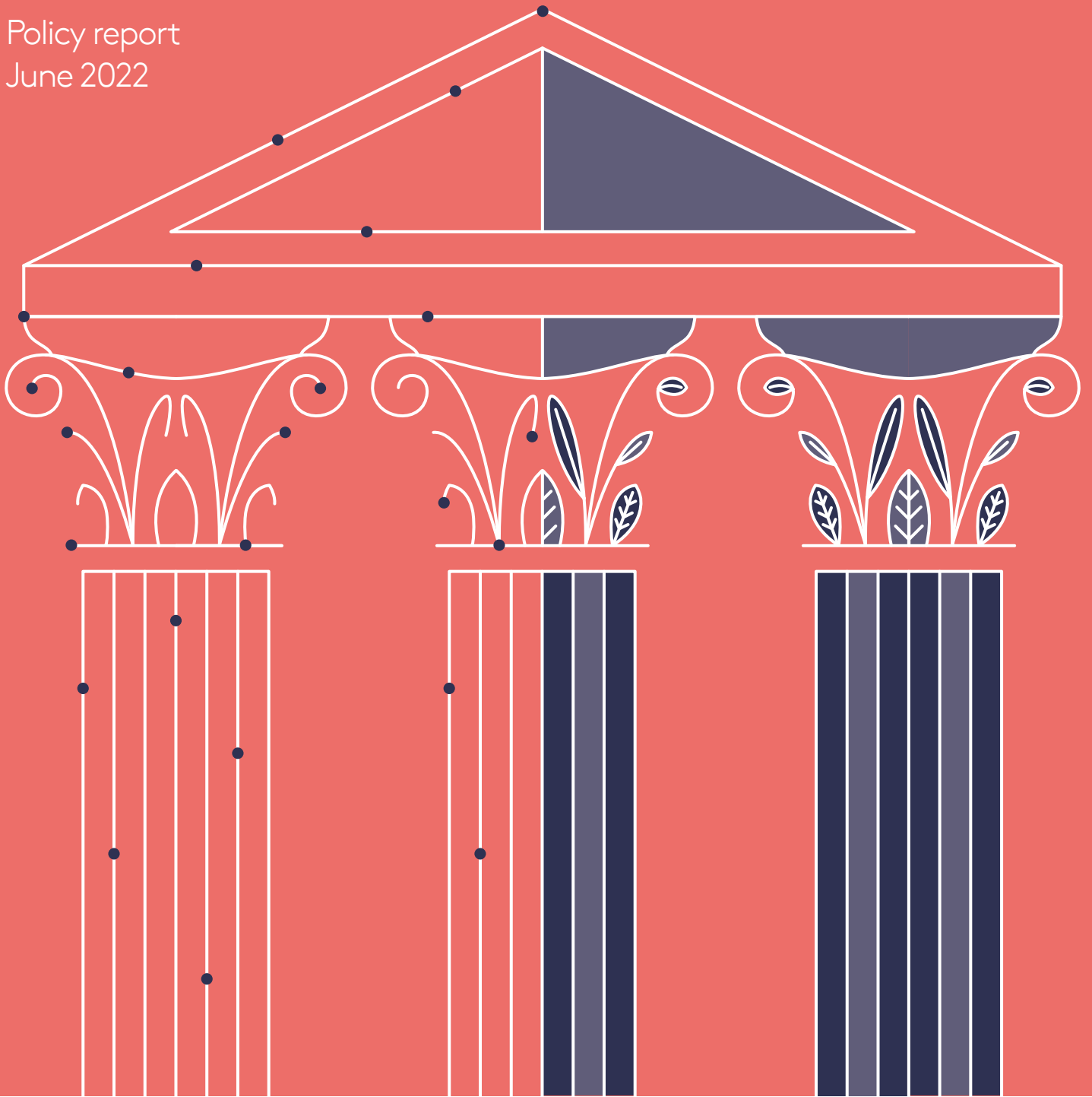


# Global trends in climate change litigation: 2022 snapshot

Joana Setzer and Catherine Higham

Policy report  
June 2022



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## Key messages

- Climate change litigation continues to grow in importance year-on-year as a way of either advancing or delaying effective action on climate change. The role of litigation in affecting “the outcome and ambition of climate governance” was recognised by the Intergovernmental Panel on Climate Change Working Group III in 2022, in a document approved by representatives of every member state.
- Globally, the cumulative number of climate change-related litigation cases has more than doubled since 2015. Just over 800 cases were filed between 1986 and 2014, and over 1,200 cases have been filed in the last eight years, bringing the total in the databases to 2,002. Roughly one-quarter of these were filed between 2020 and 2022.
- Eighty-eight cases from the Global South have now been identified and more cases continue to be filed there at a relatively steady rate.
- Climate litigation has become an instrument used to enforce or enhance climate commitments made by governments, with 73 ‘framework’ cases challenging governments’ overall responses to climate change. Of the eight framework cases where decisions have been issued by the country’s highest court, six have had favourable outcomes for climate action.
- Further cases have been brought against the Carbon Majors and other fossil fuel companies, especially outside the United States, in the last 12 months. Cases against corporate actors are also increasingly targeting the food and agriculture, transport, plastics and finance sectors.
- The number of cases with strategic ambition continues to rise. These are cases where the claimants’ motives go beyond the concerns of the individual litigant and aim to bring about some broader societal shift – including advancing climate policies, creating public awareness, or changing the behaviour of government or industry actors.
- Not all strategic litigation is aligned with climate goals. There are many recorded cases in which litigants challenge the introduction of regulations or policies that would lead to greenhouse gas emissions reductions or other ‘positive’ climate outcomes. However, not all non-aligned strategic cases are motivated by an intention to prevent climate action.
- Recent litigation has commonalities with some of the most important issues highlighted by the international community at COP26, including the need to: increase ambition and action from countries; phase down the use of all fossil fuels across the energy sector; emphasise the importance of human rights and collaboration across sectors and society to deliver effective climate action and a just transition; and use finance as a lever for systemic change.
- Five areas to watch in the coming year are: cases involving personal responsibility; cases challenging commitments that over-rely on greenhouse gas removals or ‘negative emissions’ technologies; cases focused on short-lived climate pollutants; cases explicitly concerned with the climate and biodiversity nexus; and strategies exploring legal recourse for the ‘loss and damage’ resulting from climate change.

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# Summary

This report reviews key global developments in climate change litigation over the period May 2021 to May 2022. The primary source for the report is the [Climate Change Laws of the World \(CCLW\)](#) database, maintained by the Grantham Research Institute on Climate Change and the Environment, which includes cases filed before courts in 43 countries and 15 international or regional courts or tribunals. This data has been supplemented by the [United States Climate Litigation Database](#), maintained by the Sabin Center for Climate Change Law, to provide aggregated global figures.

## Overview of observations and trends

**While the overwhelming majority of cases identified are from the Global North, the number of climate litigation cases in the Global South has continued to grow.** There are now at least 88 cases in the Global South<sup>1</sup>: 47 in Latin America and the Caribbean, 28 in Asia Pacific, and 13 cases in Africa.

**Most cases have been brought against governments (national and subnational),** typically by companies, non-governmental organisations (NGOs) and individuals. In this year's study period, more than 70% of all cases were brought against governments, and 70% were filed by NGOs, individuals, or both acting together. Outside the US, NGOs and individuals represent almost 90% of the claimants, whereas in the US, governments, companies and trade associations make up a higher proportion of claimants.

**The databases contained 2,002 ongoing or concluded cases of climate change litigation from around the world, as of May 2022.** Of these, 1,426 were filed before courts in the United States, while the remaining 576 were filed before courts in 43 other countries and 15 international or regional courts and tribunals (including the courts of the European Union). The calendar year 2021 saw the highest annual number of recorded cases outside the US. Cases were identified for the first time in Italy, Denmark and Papua New Guinea.

**Cases against the Carbon Majors and other companies involved in the extraction of fossil fuels or the provision of fossil energy have continued to proliferate,** now more significantly outside of the US. Cases are also being filed against a more diverse range of corporate actors. In the calendar year 2021, while 16 of the 38 cases against corporate defendants were filed against fossil fuel companies, more than half were filed against defendants in other sectors, with food and agriculture, transport, plastics and finance all being targeted in multiple cases.

**The number of cases filed with strategic ambition has continued to rise,** suggesting that climate litigation has firmly established itself as an activist strategy across jurisdictions.

**By analysing the type of behaviour that a case seeks to discourage or incentivise, we have created a typology of strategies** consisting of eight types of climate-aligned strategies and four types of non-climate-aligned strategies which can be used alone or combined. Applying the typology of strategies to strategic litigation outside the US mounted since the Paris Agreement, we identify 230 climate-aligned cases and 14 non-climate aligned cases – described below.

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<sup>1</sup> The distinction between the 'Global South' and 'Global North', terms favoured by many scholars and policymakers, is based on economic inequalities, but crucially for this report it must be noted that the 'Global South' is not a homogenous group of countries, and that legal development and legal capacity vary by country.

### *Climate-aligned cases include:*

- 117 cases seeking to ‘enforce climate standards’, brought against governments or companies. These cases are challenging sectoral policies, decisions around actions, multiple permits or individual projects, as well as specific aspects of companies’ supply chains.
- 65 ‘framework’ cases against governments (national and subnational) concerning the design and overall ambition of their response to climate change and/or the adequacy of the implementation of a policy response. (In addition we have identified 8 such cases in the US, bringing the total global number to 73 cases.)
- A smaller number of cases that use ‘climate-washing’ (16 cases), ‘corporate framework’ (12 cases), ‘compensation’ (9 cases), ‘personal responsibility’ (4 cases), ‘public finance’ (5 cases) and ‘failure to adapt’ (3 cases) as primary strategies.

### *Non-climate-aligned cases:*

- These have been mostly brought to challenge the ‘regulatory powers’ of national and subnational governments (5 cases) and to claim compensation for ‘stranded assets’ through Investor-State Dispute Settlement (ISDS) proceedings (4 cases).
- There is a greater degree of complexity in identifying cases filed against individuals (‘SLAPP’ cases) and claims that challenge the way in which climate action is carried out or its impact on the enjoyment of human rights (‘just transition’ litigation).

A quantitative review of the outcomes of all cases in the CCLW database where a relevant procedural decision or decision on the merits had been rendered found that **54% of cases (245) had outcomes favourable to climate change action**. The dismissal of 11 cases filed against subnational governments in Germany partially accounts for the reduction in favourable outcomes compared with our 2021 report. However, a strict focus on the direct outcomes of cases only tells part of the story of the influence of litigation on climate governance. Even cases that never make it to a full hearing may have an impact on decision-making processes.

Within the legal community it is possible to observe a growing effort to identify the legal interventions that can have the highest impact on the systems that drive climate change (‘systemic lawyering’), together with a clearer understanding that impactful litigation should empower communities (‘movement lawyering’). There is also a recognition that lawyers and judges have a role to meaningfully contribute to climate action (‘climate conscious lawyering’).

### **Trends in focus**

There are several commonalities between recent litigation and some of the most important issues highlighted by the international community. We connect the latest trends in climate litigation to key elements of the text of the Glasgow Climate Pact, adopted at COP26 in 2021.

#### **Domestic accountability for climate targets**

- Climate litigation has become an instrument used to enforce or enhance climate commitments made by governments. We have identified 73 ‘framework’ cases to date which challenge governments’ overall responses to climate change (65 outside the US and 8 in the US), 23 of which were filed against subnational governments.
- The majority of these cases have been filed in the Global North and focus on the adequacy of the design or overall ambition of a government’s policy response to climate change. A small minority of cases concern the implementation of existing climate protection measures.

- Of the 8 cases where decisions have been issued by the country's highest court, 6 have had favourable outcomes for climate action. Some of these cases have already led to real-world change, such as the Dutch Cabinet restricting the operations of coal power stations.

### Accountability for fossil fuel expansion

- Climate litigation cases have played an important role in the movement towards the phase-out of fossil fuels. Cases integrate arguments about governmental support for fossil fuel use – whether through policies, permits or subsidies – with arguments about human and constitutional rights. These cases take the arguments and standards developed in the 'framework' cases against governments and apply them at a more operational level.
- Such cases are becoming more prevalent in the Global South, where litigants are mounting large-scale challenges to policies that would involve the development of untapped fossil fuel reserves and 'lock in' development pathways dependent on fossil fuels.
- By challenging a sectoral-level procurement policy rather than focusing on individual projects, the litigants are demonstrating an increased sense of scale and urgency that may come to characterise the next generation of fossil fuel-focused cases.

### The complex connection between human rights and climate change litigation

- Together with a growing international recognition of the close connection between human rights and climate change, the use of human rights law and remedies to address concerns related to climate change continues to intensify and become more complex.
- While initially human rights offered strong grounds for cases against states, one area in which rights-based climate litigation is playing an important role is in litigation against companies, particularly in light of the development of standards for corporate human rights due diligence.
- The prediction that the decision in *Milieudefensie et al. v. Royal Dutch Shell plc.* would result in more rights-based strategic cases brought against companies is slowly materialising.
- The development of framework litigation against governments and more operational or project-based cases deploying constitutional and human rights narratives can also be clearly seen in developments before the European Court of Human Rights. There are now three cases pending before the court.

### Private and public financial institutions on the spot

- Several new and ongoing cases seek to clarify the legal obligations of both public and private financial institutions for their 'portfolio emissions' as a means to influence broader understanding of and approaches to climate-related financial risks within the global financial system.
- Recently filed complaints confirm a shift in emphasis from cases concerned primarily with the disclosure of climate-related information to cases focused on questions about what prudent financial management means in the context of the transition to a low-carbon economy.

### Climate-washing litigation: closing the credibility gap

- Climate-related greenwashing litigation or 'climate-washing' litigation is gaining pace, with the aim of holding companies or states to account for various forms of climate misinformation before domestic courts and other bodies.

## Future trends

Climate change litigation continues to evolve rapidly, and we expect that case numbers will carry on growing. We also expect the range of claimants and defendants to continue to diversify, reflecting an increased understanding of the role that multiple actors play in the causes and the solutions to climate change. In particular, we anticipate more litigation focusing on personal responsibility (ranging from criminal actions to cases focused on the duties of directors, officers and trustees to manage climate risks), but also international litigation addressing the prevention of and redress (or 'loss and damage') for climate change.

Also anticipated is a continued rise in litigation against governments and major emitters challenging commitments that over-rely on greenhouse gas removals or 'negative emissions' technologies, as well as cases that are explicitly concerned with the climate and biodiversity nexus. New cases may also focus on the need to urgently reduce short-lived climate pollutants. Entities that act inconsistently with commitments and targets, or that mislead the public and interested parties about their products and actions, are also likely to continue to face increased volumes of litigation.

*Climate commitments that over-rely on greenhouse gas removal or 'negative emissions' technologies are expected to increasingly be challenged through climate litigation.  
Photo: Drax Power Station in North Yorkshire, UK has converted its silos to produce electricity from biomass – a fuel that plays an important part in such technologies.  
© Alan Murray-Rust, [geograph.org.uk](http://geograph.org.uk)*





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# Introduction

This is the fourth annual instalment of the Grantham Research Institute's *Global trends in climate change litigation* series. Each report provides a synthesis of the latest research and developments in the climate change litigation field, focusing on cases filed in the previous 12 months; this report covers the period 31 May 2021 to 31 May 2022. We provide an update on case numbers, metrics and categorisations based on those used in previous years' reports. To help policymakers and litigators to understand new developments in this rapidly diversifying field, we introduce a typology of strategies based on the type of behaviour that the case seeks to discourage or incentivise.

## Defining climate change litigation

Delineating what to include in a report on climate change litigation and its impacts is no easy task. There is a rich academic discussion and debate about definitions in the field of climate change law (see [Peel and Osofsky, 2020](#)). However, for the purposes of these reports, we adopt a narrow approach to defining climate change litigation (also known as climate litigation). We consider climate change litigation to include cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy, or law.<sup>2</sup> This is the approach adopted by the Sabin Center for Climate Change Law at Columbia Law School in identifying cases for inclusion in its Climate Change Litigation Databases. The Sabin Center's Global database forms the basis for the litigation component of our own Climate Change Laws of the World database (see further the section on data sources below). We believe that confining our analysis to these cases allows us to provide a clear assessment of the landscape, and to draw out the most critical developments.

In this report, we frequently refer to climate-aligned and non-climate-aligned litigation. See **Box A** for more information on these terms.

Our goal in these reports is to help readers to understand the ways in which the law is being used as a tool to advance a variety of often inconsistent climate-related agendas. Legal practitioners may use the law to advance climate action, or, less frequently, seek to challenge the way in which climate policy is designed or implemented or to deter policymakers from implementing more restrictive measures on private parties responsible for greenhouse gas emissions.

## Data sources

Our main source of data is the [Climate Change Laws of the World \(CCLW\)](#) database, an open-access, searchable database created and maintained by the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science. The database is a joint initiative with the Sabin Centre for Climate Change Law at Columbia Law School and it uses cases, data and summaries identified and prepared by Sabin Center staff and their partners (including the authors of this report), and included in the Center's Global Climate Litigation database. A separate Climate Litigation database for the United States is maintained by the Sabin Center in collaboration with the law firm Arnold & Porter Kaye Scholer.

**“Our goal is to help readers to understand the ways in which the law is being used as a tool to advance a variety of often inconsistent climate-related agendas.”**

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<sup>2</sup> In some exceptional instances complaints to administrative bodies are also included, where these are indicative of an important trend or development. More information can be found in the Climate Change Laws of the World litigation methodology, available at: <https://climate-laws.org/>.

## Box A. Defining climate-aligned and non-climate-aligned litigation

Scholarly and media attention on climate litigation tends to focus on cases that seek to advance climate action, sometimes referred to as ‘pro-regulatory’ cases. However, not all climate litigation is filed with that aim in mind. There are many recorded cases in which litigants challenge the introduction of regulations or policies that would lead to greenhouse gas emissions reductions or other ‘positive’ climate outcomes. Such cases have in the past been referred to as ‘anti-regulatory’ (Peel and Osofsky, 2015), ‘defensive’ (Ghaleigh, 2010) or simply ‘anti’ (Hilson, 2010). For the most part they are filed by litigants who have a financial or ideological interest in delaying or obstructing climate action.

However, not all cases challenging the design or application of climate policies and measures fit this description. Increasingly, cases have been filed that might not have opposition to climate action as their main objective, and yet may delay the finalisation or implementation of climate policy responses. For example, individuals bringing rights-based climate cases might not object to climate action, but rather to the way in which such action is carried out or its impacts on the enjoyment of human rights. Such cases can be understood as ‘just transition’ cases (Savaresi and Setzer, 2022).

With this in mind, we adopt the terms ‘climate-aligned’ and ‘non-climate-aligned’ in this report. Climate-aligned is used to describe cases seeking to advance climate measures. ‘Non-climate-aligned’ is used to describe both anti-regulatory cases aimed at delaying climate action, and ‘just transition’ cases. While this latter group of cases may not advance the short-term climate outcomes intended by defendants, such cases may in fact result in better outcomes for the climate in the long term: ensuring that the transition to low-carbon economies is done in a way that is fair and equitable is not only a moral imperative, but is also an instrumental necessity for ensuring the long-term success of climate action (Robins et al., 2019).

This report focuses primarily on lessons to be drawn from the CCLW database, but supplements this by drawing on the Sabin Center’s US database where appropriate.

- **Data coverage and limitations:** The Sabin Center’s Climate Change Litigation Databases are the largest global climate change litigation databases compiled to date. (The CCLW litigation database includes some additional information on non-US cases – including more detailed information regarding the identity of the parties and the Grantham Research Institute’s identification of the economic sectors involved – and excludes some information about the specific laws at issue.) In the 12 months since May 2021, coverage of many jurisdictions has improved thanks to the Sabin Center’s convening of the [Peer Review Network of Global Climate Litigation](#), a new group of scholars and practitioners from around the world who track litigation within specified geographical areas and participate in ongoing information- and knowledge-sharing and dialogue about climate litigation. Nonetheless, the databases are unlikely to contain every case from every court in every country in the world. The Sabin Center/Arnold & Porter Kaye Scholer U.S. Climate Change Litigation Database benefits from the assistance of commercial litigation databases in the US and is therefore likely to be more comprehensive.
- **Trend identification:** Despite the limitations described, the databases offer a diverse and cross-cutting sample of cases covering a wide range of geographies, levels of government and types of actor and argument, enabling observations to be made about trends in high-profile cases, which often inform and inspire new litigation efforts. While we attempt to give combined figures for cases in and outside the US throughout this report where relevant, in most instances we treat US and non-US cases separately, given the high volume of US cases.

Access the datasets at: [climate-laws.org](https://climate-laws.org) and [climatecasechart.com](https://climatecasechart.com).

## Structure of the report

**Part I** provides an update on overall global trends in climate litigation, including global case numbers and the timing, location, players and substance of climate change litigation. Part I also discusses the increased use of strategic climate litigation and some of the strategies employed by litigants. We review the 'direct' outcomes of litigation and provide a discussion of the broader impacts and costs that litigation can entail.

**Part II** dives deeper into several of the litigation trends discussed in Part I. This year, for the first time, the Intergovernmental Panel on Climate Change has recognised that climate change litigation can affect "the outcome and ambition of climate governance" (IPCC, 2022). To further highlight the way in which domestic, regional and international litigation can all be understood as being in 'dialogue' with broader trends in climate governance at the international level, this section of the report is structured around elements of the Glasgow Climate Pact (UNFCCC, 2021). It also contains a review of possible future trends, based on newly filed cases, new scholarship, and the development of new international and national norms.

### Note about references

We have hyperlinked our in-text citations where possible but also provide a full references list in a separate annex, available at: [www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022](http://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022).

# Part I: Understanding overall trends

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

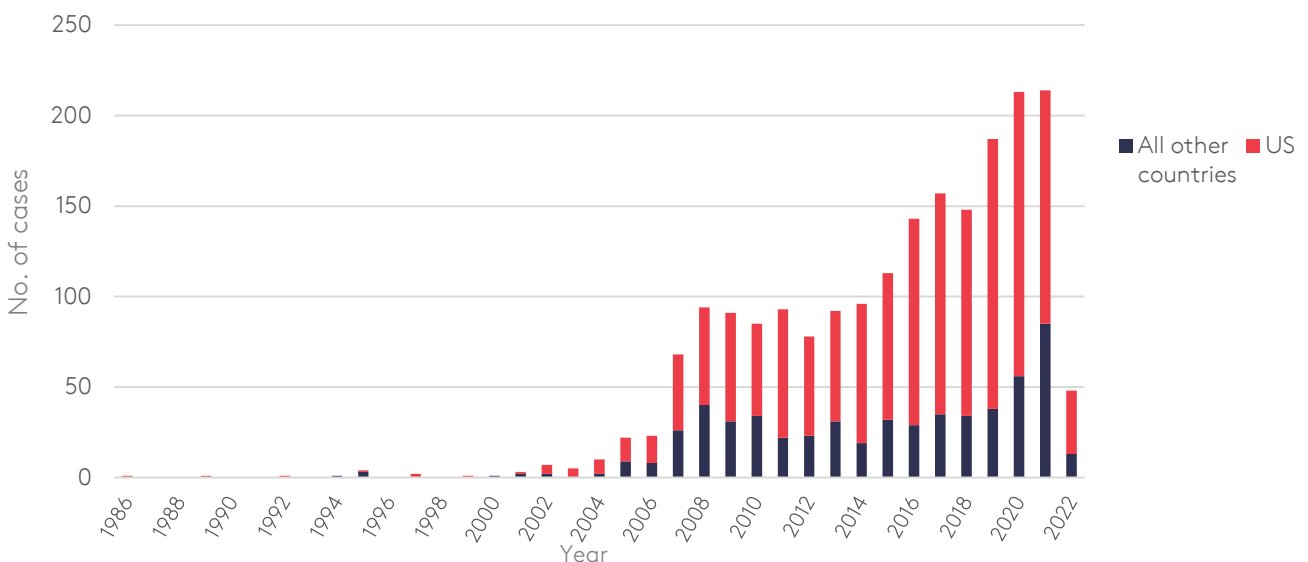
As of 31 May 2022, 2,002 cases of climate change litigation from around the world had been identified and included in the Sabin Center's Climate Change Litigation databases and the CCLW database (see **Figures 1.1 and 1.2**). Of these, 1,426 have been filed before courts in the United States, while the remaining 576 have been filed in 43 other countries or before 15 international or regional courts and tribunals.<sup>3</sup> These include climate-aligned cases and non-climate-aligned cases (see **Box A** above).

Outside the US, Australia (124 cases), the UK (83) and the EU (60) remain the jurisdictions with the highest volume of cases.

One-hundred-and-three cases have been filed before 15 international or regional courts and tribunals. These include filings before: the Courts of the European Union, United Nations (UN) bodies (the Human Rights Committee, the Committee on the Rights of the Child, the UNFCCC Compliance Committee), the Inter-American Court and Inter-American Commission on Human Rights, the East African Court of Justice, the European Court of Justice, the European Court of Human Rights and arbitration cases filed before Investor-State Dispute Settlement (ISDS) panels hosted at the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce, and the Permanent Court of Arbitration. In addition, three trade disputes have been filed before the World Trade Organization's (WTO) Dispute Settlement Body and a communication has been filed to the Office of the Prosecutor of the International Criminal Court (ICC).

Data from the past 12 months confirms that litigation continues to expand as an avenue for action on climate change. While the number of cases in the US was lower than in previous years – likely down to the change in federal government – 2021 saw the highest number of recorded cases outside the US.

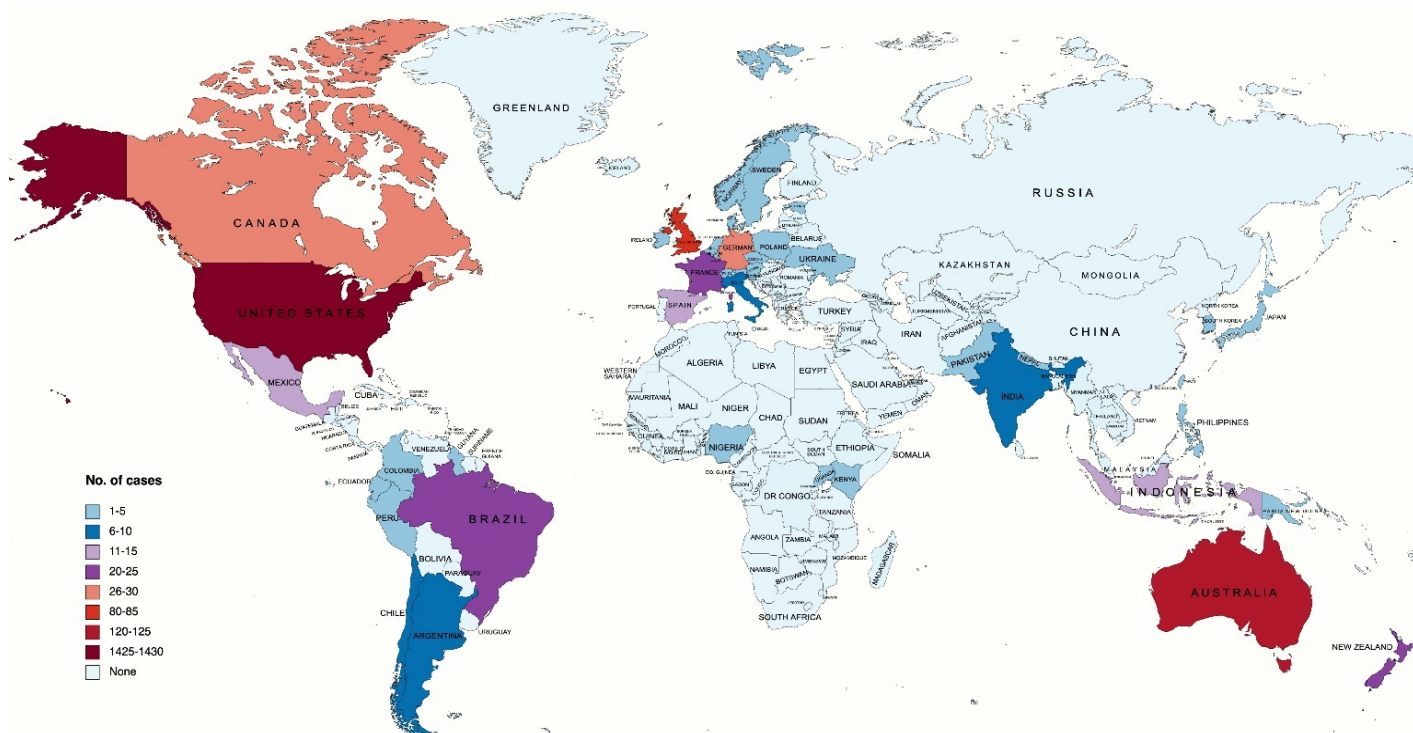
**Figure 1.1. Total climate change cases over time, US and non-US (up to 31 May 2022)**



Source: Authors based on CCLW and Sabin Center data

<sup>3</sup> During the course of the study period a number of cases were removed from the US climate case chart maintained by the Sabin Center for Climate Change Law on the basis that they fell outside the scope of the Center's recently refined methodology. Although the total number of recorded cases in the US has remained relatively stable since the last report this is because the number of new cases identified has balanced out the removal of older cases.

Figure 1.2. Number of climate litigation cases around the world, per jurisdiction (up to 31 May 2022)



Notes: Cumulative figures to May 2022. This figure only includes cases filed before national tribunals. The 103 cases filed before 15 international and regional bodies entities are not included. Source: Map created with mapchart.net based on CCLW and Sabin Center data.

The geographical coverage of older cases in the databases also improved this year due to the work of the Sabin Center’s Peer Review Network of Global Climate Litigation; participants in the Network identified older cases from 15 countries. They also identified cases in Italy, Denmark and Papua New Guinea, which were all jurisdictions for which no cases had previously been recorded. Figure 1.2 above shows the current overall numbers of cases per jurisdiction up to 31 May 2022.

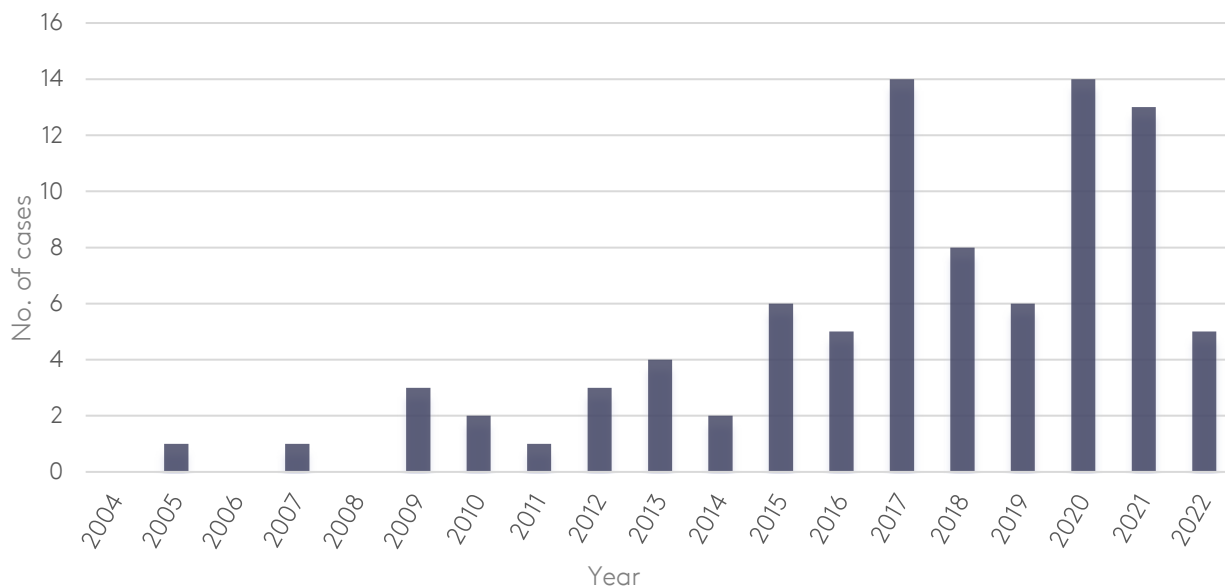
### Cases in the Global South

Overall, there are now 88 cases from the Global South<sup>4</sup> in the databases. These include 47 cases in Latin America and the Caribbean, 28 cases in Asia Pacific, and 13 cases in Africa.

When we released our *2021 snapshot report*, only 58 Global South cases had been identified. The much higher figure in this year’s report is in large part thanks to the improved data collection methods and the work of the Network described above. However, from the data it is also clear that cases continue to be filed at a relatively steady rate (see Figure 1.3 below).

<sup>4</sup> The distinction between the ‘Global South’ and ‘Global North’, terms favoured by many scholars and policymakers, is based on economic inequalities, but crucially for this report it must be noted that the ‘Global South’ is not a homogeneous group of countries, and that legal development and legal capacity vary by country. We use the list of G77 + China countries to determine if a country is in the Global South (see the *website of the Finance Center for South-South Cooperation*). For further discussion on the analytical value of these categories see Haug (2021).

Figure 1.3. Number of climate litigation cases in the Global South over time (up to 31 May 2022)



Source: Authors based on CCLW data

## Claimants and defendants: the 'who' of climate change litigation

### Increase in cases brought by individuals and NGOs in non-US litigation

Our analysis of cases from outside the US shows that more than half of all cases (307 of 576) have been filed by non-governmental organisations (NGOs), individuals, or both acting together. In previous reports, we have documented the growth in cases brought by these claimants (Setzer and Higham, 2021) and that trend is confirmed this year: nearly 90% (56 out of 63) of cases in this year's study period were filed by NGOs, individuals, or both acting together.

### Governments remain the most frequent targets in non-US litigation

Our analysis shows that outside the US, governments remain the most common defendants in climate cases: just over 70% (421 out of 576) of all global cases have been filed against governments. This trend continued to be relatively stable in the study period, with 73% (46 out of 63) of cases filed against governments.<sup>5</sup>

### Fewer cases are brought by NGOs and individuals in the US than elsewhere

In analysing the claimants and defendants in both non-US and US cases filed in the study period in more detail, we find there were 163 cases filed during this period, 100 in the US and 63 elsewhere in the world.<sup>6</sup> Overall, 78% of these cases were filed against government actors, showing that the US data broadly reflects the global pattern identified above. However, we saw more significant variation in terms of the claimants. While NGOs and individuals have been responsible for bringing 90% of the cases outside the US, in the US just 70% of cases have been brought by these groups – instead, governments, companies and trade associations make up a higher proportion of claimants than they do elsewhere in the world.

<sup>5</sup> A full analysis of the claimants and defendants in all US cases over time has not been possible for this study.

<sup>6</sup> We could not identify the filing date for three US cases which were likely filed in the last 18 months. These have been excluded from the analysis.



Aftermath of Typhoon Vamco in the Philippines, 15 November 2020. On 6 May 2022 the Philippines Commission on Human Rights released its final report on the National Inquiry on Climate Change, concluding that climate change is a human rights issue (see Box 2.3).  
© Basilio H. Sepe/Greenpeace

## A deeper dive into the actors involved in climate litigation

In the past, our analyses of defendant types distinguished between the broad categories of ‘government’ and ‘company’ only. However, as the field of climate litigation grows, it is worth considering the ‘who’s who’ of climate litigation in more detail.

### Growth in claims against subnational governments

While national governments remain the most frequent defendants, subnational governments too are becoming targets in climate litigation, particularly in Germany. Over the past 12 months, 13 complaints were filed against Länder or federal states in Germany, each challenging the subnational government’s failure to introduce or legislate sufficiently ambitious emissions reduction pathways that align with the *Neubauer et al. v. Germany* decision that was issued in April 2021. While most complaints were dismissed by the German Federal Constitutional Court, these cases reveal the potential for a ‘trickle-down impact’ between higher and lower levels of government (see further discussion on page 22).

### Corporate cases are becoming more diverse

Similarly, taking a closer look at corporate climate cases shows shifts in the types of defendants being targeted. Historically, discussion of climate litigation against companies has centred on cases against the Carbon Majors,<sup>7</sup> the so called ‘holy-grail’ of climate litigation (Bouwer, 2020). To date, the vast majority of these cases have been filed in the US, mainly by city and state governments (see further discussion in Part II). In recent years, however, growing numbers of cases have been filed outside the US (see Figure 1.4). At least 13 cases have been filed before both courts and administrative bodies in Europe, against European-domiciled Carbon Majors, and at

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<sup>7</sup> Carbon Majors is a term that refers to a list of energy and cement companies identified by Richard Heede (2014) and the Climate Accountability Institute through an assessment of the historical contributions of these companies to greenhouse gas emissions. Heede attributed 63% of the carbon dioxide and methane emitted between the years 1751 and 2010 to a mere 90 entities. Out of these, 50 are investor-owned companies, 31 are state-owned and the remaining nine are government-run. See: <https://climateaccountability.org/>.

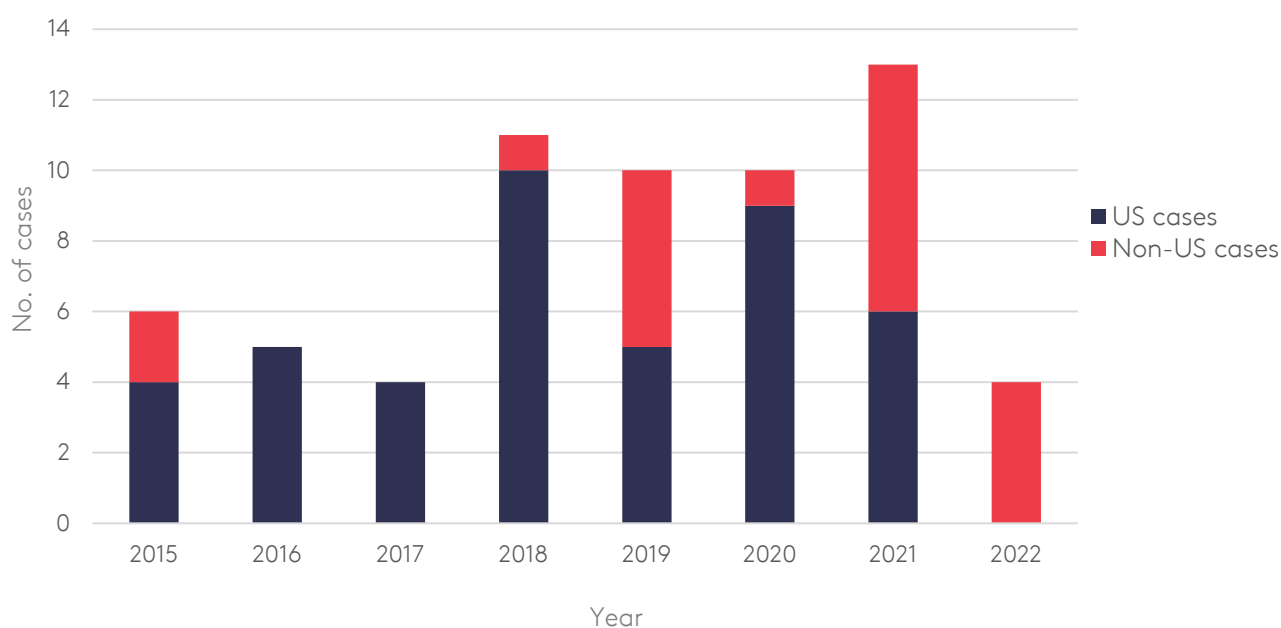
least two challenges have been launched in Australia against the gas company Santos.<sup>8</sup> Meanwhile *Exxon*, *Eni* and *Sasol* are all involved in challenges to government decisions about oil and gas exploration and licensing in Guyana and South Africa.

With the publication by the *Commission on Human Rights of the Philippines* of the final report on the responsibility of the Carbon Majors for climate-related human rights harms, further cases are likely to follow in jurisdictions with strong human rights regimes (see further discussion in **Box 2.3**). However, while cases against the Carbon Majors and other companies involved in the extraction of fossil fuels or the provision of fossil energy continue to proliferate, recent analysis shows that cases against corporate actors are also becoming far more diverse (see **Box 1.1**).

### Courts and climate civil disobedience

A final group of cases that may be worth further study consists of criminal prosecutions of those involved in climate civil disobedience. In *ADP Group (Paris Airports) v. Climate Activists* the courts acquitted the climate activists sued by the ADP Group ('Paris Airports') for protesting against the expansion of Charles de Gaulle airport. The courts found that as the climate activists were raising awareness about the negative impacts of climate change, their actions could be considered proportionate given the 'necessity' to act on climate change. The use of what can broadly be described as the 'climate necessity' defence has received a mixed reception before courts in at least five jurisdictions in recent years, but it continues to be employed by activists who see civil disobedience as one of the only available means for raising the alarm on climate change in the face of urgent scientific warnings, and may even see the prospect of ending up in court as a further opportunity to amplify their message (Nosek and Higham, forthcoming).

Figure 1.4. Number of cases filed against the Carbon Majors in the US and elsewhere since 2015 (up to 31 May 2022)



Source: Authors based on CCLW and Sabin Center data

<sup>8</sup> It should be noted that most of these cases differ from the cases filed in the US in as much as they do not involve seeking compensation for climate harms associated with the Carbon Majors' contributions to climate change or climate misinformation.

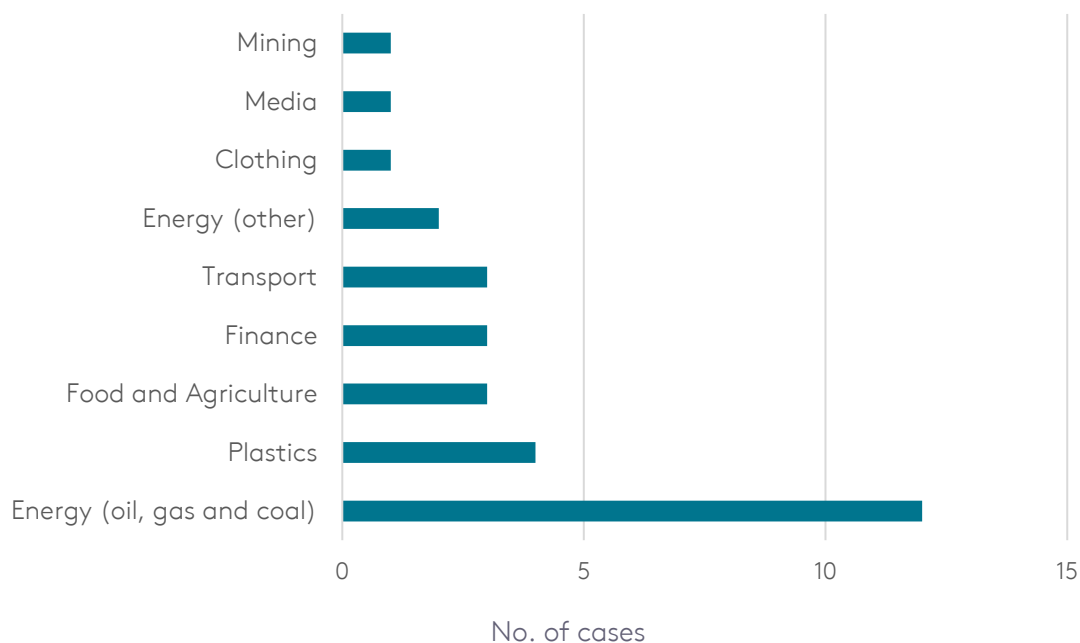


### Box 1.1. Corporate climate litigation: who are the targets?

Recently published analysis has confirmed that climate change litigation is now being filed against a more diverse range of corporate actors than before (Higham and Kerry, 2022). Although 16 of the 38 cases filed against corporate actors in the calendar year 2021 were filed against fossil fuel companies, more than half of cases were filed against defendants in other sectors, with food and agriculture, transport, plastics and finance all being targets in multiple cases (ibid.). Litigants increasingly appear to draw a connection between ongoing public debates about the contribution that individuals' consumer and lifestyle choices can make to reducing emissions and widespread concern that industry misinformation and inaction may prevent such choices from making a real difference (Jahns, 2021). While future trends are hard to predict with certainty, the increase in litigation against agricultural companies may suggest that other high emitting sectors such as heavy-duty industry (e.g. steel and cement), textiles, shipping and aviation may be the next targets for litigants.

When we updated this analysis to look at cases filed against companies during the study period for this report, we saw the trend from 2021 continuing to May 2022: 12 of the 30 cases filed against corporate actors in the study period were against fossil fuel companies but more than half were in other industries (see Figure 1.5).

Figure 1.5. Number of climate cases involving corporate defendants by sector (31 May 2021 – 31 May 2022)



Source: Authors based on CCLW and Sabin Center data

## Case characteristics: the ‘what’ of climate change litigation

To clarify the key elements of the body of non-US climate change litigation, this annual snapshot report in the past has asked three questions:

1. In what proportion of cases has climate change been the central issue?
2. What proportion of cases can be understood as having been filed with ‘strategic’ intent?
3. What are the direct outcomes of the cases, and do they advance or hinder climate action?

While it is a prerequisite for inclusion in the database that climate change must be a ‘material’ issue in a case, the degree to which arguments about climate change form the central crux of cases can vary. For example, in the case of *Envol Vert et al. v. Casino*, while climate change is mentioned as one of the many issues arising from the Casino Supermarket Group’s involvement in Amazon deforestation through its supply chain, this claim is secondary to other arguments about rights violations arising from the same behaviour. However, over time, climate change has become the central issue in more and more of the cases found in the databases.<sup>9</sup> The analysis conducted for this report confirms the general trend of previous years: climate change is a central issue in all but a handful of cases filed or identified during the study period. As such, we have determined that a more detailed discussion of this issue is no longer relevant. This section of this year’s report will therefore focus on the second and third questions detailed above.

### Strategic cases continue to grow and diversify

To date, scholarship, media attention and policy engagement have focused primarily on a subset of climate litigation known as ‘strategic’ climate litigation. These are cases where the claimants’ motives go beyond the concerns of the individual litigant and aim at advancing climate policies, creating public awareness, or changing the behaviour of government or industry actors.

Strategic cases are often accompanied by or form part of media and awareness-raising activities. As *Batros and Khan (2020)* have noted, a case is ‘litigated strategically’ when it is seen as one step in a bigger effort to achieve the ultimate goal of changing policy, social norms, or behaviours. This means that for cases to be litigated strategically, significant effort must be put into engagement and advocacy outside the courtroom as well as within it.

As strategic litigation continues to evolve, so does the thinking around what it means and how it can be best applied. Some argue that strategic litigation can be enhanced if lawyers use systems thinking to identify key nodes and links where legal interventions will have greatest impact (‘systemic lawyering’) (*Solana et al., forthcoming*). Others emphasise the importance of co-creating strategic litigation with affected communities at the centre (‘movement lawyering’) (e.g. *Cummings, 2017*). In responding to the challenges of giving holistic legal advice and grappling with the uncertainty and evolution of the law, lawyers are also being asked to implement a ‘climate conscious’ approach (*Preston, 2021*; see **Box 1.2**).

For this study, we assessed every case in the CCLW (i.e. non-US) database to determine whether the case appears to have been filed with strategic ambition. This is a subjective exercise, based on available information about the intentions of the parties. Classifying a case as strategic or non-strategic does not imply a judgment about the merits or importance of the case, or about the likely success of the tactics of the litigants (see further *Setzer and Higham, 2021*).<sup>10</sup>

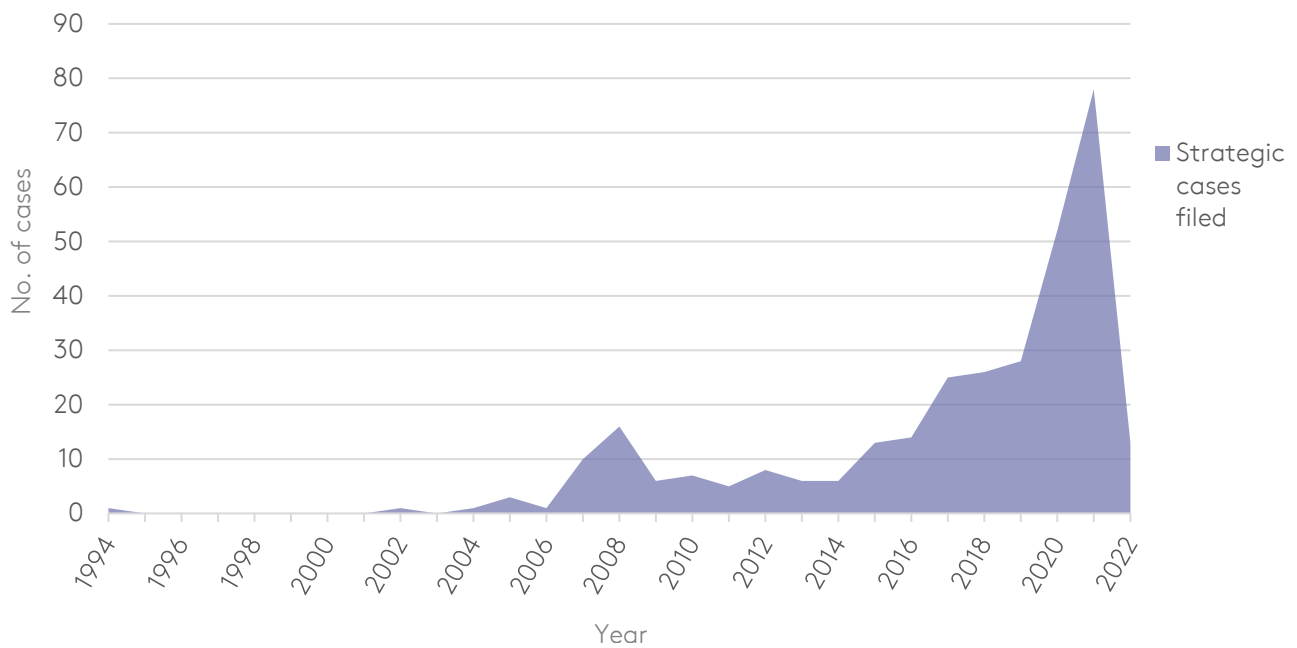
During the study period, we saw a continuation of the trend identified in the *2021 snapshot* report with the number of strategic cases filed year-on-year continuing to grow (see **Figure 1.6**).

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<sup>9</sup> This partly results from the fact that climate change has become more prominent in legal and policy discussions globally (*Setzer and Higham, 2021*), but it is also due to changes in data collection. While the databases formerly included more cases where climate change was a peripheral issue, as the overall number of cases filed has increased fewer such cases have been captured and, in some instances, older cases have been removed.

<sup>10</sup> More detailed notes on the methodology for this element of the study can be found in **Appendix 1**.

Figure 1.6. Number of strategic climate case numbers over time, outside the US (up to 31 May 2022)



Source: Authors based on CCLW data

Strategic cases may be aligned with climate action, seeking to encourage more ambitious emissions reductions or adaptation strategies, or to create an investment environment that is unfavourable to new fossil fuel projects. Strategic cases may also be non-aligned, actively seeking to counter or delay climate action or raising concerns about the distributional impacts of climate policies and policy decisions (Setzer and Higham, 2021).



## Box 1.2. 'Systemic lawyering' and the climate lawyer

Increasingly, it is understood that legal interventions to address complex problems such as climate change need to be considered in a systemic way and seek systemic change. Rather than narrow, ad hoc action, legal interventions can be designed to change the way in which the socioeconomic systems that drive climate change operate. Solana et al. (forthcoming) propose the term 'systemic lawyering' to define this type of legal action that has the explicit aim of changing how those systems operate.

Systemic lawyering refers to the process of adopting a 'systems thinking' approach for lawyering. The process is applied *ex ante* and it aims to help identify legal interventions that will have the greatest impact, increasing the transformational potential of legal action. That means not necessarily filing a case against a major emitter, but rather identifying the key nodes and links of a certain system (e.g. energy, food) and identifying what interventions are most likely to destabilise those and thus transmit shocks to the system. Systemic lawyering is needed to address the most pressing and complex problems that society faces today, including mitigating climate change and biodiversity loss (ibid.).

The letters sent by the Dutch NGO Milieudefensie to several consumer goods companies and banks mentioned in Part II illustrate this type of thinking. The letters were sent to 29 Dutch companies from a range of sectors that "contribute significantly to causing dangerous climate change through substantial emission of greenhouse gases throughout their business chain". The cases against financial institutions mentioned in Part II also illustrate a systemic lawyering approach.

Together with the efforts to identify the legal interventions that can have the greatest impact on the systems that drive climate change, there is also a growing understanding that impactful litigation should also empower communities ('movement lawyering'). 'Movement lawyering' has been used to describe "an alternative model of public interest advocacy focused on building the power of non-elite constituencies through integrated legal and political strategies" (Cummings, 2017). Organisations that engage in strategic climate litigation apply this concept to their work by co-creating strategic litigation with affected communities at the centre.

Whether litigating strategically, practising systemic lawyering or movement lawyering, or simply engaging in regular private practice, lawyers have a role in meaningfully contributing to climate action. The term 'climate conscious lawyering' is being used to describe the skills that are needed from lawyers as they give legal advice to clients and from judges as they decide on cases (see Preston, 2021; IBA Climate Crisis Statement, 2020). In practice, this means that when exercising their profession, lawyers may need to go beyond the conventional and jurisdictionally bounded sources of law, and beyond their comfort zone of the law, to deal with non-legal issues (Preston, 2021).

**"Whether litigating strategically, practising systemic lawyering or movement lawyering, or simply engaging in regular private practice, lawyers have a role in meaningfully contributing to climate action."**

## A typology of climate litigation strategies

As the field of climate change litigation has matured, so has the ecosystem of actors engaged in strategic cases (Setzer et al., 2021). One consequence of this growth has been an increasing diversity in the range of strategies employed by litigants in recent years. Previous studies have developed multiple typologies by which to classify and understand a global or national body of climate litigation cases. These often include a combination of key elements of the case strategy and the primary legal basis for the case (Markell and Ruhl, 2012; UNEP, 2021; Sindico and Moïse Mbengue, 2021; Setzer and Higham, 2021; Golnaraghi et al., 2021).

For this report, we build on these existing categories, but seek to understand case strategies employed by strategic litigants at a more granular level, relying and expanding on work by Bouwer and Setzer (2020). Our starting point in developing this typology of strategies is the target of the litigation, i.e. the type of behaviour that the case seeks to discourage or incentivise. We seek to do this for both climate-aligned strategic cases and non-climate-aligned strategic cases (see **Box A** in the Introduction and **Tables 1.1** and **1.2** below).

By viewing the cases through this lens, we provide policymakers and broader audiences with a better understanding of the motivations behind the cases, as well as a foundation from which to assess future trends. It should be noted that different legal arguments – such as those based in human or constitutional rights or on tort law grounds – may be deployed to support a range of case strategies depending on the jurisdiction. The categories are not mutually exclusive, with several cases employing multiple strategies simultaneously, often against multiple defendants (see **Figure 1.7**).

**Table 1.1. Climate-aligned litigation strategies**

Strategy type ( <i>with examples</i> )	Defendant type <sup>1</sup>
<ul style="list-style-type: none"> <li> <b>Government framework:</b> Cases that challenge the implementation or ambition of climate targets and policies affecting the whole of a country’s economy and society (<i>Urgenda Foundation v. State of the Netherlands</i>). These cases typically seek to enhance national-level targets and plans, providing a basis for more ambitious policy decisions at every level of government. These are described by Setzer and Higham (2021) as ‘systemic litigation’ and by Maxwell et al. (2022) as ‘systemic mitigation cases’. A sub-group of these cases are focused on subnational governments and can be understood as state-wide or region-wide cases. Some cases in this category may also include arguments about specific policies or projects (<i>Ali v. Federation of Pakistan</i>; <i>R (oao Friends of the Earth v Secretary of State for Business Energy and Industrial Strategy "Net Zero Challenge")</i>).         </li> </ul>	Government
<ul style="list-style-type: none"> <li> <b>Corporate framework:</b> Cases that seek to disincentivise companies from continuing with high-emitting activities by requiring changes in corporate governance and decision-making. These cases focus on company-wide policies and strategies (<i>Milieudefensie et al. v. Royal Dutch Shell plc.</i>), and frequently draw on human rights and environmental due diligence standards. These cases have been brought before national courts, but proceedings have also been opened before OECD national contact points and national human rights bodies. It is common for these cases to draw heavily on         </li> </ul>	Corporate

the theories and evidence developed in framework cases against governments, but due to the different responsibilities of governments and companies we view them as a distinct category.

- Enforcing climate standards:** Cases that seek to integrate climate standards, questions, or principles into government decision-making with the dual goal of stopping specific harmful policies and projects and making climate concerns more mainstream among policymakers.<sup>2</sup> These were described by *Bouwer and Setzer (2020)* as ‘hit the target’ cases. Cases may challenge new policies developed without careful consideration of climate impacts, or they may challenge decisions to roll back or reduce the level of ambition in existing climate policies. These cases are typically – but not exclusively – focused on mitigation and many target fossil fuel extraction and fossil energy generation. Increasingly, cases may also focus on agriculture and land use change.
- Public finance:** Cases that challenge the flow of public money to projects that are not aligned with climate action (*Africa Climate Alliance et al. v. Minister of Mineral Resources & Energy et al. (#CancelCoal case)*; *Kang et al. v KSURE and KEXIM*). Although they overlap significantly with ‘enforcing climate standards’ cases, we have chosen to analyse these cases separately since their target is more specific: to increase the cost of capital for high emitting activities to the point where such activities become economically unviable even if they remain legally permissible.
- Failure to adapt:** Cases that challenge a government or other entity for failure to take the impacts of climate change into account when developing policies or facilities (*Markell and Ruhl, 2012*; *UNEP, 2021*). These cases aim primarily to ensure that physical climate risks are better accounted for in public and private decision-making (see *Nature Conservation Council v. New South Wales Minister for Water, Property and Housing*). There is also a significant strand of cases concerning financial service providers and their failure to manage and disclose both physical and transition risks, which could be understood as financial service providers’ ‘failure to adapt’ to the low-carbon transition (*Golnaraghi et al., 2021*).
- Compensation:** Cases where damages for climate impacts are sought from defendants based on an alleged contribution to climate change harms (*Luciano Lliuya v. RWE*). These cases seek to disincentivise greenhouse gas pollution both by impacting profit margins – posing an existential challenge to the business models of the Carbon Majors – and by creating reputational damage. Cases may also seek to penalise illegal activities, particularly deforestation, that create emissions or a reduction in carbon sequestration capacity (*Ministério Público Federal v. de Rezende*; *Ministry of Environment and Forestry v. PT Jatim Jaya Perkasa*).

Corporate;  
Government and  
Corporate together

Government

Corporate;  
Government

Corporate;  
Government

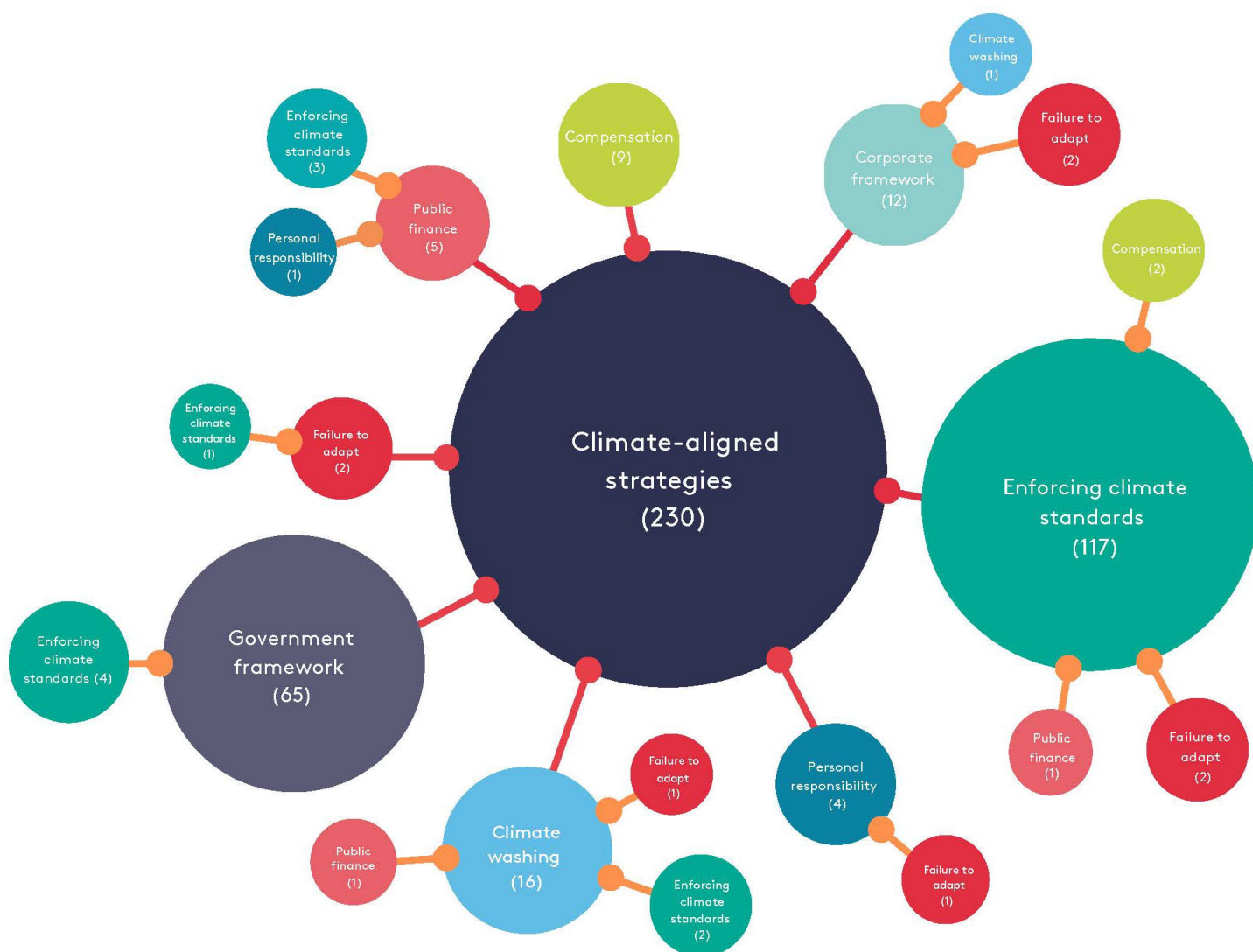
<ul style="list-style-type: none"> <li>• <b>Climate-washing:</b> Cases that aim to hold both governmental and non-state actors legally accountable for their actions or products that misleadingly claim to address climate change (Benjamin et al., 2022). These cases challenge inaccurate government or corporate narratives regarding contributions in the transition to a low-carbon future (<i>Australasian Centre for Corporate Responsibility v. Santos</i>). This category often overlaps with the ‘compensation’ category, with many new climate liability cases centred on the degree to which misinformation campaigns have contributed to climate harms.</li> <li>• <b>Personal responsibility:</b> These cases seek to incentivise the prioritisation of climate issues among public and private decision-makers, by attributing personal responsibility for contributing to or failing to adequately manage climate risks to particular individuals (or a subset of individuals, such as in <i>ClientEarth v. Board of Directors of Shell</i>). Cases may include derivative actions filed by shareholders, pension fund beneficiaries, and others (<i>Ewan McGaughey v. Universities Superannuation Scheme Limited</i>), or through criminal cases (<i>The Planet v. Bolsonaro</i>). There is also growing discussion in the literature of responsibility for professionals that may enable climate-damaging activities, such as lawyers and accountants, although no cases have so far been identified (Vaughan, 2022).</li> </ul>	<p>Corporate; Individual; Government</p> <p>Individual</p>
<p>Notes: 1. The list of defendant types is based on possible claims, rather than the empirical review of cases. 2. The standards in question may be drawn from national legislation, international conventions, or soft-law instruments. The cases often involve questions about the application of existing legal standards – such as requirements to consider environmental impacts – to the issue of climate change even when ‘climate change’ is not explicitly mentioned in the legislation or policy.</p>	

### Cases may use standalone strategies or combine multiple strategies

After developing the typology of strategies described above, we applied the typology to all non-US strategic cases filed since the Paris Agreement came into operation. Overall, we have identified 230 ‘climate-aligned’ strategic cases in this group.<sup>11</sup> Figure 1.7 shows the number and combination of the strategies identified following this review. As the figure indicates, climate litigation cases may use standalone strategies or combine multiple strategies to advance a climate agenda or achieve a favourable outcome. Sometimes litigants employ alternative legal grounds to advance the same case strategy. For example, both *Pabai Pabai & Guy Paul Jabai v. Commonwealth of Australia* and *Petition of Torres Strait Islanders to the United Nations Human Rights Committee (UNHCR) Alleging Violations Stemming from Australia’s Inaction on Climate Change* are ‘framework cases’ that challenge Australia’s failure to mitigate climate change through its climate targets policies. However, the cases use different arguments to advance their challenges. In *Pabai Pabai*, the applicants’ challenge is based on Australia’s obligations under the Torres Strait Treaty, and a duty of care under domestic tort law. *Petition of Torres Strait Islanders*, on the other hand, cites Australia’s human rights violations, including the right to life (Article 6), under the International Covenant on Civil and Political Rights at the UNHCR.

<sup>11</sup> Four cases identified in our 2021 snapshot as ‘strategic climate cases’ were excluded from this analysis on the basis that they were insufficiently similar in nature to the other cases reviewed. A petition submitted to the UN Secretary General requesting that the UN declare a climate emergency has also been excluded given its unique nature.

Figure 1.7. Combinations of strategies identified in strategic cases filed outside the US since 2015 (up to 31 May 2022)



Source: Authors using CCLW data

### Most climate-aligned cases are seeking to 'enforce climate standards'

Unsurprisingly, the most frequent primary strategy used in climate aligned cases (117 cases) is 'enforcing climate standards'. Cases in this group focus on three levels of government decision-making: sectoral policies (*PSB et al v. Brazil [on deforestation and human rights]*); significant decisions around auctions, licences and procurement that may affect multiple projects (*Thomas & De Freitas v. Guyana*); and permitting decisions for individual projects (*Sharma & others v. Minister for the Environment*). While governments are the more frequent target of these cases, cases can also be brought directly against companies (*ClientEarth v. Enea*), or against governments and companies together. Cases against companies are most frequently brought regarding specific projects, but increasingly may also concern a company's policies with regard to a specific area or aspect of its supply chain (*Envol Vert et al. v. Casino*).



## Significant increase in framework cases seeking to change governments' ambition and policies

Framework cases against governments are the second most common strategy and receive the most attention from scholars and the media. Framework cases may concern the design and overall ambition of a government's response to climate change and/or the adequacy of the implementation of a policy response. Since 2015, 65 cases have been filed outside the US, of which 28 were filed in 2021 alone. Claims have been filed before national courts in 22 countries, as well as before the European Court of Human Rights, several UN bodies and the Inter-American Commission on Human Rights. While it may not be surprising that most of these cases have been filed against national governments (49 cases), a substantial number of cases have been filed against subnational governments as well (16 cases). In fact, the majority of these subnational cases were filed in 2021 against German federal states following the decision in the case of *Neubauer et al. v. Germany*. Most framework cases have been filed in or against Global North countries, while a small but significant minority have been filed in Global South countries in Latin America (8 cases) and South Asia (5 cases).

Successful cases may have a significant impact on government decision-making, forcing governments to develop and implement more ambitious policy responses to climate change. Because government framework climate cases may result in rapid changes to policy landscapes, companies and investors should take the potential impacts of litigation into account when assessing transition risk. In **Part II** we discuss this type of strategy in the context of litigation seeking domestic accountability for climate targets, and in a further policy brief (Higham et al., forthcoming) we will analyse key trends in this type of litigation in more detail.

## Other strategies are rarely used as a primary strategy by litigants outside the US

We have identified 'climate-washing' (16 cases), 'corporate framework' (12 cases), 'compensation' (9 cases), 'personal responsibility' (4 cases), 'public finance' (5 cases) and 'failure to adapt' (2 cases) used as primary strategies. Despite growing attention, such cases are still rarely used as a primary strategy by litigants outside the US. The scant use of these strategies is likely due to the relative novelty of these types of argument, but such strategies may start to be employed more frequently in future. Cases in these categories often deploy overlapping strategies to increase their chances of success. Most of these strategies and examples of cases are described in more detail in **Part II** of this report.

In addition to developing a typology of case strategies employed in climate-aligned cases, we also developed a similar typology for non-climate-aligned strategies, although this is less granular given that fewer cases in this category have so far been identified (see **Table 1.2**).

## Most non-climate-aligned cases have been brought against governments

Cases that are not aligned with climate action are sometimes described as 'anti-regulatory' (see **Box A**). The number of cases of this type is on the rise. This trend has been well-documented in the United States, accounting for 12% of climate cases brought against the federal government between 2017 and 2020 (Silverman-Roati, 2021). Within this group of cases, one of the most important challenges of recent years has been *West Virginia v. EPA* (see **Box 1.3**). Unsurprisingly, industry groups were the most frequent claimants in these cases, representing 65% (ibid.).

Outside of the US, there has been little analysis of non-climate-aligned cases. Our databases account for 14 non-climate-aligned strategic cases filed since the Paris Agreement was signed in 2015. These mostly have been brought against governments but occasionally against individuals, such as in *Trans Mountain Pipeline ULC v. Misavair*, in which the company Trans Mountain Pipeline ULC filed a suit against protesters who had attempted to stop the construction of a pipeline expansion in Canada. The *Trans Mountain Pipeline* case is the only climate-focused strategic lawsuit against public participation ('SLAPP') case recorded in the non-US database during this period, although it is extremely likely that others exist. Cases that are not aligned with climate action are also present in many Global South countries. Newly identified cases include challenges to subnational climate mitigation policies in the *Rulings on the constitutionality of state "green taxes" in Zacatecas* and in *Baja California, Mexico* (see below).

**Table 1.2. Non-climate-aligned climate litigation strategies**

Strategy type ( <i>with examples</i> )	Defendant type <sup>1</sup>
<ul style="list-style-type: none"> <li>• <b>Regulatory powers:</b> Cases that challenge climate policy measures and regulations on the basis that the government body seeking to introduce the measure does not have the mandate or powers required to do so. These cases are commonly filed by subnational governments challenging government action (and vice-versa) (<i>Ruling on the Constitutionality of “green taxes” in Baja California</i>), as well as by corporate claimants or interest groups. These cases seek to introduce roadblocks to regulatory efforts, often with the goal of delaying climate action.</li> </ul>	Government
<ul style="list-style-type: none"> <li>• <b>Stranded assets:</b> Cases that seek compensation from governments following the introduction of climate policy measures that affect the enjoyment of property rights or the anticipated return on commercial investments, through the creation of so-called stranded assets. These cases are often filed before Investor-State Dispute Settlement (ISDS) panels (see <i>Caldecott et al., 2021</i>). These cases may be filed with the dual goals of recouping on losses (a non-strategic ambition) and dissuading governments from the introduction of further regulation, i.e. creating ‘regulatory chill’ (a strategic ambition). The combination of strategic and non-strategic ambitions motivating these cases poses challenges for defining the boundaries of this category, particularly as companies may typically be less transparent than public officials and civil society actors regarding their motivations for bringing the litigation.</li> </ul>	Government
<ul style="list-style-type: none"> <li>• <b>Strategic litigation against public participation (SLAPP):</b> Cases filed against civil servants, climate activists and litigants in climate-aligned cases (<i>Commonwealth v. Exxon Mobil Corp.</i>). These include cases seeking to disincentivise individuals and civil society groups from trying to advance climate action through the courts.</li> </ul>	Individual; Non-governmental organisation
<ul style="list-style-type: none"> <li>• <b>Just transition:</b> Cases that challenge climate policies, actions or projects based on the way in which they were developed or on their impacts on specific groups of communities (<i>Setzer and Higham, 2021; Savaresi and Setzer, 2022</i>). These cases can be distinguished from the first three categories of cases above by the fact that they do not necessarily object to climate action and will typically rely on internationally-recognised human rights protections (whether substantive or procedural) (<i>Company Workers Union of Maritima &amp; Commercial Somarco Limited and Others v. Ministry of Energy</i>).<sup>2</sup> As noted in the Introduction, while the long-term outcome of these cases may be improved climate action, this may not be true in the short-term.</li> </ul>	Government; Corporate

Notes: 1. The list of defendant types is based on possible claims, rather than the empirical review of cases.  
 2. There is often a higher degree of complexity to just transition cases that makes it challenging to group them with the other categories listed here. While they may not be strategically unaligned with climate policy, an alternative strategic goal which is being pursued may result in at least temporary non-alignment.

### Box 1.3. The limits of powers: *West Virginia v. EPA*

In February 2022 the US Supreme Court heard oral arguments in the critical case of *West Virginia v. EPA*. The case was initiated in 2015, when several states and others challenged the Obama Administration's Clean Power Plan, promulgated under the Clean Air Act (CAA). Legal proceedings continued in parallel with the Trump Administration's decision to repeal the plan and replace it with the Affordable Clean Energy Rule (or ACE Rule). In early 2021 the District of Columbia Circuit Court struck down the ACE Rule on the basis that the Environmental Protection Agency (EPA) had misinterpreted the scope of its own powers under the CAA. While the 2021 judgment paved the way for the Biden Administration's EPA to develop new regulations, the current Supreme Court proceedings now call into question the Agency's ability to do so. One of the key issues in the case is whether the 'major questions' doctrine – which prevents an agency from interpreting statutory powers to allow it to act on questions of 'vast economic or political significance' without an explicit mandate from Congress – may bar the Biden Administration from introducing ambitious new regulation without Congressional action.

### Challenges to the regulatory authority of governments setting mitigation policies have been brought in the Global North and the Global South

Five of the 14 non-climate-aligned claims challenge the regulatory authority of both national and regional/local governments in setting climate change mitigation policies. These 'regulatory power' cases have occurred in Canada and Mexico, and relate to the introduction of carbon pricing by governments. Three Canadian cases were brought by provincial governments challenging the introduction of the federal government's Greenhouse Gas Pollution Pricing Act (Bill C-74). In a similar but distinct vein, two Mexican cases present challenges to 'green taxes' that were introduced in the states of Zacatecas and Baja California. These cases were brought by individuals and companies that opposed the subnational governments' climate mitigation policies. In the *Ruling on the constitutionality of state 'green taxes' in Zacatecas*, for example, a beer production company challenged the constitutionality of the Treasury Bill of the State of Zacatecas, which had established a tax on greenhouse gases produced by stationary sources.

### Stranded assets claims have been brought through Investor-State Dispute Settlement proceedings

Four of the 14 non-climate-aligned claims can be classed as stranded asset claims. So far, these cases have all been brought against governments through ISDS proceedings. These include cases where companies and investors claim compensation for predicted losses caused by the introduction of climate-justified policy measures, cases concerning the roll-back or amendment of legislation or policy originally introduced to meet climate goals, and cases concerning claims for compensation arising from environmental permitting decisions (Fermeglia et al., 2021). An example is *RWE v. Kingdom of the Netherlands*, a stranded asset case in which RWE, a German company, filed a suit against the Dutch government under the Energy Charter Treaty, an international treaty aiming to protect foreign investments in energy. RWE claims that the Dutch government has failed to grant enough time and resources for the company to transition away from coal.

### Just transition cases do not object to climate action

There are now three 'just transition' cases included in the databases. While these cases are not objecting to climate action *per se*, because of the small sample and limited understanding about the intentions behind these cases, we are currently classifying them as 'non-climate-aligned'. The concept of a 'just transition' is still contested outside of the legal sphere (see Wang and Lo, 2021) and has only begun to be developed within the legal sphere, presenting a complex landscape from which various challenges may be brought (Savaresi and Setzer, 2022). Some cases may challenge

government decarbonisation plans for not including provisions for workers and other communities affected by transition policies and plans, such as in *Company Works Union of Maritima & Commercial Somarco Limited and Others v. Ministry of Energy*. Other challenges may be brought against governments for participation in the renewable energy transition supply chain. In *Regional Government of Atacama v. Ministry of Mining and Other*, the regional government of Atacama is suing the Chilean government for its intention to increase lithium production, which may present threats to Atacama's biodiversity and heighten water insecurity in the area. (Lithium is considered a key element of the energy transition given the increased demand for rechargeable lithium-ion batteries for supplying the power and transport sectors with renewable energy.) Both cases represent challenges that highlight communities' exclusion from the policymaking process in climate change mitigation, as well as the challenges of addressing competing priorities. It is likely that we will see more challenges being brought within this sphere as mitigation and energy transition take on increasing urgency.

While strategic cases are necessarily filed with the intention of influencing the outcome of regional, national and international policy debates, non-strategic cases may also have important outcomes with broader implications (see **Box 1.4**). For example, we do not typically classify the numerous cases filed by the state against climate activists engaged in acts of civil disobedience as strategic. However, from the protesters' perspective these may be strategic cases, as prosecuted activists use their defence or mitigation statements as an extreme form of climate activism (Bouwer and Setzer, 2020). These cases may also have an indirect impact on policy debates regarding climate action and other issues, as demonstrated by ongoing national debate regarding the UK Government's Police, Crime, Sentencing and Courts Bill and its impacts for climate activism (Alberro, 2021).

#### **Box 1.4. The broader universe of climate-relevant litigation**

As noted in the Introduction to this report, the question of how to delineate the body of climate change litigation continues to be debated. New national and regional databases of climate change litigation are proliferating, and the definitions and methodology used for each often contains significant variation (for example, see the *Platforma de Litigio Climático para América Latina y el Caribe* and *Climate Change Litigation in Asean*). Although the focus of this report is on cases where climate change is explicitly recognised as a material issue of fact or law, note that the definition will not capture many cases that may have significant impacts on climate change.

During the study period, for example, a new case concerning the 'Rights of Nature' was heard by the Constitutional Court of Ecuador. The case concerned whether mining activities proposed by Canadian company Cornerstone might violate the rights of the Los Cedros cloud forest, one of the world's most biodiverse habitats. The Court developed substantive and procedural principles regarding the application of Article 71 of Ecuador's Constitution, which protects the rights of nature (Corte Constitucional del Ecuador, 2021; Prieto, 2021). Given the role played by Los Cedros and other tropical forests in carbon sequestration, the case is likely to have significant impacts for climate policy in Ecuador and elsewhere. This case is just one example of many environmental cases filed around the world that may have profound impacts for the climate but fall outside the scope of our databases.

Cases before courts and tribunals, including challenges to planning permission for renewable energy projects, provide further important examples of climate-relevant cases that are outside the scope of this study but that should not be overlooked. In the UK, for instance, up to two-thirds of challenges to onshore windfarms based on 'adverse visual impacts' from the late 1990s onwards have been successful, with the interaction of local and national planning frameworks contributing to such projects being blocked (Jones, 2016). While there are indications that this may now start to change – particularly against the backdrop of the global gas crisis and the UK's legislated net-zero target – this line of cases demonstrates the significant implications that litigation of many types may have for climate governance.

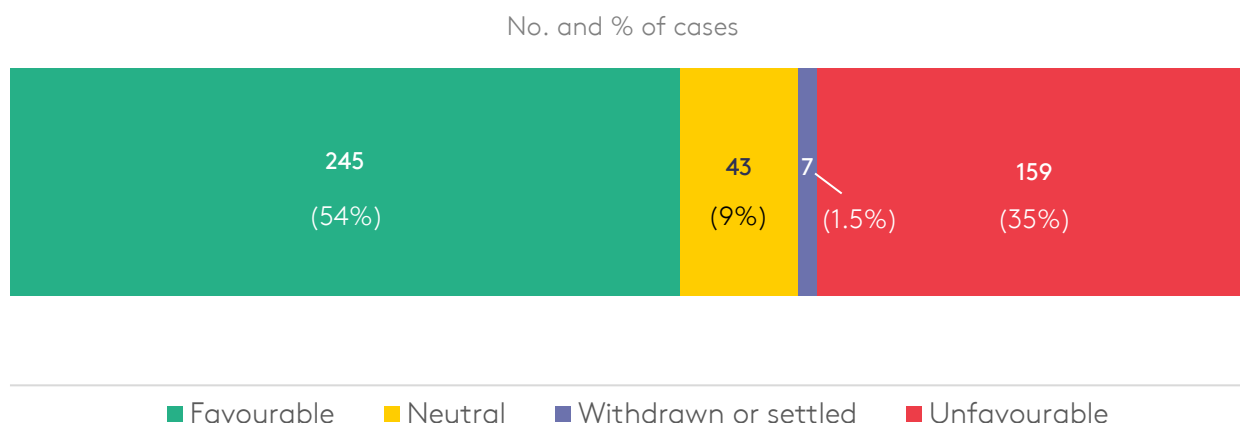
## Outcomes in climate litigation cases: a complex story

A review of the direct outcomes in cases filed outside the US demonstrates that around 54% of decided cases (245 cases) have direct outcomes that can be understood as favourable to climate action (see **Figure 1.8**).<sup>12</sup> This is a reduction of approximately 4% in the figures since the 2021 report (see **Figure 1.9**). One reason for this reduction is the simultaneous dismissal of 11 German cases filed against sub-national governments (the Länder) following the ruling in the case of *Neubauer v. Germany* discussed above. These represent more than 30% of cases filed in 2021 for which a classifiable outcome has so far occurred (of the 85 cases filed in 2021, 50 remain open with no significant judgments).<sup>13</sup> The outcomes in these cases also remind us of the need for careful consideration by climate activists and lawyers of how to use successful precedents most effectively.

At the same time, these German cases indicate that one outcome of climate litigation may be more climate litigation. While this initial round of ‘successor’ cases has been unsuccessful, the *Neubauer* judgment has also been cited in another group of four cases filed against companies before the German courts that have yet to be decided. This group of cases against private entities in Germany may also informally benefit from the ruling in *Milieudéfensie et al. v. Royal Dutch Shell plc.* (see further discussion in **Part II**).

However, a note of caution is required when assuming that any jurisdiction with a notable success will immediately see many more cases. Research by *Krommendijk (2021)* suggests that the Dutch courts have not yet seen a flood of further climate change cases following the Supreme Court decision in *Urgenda*, with only two further climate-aligned cases filed in the Netherlands: the *Milieudéfensie v. Royal Dutch Shell plc.* case and an unsuccessful case filed by Greenpeace challenging the government’s decision to bail out airline KLM during the COVID-19 pandemic. Nonetheless, human rights arguments building on *Urgenda’s* interpretation of the relationship between the rights protected by the European Convention on Human Rights (ECHR) and the environment have been advanced in a number of environmental cases, both by those seeking to promote environmental action and those wanting to protect existing interests (*ibid.*).

**Figure 1.8. Outcomes in all non-US cases over time (up to 31 May 2022)**



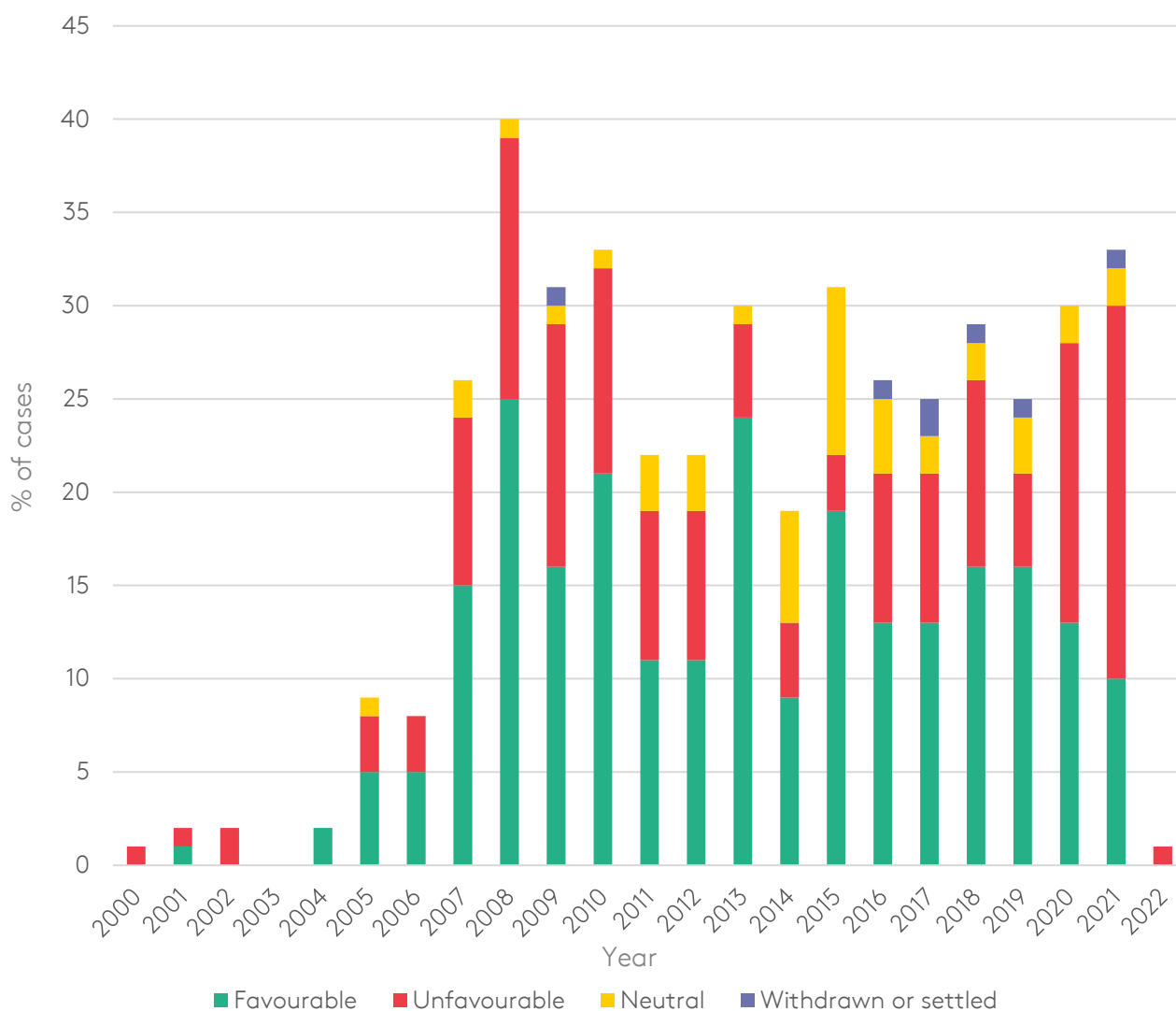
Note: The first recorded non-US case is in 1994

Source: Authors using CCLW data

<sup>12</sup> Notes on the methodology used to assess outcomes can be found in **Appendix 1: Methodological notes**.

<sup>13</sup> A further three cases concerning the responsibility of sub-national governments filed in Germany are still open.

Figure 1.9. Outcomes of non-US climate litigation from 2000 (up to 31 May 2022)



Source: Authors using CCLW data

As noted in our previous reports, a strict focus on the direct outcomes of cases – i.e. the changes to the legal regime governing climate change arising as a result of court judgments – only tells part of the story of the influence of litigation on climate governance (Setzer and Higham, 2021).

**More research is required to understand the effectiveness and impacts of climate litigation**

A small but growing literature is developing that highlights both the direct and indirect impacts that high-profile climate change litigation cases may have on the law and beyond (Peel and Markey-Towler, 2021). However, as Setzer, Silbert and Vanhala highlight in forthcoming work, considerably more research is still required to help understand the overall effectiveness of litigation as a tool for advancing climate action. There is still little conceptualisation of effectiveness as a distinct concept and we are not aware of specific frameworks to assess the effectiveness of climate litigation. Litigation’s impact may be observed on broader governance, on actors’ behavioural change, or on climate change itself. This could be in reference to how litigation shapes the wider polycentric governance of climate change and informs other transnational and international initiatives; on how litigation forces governments or companies into legal compliance or incentivises better corporate social responsibility; or in reference to the volume of greenhouse gases released into the atmosphere. The literature to date has focused on impacts associated with a relatively small number of cases, but the cumulative impacts of litigation also require further scrutiny. This issue is particularly urgent in light of litigation’s

resource-intensive nature and its use and potential use by well-resourced and powerful anti-regulatory actors.

One proxy for understanding the cumulative impacts of climate change litigation on climate governance may be the degree of engagement with the topic demonstrated by actors external to the core climate litigation community of practice. While a comprehensive review of this issue is outside the scope of this report, recent developments do suggest that climate change litigation is becoming an increasingly important factor in climate policy decisions made by both public and private actors, particularly in the financial sector.

As noted in the Introduction, litigation was recognised as affecting “the outcome and ambition of climate governance” in the *Summary for Policymakers* of the most recent report from the Intergovernmental Panel on Climate Change, a document that must be reviewed and approved by representatives of every member government (IPCC, 2022). The last 12 months have also seen reports and working papers on climate litigation published by ratings analysts (Englerth et al., 2021), the Network for Greening the Financial System (NGFS) – a network of 83 central banks and financial supervisors (NGFS, 2021), and the European Central Bank (Setzer et al., 2021). In November 2021 the Lloyds Market Association published a ‘Model Climate Change Exclusion’, which excludes costs arising from claims where the (re)insured caused or contributed to climate change or its consequences (Powell, 2021). In their roles as financial supervisors, both the Bank of England and the US Office of the Comptroller of the Currency (OCC) have also included points about litigation risk in guidance or draft guidance to large financial institutions regarding the assessment of climate change risk, building on previous work on this issue by the Task Force for Climate-related Financial Disclosures (TCFD) and others (Bank of England, 2021; OCC, 2021).<sup>14</sup> Many of the examples cited above may demonstrate a relatively narrow understanding of ‘climate litigation risk’ (Solana, 2020). Nonetheless, they suggest the influence that the global phenomenon of climate change litigation is exerting over a broad range of actors.

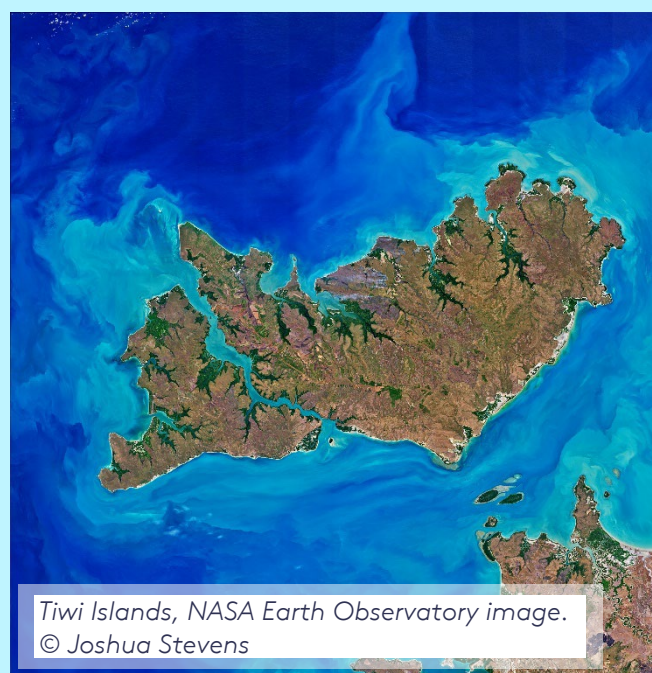
**“A small but growing literature is developing that highlights both the direct and indirect impacts that high-profile climate change litigation cases may have on the law and beyond.”**

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<sup>14</sup> It should be noted that the OCC Guidance is still in draft form following a consultation period that ended in April 2022.

## Box 1.5. Litigation risk may influence decision-making

Several of the cases added to the databases in the last 12 months suggest that even cases that never make it to a full hearing may have an impact on decision-making processes. For example, on 22 March 2022, indigenous people from the Tiwi Islands (part of Australia's Northern Territory) filed a case in *Kang et al. v. KSURE and KEXIM*, challenging two South Korean export credit agencies in an effort to prevent them from financing a new pipeline project that would run through a protected marine habitat. Two weeks later, Kexim reported delays to its decision-making around the project, citing "legal risks" and the need to further assess "ways to reduce carbon emissions" among its reasons (Ferryhough and Jung-a, 2022). The proceedings have now been dismissed, but the threat of further legal action may still influence the decision-making process of different actors involved in the case.



The *Tiwi Islanders* case is not an isolated instance. During the study period, the 2016 case of *SkeenaWild Conservation Trust v. Government of Canada* was added to the database. This case involved a challenge to the Minister of Environment and Climate Change's approval of a new LNG project in the Skeena watershed in British Columbia. Following the filing of the case, as well as several other challenges to the project filed by indigenous groups, the fossil fuel company Petronas withdrew from the project, citing changes in market conditions. Research by activist groups Indigenous Environmental Network and Oil Change International suggests that indigenous peoples' resistance to similar projects, including through litigation, could result in prevented emissions of up to 1.8 billion metric tonnes of carbon dioxide equivalent (Goldtooth et al., 2021).

An investigation into climate litigation by *The Economist* provides a further example of threatened litigation leading to a real-world outcome. The report describes how a letter from investors in Japan sent to the utility company J-Power with the support of environmental organisation ClientEarth was a key reason for J-Power's decision to abandon plans for a new coal-fired power plant in Ube (*The Economist*, 2022). In the UK, similar cases occurred around a proposed development of the Cambo oilfield in the North Sea when Shell, which had a significant stake in the project, withdrew its support in December 2021, causing the development to be put on hold. The company cited weaknesses in the economic case for the project, but activists have linked the withdrawal to the high-profile campaign against the development, including changes in the regulatory environment caused by the campaign and the threat of litigation (*Stop Cambo*, 2021). Recent reports suggest that Shell may now be revisiting the decision in light of the UK's current energy policy and response to the war in Ukraine (Tidman, 2022).

While more systematic research is required to confirm the connection between such cases and development decisions, these examples suggest that the threat of litigation alone may have significant outcomes for climate governance.



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## Part II: Litigation trends in focus

Understanding of the manifold interactions between domestic and international climate governance has developed rapidly in recent years (Jordan et al., 2018). One facet of that interaction can be seen in the way that climate litigation and climate litigants draw from, engage with, and help to shape multilateral climate negotiations. Climate litigation plays a key role in challenging, changing and advancing narratives about climate change and climate governance at multiple levels of governance (Nosek, 2018; Paiement, 2020).

To reflect this interaction, we have structured this part of the report – which provides a more qualitative analysis to complement the quantitative analysis in **Part I** – around key elements of the text of the Glasgow Climate Pact. We emphasise commonalities between recent litigation and some of the most important issues highlighted by the international community at COP26. While we focus on cases from the past 12 months, where relevant we also connect these cases to earlier trends to establish the role played by litigation (among other forms of advocacy) in pushing certain issues up the agenda at different levels of policymaking.

### Domestic accountability for climate targets

One of the major developments at COP26 was the introduction of what has been described as an ‘annual ratchet mechanism’ for countries’ domestic climate pledges, set out in documents known as Nationally Determined Contributions (NDCs) (Ferris, 2021). Following concerns that current pledges are insufficient to limit global temperature rise to 1.5°C in line with the latest scientific warnings, the ratchet mechanism urges countries to return with more ambitious pledges at COP27. One way in which activists may seek to influence the development of new pledges and targets is through litigation, particularly in light of past success in this area.

As described in **Part I**, as of 31 May 2022 we had identified 65 ‘government framework’ cases from the non-US databases. We have also identified a further 8 cases from the US database that challenge governments’ overall responses to climate change, making a total of 73 such cases around the world. Although most of these cases have been filed against national governments, when the US figures are included, a total of 23 were filed against sub-national governments. The majority of cases have been filed in the Global North and focus on the adequacy of the design or overall ambition of a government’s policy response to climate change. A small minority of cases concern the implementation of existing climate protection measures (such as *Commune de Grande-Synthe v. France*).

The sharp increase in cases of this type filed in 2021 may in part be attributable to a series of high-profile successes in similar cases: of the 8 cases where decisions have been issued by apex courts and not appealed to the European Court of Human Rights, 6 have had favourable outcomes for climate action.<sup>15</sup> These cases have already led to real-world change. For example, in December 2021 the Dutch Cabinet restricted the operations of coal power stations to no more than 35% of their maximum capacity until 2024, a measure that has been directly linked to the outcome in the landmark case of *Urgenda Foundation v. State of the Netherlands* (Higham et al., forthcoming).

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<sup>15</sup> An apex court is the highest court in a given jurisdiction. Judgments from these courts cannot typically be appealed and should be considered as final. The cases with outcomes favourable to climate action are: *Commune de Grande-Synthe v. France* (2019); *Friends of the Irish Environment v. Ireland* (2018); *Future Generations v. Ministry of the Environment and Others* (2018); *Neubauer, et al. v. Germany* (2020); *Shrestha v. Office of the Prime Minister et al.* (2017); *Urgenda Foundation v. State of the Netherlands* (2015). The cases where outcomes were deemed unfavourable to climate action are: *In re Climate Resilience Bill* (2021); *Armando Ferrão Carvalho and Others v. The European Parliament and the Council* (2018). It should be noted that *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others* has not been included in this list because there are currently outstanding proceedings in the case before the European Court of Human Rights. There are also outstanding proceedings regarding the Conseil d’Etat’s decision on the standing of individual plaintiffs in the *Grande-Synthe* case pending before the European Court of Human Rights, but as the case brought by the sub-national governments has already received a decision on the merits, these proceedings have not led to the case’s exclusion from this list.

Just as the COP26 negotiations were focused on the idea of ‘keeping 1.5 alive’, there has also been a shift in the temperature targets that are used to inform these cases. Prior to the IPCC’s *Global Warming of 1.5 Degrees* report of 2018, early claims used 2°C as an upper temperature limit to inform calculations about ‘safe’ emissions reduction targets, including the *Urgenda* case. However, a parallel shift took place in framework litigation against governments, in which arguments about temperature targets are now often made on the basis of 1.5°C of warming. Commentators have pointed out that the 2021 Glasgow Climate Pact has “cemented” 1.5°C as the “primary global temperature ceiling” (Depledge et al., 2022). This shift can also be seen in the climate lawsuits of the past 12 months.

A more detailed analysis of this group of cases and their relevance for policymakers in both the public and private sectors will be made available in a forthcoming Grantham Research Institute report (Higham et al., forthcoming).

### **Accountability for fossil fuel expansion**

Reports on the outcome of COP26 have almost invariably given considerable airtime to paragraph 20 of the Glasgow Climate Pact, in which UNFCCC signatories committed to the acceleration of “efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies” (UKCOP26, 2021). This language marks the first time that the mitigation of fossil fuel emissions has been referred to in a decision negotiated by every party to the UNFCCC (van Asselt, 2021a). While not in itself binding, it may mark a turning point in the acceptance of the aims of a broader ‘global movement’ that has sought to force an acceptance of the reality that climate action simply cannot be achieved without measures to tackle fossil fuels, which accounted for 86% of global emissions over the past decade (ibid.).

### **Governmental support for fossil fuel use as a matter of constitutional or human rights**

Climate litigation cases have played an important role in the movement towards the phase-out of fossil fuels. Some of the earliest climate litigation in the US and Australia focused on the granting of permits for new fossil fuel projects such as coal mines, and indeed on the overall obligations and responsibility of fossil fuel producers (i.e. the Carbon Majors) (see **Box 2.1**; Ganguly et al., 2018; Peel and Osofsky, 2015; van Asselt, 2021b). In the US, as noted above, state support for the fossil fuel industry has also been a key target of litigation, with ‘framework’ cases filed by youth plaintiffs against state and federal governments.

The past 12 months have seen two notable developments in this important area of litigation. Firstly, filed cases have continued the trend of integrating arguments about governmental support for fossil fuel use – whether through policies, permits or subsidies – with arguments about human and constitutional rights. These cases take the arguments and standards developed in the ‘government framework’ climate cases discussed above and apply them at a more operational level. Secondly, cases employing these strategies have become more prevalent in the Global South, as described below.

### **Avoiding fossil fuel lock-in in the Global South**

In the Global South, many litigants are mounting large-scale challenges to policies that would involve the development of yet untapped fossil fuel reserves and ‘lock in’ development pathways dependent on fossil fuels. In Guyana, for example, in the case of *Thomas & de Freitas v. Guyana*, an indigenous young person and a university lecturer have argued that Guyana’s decision to approve oil exploration licences that could lead to billions of tonnes of new emissions would lead to violations of their constitutional rights and those of future generations. In Argentina, at least four separate claims have been filed seeking to halt offshore drilling following a resolution passed by the Ministry of Environment and Sustainable Development. At least three cases included climate grounds, including a constitutional rights petition (*amparo colectivo ambiental*) filed by Greenpeace Argentina and others. The case relies on transnational jurisprudence regarding the human rights impacts of climate change, particularly on children and the rights of future generations, and argues that the new offshore drilling would mean that Argentina’s greenhouse gas emissions to 2030 would exceed the commitments in its NDC.

## Raising ambition: from individual projects to sectors

In South Africa, litigants in the youth-led *#CancelCoal Case* have challenged a 2019 government energy strategy that includes plans for the procurement of 1,500 mega-watts of new coal power. The case draws on the success of a court challenge to the proposed 1,200 MW coal-fired Thabametsi Power Project (*Earthlife Africa Johannesburg v. Minister for Environmental Affairs & others*). The project was abandoned by proponents after the court ruled the environmental impact assessment was inadequate due to a failure to consider climate impacts.

By challenging a sectoral-level procurement policy rather than focusing on individual projects, the litigants are demonstrating an increased sense of scale and urgency that may come to characterise the next generation of cases focused on fossil fuels. The increasing scale of decisions challenged has also been seen elsewhere: in the US, for example, Romany Webb has highlighted the importance of a recent injunction preventing the largest ever sale of offshore oil and gas in the country's history in the case of *Friends of the Earth v. Haaland*, granted in January 2022 (Webb, 2022). She argues that this case and others may provide much needed clarity to US federal agencies regarding their powers to halt oil and gas leasing on environmental grounds. (It has yet to be seen how energy security concerns prompted by Russia's unlawful invasion of Ukraine will ultimately affect this area of US policy.)

Many of the cases cited above refer to a series of recent influential reports from international bodies that confirm that continued exploration of new fossil fuel reserves is likely to be incompatible with a 1.5°C warming scenario. This evidence base has been further strengthened by the publication of the IPCC's *Sixth Assessment Report*, which confirms that fossil fuel-focused measures, such as decommissioning and reduced use of existing fossil fuel power infrastructure and the cancellation of new coal projects, are important mitigation measures (IPCC, 2022). It is likely that the IPCC's report may be used as part of the evidence base in future litigation.

### Box 2.1. Coal mines and the 'Duty to Care'

On 15 March 2022 a full bench of Australia's Federal Court overturned the judgment of the court of first instance in *Sharma and others v. Minister for the Environment*. The trial judge had found that in exercising a statutory duty regarding whether to approve a new coal mine, the federal Minister for the Environment owed a duty of care to Australian children to consider the loss of life and personal injury that they were reasonably likely to suffer as a result of the approval of the project. The case was hailed by activists such as Greta Thunberg as a 'huge win for the climate movement', with scholars arguing it might mark a turning point in the establishment of a 'duty to care' on the part of government (Peel and Markey-Towler, 2021a).

The Federal Court, however, dismissed the trial judge's initial ruling on several grounds including the political question doctrine. The lead judgment from Chief Justice Allsop notes that "[i]f the relationship [between the Minister and the plaintiffs] and the uncontested evidence together call forth a duty, it is political duty not a legal duty of care". While the appellate decision has been seen as a blow to the climate litigation movement in Australia, the case has nonetheless received widespread public attention. The extensive consideration of the scientific basis for climate change is unusual in Australian cases and the findings of fact may still "set important scientific parameters for future cases" (Peel and Markey-Towler, 2021a). One of those cases may be *Youth Verdict v. Waratah Coal*, in which an alliance of First Nations youth and rural landowners have sought to challenge a proposal for a new coalmine in Queensland, in part based on human rights protections enshrined in Queensland law. The hearing, held in April 2022, followed First Nations protocols – a first for environmental litigation in Australia.

While there are many differences in the grounds used in these respective challenges, it is clear that the *Sharma* appeal is far from being the last word on the legality of coal mine approvals in Australia.

## The role of human rights: understanding the complexity

The use of human rights law and remedies to address concerns related to climate change continued to intensify and become more complex over the study period. This can be understood as both a cause and an effect of the growing international recognition of the close connection between human rights and climate change, within the broader context of human rights and the environment. In October 2021, the UN Human Rights Council (UNHRC) passed a ground-breaking resolution recognising the right to a healthy environment. While climate change was not the focus of the resolution (although it does appear in the preamble), a new mandate for a Special Rapporteur on the promotion and protection of human rights in the context of climate change was also created at the same time.<sup>16</sup> Just one month later at COP26, the role of human rights was a crucial – though contentious – issue throughout the negotiations, and one that received some recognition in the final outcomes, including the Glasgow Climate Pact. These developments will no doubt be leveraged by climate litigants seeking to extend the current body of rights-related climate cases (Tigre, 2021a), which makes understanding such cases in a holistic way increasingly more important.

### Growing recognition of corporate actors' human rights responsibilities to protect the climate

One way to make sense of this body of cases is by identifying the human rights most frequently invoked in cases brought against states and against corporate actors (Savaresi and Setzer, 2022). A systematic analysis of the grounds on which rights-based climate case demands have been brought suggests that most cases have been filed against states, seeking the fulfilment of positive or negative obligations as a condition to respect, protect and fulfil human rights. This is to be expected as in human rights law, states are the primary entities with duties. However, the growing recognition of corporate actors' human rights responsibilities at the international, regional and national level have been associated with a rise in litigation concerning corporate human rights abuses (Hartmann and Savaresi, 2021).

In climate litigation, while initially human rights offered strong grounds for cases against states, one area in which rights-based climate litigation is playing an important role – and will probably continue to do so – is in litigation against companies, particularly in light of the development of standards for human rights due diligence. Here, climate litigation contributes to the gradual consolidation of the concept of 'climate due diligence' both as a standard of conduct and as a business process (Macchi, 2021). The Proposal for a Directive on Corporate Sustainability Due Diligence<sup>17</sup> issued by the European Commission in February 2022, once approved, could potentially help reduce the uncertainty about climate-related standards of care and what companies can do to reduce their risk of being involved in litigation, as could efforts to introduce due diligence legislation elsewhere.

The most obvious example of litigation that integrates the interpretation of corporate due diligence based on both human rights law and climate law standards is *Milieudefensie v. Royal Dutch Shell plc*. In May 2021, the District Court of The Hague gave a groundbreaking judgment, confirming that Shell had a corporate duty of care and due diligence obligations under national tort law. The decision was also grounded in human rights duties enshrined in international and EU law. Based on those grounds, the Court interpreted Shell's duty of care towards the inhabitants of the Netherlands as requiring it to mitigate climate change by reducing the carbon dioxide emissions resulting from its global operations by at least 45% by 2030, compared with 2019.

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<sup>16</sup> The first Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, was appointed by the UNHRC at its 49th session in March 2022 and started his mandate on 1 May 2022. Two weeks into his mandate, Fry informed eight key themes that will be included in his first report to the Human Rights Council and which will shape his activities in the next three years, and these included: climate change displacement; loss and damage; just transition; business, human rights and climate change and litigation. See Fry (2022).

<sup>17</sup> European Commission *Proposal for a Directive of the European Parliament of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*.

Shell appealed the decision and a judgement by the Court of Appeals is expected in 2024. While the decision of the District Court could be overturned, the recognition by a court of a corporate duty of care for climate change mitigation has been much celebrated. The ruling was hailed as a judgement that would ‘change the world’ by lawyers involved in the case (see [Reed and Moses \[2021\]](#)), as well by global law firms (such as [White & Case](#)) and scholars ([Hösli, 2021](#); [Macchi and van Zeven, 2021](#)). Importantly, *Milieudefensie v. Royal Dutch Shell plc.* illustrates how domestic courts can help strengthen otherwise non-binding instruments – in this particular case, soft law endorsed by Shell, such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact and the OECD Guidelines for Multinational Enterprises. However, some analysts have been more critical of the judgement. [Mayer \(2022\)](#), for example, questions whether a level of mitigation action directly inferred from global objectives and climate science could be applied to an individual company and suggests that such a ruling would need to discuss the development of transnational initiatives aimed at reducing CO<sub>2</sub> emissions in oil and gas production and to identify good practice from other companies (see [Box 2.2](#)).

While the case is still pending, it has been predicted that the decision would inspire other similar cases ([Tiruneh, 2021](#)), particularly against traded companies in high-emitting sectors ([Clyde & Co, 2021](#)). During COP26 Milieudefensie published a *toolkit* to inform individuals and organisations interested in taking on climate litigation against corporate actors. [Roger Cox and Mieke Reij \(2022\)](#) published *Defending the Danger Line*, a manual describing the legal basis and approach in the climate case against Shell for lawyers and other institutions who are considering starting a lawsuit against major polluters.

The prediction that more rights-based strategic cases would be brought against companies has been slowly materialising. In September 2021 environmental organisation Deutsche Umwelthilfe (DUH – Environmental Action Germany) filed suits against car manufacturers *Mercedes Benz* and *BMW* and oil and gas company *Wintershall*, and in November 2021 claimants associated with Greenpeace Germany and Fridays for Future Germany filed an action against Volkswagen. As in the *Milieudefensie* case, they claim that the companies’ excessive CO<sub>2</sub> emissions will violate their rights and they corroborate the claims with references to the goals of the Paris Agreement and evidence from IPCC reports. However, rather than relying on the right to life and the right to

### Box 2.2. Tracking emissions reductions from high-emitting sectors

The past few years have seen several initiatives seeking to develop pathways and roadmaps to show the speed, scope and scale of the emissions reductions required from different high-emitting sectors to achieve the low-carbon transition, and to benchmark company performance against these. One such example is the *Transition Pathway Initiative* (TPI), established in 2017 as a global initiative led by asset owners and supported by asset managers. As of May 2022, 125 investors globally had pledged support for TPI, jointly representing over US\$45 trillion in combined Assets Under Management and Advice.

TPI’s benchmarks are sector-specific and therefore recognise that different sectors of the economy (e.g. oil and gas production, electricity generation, car manufacturing) face different decarbonisation challenges, including where emissions are concentrated in the value chain and how costly it is to reduce emissions.

Such benchmarks could have a role to play in helping litigants identify industry-specific laggards, and in developing theories regarding the standards of conduct required for companies to discharge emissions reduction obligations, particularly when used in combination with evidence regarding the outsized historic responsibility of certain companies and sectors.

private and family life, as enshrined in the European Convention on Human Rights, the German claimants rely on the non-statutory general personality right in German law (Tigre, 2021b). The action groups' case also references the decision of the German Federal Constitutional court in the *Neubauer* case, from which, the groups argue, they can derive a mathematical CO<sub>2</sub> budget for each company.

There is a possibility that Milieudefensie or other organisations will consider filing cases against companies that do not respond to invitations to publish climate plans. Letters sent by Milieudefensie to 29 companies or groups of companies asked them to indicate their plans to reduce their business's CO<sub>2</sub> emissions (Scope 1, 2 and 3) by at least 45% compared with 2019.<sup>18</sup>

Other similar cases have already been filed, such as *Notre Affaire à Tous and Others v. Total*. In November 2021 the Versailles Court of Appeal confirmed the jurisdiction of the Nanterre judicial court to settle that dispute. The decision is based on the exclusive jurisdiction of certain courts of law in matters of cessation and compensation for ecological damage. Following the decision, the French Parliament passed a *law* giving exclusive jurisdiction to the Paris Civil Court with respect to matters related to the duty of vigilance.

As further detailed in **Box 2.3**, the *final report* by the Philippines Commission on Human Rights, responding to a petition filed with Greenpeace Southeast Asia and other organisations and individuals, could also potentially be used in future litigation seeking to hold corporate actors accountable to affected people worldwide (Muffett, 2022).

### Box 2.3. The Philippines Commission on Human Rights' report on the National Inquiry on Climate Change

On 6 May 2022 the Philippines Commission on Human Rights (CHR) released its final report on the nearly seven-year-long *National Inquiry on Climate Change*. The Inquiry was launched in response to a petition filed by Greenpeace Southeast Asia and individual petitioners from across the Philippines. The petition asked the Commission to examine the impacts of climate change on the human rights of the Filipino people and to consider the role of 47 large fossil fuel producing companies (Carbon Majors) in driving climate change, obstructing climate action and contributing to resulting harmful impacts.

On a basic level, the report concluded that climate change is a human rights issue: climate change adversely affects the individual rights to life, food, water, sanitation and health, and collective rights to food security, development, self-determination, preservation of culture, equality and non-discrimination (CHRP 2022, 33). Climate change impacts vulnerable populations, including women, children, Indigenous Peoples, older adults, persons with disabilities, as well as the rights of future generations (ibid., 33). Climate change is also a major cause of migration and threatens global security (ibid., 33). Consequently, national human rights institutions (NHRIs) can support victims of human rights violations resulting from climate change in their quest for justice and accountability. *(Cont. next page)*

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<sup>18</sup> The letters set out a deadline of 15 April 2022 for submission of the climate plan. The New Climate Institute will evaluate all plans and assess their quality and practicality and Milieudefensie will publish the results in a ranking.

While the Commission investigated the role of the Carbon Majors, it concluded that states have a duty to protect human rights, and this duty necessarily includes regulating the conduct of non-State actors, and protecting individuals from abuses from such actors (ibid., 70). This includes providing effective judicial and non-judicial remedies for victims seeking accountability for abuses by businesses (ibid., 71). Regarding territoriality, it recognised that States' duty to prevent human rights abuses may extend beyond its territory (ibid., 73), and that States are obliged to act if activities in their territory cause serious human rights violations in the territory of another State (ibid., 75).

The findings regarding Carbon Majors' actions conclude that major emitters "directly by themselves or indirectly through others, singly and/or through concerted action, engaged in willful obfuscation of climate science, which has prejudiced the right of the public to make informed decisions about their products, concealing that their products posed significant harms to the environment and the climate system. All these have served to obfuscate scientific findings and delay meaningful environmental and climate action" (ibid., 108-109). Moreover, the Commission observed that climate change denial and delay efforts by Carbon Majors are still ongoing: "these obstructionist efforts are driven, not by ignorance, but by greed" (ibid., 110).

The report proceeds to elaborate a series of recommendations for the Carbon Majors to publicly disclose due diligence and climate and human rights impact assessment results, and measures taken to address these (ibid., 130); desist from all activities that undermine climate science (ibid., 131); cease exploration of new oil fields, leading a just transition to clean energy (ibid., 131); contribute to financing the implementation of mitigation and adaptation measures (ibid., 131); and cooperate with experts and stakeholders to improve corporate climate responses (ibid., 132).

The report also contains recommendations for governments, financial institutions and investors, international bodies, NHRIs, courts, NGOs, legal professionals and citizens. These include a recommendation for governments to cooperate on a legally binding instrument to strengthen the implementation of the UN Guiding Principles on Business and Human Rights; for financial institutions and investors to refrain from financing fossil fuel-related projects; and for the government of the Philippines to enact laws imposing legal liabilities for corporate or business-related human rights abuses. The section on financial institutions is of particular note, emphasising that despite their negligible direct emissions, "their role as financiers of the sectors and projects that generate GHG emissions, including and most significantly, the fossil fuel industry, make them similarly accountable for global warming and climate change" (ibid., 132).

These findings and recommendations should be viewed in the context of a systemic shift in approach to accountability for climate change, and are expected to resonate beyond the Philippines and contribute to more robust climate action and accountability worldwide (Savaresi and Wewerinke-Singh, 2022).



## Climate cases that reached the European Court of Human Rights

The development of framework litigation against governments and more operational or project-based cases deploying constitutional and human rights narratives can also be clearly seen in developments before the European Court of Human Rights in Strasbourg (ECtHR). There are now three cases pending before the court: *Duarte Agostinho and Others v. Portugal and 32 Other States* (communicated in December 2020), *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others* (March 2021) and *Greenpeace Norway v. Government of Norway* (December 2021). A number of further challenges that have not yet been communicated to the court, by citizens from France, Italy and Austria against their own governments, concern country-wide inaction and management of climate risks (see **Box 2.4**). In the two Italian cases, the claimants are also seeking relief against other Council of Europe member states and the allegations in the complaints have significant similarities with those in the *Agostinho* case.<sup>19</sup>

Where the first two cases named above that have been taken up by the Court to date take a government framework approach, the *Norwegian* case is more narrowly targeted at oil and gas exploration. Given the announcement by the Court that the *Swiss* case will be dealt with by the Grand Chamber of the ECtHR, that case is likely to be the first decided. Such a development underlines the high profile the Court is giving that case.

Each of these cases brings different issues to the appreciation of the court. The *Agostinho* and the *Swiss* cases focus on the alleged insufficiency of domestic climate measures in relation to climate change, but they have fundamentally different admissibility issues (the Portuguese youth began their case directly in Strasbourg while the *Swiss* case started as a domestic, administrative law case). The *Norwegian* case, in particular, brings the contentious issue of State responsibility for extra-territorial emissions, an issue that will likely also come up as a subsidiary matter in the *Agostinho* case. Though an ECtHR decision could not overturn the Supreme Court's decision and annul the impugned oil exploration licences, should the Court find that Norway did not exercise due diligence to avoid climate harm, it could require the Norwegian State to reconsider its oil and gas policies (see *Vigne and Mason, 2022*).

Speculation about the Court's response is growing, and many questions remain to be answered, particularly regarding the hurdles that these applications will have to overcome to see a judgment on the merits and the degree of redress that the Court can offer (*Keller et al., 2022*). While environment-related cases are not new to the Court – it has decided around 300 of such cases (*ECHR, 2022*) – the Court is yet to rule on the implications of climate change for the enjoyment of the rights enshrined in the European Convention of Human Rights. Since the Convention does not provide for a specific right to a healthy environment, climate cases brought before the Court have been relying on Articles 2 (right to life) and 8 (right to private and family life) to argue that States have certain positive obligations to prevent and protect from harm caused by climate change. What the Court decides will likely have important implications for other rights-based climate change litigation and the right to a healthy environment.

**“Climate litigation contributes to the gradual consolidation of the concept of ‘climate due diligence’, both as a standard of conduct and as a business process.”**

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<sup>19</sup> See: *Mex M v. Austria*; *Careme v. France*; *Uricchio v. Italy*; *de Conto v. Italy*.



## Box 2.4. State responsibility for transboundary harm

Although the majority of framework cases against governments have been filed before domestic courts, a few have been filed before international bodies. This includes a *petition to the UN Committee on the Rights of the Child*, filed by 16 children and young people against Argentina, Brazil, France, Germany and Turkey. The petitioners alleged that the respondent states had violated their rights by their failure to impose sufficient controls on greenhouse gas emissions within their territories. While the case was dismissed on procedural grounds – the Committee held that the claimants should have sought relief before domestic courts first – the Committee made a number of important observations, including a confirmation that every state is responsible for reducing emissions and avoiding the harm to human rights associated with emissions from within its territory, even when that harm is suffered by children in another jurisdiction (see further Tigre and Lichet, 2021).

## Private and public finance institutions in the spotlight

In addition to global goals on mitigation and adaptation, Article 2 of the Paris Agreement sets a third goal of aligning finance flows with the transition to a low-carbon and resilient global economy, in recognition of the important role that finance plays as a lever for action, and how a lack of finance can prove a barrier to change. This emphasis on finance as a lever for broader systemic change is also reflected throughout the text of the Glasgow Climate Pact.<sup>20</sup>

### Cases are targeting 'portfolio' emissions

Several new and ongoing cases seek to clarify the legal obligations of both public and private financial institutions for their 'portfolio emissions' as a means to influence broader understandings of and approaches to climate-related financial risks within the global financial system. Portfolio emissions can be understood as the value chain emissions associated with a given institution's investment decisions. Cases against private finance institutions filed during the study period include the case of *Ewan McGaughey v. the Universities Superannuation Trust Limited*. Ewan McGaughey, a lecturer in law at King's College London, filed a complaint before the High Court of England and Wales against the Trustees of the Universities Superannuation Scheme, the largest private pension fund in the UK. The complaint alleges mismanagement of the fund on several grounds including over-investment in fossil fuel assets with inflated valuations. Although dismissed at first instance, the case is likely to be appealed.

In the US, students at 13 universities, including Harvard, Princeton, Yale and Stanford, have now filed complaints with their respective states' attorneys general, alleging that the universities' failures to divest from fossil fuels constitute breaches of state law, including fund managers' fiduciary duties to manage charitable funds with prudence. The complaints ask the states to investigate the alleged legal violations. These complaints follow *Harvard Climate Justice Coalition v. President & Fellows of Harvard College*, a lawsuit in which students sought to compel the divestment of Harvard's endowment funds, arguing that, among other things, continued investment in fossil fuels represented a breach of the university's fiduciary and charitable duties. The case was dismissed by the Massachusetts Appellate Court in 2016 on the basis that the students lacked standing to bring the claim.

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<sup>20</sup> Paragraph 14 of the decision text, for example, "calls upon multilateral development banks, other financial institutions and the private sector to enhance finance mobilisation in order to deliver the scale of resources needed to achieve climate plans, particularly for adaptation, and encourages Parties to continue to explore innovative approaches and instruments for mobilising finance for adaptation from private sources."

## From disclosure to prudent financial management

Collectively, these recently filed complaints confirm the shift in emphasis noted in our 2021 report from cases concerned primarily with the disclosure of climate-related information to cases focused on questions about what prudent financial management means in the context of the transition to a low-carbon economy (see [Setzer and Higham, 2021](#)). It is worth noting that to date, cases against private financial institutions have primarily focused on institutional investors with long-term investment horizons, which are increasingly understood as having obligations to manage and mitigate environmental externalities from their investments given the harm such externalities may cause to other areas of their portfolios ([Quigley, 2020](#)).

There have been major developments, too, in cases against public financial institutions over the past 12 months. First instance judgments were issued in the cases of *ClientEarth v. Belgian National Bank* and *Friends of the Earth v. UK Export Finance*. The former, in which the claimants argued that a European Central Bank corporate bond purchase scheme was in violation of EU law because institutions involved failed to integrate environmental protections into the design of the scheme, was dismissed by the Brussels Tribunal of First Instance on procedural grounds. It has since been appealed. In the latter case, claimants challenged the UK Export Credit Agency's decision to invest in a liquified natural gas project in Mozambique on the basis that the project was inconsistent with the goals of the Paris Agreement and that insufficient evidence regarding the total emissions from the project has been considered. The case resulted in a split decision from the UK High Court: one judge concluded that there was no obligation to consider Scope 3 emissions and that given the aspirational nature of the Paris Agreement there was no need to conclude that providing finance for the project contradicted the commitments made under the Agreement. Mrs Justice Thornton, however, disagreed, noting that the Paris Agreement should have been a relevant consideration in the decision-making process, and that "...in order for UKEF to demonstrate compliance with Article 2(1)(c), it had to demonstrate that funding the project is consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C". That required an adequate assessment of the project's Scope 3 emissions, among other things.

The UK case will now be appealed to the Court of Appeal. A similar case filed against two export credit agencies in South Korea has been dismissed by the court of first instance, but may also be appealed.

The uncertain outcome in these cases shows that there is still significant controversy regarding legal responsibility for assessing and managing Scope 3 emissions associated with financial investments. However, the judgment from Mrs Justice Thornton may be the first sign of acceptance that a more comprehensive consideration of climate issues may be required.

## 'Climate-washing' litigation: closing the credibility gap

One of the recurring issues dominating the multilateral negotiations at COP26 in 2021 was trust – or rather, a lack of it ([Carbon Brief, 2021](#)). A prominent manifestation of this phenomenon was a physical walk-out staged by civil society groups on the last day of the conference. One aspect of the response to this growing 'credibility gap' has been a renewed focus on transparency and accountability for greenwashing or climate disinformation. The Net Zero Tracker, for example, is designed to enable state actors, businesses, campaigners, academics and the public to benchmark the quantity and quality of net zero targets and track progress towards global climate targets.<sup>21</sup> The UN Secretary General (through a newly created High-Level Expert Group on the Net-Zero Emissions) and the COP26 Climate Champions (through its Expert Peer Review Group) are developing and applying standards and mechanisms in this area (see further [Higham, 2021](#)).

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<sup>21</sup> The Net Zero Tracker is led by the Energy & Climate Intelligence Unit, Data-Driven EnviroLab, NewClimate Institute and Oxford University's Net Zero Climate Initiative <https://zerotracker.net/>.

Even as such international developments remain in the early stages, new research shows that litigation against climate-related greenwashing, or 'climate-washing' litigation, which seeks to hold companies or states to account for various forms of climate misinformation before domestic courts and other bodies, is gaining pace (Benjamin et al., 2022). At least 20 climate-washing cases have been filed before courts in the US, Australia, France and the Netherlands since 2016, while a further 27 cases have been filed before non-judicial oversight bodies (such as advertising standards boards) (ibid.). Benjamin et al. divide this newly identified body of climate-washing litigation into three types of case, challenging "misleading communications regarding (1) corporate and governmental commitments, (2) product attributes, and (3) disclosure of climate investments, financial risks and harm caused by companies".

Two recent cases can be used to illustrate the types of claim being brought in both the first and second categories of cases. The first is the case of *Australasian Centre for Corporate Responsibility v. Santos*, in which Australian natural gas company Santos's 'net zero' plan is being challenged on the basis that the plan is not clear or credible, and that its claims that natural gas is a "clean fuel" are misleading. The case relies on both a challenge to Santos's overall commitments and to its claims about product attributes.

The second case, filed against French oil company Total in the Judicial Tribunal of Paris, makes similar claims, challenging both Total's overall claims about its commitments to carbon neutrality and specific claims about the role of both natural gas and biofuels in the energy transition. The case relies on French national law implementing the European Union Unfair Commercial Practices Directive, and as such may provide a blueprint for future cases in the EU.

Climate-washing claims have also become an integral part of the latest generation of claims by cities and states in the US against fossil fuel companies seeking compensation for harm caused by climate change (Benjamin et al., 2022). Many of these cases, which now number 25 in total, include arguments based in both negligence and nuisance, as well as several claims based in consumer protection laws and even fraud. In one of the most recent examples, filed by the City of New York in April 2021, the city alleges violations of the City's Consumer Protection Law in part on the basis of Exxon Mobil "affirmatively misrepresenting the environmental benefits of various fossil fuel products sold at their gasoline stations in New York City" (*City of New York v. Exxon Mobil Corp*).

Such cases may benefit from recent progress in a five-year-long legal battle regarding the jurisdiction of state courts to hear climate cases. At the end of March 2022, a state court in Hawai'i denied fossil fuel companies' motions to dismiss a case brought by the *City and County of Honolulu* on the basis that the city had failed to make out a claim in state law. The court concluded that the plaintiffs' case was an arguable case based in state law causes of action and should be allowed to proceed to the next stage. The case is significant as it is the first Carbon Majors litigation filed by a sub-national government in the US in which a trial court has given a final dismissal of the defendant's motions for dismissal. It came after several federal courts upheld rulings remanding similar cases to state courts following a US Supreme Court decision on their jurisdiction to decide the matters issued, in May 2021 (Silverman-Roati, 2022).

## Future trends

The field of climate litigation continues to evolve rapidly, as we have demonstrated. Below, we consider some of the future trends that may start to find further traction over the coming year, building on recent developments.

### Personal responsibility

The past 12 months have seen considerable discussion of the individual responsibility that different actors involved in the fossil fuel industry and beyond bear for contributions to climate harm. Several case theories and ways of framing this issue are now under development, ranging from criminal actions (see **Box 2.5**) to cases focused on the duties of directors, officers and trustees to manage climate risks (Barker et al., 2021; Benjamin, 2021; Commonwealth Climate Law Initiative, 2021). While some of these arguments have already started to manifest in climate cases (see **Part I** above and Golnaraghi et al., 2021), we believe it is likely that they will become more developed and higher-profile in the years to come. Two recent events seem to confirm that we will see more cases based on shareholders' rights or directors' duties. In March 2022 ClientEarth, in its capacity as a shareholder, sent a pre-action letter to Shell's Board of Directors. Its briefing on the letter notes: "ClientEarth's claim is the first attempt to hold a company's Board of Directors personally liable for failing to properly prepare for the net-zero transition. It represents a milestone in climate litigation: company directors can – and will – be challenged to uphold their legal duties to manage climate risk, by preparing their companies for the net zero transition" (ClientEarth, 2022). In turn, in April 2022 Milieudefensie sent letters to Shell's CEO Ben van Beurden and other Board members, calling on them to "voluntarily and immediately" implement the judgement of the Court (Sterling, 2022).



## Box 2.5. Criminal responsibility: an idea whose time has come?

Over the past few years, the campaign for the formalisation of 'ecocide' as an international crime has acquired significant momentum. A legal definition of ecocide has been produced by an Independent Expert Panel convened by the Stop Ecocide Foundation, published in June 2021. Interest in the criminalisation of ecocide has been recorded at the government or parliamentary level in at least 15 countries (Mehta, 2021).

Some countries have gone further: ecocide has been introduced in French law through the 'Law to combat climate change and strengthen resilience to its effects'. However, the law has been met by protest from groups such as Notre Affaire à Tous. This is because the definition of the crime has been 'watered down' insofar as the provisions simply impose a punishment for repeated environmental pollution offences – this is seen as a far cry from the creation of a new offence of equal weight to international offences such as crimes against humanity (Giraudat, 2021). As such, it is unclear if this introduction aligns with campaigners' objective of creating a "change of consciousness" in the way we understand environmental harm (Clark, 2021).

While there are currently no climate cases that have been brought on ecocide grounds, a communication recently filed at the International Criminal Court (ICC) under Article 15 of the Rome Statute in *The Planet v. Bolsonaro* does start to make the connection between environmental destruction and other international crimes. The case was filed by the NGO All Rise in October 2021 and requests an investigation into Brazilian President Bolsonaro's role in crimes against humanity that have taken place through the deforestation of the Amazon rainforest and the harm inflicted on local populations living in the Amazon. It will be interesting to watch how the case develops, and how future cases could build on the foundation it provides.

## The role of negative emissions

As the policy debate around ways to reach net-zero gathers momentum, concerns have been raised about the possible over-reliance of states and companies on the 'net' part of the concept and insufficient attention to the 'zero' part (Dyke et al., 2021; Fankhauser et al., 2021). These concerns are particularly salient when it comes to offsetting and carbon trading, whereby states and companies may rely on the existence of projects and plans to reduce emissions or enhance carbon sinks elsewhere to justify continued investment in high-emitting activities. Evidence suggests that there are real issues with current offsets and trading systems that may allow for 'double counting' of emissions reductions, or which do not guarantee that the lifetime of offsetting projects will be commensurate with the lifetime of the high-emitting projects or activities for which they are supposed to compensate. Unless they are carefully designed, the integration of policy incentives meant to increase the use emissions-removal technologies into existing carbon trading schemes may only exacerbate problems of this type (Burke and Gambhir, 2022).

The past 12 months have seen new litigation cases engaging with this debate. These include a 'climate-washing' case against Italian Energy giant Eni, challenging Eni's business plan on the basis of non-conformity with the OECD Guidelines for Multi-National Enterprises (*Rete Legalità per il Clima [Legality for Climate Network] and others v. ENI*). The case specifically complains of the company's over-reliance on greenhouse gas removals or 'negative emissions' technologies. There has also been a complaint filed against the government of New Zealand and the New Zealand Climate Change Commission expressing concern over plans to rely on 'offshore' emissions reductions to achieve the country's climate targets (*Lawyers for Climate Action NZ v. The Climate Change Commission*).

## Short-lived climate pollutants

Another issue currently receiving considerable attention from policymakers is the urgent need for action to reduce the impacts of short-lived climate pollutants, such as methane and black carbon.<sup>22</sup> For example, the past year has seen the launch of the Global Methane Pledge by the US and EU, to which more than 100 countries have now committed. The issue of short-lived climate pollutants – particularly black carbon – has been raised in a number of cases in the past (see *In re Court on its own motion v. State of Himachal Pradesh & Others*). However, the renewed sense of urgency with which this issue is being treated is likely to lead to an upturn in cases focused on these gases in the coming months.

## Forests and food systems

Forests and food systems also represent an area that is likely to see significant growth in litigation in the coming years. The IPCC's *Climate Change 2022* report (Summary for Policymakers) identified that in 2019 approximately 22% of total net anthropogenic emissions came from agriculture, forestry and other land use, but that this sector had the largest shortfall in the investment required for mitigation measures. At the same time, developments such as the publication of the first framework from the Task Force for Nature-related Financial Disclosures and other biodiversity-related tools for financial market actors signal new emerging standards of best practice in this area for business and finance alike, with the land use sector likely to be the most directly implicated by these standards. These developments have already led to predictions that biodiversity litigation against corporate actors may be 'the next frontier' of environmental litigation (Sedilekova and Lawrence, 2022). While such cases may not always involve climate-related arguments, we nonetheless anticipate an increase in the number of cases explicitly concerned with the climate and biodiversity nexus.

We may also see a growth in cases seeking to enforce standards aimed at the prevention of illegal deforestation in forest-rich nations, as well as more cases seeking compensation for the loss of 'ecosystem services' such as carbon sequestration. These would build on previous cases identified in both Indonesia and Brazil, particularly in light of the likely focus on negative emissions highlighted above.

## Loss and damage

During the course of COP26, Antigua and Barbuda and Tuvalu announced the launch of a Commission of Small Island States on Climate Change and International Law. The Commission is tasked with promoting and contributing to "the definition, implementation and progressive development of rules and principles of international law concerning climate change" under the UN Convention on the Law of the Sea and other areas of international law (Freestone et al., 2022). Its mandate explicitly includes "the responsibility for injuries arising from internationally wrongful acts" that may result from States' breach of their obligations to protect the marine environment, which could be considered commensurate with a mandate to explore legal recourse for the "loss and damage" experienced as a result of changes in the marine environment. The issue of compensation for such "loss and damage" has been hotly debated for almost as long as the UNFCCC has existed (Wewerinke-Singh and Salili, 2020). However, the new Commission, coupled with Vanuatu's announcement that it has appointed counsel to continue its campaign to secure an advisory opinion from the International Court of Justice to clarify state obligations with regard to the prevention of and redress for climate change, may suggest that this debate may soon move beyond the largely theoretical realm in which it has existed to date.

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<sup>22</sup> Short-lived climate pollutants are gases that have short lifetimes in the atmosphere but high global warming potential. Targeted efforts to rapidly reduce emissions of short-lived climate pollutants can help to limit warming on faster timescales than may be possible with many decarbonisation actions, which although vital will often take longer to implement (McKenna, 2022).

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## Conclusion

Data from the past 12 months confirms that litigation continues to be used by diverse actors around the world as a tool to influence the outcome of climate governance debates at all levels of government. The majority of strategic climate cases filed since the Paris Agreement seek to force government actors to give climate consideration more prominence in all types of decision-making – but particularly regarding the extraction of fossil fuels and the provision of fossil energy. An increasing number of litigants are filing ‘framework’ cases against governments, seeking to change the overall design, ambition and implementation of climate action at the national and subnational level. Many of the same themes that dominate discussion in the international climate regime can be seen emerging in key climate litigation cases as diverse communities turn to the courts as a forum in which the practical implications of the global consensus on the need for ambitious climate action can be interpreted and legitimised.

Cases challenging a wide array of climate-relevant government decisions continue to make up the bulk of climate cases, however litigants are also continuing to develop and adopt new approaches to understanding key pressure points within socioeconomic systems, maximising their potential for impact by focusing on key levers such as finance and supply chains and key constituencies such as directors and boards of trustees. Climate cases are being filed against an ever-wider range of corporate actors, increasingly based on concerns over climate-washing and misinformation.

While the success of climate-aligned strategic cases varies significantly, notable triumphs for litigants like the outcome of the Inquiry by the Philippines Commission on Human Rights continue to provide a strong basis for future cases. Decision-makers from across the public and private sectors must take time to understand the way in which existing legal norms and incontrovertible scientific evidence are increasingly being combined by courts tasked with determining the responsibilities of different actors in the face of a fast-changing climate, and start to proactively integrate an understanding of emerging legal norms into their own processes.



*The regional government of Atacama is suing the Chilean government for its intention to increase lithium production, which may present threats to Atacama's biodiversity and heighten water insecurity in the area (see page 25).  
Photo: Soquimich Lithium Mine in the Atacama Desert of Chile.  
© Nuno Luciano, Flickr*



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# Appendix 1. Methodological notes

## Data collection

At the time of release of our last report in this series, the Sabin Center's Global Climate Litigation Database, which forms the basis for the litigation section of the Climate Change Laws of the World database, included 454 cases. Since then, the Sabin Center has added more than 120 cases to its database, and those cases have been imported into the CCLW database. Of those cases, over 60% are older cases only recently identified. These cases were identified in: Australia, Germany, France, India, Indonesia, Spain, UK, Brazil, South Africa, Uganda, Chile, Argentina, Mexico and Guyana. As noted in the Introduction, this identification of previously unidentified cases is largely due to the Sabin Center's newly established network of peer reviewers from around the world, confirming the importance of local knowledge, language capabilities and dedicated research time in tracking critical developments.

The databases contain only cases in which an issue of climate change science or climate change policy is a material issue of law or fact. Over time, as climate change has become increasingly well understood in both scientific and policy circles, more and more cases have raised these issues as central and explicit arguments and our methodology for assessing whether such an issue is present has been more strictly applied. During the course of the study period cases have been removed from both the US and non-US databases, at the same time as more cases have been added. More detail can be found in the [Methodology](#) section of the [CCLW website](#) and on the 'About' page of the Sabin Center's climate case charts.

Because of considerable differences between US and non-US litigation, comparisons between them are both challenging to conduct and – depending on the kind of comparison being made – of limited analytical use.

## Classification of cases

When classifying cases for these reports we primarily base our findings on the Sabin Center's case summaries and the classifications available in the CCLW and Sabin Center databases. In cases where it is challenging to make a determination about a case based on the information available in the summaries we may sometimes also make reference to the full case documents in the databases and/or media reports. Some decisions about whether to classify a case as strategic or the degree to which issues of climate change science and policy can be said to be a significant issue in the case are necessarily subjective. Case assessments are also often made on imperfect or incomplete information, particularly about the parties' intentions. For example, classifying a case as 'strategic' or 'non-strategic' does not imply a judgement of one being better or more impactful than the other. Cases brought to achieve a relief that will apply to an isolated situation (i.e. non-strategic) can be as important as cases that seek the realisation of broader changes in society (i.e. strategic litigation). Courts rarely have regard for the broader intentions of the parties when determining a case, meaning that cases brought with little or no strategic intent may nonetheless provide opportunities for courts to issue far-reaching judgments on novel legal issues.

## Classification of strategies

As noted in Part I of the report, we have sought to understand and quantify the strategies used in strategic climate cases. Again, this review of cases has been based primarily on case summaries and if deemed necessary by reference to original case documents or accompanying materials where these are available. In some instances, the full case strategy may not be evident from the available materials and it is possible that some cases may employ additional strategies which we have not identified here. Similarly, we have confined our review to primary and secondary strategies, but determining which strategy takes precedence is a subjective question and our assessment may differ from the deeper understanding afforded to the parties by their access to more privileged information. Nonetheless, we feel that the classification of cases by strategy can offer a more detailed understanding of the body of climate litigation, particularly given that

differences in legal cultures may require different litigants to employ a variety of legal grounds to achieve the same ends.

### **Classification of outcomes**

When reviewing our classification of outcomes, readers should note that we classify outcomes at several different stages within a given case. The first stage at which a case may be classified as having a given outcome (as opposed to being classed as 'open') is when there is a positive ruling on a procedural issue such as standing or justiciability, even if the case has not proceeded to trial. This is particularly likely to happen in a case where the issues presented are of a novel nature, or where the case runs counter to a procedural decision taken in a similar case. The second stage is when there is an initial ruling on the case from a court of first instance, and the third stage is when the outcomes of any appeals become known. This means that the status of a case may change from 'favourable' or 'unfavourable' throughout the course of the proceedings as different judgments are issued.

In some instances, cases that may have been classified as having negative outcomes for the parties may nonetheless advance an issue of fact or law that may have positive impacts on subsequent litigation. For example, in the case of *Sacchi et al v. Argentina*, the case has been classified as having an unfavourable outcome for climate litigation because it was dismissed by the Committee on the Rights of the Child. However, it could be argued that the case has in fact had positive outcomes because it has helped to clarify several issues of international law. This reflects the overall limitations of imposing a quantitative assessment of outcomes on complex legal cases.