 in this volume. For an analysis of relevant legislation in EU Member States, see L Smit et al, *Study on due diligence requirements through the supply chain: Final Report* (European Commission 2020).

rights, including by their subsidiaries operating in third countries.[85] Since it is the primary responsibility of *States* to respect, protect and fulfil human rights, this also entails the obligation to prevent private actors, including corporations, from engaging in activities that may negatively affect the human rights of others. This requires States to adopt and implement adequate licensing policies for corporate activities, providing the necessary safeguards.

Regarding the second question mentioned above, which corresponds to the claim by *Milieudefensie* that RDS has comparable obligations *itself* deriving from Articles 2 and 8 ECHR alongside the Dutch State to prevent climate change, it would seem that this proposition currently lacks support in judicial practice. However, in this regard the conclusion of the Carbon Major Inquiry by the National Commission on Human Rights of the Philippines is significant. After a nearly three-year investigation, it concluded that 47 of the world's biggest fossil fuel firms can be held legally accountable for violating the rights of its citizens for the damage caused by global warming, considering their role in anthropogenic climate change. The Commission found that while legal responsibility for climate change is currently not covered by human rights law, companies can be held liable under national civil law, and under certain conditions, also under criminal law.[86]

In this context, the voluntary international instruments on corporate responsibility are essential. As highlighted in a recent study for the European Commission, such non-binding standards, including the UNGPs, 'are increasingly being used in civil law or tort claims to give content to the standard of care which was expected of the company in the relevant circumstances.'[87] Moreover, several complaints have been brought to the National Contact Points (NCPs) established in the context of the OECD Guidelines on the basis of companies' failure to exercise due diligence for their human rights or

85 For example, in Canada: *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41; in the Netherlands: *Akpan v Royal Dutch Shell PLC*, Hague District Court, Case No C/09/337050 / HA ZA 09-1580, 30 January 2013; in the UK: *Vedanta Resources PLC and Another v Lungowe and Others* [2019] UKSC 20. For further details, see Smit et al (n 84) 175–6.

86 This conclusion was announced by the President of the Commission on Human Rights of the Philippines at the COP 25 in Madrid on 9 December 2019, see <https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability/> accessed 11 March 2021.

87 Smit et al (n 84) 27. On 29 April 2020, it was announced that, based on this study, the European Commission will launch a legislative initiative to consider the introduction of a mandatory human rights and environmental due diligence regulation. See <https://www.biicl.org/newsitems/16415/biicl-led-due-diligence-study-basis-for-european-legislative-initiative> accessed 11 March 2021.

environmental impacts. The NCPs can make non-binding statements which are viewed as giving content to the due diligence which is expected from companies.[88] In this regard, the NPC for the Netherlands has recently adopted a statement, following a complaint brought by, inter alia, *Milieudefensie* against the Dutch bank ING, in which it outlined how the due diligence standards of corporations with respect to climate change could be applied and interpreted in practice.[89] This includes, inter alia, the setting of emission reduction targets for the company itself, as well as for their policies regarding their lending portfolios, including mechanisms to monitor compliance. This example clearly illustrates that corporations bear specific responsibilities to play their part in curbing GHG emissions through their own activities and, indirectly, those of their clients.

Therefore, it seems that the first legal ground of the claim –Article 6:162 of the Dutch Civil Code interpreted in the light of the non-binding corporate due diligence instruments, especially the OECD Guidelines and their interpretation by the Dutch NPC in its statement on ING Bank—will have better chances to succeed than the company's alleged positive obligations derived directly from Articles 2 and 8 of the ECHR.

B *Potential Impact on Climate Change Litigation in Other Jurisdictions*

The possible impact of the *Urgenda* case is most likely in cases before national courts in other countries. For example, in the ongoing *Klimaatzaak* case in Belgium,[90] plaintiffs have relied on the same legal arguments as those brought forward by Urgenda, including the positive obligations under Articles 2 and 8 ECHR. According to a report of the LSE Grantham Centre for Climate Change, '(t)here are ongoing legal proceedings regarding states' human rights obligations to mitigate climate change in Ireland, France, Belgium, Sweden, Switzerland, Germany, the United States, Canada, Peru and South Korea.'[91] Also,

88 Smit et al (n 84).

89 The Netherlands National Contact Point for the OECD Guidelines for Multinational Enterprises, 'Final Statement: Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING' (Ministry of Foreign Affairs,19 April 2019) <https://www.oecdguidelines.nl/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing> accessed 15 March 2021.

90 *VWZ Klimaatzaak v Kingdom of Belgium and Others*.

91 See J Setzer & R Byrnes, 'Global trends in climate change litigation: 2020 snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, 3 July 2020) 15 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf> accessed 11 March 2021. See also 'Global Climate Litigation' (*Urgenda*)

Italy's first climate change-related case is being prepared and it is expected to rely on human rights.[92]

However, whether the courts in these cases will ultimately adopt a similar approach to the Dutch Supreme Court remains to be seen. In this regard, the judgment of the Irish Supreme Court in the *Climate Case Ireland* of 31 July 2020,[93] is significant. In this case, the NGO Friends of the Irish Environment (FIE) had claimed that Ireland's National Mitigation Plan violated statutory law, the Irish Constitution, and human rights obligations because it is not set to reduce greenhouse gas emissions sufficiently over the near-term. In a landmark decision, the Supreme Court confirmed, based on Irish statutory laws, that Ireland's existing emission cutting plans fell 'well short' of what was required to meet its climate change commitments and must be replaced with a more ambitious strategy. However, the Court determined that FIE lacks standing to bring its claims under the Constitution or the European Convention on Human Rights. The Court also concluded that FIE had not made a compelling enough case for identifying an unenumerated right to a healthy environment, separate from the rights expressly conferred by the Irish Constitution, '[w]hile not ruling out the possibility that constitutional rights and obligations may well be engaged in the environmental field in an appropriate case.'[94] Therefore, while the effect of this judgment on national climate change policy in Ireland may be similar to the effect of the *Urgenda* case in the Netherlands, the human rights arguments that were decisive in *Urgenda,* were not upheld by the Irish Supreme Court in this particular case.

Indeed, some of the conclusions of the Dutch Supreme Court in *Urgenda* are quite innovative and extensively interpret principles laid down by the ECtHR, such as the exclusive reliance on climate science to establish the existence of a real and immediate risk to the lives and welfare of the Dutch population as a whole. Even if national courts in other countries were to accept this reasoning, it seems rather unlikely that the ECtHR itself would be willing to substitute its habitual evaluation of the existence of this risk based on specific criteria, by such a 'science-only' based interpretation.

<https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/> accessed 11 March 2021.

92 See <https://giudiziouniversale.eu> accessed 11 March 2021, and R Luporini, 'The "Last Judgment": Early reflections on upcoming climate litigation in Italy' (*Questions of International Law*, 31 January 2021) <http://www.qil-qdi.org/the-last-judgment-early-reflections-on-upcoming-climate-litigation-in-italy/> accessed 11 March 2021.

93 See <http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/> accessed 19 August 2020.

94 ibid.

Regarding the Supreme Court's application of the 'common ground' method to interpret the scope of the positive obligations of States under Articles 2 and 8 ECtHR, the recognition of non-legally binding resolutions as evidence of an international consensus (which then becomes legally binding through the positive obligations under the ECHR) may also be difficult to accept by national courts.[95] In this context, the adoption of the explicitly *non-legally binding* Nationally Determined Contributions (NDCs) in the Paris Agreement on Climate Change may well reduce the willingness of both national courts, and of international (quasi)judicial bodies to uphold a legal responsibility of individual States to comply with their voluntary emission reduction targets and climate change adaptation measures. Finally, the concept of partial responsibility of individual States may also be difficult to accept in future climate change-related cases, since the acceptance of partial responsibility presupposes a recognition of causality between the acts or omissions of a State on the one hand, and the risks to the life and wellbeing of citizens on the other, which has been a major limiting factor in practice.[96] Nevertheless, the approach of the Dutch Supreme Court has set a ground-breaking example, which may contribute to progressively overcoming such reluctance, as climate change litigation continues to expand around the globe.

V Conclusion

In the global 'experimental concert' of evolving climate change litigation,[97] the Dutch courts have clearly played their part.

95 In this regard, the work of the ILC on the Identification of Customary International Law also provides relevant insights. In particular, in the ILC's Draft Conclusions on this topic adopted at its 3444th meeting of 6 August 2018, it is stated that forms of State practice, required for the formation of customary international law 'include, but are not limited to: diplomatic acts and correspondence; *conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference;* conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.' (emphasis added) (See <https://legal.un.org/docs/path=../ilc/reports/2018/english/chp5.pdf&lang=EFSRAC> accessed 22 July 2020).

96 In particular in the United States, see M Gerrard, 'Climate Change Litigation in the United States', Chapter 2 in this volume.

97 In accordance with the symbolic comparison suggested in I Alogna, C Bakker and J-P Gauci, 'Introduction', Chapter 1 in this volume.

A *The 'Legal Impact' of the Urgenda Case*

As demonstrated in this Chapter, with the *Urgenda* case, Dutch courts have significantly contributed to what could be called the 'crystallization' of the human rights dimension in climate change litigation. More specifically, the Supreme Court's judgment has contributed to *clarifying the link between climate change and human rights* by interpreting the positive obligations of States derived from the European Convention on Human Rights. It has *confirmed and extended the 'collective', or 'public interest' dimension of individual human rights*, especially the right to life and the right to a private and family life, in the context of the risks caused by climate change. It has recognized *climate science* as a dominating factor to establish the existence of such risks to the lives and welfare of a whole population, and applied the ECtHR's '*common ground method*' to establish the existence of an international consensus on the level of required GHG emission reductions, as a means to determine the scope of the State's due diligence obligations under the ECHR. And finally, it has confirmed the *partial responsibility of individual States* for wrongful acts for which all States have a joint responsibility, applying it to the harmful consequences of climate change. While the impact of the *Urgenda* case on climate cases in other countries is beginning to manifest itself, the claim in *Milieudefensie v Shell*, alleging the applicability of human rights obligations under the ECHR also to (major) private corporations, will be a new challenge for the Dutch courts.

B *The 'Policy Impact' of the Urgenda Case*

The current legislative framework for Dutch climate action has been developed with an active participation from civil society, prior to the Supreme Court's *Urgenda* judgment of December 2019. Indeed, the Climate Act was adopted in May 2019,[98] while specific measures for the period up to 2030 are defined in the First Climate Plan,[99] including a GHG emission reduction target of 49 per cent compared to 1990. Moreover, a Climate Agreement was concluded between government and businesses, sector organizations and NGOs, setting out their respective contributions.[100]

98 *Klimaatwet* (Climate Law), No 253 of 2 July 2019, available (in Dutch) at <https://wetten.overheid.nl/BWBR0042394/2020-01-01> accessed 11 March 2021.

99 *Eerste Klimaatplan* (First Climate Plan), presented to Parliament in November 2019, available (in Dutch) at <www.rijksoverheid.nl/documenten/beleidsnotas/2020/04/24/klimaatplan-2021-2030> accessed 11 March 2021.

100 *Klimaatakkoord* (Climate Agreement), adopted on 28 June 2019, available (in Dutch) at <www.rijksoverheid.nl/onderwerpen/klimaatverandering/documenten/rapporten/2019/06/28/klimaatakkoord> accessed 11 March 2021.

Four months after the Supreme Court's judgment, the government announced its plan to comply with the ruling.[101] The plan includes reducing the capacity of its remaining coal-fired power stations by 75 per cent and implementing a €3 billion Euro package of measures to reduce Dutch emissions by the end of 2020. This package covers, inter alia, 2 billion Euros for more renewable energy, 400 million Euros to save energy in households, 360 million Euros to help farmers retire early or close their farms in order to reduce livestock numbers. Other measures include a reduction of the maximum speed-limit and incentives for more electric cars, solar panels on government buildings and schools, more sustainable forest management, and better enforcement of environmental laws. Many of these actions were taken from the '54 Climate Solutions Plan', a plan proposed by Urgenda in 2019 to assist the government, developed with the support of 800 organizations, ranging from local energy cooperatives to paper manufacturers.[102] After this encouraging development, the actual implementation of the announced measures will be crucial, despite the needs of addressing the management and economic effects of Covid-19.

In this regard, the government has outlined its response to the expected consequences of the pandemic on the Dutch climate policies, in a letter to the Dutch Parliament.[103] While recognizing that the exact consequences of the health crisis are still unknown, the Dutch government reconfirmed its commitment to the climate goals that it has set at the international, European and national levels.[104] In its letter, the government set out measures that aim to reduce the negative impacts of the crisis on the implementation of its climate policies. These measures include the phased introduction of a carbon tax for industries, subsidies for industries to support 'accelerated climate investments' (eg investments for improving energy efficiency in production processes),

101 See Urgenda, 'Climate verdict leads to 75% reduction in use of coal-fired plants + €3 billion for Urgenda's "54 climate solutions" plan' (*Pressmailings.com*, 24 April 2020) <https://news.pressmailings.com/urgenda/dutch-climate-verdict-measures> accessed 19 August 2020, and the letter from the government to the Dutch Parliament of 24 April 2020 outlining these measures is available here (in Dutch): <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/04/24/kamerbrief-over-uitvoering-urgenda-vonnis> accessed 11 March 2021.

102 For further details, see '54 Actions for 17 MTons of CO_2 Reduction' (*Urgenda*) <https://www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan/> accessed 11 March 2021.

103 This letter of 19 June 2020 is available here (in Dutch): <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/06/19/kamerbrief-over-gevolgen-crisis-rondom-coronavirus-voor-klimaat--en-energiebeleid-en-taakopdracht-ambtelijke-studiegroep-invulling-klimaatopgave-green-deal> accessed 11 March 2021.

104 ibid 2.

support for additional innovation projects, implementation of incentives for electric vehicles, initiatives to address Covid-related unemployment by creating more jobs in the energy sector, and prolongation of timeframes for, inter alia, applications for climate-related subsidies.[105] Moreover, the government intends to integrate the objectives of its climate policies and of a more sustainable economy in its structural measures to support the economic recovery from the consequences of the pandemic.

In this regard it should finally be mentioned that in December 2020, the Hague District Court rejected a claim by Greenpeace, alleging that the Dutch government's Coronavirus bailout package for airline KLM violated the State's duty of care to prevent dangerous climate change. The Court ruled that the State does not have a legally enforceable obligation to attach climate conditions to the bailout package, because international climate treaties do not cover cross-border aviation, adding that the sustainability conditions of the bailout package are fully in line with the Netherlands' international climate obligations.[106]

Moreover, according to the government agency Statistics Netherlands (CBS), 'in 2020 GHG emissions showed a year-on-year decline of 8 percent to 166 megatonnes CO_2 equivalent. This is 24.5 percent lower than in 1990 and comes close to the Urgenda target … There is only a narrow gap, and it is within the uncertainty margin of GHG emissions.'[107] It remains to be seen if this reduction can be maintained in the coming years, and efforts must be further stepped up to achieve the next target for 2030.

In any event, the courts have set the tone and there is no doubt that Urgenda and civil society in the Netherlands will continue to insist that government and parliament stay in tune.

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105 ibid.

106 District Court of The Hague, *Stichting Greenpeace Nederland v De Staat der Nederlanden* (*Ministerie Van Financiën En Ministerie Van Infrastructuur En Waterstaat*) Case no C/09/600364/KG ZA 20-933, ECLI:NL:RBDHA:2020:12440 (9 December 2020).

107 'Greenhouse gas emissions 8 percent down in 2020' (*Statistics Netherlands* (*Centraal Bureau voor de Statistiek, CBS*), 15 March 2021) <https://www.cbs.nl/en-gb/news/2021/10/greenhouse-gas-emissions-8-percent-down-in-2020> accessed 14 April 2021.

CHAPTER 10

Prospects for Climate Change Litigation in Russia

*Anatoly Yakovlevich Kapustin**

1 Introduction

Climate change has a wide international resonance and is perceived as a key global problem of our time. The 'Draft Strategy for the long-term development of the Russian Federation (RF) with a low level of greenhouse gas emissions until 2050'[1] cites the assessment of the Intergovernmental Panel on Climate Change (IPCC) that global warming has been observed since the 1970s, which is manifested in almost linear temperature growth and is associated with an increase in the concentration of greenhouse gases in the atmosphere due to an increase in their anthropogenic emissions. The task of climate conservation is common to and shared amongst all countries. The report of the World Meteorological Organization (WMO) on the state of the Earth's climate for 2019 notes that the increase in the concentration of greenhouse gases in the atmosphere continues; according to the report for 2018, the concentration of CO_2 in the atmosphere was 407.8 parts per million.[2]

The RF attaches great importance to this problem. Russian President Vladimir Putin, during a press conference in December 2019, noted that the problem of climate change is very urgent for Russia. This is due to the fact that the rate of temperature growth is two and a half times higher than the average on the planet. 70 per cent of the Russian territory is located in Northern latitudes. Since several cities are entirely built on permafrost, the melting of such soil can have serious consequences.[3]

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1 'Draft Strategy for the long-term development of the RF with a low level of greenhouse gas emissions until 2050' (*Ministry of Economic Development*) <https://www.economy.gov.ru/material/file/babacbb75d32d90e28d3298582d13a75/proekt_strategii.pdf> accessed 15 September 2020.

2 'Climate Change: records we would like to avoid' (*UN News*, 10 March 2020) <https://news.un.org/ru/interview/2020/03/1374141> accessed 15 September 2020.

3 Associated Press, 'Five key points from Russian president Vladimir Putin's four-hour news conference' (*euronews*, 19 December 2019) <https://www.euronews.com/2019/12/19/russian-president-vladimir-putin-faces-questions-at-annual-news-conference> accessed 15 September 2020.

The Climate Action Tracker (CAT) research group has identified Russia as one of the countries with critically insufficient climate policies, along with Ukraine, Chile, the United States, Turkey and Saudi Arabia.[4] Russia ranks fourth in the world in terms of greenhouse gas emissions, so with the adoption of the 2015 Paris Climate Agreement (PCA), it became one of the last major emitters of greenhouse gases to begin to participate fully in shaping the modern global climate agenda. This step will mitigate Russia's reputational losses, although it is clear that reducing greenhouse gas emissions depends largely on the country's energy strategy. The President of the Russian Federation's Special Representative on Climate, R Edelgeriev, noted that maintaining the current development model based solely on the sale of hydrocarbon is dangerous for the Russian economy in the long term, therefore a gradual transition to a low-carbon development path is the only option. In his view, through the formation of a new legislative and regulatory framework that ensures the use of modern technologies, conditions are being created for increasing the RF's GDP while simultaneously reducing the level of CO_2 emissions.[5]

Against this background, this chapter will consider whether domestic courts could play a role in this process, or, in other words, what are the prospects for climate change litigation in the Russian Federation. To this end, the chapter first provides an overview of Russia's international commitments in relation to climate change (Section II) before examining the national legal context, focusing on the federal legislation related to environmental protection (Section III). The chapter then discusses the prospects for climate change litigation (Section IV). It concludes with some remarks about both positive developments and limiting factors for climate change-related litigation in the RF.

II Russia's International Commitments in the Field of Climate Change

Concern about the problem of climate change and the level of response to it in the country explains Russia's interest in international and national legal regulation. In 1994, Russia ratified the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and took measures to implement its provisions in national

4 See 'Russian Federation' (*Climate Action Tracker*) <https://climateactiontracker.org/countries/russian-federation> accessed 15 September 2020.

5 See N Krapivina, 'Presidential Adviser explains how Russia will implement the Paris Agreement' (*Plus One*, 10 October 2019) <https://plus-one.ru/ecology/sovetnik-prezidenta-rasskazal-kak-rossiya-budet-vypolnyat-parizhskoe-soglashenie> accessed 15 September 2020.

legislation. The main goal of the UNFCCC was to stabilize the concentration of greenhouse gases in the atmosphere at a level that would not allow dangerous anthropogenic impact on the Earth's climate system. In 1997 the Kyoto Protocol was adopted, which introduced quantified emission reduction targets for industrialized States and 'economies in transition' with respect to six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride). Russia signed the Kyoto Protocol in 1999 and ratified it in 2004. The Kyoto Protocol entered into force when the limit of 55 per cent of the emissions of the participating States was exceeded, which was made possible due to 17.4 per cent of the greenhouse gas emissions of Russia.[6]

Participation in the Kyoto Protocol was received with ambivalence within the country.[7] The Russian Academy of Sciences expressed a negative position on the ratification of the Protocol, considering it insufficiently scientifically justified. In addition, ratification of the Protocol could lead to a restriction on the country's GDP growth rate. Despite these and other negative positions, Russia became a Party to the Kyoto Protocol, although the situation with its implementation was complicated by the fact that the country left itself limited time to adopt the necessary legal acts. At the end of 2010, the first sale of carbon quotas by a Russian company was made, based on the emission trading mechanism created in the context of this Protocol. Russia did not participate in the second commitment period under the Kyoto Protocol. Russia's position was explained by the fact that the Kyoto Protocol, as the experience of the first period showed, produced too small an impact to affect the increase in global temperature.

On 22 April 2016, Russia signed the Paris Climate Agreement (PCA) and on 21 September 2019, it was adopted by a decree of the Government of the RF. The Agreement entered into force for Russia on 6 November 2019. The Paris Agreement was intended to replace the Kyoto Protocol. Its main goal is to keep the global average temperature rise well below 2°C and to assist efforts to limit the temperature rise to 1.5°C, which will significantly reduce the risks and impacts of climate change. It is known that the source of scientific data for

6 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol) art 25(1) Kyoto Protocol: 'This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention … which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.'

7 Institute of legislation and comparative Law under the Government of the Russian Federation. See NV Kichigin and NI Khludeneva, *The Legal mechanism for implementing the Kyoto Protocol in Russia* (Institute of Legislation and Comparative Law of the Government of the Russian Federation (ILCLGRF) 2009) 5.

the Paris Agreement was the IPCC's Fifth Assessment Report. The IPCC 2018 Special Report confirms that climate change is already affecting people, ecosystems and livelihoods around the world. The Report concludes that there are clear advantages to limiting warming to 1.5°C compared to 2°C or higher. With warming, every fraction of a degree matters.[8] Three Russian scientists participated in the preparation of the IPCC 2018 Special Report, which shows that the Russian scientific community understands the importance of climate change for the future of Russia and of the whole world. The preamble of this document recognizes that climate change is a common concern of humanity, so its participants undertake to respect, promote and take into account their respective human rights obligations, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and those in vulnerable situations, and the right to development, as well as gender equality, women's empowerment and intergenerational justice.[9] The Agreement is legally binding.

III The National Legal Context Applicable to Climate Change

A *Applicability of International Law in the Domestic Legal Order*

The Russian Constitution establishes that the generally recognized principles and norms of international law and international treaties of the RF are an integral part of its legal system[10] and where an international agreement of the RF establishes rules other than those provided for by national law, the provisions of the international agreement will take precedence. Consequently, Russia's international treaties have priority over the provisions of national law, except

8 See V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) <https://www.ipcc.ch/sr15/> accessed 15 September 2020.

9 When joining the 2015 PCA Russia made three statements. First, that Russia recognizes the obligation under the PCA for the provision of financial resources by developed countries that are Parties to the Agreement, to assist developing country Parties in both preventing and adapting to climate change. In this context, Russia notes that, as a Party to the Convention, it is not included in Annex II to the Convention. Second, Russia believes in the importance of preserving and increasing the absorption capacity of forests and other ecosystems, as well as the need to take it into account as much as possible, including when implementing the Agreement's mechanisms. Third, Russia considers it unacceptable to use the Agreement and its mechanisms as a tool for creating barriers to the sustainable socio-economic development of the Parties to the Convention. See Resolution of the Government of the RF No 1229 of 21 September 2019 'On the adoption of the Paris Agreement' (Collection of legislation of the Russian Federation (CL RF) No 39 Art 5430).

10 Art 15, pt 4 of the Constitution of the RF, 12 December 1993.

for the Constitution. The Constitution of the RF has supremacy in the country's legal system. By virtue of paragraph 1 of Article 15 of the Constitution, it has the highest legal force, and laws and other legal acts adopted in the RF, including international treaties, must not contradict the Constitution of the country. In accordance with the amendments to Article 79 of the Constitution of Russia, which entered into force on 4 July 2020,[11] decisions of inter-State bodies, adopted on the basis of provisions of international treaties entered into by the RF, that contradict the Constitution of the RF are not subject to execution in the RF. The Constitutional Court of the RF shall resolve the issue of the possibility of executing such decisions of inter-State bodies in accordance with a procedure that will be established in new amendments to the Federal Constitutional law 'On the Constitutional Court of the RF'.[12]

Thus, after the entry into force of the PCA it became part of the Russian legal framework. The Russian legislation on international treaties[13] enshrines the concept of 'self-executing agreements'[14] The provisions of officially published international treaties of the RF, which do not require the adoption of domestic acts, are directly applicable in Russia. To implement other provisions of international treaties of the RF, appropriate domestic legal acts are adopted. This wording is reproduced in a number of specific legislative acts. For example, the Russian Civil Code[15] establishes that international treaties of the RF apply directly to civil law relations, except in cases where it follows from an international treaty that its application requires the adoption of an internal State act. If an international agreement of the RF establishes rules other than those provided for by civil law, the rules of the international agreement shall apply.

The provisions of the legislation on 'self-executing agreements' were interpreted in two Decisions of the Plenary Session of the Supreme Court of the RF

11 Decree of the President of the RF 'On the official publication of the Constitution of the RF as amended', N 445, July 3, 2020 (CL RF No 27 Art 4196).

12 These amendments to the Federal constitutional law that establish the new powers of the Constitutional Court of the Russian Federation are in the process of being developed and have not yet been adopted.

13 See the Federal Law 'On international treaties of the RF', No 101-FZ, 15 July 1995 (CL RF No 29 Art 2757).

14 See: BI Osminin, 'Questions of self-executing international agreements (on the example of the USA, the Netherlands and Russia)' (2012) 6 Journal of Russian law 80; BI Osminin 'International treaties in the Russian legal system (to the 20th anniversary of the Federal Law "On international treaties of the RF")' (2015) 12 Journal of Russian law 136.

15 Art 7 item 2 of the Civil Code of the RF (Part one). N 51-FZ, 30 November 1994 (ed 31 July 2020). (CL RF No. 32 Art 3301).

in 1995[16] and 2003.[17] In the first decision, the Supreme Court recommended that courts of general jurisdiction, when applying the rules of international treaties, keep in mind that the provisions of officially published international treaties, that do not require the publication of domestic acts for application, apply directly. In other cases, along with an international treaty ratified by the Russian Federation, the relevant domestic legal act adopted to implement the provisions of this international treaty should also be applied.

The second abovementioned decision by the Supreme Court of Russia of 2003 highlighted the features of 'non-self-executing international agreements.' The adoption of a 'non-self-executing international agreement' is accompanied by the publication of a domestic legal act that reproduces the text of the treaty. This act is different from the act of ratification or accession to a treaty. It follows that the provisions of such an agreement cannot be directly applied by the courts. Sometimes such agreements contain an obligation for the Parties to amend national legislation. In addition, international treaties containing rules providing for elements of criminally punishable acts cannot be directly applied by the courts, since such treaties expressly establish the obligation of States to ensure compliance with the obligations stipulated in the treaty by establishing the criminality of certain crimes by domestic (national) law.

The concept of 'self-executing international agreements' is applied in those States whose national legal doctrine and legal systems allow the rules of international treaties to operate in national law. In the Russian legal doctrine, there are different opinions about the possibility of direct application of the rules of international treaties by the courts of the country. Proponents of the concept of 'self-executing international agreements' arguably did not offer a sufficiently strict justification for it. In their view, the issue of direct effect of international treaties in the legal system of the country should be resolved through the proper interpretation of the provisions of the treaty by State bodies, given its content and the specificities of the national legal system and legislation. Russian legal doctrine and practice recognize that one of the main principles of international law is the faithful implementation of

16 See Decision No 8F of the Plenum of the Supreme Court of the RF 'On some issues of application by courts of the Constitution of the RF in the administration of justice', 31 October 1995 (1996) 1 Bulletin of the Supreme Court of the Russian Federation.

17 See Decision of the Plenum of the Supreme Court of the RF No 5 'On the application by courts of general jurisdiction of generally recognized principles and norms of International law and international treaties of the RF', 10 October 2003 (2003) 12 Bulletin of the Supreme Court of the Russian Federation.

international obligations. This principle applies to all international obligations arising from both international treaties and customary rules of international law. The Federal Law 'On International Treaties of the RF' establishes that International treaties to which Russia is a Party are subject to good faith implementation in accordance with the terms of the international treaties themselves, the norms of international law, the Constitution of the RF, this Federal Law, and other Russian legislation.[18] An international treaty is subject to implementation by Russia from the moment it enters into force for the RF.

In my opinion, the provisions of Articles 4, 7 and 13 of the PCA, which contain the most important obligations of States to achieve the goals of the PCA (nationally determined contributions, diversified differentiation and the adoption of internal measures to prevent climate change in order to achieve the goals of national contributions), as well as most other provisions of the PCA in their systematic interpretation, do not give grounds for recognizing the PCA's self-execution in Russian law. The PCA provides mainly for the obligations of States Parties, but no rights or obligations are established for subjects of national law (legal entities or individuals).[19] The documents adopted by the Government to implement the provisions of the PCA also set tasks and plans for State bodies. With this in mind, we can conclude that the PCA is legally binding for Russia, but it does not have direct effect in the Russian legal system in the sense used in the Russian legal doctrine. This does not mean that it cannot be considered by the courts. This is possible, but only in connection with national legal acts that are aimed at its implementation.

To assess the possibility of implementing the State's international obligations to prevent climate change within its territory, it is necessary to study the features of the national legal framework for ensuring environmental protection, including the right to a favourable environment.

18 See Art 31 of the Federal law 'On International Treaties of the RF', No 101-FZ, 15 July 1995 (CL RF No 29 Art 2757).

19 Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 (PCA) art 7, para 5 states that 'Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems.' Art 12, in turn, establishes that 'Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement'. However, these provisions of the PCA will be implemented on the basis of the procedures established in the national legislation.

B *The National Legal Framework for Environmental Protection*

1 The Constitution of the Russian Federation

The current Constitution of the RF can be considered friendly to the environment. It establishes the constitutional basis of the State's environmental policy. During the process of updating the Constitution in 2020, amendments were introduced designed to protect the rights of citizens to a favourable and comfortable living environment. Amendments to Article 114 require the Government to implement measures aimed at creating favourable living conditions for the population, reducing the negative impact of economic and other activities on the environment, preserving the country's unique natural and biological diversity, and developing a responsible attitude to animals in society. In addition, the Government is responsible for facilitating the environmental education of citizens and education of environmental culture.

The Russian Constitution establishes in Article 42 the right of everyone, that is, all individuals (not only citizens) and legal entities, to a favourable environment, reliable information about its condition, and to compensation for damage caused to their health or property by an environmental offence. This constitutional provision corresponds to the obligation of everyone established in Article 58 of the Constitution to preserve nature and the environment, and to take care of natural resources. The term 'climate' does not appear in the text of the Constitution, and there were no proposals to incorporate it in the Constitution during the recent discussion on amendments.

2 Federal Laws on Environmental Protection and Related Areas

The term 'climate' is also absent from the fundamental Environmental Law of Russia, the Federal Law 'On Environmental Protection of 2002'.[20] Article 4 of this Law states that 'components of the natural environment' are to be the subject of environmental protections against pollution, depletion, degradation, damage, destruction and other negative effects of economic and/or other activities. Article 1 of this Law, defines 'components of the natural environment' as land, subsoil, soil, surface and underground waters, atmospheric air, vegetation, fauna and other organisms and the ozone layer of the atmosphere and near-Earth Space, providing, together with other components, favourable conditions for the existence of life on Earth. According to modern scientific data, the Earth's climate system includes the atmosphere, hydrosphere (ocean), active land layer, cryosphere and biosphere.[21] Thus, all components

20 Federal law 'On Environmental Protection', N 7-FZ, 10 January 2002 (CL RF No 2 Art 133).

21 The New Russian Encyclopedia (Encyclopedia, INFRA-M 2011) vol VIII (1) 397.

of the climate system can be considered as components of the natural environment and they are subject to protection in Russia in accordance with the provisions of the legislation on environmental protection.

The Federal Law 'On Atmospheric Air Protection' of 1999[22] is intended to regulate for the prevention of pollution of atmospheric air with harmful chemical or biological agents, as well as for the prevention of harmful physical changes to atmospheric air (such as increased air temperature). The Law also introduces a system of measures for monitoring and improving air quality, involving State supervision, and industrial and public control over the protection of atmospheric air. Article 16 of this Law establishes requirements for the protection of atmospheric air in the design, placement, construction, reconstruction and operation of objects of economic and other activities. The Law prohibits the design, siting and construction of objects of economic and other activities, the functioning of which may lead to unfavourable changes of climate and the ozone layer, deterioration of health, destruction of genetic resources, of plants and animals, irreversible consequences for people and the environment.[23] However, the term 'climate' used in the law on atmospheric air protection is not defined.

Climate maintenance in Russia is also regulated by other Federal laws: 'On Hydrometeorological Service',[24] 'On Specially Protected Natural Territories',[25] 'On Environmental Expertise',[26] 'On Radiation Safety of the Population',[27] etc. For example, the Federal Law 'On the Hydrometeorological Service', which establishes the legal framework for activities in the field of Hydrometeorology and related fields, includes the protection of vital interests of individuals, society and the State from the impact of climate change in the concept of hydrometeorological security. The Regulation on Sate monitoring of the state and pollution of the environment was adopted by the Government of the RF in 2013.[28] It establishes the procedure for State monitoring of the state and pollution of the

22 Federal Law 'On Protection of Atmospheric Air', N 96-FZ, 4 May 1999 (CL RF No 18 Art 2222).

23 Federal Law 'On Protection of Atmospheric Air', N 96-FZ, 4 May 1999 (CL RF No 18 Art 2222).

24 Federal Law 'On Hydrometeorological Service', N 113-FZ, 19 July1998 (CL RF No 30 Art 3609).

25 Federal Law 'On Specially Protected Natural Territories, N 33-FZ, 14 March 1995 (CL RF No 12 Art 1024).

26 Federal Law 'On Environmental Expertise', N 174-FZ 23 November 1995 (CL RF No 48 Art 4556).

27 Federal Law 'On Radiation Safety of the Population', N 3-FZ 9 January 1996 (CL RF No 3 Art 166).

28 Resolution of the Government of the RF, N 477, 6 June 2013 (ed from 10 July 2014) 'About realization of the State monitoring of condition and pollution of the environment'

environment. The Federal Service for Hydrometeorology and environmental monitoring, when carrying out State monitoring, provides observations on the state and pollution of the environment, assessment of changes occurring in it, as well as forecasting of dangerous phenomena and factors, including chemical, radioactive and thermal pollution; harmful physical, chemical and biological (for surface water bodies) processes; and changes in the components of the natural environment, including climate change.

3 The Russian 'Climate Doctrine' and other Policy Documents

A significant place in the government regulation of climate is reserved for the conceptual documents of a political and strategic character, such as: the Russian Climate Doctrine, 2009;[29] the Concept of Forming a System for Monitoring, Reporting and Verifying the Volume of Greenhouse Gas Emissions in the RF, 2015;[30] and the National Action Plan for the first phase of adaptation to climate change for the period up to 2022.[31] The latter is preparing a long-term development Strategy for Russia with low gas emissions until 2050, which seeks to implement Article 4, paragraph 19 of the PCA.[32]

The Russian Climate Doctrine is a system of views on the purpose, principles, content and ways of implementing the unified State policy of the RF within the country and in the international arena on issues related to climate change and its consequences. It is the basis for the formation and implementation of climate policy. The legal basis of the Doctrine is the Constitution of the RF, Federal laws, normative legal acts of the President and the Government of the RF, the UNFCCC and other international agreements to which the RF is a Party, including those on the environment and sustainable development. As for the legal support for the implementation of the Doctrine, it is formulated in fairly general terms and it is difficult to definitely predict its development. Thus, until now, Russia does not have a special Law on climate that would

(together with 'Statute on State monitoring of environmental pollution' (CL RF No 24 Art 3000)).

29 Order of the President of the RF 'On the Climate Doctrine of the RF', N 861-RP, 17 December 2009 (CL RF No 51 Art 6305).

30 Order of the Government of the RF 'On Approval of the Concept of Forming a System for Monitoring, Reporting and Verifying the Volume of Greenhouse Gas Emissions in the RF', N 716-p, 22 April 2015 (ed from 30 April 2018) (CL RF No 18 Art 2737).

31 Order of the Government of the RF 'On Approval of the National Action Plan for the First Stage of Adaptation to Climate Change for the Period up to 2022', N 3183-R, 25 December 2019 (CL RF No 1 Art 115).

32 'Draft Strategy' (n 1) <https://www.economy.gov.ru/material/file/babacbb75d-32d90e28d3298582d13a75/proekt_strategii.pdf> accessed 15 September 2020.

contain the concept of climate, its adverse change, as well as measures to protect the climate.

The Concept of Forming a System for Monitoring, Reporting and Verifying the Volume of Greenhouse Gas Emissions in Russia was adopted in 2015 by an Order of the Russian Government.[33] Its main goal is to raise awareness among Federal government bodies of Russia, State authorities of Russian regions, local governments, investors, the business community, non-governmental non-profit organizations and the population about the volume of anthropogenic greenhouse gas emissions that are produced in the course of economic and other activities on the territory of Russia.

The National Action Plan for the first stage of climate change adaptation for the period up to 2022 was approved by an Order of the Russian Government in 2019[34] after the adoption of the PCA. In accordance with the 2009 Climate Doctrine of the RF, the development and implementation of operational and long-term adaptation measures are one of the main objectives of climate policy. At the national level, the National Action Plan for the first stage of adaptation to climate change for the period up to 2022 is a State system of measures of a political, legislative, regulatory, economic and social nature that are implemented by Federal Executive authorities and Executive authorities of the subjects of the Federation. The measures are aimed at reducing the vulnerability of the national security system of the country, as well as the vulnerability of economic entities and citizens, to changes in the global climate and/or the localized climate on the territory of Russia, on the territories of neighbouring States, or on the adjacent waters of the World ocean. The measures also aim to capitalize on any favourable opportunities brought about by these climatic changes.

Currently, a 'Draft Strategy for the long-term development of the RF until 2050 with a low level of greenhouse gas emissions' has been developed, which is undergoing the necessary approvals and is likely to be approved soon.[35] The Strategy is an intersectoral document of strategic planning and is the main information base that will be drawn upon in order to implement measures of State policy in the field of low-carbon development in sectoral documents of strategic planning; strategies for socio-economic development of the subjects of the RF; State programmes of the RF and its subjects; and corporate

33 Order of the Government of the RF 'On Approval of the Concept of Forming a System for Monitoring, Reporting and Verifying the Volume of Greenhouse Gas Emissions in the RF' (n 30).

34 This Order has not been published yet at the time of writing.

35 'Draft Strategy' (n 1).

programmes. The Strategy covers sectors of the economy and public administration that are sources of greenhouse gas emissions or their effluents.

The Strategy sets out measures to achieve the goal of controlling greenhouse gas emissions set as part of Russia's national contribution to strengthening the global response to the threat of climate change in the light of existing national conditions, helps to keep the increase in global average temperature well below 2°C above pre-industrial levels, and aims to ensure the progressive socio-economic development of Russia, characterized by a low level of greenhouse gas emissions. The adoption of the Strategy will be accompanied by the establishment, as part of the first national contribution to the global response to climate change under the PCA, of a target for limiting greenhouse gas emissions by 2030 at the level of 67 per cent of those emissions in 1990, taking into account emissions and removals from forestry and land use.

Thus, strategic and conceptual documents provide for public policy measures in the implementation of a global response to the threat of climate change, intended for implementation at various levels of government (Federal, regional, municipal, and sometimes corporate), taking into account the State's international obligations. They create prerequisites for the formation of a regulatory framework for State policy to implement international obligations. The development of the legal framework in the field of climate change is the main prerequisite for the creation and effective functioning of a mechanism for implementing policies in this area. The strategic and conceptual documents set out the task of further improving the legislation of the RF in this area, which should help organize the work of Federal Executive authorities and Executive authorities of subjects of the Federation to implement specific measures aimed at preventing and overcoming threats to national interests in the field of climate change, and ensure strict compliance with the legislation by all economic entities. At this stage, legislative regulation is aimed at solving specific issues in the areas covered by the strategic documents, it is characterized by a point-based nature and a large amount of by-law regulation.

4 Towards the Development of Specific Climate Legislation?

The Russian legal doctrine does not deny the importance of legal regulation for countering climate change in the framework of global efforts. In particular, the legal regulation of climate stabilization and its preservation for present and future generations is noted, which leads to the preparation and adoption of numerous normative legal acts at various levels. It is obvious that public awareness of the impact of human activities on climate change and the impact of climate change itself on the existence of all living things is increasing, and that these impacts also affect 'social relations' within Russian society. Indeed,

these issues are becoming social in nature, the importance of which is growing and requires legal regulation. This gives rise to a reasonable question about the formation of the concept of climate change law.[36] Along with this, doubts are expressed about the specifics of legal regulation of climate change and its qualitative difference from the regulation of environmental protection.[37] Such discussions about the need to recognize climate change law as an independent branch of law at the doctrinal level, which stimulate initiatives to develop climate change legislation and potentially litigation, reflect the growing public awareness of these issues.

The division of Law into separate branches in the Russian legal doctrine was formed in the 1930s.[38] Branches of law differ in both the subject and the method of regulation. Each branch of Law has its own sphere of legal influence, its own subject of regulation. Social relations can be subject to legal regulation if they are stable and 'repeatable'. The State and society are interested in giving these social relations a legal form and, consequently, in their protection. The method of legal regulation shows the ways, means, and techniques used to regulate these social relations. The method of legal regulation allows for the determination of the legal status of subjects; procedures for creating subjective rights and obligations; means of ensuring them; the nature of sanctions. Two main methods are considered: dispositive and imperative. The dispositive (autonomous) method allows for significant independence of legal entities and provides them with the opportunity to settle the relationship at their own discretion within the limits of legal means. The next section of this chapter examines to what extent these methods of legal regulation, as applied in the environmental field, offer any scope for climate change litigation in the Russian Federation. The imperative method regulates the State's management of climate protection, while the dispositive method allows citizens and organizations to protect their rights in this area.

IV Prospects for Climate Change Litigation

A *Environmental Control through Administrative Remedies*

As discussed above, there is a fairly extensive Russian environmental legislation covering issues of ownership of natural resources and who has the right

36 SA Bogolyubov, 'Is Climate Law justified?' in Yu A Tikhomirov, SA Bogolyubov and NV Kichigin (eds), *Law and climate of the planet: a scientific publication* (JUSTICE 2018) 21.

37 See ibid 32.

38 See TN Radko (ed), *Legal System: history, modernity, prospects* (PROSPECT 2019) 26.

to use natural resources, measures to ensure environmental safety, environmental requirements for economic activities, as well as legal regulation of various types of environmental management (use of water, forests, air, wildlife, etc). An important element of State environmental management is the implementation of environmental control, that is, verification of compliance of the activities of participants in environmental relations with the requirements of legislation. The Russian legislation on environmental protection establishes certain requirements for the norms on environmental control, which is understood as a system of measures aimed at preventing, detecting and suppressing violations of legislation in the field of environmental protection, and at ensuring compliance by business entities and other actors with the requirements of regulations and regulatory documents in the field of environmental protection. There are three types of environmental control: State, industrial, and public. State control is carried out by State authorities. Industrial control, which is carried out by the enterprises themselves, is currently understood as an integral part of environmental management, including the use of external environmental audit. Public control is aimed at ensuring the right of citizens and public organizations to discuss issues related to the planned impact on the environment.

According to Article 12 of the Federal Law 'On Environmental Protection', public associations and non-profit organizations have the right to submit complaints, applications, claims and proposals on issues related to environmental protection and negative impact on the environment to State authorities of the Russian Federation, State authorities of the subjects (regions) of the Russian Federation, local self-government bodies and other organizations, and to receive timely and reliable information about the state of the environment, measures for its protection, economic and other activities that pose a threat to the environment, life, health and property of citizens. Thus, public associations of citizens and other non-profit organizations registered as legal entities in accordance with the procedure established by law have been able to act as procedural plaintiffs in defence of the environmental rights of an indefinite number of persons, but only with suppressive requirements, that is, they can seek to stop illegal activities, but are not able to claim compensation for environmental damage.

B *Judicial Protection in the Environmental Field and its Applicability to Climate Change*

The Russian legal doctrine places significant value on the importance of judicial protection as a legal means of ensuring and protecting the rights of citizens.

For example, the authoritative Russian academic theorist and researcher of justice issues, Professor VV Lazarev claims:

> The court in the Russian legal system is primarily designed to perform a social function, performing both general service to the individual and society, and comprehensive activities to protect specific social rights of citizens.[39]

At the same time, experts in the field of environmental law note that when judicial bodies engage with the application of environmental legislation, difficulties arise, which are often due to the peculiarities of environmental legal regulation. They include the diversity of the sphere of legal regulation of environmental protection, and the relative youth of this branch of Russian law, which was significantly updated at the beginning of the XXI century and the process of its modernization continues.

The possibility of using the methods of protecting citizens' environmental rights provided for by the Law 'On Environmental Protection' in order to protect against climate change is unlikely for a number of reasons. First, citizens' environmental rights are more specific, while climate change and its consequences are a broader, more global issue. Under the provisions of the Law 'On Environmental Protection', citizens have the right to apply to the court with claims for compensation for environmental damage, but they cannot demand the termination of environmentally dangerous economic activities. The Law 'On Atmospheric Air Protection' provides that public control over the protection of atmospheric air is carried out in accordance with federal and regional legislation on environmental protection and on public associations. It also establishes that citizens and public associations have the right to file claims for compensation for damage to the health and property of citizens and the environment caused by atmospheric air pollution.

Since the norms on climate change are part of Russian environmental law, the legal means of protection provided by environmental legislation can be applied in the event of climate disputes. In this regard, we can refer to the opinion that:

> at present, the possibility of filing claims to protect the rights of citizens from adverse manifestations of climate change is associated with

39 VV Lazarev 'The Place of the court and judicial practice in the legal system of Russia' in T Ya Khabrieva and VV Lazarev (eds), *Judicial practice in the modern legal system of Russia: monograph* (NORMA, INFRA-M2018) 44.

> difficulties due to insufficient regulation of issues of climate change prevention in environmental legislation.[40]

This conclusion correctly reflects the state of modern Russian legislation. As the experience of other countries shows, the existing objective difficulty in climate change litigation is to establish a causal relationship between the actions of the defendants (greenhouse gas emissions) and the resulting negative consequences (damage) for the plaintiffs.[41] Until recently, Russian doctrine opined that judicial protection of citizens' rights to prevent climate change was unlikely due to obstacles in procedural legislation. This was justified by the fact that Russian civil procedure legislation did not contain the possibility of filing class actions aimed at protecting private property and non-property rights and legally protected interests of groups of citizens.[42]

However more recently, the Russian legal system has created conditions for overcoming such procedural obstacles. Previously, Russian procedural legislation allowed only 'procedural participation', in which a claim was filed in court jointly by several plaintiffs. Procedural participation was possible if the subject of the dispute was the common rights or obligations of several plaintiffs, or the rights and obligations of several plaintiffs had the same basis, or the subject of the dispute was homogeneous rights and obligations.[43]

Amendments to the Civil Procedure Code of the RF and the Arbitration Procedure Code of the RF concerning class actions were adopted in 2019. The amendments have significantly changed the regulation of class actions. As noted by Professor D Ya Maleshin, the adoption of these amendments 'can be regarded as one of the important events in the modern history of the Russian civil process. A class action can become one of the key means of protecting the violated rights of a large number of citizens or an indefinite number of individuals in our country'.[44]

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40 AV Kodolova 'Lessons from the case "Fund" Urgenda v. the Netherlands, assessment of the possibility of filing such claims in Russia' in Yu A Tikhomirov, SA Bogolyubov and NV Kichigin (eds), *Law and climate of the planet: scientific publication* (JUSTICE 2018) 149.

41 AP Anisimov 'Legal problems of compensation for damage caused by climate change: the experience of Russia and the United States' (2015) 10 Questions of Russian and International Law 10.

42 Kodolova (n 40) 146.

43 Art 40 of the 'Civil Procedure Code of the RF', No 138-FZ, 14 November 2002 (CL RF No 46 Art 4532).

44 Federal Law 'On Amendments to Certain Legislative Acts of the RF' No 191-FZ, 18 July 2019 (CL RF No 29 Art 3858).

Russian Civil procedure legislation continues to allow the filing of a public class action by a public Prosecutor. According to Article 45 of the Civil procedure code, the Prosecutor has the right to apply to the court to protect the rights, freedoms and legitimate interests of citizens, an indefinite circle of persons or the interests of the RF, subjects of the RF, and municipalities. An application for the protection of the rights, freedoms and legitimate interests of a particular citizen may be filed by a Prosecutor only if the citizen, for reasons of health, age, incapacity or other valid reasons, cannot apply to the court himself.

The changes made to the procedural legislation have created a fairly promising model of class actions, which has obvious advantages compared with some foreign analogies. Notably, similar rules for group proceedings have been adopted for civil and arbitration legislation. The right to appeal to the court to protect the interests of a group of persons is subject to conditions relating to the criteria of the group. Such conditions, according to the Civil Procedure Code, are: common defendant, common or similar rights of members of groups of persons, similar factual circumstances of claims, the same method of protection of rights. Both citizens and legal entities can apply for protection of the group's rights. A claim is recognized as a group claim if at the time of its filing at least 20 persons join it (or five persons in the arbitration process).

In Russia, the 'opt-in' model is established meaning that potential members of the group must indicate their desire to join the group. It is suggested that this model is less radical than the 'opt-out' model, which assumes automatic recognition of all persons who meet the criteria of the group as members of the group. Given that the possibility of class action is indeed novel to the Russian system, this less radical model allows the possibility of testing such novel claims.

C *An Emerging Practice of Climate Change Litigation in Russia?*

There are no recorded cases of climate change litigation in Russia. However, there are prospects, especially given the introduction of a new procedural institution of class action as discussed above. Such actions can be filed in connection with violations of environmental protection legislation, including climate change issues. Indeed, despite the relatively short period of time since the date of entry into force of these legislative amendments (October 2019), according to media reports, the first case of filing a class action on an environmental dispute in Russia has been recorded.

In February 2020, 32 residents of the city of Elektrogorsk filed a collective environmental lawsuit against the Kronospan group of companies (a global manufacturer of wood slabs and building materials) in the Yegoryevsky city

court of the Moscow region. The applicant, in the interests of 32 citizens, was National Ecological Corps, a voluntary, self-governing non-profit association that represents the interests of Russian society in the field of environmental protection and environmental safety.

The citizens' claim indicates that the defendant's activities, including as a result of production, waste disposal, and the release of harmful substances, cause harm to the environment, which is expressed in the fact that the soil, water and air are polluted, and the maximum permissible noise level is exceeded. There is a pungent smell of chemicals around the buildings of the defendant's businesses and the towns where they are located. According to former employees at Kronospan group companies, filters that protect the local population from emissions are turned off at night. From the production facilities of the defendant, noise reaches a high level. Illegal logging is carried out around the territory occupied by the defendant's enterprises. All claims of the plaintiffs are confirmed by recorded research conducted by various laboratories. The defendant denies any wrongdoing.[45]

Thus, this case does not directly relate to climate change disputes, but it is based on the provisions of the law on environmental protection relating to the protection of citizens' rights from gross violations of environmental legislation. At the same time, it raises issues of violations of legislation on the protection of atmospheric air and can serve as a kind of precedent for filing climate change-specific lawsuits.

V Concluding Remarks

Based on the analysis in this chapter, we can point to a number of favourable legal conditions for developing litigation towards protecting citizens' rights from the negative effects of climate change. These changes are both substantive and procedural.

Substantively, Russia joined the PCA in 2015. In Russian legislation, issues of climate change prevention are already enshrined in strategic documents, and new requirements are being developed as part of the implementation of the provisions of the PCA. The adoption of the Strategy for the long-term development of the RF until 2050 with a low level of greenhouse gas emissions will entail the completion of the development and adoption of the law on carbon

45 'Russia's first environmental class action lawsuit' (*Pravo*, 11 February 2020) <https://pravo.ru/news/218424/> accessed 15 September 2020.

regulation. The Russian Government is still preparing a draft Federal Law 'On State Regulation of Greenhouse Gas Emissions', which is intended to create conditions for reducing greenhouse gas emissions, taking into account the need to ensure Russia's sustainable economic development and in accordance with its international obligations. The adoption of such a law will further build a legal framework for protecting the rights of citizens from adverse climate changes. The law will further clarify, for example, the concept of adverse climate changes, and legal mechanisms for their prevention will be proposed. The law will also support the harmonization of standards across different fields of law. It is likely that the adoption of this bill will expand the legal grounds for judicial protection against adverse climate changes and thereby further support the possibilities of climate change litigation.

The adoption of such a Law will not end the discussion about the formation of the Russian conception of climate change law. Rather, it will allow for the initiation of comprehensive scientific research to substantiate the possibility of filing climate change claims, based on international legal obligations and provisions of Russian legislation. As a result of the research, it will be possible to clarify questions about the causal relationship between violations of legislation and damage to the climate and the rights of citizens, forms of damage, and criteria for bringing actions related to various activities that lead to climate change.

Procedurally, changes in Russia's procedural legislation have created the conditions for judicial protection of citizens' rights against adverse climate changes and compliance with Russia's international obligations under the PCA.

Despite these positive developments, certain factors are nevertheless likely to prevent the full implementation of citizens' rights to bring climate change lawsuits. These include the traditional cautious approach of the legislator to the adoption of laws in the field of preventing adverse climate change, which may result in too general provisions or the adoption of framework laws which may prove difficult to use as a basis for litigation. A further concern is the excessive bureaucratization of the measures taken by the State for implementation of its strategies. Moreover, other organizational and legal issues will also need to be resolved, such as developing the structure for relevant procedures. However, these difficulties are temporary and can be overcome. Russia will gradually take its place among other actors on the global climate change agenda.

CHAPTER 11

Prospects for Climate Change Litigation in China

Chen Zhou and Tianbao Qin***

1 Introduction

Recent years have witnessed a spread of climate change litigation across the world. As this volume amply demonstrates, climate change-related lawsuits have emerged in various judicial systems, in both developing and developed countries, civil and common law systems, in States Parties to the Paris Agreement or non-Parties alike. The ways in which judicial systems in various countries deal with these lawsuits provide research-worthy comparative ideas for effective legal responses to the issues related to climate change mitigation and adaptation.

While China is a big carbon emitter, it is actively engaging in environmental governance by means of law. Its rich environmental law-making and dynamic judicial practices have generated far-reaching impacts including in terms of a (low-carbon) economy, society and ecosystems.[1] A most notable achievement is the introduction of public interest litigation (PIL). Owing to the broad implementation approach that seeks to embed climate change in wider issues of environmental protection and sustainable development like pollution prevention and control, natural resources management and biodiversity protection, PIL becomes a potentially significant and necessary tool for tackling environmental and climate change-related problems in China.[2] For example, in 2016, a first case explicitly and distinctly claimed for damages arising from CO_2 emissions. China has sought to play an active role in climate change litigation in both broad and narrow senses.[3] The intensive legislations and constructive

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1 The Ministry of Ecology and Environment, 'China's Policies and Actions for Addressing Climate Change' (2019), 10–21. It is also known as the 'Blue Paper' (2019).

2 China Council for International Cooperation on Environment and Development (CCICED), 'Research on Coordinated Control Policies for Climate Change and Air Pollution' (CCICED 2015 Annual Conference, Beijing, November 2015).

3 The Ministry of Ecology and Environment (n 1) 1–14.

practices in China may provide multidimensional solutions for remediable, compensable and restorable climate change losses and damages.

There have been increasingly-emerging adverse impacts of global climate change on China in the last three years and this tendency is likely to be further aggravated in the near future.[4] An observed temperature increase has dominated since 2017, imposing risks to the environment and to public health due to extreme weather events, including heat waves, and contributing to shortages in food and water supply amongst other concerns.[5] Meanwhile, China has overtaken the US and become the largest GHG emitter, due to its coal-relying industry and rapidly-growing economy. Strong and well-prepared responses, which involve all-round measures, are thus required to be in place to mitigate and adapt to climate change.

Since the 1992 UNFCCC,[6] China has taken top-down actions to reduce greenhouse gases (GHGs) across the country. Policy tools including action plans, programmes and executive directives, including command-and-control instruments, have been applied.[7] These government-driven efforts were further strengthened by signing the Paris Agreement in 2015. China made a pledge to achieve a peaking of CO_2 emissions by 2030 with the aim of ambitious reduction targets, energy structure decarbonization and sustainable forest use.[8] To fulfill its international commitments and to supplement its command-and-control measures, China opened a nation-wide carbon market for emissions trading, incentivizing emitters to internalize their emissions costs.[9] The

4 The Chinese Academy of Social Sciences & National Meteorological Administration, *The 10th Annual Report on Climate Change (2018): Gathering in Katowice* (2018). This 10th Green Paper on Climate Change was published by the Joint Laboratory of Climate Change Economic Simulations of the Chinese Academy of Social Sciences-National Meteorological Administration and the Social Science Literature Press. The report comprehensively reviews China's policies and actions on climate change and showcases China's achievements in the past year.

5 China's surface temperature rose by 0.24 degrees Celsius every 10 years from 1951 to 2017.

6 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC). China signed the UNFCCC in 1992.

7 There are, for instance, Social and Economic Five-Year Plans (FYP), the National Climate Change Program 2007, and emissions reduction directives throughout the administrative system.

8 China forwarded its Intended National Determined Contributions (INDC), aiming that by 2030 the CO_2 emissions per unit of GDP should fall by 60 to 65 per cent, compared to 2005 levels. By 2030, non-fossil energy should account for about 20 per cent of primary energy consumption, and the amount of forest reserves should be increased by about 4.5 billion cubic metres, compared to 2005.

9 E Huang and A Rathi, 'China has just launched the world's largest carbon market. Here's what you need to know' (*World Economic Forum*, 21 December 2017)

upcoming 14th Social and Economic Five-Year Plan[10] will include a climate change chapter aimed at improving the current legal framework, establishing robust frameworks for climate mitigation and adaptation.[11]

Despite intensive policies, the inadequacy of legal responses to climate change undermines current efforts. Legislative measures like pollution control and discharge standards, licensing and legal liability are of great importance, particularly for the market-driven emissions traders. In this regard, a bottom-up approach—with integrated public participation and social supervision of potential GHG emitters and supervision of the government to make sure it adheres to its climate duties—is likely to overcome the limitations of the top-down approach currently in place. China's 'Ecological Civilization Reform'[12] and 'judicial activism'[13] have facilitated a focus on broad, general environmental law-making and on 'greening' the judiciary. This, in turn, has resulted in remarkable achievements in environmental quality enhancement, pollution control and the curbing of ecological disruption. This yields co-benefits in climate governance.[14] Across these processes, Courts play an ever-greater role in strengthening environmental governance.

<https://www.weforum.org/agenda/2017/12/china-has-just-launched-the-worlds-largest-carbon-market-heres-what-you-need-to-know> accessed 5 July 2020.

10 Details of the 13th Social and Economic Five-Year Plan are on the China Meteorological Administration website (18 March 2016) <http://www.cma.gov.cn/2011xwzx/2011xqxxw/2011xqxyw/201603/t20160318_306896.html> accessed 5 July 2020. The 13th Social and Economic Five-Year Plan (2016–20) laid the foundations for the specialized Climate Change Chapter in the 14th Five-Year Plan, which foresees taking active measures for climate change mitigation by optimizing the energy sector, managing forestation and controlling key industries with high emissions. In the last year, 2019, a systematic evaluation was conducted on the climate change target.

11 'China's response to climate change has made significant achievements: Integrating Climate Change into "the 14th Five-Year Plan"' (*Chinaxiaokang*, 28 November 2019) <http://www.chinaxiaokang.com/gongyipindao/2019/1128/849775.html> accessed 5 July 2020.

12 The State Council, *National Program on Ecological Civilization Reform* (2015).

13 Judicial activism has recently increased in China and the courts are playing an active and constructive role in social governance. The trend towards greater judicial activism began when the courts had to deal with the financial crisis in 2008, and it then expanded to other social disputes, including environmental disputes. The judiciary, the Supreme People's Court and in particular green courts carry out judicial activism to pursue environmental goals, such as devising and monitoring the implementation of pollution control and ecosystem conservation measures. See Y Jianjun, 'The Development of Judicial Activism in China' (2010) 1 Science of Law (Journal of Northwest University of Political Science and Law) 56.

14 The Meteorological Administration, 'Report on the Meteorological Administration's Activities for the Ecological Civilization Reform and the Combat of Climate Change', 12

What has been practiced in the Chinese judicial system, in particular by specialized environmental courts, provides diverse angles, pathways and solutions for common problems faced in climate change litigation across the globe. These problems include, but are not limited to justiciability, standing, legal sources, climate change-related environmental tort, burden of proof and remedies.[15] It is argued that China's recent inclusive environmental legislation and constructive judicial practice may allow remedies for climate change risks, damages and losses. This chapter examines the legal sources for climate change litigation in China, analyzing relevant practice and assessing China's judicial efforts towards addressing climate change issues. In doing so it highlights both barriers and opportunities.

II Legal Sources for Climate Change Litigation

Despite the lagging and insufficient climate change legislation, lawsuits targeted at achieving emissions reduction or at producing climate-friendly impacts have emerged in China. They have been positively received by the judiciary.[16] This, in part reflects that local substantive laws as well as procedural rules accommodate climate change lawsuits.

A *Procedural Rules*

Guided by the nation-wide Ecological Civilization Reform, China has significantly advanced its procedural rules, in particular PIL-related rules.[17] Key issues such as justiciability, standing and litigants are addressed in this regard, making claims for climate losses, damages and even risks justiciable in the People's Court.

Until now, there have been three types of PIL in China's legal framework: (1) civil PIL; (2) administrative PIL; and (3) pure eco-environmental damages compensation litigation. Each reflects possibilities for addressing climate

October 2017 <http://www.gov.cn/zhuanti/2017-10/12/content_5231348.htm> accessed 12 July 2020.

15 Law Division UNEP, *The Status of Climate Change Litigation: A Global Review* (United Nations Environment Programme 2017) 27–39 <https://www.unenvironment.org/resources/publication/status-climate-change-litigation-global-review> accessed 19 September 2020.

16 The Supreme People's Court, *White Paper on China's Environment and Natural Resources Trials* (2019).

17 Civil Procedure Law 2012 (PRC) art 55; Administrative Procedure law 2017 (PRC) art 25(2). There is also judicial interpretation specialized to guide PIL.

change. Environmental law as well as procedural laws set down specific rules corresponding to each type of PIL. Civil PIL was first introduced by China's Civil Procedure Law (CPL) in 2012 and subsequently reconfirmed in the revised Environmental Protection Law (EPL) in 2014.[18] According to these provisions, eligible NGOs and procuratorate are entitled to sue those responsible for pollution or ecological damage.[19] NGOs that satisfy certain conditions[20] can represent collective environmental interests before the People's courts. This provides for their standing in cases of climate change-related air pollution and forest ecosystem disruption. Serving as actors for 'social supervision' on environment quality, green NGOs play an increasingly influential role and their number is growing rapidly.[21] Such organizations are particularly active in areas where statutory provisions are generally lacking like climate change mitigation. To further provide full and timely protection of the environment as a public good, the procuratorate can initiate public interest suits in the case of non-eligibility, or non-willingness of NGOs.[22] There have been abundant environmental tort cases since the revisions of the EPL and the CPL.[23] In addition, the advanced procedural rules have promoted improvements of relevant substantive laws. For instance, China's Civil Code stipulated the 'Green Principle' and revised its legal liability chapter particularly for environmental tort.[24]

18 Civil Procedure Law 2012 (PRC) art 55, reconfirmed by art 58 of the Environmental Protection Law, laid down the public interest litigation.

19 Environmental Protection Law 2014 (PRC) art 58.

20 According to art 58 of the Environmental Protection Law, two criteria shall be met as follows: (1) be registered at the civil affairs departments of the people's government, at or above municipal (including sub-districts) level, in accordance with the law; (2) have specialized in environmental protection public interest activities for five consecutive years or more, and have no record of violating the law.

21 R Zhang and B Mayer, 'Public Interest Environmental Litigation in China' (2017) 1(2) Chinese Journal of Environmental Law 202.

22 The Supreme People's Court, 'Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigation' (2015) (PRC). According to this, a public procurator can either support eligible green NGOs in civil public interest litigation (known as supporting-suit; experts and other institutes can also do so), or bring separate civil litigation against environmental pollution and ecological disruption, in the absence of social NGOs able or willing to bring the case themselves.

23 The Supreme People's Court, 'China Environmental Justice Development Report and Typical Case Press Conference' (*The Supreme People's Court*, 3 June 2019) <http://www.court.gov.cn/zixun-xiangqing-145082.html> accessed 5 July 2020.

24 Civil Code 2020 (PRC) art 9; Tort Liability Law (PRC) ch 8; Environmental Protection Law 2014 (PRC) art 64. For instance, the Green Principle requires that 'all civil subjects engaging in civil activities shall assist in saving natural resources and protecting the ecological environment'.

Although there is no particular climate change liability in the current tort law framework, the forms of environmental tort liability have been expanded and diversified, and are increasingly likely to provide potentially feasible remedies for climate change loss and damages.

The involvement of the procuratorate in civil PIL is to assist the PIL-launching NGOs who primarily need to meet the statutory criteria like registration, no record of illegality, and qualification.[25] They play a supplementary and sometimes strong role in those cases where there is usually a lack of eligible and willing NGOs, for instance in cases against heavy and habitual polluters. This supervisory role of the procuratorate was soon extended to administrative litigation to hold government organs liable for failure to comply with their environmental duties.[26] After two years in which experimental programmes were carried out at provincial level, administrative PIL was prescribed by both civil and administrative procedure legislation, which opens a window for supervision of environmental duties in the form of 'official suing official'.[27] The issue of standing is thus addressed. This can be contrasted with the classic *Urgenda* Case where the plaintiff resorted to the 'duty of care' under civil law for their claim about the government's insufficient action on emissions reduction.[28] In this regard, government organs legally responsible for energy conservation and emissions reduction, air-pollution control, clean production, waste and forest resource management, are all likely to become potential defendants.

However, this does not mean that a procuratorate in China could start official suits on any occasion. Preconditions are attached on prosecuting: (1) a prosecution can only be brought against a government organ for failures in the course of performing its duties; and (2) the procuratorate must undertake mandatory pre-suit proceedings.[29] An independent suit without the due performance of the procuratorate is not allowed.[30] Besides, there is the pre-suit arrangement of 'urging proceedings' with 'prosecutorial suggestions' to take

25 Y Xie, 'Prosecutors Pilot Public Interest Litigation in 13 Provinces and NGOs Are Still Spectators' (*Jiemian*, 2 July 2019) <https://www.jiemian.com/article/317480_qq.html> accessed 5 July 2020.

26 Administrative Procedure Law 2017 (PRC) art 25 (2).

27 'Official Suing Official' is a breakthrough in China for administrative litigation. Q Gao, 'Legal Assessment on Prosecutor-Launching Public Interest Litigation' (2020) 19(1) Journal of Nanjing University of Technology (Social Science Edition) 54.

28 J Zenben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide' (2015) 4(02) Transnational Environmental Law 341.

29 Administrative Procedure Law 2017 (PRC) art 25 (2).

30 The due performance of public procurator in China is to investigate a crime directly, according to the Public Procurator Law 1995 (PRC) art 6.

measures within a certain time limit.[31] In practice, overwhelming government inaction and legally improper acts are corrected in accordance with 'prosecutorial suggestion', making administrative litigation ultimately unnecessary.[32]

A third type of litigation has been emerging more recently and is related to eco-damages compensation. This unique litigation has been developed from the Chinese judicial practices of ecological-and-environmental damages investigation, identification, evaluation and restoration, as well as environmental liability.[33] A specialized judicial interpretation was issued to guide it. As a novel type of litigation, eco-damages compensation litigation targets pure, serious ecological environment damages not accompanied by any property or personal losses.[34] Based on the ownership of a public (environmental) good, governments at local levels (provincial and municipal) could claim for compensation from polluters, or eco-disruptors.[35] Above all, local governments need to conduct 'consultation proceedings' with polluters, eco-damagers on specific compensation. Litigation occurs only when there is a failure to reach an agreement in 'consultation proceedings'. It should be noted that the Reform Program, explicitly defines what constitute ecological environment damages.[36] Accordingly, they refer to any adverse modification to environmental and natural elements, and functional degradation of the ecosystem composed of the above elements that result from pollution and ecological disruption. In

31 The Supreme People's Court and Supreme People's Procuratorate, 'Juridical Interpretations on the Application of Law in Prosecuting Public Interest Litigation Cases (PRC)' (2018) art 21: 'When the national interest and/or social public interests are infringed, the prosecutor shall submit prosecutorial suggestions to the administrative organ concerned and urge it to perform its duties in accordance with the law. The administrative organ shall perform its duties accordingly within two months from the date of the proposal and then reply to the prosecutor in writing. Alternatively, the administrative organ shall reply in writing within 15 days from the date of the proposal in emergency situations of continued, expanding damages to the national interest and/or social public interest. If the administrative organ fails to perform its duties in accordance with law, the public prosecutor shall bring a lawsuit to the people's court according to law.'

32 The Supreme Procuratorate, '2019 Working Report of the Supreme Procuratorate' (The Supreme Procuratorate, 12 March 2019) <http://www.spp.gov.cn/spp/tt/201903/t20190312_411422.shtml> accessed 12 March 2019.

33 General Office of the Central Committee of the Communist Party of China, General Office of the State Council of the People's Republic of China, *Reforming Program on Eco-Environmental Damages Compensation* (2018).

34 The Supreme People's Court, 'Judicial Interpretations on Eco-Environmental Damages Compensation Litigation (for Trial Implementation)' (2019) (PRC) art 1.

35 Constitution (PRC) art 9.

36 The State Council, *Reform Program on Eco-Environmental Damages Compensation* (2018) Section 3 The Scope of Application.

this regard, the atmosphere is explicitly listed as an environmental and natural element, and ecologically unfavourable alterations of its physical and chemical composition, due to pollution and other harmful practices, could logically give rise to claims for compensation under this concept. As Xiangmin explains, climate change has abnormally changed the state of the atmosphere, which in essence degrades the atmospheric function of the Earth's ecosystem. The tentative programmes of eco-environmental damages compensation had been initiated in climate change-sensitive provinces like Qinghai and Guizhou.[37]

Altogether, the three types of litigation as key forums of 'judicial activism' serve for strengthening environmental-climate governance. From an institutional perspective, specialized environmental courts have been established all over the country, at all levels from the Supreme People's Court to the county People's Courts.[38] The judicial system has been restructured and equipped with trained judges, trial rules and case databases in order to achieve environmentally friendly jurisdictions. To further guide the environmental courts and the daily trials, legally binding judicial interpretations have been updated for PIL.[39] An environmentally friendly judiciary contributes to broad-term climate change lawsuits and is an imperative step for a well-prepared climate-friendly jurisdiction. In this respect, the Supreme People's Court in 2016 issued important working guidance of relevance to climate change-related litigation.[40] Subsequently, the 'Directive Opinions on Promoting Trials for Ecological Civilization Establishment and Green Development' further divided climate change-related trials into three concrete categories: disputes on (1) emissions

37 General Office of the Central Committee of the Communist Party of China, 'Reform Program on Eco-Environmental Damages Compensation Litigation' (General Office, 12 December 2015) <http://www.gov.cn/zhengce/2015-12/03/content_5019585.htm> accessed 5 July 2020. The experimental programmes had been carried out in Jilin, Jiangsu, Shandong, Hunan, Chongqing, Guizhou and Yunnan.

38 *White Paper* (2019) Annex II The Establishment and Development of Environment Court in China.

39 The Supreme People's Court, 'Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigation' (2015) (PRC); 'Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts' (2015) (PRC); 'Several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment (for Trial Implementation)' (2019) (PRC).

40 The Supreme People's Court, *White Paper on China's Environment and Natural Resources Trials* (n 16). The other three types of litigation involve: (1) pollutions control and ecological protection; (2) natural resources exploitation and utilization; and (3) eco-environment damages compensation.

trading; (2) green finance and bio-diversity; and (3) emissions reduction and energy conservation.[41] Apparently, the proposed CCL s in China adopt a broad-implementation approach, which involves a series of substantive laws. The outcomes rest on the understanding and interpretation of the relevant laws, in particular environmental statutes in the context of climate change.

B *Substantive Law Sources*

China currently lacks a special climate change act. Still, it consistently promotes climate change mitigation and adaptation with legal arrangements, prudently and gradually embedding this progress in an overall 'Ecological Civilization Reform'.

1 Climate Change Legislation

In China, tackling climate change is, in general, policy-driven. The adoption of a uniform and specialized act is likely to be a slow process, due to various reasons including legal and non-legal factors.[42] In 2012, China issued the draft Climate Change Act for public consultation. As it stands, climate change legislation equally promotes climate change mitigation and adaptation, though it is sector-focused and mostly energy-focused. Both common-and-control and market measures like carbon emissions trading have been laid down. Following this, the carbon market was opened from initially local levels to eventually national level. Very recently, the Temporary Management Measures on Voluntary GHG Emissions Reduction Trading[43] was issued, which could and would provide a legal basis for settling disputes of carbon trading. The Measures serve emissions reduction-involved sectors like electricity and industry; and meanwhile work as administrative regulations with aims of providing management and supervision. This means they are more stable and

41 The Supreme People's Court, 'Directive Opinions on Promoting Trials for Ecological Civilization Establishment and Green Developments' (2016) 8 Gazette of the Supreme People's Court of the People's Republic of China 14.

42 'China finished the Draft of Climate Change Act' (*Chinadialogue,* 8 June 2014) <https://www.chinadialogue.net/blog/7202-China-s-new-climate-change-law-may-hamper-emission-cuts/ch> accessed 10 July 2020. Taking law factors as an example, there is a lack of consensus on the Act, the conent of the Act is overly-abstract, the Act provides an overarching but loose framework, and it is not flexible enough in response to domestic and international trends like the carbon market etc.

43 Temporary Management Measures on Voluntary GHG Emissions Reduction Trading 2019 (PRC). Disputes related to carbon-trading do not necessarily involve public interest litigation. There are also private clients, and in this case, civil law and finance law need to respond to define the relevant rights and obligations in a consistent way.

predictable than mere polices and send strong signals to carbon market stakeholders. To carry out the Measures, the Ministry of Ecology and Environment (MEE) recently listed the first inventory of key emission units.[44] The units on the inventory are disclosed publicly and are potential defendants in future CCL. Additionally, indirect climate change legislation is broadly scattered among environmental-climate laws.

2 Environmental-Climate Legislation

To a great extent, the 'Ecological Civilization Reform' has expanded the environmental law framework. Legislation on anti-pollution measures, low-carbon development, forest management and biodiversity protection provide for potential substantive sources for CCL.

In response to this reform, the revised EPL sets forth the principle of priority of protection.[45] Based on the principle of integration, this new principle readjusts the focus and identifies the environment as the most urgent and key interest in China. For measures which typically require a cost-benefit analysis and which may have an impact of climate change, the principle of priority is supposed to guide local governments to choose 'green' over 'pure GDP'. Then, a specific provision, article 40, obligates both public and private sectors to adopt a decarbonized development approach.[46] Even though it does not explicitly refer to 'climate change' or 'global warming', this article constitutes a core legal basis for climate change mitigation suits. In broad terms, the parent EPL defines environmental and natural elements, covering, inter alia, the atmosphere, wildlife, forest and grassland.[47] For instance, Article 30 aims at reasonable exploitation and utilization of natural resources, and particularly

44 'The Ministry of Ecology and Environment Establishes the First Inventory of Key Emission Units' *21st Century Business Herald* (7 September 2018) <http://www.tanpaifang.com/tanjiaoyi/2018/0907/62281.html> accessed 5 July 2020.

45 Environmental Protection Law 2014 (PRC) arts 4 and 5. The State shall adopt economic and technological policies and measures favorable for conservation and circular use of resources, protection and improvement of environment and harmony between humans and nature, so as to coordinate economic and social development with the work of environmental protection.

46 Environmental Protection Law 2014 (PRC) art 40: 'The State shall promote clean production and resources recycling. Relevant departments of the State Council and local people's governments at various levels shall adopt measures to promote the production and use of clean energy. Enterprises shall give priority to the introduction of clean energy, adopt processes and facilities with higher resource efficiency as well as low pollution discharges, and apply comprehensive waste utilization technologies and waste disposal technologies to reduce pollutant generation.'

47 Environmental Protection Law 2014 (PRC) art 2.

biological diversity conservation. The article could be used in biodiversity-related climate change litigation. As for forest resources, the Forest Law has been revised recently. In article 28, the functional importance of forest for climate regulation is clearly identified.[48] Responding to the EPL, the Forest Law specifies the principle, with regard to forestry, of giving priority to ecology and environmental protection over exploitation and utilization of forest products.[49] The new law requires afforestation (urban and rural) and land greening in order to fulfil the constitutional obligation of tree-planting.[50] In practice, forest protection is targeted by all three types of PIL. The strengthened legal liabilities for deforestation and forest degradation certainly provide better protection and yield climate sound results.

Anti-pollution efforts are significantly strengthened under the 'Ecological Civilization Reform'.[51] Air pollution prevention and control not only serve to safeguard a blue sky, but are also major tools for combatting climate change. The Air Pollution Prevention and Control Law (APPCL), revised in 2018, confirmed the coordinated control of air pollutants and GHGs, by focusing on reducing sources of emissions.[52] Legal instruments of anti-pollution such as total amount control, discharging standards, licenses, taxation, black lists and phase-out processes can be applied to short-lived climate pollutants and non-road mobile machinery (NRMM) pollutant emissions reduction. Very broadly, pollution control measures cover power generation, industry, transportation, agriculture and construction.[53] In this context, the 2018 restructuring of the 'MEE' officially integrated the climate change department, which used to fall under the Reform and Development Council (RDC), into the anti-air pollution department.[54] After this reform, PIL against air pollution experienced a rapid growth.[55]

48 Forest Law 2019 (PRC) art 28: 'The State shall strengthen the protection of forest resources and exert the various functions related to protection of forests such as water storage and soil conservation, climate regulation, environmental improvement, biodiversity conservation, and provision of forest products.'

49 Forest Law 2019 (PRC) art 3. Forest Law 2019 (PRC) art 28.

50 Forest Law 2019 (PRC) ch 5; Constitution (PRC) art 9.

51 The State Council, *National Program on Ecological Civilization Reform* (n 12).

52 Air Pollution Prevention and Control Law 2018 (PRC) art 2.

53 Air Pollution Prevention and Control Law 2018 (PRC) ch 4.

54 'The Department of Climate Change' (Governmental Information Disclosure, Ministry of Ecology and Environment, 8 October 2018) <http://www.mee.gov.cn/xxgk2018/xxgk/zjjg/jgsz/201810/t20181008_644817.html> accessed 8 July 2020.

55 'The First Anti-Air Pollution Lawsuit after the Amendment of Environmental Protection Law' (*Sina,* 2 April 2015) <http://gongyi.sina.com.cn/greenlife/2015-04-02/101252241> accessed 8 July 2020.

In principle, China's strategy of low-carbon development aims at energy-mix optimization, clean production and a circular economy. Both the Energy Conservation Law (ECL)[56] and the Renewable Energy Promotion Law (RPL) attempt to phase-out and rationalize inefficient fossil fuels, which are integrated into sustainable development. For instance, in article 1, the RPL affirmed environmental protection as one of its key legislative goals.[57] This law described the duties of the government, business and other users in respect of renewable energy development and utilization. It also includes command-and-control measures like mandatory grid connection, full purchase and marketing measures such as differentiated pricing, special funds and tax reliefs.[58] In addition, the Clean Production Promotion Law and the Circular Economy Promotion Law reaffirm the main responsibilities of private enterprises in the establishment and maintenance of a sustainable and decarbonized economy.[59] Their requirements on clean production, technology advancement and waste management, potentially supply statutory sources for 'broad-term' CCL.

III Practice of Climate Change Litigation in China

Despite the significant practice that has taken place in civil, administrative PIL and eco-environmental compensation litigation, climate change litigation has not been a widespread phenomenon in China. There is a general inadequacy of empirical research on climate change-related litigation in China. At the international level, not surprisingly, not a single case from China has ever been recorded by the Sabin Center, which runs a global CCL database. Yet in this section, several crucial examples are examined to demonstrate China's practice of CCL.

56 Energy Conservation Law (PRC) (enacted in 1997 and recently revised in 2018) aims to strengthen energy conservation, particularly for key energy-using entities, promote rational utilization of renewable energy and advancement of energy conservation technology.

57 Renewable Energy Promotion Law (PRC) (enacted in 2005 and recently revised in 2017) art 1. It set the goal to realize 15 per cent of China's energy from renewable sources by 2020.

58 Renewable Energy Promotion Law (PRC) chs 2, 3 and 4.

59 The Circular Economy Promotion Law (PRC), which came into force in 2009, and the Cleaner Production Promotion Law (PRC), which came into force in 2003, are intended to decarbonize the methods of production and consumption in accordance with the Reuse, Reduce and Recycle principle.

A *Climate Change Litigation in a Broad Sense*

As discussed above, air pollution PIL can be the most likely channel for CCL in a broad sense. An analysis of 10 cases shows a high applicability of tort-based air pollution PIL to CCL.[60] Green NGOs (eight of ten) and procuratorates filed suits against private, often petrochemical enterprises, vehicle producers, sellers and manufacturers for their unlawful emissions of air pollutants, such as excessive or non-licensed emissions and evasion of regulations.[61] The defendants in air pollution cases are highly likely GHG emitters themselves. For example, in the first PIL related to air pollution decided in 2016, the environment court ruled that the defendant who had failed to install treatment facilities and excessively discharged CO_2 during its glass production, had to pay compensation for damages caused to common environmental interests and public health.[62] In this case, as was shown in the later air pollution-related cases, the plaintiff bore a light burden of proof for the causation between the defendant's behaviour and the damages caused. The Chinese APPCL helps in this regard, by setting forth the systems of key Air-pollutants Total Amount Control and Major Polluters Black List.[63] Those on black lists are obligated to disclose their emissions information in a public and regular manner.[64] Likewise, the first inventory of key emission units might become the list of potential defendants of CCL.[65] Under the inversion of the burden of proof, the defendant had to provide substantial evidence to break the causation chain.[66] On a related point of compensation, a virtual disposal cost approach was adopted in this case to

60 China Judgments Online (in Chinese), <http://wenshu.court.gov.cn> accessed 5 July 2020. See also Y Zhao, 'Research on the Pathway of Climate Change Litigation in China: Based on the Empirical Analysis of 41 Air Pollution Public Interest Lawsuits' (2019) 6 Journal of Shandong University (Philosophy and Social Sciences Edition) 27.

61 For instance, the illegal production and selling of annual inspection certificates to assist car owners to evade air pollution laws has been the subject of PIL.

62 *All-China Environment Federation v Jinghua Group Zhenhua Co Ltd,* Case No 1 civil (2015) was decided in Dezhou Middle Court on 18 July 2016.

63 Air Pollution Prevention and Control Law 2018 (PRC) arts 24 and 78. CO_2 is listed as a key air-pollutant, and the defendant Jinghua Group Zhenhua Co Ltd, is deemed a major polluter.

64 Air Pollution Prevention and Control Law 2018 (PRC) art 23; Environmental Protection Law 2014 (PRC) art 54.

65 *21st Century Business Herald* (n 44) <http://www.tanpaifang.com/tanjiaoyi/2018/0907/62281.html> accessed 10 July 2020.

66 Tort Lability Law (PRC) art 6. The Supreme People's Court, 'Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations' (2015) (PRC) art 7.

measure the restoration expense of temporary eco-function losses.[67] In conclusion, air pollution PIL deals with atmospheric problems for collective environmental interest, contributing to mitigating climate change. Likewise, civil PIL aiming for sustainable forest and land use, or biodiversity protection also has climate-friendly impacts.

Avoiding the potential dilemmas of causation commonly faced by CCL, administrative PIL serves as a convenient channel to hold governments accountable for their environmental-climate duties. Using air pollution cases as an example again, it has mainly been governments at county level in charge of ecology, environment and forest to be prosecuted.[68] Litigation is based on the lack of or unlawful performance of air protection duties with respect to exhaust supervision, waste management and forest protection.[69] From the perspective of specific administrative actions, air pollution administrative PIL focuses on the inactions related to post-supervision of industrial and agricultural exhausts; whilst the in-process supervision duties like environmental impact assessment of construction programmes and environmental facility acceptance are involved occasionally. There are, however, only a few cases that refer to ex-ante supervisory duties like environmental planning. This is possibly the result of the very delicate boundary of powers between the judiciary and administration.[70] As required by the procedural rules concerned, the procuratorates first of all urges governments to fulfill their duties, or to correct unlawful administration in due course. An overwhelming number of cases are solved, as the statistics show, by following prosecutorial suggestions in the pre-litigation phase of 'urging proceedings'.[71] Moreover, administrative PIL cases have a positive win rate, and so do air-pollution litigations.[72] Given that the coordinated control of GHG and air-pollutant policies has not been accomplished yet, air pollution

67 Q Chen, Z Chen, 'Study on Quantitative Assessment of Eco-environmental Damage Caused by Air Pollution Based on Virtual Disposal Cost Approach' (2018) 2 Environment & Sustainable Development 29.

68 Zhao (n 60) 32.

69 Zhao (n 60) 32.

70 H Shen, *Environmental Justice and Administration in the Context of Climate Change* (Fudan University Press 2018) 164.

71 L Yu, 'Success Rate of Correction in the Urging Proceedings of Public Interest Litigation reaches 97%' (*The Supreme Procuratorate*, 14 February 2019) <https://www.spp.gov.cn/spp/zdgz/201902/t20190214_408047.shtml> accessed 12 July 2020.

72 The Supreme Procuratorate, '2019 Working Report of the Supreme Procuratorate' (The Supreme Procuratorate, 12 March 2019) <http://www.spp.gov.cn/spp/tt/201903/t20190312_411422.shtml> accessed 12 July 2020.

administrative PIL may indirectly promote GHG emissions reduction in China. However, there are potential uncertainties and this is largely because climate change duties such as monitoring GHG emissions and fossil fuel pollution control have not been fully and clearly distinguished yet from the government's usual and ordinary environmental responsibilities, in particular at local environmental administration level. Once the synergy is achieved in this regard, the room for administrative PIL in the context of CCL is likely to be much more limited.[73] Whatever policies may be adopted, administrative PIL against forest administration contributes to maintaining and increasing carbon sink and can thus be regarded as a pathway for climate change lawsuits moving forward.

B *Climate Change Litigation in a Narrow Sense*

PIL, and in particular air pollution PIL covers both tort-based and administrative lawsuits, which prepare for CCL in both theory and practice. In 2016, the Green NGO Friends of Nature sued the Gansu Branch of the State Power Grid, triggering the era of 'typical' CCL.

1 Proceedings

To solve the prevailing problem of renewables curtailment (wind and solar), the plaintiff, who has experience with air pollution lawsuits, initiated a PIL case against Gansu power grid for its inaction on mandatory requirements on connecting renewable energy providers to the power grid and purchasing a minimum number of hours from them. Core claims focus on providing the connection and the full purchasing service for renewables plants and compensating 0.17 billion RMB for eco-environmental damages.[74] The case was primarily dismissed by the Intermediate Court on the grounds that the Gansu power grid was an improper defendant and thus the suit failed to satisfy the conditions of PIL.[75] According to PIL procedural rules, the defendant must perform activities involving pollution discharge, environmental elements and media contamination, and ecology disruption. The plaintiff appealed to the High Court of Gansu. Overturning the procedural rules of the Intermediate

73 Zhao (n 60) 34.

74 Other claims are to stop the infringing (public environment interest) acts; publicly apologize in national and/or provincial media; pay for litigation expenses.

75 The Supreme People's Court, 'Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigation' (2015) (PRC) art 1.

People's Court, the appellate court designated the Mineral Court—a specialized green court in Gansu—to hear this case focusing on substantive rights and obligations.

2 Key Legal Issues and Judicial Responses

As the first example of CCL, the case involves a series of legal issues.[76] Firstly, the case principally resorts to energy laws (ie RPL).[77] In addition, EPL was invoked to support the argument that the defendant's refusal of connection and full purchasing led to persistently high pollution, high emissions and therefore infringed public environmental interests.[78] Secondly, the key legal controversy attributed to the defendant was whether the refusal of Gansu Power Grid can be deemed as the air-polluting behaviour or not. Understandably, the Intermediate Court denied this indirect causation, whilst the High Court has shown a relatively positive attitude toward a broad interpretation of 'polluter'.[79] Last but not least, there was a conceptual barrier about carbon emissions resulting from difference of views. In Chinese APPCL, the legal nature of CO_2 is unclear. Therefore, in this case, the large amount of compensation covered, according to the plaintiff, both the costs of air pollution abatement (virtual disposal cost approach)[80] and CO_2 mitigation measures.

Now, the Mineral Court is confronted with the substantive issue of eco-environmental damages compensation. Concretely speaking, there is no direct legal basis for climate change-related cases or for the compensation of carbon emissions damages. Clearly, the defendant Gansu power grid has not been identified by the inventory of key emission units as mentioned above, even though their indirect contribution to carbon emissions was not questioned in the proceedings. The subsequent process will be confronted with the key substantive issue of carbon emissions damages compensation.

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76 C Zhou, 'Addressing Dilemmas over Climate Change Litigation in China' (2019) 49(2) Hong Kong Law Journal 728.

77 Renewable Energy Promotion Law (PRC) art 14 (the connection and full purchasing service); art 26 (legal liability).

78 Environmental Protection Law 2014 (PRC) art 40.

79 Friends of Nature, 'Wind Curtailment of Gansu: We Restart' (*Friends of Nature,* 5 November 2019) <http://www.fon.org.cn/index.php?option=com_k2&view=item&id=13433:2019-01-28-03-10-35&Itemid=176> accessed 12 July 2020.

80 The same approach had been used in the case: *All-China Environment Federation v Jinghua Group Zhenhua Co Ltd*. The virtual disposal cost approach is used in China for the quantitative assessment of the damages caused by air pollution. According to this approach, uniform assessment standards are applied for per unit treatment cost of all air pollutants on the basis of pollution equivalent. Chen and Chen (n 67) 32.

Interestingly, it is only in a narrow-sense climate change lawsuit, placing climate change at the centre rather than the periphery of the litigation, that the question of whether a State's judiciary and environmental laws are climate-friendly or not, and to what extent, can be tested. This case is the first climate change (energy) litigation currently before the Chinese courts. A final decision is yet to be rendered.

IV Opportunities and Barriers

In China, CCL in general follows the two-track PIL (civil, administrative). The extent to which eco-environmental compensation litigation could be applied to tackling climate change is less clear, due to the conceptual vagueness and the limited practice. Opportunities and barriers co-exist for conducting CCL in China.

A *Opportunities*

Opportunities are apparent in aspects of legislation, judiciary and broad legal tradition and culture.

1 PIL Offsets the Statutory Inadequacy Relating to Climate Change

Due to PIL, NGOs are proactive in environmental co-governance promoted by the present 'Ecological Civilization Reform'. Very often, the experienced green NGOs participate in various areas of reform such as experimental and pilot programmes, and imported and/or newly-established institutions.[81] It is easier and more flexible for them, in comparison with the legislature, to address areas faced with theoretical and practical dilemmas. On a case-by-case basis, the close interaction between NGOs and environment courts offers tests and empirical solutions for law-makers. For instance, in 2019 a nationwide assessment was conducted on the implementation and enforcement of RPL for future legislative improvements. Renewables curtailment, connection service and purchasing measures reflected by the above energy lawsuit have been noticed and considered in this context.[82]

81 For instance, there are pilot programmes conducted for ecological civilization reforms on carbon emissions trading, newly-establishing green finance and so on.

82 Shanghai Municipal People's Congress, 'The NPC (National People's Congress) Investigates the Implementation of the Renewable Energy Promotion Law and Plans to Revise the Law Next' (*Shanghai Municipal People's Congress,* 24 May 2019) <http://www.spcsc.sh.cn/n1939/n1944/n1945/n2298/u1ai192332.html> accessed 10 July 2020.

Another example is the biodiversity protection lawsuit which makes good use of the preventive function of PIL. Friends of Nature initiated a PIL to protect green peafowls and their habitats from being destroyed by a proposed hydropower station, and recently won the case.[83] Despite its complex impacts on climate change, as the first preventive litigation in China, the case is a good illustration of judicial progress that allows lawsuits on environmental risks. Although the judicial interpretation leaves room for preventive lawsuits,[84] it is very hard to bring such a case because the standards of 'significant risk' still remain unclear.[85] In this case, the judge, when considering the impacts of a hydropower station on the habitat of green peafowls, adopted a broad interpretation of 'proximity' and considered it as an irreversible damage which could lead to the species' regional extinction. Moreover, the winning of the green peafowl case also demonstrates an open and positive attitude of the judiciary toward the principle of precaution which, however, is missing within the current legal framework, but proves to be crucial for addressing climate change issues.[86] Due to the defendant's aim of establishing a renewable power station, the effects of this case are unclear when it comes to climate change mitigation efforts. However, the judiciary's gesture towards the principle of precaution is truly meaningful for future CCL that covers not only mitigation but also adaption targeting capacity-building, preparedness and climate resilience.

In short, PIL tests the lack of law and offers possible solutions. As commented by Chu Juan, 'Emerging environmental PIL should be embraced as a public nuisance-style framework that stands as an independent tool to vindicate public environmental interests when statutory laws have been inadequate to prevent or redress harm.'[87] This testing role of PIL enables a climate-friendly

83 H Wang, 'A Victory for Nature, Court ruling in favor of wildlife habitat has far-reaching implications' *Beijing Review* (16 April 2020) <http://www.bjreview.com/Nation/202004/t20200410_800200594.html> accessed 10 July 2020.

84 The Supreme People's Court, 'Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations' (2015) (PRC) art 1: public interest cases shall be accepted by courts, where a conduct has significant risk of harming the public interest through polluting the environment or damaging the ecology.

85 D de Boer, 'China should Allow Lawsuits before Environmentally Risky Projects Begin' (*Chinadialogue,* 10 February 2020) <https://www.chinadialogue.net/article/show/single/en/11846-China-should-allow-lawsuits-before-environmentally-risky-projects-begin?-from=timeline> accessed 10 July 2020.

86 Environmental Protection Law 2014 (PRC) art 5 (principles) and art 6 (the prevention principle).

87 J Chu, 'Vindicating Public Environmental Interest: Defining the Role of Environmental Public Interest Litigation in China' (2018) 45(3) Ecology Law Quarterly 485.

judiciary in the short term, and is assumed to speed up the promulgation of a climate change act and improve the relevant legal framework. Environmental courts, as a major forum for carrying out judicial activism and hearing the PIL cases, might somehow play a test role of 'value-driven lawmakers' rather than 'rule-interpreting bureaucrats'.[88]

2 PIL Provides an Environmental-Friendly Judicial Atmosphere for CCL

CCL is confronted world-wide with common problems related to causation, the scope of defendants, and loss and damages measurement, for which Chinese PIL and environmental courts may provide new perspectives or solutions. Its legal arrangements on standing and justiciability, for instance, free the potential plaintiff from the requirement of direct stake (ie property and personal losses) in ordinary private interest litigation. In this regard, civil PIL aiming at the sustainable use of forest, land and the protection of biodiversity directly contributes to the efforts of climate change mitigation. Judges of environmental courts are active and constructive in various aspects of exercising discretion, adopting trial rules and providing guidance for litigants. For instance, they tend to adopt environmentally favourable interpretations when it comes to vague statutes and open concepts.[89] During trials, public participation is highlighted by the appointment of citizens as representatives of the public into collegial panels of PIL lawsuits. Besides, classic PIL cases are identified regularly by the Supreme People's Court as precedents, which helps shape and maintain an environmental-friendly atmosphere throughout the entire judicial system.[90] In this regard, the assignment of the Mineral Court for the *Gansu Power Grid* case demonstrates, in any case, an optimistic gesture. Moreover, the current practices of PIL diversify environmental tort liabilities. As far as climate loss and damages are concerned, they are increasingly likely to be remedied, compensated and restored. A mixed form of nuisance, ecological restoration and public apology combines traditional civil liabilities with modern environmental remedies. The global practices of CCL demonstrate that in tort law and air protection law (such as in the US, the Clean Air Act), public nuisance is a central tool for citizens to sue, seeking limits on GHG emissions

88 R Stern, *Environmental Litigation in China: A Study in Political Ambivalence* (CUP 2015) 2.

89 A good example is *Green Development Foundation v Ningxia Ruitai Ltd.* In this case, the judge broadly interpreted the key concept of 'Environment' and confirmed the standing of the plaintiff.

90 The Supreme People's Court, *White Paper on China's Environment and Natural Resources Trials* (n 16).

and damages for harm caused by past and current emissions.[91] Likewise, PIL gives weight to abatement of (public) nuisance and other corrective measures such as cease infringement, or elimination of hazards. In air pollution trials, courts usually order polluters to suspend production, shut down high emission equipment or install alternative facilities to meet emissions standards.[92] For the control of air polluting-GHGs, the above forms of liability generally adopted in air pollution PIL cases could be directly applied to climate change lawsuits. Another example is restoration liability. Environmental restoration, acknowledged as an essential liability of environmental tort, has experienced theoretical and practical developments and become practically applicable with flexible and constructive arrangements.[93] For instance, alternative eco-restoration is newly used in air pollution cases. Alternative forestry and reseed replace the direct treatment of polluted air, which actually contribute to climate change mitigation through the effects of carbon sink. Moreover, offset restoration, third-party treatment and restoration of ecological function provide various options for defendants to continuously fulfill their legal responsibilities. In particular, restoration of ecological function, including both temporary and permanent losses, has recently been applied in the case of forest resources protection. Indeed, the function of forestry, as natural carbon sink, has been recognized by the judiciary and integrated the relevant losses into compensation assessment.[94] Finally, the introduction of public apology (on the media at provincial level or above) aims to deter other potential emitters, polluters and ecological disruptors, and meanwhile to educate the public. In the context of the Ecological Civilization Reform, private sector actors are deemed as major responsible subjects and incorporated into the 'Green Credit

91 TD Hester, 'A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation' (2012) 31 Stanford Environmental Law Journal 49.

92 Zhao (n 60) 31.

93 Z Lv and H Dou, 'Reconstruction of Environmental Tort Liabilities System with Ecology Restoration' (2020) (2) Chinese Social Science 118.

94 The Supreme People's Court, 'Several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment (for Trial Implementation)' (2019) (PRC) art 15. According to it, under the eco-environmental damages compensation litigation, the plaintiff could claim for the compensation of temporary or permanent losses of eco-function, for which the environment court should give consideration in accordance with law. For instance, the climate change-mitigating function of forest ecosystems may suffer temporary or permanent losses. Moreover, where eco-function restoration is feasible, the cost of such restoration could also be included in the compensation award.

System'.[95] To those who are defendants in major public interest lawsuits, the rule of public apology places them under the consistent and intensive supervision of the entire society. Just like in the energy case, the plaintiff claimed for a public apology from the Gansu Power Grid. It is high time to educate the public about climate change impacts and the State's strategy of low-carbon development. Broad supervision resulting from public apology proves to be even more important in the course of the enforcement of judicial decisions. After the judges have ruled, people keep a close eye on whether the polluted, damaged environment has been fully restored by the defendants.

3 PIL Modernizes Legal Tradition and Internationalizes the Culture of the Judiciary

Two examples are presented here. The first one underlies the 'public trust doctrine'. China is a continental law country without a legal tradition on this doctrine. Nevertheless, the legislation and practices relating to eco-environmental damages compensation and litigation illustrate an increasingly open attitude towards the public trust doctrine. Under this kind of litigation, local governments procedurally have litigating rights on the basis of the 'public good' theory, for they are owners of the environmental good and the natural resources; whilst the public trust doctrine further justifies the claims for eco-damages compensation with substantive environmental rights. This practice and tendency are crucial for climate change-related litigation involving energy, wildlife, forest resources and protected areas.[96] The lack of legal tradition and realistic conditions for the acceptance of a public trust doctrine in China has been challenged. As discussed above, the judicial practice eases the way for the possible application of the public trust doctrine which has been referred to in international and comparative experiences to support the intra-generation equity for climate change lawsuits.[97] For the inter-generation equity and future environment rights concerned, it is still too early to draw the conclusion that the doctrine will be naturally adopted for CCL at least in the near future.

95 W Feng, Y Siyue, 'Does Green Credit Policy Work in China? The Correlation between Green Credit and Corporate Environmental Information Disclosure Quality' (2019) 11(3) Sustainability 733.

96 National Institute for Public Health and the Environment Ministry of Health, Welfare and Sport, *Nitrogen Action Program 2019*. Taking the Netherlands as an example, its Natural 2000 area now exhibits excessive nitrous oxide NOx (partly due to agricultural activities in the area, especially animal husbandry), which has negative impacts on the conservation of flora and fauna, such as eutrophication. To address climate change and develop sustainable agriculture, all permits for new activities in Natural 2000 have been cancelled.

97 Law Division UNEP (n 15) 23.

Nevertheless, uncertainty still remains on whether a GHG emitter is a potential 'compensator', or more directly a polluter and eco-disruptor. Therefore, whatever the results are, the *Gansu Power Grid* case will have far-reaching impacts on CCL, because the case is now confronting key substantive issues of compensable, remediable climate change losses and damages.

The second example is about the 'greening relation' between the judiciary and the administration. The national promotion of judicial activism is a key step toward improving the balance between the judiciary and the administration.[98] In China, there is a historic tension between a weak judiciary and a strong administration. The corrective justice of environmental law and administrative PIL enlarges the potential function of the judiciary, which works, consciously or unconsciously, as a case-based judicial review. Being a natural 'guardian' of collective environmental interests, the procuratorate with legitimate supervision powers have adequate capacity with respect to personnel, techniques and finance, as evidenced by the win rate of PIL.[99] In reality, under the coordinated control of GHG and air pollutants policies, administrative PIL could serve as a feasible tool for supervising the climate inaction and/or legally improper acts of governments. There are the growing threats of climate change nowadays in domestic China, and meanwhile the pressure from international society calling for stronger climate actions is increasing … In this context, the role of administrative PIL seems increasingly important. However, it is equally important to realize the essential difference between administrative PIL and judicial review. As practices of the procuratorate showed, Chinese administrative PIL could be appropriately characterized as an 'urging' and 'collaborative' prosecution.[100]

B *Potential Barriers*

Despite these opportunities, potential barriers should never be ignored. First of all, there is a long way ahead for the rights-based CCL. This chapter has focused on the potentials of PIL and the environment courts. It has been found that addressing climate change enriches public law rights like environmental rights and human rights. Yet, PIL in China cannot be regarded as rights-based litigation.[101] After all, fundamental environmental rights have not been confirmed

98 Gao (n 27) 55–6.

99 Gao (n 27) 55–6.

100 G Fu, 'Administrative Public Interest Litigation Demonstrates the Characteristics of Prosecution and Collaboration' (*The Supreme Procuratorate*, 1 March 2020), <https://www.spp.gov.cn/spp/llyj/202003/t20200301_455488.shtml> accessed 10 July 2020.

101 B Tan, 'Construction of China's Administrative Litigation for Climate Change-Climate Governance through Justice' (2017) 38(4) Dongyue Tribune 161.

in the legal framework.[102] Private interest litigation in this regard involves contractual disputes between energy companies, bio-technology companies and even ozone depleting substances (ODS) producers. Little attention however is given to private interest litigation as far as climate change is concerned, due to the marginal influences and the irrelevant motivations. Motivated by protecting contractual rights or fulfilling contractual obligations rather than achieving specific climate change goals, private litigants tend to ignore, or list climate change concerns at the periphery of their arguments.[103] Nevertheless, the enactment of the Civil Code[104] and the national opening of the carbon market seem likely to increase private rights-based litigation.

Secondly, uncertainties still exist for CCL in the 'big picture' and in the long run. As discussed above, the revision of the APPCL and the restructuring of the climate change department reflect that the coordinated control of air pollutants and GHGs is a potentially feasible strategy to address climate change, upon which CCL heavily relies. Provided that the synergy goals have not yet been realized, PIL (civil and administrative) on air pollution that managed to overcome important legal hurdles could still lend insights into future CCL in China.[105] However, it is vital to further realize the distinctions between air and climate change policy. No targets and requirements about the temperature of the atmosphere are included in new APPCL and air quality standards, while air pollution prevention and control is not directly contained in climate change policies.[106] In other words, the effectiveness of anti-air pollution PIL contribution to climate change mitigation can only be examined on a case-by-case basis. More importantly, as a legal context that explicitly mentions climate change, APPCL ultimately remains silent on the legal nature of CO_2.[107]

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102 For instance, Constitution (PRC) art 9 stipulated fundamental environmental duties of government. But there are no corresponding fundamental environmental rights. The Environmental Protection Law 2014 (PRC) sets forth the procedural environmental rights in ch 5.

103 Y Zhao, L Shuang and W Zhu, 'Prospects for Climate Change Litigation in China' (2019) 8(2) Transnational Environmental Law 14.

104 The Civil Code 2020 (PRC) contains the green principle, several green articles and a specialized environmental liability chapter. For example, section 7 ch 1 Legal Liability for Environmental Pollution and Ecological Disruption.

105 Zhao (n 60) 29.

106 W Gong, 'Challenges and Countermeasures for Coordinated Control of Atmospheric Pollutants and Greenhouse Gases – From the perspective of enforcement' (2017) 38(1) Journal of Southwest University for Nationalities (Humanities and Social Sciences Edition) 110.

107 In the process of revising APPCL, the 'Revision Draft for Review' submitted to the State Council in June 2014 has also developed, in addition to the provisions of art 2 on coordinated control and comprehensive management, a specialized chapter VI in order to

Uncertainties are left for daily judicial practice, just as the *Gansu Power Grids* case shows. When exercising discretion, judges make decisions based on various factors, like public policy concerns, opinions of academics and existing precedent.[108] Unfortunately, in the Chinese academic circle, a majority tends to regard CO_2 as an air component, or air intervening substance rather than an air pollutant.[109] This therefore inevitably restrains the potential for CCL in a narrow sense.

Last but not least, in the case of poor implementation and enforcement, it is questionable to what extent the current legal framework (environmental-climate laws) could provide the legal basis for CCL. Under the broad implementation approach, climate change litigants tend to efficiently use the currently limited sources for climate co-benefits. Energy laws and the first CCL illustrate this. Although the increasingly tightened interaction between energy laws and environmental law increases the likelihood for PIL, the implementation and enforcement of RPL and ECL prove to be poor in practice. This is in part due to the promotive nature of energy laws as a result of policy direction.[110] To fundamentally overcome this, a comprehensive Energy Act has been drafted and just opened for public consultation.[111] The draft distinctly responds to the needs related to climate change. In this law, for the first time, the energy industry is incorporated into the capacity building for climate change mitigation and adaptation.[112] Specifically, for instance, energy units should launch source reduction and control environmental risks, abating eco-disruption and GHG emissions in energy exploitation and utilization.[113] Another positive change is that liable subjects are expanded from energy generators to entire life-circle stakeholders including energy distributors and transmitters. Given that the *Gansu Power Grid* case happens in the era of the Energy Act, the likelihood

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regulate GHG emissions. The proposed new chapter mainly involves principles and emissions reduction plans, industrial restructuring, energy efficiency, low-carbon technologies promotion, energy efficiency labeling, carbon sink, international cooperation, etc. However, in the final version, the climate change chapter had been removed. Only the coordinated control article remains.

108 Zhou (n 76) 739–46.

109 Gong (n 106) 109.

110 S Schuman and A Lin, 'China's Renewable Energy Law and Its Impact on Renewable Power in China: Progress, Challenges and Recommendations for Improving Implementation' (2012) 51 Energy Policy 89.

111 B Wang, 'China Drafts New Energy Llaw in Opening-up Determination' *Global Times* (10 April 2020) <https://www.globaltimes.cn/content/1185236.shtml> accessed 12 July 2020.

112 Energy Act (draft) 2020 (PRC) art 19.

113 Energy Act (draft) 2020 (PRC) art 34.

of a positive outcome should, theoretically be improved. The Energy Act is expected to be issued soon, in any case before the Climate Change Act.

V Conclusion

Due to language and information barriers unfortunately, Chinese practice and experience are missing from the global database on CCL. This chapter attempts to bridge this gap by presenting the overarching picture, with in-depth examinations on critical cases, theoretical developments and judicial responses.

In general, climate change action in China is government-led. Policy tools like plans and programmes play a significant role in addressing climate change, which directly or indirectly influences courts and trials, litigants and judges. Government authorities, in particular local environmental ones, representing public environmental interests, could intervene and provide important evidence to support civil PIL, whilst their environmental governance failures may give rise to administrative PIL directly launched by the procuratorate.

Courts, by comparison, play a secondary, supplementary role. The extent to which they work depends, more or less, on the overarching environmental legal framework and the broad implementation approach would be fully and properly used. This is especially true when it comes to climate change adaptation litigation. However, in the favourable context of the Ecological Civilization Reform and encouraged judicial activism, the role of the judiciary becomes ever greater and increasingly strengthened. This is particularly the case of the environmental courts. The environmental courts nowadays have experienced CCL not only in a broad sense, but also in a narrow sense, for which environment-friendly legislation and judiciary certainly help. Can these environment-friendly practices in China be climate-friendly as well? This is no longer a question of 'yes or no', but today the question is rather one of 'what and how?'.

PART 2

Climate Change Litigation: Regional and International Perspectives

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CHAPTER 12

Climate Change Litigation in Africa: A Multi-Level Perspective

*Sam Adelman**

1 Introduction

Climate breakdown has led to a rapid increase in climate change litigation around the world, but there have been few cases specifically related to global heating in Africa.[1] This is surprising in light of the continent's vulnerability to climatic harms due to relatively low levels of development, resilience and adaptive capacities.[2] Between 75 and 250 million people on the continent are water stressed and yields in some countries from rain-fed agriculture are decreasing.[3] The UN Environment Programme estimates that heating of 2°C will threaten more than half the continent's population with malnutrition. Even if this dangerous level is avoided, the continent will face annual adaptation costs of $50 billion by 2050 and annual GDP losses equivalent to 2–4 per cent by 2040.[4]

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1 By January 2020, nearly 1,500 cases had been filed in more than 30 countries (See Sabin Center for Climate Change Law database, available at: <http://climatecasechart.com/> accessed 3 May 2020). Global heating is a term that better reflects the continuous increase in average global temperature than global warming; see, for example, J Watts, 'Global warming should be called global heating, says key scientist' *The Guardian* (13 December 2018) <https://www.theguardian.com/environment/2018/dec/13/global-heating-more-accurate-to-describe-risks-to-planet-says-key-scientist> accessed 3 May 2020.

2 M Berhanu and AO Wolde, 'Review on Climate Change Impacts and its Adaptation strategies on Food Security in Sub-Saharan Africa' (2019) 19(3) Agricultural Socio-Economics Journal 145.

3 S Mohapatra, *Climate Change, New Security Challenges and the United Nations* (Routledge 2018) 44.

4 'Responding to climate change' (*UNEP*) <https://www.unenvironment.org/regions/africa/regional-initiatives/responding-climate-change> accessed 2 March 2020.

This Chapter analyzes prospects and limitations of climate change litigation in the African context, considering cases that have been brought both before national courts, and at the regional level, including the landmark *actio popularis* brought by the Social and Economic Rights Action Center (SERAC) in 2001 on the right to a healthy environment in the African Charter on Human and Peoples' Rights. It considers directions for future litigation and draws conclusions on how these can be facilitated. To this end, Section II considers the classification of climate-related litigation and discusses the problems confronting litigants in many African countries. Section III examines avenues for litigation in the domestic, regional and international spheres. In Section IV, I discuss cases that have been brought in Nigeria, Kenya, Uganda and South Africa. In Section V, I suggest directions for future litigation in domestic tribunals and the African Court of Human and Peoples' Rights drawing on the example of the 2017 Advisory Opinion of the Inter-American Court of Human Rights (IACtHR) on the environment and human rights.[5] Section VI draws conclusions about climate change litigation in Africa to date.[6]

Climate change litigation in the Global South is less common, more low-key and has attracted less attention than in the North.[7] There is some debate in the literature about the definition of climate change litigation.[8] There are divergent views about what constitutes a climate change case. Markell and Ruhl define climate change litigation as federal, state, tribal or local administrative or judicial litigation in which litigant filings or tribunal decisions directly and expressly raise an issue of fact or law relating to the causes or impacts of climate change.[9] Peel and Osofsky define it as cases that have climate change at

5 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter).

6 J Setzer and R Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (Grantham Research Institute on Climate Change and the Environment, 4 July 2019) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> accessed 2 March 2021.

7 J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) American Journal of International Law 679; J Setzer and L Benjamin, 'Climate litigation in the Global South: constraints and innovations' (2020) 9(1) Transnational Environmental Law 77.

8 On the criteria that qualify cases as climate-related, see J Setzer and L Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10(3) Wiley Interdisciplinary Reviews: Climate Change 580.

9 D Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64(1) Florida Law Review 5, 21.

their core and raise climate-specific arguments or judicial analysis referring to climate change.[10] They distinguish between core and peripheral cases and note that a significant number of cases 'reflect a "peripheral" focus on climate change rather than having the issue at the "core" of the litigation'.[11] They identify five core cases in Africa, three from South Africa.[12]

Setzer and Benjamin identify five climate change litigation cases in Africa whereas Peel and Lin discern six.[13] Peel and Lin use five criteria: the identity of the plaintiffs and defendants; whether climate change was a core or peripheral issue; the nature of the claim, eg environmental impact assessments, public trust, rights violations, etc; whether the Paris Agreement or implementing legislation was relied upon in the claim or decision; and whether NGOs were involved.[14]

In Africa, development has generally taken precedence over environmental concerns even though it is clear that climate breakdown leads to underdevelopment and impoverishment.[15] Global heating tends to have less salience in public discourse and government policy although this may change as climatic harms such as droughts, desertification and flooding intensify. Setzer and Benjamin note that litigation in many Southern countries focuses upon development-related environmental threats such as hazardous waste and safe drinking water rather than directly upon global heating.[16] Likewise, Peel and Lin observe that climate change matters are more likely to be 'packaged up with a range of other issues, such as … pollution, land-use and forestry, natural resource conservation, disaster risk management, implementation of planning frameworks or environmental justice and rights claims'.[17] Litigation is more likely to address localized environmental issues which may have climate-related elements than to address climate change per se.

10 J Peel and HM Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2015); Peel and Lin (n 7).

11 Peel and Lin (n 7) 692.

12 Peel and Lin (n 7) 704.

13 Setzer and Benjamin (n 7); Peel and Lin (n 7).

14 Peel and Lin (n 7) 702.

15 W Scholtz, 'Human rights and the environment in the African Union context' in A Grear and L Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015) 415. However, Frans Viljoen argues that the African human rights framework is designed to reconcile the tension between environmental rights and the right to development and that it is 'more favourable to the individual, and more restrictive to the developmentalist state' (F Viljoen, *Human Rights Law in Africa* (OUP 2012) 272).

16 Setzer and Benjamin (n 7) 81.

17 Peel and Lin (n 7) 694.

One of the legacies of colonialism is that legal systems in many sub-Saharan States are relatively underdeveloped with weak legislative frameworks and civil society organizations.[18] Litigants face other obstacles, including lack of financial resources and expertise and, as elsewhere, standing, jurisdiction, costs, causation, and enforceability.[19] In Ghana, for example, national climate strategy and policy do not create legally enforceable commitments. There is no legislation or regulations on climate change. In addition to overcoming hurdles of standing, litigation in Ghana is notoriously slow, litigants must rely on private funding in the absence of legal aid, which may make cases unaffordable.[20] In the few environmental cases that have been filed, civil society organizations have focused on environmental issues such as pollution from extractive industries:

> [P]otential climate litigation is likely to be subsumed within wider issues of environmental protection, land-use, or natural resource conservation, with climate impacts a secondary consideration. [This] is perhaps a more practical way of tackling climate change concerns within the existing legal and political situation … and reinforcing the need for climate governance to be part of, rather than separate from, broader global environmental governance. This strategy, however, risks weakening any efforts to develop a body of climate change litigation.[21]

II Domestic, Regional and International Jurisdiction

A *Domestic*

The obvious place for litigants to seek relief for climatic harms is in domestic courts. In Africa, the ability to litigate is constrained by significant capacity constraints in many countries.[22] These include weak legislative and regulatory

18 M Mutua, 'Africa and the Rule of Law' (2016) 23 SUR-International Journal on Human Rights 159.

19 International Bar Association, *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change: An International Bar Association Climate Change Justice and Human Rights Task Force Report* (IBA 2020) ch III. The model statute provides a template for limiting litigation costs. It can be used by environmental activists to pressurize governments to legislate.

20 B Erinosho, 'Climate Change Litigation in Ghana: An Analysis of the Role of Courts in Enforcing Climate Change Law' (2020) 114 American Journal of International Law Unbound 51.

21 ibid 53.

22 Setzer and Benjamin (n 7).

frameworks, poor governance and enforcement mechanisms, limited access to financial, legal and technical resources, and the absence of strong human rights protections. In the Global South, plaintiffs 'are more likely to use litigation to compel governments to enforce existing policies for mitigation and adaptation, attempting to overcome implementation constraints.'[23]

Because the window to prevent the catastrophic consequences of global temperature increasing by more than 1.5°C is rapidly closing, climate change litigation must perform a dual role. First, it provides litigants with a means of redress for specific rights violations and climatic harms. Second, it is also an avenue for climate justice through strategic cases which 'aim to influence public and private climate accountability. These cases tend to be high-profile, as parties seek to leverage the litigation to instigate broader policy debates and change'.[24] Landmark cases such as *Ashgar Leghari* and *Urgenda* have addressed human rights violations or sought to compel governments to adhere to their commitments under the Paris Agreement.[25] The first judgment against a carbon major in a strategic case will signal a substantial breakthrough.

B *Regional*

At the regional level, the main instrument on which future climate change litigation might be based is the African Charter of Human and Peoples' Rights, which was adopted in 1981.[26] This paved the way for the creation in 1987 of the African Commission on Human and Peoples' Rights (ACHPR) to monitor implementation of the Charter (also known as the Banjul Charter).[27] Monitoring was enhanced by the establishment of the African Court on Human and Peoples' Rights (ACtHPR) in 2004.[28] Complainants must exhaust

23 Setzer and Benjamin (n 7) 3. Victory over a carbon major for climatic harms from the extraction and emission of fossil fuels is the Holy Grail of climate change litigation but is more likely to occur in a Northern jurisdiction.

24 Setzer and Byrnes (n 6) 2.

25 A*shgar Leghari v Federation of Pakistan* [2015] WP No 25501/201, Lahore High Court, 4 April 2015; *The State of the Netherlands* (*Ministry of Economic Affairs and Climate Policy*) *v Stichting Urgenda* (case number 19/00135, 20 December 2019), Netherlands Supreme Court. On these cases, see also B Ohdedar, 'Climate Change Litigation in India and Pakistan', chapter 5 in this volume and C Bakker, 'Climate Change Litigation in the Netherlands', chapter 9 in this volume.

26 African Charter (n 5).

27 The ACHPR is a quasi–judicial body for promoting and protecting human rights throughout the African continent. It came into force on 21 October 1986. The Commission interprets the African Charter and considers individual complaints of violations of the Charter.

28 The ACtHPR was established under the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/

domestic remedies before approaching either institution. Unlike the ACHPR, the Court has the power to issue binding decisions and, potentially significant for climate change litigation, NGOs have standing to bring cases before it. The ACtHPR has received a handful of environmental cases since 2005 but none specifically on global heating. Climate change litigation in the African system is impeded by the fact that only eight of the African Union (AU)'s 55 Member States have issued declarations under Article 34(6) of the 1998 Protocol to the African Charter that enables NGOs with observer status before the Commission and individuals to initiate cases directly in the ACtHPR.[29]

Article 3 of the 1998 Protocol gives the ACtHPR jurisdiction to issue advisory opinions on 'any legal matter relating to the Charter or other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission'. In contrast, the IACtHR and the European Court of Human Rights may only consider violations of the regional instruments they oversee. This gives the ACtHPR substantial scope for action to issue an advisory opinion or adjudicate a contentious case on global heating—a situation that it has not yet been faced with.

Applications to the Court may be made by the African Commission or other African intergovernmental organizations, by States involved in complaints before the ACHPR, and by States whose citizens' human rights are violated. Other States Parties to the Protocol with an interest in a case may be permitted by the Court to join proceedings. In addition, applications may be lodged directly by individuals and NGOs with Observer Status before the African Commission, but only against States which have accepted the competence of the Court under Article 5(3) of the Protocol.

Future climate change litigants in Africa might include individuals and communities displaced by climate breakdown under Article 20(3) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).[30] Women have the right to a healthy

AFCHPR/PROT (III). The ACtHPR hears cases from the 30 African Union (AU) Member States that have ratified the Protocol.

29 Status list of ratifications and declarations to the 1998 Protocol (ibid) <https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf> accessed 10 August 2020.

30 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) (2013) 52 ILM 397 (Kampala Convention). The Kampala Convention links migration to the

and sustainable environment under the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa as well as the environmental right in the Charter itself. The African Convention on the Conservation of Nature and Natural Resources and the African Charter on the Welfare of the Child might also provide a basis for litigation.[31]

Other avenues for potential litigants seeking climate justice are the Economic Community of West African States (ECOWAS) Court of Justice and the East African Court of Justice, which were initially created as economic courts but have acquired extensive human rights jurisdiction—the former through an explicit mandate, the latter through expansive interpretation of its mandate.[32] Neither court requires the exhaustion of local remedies.

C *International*

Two trends stand out in recent landmark climate cases: attempts to enforce the Paris Agreement and rights-based petitions. Both were prominent in *Urgenda*; the Court of Appeal of England and Wales ruling in January 2020 that plans for a third runway at Heathrow airport are illegal; and the *Thabametsi* case in

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adverse effects of climate change and Article 20(3) allows complaints by internally displaced persons to the ACHPR and the ACtHPR, but this has not yet occurred in relation to global heating.

31 African Convention on the Conservation of Nature and Natural Resources (adopted 15 September 1968, entered into force 16 June 1969) 1001 UNTS 4 (Algiers Charter); Revised African Convention on the Conservation of Nature and Natural Resources (adopted 1 July 2003, not yet in force) <https://au.int/sites/default/files/treaties/7782-treaty-0029_-_revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf> accessed 10 August 2020; African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990) <https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf> accessed 10 August 2020.

32 NC Maduekwe, 'The East African Court of Justice and a human rights approach to climate change' (*International Bar Association*, 2 October 2018) <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=9060a02f-a66a-4b0c-bcd9-29b4ccd923ae> accessed 2 May 2020. Supplementary Protocol A/SP.1/01/05 of 19 January 2005 gives the ECOWAS Court similar powers to the ACtHPR. In 2005, Supplementary Protocol A/SP1/01/05 gave the ECOWAS Court broad human rights jurisdiction. Judges in the East African Court of Justice and the Tribunal of the Southern African Development Community have unilaterally asserted their authority to adjudicate human rights claims. See KJ Alter, LR Helfer and JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107(4) American Journal of International Law 737.

South Africa.[33] Human rights were also central to the plaintiff's argument in *Ashgar Leghari*.[34]

Human rights arguably enjoy greater legitimacy than legislation because they highlight the individual impacts of climatic harms in the Anthropocene. Rights-based litigation tends to be retrospective but successful cases may deter future violations. Peel and Osofsky identify a discernible 'rights turn in climate litigation',[35] and courts appear willing to recognize the right to a healthy environment—for example in the 2017 Advisory Opinion of the IACtHR.[36] Liability for greenhouse gas emissions and other climatic harms is not addressed by international human rights law, but the Philippines Human Rights Commission has ruled that major fossil fuel companies have a moral obligation to respect human rights.[37]

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33 *R* (*on the application of Plan B Earth and Others*) *v Secretary of State for Transport* [2020] EWCA Civ 214; *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others*, Case No 65662/16, High Court, Order of 8 Mar 2017. See J-C Ashukem, 'Setting the Scene for Climate Change Litigation in South Africa: Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others [2017] ZAGPPHC 58 (2017) 65662/16' (2017) 13 Law, Environment and Development Journal 35; T-L Humby, 'The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs' (2018) 30 Journal of Environmental Law 145. The Paris Agreement was also referred to in *Friends of the Irish Environment v Ireland*, Appeal No 205/19 (Supreme Court of Ireland, 31 July 2020), which rejected the government's climate plan as too weak. See also C Bakker, 'Climate Change Litigation in the Netherlands', Chapter 9 in this volume; N Pleming and R Keating, 'Climate Change Litigation in the United Kingdom, Chapter 4 in this volume, and T-L Field, 'Climate Change Litigation in South Africa', Chapter 8 in this volume.

34 *Ashgar Leghari* (n 25). The plaintiff contended that climate change seriously threatens fundamental rights in Pakistan's 1973 Constitution, including the rights to life, dignity of person and privacy of home, and the right to property. See B Ohdedar, 'Climate Change Litigation in India and Pakistan', Chapter 5 in this volume.

35 J Peel and HM Osofsky, 'A Rights Turn in Climate Litigation?' (2018) 7(1) Transnational Environmental Law 37.

36 *The Environment and Human Rights* (*State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*), Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017). On environmental rights, see D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press 2011) and JH Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018).

37 In December 2019, the Commission on Human Rights of the Philippines announced that 47 carbon majors, the world's biggest polluters, could be held liable for their contributions to global heating. See 'National Inquiry on Climate Change' (*Republic of the Philippines Commission on Human Rights*) <http://chr.gov.ph/nicc-2/> accessed 12 April 2020.

The climate regime is also weak on human rights. The preamble to the Paris Agreement contains the sole reference to human rights in a multilateral environmental agreement to date. It requires parties to:

> respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

Inclusion of human rights in the operative part of the Paris Agreement—which was resisted mainly by developed countries—would have facilitated climate change litigation, but rights-based litigation is proving to be a productive strategy in landmark cases such as *Urgenda* and *Ashgar Leghari*.[38]

Individual petitions to international human rights bodies specifically on global heating are rare. The first climate cases before international human rights bodies were brought in 2019 and 2020.[39] In September 2019, 16 youths, including one from South Africa, submitted a complaint about climate change with the United Nations Committee on the Rights of the Child, but no case has emerged in Africa.[40]

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38 S Adelman, 'Human Rights in the Paris Agreement: Too Little, too Late?' (2018) 7(1) Transnational Environmental Law 17 (special issue on A Rights-Based Approach to Climate Change: Reflections on the Paris Agreement).

39 The Inter-American Commission on Human Rights is the only regional body to have received an individual petition: *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, Petition No P-413-05 (filed 8 December 2005) <http://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/> accessed 2 March 2021; and *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada* (filed 23 April 2013) <http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf> accessed 3 May 2020.

40 *Sacchi et al v Argentina et al*, Communication to the Committee on the Rights of the Child (filed 23 September 2019) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Not-available_petition-1.pdf> accessed 10 May 2020. The other case involved a claim for asylum due to climate displacement: UN Human Rights Committee, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016' (7 January 2020) UN Doc CCPR/C/127/D/2728/2016. For further details on these communications, see I Gubbay and C Wenzler, 'Intergenerational Climate Change Litigation', Chapter 15 in this volume; and M Feria-Tinta, 'Climate Change as a Human Rights Issue', Chapter 14 in this volume.

Every country in the African Union (AU) recognizes the right to a healthy environment through the Charter, its constitution or in legislation.[41] A singular advantage of the African system is that the environmental right in Article 24 of the Charter is collective.

III Climate-Related Litigation in Africa

A *Rights-based Litigation*

The African Charter was the first international treaty to recognize a collective right to a healthy environment. Article 24 states: 'All peoples shall have the right to a general satisfactory environment favourable to their development'. Peoples are not defined, but ACtHPR jurisprudence suggests that sub-State communities such as ethnic groups are bearers of the right along with individuals and the wider public.[42] The African Commission has argued that the right to a satisfactory environment is important for safety, quality of life, and to promote development.[43] Provisions similar to Article 24 have been included in several African constitutions since 1986, eg Benin, Cameroon, the Democratic Republic of Congo, and South Africa.

In 2001, the ACHPR became the first international human rights body to address the right to a healthy environment in the SERAC Communication.[44] The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights brought an *actio popularis* against Nigeria's military government and Shell alleging widespread environmental contamination from oil spills and gas flaring. The plaintiffs alleged that the resulting health problems of the Ogoni people in the Niger Delta violated their right to health, to the free disposal of their wealth and resources, and their right to a healthy environment.[45] The ACHPR identified 'four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights', and adumbrated the obligations that arise from

41 UNGA 'Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Africa Region' (14 February 2020) UN Doc A/HRC/43/53/Annex IV.

42 *African Commission on Human and Peoples' Rights v The Republic of Kenya* App no 006/2012 (15 March 2013) para 197. M van der Linde and L Louw, 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication' (2003) 3 African Human Rights Law Journal 167, 174.

43 *Social and Economic Rights Action Center* (*SERAC*) *and Center for Economic and Social Rights* (*CESR*) *v Nigeria* Comm no 155/96 (ACHPR 2001) para 51.

44 ibid paras 52–3.

45 Arts 16, 21 and 24 in the African Charter.

Article 24.[46] The Commission found that the Nigerian government 'did not live up to the minimum expectations of the African Charter' by failing to regulate the oil companies; to hold them accountable for these violations; to 'take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'; or to require and publicize 'environmental and social impact studies prior to any major industrial development.'[47]

The ACHPR has subsequently issued several resolutions on climate change, but the SERAC case is the only legal action it has taken in relation to climate change to date.[48] The case was not about climate change but may nevertheless serve as a precedent for climate change litigation on the basis of the Commission's finding that Article 24 of the African Charter imposes an obligation on the State to take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.'[49]

In 2009, the ACHPR urged Member States to ensure human rights safeguards are included in legal texts on climate change as preventive measures against forced relocation, unfair dispossession of property and loss of livelihoods. The Commission called for special protection for vulnerable groups such as children, women, the elderly, indigenous communities and victims of natural disasters to be included in any international agreement or instruments on climate change. The ACHPR decided to carry out a study on the impact of climate change on human rights in Africa. Resolution 271 in 2014 requested the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to undertake an in-depth study on the impact of climate change on human rights in Africa. This call was repeated in 2016 in Resolution 342 on Climate Change and Human Rights in Africa, which also encouraged comprehensive climate action to ensure the human rights of Africans are safeguarded to the greatest extent possible, with special protections for vulnerable groups.

In 2019, in Resolution 417, the ACHPR called upon AU members 'to ensure that contingency plans and emergency measures are put in place to increase

46 *SERAC v Nigeria* (n 43) para 44.

47 *SERAC v Nigeria* (n 43) paras 52, 53, 68.

48 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa—ACHPR/Res 153(XLVI)2009; Resolution on Climate Change in Africa—ACHPR/Res 271(LV)2014; Resolution on Climate Change and Human Rights in Africa—ACHPR/Res 342(LVIII)2016; Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change—ACHPR/Res 417(LXIV)2019.

49 *SERAC v Nigeria* (n 43) para 44.

the level of preparedness for an increase in extreme weather events and unstable weather patterns as the consequences of climate change intensify'; to fully integrate climate change and human rights protections into their development plans; to strengthen regional cooperation on adaptation, mitigation and responses to climatic harms; and called upon the AU to declare 2021 the African Union Year on Climate Change.

Peel and Lin identify rights-based arguments in five of the six cases filed or adjudicated in Africa (one in Nigeria and Uganda, three in South Africa).[50] These cases are also based upon other legal provisions such as the requirement for environmental impact assessments (EIAs) discussed in the following section.

B *Environmental Impact Assessments*

1 Nigeria

In Peel and Lin's classification, five of the six climate-related cases in Africa have relied upon legislation requiring environmental impact assessments.[51]

The first challenge to a government's failure to properly implement an environmental impact assessment came in 2005. Jonah Gbemre, representing the Iwherekan community in the Niger Delta filed suit against the Nigerian government and Shell for serious environmental harms from 'massive, relentless and continuous gas flaring'.[52] The federal court ruled that the flaring is a gross violation of the fundamental rights to life and dignity of the human person, as provided in Sections 33(1) and 34(1) of the Constitution and Articles 4, 16 and 24 of the African Charter, and that Article 24 logically includes the right to a 'poison-free, pollution-free and healthy environment'. This violation was due in part to the failure to carry out a compulsory EIA under the Environmental Impact Assessment Act of Nigeria (No 86 of 1992). The federal court relied upon the environmental right in the African Charter in holding that:

> The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment … imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological

50 Peel and Lin (n 7) 706.

51 The exception is *Mbabazi and Others v The Attorney General and National Environmental Management Authority* (Civil Suit No 283 of 2012).

52 *Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others* (FHC/B/CS/53/05). Peel and Lin (n 7) classify the case as peripheral because climate change did not feature in the pleadings or the court's decision.

> degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[53]

Kotzé and du Plessis regard the *Gbemre* case as 'a victory for the interpretation and application of environmental rights' despite the absence of a right to a healthy environment in Nigeria's Constitution, but 15 years on from the decision, the case remains on appeal and gas flaring continues.[54]

2 Kenya

In *Save Lamu*, local and foreign NGOs and members of the Lamu community challenged the granting of an EIA licence for the Lamu Coal-fired Power Plant, which would have been the first coal-fired power station in East Africa.[55] The National Environmental Tribunal set aside the licence because the National Environmental Management Authority had violated the National Environmental (Impact Assessment) Audit Regulations of 2003 by granting it without adequate public participation. The tribunal found the Amu Power Company's Environmental and Social Impact Assessment to be incomplete and scientifically insufficient because it failed to consider the Climate Change Act of 2016. The tribunal ordered a new assessment, but the case rumbles on in a succession of appeals.[56]

3 South Africa

Most EIA-related litigation has occurred in South Africa and is discussed in Field's chapter in this volume.[57] In 2017, the Earthlife NGO successfully challenged the approval of a licence for a coal-fired power plant based on a flawed EIA.[58] The decision is notable for the court's ruling that South Africa's

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53 *SERAC v Nigeria* (n 43) para 52.

54 L Kotzé and A du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' Journal of Environmental Law and Litigation (forthcoming) 25. Manuscript available at: <http://eprints.lincoln.ac.uk/36688/> accessed 16 December 2019.

55 *Save Lamu et al v National Environmental Management Authority and Amu Power Co Ltd* (Tribunal Appeal No Net 196 of 2016).

56 *Save Lamu & 5 others v National Environmental Management Authority* (*Nema*) *& another* [2019] eKLR, Appeal No 3 of 2018, rejected on 24 January 2019 <http://kenyalaw.org/caselaw/cases/view/167761> accessed 15 January 2020.

57 The South African cases are discussed in that chapter at the editors' request.

58 *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others*, Case No 65662/16, High Court, Order of 8 Mar 2017. See T-L Humby, 'The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs' (2018) 30 Journal of Environmental Law 145.

commitments under the Paris Agreement were a relevant consideration for the environmental review of a coal-fired power plant. This case inspired similar cases involving EIA s.[59] The potential of cross-pollination is demonstrated by an Indonesian case closely modelled on *Thabametsi*.[60]

C *Public Trust*

1 Uganda

Another example of cross-pollination is the 2012 case filed by the Greenwatch NGO against the Ugandan government on behalf of four local youths.[61] The case also demonstrates the importance of legal and financial support from the Global North. The plaintiffs argued that the government is a public trustee of the country's natural resources, including its atmosphere, and is obliged to protect them on behalf of current and future generations. Under Article 39 of the Constitution, '[e]very Ugandan has a right to a clean and healthy environment'. Article 237(2)(b) states that national or local government 'shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens.'[62] The plaintiffs argued that the government was violating its obligations under the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, which 'require parties to put in place powerful and legally binding measures to curtail climate change'.[63] The plaintiffs contended that the government's duties include sustainable use of natural resources to 'ensure that the atmosphere

59 *Khanyisa Thermal Power Station RF (Pty) Ltd and Others* (Case No 61561/17)*; Trustees for the Time Being of the GroundWork Trust v Minister of Environmental Affairs, KiPower (Pty) Ltd and Others* (Case No 54087/17). See also the Constitutional Court decision on coal mining in a strategic water zone in *Mpumalanga: Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* (Case No 50779/2017) [2018] ZAGPPHC 807; [2019] 1 All SA 491 (GP) (8 November 2018).

60 *Greenpeace Indonesia and Others v Bali Provincial Governor*, 2/G/LH/2018/PTUN.DPS (Denpasar Admin Ct, Jan 24, 2018). On South-South cooperation, see Peel and Lin (n 7) 705.

61 *Mbabazi and Others* (n 51). The litigation was supported by Our Children's Trust, the NGO that brought the *Juliana* case in Oregon that was dismissed by the Ninth Circuit Appeal Court in January 2020: US Court of Appeals for the Ninth Circuit, No 18-36082, DC No 6:15-cv-01517AA, Opinion, 17 January 2020.

62 See S Varvastian, 'A Natural Resource Beyond the Sky: Invoking the Public Trust Doctrine to Protect the Atmosphere from Greenhouse Gas Emissions' in H Tegner Anker and B Egelund Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia 2018).

63 *Mbabazi* (n 51) para 5(h).

is free from pollution for the present and future generations'; and to uphold the 'right to a clean and healthy environment'. They requested a declaration that the government is violating its public trust duty and an order compelling it to provide accurate information on national greenhouse gas emissions and a clear mitigation plan. In a preliminary hearing, the High Court ordered the parties to undertake a 90-day mediation process that failed to resolve the matter. The court held a hearing in May 2019 to enable the young plaintiffs to present evidence of the government's failure to take adequate mitigation and adaptation measures to protect young people and future generations but has taken no further action.

Since the case was brought, the Ugandan government has issued new climate change policy and published a draft bill that falls short on adaptation measures to mitigate water and food shortages, ill health and mass migration.[64]

D *Duty of Vigilance*

Uganda also features in *Friends of the Earth et al v Total*, a case initiated in France in January 2020. It is the first case under the corporate duty of vigilance law passed in 2017 that creates a binding obligation on parent companies to identify and prevent adverse human rights and environmental impacts resulting from their activities, companies they control, and subcontractors and suppliers with which they have established commercial relationships.[65]

Six NGOs (four Ugandan, two French) and several Ugandan farmers are suing Total for failing to adequately assess the threats to human rights and the environment from the Tilenga oil megaproject in Uganda and Tanzania.[66] It is estimated that the project could displace 50,000 farmers. The claim focuses on human rights and environmental pollution, but also alleges that the project's vigilance plan does not properly consider the greenhouse gas emissions likely to result from the project.[67]

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64 The Uganda National Climate Change Policy was published in 2015 <https://www.mwe.go.ug/sites/default/files/library/National%20Climate%20Change%20Policy%20April%202015%20final.pdf> accessed 20 June 2020. See also the National Environment Act, Act 5 of 2019.

65 See also M Torre-Schaub, 'Climate Litigation in France', Ch 6 in this volume. Discussions about similar legislation are taking place in the United Kingdom, the Netherlands, Germany, Finland, Switzerland and the European Commission.

66 The Ugandan NGOs are Friends of the Earth Uganda and NAVODA (Natural Resources, Environmental and Bio-diversity Conserving Organization). Total, Tullow Oil, and the China National Offshore Oil Corporation planned to drill more than 400 wells in six oil fields and construct a 900-mile pipeline to Tanzania.

67 In September 2019, Total SA suspended the proposed $3.5 billion crude export pipeline from Uganda to Tanzania after the collapse of a deal to buy a stake in Tullow Oil Plc's

The significance of the case is twofold. First, it may make European multinationals more accountable to local communities and reshape the way they do business in the Global South. Second, it demonstrates the potential for cooperation between litigants in the Global North and South despite the setback in January 2020, when the Nanterre High Court of Justice ruled that the case must be pursued in a commercial court.[68]

IV Future Directions

A *Litigation Based on Climate Change Legislation*

Climate change legislation in a growing number of countries provides possibilities for future litigation in Africa.[69] The climate-related aspects of *Thabametsi*, *Gbemre* and *Mbabazi* flowed from legislation on EIAs, energy resources, environmental problems such as pollution, and human rights law.[70] This suggests that the absence of climate change statutes is not an insuperable barrier to successful litigation. It also demonstrates that other bodies of law such as administrative law provide a wedge to enable litigants to introduce climate-related arguments to extend the scope of EIAs. Tort law is the basis of a substantial number of climate cases around the world. Nevertheless, litigation is facilitated by legislation that incorporates the Paris Agreement such as Kenya's Climate Change Act 11 of 2016 and South Africa's pending Act. As Lord Carnwath has pointed out:

> National legislatures bear the primary responsibility to give legal effect to the commitments undertaken by states under the Paris agreement. However, the courts will also have an important role in holding their governments to account, and, so far as possible within the constraints of

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oil fields in Uganda. See F Ojambo and P Burkhardt, 'Total Suspends Planned $3.5 billion Uganda-Tanzania Oil Pipe' (*Bloomberg*, 4 September 2019) <https://www.bloomberg.com/news/articles/2019-09-04/total-suspends-planned-3-5-billion-uganda-tanzania-oil-pipe> accessed 15 January 2020.

68 Tribunal Judiciaire de Nanterre, Ordonnance de Référé, 30 January 2020, N° RG: 19/02833 – N° Portalis DB3R-W-B7D-VIPX <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200130_NA_judgment-1.pdf> accessed 20 June 2020.

69 'Climate Change Laws of the World' (*Grantham Research Institute on Climate Change and the Environment*) < https://climate-laws.org/> accessed 2 March 2021.

70 Kotzé and du Plessis (n 54) 31.

> their individual legal systems, in ensuring that those commitments are given practical and enforceable effect.[71]

None of the 34 cases in the Global South classified by Peel and Lin as climate-related involved climate change legislation.[72]

Legislation incorporating the Paris Agreement gives litigants the possibility to hold governments to account for adaptation, mitigation policies and sustainable development policies, rights violations, and a just transition. The hybrid nature of the Agreement, which contains top-down and bottom-up elements, makes it possible for litigants to highlight disparities between a State's emissions and the targets in Articles 2 and 4 of the accord, or lack of ambition in its non-binding Nationally Determined Contribution. *Urgenda* and the *Heathrow* decision suggest that courts may be willing to assess States' emissions obligations on a proportionate basis.[73]

B *Advisory Opinions*

In addition to domestic litigation, Colombia's request for an advisory opinion on human rights and the environment from the Inter-American Court of Human Rights provides an example that might be followed in Africa.[74] When domestic remedies are exhausted or unavailable, an organization with standing might seek an advisory opinion from the ACtHPR, which has advisory jurisdiction under Article 4(1) of the 1998 Protocol.[75] This is likely to be a civil society institution because AU Member States have been relatively reluctant to seek advisory opinions and no right of individual petition has been introduced in respect of advisory opinions.[76] Plaintiffs would have to overcome hurdles

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71 Lord Carnwath JSC, 'Climate Change Adjudication After Paris: A Reflection' (2016) 28(1) Journal of Environmental Law 5, 9.

72 Peel and Lin (n 7) 708. Kenya's Climate Change Act of 2016 was referred to in the *Save Lamu* case discussed below.

73 *Urgenda* (n 25); *Heathrow* (n 33).

74 Inter-American Court of Human Rights, Advisory Opinion OC-23/17 (n 36).

75 Advisory opinions can be requested by Member States, the AU or any of its organs, or any African organization recognized by the African Union. In 2017, the ACtHPR narrowed standing in deciding that that recognition of NGOs by the AU is through the granting of Observer Status or the signing of a Memorandum of Understanding with the NGO. (App 001/2013 *Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (*SERAP*) (*Advisory Opinion*), 26 May 2017, para 64). As a result, NGOs paradoxically have broader standing in contentious matters for which they only require recognition by the Commission.

76 The Court can deliver advisory opinions on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the

such as standing and exhaust domestic remedies. But the impact of a positive advisory opinion could be substantial and reflect the willingness of courts in other jurisdictions to respond favourably to coherent legal arguments that reflect growing public alarm about the climate emergency. By September 2019, the ACtHPR had finalized 12 advisory opinions and one was pending. In contrast, the Inter-American Court, handed down ten advisory opinions before adopting its first decision in a contentious case.[77] Another difference is that the IACtHR has the competence to give an opinion about the compatibility of a State's domestic laws with the treaties within its jurisdiction.

Consideration has long been given by small island States in the Pacific to seeking an advisory opinion from the International Court of Justice on State obligations in relation to climate change. Advisory opinions avoid the need for individuals to seek redress (which is costly) and the political backlash that may result from contentious litigation between States.[78] Wewerinke-Singh and Salili argue that even though such opinions are not binding, they have the potential to clarify the rights and obligations of States, improve the negotiating hands of climate-vulnerable States in the UNFCCC, influence other areas of international law such as international trade law and investment arbitration, and empower citizens, local governments and non-governmental organizations in holding recalcitrant States to account before regional and domestic courts.[79]

The merits of a case in contentious proceedings can be considered by the ACtHPR through direct access by litigants or indirect access via the African Commission.[80] The Court can issue an opinion on any matter relating to the Charter or other relevant human rights instruments at the request of a Member State of the African Union, any of the organs of the AU, or any African

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Economic, Social and Cultural Council, the Financial Institutions, or any other organ of the African Union as authorized by the Assembly. By 2019, the Court's advisory jurisdiction had been requested 13 times.

77 CL Carneiro, 'The Inter-American Human Rights System' in Gordon DiGiacomo and Susan Kang (eds), *The Institutions of Human Rights: Developments and Practices* (University of Toronto Press 2019) 212.

78 CM Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion' (2018) 15(1) The Brazilian Journal of International Law 255, 276.

79 M Wewerinke-Singh and D Hinge Salili, 'Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change' (2019) 1 Climate Policy 8. See also D Bodanksy, 'The role of the international court of justice in addressing climate change: Some preliminary reflections' (2017) 49 Arizona State Law Journal 659.

80 The Court began functioning in 2006. Its capacity to deliver binding decisions complements the quasi-judicial mandate of the African Commission.

organization recognized by the AU provided that the matter is not related to a matter being examined by the Commission.[81]

An advantage of advisory opinions is their non-contentious nature in that they do not involve proceedings against Member States but rather an application to the Court to clarify a matter of law or to establish its position on a particular matter. AU members have indicated a strong preference for diplomatic rather than legal solutions.

The issue for which an advisory opinion is sought will be important, both to increase the likelihood that the ACtHPR will accept it and to achieve the broadest possible impact across the continent. Article 24 provides a collective right to a healthy environment, and the obligation to act jointly or collectively, which is explicit in relation to the right to development in the African Charter, may enable litigants to argue that States have positive extraterritorial obligations toward African peoples.[82] The SERAC strategy—which surprisingly has not been repeated—focused on a particular environmental problem and suggests that pollution amounting to ecocide might form the basis for a petition. This might be linked to deforestation or the incompatibility of ecologically unsustainable extractive development with the conception of sustainable development in *Agenda 2063: The Africa We Want*.[83] Adopted in 2015, the Agenda outlines the AU's 50-year development strategy and its aspiration for '[a] prosperous Africa based on inclusive growth and sustainable development'. Africa is expected to achieve 'environmentally sustainable and climate resilient economies and communities' by 2063. A request for an advisory opinion might also rely upon the Revised African Convention on the Conservation of Nature and Natural Resources, which reaffirms the responsibility of State Parties 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction'.[84] States should use environment and natural resources in a 'sustainable

81 The ACtHPR handed down its first decision on an environmental matter in 2017 in *African Commission on Human and Peoples' Rights v The Republic of Kenya* App no 006/2012, Decision, African Court on Human and Peoples' Rights, 216 (May 26, 2017). See L Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System' in JH Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018).

82 Scholtz (n 15) 404.

83 *Agenda 2063: The Africa We Want* (African Union Commission 2015).

84 'Stockholm Declaration on the Human Environment' United Nations Conference on the Human Environment (Stockholm 5 June–16 June 1972) (1973) UN Doc A/CONF.48/14/Rev 1, Principle 21; 'Rio Declaration on Environment and Development' United Nations

manner with the aim to satisfy human needs according to the carrying capacity of the environment'.[85]

In March 2016, Colombia requested an Advisory Opinion from the IACtHR on the application of the American Convention on Human Rights to severe degradation of the human and marine environment of the Wider Caribbean Region from the acts or omissions of Caribbean States through major new infrastructure projects.[86] The IACtHR held that the right to a healthy environment is a right in itself, that a wide range of human rights are threatened by environmental degradation, and that State Parties have obligations to respect and guarantee the rights in the American Convention, including undertaking EIAs when there is a risk of significant damage to the environment. The Court invoked international environmental law principles such as the precautionary principle and the duty to cooperate in good faith that have rarely been effective. Campbell-Duruflé and Atapattu argue that the Advisory Opinion has significant implications in relation to enforceability, causality, and extraterritoriality, and opens the possibility that the negative impacts of environmental degradation on economic, social and cultural rights are justiciable in and of themselves.[87] They maintain that the Opinion makes it possible to invoke human rights obligations:

> before climate-change-induced harms have materialized, as well as subsequently, thereby shifting the focus from establishing causation between the actions or omissions of states and climate harms to whether states have contributed to the *risk* that such harm will occur.[88]

There is no obvious impediment to a similar request to the ACtHPR.

The existence of the right to a healthy environment in domestic constitutions offers another avenue for a test case. A favourable decision from the South African Constitutional Court on the balance between the right to a healthy environment and what constitutes sustainable development would be a significant strategic victory. Article 24 states:

Conference on Environment and Development (Rio de Janeiro 3 June–14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (vol I) Principle 2.

85 Preamble to the Revised African Convention on the Conservation of Nature and Natural Resources (n 31).

86 Inter-American Court of Human Rights, Advisory Opinion OC-23/17 (n 36).

87 C Campbell-Duruflé and S Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8(3–4) Climate Law 321.

88 ibid 333 (emphasis in original).

Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
    (i) prevent pollution and ecological degradation;
    (ii) promote conservation; and
    (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

v Conclusion

To date, most of the cases discussed in this chapter have been brought on environmental problems that are climate-related to varying degrees. Given the thin dividing line between environmental and climate issues, we can expect this to continue, but climate breakdown is likely to increase the number of cases with a greater climatic component.

Several conclusions can be drawn from this brief survey of climate change litigation in Africa. First, climate change litigation in Africa is limited by capacity constraints. Constitutional rights provisions, regional instruments such as the African Charter and international human rights and climate law facilitate litigation, but domestic climate change legislation offers the most immediate basis for climate change litigation.

Second, strategic cases are likely to have an influence beyond the jurisdiction in which they are brought. Peel and Lin suggest that most Southern litigants seek to compel governments to translate adaptation and mitigation policies into action or to avoid environmental harms. Most cases reflect the linkage between greenhouse gas emissions and chronic environmental pollution problems.[89] Thus, while most cases are likely to focus upon localized environmental issues such as EIAs, the greater the degree to which they are based upon human rights claims and government commitments under the Paris Agreement, the greater will be their impact—as *Urgenda* and the *Heathrow* litigation demonstrate. The growing number of cases involving youth and intergenerational justice suggest that this might be a particularly productive path to follow.[90] Decisions in Southern tribunals are less likely to be regarded

89 Peel and Lin (n 7) 714, 716.

90 A Gage, 'Youth are leading the climate movement – in court and on the streets' (*West Coast Environmental Law*, 15 October 2019) <https://www.wcel.org/blog/youth-are-leading-climate-movement-in-court-and-streets> accessed 10 May 2020.

as landmarks even though their impact across the Global South may be significant. Litigants in one country adapt litigation strategies: for example, the *Mbabazi* case draws on the public trust doctrine used in the *Juliana* case in Oregon and is available in Southern jurisdictions such as India, Pakistan and South Africa.[91] A positive advisory opinion from the ACtHPR along the lines of that by the IACtHR that adumbrates State obligations to protect human rights and promote ecologically sustainable development may have a significant impact throughout the AU.

Third, the involvement of NGOs such as SERAC, Earthlife and Greenwatch, and environmental lawyers is an important way of overcoming capacity constraints.[92] *SERAC*, the South African EIA cases, *Mbabazi* and the *Total* case were brought by individual litigants or communities in conjunction with local or international NGOs as co-litigants or amici curiae. 50 per cent of climate cases in the Global South fall in this category.[93]

Fourth, as public alarm about global heating increases, it is important to take advantage of the apparent willingness of courts in different jurisdictions to hand down favourable decisions when presented with innovative, well-crafted legal arguments. With time running out, now is the time to litigate, even at the risk of failure. The history of climate change litigation suggests that cases are unlikely to succeed in the first instance but that success or failure in one country provides lessons for litigation strategies elsewhere.

Fifth, North-South cooperation can play a significant role. All the African cases have been against governments alone or together with companies such as Shell, but the case against Total SA indicates the potential for litigation directly against corporations. The *Total* case shows the potential for Southern involvement in Northern cases and vice versa. Other examples are the *Mbabazi* case and the so-called *People's Climate Case* filed with the European General Court in 2018 on behalf of families and youths from Europe, Kenya and Fiji.[94] This has benefits for both sides, including the transfer of knowledge, expertise and

91 *Mbabazi* (n 51). *Juliana v United States* 217 F Supp 3d 1224 (D Or 2016). See also M Gerrard, 'Climate Litigation in the United States', Chapter 2 in this volume.

92 NGO activities are restricted by legislation in many low and middle-income countries: UNEP, *Environmental Rule of Law: First Global Report* (UN Environment Programme 2019).

93 Peel and Lin (n 7) 710.

94 Case T-330/18 *Carvalho & Others v European Parliament and Council* EU:T:2019:324. The court denied the applicants' standing to bring the case. In July 2019, the applicants appealed to the European Court of Justice. See also M Willers, 'Climate Change Litigation in European Courts', Chapter 13 in this volume.

financial resources to Southern actors, and moral legitimacy, positive media exposure and public awareness-raising for Northern organizations.[95] As Peel and Lin formulated:

> Such partnering is strategic: Global South advocates benefit from the expertise and financial resources of Global North organizations, while the inclusion of Southern advocates' local knowledge and the stories of Global South plaintiffs may lend greater moral legitimacy to the claims advanced in court, as well as in accompanying media and public awareness-raising campaigns.[96]

South-South cross-pollination and solidarity is important because developing countries face similar problems. The *Thabametsi* and *Greenpeace Indonesia* litigation demonstrates the potential for litigants to learn from each other.

Former NASA climate scientist James Hansen has called for a wave of litigation to address the failure of the Paris Agreement, which he describes as 'eyewash' because it fails to price the social cost of carbon. Hansen believes national legislation is doomed to fail because governments are too beholden to lobbyists.[97] Since time is running out to prevent the global temperature from increasing by more than 1.5°C above pre-industrial levels, and catastrophic global heating, and because litigation is a lengthy process, all avenues at all levels in all places must be urgently considered.[98]

95 Peel and Lin (n 7).

96 Peel and Lin (n 7) 684.

97 J Watts, ' "We should be on the offensive" – James Hansen calls for wave of climate lawsuits' *The Guardian* (17 November 2017) <https://www.theguardian.com/environment/2017/nov/17/we-should-be-on-the-offensive-james-hansen-calls-for-wave-of-climate-lawsuits> accessed 12 May 2020.

98 V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) <https://www.ipcc.ch/sr15/> accessed 29 March 2021.

CHAPTER 13

Climate Change Litigation in European Regional Courts: Jumping Procedural Hurdles to Hold States to Account?

*Marc Willers**

1 Introduction

A *The Impact of Climate Change on Human Rights and Poverty*

In 2019 the UN High Commissioner for Human Rights, Michelle Bachelet, described climate change and its threat to human rights in the following terms:[1]

> Climate change is a reality that now affects every region of the world. The human implications of currently projected levels of global heating are catastrophic. Storms are rising and tides could submerge entire island nations and coastal cities. Fires rage through our forests, and the ice is melting. We are burning up our future – literally … The world has never seen a threat to human rights of this scope. This is not a situation where any country, any institution, any policy-maker can stand on the sidelines. The economies of all nations; the institutional, political, social and cultural fabric of every State; and the rights of all your people – and future generations – will be impacted.

In the same year Philip Alston, the UN Special Rapporteur on extreme poverty and human rights, reported on the impact of climate change on poverty[2] and said:

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1 M Bachelet, 'Opening statement by UN High Commissioner for Human Rights Michelle Bachelet' (Global update at the 42nd session of the Human Rights Council, Geneva, 9 September 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E> accessed 19 February 2020.

2 UN Human Rights Council, 'Climate change and poverty: Report of the Special Rapporteur on extreme poverty and human rights' (17 July 2019) UN Doc A/HRC/41/39, para 1.

> Human rights law requires a remedy for violations and climate change is no different. Given what is now known about the widespread harm and human rights impact of either 2°C or even 1.5°C of warming, it is also necessary to determine what measures States must take to provide the required remedies for the all-but-certain human rights violations that climate change will bring…[3]

Summarizing his conclusions, Philip Alston said:

> Although climate change has been on the human rights agenda for well over a decade, it remains a marginal concern for most actors. Yet it represents an emergency without precedent and requires bold and creative thinking from the human rights community, and a radically more robust, detailed, and coordinated approach.[4]

B *The Paris Agreement*

At the global level 195 States have ratified the Paris Agreement and committed to the aim of holding:

> the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.[5]

That said, the Paris Agreement does not lay down the pathways that States should follow in order to meet its aim or prescribe a specific approach to the distribution of burden sharing that States Parties should adopt to keep global warming to well below 2°C above pre-industrial levels. Rather, the Paris Agreement provides for the achievement of this collective target through a 'bottom-up' approach according to which each State Party must 'prepare, communicate and maintain successive nationally determined contributions that it intends to achieve'.[6] Thereafter every five years each State Party must communicate a new nationally determined contribution which must:

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3 ibid para 82. See also V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) <https://www.ipcc.ch/sr15/> accessed 21 June 2020.

4 V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) 'Summary for Policymakers' at the beginning of the report. <https://www.ipcc.ch/sr15/> accessed 21 June 2020

5 Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 (Paris Agreement) art 2(1)(a).

6 ibid art 4(2).

represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances[7]

C *The European Union Declares a Climate Emergency*

The fact that we are in the midst of a climate emergency has now been formally acknowledged by the European Parliament[8] and the European Commission.[9] However, whilst governments across Europe are, at least outwardly, indicating that they understand the threat posed by climate change, the policies they have adopted to achieve the goal set in the Paris Agreement seem widely off the mark.[10] Meanwhile, environmental activists and human rights defenders have taken up the gauntlet thrown down by Philip Alston and other experts and begun challenging the adequacy of steps taken by governments to tackle climate change in European regional courts. This chapter examines the progress of two cases recently brought before the Court of Justice and the General Court of the European Union (EU) (Section II); as well as the potential for cases to be brought in the separate, and not to be confused, jurisdiction of the European Court of Human Rights (Section III).

II Tackling Climate Change in the Courts of the European Union

A *EU Law*

At the time of writing, the EU comprises 27 Member States (with the United Kingdom having left the EU on 31 January 2020 and entered a transition phase which is scheduled to end on 31 December 2020).[11] The main sources of primary EU law are the Treaty on European Union (TEU) and the Treaty on the

7 ibid art 4(3).

8 EU Parliament resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)) <http://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.html> accessed 19 February 2020.

9 EU Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

10 M Roelfsema et al, 'Taking stock of national climate policies to evaluate implementation of the Paris Agreement' (2020) 11 Nature Communications, Article number 2096 (2020) <https://www.nature.com/articles/s41467-020-15414-6> accessed 21 June 2020.

11 'Relations with the United Kingdom' (*European Commission*) <https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/brexit-brief/transition-period_en> accessed 21 June 2020.

Functioning of the European Union (TFEU). Significantly, Article 191 of the TFEU provides that:

1. Union policy on the environment shall contribute to pursuit of the following objectives:
   - preserving, protecting and improving the quality of the environment,
   - protecting human health,
   - prudent and rational utilisation of natural resources,
   - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Article 288 of the TFEU provides for two main forms of secondary legislation: regulations and directives. Regulations are the most direct form of secondary EU law—they are binding in their entirety and directly applicable in all Member States. Directives are binding, as to the result to be achieved, upon each Member State to which they are addressed, but it is left to the national authorities to decide on the form and method of implementing directives.

In 2000, the EU Member States adopted the Charter of Fundamental Rights of the EU (the Charter).[12] At that time, it amounted to a non-binding declaration of the list of human rights to which the Member States ascribed. However, since the Lisbon Treaty entered into force in 2010, the Charter has had the same legal status as the TEU and TFEU.[13] The EU institutions are bound to act in accordance with the Charter and the Member States must comply with its provisions when they are implementing EU law. Thus, Article 51(1) of the Charter states that:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with regard for the principle of subsidiarity and to the Member States only when they are implementing EU law. They shall therefore respect the rights, observe the principles and

12 <https://www.europarl.europa.eu/charter/pdf/text_en.pdf> accessed 21 June 2020.

13 TEU Article 6(1).

promote the application thereof in accordance with their respective powers and respecting the limits of the powers conferred on it in the treaties.

The Charter draws together the rights that Member States have already committed to elsewhere and protects civil, political, economic, social and cultural rights, including: Article 2 protects the right to life; Article 3 protects the right to physical and mental integrity; Article 7 protects the right to respect for one's private and family life, home and communications; Article 17 protects the right to property; Article 24 protects the rights of children; and Article 37 provides that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the EU and assured in accordance with the principle of sustainable development.

1 Actions for Annulment

Article 263 of the TFEU provides that 'natural or legal persons' (that is, individuals, companies, associations, foundations and other incorporated bodies) may bring an action for annulment of EU legislative acts and other reviewable acts before the General Court at first instance, with appeals on a point of law being heard by the Court of Justice.[14] The grounds for annulling a legally binding piece of EU legislation arise when there is: a lack of competence; an infringement of an essential procedural requirement; an infringement of the EU Treaties, including the Charter, or of any rule of law relating to their application; a misuse of powers.

However, the admissibility requirements for such actions are very strict and include a requirement that an EU act is of 'direct and individual concern' to the person bringing the case. According to EU case law, the notion of direct concern presupposes that the impugned EU legislative act:

- affects the legal situation of the person concerned directly;[15] and
- leaves no discretion to those responsible for its implementation, making the implementation of the act automatic, and without the involvement of intermediate rules.[16]

Furthermore, an EU legislative act will only be of individual concern to a person bringing the action if, in accordance with what has become known as the '*Plaumann* test',[17] it affects that person by reason of certain attributes that are

14 Article 256(1) of the TFEU.

15 See Case C-486/01 P *Front National v European Parliament* [2004] ECR I-6289, paras 34–43.

16 See Cases 41–4/70 *International Fruit Co and Others v Commission of the European Communities* [1971] ECR 411, paras 23–8.

17 Following the case of *Plaumann:* Case C-25/62 *Plaumann & Co v Commission of the European Economic Community* [1963] ECR 95, 107.

peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually.

2 Preliminary Reference Procedure

There is another way to challenge the validity of EU law. Article 267 of the TFEU establishes the preliminary reference procedure which makes provision for a national court or tribunal to ask the Court of Justice of the EU to give a preliminary ruling if it is faced with a question of the validity of EU law.

B *Climate Change Cases in the EU Courts*

A number of climate change cases have been brought before the Court of Justice and the General Court of the EU, the majority of which have focussed on such matters as the allocation of allowances under the EU's Emissions Trading Scheme. However, applicants in two recent cases have gone further and challenged EU legislative acts which set the EU's climate change targets and permit reliance on biomass for meeting those targets.

1 *Carvalho and Others v The EU Parliament and Council*[18]

In *Carvalho* (also known as *'The People's Climate Case'*) 10 families and the Saami Youth Association Sáminuorra applied to the General Court for the annulment of three pieces of EU legislation,[19] arguing that the EU's 2030 climate target (of reducing domestic greenhouse gas emissions by at least 40% compared to 1990 levels) was insufficient to avoid dangerous effects of climate change, conflicted with the EUs environmental policy laid down by Article 191 of the TFEU, and threatened their fundamental rights protected by the Charter.

The General Court dismissed the application having concluded that the applicants had not established that they had standing to bring the action because they could not satisfy the *Plaumann* test and demonstrate that they were individually concerned. When doing so the General Court rejected the applicants' argument that the effect of climate change and, by extension, the infringement of fundamental rights, is unique to and different for each individual. It accepted that every person is likely to be affected by climate change in one way or another, but held that the applicants' arguments would render the requirements of Article 263 of the TFEU 'meaningless'.

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18 Case T-330/18 *Armando Carvalho and Others v European Parliament and Council* EU:T:2019:324.

19 They are the 2018 amendment of the Emission Trading Scheme Directive; the Effort Sharing Regulation; and the Land Use, Land Use Change and Forestry Regulation.

The applicants had argued that the *Plaumann* test of individual concern could render EU legislation practically immune from judicial review and had invited the General Court to adapt its requirements. However, the Court held that Article 47 of the Charter does not confer an 'unconditional entitlement' to bring a claim before the Courts of the EU and that the right to seek redress before national courts (which includes the right to seek a preliminary reference under Article 267 of the TFEU) provides sufficient judicial protection.[20]

The applicants have appealed to the Court of Justice and argue that:

– the General Court erred in concluding that they did not satisfy the *Plaumann* test for establishing individual concern – given that the three legislative acts permit the emission of greenhouse gases that will affect each applicant in a distinctive factual way and infringe their personal fundamental rights protected by the Charter; and
– in the alternative, the General Court should have modified the *Plaumann* test to take account of the compelling challenge posed by climate change and the fact that the applicants' case was founded upon the need to protect their individual fundamental rights, including a guarantee of effective legal protection of those rights.

Thus, the applicants invite the Court of Justice to conclude that the requirement that they demonstrate an individual concern will be established where a legislative act infringes a personal fundamental right to a serious degree, or alternatively, interferes with the essence of the right. We shall have to wait and see whether the Court of Justice accepts that proposition.

2 *Sabo and Others v The EU Parliament and Council*[21]

The *Sabo* case (also known as the '*EU Biomass case*') was launched on 4 March 2019, a few months before the General Court dismissed the *Carvalho* application. The applicants were a group of individuals and civil society organizations who sought the annulment of provisions of the Renewable Energy Directive 2018,[22] primarily on the ground that they permit energy from forest biomass to contribute towards the EU's climate target for 2030.

The applicants argued that the Directive violates Article 191 of the TFEU because the offending provisions: fail to preserve, protect or improve the quality

20 *Plaumann v Commission* (n 17) paras 45–53.

21 Case T-141/19 *Sabo and Others v European Parliament and Council* EU:T:2020:179.

22 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) (Text with EEA relevance) [2018] OJ L328/82 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L2001&from=EN> accessed 21 June 2020.

of the environment, to protect human health, or to use natural resources prudently or rationally; do not aim at a high level of environmental protection; fail to rectify damage at source; fail to apply the precautionary principle or make the polluter pay; ignore available scientific data on the climate change impacts of burning forest biomass; and in addition they violate a number of fundamental rights protected by the Charter.[23]

As for admissibility, the applicants argued that the Directive: is of direct concern to them because of the effect that including forest biomass among the sources of renewable energy has on their legal situation; leaves no discretion to those responsible for its implementation; and is of individual concern to them because they are part of a limited category of persons that is affected by the deforestation and the operation of power plants resulting from the Directive's implementation. In support of their position, they also alleged an infringement of their individual legal interests and their fundamental rights protected by the Charter.[24] Not surprisingly, given its judgment in *Carvalho*, the General Court concluded that the applicants' arguments could not succeed for the following reasons.

First, the Directive constitutes an act of general application in that it applies to objectively determined situations and entails legal effects for categories of persons envisaged in a general and abstract manner. It establishes a common framework for the promotion of the production of renewable energy and sets a target for the reduction of greenhouse gas emissions by increasing the use of energy from renewable sources with the aim of enabling the EU to comply with its commitments under the Paris Agreement. It follows that it is not possible to identify a limited category of persons concerned by the provisions of the Directive that are at issue. The Directive applies to all persons, both natural and legal. The applicants did not put forward any factor recognized by case law which would be capable of distinguishing them individually as addressees. Furthermore, they themselves acknowledged that the protection and regulation of the environment is something which affects 'everyone in both current and future generations', a statement which is difficult to deny and which militates against the notion of individual concern. Accordingly, even assuming that the Directive does have a negative impact as regards forests and the operation of power plants, the applicants are not in a situation that is different from that of the indeterminate and indeterminable body of

23 See the application for annulment <http://eubiomasscase.org/wp-content/uploads/2019/08/EU-Biomass-Case-Main-Arguments.pdf> accessed 21 June 2020.

24 ibid.

EU citizens, which prevents the contested Directive from being of individual concern to them.

Secondly, according to case law, the protection conferred by Article 47 of the Charter does not require that an individual should have an unconditional entitlement to bring an action for annulment of an EU legislative act directly before the Courts of the EU.[25] Article 263 of the TFEU on the one hand and Article 267 of the TFEU on the other have established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions. The TFEU thus guarantees that natural or legal persons who cannot, by reason of the conditions of admissibility laid down by Article 263 of the TFEU, apply to the Courts of the EU for the annulment of legislative acts of general application are nevertheless able to challenge their validity before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 of the TFEU.[26]

C *Conclusion*

The General Court's decisions in *Carvalho* and *Sabo* demonstrate just how difficult it is for individuals and civil society organizations to use the Article 263 annulment procedure to challenge the validity of EU legislation directly before the EU Courts. The *Plaumann* test has been the subject of criticism by jurists and commentators[27] but the Court of Justice has thus far resisted attempts to relax its strictures. Whether it will take the opportunity to modify the *Plaumann* test so that individuals can challenge EU legislation directly when determining the *Carvalho* appeal remains to be seen. But if it does so then EU citizens will at last have the access to environmental justice that the EU guaranteed they would enjoy when it signed the Aarhus Convention[28] back in 1998.

25 C-583/11 P, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* EU:C:2013:625, para 105.

26 ibid paras 93- 5.

27 See, for example, Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, Opinion of AG Jacobs <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CC0050&from=EN> accessed 21 June 2020.

28 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention) <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> accessed 21 June 2020.

III Tackling Climate Change in the European Court of Human Rights

A *The Council of Europe*

The Council of Europe is a pan-European organization based in Strasbourg which was created in 1949 and is now made up of 47 Member States, encompassing all the countries in Europe (apart from Belarus) and including Russia and Turkey. The Council of Europe is a distinct international institution from the EU, albeit all 27 Member States of the EU are also members of the Council of Europe. It is important to note that the UK's membership of the Council of Europe will not be directly affected by its withdrawal from the EU.

One of the Council of Europe's aims is to maintain and further the respect of human rights and fundamental freedoms.[29] To this end, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention)[30] was opened for signature in Rome in 1950 for the Council of Europe Member States to sign. The Convention came into force in September 1953 and the European Court of Human Rights (ECtHR) was established in 1959 to ensure that Member States comply with the Convention.

B *The European Convention on Human Rights*

The Convention sets out legally binding obligations on contracting States Parties to guarantee that the rights enshrined within it are available to everyone in their jurisdiction. Some of the key rights protected by the Convention and its protocols are: the right to life (Article 2); the right to respect for private and family life, home and correspondence (Article 8); the prohibition of discrimination in the enjoyment of the rights set forth in the Convention (Article 14); and the right to peaceful enjoyment of possessions (Article 1 of Protocol 1).

C *Applications to the European Court of Human Rights*

1 Jurisdiction

In accordance with Article 1 of the Convention:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

29 Article 1(2) of the Statute of the Council of Europe.

30 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 21 June 2020.

Thus, all individuals who allege that their rights have been violated when they are in the territory of a contracting State are entitled to complain. The acts of Member States performed outside of their territory may amount to exercise by them of their jurisdiction within the meaning of Article 1. Whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under the Convention.[31] Furthermore, acts which are 'performed within … national boundaries [but] which produce effects outside' those boundaries may give rise to jurisdiction in certain circumstances.[32]

2 Standing

Article 34 of the Convention provides that the ECtHR may receive applications from 'any person, non-governmental organization or group of individuals' claiming that a Member State has violated one or more of their rights protected by the Convention. Applicants only have standing if they are an actual victim, potential victim or indirect victim of an alleged violation.

An actual victim is one who has already been personally affected by the alleged violation. No specific detriment has to be suffered in order to qualify as a victim for the purposes of the Convention.[33] Potential victims are individuals at risk of being directly affected by a law or an administrative act.[34] A potential future violation may be sufficient in itself to render the applicant a victim.[35] An applicant does not have to show that the measure in question has caused specific prejudice or damage.[36] Indirect victims are those who have suffered as a result of a violation of the Convention rights of another.[37] This could occur, for example, where the applicant is a relative of someone who is deceased and where there is an allegation that the action

31 See *Öcalan v Turkey* App no 46221/99 (2005) 41 EHRR 45.

32 See *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995) para 62.

33 See *Eckle v Germany* App no 8130/78 (1982) Series A no 51, (1982) 5 EHRR 1, para 66.

34 See *Ahmed v Austria* App no 25964/94 (1997) 24 EHRR 278; *Marckx v Belgium* App no 6833/74 (1979) Series A no 31, (1979) 2 EHRR 330, para 27; *Norris v Ireland* App no 10581/83 (1988) Series A no 142, (1991) 13 EHRR 186, para 31.

35 See *Campbell and Cosans v United Kingdom* App nos 7511/76 and 7743/76 (1982) Series A no 48, (1982) 4 EHRR 293, para 26; *Soering v United Kingdom* App no 14038/88 (1989) Series A no 61, (1989) 11 EHRR 439, para 94.

36 See *Eckle v Germany* (n 33) para 66.

37 See *Abdulaziz, Cabales and Balkandali v United Kingdom* App nos 9214/80, 9473/81 and 9474/81 (1985) Series A no 94, (1985) 7 EHRR 471.

or omission that caused the death constituted a breach of Article 2 of the Convention.[38]

3 Exhaustion of Domestic Remedies

Article 35 of the Convention provides that the ECtHR is only able to deal with a complaint after all domestic remedies have been exhausted so as to provide the State with the opportunity to comply with the Convention's requirements. The only remedies that Article 35 requires to be exhausted are those that are available and sufficient and relate to the breaches alleged. A remedy will not be considered effective if it will 'bear no fruit within sufficient time'[39] or where it is purely theoretical. The burden is on the Member State invoking the rule to prove that at the relevant time, there existed an available and sufficient remedy.[40] The State must explain with sufficient clarity the effective remedy that the applicant has failed to pursue and demonstrate that the applicant had effective access to that remedy. Once the State has proved the availability of an unused domestic remedy, then the applicant has to demonstrate that the remedy is ineffective or that special reasons exist why that remedy was not pursued. To be effective, a remedy must be capable of remedying the violation and be practically and directly 'accessible' to the individual concerned. Thus, discretionary remedies that cannot be sought by the applicant himself will not be considered 'effective' or 'accessible'. An individual is not required to try more than one way of redress when there are several available. The Court only expects the most obvious and sensible remedy to be pursued, reflecting the practical realities of the individual's position and does not require applicants to pursue remedies which have no prospect of success.

D *ECtHR Environmental Case Law*

Given its remit, the ECtHR could prove to be a vital supra-national tribunal for those seeking to hold governments to account for failing to tackle climate change. However, the ECtHR has yet to give a judgment on a climate change-related case. That said, the ECtHR has pronounced judgment in a number of environmental cases which provide the foundation stones on which to build a

38 See, for example, *Fedorchenko and Lozenko v Ukraine* App no 387/03 (ECtHR, 20 September 2012).

39 *Pine Valley Developments Ltd and Others v Ireland* App no 12742/87 (1992) 14 EHRR 319, para 47.

40 See *Deweer v Belgium* App no 6903/75 (1980) Series A no 35, (1979–1980) 2 EHRR 439, para 26.

successful climate change case, as was done at the domestic level in the landmark *Urgenda* case.[41]

1 Case Law Relating to Article 2 of the Convention

Article 2(1) provides that:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

In *Öneryildiz v Turkey*[42] the ECtHR held that Article 2 imposes a positive duty on the State 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'[43] and that, in the context of dangerous activities, 'special emphasis must be placed on regulations geared to the special features of the activity in question' which 'must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks'.[44]

The ECtHR has also stated that whenever a State undertakes or organizes dangerous activities, or authorizes them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum.[45] Similarly, in *Budayeva v Russia*,[46] the Court held that: '[t]he scope of the positive obligations [under Article 2] imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation';[47] and that Article 2 imposes a duty 'to do everything within the authorities' power in the sphere of disaster relief for the protection of that right [to life]'[48] That said, Article 2 will

41 *The State of the Netherlands* (*Ministry of Economic Affairs and Climate Policy*) *v Stichting Urgenda*, English version of the judgment available on the SCCCL Database at <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf> accessed 18 May 2020.

42 App no 48939/99 (ECtHR, 30 November 2004).

43 ibid para 89.

44 ibid para 90.

45 *Mučibabić v Serbia* App no 34661/07 (ECtHR, 12 July 2016) para 126.

46 *Budeyeva v Russia* App no 15339/02 inter alia (ECtHR, 20 March 2008).

47 ibid para 137.

48 ibid para 175.

not be interpreted as imposing an impossible, or in the circumstances, disproportionate burden being placed on States.[49]

2 Case law relating to Article 8 of the Convention

Article 8 of the Convention provides that:

> 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In *Tatar v Romania*[50] the ECtHR held that Article 8 imposes a positive obligation on States to adopt reasonable and sufficient measures capable of protecting the right to a private life, a home and, more generally, a healthy, protected environment. The ECtHR has also held that the positive obligation requires that the measures not only exist but are implemented in practice, to ensure that the Article 8 rights are effective and not illusory;[51] and that the obligation has arisen in cases concerning hazardous emissions from private sector activities.[52]

The positive obligation arises where there is a sufficient causal link between the impugned activity and the adverse impact on persons within the jurisdiction. The positive obligation also arises if there is a serious and substantial threat to the health and well-being of persons within the jurisdiction.[53] In this respect, the ECtHR stressed the importance of the precautionary principle, given its aim to secure a high level of protection for the health and safety of persons and the environment.[54] Physical and mental health are both crucial parts of private life associated with the aspects of physical and moral integrity;[55] and

49 ibid para 135.
50 *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009) para 170.
51 *Moreno Gomez v Spain* App no 4143/02 (ECtHR, 16 November 2004) para 56.
52 *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005).
53 See *Tatar v Romania* (n 50) para 107.
54 *Tatar v Romania* (n 50) para 120.
55 *Bensaid v United Kingdom* App no 44599/98 (ECtHR, 6 February 2001) para 47.

in *Tatar* the ECtHR also found a violation of Article 8 in circumstances where the applicants had lived in a state of anxiety, uncertainty and fear.[56]

E *Future Cases That Might Be Brought before the ECtHR*

Sooner or later one of the climate change cases being taken through the domestic courts of Europe is bound to make its way to the ECtHR. In the meantime, there is a case which is poised to be filed with the ECtHR by a number of Portuguese children and young people against a significant number of the Member States of the Council of Europe. The Portuguese youth applicants will argue that the respondent States, who are the biggest emitters of greenhouse gases in Europe, share responsibility for climate change; and that they have standing as potential victims, given the risk that climate change will violate their rights protected by Articles 2, 8, 14 and Article 1 of Protocol 1 of the Convention.[57]

As the Portuguese youth applicants have not previously brought domestic proceedings they will need to persuade the ECtHR that they have exhausted their domestic remedies; which will require them to demonstrate why they cannot obtain relief against the respondent States in the Portuguese courts and could not reasonably be expected to litigate their case in those States.

The Portuguese youth applicants will also need to convince the ECtHR that they are within the extra-territorial jurisdiction of all the respondent States (bar Portugal) for the purposes of Article 1 of the Convention; and when doing so will rely upon the fact that the greenhouse gas emissions generated by the respondent States contribute to climate change effects felt in Portugal.

Assuming the Portuguese youth applicants jump the ECtHR's admissibility hurdles then they will argue that the respondent States share presumptive responsibility for dangerous climate change that could cause them harm in the future. It will then be for each respondent State: to demonstrate that it has complied with the positive obligations imposed by Articles 2 and 8 of the Convention; and to justify the adequacy of the emissions reductions which its climate change mitigation policies entail if it is to extricate itself from the shared responsibility for dangerous climate change.

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56 *Tatar v Romania* (n 50) para 122.

57 'Crowdfunding campaign for climate change legal action launched.' (*Global Legal Action Network*, 24 September 2017) <https://www.glanlaw.org/single-post/2017/09/24/Crowdfunding-campaign-for-climate-change-legal-action-launched> accessed 19 February 2020.

IV Conclusion

There is real scope for significant progress to be made in the fight against dangerous climate change by litigation in the European regional courts. That said, the two climate change cases that have been brought in the General Court of the EU have been dismissed on procedural grounds whilst the jurisdiction of the ECtHR has yet to be tested.

Though the procedural hurdles facing individuals wishing to bring climate change cases before European regional courts are high they may not be insurmountable. Lawyers and activists have already taken up the gauntlet laid down by Philip Alston and, with 'bold and creative thinking', may yet overcome those hurdles and hold European States to account for their failure to protect their citizens from dangerous climate change.

CHAPTER 14

Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee

*Monica Feria-Tinta**

1 Introduction

The key underlying question of climate change litigation within the Inter-American System of Human Rights and similar international and regional human rights bodies is whether climate change is an issue of human rights, and if so, whether it is justiciable before these organs.

Traditionally, environmental law and human rights law evolved as separate entities. Whereas the fundamental tenets of human rights law were adopted as early as 1948,[1] international environmental law is a younger field: its emergence as a distinct body of law is usually dated back to about 1972.[2] International environmental law, however, evolved and expanded rapidly[3] and it has been experiencing, in recent years, a rise within the general area of public international law dispute resolution.[4] This includes the justiciability of environmental issues before international human rights courts.

This growing trend of justiciability of environmental issues in human rights courts responds to an elemental reason which was aptly summarized by John

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1 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

2 For example, M Fitzmaurice, DM Ong and P Merkouris (eds), *Research Handbook on International Environmental Law* (Elgar 2010) 15.

3 For example, E Brown Weiss, 'The Evolution of International Environmental Law' (2011) 54 Japanese Yearbook of International Law 1.

4 M Feria-Tinta and S Milnes, 'The Rise of Environmental Law in International Dispute Resolution' (2016) 27 Yearbook of International Environmental Law 64.

H Knox, as follows: 'Human Rights and the protection of the environment are inherently interdependent'.[5]

A critical framework in that sense has been recently provided by the Sustainable Development Goals adopted in 2015, in particular Goal 13, which refers to Climate Action.[6] The Intergovernmental Panel on Climate Change (IPCC) Reports have further precipitated acknowledgement of climate change as a pressing human rights issue including by the Office of the United Nations High Commissioner for Human Rights, which confirmed:

> Climate change threatens the effective enjoyment of a range of human rights including those to life, water and sanitation, food, health, housing, self-determination, culture and development. States have a human rights obligation to prevent the foreseeable adverse effects of climate change and ensure that those affected by it, particularly those in vulnerable situations, have access to effective remedies and means of adaptation to enjoy lives of human dignity.[7]

The Human Rights Council has likewise acknowledged climate change to be a human rights issue, noting that:

> the adverse effects of climate change have a range of implications, which can increase with greater global warming, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation, the right to work and the right to development, and

5 UN Human Rights Council, 'Preliminary Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 December 2012) UN Doc A/HRC/22/43, para 10.

6 The 17 Goals were adopted by all UN Member States in 2015, as part of the 2030 Agenda for Sustainable Development which set out a 15-year plan to achieve the Goals. UNGA Res 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/Res/70/1 <https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E> accessed 9 March 2021.

7 Office of the High Commissioner for Human Rights, 'OHCHR and Climate Change' <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> accessed 12 April 2020.

> recalling that in no case may a people be deprived of its own means of subsistence.[8]

Further milestones in the development of this growing body of United Nations authoritative pronouncements on the acknowledgement of climate change implications for human rights are the reports by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox, focusing on climate change and human rights;[9] David R Boyd's report on air pollution and human rights,[10] and on State obligations and business responsibilities in relation to human rights and climate change,[11] as well as the report of the Special Rapporteur on extreme poverty and human rights relating to climate change and poverty.[12]

As a contentious issue, however, in proceedings before international human rights organs, climate change is relatively new. Given its complexity, the question may be asked as to whether human rights law can make a significant contribution to addressing the immense challenges climate degradation currently poses. The international human rights adjudicatory system is currently tested with such a crucible. But are human rights 'an imperfect tool'—as suggested by some commentators—in dealing with such a complex and wide-ranging issue as climate change?[13] Should international courts be scrutinizing the decision-making of States in this area? Or is this rather a policy issue, a sort of a non-justiciable area, unsuitable for international human rights bilateralized disputes?

This chapter deals with some key jurisprudential milestones in the development of contentious cases both before the Inter-American System and the UN Human Rights Committee. A common thread in the evolutive approach of these

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8 UN Human Rights Council, 'Human rights and climate change' Res 41/21 (12 July 2019) UN Doc A/HRC/RES/41/21.

9 UN Human Rights Council, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (1 February 2016) UN Doc A/HRC/31/52.

10 UN Human Rights Council, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (8 January 2019) UN Doc A/HRC/40/55.

11 UNGA 'Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment' (2019) UN Doc A/74/161.<https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pd> accessed 12 April 2020.

12 UN Human Rights Council, 'Climate change and poverty: Report of the Special Rapporteur on extreme poverty and human rights' (17 July 2019) UN Doc A/HRC/41/39.

13 Lord Carnwath, 'Human Rights and the Environment' (Public Lecture at The Institute of International and European Affairs, Dublin, 20 June 2019) 13.

two systems is identified; in particular, I submit that the Inter-American system has developed notions which have influenced the work of the UN Human Rights Committee. The structure of this chapter is as follows. It looks first, in Section II, at the Inter-American System focusing on three key moments: (i) the first climate change case which arose in the Inter-American System (the *Inuit* case);[14] (ii) the quantum leap the Inter-American system made with the Inter-American Court of Human Rights Advisory Opinion 23[15] (and its significance); and (iii) the emerging jurisprudence post-Advisory Opinion 23 with the first contentious case acknowledging the right to a healthy environment under the American Convention on Human Rights (the *Lakha Honhat* case).[16] It then turns to the Human Rights Committee (Section III), examining its prospects in addressing climate change under the International Covenant on Civil and Political Rights (ICCPR)[17] focusing on four significant developments: (i) General Comment 36 on the right to life[18] (with an emphasis on the implications for climate change litigation); (ii) the treatment of environmental issues in the *Portillo* case;[19] (iii) the currently pending *Torres Strait Islanders* case[20] (the first 'world climate change' case brought before an international human rights organ); and (iv) the implications of the recently decided *Kiribati refugee* case.[21]

14 *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, Petition No P-1413-05 (7 December 2005).

15 *The Environment and Human Rights* (*State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*), Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (Advisory Opinion 23).

16 *Indigenous Communities of the Lhaka Honhat* (*Our Land*) *Association v Argentina* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 400 (6 February 2020) (*Lhaka Honhat* case).

17 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

18 UN Human Rights Committee, 'General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC/36 (General Comment No 36).

19 UN Human Rights Committee, *Portillo Cáceres and Others v Paraguay* (25 July 2019) UN Doc CCPR/C/126/D/2751/2016 (*Portillo* case).

20 *Torres Strait Islanders v Australia*, Communication 3624/2019 (submitted May 2019) currently pending before the UN Human Rights Committee (*Torres Strait Islanders* case).

21 UN Human Rights Committee, *Ioane Teitiota v New Zealand* (7 January 2020) UN Doc CCPR/C/127/D/2728/2016 (*Kiribati refugee* case).

To my mind, the above-traced evolution of climate change litigation before international human rights organs begs the question not so much of whether climate change is justiciable as a human rights issue, but rather the question of why it took so long for organs to meaningfully engage with such a defining issue of our times.

These growing efforts to make climate degradation a justiciable issue must be seen within the context of a key development in international law. From the first failed attempt in which a climate change case ever reached an international human rights organ (the *Inuit* case), to the *Torres Strait Islanders* case, there has been a sea-change development, namely the crystallization of binding obligations on States under the Paris Agreement.[22]

The evolution discussed in this chapter identifies a trajectory of travel in the justiciability of climate change issues at the UN level, which owes a great deal to the developments that have taken place in the Inter-American System. This chapter traces a common thread in the developments on the notion of the right to life (which protects individuals from environmental degradation) in the Inter-American system, to the conceptualization reflected today under Article 6 of the International Covenant on Civil and Political Rights. It is argued that the latter is a critical provision for understanding State obligations in relation to climate change.

11 The Inter-American System

The critical link between human beings' subsistence and the environment was recognized early in the work of the Inter-American Human Rights Commission.[23] Yet, the first climate change case ever to reach an international human rights organ was simply dismissed by that same organ.

A parallel development, however, has been running through the jurisprudence of the entire system (in the jurisprudence of both the Inter-American Commission and the Inter-American Court); that is, increasingly, the justiciability of environmental issues both under the American Declaration of the

22 Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 (Paris Agreement) <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 10 March 2020.

23 Inter-American Commission on Human Rights, *Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System* (30 December 2009) OEA/Ser.I/L/V/II Doc 56/09 (footnotes omitted).

Rights and Duties of Man ('The American Declaration')[24] and the American Convention on Human Rights ('The American Convention').[25] A fundamental development in this regard has been, as will be seen below, the acknowledgement of the right to a healthy environment under the right to life in the Americas.

Whilst a contentious climate change case as such has not been brought before the system after the early attempt made by the Inuits (climate change has rather been dealt with only as a thematic issue before the Commission since), it is clear that the jurisprudence of the system has matured to a point—as demonstrated by the Inter-American Court decision in the *Lhaka Honhat* case examined below—where such contentious cases would not only be justiciable but, if framed correctly, successful, adjudicated with the benefit of the jurisprudential developments the system has seen in recent years.

A *Sheila Watt-Cloutier et al v United States, Inter-American Commission on Human Rights, 2005*

The first climate change case brought before the Inter-American System was the *Sheila Watt-Cloutier et al v United States*.[26] The petition, filed against the United States before the Inter-American Commission in 2005, denounced the effects that global warming was having on the Arctic, which was affecting the way of life and the fundamental rights of the Inuit indigenous peoples. Boldly, it was brought on behalf of all Inuit of the Arctic regions of the United States and Canada, a large number of whom had been individualized for the purposes of filing the claim. The claim provided a full analysis of the alleged violations and described the manner in which global warming and climate change

24 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) <https://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm> accessed 3 March 2020.

25 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> accessed 2 July 2020. See M Feria-Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 Human Rights Quarterly 431. See also M Feria-Tinta, 'Litigation in Regional Human Rights Systems on Economic, Social and Cultural Rights against Poverty' in G Van Bueren (ed), *Freedom from Poverty as a Human Right* (UNESCO Publishing 2009).

26 *Petition Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States* (n 14) <https://climate-laws.org/cclow/geographies/9/litigation_cases/7052> accessed 19 February 2020.

was harming Inuit life and culture. It described that for the Inuit, 'ice is a supporter of life. It brings the sea animals from the north … and in the fall it also becomes an extension of Inuit land.'[27]

Highlighting first the extent to which the life and culture of the Inuit was completely dependent on the Arctic environment, the claim argued that 'nowhere on Earth has global warming had a more severe impact than the Arctic.'[28]

It was alleged that global warming had already visibly transformed the Arctic, 'altering land conditions',[29] making the weather of the Arctic 'increasingly unpredictable' (with Inuit elders, who have long experience in reading the weather, reporting various changes in weather patterns in different areas of the Arctic),[30] 'decreas[ing] water levels in lakes and rivers', and producing 'changes in the location, characteristics and health of plant and animal species'.[31] Moreover, natural drinking water sources had become scarcer and less drinkable, harming Inuit health. This was the result of the combined effect of the decrease in snowfall, permafrost melt, the sudden early melt, erosion, rising temperatures and changing winds.[32]

The claim further argued that the 'deteriorating ice conditions have made travel, harvest, and everyday life more dangerous for the Inuit because the location of unsafe ice was harder to predict'.[33] The claim also indicated that '[s]ome previously navigable rivers are now impossible to use for transportation'.[34] Disappearing sea ice, combined with changes in prevailing winds and currents, on the other hand, wreaked havoc with travel and harvest.[35]

The claim continued by noting that loss of permafrost and sea ice had both contributed to increasingly devastating coastal erosion which had a 'cataclysmic impact on the Inuit',[36] given that most Inuit live, hunt and travel near the coast. Inuit homes and communities were further threatened because of the increased storm surges resulting from the loss of the ice's wave-suppressing effects.[37] Changes in ice and snow had affected animals on which the Inuit

27 ibid 39.
28 ibid 1.
29 ibid 37.
30 ibid.
31 ibid.
32 ibid 61.
33 ibid 39.
34 ibid 65.
35 ibid.
36 ibid 51.
37 ibid.

relied. damaging their subsistence, harvest, safety and health. The claim argued that 'ice dependent species such as seals, walrus, polar bears, and sea birds are already suffering population decreases as a result of the disappearing ice.'[38] The claim noted that 'polar bears are unlikely to survive as a species without the ice and ice dependent seals … are particularly vulnerable to the observed and projected reductions in Arctic sea ice'.[39] Changes in ice conditions have also reduced the habitat available for the polar bears. As a consequence, there were more dangerous encounters between them and humans. On the other hand, changing species distribution has harmed the nutrition, health and subsistence harvest of the Inuit.[40] For example, the gathering seasons were getting shorter for picking berries, an important component of the Inuit diet. Harvesting of greens had also been affected by climate changes. Important protein sources were also changing location and were of lower quality in some areas.[41] Caribou, moose and various species of waterfowl were likely to undergo shifts in range and abundance.[42] Different species of fish were also moving northward, jeopardizing native fish stocks.[43] It was stressed that the Inuit have already noticed a deterioration in their health because of a lack of country food.[44] The shift from traditional diet has created diseases such as diabetes and cardiovascular diseases amongst the Inuit.[45] Lastly, it was argued that the deteriorating ice and snow conditions have also undermined the traditional Inuit way of life.[46] Travelling and harvesting, two critical components of Inuit culture, have been damaged as a result of climate change. The inability to forecast the weather has also diminished the important role of elders in planning hunting, travel and day-to-day preparation for bad weather.[47] Further, because of the deterioration of the snow, the art of building igloos could not easily be passed on to the next generation, resulting in a loss of traditional knowledge about a truly unique feature of Inuit culture.[48] In short, it was argued that the changes described above were 'seriously threatening the Inuit's continued survival as a distinct and unique society.'[49]

38 ibid 45.
39 ibid.
40 ibid 54.
41 ibid.
42 ibid 55.
43 ibid 67.
44 ibid 55.
45 ibid 62–3.
46 ibid 48.
47 ibid 58.
48 ibid 49.
49 ibid 67.

The central Inuit argument was that by its acts and omissions the United States, which the claim identified as the largest contributor to global warming and its damaging effects on the Inuit, bore State responsibility for the above impacts. The claim argued:

> Among nations, the United States has long been the world's greatest consumer of energy, and hence of fossil fuels … throughout the industrial era the United States has had the highest CO2 emission of any nation.[50]

The claim noted that the United States continued to be the world's largest emitter of energy-related CO_2, and that climate change caused by the US government regulatory actions and inactions (eg misleading and ineffective targets, no mandatory controls, no reduction of greenhouse gas emissions, misleading and obscuring climate science, failure to cooperate with efforts to reduce greenhouse gas emissions) were therefore causing disappearing Arctic ice, the ancestral land of the Inuit, threatening their survival and violating their rights under the American Declaration of the Rights and Duties of Man (right to culture, right to enjoy the lands they have traditionally used and occupied, right to use and enjoy their personal property, right to the preservation of health, right to life, physical integrity and security, right to their own means of subsistence, right to residence and movement and inviolability of home).

The case was dismissed even before consideration of its admissibility. The Commission decided simply not to process it, on the grounds that 'the information it contains does not satisfy the requirements set forth in [the Commission's] Rules'.[51] The determination noted specifically that 'the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration'.[52] This despite the fact that the claim had provided over 150 pages of detailed analysis of the violations under the American Declaration.

The dismissal of the Inuit case was a missed opportunity for the Inter-American system to consider the link between climate change and human rights many years prior to climate change litigation becoming an established strategic legal tool. Nevertheless, the case marked a turning point, namely the recognition of the need to address existential threats such as climate change,

50 ibid 68.

51 Inter-American Commission on Human Rights, Letter dated 16 November 2006 <https://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> accessed 10 March 2020.

52 ibid.

as a human rights issue within the Inter-American system, something the Commission started doing by engaging with climate change as a thematic issue in its work.[53] Such engagement has also resulted in attention to the relationship between the private sector and climate change. Early this year, for example, the Commission published a Report on Business and Human Rights which addresses climate change, environmental degradation and the obligations of States to regulate the private sector.[54] The report highlighted the right of access to justice to remediate the impact of climate change.[55]

B *The Advisory Opinion of the Inter-American Court of Human Rights on the Environment and Human Rights*

A critical development however, did take place before the Inter-American Court of Human Rights: the Court's ground-breaking *Advisory Opinion on the Environment and Human Rights*,[56] which is in my view the most significant ruling on environmental issues of any international tribunal to date.

Special Rapporteur John H Knox stated in his preliminary report to the Human Rights Council that:

> environmental rights – that is, rights understood to be related to environmental protection – are late arrivals to the body of human rights law. The drafters of the seminal human rights instrument, the 1948 Universal Declaration of Human Rights did not include environmental rights.[57]

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53 See Sabin Center for Climate Change Law database for details of the 2019 'Hearing on Climate Change Before the Inter-American Commission on Human Rights' <http://climatecasechart.com/non-us-case/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights/> accessed 11 March 2020.

54 S García Muñoz, *Empresas y Derechos Humanos: Estándares Interamericanos* (Inter-American Commission on Human Rights 2019) <https://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf> accessed 11 March 2020. See, in particular, paras 233–53.

55 It stated: 'For the Commission and its REDESCA, it is also a priority that the States guarantee access to justice and reparation for damage in climate matters. This obligation requires States to guarantee the existence of accessible, affordable, timely and effective mechanisms to challenge those actions or omissions that may affect human rights due to climate change and environmental degradation and to obtain reparation for damages arising from the climate risks and the policies adopted in this regard, whether these actions come from the State or through companies.' ibid para 251 (M Feria-Tinta's translation).

56 Advisory Opinion 23 (n 15).

57 'Preliminary Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (n 5) UN Doc A/HRC/22/43, para 7.

However, the Inter-American Court of Human Rights, via an evolutive and systemic interpretation of the American Convention, has effectively made environmental law part of the body of the human rights law of the American region. For the first time, the environment and human rights (both their substantive and procedural connections) were centrally examined by an international tribunal. The result is a carefully reasoned and richly supported analysis which is likely to be a fertile source for legal argument and jurisprudential reasoning in future cases.

The following sections will focus on four important aspects of the Advisory Opinion: (1) the meaning of jurisdiction in the American Convention covering a State's activities that cause effects outside its territory (ie transboundary damage); (2) The Advisory Opinion's emphasis on the inherent relationship between the protection of the environment and the realization of other human rights (eg the right to life);[58] (3) the notion that the right to life includes a right to life with dignity; and (4) the notion of due diligence and other procedural obligations as giving effect to the respect of human rights.

1 The Meaning of Jurisdiction under the American Convention and Potential Diagonal Climate Change Claims

A significant aspect of the Advisory Opinion, for potential climate change claims, is that it signals the possibility of 'diagonal' human rights claims in circumstances far broader than those which have been held admissible under the Inter-American system to date. So far, the Inter-American system has taken a cautious approach to extraterritorial obligations. Generally, the relatively few cases found to be admissible in the extraterritorial application of human rights treaties have involved direct exercise of violence by State agents outside a State's borders, and sometimes even that is not enough.[59] The Advisory Opinion makes clear that, in principle, the Inter-American system permits cross-border human rights claims in respect of other types of conduct, such as transboundary pollution and ecological damage.

The Court held that the word *jurisdiction*, for the purposes of the human rights obligations under the American Convention, 'may encompass a State's activities that cause effects outside its territory'.[60] The Court emphasized that States:

58 Advisory Opinion 23 (n 15) para 47.

59 See, for example, the approach taken in the European System: *Banković and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001) (*Banković*).

60 Advisory Opinion 23 (n 15) para 95 (M Feria-Tinta's translation).

> must ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their jurisdiction, and that States are obliged to use all available means to avoid activities in their territory, or in any area under their jurisdiction, causing significant damage to the environment of another State.[61]

In this context, one of the most interesting features of the Advisory Opinion is the Court's handling of the concept of '*effective control*'.
The Court held:

> In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or *under whose jurisdiction the activities* were carried out that has *the effective control over them* and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage.[62]

It further concluded:

> When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises *when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation.*[63]

Thus, in the Advisory Opinion, as concerns transboundary environmental harms, '*effective control*' is no longer something which has to be exercised *over the territory* where the victim was, nor *over the victim* herself. Rather, what matters is whether the source State—State X—has effective control *over the activities* that caused the transboundary harm. This is significant for potential

61 Advisory Opinion 23 (n 15) para 97 (M Feria-Tinta's translation).
62 Advisory Opinion 23 (n 15) para 102 (emphasis added) (M Feria-Tinta's translation).
63 Advisory Opinion 23 (n 15) para 104(h) (emphasis added) (M Feria-Tinta's translation).

climate change cases as it opens the door to diagonal claims (concerning obligations capable of being invoked by individual or groups against States other than their own). The Court's reasoning could be used to support an argument that a State's contribution to the accumulation of greenhouse gases in the atmosphere should result in State responsibility and accountability under the American Convention to victims living in other States.

2 The Right to Life as a Right to a Healthy Environment

> … The degradation of the environment can cause irreparable damage to human beings, and therefore a healthy environment is a fundamental right for the existence of humanity.[64]

The Advisory Opinion recognized the right to healthy environment as 'a fundamental right for the existence of humanity', as part of the right to life.[65] The Court further held that 'environmental degradation and the adverse effects of climate change affect the effective enjoyment of human rights' (including, fundamentally, the right to life).[66]

In the Court's view the 'human right to a healthy environment' has collective and individual connotations, being both a 'universal interest … owed to present and future generations' and having 'direct or indirect repercussions on people due to its connection with other [individual] rights, such as the right to health, personal integrity or life, among others'.[67]

It was therefore acknowledged that there is an interdependence and indivisibility between human rights and the protection of the environment, giving rise to State obligations.[68] The Court held in that sense that 'climate change has very diverse repercussions for the effective enjoyment of human rights, such as the rights to life, health, food, water, housing and self-determination.'[69] In the same vein, it stressed that 'a critical link between human beings' subsistence and the environment has been recognised in other international treaties

64 Advisory Opinion 23 (n 15) para 59 (M Feria-Tinta's translation). In the original Spanish: *'La degradación del medio ambiente puede causar daños irreparables en los seres humanos, por lo cual un medio ambiente sano es un derecho fundamental para la existencia de la humanidad.'*

65 Advisory Opinion 23 (n 15) para 59 (M Feria-Tinta's translation).

66 Advisory Opinion 23 (n 15) para 47 (M Feria-Tinta's translation).

67 Advisory Opinion 23 (n 15) para 59 (M Feria-Tinta's translation).

68 Advisory Opinion 23 (n 15) para 55.

69 Advisory Opinion 23 (n 15) para 54 (M Feria-Tinta's translation).

and instruments … including the International Covenant on Civil and Political Rights.'[70]

3 The Positive Obligations under the Right to Life and the Notion of the Right to Life in Dignity

The Advisory Opinion relied on a long-standing jurisprudence of the Court which has indicated that compliance with the obligations imposed by Article 4 of the American Convention, related to Article 1(1) of this instrument, not only presupposes that no person may be deprived of his or her life arbitrarily (negative obligation) but also, in light of the obligation to ensure the free and full exercise of human rights, it requires States to take all appropriate measures to protect and preserve the right to life (positive obligations).[71] This is a key consideration concerning the right to life, which has been embraced also by the Human Rights Committee as discussed below.[72]

This approach has enabled the Court to examine and establish the violation of Article 4 of the Convention in relation to individuals who did not die as a result of the actions that violated this instrument.[73] In the case of the *Yakye Axa Indigenous Community v Paraguay*, the Court declared, for example, that:

> the State was responsible for violating the right to life considering that, by failing to ensure the right to communal property, the State had deprived the victims of the possibility of acceding to their traditional means of subsistence, as well as of the use and enjoyment of the natural resources needed to obtain clean water and for the practice of traditional medicine to prevent and cure illnesses, in addition to failing to take the necessary positive measures to guarantee them living conditions compatible with their dignity.[74]

It is worth mentioning that this approach to the right to life is reflected in jurisprudence of the European Court of Human Rights. In fact, as noted by the

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70 *Indigenous and Tribal People's Rights over Their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System* (n 23) para 192.

71 Advisory Opinion 23 (n 15) para 108.

72 Art 4 of the American Convention is in similar terms to art 6(1) of the ICCPR and provides: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of this life.'

73 Advisory Opinion 23 (n 15) para 109.

74 *Yakye Axa Indigenous Community v Paraguay* (Judgment) Inter-American Court of Human Rights Series C No 125 (17 June 2005) paras 158(d) and 158(e) (*Yakye Axa* case).

Advisory Opinion, the European Court of Human Rights has also found violations of the right to life with regard to individuals who did not die as a result of the acts that violated the European Convention on Human Rights.[75]

The *Yakye Axa* reference above raises an important further consideration. At the centre of the conception of the right to life under the American Convention is the notion of 'the right to a life with dignity'.

The proposition that, in international human rights law, the right to life includes a right to life with dignity has evolved from the jurisprudence of the Inter-American Court of Human Rights.[76] In the *Yakye Axa* case, the right to life in Article 4 of the American Convention on Human Rights was regarded as containing basic economic, social and cultural rights which included being able to exercise traditional activities for subsistence (hunting, fishing) and access to natural resources deeply connected with the cultural identity of aboriginal communities. The Court stated that:

> one of the obligations that the State must inescapably undertake as a guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard the State has the duty to take positive, concrete measures geared towards fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk.[77]

The Court concluded in the case, that Paraguay had violated the right to life because it had failed to ensure the indigenous community's *right to a life in dignity*.

In *Sawhoyamaxa Indigenous Community v Paraguay*[78] the Court also emphasized the duty of States to guarantee conditions that may be necessary in order to prevent violations of the right to life. The case of *Moiwana Village v Suriname,*[79] on the other hand, concerned the claim of an indigenous

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75 In this regard, see *Acar and Others v Turkey* App nos 36088/97 and 38417/97 (ECtHR, 24 May 2005) paras 77 and 110; *Makaratzis v Greece* App no 50385/99 (ECtHR, 20 December 2004) paras 51 and 55.

76 *Villagrán-Morales v Guatemala* (Judgment) Inter-American Court of Human Rights Series C No 63 (19 November 1999).

77 *Yakye Axa* case para 162.

78 *Sawhoyamaxa Indigenous Community v Paraguay* (Judgment) Inter-American Court of Human Rights Series C No 146 (29 March 2006).

79 *Moiwana Village v Suriname* (Judgment) Inter-American Court of Human Rights Series C No 124 (15 June 2005).

community that had been forcibly evicted from its land by State agents. As a result, the community was displaced and left to live without their land rights. The Court acknowledged the community's relationship to its traditional land as 'of vital spiritual, cultural and material importance'. It held that '(i)n order for the culture to maintain its integrity and identity, its members must have access to their homeland.'[80] In a Separate Opinion in the case, Judge Cançado Trindade observed the existing links between the right to life and the right to culture of individuals with a distinctive culture such as the indigenous/aboriginal petitioners:

> The tragedy of uprootedness, manifested in the present case, cannot pass unnoticed here, as uprootedness affects ultimately the right to cultural identity, which conforms the material or substantive content of the right to life *lato sensu* itself.'[81]

Among other issues, the displacement of the N'djuka, for whom it was crucial to perform burial and rituals for the deceased in traditional lands, deprived them of an essential cultural right that went directly to the notion of dignity. By not fulfilling the traditional obligations concerning the dead, the petitioners in that case declared that 'it is as if we do not exist on Earth.'

This approach to the right to life, highlighted by the Court in the context of establishing the link between environmental degradation and the right to life, is crucial to the proper examination of rights under Article 4 of the Convention in a potential climate change case.

The Court's ruling that States *can* be accountable for the emission of pollutants from activities in their territory which cause transboundary ecological harm coupled with an approach to the right to life as described above is significant for climate change claims. If in 2005, the Inter-American Commission decided against accepting a petition by Inuit peoples that climate change was violating their rights, in the light of the Advisory Opinion the arguments of the Inuit (and other vulnerable groups for whom climate change has become an existential threat to their lands, livelihoods and cultures) benefit from enhanced weight of principle and authority.

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80 ibid para 86(6).

81 *Moiwana Village v Suriname* (Judgment) (Separate Opinion of Judge Cançado Trindade) Inter-American Court of Human Rights Series C No 124 (15 June 2005) para 1 (emphasis added).

4 Due Diligence, the Duty to Prevent Transboundary Harm and Procedural Obligations

Finally, in the Advisory Opinion, the Court held that the majority of the environmental obligations rest on a duty of *due diligence* on the part of the State.[82] Such a duty is understood as an obligation of conduct (ie focusing on what States do), and not as an obligation of result (focusing on whether States succeed in achieving a particular result or not).[83]

The Advisory Opinion draws heavily from the 1972 Stockholm Declaration[84] and the 1992 Rio Declaration,[85] treating the principles enunciated in those early non-binding legal instruments—including prevention of environmental harm, the precautionary principle, procedural safeguards and the obligation of cooperation—as binding legal obligations under the American Convention. It also elaborates on the scope of a number of *procedural* rights such as access to information, public participation and access to justice.

The Court held in particular that, in order to respect and guarantee rights to life and integrity, States are under a duty to:

(1) Prevent significant environmental damage, both inside and outside their territory;
(2) Regulate, oversee and control the activities under their jurisdiction which may give rise to significant damage to the environment, carry out studies on environmental impact when there exists the risk of significant damage to the environment, draw up a contingency plan so as to have in place safety measures and procedures for minimizing the possibility of major environmental accidents, and mitigating any significant environmental damage that would have ensued, even when this may have occurred in spite of preventive actions on the part of the State;
(3) Act in accordance with the precautionary principle, when faced with possible severe or irreversible damage to the environment, even in the absence of scientific certainty;
(4) Co-operate, in good faith, for the protection against damage to the environment;

82 Advisory Opinion 23 (n 15) para 124.
83 Advisory Opinion 23 (n 15) para 123.
84 'Stockholm Declaration on the Human Environment' United Nations Conference on the Human Environment (Stockholm 5 June–16 June 1972) (1973) UN Doc A/CONF.48/14/Rev 1.
85 'Rio Declaration on Environment and Development' United Nations Conference on Environment and Development (Rio de Janeiro 3 June–14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (vol I).

(5) Pursuant to that duty of co-operation, notify other States that may be potentially affected when they become aware that a planned activity under their jurisdiction could give rise to a risk of significant cross-border damage, and in cases of environmental emergencies, as well as consulting and negotiating, in good faith, with the States potentially affected by significant cross-border damage;
(6) Guarantee the right of access to information relating to possible negative impact upon the environment, enshrined in Article 13 of the American Convention;
(7) Guarantee the right to public participation of people under their jurisdiction, which is enshrined in Article 23(1) of the American Convention, in the making of decisions and policies that may affect the environment; and
(8) Guarantee access to justice, with regard to State obligations for the protection of the environment.[86]

In short, the implications of the Advisory Opinion 23, are likely to ripple well beyond the Americas. Cross-fertilization among international judicial bodies is common: the opinion will stand as a marker when the European Court of Human Rights, sooner or later, has to do its own thinking on what 'jurisdiction' means for transboundary environmental damage. Its substantive approach to the right to life is also now mirrored in General Comment 36 by the Human Rights Committee.

The Opinion's core reasoning could be applied to air pollution, chemicals and climate change. It may also stimulate new thinking in arguments about international law's (in)ability to regulate the activities of multinational corporations. In any event, the Advisory Opinion is certainly a landmark and a quantum leap in the jurisprudence of the Inter-American system and international human rights law.

A positive perspective may be noted on the power and value of advisory opinions, as they overcome the fact that cases often take up to ten years to be decided, a major barrier in the Inter-American System of Human Rights. The Advisory Opinion can be applied directly in all jurisdictions within the Inter-American system, showing its usefulness as a potentially influential legal tool. Seen from this perspective, it is likely that many climate change cases will be brought before the highest courts in the Americas, in particular Constitutional Courts, applying directly the notions recognized in the Advisory Opinion.

86 Advisory Opinion 23 (n 15) para 242.

C *The First Contentious Case on the Right to Healthy Environment: The Lhaka Honhat Case*

The *Lhaka Honhat* case[87] is the first instance in which the Inter-American Court upheld the right to a healthy environment in a contentious case making it justiciable under the American Convention on Human Rights. In this particular case, the claimant raised this right under Article 26 of the Convention (the right to 'progressive development').[88] The case referred to indigenous communities in the province of Salta, Argentina, alleging that the State had failed to implement measures to stop illegal logging and other harmful activities in their territory, which had altered their indigenous way of life and damaged their cultural identity.

The indigenous peoples argued that 'the environmental degradation of the territory claimed' had been 'a continuous and significant process' that 'started at the beginning of the twentieth century with the introduction of cattle by the criollo settlers.'[89] Further, they posited that 'as a result of over-grazing by the cattle,' the 'illegal logging of the forests' and the 'fences put up by the criollo families' the environment had been 'degraded'; moreover, '[t]he cattle have destroyed the herbaceous and arboreal vegetation, and this has ruined the irrigation and regeneration capacity of the land,' which 'has resulted in desertification and fissures.' They added that 'the illegal logging of native forests, using "mining" methods—indiscriminate and unsustainable extraction—significantly affects the resilience and renewal capacity of tracts of forest.' They also indicated that the loss of flora had an impact on the natural habitat of the wildlife, which also had to compete with the cattle for food and water, adding that the loss of autochthonous flora and fauna was also related to the installation of fencing in the territory, which 'constitutes a natural obstacle' to their development.[90]

The Court noted that this was the first contentious case in which it had to rule on the rights to a healthy environment, to adequate food, to water and to take part in cultural life based on Article 26 of the Convention. Among other considerations the Court noted that other Inter-American instruments

87 *Lhaka Honhat* case (n 16).

88 The provision reads: 'Article 26. Progressive Development: The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires'.

89 *Lhaka Honhat* case (n 16) para 187.

90 *Lhaka Honhat* case (n 16) para 187.

such as Article XIX of the American Declaration on the Rights of Indigenous Peoples refers to the 'the right to protection of a heathy environment,' which includes the right of the 'indigenous peoples' 'to live in harmony with nature and to a healthy, safe, and sustainable environment'; 'to conserve, restore, and protect the environment and to manage their lands, territories and resources in a sustainable way,' and 'to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.'[91]

In addition to finding a number of violations under the American Convention,[92] the Court concluded that 'the interrelated rights to cultural identity, a healthy environment, adequate food, and water' under Article 26 had been violated in the case.

III The Human Rights Committee and Climate Change

A *Climate Change as an Issue of Human Rights in the UN Charter-Based Bodies and in the Reporting Mechanisms of the UN Treaty Bodies*

The Human Rights Committee, a quasi-judicial body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights, as well as other UN bodies and institutions, have affirmed repeatedly that climate change is a matter of fundamental human rights.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has set out a number of considerations that should guide States in the action they must take to address climate change under their human rights obligations including the ICCPR. These include: (i) mitigating climate change and preventing negative effects on human rights; (ii) ensuring that all persons have the necessary capacity to adapt to climate change; (iii) ensuring accountability and effective remedy for human rights harms caused by climate change; (iv) mobilizing maximum available resources for sustainable, human rights-based development; (v) ensuring equity in climate action; and

91 *Lhaka Honhat* case (n 16) para 248.

92 Namely, art 21 (Right to property), art 23 (Right to political participation), art 8(1) (Right to judicial guarantees), art 3 (Right to recognition of juridical personality), art 13 (Right to freedom of thought and expression), art 16 (Right to freedom of association), and art 22(1) (Right to freedom of movement and residence) of the American Convention on Human Rights.

(vi) guaranteeing equality, non-discrimination, and meaningful and informed participation in decision-making.[93] The OHCHR stressed that:

> States (duty-bearers) have *an affirmative obligation to take effective measures to prevent and redress these climate impacts*, and therefore, to mitigate climate change, and to ensure that all human beings (rights-holders) have the necessary capacity to adapt to the climate crisis.[94]

On 16 September 2019, a Joint Statement on 'Human Rights and Climate Change' was issued by five Human Rights Treaty Bodies.[95] The Joint Statement inter alia identified:

> Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations.
>
> In order for States to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.
>
> In relation to efforts to reduce emissions, States parties should effectively contribute to phasing out fossil fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation.
>
> Additionally, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure which are not consistent with low

93 OHCHR, 'Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change' (27 November 2015) <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> accessed 10 April 2020.

94 ibid (emphasis added).

95 'Five UN Human Rights Treaty Bodies Issue a Joint Statement on Human Rights and Climate Change: Joint Statement on "Human Rights and Climate Change"' (*OHCHR*, 16 September 2019) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> accessed 10 March 2021.

> greenhouse gas emissions pathways, whether undertaken by public or private actors as a mitigation measure to prevent further damage and risk.[96]

The authoritative interpretations that other human rights organs have made regarding climate change and human rights obligations under UN human rights treaties within the UN system are relevant to construing State obligations under the ICCPR because of the interrelated, interdependent and indivisible nature of rights[97] and the systemic nature of international law.

The Committee on Economic, Social and Cultural Rights, which monitors the International Covenant on Economic Social and Cultural Rights (ICESCR), has acknowledged that climate change constitutes 'a massive threat to economic, social and cultural rights' and it warned that 'a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation.'[98] It also commented, in relation to States' National Determined Contributions (NCDs) that 'in order to act consistently with their human rights obligations, those contributions should be revised to better reflect the "highest possible ambition" referred to in the Paris Agreement (art 4 (3)).'[99]

In February 2018, the Committee on the Elimination of Discrimination Against Women issued General Recommendation No 37 on 'Gender-related dimensions of disaster risk-reduction in the context of climate change.' This identifies many of the key climate change issues that States should consider when implementing CEDAW, including 'limiting fossil fuel use and greenhouse gas emissions; the harmful environmental effects of extractive industries such as mining …; and the allocation of climate finance'.[100]

The United Nations Human Rights Council noted in 2018 that 'climate change has contributed and continues to contribute to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset

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96 ibid.

97 'Vienna Declaration and Programme of Action' World Conference on Human Rights (Vienna 14 June–25 June 1993) (12 July 1993) UN Doc A/CONF.157/23 <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> accessed 21 August 2020.

98 UN Committee on Economic, Social and Cultural Rights, 'Climate change and the International Covenant on Economic, Social and Cultural Rights' (31 October 2018) UN Doc E/C.12/2018/1, para 6.

99 ibid paras 6–13.

100 UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 37 on Gender-related dimensions of disaster risk reduction in the context of climate change' (7 February 2018) UN DOC CEDAW/C/GC/37, para 13.

events, and that these events have adverse effects on the full enjoyment of all human rights'.[101] The Council gave particular emphasis to the achievement of the Paris Agreement's temperature goals as a human rights concern:

> *Stressing* the importance of holding the increase in the global average temperature to well below 2°C above pre-industrial levels and of pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, while recognizing that this would significantly reduce the risks and impacts of climate change.[102]

The Human Rights Council accordingly called for 'full, effective and sustained implementation of the United Nations Framework Convention on Climate Change and the Paris Agreement.'[103]

In October 2018, David Boyd, the UN Special Rapporteur on Human Rights and the Environment, issued a 'Statement on human rights obligations related to climate change, with a particular focus on the right to life' (in the context of proceedings in the Irish Courts), in which he emphasized the obligation 'to take positive and effective measures to prevent the human rights harm caused by climate change.'[104]

Further, the CESCR has stated in relation to Australia (by way of example):

> The Committee is concerned about the continued increase of carbon dioxide emissions in the State party, which run the risk of worsening in the coming years, despite the State party's commitments as a developed country under the United Nations Framework Convention on Climate Change and the Kyoto Protocol, as well as its national determined contribution under the Paris Agreement. The Committee is also concerned that environmental protection has decreased in recent years as shown by the repeal of the emissions scheme trading scheme 2013, and the State party's ongoing support to new coal mines and coal-fired power stations. The Committee is also concerned that climate change

101 UN Human Rights Council, 'Human Rights and Climate Change' Res 38/4 (5 July 2018) UN Doc A/HRC/RES/38/4, recitals and para 2.

102 ibid recital 8.

103 ibid recital 7.

104 UN Special Rapporteur on human rights and the environment, 'Statement on the human rights obligations related to climate change, with a particular focus on the right to life' (25 October 2018) para 54 <https://www.iucn.org/sites/dev/files/content/documents/2019/friendsirishenvironment25oct2018.pdf> accessed 10 March 2021.

> is disproportionally affecting the enjoyment of the Covenant rights by indigenous peoples.[105]

It recommended that Australia 'revise its climate change and energy policies', 'to take immediate measures aimed at reversing the current trend of increasing absolute emissions of greenhouse gases', 'to review its position in support of coal mines and coal exports', and 'to address the impact of climate change on indigenous peoples more effectively'.[106] The CEDAW Committee likewise has recommended Australia to adopt 'a human rights-based approach in the development of climate change responses', to further reduce greenhouse emissions, notably those resulting from coal consumption and exports, and to establish safeguards to protect all groups from the negative impacts of fossil fuels, both within its territory as well as abroad, including when those result from export of fossil fuels.[107]

In respect of the Human Rights Committee's own recommendations under reporting proceedings the recent examinations concerning Cabo Verde and Guyana under the ICCPR merit note. In the examination of Cabo Verde's report, the Human Rights Committee referred to its General Comment 36 on the right to life, and asked the delegation of Cabo Verde 'to explain how it ensured meaningful and informed participation of all populations in the process of developing strategies, policies and programmes, and how it planned to put in place a more inclusive and more gender-sensitive climate change policy.'[108]

Thus, General Comment 36 is a crucial tool for understanding the obligations of States in respect of the right to life in the context of environmental claims.[109]

More recently, also under its reporting proceedings, the Committee asked the government of Guyana to respond to concerns that large scale oil extraction significantly increased greenhouse gas emissions, causes ocean acidification

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105 UN Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fifth periodic report of Australia' (11 July 2017) UN Doc E/C.12/AUS/CO/5, para 11.

106 ibid para 12.

107 UN Committee on the Elimination of Discrimination Against Women, 'Concluding Observations on the eighth periodic report of Australia' (25 July 2018) UN Doc CEDAW/C/AUS/CO/8, paras 29–30.

108 OHCHR, 'In dialogue with Cabo Verde, Human Rights Committee Experts raise concerns about anti-discrimination legislation, gender-based violence, the court system and corruption' (*OHCHR*, 23 October 2019) <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25190&LangID=E> accessed 9 October 2020.

109 General Comment No 36 (n 18).

and rising sea levels.[110] In other words, under the ICCPR, the protection of the right to life requires States to review their energy policies and prevent the dangerous emission of greenhouse gases.

B *Human Rights General Comment No 36—Article 6 (Right to Life)*

In October 2018, the Committee adopted its General Comment 36 in relation to Article 6 (the right to life).[111] The Committee stated therein that climate change constituted one of the most pressing and serious threats to the right to life as follows:

> Environmental degradation, *climate change* and non-sustainable development constitute *some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.* Obligations of States parties under international environmental law should thus inform the contents of Article 6 of the Covenant, and the obligation of State parties to respect and ensure the right to life must reinforce their relevant obligations under international environmental law. *The ability of individuals to enjoy the right to life, and in particular life with dignity, depends on measures taken by State parties to protect the environment against harm and pollution.*[112]

The Committee has confirmed that the right to life under Article 6 ICCPR is not to be interpreted narrowly;[113] that it includes a right to 'life with dignity'; and that the serious threat of climate change requires States to act to protect the ability of citizens to enjoy a life with dignity.[114] This approach to the right to life has been applied in a recent case raising an environmental issue, the *Portillo* case, to which we turn next.

C *The Portillo Case*

In *Portillo Cáceres and Others v Paraguay,*[115] a'campesino'farming family in Paraguay petitioned the United Nations Human Rights Committee claiming

110 'United Nations Human Rights Committee Responds to Guyana's Carbon Bomb' (*Center for International Environmental Law*, 10 August 2020) <https://www.ciel.org/news/united-nations-human-rights-committee-responds-to-guyanas-carbon-bomb/> accessed 1 September 2020.

111 General Comment No 36 (n 18).

112 General Comment No 36 (n 18) para 62 (emphasis added).

113 General Comment No 36 (n 18) para 3.

114 General Comment No 36 (n 18) para 65.

115 *Portillo* case (n 19).

the mass use of agrotoxins by nearby large agrobusinesses had poisoned many local residents and led to the death of their relative, Ruben Portillo Cáceres. Two aspects of the case are particularly relevant for possible climate change cases. First, it concerns the approach to the right to life as 'a duty to protect'. The authors of the communication alleged that the State Party had violated the right to life because it had:

> failed to discharge its duty to protect their lives and physical integrity because it was not diligent in enforcing environmental standards and laws. The authors also claim that their right to a life with dignity has been violated owing to the circumstances in which they live, as they are surrounded by uncontrolled crop dusting that has a detrimental impact on their daily lives and has resulted in their being poisoned, since it pollutes the waterways in which they fish and the well water that they drink, has ruined the crops that they use for food and has caused the death of their farm animals.[116]

The Committee held in that respect:

> The Committee observes that a narrow interpretation does not adequately convey the full concept of the right to life and that States must take positive action to protect that right. The Committee recalls its general comment No. 36, in which it has established that the right to life also concerns the entitlement of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death. States parties should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity, and these conditions include environmental pollution.[117]

The Committee concluded that heavily spraying the area in question with toxic agrochemicals—an action which has been amply documented—posed a reasonably foreseeable threat to the authors' lives.[118]

A second, important aspect of the case, was that in finding a violation of the right to life in respect of individuals who were alive, the Human Rights Committee reaffirmed the principle that 'States parties may be in violation of

116 *Portillo* case (n 19) para 3.5 (footnotes omitted).
117 *Portillo* case (n 19) para 7.3.
118 *Portillo* case (n 19) para 7.5.

article 6 of the Covenant even if such threats and situations do not result in loss of life.'[119]

D *The Torres Strait Islanders Case*

An important case currently pending before the Human Rights Committee which has been referred to as a 'world-first' case on climate change and human rights, is the *Torres Strait Islanders* case,[120] brought by a group of Torres Strait Islanders against Australia, over its inaction on climate change. The eight authors of this Communication are from the Torres Strait Islander indigenous minority group. They live on the islands of Boigu (Talbot), Masig (Yorke), Warraber (Sue) and Poruma (Coconut) in the Torres Strait region of the State of Queensland, Australia. Two of the authors bring their complaint also on behalf of their children.

The claimants argue that the islands, their home, are low-lying islands seriously affected by sea level rise—their way of life and culture (aboriginal Australians with ancestral ties to the land and territorial sea in these islands) being seriously threatened by the prospect of becoming displaced. The Torres Strait is a pristine wilderness region, containing the most northerly part of the Great Barrier Reef. The area is home to one of the world's oldest living cultures, as well as rare species such as endangered turtles and dugongs.

The case argues that there are no remedies that can be exhausted in Australia, as they should be put in place by the domestic government. The claimants seek mitigation and adaptation measures by Australia as a remedy, as opposed to compensation.

1 The ICCPR Rights Invoked

The Authors allege that their State, Australia, is violating its responsibility to protect their human rights (and those of the children identified in the complaint) by:

a. failing to take adequate measures to protect their lives and way of life, their homes and their culture against the threats posed by climate change ('adaptation'), especially sea level rise; and
b. failing to take adequate measures to reduce Australia's national greenhouse gas emissions ('mitigation'), including by failing to set a sufficiently ambitious nationally determined contribution (NDC) under the 2015 Paris Agreement, by failing to pursue adequate domestic measures

119 *Portillo* case (n 19) para 7.3.
120 *Torres Strait Islanders* case (n 20).

to meet that NDC, and by promoting the extraction and use of fossil fuels, particularly coal for electricity generation.

The Torres Strait Islanders bringing the case allege that these acts and omissions by Australia constitute a violation of Articles 2(1) (obligations to respect and to ensure rights under the Covenant), 2(2) (take necessary steps to adopt laws and measures to give effect to the rights recognized in the Covenant), 2(3) (to ensure effective remedies), 6 (right to life), 17 (right to privacy and home), 27 (right to culture—minorities rights); and (in respect of their children) Article 24(1) under the ICCPR.

The current impacts of climate change alleged by the Torres Strait Islanders include changes in weather conditions and draught, severe flooding and erosion, deforestation, and the disappearance of certain species in the sea which are basic foodstuff the authors depend on. They also allege that their access to drinkable water, and natural resources they have traditionally depended on, and which are crucial to their survival as a distinctive cultural and racial minority in Australia, aboriginal to the Islands, is being adversely affected, preventing their enjoyment of their culture and way of life.

Moreover, the authors allege that climate change is threatening their home, and unless something is done now, they (and their children) are at risk of forced displacement which is threatening the fundamental basis of their culture and way of life. It is further argued that the authors are among those most threatened by the impacts of climate change, a problem that they have not contributed to, yet which threatens their very cultural identity and being as Torres Strait Islanders. It is alleged that Australia is clearly failing to protect the authors and their communities against this existential threat, in breach of Articles 2 and 6 (right to life) in their interconnections with articles 17 (freedom from interference with the enjoyment of one's home), 24 (duty of protection by Australia, of the rights of the child) and 27 of the Covenant.

2 The Critical Risk to the Indigenous Torres Strait Islanders' Culture Posed by Climate Change

The Authors claim that they and their communities are among the most vulnerable in the world to the current and future impacts of climate change and they raise a deep concern that their culture and way of life—which are inextricably linked to their traditional land and sea territories—are gravely threatened by the effects of climate change and sea level rise in particular.[121]

121 J Banister, ' "It's our right to be here": the Torres Straight Islanders fighting to save their homes from a rising sea' *The Guardian* (29 February 2020). <https://www.theguardian.com/australia-news/2020/mar/01/its-our-right-to-be-here-the-torres-strait-islanders-fighting-to-save-their-homes-from-a-rising-sea> accessed 30 March 2021

This communication demonstrates the critical role that the Committee has in upholding the civil and political rights of those most vulnerable to the impacts of climate change. When decided this will be the leading case on climate change justice before international human rights organs/courts and a relevant precedent for other climate change cases currently pending before the UN organs and European Court of Human Rights.

E *Ioane Teitiota v New Zealand* (*The Kiribati Climate Change Refugee Case*)

A recently decided case indirectly raising climate change issues was that of the *Kiribati climate change refugee case*.[122] The author claimed that the effects of climate change and sea level rise had forced him to migrate from the island of Tarawa in the Republic of Kiribati to New Zealand. He had argued that the situation in Tarawa had become increasingly unstable and precarious due to sea level rise caused by global warming. Fresh water has become scarce because of saltwater contamination and overcrowding on Tarawa. Attempts to combat sea level rise have largely been ineffective. Inhabitable land on Tarawa has eroded, resulting in a housing crisis and land disputes that have caused numerous fatalities. The author argued that Kiribati has thus become an untenable and violent environment for him and his family.[123] In essence however, this was a deportation case. New Zealand had rejected the author's claim for asylum. The author's claim before the Human Rights Committee was against New Zealand, not Kiribati.

Yet the Committee focused on observations by the New Zealand Tribunal (which rejected Teitiota's asylum application) on whether Kiribati had sufficiently acted in relation to the climate change emergency experienced on the island.[124] As this is a country of limited resources (which was already making adaptation efforts) and no high emissions, the Committee noted the New Zealand Tribunal's conclusion that it had. One cannot fail to note that the principle of differentiated responsibility would imply a different finding in relation to acts/omissions relating to countries which are major contributors to climate change in a similar scenario.

122 *Kiribati refugee* case (n 21).

123 *Kiribati refugee* case (n 21) para 2.1.

124 *Kiribati refugee* case (n 21) para 2.10. The Committee further observed at para 9.12 that: 'The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms.'

The Committee also made a one-sided analysis of the right to life focusing on whether the author was in any 'imminent' danger of harm to his right to life. The Committee concluded that the Author's life was not 'in imminent danger':

> The Committee accepts the author's claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.[125]

The approach taken to the right of life in the case by the Committee nevertheless shows obvious shortcomings, and it is tainted by the 'real risk' of persecution test of asylum claims. The New Zealand Tribunal that had examined the author's claim for asylum had stated that:

> There was no evidence that … the environmental conditions that he faced or would face on return were so perilous that his life would be jeopardized. For these reasons, he was not a "refugee" as defined by the Refugee Convention.[126]

The Human Rights Committee's approach seemed to have required the claimant to show an 'individualized harm' (specific to him): 'The Committee also notes the Tribunal's statement that the author appeared to accept that he was alleging not a risk of harm specific to him, but rather a general risk faced by all individuals in Kiribati.'[127]

While the Committee recalled that (i) the obligation of States Parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life, (ii) that States Parties may be in violation of Article 6 of the Covenant even if such threats and situations do not result in the loss of life; and (iii) that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life,[128] the Committee failed to properly engage with these principles in the consideration of the case. It ignored whether the

125 *Kiribati refugee* case (n 21) para 9.12.
126 *Kiribati refugee* case (n 21) para 2.8.
127 *Kiribati refugee* case (n 21) para 9.7.
128 See *Kiribati refugee* case (n 21) paras 9.4 and 9.5.

level of environmental degradation in the case could possibly be consistent with the right to life of Mr Teitiota under the ICCPR (even if loss of life had not occurred) and indeed with his right to dignity. The Committee did not deny the principles[129] but failed to engage with them in practice. To an extent, this may have been due to an evidentiary problem.[130] New Zealand had noted that only two letters had accompanied the communication.[131] This may have been due also to the manner in which the right to life was pleaded in the case.

While the Committee did not completely close the door to possible refugee claims caused by climate change, one wonders whether in the narrow construct of '*imminent*' advanced by the Committee in its analysis any possible claim for asylum is practically feasible.

The correct test for 'imminent' threat (specific risks posed by climate change) to the right to life (to draw an instructive example in the context of the European Convention of Human Rights) is reflected in the analysis of the Dutch Supreme Court in the *Urgenda* case where it was held:

> The ECtHR has on multiple occasions found that Article 2 ECHR was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster. It is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk. In this context, the term 'real and immediate risk' must be understood to refer to a risk that is both genuine and *imminent*. *The term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialise in the longer term.*[132]

It is worth mentioning as well, that whereas it was an option for the claimant in the *Kiribati Climate Change Refugee* case to relocate (and indeed this was a 'relocation' climate change claim), this case is distinguishable from those cases where claimants are seeking the contrary, their right to stay, as the forcible displacement by climate change effects would amount to further violations

129 *Kiribati refugee* case (n 21) para 9.9.

130 *Kiribati refugee* case (n 21) para 4.7. The Committee noted 'The communication is also insufficiently substantiated because the author has not submitted any further evidence in addition to the evidence that has already been considered by the domestic authorities.'

131 *Kiribati refugee* case (n 21) para 4.6.

132 *The State of the Netherlands v Urgenda Foundation,* Supreme Court of the Netherlands, Case No 19/00135, 20 December 2019, para 5.2.2 (footnotes omitted) (emphasis added).

under the ICCPR. For example, this is the case of the *Torres Strait Islanders* seen above.

The Dissenting Opinion of Committee members Vasilka Sancin and Duncan Laki Muhumuza are telling as to the shortcomings of this Committee's conclusions in the *Kiribati Climate Change Refugee* case. Ambassador Laki Muhumuza observed in that sense:

> Considering the author's situation and his family, balanced with all the facts and circumstances of the situation in the author's country of origin, reveals a livelihood short of the dignity that the Convention seeks to protect.[133]

IV Conclusion

This chapter has explored the ascent of climate change as a human rights issue in the work of the Inter-American organs (both at the level of the Commission and the Court) and the UN organs (with a particular focus on the UN Human Rights Committee). As the legal pronouncements from these organs and the growing contentious cases in the area of climate change show, those affected by the adverse effects of climate degradation are exercising their right to access to justice. It is unquestionable that if we are to accept that climate change may constitute human rights violations, the right to a remedy (to right to legal consequences), cannot be made illusionary.

If the Inter-American system had a slow start with the *Inuit* case, the Court's Advisory Opinion 23 is certainly a quantum leap in the jurisprudence of the Inter-American system and international human rights law for the justiciability of environmental claims, including possible climate change claims (diagonal and non-diagonal) under human rights treaties. The Advisory Opinion is likely to have a ripple effect well beyond the Americas. Cross-fertilization among international judicial bodies is common: the opinion will stand as a marker when the European Court of Human Rights, sooner or later, has to do its own thinking on what 'jurisdiction' means for transboundary environmental damage.[134] The Opinion's core reasoning could be applied to air pollution,

133 *Kiribati refugee* case (n 21) Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting) para 5.

134 See, for example, the case in respect of six Portuguese children and young adults, filed before the European Court of Human Rights on 3 September 2020, against 33 Council of Europe Member States under the European Convention on Human Rights. P Clark, G Liston and I Kalpouzos, 'Climate change and the European Court of Human Rights: The

chemicals and climate change. It may also stimulate new thinking in arguments about international law's (in)ability to regulate the activities of multinational corporations.

Whilst a climate change contentious case as such has not been brought before the Inter-American System after the early attempt made by the Inuits, it is clear that the jurisprudence of the system has matured to a point—as demonstrated by the decision in the *Lhaka Honhat* case—where a climate change contentious case would not only be justiciable but—if framed correctly—successful, adjudicated with the benefit of the jurisprudential developments the system has seen in recent years.

The UN system has taken a great deal from such regional developments. The substantive approach to the right to life reflected in General Comment 36 by the Human Rights Committee is a clear example of that. The *Portillo* case and the *Torres Strait Islanders* case are amongst some of the most defining cases for the future of humanity.

Portuguese Youth Case' (*EJIL:Talk!*, 6 October 2020) <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/> accessed 10 March 2021.

CHAPTER 15

Intergenerational Climate Change Litigation: The First Climate Communication to the UN Committee on the Rights of the Child

Ingrid Gubbay and Claus Wenzler***

1 Introduction

On the day of the UN Climate Action Summit 2019, held in New York on 23 September 2019, the first climate change-related Communication[1] was filed on behalf of 16 children ('the Petitioners') under the United Nations Convention on the Rights of the Child (UNCRC) ('the Petition'). The Petitioners live in variously affected climate regions around the world. The filing was made by the law firm Hausfeld together with the environmental NGO Earthjustice.[2] The Petition alleges that each of the actions of the five G20 Respondent States—Germany, France, Turkey, Brazil and Argentina ('the Respondents')—are causing and perpetuating the climate crisis and are continuing to harm the Petitioners' fundamental human rights protected under the UNCRC.

Currently, the Petition has been registered and is still in process, with further outstanding State responses to the questions of admissibility and the merits due over the next months. On 1 May 2020, the UN Special Rapporteur for human rights and the environment submitted a powerful amicus curiae to the Committee on the Rights of the Child ('CRC Committee') in support

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1 *Chiara Sacchi, Caterina Lorenzo, et al v Argentina, Brazil, France, Germany and Turkey*, communication numbers CRC 104/2019-108/2019 ('the Petition'). The NGO 'Heirs to our Oceans' assisted in identifying the Petitioners through their climate education networks and UNICEF Headquarters in New York provided the venue for the launch and media training for the Petitioners.

2 The authors of this chapter were involved in the filing on behalf of Hausfeld.

of the Petitioners.[3] In it, he underlines the broader importance of the Petition:

> This is one of the most significant communications ever received by this Committee. The Committee's decision could provide vital and timely guidance to other human rights bodies, international and domestic tribunals, States, international organizations, communities, and individuals all over the world.[4]

The Petitioners have requested that the CRC Committee makes the findings summarized below:

- That climate change is a crisis common to humankind, harming the right to life of the child, binding on all nations.
- That the Respondents have jointly with other States caused, contributed to and knowingly perpetuated the climate crisis flying in the face of scientific evidence.
- That each of the Respondent States' continued contribution to the climate crisis has violated the Petitioners' rights to survival and development, health, and the prioritization of the child's best interests, as well as the cultural rights of the petitioners from indigenous communities.
- That the Respondents should review their national and subnational laws and policies regarding the climate crisis, and where necessary amend such laws and policies to ensure that mitigation efforts are being sufficiently accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence.
- That in doing so, the Respondents ensure they are acting in the best interests of the child as a primary consideration, and that the costs and burdens of climate change mitigation and adaptation are equitably distributed with respect to children.
- That each Respondent immediately engage with other States in binding international cooperation to mitigate the climate crisis, to prevent further harm to the Petitioners and other children.

Finally, and most critically, the Petitioners request that the Respondents also ensure the children have a right to be heard and to express their views freely

3 DR Boyd, amicus curiae brief co-authored with JH Knox and submitted in support of the Petitioners (currently unavailable publicly).

4 ibid para 16.

in respect of all international, national and subnational efforts to mitigate or adapt to the climate crisis.[5]

Ultimately, the Petitioners hope that the CRC Committee accepts the Petition and makes recommendations to each of the Respondent States. The Committee could also report to the United Nations General Assembly ('General Assembly'), bringing the link between the rights of the child and climate change into international political focus. Unless children have access to a clean and healthy environment and live in a world that is prepared for climate change, their rights under the UNCRC may be rendered meaningless. 'Conversely, clarifying the impacts of climate disruption on the 16 petitioners' rights and the obligations of the five Respondent States will benefit all children and all States.'[6]

A full exposition of the many legal and logistical issues which arose in this action is outside the scope of this chapter. Rather, after briefly recalling the background of youth climate activism in the courts (Section II), the chapter will focus on the strategic ambition and cover four key legal areas: choosing the Respondents; the jurisdiction of the CRC Committee; causation; and exhaustion of domestic remedies (Section III). These areas will consistently arise for those seeking to use the international human rights treaty body system in global climate change-related matters. It concludes, in Section IV, with a note on the future direction of travel for children and youth in climate change litigation.

II Youth[7] Climate Activism in the Courts

The rights holders covered by the UNCRC represent the largest group that will be affected by environmental harm, both today and in the future: children. There are currently over two billion children[8] living on earth and they are among those most vulnerable to the impacts of climate change. Already today the global average temperature is 1°C above pre-industrial times.[9] The

5 Petition (n 1) 96.

6 Boyd and Knox (n 3).

7 Art 1 of the UNCRC defines a 'child' as a person under the age of 18 and the UN generally defines 'youth' as between the ages of 15 and 24 years old, see eg UNGA 'Report of the Secretary-General on the International Youth Year: Participation, Development, Peace' (19 June 1981) UN Doc A/36/215, Annex p 15, fn 8.

8 'World Population Dashboard' (*United Nations Population Fund*) <https://www.unfpa.org/data/world-population-dashboard> accessed 14 September 2020.

9 'Global Warming reaches 1°C above preindustrial, warmest in more than 11,000 years' (*Climate Analytics*) <https://climateanalytics.org/briefings/global-warming-reaches-1c-above-preindustrial-warmest-in-more-than-11000-years/> accessed 14 September 2020.

likelihood that children will live in a 1.5°C, 2°C and 3°C world is significantly higher than for adults. Of those children, more than 1.7 million under the age of five lose their lives every year as a result of avoidable environmental impacts, while millions more suffer from preventable diseases and disability, and an array of other forms of harm.[10] Numerous studies have found that environmental harm interferes with a host of children's rights, including the rights to life, health and development, food, housing, water, play and education, cultural rights, and to a safe, clean, healthy and sustainable environment. Furthermore, indigenous children, poor children and girls suffer disproportionately adverse impacts of climate change.[11] Children from these backgrounds are represented in the Petition. These staggering statistics alone make for a compelling case for a youth-led review of global commitments to address what is a real and imminent threat to the lives of future generations and the very survival of the planet.

Some first steps in the domestic courts have been met with mixed success. In the United States, a group of youth plaintiffs asserted that a stable climate system is a prerequisite for enjoying many rights, including the right to life. While it has to date not reached successful judgment, the government's motion to dismiss the case was rejected by a Federal District Court judge who wrote: 'I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.'[12] Meanwhile, in Colombia in 2018, the Supreme Court ruled in favour of 25 young people who had filed a lawsuit to protect their constitutional rights to life, food, water, and a healthy environment from the effects of deforestation and climate change.[13] The Court upheld the young people's rights and ordered the Colombian government to work with them to develop an effective plan to halt deforestation in the Amazon rainforest.

10 'The cost of a polluted environment: 1.7 million child deaths a year, says WHO' (*World Health Organization*, 6 March 2017) <https://www.who.int/news-room/detail/06-03-2017-the-cost-of-a-polluted-environment-1-7-million-child-deaths-a-year-says-who> accessed 14 September 2020.

11 UN Human Rights Council, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, with regard to the relationship between children's rights and environmental protection' (24 January 2018) UN Doc A/HRC/37/58.

12 *Juliana v United States*, 217 F Supp 3d 1224 (D Or 2016) 32. See also M Gerrard, 'Climate Change Litigation in the United States', Chapter 2 in this volume.

13 *Demanda Generaciones Futuras v Minambiente*, No 11001-22-03-000-2018-00319-01, Supreme Court of Colombia, Decision of 5 April 2018.

More recently, a youth-led case filed in South Korea[14] and an earlier case in India[15] may see wider positive impacts permeate throughout South and South East Asia as countries in those regions come to grips with implementing environmental legal frameworks to comply with their commitments under the 2015 Paris Agreement,[16] and to address the climate threats facing each of them. Accordingly, the momentum building from the youth climate movement[17] has created a global wave of powerful and informed activism. This youth activism is set on a path to interrogate and attempt to bring to account, by any means possible, every lagging State, diplomatic negotiation, and fossil fuel major, using all appropriate judicial and quasi-judicial avenues and other public fora. Future filings are currently scheduled in the next 12 months in other regional and domestic courts.

Against that powerful backdrop sits the narrative of this first UNCRC Communication, which takes forward a child-centred approach to the climate emergency, and which is the first of its kind to be filed within the international UN human rights treaty body system.

III Developing the Legal Strategy

The initial brief from a high-profile youth climate activist[18] was to provide a creative and impactful legal strategy to bring to account those States lagging and failing to meet their commitments under the 2015 Paris Agreement toward a net zero decarbonization by 2050. The strategic ambition was to make the climate emergency central, given the scarcity of time,[19] and the much documented current and future threats to health and to life for those children now

14 *Kim Yujin et al v South Korea* (filed 13 March 2020).

15 *Ridhima Pandey v Union of India*, Application No 187/2017, National Green Tribunal, 15 January 2019; Ridhima Pandey, the Petitioner from India in the CRC case, also filed a case against India in 2013 for failure to act on climate change. She was 11 years old when the Petition was filed.

16 Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 (Paris Agreement).

17 For example, Fridays for Future movement <https://fridaysforfuture.org/> accessed 10 July 2020.

18 Thunberg family on behalf of Greta Thunberg, Swedish climate activist.

19 'Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn during General Assembly High-Level Meeting' (Meetings Coverage of General Assembly, Seventy-third Session, High Level Meeting on Climate and Sustainable Development, GA/12131, *United Nations Meetings Coverage and Press Releases*, 28 March 2019) <https://www.un.org/press/en/2019/ga12131.doc.htm> accessed 12 March 2021.

living on the precipice in climate change-affected regions of the world,[20] children who are faced with further, imminent threats of catastrophic weather events, degraded environments, and rapid loss of biodiversity.

A collective rather than an individual approach was preferred, where a group could potentially come together to be heard as one powerful voice and give impetus to a broader change to international and national climate policy, keep G20 countries on track to meet their respective Nationally Determined Contributions (NDCs) as foreseen under the Paris Agreement, and further build on efforts to create binding and enforceable environmental instruments, locating children at the heart of policy-making, and placing children's rights on an equal footing with human rights.

Thus, there were a number of relevant factors which played into the final decision to file the Petition with the CRC Committee. The first such factor considered was the breadth of the outcomes that could be sought before the CRC Committee, which could build upon the efforts of other cases as another step toward the ultimate goal. Second, the UNCRC 'Third Optional Protocol' (OPIC 3)[21] mechanism offered the possibility for a group of disparate Petitioners from around the world to file collectively against a number of G20 States. These factors, together with a series of key global climate events during 2019 as mentioned above, set a natural course toward filing a petition to coincide with the international #FridaysforFuture march in New York City, which saw participation from 170 nations, alongside the UN Climate Action Summit in September 2019.

In addition, the advances in establishing medical links between child health[22] and anthropogenic degradation, along with the publication of the Fifth Assessment Report of the United Nations Intergovernmental Panel on Climate Change (IPCC), provided a strong evidential basis for an increasing number of statements and General Comments[23] being published by United

20 N Watts et al, 'The 2019 Report of The Lancet Countdown on health and climate change: ensuring that the health of a child born today is not defined by a changing climate' (2019) 394 The Lancet 1836.

21 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) 2983 UNTS Reg No 27531 (OPIC 3). At 14 September 2020, there are 52 signatories and 46 parties.

22 ibid.

23 UN Human Rights Committee, 'General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC/36 (General Comment No 36); UN Human Rights Council, 'Climate change and poverty: Report of the Special Rapporteur on extreme poverty and human rights' (17 July 2019) UN Doc A/HRC/41/39.

Nations treaty bodies[24]—including the CRC Committee—which confirm the heightened risks to children and vulnerable groups from climate change. These were viewed as an encouraging sign that the CRC Committee may be ready to receive a first petition with respect to the violation of children's rights in the climate context.

As movement lawyers,[25] our first port of call was to draft a strategy which might bring about systemic change. Systemic outcomes could result in the implementation of ambitious climate policy and regulatory change, or promote and define international cooperation, or challenge adverse government planning decisions. In this case, it became clear that there was a strong need to elevate the voice of the world's children into the political climate change debate, and that this might only be achievable through the international human rights treaty body system. The aim was for the climate crisis to be recognized formally as a children's crisis.

While some may point to the limitations of the international human rights system as regards implementing effective remedies, the international system does offer a unique flexibility of approach, permits multiple petitioners to file a communication against multiple State Respondents, and permits case timeframes from start to finish of (typically) 12–18 months, which is much shorter than similar domestic processes. Most significantly, the UNCRC reporting mechanism to the General Assembly[26] could provide a vital platform for linking children and the climate crisis, and assist with mainstreaming the climate crisis, which impacts all areas of human rights across the whole of the treaty body system. Such a move could lead to the systemic outcome of pushing nations toward adopting a fresh framework for environmental and climate change law, both at the domestic and the international level, which is one of the elements of relief being sought in the case. These factors were each duly considered from the earliest stages of planning the case.

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24 In addition to the CRC Committee, several other human rights committees oversee the implementation of the United Nation's human rights treaties. For example, the Convention on the Elimination of All Forms of Discrimination Against Women is overseen by the Committee on the Elimination of Discrimination Against Women. In total, there are nine UN human rights treaties with corresponding committees.

25 Lawyers who use the law strategically with civil society partners to create systemic change.

26 Art 16 of the OPIC provides that the CRC Committee must report every two years to the UN General Assembly on its activities. Bringing the climate crisis into central focus within the report would transpose the framework of discussing climate change as a children's rights crisis into other UN bodies.

The 30th Anniversary of the UNCRC in November 2019 stood out as a rallying point. At that time, there had not been any use of the 2014 UNCRC OPIC 3 procedure with respect to violations of children's rights arising from the lack of State action around climate change. After much discussion and collaboration with climate practitioners and stakeholders around the wider benefits and limitations of such an action, including the need for careful drafting so as to minimize the potential for any negative impacts on pending or actual cases in domestic courts, the idea of filing the UNCRC OPIC 3 communication fell into place.

For State diplomats and other long- and hard-working climate negotiators, the 2015 Paris Agreement (Paris Agreement) is considered a major triumph. To date, 189 Parties, including China and regional bodies such as the European Union, have ratified the Paris Agreement, representing 97% of global greenhouse gas emissions. What this Agreement has done is identify a quantitative long-term temperature goal (well below 2°C with an aspirational target of 1.5°C). This was certainly a major achievement. The intention of the Paris Agreement is that States will ambitiously drive forward their self-selected NDCs, ratcheting these up over time to achieve net zero by 2050.

What has become clear, however, is that current NDCs are inadequate. They cover 99% of emissions but put the world on track to a 3.2°C temperature increase. This year, States are meant to submit revised NDCs for 2030, but only 12 States had done so by mid-September 2020.[27] The 108 States that have committed to enhancing their NDCs only account for 15% of global emissions. Coverage has also been inhibited by the planned US withdrawal from the Paris Agreement in November 2020. The issue then for litigators and civil society, seeking to advance accountability and review of the NDCs, is that the Agreement itself has serious inherent limitations[28] as it contains no enforcement mechanism, which is also the case for the wider international environmental law framework.

Thus, holding States to account for their respective self-identified NDCs in compliance with their obligations under the Paris Agreement has become the unifying goal of much of the current strategic litigation. Recent domestic court decisions demonstrate the increasing willingness of courts to step in to undertake the task of adequacy review on the NDCs;[29] albeit there are still

27 NDC Registry (interim), The Latest Submissions <https://www4.unfccc.int/sites/ndcstaging/Pages/LatestSubmissions.aspx> accessed 14 September 2020.

28 These limitations are the subject of much discussion at academic round tables working toward more incisive strategic climate change litigation.

29 See, for example, *The State of the Netherlands v Urgenda Foundation,* Supreme Court of the Netherlands, Case No 19/00135, 20 December 2019.

far too few successes, and cases often take several years to grind through the domestic court process. Cases asserting violations of fundamental human and constitutional rights, which are informed by international environmental law principles, and supported by clear and compelling scientific evidence, are nevertheless gaining some acceptance in the courts.[30]

While there have been efforts made to reach a general consensus on a more far-reaching Environmental/Ecocide Treaty,[31] this is still in a nascent stage of development, as are discussions to set up a dedicated international climate court.[32] Such a court, it is proposed, could receive complaints from individuals suffering environmental harms. The options for international redress in respect of environmental and climate change law therefore remain limited, despite the climate emergency being the single most urgent and immediate threat to life on earth both today and in the future. Thus, one of the desired effects of filing the Petition with the CRC Committee is to highlight this systemic failure of enforcement within the framework of international environmental law.

In stark contrast, the international human rights legal framework and its overarching treaty body system is much more developed, given its foundations were laid as early as 1948. It has gained near-global consensus and is binding on all signatories. A case based on an international human rights approach and informed by environmental law principles was therefore the Petitioners' chosen vehicle to take forward the action on behalf of all children.

A *The Convention Violations and the OPIC 3 Procedure*

The UNCRC is dedicated specifically to children and binding on countries that ratified it. It immediately stands out for two reasons. It was ratified the fastest,

30 ibid.

31 See, for example, environmental lawyer Polly Higgins, who in April 2010 introduced a proposal to the United Nations Law Commission to recognize ecocide as a fifth 'crime against peace' <https://www.theguardian.com/environment/2010/apr/09/ecocide-crime-genocide-un-environmental-damage> accessed 11 July 2020.

32 See, for example, Ad Hoc Working Group on the Durban Platform for Enhanced Action, 'Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action' (Second Session, Part Eleven, 20 October 2015) art 11(1), at 19 <http://unfccc.int/files/adaptation/application/pdf/mechanical_light_editing.pdf> accessed 10 July 2020; also see efforts of the ICE Coalition <http://www.icecoalition.org/> accessed 10 July 2020; and see J Cole, 'After the COP21 Paris Climate Accord, What We Need is an Int'l Climate Court' (*Informed Comment*, 13 December 2015) <http://www.juancole.com/2015/12/after-climate-accord.html> accessed 9 July 2020.

and by the greatest number of countries, which now stands at 196.[33] Most importantly, it elevates children as persons and as bearers of their own rights, able to exercise them gradually as they grow up. At its heart, the mechanism enshrines the right of children to express their opinion and the obligation on all communities to really ask for and take into account the views of children. To enable this, the UNCRC has its own dedicated Committee and concomitant Optional Protocol, which permits direct communication between children and the Committee.

Article 5 of the Third Optional Protocol,[34] which came into force in 2014, allows a child or their representative to file a complaint against their home nation[35] for a breach of their rights under the UNCRC. Such a so-called 'communication' will be submitted to the CRC Committee, and, if it meets the admissibility criteria, the Committee can make an inquiry and submit a report to the General Assembly based on their findings. Each of the chosen State Respondents has been an active participant in the international legal framework on climate change. Right from the UN Framework Convention on Climate Change and the Kyoto Protocol in the 1990s, to the 2015 Paris Climate Agreement, four of the five Respondents have signed and ratified all of the primary environmental instruments, with Turkey having only acceded to the Paris Agreement. In doing so, the Respondents have promised the next generation that they will both accept climate change is real and agree to uphold their international obligations to prevent it, and to adopt adequate mitigation and adaptation measures.

Critically, the UNCRC lays out strong children's rights protections relating to the environment and contains two explicit references to the environment. First, the Convention links the child's rights to the highest attainable standard of health (including the rights to nutritious food and safe drinking water) with issues of environmental pollution (Article 24). Second, it defines the child's rights to information on environmental health issues and identifies environmental education as one of the goals of education (Article 29). The Convention, adopted by the General Assembly in 1989, is unique in this respect in drawing a link between the rights of children and the environment. No other UN human rights treaty makes such explicit reference connecting the two areas.

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33 The list of ratifications can be found at: <https://treaties.un.org/Pages/showDetails.aspx-?objid=0800000280000 7fe> accessed 12 March 2021. The United States of America is the only UN Member State that has not ratified the CRC.

34 OPIC 3 (n 21) art 5.

35 See subsection D below for an analysis of the jurisdictional scope of the UNCRC.

Having said this, it is fair to say that very little by way of UN commentary was published about the effects of climate change on children by the CRC Committee until 2016. The CRC Committee also had not previously had an opportunity to consider the climate change issue, as the OPIC 3 communication system has largely been used by children seeking relief from deportation in an asylum context or from other grave abuses.

A year after the Paris Agreement came into force in 2016, the CRC Committee held its 73rd session, which was a special biennial day dedicated to children's rights and the environment,[36] at which a number of youth representatives spoke about the toxic contamination they were experiencing in heavily mined communities throughout Africa and India. On that day, representative climate NGOs also began raising the alarm around the detailed scientific studies reporting rapid loss of nature, fast declining biodiversity, and depletion of the world's natural capital, together posing a severe threat of an irreplaceable environmental deficit for future generations. At that time, the CRC Committee was aware that no legal link between child rights and climate change had yet been made.

During that session, the CRC Committee recognized the urgency of the climate threat to children and adopted this recommendation:

> The UNFCCC was established to ensure the widest possible cooperation from all countries to keep the atmosphere healthy for present and future generations. Yet decades on, we have failed to take the actions needed to stabilize our climate system. When determining the level of climate protection, States should take into account the rights and best interests of the child, especially the right to life, survival and development.[37]

The former UN Special Rapporteur for human rights and the environment, John H. Knox,[38] separately added that, in this regard, there was '[n]o doubt States have heightened obligations towards children'.[39]

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36 Day of General Discussion: 'Children's Rights and the Environment' (23 September 2016)—Ingrid Gubbay was in attendance, instructed by WWF-UK.

37 UN Committee on the Rights of the Child, 'Report of the 2016 Day of General Discussion: Children's Rights and the Environment' (May 2017) 13 <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2016/DGDoutcomereport-May2017.pdf> accessed 12 March 2021.

38 JH Knox, the first United Nations Special Rapporteur (UN SR) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2012–18), preceded DR Boyd, the current UN SR on this issue.

39 OHCHR, 'Panel discussion on climate change and the rights of the child at 34th session of the Human Rights Council' (2 March 2017).

These were very significant first steps by the UN human rights treaty body system towards the linking of children to environmental harm and the need for States' heightened protection. Fortuitously, a week before the Petition was filed and with the UN Climate Summit approaching, five UN treaty bodies, including the CRC Committee, adopted a powerful joint statement on human rights and climate change:

> [T]he Committees note with great concern that States' current commitments under the Paris Agreement are insufficient to limit global warming to 1.5°C and that many States are not on track to meet their commitments. Consequently, States are exposing their populations and future generations to the significant threats to human rights associated with greater temperature increases.[40]

This sequence of weighty statements, along with the General Comments of the United Nations Human Rights Committee, when read together are strongly indicative of a progressive approach linking climate change with human rights violations and were very timely in providing further substantive support for the Petition at the international level. It would justifiably raise serious questions if the CRC Committee were now to make an adverse decision with respect to admissibility in light of these very significant and far sighted pronouncements.

B *Choice of Respondents*

International anthropogenic climate change is caused, sometimes more, sometimes less so, by all States. Due to early industrialization, many Western States have historically contributed much more to greenhouse gas emissions than others, and they continue to count among the largest emitters today. Other countries, perhaps less industrialized, contribute massively to climate change by eroding so-called carbon sinks, such as rainforests, for agricultural or other industrial purposes, while also building up their industrial bases.

It is universally acknowledged that only a concerted international effort may reverse the tide on climate change.[41] Ideally, all countries would be

40 Joint Statement on 'Human Rights and Climate Change' made by Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities (16 September 2019) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> accessed 10 July 2020.

41 RK Pachauri et al (eds), *Climate Change 2014: Synthesis Report* (IPCC 2015) <https://www.ipcc.ch/report/ar5/syr/> accessed 9 July 2020.

brought to the table to account for their human rights records in respect of climate change. However, a communication to the United Nations Human Rights Committee is limited by two primary considerations. First, bringing a legal challenge against over 190 States requires authors of a communication to deal with over 190 parties—a logistical effort best avoided. Second, the human rights treaties often adopt an opt-in approach for States to accept jurisdiction of the human rights treaty bodies to hear communications submitted by individuals. In the case of the UNCRC, the Third Optional Protocol provides for a communications mechanism that allows children who meet certain conditions to submit communications to the CRC Committee. However, Article 1 of the Third Optional Protocol limits the jurisdiction of the CRC Committee to hearing communications in respect of States Parties to the Third Optional Protocol only.

Four factors therefore played a role in selecting potential respondents for a communication alleging human rights violations caused by climate change:

– Only State parties to the protocol may act as respondents – the number of those currently stands at 46.
– Amongst those 46 States, who are the largest greenhouse gas emitters? Notably, the United States and China, who both top the leagues of greenhouse gas emitters, did not sign the protocol.
– Out of the largest greenhouse gas emitters who have signed the protocol, which have the worst record in mitigating climate change risks?
– And, lastly, what is a manageable number of States for an individual petitioner (or a group of petitioners) to deal with?

Consequently, Argentina, Brazil, France, Germany and Turkey were selected as the biggest climate polluters out of the 46 countries that have adopted the protocol. Current emissions from all five countries are on track for more than a 3 degree Celsius warming.[42] Many will argue that Germany and France are world leaders in advancing their respective green policy frameworks under the EU New Green Deal,[43] yet, in the view of the Petitioners, they have done little to date to implement measures regulating their respective high-polluting carbon majors operating in the energy sector.

42 Petition (n 1) 12.

43 Commission, 'The European Green Deal' (Communication) COM (2019) 640 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576150542719&uri=COM%3A2019%3A640%3AFIN> accessed 12 July 2020.

C *Exhaustion of Local Remedies*

Communications before the UN Human Rights Committees generally follow the well-known principle of subsidiarity.[44] According to this principle, States, including through their local courts, have the primary responsibility to ensure that human rights are respected, protected and enforced, before they become a matter for the international human rights committees. This principle certainly has its advantages in the context of human rights violations arising out of individual circumstances, for example by giving local courts the power to require reform of certain laws or correct certain behaviour within their constitutionally assigned roles and within their local communities.

However, the principle may cause certain issues for individuals affected by global processes that infringe their human rights. In the case of climate change, this problem is exacerbated by the immediate need to double down on the efforts to keep climate change within the internationally agreed target of a 1.5°C warming: time is of the essence, and fast running out.

If a local route is pursued (and there are good reasons why this also is an option), individuals affected by global processes face two possibilities: either they attempt to sue a range of responsible countries in the individual's own domestic court; or they initiate separate proceedings in a range of jurisdictions. Neither option is attractive.

The first option hinges on the ability of national courts to exercise their powers extraterritorially, which traditionally is very limited, and against foreign governments, which are often protected by State immunity. National litigation against a range of Sates therefore suffers not only from formidable legal challenges, but also the risk of obtaining an unenforceable remedy. The second option is equally unattractive: litigating in multiple fora is an exercise unaffordable to any child activist. Both options would also cause unreasonable delay. Defences are consistently raised by States (and carbon majors) to delay or prevent individuals from accessing climate change justice. Moreover, the judicial process itself, including the prospect of appeals, contains inherent delays in reaching trial and enforcement.

How do the problems frequently encountered in national courts sit with the principle of subsidiarity built into the international human rights system? Looking at the UNCRC, Article 7(e) of the Third Optional Protocol makes communications inadmissible when:

44 GL Neuman, 'Subsidiarity' in D Rose (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

> All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief.

The CRC Committee considered inadmissibility under Article 7(e) in *NBF v Spain*.[45] In this communication, the Committee appears to have tied the notion of unreasonable prolongation to that of the effectiveness of the potential relief:

> in the context of the author's imminent expulsion from Spanish territory, any remedies that are excessively prolonged or do not suspend the execution of the existing deportation order cannot be considered effective.[46]

It is argued that this reasoning is directly applicable to the climate change-related communications. States' failure to implement meaningful measures to comply with national and international emissions targets is an imminent threat to individuals' human rights: failure to prevent temperature increases beyond 1.5°C will cause grievous, long-lasting and potentially irreversible harm to the planet, its ecosystems, humanity, and, in particular, children and future generations. Any failure to take immediate action will shorten the period in which mitigating measures can be implemented. Adjudicating domestic cases in numerous jurisdictions would take years, if not decades, and interim relief would often be unavailable to petitioners in the meantime.

Article 7(e), while securing subsidiarity, thus contains a safety valve. The CRC Committee recognizes the gravity of infringements of the right to life, and other fundamental children's rights. Climate change poses an unprecedented global risk. Any interpretation of Article 7(e) should therefore build on the precedent set by prior jurisprudence along with reference to the Paris Agreement, and recognize that while certain judicial remedies may be available to individuals in particular jurisdictions, in order to protect their fundamental rights, the broader remedies sought in this case are not achievable at the domestic level.

D *Jurisdiction of the CRC Committee*

Climate change occurs through the release of 'greenhouse gases (GHGs)' into the atmosphere, where they affect global and local weather patterns and

45 UN Committee on the Rights of the Child, *NBF v Spain* (27 September 2018) UN Doc CRC/C/79/D/11/2017.

46 ibid para 11.3.

temperatures. As scientific evidence makes clear, the largest emitters are usually not the countries worst affected by such temperature and weather changes. The reverse is true: countries in the Global South and island nations are disproportionately affected by a changing climate.[47] Nevertheless, as the atmosphere is 'one', emissions in one part of the world change the weather everywhere. All States contribute to climate change, some more, some less, and all States are affected, some more, some less.

The obvious issue in relation to States' human rights obligations is that the emissions from country X, a large GHG emitter which fails to adequately reduce its emissions in line with internationally agreed targets, contributes to global climate change affecting the human rights of person A in country Y (and indeed, the human rights of everyone, everywhere). In an international legal order historically centred around territoriality and sovereignty, how can person A in country Y hold country X to account for its breaches of person A's human rights? Or, put in more legal terms, is person A within country X's jurisdiction for the purposes of pursuing a human rights complaint against country X on the basis of an international human rights treaty?

In respect of the Petition, Article 2(1) of the UNCRC is the starting point for any consideration of jurisdiction. It provides that 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction'. Similarly, Article 5(1) of the Third Optional Protocol reads: 'Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be the victims of a violation by that State party [of the UNCRC rights]'. The question, therefore, is what does 'within [the State Party's] jurisdiction' mean? In an attempt to make a case for the extraterritorial application of human rights treaties in the context of climate change, the subsequent paragraphs consider (1) control as the traditional basis to establish extraterritorial jurisdiction; and (2) the significance of directness and foreseeability as emerging factors in establishing extraterritorial jurisdiction.

1 Control

It is well-established law that States are responsible for human rights violations that occur a) within territories in which they exercise (a degree of)

47 'Unprecedented Impacts of climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate' (Meetings Coverage of General Assembly, Seventy-fourth Session, Second Committee, GA/EF/3516, *United Nations Meetings Coverage and Press Releases*, 8 October 2019) <https://www.un.org/press/en/2019/gaef3516.doc.htm> accessed 13 March 2021.

control;[48] and b) in respect of people over which they exercise (a degree) of control.[49] The limits of these concepts are reached when situations of transnational harmful effects are considered. In such a situation, the harmful effect manifests itself outside of an area over which the originator State has control and affects the enjoyment of human rights of people over which the originator State does not exercise control. However, does jurisdiction extend to (in) actions of States over which they exercise control, and which directly and foreseeably affect an individual's human rights in another country?

2 Direct and Foreseeable Effect

The Inter-American Court of Human Rights (IACtHR) considered the issue of human rights violations caused by transboundary environmental harm. It was asked by Colombia to provide an Advisory Opinion on the question of whether a person situated outside the territory of a State Party to the American Convention on Human Rights (the Convention),[50] whose rights have been violated as a result of damage to the environment (or the risk thereof) which can be attributed to that State Party, falls within the jurisdiction of that State Party.[51] For the first time, the IACtHR went beyond the traditional tests for jurisdiction based on control over territory and control over people and embraced a test based on a 'causal nexus'. In other words, it postulated that where the event giving rise to the violation of human rights is sufficiently closely connected to the violation, the person suffering the violation of their human rights falls within the jurisdiction of that State.

However, the IACtHR opined that not anyone in the world adversely affected by an act imputable to a State Party to the Convention would be brought into the jurisdiction of that State. The State Party's responsibility would only arise from a failure to exercise its due diligence obligation within its territory in a

48 See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Banković and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001).

49 See, for example, UN Human Rights Committee, *Lopez Burgos v Uruguay* (29 July 1981) UN Doc CCPR/C/13/D/52/1979; *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011).

50 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention).

51 *The Environment and Human Rights* (*State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*), Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (Advisory Opinion 23).

situation where the State Party (i) is factually linked to an extraterritorial situation; (ii) has knowledge of the risk of wrongful effects; and (iii) has the capacity to protect extraterritorially resident individuals due to its effective control over activities within its own territory. In respect of the harm, the IACtHR opined that it must be foreseeable and that there must be plausible factors connecting the activity (or omission) with the harmful effect.

Under this formulation, which the Petition endorsed, the failure to implement fully sufficient climate change policies by the Respondent States arguably meets the applicable test to establish jurisdiction: the Petitioners are within the Respondent States' jurisdiction in respect of the foreseeable harms they suffer from climate change. More recently, picking up on the broader comments in this context made by the court in the successful *Urgenda* decision of the Supreme Court of The Netherlands, Michelle Bachelet, UN High Commissioner for Human Rights, stated:

> [t]he decision confirms that the government of the Netherlands and, by implication, other governments have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases[52]

E *Causation*

As is apparent from the above, one of the key challenges in establishing a human rights violation arising out of a failure to minimize anthropogenic climate change lies in establishing the nexus, or causal relationship, between a government's acts or omissions and a violation of an individual's human rights.

In public law climate change cases, the success of a case is usually based on proof of causation and linking impacts with GHG emissions from a specific activity that requires regulation. However, climate change is a global process and even though science improves constantly, it can be difficult to attribute harm to a specific emitter, as GHG emissions collectively cause harm. This is known as the 'proof problem'. Another complicating factor concerning causation is known as the 'drop in the ocean' problem: the fact that emissions from a single source (or even country) appear minimal compared to total global emissions.[53] Thirdly, the lack of scientific certainty of

52 'Bachelet welcomes top court's landmark decision to protect human rights from climate change' (*OHCHR*, 20 December 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E> accessed 12 July 2020.

53 See, for example, *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter* [2007] FCA 1480, an Australian case where it was stated that '[i]n light of the relatively small contribution of the proposed action

attributing[54] global climate change to local impacts may make it difficult to link emissions from a specific source to the harm or injury. These three 'causation problems' are commonly presented by defendant States and multinationals in climate change cases. Nevertheless, two principles—the precautionary principle and the principle of shared responsibility—effectively counter these 'problems'.

Firstly, the precautionary principle may assist in overcoming the otherwise stringent tests in establishing a causal nexus between act or omission and infringement. The precautionary principle may be used a) to allow courts to infer from the general evidence of impacts of climate change a likelihood of causation of the specific injury; and b) to reverse the burden of proof in appropriate cases, requiring the defendant to prove that their emissions (or lack of action by public authorities) will not cause harm to the claimants.

One of the earlier formulations of the precautionary principle can be found in the 1992 Rio Declaration.[55] The key idea is: better safe than sorry. The principle addresses situations in which harmful effects are possible, but it is scientifically impossible to predict their occurrence with certainty. All the precautionary principle requires is some reasonable grounds for concern before action should be taken. As the Petitioners argue, the worst potential consequences of climate change will only manifest themselves in the mid to long term, but will do so with high scientific certainty.[56] It would be both immoral and in breach of the precautionary principle if States could point to any residual scientific uncertainty to break the chain of causation. In the face of grave future harm, uncertainty cannot be a defence to inaction.

Helpfully, the Advisory Opinion of the IACtHR of 15 November 2017 also considered the application of the precautionary principle within the context

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to the amount and concentration of greenhouse gases in the atmosphere, I found that a possible link between the additional greenhouse gases arising from the proposed action and a measurable or identifiable increase in global atmospheric temperature or other greenhouse impacts is not likely to be identifiable.'

54 It is foreshadowed that the forthcoming IPCC 6th report (scheduled for publication in July 2021) will focus on the application of methodologies in measuring specific weather event attribution.

55 'Rio Declaration on Environment and Development' United Nations Conference on Environment and Development (Rio de Janeiro 3 June–14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (vol I). For a line of cases that have grappled with the precautionary principle, see *Trail Smelter Case* (*United States v Canada*) (1941) 3 RIAA 1905; *Southern Bluefin Tuna Cases* (*New Zealand v Japan; Australia v Japan*) (Provisional Measures) (1999) 38 ILM 1624 (ITLOS Order of 27 August 1999); and *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment) [2010] ICJ Rep 14.

56 Petition (n 1) paras 188ff.

of the American Convention on Human Rights. The Court notes that the principle is emerging as a rule of customary international law. The Court concludes:

> Thus, in the context of the protection of the rights to life and to personal integrity, the Court considers that States must act in keeping with the precautionary principle. Therefore, even in the absence of scientific certainty, they must take 'effective' measures to prevent severe or irreversible damage.[57]

What holds true for the Inter-American Convention on Human Rights must hold true for the UNCRC.

Secondly, regarding the principle of shared responsibility, the Dutch Supreme Court confirmed in the well-known *Urgenda*[58] litigation that even where a State is only a minor contributor to global climate change, the responsibility of the State is nevertheless engaged. In addition, the precautionary principle was applied in the Court's human rights analysis: the fact that risks would only materialize (without scientific certainty) at a future date did not preclude the engagement of Articles 2 (right to life) and 8 (right to a private and family life) of the European Convention on Human Rights. More specifically, the Supreme Court confirmed that the principle of shared responsibility enshrined in climate change agreements also meant that each State is the bearer of individual obligations and accountable by reference to its actual (mis-)conduct. Partial causation thus justifies partial responsibility. The Court correctly observed that the insufficient-causal-link defence often raised in this context would absolve all States:

> If the opinion of the State were to be followed, an effective legal remedy for a global problem would be lacking. After all, each State held accountable would then be able to argue that it does not have to take measures if other States do not do so either.[59]

As the Petitioners have submitted, this causal mechanism is legally sufficient for admissibility. By substantially contributing to climate change, each Respondent is responsible for its contributions to the Petitioners' injuries. Nothing in international law requires a State to be the sole cause of a violation.

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57 Advisory Opinion 23 (n 51) para 180.

58 *Netherlands v Urgenda* (n 29). See also C Bakker, 'Climate Change Litigation in The Netherlands', Chapter 9 in this volume.

59 *Netherlands v Urgenda* (n 29) para 64.

To the contrary, the CRC Committee and other treaty bodies have already recognized State responsibility for contributing to climate change-related violations.[60] As a general principle of international law, when multiple States contribute to a single harm, each State is responsible for its own wrongful acts, according to its own international obligations.[61] Where some or all of the contributing States have consented to a court or committee's jurisdiction, they can be joined in one case. Article 17 of the OPIC Rules of Procedure expressly provides for joint communications.[62]

IV Conclusion

The five years since the adoption of the UN Paris Agreement have seen the opening up of climate change litigation. It has largely been *ad hoc* by nature but nevertheless follows a course of attempting to keep States on track to meet their NDC commitments and reach more ambitious targets. At the same time, in the context of climate change activism, international human rights law has enjoyed a slightly uneasy 'revival' but is playing a critically important role in providing legal remedies currently unavailable in environmental international law: providing redress by linking the harmful impacts of insufficient State climate ambition with human rights violations.

It is likely that, going forward, lessons will be drawn from historic and current cases which will better equip lawyers in setting out their strategic ambition in the time left, to act with more surgical precision in both supporting diplomatic efforts to avert the global crisis and to continue bringing accountability where there are failures. Litigation may also be an added driver to States implementing dedicated climate statutes from which to seek domestic remedies in shorter timeframes.[63] The rapidly evolving science being published by the IPCC and other respected institutions is better able to ascribe anthropocentric probability values to individual States. It may well be that the principle of shared responsibility of States will become more accepted as the scientific

60 Joint Statement on 'Human Rights and Climate Change' (n 40) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> accessed 14 September 2020.

61 See, for example, A Nollkaemper et al, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) EJIL 15, 24ff.

62 UN Committee on the Rights of the Child, 'Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure' (16 April 2013) UN Doc CRC/C/62/3, Rule 17(2).

63 See, for example, the United Kingdom's Climate Change Act 2008 (ch 27).

evidence becomes more solid and States increasingly look for international cooperation in burden sharing, much as it has in dealing with the COVID-19 pandemic.

More broadly, children and their representatives[64] are engaged in lobbying States to ratify the UNCRC Third Optional Protocol,[65] a mechanism which gives them a direct voice to the UN.[66] Alongside this, the Intergovernmental Declaration on Children, Youth and Climate Action,[67] and Joint Call to Action on 'Realising Children's Right to a Healthy Environment',[68] were presented to State leaders for signature at the start of the 44th session of the Human Rights Council on 30 June 2020. The intention is that the Declaration on Children's Rights and the Environment will inspire further action to set and implement relevant standards at the international and national levels. This is a fast-moving space and there is every expectation that these rapid high-level developments will lead to further consolidation of grounds for legal review where diplomatic efforts fail.

Closer to home, the children in the present Petition report a sense of empowerment in engaging in the UNCRC process, and are sought after to regularly speak at international and other events.[69] They have formed an advocacy hub which networks widely with youth climate education portals globally,

64 See, for example, Child Rights Connect, based in Geneva < https://www.childrightsconnect.org/organisation/> accessed 11 July 2020.

65 OPIC 3 (n 21).

66 A more specific process giving children more involvement in decision-making processes is also in discussion, see OHCHR, 'Global Initiative: Advancing Children's Right to a Healthy Environment' (Concept note, 2019) <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/ConceptNoteChildRights_EN.PDF> accessed 13 March 2021.

67 On 9 December 2019, at the 25th Conference of the Parties (COP 25) in Madrid, Spain, governments and youth activists united for a historic moment to sign the *Intergovernmental Declaration on Children, Youth and Climate Action*. This declaration—based on priorities identified by YOUNGO and inputs from children and youth across the world received through the Centre for Educational Research and Innovation's online and in-person consultations—is a first-of-its-kind commitment to accelerate inclusive, child- and youth-centred climate policies and action at national and global levels. <https://www.voicesofyouth.org/es/campa%C3%B1a/cop25-declaracion-sobre-los-ninos-ninas-jovenes-y-la-accion-climatica> accessed 10 July 2020.

68 'Realising Children's Right to a Healthy Environment: A Joint Call to Action for the HRC Annual Full-Day Meeting on the Rights of the Child' (June 2020) <https://www.hrw.org/sites/default/files/media_2020/06/ADRC_Call%20for%20action_0.pdf> accessed 11 July 2020.

69 If not in person, often linked up via videoconferencing facilities.

actively write letters[70] to State leaders pointing out deficiencies in State investment which are contrary to climate commitments, and are part of formulating new strategies for engagement and inclusive climate policy at the diplomatic and legal levels. They are hopeful that the CRC Committee will seize the day and redefine the climate crisis as a children's crisis and grant the relief they seek. Their voices are recognized and their genuine and continuing commitment to reversing the climate crisis has been both personally transformative, and a beacon of hope for their communities, and all the children alive today and future generations. The time for action to address the climate crisis and prevent catastrophic impacts on children's rights is rapidly running out. As the IPCC has stated, 'Every bit of warming matters, every year matters, every choice matters'[71] and so it follows, 'every child matters.'[72]

70 Hausfeld LLP on behalf of the Petitioners, 'Letter to the Prime Minister of Canada' (9 December 2019) <https://www.hausfeld.com/uploads/documents/2019.12.06_Children_v._Climate_Change_Letter_-_Canada_for_website_(final).pdf> accessed 10 July 2020; Hausfeld LLP on behalf of the Petitioners, 'Letter to the Prime Minister of Norway' (9 December 2019) <https://www.hausfeld.com/uploads/documents/2019.12.06_Children_v._Climate_Change_Letter_-_Norway_for_website_(final).pdf> accessed 10 July 2020.

71 V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) vii (Foreword) <https://www.ipcc.ch/sr15/> accessed 29 March 2021.

72 DR Boyd, sentiments expressed in his amicus curiae brief (n 3).

CHAPTER 16

Inter-State Climate Change Litigation: 'Neither a Chimera nor a Panacea'

*Annalisa Savaresi**

> The law of nations is neither a chimera nor a panacea, but just one institution amongst others that we have at our disposal for the building up of a saner international order.
>
> JAMES LESLIE BRIERLY, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (OUP 2012) v.

1 Introduction

In the face of the difficulties of international climate diplomacy, 'the invisible college of international lawyers' has been called upon to devote more efforts 'towards reviving the blunt edge of climate change-based national, regional, or international litigation, adjudication, and arbitration towards reaching sufficiency of climate pledges'.[1]

While earlier contributions in this volume focus on national and regional developments, this chapter specifically introduces the matter of international litigation concerning climate change, focusing in particular on inter-State litigation. The literature typically distinguishes between 'pro-' litigation—initiated in order to engender policy change, for example, by requesting the adoption or reform of legislation; and 'anti-' litigation—initiated to resist such change, for example, by challenging the adoption of new or reformed

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1 D Desierto, 'COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?' (*EJIL: Talk!*, 19 December 2019) <https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-States-to-act-faster-to-implement-climate-obligations/> accessed 23 December 2019.

legislation.[2] It is furthermore possible to distinguish between litigation instigated by/against State and non-State actors.

Anti- international climate change litigation has long been common, especially in the area of investment law. Non-State actors have resorted to dispute settlement mechanisms, relying on investment treaties, for example to resist reforms of renewable energy subsidies, with increasing frequency and alternate fortunes.[3] Instead, pro- inter-State climate change litigation has hardly happened. A few non-State actors—most saliently indigenous peoples and children—have resorted to international human rights mechanisms to complain about multiple human rights violations associated with the actual and projected impacts of climate change.[4] While only a handful such complaints have been lodged, none have been successful to date. In the meantime, no inter-State climate change litigation has taken place.

In spite of this lack of practice, the possibility to instigate pro- inter-State climate change litigation has been at the centre of much scholarly speculation.[5] The history of international environmental litigation shows that inter-State disputes are 'seldom, if ever brought purely to achieve legal objectives, and instead are often part of the "theatre" of environmental diplomacy.'[6] While

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2 See, for example, CJ Hilson, 'Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back In)' in F Fracchia and M Occhiena (eds), *Editoriale Scientifica, Naples* (Editoriale Scientifica 2010) 421; J Peel and HM Osofsky, *Climate Change Litigation* (CUP 2015) 30–31.

3 See, for example, *Blusun SA and Others v Italy* (2017); *Charanne and Construction Investments v Spain* (2017). F Baetens, 'Renewable Energy Incentives: Reconciling Investment, EU State Aid and Climate Change Law' (*EJIL: Talk!*, 18 December 2019) <https://www.ejiltalk.org/renewable-energy-incentives-reconciling-investment-eu-State-aid-and-climate-change-law/> accessed 23 December 2019. See also P Thieffry, 'International Arbitration of Climate-Related Disputes', Chapter 20 in this volume.

4 See M Feria Tinta, 'Climate Change as a Human Rights Issue', chapter 14 in this volume and I Gubbay and C Wenzler, 'Intergenerational Climate Change Litigation', chapter 15 in this volume.

5 Some of the most widely cited works include: R Tol and R Verheyen, 'State Responsibility and Compensation for Climate Change Damages – a Legal and Economic Assessment' (2004) 32 Energy Policy 1109; R Verheyen, *Climate Change Damage and International Law: Prevention, Duties and State Responsibility* (Martinus Nijhoff 2005); MG Faure and A Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 26 Stanford Journal of International Law 123; C Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 Nordic Journal of International Law 1; D Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 Arizona State Law Journal 659; M Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart 2019); A Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 The International Journal of Marine and Coastal Law 458.

6 T Stephens, 'International Environmental Disputes: To Sue or Not to Sue?' in N Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014) 287.

therefore in theory the main purpose of inter-State litigation is that to settle disputes between two or more parties, in practice ulterior motives may be pursued, such as domestic political objectives, or the bolstering of international diplomatic endeavours.[7] In this connection, like any litigation, inter-State disputes are not an end in themselves, but merely 'a means to an end'.[8] In the context of climate change, the ulterior motive would be that to deliver judicial solutions to two intractable problems, namely: how to put pressure on States to intensify their response to climate change and reduce emissions, and/or to redress harm associated with the impacts of climate change.

To be sure, international diplomatic fora and processes designated to deliver inter-State cooperation on both matters already exist. The international climate change treaties—ie the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol and the 2015 Paris Agreement[9]—and the abundant normative production associated with each are very much part and parcel of the international legal order.[10] However, solutions to the intractable problems above have largely eluded international climate negotiations and the institutions they created in the course of almost three decades. So, could inter-State litigation make a difference? And what added value would it have?

The literature has explored pro- inter-State litigation, focussing on three main hypothetical scenarios:

I. disputes over breaches of international obligations concerning climate change;
II. disputes over harm associated with climate change;
III. an advisory opinion interpreting international obligations on climate change.

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7 As noted also in A Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (2019) 62 German Yearbook of International Law 305, 326.

8 V Lowe, 'The Function of Litigation in International Society' (2012) 61 International & Comparative Law Quarterly 209, 221.

9 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC); Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol); and Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 (Paris Agreement).

10 RR Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 American Journal of International Law 623; J Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 Leiden Journal of International Law 1.

The first two scenarios both concern the application of the law of State responsibility to climate change but deserve separate consideration because of the different litigation hurdles associated with each. The latter scenario, instead, clearly differs from the previous two because of its non-contentious nature.

This chapter critically engages with the arguments made by some of the most widely cited scholars on these litigation scenarios, in light of developments occurred since the adoption of the 2015 Paris Agreement. The objective is to ascertain whether inter-State pro- climate change litigation could make a difference, and assuming it could, its added value. It does so by exploring the three litigation scenarios identified above, considering the opportunities and the constraints of each.

The opportunities and constraints of each scenario are categorized into three groups: 'technical', 'substantive' and 'existential'. Technical opportunities and constraints are those of a procedural nature—ie concerning the rules on jurisdiction of international adjudicatory bodies. Substantive opportunities and constraints, conversely, concern the content of international law obligations—for example, the contours of due diligence obligations under the climate treaties. Finally, existential opportunities and constraints are those that result from the very nature of international law as a normative legal system, that is produced and implemented within the limits of State sovereignty and State consensus. Paraphrasing Brierly, the chapter concludes that, given the present state of international climate diplomacy, international litigation is 'neither a chimera nor a panacea',[11] but represents one means at our disposal for delivering better and greater climate action.

11 Disputes Over Breaches of an International Obligation Concerning Climate Change

State responsibility typically arises when an action or omission that is attributable to a State breaches an international obligation,[12] regardless of the origin or character of the latter obligation.[13] As such, State responsibility requires neither fault nor damage. Instead, any 'injured' State, whose subjective rights have

11 JL Brierly, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (OUP 2012) v.

12 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' [2001] vol II(2) Yearbook of the International Law Commission 31 (ILC Draft Articles) art 2.

13 ibid art 12.

been violated by said breach, may invoke State responsibility.[14] This may occur in a bilateral setting, ie for the breach of an obligation owed to the aggrieved State only; or, in a multilateral setting, ie either for the breach of an obligation due to multiple States, or indeed to all States.[15] Multilateral obligations may be breached under the same circumstances as any other international obligation.[16] In both instances, therefore, the claiming State needs to be specifically affected by the breach, eg because the wrongful act was committed against its citizens or on its territory.[17] The injured State can claim all the remedies available under the law of State responsibility, ranging from cessation to assurances of non-repetition, restitution, compensation and satisfaction.[18]

In addition, any State may invoke State responsibility for the breach of obligations in the collective interest (*erga omnes* or *erga omnes partes*), even where it is not itself specifically affected (eg for wrongful acts committed against the citizens of another State and on the territory of another State).[19] In these instances, however, the applicant State can demand only cessation of the internationally wrongful act and the performance of the duty to make reparation for the benefit of any injured States.[20]

In order to instigate a dispute for a breach of an international obligation concerning climate change, therefore, a set of material conditions need to materialize:

– A State has international obligations concerning climate change;
– One or more of these obligations have been breached, through an act or omission by the same State;
– The breach is attributable to said State;
– One or more States have been injured by said breach *or* the breached obligation is *erga omnes/erga omnes partes*.

With regard to the first condition, multiple international obligations in relation to climate change clearly exist. These are primarily enshrined in international climate treaties, which have been ratified by virtually all States.[21]

14 ibid art 42.

15 Including, the possibility under art 42.2 that the breach is 'of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.'

16 C Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations' (1999) 10 European Journal of International Law 353, 361.

17 R Kolb, *International Law of State Responsibility: An Introduction* (Edward Elgar 2018) 196.

18 ILC Draft Articles (n 12) arts 30–31.

19 ILC Draft Articles (n 12) art 48.

20 ILC Draft Articles (n 12) art 48.

21 At the time of writing, the UNFCCC has 197 Parties; the Kyoto Protocol has 192 Parties; and the Paris Agreement has 189 Parties.

Climate treaties, however, leave the regulation of specific matters, eg emissions from aviation, to other international regimes, eg the International Civil Aviation Organization.[22] Numerous other multilateral treaties may therefore be relevant for climate protection.[23] These include other multilateral environmental treaties (MEAs)—on matters such as air quality, the protection of the ozone layer, biodiversity and the law of the sea—as well as treaties in other areas—such as human rights, or international economic law.[24]

International disputes concerning the breach of obligations enshrined in MEAs are relatively rare—with the sole significant exception of disputes under the UN Convention of the Law of the Sea.[25] Conversely, inter-State litigation based on human rights and international economic law is comparatively frequent.[26] So far, no international litigation has been instigated for a breach of an international obligation concerning climate change. Let us now consider how the remainder of the material conditions to instigate an inter-State dispute for a breach of an international obligation concerning climate change may be fulfilled.

A *Material Conditions to Instigate a Dispute*

Even if the Paris Agreement only entered into force in 2016, breaches of obligations enshrined in the treaty may have already occurred. The agreement requires each party to periodically prepare, communicate and maintain 'nationally determined contributions' (NDCs).[27] These are plans detailing how each party intends to reduce its emissions and by how much, in order to contribute to the global temperature goal enshrined in the Paris Agreement. The latter is set to hold the increase of the global average temperature to well below 2°C, and ideally limited to 1.5°C above pre-industrial levels.[28] NDCs

22 Kyoto Protocol (n 9) art 2.2.

23 See, for example, R Rayfuse and S Scott, *International Law in the Era of Climate Change* (Edward Elgar 2012); H van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar 2014).

24 Faure and Nollkaemper (n 5) 143.

25 For a list of contentious cases before the International Tribunal on the Law of the Sea, see: <https://www.itlos.org/en/cases/list-of-cases/> accessed 3 March 2020. See also J Harrison, 'Litigation under the United Nations Convention on the Law of the Sea', chapter 18 in this volume.

26 There is no single repository of the abundant international litigation in these areas, but a compilation of selected cases may be found at: <http://www.worldcourts.com> and <http://www.worldlii.org> for human rights law; and at <https://icsid.worldbank.org/en/> and <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> for international economic law, accessed 15 June 2020.

27 Paris Agreement (n 9) art 4.2.

28 Paris Agreement (n 9) art 2.1(a).

therefore are the yardstick against which parties' performance under the Paris Agreement is to be reviewed.

At the *procedural* level, the obligation to submit periodical plans to be reviewed by treaty bodies is typical of MEAs.[29] Unlike the Kyoto Protocol, however, the Paris Agreement does not impose upon its parties obligations of result to achieve specific emission reductions over a certain time frame.[30] Instead, the obligations associated with NDCs are largely procedural in nature.[31] Whilst no format for NDCs could be agreed ahead of adoption of the Paris Agreement, parties have been negotiating specific guidance on this issue ever since,[32] in a process that remains ongoing at the time of writing.[33] But even if the parties had agreed to submit revised NDCs in early 2020,[34] only a handful had done so. And even though an extension is likely to be agreed, we may be faced already with a breach of *procedural* obligations under the Paris Agreement. The same may certainly be said if a party fails to submit an NDC altogether.

At the *substantive* level, even where an NDC has been submitted, Voigt suggests that the principle of 'highest possible ambition' embedded in the Paris Agreement[35] may be interpreted to imply a due diligence standard that requires States to act 'in proportion to the risk at stake and to the means at their disposal'.[36] Boyle seems to agree, by arguing that there are potentially justiciable parameters in the Agreement, even if the treaty deliberately leaves

29 D Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2011) 238.

30 Kyoto Protocol (n 9) art 3.1 and Annex B.

31 See, for example, D Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 Review of European, Comparative & International Environmental Law 142, 146.

32 Paris Agreement (n 9) art 4.13; and UNFCCC Conference of the Parties, 'Decision 1/CP.21 Adoption of the Paris Agreement' (29 January 2016) UN Doc FCCC/CP/2015/10/Add.1, para 31 <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> accessed 13 March 2021.

33 JI Allan et al, 'Earth Negotiations Bulletin: Summary of the Madrid Climate Change Conference' (IISD 2019) <https://enb.iisd.org/vol12/enb12775e.html> accessed 25 February 2020.

34 Decision 1/CP.21 (n 32) para 25 says: 'Parties shall submit to the secretariat their nationally determined contributions referred to in Article 4 of the Agreement at least 9 to 12 months in advance of the relevant session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement'. COP26 was expected to take place in November 2020, so the deadline envisioned in Decision 1/CP.21 has passed already. Only a handful of parties, however, have submitted their revised NDCs: <https://www4.unfccc.int/sites/ndcstaging/Pages/LatestSubmissions.aspx> accessed 15 June 2020.

35 Paris Agreement (n 9) art 4.3.

36 C Voigt, 'The Paris Agreement: What Is the Standard of Conduct for Parties?' (*Questions of International law*, 24 March 2016) <http://www.qil-qdi.org/paris-agreement-standard-conduct-parties/> accessed 18 April 2016.

very considerable discretion to individual State Parties.[37] In the meantime, scientists largely converge that the level of ambition embedded in NDCs submitted to date is insufficient to secure the achievement of the temperature goal envisioned in the Paris Agreement.[38] Potentially, therefore we are already faced also with breaches of *substantive* obligations concerning NDCs under the Paris Agreement.

Whether or not a breach of the above obligations concerning NDCs may be attributed to a party does not seem to pose any specific obstacles. NDCs submission is a formalized process and clearly entails State ownership. Equally, the matter of which States may claim to have been injured by said breach is relatively straightforward. States that are particularly vulnerable to the impacts of climate change and have contributed little to the problem are already singled out in the climate treaties as deserving special attention and support, and they already benefit from preferential treatment.[39] These parties may persuasively argue to be an injured State and invoke State responsibility for breaches of obligations enshrined in the Paris Agreement concerning NDCs. Alternatively, any party may claim that obligations concerning the submission of NDCs are *erga omnes partes.*

B *Opportunities and Constraints*

Like many other MEAs, the Paris Agreement establishes a dedicated facilitative compliance mechanism,[40] embracing what has been described as a 'managerial' approach to compliance.[41] This means that the compliance mechanism is not endowed with powers to 'enforce', but rather to encourage compliance, facilitating parties' consultation, cooperation and peer pressure.[42] Parties, however, are not required to subject matters of compliance to the committee, before they engage in a formal dispute. Instead, as under the other climate treaties,[43] parties to the Paris Agreement may submit a dispute to an international

37 Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7) 337.

38 United Nations Environment Programme, 'The Emissions Gap Report 2019' (2019) <https://www.unenvironment.org/resources/emissions-gap-report-2019> accessed 25 May 2020.

39 UNFCCC (n 9) Preamble and arts 3.2; 4.3 and 4.10. Paris Agreement (n 9) Preamble and arts 7.2; 7.5; 7.6; 7.9; 9.4 and 11.1.

40 Kyoto Protocol (n 9) art 18; Paris Agreement (n 9) art 15.

41 Bodansky, *Art and Craft* (n 29) 242.

42 G Zihua, C Voigt and J Werksman, 'Facilitating Implementation and Promoting Compliance with the Paris Agreement Under Article 15: Conceptual Challenges and Pragmatic Choices' (2019) 9 Climate Law 65.

43 UNFCCC (n 9) art 14.

court or tribunal, subject to a special declaration.[44] Hardly any parties have made such a declaration to date.[45]

For this reason, the literature has dedicated much attention to how to overcome the *technical* constraints to bringing a contentious climate case before the International Court of Justice (ICJ). This matter is dealt with in another chapter in this volume and will not be looked at in further detail here.[46] For the present purposes it suffices to mention that the ICJ may only adjudicate on a dispute if all States concerned have consented to its jurisdiction.[47] This limits considerably the number of States that may be engaged in a dispute, and excludes the world's largest emitters—namely China and the US.[48] The literature has therefore considered alternative fora for inter-State climate change litigation, and most saliently, the possibility to initiate litigation before the International Tribunal on the Law of the Sea (ITLOS), as we shall see in further detail below (Section III).[49]

Even assuming that an expedient adjudicatory body can be identified, inter-State litigation for a breach of an international obligation concerning climate change would be faced with significant *existential* constraints. As almost all parties to the Paris Agreement have failed to submit an NDC in a timely fashion, and almost all of them have failed to pledge adequate emission reductions in their NDCs, judicial proceedings involving only some of the parties would arguably not be the best way to solve problems originated by what may be regarded as a 'dysfunctional treaty system'.[50] If, in other words, there are systemic issues of non-compliance with obligations under the climate treaties, what may be needed is stronger political action at the national level, rather than more international law-making or litigation.[51] In this state of affairs, Bodansky warns, contentious proceedings could even undermine, rather than

44 UNFCCC (n 9) art 14.1.

45 See: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27> accessed 17 June 2020.

46 See M Wewerinke-Singh, J Aguon and J Hunter, 'Bringing Climate Change before the International Court of Justice', chapter 17 in this volume.

47 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 34(1).

48 The US withdrew its declaration in 1985 after the Court accepted jurisdiction in the *Nicaragua* case.

49 See also Harrison (n 25).

50 This point is made also in Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7) 342.

51 Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7) 342.

enhance, inter-State cooperation.[52] There are, in addition, even more pressing existential constraints with this type of litigation. Major global emitters—such as China, the US and the Russian Federation—have an especially lacklustre track record in complying with international judicial decisions.[53] Celebrious examples of these States' attitude towards international courts' decisions include the US response to the *Nicaragua*,[54] *LaGrand*[55] and *Avena*[56] judgments; the Russian Federation's response to the *Arctic Sunrise* prompt release case;[57] and China's response to the *South China Sea* arbitration.[58]

These precedents seemingly suggest that an inter-State dispute concerning a breach of international climate change obligations would have limited added value vis-à-vis a declaration of non-compliance by the Paris Agreement's Compliance Committee. Bodansky for example notes how the reputational costs of breaking a negotiated agreement are higher than the costs of non-compliance with a judicial decision[59]—as the saga of US membership of the climate treaties suggests.[60] The climate treaties compliance mechanisms therefore may be a more congenial forum to deal with matters associated with parties' performance, which come with clear reputational implications—as the saga associated with Canada's withdrawal from the Kyoto Protocol also demonstrates.[61] Yet again, at the formal level, the

52 This point is made also in Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 711.

53 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 705.

54 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14.

55 *LaGrand* (*Germany v United States of America*) (Judgment) [2001] ICJ Rep 466.

56 *Avena and Other Mexican Nationals* (*Mexico v United States of America*) (Judgment) [2004] ICJ Rep 12.

57 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

58 *The South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013-19, Award (12 July 2016).

59 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 706.

60 The US is a party to the UNFCCC but never ratified the Kyoto Protocol, in spite of having signed it on 12 November 1998. On 4 November 2019, the US gave formal notification of its intention to withdraw from the Paris Agreement: <https://www.State.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> accessed 17 June 2020. The US joined the treaty again in 2021.

61 Canada gave formal notification of its intention to withdraw from the Kyoto Protocol on 15 December 2011, and in accordance with rules under that treaty, its withdrawal became effective on 15 December 2012.

advantage of litigation would be that of having an authoritative statement that an international obligation has been breached. This would enable an applicant State to claim all or some of the remedies available under the law of State responsibility, depending upon which basis said State claims to have been injured.[62]

III Disputes Concerning Harm Associated with Climate Change

The customary obligations associated with the prohibition and prevention of transboundary harm, including areas beyond national jurisdiction, and with the obligation to minimize the risk thereof,[63] apply in principle also to harm associated with climate change. In order to successfully establish State responsibility in this connection, an applicant State has to prove that another State has breached the prohibition on transboundary harm, the related obligation to prevent harm, and/or the associated procedural duties to cooperate and to carry out an environmental impact assessment.[64]

In relation to climate change, this would require demonstrating that the applicant State's territory or an area beyond national jurisdiction has suffered significant harm (ie loss of life, loss of property, and/or environmental damage) as a result of activities (ie greenhouse gas emissions) carried out under the jurisdiction or control of the respondent State.

International law does not provide strict liability for transboundary harm arising from activities that fall within the exercise of a State's sovereign rights within their jurisdiction.[65] An applicant State would therefore have to identify due diligence obligations, which have been breached by the respondent State. The fact that the respondent State has exercised reasonable diligence would

62 ILC Draft Articles (n 12) arts 30–1.

63 The 'no harm' principle is recognized in Principle 21 of the 'Stockholm Declaration on the Human Environment' United Nations Conference on the Human Environment (Stockholm 5 June–16 June 1972) (1973) UN Doc A/CONF.48/14/Rev 1; and Principle 2 of the 'Rio Declaration on Environment and Development' United Nations Conference on Environment and Development (Rio de Janeiro 3 June–14 June 1992) (12 August 1992) UN Doc A/CONF.151/26 (vol 1). The International Court of Justice has acknowledged the customary international law status of the no harm principle in: *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 241–2, para 29.

64 As noted also in D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (OUP 2017) 45.

65 A Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 Journal of Environmental Law 3, 6.

be sufficient to exclude responsibility, even if some significant harm has been suffered.

International law obligations of due diligence typically are obligations of conduct, rather than of result.[66] Proof must be provided that the State has not put in place the legislative and regulatory framework which would have enabled it to become aware of the risk, to measure its probability and gravity, and to take measures aimed at preventing and mitigating the harm.[67]

Ascertaining compliance with the obligation to act with due diligence to prevent, reduce or control transboundary harm is far from straightforward. It requires assessing whether a balance has been equitably struck 'between what is possible and what is economically acceptable'.[68] Identifying the specific contours of due diligence obligations in relation to climate harms would therefore place a heavy burden of proof on prospective State litigants, to identify flaws in the discharge of due diligence obligations that are broadly worded and imprecise.[69]

As noted above, the law of State responsibility provides the possibility also to request compensation for 'financially assessable damage suffered by the injured State or its nationals',[70] whether material or moral.[71] The appropriate heads of compensable damage and the principles for quantification vary, depending upon the content of particular primary obligations.[72] In any event, the award of compensation is not aimed to punish the responsible State. Typically, damage claims in inter-State disputes are constrained by causation, remoteness, evidentiary requirements and accounting principles.[73] As a result, relatively few inter-State disputes have resulted in the award of compensation, and only one rather modest award for compensation for environmental damage has been recorded to date.[74]

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66 International Law Association, 'ILA Study Group on Due Diligence in International Law First Report' (2014) 26 <https://www.ila-hq.org/index.php/study-groups?studygroupsID=63> accessed 25 May 2020.

67 ibid.

68 Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7) 334.

69 Voigt, 'State Responsibility for Climate Change Damages' (n 5) 4; Bodansky, Brunnée and Rajamani (n 64) 45.

70 ILC Draft Articles (n 12) art 36, commentary, para 4.

71 ILC Draft Articles (n 12) art 36.

72 ILC Draft Articles (n 12) art 36, commentary, para 7.

73 ILC Draft Articles (n 12) art 36, para 32.

74 *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Compensation, Judgment) [2018] ICJ Rep 15.

In spite of these limitations in the practice of international litigation, the literature has considered hypothetical inter-State dispute scenarios for breaches of the customary obligation to prevent transboundary harm, in light of specific due diligence obligations enshrined in the Paris Agreement, the UN Convention on the Law of the Sea (UNCLOS) and international human rights treaties. The arguments made in the literature associated with each litigation scenario are analyzed below, alongside their constraints and opportunities.

A *Climate Change Law*

The Paris Agreement acknowledges for the first time in the history of the climate regime the need to tackle the permanent and irreversible impacts of human-induced climate change in the standalone provisions concerning 'loss and damage'.[75] It does not, however, provide means to compensate the harm to persons, property and the environment associated with climate change. Instead, parties have seemingly excluded compensation from the scope of the Paris Agreement, by adopting an interpretative declaration, stating that the provision on loss and damage 'does not involve or provide a basis for any liability or compensation'.[76] The value of declarations such as this is clearly subject to parties' continued consensus.[77] Moreover, this interpretative declaration arguably does not exclude the possibility to invoke the law of State responsibility with regard to damages caused by climate change, relying on general international law obligations, such as the provision of transboundary harm.[78] Or at least, this is the position of the nine States Parties that have issued declarations stating that their acceptance of the Paris Agreement:

> shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change.[79]

75 Paris Agreement (n 9) art 8.

76 Decision 1/CP.21 (n 32) para 51.

77 MJ Mace and R Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25 Review of European, Comparative & International Environmental Law 197, 205.

78 ibid 206.

79 Declarations by Cook Islands, Marshall Islands, Micronesia, Nauru, Niue, the Philippines, the Solomon Islands, Tuvalu, and Vanuatu. See 'Status of Treaties: Chapter XXVII

The value of these declarations is itself doubtful, given that the Paris Agreement does not allow for reservations.[80] This state of affairs, nevertheless, poses additional and specific *technical* constraints to inter-State disputes for harm associated with the impacts of climate change, which are instigated on the basis of obligations enshrined in international climate change law.

At the *substantive* level Bodansky et al suggest that the Paris Agreement may even have made it easier to demonstrate due diligence.[81] This is because the regime presently relies on individual States' NDCs, providing limited mechanisms to scrutinize these in the merits. Thus, should a State comply with the obligation to submit an NDC, it may be arduous to prove lack of diligence.[82] Still, failure to submit an NDC would in all likelihood be regarded as a breach of due diligence obligations under the Paris Agreement.

The very existence of international climate change law places chronological constraints on the definition of the relevant harm. The literature suggests that the creation of the Intergovernmental Panel on Climate Change (IPCC) in 1988 and/or the adoption of the UNFCCC in 1992 might be considered as the starting dates from which climate harms may be invoked.[83] The challenge would then be to identify the specific harms that have been produced, since the adoption of the Paris Agreement, and/or of the UNFCCC. Faure and Nollkaemper suggest that if a joint and several approach to liability is applied, uncertainty over causation would not necessarily exclude State liability for climate change harms.[84] In the case of a plurality of responsible States, the general principle is that each State is separately responsible for conduct attributable to it.[85]

At the *existential* level, however, one may question whether compensation for climate harms awarded in the context of an inter-State dispute would adequately redress the plight of those suffering for calamitous impacts of climate change. As noted above, significant awards of compensation are extremely rare in international litigation, thus making deterrence from further harm 'feeble'.[86]

Environment, 7.d Paris Agreement' (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> accessed 13 March 2021.

80 Paris Agreement (n 9) art 27.

81 Bodansky, Brunnée and Rajamani (n 64) 45.

82 In March 2020, 186 out of 189 Parties to the Paris Agreement had submitted their first NDC. See <https://www4.unfccc.int/sites/ndcstaging/Pages/Home.aspx> accessed 3 March 2020.

83 See, for example, Faure and Nollkaemper (n 5) 172; Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 480.

84 Faure and Nollkaemper (n 5) 164.

85 ILC Draft Articles (n 12) art 47, commentary, para 3.

86 Faure and Nollkaemper (n 5) 141.

Yet, since the matter of harm associated with the impacts of climate change damages does not fall within the remit of the Paris Agreement Compliance Committee, inter-State litigation would provide an expedient means to 'name and shame' those States that may be regarded as most responsible for the impacts of climate change, and to hold them at least in part accountable for the harm caused.

B *Law of the Sea*

As another chapter in this volume explains in further detail,[87] UNCLOS makes parties responsible for regulating and controlling the risk of marine pollution resulting from the activities of the private sector through an obligation of due diligence.[88] Greenhouse gases may be regarded as pollutants falling within the scope of UNCLOS.[89] In fulfilling their obligations, UNCLOS parties are required to take into account 'internationally agreed rules, standards and recommended practices and procedures'.[90] The climate treaties as well as decisions and guidance by their treaty bodies may therefore be regarded as relevant normative sources to define the contours of the due diligence obligations derived from UNCLOS.[91] In this vein, non-compliance with the Paris Agreement's provisions concerning NDCs could be regarded as evidence of non-compliance with UNCLOS.[92]

UNCLOS parties that are coastal States and, as such, are also particularly exposed to the harmful impact of climate change, may claim to be injured by a breach of international obligations enshrined in UNCLOS, for example due to either lack of submission of an NDC, or to an NDC that is sufficiently ambitious.[93] Such a dispute could target UNCLOS parties harbouring major emitters and include a claim for compensation for harms associated with climate change as a result of breach of the obligations enshrined in UNCLOS.[94] In this context, State liability would arise from failure to carry out the respondent State's own due diligence obligations, provided that a causal link could be established between that State's failure and the existence of damage caused

87 See Harrison (n 25).

88 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) arts 192–4 and Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 465.

89 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 464.

90 UNCLOS (n 88) arts 207.1 and 212.

91 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 466.

92 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 467.

93 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 479.

94 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 479.

by a private contractor.[95] For example, the applicant State could argue that, in order to meet due diligence obligations under UNCLOS, it is not enough to merely submit an NDC, but an NDC that reflects that State's 'fair share' of the emissions reductions necessary to stay below the temperature goal enshrined in the Paris Agreement.[96]

There are some advantages associated with instigating an international dispute concerning breaches of international obligations concerning climate change under UNCLOS. At the *technical* level, UNCLOS provides compulsory binding dispute settlement procedures, which would be readily available to any of its parties to invoke State responsibility for a breach of an international obligation. At the *substantive* level, a claim for compensation for historical damage predating the Paris Agreement and the UNFCCC is unlikely to be viable, but compensation for future damage could be possible.[97] The challenge would be, however, to identify the specific harms that have been produced since the adoption of the Paris Agreement, and/or of the UNFCCC. Still, an applicant State would be faced with familiar hurdles concerning causation of harm, its foreseeability, the allocation of responsibility between multiple respondents, the possibility of defences which may preclude liability, the adequacy of available remedies to redress and compensate for damages,[98] and the inter-relationship with the climate change law, and especially with the loss and damage provision included in the Paris Agreement.[99]

Yet, McCreath suggests that requesting a finding that a State is not meeting its UNCLOS obligations without the award for compensation would bypass numerous litigation hurdles highlighted above. In turn, this would provide a platform to States that are particularly vulnerable to the impacts of climate change to demand that more is done by those States that are most responsible for causing the problem in the first place.[100] Conversely, Boyle notes that it seems unlikely that an international tribunal would find that due diligence obligations under UNCLOS are attached with some separate and additional effect, vis-à-vis those included in the climate treaties.[101] So, should the

95 *Seabed Mining* (Advisory Opinion) (2011) 50 ILM 458.

96 M McCreath, 'The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes' in J Lin and D Kysar (eds), *Climate Change Litigation in the Asia Pacific* (CUP 2020) 120.

97 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 480.

98 S Lee and L Bautista, 'Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate Against Climate Change: Making Out a Claim, Causation, and Related Issues' (2018) 45 Ecology Law Quarterly 129, 153.

99 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 479.

100 McCreath (n 96) 130.

101 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 481.

applicant State maintain that UNCLOS imposes due diligence obligations that have a separate or even a more onerous character than those included in climate treaties, it would in all likelihood be faced with *lex specialis* objections.[102]

Finally, there are significant *existential* constraints to what a court/tribunal may ask the respondent State to do in an UNCLOS-based dispute. Boyle suggests that all an international court may order is that States comply with their obligations under the Paris Agreement.[103] It would in other words seem unlikely that an international tribunal would ask the responsible State to adopt measures that are more stringent than those required under that treaty.[104] If this is true, the effects of a judicial decision would be similar to those associated with a breach of an obligation of the climate treaties. And as noted above, the added value of such a judicial decision, vis-à-vis a finding of non-compliance by the Paris Agreement Compliance Committee, would be largely reputational and political, rather than substantive. Yet, an international tribunal could take the view that the primary obligations under UNCLOS may be interpreted as going above and beyond what is required by the Paris Agreement. In that case, State obligations under the Paris Agreement would not be the parameter to determine the remedies that an international tribunal would accord.

C *Human Rights Law*

Climate change undermines the enjoyment of a wide range of human rights.[105] The relationship between climate change and human rights law has increasingly been recognized by States and international organizations, including the Human Rights Council,[106] its Special Procedures mandate holders,[107] and

102 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 480.

103 Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7) 341.

104 Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7) 341.

105 UN Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (15 January 2009) UN Doc A/HRC/10/61, para 16.

106 The Human Rights Council has adopted nine resolutions on human right and climate change between 2008 and 2019. See <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx> accessed 15 June 2020.

107 See especially: UN Human Rights Council, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (1 February 2016) UN Doc A/HRC/31/52; UN Human Rights Council, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (15 July 2019) UN Doc A/74/161.

the Office of the UN High Commissioner for Human Rights.[108] Parties to the climate regime have acknowledged the need to interpret climate change and human rights obligations in a mutually supportive way, as noted in preamble of the Paris Agreement.[109]

It is well established in the practice of international human rights bodies that States should prevent environmental harm that interferes with the full enjoyment of human rights and reduce it to the extent possible, providing for remedies for any remaining harm.[110] Failure to submit an NDC, or to submit an NDC that is ambitious enough, could be characterized as a violation of the State's obligation to respect, protect and fulfil the rights of those within its jurisdiction. The obligation to protect human rights does not require States to prohibit all activities that may cause environmental degradation. Instead, States have discretion to strike a balance between environmental protection and other legitimate societal interests. As both the Special Rapporteurs on human rights and the environment have noted, however, this balance must not be 'unjustifiable or unreasonable' or result in unjustified, foreseeable infringements of human rights.[111] In relation to climate change, these obligations entail taking action to reduce emissions and to adapt to changes that are foreseeable. Human rights obligations furthermore require that States cooperate with each other to deal with the global and transboundary implications of climate change.[112]

Inter-State litigation would be particularly appealing for States that are particularly vulnerable to the impacts of climate change, who could claim that climate change harms represent a breach of international human rights obligations.[113] In case of success, the finding of a breach of an international human rights law obligation could be accompanied by an order to provide

108 A summary of the activities of the Office of the High Commissioner is available at: <www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx> accessed 15 June 2020.

109 Preamble of the Paris Agreement (n 9). See the analysis in A Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages' in S Duyck, S Jodoin and A Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge, Taylor & Francis Group 2018) <https://ssrn.com/abstract=2902662> accessed 13 March 2021.

110 UN Human Rights Council, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 January 2018) UN Doc A/HRC/37/59, para 5.

111 ibid para 33.

112 UN Doc A/HRC/31/52 (n 107) paras 43–4.

113 Wewerinke-Singh (n 5) 160. See also Wewerinke-Singh, Aguon and Hunter (n 46).

compensation for the harm suffered.[114] State responsibility for breaches of human rights obligations associated with climate change may be invoked in multiple ways. In addition to the possibility to instigate a dispute before the ICJ, it may be possible to make recourse to inter-State proceedings before international human rights courts—like the European Court of Human Rights. In practice, however, while there have been some inter-State complaints before regional human rights courts—especially in the European system[115]—there have been relatively few contentious human rights-based cases before international courts.[116]

States that are most vulnerable to the impacts of climate change could claim to be an injured party also in relation to breaches of international human rights obligations. For example, the Philippines could bring Australia before the ICJ, for human rights violations suffered by Australians, or by Filipino citizens living in Australia. It would however be harder to bring a complaint against Australia on the basis of human rights violations suffered by Filipino citizens in the Philippines, unless the relevant obligations may be regarded as *erga omnes* obligations. This is so because human rights treaties have been typically interpreted to protect only those within the jurisdiction of a State Party, with the salient exception of the International Covenant on Cultural, Social and Economic Rights.[117] Some authors[118] and human rights bodies[119] maintain that State's human rights obligations have an extraterritorial reach.[120] An Advisory Opinion of the Inter-American Court has recently confirmed this understanding and significantly expanded the extraterritorial reach of State obligations in this regard.[121] Such an argument, however, is yet to be tested in an inter-State dispute.

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114 Wewerinke-Singh (n 5) 160. See also Wewerinke-Singh, Aguon and Hunter (n 46).

115 See list of cases at: <https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf> accessed 20 July 2020.

116 See, for example, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (Judgment) [2005] ICJ Rep 168.

117 The ICJ has recognized that the International Covenant on Civil and Political Rights applies extraterritorially, in specific circumstances (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 107–13).

118 See, for example, Wewerinke-Singh (n 5) ch 9.

119 UN Human Rights Committee, *Lopez Burgos v Uruguay* (29 July 1981) UN Doc CCPR/C/13/D/52/1979, para 12.3.

120 Wewerinke-Singh (n 5) 154.

121 See *The Environment and Human Rights* (*State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human*

At the *technical* level, inter-State human rights complaints provide clear advantages. For example, in the European Court of Human Rights system, the sole condition for the Court's competence *ratione personae* to hear an inter-State case is that both the applicant and respondent States have ratified the Convention. An applicant State, unlike an individual applicant, does not have to claim to be a 'victim' of the alleged breach. Nor does the applicant State have to justify a special interest in the subject matter of the complaint. In particular, it is not a condition that the matter complained of should have affected or prejudiced one of its nationals.[122] Another technical opportunity associated with relying on human rights obligations is that inter-State applications can also cover broad allegations, concerning for example an administrative practice, or 'the mere existence of a law which introduces, directs or authorises measures incompatible with the rights and freedoms guaranteed'.[123] Should an applicant State be successful, the finding of a violation of international human rights law could be accompanied by an order to adopt/reform domestic laws, policies and practices in line with States' human rights obligations.[124]

There are however also significant *technical constraints* to human rights-based climate change litigation. Inter-State human rights complaints are allowed in some, but not all, human rights systems, and only under specific conditions.[125] These complaints are therefore only available to some parties to said treaties—thus again excluding the US and China, that are not party to any treaties enabling such litigation. There are limited precedents where the finding of a breach of an international human rights obligation has resulted in the award of compensation in the context of an inter-State dispute.[126] While some regional human rights courts have the power to award compensation to victims of human rights abuses, this has hardly been done in the context of inter-State complaints.

At the *substantive* level, inter-State disputes based on a breach of a human rights obligation are particularly appealing, because the *erga omnes* character

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Rights), Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (Advisory Opinion 23).

122 D Harris et al, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2018) 48.

123 *Ireland v UK* (1978) 2 EHRR 25, para 240.

124 Wewerinke-Singh (n 5) 160.

125 See, for example, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 33.

126 For example, only two such cases have been recorded in the European system, vis-à-vis a total of 24 inter-State complaints. See: <https://www.echr.coe.int/Documents/Press_Q_A_Inter-State_cases_ENG.pdf> accessed 20 July 2020.

of at least some international human rights obligations.[127] In order to claim to be injured and ask for compensation, however, an applicant State must first satisfy the adjudicating body that human rights violations have occurred, and that the responsibility for such violation may be attributed to the respondent State. This entails providing evidence that human rights breaches have occurred, and of causation and attribution associated with said breaches. Admittedly discharging the burden of proof in this regard would be hard, even though progress in attribution science concerning has made it easier to trace causal connections between particular emissions and the resulting harms.[128]

The same constraints associated with a finding of a violation of UNCLOS, however, would apply, *mutatis mutandis*. Relying on human rights would not enable an applicant State to overcome *lex specialis* arguments, and configure obligations that have a separate or even a more onerous character than those included in climate treaties.[129] Qualifying the impacts of climate change as a form of harm that justifies the payment of compensation poses a series of by now familiar obstacles, concerning disentangling complex causal relationships and projections about future impacts.[130] It seems unlikely that these arguments would be sufficient to persuade an international tribunal to award compensation for harms suffered by the applicant State's citizens, and even less so for harms suffered by citizens of another State.

There are, finally, *existential* constraints that are typical of human rights law. Knox has generally cautioned about the dangers associated with merely 'treating climate change as a series of individual transboundary harms, rather than as a global threat to human rights'.[131] Even when inter-State complaints are possible, States rarely make use of them. The database of the world's most seasoned international human rights court—the European Court of Human Rights—reveals that, as of 2019, there had been only 24 inter-State cases since

127 Wewerinke-Singh (n 5) 160.

128 See, for example, FEL Otto et al, 'Assigning Historic Responsibility for Extreme Weather Events' (2017) 7 Nature Climate Change 757; S Marjanac and L Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36 Journal of Energy & Natural Resources Law 265; LJ Harrington and FEL Otto, 'Attributable Damage Liability in a Non-Linear Climate' (2019) 153 Climatic Change 15; R Licker et al, 'Attributing Ocean Acidification to Major Carbon Producers' (2019) 14 Environmental Research Letters <https://iopscience.iop.org/article/10.1088/1748-9326/ab5abc/pdf> accessed 13 March 2021.

129 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 480.

130 UN Doc A/HRC/10/61 (n 105) para 70.

131 JH Knox, 'Climate Change and Human Rights Law' (2009) 50 Virginia Journal of International Law 163, 211.

the European Convention entered into force, in 1953. These complaints overwhelmingly target a handful of parties with an especially lacklustre human rights track record,[132] and that, sadly, have done little to change their ways, in spite of the said inter-State complaints. Only two of such complaints have ended up in the award of rather modest amounts of compensation to the victims, and only after very lengthy judicial proceedings.[133]

In this regard, the effectiveness of any human rights-based inter-State dispute ultimately relies on a State's deference to international human rights obligations.[134] Whenever this is absent, a declaration of a breach of an international obligation would simply 'name and shame' the respondent State. Whether such a finding would have any added value, vis-à-vis a finding of non-compliance by the Paris Agreement Compliance Committee, is subject to the considerations already made above.

IV Advisory Opinion on States' Obligations Concerning Climate Change

The literature has specifically considered the potential to ask the ICJ for an advisory opinion on international obligations concerning climate change.[135] Such an advisory opinion may be issued at the request of the United Nations (UN) General Assembly, the Security Council or of other UN organs and specialized agencies, that the General Assembly may authorize to raise questions arising within the scope of their activities.[136] Bodansky argues that such an opinion could serve to bring legal clarity and progress international diplomatic endeavours, for example concerning the contours of States' due diligence obligations to ensure that their greenhouse gas emissions do not cause serious damage to other States.[137] Such an opinion would have the potential to set the terms of the debate, provide evaluative standards and establish a framework

132 Of 24 complaints, 10 concern the Russian Federation, and six concern Turkey.

133 The European Court awarded compensation (just satisfaction) only in Grand Chamber judgment *Cyprus v Turkey* App no 25781/94 (ECtHR, 12 May 2014); and Grand Chamber judgment *Georgia v Russia* (*I*) App no 13255/07 (ECtHR, 31 January 2019).

134 As noted also in Wewerinke-Singh (n 5) ch 9.

135 Wewerinke-Singh (n 5); Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5); Bodansky, Brunnée and Rajamani (n 64).

136 ICJ Statute (n 47) art 65 and UN Charter art 96.

137 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 711.

of principles to develop more specific norms, and more generally 'shape public consciousness and define normative expectations for a broad variety of actors as on its direct influence on States'.[138]

At the *technical* level, Bodansky suggests that an advisory opinion would have multiple advantages vis-à-vis a contentious case. First, he argues, an advisory opinion would have 'a more general effect' –whereas judgments in contentious cases bind only the parties to the dispute. Yet, an advisory opinion will formally bind no-one at all, and could simply be ignored by any State particularly affected, as the United Kingdom's reaction to the ICJ's Chagos Islands Advisory Opinion[139] clearly demonstrates. More generally, a judgment delivered as a result of contentious proceedings is only binding on the parties insofar as it orders the parties to do/not do something. But insofar as non-parties to the dispute are concerned, and insofar as it interprets the law, it will carry the same authority as an advisory opinion. So, if the aim is to clarify the law, there would be little difference between an advisory opinion and a contentious case, especially one concerning the interpretation of a multilateral treaty to which many States are party, such as the Paris Agreement. Second, Bodansky suggests that all States could have their voices heard in an advisory opinion, whereas contentious cases are limited to the parties to the dispute and to States permitted to intervene. At least in principle, every party to a treaty has a right to intervene in a dispute concerning that treaty. Intervention in contentious proceedings is however generally rare, and States have instead more likely to intervene in advisory proceedings.[140] Third, Bodansky suggests that an advisory opinion could address general issues, leaving the specifics to international climate negotiations.[141] Yet, if the objective of the dispute is to obtain clarification concerning the contours of State obligations, surely this is not necessarily an argument against instigating a contentious case. At least at the technical level, therefore, the added value of pursuing an advisory opinion is not immediately apparent.

At the *substantive* level, determining which legal questions could be helpfully subjected to a request for an advisory opinion is not as simple as it may seem. Bodansky suggests that such an opinion should carefully avoid issues

138 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 706.

139 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (n 57).

140 ICJ Statute (n 47) art 63.2.

141 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 711.

addressed directly in the climate change negotiations, especially highly political and contentious ones—for example, the meaning of the principle of common but differentiated responsibilities and respective capabilities. He cautions that an opinion on this matter 'would have little upside potential but considerable dangers,'[142] most saliently that of throwing the Court into extremely political debates, thus damaging its reputation while simultaneously exacerbating tensions in the negotiations. Instead, Bodansky reckons that an opinion on factual issues would be 'more neutral'.[143] He rejects Sands' suggestions that an international court be asked to settle the scientific dispute about climate change,[144] as this matter already falls within the remit of the IPCC, which in any event is much better equipped to deal with it. Instead, Bodansky suggests that an international tribunal could elaborate more specific criteria of due diligence, establishing 'a common language for discussing NDCs' which in turn could result into more ambitious NDCs in the future.[145]

This and similar suggestions, however, seem to fly in the face of the *existential* constraints associated with the fact that parties to the climate regime are working on this very matter already. If, in other words, the objective is to develop more/better rules concerning NDCs, the parties to the climate treaties arguably are in a better position than an international court to develop such rules. Even an advisory opinion on the due diligence obligations associated with NDCs could be regarded as undermining the nationally determined nature of States' contributions and, therefore, as contrary to the spirit of the Paris Agreement.[146] Similarly, an advisory opinion on whether financial transfers represent compensation or assistance would be at odds with the climate regime parties' 'studied silence' on this divisive matter.[147] As Bodansky observes, States are likely to feel a stronger commitment to norms to which they have agreed, and over which they have ownership, than those

142 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 708.

143 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 209.

144 P Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 Journal of Environmental Law 19, 29.

145 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 709.

146 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 710.

147 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 711.

devised by an international adjudicatory body.[148] Indeed, the fact that parties to the Paris Agreement are still engaged in the development of rules on NDCs makes litigation seem premature and counterproductive. Yet again, recent climate change litigation at the national and regional level clearly shows the potential to put pressure on governments to deliver more ambitious climate obligations, by challenging existing laws, and even ones that have just been adopted.[149]

Ultimately, however, even an advisory opinion asserting that States have a responsibility to reduce emissions would at best put pressure on States to do the same in the context of the climate treaties, rather than directly cause them to reduce their emissions.[150] So, also at the substantive and at the existential level, the added value of an advisory opinion seems to be far from apparent.

V Conclusion

This chapter has selectively revisited and critically engaged with the copious body of literature on inter-State climate change litigation in light of developments since the adoption of the Paris Agreement. It evaluated the opportunities and constraints of each litigation scenario and their potential, firstly, to put pressure on States to intensify their response to climate change, and, secondly, to redress harm associated with the impacts of climate change.

In relation to the first matter, the very existence of international processes dedicated to the same purpose makes it seem unlikely that any international tribunal might be willing to venture into this minefield. Even if they did, it seems doubtful that a judicial decision—whether advisory or otherwise—would do anything more than simply reiterate that parties should comply with their obligations to reduce their emissions under the climate treaties. If anything, international adjudication would probably augment divisions and animosity, and damage an international diplomatic process that is already marred by distrust and faltering political will. Therefore, the added value of

148 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 706.

149 See, for example, *The State of the Netherlands v Urgenda Foundation*, Hague Court of Appeal, Case No C/09/456689 / HA ZA 13-1396, 9 October 2018; Case T-330/18 *Carvalho and Others v European Parliament and Council* EU:T:2019:324. See also C Bakker, 'Climate Change Litigation in the Netherlands',chapter 9 and by M Willers, 'Climate Change Litigation in European Courts', chapter 13 in this volume.

150 As noted also in Bodansky, Brunnée and Rajamani (n 64) 289.

inter-State litigation to instigate litigation to put pressure on States to intensify their response to climate change would seem to be limited.

In relation to the second matter, both the literature and the present author are more hopeful. International climate negotiations have avoided dealing with climate change-related harms for almost 30 years. And even though, as Bodansky notes, their silence is laden with political consequence,[151] this does not detract from the fact that the law on harm associated with climate change is on the cusp of a veritable revolution. In coming years domestic law is bound to evolve to accommodate civil liability and compulsory insurance arrangements to grapple with the impacts of climate change.[152] This shift in domestic law is likely to reverberate on international law, as the *Trail Smelter* arbitration exemplifies.[153] In a few years' time, 'general principles of law recognized by civilized nations'[154]—to use the dated expression included in the ICJ Statute—on this specific matter will exist, and may also be used in the context of international adjudication. So, in the not so distant future—and perhaps with greater age and gender diversity on the bench—we may indeed see some inter-State litigation for climate change-related harms before the ICJ.

What would the added value of such litigation be? At the very least, this litigation would put pressure on States to legislate and cooperate, especially on the vexed matter of people's displacement –a real elephant in the room at international climate negotiations. And whilst not a solution, international litigation could be instrumental in bringing about a change in attitude by courts and lawmakers, eventually triggering inter-State cooperation that is sorely needed to address the plight of those vulnerable to the devastating impacts of climate change. In this regard, domestic litigation like the *Urgenda* case[155] provides an important example of how human rights law obligations may be relied on to put pressure on national governments to prevent dangerous climate change. Inter-State litigation could potentially have a similar effect, bolstering international cooperation on climate action.

This brings us back to Brierly's famous quote[156] and leads the present author to conclude that, like international law, inter-State climate change litigation is 'neither a chimera nor a panacea', but merely one of the tools at our disposal

151 See (n 142) above and corresponding text.

152 See literature review in A Savaresi, 'Human Rights and the Impacts of Climate Change: Revisiting the Assumptions' (2019) 11 Oñati Socio-Legal Series 231.

153 *Trail Smelter Case* (*United States v Canada*) (1941) 3 RIAA 1905.

154 ICJ Statute (n 47) art 38.1.c.

155 See (n 149) and corresponding text.

156 Brierly (n 11) v.

for delivering better and greater climate action. Only time will tell whether and how this tool will be used. But given the present state of international climate diplomacy, something needs to be done. And as this volume clearly shows, in the face of the climate emergency, 'whatever works' seems to have increasingly become the motto of climate change litigators all over the world.

CHAPTER 17

Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions

Margaretha Wewerinke-Singh, Julian Aguon** and Julie Hunter****

1 Introduction

Climate change is perhaps the greatest threat facing humanity, affecting livelihoods, food security, health, life and culture. A group of United Nations (UN) Human Rights Special Rapporteurs described climate change as 'one of the greatest human rights challenges of our generation'[1] and the UN High Commissioner for Human Rights said that 'the world has never seen a threat to human rights of this scope'.[2] Yet despite this, global emissions continue to rise.[3] The multilateral process is failing to deliver the transformative action

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1 'Joint statement by UN Special Procedures on the occasion of World Environment Day' (*OHCHR*, 5 June 2015) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E> accessed 16 June 2020.

2 M Bachelet, 'Opening statement by UN High Commissioner for Human Rights Michelle Bachelet' (Global update at the 42nd session of the Human Rights Council, Geneva, 9 September 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E> accessed 16 June 2020. It should be recognized at the outset that human rights are but one source of international obligations that may be relevant in a climate case before the ICJ. The chapter by A Savaresi in this collection discusses these different sources in more detail.

3 See V Masson-Delmotte et al (eds), *Global Warming of 1.5°C: An IPCC Special Report* (IPCC 2019) 8 <https://www.ipcc.ch/sr15/> accessed 29 March 2021; see also X Wang, D Jiang and X Lang, 'Climate Change of 4°C Global Warming above Pre-industrial Levels' (2018) 35 Advances in Atmospheric Sciences 757, 760 ('if greenhouse gas emissions continue to rise with no mitigation, many of the models suggest a 4°C global warming being reached in the 21st century.').

necessary to keep temperature rise below 1.5°C;[4] and while thousands of climate cases have been lodged at the national and regional levels,[5] these efforts have so far delivered mixed results and remain piecemeal.

Against this backdrop, the role of the International Court of Justice (ICJ) in addressing the climate crisis is increasingly being considered. The ICJ is the principal judicial organ of the United Nations, established by the UN Charter.[6] It is the primary tribunal for settling inter-State legal disputes and provides advisory opinions on legal questions proposed by duly authorized organs and agencies of the United Nations.[7] The ICJ does not hear cases submitted by individuals or non-governmental organizations. Since its creation in 1946, it has heard over 160 cases or applications for advisory opinions (averaging to a bit more than two annually, most of which take several years to resolve).[8] In resolving disputes and providing advisory opinions, the ICJ applies international conventions, customary international law, general principles of law and (as a subsidiary means) judicial decisions and teachings.[9] Reflecting on the ICJ's propensity in the context of a potential climate case, Sands notes that there is a 'clear line from the 1996 advisory opinion on the legality of nuclear weapons through to the 2014 judgement in the whaling case' so that the Court now has 'a record on the environment of which it can be proud'.[10]

As an international judicial body, the ICJ could clarify issues of climate liability, such as the scope and content of positive obligations, the precautionary principle and the allocation of responsibility, in a manner that assists further climate change litigation around the globe.[11] The potential impact of an ICJ

4 See UN Environment Programme, *Emissions Gap Report 2019* (UNEP 2019) <https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y> accessed 17 June 2020.

5 See J Setzer & R Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (Grantham Research Institute on Climate Change and the Environment, 4 July 2019) <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> accessed 17 June 2020.

6 UN Charter art 92.

7 ibid art 96.

8 'List of all cases' (*ICJ*) <https://www.icj-cij.org/en/list-of-all-cases> accessed 27 April 2019.

9 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38.

10 P Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (Public Lecture at the United Kingdom Supreme Court, London, 17 September 2015) 18 <https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf> accessed 13 March 2021.

11 See also D Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 Arizona State Law Review 690, 707.

intervention on further climate change litigation is arguably greater than that of any other international court or tribunal, given the ICJ's position as 'first amongst equals' within the international legal system.[12] Indeed, research confirms that national courts refer to ICJ opinions and judgments 'to support conclusions drawn on the basis of legislation, or to fill gaps in national law'.[13]

As is discussed below, there have been several proposals to bring the question of climate change before the ICJ, including most recently an initiative to seek an advisory opinion on climate change and human rights.[14] However, these proposals have not yet materialized. This chapter discusses prospects and pitfalls of pursuing either a contentious case or an advisory opinion relating to climate change from the ICJ. In relation to contentious cases, it considers a range of obstacles that would need to be overcome to obtain a helpful intervention from the Court. Requesting an advisory opinion instead could be a way to overcome some of these obstacles, although this option has its own challenges. Recognizing that the impact of any attempt to bring climate change before the ICJ will depend on a wide range of factors, the chapter concludes with some remarks about how some of those factors could help or hinder the prospects for a meaningful intervention on climate change from the ICJ.

II Bringing a Contentious Climate Case Before the ICJ

One of the principal benefits of bringing a contentious case before the ICJ is the prospect of obtaining a binding judgment from the Court (or one of its Chambers). While this binding effect applies formally only to the parties concerned,[15] the impact of a judgment from the ICJ on climate change would likely extend far beyond the particular dispute, given States' common interest in the issue, the high chance that the factual basis for the dispute extends to a much wider range of States, and the high value of judicial precedent under Article 38 (1) (d) of the ICJ Statute.

In the environmental sphere, the potential role of the ICJ in the progressive interpretation of international law is illustrated by such judgments as *Pulp Mills on the River Uruguay*,[16] where the ICJ found that 'due diligence':

12 ibid 701.

13 A Nollkaemper, 'Conversations Among Courts: Domestic and International Adjudicators' in CPR Romano, KJ Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 538.

14 See Section IIIA and (n 74).

15 ICJ Statute (n 9) art 59; UN Charter art 94.

16 *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Order) [2006] ICJ REP 113.

> is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.[17]

It further clarified the status of environmental impact assessments (EIAs) in international law, stating that an obligation arises under general international law to undertake such an assessment 'where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource'.[18] The Court also underscored that EIAs must be conducted prior to the implementation of the proposed project.[19]

Further, in *Gabcikovo-Nagymaros,*[20] the Court recognized ecological interests as 'essential interests' of States.[21] Moreover, and perhaps most crucial to any climate change litigation, the Court pointed to an understanding of the concept of sustainable development, specifically addressing that environmental standards applied by the global community ought to keep in mind new scientific insights.[22] More recently, in *Navigational and Related Rights* the Court found that Nicaragua was liable to pay compensation to Costa Rica for environmental damage caused by Nicaragua's unlawful activities in the border area.[23] Specifically, it confirmed that damage to or loss of environmental resources and the cost of ecosystem restoration were compensable under international law.[24] This judgment demonstrates a propensity to apply the general law of State responsibility toward environmental obligations, which is critical to the success of a contentious case concerning loss and damage from climate change.

With regard to human rights specifically, a particularly notable case is *Barcelona Traction.*[25] The Court's judgment in this case recognized the

17 ibid para 197.
18 ibid para 204.
19 ibid para 205.
20 *Gabcíkovo-Nagymaros Project* (*Hungary v Slovakia*) (Judgment) [1997] ICJ Rep 7.
21 ibid paras 53–4.
22 ibid
23 *Dispute regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) (Judgment) [2009] ICJ Rep 213, para 87. This case concerned rights of navigation on the San Juan River, constituting a border between the two States.
24 *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Compensation, Judgment) [2018] ICJ Rep 15, para 42.
25 *Barcelona Traction, Light & Power Co* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3.

existence of obligations *erga omnes*; a category of obligations which, according to the Court, included obligations deriving from 'the principles and rules concerning the basic rights of the human person'.[26] Recognition that these obligations are 'owed to the international community as a whole', rather than merely from one State to another, is important for addressing the legal consequences of climate change, which similarly cannot be dealt with effectively within the traditional framework of bilateral legal relationships between States.[27]

When it comes to technical expertise, it should be acknowledged that the ICJ is a generalist court with limited in-house expertise on environmental science. However, its capability to grapple with complex scientific evidence is increasing. Particularly noteworthy on this score is *Whaling in the Antarctic* (*Australia v Japan*),[28] the first ICJ case in which there was cross-examination of the scientific experts put forward by the parties. This precedent, and the propensity to ensure objectivity in handling competing scientific claims, bodes well for the chances of the ICJ engaging meaningfully with climate science in a contentious case.[29] More specifically, the ICJ may respond positively to an invitation to endorse the scientific consensus on climate change as to occurrence, causation, impacts and responses, reflected in the reports of the Intergovernmental Panel on Climate Change (IPCC).[30] Such an endorsement would serve to dispel skepticism about the anthropogenic nature of climate change as well as provide a factual basis for future legal cases on climate change.

Tuvalu is one State that, in 2002, openly considered lodging a contentious climate change case in the ICJ, notably against the United States and Australia, which at the time were the only two industrialized States that had not ratified the Kyoto Protocol.[31] This announcement may have been primarily symbolic, at

26 ibid 32.

27 Needless to say, this review of the Court's case law is cursory and leaves out many important cases and caveats. For more detailed discussions, see, eg, R Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 Chinese Journal of International Law 639; B Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 Journal of International Dispute Settlement 1, 7–29. For more information, see A Savaresi, 'Inter-State Climate Change Litigation', chapter 16 in this volume.

28 *Whaling in the Antarctic* (*Australia v Japan*) (Judgment) [2014] ICJ Rep 226.

29 On the integration of science in environmental adjudication, see K Sulyok, *Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication* (CUP 2020).

30 See Sands (n 10) 11; see also Bodansky (n 11) 708.

31 A Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice' (2009) 3 School of Law Faculty Publications 334, 339, fn 18: 'Koloa Talake, the prime minister who was the driving force behind the lawsuit, lost reelection in August

least in relation to the United States, given the unlikely prospect of the United States consenting to the jurisdiction of the ICJ over such a dispute (which, as is discussed below, is almost certainly required in order for the Court to hear the case). Nonetheless, Tuvalu's announcement succeeded in triggering substantial media attention and scholarly debate about the role of the ICJ in addressing climate change.[32] This section discusses what a future contentious climate case before the ICJ might look like, considering potential parties to the dispute, jurisdictional bases, the substance of the claim, and potential pitfalls and prospects.

A *Potential Parties to the Dispute*

Although all UN members are automatically parties to the Statute of the ICJ as per Article 93 of the UN Charter, the ICJ can only hear a dispute when requested to do so by one or more States.[33] The most likely States to make such a request are those who contributed the least to climate change yet are most directly affected by its adverse effects. These include Small Island Developing States (SIDS) in the Pacific and Indian Oceans who face the prospect of their territories becoming uninhabitable as a result of sea level rise.[34] However, as the impacts of climate change are increasingly being felt around the world and the negotiation process continues to fail to deliver the necessary action, the number of States that might consider bringing a climate case before the ICJ is bound to increase.

The most likely defendants in a climate case before the ICJ are States that have contributed the most to anthropogenic greenhouse gases accumulated in the global atmosphere linked to climate change.[35] States' track record in

2002, and the subsequent government did not pursue the litigation'; RE Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court Of Justice' (2005) Pacific Rim Law and Policy Journal 103.

32 Strauss (n 31) 339.

33 ICJ Statute (n 9) art 36.

34 H-O Pörtner et al (eds), *The Ocean and Cryosphere in a Changing Climate: A Special Report of the Intergovernmental Panel on Climate Change* (IPCC 2019) ch 4: Sea Level Rise and Implications for Low Lying Islands, Coasts and Communities.

35 For a discussion of potential parties to a contentious climate case before the ICJ, see M Gromilova, 'Rescuing the People of Tuvalu: Towards an ICJ Advisory Opinion on the International Legal Obligations to Protect the Environment and Human Rights of Populations Affected by Climate Change' (2015) 10 Intercultural Human Rights Law Review 233, 245–9; Strauss (n 31) 338–9; T Stephens, 'Low-Lying Pacific Islands Sue Over Climate Change' *The Maritime Executive* (30 October 2019) <https://www.maritime-executive.com/editorials/low-lying-pacific-islands-sue-over-climate-change> accessed 17 July 2020.

implementing good faith climate policy addressing emissions would likely also be a highly relevant consideration for applicant States in choosing a defendant State. A State's active promotion of oil, gas and coal, both domestically and internationally, would also press in favour of considering it as a defendant. However, there are other considerations as well. For example, a major consideration for small States would likely be the defendant State's power as an adversary, including its power to marshal a large coalition and apply substantial political pressure against the initiating State. Proximity may also be a factor, as well as the State's mining and extractive interests that may directly affect the State in question. Finally, development assistance and infrastructure investments will merit consideration for many developing States that are considering bringing a case.

Bringing a case before the ICJ hinges on acceptance by the States involved of the Court's jurisdiction, meaning the States must have consented to the Court considering the dispute in question (either explicitly, to the issue at hand, or implicitly through a jurisdictional clause in another treaty).[36] Article 36(2) of the ICJ Statute allows States to make optional declarations accepting the Court's compulsory jurisdiction (but with various reservations allowed)—the 73 States who have done so to date include Australia, Canada, Germany, India, Japan, Mexico, the Netherlands, Norway, Poland, and the United Kingdom, among others.[37] It is unlikely that a State that has withdrawn or not recognized compulsory jurisdiction of the ICJ, such as the United States or China, would consent to have the Court hear a contentious case related to its climate change responsibilities, given the costs and burdens that a negative judgment could have. Thus, the most realistic options draw on the acceptance of the Court's compulsory jurisdiction by significant emitter States.[38]

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36 'Frequently Asked Questions' (*ICJ*) <https://www.icj-cij.org/en/frequently-asked-questions> accessed 27 April 2019; ICJ, 'The Court at a Glance' <https://www.icj-cij.org/files/the-court-at-a-glance/the-court-at-a-glance-en.pdf> accessed 27 April 2019.

37 'Declarations recognizing the jurisdiction of the Court as compulsory' (*ICJ*) <https://www.icj-cij.org/en/declarations> accessed 27 April 2019.

38 As an aside, this could in effect be seen as 'punishing' States who express their commitment to abiding by the international rule of law (particularly the Netherlands, without even a reciprocity clause), while letting those who refuse to subject themselves to international courts unless it serves their interests elude accountability (see: the US withdrawing from the ICJ after its first loss in a case against Nicaragua, *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14). A couple of considerations: as States are not monoliths and the above list are primarily democracies, there could still be significant support from large portions of those States' citizenry, as well as potential parties or elements within the governments themselves, who would like to see their States doing more about climate change, for their

Several SIDS have recognized the jurisdiction of the ICJ as compulsory—these include Barbados, Dominica, Dominican Republic, Haiti, Mauritius, Suriname and Timor-Leste. Numerous other States that are already severely affected by climate impacts are also listed, such as the Philippines, Botswana, Cambodia, Cameroon, the Democratic Republic of Congo and Peru, to name but a few. Pacific SIDS are notably absent from the list, with the exception being the Marshall Islands, which accepted the ICJ's compulsory jurisdiction on April 24, 2013 and filed a well-publicized case on 24 April 2014 against nine nuclear powers.[39] (The only States to remain in the proceedings were the ones who had accepted compulsory jurisdiction, namely the United Kingdom, India and Pakistan). While States that have not accepted the jurisdiction of the ICJ as compulsory could still file a case, the chances of the ICJ recognizing jurisdiction over the dispute would be small given that all of the declarations of the States listed above—with the exception of the Netherlands—are contingent upon the other party also accepting compulsory jurisdiction (the reciprocity rule, in accordance with Article 36(3)).[40] Furthermore, some States, including Australia, Germany, Japan and the United Kingdom, provide in their declaration for an exception of disputes:

> in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than twelve months prior to the filing of the application bringing the dispute before the Court.[41]

Thus, were a State that has not yet recognized the ICJ's compulsory jurisdiction to lodge a case against any of these States, the applicant State would first

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own and others' benefit—and thus would welcome a ruling in favour of climate progress. That said, there are several States in that group that have evinced a fair amount of hypocrisy with their energy and environmental policies, whose governments may speak of environmentalism but do little to address emissions.

39 The case was eventually dismissed against all parties due to lack of jurisdiction. See, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v India*) (Jurisdiction of the Court and admissibility of the application) [2016] ICJ Rep 255.

40 ICJ Statute (n 9) art 36(3); ICJ Declarations (n 37).

41 See, for example, 'Declarations recognizing the jurisdiction of the Court as compulsory: Australia' (*ICJ*, March 2002) <https://www.icj-cij.org/en/declarations/au> accessed 27 April 2019 (Australia ICJ declaration).

need to accept the compulsory jurisdiction of the ICJ and then likely wait a year to file the application (as the Marshall Islands did). Even then, the opposing State(s) could argue that the State in question only accepted the compulsory jurisdiction for the purpose of the lodged dispute. Australia has further carved out an exception related to the delimitation of maritime zones, which could possibly be tied to climate change if the dispute encompasses maritime boundaries shifting due to sea level rise.[42]

In addition, the ICJ has subject matter jurisdiction over 'all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'.[43] The United Nations Framework Convention on Climate Change (UNFCCC), and by extension the Kyoto Protocol and Paris Agreement provide for settlement of disputes concerning the interpretation or application of the Convention by submission to the ICJ.[44] However, they also provide that parties can jointly seek settlement of their dispute 'through negotiation or any other peaceful means of their own choice', including binding arbitration.[45] The Netherlands is the only State that has made a declaration accepting jurisdiction of the ICJ for UNFCCC matters, recognizing 'both means of dispute settlement [including arbitration] … as compulsory in relation to any Party accepting one or both means of dispute settlement'.[46]

Another complicating factor is that the States above who have made ICJ compulsory jurisdiction declarations (again, excepting the Netherlands) have excluded 'any dispute … which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement'.[47] Defendant States could argue that ongoing climate negotiations constitute a means of peaceful settlement to which the parties have agreed; however, an initiating State could counter that the specific claims being brought before the ICJ are not all included in the ambit of UNFCCC negotiations or other mechanisms.

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42 ibid.

43 ICJ Statute (n 9) art 36.

44 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 14(2)(a); Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 December 2005) 2303 UNTS 162 (Kyoto Protocol) art 19: 'The provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Protocol.'

45 UNFCCC (n 44) arts 14(1) and 14(2)(b).

46 'Declarations by Parties: Netherlands' (*UNFCCC*) <https://unfccc.int/process/the-convention/status-of-ratification/declarations-by-parties> accessed 28 March 2020.

47 See, for example, Australia ICJ declaration (n 41).

As Strauss notes, potential dispute resolution barriers stemming from the UNFCCC and Kyoto Protocol themselves need not be fatal to a climate change case before the ICJ, depending on how it is framed; indeed, States:

> attempting to formulate climate change claims so as to achieve maximum impact in an ICJ proceeding would be unlikely to conceptualize them as solely a question of compliance with the UNFCCC and the Kyoto Protocol even if they and their adversaries were party to these agreements.[48]

Particularly, if a climate change action is framed as a broader question of State responsibility for environmental (or different forms of transboundary) harm under international law, the dispute resolution provisions of specific treaties may not be directly applicable.[49]

Finally, it is worth noting that the jurisdictional restrictions discussed here do not necessarily prevent climate vulnerable States from initiating a case against any and all States that appear to be appropriate defendants as a matter of fact and in terms of *locus standi*. It is possible, at least procedurally, to lodge simultaneous cases against all of these States, similar to the Marshall Islands' approach in the nuclear zero lawsuits.[50] Even though not all of these would likely advance to the hearing stage, this approach could make a significant impact as a statement on the role of large historical emitters in causing climate change and would avoid having to single out any one particular State.

B *Contentious Case in Name Only*

Under Article 36(1), the ICJ can hear cases referred by mutual agreement of the parties. If one State could find another State willing to go before the ICJ on the matter of its climate change obligations, some of the jurisdictional and other hurdles of a true contentious case could be avoided. On the other hand, it is unlikely—notwithstanding some major political development—that one of the big emitters or States failing to fulfil their UNFCCC, Kyoto Protocol or

48 Strauss (n 31) 344.

49 Strauss (n 31) 344.

50 The Marshall Islands initially filed applications against nine States (China, Democratic People's Republic of Korea, France, India, Israel, Pakistan, Russian Federation, United Kingdom and United States). The applications filed against India, Pakistan and the United Kingdom (which had all recognized the compulsory jurisdiction of the Court) culminated in judgments on each of the respective cases, while the applications filed against the other six States were officially transmitted to them but did not proceed further due to a lack of consent.

Paris Agreement obligations would willingly submit themselves as a defending State Party for the purposes of developing climate change law.[51] It is possible that a climate vulnerable State with a similar interest in clarifying or advancing international law relating to climate change would agree to be an opposing party, but it is not entirely clear what purpose this would serve if the other State is not a big emitter, or is failing to fulfil its climate obligations due to a lack of resources.

It should also be noted that recent case law suggests that an actual legal dispute must exist in order to secure the ICJ's jurisdiction—it is not enough to simply allege that there is a dispute, but rather there must be actual awareness on the part of the parties that they have clearly opposing views concerning the question of the performance or non-performance of certain international obligations. Moreover, such 'awareness' must exist prior to the filing of a case. This was one of the main reasons the nuclear zero lawsuit filed by the Marshall Islands against the United Kingdom was rejected by the ICJ—the Court found that the Marshall Islands had effectively failed to put the United Kingdom on notice of the existence of a dispute in advance of filing suit.[52] Ultimately, a true contentious case probably makes more intuitive and legal sense—and joint mobilization efforts could be reserved for multi-State initiatives like the advisory opinion option.

III Advisory Opinion on Climate Change

An advisory opinion is legal advice provided to the UN or a specialized agency in accordance with Article 96 of the UN Charter.[53] The only bodies at present authorized to request advisory opinions of the Court are five UN organs and 16 agencies of the UN family.[54] The UN General Assembly (UNGA) or the Security Council may request advisory opinions of the ICJ on 'any legal matter', while other organs or specialized agencies may request advisory opinions on 'legal

51 The ICJ has heard cases under the referral by mutual agreement provision; however, almost all of them have been boundary disputes where the disputing parties both desired an independent and authoritative resolution. Strauss (n 31) 340.

52 See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v United Kingdom*) (Preliminary Objections) [2016] ICJ Rep 833, paras 26–58.

53 UN Charter art 96.

54 ICJ At a Glance (n 36) 4.

questions arising within the scope of their activities'.[55] Since its creation, the ICJ has provided 28 advisory opinions.[56]

Unlike judgments of the ICJ in contentious proceedings between States, advisory opinions do not have binding legal effect unless their binding nature is stipulated beforehand. Nevertheless, the findings contained in advisory opinions generally carry significant legal weight and great moral authority. Advisory opinions can also affect the judgments of regional and domestic courts,[57] including in litigation against States or private actors relating to loss and damage resulting from climate change.[58] Moreover, advisory opinions have an important awareness-raising function. Sands points at their potential to contribute to the formation of 'an international public consciousness' on climate change as a matter of global concern.[59] Bodanksy similarly highlights the potential of advisory opinions to 'shape and stabilize normative expectations among the wider set of public and private actors engaged in climate-related work'.[60]

At the international level, the ICJ's advisory opinions contribute to the clarification and development of international law. For example, the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion[61] confirmed the continued applicability of international human rights law during times of war. In addition, the opinion confirmed the extraterritorial applicability of human rights treaties; a finding that is of renewed importance in the context of climate change.[62] The *Reservations to the Convention on Genocide* advisory opinion[63] clarified the use and effect of

55 UN Charter art 96; United Nations Dag Hammarskjöld Library, 'What is an Advisory Opinion of the International Court of Justice (ICJ)?' (*Ask DAG*, 20 September 2019) <http://ask.un.org/faq/208207> accessed 28 March 2020.

56 'Advisory Jurisdiction' (*ICJ*) <https://www.icj-cij.org/en/advisory-jurisdiction> accessed 17 July 2020.

57 Sands (n 10) 11.

58 See P Toussaint, 'Loss and Damage and Climate Litigation: The Case for Greater Interlinkage' (2020) Review of European, Comparative & International Environmental Law <https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12335> accessed 13 March 2021; M Wewerinke-Singh and D Salili, 'Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change' (2020) 20 Climate Policy 681.

59 See Sands (n 10) 10.

60 Bodansky (n 11) 692.

61 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

62 ibid 240, para 2.

63 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15.

reservations to treaties (which was subsequently incorporated in Articles 19–21 of the 1996 Vienna Convention on the Law of Treaties); and the *Threat or Use of Nuclear Weapons* advisory opinion[64] consolidated the principle that States have an obligation to act to prevent significant transboundary harm where such harm is caused by activities carried out in their territory or falling under their jurisdiction. Further, in the advisory opinion on *Western Sahara,* the Court recognized the legal consequences of 'self-determination through the free and genuine expression of the will of the peoples' of the territory concerned.[65] More recently, the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* advisory opinion[66] confirmed that the right of self-determination was already a rule of customary law by 1965.

The *Chagos Archipelago* advisory opinion also serves as a useful illustration of both the benefits and the limits of an ICJ advisory opinion. The opinion formed the basis for an overwhelming majority of 116 Member States in the UNGA voting in favour of the condemnation of the United Kingdom's continued occupation of the Chagos Islands in 2019.[67] The result of this motion was a deadline being placed upon the United Kingdom to relinquish authority over the Chagos Islands by the 22nd of November 2019, with which the United Kingdom refused to comply.[68] Despite the United Kingdom's refusal to honor this motion, and thereby continued defiance of international law, the influence of the advisory opinion and subsequent motion has resulted in greater pressure being applied to the United Kingdom to respect international law. The African Union, for example, has declared the United Kingdom's occupation of the Chagos Islands as an 'illegal colonial administration'.[69] Such statements of disdain for the actions of the United Kingdom illustrate the international influence that the advisory opinions of the ICJ can have upon contentious

64 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

65 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 79–80.

66 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

67 O Bowcott, 'UK suffers crushing defeat in UN vote on Chagos Islands' *The Guardian* (22 May 2019) <https://www.theguardian.com/world/2019/may/22/uk-suffers-crushing-defeat-un-vote-chagos-islands> accessed 17 July 2020.

68 M Bak Mckenna, 'Chagos Islands: UK refusal to return archipelago to Mauritius shows the limits of international law' (*The Conversation*, 26 November 2019) <https://theconversation.com/chagos-islands-uk-refusal-to-return-archipelago-to-mauritius-show-the-limits-of-international-law-127650> accessed 17 July 2020.

69 J Omondi, 'African Union asks UK to withdraw from Chagos Islands, end "colonial administration" ' (*CGTN*, 22 November 2019) <https://africa.cgtn.com/2019/11/22/african-union-asks-u-k-to-withdraw-from-chagos-islands-end-colonial-administration/> accessed 17 July 2020.

legal issues and global politics. At the same time, the United Kingdom's refusal to implement the opinion illustrates that an advisory opinion from the ICJ is likely to have impact only as part of a broader strategy.

There have been several attempts to bring the question of State responsibility for, or obligations regarding climate change to the ICJ for an advisory opinion. The first was by Palau, with the support of other Pacific Island States, in 2011, at the UNGA.[70] While Palau managed to build a more than 30-member coalition, the initiative was effectively ended by the United States, which threatened to cut off certain monetary aid to Palau if it continued with the effort.[71] Several parties, including the Marshall Islands, Bangladesh and the Intergenerational Climate Justice movement have kept the idea of seeking an ICJ advisory opinion on climate change alive.[72]

In June 2019, a group of law students from the University of the South Pacific (USP)—the Pacific Islands Students Fighting Climate Change (PISFCC)—wrote to Pacific heads of State urging them to seek an ICJ advisory opinion on climate change. Importantly, PISFCC's framing of the question shifted the focus of the potential question from State responsibility and damage, to States' obligations to act on climate change to safeguard human rights.[73] PISFCC continued its advocacy at the Pacific Islands Forum (PIF) Leaders Meeting in Tuvalu in August 2019, where Vanuatu resolved to place the initiative on the official agenda and called on Pacific Island leaders to support it. While the Leaders Communiqué adopted at the summit falls short of endorsing the initiative, it includes the following paragraph:

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70 L Hurley, 'Island Nation Girds for Legal Battle Against Industrial Emissions' *The New York Times* (28 September 2011) <https://archive.nytimes.com/www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html?pagewanted=all> accessed 28 March 2020.

71 R Brown, 'The Rising Tide of Climate Change Cases' (2013) 13(2) The Yale Globalist 20 <https://globalist.yale.edu/in-the-magazine/theme/the-rising-tide-of-climate-change-cases/?utm_source=rss&utm_medium=rss&utm_campaign=the-rising-tide-of-climate-change-cases> accessed 28 March 2020.

72 See, for example, International Union for Conservation of Nature (IUCN), 'Request for an Advisory Opinion of the International Court of Justice on the Principles of Sustainable Development in View of the Needs of Future Generations' (10 September 2016) Doc No WCC-2016-Res-079-EN; see also the Global Center for Environmental Legal Studies, supporting the decision of the International Union for the Conservation of Nature's 2016 World Conservation Congress in Honolulu, Hawaii, inviting the UNGA to request an advisory opinion from the ICJ on the principle of sustainable development in view of the needs of future generations: 'Inter-Generational Climate Justice' (*Global Center for Environmental Legal Studies, Pace School of Law*) <https://law.pace.edu/inter-generational-climate-justice> accessed 28 April 2019.

73 ibid.

> 16. In recognizing the need to formally secure the future of our people in the face of climate change and its impacts, Leaders noted the proposal for a UN General Assembly Resolution seeking an advisory opinion from the International Court of Justice on the obligations of States under international law to protect the rights of present and future generations against the adverse effects of climate change.[74]

In September 2019, as part of a packed week of activities surrounding the UN Climate Action Summit and the opening of the 74th Session of the UNGA in New York, Vanuatu hosted initial meetings that aimed to garner diplomatic support for the advisory opinion.[75] The procedural steps required to secure an opinion through the UNGA are detailed below.

A *Advisory Opinion through the UNGA*

To request an advisory opinion from the ICJ, the UNGA must articulate the request in a resolution supported by a majority of UN Member States. Article 18 of the UN Charter stipulates that 'decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting', while 'decisions on other questions … shall be made by a majority of the members present and voting'.[76] While a decision on a possible advisory opinion could in theory be characterized as an 'important question', at least four advisory opinions have been requested through a simple majority (ie *Legality of Nuclear Weapons, Wall in Occupied Palestine Territory, Kosovo,* and *Chagos Archipelago*)—thus it is expected that a simple majority of 97 Member States would suffice to request the advisory opinion. Given that States that abstain from voting are considered absent,[77] the actual number of States required to adopt the resolution containing the request may be even lower.

B *Advisory Opinion through a Specialized Agency*

Article 96(2) of the UN Charter states that:

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74 Fiftieth Pacific Islands Forum Tuvalu, 'Forum Communiqué' (13–16 August 2019) Doc No PIF (19) 14, para 16.

75 'Vanuatu hosts high-profile event on legal action for climate justice' *The Vanuatu Daily Post* (5 October 2019) <https://dailypost.vu/news/vanuatu-hosts-high-profile-event-on-legal-action-for-climate/article_4f58e312-e7f3-11e9-b713-2b437f0c7f2f.html> accessed 17 July 2020.

76 UN Charter art 18.

77 UNGA 'Rules of Procedure' (2016) UN Doc A/520/Rev.18 <https://undocs.org/en/A/520/rev.18> accessed 17 July 2020.

> other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.[78]

It would seem relatively straightforward to formulate a question relating to climate change that falls within the scope of competence of an authorized specialized agency. For example, the Food and Agriculture Organization (FAO) has a clear interest in climate mitigation and adaptation given its mandate on food security and in relation to the adverse effects of climate change on forestry, fisheries and agriculture. The International Labour Organization (ILO) has an interest in the impacts of climate change on workers, including both physical impacts (heat impacts on agricultural and construction workers, for example, and implications on the safety of workers particularly vulnerable to extreme weather events) and socio-economic impacts.[79] However, a negative precedent exists in the World Health Organization's (WHO) 1993 request for an advisory opinion from the ICJ on the legality of nuclear weapons in armed conflict, in connection with its work on the effects of nuclear weapons on health and the environment.[80] Despite this connection, the Court concluded that the request fell outside the WHO's scope of competence.[81] While there is a risk of the ICJ similarly declining a specialized agency's request for an advisory opinion on climate change today, there may be grounds for distinguishing such a request from the *Nuclear Weapons* precedent, such as references to food security and food production systems,[82] a 'just transition of the workforce'[83] and the right to health in the Paris Agreement.[84]

78 See also art 65(1) of the ICJ Statute (n 9). The full list of Organs and agencies authorized to request advisory opinions is available here: <https://www.icj-cij.org/en/organs-agencies-authorized> accessed 17 July 2020. It includes the ILO, the FAO, UNESCO, WHO, IBRD, IFC, IDA, IMF, ICAO, ITU, IFAD, WMO, IMO, WIPO, UNIDO, and IAEA.

79 The authors are grateful to Kate Cook for sharing insights on this point.

80 World Health Organization, 'Health and Environmental Effects of Nuclear Weapons' World Health Assembly Res WHA46.40 (14 May 1993).

81 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, paras 20–6.

82 Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 (Paris Agreement) preambular para 9.

83 ibid preambular para 10.

84 ibid preambular para 11.

C *Process for an Advisory Opinion, Continued*

The voting requirements for a request for an advisory opinion are not expressly provided in the Charter, but are to be determined in accordance with the procedure of each organ or specialized agency.[85] After suitable discussion, the organ or agency seeking the advisory opinion drafts the question(s) to be submitted in a resolution or decision, sometimes in consultation with other bodies. Legal assistance is usually mobilized within the requesting organ or agency to support the drafting of the request. For instance, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Executive Board was assisted by its Secretariat, the International Maritime Consultative Organization (IMCO) Assembly involved its Legal Committee, and the World Health Assembly delegated the task to one of its main committees.[86] The UN Secretary-General, or the Director or Secretary-General of the entity requesting the opinion, then communicates the request to the Court.[87]

Any documents likely to throw light upon the question being asked must be transmitted to the ICJ by the requesting body at the same time as the request or as soon as possible thereafter.[88] For a question related to climate change, such documents can include reports of the IPCC, decisions of the Conference of the Parties to the UNFCCC and Meeting of the Parties to the Paris Agreement, declarations and reports of the UNFCCC Executive Secretary or secretariat, resolutions of the UN Human Rights Council and reports of its Special Rapporteurs, and reports of the UN Office of the High Commissioner for Human Rights, among others.[89] Upon receipt of the request for an advisory opinion, the Registrar must give notice to all States entitled to appear before it, and invite further information relevant to the question from States and/or international organizations.[90] If the request for an opinion is made by the UNGA, the States entitled to appear before the ICJ will be the UN Member States. States will then submit written statements (amicus curiae from international organizations

85 FB Sloan, 'Advisory Jurisdiction of the International Court of Justice' (1950) 38 California Law Review 830, 836.

86 ICJ, *Handbook of the Court* (ICJ 2018) 84 <https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf> accessed 17 July 2020.

87 ibid 84–5.

88 Rules of Court (adopted 14 April 1978, entered into force 1 July 1978) (as subsequently amended) (ICJ Rules) art 104; ICJ Statute (n 9) art 65(2).

89 See also R Bavishi and S Barakat, 'Procedural Issues related to the ICJ's advisory jurisdiction' (Briefing Paper, Legal Responsive Initiative, 11 June 2012) <https://legalresponse.org/wp-content/uploads/2013/09/BP41E-Briefing-Paper-The-ICJ-Advisory-Opinion-Procedure-11-June-2012.pdf> accessed 17 July 2020.

90 ICJ Statute (n 9) art 66; see also 'Advisory Jurisdiction' (n 56).

may also be accepted), followed by oral hearings, where States and authorized international organizations may make further statements and comments.[91]

The time between the request and the delivery of the opinion will depend in part on the complexity of the question(s) put to the Court and the number of States (and possibly other entities) participating in the proceedings.[92] If, pursuant to Article 103 of the Rules of the Court, the request asks for the opinion to be given urgently (or where the Court finds that an early answer would be desirable), the Court is to take all necessary steps to accelerate the procedure.[93]

D *Formulation of the Question*

The formulation of the question to be put to the ICJ is critical to the outcome of the effort. In literature and practice, a range of different approaches has been proposed in terms of detail, area(s) of law to be considered, and specific focus. For example, some believe the question should be kept as simple as possible and be located within the realm of general international law without touching explicitly on treaty law.[94] This approach arguably minimizes the risk of the Court declining to exercise jurisdiction or delivering an unhelpful opinion resulting from deference to specialized courts and tribunals. A more general question might also make it more easily through the UNGA. Others, however, favour a more detailed question as a means of reducing the risk of the Court providing an underwhelming answer.

In principle, if the request for an advisory opinion is made by the UNGA, the question put to the ICJ could, as Sands puts it, '[go] to the heart of the issue'.[95] At the same time, it should be phrased so as to avoid the most sensitive issues in the climate negotiations given the risks this would pose to the Court itself as well as to the negotiation process.[96] Focusing the question on customary international law or a broader range of treaty regimes could help to achieve this. For example, the Court could be asked to clarify the obligations of States under customary international law to ensure that their greenhouse gas emissions do not cause serious damage to other States. The ICJ could be requested also to examine the role of 'general principles' on international law,

91 See ICJ Rules (n 88) arts 69, 105 and 106.

92 Bavishi and Barakat (n 89) 5.

93 ICJ Rules (n 88) art 103.

94 See DA Kysar, 'Climate Change and the International Court of Justice' (2013) Yale Law School, Public Law Research Paper No 315, 8 <https://ssrn.com/abstract=2309943> accessed 28 March 2020.

95 Sands (n 10) 17–18.

96 See also Bodansky (n 11) 708.

such as the principle of prevention of harm, and the principle of international cooperation, in conjunction with the principle of public participation in decisions affecting the climate as well as the principle of common but differentiated responsibilities. Rather than undermining the negotiation process, this approach could assist it namely, in the words of Bodansky:

> by establishing a common language for discussing NDCs [nationally determined contributions] – for example, through metrics such as marginal and total abatement costs, emission reductions relative to business-as-usual, emissions per unit GDP, and emissions per capita.[97]

The advisory opinion would 'tend to serve as a focal point', 'give the chosen criteria greater status', and thus be 'harder for the parties to ignore than the existing case law of the ICJ on international environmental issues, since it would focus specifically on climate change and clearly be relevant.'[98]

A variation of this question could place States' due diligence obligations relating to climate change in the broader context of sustainable development and poverty eradication.[99] This would invite the Court not only to clarify States' obligations to reduce emissions but also elaborate on obligations related to finance, technology transfer and capacity building. The added value of such clarification could be significant given the open nature of the provisions of the UNFCCC and Paris Agreement on these issues, and the lack of jurisprudence elucidating their precise meaning. This type of question would also lend itself to clarification of States' obligations of international assistance and cooperation under international human rights law. The resulting opinion could catalyze greater ambition in new or updated NDCs not only in connection with mitigation but also on finance, technology transfer and capacity building.

Another approach is to focus the question on compensation for loss and damage from climate change.[100] This issue has been ignored or addressed inadequately in the negotiations from the outset, starting with the attempt of the Alliance of Small Island States (AOSIS) to establish a compensation regime for climate damages in 1991.[101] While AOSIS succeeded at establishing the

97 Bodansky (n 11) 709.

98 Bodansky (n 11) 710.

99 The authors are grateful to Jacqueline Peel for sharing her insights on this point.

100 See also Bodansky (n 11) 710.

101 Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, 'Vanuatu: Draft annex relating to Article 23 (Insurance) for inclusion in the revised single text on elements relating to mechanisms (A/AC.237/WG.II/Misc.13)

Warsaw International Mechanism for Loss and Damage in 2013, and incorporating this mechanism in the Paris Agreement two years later,[102] the decision accompanying the Paris Agreement states that the article on loss and damage 'does not involve or provide a basis for any liability or compensation'.[103] An advisory opinion from the ICJ on the issue of compensation could set the stage for further international litigation, and also inspire cases at the domestic level. While these potential benefits of this approach are significant, the risks are, too. Perhaps the greatest risk is that the Court delivers an unhelpful or inadequate opinion. Bodansky further points at the risk of the opinion jeopardizing existing arrangements on climate finance which are based on constructive ambiguity about their nature (ie compensation or assistance).[104] However, this risk is perhaps not as great as it would at first appear to be, given that loss and damage has now been firmly established as a standalone area in the international climate change regime, and finance for loss and damage is increasingly being discussed separately from other areas of climate finance. Moreover, the risk may be circumvented, at least in part, by asking about the legal consequences of State action or inaction deemed unlawful under international law.

Finally, a potentially impactful approach is to focus the question on human rights, as advocated by PISFCC. The possibility of including an explicit reference to human rights in the question (rather than leaving it to the Court's discretion as to whether or not to consider States' human rights obligations) merits serious consideration in light of various recent developments. First, the final judgment in *Urgenda v The Netherlands*[105] confirms that international human rights law imposes obligations on States to mitigate climate change, in accordance with the principle of common but differentiated responsibilities and respective capabilities and the best available science. *Urgenda* reflects a growing trend among courts and global institutions to recognize the human rights dimensions of climate change, which is also reflected in a preambular

submitted by the Co-Chairmen of Working Group II' (17 December 1991) UN Doc A/AC.237/WG.II/CRP.8 (AOSIS proposal).

102 Paris Agreement (n 82) art 8.

103 UNFCCC Conference of the Parties, 'Decision 1/CP.21 Adoption of the Paris Agreement' (29 January 2016) UN Doc FCCC/CP/2015/10/Add.1, para 51 <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> accessed 17 July 2020.

104 Bodansky (n 11) 710.

105 *The State of the Netherlands v Urgenda Foundation,* Supreme Court of the Netherlands, Case No 19/00135, 20 December 2019 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2006> accessed 17 June 2020; see also C Bakker, 'Climate Change Litigation in the Netherlands', Chapter 9 in this volume.

clause of the Paris Agreement.[106] Speaking on the outcome of *Urgenda*, UN High Commissioner for Human Rights Michelle Bachelet highlighted the importance of the Supreme Court's decision and 'the even greater importance of it being swiftly replicated in other countries'.[107] An advisory opinion from the ICJ that elaborates upon States' human rights obligations (to the extent they are implicated by climate change) could assist in achieving this replication.

Second, the ICJ's articulation of States' human rights obligations relating to climate change would provide important guidance to the international climate negotiations in a manner that could embolden the negotiating position of climate vulnerable States. As in *Urgenda*, it could confirm that States' discretion to decide on their own climate targets and levels of support (including for loss and damage) is limited by international human rights standards which are objective and non-negotiable. Notably, these standards include the principle that victims of human rights violations are entitled to adequate and effective remedies for those violations. Human rights could also be the lens through which specific factual scenarios could be presented to (and subsequently examined by) the Court, such as the loss of territory or forced displacement resulting from climate change.

IV Concluding Remarks

To date, perhaps for capacity reasons, climate vulnerable States have not taken full advantage of existing international legal mechanisms to further their interests. This chapter has demonstrated that, while not a silver bullet, bringing climate change before the ICJ, either through a contentious case, or by requesting an advisory opinion, is a plausible option that could have impact in terms of both garnering attention for the adverse effects of climate change and regulating State behavior. Ensuring that an intervention from the ICJ helps rather than hinders the climate negotiation process is crucial, given that multilateralism remains the most efficient and legitimate approach to combating climate change and addressing its consequences.[108] The possibility of a negative

106 See, for example, J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37, 39, noting that petitioners have raised rights claims in recent climate change litigation in the Philippines, the United States, Austria, and South Africa, among others.

107 'Bachelet welcomes top court's landmark decision to protect human rights from climate change' (*OHCHR*, 20 December 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E> accessed 13 March 2021.

108 Bodansky (n 11) 699.

outcome or potentially regressive *obiter dicta* should be considered,[109] with any initiative to bring climate change before the ICJ mapping out these risks and taking steps to minimize them. Finally, the potential of such an initiative to facilitate or support climate change litigation is significant, as illustrated most recently by the *Chagos Archipelago* precedent. Indeed, further litigation against States that violate their international obligations may well be a necessary component of a broader strategy to ensure that a favourable outcome from the ICJ is actually implemented. Taking account of this array of factors, the ICJ route could enable climate vulnerable States to level playing fields, projecting their voices further in defence of climate justice and accountability.

109 See, for example, Kysar (n 94) 56–8 'Judges and Potential Bias'.

CHAPTER 18

Litigation under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime

*James Harrison**

1 Introduction

It is now widely accepted that climate change is one of the most important challenges facing the international community and it demands 'urgent action'[1] to mitigate the significant risks posed to humankind and natural ecosystems. The international regime has evolved to demand that all States undertake 'ambitious efforts' to combat climate change with a view to holding the increase in the global average temperature to 'well below 2°C above pre-industrial levels' and to increasing the ability of all States to adapt to the adverse impacts of climate change.[2]

The importance of the oceans in the climate change regime has also gradually been acknowledged, with the Intergovernmental Panel on Climate Change (IPCC) publishing a report in September 2019, which recognizes the significant effects that climate change is having on the world's seas. The IPCC records the unabated warming of the oceans since 1970 and highlights that the oceans are thought to have taken up more than 90% of the excess heat in the climate system.[3] The melting of glaciers into the oceans has also affected the salinity of marine waters.[4] These events have had significant repercussions for marine ecosystems. Certain habitat types have been devastated by warming waters, with widespread evidence of tropical coral reefs being particularly badly hit.

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1 UNGA Res 70/1, 'Transforming our World: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1, Goal 13.

2 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740 (Paris Agreement) art 2.

3 H-O Pörtner et al (eds), *The Ocean and Cryosphere in a Changing Climate: A Special Report of the Intergovernmental Panel on Climate Change* (IPCC 2019) 9.

4 ibid 13.

An outlook report on the Great Barrier Reef released in August 2019 officially classified the status of the reef as very poor, with sea temperature increases caused by climate change being a major driver of its decline.[5] A further mass coral bleaching event, caused by increased sea temperatures, was recorded in February 2020.[6] Nor is the Great Barrier Reef alone in being affected; according to a 2016 report, 'by the end of 2015, 32% of coral reefs worldwide had been exposed to thermal stress of 4 °C-weeks or more and almost all of the world's reefs had exceeded their normal warm-season temperatures.'[7] Yet, the consequences of climate change go far beyond coral reefs, with many marine species shifting their geographical range and seasonal activities in response to ocean warming, changes in biogeochemical conditions, and loss of habitat.[8] Whilst the precise impacts vary from region to region, these changes have implications for the whole planet, because of the vital ecosystem services provided by the oceans at the local, regional and global levels.[9]

In addition to the direct impacts of climate change, the ocean has also undergone significant acidification through the absorption of carbon dioxide (CO_2) into the water column.[10] The primary casualties of ocean acidification are those marine species who rely upon calcification to form their physical structures—eg corals and crustaceans—but emerging scientific research suggests that there may be broader impacts on the behaviour of marine species because of the way that acidification alters the cycling of nutrients, elements and compounds in the water column.[11]

The only way of tackling the climate change impacts on the oceans in the long-term is through the reduction of greenhouse gas (GHG) emissions (eg CO_2, methane, nitrous oxide) into the atmosphere, although impacts may be reduced through adaptation measures, which increase the resilience of marine

5 Great Barrier Reef Authority, *Great Barrier Reef Outlook Report 2019* (2019).

6 See 'Great Barrier Reef suffers third mass bleaching in five years' (*BBC News*, 26 March 2020) <https://www.bbc.co.uk/news/world-australia-52043554> accessed 30 April 2020.

7 CM Eakin et al, 'Global Coral Bleaching 2014–2017: Status and Appeal for Observations' (2016) 31(1) Reef Encounter 20, 23.

8 IPPC (n 3) 12. For a study of distributional shifts in fish stocks in the North-East Atlantic, see International Council for the Exploration of the Seas, 'Report of the Working Group on Fish Distribution Shifts' (2017).

9 See L Inniss, A Simcock et al, *First Global Integrated Marine Assessment* (United Nations 2016) chs 3–9.

10 IPPC (n 3) 9.

11 Royal Society, 'Climate Change Evidence and Causes: Update 2020' (2020) 17. See also SJ Hennige, JM Murray, and P Williamson (eds), *CBD Technical Series No 75: An updated synthesis of the impacts of ocean acidification on marine biodiversity* (Secretariat of the Convention on Biological Diversity 2014).

ecosystems in the short-term. The oceans may also provide some solutions to climate change, through the opportunities to store captured carbon dioxide in sub-sea geological formations or through the use of geo-engineering techniques, although these technological innovations must be approached with care in order to ensure that they do not cause other types of harm to marine ecosystems.[12]

Perhaps surprisingly, the oceans have not featured prominently in discussions on mitigation and adaptation under the United Nations Framework Convention on Climate Change (UNFCCC) until very recently. The 'Because the Ocean Initiative' was launched at the 21st Conference of the Parties (COP) in 2015 as a means to raise awareness of the interlinkages between the climate change regime and the oceans with a view to 'enhanc[ing] global ocean resilience to the impacts of CO_2 emissions and climate change.'[13] Momentum has grown through a number of formal and informal initiatives.[14] The 25th COP held in Madrid in December 2019 was heralded by the organizers as a 'blue COP', although the final conference decisions do little more than initiate yet another 'dialogue on the oceans and climate change to consider how to strengthen mitigation and adaptation action in this context.'[15] Indeed, the climate regime is a long way from producing the commitments necessary to meet its objective; a recent UNEP report reveals how current commitments would lead to greenhouse gas emissions in 2030 being 38% higher than required to meet the 1.5°C goal.[16]

It is the slow progress through these political processes which leads to discussions about how other legal frameworks may be able to stimulate action on climate change and what contributions litigation could make. The question to be addressed in this chapter is how the law of the sea regime can contribute to tackling climate change and particularly how the dispute settlement system under the United Nations Convention on the Law of the Sea (UNCLOS)[17] may

12 See Section IV below.

13 'First Because the Ocean Declaration' (*Because the Ocean*, 2015) <https://www.becausetheocean.org/> accessed 9 June 2020.

14 See also the Roadmap to Oceans and Climate Action (ROCA) Initiative: <https://roca-initiative.com/>accessed 8 June 2020; The Ocean Pathway: <https://cop23.com.fj/the-ocean-pathway/> accessed 8 June 2020.

15 UNFCCC Conference of the Parties, 'Decision 1/CP.25 Chile Madrid Time for Action' (15 December 2019) UN Doc FCCC/CP/2019/13/Add.1, paras 30–1.

16 See UNEP, *Emissions Gap Report 2019* (UNEP 2019) <https://www.unenvironment.org/resources/emissions-gap-report-2019> accessed 30 April 2020.

17 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

be used in order to promote action on this front. UNCLOS is an obvious focus, not only because of its widespread acceptance and its overarching framework for marine environmental protection, but also because it permits unilateral recourse to international courts and tribunals for most marine environmental disputes. Section II of the chapter will give a brief background to UNCLOS as the so-called 'constitution for the oceans'[18] and what options for dispute settlement it provides. Sections III and IV will consider which provisions of UNCLOS could be invoked in order to address climate change mitigation. Section V concludes by reflecting upon additional factors that might influence the success of a litigation strategy, as well as the limitations on this course of action.

II UNCLOS Dispute Settlement

UNCLOS is the central pillar of the international legal framework for the oceans, laying down rules on the jurisdictional framework that governs the regulation of most maritime activities. At the time of writing, UNCLOS had been accepted by 168 parties, including most coastal and maritime States.[19]

The importance of the Convention is not only the rules that it contains, but the inclusion of a system for the compulsory settlement of most disputes arising thereunder.[20] In this respect, UNCLOS can be contrasted with the major climate change treaties, which make binding dispute settlement optional and rely upon conciliation as the main method of dispute settlement.[21]

Whilst dispute settlement under UNCLOS is generally compulsory, there is no single forum which is competent to hear disputes. Rather, UNCLOS invites States to nominate one of the four following dispute settlement forums when they sign, ratify or accede to the Convention:

– the International Tribunal for the Law of the Sea;
– the International Court of Justice;

18 See TB Koh, 'A Constitution for the Oceans' (adapted from statements by TB Koh at the Third United Nations Conference on the Law of the Sea, Montego Bay, 6 and 11 December 1982) <https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm> accessed 4 June 2020.

19 See <https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 9 June 2020.

20 UNCLOS (n 17) Part XV.

21 See United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 14; Paris Agreement (n 2) art 24.

– an arbitral tribunal constituted in accordance with Annex VII; or
– a special arbitral tribunal constituted in accordance with Annex VIII.[22]

Disputes may be submitted to any forum nominated by both the applicant State and the respondent State.[23] If the States concerned have not nominated the same forum or if they have not nominated any forum at all, a dispute can only be submitted to Annex VII arbitration.[24] In practice, only 54 UNCLOS parties have made a declaration indicating their choice of forum, meaning that Annex VII arbitration is likely to be the default forum for most disputes, although it is open to the parties to agree upon an alternative forum[25] or even to transfer proceedings to a different forum once Annex VII arbitration has commenced.[26]

Whichever forum is chosen to hear a dispute, the scope of jurisdiction is prescribed by Article 288, which limits an UNCLOS court or tribunal to deciding 'disputes concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.'[27] Courts and tribunals have emphasized that this limitation means that they do 'not have jurisdiction to determine breaches of obligations not having their source in the Convention',[28] but it has also been recognized that courts and tribunals may 'rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention.'[29] Such systemic interpretation has been particularly emphasized in disputes concerning Part XII on the Protection and Preservation of the Marine Environment; the Tribunal in the *South China Sea Arbitration* made clear that the content of Part XII was 'informed by … other applicable rules of international law.'[30]

The need for the systemic interpretation of Part XII offers many opportunities for understanding UNCLOS in light of the broader international legal framework on climate change, which will be explored in the following sections. However, the potential overlap of the two independent legal regimes

22 UNCLOS (n 17) art 287(1).
23 UNCLOS (n 17) art 287(4).
24 UNCLOS (n 17) art 287(3) and (5).
25 UNCLOS (n 17) art 287(4).
26 See, for example, *M/V 'Saiga'* (*No 2*) (*Saint Vincent and the Grenadines v Guinea*) (Order of 20 February 1998) ITLOS Reports 1998, 10; *M/T 'San Padre Pio'* (*No 2*) (*Switzerland v Nigeria*) (Order of 7 January 2020) ITLOS Case No 29.
27 UNCLOS (n 17) art 288(1).
28 *Duzgit Integrity* (*Malta v São Tomé and Príncipe*), PCA Case No 2014-07, Award (5 September 2016) para 207.
29 ibid para 208.
30 *South China Sea Arbitration* (*Philippines v China*), PCA Case No 2013-19, Award (12 July 2016) para 941.

also raises questions about States' ability to pursue litigation under UNCLOS. In the *Southern Bluefin Tuna Arbitration*, the tribunal ruled that it did not have jurisdiction over a dispute impinging upon both UNCLOS and the Convention on the Conservation on Southern Bluefin Tuna because the latter instrument implicitly excluded the possibility of compulsory arbitration.[31] Yet, this decision has proven controversial[32] and the tribunal in the *South China Sea Arbitration* took the view that even though it is 'true that the same facts may implicate multiple treaties',[33] 'a dispute under UNCLOS does not become a dispute under [another treaty] merely because there is some overlap between the two.'[34] This latter view is more convincing and it opens the door to pursuing litigation on climate change under UNCLOS, despite a parallelism of treaty regimes.[35] This leads us to questions about what potential claims may be made under UNCLOS.

III Invoking UNCLOS to Support Action under the Climate Change Regime

UNCLOS was negotiated at a time when climate change had not yet been acknowledged as a major threat by the international community and therefore it is no surprise that it does not expressly mention climate change. Nevertheless, Part XII of UNCLOS was drafted to be flexible and to accommodate emerging threats to the marine environment.[36] To this end, the obligation to prevent, reduce and control pollution of the marine environment applies to 'all sources'[37] and the definition of pollution is broad, covering 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in …

31 *Southern Bluefin Tuna* (*Australia v Japan and New Zealand v Japan*) (Jurisdiction and Admissibility) (2000) 23 RIAA 1.

32 See, for example, J Peel, 'A Paper Umbrella which Dissolves in the Rain? The Future for Resolving Fisheries Disputes under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration' (2002) 3 Melbourne Journal of International Law 53.

33 *South China Sea Arbitration* (*Philippines v China*), PCA Case No 2013-19, Jurisdiction and Admissibility (29 October 2015) para 284.

34 ibid para 285.

35 See further AE Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 International Journal of Marine and Coastal Law 458, 475–7. See also A Savaresi, 'Inter-State Climate Change Litigation', chapter 16 in this volume.

36 J Harrison, *Saving the Oceans through Law* (OUP 2017) 27; C Redgwell, 'Treaty Evolution, Adaptation and Change: Is the LOSC "Enough" to Address Climate Change Impacts on the Marine Environment?' (2019) 34 International Journal of Marine and Coastal Law 440.

37 UNCLOS (n 17) art 194(3).

deleterious effects…'.[38] It is plain that the impact of climate change on the oceans falls within this definition, particularly by the introduction of heat, a source of energy, into the oceans.[39]

Of course, the obligation in UNCLOS is not to prevent all pollution of the marine environment, but rather it is an obligation of due diligence,[40] meaning that States must take appropriate action to prevent foreseeable marine environmental harm. Due diligence obligations are by their very nature flexible and they must be interpreted on a case-by-case basis, taking into account, inter alia, the nature of the threats posed by a particular source of pollution and the capacities of an individual country to address those threats.[41] Due diligence must also now be understood as demanding a precautionary approach, meaning that it is not necessary to prove with absolute certainty the likelihood of harm, as the obligation to act will be triggered when there are 'plausible indications of potential risks.'[42] As recently held by the Dutch Supreme Court in the *Urgenda* litigation, 'the precautionary principle therefore means that more far-reaching measures should be taken to reduce [GHG] emissions, rather than less-far reaching measures.'[43] Due diligence is also a dynamic concept so that the content of the obligation 'change[s] over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.'[44]

An important factor to be taken into account when deciding what action is required as a matter of due diligence is the existence of any applicable international legal obligations. When it comes to adopting national measures to prevent, reduce and control pollution of the marine environment from land-based activities or from or through the atmosphere, UNCLOS expressly requires States to take into account any 'internationally agreed rules, standards, and recommended practices and procedures.'[45]

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38 UNCLOS (n 17) art 1(1).

39 Harrison (n 36) 255; Boyle (n 35) 462; T Stephens, 'Warming Waters and Souring Seas' in D Rothwell et al (eds), *Oxford Handbook on the Law of the Sea* (OUP 2015) 783.

40 *South China Sea Arbitration* (*Merits*) (n 30) para 944.

41 See Harrison (n 36) 28–9.

42 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, 10, para 131.

43 *The State of the Netherlands v Urgenda Foundation*, Supreme Court of the Netherlands, Case No 19/00135, Judgment, 20 December 2019, para 7.2.10. See also C Bakker, 'Climate Change Litigation in the Netherlands' , chapter 9 in this volume.

44 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 42) para 117.

45 UNCLOS (n 17) arts 207(1) and 212(1).

Despite the weak language of this rule of reference, when States are bound by those other international rules, it can be argued that States are obliged to apply them as a minimum standard for action under UNCLOS.[46] Thus, when the Kyoto Protocol was the principal legal instrument regulating the emissions of developed economies, it was relatively straightforward to argue that the targets agreed by States in that instrument provided a benchmark against which to judge the action of States to combat climate change under Part XII of UNCLOS. Indeed, given that the targets under the Kyoto Protocol were part of a multilateral agreement, Boyle convincingly argued that 'it seems very likely that any tribunal would … be reluctant to require more of States than they have agreed to under Kyoto…'.[47] Moreover, linking implementation of UNCLOS commitments on the protection of the marine environment to the Kyoto Protocol was only possible for those parties having binding commitments under the latter instrument, which did not cover certain major emitters, such as the United States of America or China.

A slightly different line of argumentation is required for the targets adopted for the second implementation period of the Kyoto Protocol under the Doha Amendment. This amendment lays down individual quantitative reduction targets for a number of industrialized States for the period 1 January 2013 to 31 December 2020. Given that this amendment has not entered into force and no States have formally agreed to provisionally apply it, States are not *obliged* to meet this standard in the same way as they were obliged to meet their commitments for the first commitment period under the Kyoto Protocol. Despite the fact that they are not legally binding, the targets in the Doha Amendment can arguably be still counted as 'international rules and standards' or (more likely) 'recommended practices and procedures' for the purposes of Articles 207 and 212 of UNCLOS, meaning that they at least have to be 'taken into account' when deciding what action is required under these provisions. In this context, it is worth noting that the decision adopting the amendments reinforces that the amendments do not rely exclusively on their entry into force for their normative value; the decision says that parties 'will implement their commitments and other responsibilities in relation to the second commitment period, in a manner consistent with their national legislation or domestic processes, as of 1 January 2013 and pending the entry into force of the amendment.'[48]

46 Boyle (n 35) 468.

47 AE Boyle, 'Law of the Sea Perspectives on Climate Change' (2012) 27 International Journal of Marine and Coastal Law 831, 836.

48 UNFCCC Conference of the Parties, 'Decision 1/CMP.8 Amendment to the Kyoto Protocol' (28 Feburary 2013) UN Doc FCCC/KP/CMP/2012/13/Add.1 (Doha Amendment) para 6.

Yet, neither this decision, nor the rule of reference in UNCLOS, demand absolute compliance with the Doha Amendment, as they both clearly give some flexibility to take alternative measures. Nevertheless, the fact that the Doha Amendment was multilaterally agreed means that it provides strong evidence of what is required by due diligence. A State wishing to unilaterally depart from this target would have to provide a clear justification for its position in order to convince a court or tribunal that the target agreed by the international community should be lowered. Indeed, it is important to observe that the targets included in the Doha Amendment are envisaged as a minimum and States are encouraged to unilaterally 'revisit' its target and 'increase the ambition of its commitment.'[49] In this respect, the Doha targets can be contrasted with the original targets in the Kyoto Protocol and it is therefore possible to argue that States may need to go above and beyond the levels set out in the Doha Amendment in order to meet their due diligence obligation under UNCLOS. Of course, in this context, the claimant State would have to convince a court or tribunal that the multilaterally agreed standard was insufficient to meet the due diligence obligation in UNCLOS. Yet, like the Kyoto Protocol, the greatest drawback of the Doha Amendment is its limited scope. Indeed, the Doha Amendment is even narrower than the Kyoto Protocol as several industrialized countries opted out—namely Canada, Japan, New Zealand and the Russian Federation[50]—and so it only covers a minority of global emissions,[51] limiting its usefulness as a benchmark for due diligence.

What about climate change action in the post-2020 period? Under the Paris Agreement, the rigid differentiation between industrialized countries and developing countries has been dropped and all States are now expected to take mitigation action, even if developed economies should still take the lead.[52] This potentially increases the opportunities for climate change litigation linked to the climate change regime. At the same time, the Paris Agreement introduces a fundamental shift in the international community's response to climate change, by moving from a top-down regime of targets and timetables to a bottom-up system of pledge and review.[53] Thus, States are to set their own targets through so-called Nationally Determined Contributions (NDCs).[54]

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49 ibid para 7.

50 See ibid fns 13–16.

51 See B Mayer, 'The Curious Fate of the Doha Amendment' (*EJIL: Talk!*, 4 May 2020) <ejiltalk.org/the-curious-fate-of-the-doha-amendment/> accessed 9 June 2020.

52 Paris Agreement (n 2) art 4(4).

53 For further discussion, see A Savaresi, 'The Paris Agreement and the Future of the Climate Regime' in G Ulrich et al (eds), *How International Law works in Times of Crisis* (OUP 2019).

54 Paris Agreement (n 2) art 3.

These documents are far more complex than the commitments under the Kyoto Protocol or the Doha Amendment. Whereas the Paris Agreement itself provides few details about the content of NDCs and the final 'rules' on the communication of NDCs have not yet been adopted, it would appear that States have significant flexibility for determining their approach,[55] as is demonstrated by the variety in NDCs that have been communicated to date. For example, some countries have indicated quantified emissions reduction targets[56] whereas other countries have indicated emissions limit targets[57] or maximum growth rates.[58] In contrast, some NDCs have indicated a target range for reductions, rather than a precise target[59] or they have distinguished between 'binding targets' and 'indicative targets'[60] or 'unconditional' and 'conditional' contributions.[61] Some NDCs also outline the detailed measures that the State intends to take in order to achieve the target.[62]

As well as substantive differences to previous commitments under the climate change regime, the unilateral NDCs also have a different legal character from the obligations of result embedded in the Kyoto Protocol and the Doha Amendment. The key obligation in the Paris Agreement requires that each party 'prepares, communicates and maintains successive nationally determined contributions that it intends to achieve' and it further provides that 'parties shall pursue domestic mitigation measures, with the aims of achieving the objectives of such contributions.'[63] Most commentators agree that the Paris Agreement establishes an obligation of conduct for States to take appropriate measures to achieve their NDCs.[64] In other words, States are not legally

55 See, for example, UNFCCC Conference of the Parties, 'Decision 1/CP.21 Adoption of the Paris Agreement' (29 January 2016) UN Doc FCCC/CP/2015/10/Add.1, para 27.

56 For example, Switzerland NDC (18 February 2020): 50 percent by 2030 compared to 1990 levels; New Zealand NDC (22 April 2020): zero net emissions of greenhouse gases (other than biogenic methane) by 2050; Japan NDC (31 March 2020): 26.0% reduction by FY 2030 compared to FY 2013.

57 For example, Singapore NDC (30 March 2020): an economy-wide absolute GHG emissions limitation target to peak its GHG emissions at 65 MtCO2e around 2030.

58 For example, Oman NDC (21 May 2019).

59 For example, Kyrgyzstan NDC (17 February 2020): reduce GHG emissions in the range of 11.49–13.75% below business as usual in 2030 and in the range of 12.67–15.69% below business as usual in 2050.

60 For example, Marshall Islands NDC (21 November 2018).

61 For example, Rwanda NDC (5 October 2016).

62 For example, Uzbekistan NDC (8 November 2018); Canada NDC (10 May 2017).

63 Paris Agreement (n 2) art 3(2).

64 Savaresi (n 53) 201; Mayer (n 51); C Voigt, 'The Paris Agreement: What is the standard of conduct for parties? (2016) 26 Questions of International Law 17–28.

bound to achieve any target in their NDC, as long as they exercise their best efforts to do so. Furthermore, the description of specific measures within an NDC does not commit a State to taking those particular measures, as they are not part of the objective of the NDC.

Based upon the preceding analysis, it is therefore not possible to argue that NDCs provide a definitive statement of what States must do in order to meet their due diligence obligations under UNCLOS. If States can justify a failure to reach their stated targets under the Paris Agreement, then such justifications will also be relevant to deciding whether they have complied with their UNCLOS obligations. Nevertheless, the NDC can still be used as strong *evidence* of what action may be appropriate to tackle climate change for the purposes of UNCLOS. After all, NDCs represent a statement of what that State considers to be an appropriate contribution to the global mitigation objective at a particular point in time. Such statements must be presumed to have been made in good faith and therefore they can be considered to constitute prima facie evidence of an appropriate standard for due diligence. Nevertheless, it is open to States to produce evidence as to why they have failed to meet the objectives in their NDC or as to why their NDC is not an appropriate standard. The value of litigation in this context is precisely the opportunity to engage with a State on these questions in a judicial forum with clear standards and procedures for presenting evidence and an independent arbiter to decide the issue in an authoritative manner.

Nor is UNCLOS litigation necessarily restricted to promoting compliance by a State with its own NDC. It may also be possible to argue that a NDC does not go far enough in order to meet the autonomous due diligence standard under UNCLOS. Unlike the multilateral character of the commitments under Kyoto, NDCs lack the endorsement of other States and therefore they cannot be considered as a definitive understanding of what is demanded by due diligence in the context of climate change. Indeed, the Paris Agreement itself indicates that individual NDCs must be adapted over time, with successive NDCs gradually increasing the level of ambition.[65] The relatively frequent timetable for reappraisal of NDCs as well as the regular progress reports required by the Agreement[66] provide valuable opportunities to consider whether States have done enough to develop their climate change mitigation plans, with the possibility of legal action under UNCLOS if there is a lack of action or a failure to demonstrate ambition. For example, it has been argued that 'a comparison

65 Paris Agreement (n 2) art 4(3).
66 Paris Agreement (n 2) art 13.

could be made with the best performers in a similar situation'[67] and, in this respect, the public registry of NDCs[68] provides a valuable source of contextual information in order to compare the action of a single State against its peers in order to demonstrate a tardiness or lethargy in climate action. It must be stressed that, in this case, an UNCLOS court or tribunal is not being called upon to decide precisely what action is required by a particular State, but rather whether or not a State has done enough to meet its due diligence obligation. We will return to this important distinction in the conclusion.

IV Invoking UNCLOS to Supplement Action under the Climate Change Regime

One criticism of the climate change regime has been its focus on reducing emissions, with little consideration of other issues. In this section, we will consider how litigation under UNCLOS could be used to ensure that States take broader environmental issues into account when developing their climate change policies.

The first major omission from the climate change regime is its failure to expressly acknowledge the problem of ocean acidification, despite the fact that it is caused by one of the principal GHGs also responsible for climate change, namely CO_2.[69] By itself, the climate change regime does not require action against ocean acidification, as CO_2 is only one of the bundle of GHGs that may be regulated by States in order to meet their commitments under the Paris Agreement. There may even be an incentive to focus GHG reductions on other gases, such as methane, 1kg of which is equivalent to 25kg of CO_2. In extremis, Stephens observes that 'states … may even increase CO_2 emissions, so long as there is a corresponding reduction in other GHGs.'[70] Indeed, despite the growing awareness of this issue, ocean acidification continues to be treated as a low priority. Very few States have explicitly addressed this issue in their NDCs.[71] Oral rightly points out that collective action will ultimately be needed

67 Boyle (n 35) 474.

68 <https://www4.unfccc.int/sites/ndcstaging/Pages/Home.aspx> accessed 9 June 2020.

69 See, for example, ER Harrould-Kolieb, 'Ocean Acidification and the UNFCCC: Finding Legal Clarity in the Twilight Zone' (2016) 6 Washington Journal of Environmental Law & Policy 612.

70 T Stephens, 'Warming Waters and Souring Seas' in D Rothwell et al (eds), *Oxford Handbook on the Law of the Sea* (OUP 2015) 786.

71 See T Stephens, 'The Role and Relevance of Nationally Determined Contributions under the Paris Agreement to Ocean and Coastal Management in the Anthropocene' (2018) 33 Ocean Yearbook 250, 263.

and she argues that 'the UNFCCC regime appears to provide the more suitable framework for the collective action necessary to mitigate emissions of carbon dioxide causing ocean acidification.'[72] The question to be addressed here is what role litigation may play as a spur for such action.

Whilst ocean acidification is not mentioned by UNCLOS, there is little doubt that the absorption of CO_2 by the oceans qualifies as marine pollution under UNCLOS and therefore States are under a due diligence obligation to take appropriate action.[73] It follows that a State which chooses to predominantly concentrate its GHG emission reductions on other gases, whilst not addressing its CO_2 emissions, may not be compliant with its UNCLOS obligations, even if it was not in breach of the Paris Agreement.[74] It is obviously difficult to pinpoint a particular level of CO_2 reductions that might be required from an individual State in the absence of any globally agreed targets or unilateral commitments. Nevertheless, it is still possible to argue that in order to satisfy their due diligence obligation, States must be able to demonstrate that they have considered their contribution to ocean acidification and they have reflected this element in their overall emissions reductions policies in a precautionary manner. In other words, UNCLOS requires at a minimum that States can demonstrate that they have quantified their contribution to ocean acidification and they have adopted what they consider to be appropriate measures to mitigate any damage. Without even acknowledging their contribution, States cannot be considered to be acting diligently.

UNCLOS may play a similar role in ensuring that measures taken to combat climate change do not have a detrimental impact on marine ecosystems. It is broadly accepted that so-called negative emissions reduction technologies may need to be used to meet the global temperature targets under the Paris Agreement,[75] with marine carbon capture and storage[76] and marine geoengineering having both been highlighted as being particularly promising in

72 N Oral, 'Ocean Acidification: Falling between the Legal Cracks of UNCLOS and the UNFCCC' (2018) 45 Ecology Law Quarterly 9, 29.

73 See Harrison (n 36) 257; KN Scott, 'Ocean Acidification: A due diligence obligation under the LOSC' (2020) 35 International Journal of Marine and Coastal Law 382, 393.

74 See KN Scott, 'Ocean Acidification: A due diligence obligation under the LOSC' (2020) 35 International Journal of Marine and Coastal Law 402.

75 For example, RS Haszeldine et al, 'Negative emissions technologies and carbon capture and storage to achieve the Paris Agreement commitments' (2018) A376 Philosophical Transactions of the Royal Society 20160447.

76 See, for example, B Metz et al (eds), *IPCC Special Report on Carbon Dioxide Capture and Storage* (CUP 2005). Carbon capture and storage is already a key element of some States' NDCs; see eg Saudi Arabia NDC; Norway NDC.

this respect. Yet, States must take into account the potential impacts of these strategies on the marine environment. It has been recognized for some time that efforts to address climate change could end up having negative effects on biodiversity, if not carried out sensitively.[77] A recent study by the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP) indicated that significant gaps in scientific knowledge exist in relation to marine geo-engineering[78] and, as noted by Scott, 'to the extent that they involve increasing ocean reservoir of CO_2, deliberately through fertilisation or naturally through a focus on solar radiation management rather than emissions control, geo-engineering is likely to make ocean acidification much worse.'[79] Even the relatively less controversial option of sequestering CO_2 in sub-sea geological formations could have negative marine environmental impacts if certain precautions are not taken to, inter alia, prevent leakage of stored CO_2. The preamble of the Paris Agreement does expressly mention the 'importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity … when taking action to address climate change', but it contains no substantive obligations on this subject. It is in this respect that UNCLOS may provide some basic rules that regulate the use of these technologies in order to ensure that climate change mitigation is sensitive to protecting marine ecosystems.

In the first place, Article 196(1) provides that 'states shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control' and Article 195 reiterates that 'in taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.' Moreover, any activity which States have reasonable grounds for believing may cause substantial pollution of, or significant and harmful changes to, the marine environment must be subjected

77 See, for example, TWR Powell and TM Lenton, 'Scenarios for future biodiversity loss due to multiple drivers reveal conflict between mitigating climate change and preserving biodiversity' (2013) 8 Environmental Research Letters 025024. See also Convention on Biological Diversity Conference of the Parties, 'Decision 14/5 Biodiversity and Climate Change' (30 November 2018) UN Doc CBD/COP/DEC/14/5.

78 Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, 'High Level Review of a Wide Range of Proposed Marine Geoengineering Techniques' (GESAMP Reports and Studies No 98, 2019).

79 KN Scott, 'Engineering the 'Mis-Anthropocene': International Law, Ethics and Geoengineering' (2018) 29 Ocean Yearbook 61, 68–9.

to an environmental impact assessment (EIA).[80] This important procedural tool must be applied, whether or not there is a transboundary impact from the proposed activity.[81] The purpose of an EIA is to ensure that States have sufficient information in order to inform their decision-making process and to take appropriate mitigation measures in accordance with their overarching due diligence obligation to protect the marine environment.

These general provisions must also be read in light of the UNCLOS provisions on dumping, which require parties to adopt laws and regulations 'no less effective in preventing, reducing and controlling such pollution than the global rules and standards.'[82] This rule of reference is generally understood to incorporate the relevant provisions of the 1972 London Dumping Convention[83] and the parties to the latter treaty have adopted a number of decisions relating to both carbon capture and storage and geo-engineering, which may be used to further guide decision-making by parties to UNCLOS.

Firstly, in 2012, the parties to the London Dumping Convention adopted specific guidelines for the assessment of CO_2 for disposal into sub-seabed geological formations.[84] This guidance is intended to ensure that States take an appropriate range of considerations into account before authorizing the storage of CO_2 in sub-sea geological formations, including the risks of leakage. The guidance makes it clear that storage of CO_2 should only take place in sub-seabed geological formations and dumping of CO_2 in the water column is never appropriate, as it is likely to cause further ocean acidification.[85] Whilst non-binding, States can demonstrate that they have met their due diligence obligations under UNCLOS if they can show that they have followed this internationally agreed guidance. In contrast, failure to do so may raise questions about the propriety of their action.

Secondly, the parties to the London Dumping Convention have also adopted relevant decisions relating to geo-engineering, including a 2008 decision that 'ocean fertilization activities other than legitimate scientific research should not be allowed' and that such activities 'should be considered as contrary to the aims of the Convention and Protocol and not currently qualify for any exemption from the definition of dumping in … the Convention…'.[86] This

80 UNCLOS (n 17) art 206.
81 Harrison (n 36) 32.
82 UNCLOS (n 17) art 210(6).
83 See Harrison (n 36) 100.
84 Document LC 34/15, annex 8.
85 See Harrison (n 36) 268; Scott (n 73) 401.
86 Resolution LC-LP.1(2008), para 8.

is an important interpretation of the dumping treaties because it brings geo-engineering within their scope and this interpretation could also be applied to the definition of dumping for the purposes of UNCLOS.[87] The parties to the dumping treaties have also adopted an assessment framework for scientific research involving ocean fertilization, which provides guidance to States on how to ensure that such research is conducted in such a manner that any risks to the marine environment are minimized.[88] The assessment framework requires an impact assessment of any proposal and urges 'utmost caution' to be exercised when authorizing scientific research into ocean fertilization.[89] Like the guidance in relation to CO_2 storage, this instrument sets an appropriate benchmark against which to determine the due diligence of a State in regulating geo-engineering.

V Conclusion

This chapter has considered a range of arguments that can be made to interpret and apply UNCLOS in order to prevent, reduce and control the impacts of climate change on the marine environment. In doing so, it has analyzed the interrelationship between UNCLOS and the climate change regime, but also how UNCLOS may be invoked to ensure that States take additional considerations into account when taking climate change action. It is in theory possible that the provisions discussed in this chapter could be used as a basis for an individual State to claim for damages suffered as a result of climate change or ocean acidification impacts on the oceans, but such an approach would present challenges in terms of proving causation and attributing damage to a particular State.[90] It may be more straightforward to invoke UNCLOS as a means of arguing that a particular State has failed to take appropriate climate change action with a view to ensuring that the State concerned takes more ambitious measures in order to bring itself into compliance with its legal obligations. The fact that the marine environmental provisions of UNCLOS can be considered as establishing *erga omnes* obligations would further facilitate such a claim.[91]

87 UNCLOS (n 17) art 1(5).

88 See Resolution LC LP.2(2010). There may be further questions about what is meant by legitimate scientific research in this context; see Scott (n 79).

89 Resolution LC LP.2(2010).

90 See Boyle (n 35) 479–80; S Lee and L Bautista, 'Part XII of [UNCLOS] and the duty to mitigate against climate change: Making out a claim, causation and related issues' (2018) 45 Ecology Law Quarterly 129, 148–9.

91 Harrison (n 36) 24–5.

Even then, it is clear that the target of litigation would have to be chosen with care; whereas a successful claim could send a powerful signal to the international community of the need for States to take their climate change obligations seriously, an unsuccessful outcome could undermine that message.

The availability of dispute settlement under UNCLOS does not mean that States should rush into litigation in order to demand climate change action. A long-term political solution to climate change is clearly preferable and the Paris Agreement provides the most appropriate framework within which to agree on the necessary collective action, particularly through the anticipated global stocktake exercise.[92] Nevertheless, UNCLOS litigation may be particularly attractive in two scenarios: either if the mechanisms under the Paris Agreement do not produce desired results in terms of increased pledges for GHG reductions, or if States do not take adequate action to meet the commitments made under the Paris Agreement and they fail to respond to diplomatic pressure to do so. Furthermore, as noted in Section IV of this chapter, litigation may be an option in order to ensure that climate change mitigation takes into account other potential impacts on the marine environment.

Even if litigation is undertaken, the limits of this strategy must be recognized. Whereas legal action may force States to account for their conduct before an independent judicial organ, it is important to be realistic about any outcome. It has been acknowledged that litigation of this sort raises legitimacy challenges for courts and tribunals given the range of scientific, political and even moral questions implicated by climate change.[93] Most courts or tribunals are thus likely to limit themselves to finding that a State has not lived up to its due diligence obligation, whilst leaving it to the individual State to decide how to remedy the breach. In this respect, the Dutch Supreme Court has recently warned that 'in determining the State's minimum obligations, the courts must observe restraint, especially if rules or agreements are involved that are not legally binding in themselves. It is therefore only in clear-cut cases that the courts can rule … that the State has a legal obligation to take measures.'[94] Nor is such a result uncommon in other international environmental disputes where courts have indicated that a violation of international law has taken place but it has called for the parties to reach a settlement on how to remedy the

92 Paris Agreement (n 2) art 14(1).

93 See J Peel, 'Issues in Climate Change Litigation' (2011) 1 Carbon and Climate Law Review 15.

94 *The State of the Netherlands v Stichting Urgenda* (n 43) para 6.6. UK courts have indicated a similar sentiment; see *R* (*on the application of Plan B*) *v Secretary of State for Transport* [2020] EWCA Civ 214, para 285.

situation.[95] Therefore, we cannot expect international courts and tribunal to specify the steps that States must take to address climate change. Nevertheless, a legal decision may clarify the legal framework within which governments must exercise their decision-making powers, by indicating the considerations that must be taken into account and the limits of any discretion. Furthermore, even a judicial decision that a State must do more may be enough to overcome inertia. This observation does, however, mean that a successful claim is not necessarily the end of the matter and further diplomatic work will be required even after a successful claim. As explained by Boyle, 'an authoritative judgment may facilitate a settlement of some kind, whether directly, or by further negotiations, or simply by legitimising the claims made.'[96]

Finally, it should also be recognized that UNCLOS is not a panacea for climate change litigation. In particular, not all States are a party to UNCLOS, with notable absences including Iran, Venezuela, Colombia and the United States of America. Indeed, it is worth noting that the risk of climate change litigation was one of the factors that was raised by members of the Senate Foreign Affairs Committee when discussing whether or not the United States should become a party to UNCLOS.[97] UNCLOS litigation is not an option in relation to these States, even if they are in theory bound by rules of customary international law relating to the protection of the marine environment.[98]

95 For example, *Icelandic Fisheries Case* [1974] ICJ Rep 3, paras 74–5; *Gabcíkovo-Nagymaros Case* [1997] ICJ Rep 7, paras 140–1.

96 Boyle (n 35) 459.

97 See, for example, comments of Senator Corker in Hearings before the Committee on Foreign Affairs of the United States Senate, One Hundred Twelfth Congress, Second Session, 23 May, 14 June, and 28 June 2012, 32.

98 They may be bound by more specific marine treaties, however; see eg WCG Burns, 'A Voice for the Fish? Climate Change Litigation and Potential Causes of Action for Impacts under the United Nations Fish Stocks Agreement' (2008) 11 Journal of International Wildlife Law and Policy 30.

CHAPTER 19

Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?

*Harro van Asselt**

1 Introduction

The World Trade Organization (WTO) hosts one of the strongest and most sophisticated intergovernmental dispute settlement systems in public international law. The system has compulsory jurisdiction, is governed by rules of law, leads to binding decisions and allows for sanctions in case of non-compliance.[1] The system is heavily relied upon by WTO Members, who have submitted nearly 600 requests for consultation—leading to 350 rulings—since its creation in 1994.[2] One of the main innovations of the WTO dispute settlement system has been an appeals mechanism in the form of the WTO Appellate Body: a standing seven-person body, whose members hold four-year terms, that can hear appeals against the decisions of panels established by the WTO Dispute Settlement Body.[3] After 25 years, it is precisely this feature of the WTO that is under stress. With the United States government persistently blocking new appointments to the Appellate Body due to concerns over judicial overreach,[4] the terms of two of the three remaining members expired in December 2019.

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1 M Matsushita et al, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, OUP 2015) 83.

2 'Dispute Settlement' (*WTO*) <www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 19 February 2021.

3 Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU) art 17.

4 United States Trade Representative (USTR), 'Report on the Appellate Body of the World Trade Organization' (USTR 2020) <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf> accessed 19 February 2021.

As a result, the body no longer has the required minimum of three judges.[5] Although a set of WTO Members—including Australia, Brazil, Canada, China and the European Union (EU)—have sought to fill the gap by agreeing on a 'multi-party interim appeal arbitration arrangement',[6] whether and how the crisis of the WTO dispute settlement system will be overcome once the COVID-19 pandemic subsides remains uncertain.[7]

This context matters since disputes related to environmental protection and, more recently, also climate change have played a major role in the history of WTO dispute settlement.[8] Already before the creation of the WTO, panels established under the 1947 General Agreement on Tariffs and Trade (GATT)—the predecessor of the current system—had issued rulings on the legality of unilateral trade measures to protect the environment in the *Tuna-Dolphin* disputes.[9] Although the panels ruled against the trade measures—sparking an outcry among environmentalists at the time—the decisions can in hindsight be considered an 'outlier' in trade law jurisprudence.[10] Subsequent disputes under the WTO, including notably the *Shrimp–Turtle* rulings,[11] suggest that WTO jurisprudence has indeed become more amenable to integrating environmental concerns.

The balancing of trade and non-trade concerns, however, may be further put to the test with the gradual strengthening of climate action to achieve the long-term goal of the Paris Agreement to keep global warming to well below 2°C

5 A Walker, 'Trade Disputes Settlement System Facing Crisis' (*BBC News*, 8 December 2019) <https://www.bbc.com/news/business-50681431> accessed 19 February 2021.

6 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (March 2020) (MPIA) <https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf> accessed 21 July 2020.

7 See further the contributions in C Lo, J Nakagawa and T Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2020).

8 See E Brown Weiss, JH Jackson and N Bernasconi-Osterwalder (eds), *Reconciling Environment and Trade* (Brill Nijhoff 2008); A Cosbey and PC Mavroidis, 'Heavy Fuel: Trade and Environment in the GATT/WTO Case Law' (2014) 23(3) Review of European Community & International Environmental Law 288.

9 *United States–Restrictions on Import of Tuna* (*I*) (1991) BISD 39S/155 (unadopted); *United States–Restrictions on Import of Tuna* (*II*) (1994) 33 ILM 839 (unadopted). For a discussion, see MH Hurlock, 'The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision' (1992) 92(8) Columbia Law Review 2098.

10 Cosbey and Mavroidis (n 8) 289.

11 *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R (12 October 1998) (*US–Shrimp*); *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (*Recourse to Article 21.5 by Malaysia*), Appellate Body Report, WT/DS58/AB/RW (22 October 2001) (*US–Shrimp, Article 21.5*).

above pre-industrial levels and make efforts to stay below 1.5°C.[12] Although an outright clash between international trade law and multilateral climate treaties has yet to materialize, a new generation of trade disputes has emerged, revolving around governmental efforts to boost low-carbon industries.[13] These disputes have reignited a debate on the role of the WTO in promoting environmental and climate change protection. Given the diverging aims of the WTO and the climate change treaties, at least three different perspectives on the role of the multilateral trade regime can be distinguished in this debate. First, WTO rules—as enforced through its dispute settlement system—can be viewed as an obstacle to urgently needed climate action. Second, WTO rules can be seen as necessary for ensuring that measures taken to achieve climate change goals do not amount to disguised protectionism[14] or 'eco-imperialism'.[15] Third, WTO rules can conceivably address measures that have adverse impacts on both trade and climate change, notably fossil fuel subsidies.[16]

Considering these varying perspectives, this chapter analyzes the prospects of climate change-related disputes before the WTO, shedding light on the extent to which such disputes could hamper or drive international climate action. To offer some necessary context, the chapter begins by recapitulating the relationship between the WTO and the environment in general, and climate change in particular (Section II). The chapter then moves on to an analysis of the main climate change-related disputes thus far, distinguishing between disputes focused on renewable energy support measures and disputes related

12 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740 (Paris Agreement) art 2(1)(a).

13 K Kulovesi, 'International Trade Disputes on Renewable Energy: Testing Ground for the Mutual Supportiveness of WTO Law and Climate Change Law' (2014) 23(3) Review of European Community & International Environmental Law 342; M Wu and J Salzman, 'The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy' (2014) 108(2) Northwestern University Law Review 401; I Espa and G Marín Durán, 'Renewable Energy Subsidies and WTO Law: Time to Rethink the Case for Reform beyond *Canada – Renewable Energy/FIT Program*' (2018) 21(3) Journal of International Economic Law 621; L Benjamin, 'Renewable Energy and Trade: Meeting the Paris Agreement's Goals through Strategic Compliance' (2021) 22(1) Minnesota Journal of Law, Science & Technology 1.

14 MA Young, 'Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues' (2014) 23(3) Review of European Community & International Environmental Law 302, 304.

15 CG Gonzalez, 'Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade' (2001) 78(4) Denver University Law Review 979.

16 C Verkuijl et al, 'Tackling Fossil Fuel Subsidies through International Trade Agreements: Taking Stock, Looking Forward' (2019) 58(2) Virginia Journal of International Law 309.

to biofuels (Section III). Next, the chapter looks at possible future climate change-related disputes, with a focus on border carbon adjustments (BCAs) and fossil fuel subsidies (Section IV). Arguing that the WTO dispute settlement system is not well placed to deal with the precarious balancing act involved in a trade and climate dispute, the chapter then discusses possible ways forward (Section V), before drawing conclusions (Section VI).

II The WTO, the Environment and Climate Change

A *Trade and Environment at the WTO*

The WTO was established to further the implementation, administration and operation of multilateral trade agreements. The organization also serves as a forum for further trade negotiations and, through its dispute settlement system, allows Members to resolve disputes with each other.[17] While the main purposes of the WTO, as outlined in the preamble of the 1994 Marrakech Agreement Establishing the WTO, are unequivocally focused on economic growth and expanding trade, the preamble also suggests that achieving its trade-related goals should allow 'for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [Parties'] respective needs and concerns at different levels of economic development'.[18] However, apart from this preambular reference and two environmental exceptions (see below), environmental considerations hardly feature in the text of the WTO Agreements.

The main multilateral agreement dealing with the trade in goods is the 1994 GATT, which incorporates its 1947 predecessor. The GATT's core rules revolve around non-discrimination. It provides that a country should not discriminate between producers from other countries and domestic producers and that it should treat 'like' imported and domestic products as such ('national treatment').[19] The other main rule is that a country should not discriminate between its trading partners ('most-favoured-nation treatment').[20] Importantly, the GATT contains several exceptions that can save measures deemed to violate

17 Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3 art III.

18 ibid recital 1.

19 General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 art III.

20 ibid art I.

the GATT's core disciplines that are taken for legitimate public policy reasons. Specifically, such exceptions apply to measures that are 'necessary to protect human, animal or plant life or health' (Article XX(b) GATT) or 'relating to the conservation of exhaustible natural resources' (Article XX(g) GATT), provided that 'such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade' (Article XX *chapeau* GATT).[21] In addition to the GATT, the WTO administers several other agreements with relevance to trade and the environment, including agreements dealing with the trade in services, intellectual property rights, technical standards, health and safety measures, and subsidies.

The creation of the WTO was accompanied by a Ministerial Decision on Trade and Environment, which established a dedicated Committee on Trade and Environment.[22] In 2001, as part of the newly launched Doha Round of trade talks, new negotiations commenced on the relationship between trade obligations under multilateral environmental agreements and trade rules, procedures for information exchange between secretariats of environmental treaties and the WTO, and the reduction of trade barriers for environmental goods and services.[23] However, as the Doha Round largely ground to a halt in the late 2000s, the prospects of these multilateral negotiations on environmental rules being completed are limited.

B *Trade and Environment Disputes*

With a lack of progress in multilateral negotiations, the relationship between international trade law and the environment has been shaped largely by a series of rulings by WTO panels and the Appellate Body. These disputes have dealt with several key questions that are likely to assume relevance in the context of a climate change-related dispute.

A first question is whether Members can adopt unilateral trade measures to protect resources and the environment beyond areas of national jurisdiction (ie measures with extraterritorial effect).[24] The question played a role in both

21 The language of the *chapeau* of art XX GATT is echoed in the United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 3(5).

22 WTO, 'Decision on Trade and Environment' LT/UR/D-6/2 (15 April 1994).

23 ibid para 31.

24 See D Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11(2) European Journal of International Law 339; L Ankersmit, GT Davies and J Lawrence, 'Extraterritorial Social and Environmental Concerns and Trade: Pathways to Conflict between the WTO and EU' (2012) 21 Minnesota Journal of International Law 14;

the *Tuna–Dolphin* and *Shrimp–Turtle* disputes, as well as the more recent *Seal Products* case.[25] In *Shrimp–Turtle*, a trade measure by the United States motivated by the conservation of sea turtles was at stake. The measure prohibited the import of shrimp that was not caught with 'turtle excluder devices', leading to a complaint brought by India, Malaysia, Pakistan and Thailand. Although the Appellate Body did not rule on whether there were any jurisdictional limitations implied by Article XX(g) GATT, it found that there was a 'sufficient nexus between the migratory and endangered marine populations involved and the United States'.[26] In *Seal Products*, the Appellate Body likewise declined to rule on the jurisdictional limitation question in the context of Article XX(a) GATT on public morals.[27] This leaves open the question of whether a country can adopt trade measures that, for instance, target the carbon footprint of products made in third countries.

A second and closely related question is whether Members are allowed to discriminate against products because of the environmental impacts during the production process (ie measures targeting 'processes and production methods' or 'PPMs').[28] This debate is generally settled if a measure concerns PPMs are physically traceable in a product, such as trade measures targeting pesticides used in growing apples or products containing carcinogenic asbestos. Such products are deemed not 'like' similar products containing pesticides or asbestos. It is less clear whether a measure can be based on PPMs that are not traceable. This would be the case, for example, when a country wants to distinguish between steel products produced with renewable energy or coal. To determine 'likeness', WTO dispute settlement bodies commonly carry out an economic assessment of the competitive relationship between two products, focusing on: (1) the properties, nature and quality of the products, (2) their

Young (n 14); B Cooreman, *Global Environmental Protection through Trade: A Systematic Approach to Extraterritoriality* (Edward Elgar 2017); N Dobson, 'The EU's Conditioning of the 'Extraterritorial' Carbon Footprint: A Call for an Integrated Approach in Trade Law Discourse' (2018) 27(1) Review of European, Comparative & International Environmental Law 75.

25 *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, Appellate Body Report, WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) (*EC–Seal Products*).

26 *US–Shrimp* (n 11) para 133.

27 *EC–Seal Products* (n 25) para 5.173.

28 See R Howse and D Regan, 'The Product/Process Distinction: An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11(2) European Journal of International Law 249; S Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality' (2002) 27(1) Yale Journal of International Law 59; C Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (CUP 2011).

end-uses, (3) consumers' tastes and habits, and (4) the products' tariff classification.[29] As the Appellate Body pointed out in the *Asbestos* case, the health risks of a product (eg asbestos fibres) should be assessed under the first criterion.[30] For other products, the determination of likeness depends primarily on how consumers' tastes and habits are constructed.[31]

A third relevant question is under which conditions a measure can be saved by Article XX GATT. The Appellate Body has followed an 'evolutionary' interpretation of the environmental exceptions of the GATT.[32] This has led to a more expansive reading of the exceptions in Article XX(b) and (g), which were drafted in 1947—long before the advent of environmental and climate change concerns on national policy agendas. Importantly, the Appellate Body has come to interpret the notion of 'exhaustible natural resources' in Article XX(g) to include living resources and clean air.[33] The more difficult question under these sub-paragraphs concerns the link between a trade measure and its environmental goal. Under Article XX(b), the necessity test requires 'weighing and balancing'[34] a series of factors, including whether there is a 'a genuine relationship of ends and means',[35] the proportionality of a measure related to the interests at stake, and the availability of less trade-restrictive alternatives.[36] In comparison, the 'relating to' test under Article XX(g) has been easier to meet.[37] WTO jurisprudence further underlines the importance of procedural requirements in the context of the *chapeau* of the Article XX. This means that in implementing trade measures, countries need to ensure 'basic fairness and due process'.[38] Moreover, they need to have pursued 'serious, across-the-board negotiations' with a view to concluding environmental agreements.[39] And

29 See for instance *European Communities–Measures Affecting Asbestos and Products Containing Asbestos*, Appellate Body Report, WT/DS135/AB/R (12 March 2001) para 101.

30 ibid para 116.

31 See E Lydgate, 'Consumer Preferences and the National Treatment Principle: Emerging Environmental Regulations Prompt a New Look at an Old Problem' (2011) 10(2) World Trade Review 165.

32 *US–Shrimp* (n 11) para 130.

33 *US–Shrimp* (n 11) para 131; and *United States–Standards for Reformulated and Conventional Gasoline*, Panel Report, WT/DS2/R (29 April 1996) para 6.37.

34 *Brazil–Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, WT/DS332/AB/R (3 December 2007) (*Brazil–Retreaded Tyres*) para 182.

35 ibid paras 145 and 210.

36 ibid para 156.

37 See, for instance, *US–Shrimp* (n 11) para 141.

38 *US–Shrimp* (n 11) paras 180–1.

39 *US–Shrimp* (n 11) para 166.

while a country imposing a measure cannot expect another country to copy the exact same regulation, it can require one that is 'comparable in effectiveness'.[40]

C *Trade and Climate Change at the WTO*

While environment-related disputes have been a feature of the WTO since its creation, climate change was hardly discussed within the organization for a long time. Around 2007 this started to change. Delivering a speech at an Informal Trade Ministers Dialogue on Climate Change Issues on the side-lines of the UN Climate Conference in Bali in December, 2007, then-WTO Director-General Pascal Lamy suggested that '[t]he WTO tool-box of rules can certainly be leveraged in the fight against climate change, and "adapted" if governments perceive this to be necessary to better achieve their goals'.[41] Lamy's 'win-win' framing of climate and trade policies led to further work by the WTO Secretariat on trade and climate change, including a 2009 report that in detail discussed the physical, economic and legal interlinkages between the two policy areas.[42]

Some WTO Members have also begun to acknowledge the relevance of climate change for trade discussions. For instance, in Doha Round negotiations on the liberalization of environmental goods and services, several WTO Members put forward suggestions to liberalize trade in specific climate-friendly goods and services,[43] whereas others have suggested to identify categories of 'environmental activities that are useful in combating climate change'.[44] Further discussions were driven by, among others, the emergence of carbon footprint standards and labelling schemes,[45] as well as concerns over the adoption of unilateral trade-related climate change measures, in particular border carbon adjustments (see Section IV).[46] Since the late 2000s, discussions in the

40 *US–Shrimp, Article 21.5* (n 11) para 144.

41 P Lamy, 'Doha could deliver double-win for environment and trade' (Informal Trade Ministers' Dialogue on Climate Change, Bali, 8-9 December 2007) <https://www.wto.org/english/news_e/sppl_e/sppl83_e.htm> accessed 19 February 2021.

42 United Nations Environment Programme (UNEP) and WTO, *Trade and Climate Change. A Report by the United Nations Environment Programme and the World Trade Organization* (UNEP and WTO 2009).

43 International Centre for Trade and Sustainable Development (ICTSD), 'Liberalization of Trade in Environmental Goods for Climate Change Mitigation: The Sustainable Development Context' (2008) 6.

44 Argentina, 'The Doha Round and Climate Change' TN/TE/W/74 (23 November 2009) para 7.

45 WTO, 'Summary Report of the Information Session on Product Carbon Footprint and Labelling Schemes' WT/CTE/M/49/Add.1 (28 May 2010).

46 See specifically Singapore, 'Promoting Mutual Supportiveness between Trade and Climate Change Mitigation Actions: Carbon-Related Border Tax Adjustments' WT/CTE/W/248 (30 March 2011).

Committee on Trade and Environment have regularly addressed climate change.[47] Moreover, climate change-related questions—for instance, dealing with climate change-related technical regulations—have arisen in the context of the WTO Committee on Technical Barriers to Trade.[48] However, as the next section will show, one of the main ways in which the WTO has assumed relevance for climate policy is again through its dispute settlement system.

III Climate Change-Related Litigation in the WTO: The Story Thus Far

Several scenarios for climate change-related trade disputes can be distinguished. The first scenario is one where a dispute arises over a trade measure in one of the multilateral climate change treaties. Such a dispute would lead to a direct clash between the multilateral climate change and trade regimes. However, given that no such measures are included in the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol or the Paris Agreement, this scenario is not plausible.[49] A second scenario would concern a dispute over policies and measures explicitly mandated by a climate change treaty. However, also this type of dispute remains hypothetical, with no provision in the climate change treaties obliging countries to adopt specific policies and measures.[50] A third scenario is where a country challenges a trade

47 For instance, WTO, 'Report (2018) of the Committee on Trade and Environment' WT/CTE/25 (10 December 2018) paras 3.1–3.5. As this report shows, even the discussion of climate change in WTO committees remains controversial: 'Several other delegations believed the issue should not be discussed in the [Committee on Trade and Environment] as the issues under the Paris Agreement were delicate and outside the WTO mandate as well as no parallel negotiations should take place outside of the UNFCCC' ibid para 3.5. See further MAJ Teehankee, *Trade and Environment Governance at the World Trade Organization Committee on Trade and Environment* (Wolters Kluwer 2020).

48 L Tamiotti and D Ramos, 'Climate Change Mitigation and the WTO Framework' in P Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016) 516–17.

49 As noted, the only reference to trade measures in the UNFCCC (n 21) resembles that of the *chapeau* of Article XX GATT. As such, it 'neither condones nor forbids using trade measures'; DM Bodansky, The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18(2) Yale Journal of International Law 451, 505. The Kyoto Protocol merely reaffirms the commitment to 'minimize adverse effects on … international trade' in the pursuit of its objectives. Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 22 (Kyoto Protocol) art 2(3).

50 The Kyoto Protocol (n 49) art 2(1)(a), contains an illustrative list of policies and measures, but does not mandate their adoption. Similarly, the Paris Agreement (n 12) art 4(2),

measure adopted by another country to achieve its climate goals. As we will see in this section, it is this scenario that has played out in several disputes before the WTO. However, before discussing this type of dispute in more detail, a final scenario should be mentioned, namely that of a country challenging a measure that hampers the clean energy transition. One example of such a possible dispute—namely a challenge of fossil fuel subsidies—will be discussed in Section IV.

The types of policies and measures that can be adopted in the third scenario can vary. They include measures such as carbon taxes, emissions trading systems, fuel efficiency standards, greenhouse gas emissions standards, carbon labels, and so on. These types of measures raise some of the same issues that have emerged in the WTO's past trade and environment jurisprudence, including on extraterritoriality, PPMs and the scope of Article XX GATT.[51] However, the 'new era of climate change-related disputes at the WTO'[52] has thus far rather concerned a different set of 'green industrial policy' measures that have raised new questions rather than revisited long-standing debates.[53] The remainder of this section discusses the main disputes in this regard, related to (1) renewable energy support measures and (2) biofuels.

A *Renewable Energy Disputes*

The first set of WTO disputes has focused on renewable energy support measures.[54] Support for renewable energy—including electricity produced from renewable energy sources and the development of renewable energy technologies such as solar panels and wind turbines—is provided by some of the major trading nations, including the EU, the United States, China, India and Japan.[55] Such support has however led to a series of trade disputes.[56]

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requires its Parties to submit five-yearly nationally determined contributions, but does not specify what policies Parties should implement.

51 Or, in the case of standards, similar questions raised in the context of trade and environment disputes on technical regulations. See for instance *United States–Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Appellate Body Report, WT/DS381/AB/R (16 May 2012).

52 D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (OUP 2017) 342.

53 Wu and Salzman (n 13).

54 See generally JI Lewis, 'The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development' (2014) 14(4) Global Environmental Politics 10.

55 M Taylor, 'Energy Subsidies: Evolution in the Global Energy Transformation to 2050' (International Renewable Energy Agency 2020) 31.

56 This section will only discuss the WTO disputes that have gone past the consultations stage. The latter includes *China–Measures Concerning Wind Power Equipment* (DS419),

In a first dispute, *Canada–Renewable Energy*, the Appellate Body found that renewable energy support measures by the government of the Canadian province Ontario contravened multilateral trade rules.[57] At stake was a feed-in tariff—a fixed higher rate paid to green electricity producers compared to fossil fuel-based energy generation—which was conditional on the minimum use of local content (eg solar panels produced in Ontario). The measure was challenged by the EU and Japan, who argued that the measure violated Article III:4 GATT and Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement) on local content requirements, as well as Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (ASCM) on prohibited subsidies. The Panel and Appellate Body concluded that the local content requirements violated the GATT and TRIMs Agreement, but did not come to any finding on whether the measure constituted a prohibited subsidy under Article 3 ASCM. Specifically, the Appellate Body found itself unable to complete an analysis to determine that a benefit had been conferred, thus concluding that it could not be established whether the measure was a 'subsidy' in the context of the ASCM.[58]

European Union and Certain Member States–Certain Measures Affecting the Renewable Energy Sector (DS452) and *United States–Certain Measures Related to Renewable Energy* (DS563). In addition to the disputes that have reached the WTO, there have also been disputes related to national trade remedies (eg anti-dumping and countervailing duties) against clean energy imports. See J Kasteng, 'Trade Remedies on Clean Energy: A New Trend in Need of Multilateral Initiatives' (ICTSD and World Economic Forum 2013). Although these cases will not be discussed here, it is notable that one such case—involving countervailing duties imposed by the United States against a range of products, including solar panels and wind turbines, from China—led to a WTO dispute. See *United States–Countervailing Duty Measures on Certain Products from China*, Appellate Body Report, WT/DS437/AB/R (18 December 2014). For an analysis, see R Brewster, C Brunel and AM Mayda, 'Trade in Environmental Goods: A Review of the WTO Appellate Body's Ruling in *US-Countervailing Measures* (*China*)' (2016) 15(2) World Trade Review 327.

57 *Canada–Certain Measures Affecting the Renewable Energy Generation Sector*, Appellate Body Report, WT/DS412/AB/R (24 May 2013) (*Canada–Renewable Energy*). See A Cosbey and PC Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17(1) Journal of International Economic Law 11; L Rubini, ' "The Good, the Bad, and Ugly." Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies' (2014) 48(5) Journal of World Trade 895; and S Charnovitz and C Fischer, '*Canada – Renewable Energy*: Implications for WTO Law on Green and Not-so-Green Subsidies' (2015) 14(2) World Trade Review 177.

58 *Canada–Renewable Energy* (n 57) para 5.246. The Appellate Body analysis suggests that a distinction should be made between a government intervening in an existing market and a government creating a market, in this case for wind- or solar-based electricity (*Canada–Renewable Energy* (n 57) paras 5.188–5.190 and 5.227).

A subsequent complaint by the United States concerning India's Jawaharlal Nehru National Solar Mission also led to a ruling striking down a renewable energy support measure due to the use of local content requirements (*India–Solar Cells*).[59] Again, the violation concerned Article III:4 GATT and Article 2.1 TRIMs Agreement. In this dispute, India sought to justify its measure by invoking two exceptions contained in Article XX GATT—related to measures necessary to 'secure compliance with laws or regulations' and 'products in general or local short supply'—but neither of these defences was accepted by the Appellate Body.[60]

The third dispute reversed the roles of complainant and defendant, with India challenging a set of subnational renewable energy support measures in the United States (in the states of California, Connecticut, Delaware, Michigan, Montana, Minnesota and Washington) that included local content requirements, once again invoking Article III:4 GATT, Article 2.1 TRIMs Agreement and Article 3 ASCM (*US–Renewable Energy*).[61] Also in this case the Panel sided with the complainant, finding that the use of local content requirements violated the GATT and TRIMs Agreement.

A few observations can be made on the basis of these cases. First, in none of the cases was the measure at hand deemed a 'subsidy' under the ASCM. In other words, the support itself was not found to be inconsistent with WTO law. However, the dispute settlement bodies found the use of discriminatory local content requirements problematic. Such requirements may help garner domestic support for building a green economy, but the jury on their effectiveness is still out.[62] Although subsidies using local content requirements are prohibited under the ASCM,[63] following the Appellate Body ruling in *Canada–Renewable Energy*, the United States did not refer to the ASCM in its request for establishing a panel in *India–Solar Cells*,[64] whereas the Panel in

59 *India–Certain Measures Relating to Solar Cells and Solar Modules*, Appellate Body Report, WT/DS456/AB/R (16 September 2016) (*India–Solar Cells*). See V Jha, 'Political Economy of Climate, Trade and Solar Energy in India' (2017) 9(2) Trade, Law & Development 255.

60 *India–Solar Cells* (n 59) para 5.154.

61 *United States–Certain Measures Relating to the Renewable Energy Sector*, Panel Report, WT/DS510/R (27 June 2019) (*US–Renewable Energy*). The Panel ruling is being appealed, but this appeal affected by the stasis at the Appellate Body.

62 J-C Kuntze and T Moerenhout, 'Local Content Requirements and the Renewable Energy Industry – A Good Match? (ICTSD 2013).

63 Agreement on Subsidies and Countervailing Measures (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14 (ASCM) art 3.

64 *India–Certain Measures Relating to Solar Cells and Solar Modules*, Panel Report, WT/DS456/R (24 February 2016) (*India–Solar Cells*, Panel Report) fn 1.

US–Renewable Energy exercised 'judicial economy' regarding India's claims under the ASCM.[65] As a result, the status of renewable energy support measures under the ASCM—including that of measures that do not require the use of local content—remains uncertain.[66]

Second, and perhaps surprisingly, the environmental exceptions of Article XX GATT were not invoked in any of the disputes. India did invoke the UNFCCC, but only to argue that it was an international instrument with which compliance was necessary under Article XX(d) GATT.[67] It remains unclear what would have happened if India had invoked Article XX(b) or (g) GATT to argue that the support—including the use of local content requirements—was motivated by its commitments under the climate treaties or, more specifically, its nationally determined contribution under the Paris Agreement (which it had submitted while the case was ongoing).[68] Nevertheless, the Appellate Body in *Canada–Renewable Energy* acknowledged—without however mentioning the imperative of climate change—that '[f]ossil energy resources are exhaustible, and thus fossil energy needs to be replaced progressively if electricity supply is to be guaranteed in the long term', implying that a defence under Article XX(g) may have a chance of success.[69]

B *Biofuel Disputes*

Another group of disputes, several involving the EU,[70] has concerned measures supporting the biofuels industry. Biofuels can be made using plant materials (eg sugar cane, soybeans, palm oil) or from organic waste. The uptake of biofuels such as biodiesel and bioethanol can help reduce the reliance on fossil fuels, particularly in the transport sector. However, some types of (first-generation or

65 *US–Renewable Energy* (n 61) para 7.368.

66 Espa and Marín Durán (n 13) 637–43.

67 *India–Solar Cells*, Panel Report (n 64) paras 7.271–7.272.

68 India's nationally determined contribution includes the target of '40 percent cumulative electric power installed capacity from non-fossil fuel based energy resources by 2030', and its National Solar Mission is mentioned specifically as a mitigation strategy ('India's Intended Nationally Determined Contribution: Working towards Climate Justice' (*UNFCCC*) 29 and 35 <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/India%20First/INDIA%20INDC%20TO%20UNFCCC.pdf> accessed 19 February 2021).

69 *Canada–Renewable Energy* (n 57) para 5.186. See Charnovitz and Fischer (n 57) 207.

70 The EU is not the only defendant, however. Argentina has requested consultations with Peru regarding anti-dumping measures taken by the latter against its biodiesel imports. See *Peru—Anti-Dumping and Countervailing Measures on Biodiesel from Argentina*, Request for Consultations by Argentina, WT/DS572/1, G/L/1285 G/SCM/D122/1, G/ADP/D129/1 (5 December 2018).

conventional) biofuels may affect food production. Moreover, biofuel production may further lead to negative environmental impacts—including on climate change—through inducing direct or indirect land-use change (eg when biofuel production drives deforestation).[71]

With its 2009 Renewable Energy Directive, the EU sought to encourage the uptake of biofuels in transport by requiring its Member States to 'ensure that the share of energy from renewable sources in all forms of transport in 2020 is at least 10% of the final consumption of energy in transport'.[72] While the directive was motivated by climate concerns, it also was partly driven by the desire to boost the emerging biofuels industry in Europe.[73] The directive led to a significant increase of consumption of biodiesel in the EU, but the growth of the European industry was overshadowed by sharply rising imports, particularly from Argentina and Indonesia.[74] To encourage their own biofuel industries, these countries had imposed higher export taxes on the raw materials used for producing biofuels (soybeans in Argentina, palm oil in Indonesia) than on processed biofuels. Following complaints from its own biofuels industry, the EU started using trade remedies against Argentina and Indonesia in the form of anti-dumping duties.[75]

The anti-dumping duties were challenged, first by Argentina, followed by Indonesia. In both cases, the WTO dispute settlement bodies ruled in favour of the complainants.[76] Specifically, the Appellate Body in *EU—Biodiesel* (*Argentina*) ruled that the methodology used by the European Commission to determine the duties was inconsistent with its obligations under the WTO

71 BD Solomon, 'Biofuels and Sustainability' (2010) 1185 Annals of the New York Academy of Sciences 119.

72 Parliament and Council Directive (EC) 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16 art 3(4).

73 C Fischer and T Meyer, 'Baptists and Bootleggers in the Biodiesel Trade: *EU–Biodiesel* (*Indonesia*)' (2020) 19(2) World Trade Review 297, 299.

74 ibid 300–301.

75 Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia [2013] OJ L315/2.

76 *European Union–Anti-Dumping Measures on Biodiesel from Argentina*, Appellate Body Report, WT/DS473/AB/R (6 October 2016); *European Union–Anti-Dumping Measures on Biodiesel from Indonesia*, Panel Report, WT/DS480/R (25 January 2018). On the Argentina dispute, see MA Crowley and JA Hillman, 'Slamming the Door on Trade Policy Discretion? The WTO Appellate Body's Ruling on Market Distortions and Production Costs in EU–Biodiesel (Argentina)' (2018) 17(2) World Trade Review 195. On the Indonesia dispute, see Fischer and Meyer (n 73).

Anti-Dumping Agreement. Given the similarities in the two cases, the Panel in *EU—Biodiesel* (*Indonesia*) closely followed the Appellate Body's ruling. Accordingly, the EU terminated its anti-dumping duties in 2018.[77]

The two cases offer an indication of the rising importance of national trade remedies (ie anti-dumping and countervailing duties) in the context of climate and trade disputes. Even after the European Commission was thwarted in its attempt to counter Argentina and Indonesia's support through anti-dumping measures, it imposed countervailing duties against both countries in 2019, arguing that the support provided through the differential export tax constituted a subsidy.[78]

While these measures have not been challenged by either Argentina or Indonesia,[79] another measure by the EU has moved to the Panel stage. When the EU recast its Renewable Energy Directive in 2018, it introduced new sustainability criteria that particularly address the risks of indirect land-use change (ILUC) posed by biofuels.[80] The directive specifies that, by the end of 2030, 'high indirect land-use change-risk biofuels, bioliquids or biomass fuels' can no longer count towards the renewable energy target for transport.[81] A separate regulation specifies criteria for ILUC risk, which suggest that palm oil biofuels should be considered to pose a high ILUC risk.[82] This was confirmed by a 2019 report by the European Commission that suggested that '[p]alm oil … qualifies as high ILUC-risk feedstock for which a significant expansion into land with high-carbon stock is observed'.[83] Indonesia responded by requesting

77 Commission Implementing Regulation (EU) 2018/1570 terminating the proceedings concerning imports of biodiesel originating in Argentina and Indonesia and repealing Implementing Regulation (EU) No 1194/2013 [2018] OJ L262/40.

78 Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina [2019] OJ L40/1; and Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia [2019] OJ L212/1.

79 Fischer and Meyer (n 73) 309–10.

80 Parliament and Council Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82.

81 ibid art 26(2).

82 Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels [2019] OJ L133/1 art 3 and Annex.

83 Commission (EU) 'Report on the status of production expansion of relevant food and feed crops worldwide' COM(2019) 142 final, 13 March 2019, 19.

consultations at the WTO, arguing that the EU measures—including also a fuel tax in France—contravene the WTO Agreement on Technical Barriers to Trade, the GATT and the ASCM.[84] The case will likely raise important questions about extraterritoriality and the scope of the WTO's environmental exceptions.[85]

IV Prospects for New Climate Change-Related Cases

Although the focus of trade disputes has thus far been on measures through which countries have sought to boost the international competitiveness of their green industries, future disputes may also take on a different character. First, it is possible that the future adoption of border carbon adjustments or a similar trade measure targeting product's carbon footprint (ie the greenhouse gases emitted during the production process) may be challenged. As noted above, such a dispute would share several features with the classic trade and environment disputes, and hence raise similar questions to those that arose in disputes such as *Shrimp–Turtle*. Second, it may be possible to use WTO dispute settlement to tackle measures that may be both trade-distortive and environmentally harmful, such as fossil fuel subsidies. This section will discuss these possible disputes in turn.

A *A Dispute on Border Carbon Adjustments*

Parties to the Paris Agreement enjoy wide discretion with regard to the ambition of their climate policy as well as the measures they adopt to achieve their goals.[86] Arguably, this discretion reduces the chances of a direct clash with multilateral trade rules. Yet countries' varying levels of ambition may also lead to calls for trade measures to prevent 'carbon leakage' (where the

84 *European Union–Certain Measures Concerning Palm Oil and Oil Palm Crop-based Biofuels*, Request for Consultations by Indonesia, WT/DS593/1, G/L/1348 G/TBT/D/52, G/SCM/D128/1 (16 December 2019). Another request for consultations has been filed by Malaysia: *European Union and Certain Member States–Certain Measures Concerning Palm Oil and Oil Palm Crop-based Biofuels*, Request for Consultations by Malaysia, WT/DS600/1, G/L/1384, G/TBT/D/54, G/SCM/D131/1 (19 January 2021).

85 See S Mayr, B Hollaus and V Madner, ' Palm Oil, the RED II and WTO Law: EU Sustainable Biofuel Policy Tangled up in Green?' (2021) Review of European, Comparative & International Environmental Law (forthcoming); A Mitchell and D Merriman, 'Indonesia's WTO Challenge to the European Union's Renewable Energy Directive: Palm Oil & Indirect Land-Use Change' (2020) 12(2) Trade, Law & Development <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665463> accessed 19 February 2021.

86 Paris Agreement (n 12) art 4.

introduction of climate policies leads to a shift in production and associated greenhouse gas emissions to jurisdictions with no or less stringent policies in place),[87] to level the competitive playing field and to counter free-rider behaviour.[88]

The main response so far to the risk of carbon leakage in jurisdictions that price carbon through an emissions trading system—notably the EU[89]—has been to distribute greenhouse gas emissions allowances for free. However, due to persisting concerns associated with such free allocation,[90] and the anticipated decrease of free allocation for some sectors,[91] alternative measures have been proposed in the form of border carbon adjustments.[92] BCAs are charges levied on traded products on the basis of their carbon content, which can in principle be associated with an emissions trading system, a carbon tax and conceivably also other forms of carbon constraints (eg standards and regulations). In the late 2000s, such measures came to the forefront of climate policy discussions in both the EU and the United States, although no BCA was ever adopted in either jurisdiction.[93] Various reasons can be cited for the reluctance of policy-makers to adopt BCAs. The measure can be difficult to administer, as it requires access to consistent and verifiable information about the

87 J Ward et al, 'Carbon Leakage: Theory, Evidence and Policy Design' (Partnership for Market Readiness 2015) 14–15.

88 See W Nordhaus, 'Climate Clubs: Overcoming Free-Riding in International Climate Policy' (2015) 105(4) American Economic Review 1339.

89 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emissions Allowance Trading Within the Community and Amending Council Directive 96/61/EC [2003] OJ L275/32 (as amended) art 10b.

90 Free allocation leads to windfall profits for industries as well as a distorted carbon price signal. See S de Bruyn et al, 'Calculation of Additional Profits of Sectors and Firms from the EU ETS 2008–2015' (CE Delft 2016); K Neuhoff et al, 'Inclusion of Consumption of Carbon Intensive Materials in Emissions Trading: An Option for Carbon Pricing Post-2020' (Climate Strategies 2016) 3. Free allocation also raises WTO questions in its own right. See L Rubini and I Jegou, 'Who'll Stop the Rain: Allocating Emissions Allowances for Free: Environmental Policy, Economics, and WTO Subsidy Law' (2012) 1(2) Transnational Environmental Law 325.

91 Directive 2003/87/EC (n 89) art 10b(4).

92 For an early call, see F Biermann and R Brohm, 'Implementing the Kyoto Protocol Without the USA: The Strategic Role of Energy Tax Adjustments at the Border' (2005) 4(3) Climate Policy 289.

93 H van Asselt and T Brewer, 'Addressing Competitiveness and Leakage Concerns in Climate Policy: An Analysis of Border Adjustment Measures in the US and the EU' (2010) 38(1) Energy Policy 42.

carbon footprint of traded products.[94] Furthermore, the extent to which a BCA helps reduce carbon leakage depends on its scope and coverage.[95] Perhaps most importantly, as a unilaterally imposed trade measure with extraterritorial implications, policy-makers tend to view BCAs as politically contentious. Nevertheless, calls for BCAs have not subsided following the adoption of the Paris Agreement.[96] Most notably, the announcement by the new European Commission to suggest a 'carbon border adjustment mechanism' as part of its European Green Deal proposal[97] underscores that BCAs may at long last move from theory to practice. This raises the question of what would happen in case of a WTO dispute on BCAs.[98]

As always with trade disputes, much will depend on the actual design and implementation of a measure. Although space constraints do not allow for a detailed discussion of all relevant legal questions, a few points can be made regarding the likely WTO consistency of BCAs.

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94 T Houser et al, *Leveling the Carbon Playing Field: International Competition and U.S. Climate Policy Design* (Peterson Institute for International Economics and World Resources Institute 2008) 33–4.

95 F Branger and P Quirion, 'Would Border Carbon Adjustments Prevent Carbon Leakage and Heavy Industry Competitiveness Losses? Insights from a Meta-Analysis of Recent Economic Studies' (2014) 99 Ecological Economics 29.

96 MA Mehling et al, 'Designing Border Carbon Adjustments for Enhanced Climate Action' (2019) 113(3) American Journal of International Law 433, 438.

97 Commission (EU) 'The European Green Deal' (Communication) COM(2019) 640 final, 11 December 2019, 5. The measure is envisaged to come into force on 1 January 2023. See European Council, 'Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020), Conclusions' EUCO 10/20 (21 July 2020) para 147.

98 A wealth of literature has looked into this question, including: J de Cendra, 'Can Emissions Trading Schemes Be Coupled with Border Tax Adjustments? An Analysis Vis-à-Vis WTO Law' (2006) 15(2) Review of European Community & International Environmental Law 131; R Ismer and K Neuhoff, 'Border Tax Adjustment: A Feasible Way to Support Stringent Emission Trading' (2007) 24(2) European Journal of Law and Economics 137; J Pauwelyn, 'U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law '(Nicholas Institute for Environmental Policy Solutions 2007); L Tamiotti, 'The Legal Interface between Carbon Border Measures and Trade Rules' (2011) 11(5) Climate Policy 1202; J Hillman, 'Changing Climate for Carbon Taxes: Who's Afraid of the WTO?' (German Marshall Fund of the United States 2013); K Holzer, *Carbon-Related Border Adjustment and WTO Law* (Edward Elgar 2014); Mehling et al (n 96); U Will, *Climate Border Adjustments and WTO Law* (Brill 2019). The Commission's proposal has already been discussed in the WTO's Market Access Committee: 'Brexit, EU's Carbon Border Adjustment Mechanism Take Centre Stage at Market Access Committee' (*WTO*, 16 November 2020) <https://www.wto.org/english/news_e/news20_e/mark_16nov20_e.htm> accessed 19 February 2021.

First, a measure would likely be found to violate the national treatment obligation in Article III GATT if it would not ensure that 'like' domestic products face similar carbon constraints. This raises the question of whether products with a different carbon footprint—eg steel produced using coal and steel made with renewable energy—can be considered 'like'. Referring back to the criteria for 'likeness' outlined in the *Asbestos* case, Mehling and colleagues note that 'unless it can be demonstrated that consumers treat products with high and low carbon intensities differently (or are likely to do so), or other criteria assume a greater role in future jurisprudence, low-carbon and carbon-intensive products will probably be considered "like products" '.[99] This could mean that a BCA would violate the national treatment obligation under Article III:2 GATT. However, a BCA arguably could also be considered an 'internal regulation' under Article III:4 GATT, in which case the primary requirement would be that it is origin-neutral (ie any differential treatment is based on the carbon footprint of a product, rather than its country of origin).[100]

Second, a measure that differentiates between trade partners based on country-specific considerations such as the type (or stringency) of domestic climate policy in place or participation in an international climate agreement risks violating the most-favoured-nation rule in Article I GATT.[101] This risk would be reduced if a measure accommodates the circumstances of third countries, particularly developing countries, by taking into account the climate efforts of trade partners in the calculation of the BCA.[102]

Third, even if a BCA is considered to violate one of the substantive obligations of the GATT, it might still be saved by a defence under Article XX GATT. For that purpose, it would need fall under one of the substantive exceptions, whilst also meeting the conditions of the *chapeau* of Article XX. With regard to one of the substantive exceptions, Article XX(b), a BCA that is likely to be effective in tackling carbon leakage—or for which it can otherwise be shown that it will lead to emission reductions—would probably fall within the substantive scope of the environmental exceptions of Article XX. Although, as discussed in Section III, no climate change-related dispute has invoked these exceptions,

99 Mehling et al (n 96) 461. However, it can also be argued that the carbon embodied in a product should be considered part of the product's physical property; see N Eisen, 'Carbon Emissions as a Physical Property: Ontological Approaches to the WTO *Like Products* Debate' (2019) 51(3) New York University Journal of International Law & Policy 871.

100 Mehling et al (n 96) 462.

101 Mehling et al (n 96) 474.

102 Mehling et al (n 96) 477–8. This would also strengthen the measure in light of international climate change law, in line with the principle of 'common but differentiated responsibilities and respective capabilities' (Mehling et al (n 96) 472–3).

the Panel in *Brazil–Taxation* found that 'the reduction of [carbon dioxide] emissions is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range of policies that protect human life or health'.[103] Ensuring that a BCA focuses on the most leakage-prone sectors (ie sectors that are energy-intensive and trade-exposed) such as cement and steel would further strengthen the link between the measure and its environmental objective,[104] helping to establish 'a genuine relationship of ends and means' between the two.[105] In this regard, the Appellate Body in *Brazil–Retreaded Tyres* acknowledged the particular nature of a climate change-related dispute, noting that 'the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change … can only be evaluated with the benefit of time'.[106] Although there may still be some uncertainty about whether a BCA could meet the other hurdles associated with an Article XX(b) defence, passing the Article XX(g) test of 'relating to the conservation of exhaustible natural resources' is generally considered to be feasible.[107]

Fourth, however, the BCA would still need to meet the requirements of the *chapeau* of Article XX GATT. As outlined above, to save the measure its design and implementation of BCAs would need to follow principles of basic fairness and due process,[108] and provide for 'sufficient flexibility to take into account the specific conditions prevailing in any exporting Member'.[109] If the BCA process allows another county to provide input into key decisions affected the imposition of a BCA, or if appeals to such decisions are possible, it is more likely that it will meet this requirement.[110] Related to this, if a country conducts BCA-specific negotiations with affected countries before introducing the BCA, it would help to meet the criterion of 'serious, across-the-board negotiations'.[111]

The outcome of a possible dispute on BCAs remains uncertain. Although it is possible to design a BCA to be WTO-consistent in theory, in practice the

103 *Brazil–Certain Measures Concerning Taxation and Charges*, Panel Report, WT/DS472/R, WT/DS497/R (30 August 2017) para 7.880.
104 Mehling et al (n 96) 474.
105 *Brazil–Retreaded Tyres* (n 34) para 145.
106 *Brazil–Retreaded Tyres* (n 34) para 151.
107 See for instance Holzer (n 98) 150–7; Will (n 98) 219; Mehling et al (n 96) 468.
108 *US–Shrimp* (n 11) para 181.
109 *US–Shrimp, Article 21.5* (n 11) para 149.
110 Mehling et al (n 96) 468.
111 *US–Shrimp* (n 11) para 166. See Mehling et al (n 96) 469.

drafting of such measures involves difficult political trade-offs. As such, the legality of any BCA remains to be seen until such a measure is actually adopted.

B *A Dispute on Fossil Fuel Subsidies*

While WTO disputes so far have targeted various renewable energy support measures, subsidies for dirty energy have remained unscathed.[112] According to the Organisation for Economic Co-operation and Development (OECD) and the International Energy Agency (IEA), support for fossil fuels amounted to US$ 478 billion in 2019.[113] Moreover, notwithstanding calls for a 'green recovery', support for fossil fuels eclipsed clean energy funding in the wake of COVID-19.[114] Support for fossil fuel production and consumption drives greenhouse gas emissions and results in carbon lock-in.[115] Moreover, fossil fuel subsidies prevent the uptake of renewable energy[116] and lead to adverse impacts on public health.[117] Importantly, fossil fuel subsidies can have effects on international trade. These effects can be direct, strengthening the competitiveness of the subsidized producer, or indirect, with passthrough effects leading to downstream producers using subsidized inputs gaining a competitive advantage.[118] This again raises the question of what could happen in case of a WTO complaint against a fossil fuel subsidy.[119] Although disputes on renewable energy

112 Steenblik and colleagues document only one case that came close to a formal dispute, and only one case in which a company sought to impose an anti-dumping or countervailing duty against fossil fuel subsidies; R Steenblik, J Sauvage and C Timiliotis, 'Fossil Fuel Subsidies and the Global Trade Regime' in J Skovgaard and H van Asselt (eds), *The Politics of Fossil Fuel Subsidies and Their Reform* (CUP 2018) 127.

113 'Governments Should Use Covid-19 Recovery Efforts as an Opportunity to Phase out Support for Fossil Fuels, Say OECD and IEA' (*OECD,* 5 June 2020) <https://www.oecd.org/environment/governments-should-use-covid-19-recovery-efforts-as-an-opportunity-to-phase-out-support-for-fossil-fuels-say-oecd-and-iea.htm> accessed 19 February 2021.

114 See <https://www.energypolicytracker.org/> accessed 19 February 2021.

115 See, for instance, IEA, *Energy and Climate Change: World Energy Outlook Special Report* (2015); R Stefanski, 'Into the Mire: A Closer Look at Fossil Fuel Subsidies' (University of Calgary 2016); J Jewell et al, 'Limited Emission Reductions from Fuel Subsidy Removal Except in Energy-Exporting Regions' (2018) 554 Nature 229; P Erickson et al, 'Why Fossil Fuel Produce Subsidies Matter' (2020) 578 Nature E1.

116 R Bridle and L Kitson, 'The Impact of Fossil-Fuel Subsidies on Renewable Electricity Generation' (International Institute for Sustainable Development (IISD 2014) 18.

117 'Fossil Fuel Subsidies and Health' (*Health and Environment Alliance*, 2017) <http://www.env-health.org/wp-content/uploads/2018/06/fossil-fuel-subsidies-and-health-briefing.pdf> accessed 19 February 2021.

118 T Moerenhout and T Irschlinger, 'Exploring the Trade Impacts of Fossil Fuel Subsidies' (IISD 2020).

119 The likelihood of such a dispute materializing does not solely depend on the chances of a successful challenge. Strategic and political considerations may also affect a Member's

support measures have thus far revolved around Article III:4 GATT and Article 2.1 TRIMs Agreement, the focus here is on the WTO's main subsidy rules as laid down in the ASCM.[120]

A first question that would arise under the ASCM is whether a measure can be considered a 'subsidy'. It therefore would need to be shown that there has been a 'financial contribution' by a government or 'income or price support', and that this has led to the conferral of a 'benefit'.[121] Some measures clearly amount to a financial contribution, such as direct financial support to a fossil fuel company in the form of a grant or a loan, or government funding for a railroad that is solely aimed at transporting coal from a mine to a port. However, for other measures, such as tax breaks for fossil fuel producers, it is necessary to determine whether there were 'objective reasons' for the preferential tax treatment, as well as a benchmark tax treatment against which these reasons can be compared.[122] Demonstrating that a benefit has been conferred may likewise be straightforward for some measures, for instance if a subsidy consists of a favourable loan to a fossil fuel producer or if a subsidy results in consumers not paying the market price for certain fuels.[123] However, proving a consumption subsidy—the most prevalent type of subsidy, usually consisting of government-regulated market prices for fuels used for consumption—confers a benefit can be hard to establish in fossil fuel producing countries 'if the producing country provides fuel at above production cost, but below the international market price'.[124]

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decision to challenge another Member's subsidy (or refrain from doing so). For instance, given that fossil fuel subsidies are provided by countries across the world, Members may decide not to challenge each other's fossil fuel subsidies for fear of retaliation. See further D De Bièvre, I Espa and A Poletti, 'No Iceberg in Sight: on the Absence of WTO Disputes Challenging Fossil Fuel Subsidies' (2017) 17(3) International Environmental Agreements: Politics, Law and Economics 411; and T Meyer, 'Explaining Energy Disputes at the World Trade Organization' (2017) 17(3) International Environmental Agreements: Politics, Law and Economics 391.

120 As noted above, the main reason why the renewable energy disputes have been struck down in WTO dispute settlement is their use of local content requirements. Although the use of local content requirements is widespread in the fossil fuel sector, these are not necessarily linked to fossil fuel *subsidies*. See generally S Tordo et al, 'Local Content Policies in the Oil and Gas Sector' (World Bank 2013).

121 ASCM (n 63) art 1.1.

122 D Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (CUP 2014) 46ff.

123 Verkuijl et al (n 16).

124 TSH Moerenhout, 'Energy Pricing Policies and the International Trade Regime' (2020) 23(1) Journal of International Economic Law 119, 124.

A 'subsidy' under the ASCM can be 'prohibited' or 'actionable'. In addition to subsidies using local content requirements, subsidies are prohibited if they are 'contingent, in law or in fact … upon export performance'.[125] While fossil fuel consumption subsidies in the form of universal low end-user prices are unlikely to be prohibited subsidies,[126] some fossil fuel production subsidies could constitute prohibited export subsidies. For instance, the export orientation of an enterprise receiving the fossil fuel subsidy and the saturation of domestic fossil fuel markets can support the argument that a measure constitutes a prohibited export subsidy.[127] Importantly, unlike actionable subsidies (see below), prohibited subsidies can be challenged by any WTO Member.[128]

A precondition for a subsidy to be actionable is that it is 'specific to an enterprise or industry or group of enterprises or industries'.[129] Generally, fossil fuel production subsidies are more likely to meet this requirement than consumption subsidies such as the under-pricing of fuels for the domestic market or dual pricing schemes, which benefit large and diffuse groups of consumers.[130] Nevertheless, if consumption subsidies disproportionately benefit certain energy-intensive industries, they are arguably de facto specific.[131] However, such subsidies may still provide important benefits to other energy consumers, including households and other industries.[132]

For a subsidy to be actionable, it further needs to be established that it leads to 'adverse effects to the interests of other Members'.[133] Such adverse effects include (1) injury to the domestic industry of another Member, (2) nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT,[134] and (3) serious prejudice to the interests of another Member. With regard to injury to the domestic industry of another Member, it

125 ASCM (n 63) art 3.1(a).

126 Moerenhout (n 124).

127 CH Slattery, 'Fossil Fueling the Apocalypse': Australian Coal Subsidies and the Agreement on Subsidies and Countervailing Measures' (2019) 18(1) World Trade Review 109.

128 ASCM (n 63) art 4.1.

129 ASCM (n 63) art 2.1.

130 De Bièvre et al (n 119) 418.

131 R Howse, 'Climate Change Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis' (IISD 2010) 9; A Marhold, 'Fossil Fuel Subsidy Reform in the WTO: Options for Constraining Dual Pricing in the Multilateral Trading System' (ICTSD 2017) 13.

132 Moerenhout (n 124) 127–8.

133 ASCM (n 63) art 5.

134 This category is less relevant for the current discussion, as it includes the requirement that the price effect of a tariff concession should be 'systematically offset' by a subsidy. *United States–Continued Dumping and Subsidy Offset Act of 2000*, Panel Report, WT/DS217/R, WT/DS234/R (16 September 2002) para 7.127.

needs to be established that there was an injury (eg in the form of a decline of output, sales, market share, profits, productivity, etc)[135] over a certain period, caused by the subsidized imports,[136] Concerning serious prejudice to the interests of another Member, a complainant may argue that a fossil fuel subsidy leads to the displacement of its exports. However, the claimant needs to prove that the effect is due to the subsidy itself.[137] Determining this causation is a 'fact-intensive exercise, and one that inevitably involves extensive, case-specific evidence',[138] including both qualitative and quantitative analyses. Moreover, in several instances, serious prejudice needs to be caused against 'like products'[139] While it may perhaps be argued that, for instance, Australian coal and Indonesian coal are 'like',[140] it is improbable that renewable energy products (eg solar panels) and fossil fuels would be considered 'like'.[141] This means that trade effects of fossil fuel subsidies on renewable energy products would likely fall by the wayside.

As the preceding discussion has shown, a challenge to fossil fuel subsidies is possible, but passing the various hurdles of the ASCM will likely prove challenging, particularly in the absence of public information about a subsidy. Moreover, the ASCM disciplines are solely concerned with the trade effects of fossil fuel subsidies, rather than its environmentally harmful impacts.[142]

V Should WTO Bodies Decide On Climate Change-Related Disputes?

The chapter thus far has surveyed the existing practice of the WTO in climate change-related disputes and offered a glimpse into the possible future. However, it has not answered a more fundamental question: is it at all desirable

135 ASCM (n 63) art 15.4.

136 *European Communities and Certain Member States–Measures Affecting Trade in Large Civil Aircraft*, Panel Report, WT/DS316/R (1 June 2011) paras 7.2059–7.2071.

137 Coppens (n 122) 145.

138 *United States–Measures Affecting Trade in Large Civil Aircraft* (*Second Complaint*), Appellate Body Report, WT/DS353/AB/R (23 March 2012) para 915.

139 ASCM (n 63) art 6.3.

140 Slattery (n 127) 128.

141 C Wold, G Wilson and S Foroshani, 'Leveraging Climate Change Benefits through the World Trade Organization: Are Fossil Fuel Subsidies Actionable?' (2012) 43(3) Georgetown Journal of International Law 635, 670.

142 In this context, ongoing negotiations on unsustainable fisheries subsidies at the WTO may hint at the possibilities for developing rules on fossil fuel subsidies. See MA Young, 'Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies' (2017) 17(3) International Environmental Agreements: Politics, Law and Economics 371.

for the WTO dispute settlement bodies to rule on climate change-related disputes? This section explains why some caution is warranted in advocating for a stronger role for the WTO dispute settlement system and offers some ideas on how climate change considerations could be strengthened in future disputes.

Climate change-related disputes before the WTO can raise several important policy questions. Are local content requirements an effective means of achieving green industrial policy goals? What kind of biofuels should support the decarbonization of the transport sector? How can a BCA take into account the climate policies of another country? How do fossil fuel subsidies hamper the clean energy transition? Not all these questions, however, can be answered in WTO dispute settlement. More importantly, some of these questions probably *should not* be answered by WTO panels or the Appellate Body.

WTO disputes involve trade rules, as applied and interpreted by trade experts. Although the practice of the Appellate Body suggests an increasing accommodation of environmental concerns, as evidenced by the *Shrimp–Turtle* rulings, other disputes have exposed the limitations of the dispute settlement bodies' willingness to integrate non-trade concerns. For instance, in the *Biotech* dispute, the Panel did not seek recourse to the Convention on Biological Diversity or the Cartagena Protocol, despite their obvious relevance to the dispute.[143]

Due to the strength of its dispute settlement mechanism the WTO may find itself in the unenviable position of finding the right balance between trade and climate concerns. The likely result of such an exercise is 'a particular *kind* of balance – which inevitably favours some interests and values over others'.[144] Even in the case that climate policy considerations are given due regard, it remains the case that for some climate change-related trade measures the jury is still out. For instance, while some may argue that a BCA is essential for preventing carbon leakage and leveraging other countries to increase climate ambition, others may argue such measures are premised on an implicit or explicit evaluation of the climate policies of other countries that runs against the spirit of the Paris Agreement. And while some may argue that local content requirements are ineffective and discriminatory, in some cases they may be genuinely necessary for the success of a country's green industrial policy. If WTO dispute

143 *European Communities–Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report, WT/DS291/R (29 September 2006) paras 7.74–7.75, 7.95. See MA Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case' (2007) 56(4) International & Comparative Law Quarterly 907.

144 ATF Lang, 'Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition' in MA Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 113.

settlement bodies have to rule on these contentious questions, the outcome may adversely affect countries' climate policies, the prospects for international climate cooperation, as well as the external legitimacy of the WTO (and its dispute settlement system).[145]

Mindful of these caveats, there are several ways through which the practice of WTO dispute settlement could be improved to better integrate climate change-related considerations. A first set of options concerns the ways in which climate change-related expertise can be better integrated into WTO dispute settlement. The most direct way to do so would be to ensure that panel and Appellate Body members have a relevant background in environmental science, law and/or policy.[146] For panel members, the WTO's Dispute Settlement Understanding (DSU) specifies that panels should be 'composed of well-qualified governmental and/or non-governmental individuals', and that '[p]anel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience'.[147] For the Appellate Body, the DSU suggests that it will 'comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'.[148] These formulations are broad enough to include people with relevant climate expertise in panels or even the Appellate Body, although for both (and especially the Appellate Body) general expertise in trade agreements will also be required.[149]

Another way in which (the use of) climate expertise in trade disputes could be strengthened is by calling upon relevant climate change-related experts or information.[150] Pursuant to Article 13 DSU, panels are entitled to 'seek information and technical advice from any individual or body which it deems appropriate'[151] and in addition they may 'seek information from any relevant source

145 See GC Hufbauer, S Charnovitz and J Kim, *Global Warming and the International Trading System* (Peterson Institute for International Economics) 96; and K Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International 2011).

146 A related suggestion is to ensure that WTO Secretariat staff assisting panels and the Appellate Body have the relevant expertise. See J Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51(2) International & Comparative Law Quarterly 325, 345.

147 DSU (n 3) arts 4(1) and 4(2).

148 DSU (n 3) art 17(3). The language is repeated *verbatim* in MPIA (n 6) Annex 2, para 3.

149 Indeed, Pauwelyn warns that putting scientific experts on a panel 'is not a good idea … [as] the expert/panel member in question exerts too much uncontrolled power over the other two panelists' (Pauwelyn (n 146) 345).

150 See generally Pauwelyn (n 146); and CT Timura, 'Cross-Examining Expertise in the WTO Dispute Settlement Process' (2002) 23(3) Michigan Journal of International Law 709.

151 DSU (n 3) art 13(1).

and may consult experts to obtain their opinion on certain aspects of the matter'.[152] The latter may also involve an advisory report from an expert review group;[153] however, the general WTO practice has been to rely primarily upon individually appointed experts, rather than for instance intergovernmental organizations with relevant expertise.[154] Experts could advise a panel on factual issues (eg the sustainability impacts of different types of biofuels), but in principle they could advise on legal issues outside of the trade law expertise of members (eg the legal nature of the Paris Agreement and its nationally determined contributions).[155] While the role of experts is advisory, 'it will be difficult, if not impossible, for a panel to overrule a consensus position expressed by the experts'.[156]

The broad formulation of Article 13 DSU has also provided panels with the discretion to consider unsolicited amicus curiae briefs from interested actors.[157] However, given disagreements among Members on the admissibility of information contained in these briefs,[158] dispute settlement bodies have been reluctant to draw on them.[159] For instance, while both the Panel and Appellate Body in *Canada–Renewable Energy* received several amicus briefs, their contents were not considered.[160] Nevertheless, amicus curiae briefs could offer one further way through which climate change-related information could be brought to the attention of the dispute settlement bodies.

A second set of options concerns the space for dispute settlement bodies to clarify provisions of the WTO Agreements through 'evolutionary' interpretation. To avoid situations in which the WTO dispute settlement bodies determine which climate policies are most suitable (see above), a careful approach to this option would be required. While it is beyond the scope of this chapter to discuss all the ways in which provisions of the GATT and other WTO Agreements could be interpreted in more climate-friendly ways, one clear

152 DSU (n 3) art 13(2).

153 DSU (n 3) art 13(2) and Appendix 4.

154 M Cossy and G Marceau, 'Institutional Challenges to Enhance Policy Co-ordination – How WTO Rules Could be Utilised to Meet Climate Objectives?' in T Cottier, O Nartova and SZ Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (CUP 2009) 377.

155 Pauwelyn (n 146) 332.

156 Pauwelyn (n 146) 355.

157 For an overview of submitted briefs, see <http://www.worldtradelaw.net/static.php?type=public&page=amicus> accessed 19 February 2021.

158 Cossy and Marceau (n 154) 380.

159 T Squatrito, 'Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?' (2018) 17(1) World Trade Review 65.

160 Charnovitz and Fischer (n 57) 199.

candidate is the interpretation that climate change measures fall within the substantive scope of Articles XX(b) and (g) GATT.[161]

Implementing the sets of options outlined above likely requires overcoming the ongoing Appellate Body impasse. A final option, however, may well build on the continuing stand-off. Under the option of a 'peace clause' or moratorium, WTO Members would refrain, at least for a period of time, from challenging each other's climate policies.[162] While such a peace clause is in effect, Members could feel at liberty to ramp up climate action without the threat of a WTO dispute hanging over their heads. However, a peace clause would likely require a decision from WTO Members, which requires consensus or, if that is not possible, a majority vote.[163] Moreover, a peace clause may not fully protect Members from challenges, and would require a careful formulation to avoid creating the 'perverse incentive for introducing protectionist or otherwise trade-restrictive climate policy measures'.[164]

VI Concluding Remarks

In the wake of the COVID-19 pandemic and its associated economic crisis, the multilateral trade and climate change regimes are both at a crossroads. The trade regime is faced with a dysfunctional dispute settlement system and a stalled round of negotiations. The climate regime is in urgent need of countries to step up and submit more ambitious nationally determined contributions to achieve the goals set by the Paris Agreement. While a green trade recovery could offer a way forward that could reinvigorate both regimes,[165] the limited

161 R Meléndez-Ortiz, 'Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System' (ICTSD and World Economic Forum) 23. As noted above, this has already been made explicit by the Panel in *Brazil–Taxation* (n 103) for Article XX(b). Another suggestion is to interpret the *chapeau* of Article XX GATT in a climate-friendly manner; see Benjamin (n 13).

162 For instance, an option may be 'to wait at least three years before challenging national climate measures or countermeasures that restrict trade or otherwise have trade effects in WTO dispute settlement'; see J Bacchus, 'Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes' (ICTSD and World Economic Forum 2016) 14.

163 Agreement Establishing the World Trade Organization (n 17) art IX(1).

164 K Das et al, 'Making the International Trading System Work for Climate Change: Assessing the Options' (2019) 49(6) Environmental Law Reporter 10553, 10563.

165 See C Charveriat and C Deere Birkbeck, 'Greening Trade for a Global, Green, and Just Recovery' (Institute for European Environmental Policy and Chatham House 2020).

progress in trade negotiations could mean that the relationship between the two regimes is largely determined through disputes.[166]

Assuming the current Appellate Body crisis can be overcome, the gradual strengthening of climate action by countries pursuant to the Paris Agreement may put more disputes before the WTO dispute settlement system. Considering existing disputes as well as potential forthcoming ones, this chapter has reflected on the role of the WTO dispute settlement in the context of climate change.

At first blush, some of the rulings—notably those related to renewable energy support measures in Canada, India and the United States—may give credence to the claim that the WTO is blocking climate action. However, a closer look shows that WTO dispute settlement bodies were mainly concerned with the use of local content requirements. Still, further disputes against other renewable energy support measures cannot be ruled out. The extent to which WTO can balance climate change goals with—primarily developing countries'—concerns over disguised protectionism has yet to be put to the test, but a dispute on BCAs would likely involve such a balancing act. However, as this chapter has sought to make clear, in such a case it would be incredibly hard for a dispute settlement body to strike the right balance.

Whether WTO dispute settlement will play a role in addressing measures that are both environmentally harmful and have adverse trade effects remains uncertain. The discussion of a possible dispute on fossil fuel subsidies shows that existing subsidies rules were not crafted with the negative environmental impacts of such subsidies in mind, and that evidentiary barriers for a successful challenge are high. Nevertheless, such a dispute—should a Member decide to launch one—would offer a unique opportunity for WTO dispute settlement bodies to use trade rules to drive climate action.

166 Although Doha Round negotiations on trade and the environment have not made much progress, an interesting development has been the launch of negotiations on a new Agreement on Climate Change, Trade and Sustainability, involving Costa Rica, Fiji, Iceland, New Zealand, Norway and Switzerland. See H van Asselt, 'Small Countries Punching Above Their Weight: The New Initiative for an Agreement on Climate Change, Trade and Sustainability (ACCTS)' (*SDG Knowledge Hub*, 3 October 2019).

CHAPTER 20

International Arbitration of Climate-Related Disputes: Prospects for Alternative Dispute Resolution

*Patrick Thieffry**

1 Introduction

Arbitration has been used as a forum to resolve international disputes since well before climate change became a matter of concern, and even before the environment in its modern conception started to be a subject matter of disputes. From that very simple initial observation, one might infer that arbitration was not designed for the purpose of addressing climate change-related, or even environment-related, disputes and find a corroboration of the ontological finding that arbitration is ill-suited for that purpose. Yet, this would ignore significant considerations, not least the fact that environmental, energy, and lately, climate-related disputes have in fact been submitted to and resolved through arbitration. This is a sign that it may well be a desirable forum for resolving such disputes, for various reasons and perhaps subject to certain adjustments.

Climate change-related disputes are a recent phenomenon, hence the number of known related arbitrations is very limited. However, from an analytical point of view, the strong nexus between climate issues and environment law, and therefore between related disputes, makes environmental dispute resolution an acceptable proxy for climate change dispute resolution. At an empirical level, State-to-State arbitration practice confirms the capability of arbitration to resolve transnational disputes with an environmental dimension. Environmental damages were the subject matter of famous groundbreaking arbitrations in the *Trail Smelter*[1] and *Lake Lanoux*[2] cases. The *Indus*

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1 *Trail Smelter Arbitration* (*United States of America v Canada*) (1941) 3 RIAA 1905.

2 *Lake Lanoux Arbitration* (*France v Spain*) (1957) 12 RIAA 281; 24 ILR 101.

Waters award takes into account international environment law principles,[3] and the award rendered in the *Iron Rhine* matter makes significant references to environmental law.[4] Academic research is also still quite limited as to climate change-related arbitration strictly understood.[5] However, research has been discussing arbitral tribunals taking account of environmental considerations, in as much as arbitral awards venturing in such unknown territory have been available, mainly in the area of foreign direct investment protection through the now famous 'investment-State dispute settlement' system (ISDS) or 'investment arbitration',[6] and in the less publicized field of 'commercial' disputes,[7] with a few authors having noted similarities between the two.[8]

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3 *Indus Waters Kishenganga Arbitration* (*Pakistan v India*), PCA Case No 2011-01, Award (20 December 2013) para 111.

4 *Iron Rhine Railway Arbitration* (*Belgium v Netherlands*) (2005) 27 RIAA 35 <https://pca-cases.com/web/sendAttach/481>.

5 See E Wisniewski, 'A Changing Climate: The Future of "Legitimate Expectations" in Energy Investment Disputes' [2018] (4) ICC Dispute Resolution Bulletin 69; S Grosbon, 'Investissements et changements climatiques: le chapitre 8 de l'Accord économique et commercial global (AECG/CETA) face aux impératifs de transition énergétique' (2019) 146 Journal du Droit International (Clunet) 365.

6 W Ben Hamida, 'La prise en compte de l'intérêt général et des impératifs de développement dans le droit des investissements' (2008) 135 Journal du Droit International (Clunet) 999; C Titi, 'Le "droit de réglementer" et les nouveaux accords de l'Union européenne sur l'investissement' (2015) 142 Journal du Droit International (Clunet) 39; JE Viñuales, 'Foreign investment and the environment in international law: The current state of play' (2016) Cambridge Centre for Environment, Energy and Natural Resource Governance Working Paper 1/2016, 1 <https://www.ceenrg.landecon.cam.ac.uk/working-paper-files/wp05> accessed 26 February 2021; CL Beharry and ME Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30(3) American University International Law Review 383; S Lemaire, 'Arbitrage d'investissement et Union européenne' [2016] Revue de l'Arbitrage 1029; MM Mbengue, 'Les obligations des investisseurs étrangers' in L Dubin, P Bodeau-Livinec, J-L Iten and V Tomkiewicz (eds), *L'entreprise multinationale et le droit international* (Pedone 2017) 295; S Lemaire, 'Chronique de jurisprudence arbitrale en droit des investissements: I. Arbitrage d'investissement et droit de l'Union européenne' [2019] Revue de l'Arbitrage 555; M Laazouzi, 'Chronique de jurisprudence arbitrale en droit des investissements: IV. Protection de l'environnement' [2019] Revue de l'Arbitrage 609.

7 T Clay, 'Arbitrage et environnement' (2003) 149 Gazette du Palais 10; E Jolivet, 'Chronique de jurisprudence arbitrale de la Chambre de commerce internationale (CCI): aspects du droit de l'environnement dans l'arbitrage CCI' (2004) 339 Gazette du Palais 54; V Thieffry, 'La convention d'arbitrage, convention d'aménagement du contentieux environnemental interne et international' (2007) 10 (supp) Bulletin du Droit de l'Environnement Industriel 25; E Jolivet and L Marquis, 'Arbitrage commercial international et litiges environnementaux: illustrations dans des affaires récentes' [2011] Cahiers de l'Arbitrage 91.

8 E Loquin, 'Le droit de l'environnement devant les tribunaux arbitraux internationaux' in *Pour un droit économique de l'environnement: Mélanges en l'honneur de Gilles J Martin* (Frison-Roche 2013) 299; O Boskovic, 'L'arbitrage international en matière

On the institutional front, the Permanent Court of Arbitration (PCA) issued 'Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment' (the 'PCA Environmental Rules') in 2001,[9] which apply to both types of arbitration.[10] Likewise, the International Chamber of Commerce (ICC), a leading international arbitration institution with strong commercial arbitration roots, recently issued a report of its Task Force on Arbitration of Climate Change-related Disputes entitled 'Resolving Climate Change Related Disputes through Arbitration and ADR', which concludes that that institution's procedures, including its Arbitration Rules, are fit for the purpose of resolving such disputes.[11]

However, obviously, such documents fall short of providing an assessment of the prospects for resolving climate change-related disputes through international arbitration. Such prospects would not be sufficiently ascertained by the mere observation that environmental considerations, or even environment protection principles and/or legal rules, have been considered by arbitral tribunals. First, this does not mean that such arbitral tribunals resolved environment-related disputes since their mandate was not to resolve such a dispute, but rather to resolve some type of an investment protection or commercial dispute with an environment-related contextual element. Second, while it was accepted above that environment-related arbitration practice may be an acceptable proxy for the yet-to-be developed climate change-related arbitration practice, and it may well be the best possible analogy, it remains to be demonstrated that indeed the latter will follow the former.

In this respect, when it comes to the purpose of the claims asserted, climate change-related disputes, actual or potential, present somewhat comparable features to environment-related claims based on fundamental rights.[12] On the one hand, a first wave of such claims seek protection against alleged adverse

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environnementale' [2019] (4) Energie-Environnement-Infrastructures 26; P Thieffry, 'L'Arbitrage et le droit européen de l'environnement' [2019] Revue de l'Arbitrage 1069.

9 Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (2001) 40 ILM 202 <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf> accessed 7 September 2020.

10 Boskovic (n 8) para 3.

11 ICC, *Resolving Climate Change Related Disputes through Arbitration and ADR* (ICC pub no 999, 2019) <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf.> accessed 11 June 2020.

12 See P Thieffry, 'La charte des droits fondamentaux de l'Union européenne en droit de l'environnement' in C Vial and R Tinière (eds), *Les dix ans de la Charte des Droits fondamentaux de l'Union européenne: Bilan et perspectives* (Bruylant 2020).

impacts of environment protection measures, eg challenging their validity or their extent based on the proportionality or equality principles or on the requirements of due process.[13] On the other hand, a more recent series of such claims purports, on the contrary, to force the adoption or the strengthening of environmental measures taken by public authorities or private operators, eg relying on relevant substantive rights[14] or on the right to effective judicial protection.[15] Interestingly, it was noted that ISDS can be used either as a 'shield' from environmental protection measures, or as a 'sword' in the fight for such protection.[16]

A similar analytical approach will be used below in attempting to anticipate the prospects for resolving climate change-related disputes through international arbitration, be it investment or commercial. In an endeavour to analyze the subject matter and the relevance of such prospects, one may start from the metaphoric but valid observation that it is more often than not perceived as a 'shield' against climate action, geared at challenging its validity or its extent (II), rather than as a 'sword' for climate action, aiming to cause the adoption or the strengthening of environmental measures (III).

II Arbitration as a 'shield' against Climate Action

The significant questioning of arbitration in the last few years is arguably partly related to the perception that arbitrators appear to be more concerned with compliance with the mandate received from parties than with the general, broader (social) impact of their decisions.[17] As far as ISDS is concerned, where disputes are widely publicized, the tension has been growing because arbitrators have been seen as not being concerned with the public interest but

13 See, eg, Case C-321/15 *ArcelorMittal Rodange et Schifflange SA v État du Grand-duché de Luxembourg* EU:C:2017:179; Case C-195/12 *Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne* EU:C:2013:598, paras 24–25 and 66ff; *ZANTE–Marathonisi AE v Greece* App no 14216/03 (ECtHR, 6 Decembre 2007); *Chassagnou et al v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999).

14 See, eg, *Tatar v Romania* App no 67021/21 (ECtHR, 27 January 2009); Case C-444/15 *Associazione Italia Nostra Onlus v Comune di Venezia et al* EU:C:2016:978.

15 See, eg, *Hatton et al v United Kingdom* App no 36022/97 (ECtHR, 8 July 2003); Case C-723/17 *Craeynest et al v Brussels Hoofdstedelijk Gewest* EU:C:2019:533; Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern* EU:C:2019:1114.

16 This war-inspired analogy was made by Professor Stephan Schill in a presentation at the 2020 Vienna Arbitration Days on the topic of Safeguarding Public Interest in Arbitration in the area of environment protection.

17 See, eg, A Reinish, *Recent Developments in International Investment Law* (Pedone 2009) 40.

rather only with the bilateral investment treaties (BITs) or other investment protection agreements, legislation and contracts on which arbitral jurisdiction is based. These, historically, prioritized the protection of investors rather than that of the environment, and even less so of the climate.

In commercial arbitration, not only has confidentiality prevailed until recently, the general interest is less systematically involved, so that whatever concerns may arise, they are often based on suspicions of possible wrongdoing rather than actual evidence. Against such different backgrounds, it is appropriate to separately discuss the use of investment arbitration (*A*) and of commercial arbitration (*B*) by business operators as protection against alleged adverse impacts of environment protection measures.

A *The Critical Approach of ISDS*

Investors have been used to relying on their legitimate expectations of profitability or duration of their investments as a shield against the strengthening of the host State's environmental protections.[18] This was long before investment protection treaties started to expressly recognize the State's interest in its environmental and/or climate legislation, and its right or its duty to legislate.[19] It has been shown that environmental considerations have been far from unknown in ISDS practice,[20] but national environmental measures were often, and quite logically, treated as subordinate to investors' rights under international law.[21]

Nevertheless, ISDS has faced fierce attacks, although quite diverse in their shapes, fora and substance, which can be briefly illustrated through a quick reminder of its most notable unraveling in the European Union (EU). Indeed, the *Achmea* Judgement of the Court of Justice of the European Union (CJEU)[22] came as a fatal blow to ISDS—it was described as its death notice[23]—at least in the context of intra-EU bilateral investment treaties (BITs). Even beyond that

18 Wisniewski (n 5).

19 Beharry and Kuritzky (n 6).

20 Professor Jorge E Viñuales reviewed 114 cases identified until 2015 with an environmental component and noted that 60 of them were started between 2012 and 2015. See Viñuales (n 6) 17–21.

21 See, eg, Viñuales (n 6) 23–5. The author notes that the thousands of multilateral environmental agreements existing could however place their purpose on an equal footing to those providing for investor protection.

22 Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158, para 32.

23 The expression was used by Sophie Lemaire, 'Chronique de jurisprudence arbitrale en droit des investissements: I. Arbitrage d'investissement et droit de l'Union européenne' (n 6) 556.

EU private preserve, its implications remain to be ascertained as to regional investment protection agreements (mainly the Energy Charter Treaty),[24] and potentially to multilateral agreements[25] or BITs between EU Member States and non-EU countries. Upon prior referral in the context of the competence on foreign direct investment that had been transferred from the Member States to the EU by the Lisbon treaty in 2009 (Article 207 TFEU), the Court referred to its doctrine that the preservation of the autonomy and the essential characteristics of EU law relies on a 'judicial system intended to ensure consistency and uniformity in the interpretation of EU law', of which the 'keystone' is the preliminary ruling procedure pursuant to which Member States' courts seek interpretation and/or review of EU Law by the Court of Justice.[26]

However, according to the Court, while an arbitral tribunal pursuant to a BIT may be called on to interpret or indeed to apply EU law, its decisions are not 'subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU.'[27] The tension created by that position was further intensified by an arbitral award in the *Micula v Romania* matter ordering the host Member State to compensate an investor for the losses incurred upon the suppression of a State aid regime having become unlawful as a result of that State's accession to the EU.[28]

To make a long story short, it is in that unfavourable context that alternatives to ISDS, as currently applied, started to be proposed, mainly by the EU. The Comprehensive Economic and Trade Agreement between Canada and the EU (CETA)[29] and the Investment Protection Agreement negotiated between the EU and Singapore[30] both provide for 'the establishment of a multilateral

24 Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects [1998] OJ L69/1.

25 Such as under the widely used 'ICSID' Convention on the Settlement of Investment Disputes between States and Nationals of other States.

26 C-284/16 (n 22) paras 33–7.

27 Because it is not entitled to make a reference to the Court for a preliminary ruling (C-284/16 (n 22) paras 42–9), nor are its awards subject to review by a court of a Member State which would in turn be in the position of 'ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling' (C-284/16 (n 22) paras 50–3).

28 *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013).

29 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23.

30 EU-Singapore Investment Protection Agreement (signed 19 October 2018, not yet in force) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 30 March 2021.

investment tribunal and appellate mechanism for the resolution of investment disputes.'[31] Pending such establishment, the CETA sets forth a Tribunal of 15 members and an Appellate Tribunal,[32] and the agreement with Singapore provides for the resolution of investor claims by a Tribunal of First Instance comprising six members, and an Appeal Tribunal.[33] In both agreements, such members would most likely be former judges with strong public international and trade law backgrounds.[34]

While repeatedly and forcefully denounced, the actual extent to which arbitration may have acted as a 'shield' from environmental measures is difficult to ascertain. Arbitral awards, or at least some of them, have relied on the principle of foreseeability to allow for increases in environmental and human health protections, or in favour of energy transition measures. First, in the environmental area, a well-known example is the award in *Methanex v United States,*[35] which dismissed all the claims of the Canadian investor, a producer of methyl tert-butyl ether (MTBE), a fuel additive which was prohibited in California after signs of apparently resulting contamination were discovered in the soils and underground waters. In the absence of any particular commitment from the State and in view of California's constant observance of a protection policy, the tribunal dismissed the investor's claims.[36]

Second, in the area of human health, which provides also relevant background for climate-related legislation, the first, and so far only, award in one of the much mediatized *Marlboro* cases illustrates that balanced approach. The award recounts that:

> [i]t is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability … do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.[37]

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31 CETA art 8.29.

32 CETA arts 8.27 and 8.28.

33 EU-Singapore Investment Protection Agreement arts 3.9 and 3.10.

34 Including equally nationals of a Member State, nationals of Canada, and nationals of third countries, all qualified in their respective countries for appointment to judicial office or jurists 'of recognized competence' having demonstrated expertise in public international law, and preferably in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements (CETA art 8.27; EU-Singapore Investment Protection Agreement art 3.9).

35 *Methanex Corporation v United States of America* (Award) (2005) 44 ILM 1345.

36 ibid pt IV, ch D.

37 *Philip Morris Brands SARL, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 422.

The same award consequently considers that:

> [g]iven the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.

Therefore, in a finding which bears significant relevance for climate change-related disputes, the arbitral tribunal concludes that 'in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products'.[38]

Third, in the energy transition area, where investment protection claims based on the Energy Charter Treaty have bloomed in Spain, Italy, the Czech Republic and Bulgaria,[39] arbitral awards generally tend to accept that, in the absence of other blameable behaviour of the responding State, its legitimate and rational measures do not normally amount to breaches of the investor's legitimate expectations, which are qualified by the due diligence the investor is supposed to conduct as to the political, economic and social background in the host State, including climate change pressures.[40] Such an analysis may not prevail, however, in the notorious pending *Vattenfall* case where the major Swedish utility seeks compensation for the losses incurred as a result of Germany's decision to disengage from nuclear power production[41] where, as was suggested, the tribunal will have to appreciate whether the 2011 moratorium was foreseeable by operators despite the 2010 moderation of the progressive downgrading legislation initially adopted in 2002.[42]

Scholars consider that 'the reasoning of investment tribunals integrates environmental considerations in an increasingly clear and open form, even

38 ibid paras 427 and 430.

39 See Wisniewski (n 5); Viñuales (n 6).

40 See, eg, *Charanne and Construction Investments v The Kingdom of Spain*, Award, SCC Case No 062/2012 (21 January 2016); *Novenergia II–Energy & Environment* (*SCA*) (*Grand Duchy of Luxembourg*), *SICAR v The Kingdom of Spain*, Award, SCC Case No 2015/063 (15 February 2018) specifically para 697; *Masdar Solar & Wind Cooperatief UA v The Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) paras 521–2; *Antin Infrastructure Services Luxembourg SARL and Antin Energia Termosolar BV v The Kingdom of Spain*, ICSID Case No ARB/13/31, Award (15 June 2018) paras 563–73.

41 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12.

42 Wisniewski (n 5).

when the relevant environmental measures are in breach of investment law'.[43] Other specific features of investment law have also been used, such as where the investor's failure to conduct legally required preliminary environmental impact assessments has led arbitral tribunals to either decline jurisdiction based on the investment's illegality,[44] or to dismiss the claims on the merits.[45]

B *Commercial Arbitration as a Possible Forum for Climate Disputes*

In commercial arbitration, arbitral awards have generally not been publicized, and the proceedings themselves even less so.[46] Yet, based on limited access to relevant materials, academic research has been able to confirm the existence of awards in various situations of relevance to environment protection.[47] While it is not clear that such practice is a reliable precursor to the development of commercial arbitration of climate change-related arbitration, it is worth ascertaining whether the availability of such information may help formulating an educated guess in this respect.

As early as between 1999 and 2001, eight International Chamber of Commerce awards with some environmental aspects were reported, and then 22 more between 2001 and 2007. About half of these awards dealt with warranty agreements in corporate acquisitions and sales of contaminated sites.[48] In these cases, arbitral tribunals are clearly not entrusted with the task of safeguarding the environment, but they may have to consider issues of relevance to climate change-related disputes, such as the existence of site contamination and resulting environmental damage, its 'imputability' to the current or former operator, and the extent and costs of remediation.[49] Other reported arbitrations concerned construction and infrastructure projects, such as solar parks, wind farms and hydroelectricity installations. Some have as their subject matter, prospection, extraction, transportation, storage and distribution

43 Viñuales (n 6) 24–5. See also Mbengue (n 6); M Laazouzi, 'Chronique de jurisprudence arbitrale en droit des investissements: IV. Protection de l'environnement' [2019] Revue de l'Arbitrage 609.

44 *Cortec Mining Kenya Limited, Cortec Limited and Stirling Capital v Kenya*, ICSID Case No ARB/15/29, Award (22 October 2018) para 365.

45 *David Aven and Others v Costa Rica*, Case No UNCT/15/3, Award (18 September 2018) para 552; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award (13 November 2000).

46 This situation is evolving, as discussed below.

47 See Boskovic (n 8); Clay (n 7) 10; Jolivet (n 7) 54; Jolivet and Marquis (n 7) 91; Loquin (n 8) 299.

48 See Jolivet (n 7); Jolivet and Marquis (n 7).

49 Thieffry, 'L'Arbitrage et le droit européen de l'environnement' (n 8).

of natural resources, sometimes with the disruption of administrative orders, not unlike State measures in investment arbitration.[50] In this respect, it should be noted that many such contract disputes involve long-term prospection and/or extraction rights (eg in the oil and gas industry), which are prone to being questioned in the wake of climate-mandated transitions and are mainly granted by States or State entities, a factor that somewhat blurs the distinction between commercial arbitration and ISDS.

Nevertheless, in contrast with ISDS, commercial arbitration operates mainly as a means of resolving disputes with primarily private interests at stake, and there is no obvious reason why climate change-related disputes should differ from those with environmental aspects. This does not come as a surprise. In addition, the limited information available regarding commercial arbitration means that the initial analysis may be biased or incomplete. In order to have a better grasp on the practical impacts of the disputes at hand, one should take into account the status of the parties, primarily the claimants, including their ability to address or remediate environmental damage or to comply with costly administrative prescriptions. They may be worse off by their failure to obtain relief in arbitration. However, a 'better' response to such a situation may not be secured in State court. If anything, from this point of view, one can only insist on the importance of ensuring that appropriate expertise in the various legal and technical aspects of climate change is available to the parties and the tribunal, including through arbitrators with appropriate expertise, party-appointed experts, tribunal-appointed experts, and/or expert determination.[51] In addition, these observations are equally relevant in matters where arbitration is looked at as a means to foster climate action.

Beyond the strict arena of private commercial disputes, a clear illustration of the nexus between commercial arbitration and the public interest was given by a case where it was determined that an award issued in a commercial arbitration context, albeit between two business operators owned by States, did not constitute State aid within the meaning of competition rules.[52] The reasoning for that decision was most relevant, since it relied in part on the selection of the arbitrators and on the mandate they had been given. The subject matter of the

50 Thieffry, 'L'Arbitrage et le droit européen de l'environnement' (n 8)..

51 ICC, *Resolving Climate Change Related Disputes through Arbitration and ADR* (n 11) paras 5.7ff.

52 EFTA Surveillance Authority, Case No 83877, Decision of 10 September 2019 No 064/19/COL, *Arbitral award between Landsvirkjun and Elkem* [2019] OJ C419/11. The full redacted decision is available at: <http://www.eftasurv.int/state-aid/state-aid-register/decisions/> accessed 7 September 2020.

controversy was the fixing of the price of electricity upon renewal of a power supply contract where the parties had agreed to refer that question to arbitration. It was considered that there was no advantage to the seller—one of the requisites for the existence of State aid—based on the overarching principle of the 'market economy operator', ie a prudent private market operator, placed in a similar situation as the purchaser, would have acted in the same way when agreeing to such an arbitration clause.[53] In the situation at hand, that conclusion was warranted by the finding that the arbitration clause 'established clear and objective parameters for determining a power price that arbitrators, being expert in the field, had to follow', hence, in line with market conditions, so that the seller had obtained no economic advantage.[54] This decision is significant in a number of respects, not the least by highlighting that commercial arbitration may raise major public interest concerns, such as the price of power provided to a State entity. Moreover, it also highlights the role of arbitration in providing an acceptable response to such public interest concerns. There is little doubt that a wide array of other such situations will arise in the future. Arbitration, therefore, will increasingly come forth as a forum where such general interests, including climate change-related ones, can be promoted in the appropriate circumstances.

III Arbitration as a 'Sword' for Climate Action

Not all arbitrations with a climate change-related aspect operate, or will operate, as a 'shield' against climate action. It is now apparent that such proceedings may rather *de facto* serve, intentionally or not, as a 'sword' for climate action, that is to say aiming to force or induce the adoption or the strengthening of environmental measures. In such climate change-related disputes, claimants may seek injunctive as well as compensatory relief. However, due to the specificities of the climate change phenomenon, the pre-requisites for compensatory relief may not be immediately met since issues such as locus standi, existence of a cause of action, 'imputability' or causation would have to be assessed by arbitral tribunals under applicable rules, in the same way that they would if brought in a State or other court. These issues depend mainly on substantive as well as evidentiary considerations which arbitral tribunals tend to address in ways that are quite similar to those adopted by courts. By

53 ibid para 55.
54 ibid para 62.

comparison, the conditions for injunctive relief may, at least in appropriate circumstances, be easier to fulfil. In any event, such considerations will not be further discussed below since they are by no means specific to arbitration, whether 'investment' or 'commercial.' While the revisiting of ISDS will likely take account of the climate change context, the 'renaissance' of commercial arbitration appears bound to do so.

A *ISDS Revisited*

Even in the current ISDS practice, arbitration may be used to foster climate change action rather than as a deterrent or limiting factor. Again, awards rendered in the past few years with respect to environmental legislation have had recourse to creative interpretations of investment treaties and/or assessments of new types of relevant facts. In addition, the most recently negotiated treaties of this kind tend to integrate climate change—as well as environment and human health—safeguards. This will necessarily impact subsequent dispute resolution. Based on recent practice, it is possible to identify at least two avenues through which environmental claims were pursued in investor-State disputes, and which could serve as models for claims in climate change-related disputes.

The first trend is that of environmental claims asserted by investors. While it apparently remains an insulated occurrence at the time of writing, the matter of *Peter A Allard v The Government of Barbados* was remarkable in that, albeit a pure investment protection claim, it was seeking redress for environmental damage allegedly caused by the responding State. The claims were ultimately dismissed, so that it provides limited information other than the mere fact that such claims are indeed conceivable and may well be developed further in future.[55] In that case, the investor had purchased and developed land for the purpose of an ecotourism project. The investor (Mr Allard) claimed that the State had failed to take reasonable and necessary environmental measures and contributed to the site's contamination, thus annihilating the value of his investment. As part of his case, Mr. Allard alleged that the environmental degradation had been occurring slowly and that, unless Barbados reversed its course of action, this would become readily apparent to most visitors. However, the arbitral tribunal found that he had not established that the factual premises of this statement were correct and that 'in respect of the six aspects of environmental health identified (namely water salinity, other parameters of water

55 *Peter A Allard* (*Canada*) *v The Government of Barbados*, PCA Case No 2012-06, Award (27 June 2016).

quality, the health of the mangroves, the diversity and health of fish, the diversity and number of birds, and the number of crabs), the claimant fell short of establishing material deterioration during the Relevant Period, let alone to the extent that would be apparent to one-time visitors' so that he failed to establish that his decision to cease operating the sanctuary as an ecotourism attraction arose out of any relevant degradation of the environment.[56] Moreover, the tribunal added, 'even if it had found that there was a degradation of the environment at the Sanctuary during the Relevant Period (which it did not), it would not have been persuaded that such degradation was caused by any actions or inactions of Barbados.'[57]

The second possible new trend is that of counterclaims brought by the responding State based on environmental damages. It should be stressed at the outset that counterclaims do not have a long track record in ISDS, precisely because that discipline has as its core purpose the protection of investors, not that of States, the environment or climate. Quite predictably, the investor may challenge the very jurisdiction itself of the arbitral tribunal to entertain such a counterclaim or its admissibility. For instance, in a dispute pertaining to a concession of services of water distribution and sanitation in Buenos Aires, the tribunal considered that the contents of the applicable BIT were neutral and that there was a manifest link between the subject matter of the main claim and of the counterclaim.[58] A State's counterclaims may also of course be inadmissible, for example where they are not sufficiently substantiated.[59]

However, two significant, related, awards on counterclaims have been rendered in sister cases involving distinct investors, members of a consortium, that had brought separate arbitrations against the same host State. In both arbitrations, the responding State filed counterclaims against the investors, seeking compensation for damages to the soils, underground waters and infrastructures. In the first such case, *Burlington Resources Inc v Republic of Ecuador*, the investor was held liable to pay more than USD 40 million to the State.[60] In the second case, *Perenco Ecuador Limited v Republic of Ecuador*, a different

56 ibid para 139.

57 ibid para 166.

58 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) paras 1110ff. On the merits, the counterclaim was dismissed for lack of an investor's fundamental right to water. See also *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017).

59 *David Aven and Others v Costa Rica* (n 45) para 747.

60 *Burlington Resources Inc v Republic of Ecuador* (n 58).

arbitral tribunal held that, subject to such a counterclaim being possible under the relevant BIT, the State is entitled to full compensation of the environmental damage caused by an investor under the applicable law.[61] An award of USD 93,638,890 ensued.[62] Needless to say, some of the questions which had to be addressed by the arbitrators did not have ready-made responses, even in the State court's case law, such as the risk of double compensation or the allocation of the monies awarded to the site's clean-up.[63]

While it has not reached a balance between investors' and general interests which might have allowed ISDS to be accepted as a dispute resolution mechanism, the CETA does purport to delineate the rights of investors. In the opening provisions of the treaty's Chapter VIII, Section D, on 'Investment protection', the contracting parties 'reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.'[64] Likewise, Chapter XXIV on 'Trade and environment' recognizes 'the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement', and adds that each Party 'shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection.'[65]

These provisions of the CETA are typical of those recently inserted in investment protection treaties at large, including recognition of environmental protection as a treaty objective, the right of States to regulate environmental matters and the continuing duty of States to enforce and promote environmental protection measures.[66] There is little doubt that similar considerations as those encountered in recent ISDS practice and in new generation investment protection treaties could be raised in relation to climate change-related disputes as they have been in environment-related ones.

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61 *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015) para 34.

62 *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Award (27 September 2019).

63 See Thieffry, 'L'Arbitrage et le droit européen de l'environnement' (n 8).

64 CETA art 8.9.

65 CETA art 24.3.

66 Beharry and Kuritzky (n 6) 389.

B *Towards a 'Renaissance' of Commercial Arbitration*

The above-mentioned International Chamber of Commerce task force estimates that 'required rapid and far-reaching transition to energy, land, urban and infrastructure and industrial systems arising out of a global response to climate change will necessarily give rise to new investment and contracts, and accordingly contractual and other legal disputes.'[67] A significant part of the work of that task force aimed at trying to predict and understand the types of such disputes, and it came up with three potential categories based on their subject matter and/or the underlying legal instruments.

First, climate change-related arbitration may arise out of or in relation to contracts relating to mitigation of greenhouse gas emissions (such as transactions on emission allowances), adaptation, or more generally the implementation of energy, land, urban and infrastructure or systems transition, including the already numerous commercial disputes over the supply, erection and/or operation of renewable energy facilities (wind, solar, hydro …), the decommissioning of non-renewable power plants, the adaptation of existing buildings and infrastructure, etc.

Second, contracts without specific climate-related objectives or subject matter may give rise to disputes involving climate or related environmental issues as they may be impacted by the contracting parties' responses to changes in national laws, regulation or policy, voluntary commitments or, even more broadly, environmental impacts of climate change and/or responses to associated climate change action in national courts and other fora.

Third, even beyond the traditional *inter partes* scope of contractual relations, arbitration may conceivably be initiated by an affected non-party individual or group of individuals. This could be achieved on the basis of a 'submission agreement' (*compromis*) concluded with a business operator. Alternatively, such arbitration could also be based on a unilateral offer to arbitrate included in such a business operator's code of conduct, ethical standards, or corporate governance model in order to resolve existing climate change or related environmental disputes. Initiators could for instance be groups or populations potentially impacted by an investment in new or protected forestry areas, eg the establishment of a wind farm or solar power panel installation, affecting arable land or fisheries.[68]

While some types of climate change-related disputes may aim at acting as a 'shield' against climate action, this is less systematic than in the context of

67 ICC, *Resolving Climate Change Related Disputes through Arbitration and ADR* (n 11) para 2.3.

68 ibid paras 2.4–2.6 and fn 13.

investment protection which is by essence geared at challenging the validity or the extent of such action, albeit indirectly through the deterring effect of potential compensation. Rather, at least some of them could arguably be expected to act as a 'sword' for climate action, seeking to force the adoption or the strengthening of environmental measures. Not all the claims brought by potentially impacted groups or populations will be seeking such proactive measures. On the contrary, they may be seeking relief from the hardships caused by mitigation or adaptation measures, eg the nearby installation of wind parks, hydropower or carbon capture facilities, not to mention reforestation projects. With respect to that last category of disputes, which are the most likely ones to contribute to the adoption or strengthening of proactive climate action, the International Chamber of Commerce Report stresses that such situations may not necessarily involve an underlying contract and may have a legal basis, such as tort law: '[p]rovided a valid and binding dispute resolution agreement is entered into between the parties, there is no conceptual or procedural reason for which such non-contractual disputes cannot be subject to arbitration or ADR.'[69] Yet, even with respect to those disputes, arbitration may be bringing a favourable contribution to the implementation of measures aimed at mitigating climate change or adapting to its effects, thanks not only to the features that have made its success in providing a forum for the resolution of commercial disputes, including the flexibility of arbitral procedures,[70] but also to the mere fact that it offers an alternative dispute resolution forum to State courts, in the absence of an international court having jurisdiction.

However, the prospects of commercial arbitration for resolving such types of climate change-related disputes may depend on its 'social acceptability'. In this respect, the above-mentioned ICC Report notes that there is room for improvement in several respects. One way of doing this may be by allowing some level of third-party involvement in what is otherwise a private process, for example by allowing amici curiae to provide information to arbitral tribunals.[71] Likewise, in commercial arbitration, arbitral awards have generally not

69 Subject of course to the 'significant issues [that] should be expected to arise in connection with such disputes, as with respect to locus standi, existence of a cause of action, imputability, causation or appropriate remedies.' (ICC, *Resolving Climate Change Related Disputes through Arbitration and ADR* (n 11) fn 14).

70 See, eg, ICC, *Resolving Climate Change Related Disputes through Arbitration and ADR* (n 11) s IV.

71 In ICC arbitration practice 'the arbitral tribunal may, after consulting the parties, adopt measures to allow oral or written submissions by amici curiae and non-disputing parties' (ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the

been publicized, and the proceedings themselves even less so. Yet, even though they arise from commercial contracts, an increasing proportion of commercial arbitrations involve public interest issues, most notably when States or State entities are parties.[72] As a result, '[t]he public versus private distinction between treaty and contract arbitration can be over-stated' because the latter 'can have just as much of an impact on state's public policy and finances as investor-state arbitration.'[73] In climate change-related disputes, there is likely to be increasing pressure for the disclosure of information even in commercial arbitration because of the public policy implications, all the more so where members of the public are directly affected by the environmental impacts of climate change. The ICC Report thus notes that:

> '[i]ncreasing transparency of arbitral proceedings could assist in enhancing the perception of legitimacy of those proceedings with broader stakeholders, such as in investor-state dispute resolution, but also in other areas' and that '[t]his will be particularly so if arbitral proceedings concern broader policy issues, such as climate policy and associated environmental impacts.'[74]

The task force thus suggests that '[i]ncreased transparency in relation to climate change-related disputes could be achieved in two main ways: (i) opening the proceedings to the public, including in the publication of submissions, procedural decisions and hearings; and (ii) publication (or even redacted publication) of awards.'[75]

The ICC already allows some degree of transparency in arbitration under its aegis by publishing the names and nationalities of arbitrators, their role within a tribunal and the method of appointment, the sector of industry involved and

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ICC Rules of Arbitration' (ICC, 1 Jan 2019) para 143 <https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf> accessed 11 June 2020).'

72 A State or State entity was a party in approximately 20 per cent of arbitrations filed with the International Chamber of Commerce in 2019, and there has been a constant and steady growth of that ratio in the recent years (ICC, *Resolving Climate Change Related Disputes through Arbitration and ADR* (n 11) para 5.68).

73 C Partasides and S Maynard, 'Raising the Curtain on English Arbitration' (2017) 33(2) Arbitration International 197.

74 ICC, *Resolving Climate Change Related Disputes through Arbitration and ADR* (n 11) para 5.69.

75 ICC, Res*olving Climate Change Related Disputes through Arbitration and ADR* (n 11) para 5.70.

counsel representing the parties in the case.[76] In addition, upon request of any party, it may communicate the reasons for certain administrative decisions to the parties.[77] Finally, ICC awards from 1 January 2019 may be published, albeit generally after at least two years of their notification to the parties, absent objection by any of the parties.[78]

IV Concluding Remarks

Arbitration, both of investment protection and commercial disputes, was never primarily intended as an instrument for the protection of environmental or other general or public interests. The prospects of commercial arbitration for resolving climate change-related disputes may depend on its 'social acceptability', and arbitral institutions have been attempting to improve the public's perception of their work by allowing some level of third-party involvement in what is otherwise a private process, for example through amici curiae to provide information to arbitral tribunals or by increasing transparency of arbitral proceedings or opening the proceedings to the public, including in the publication of submissions, procedural decisions, hearings and awards. Investment arbitration more notoriously involves environmental and other general and public interests and struggles to take account of those interests as well as of investors' protection.

Against this background, State courts continue to be perceived as the natural forum for the resolution of such disputes. However, climate justice is only in its infancy and State courts do not always provide optimal dispute resolution. Situations such as those where a multiplicity of victims seek relief from a plurality of respondents, where complex cross-border scientific, financial or legal issues require transnational specialized expertise, or where enforcement of the forthcoming decision will take place in another jurisdiction or in other

76 ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (n 71) paras 35–6.

77 Namely, (i) a decision whether or not and to what extent the arbitration shall proceed, ie if the ICC Court is prima facie satisfied that an arbitration agreement under the Rules may exist; (ii) a decision whether or not to consolidate two or more arbitrations; (iii) a decision made on the challenge of an arbitrator; and (iv) a decision to initiate replacement proceedings and subsequently to replace an arbitrator. ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (n 71) paras 34ff.

78 ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (n 71) paras 40ff.

jurisdictions than that of the forum, to take only a few examples, may receive better responses in arbitration. Thus, as climate change-related disputes develop over next few years, the possibility cannot be ruled out that a portion of them are resolved through arbitration.

CHAPTER 21

Climate Change Litigation before the International Criminal Court: Prospects in Theory and Practice

Nema Milaninia and Jelena Aparac***

1 Introduction

Since its inception, international criminal law (ICL) has largely focused on crimes tied to conflict: World War II, the war in the former Yugoslavia, postcolonial conflicts in sub-Saharan Africa, and now increasingly in South America and the Middle East. To date, ICL has ignored crimes associated with damage to the environment. As our understanding relating to man-made climate change and its severe consequences has evolved, however, States and jurists have started looking for new and innovative ways to ensure accountability for climate polluters. One of those strategies is international criminal accountability for the most responsible persons.

Within the context of ICL, there has been a growing body of literature concerning ICL and the environment and the design of new ecocentric crimes, like ecocide.[1] However, to date, the crime of ecocide remains no more than a theoretical discussion. The crime has yet to be included in any international treaty or convention. There is also no settled legal definition, let alone one that is

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1 See, for example, L Neyret, *Des écocrimes à l'écocide* (Bruylant 2015); M Gillett, 'Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict' in C Stahn, J Iverson and JS Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (OUP 2017); H Brady and D Re, 'Environmental and Cultural Heritage Crimes: The Possibilities under the Rome Statute' in M Böse et al (eds), *Justice Without* Borders (Brill 2018); R Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 Criminal Law Forum 179; A Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?' (2019) 30(3) Fordham Environmental Law Review 1.

universally accepted. There is no consensus on what would amount to a crime of ecocide, including what its constituent criminal elements would be. From a criminological standpoint, reference to ecocide could thus raise concerns relating to the principle of *nullum crimen sine lege* whereby the crime must be defined by a clear and precise law.

In contrast, climate change has not been sufficiently explored from an ICL perspective despite being recognized as a scientific reality and increasingly the subject of domestic litigation. At its core, climate change, as defined by the United Nations Framework Convention on Climate Change (UNFCCC) refers to 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'.[2] While the causes of climate change vary, scientists have traditionally found that they are largely due to the burning of coal, oil, and gas, deforestation, increased livestock farming, and other land-use changes.[3]

There are several reasons why the prosecution of climate polluters using an ICL framework can complement existing legal strategies. First, in certain circumstances harm to the environment can result in the commission of genocide, war crimes, crimes against humanity and the crime of aggression. The prohibition of these crimes is largely understood to be a peremptory norm of international law (*jus cogens*) from which no derogation is permitted.[4] Characterizing certain climate change contributions—human activities that result in the emission of greenhouse gases—as international crimes would send a strong message that the protection of the climate is fundamental for the well-being of humanity and to preserving international peace and security.

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2 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC). The UNFCCC makes a distinction between climate change attributable to human activities altering the atmospheric composition, and climate variability attributable to natural causes. Note that the Intergovernmental Panel on Climate Change (IPCC) has a slightly different definition of climate change that does not appear to make the same distinction: 'A change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal processes or external forcings, or to persistent anthropogenic changes in the composition of the atmosphere or in land use'.

3 United States Environmental Protection Agency, 'Sources of Greenhouse Gas Emissions' (*EPA*) <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> accessed 3 July 2020.

4 International Law Commission, 'Report of the International Law Commission on the work of its fifty-third session' Yearbook of the International Law Commission [2001] vol II(2) 85; *Prosecutor v Kupreškić et al* (Judgment) IT-95-16-T (14 January 2000) para 520.

Second, international crimes are typically subject to universal jurisdiction.[5] When universal jurisdiction is implemented at the national level, the relevant domestic legislation empowers national courts to investigate and prosecute persons suspected of crimes potentially amounting to violations of international (criminal) law regardless of where the crime was committed, the nationality of the suspect, or the nationality of the victim.[6] Finally, it is generally accepted that all States have an obligation under treaty or customary international law to prosecute or extradite (*aut dedere aut judicare*) those accused of the crimes underlying ICL to prevent impunity for their commission in light of the seriousness and gravity of those crimes.[7]

Despite the potential power of ICL, there have been no significant prosecutions under ICL for serious damage to the environment.[8] For its part, the International Criminal Court (ICC) has not focused investigations and prosecutions on environmental crimes despite its 2016 policy paper announcing such crimes as one of their priorities.[9] The Court's limited budget, waning State support and inflexible managing of human resources also make it difficult for the Court to obtain the expertise needed to investigate and prosecute environmental crimes, such as toxicologists, forensic biologists, and others

5 X Philippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 ICRC Review 375.

6 In 2012, for instance, Amnesty International reported that, in total, 163 of the 193 UN Member States 'can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law.' Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update' (2012) 2.

7 Trial Chamber's conclusion in the *Furundžija* case before the International Criminal Tribunal for the former Yugoslavia (ICTY) that 'one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction'. *Prosecutor v Anto Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 156.

8 While some international or internationalized tribunals (ICTY, International Criminal Tribunal for Rwanda (ICTR), Iraqi Special Tribunal) contained limited provisions for the protection of the environment (or provisions that could be interpreted as extending to the protection of the environment), no prosecution has been undertaken pursuant to these provisions. None of the other major international tribunals, (Extraordinary Chambers in the Courts of Cambodia (ECCC), Special Court for Sierra Leone (SCSL), Special Tribunal for Lebanon (STL), East Timor Tribunal), appear to have direct jurisdiction over crimes of serious environmental damage and have not undertaken any prosecutions for these offences.

9 ICC OTP, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) paras 40–1. See also F Bensouda, 'Panel discussion on Individual Liability for Business Involvement in International Crimes' (AIDP XX International Congress of Penal Law 'Criminal Justice and Corporate Business', Rome, 13–16 November 2019).

with technical skills needed for the effective investigation of such matters. The Court's poor performance to date[10] is also likely to dissuade States and Court personnel from adding more to the institution's docket until it has demonstrated the ability to successfully undertake the investigation of international crimes currently within its Statutory purview.

Further, the field of ICL is not intended to criminalize *every* international crime nor *every* person responsible for the commission of such crimes.[11] As the ICC's Office of the Prosecutor emphasizes in its 'Policy paper on case selection and prioritisation': '[i]t is not the responsibility or role of the Office to investigate and prosecute each and every alleged criminal act within a given situation or every person allegedly responsible for such crimes.'[12] ICL deals with the criminal responsibility of individuals for only certain international crimes, of which there is no generally accepted definition. Most international courts also limit jurisdiction to only a sub-set of persons deemed those 'most responsible'.[13] For instance, Articles 25, 28 and 30 of the ICC Statute establish relatively onerous actus reus and mens rea requirements for establishing individual criminal responsibility at the ICC, for the purpose of narrowing liability to only those most responsible for the ICC crimes.[14]

These limits are particularly apparent in the standards required for aiding and abetting liability—the principal mode of liability used for establishing accountability by private contributors to international crimes, like corporate directors or employees. While the legal requirements differ per international tribunal, they are nonetheless significant to meet. The ICC, for instance, sets a lower bar for the actus reus standards than the ICTY, ICTR, SCSL and ECCC—which require the alleged act has a 'substantial effect' on the commission of

10 See, for example, Z Raad Al Hussein et al, 'The International Criminal Court needs fixing' (*Atlantic Council*, 24 April 2019) <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/> accessed 30 August 2020; R Dicker, 'Time to Step Up at the ICC: No Time to Trim the Sails' (The Promise Institute for Human Rights, Spring 2020) <https://law.ucla.edu/sites/default/files/PDFs/Publications/Promise_Institute/No%20Time%20to%20Trim%20the%20Sails.pdf> accessed 30 August 2020.

11 I Fouchard, *Crimes Internationaux: entre internationalisation du droit pénal et pénalisation du droit international* (Bruylant 2014) 70.

12 ICC OTP, 'Policy Paper on Case Selection and Prioritisation' (n 9) para 5.

13 ICC, *Regulations of the Office of the Prosecutor* (ICC 2009) Regulation 34 ('The joint team shall review the information and evidence collected and shall determine a provisional case hypothesis (or hypotheses) identifying the incidents to be investigated and the person or persons who appear to be the most responsible.').

14 This chapter does not provide a detailed analysis of these elements and how they may restrict ICC prosecutions of contributors to climate crime.

the principal crime.[15] However, the ICC sets a higher mens rea requirement by expressly requiring that the aider or abettor have the 'purpose' of facilitating the commission of the underlying crime[16]—in contrast with the ICTY, ICTR, ECCC and SCSL, which only require that the accused have knowledge that the acts assist the commission of the principal crime.[17]

Nonetheless, these limitations do not obviate the importance of understanding climate change contributions through the lens of ICL and before the ICC. Even in the absence of successful investigations and prosecutions, simply framing climate change contributions from an ICL standpoint can have a persuasive deterrent effect given the enormous reputational weight ICL crimes have within the international community. Given the emerging attention on the intersection between climate change and ICL, this chapter analyzes different legal theories for prosecuting climate change as an international crime, as well as challenges to such prosecutions. First, Section II examines the circumstances under which climate change contributions can theoretically amount to a war crime, crime against humanity or act of genocide, and identifies the main limitations for prosecuting such crimes. Section III then analyzes the prospects for reparations for climate change-related crimes under the ICC's framework.

II Climate Change and International Crimes

It is largely accepted that the ICC Statute enumerates the 'core' crimes that encompass ICL. These are reflected in Article 5 of the ICC Statute and consist of the crime of genocide, crimes against humanity, war crimes and the crime of aggression—the last of which was activated by the Assembly of State Parties, the Court's governance body, on 15 December 2017.[18] As recognized in

15 *Prosecutor v Blaškić* (Appeals Judgment) IT-95-14-A (29 July 2004) para 46; *Prosecutor v Rukundo* (Appeals Judgment) ICTR-2001-70-A (20 October 2010) para 52; *Prosecutor v Taylor* (Judgment) SCSL-03-01-T-1283 (26 April 2012) para 482; *Prosecutor v Kaing* (Judgment) 001/18-07-2007/ECCC/TC (26 July 2010).

16 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90) (ICC Statute) (last amended 2010) art 25(3)(c).

17 OA Hathaway et al, 'Aiding and Abetting in International Criminal Law' (2019) 104 Cornell Law Review 1593, 1609.

18 This chapter does not analyze how climate change can amount to an act of aggression given that the crime was only recently defined in the ICC Statute and only recently became activated. For an analysis on how environmental damage can constitute a crime of aggression, see Gillett (n 1) 226–8.

the Statute's preamble, these are crimes that are universally accepted to be so egregious as to deeply 'shock the conscience of humanity' and 'threaten the peace, security and well-being of the world'.[19] In this regard, the crimes under the Court's jurisdiction are naturally limited, and relate to discrete circumstances that rise to the threshold of seriousness such as to warrant not only the concern of the international community, but also necessitate accountability and the end of impunity for the perpetrators of those crimes. As will be shown in the following sections, this means that the circumstances in which acts contributing to climate change fall within the scope of these crimes will also be limited to particularly egregious circumstances.

A *Climate Change as a War Crime*

In 2019, a scientific report in *Nature* concluded that climate conditions influenced between 3% and 20% of armed conflicts over the last century and intensifying climate change is estimated to increase future risks of conflict.[20] The reasoning is simple: as noted by agricultural economist Marshall Burke of Stanford University, '[i]f temperatures rise, crop yields decline, and rural populations become more likely to take up arms'.[21] Many nations already stagger under the weight of extreme poverty, pervasive hunger, social unrest and political instability—all of which climate change only exacerbates, further eroding the legitimacy of many governments and heightening international security concerns.[22] Recent studies of the Syrian uprising, for example, have

19 ICC Statute (n 16) preamble.

20 KJ Mach et al, 'Climate as a risk factor for armed conflict' (2019) 571 Nature 193. See also C-L Grayson, 'When Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People's Lives' (ICRC, July 2020) 19.

21 D Biello, 'Can Climate Change Cause Conflict? Recent History Suggests So' (*Scientific American*, 23 November 2009) <https://www.scientificamerican.com/article/can-climate-change-cause-conflict/> accessed 1 July 2020 (quoting Marshall Burke). See also T Carleton, SM Hsiang and M Burke, 'Conflict in a changing climate' (2016) 225 The European Physical Journal Special Topics 489; SM Hsiang, M Burke and E Miguel, 'Quantifying the Influence of Climate on Human Conflict' (2013) 341 Science 1212; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions' (2019).

22 CF Wald, S Goodman and DM Catarious, 'Climate and Energy the Dominant Challenges of 21st Century' (*Atlantic Council*, 11 November 2009) <https://www.atlanticcouncil.org/blogs/new-atlanticist/climate-and-energy-the-dominant-challenges-of-21st-century/> accessed 1 July 2020; MB Burke et al, 'Warming increases the risk of civil war in Africa' (2009) 106(49) Proceedings of the National Academy of Sciences of the United States of America 20670.

shown that growing water scarcity and frequent droughts, coupled with poor water management, led to multi-year crop failures, economic deterioration and consequently mass migration of rural families to urban areas.[23] Rapidly growing populations, overcrowding, unemployment and increased inequality put pressure on urban centres and finally contributed to the breakout of political unrest.[24]

Climate change not only has the prospect of provoking conflict, but the reverse is also true: conflict itself is a contributor to climate change. A study from Brown University's Costs of War project, for example, revealed that the US Department of Defense was the single largest producer of greenhouse gases in the world and has a larger annual carbon footprint than most countries due to several military campaigns and its ongoing participation in conflicts in Afghanistan, Iraq and elsewhere.[25] As similarly noted by the ICRC, other direct consequences of conflict on the climate include 'the destruction of large areas of forest, or damage to infrastructure such as oil installations or big industrial facilities,[which] can [also] have detrimental climate consequences, including the release of large volumes of greenhouse gases into the air.'[26]

Despite this strong nexus between conflict and climate, ICL significantly limits the circumstances under which contributors to climate change could be held responsible for war crimes. ICL, including war crimes, is almost entirely anthropocentric—designed to alleviate the suffering of humans. In general, war crimes—as listed in Article 8 of the ICC Statute—can be divided into the following categories: (i) crimes against persons requiring particular protection (for instance civilians and prisoners of war); (ii) crimes against those providing humanitarian assistance and peacekeeping operations; (iii) crimes against property and other rights; (iv) prohibited methods of warfare; and (v) prohibited means of warfare. Importantly, for conduct to constitute a war crime, it

23 See PH Gleick, 'Water, Drought, Climate Change, and Conflict in Syria' (2014) 6(3) Weather, Climate, and Society 331; CP Kelley et al, 'Climate change in the Fertile Crescent and implications of the recent Syrian drought' (2015) 112(11) Proceedings of the National Academy of Sciences of the United States of America 3241.

24 GJ Abel et al, 'Climate, conflict and forced migration' (2019) 54 Global Environmental Change 239. See also J Selby et al, 'Climate change and the Syrian civil war revisited' (2017) 60 Political Geography 232.

25 NC Crawford, 'Pentagon Fuel Use, Climate Change, and the Costs of War' (Costs of War Project, Brown University, 13 November 2019) <https://bit.ly/3sTPOuO> accessed 7 March 2021.

26 Grayson (n 20) 17.

must take place in the context of and or associated with an international or non-international armed conflict.[27]

1 Ecocentric War Crimes

The ICC Statute only expressly refers to damage to the environment in Article 8(2)(b)(iv), which criminalizes the 'intentional [launch of] an attack in the knowledge that such an attack will cause … widespread, long-term and severe damage to the natural environment which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated'.[28] The provision is derived from the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) as well as Articles 35(3) and 55(1) of Additional Protocol I to the Geneva Conventions (API).[29] Article 8(2)(b)(iv) contains four cumulative requirements that severely limit its application, namely the environmental harm, the attack, the military necessity and finally the mens rea condition.

First, the crime has three cumulative qualitative thresholds for the environmental harm: it must be widespread, long-term and severe. These terms are not expressly defined in the ICC's legal texts, or in API. Nonetheless, there is good reason to believe that however onerous these requirements are, climate change would meet them. The Committee on Disarmament, under whose auspices ENMOD was negotiated, attached 'Understandings' to ENMOD. Therein, the Committee noted that 'widespread' means harm encompassing an area on the scale of several hundred square kilometres; 'long-lasting' means lasting for a period of months or a season; and 'severe' means serious or significant disruption or harm to human life, natural and economic resources or other assets.[30] These are more or less consistent with the interpretation given to the same terms in relation to API.[31] Notably, the Committee on Disarmament

27 *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-A (2 October 1995) para 70.

28 MA Drumbl, 'Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development' (International Center for Transitional Justice, November 2009) 8. See also KJ Heller and JC Lawrence, 'The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute' (2007) 20 Georgetown International Environmental Law Review 61.

29 Brady and Re (n 1) 128.

30 UNGA 'Report of the Conference of the Committee on Disarmament' UNGAOR 31st Session Supp No 27 UN Doc A/31/27 (1976) vol I, 91–2. The military manuals of a number of countries adopt the same definitions. See, for example, United States Department of Defense, 'Law of War Manual' (June 2015, updated December 2016) s 6.10.2.

31 Gillett (n 1) 228–9; I Peterson, 'The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?'(2009) 22 Leiden Journal of International Law

determined the following environmental effects fall within these cumulative requirements: 'an upset in the ecological balance of a region'; 'changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms)'; 'changes in climate patterns'; 'changes in ocean currents'; 'changes in the state of the ozone layer'; and 'changes in the state of the ionosphere'[32] As determined by the IPCC, these are also the same impacts on the physical environment caused by climate change.[33]

Second, the Article subordinates environmental harm to national security interests through requiring the environmental damage to 'clearly be excessive in relation to the direct overall military advantage anticipated'. The use of the word 'clearly' ensures that criminal responsibility would only attach in cases where the excessiveness of the incidental damage was obvious. This is a significantly high bar. In the *Hostages* case before the Nuremberg Military Tribunals, for instance, the German General Rendulic was acquitted of the charge of wanton destruction on the grounds that although Rendulic may have erred in believing that there was military necessity for the widespread environmental destruction entailed by his use of a 'scorched earth' policy in the Norwegian province of Finnmark, he was not guilty of a criminal act because the General honestly believed that the policy was necessary in light of the military situation as he perceived it at the time.[34]

Third, there must be an 'attack' that intentionally causes the environmental harm. This last requirement would appear to prevent criminal liability for carbon costs resulting from maintaining a large military—like the exorbitant emission of CO_2 (or carbon-dioxide equivalent) by the US military's extensive institutional infrastructure and operations domestically and overseas.[35] Finally, the *ratione contextus* of the war crime requires a nexus between the act

331–2; *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva 1974–77* (Swiss Federal Political Department 1978) 268–9; M Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict' (1997) 22(1) Yale Journal of International Law 71.

32 'Report of the Conference of the Committee on Disarmament' (n 30) vol I, 92.

33 SI Seneviratne et al, 'Changes in Climate Extremes and their Impacts on the Natural Physical Environment' in CB Field et al (eds), *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Special Report of the Intergovernmental Panel on Climate Change* (CUP 2012) 109.

34 *Trials of War Criminals Before the Nuernberg Military Tribunals* (United States Government Printing Office 1950) vol XI, 1296.

35 O Belcher et al, 'Hidden carbon costs of the "everywhere war": Logistics, geopolitical ecology, and the carbon boot-print of the US military' (2020) 45(1) Transactions of the Institute of British Geographers 65.

resulting in climate change and an international armed conflict. This is particularly problematic given that the majority of conflicts occurring today are internal to a State, even if involving external State actors.[36]

It is hard to see any contribution to climate change meeting the requirements of Article 8(2)(b)(iv). In effect, the Article would require a mass attack on the environment that would be clearly unjustified by the anticipated military advantage. Such could be the case in attacks carried out with nuclear weapons.[37] But absent such egregious examples, prosecution under this provision as currently formulated appears unrealistic.

2 War Crimes That Directly Relate to Climate Polluters

Despite not expressly mentioning the environment, there are other crimes that could relate to the conduct of climate polluters and create opportunities for climate prosecutions. These crimes are implicated by the anthropocentric consequences of climate change. The most obvious examples of other crimes being implicated by climate change are forced displacement and starvation of civilians as a method of warfare. With regards to the former, the ICC Statute and the ICC's jurisprudence expressly criminalizes displacement, both for international armed conflicts (IACs) and non-international armed conflicts (NIACs).[38] Displacement occurs when the affected population flees from a certain area or country, believing they had no genuine choice but to leave because of the underlying act.[39] Several peace and security studies have cited climate change-induced conflict in the Middle East and Africa as a major driver of the surge of displacement over recent years.[40]

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36 ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Doc No 31IC/11/5.1.2, October 2011) 5–6. See also ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions' (n 21) 39.

37 See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (Dissenting Opinion of Judge Weeramantry) [1996] ICJ Rep 429.

38 Art 8(2)(b)(viii) and art 8(2)(e)(viii) ICC Statute (n 16). See also *Prosecutor v Alfred Yekatom and Patrice-Edouard Ngaïssona* (Decision on the Confirmation of Charges) ICC-01/14-01/18-403-Red-Corr (14 May 2020) para 94 ('The Chamber considers that article 8(2)(e)(viii) of the Statute is not limited to "[o]rdering the displacement of the civilian population" '); *Prosecutor v Bosco Ntaganda* (Decision on the Confirmation of Charges) ICC-01/04-02/06-309 (9 June 2014) para 64 (noting the same).

39 See *Prosecutor v Karadžić* (Judgment) IT-95-5/18-T (24 March 2016) para 488.

40 TF Homer-Dixon, *Environment, Scarcity, and Violence* (Princeton University Press 1999); R Reuveny, 'Ecomigration and violent conflict: case studies and public policy implications' (2008) 36 Human Ecology 1; R Reuveny, 'Climate change-induced migration and violent conflict' (2007) 26 Political Geography 656–73.

The narrative behind these studies tends to follow a similar path, claiming that climate change reduces the availability and effects the distribution of resources such as water, food and arable land, which in turn trigger violent conflict and, consequently, migration. In the *Bashir* case, attacks impacting on the victim group's means of survival, including natural resources, are charged as a means of displacing the population. Another vector for displacement, is through the impact certain climate change contributors, principally deforestation and mineral extractors, can have on displacing indigenous populations who rely on their natural habitat for their livelihood.[41]

In the same way, the crime of starvation is also intrinsically linked with climate change. Many peoples' food sources are derived from their local environment, including fruit, vegetables, cereals, animals and fish. Many people also source water from natural wells. The destruction of a population's natural habitat, such as through deforestation, can have deleterious effects on the population's ability to survive and nourish itself. As noted by the ICRC:

> The convergence of conflict and climate risks can increase needs and vulnerabilities – by exacerbating food and economic insecurity and health disparities, and by limiting access to services – when the capacity or will of governments and institutions to provide emergency support, and implement longer-term measures to strengthen resilience, is weakened … In circumstances where people struggle to feed themselves and survival seems dependent solely on the exploitation of natural resources, promoting respect for the environment and for a sustainable exploitation of resources may be an irrelevance. The capacity to change livelihoods and ways of life may also be very limited.[42]

41 Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (Inter-American Commission on Human Rights 2015); JL Koorndijk, 'Judgements of the Inter-American Court of Human Rights concerning indigenous and tribal land rights in Suriname: new approaches to stimulating full compliance' (2019) 23 International Journal of Human Rights 1615; UN Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples' (1 November 2017) UN Doc A/HRC/36/46.

42 Grayson (n 20) 18, see also 29 and 35; UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people' (27 February 2007) UN Doc A/HRC/4/32, paras 49–51; UN Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples' (n 41).

Altogether, climate change's impact on movement and access to resources will likely provide the most viable avenues for criminal responsibility. Even then, however, such conduct would only be prosecutable when linked with an armed conflict.

A *Climate Change as a Crime Against Humanity*

Crimes against humanity can be a useful tool for prosecuting climate change contributors, because, unlike war crimes, they do not require the existence of an armed conflict, or a nexus thereto. The enumerated crimes[43] that can amount to crimes against humanity, as detailed below, are also broader and less specific than war crimes, and permit prosecution for unenumerated crimes as long as they meet the requisite legal threshold. That said, prosecuting contributions to climate change as a crime against humanity poses other difficulties which, similar to war crimes, limit the types of cases that may be justiciable.

1 Climate Change and the Enumerated Acts

All the enumerated acts constituting crimes against humanity, as listed in Article 7 of the ICC Statute, relate to harms committed against humans (such as murder, extermination, or enslavement). Further, the residual clause of Article 7—which criminalizes 'other inhumane acts'—requires that any attack on the environment must endanger human health by causing 'great suffering, or serious injury to body or to mental or physical health' and must be of a 'similar character' to the enumerated acts in order to be recognized as a crime against humanity. Thus, unlike war crimes, there are no ecocentric crimes against humanity.[44]

Theoretically, certain contributions to climate change could result in the commission of one of the enumerated prohibited acts through harming

43 Under art 7 of the ICC Statute (n 16), these are: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

44 Brady and Re (n 1) 131.

humans. Like in the context of war crimes, the strongest link between climate change and one of the enumerated crimes, is the effect of climate change on forced migration. For instance, an Article 15 communication[45] currently pending before the ICC's Office of the Prosecutor (OTP) alleges that widespread and systematic large-scale land grabbing by the Cambodian ruling elite since 2000 by way of illegally seizing and re-allocating millions of hectares of valuable land has resulted in the forced displacement of over 60,000 victims, amounting to 'deportation or forcible transfer of the population'.[46]

Certain contributions to climate change can also result in the commission of 'inhumane acts'. For instance, commentators have suggested that the operation of an open-pit mine in the town of Cerro de Pasco, Peru arguably amounts to an 'other inhumane act'. The mine released toxic metal concentrations 100,000 times higher than normal into the town's surrounding lakes and rivers, resulting in lead, arsenic and mercury poisoning of the town's 70,000 inhabitants. Such poisoning predictably produces higher mortality rates and severe health and developmental problems, arguably meeting Article 7(1)(k)'s requirements of causing 'great suffering, or serious injury to body or to mental or physical health' and being of a similar character to the other enumerated acts, insofar that the poisoning has resulted in deaths and severe health problems. Altogether, at least theoretically, there appear to be less barriers in connecting the acts of climate polluters with the enumerated acts for crimes against humanity.

2 Meeting the Chapeau and Policy Requirements

The main legal difficulty in prosecuting contributions to climate change as a crime against humanity is in meeting the crime's other requirements. What distinguishes a crime against humanity from an ordinary crime is the requirement that it must have been committed in the context of a widespread or systematic attack directed against a civilian population.[47] This requirement, which constitutes the *chapeau* or contextual requirements of crimes against humanity, sets out the necessary context in which the acts of an accused must

45 Under art 15 of the ICC Statute (n 16), the Prosecutor may initiate investigations *proprio motu* based on the information submitted by reliable external actors (other UN organs, governmental and nongovernmental organizations).

46 Global Diligence, 'Executive Summary: Communication under Article 15 of the Rome Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia July 2002 to Present' (2014) <https://www.fidh.org/IMG/pdf/executive_summary-2.pdf> accessed 1 July 2020.

47 Art 7(1) ICC Statute (n 16).

be inscribed. While limiting, the *chapeau* requirements do not foreclose the possibility of prosecuting climate contributors.

First, an 'attack' does not necessarily entail the commission of a violent act. In *Kunarac*, an Appeals Chamber of the ICTY concluded that 'the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.'[48] Changes to the climate causing physical or mental harm to a civilian population, like in the Cerro de Pasco example discussed above, should suffice for these purposes.

Second, the requirement that the attack be widespread or systematic would limit, but not bar, prosecuting certain climate crimes. An attack is widespread, if it involves 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.'[49] A systematic attack requires 'organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources … there must exist some form of preconceived plan or policy.[50] In theory, both requirements could be met in circumstances where a State or company releases pollutants or toxins into the air or water in the knowledge that this will have a detrimental impact on the health of the local community; or, for example, in the organized destruction of the rainforest, such as in Brazil.

Third, that the attack be 'directed against a civilian population' does not necessarily mean that the subject intends or is motivated to cause harm to civilians. As noted by the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, 'crimes against humanity do not require that the … policy underlying them has to be driven by a purpose of harming a civilian population.'[51] Rather, it is sufficient that the individuals establishing

48 *Prosecutor v Kunarac et al* (Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) para 86; *Prosecutor v Blagojević* (Judgment) IT-02-60-T (17 January 2005) para 543; UN Human Rights Council, 'Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea' (7 February 2014) UN Doc A/HRC/25/CRP.1, para 1030.

49 *Prosecutor v Akayesu* (Judgment) ICTR–96–4–T (2 September 1998) para 580; *Prosecutor v Musema* (Judgment) ICTR–96–13–T (27 January 2000) para 204; *Prosecutor v William Sameoi Ruto et al* (Decision on the Confirmation of Charges) ICC-01/09-01/11-373 (4 February 2012) para 176.

50 *Prosecutor v Musema* (n 49) para 204. See also *Prosecutor v Blaškić* (Judgment) IT-95-14-T (3 March 2000) para 204; *Prosecutor v Dordević* (Judgment) IT-05-87/1-T (23 February 2011) paras 1262–380; *Prosecutor v Dario Kordić and Mario Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) paras 98 and 179; *Prosecutor v Katanga* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717 (14 October 2008) para 397.

51 UN Human Rights Council, 'Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea' (7 February 2014) UN Doc A/HRC/25/CRP.1, para 1135.

the organization's policy are aware of the direct causal relationship between the policy and the harm done.[52] One can see how damage resulting from oil exploitation by a company posing a threat to the livelihood of the people and the viability and health of the environment can meet this requirement.[53]

Finally, according to Article 7(2)(a) of the ICC Statute, this act must be pursuant to 'a State or organizational policy' to commit such an attack. The policy does not need to emanate from the State—non-State actors or private individuals who exercise de facto power can constitute the entity behind an organizational policy. It is also likely that corporations can qualify as an 'organization' under Article 7 given that most corporations have the institutional structure and capacity to qualify.[54] The other possibility is to try to show that the State was actively involved, encouraging the policy—as is often the case when multinational corporations operate through joint ventures with State-owned entities.

Overall, while the *chapeau* requirements certainly limit the types of climate cases that could be prosecuted, they do not bar them outright. And in many ways crimes against humanity provide a much more realistic avenue for prosecution than other international crimes.

B *Climate Change as Genocide*

At its core, the crime of genocide is intended to protect against efforts aimed at eradicating specific groups of people. It is therefore by definition intended to apply only to a very specific set of circumstances where the perpetrators undertake or aid acts specifically aimed at destroying those groups. The crime of genocide requires the commission of one of the underlying acts of genocide coupled with the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.[55] Theoretically, the commission of a single underlying act committed with the *dolus specialis* is sufficient to trigger responsibility for genocide. Unlike war crimes, genocide does not need to occur during

52 ibid.

53 See C Lambert, 'Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?' (2017) 30 Leiden Journal of International Law 707; P Fajardo Mendoza and EB Toledo, 'Communication: Situation in Ecuador' (2014) <https://chevroninecuador.org/assets/docs/2014-icc-complaint.pdf> accessed 1 July 2020.

54 *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) paras 90–3; G Werle and B Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a "State-like" Organization?' (2012) 10(5) Journal of International Criminal Justice 1151.

55 Art 6 ICC Statute (n 16).

war. And unlike crimes against humanity, genocide does not need to be part of a widespread or systematic attack.

Charging contributions to climate change as an act of genocide is certainly difficult, though not theoretically impossible. Climate polluters can cause several of the underlying acts of genocide. Significant pollution and the emission of toxins or the destruction of local ecosystems can clearly result in killing members of the group, or result in their serious bodily or mental harm. In addition, climate change can, in certain circumstances, amount to the deliberate infliction on members of the target group conditions of life calculated to bring about the group's physical destruction in whole or in part. For instance, the indictment against Omar al-Bashir concluded that there was sufficient evidence showing that forces under the former Sudanese President not only killed members of the target groups and forcibly displaced them from their lands, but also destroyed the groups' very means of survival through destroying food, wells and water pumping machines, shelter, crops and livestock, as well as any physical structures capable of sustaining life or commerce.[56] The Chamber reasoned that '[t]he aim was to ensure that those inhabitants not killed outright would be unable to survive without assistance' particularly '[g]iven Darfur's hostile desert environment and lack of infrastructure [making it] difficult to survive outside the communal setting.'[57]

The most significant challenge is meeting the crime's *dolus specialis*—demonstrating that the act was perpetrated with the specific intent to destroy one of the protected groups. But again, this is not impossible. In confirming al-Bashir's arrest warrant, the ICC Pre-Trial Chamber confirmed that:

> one of the reasonable conclusions that can be drawn is that the acts of contamination of water pumps and forcible transfer coupled by resettlement by members of other tribes, were committed in furtherance of the genocidal policy, and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups.[58]

56 *Situation in Darfur, the Sudan* (Public Redacted Version of the Prosecutor's Application under Article 58) ICC-02/05 (14 July 2008) para 174.

57 ibid para 175.

58 *Prosecutor v Omar Hassan Ahmad al Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09-94 (12 July 2010). See also *Situation in Darfur, the Sudan* (Public Redacted Version of the Prosecutor's Application under Article 58) (n 56) para 39.

In general, the circumstances where environmental crimes, including conduct contributing to climate change, are likely to qualify as genocide are those where the act is coupled with the commission of other acts of violence directed against and intending the destroy the group, like in the al-Bashir case. Those are likely to be exceedingly rare cases.

III Prospects for Reparations in Climate Change-Related Cases

Under Articles 25 and 28 of its Statute, the ICC, like all the other international criminal tribunals, recognizes individual criminal responsibility for crimes under its jurisdiction. Individual criminal responsibility for war crimes in particular has also been recognized as a rule of customary international law. Committing international crimes often requires contributions by a large number of people who are connected and organized, similar to the climate change-related crimes. ICL recognizes that even if the crimes are of a collective nature, it is the individuals who are criminally liable, including by directly committing the act, contributing through an organizational framework, or by omission where they failed to prevent or sanction the committed crime. Thus, distance from the criminal act does not exclude individual criminal responsibility. To the contrary, the highest ranking civilian (including corporate directors) or military officer can be criminally responsible, even if they never had any physical contact with the crime or a victim. This can be applicable in the context of climate change polluters.

Corollary to the principle of individual criminal responsibility, the ICC focuses on the conduct of natural persons—authors of the crime who can act by being part of a large and organized structure, as State agents or as private actors working for armed groups or corporations.[59] Unlike other international criminal tribunals, the ICC recognizes a victim's right to reparations to help remedy the damage or harm caused by a criminal act.[60] To date, the Court's jurisprudence on reparations is limited—the Court has only issued four reparations orders following the individual convictions of Lubanga, Kenyatta, al-Mahdi and Ntaganda.[61] Nonetheless, the Court's jurisprudence on reparations

59 Art 25 ICC Statute (n 16).

60 Art 75 ICC Statute (n 16).

61 See *Prosecutor v Thomas Lubanga Dyilo* (Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable) ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017); *Prosecutor v Katanga* (Reparations Order) ICC-01/04-01/07-3728-tENG (24 March 2017); *Prosecutor v Ahmad al Faqi al Mahdi* (Reparations Order) ICC-01/

and the ICC's legal texts[62] suggest that, conceptually, individuals responsible for climate change-related crimes would bear an obligation to make reparations if convicted.

Reparations in the context of climate change, however, require some specific considerations, which remain purely theoretical for the moment. As compared to traditional ICC crimes, climate change is a global phenomenon that is not bound to a singular geographical space. It is a crime of a collective nature from the perspective of both perpetrator and victim. From the perpetrator's standpoint, climate change is of the most complex character and can create widespread, long-term and severe harm to both humans and the environment. From the victims' viewpoint, climate change has the most negative consequences on victims, affecting them individually and collectively.

As a criminological issue, even though most of the reports identify corporations as major carbon emissions contributors,[63] it is important to understand that corporations behave as they do with the consent of, or upon request made by, States which are unwilling to regulate or mitigate the corporate pollutions. This relationship between States and 'dirty industries', namely those producing fossil fuels, could, under certain circumstances, potentially create the most organized transnational collective crime that could have disastrous consequences on the environment essential for human survival.

This raises two main issues: first, who should bear the responsibility of reparations, and second, who or what should be entitled to reparations before the ICC?

A *Who Should be Responsible for Reparations?*

In the event of a climate change-related conviction, a person is very unlikely to act in their personal capacity, rather they act as part of the bigger structure, either State or non-State (such as corporations) and on their behalf. In this context, should that State or corporation be targeted by the reparations order and do they have an obligation to contribute to reparations?

12-01/15-236 (17 August 2017); *Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659 (8 March 2021).

62 ICC Statute (n 16); ICC, *Rules of Procedure and Evidence* (2nd edn, ICC 2013) (RPE); ICC (Resolution of the Assembly of States Parties) 'Regulations of the Trust Fund for Victims' (3 December 2005) ICC-ASP/4/Res.3 (RTFV).

63 R Heede, 'Carbon Majors: Accounting for carbon and methane emissions 1854–2010. Methods and Results Report' (Climate Mitigation Services, 7 April 2014); P Griffin, 'The Carbon Majors Database: CDP Carbon Majors Report 2017' (CDP, July 2017).

Under the ICC Statute, a convicted person can bear criminal sanction.[64] While the ICC Statute itself is somewhat vague about the responsibility for reparations of the convicted person in Article 75, the ICC Rules of Procedure and Evidence (RPE) are explicit: the obligation to make reparations lies with the convicted person.[65] The obligation of the convicted person to repair was also confirmed by the Appeals Chamber in the *Lubanga* case.[66]

It must also be noted that, under the ICC Statute:

> [a]n award for reparations is not punitive in nature. It is clearly not a fine and not listed under Article 77 as a potential penalty and thus, does not appear under Part 7 of the Statute, but can be found under Part 6. The placement within the Statute already demonstrates the nature of a reparations award, distinct from a penalty.[67]

The ICC Statute separates the issue of reparations from the issue of penalties, thus clearly expressing that a reparations award is not punitive in nature.[68] Procedurally, this entails two phases: first, the Chamber adopts a sentence against the convicted person; second, the Chamber issues a reparations order for the convicted person to redress the harm. By separating the sentencing and reparations regimes, the reparations framework offers an interesting opportunity to address the harm caused by climate change by various actors.

Notably, Rule 98(1) of the RPE sets forth that '[i]ndividual awards for reparations shall be made directly against a convicted person.' However, according to Rule 94(2) of RPE, the 'Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges' raised by victims. A similar provision exits in Rule 95(1). Both

64 Art 76 ICC Statute (n 16).

65 Rule 98 ICC RPE (n 62).

66 *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2) ICC-01/04-01/06-3129 (3 March 2015) para 99.

67 *Prosecutor v Thomas Lubanga Dyilo* (Observations of the Trust Fund for Victims on the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations') ICC-01/04-01/06-3009 (8 April 2013) (TFV Observations) para 105. See also C McCarthy, 'Victim Redress and International Criminal Justice – Competing Paradigms, or Compatible Forms of Justice?' (2012) 19 Journal of International Criminal Justice 351, 361.

68 TFV Observations (n 67) para 105.

provisions make reference to the 'person' without specifying their natural or legal character.

Additionally, according to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), terms in a treaty should be examined 'in the light of the object and purpose' of the Convention, which allows a judge some freedom of interpretation. If the convicted person is found guilty for climate change-related crimes committed using a corporate entity as the instrumentality, the elements of Rules 94(2) and 95(1) could be interpreted to include other persons who were not necessarily convicted, including natural and juridical persons. This assumption seems to be legitimate in the absence of any case law regarding the interpretation of the notion of 'person' in this context.

The ICC reparations framework has the potential to make both States and corporations contribute to reparations related to climate change cases. States can contribute to the Trust Fund for Victims (TFV), which is the ICC entity tasked with the mandate to assist victims independently from the conviction.[69] Through this system, States contribute to the reparations system in general, which ultimately can be used to redress the harm caused by climate change.

In addition, the TFV has also a reparations mandate to implement the Chambers' reparations orders (which puts an end to the reparations proceedings). Under the oversight of the judicial body, the TFV is tasked to dispatch reparations to victims under the modalities set up by judges in the reparations order. While the TFV recognizes that reparations must be ordered against a convicted person, it is not opposed to subrogation.[70] Consequently, if a corporate director were to be convicted for a climate change-related crime, there are no obstacles for the judges to interpret the Rules and to impose the obligation of reparations on the corporation itself. Indeed, it would seem that:

> despite the absence of international enforcement mechanisms, there appears to be a tendency on the part of international law to consider that non-state entities that breach obligations deriving from international human rights law or international humanitarian law are indeed under an obligation to make reparation.[71]

69 See also *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman* (Prosecution's Response to 'Requête et observations sur les réparations en vertu de l'Article 75-1' (ICC-02/05-01/20-98)) ICC-02/05-01/20-102 (23 July 2020) para 4.

70 TFV Observations (n 67) para 108.

71 E Mongelard, 'Corporate civil liability for violations of international humanitarian law' (2006) 88 International Review of the Red Cross 665, 673.

Therefore, theoretically at least, corporations could be called to contribute to reparations insofar as their directors acted for them and on their behalf.

For example, reparations by corporations for their climate change-related crimes are possible when the impact of tons of carbon dioxide emissions can be measured by scientific means, such as carbon offsetting. The system of carbon offsetting allocates a share of responsibility to actors for their contributions to climate change. Such contributions are measured and certified by carbon credits.[72] Utilizing the carbon offsetting methodology could be used as a tool in proceedings before the ICC to ensure that actors are held proportionally responsible for climate change-related crimes under the ICC Statute.

This exemplifies a critical component of reparations for climate change-related crimes: an intersectional approach to the litigation and reparations: environmental and criminal. This approach would be in line with the victim-oriented perspective from the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[73] Even in cases where the perpetrator is not identified or convicted, the Principles allow for a broad scope of victimhood which is independent of the convictions.[74] Principle 15 notes that '[i]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.'[75] One author points out that:

> While the Principles and Guidelines are drawn up on the basis of State responsibility, the issue of responsibility of non-State actors was also raised in the discussions and negotiations … also with regard to business enterprises exercising economic power. It was generally felt that non-State actors are to be held responsible for their policies and

72 CM Anderson, CB Field and KJ Mach, 'Forest offsets partner climate-change mitigation with conservation' (2017) 15(7) Frontiers in Ecology and the Environment 359.

73 UNGA Res 60/147 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) UN Doc A/RES/60/147.

74 L Moffett, 'Reparations at the ICC: Can it Really Serve as a Model?' (*Justiceinfo.net*, 19 July 2019) <https://www.justiceinfo.net/en/41949-reparations-at-the-icc-can-it-really-serve-as-a-model.html> accessed 8 March 2021.

75 'Basic Principles and Guidelines on the Right to a Remedy and Reparation' (n 73).

> practices, allowing victims to seek redress and reparation on the basis of legal liability and human solidarity, and not on the basis of State responsibility.[76]

Therefore, whenever a corporation is found liable, including indirectly through its corporate directors, it should bear the obligation of making reparations.

B *Who Should Be Entitled to Reparations?*

Climate change-related crimes cause harm to human beings and the environment. In the context of ICC proceedings, victims are defined by Rule 85(a) of the Court's Rules of Procedure and Evidence[77] as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. The Rule entails the need to establish the causal connection between the crime committed by the convicted person and the harm suffered by the victim in order to define the scope of victimhood and limit the number of persons who can participate in the proceedings and potentially benefit from the awarded reparations.[78]

The conviction decision, like in all other cases, sets the temporal and territorial parameters that help identify the eligible victims for reparations. The right to reparations belongs to natural persons and victims can find satisfaction in it, particularly in cases where entire communities are affected by the harm. Thus, the Court can award reparations individually, on a collective basis, or both depending on the extent of the damage.[79] In the absence of an award of reparations[80] the Trust Fund for Victims could issue reparations to victims or beneficiary groups as identified by the Secretariat of the Trust Fund and approved by its Board of Directors.[81]

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76 T van Boven, 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (United Nations Audiovisual Library of International Law 2010) 3.

77 Rule 85 ICC RPE (n 62).

78 N Milaninia, 'Conceptualizing Victimization at the International Criminal Court: Understanding the Causal Relationship between Crime and Harm' (2019) 50(2) Columbia Human Rights Law Review 116, 127.

79 Rule 97(1) ICC RPE (n 62).

80 Regulation 47 RTFV (n 62). See also *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2) ICC-01/04-01/06-3129 (3 March 2015) para 108.

81 Regulation 60 RTFV (n 62).

However, collective reparations should not be considered a synonym for collective victims.[82] In her dissenting opinion in the *Lubanga* case, Judge Luz del Carmen Ibáñez Carranza observed that 'a community becomes a collective victim whenever the collective rights that such community enjoys are harmed because of the commission of the atrocious crime.'[83] The gravity and continuing nature of climate change affects communities around the world insofar as it impacts their ability to develop, thereby preventing them from enjoying 'the lands, territories and resources which they have traditionally owned, occupied, or otherwise used or acquired.[84]

Following this reasoning, the environment cannot be identified as a 'victim' under the ICC legal regime because it does not enjoy a legal personality and has no rights attached to it. In addition, the ICC Statute contains no specific provisions related to reparations for environmental damage.[85] Nevertheless, the ICC Statute offers some prospects for reparations for environmental harm because Article 75(2) of the ICC Statute stipulates that '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.' Thus, the Court can order reparations for environment-related crimes whenever this seems appropriate. Theoretically at least, the Court would have the power to issue reparations for harm to the environment through a collective award as long as there is a causal relationship between the convicted person and the harm caused to the environment.

Reparations can take different forms,[86] from compensation and rehabilitation to restitution *in integrum* according to the circumstances of the case.[87] Taking into account the overall environmental impact, reparations should be proportional to the gravity of the crime, the seriousness of the human rights

82 *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') (Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza) ICC-01/04-01/06-3466-AnxII, para 138.

83 ibid.

84 United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) (adopted by 144 votes in favour, 4 against and 11 abstentions) art 26.

85 Art 75 of the ICC Statute (n 16) omits any reference to the environment.

86 See also *Prosecutor v Katanga* (Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute') ICC-01/04-01/07-3778-Red (9 March 2018).

87 *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red (18 July 2019) (*Lubanga* Reparations Appeal Judgment).

violations and the degree of responsibility of the perpetrator.[88] Collective reparations[89] can provide appropriate compensation for harm done to the environment and allow for measures to protect against the rise of sea levels, to reconstruct forests, or to reinforce biodiversity or sustainable systems of land management. Collective reparations can thus directly concern the environment because they can be expressed beyond monetary compensation for the damage caused to victims. They can also compensate for the damage caused to nature by obliging rehabilitation of the victims' environment, and removal or limitation of the harmful consequences of economic activities on the victims' environment.[90]

IV Conclusion

Climate change is destroying the global ecosystem and causing harm to mankind. By its harms alone, the destruction caused by climate change to our environment, to indigenous communities, and to people in general is on par with the protective interests that underlie all ICL crimes, such as to warrant international attention and prosecutorial action. This chapter has demonstrated that, in theory, climate change contributions can, under specific circumstances, be classified as war crimes, crimes against humanity or as acts of genocide. While prosecuting natural persons before the ICC for their climate change-related crimes is not implausible; it will, however, be extremely difficult given the legal elements required for each crime and the limited and stretched resources of the ICC and other international criminal bodies at this moment.

Even if individuals were prosecuted, those individuals could never answer for all climate change. This would be legally impossible and morally unacceptable due to the complex webs of actors contributing to climate change. However, natural persons could theoretically be held liable for their contribution to climate change as committed directly or through legal entities on whose behalf they acted. Should this be the case one day, individuals as well as legal entities such as extractive industries and the other major polluters, could be ordered to contribute to various modes of reparation, even in the absence of the ICC's jurisdiction over legal entities. Indeed, due to the separation of the

88 Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza (n 82) para 29.

89 *Lubanga* Reparations Appeal Judgment (n 87) para 330.

90 C Oliveira, A Pomade and B Steinmetz, 'La réparation de l'atteinte au milieu naturel' in K Martin-Chenut and R de Quenaudon (eds), *Responsabilité sociétale des entreprises, la RSE saisie par le droit: perspectives internes et internationales* (Pedone 2016).

sentencing phase from the reparations phase under the ICC Statute, persons, legal or natural, could be, theoretically, required to repair the harm caused by the international crime for which a natural person was convicted. While the environment itself cannot be identified as victim before the ICC, it can, nevertheless, benefit from the ICC reparations regime as a form of reparation to the legally identified victims.

While the idea of prosecuting climate change-related crimes before the ICC could arguably be appealing, the length of ICC proceedings—which often take years—means that prosecutions may not be an effective response against or even mitigate the rapid and irreversible environmental damage caused by climate change. However, the possibility of prosecuting such cases at the only international court with global jurisdiction responsible for prosecuting mass atrocities could potentially have a dissuasive and preventive effect rather than just punitive. Ultimately, regardless of the jurisdiction, urgent action is needed to preserve the global ecosystem and humankind. ICL is only one part of a larger legal strategy that needs to be undertaken.

APPENDIX 1

Table of Cases

1 International and 'Hybrid' Courts, Tribunals and Other Monitoring Bodies

Arbitral Tribunals

Iron Rhine Railway (*Belgium v Netherlands*) (2005) 27 RIAA 35

Lake Lanoux (*France v Spain*) (1957) 24 I.LR 101

Trail Smelter (*United States of America v Canada*) (1941) 3 RIAA 1905

Extraordinary Chambers in the Courts of Cambodia

Prosecutor v Kaing (Judgment) 001/18-07-2007/ECCC/TC (26 July 2010)

International Centre for the Settlement of Investment Disputes

Antin Infrastructure Services Luxembourg SARL and Antin Energia Termosolar BV v The Kingdom of Spain, ICSID Case No ARB/13/31, Award (15 June 2018)

Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italy, ICSID Case No ARB/14/3, Award (27 December 2016)

Burlington Resources Inc v Republic of Ecuador, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017)

Cortec Mining Kenya Limited, Cortec Limited and Stirling Capital v Kenya, ICSID Case No ARB/15/29, Award (22 October 2018)

Emilio Agustín Maffezini v The Kingdom of Spain, ICSID Case No ARB/97/7, Award (13 November 2000)

Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania, ICSID Case No ARB/05/20, Award (11 December 2013)

Masdar Solar & Wind Cooperatief UA v The Kingdom of Spain, ICSID Case No ARB/14/1, Award (16 May 2018)

Perenco Ecuador Limited v Republic of Ecuador, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015)

Perenco Ecuador Limited v Republic of Ecuador, ICSID Case No ARB/08/6, Award (27 September 2019)

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1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights)

European Union

1957 Treaty on the Functioning of the European Union, adopted 25 March 1957, entered into force 1 January 1958

1992 Treaty on the European Union, adopted 7 February 1992, entered into force 1 November 1993

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2003 Directive 2003/87/EC of the European Parliament and of the Council, 13 October 2003

2006 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008

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2009 Directive 2009/14/EC of the European Parliament and of the Council, 11 March 2009

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1958 Migration Act, 1958

1999 Environment Protection and Biodiversity Conservation Act, 1999

2001 Australian Securities and Investments Commission Act, 2001

Corporations Act, 2001

2007 National Greenhouse and Energy Reporting Act, 2007

2009 Carbon Pollution Reduction Scheme Bill, 2009

2011 Clean Energy Act 2011

2013 Public Governance, Performance and Accountability Act, 2013

2017 National Energy Guarantee, 2017
2004 Australian Capital Territory: Human Rights Act, 2004
2019 Queensland: Human Rights Act, 2019
2007 South Australia: Climate Change and Greenhouse Emissions Reduction Act, 2007
2008 Tasmania: Climate Change Act, 2008
2006 Victoria: Charter of Human Rights and Responsibilities Act, 2006
2017 Victoria: Climate Change Act, 2017

Brazil

1965 Law no 4,771: The 1965 Forest Code, 15 September 1985
1981 Act no 6,938: National Environmental Policy, 27 April 1981
1985 Law no 7,347: Public Civil Action Act, 24 July 1985
1988 Brazilian Constitution, 5 November 1988
1994 Legislative Decree no 01/1994
1998 Executive Decree no 2,652/1998
2002 Legislative Decree no 144/2002
2005 Executive Decree no 5,445/2005
2009 Law no 12.114: National Climate Change Fund, 2009
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2012 Act no 12,651: New Forest Code, 25 May 2012
2016 Legislative Decree no 140/2016
2017 Executive Decree no 9,073/2017
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Ordinance no 675, 13 August 2018
2019 Provisional Measure no 910: Act on Land Regularization, 11 December, 2019

China

2007 National Program on Climate Change Actions, 2007
2008 Energy Conservation Law, 1 April 2008
2009 Renewable Energy Promotion Law, 26 December 2009
2012 Civil Procedure Law, 2012
2014 Environmental Protection Law, 2014
2015 Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations, 6 January 2015

	Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts, 3 June 2015
	Reform Program on Eco-Environmental Damages Compensation Litigation, 12 December 2015
2017	Administrative Procedure law 2017
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1807	French Commercial Code, adopted in 1807, last revision 2000
1810	French Penal Code, adopted in 1810; last revision 1992, entered into force 1994
1958	French Constitution, signed 28 September 1958, entered into force 4 October 1958
2016	Biodiversity Act, 8 August 2016

India

2008	National Action Plan on Climate Change, 30 June 2008

Ireland

1937	Constitution of Ireland, ratified 1 July 1937, entered into force 29 December 1937
2017	Ireland's National Mitigation Plan, 18 July 2017

Russian Federation

1993 Constitution of the Russian Federation, 1993

1994 Civil Code of the RF (Part one), N 51-FZ, 30 November 1994

1995 Federal law 'On specially protected natural territories', N 33-FZ, 14 March 1995

Federal Law 'On international treaties of the RF', No 101-FZ, 15 July 1995

Federal law 'On environmental expertise', N 174-FZ 23 November 1995

1998 Federal law 'On Hydrometeorological Service', N 113-FZ, 19 July 1998

1999 Federal law 'On protection of atmospheric air', N 96-FZ, 4 May 1999

2002 Federal law 'On environmental protection', N 7-FZ, 10 January 2002

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2013 Resolution of the Government of the RF, N 477, 6 June 2013

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2020 Draft Strategy for the long-term development of the RF with a low level of greenhouse gas emissions until 2050, 23 March 2020

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1996 South African Constitution 1996

1998 National Water Act 36, 20 August 1998

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2000 Promotion of Administrative Justice Act 3, 3 January 2000

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2004 National Environmental Management: Air Quality Act 39, 2004

2006 Electricity Regulation Act 4, 1 August 2006

2011 Integrated Resource Plan for Electricity: 2010–2030, 2011

2012 National Development Plan 2030, 2012

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2016 Integrated Energy Plan, 2016

2018 Climate Change Bill, introduced 2018

2019 Carbon Tax Act 15 of, 1 June 2019

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Kenya

2003 National Environmental Impact Assessment and Audit Regulations, 2003

2016 The Climate Change Act, 2016

Nigeria

1992 Environmental Impact Assessment Act of Nigeria, 1992

1999 Constitution of Nigeria, 29 May 1999

Pakistan

1973 Constitution of Pakistan, 14 August 1973

2012 National Climate Change Policy, September 2012

2012 Framework for the Implementation of Climate Change Policy, November 2013

Peru

1993 Constitution of Peru, 29 December 1993

Uganda

2015 Uganda National Climate Change Policy, 2015

2019 National Environment Act, 2019

United Kingdom

1986 Public Order Act, 19 November 1986

1989 Electricity Act, 27 July 1989

1990 Town and Country Planning Act, 24 May 1990

1997 Town and Country Planning (Scotland) Act, 27 February 1997

1998 Scotland Act, 19 November 1998

2000 Finance Act, 28 July 2000

2004 Planning and Compulsory Purchase Act, 13 May 2004

Energy Act, 22 July 2004

2008 Climate Change Act, 26 November 2008

Planning Act, 26 November 2008

2018 European Union (Withdrawal) Act, 26 June 2018

2019 Climate Change Act 2008 (2050 Target Amendment) Order 2019, No 1056, 27 June 2019.

2020 Environment Bill 2019–21, Introduced 30 January 2020

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1787 US Constitution, 17 September 1787

1921 Martin Act, NY Gen Bus Law Article 23-A, 7 May 1921

1946 Administrative Procedure Act, Public Law 79–404, 11 June 1946

1963 Clean Air Act of 1963, Public Law 88–206, 17 December 1963

1967 Massachusetts Consumer Protection Act, Mass Gen Laws Chap 93A, 1967

1969 National Environmental Policy Act of 1969, Public Law 91–190, 1 January 1970

1970 California Environmental Quality Act of 1970, Cal Pub Res Code §§ 21000-21177, 1970

1972 Clean Water Act of 1972, Public Law 92-500, 18 October 1972

1973 Endangered Species Act of 1973, Public Law 93-205, 27 December 1973

1976 1976 Resource Conservation and Recovery Act, Public Law 94-580, 21 October 1976

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